Rights in the era of ‘green’ market expansion: articulating radical demands

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Abstract

The unfolding planetary crisis confronts us with unprecedented challenges. As climate change and biodiversity loss accelerate, environmental and social movements across the planet increasingly turn to human rights, to tackle the problems global policy largely fails to address. More and more, rights are not only invoked to press governments towards more ambitious climate action, but also against the injustices resulting from our responses to the planetary crisis. A central feature of global climate law and policy are market-based solutions. While proponents praise them as the most efficient way to reduce emissions, market mechanisms favour historical polluters and are geared towards upholding the capitalist political economy that has caused the crisis in the first place. While rights-based litigation seeks to confront the multiple injustices caused or exacerbated by 'green' markets, rights' transformative force remains ambivalent. While human rights are often seen as a device of resistance against capitalism's excesses, their orthodox understanding is firmly rooted in Western-liberal individualism, centred on the human, property owning subject. Consequently, critical scholars have called into question human rights' emancipatory potential or even accused them of being complicit in neoliberal globalisation. Looking at recent case law on climate and just transition permits to retrieve a differential understanding of rights, that neither uncritically endorses, nor entirely dismisses them. Climate and just transition litigation suggest that human rights are best conceptualised as oscillating between two poles: As a-legal, radical demands, they confront and challenge the given order – as authoritatively mediated decisions in the field of law, they consolidate the given political-economic set up. Understanding rights this way helps to inform our thinking about how we best employ them strategically.

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Author's declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Abbreviations

ANT	Actor-network theory
App	Application
CA	Corresponding adjustment
CCB	Climate, Community and Biodiversity
CDM	Clean Development Mechanism
CERs	Certified Emission Reductions
cf.	confer
CJEU	European Court of Justice
CO_2	Carbon dioxide
COP26	26th United Nations Climate Change Conference of the Parties
CORSIA	Carbon Offsetting and Reduction Scheme for International Aviation
CPR	Common property regimes
CSR	Corporate social responsibility
CUP	Cambridge University Press
e.g.	for example
EC	European Council
ECHR	European Convention on Human Rights
ECLI	European Case Law Identifier
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
ed/eds/edn	editor/editors/edition
EJIL	European Journal of International Law
ERPA	Emission Reduction Purchase Agreement
ERR	Emission reductions or removals

et al.	et alii (and others)
etc.	et cetera
ETS	Emissions Trading Systems
EU-ETS	European Union Emission Trading System
EWHC	England and Wales High Court
FAQ	Frequently asked question
FET	Fair and equitable treatment
FPIC	free, prior, and informed consent
GDP	Gross domestic product
GG	Grundgesetz (German Constitution)
GHG	Greenhouse gas
i.e.	id est (that is)
ibid	ibidem (in the same place)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ICSID	International Centre for Settlement of Investment Disputes
IDS	Institute of Development Studies
IHRL	International human rights law
ILO	International Labour Organization
infra	below
IPCC	Intergovernmental Panel on Climate Change
ISDS	Investor-state dispute settlement
ISO	International Organization for Standardization

ITMO	Internationally transferred mitigation outcomes
KP	Kyoto Protocol
LPE	law and political economy
MST	Brazilian Landless Rural Workers' Movement
n	note
NDC	Nationally Determined Contributions
NGO	Non-governmental organization
NIE	New Institutional Economics
NLR	New Left Review
No	Number
NOK	Norwegian krone
np	No page number
NZZ	Neue Zürcher Zeitung
OIES	Oxford Institute for Energy Studies
OUP	Oxford University Press
p	page
PA	Paris Agreement
PR	Public relations
REDD+	Reducing emissions from deforestation and forest degradation in developing countries and additional forest-related activities that protect the climate, namely sustainable management of forests and the conservation and enhancement of forest carbon stocks
RES	Resolution
SA	Société Anonyme
supra	above
TCC	Transnational capitalist class

tCO_2e	Tonnes of carbon dioxide equivalent
TEA	Tradeable Environmental Allowances
TWAIL	Third-world approaches to international law
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDRIP	Declaration on the Rights of Indigenous Peoples
UNDROP	Declaration on the Rights of Peasants and Other People Working in Rural Areas
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
US	United States
USAID	United States Agency for International Development
USD	United States dollar
v.	versus
VCM	'Voluntary' carbon markets
VER+	Verified emission reductions standard
vol	volume
WCC	Woodland Carbon Code
WIRE	Wiley Interdisciplinary Reviews

1. Introduction

Since the turn of the Millenium, it has become increasingly clear that our planet is changing – to an extent and at a pace that appears unprecedented in human history.[1] Given the decisive role of humans in causing the planetary changes we are witnessing, geologists have coined the term 'Anthropocene' to refer to the present epoch in which humans and human societies have become a global geophysical force.[2] Yet, as scholars of various disciplines have stressed, the term is problematic since it suggests a transcendental ideal of 'humanity' to be the initiator and victim of the changes we are witnessing, whilst, in fact, some societies and individuals have contributed more to the unfolding planetary crisis than others, and some will suffer more than others from its consequences.[3] In this vein, it has been proposed to refer to the 'Capitalocene', suggesting that the global crises of the 21st century are not rooted in the 'Age of Man', but instead in the 'Age of Capital', denoting an era where capital and power do not merely act upon nature, but instead are deeply engrained in the 'web of life'.[4] Recent decades have seen an ever deeper intrusion of capital into almost every aspect of life: While the onset of the Capitalocene commenced with the commodification of land and labour,[5] recent decades have seen further rounds of commodification, including the commodification of terrestrial ecosystems, and the planet's atmosphere.[6] Law has, from the very outset, played a constitutive role in extending capitalism's reach, namely through the creation of abstract property rights, dissociating the bond between land, people, and their surroundings.[7] In this thesis, I explore if law – and the form of rights in particular – can be deployed as a praxis that assists in halting and reversing prior rounds of accumulation and commodification.

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[1] IPCC, 'Climate change widespread, rapid, and intensifying' (9 August 2021) <https://www.ipcc.ch/site/assets/uploads/2021/08/IPCC_WGI-AR6-Press-Release_en.pdf> accessed 19 November 2024.

[2] Will Steffen et al, 'The Anthropocene: Are Humans Now Overwhelming the Great Forces of Nature?' (2007) 36 Ambio: A Journal of the Human Environment 614.

[3] See generally: Jason W Moore (ed), *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism* (2016 PM Press/Karios).

[4] Jason W Moore, The Capitalocene, Part I: on nature and origins of our ecological crisis (2017) 44 The Journal of Peasant Studies 594.

[5] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* [1944] (Beacon Press, 2nd end, 2001).

[6] See eg Jacob Smessaert et al, 'The commodification of nature, a review in social sciences' (2020) 172 Ecological Economics 106624.

[7] See eg Paddy Ireland, 'Property Law' in Emilios Christodoulidis et al (eds), *Research Handbook on Critical Legal Theory* (Edward Edgar 2019) 260.

1.1 Distributive implications of 'green' market expansion

The Anthropocene is fraught with countless injustices: Not only is the planetary crisis hitting those the hardest, who have contributed the least to the problem.[8] Likewise are the proposed solutions to climate change and environmental destruction more broadly: measures to mitigate climate change and to address environmental destruction may, in themselves, lead to unjust outcomes, not least in distributive terms. This does not come as a great surprise, given that much of our global response to the environmental crisis may well be seen as 'business as usual'. In a nutshell, this response can be described as 'green capitalism' aimed at preserving existing capitalist systems and relations while securing new domains for accumulation in the transition to a decarbonised, 'sustainable' economy.[9] What characterises this new era of capitalism is what I refer to as 'green' market expansion: The commodification and marketisation of carbon and other 'ecosystem services' as a key strategy to achieve climate mitigation and environmental protection, purportedly at the lowest possible cost. Yet, the question is: The lowest cost for whom? – 'Green' market expansion risks to reproduce and exacerbate existing inequalities on an already highly uneven global terrain: Within, as well as between countries, elites are likely to benefit while already marginalised groups are further disadvantaged.[10]

Distributive inequalities linked to 'green' market expansion occur on various levels. Firstly, the world's carbon budget has been unevenly distributed from the outset: When the international climate regime was created, it enabled an unequal and inequitable allocation of emission allowances, thereby favouring the historical polluters of the global North over the global South.[11] Under the first international climate framework developed in the 1990s, the countries with the highest amount of emissions received the largest amount of entitlements to emit,[12] effectively leading to an 'enclosure' of the atmosphere according to

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[8] See eg Danielle Falzon et al, 'Sociology and Climate Change: A Review and Research Agenda' in Beth Schaefer Caniglia et al (eds), Handbook of Environmental Sociology (Springer 2021).

[9] Adrienne Buller, *The Value of a Whale, On the Illusions of Green Capitalism* (Manchester University Press 2022) 12.

[10] Alexander Dunlap and Sian Sullivan, 'A faultline in neoliberal environmental governance scholarship? Or, why accumulation-by-alienation matters' (2020) 3 EPE Nature and Space 552, 558.

[11] Julia Dehm, *Reconsidering REDD+, Authority, Power and Law in the Green Economy* (CUP 2021) 196; 199.

[12] Romain Felli, 'On Climate Rent' (2014) 22 Historical Materialism 251.

existing pollution levels.[13] With the invention of carbon markets, the way was paved for further maldistributions: By creating carbon as a fungible unit, very different actions became commensurable.[14] The uniform price for one tonne of carbon creates a false equivalence between 'luxury and 'survival' emissions.[15] It does not discriminate between car journey for private convenience in the global North and the gas boiler heating a family home in the global South, neither does it reflect the fact that the wealthy are more likely to absorb higher costs and maintain the demand for carbon-intensive goods and services. Hence, while low-income segments of societies around the globe struggle with increasing costs associated with the 'price' tag attached to carbon emissions, for high net-worth individuals and transnational corporations, the carbon price presents a 'gradual and comparatively painless policy solution'.[16]

Yet, not only the allocation of the carbon budget and the price of carbon itself create distributive inequalities, likewise do their impacts on the ground associated with projects aimed at sequestering or 'offsetting' carbon. 'Green' markets rely on the principle of differential opportunity costs which suggests that the repair of the global environment should be sought where this is available at the lowest price.[17] As hinted above, this means that poor and marginalised communities bear the brunt of projects aimed at generating the 'green' commodities in question: Literature on renewable energy projects highlights how those have led to enclosure, exclusion, encroachment, and entrenchment.[18] Numerous case studies across different continents have exposed how land pressures and patterns of uneven development emerge as common features of renewable energy projects.[19] Further, 'green' markets can worsen existing pollution burdens: As a study of California's carbon market has shown, the ability of facilities to purchase carbon allowances from others may in fact

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[13] Diana Liverman, 'Conventions of climate change: Constructions of danger and the dispossession of the atmosphere' (2009) 35 Journal of Historical Geography 279, 294.

[14] Dehm 2021 (n 11) 140.

[15] Jevgeniy Bluwstein and Connor Cavanagh, 'Rescaling the land rush? Global political ecologies of land use and cover change in key scenario archetypes for achieving the 1.5 °C Paris agreement target' (2023) 50 Journal of Peasant Studies 262, 266.

[16] Buller (n 9) 74. See also: Dario Kenner, *Carbon Inequality: The Role of the Richest in Climate Change* (Routledge 2019).

[17] James Fairhead et al, 'Green Grabbing: A new Appropriation of Nature?' (2012) 39 Journal of Peasant Studies 237, 245.

[18] Benjamin K Sovacool, 'Who are the victims of low-carbon transitions? Towards a political ecology of climate change mitigation' (2021) 73 Energy Research & Social Science 101916.

[19] Sofía Avila, 'Environmental Justice and the expanding geography of wind power conflicts' (2018) 13 Sustainability Science 599.

worsen the emission burdens of health-damaging co-pollutants in low-income neighbourhoods predominately inhabited by communities of colour.[20] Not only the erection of large-scale infrastructure can cause harm to local communities, equally can planting trees: An extensive body of literature has documented the impacts of the United Nations framework on reducing emissions from deforestation and forest degradation in developing countries (REDD+).[21] Indigenous communities have been disadvantaged, disenfranchised, or displaced through REDD+ projects which encouraged enclosure and appropriation by local elites working in tandem with large-scale corporate actors.[22] In the global North, negative impacts on local communities have been found to include loss of employment, the decline of local services due to depopulation, and a decrease in housing availability where 'green' investment in 'natural capital' was sought.[23]

Yet, regardless of whether large-scale renewable energy infrastructures are erected, or trees are planted to provide for 'carbon sinks' – 'green' market expansion essentially relies on the availability of one central resource, that is: land. In recent years, researchers have increasingly focused on the asymmetrical impact of 'green' land acquisitions for climate change mitigation, conservation and other ecological restauration schemes.[24] The proliferation of 'green' markets is seen to trigger renewed land rush dynamics, commonly referred to as 'green grabbing'.[25] Again, land rush dynamics, while predominantly associated with large-scale land acquisitions by corporations, states, and individuals in developing countries, are not confined to the global South.[26] While large-scale land

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[20] Lara Cushing et al, 'Carbon trading, co-pollutants, and environmental equity: Evidence from California's cap-and-trade program' (2011-2015)' (2018) 15 PLOS Medicine e1002604.

[21] See generally Dehm (n 11).

[22] See eg Michael Eilenberg 'Shades of green and REDD: Local and global contestations over the value of forest versus plantation development on the Indonesian forest frontier' (2015) 56 Asia Pacific Viewpoint 48; Anu Lounela, 'Climate change disputes and justice in Central Kalimantan, Indonesia' (2015) 56 Asia Pacific Viewpoint 1; Susan Chomba et al, 'Roots of inequity: How the implementation of REDD+ reinforces past injustices' (2016) 50 Land Use Policy 202.

[23] Annie McKee et al, 'The Social and Economic Impacts of Green Land Investment in Rural Scotland' (The James Hutton institute, December 2023) 34-38; 63. <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2023/12/social-economic-impacts-green-land-investment-rural-scotland/documents/social-economic-impacts-green-land-investment-rural-scotland/social-economic-impacts-green-land-investment-rural-scotland/govscot%3Adocument/social-economic-impacts-green-land-investment-rural-scotland.pdf> accessed 3 January 2025.

[24] See eg Bluwstein and Cavanagh (n 15).

[25] Fairhead et al (n 17) 263.

[26] Umut Özsu 'Grabbing Land Legally' (2019) 32 Leiden Journal of International Law 215, 216. Further, as the author notes, in many instances the local communities living and working on the land in question have

acquisitions for ‘green’ ends in the global North have not been linked to overt dispossession to the extent witnessed in the global South, ‘green’ land they have, too, been associated with the decline of agricultural communities.[27] Around the time the COP26 climate conference was held in Glasgow in 2021, rural land prices in Scotland skyrocketed: Farmland values rose over thirty per cent compared to the previous year, land suitable for tree planting saw and uplift of over fifty per cent, and average prices for Scottish estates increased by almost ninety per cent.[28] Institutional and corporate investors seeking to maximise profits through natural capital investments were identified as one of the key drivers,[29] yet, land rush dynamics are often propelled by multiple and overlapping factors, and the exact contribution of ecosystem markets in driving land prices remains difficult to discern.[30] As such, ‘green’ market expansion may act as an ‘amplifier’ of existing patterns, further entrenching tendencies to favour existing elites. [31] With rural spaces becoming increasingly economically viable as carbon sinks, there is a concern large segments of rural communities will be rendered ‘relative surplus populations’ superfluous to capital’s requirements.[32] With this, we are likely to witness, on a global scale, what feminist eco-philosopher Val Plumwood has characterised as the division between the ‘beautiful landscapes and forests close to the homes of the relatively privileged’, and the ‘shadow places’ which the ‘offsets’ produced by ‘green’ markets are set to compensate for.[33]

In the light of the above, distributive implications of ‘green’ market expansion can be conceptualised along three overlapping layers of distributive inequalities: The inequitable

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participated and sought benefit from resulting ‘investment opportunities’, rather than mounted a frontal challenge to the respective developments. Ibid 217.

[27] Rob McMorran et al, ‘Large-scale land acquisition for carbon: opportunities and risks: A SEFARI Special Advisory Group Final Report’ (Scotland's Rural College, 31 May 2022) <https://researchportal.hw.ac.uk/en/publications/large-scale-land-acquisition-for-carbon-opportunities-and-risks-a> accessed 3 January 2025.

[28] Rob McMorran et al, ‘Rural Land Market Insights Report’ (Report to the Scottish Land Commission, April 2022) 5-6. <https://www.landcommission.gov.scot/downloads/62543b9498bb1_Rural%20Land%20Market%20Insights%20Report%20April%202022.pdf> accessed 3 January 2025.

[29] Ian Merrell et al, ‘Rural Land Market Insights Report 2023’ (Scottish Land Commission, 2023) 22 <https://www.landcommission.gov.scot/downloads/645cda7a2ba61_Rural%20Land%20Markets%20Insights%202023.pdf> accessed 7 December 2024.

[30] Carol Hunsberger et al, ‘Climate change mitigation, land grabbing and conflict: towards a landscape-based and collaborative action research agenda’ (2017) 38 Canadian Journal of Development Studie 305, 313.

[31] Jennifer C Franco and Saturnino M Borras, ‘Grey areas in green grabbing: subtle and indirect interconnections between climate change politics and land grabs and their implications for research’ (2018) 84 Land Use Policy 192.

[32] Karl Marx, *Capital: A Critique of the Political Economy* [1867] (Penguin 2004) 782-802.

[33] Val Plumwood, ‘Shadow Places and the Politics of Dwelling’ (2008) 44 Australian Humanities Review 139.

distribution of the carbon budget, the uneven distribution of burdens from the projects aimed at 'green' markets generated on the ground, and the increasingly skewed distribution of land as a finite resource more generally. To counter these developments, scholarship is increasingly concerned with the concept of 'benefit sharing' aimed at reallocating of advantages derived from climate responses in a fair and equitable manner.[34] Yet, what is deemed 'fair and equitable' varies, and empirical evidence suggests that benefit sharing, in practice, rarely achieves its stated objectives.[35] Economic benefits of low-carbon investments in the global South are often skewed with profits being enjoyed by the corporate actors implementing the projects, or by intermediaries such as brokers, platforms, and other traders located in the global North, while only few economic benefits actually reach local people.[36] Within communities, benefit-sharing arrangements may create or exacerbate power hierarchies and distributive patterns.[37] Benefits often accrue with more powerful actors and larger landowners, while excluding smallholders and other marginalised groups.[38]

On the other end of the spectrum, where land is concentrated in the hands of an already wealthy elite, investment in 'green' commodities typically occur on top of existing grants, tax exemptions and subsidies, leading to windfall gains for large private landowners, with the additional income streams entrenching their position.[39] Recent 'green' land investments in Scotland have sparked concerns about these primarily being motivated by minimising the tax burdens of high net worth investors, speculation on rising land prices, and profits

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[34] Kim Bouwer, 'Possibilities for Justice and Equity in Human Rights and Climate Law: Benefit-Sharing in Climate Finance' (2021) 11 Climate Law 1, 2-3.

[35] Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27 *European Journal of International Law* 353, 380.

[36] Paola Velasco Herrejon and Annalisa Savaresi, 'Wind Energy, Benefit-Sharing and Indigenous Peoples: Lessons from the Isthmus of Tehuantepec, Southern Mexico' (2020) Oil, Gas and Energy Law Journal 1, 3; Gilles Dufrasne and Jonas Fuchs, 'Secretive intermediaries, Are carbon markets really financing climate action?' (Carbon Market Watch, 2 February 2023) <https://carbonmarketwatch.org/publications/secret-intermediaries-are-carbon-markets-really-financing-climate-action/#:~:text=Drawing%20on%20the%20results%20of,and%20rectifying%20this%20lack%20of> accessed 3 January 2025.

[37] Barry Barton and Michael Goldsmith 'Community and sharing' in Lila Barrera-Hernández et al (eds), Sharing the Costs and Benefits of Energy and Resource Activity, Legal Change and Impact on Communities (OUP 2016).

[38] Dehm 2021 (n 11) 327.

[39] Jon Hollingdale 'Green finance, land reform and a just transition to net zero' (Community Land Scotland Discussion Paper, February 2022) 5 <https://www.communitylandscotland.org.uk/wp-content/uploads/2022/08/Discussion-Paper-2022-Green-finance-land-reform-and-a-just-transition-to-net-zero.pdf> accessed 3 December 2024.

from residential and commercial developments.[40] Accordingly, problems of unequal benefit flows may be further aggravated if investments in 'green' projects further consolidate control over land and resource access.[41] Again, 'green' market expansion does not operate on a neutral terrain, but precipitates on a highly uneven landscape. Yet, the complex and multi-layered processes at work may obscure the distributive implications that 'green' market expansion creates in and of itself by reinforcing and exacerbating existing patterns.

1.2 'Green' market expansion and the law: Part of the problem

Law, at once, holds oppressive and emancipatory potential. Yet, given law's constitutive role in a global capitalist political economy riddled with multifaced injustices, scholars have called into question law's promise for redress.[42] A key concern for critical legal scholarship is the question if law in general, and rights in particular, can effect changes in the political-economic order to bring about more a equitable distribution of wealth and power within, as well as between the world's societies. The challenge is aggravated by the fact that capital is increasingly mobile, flowing across jurisdictions, while human and non-human beings are largely bound to place – to jurisdictions, ecosystems, communities. This thesis is concerned with law's capacity to impact on distributive inequalities, at a time where globalised markets intensify their grip on ever more aspects of the living world, including the integrity of human and non-human environments.

Law plays a constitutive role: On the global level, the developments just described are facilitated by the international climate change regime, whose market-centred approach shapes our response to the unfolding climate disaster.[43] Carbon markets are not the only markets for environmental protection, but instead form part of an expanding range of 'green' commodities including biodiversity units, water quality, or flood risk mitigation.[44]

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[40] Ibid.

[41] See Dehm 2021 (n 11) 329.

[42] See generally: Emilios Christodoulidis et al (eds), *Research handbook on critical legal theory* (Edward Elgar Publishing 2019).

[43] I will further unpack this in the next chapter.

[44] See eg Green Finance Institute, 'Introduction to Nature Markets' <https://hive.greenfinanceinstitute.com/gfihive/farming-toolkit/introduction-to-nature-markets/#introduction-more-info1> accessed 3 January 2025.

All of these markets function in different ways, yet they have one thing in common: They encroach into previously uncommodified domains, making ever more aspects of planetary life subject to market thinking.[45] The legal and institutional framework underpinning 'green' markets rationalises the putative necessity of those markets: It suggests that they are needed to save the planet from the looming catastrophe. In this vein, I employ the term 'green' market expansion – rather than 'green capitalism' or 'neoliberal environmentalism' – to highlight two things: Firstly, 'green', which I will keep in inverted commas throughout, is used to problematise the inflationary use of the term 'green' to justify practices that, in fact, continue to be part of an exploitative and extractive political-economic model. Secondly, 'market expansion' aims to draw particular attention to the intrusion of markets into ever more spaces, further deepening the hold of capitalism in the 'web of life'.[46]

As discussed above and as explored in more detail throughout this thesis, the ways in which 'green' markets impact upon pre-existing settings are discrete and at times difficult to disentangle from other, coinciding and not particularly 'green' aspects: In the *Fosen* case discussed in the last chapter, for example, the dispute at issue concerns a piece of infrastructure – a wind park – which might as well be any other piece of infrastructure. Yet, the financial motives for the investors, as well as the moral justification for the project, are arguably underpinned by 'green' market thinking.[47] While my thesis predominantly concerned with carbon markets, these share with other environmental markets a tendency to outsource environmental problems to market actors, thereby vesting them with significant power and control over aspects of life that traditionally have been under the purview of formally sovereign nation states.

In this, my approach aligns with what critical scholars loosely aligning with Marxian approaches to law have termed 'new constitutionalism' or 'market constitutionalism'.[48] New constitutionalism scholarship highlights that contemporary capitalism does not merely consist of a neutral set of laws and regulations, but instead systematically works on behalf of particular interests, increasingly dissolving the boundary between public and

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[45] An early description process of commodification and markets' increasing grip on society was under taken by Karl Polanyi. Polanyi (n 5).

[46] Moore (n 4).

[47] Infra chapter 2.

[48] Stephen Gill and Claire A Cutler (eds), *New Constitutionalism and World Order* (CUP 2014).

private and outsourcing the provision of public goods to the market.[49] While analysing the role of 'green' markets through the lens of new constitutionalism in greater detail would be an endeavour of its own, this is not the project I pursue here. Rather, the hint at new constitutionalism serves as a backdrop for my current inquiry into the role of human rights as device of resistance against 'green' market expansion. Since, as further discussed below, scholarship concerned with human rights not always pays sufficient attention to the structural conditions that form part of the context in which rights claims are uttered. Yet, exactly these conditions limit what rights can achieve.[50] Hence, hinting at new constitutionalism is to acknowledge, from the very outset, the constraints within which rights operate, before looking at their emancipatory potential.

Recently, scholars have enquired routes towards a 'constitutionalism for the Anthropocene' which starkly contrasts with the market thinking of new constitutionalism.[51] Their proposal reflects a broader trend towards conceptualising legal relations as 'never limited to human concerns, but always and already part of more-than-human collectives, in which both humans and nonhumans act with co-agency, in recognition of shared vulnerabilities and in relations premised on care'.[52] Yet, as the authors themselves caution: How do such calls for reform 'interact with the deep grains of [law's] exploitative structures that maintain and preserve personhood as a privileged instrument by which human and corporate actors assert mastery over and dispossess human and nonhuman others through property relations?'.[53] While there is certainly a need for law to be more responsive to the challenges of the Anthropocene, trust in law's potential to engender radical change mut be tempered, given law's exploitive past and present, and the limitations inherent in its current architecture.[54] Accordingly, a perspective that only focuses on law's transformative potential neglects the role of law in the creation of structures, institutions, paradigms and processes that have led to the emergence of the crisis in the first place.

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[49] See Emilios Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (CUP 2021). I will further unpack these claims in the following chapter.

[50] See infra chapter 2.

[51] Fleurke Floor et al, 'Constitutionalizing in the Anthropocene' (2024) 15 Journal of Human Rights and the Environment 4.

[52] Ibid.

[53] Ibid 21.

[54] Ibid 18.

1.3 Human rights: Confronting 'green' market expansion?

The distributive inequalities associated with market-based 'solutions' to climate change and environmental destruction have attracted considerable criticism often expressed as calls for 'climate justice' or a 'just transition'.[55] Rights have been described as powerful tool in this context since they 'supply not only legal imperatives, but also a set of internationally agreed values around which common action can be negotiated and motivated'.[56] Social movements around the globe increasingly resort to human rights to seek redress for the multiple injustices associated with climate change and the responses thereto: In the recent decade, rights-based litigation related to climate change and just transition has proliferated,[57] creating a sub-discipline of legal scholarship in its own right.[58] An ever-increasing body of literature is concerned with mapping, categorising, and comparing cases, with describing litigation strategies and legal arguments, with analysing 'failures' and 'successes', with exploring avenues for cross-jurisdictional borrowing.[59] More fundamentally, rights-based litigation has been described as a promising avenue to advance demands for 'planetary' justice.[60]

Yet, while much emphasis is placed on the promise of rights-based litigation, research has largely avoided to approach the phenomenon from a theoretical perspective that situates it within the broader political-economic landscape shaping our response to the planetary

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[55] The two terms are similar, yet not entirely congruent, both have their roots in social movements, and both share a considerable lack of conceptual clarity, leading to differing, at times conflicting interpretations. While climate justice tends to be employed mostly in a North/South context, injustices in domestic settings, especially the Global North, are often exposed as not conforming to a just transition, though the conceptual boundaries of the two become increasingly blurred. Sometimes, the two terms are employed synonymous. Eduard Morena et al (eds) *Just transitions: Social justice in the shift towards a low-carbon world* (Pluto Press 2019); Peter Newell and Dustin Mulvaney 'The political economy of the "just transition"' (2013) 179 The Geographical Journal 132.

[56] International Council on Human Rights Policy, '*Climate Change and Human Rights:A Rough Guide'* (2008) <www.ichrp.org/files/reports/45/136_report.pdf> 8. Accessed 3 May 2023.

[57] Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37.

[58] See Joana Setzer and Catherine Higham, 'Global Trends in Climate Litigation 2024 Snapshot' (Grantham Reserach Institute on Climate Change and the Environment Policy Report, June 2024) <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf> accessed 3 January 2025.

[59] For a recent contributions see Cesar Rodríguez-Garavito (ed), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (CUP 2022); Shuma Talukdar and Valéria Emília de Aquino (eds) *Judicial Responses to Climate Change in the Global South, A Jurisdictional and Thematic Review* (Springer 2023); Jolene Lin and Jacqueline Peel, *Litigating Climate Change in the Global South* (OUP 2024).

[60] Louis Kotzé, 'Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene' (2021) 22 German Law Journal 1423.

crisis. Since, contrary to the transformative potential often ascribed to rights-based climate litigation, human rights, thus far, have seen to be largely incapable to challenge and confront distributive injustices.[61] Further, few studies have thus far explored how the increased instrumentalization of rights in the context of climate justice and just transition relates to the wider critique of rights voiced in recent decades from variety of perspectives.[62] This is the point of departure for my thesis. As critical scholars have repeatedly argued, human rights law and discourse have remained largely inattentive to the structural causes of the maldistribution of wealth, income, and access to resources.[63] In this vein, scholars have described human rights as a 'powerless companion' in the fight against the glaring distributional injustices of our time,[64] or have even suggested that human rights are complicit in neoliberal globalisation.[65] Just as any other emancipatory agenda, rights discourses are at a constant risk of being co-opted,[66] and human rights law's traditional focus on state acts and omissions makes it difficult to seek redress through rights for the conduct of private actors.[67] Moreover, Western-liberal accounts of human rights are rightly criticised of obscuring the fact that states, particularly in the global South, may be unable or unwilling to ensure the realisation of rights in practice – not least to due particular political conditions and colonial legacies.[68] Due to these shortfalls, rights have been

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[61] Lorenzo Cotula, 'Between Hope and Critique: Human Rights, Social Justice and Re-Imagining International Law from the Bottom Up' (2020) 48 Georgia Journal of International and Comparative Law 473, 479.

[62] For an exception See Marie-Catherine Petersmann, 'Life Beyond the Law – From the "Living Constitution" to the "Consitution of the Living"' (2022) 82 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 769.

[63] For an overview See Daniel Brinks et al, 'Introduction: Human Rights and Economic Inequality' (2019) 10 Humanity 363.

[64] Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2016) 77 Law and Contemporary Problems 147; Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).

[65] Wendy Brown, '"The Most We Can Hope For…": Human Rights and the Politics of Fatalism' (2004) 103 South Atlantic Quarterly 451; Susan Marks, 'Four Human Rights Myths', in David Kinley et al (eds) *Human Rights: Old Problems, New Possibilities* (Edward Elgar 2017) 217. Jessica Whyte, 'Powerless Companions or Fellow Travellers? Human Rights and the Neoliberal Assault on Post-Colonial Economic Justice' (2018) 2 Radical Philosophy 26.

[66] Anna Grear, Towards 'climate justice'? A critical reflection on legal subjectivity and climate injustice: warning signals, patterned hierarchies, directions for future law and policy (2014) 5 Journal of Human Rights and the Environment 103.

[67] Boaventura De Sousa Santos, Toward a New Legal Common Sense: Law, Globalization and Emancipation (Butterworths 2002) 167.

[68] Anna Chadwick et al, 'Protecting, respecting, or violating peasants' rights? UNDROP, the state and "Sembrando Vida" – Mexico's flagship reforestation project' (2024) 20 McGill Journal of Sustainable Development Law 1.

criticised of unduly occupying the emancipatory space at the cost of displacing other concepts and languages.[69]

Further, on a deeper, conceptual level, human rights' roots in Western-liberal thought are seen to render them ill-equipped to confront the challenges of the Anthropocene: Western liberal law, and in particular its constitution of liberal subjectivity, is seen to be 'thoroughly *tilted* and deeply implicated in the genesis of the climate crisis and in continuing patterns of climate injustice'.[70] As hinted above, legal theory has started to grapple with the question how law and subjecthood could be conceptualised in a way more attuned with a perspective attentive to human and more-than-human co-agency, shared vulnerabilities, and relations premised on care.[71] Yet, while the respective scholarship engages with the critique of rights and their roots in Western-liberal individualism,[72] it remains largely theoretical, without contemplating how the call for a renewed, more relational understanding of law could (if at all) be enacted through law – and through the invocation of rights in particular – in practice.

In defiance of the critique of rights as 'powerless companion' in the fight distributive injustices, recent regional human rights jurisprudence, particularly in the global South, shows that human rights advocates were able to confront social justice issues at the very foundations of dominant economic models, shifting the control over land to groups managing resources in ways not conforming to neoliberal and extractivist agendas.[73] This includes instances where rights were successfully mobilised to advance claims that do not conform to Western-liberal law's structuring around individualism and anthropocentrism.[74] Accordingly, it has been suggested that, while the dominant political and economic structures pose inherent limits to mobilising human rights, there may nonetheless be avenues for social movements to appropriate – and at times reconfigure – human rights, sustaining emancipatory action in social struggles.[75]

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[69] See eg Costas Douzinas, *The End of Human Rights, Critical Legal Thought at the Turn of the Century* (Hart Publishing 2000).
[70] Grear 2014 (n 66) 104.
[71] Supra 20.
[72] Floor et al (n 51).
[73] Cotula 2020 (n 61) 502.
[74] Ibid 494-95.
[75] Ibid 478.

My proposition is that when looking at rights in the era of 'green' market expansion, it is required to acknowledge both, the problematic ideational foundations of modern human rights and their role in perpetuating a system fraught with injustice, as well as their potential to challenge this system. While many scholarly approaches either take human rights' emancipatory potential for granted, or else dismiss them altogether, I argue that climate and just transition litigation invite us direct renewed attention towards a differential discourse of human rights.[76] This means taking both seriously: Rights' possibilities, as well as their limits. It further means to draw attention to strategy: Climate and just transition litigation is often referred to as 'strategic' litigation, yet without any in-depth inquiry what 'strategic' in 'strategic litigation' means. Since while rights-based litigation may well push some boundaries, it may equally reinforce others. Current climate litigation scholarship identifies possibilities and limitations of particular litigation tactics in particular settings,[77] yet it largely avoids to contextualise them within the wider structures which condition them in the first place. It is this gap, that I am attempting to fill.

1.4 Research question

This thesis is, above all, concerned with resistance through the invocation of *rights*. Rights' potential in this regard – or the lack thereof – has been extensively theorised from a range of perspective including post-colonial, feminist, Marxist, and third-world approaches to international law (TWAIL).[78] Equally, the case law of rights-based climate and just transition litigation does not suffer from being under-researched, as the considerable and growing body of literature on the subject demonstrates. What is less explored, however, is how the 'rights turn' in climate litigation can be contextualised firstly, with a view to the critique of rights highlighted above, and, secondly, against the backdrop of the processes of commodification and market entrenchment accompanying our response to the planetary crisis. Accordingly, I do not undertake a doctrinal case law analysis, nor do I aim at developing a comprehensive theory of rights in the era of 'green' market expansion.

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[76] In this, I draw on Illan rua Wall's approach, yet extend his thinking towards the context of the Anthropocene. See Illan rua Wall, *Human Rights and Constituent Power, Without Model or Warranty* (Routledge 2012).

[77] See eg Lucy Maxwell et al, Standards for adjudicating the next generation of Urgenda-style climate cases (2022)13 Journal of Human Rights and the Environment 35.

[78] See among many others eg Martha Nussbaum, 'Women and equality: The capabilities approach' (1999) 138 International Labour Law Review 227; Upendra Baxi, *The Future of Human Rights* (OUP 2002); Radha D'Souza, *What's Wrong with Rights?* (Pluto Press 2018).

Rather, I seek to employ theory as a heuristic device to make sense of law's constitutive role in the global political economy of the Anthropocene, and of its potential to induce changes towards a system that is more equitable in distributive terms, and responsive to the needs and mutual entanglements of human and non-human beings.

The research question that motivates my enquiry is the following:

Can human rights be deployed as a device of resistance against 'green' market expansion?

Responding to the main question requires to pose a set of secondary questions along which this thesis is structured, those being:

- What are the legal and ideational foundations and the wider implications of 'green' market expansion? (Chapter 2)

- How can law and rights be conceptualised in a way that captures both, constitutive, as well as resistive potential? (Chapter 3)

- What is the role of property in 'green' market expansion and the multiple layers of distributive injustices it entails? (Chapters 4 and 5)

- What are the possibilities, and what the limitations of human rights in counteracting 'green' market expansion? (Chapters 4 and 6)

- Can the invocation of rights in courts of law be conceptualised in strategic terms, as a way to confront the institutions and paradigms that create and perpetuate distributive inequalities in the era of 'green' market expansion? (Chapter 7)

My interest here is in the contradictions the climate change regime is fraught with. Firstly, on a general level, it appears contradictory that the present crisis can be cured by what has caused it in the first place: The expansionist and extractive logics of capitalism that have

brought the planetary system to the edge of collapse,[79] are being redeployed in a new guise, suggesting that continued economic growth is possible and indeed desirable, just in slightly different terms.[80] Secondly, the United Nations Framework Convention on Climate Change (UNFCCC), in its very first paragraph, acknowledges that 'the change in the Earth's climate and its adverse effects are a *common* concern of humankind',[81] our response to the crisis predominantly relies on *private* property rights.[82] Thirdly, the commodities traded in carbon markets harbour a contradiction, in that they are 'dephysicalised' and free to circulate in globalised markets, while their creation remains spatially and contextually bound. Lastly, a contradiction arises between two prevailing currents, ostensibly pulling in opposite directions: The advance and entrenchment of markets on one hand, and the proliferation of rights-based claims on the other. Yet, these are in fact two sides of the same coin: They are both concerned with proprietary relations, with a mode of 'having', rather than 'being'. Human rights are invoked by social movements precisely to limit the ravages of capitalism – though the question is: can they?

1.5 Theoretical and methodological choices

As hinted above, scholars have recently sketched out a vision for a 'constitutionalism for the Anthropocene' that confronts flattening and generalising tendencies to see humans as one single 'global geophysical force' thereby drawing attention to variety of roles played by specific societies in the context of a capitalist world ecology.[83] Further, taking cue from new materialism's insistence on entanglement and interconnectivity, the authors insist on reconceptualising legal relations as part of more-than-human collectives in recognition of shared vulnerabilities and in relations premised on care, abandoning the binary between humans and nonhumans and the idea of human mastery that has dominated Western legal traditions since the Enlightment .[84] A constitutionalism for the Anthropocene so understood starkly contrasts with the new constitutionalism of 'green' market expansion. – The

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[79] Johan Rockström et al, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14 Ecology & Society 32.

[80] Julia Dehm, 'Carbon colonialism or climate justice? Interrogating the international climate regime from a TWAIL perspective' (2016) 33 Windsor Yearbook of Access to Justice 129.

[81] United Nations Framework Convention On Climate Chang (adopted May 1992) FCCC/INFORMAL/84 GE 05-62220 (E) 200705. Emphasis my own.

[82] See in particular chapter 3 on the constitutive role of property.

[83] Floor et al (n 51) 6.

[84] Ibid 4.

question is: How, if at all, do we move from the from the latter to the former? And: Who is 'we'? Who is the driving agent instigating that shift? If the world is no longer conceived as 'the inert matter that humans act upon, but rather intra-active entities that humans act with', the question of agency arises.[85]

While insisting that looking at legal relations in the Anthropocene requires us to 'acknowledge the co-agency of agency' of humans and non-humans as part of more-than-human collectives who '"act-with" and respond to each other', the authors rightly stress that not all parts of those collectives will all have the same abilities to act and respond and that the differences and asymmetries between them should not be flattened or disavowed.[86] Yet, the question is: what agency can *human* beings have, to give leverage to those more relational understandings, in a political and legal system that still is widely seen as enacted and maintained by human actors? The response lies, as I argue, in drawing attention to community – community of humans, as well as community of humans and more-than-human entities. Yet, while the insistence of the more-than-human is important, and while this approach, in principle, militates against privileging human agency, I submit that, to start with, it is nonetheless valuable to explore how *human* communities into being – which may occur in that they gather around a radical demand. This demand, I submit, may be uttered through the medium of rights.

Given my focus on law's role in the maintenance and reproduction of capitalism, a Marxian approach to method suggests itself as a point of departure.[87] Overall, my point is, that any meaningful analysis of rights and their emancipatory potential in any given context must start with the critique of the political economy. While I do not attempt to undertake a rigid Marxist analysis, I do take cue from its core tenets – dialectics and materialism. This implies, firstly, to pay attention to the specific historic and material conditions that gave rise to particular legal forms, and, secondly, to understand these legal forms 'not as things but as complex and contradictory processes and relationships'.[88] My analysis thus attempts to focus on the concrete material relationships, and the dynamic processes that produce and sustain the legal forms underpinning 'green' market expansion,

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[85] Ibid 8.
[86] Ibid 9.
[87] The approach outlined here is inspired by Paul O'Connell, 'Law, Marxism and Method' (2018) 16 tripleC 647.
[88] Ibid 649.

namely: the form of rights. Secondly, Marxist methodology assumes that capitalism and the legal forms through which it operates are historically specific, they not inevitable but contingent and, as such, it is possible to overcome them.[89] Further, in line with Marxism, my contention here is that it is the production of surplus-value (such as profits, interests, and rents) that predominates within the capitalist mode of production and, as such, also underlies 'green' market expansion.[90] This links to the third pillar of Marx' methodological framework is centred on class struggle with 'class' denoting the structural relationship of specific groups of people with a view to their capacity to appropriate surplus value.[91] While class is fraught and much theorised concept, this basic understanding sits well with my current endeavour: 'Green' market expansion arguably is linked to the extraction of surplus value, though not necessarily, or not in the first instance, through human labour.

For Marx, '… all methods for the production of surplus-value are at the same time methods of accumulation; and every extension of accumulation becomes again a means for the development of those methods…'.[92] Arguably, without theorising this in greater depth, climate change and the market-based response thereto are reflective of capitalism's logic that requires the incessant drive towards further expansion: The exploitation and destruction of nature an the atmosphere through capitalism enables their commodification in the first place, by making them scarce goods that can be accumulated and sold at surplus-value.[93] Marx, however, mostly focused on the accumulation of surplus value through human labour. Recently, scholarship has taken renewed interest in theorising Marx from an environmental perspective,[94] yet to my own knowledge, this body of work has not yet been brought in much conversation with Marxian legal theory. This, however, is not a project I pursue here. Instead, I would like to bring the Marxist critique of law in conversation with other strands scholarship, namely work on new legal institutionalism, human rights, and a range of perspectives associated with critical environmental law

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[89] Ibid 650-51.

[90] See David Harvey, 'History Versus Theory: A Commentary on Marx's Method in Capital' (2012) 20 Historical Materialism 3, 15.

[91] O'Connell (n 87) 651.

[92] Karl Marx 1867 (n 32) 709.

[93] See in this vein the critique of neoliberal environmentalism infra at 2.1.

[94] See eg John Bellamy Foster and Brett Clark, The Robbery of Nature: Capitalism and the Ecological Rift (Monthly Review Press 2020); John Bellamy Foster, The Return of Nature: Socialism and Ecology (Monthly Review Press 2020); Ryuji Sasaki, New Materialism, Critique of Political Economy, and the Concept of Metabolism (Plagrave Macmillan 2021); Kohei Saito, Marx in the Anthropocene: Towards the Idea of Degrowth Communism (CUP 2023).

scholarship. I then, again taking cue from Marxian perspectives, link and connect these approaches to rights-based climate and just transition litigation in an attempt to conceptualise them as a practice aimed at confronting the dominant market paradigm.[95]

Contemporary enquiries into the role of law in the Anthropocene loosely aligned with what has to become to be known as 'new materialism' share some aspects of the Marxist critique, namely, the critique of liberal law's metaphysical individualism and the scant attention it pays to the material circumstances upon which it operates.[96] This similarity aside, however there are considerable divergences: Classical Marxist historical materialism is usually deterministic in its outlook and mostly focused on the economic process, particularly in relation to the exploitation of human labour. Contrastingly, new materialism scholarship widens the definition of the 'material' to include living and inert matters with differential agencies, interacting in complex ways. In this vein, scholars associated with actor-network theory (ANT) have sought to conceptualise the world – human and non-human natures alike – a messy and emergent set of relations that lack final closure. Drawing on the so-called 'Gaia hypothesis' developed by scientists in the 1970s, Bruno Latour argues that a philosophy for the Anthropocene is ought to conceptualise the planetary system as set of 'intermingled and unpredictable consequences of the agents, each of which is pursuing its own interest by manipulating its own environment', and that it is the precisely this lack of unified agency that carries political force.[97] Against this background, Margaret Davies, advocates for a perspective centred on 'eco law' which conceptualises norms – legal and non-legal, as well as human an non-human – as 'iterative, connective and teleological', thereby fostering an understanding of law as placed 'within relationships that create it'.[98]

New materialism's perspective is valuable, in that it defies the objectifying and separating logics upon which capitalism operates. What it, however, lacks, precisely because its insistence on radical openness, is any kind of normative proposition that could instruct how we deal with the uneven global landscape capitalism continues to shape. Law, so understood, is neither intelligible to human legal systems, nor does it hint at the choices we

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[95] I expand on this in chapter 3.

[96] For this and the following see Hyo Yoon Kang and Sara Kendall, 'Legal Materiality' in Simon Stern et al (eds), *The Oxford Handbook of Law and Humanities* (OUP 2019) 20, 24-26.

[97] Bruno Latour, *Facing Gaia: Eight Lectures on the New Climatic Regime* (Polity Press 2017) 142.

[98] Margaret Davies, *EcoLaw, Legality Life, and the Normativity of Nature* (Routledge 2022) 4-5.

ought to make in the here and now – which is why I will not go down the route to engage in depth with Latour's and Davies' work. As Alain Pottage notes, borrowing from Donna Haraway: 'No Jurisprudence can truly "stay with the trouble"; a cut has to be made somewhere.'[99] The problem with ANT is that it is politically agnostic: Latour's account, Pottage argues, 'does not allow us to gain any critical purchase on the entanglements of nature and culture, and to choose which of these to foster and which to curtail'.[100] Hence, the challenge is that while classical Marxism tends to neglect whatever lies beyond the relations of production, new materialism's insistence on openness and entanglement tends to neglect the power dynamics intrinsic to the capitalist political economy.

Both perspectives are important for my endeavour and, as I will argue throughout this thesis, they share a common node, that is: the critique of the Western-liberal property paradigm. Marx stressed the fundamental contradiction between private property and human emancipation, concluding that the attainment of human emancipation requires the negation of private property.[101] While Marx saw the nascent proletariat at the heart of human emancipation, this category, without significant reconceptualization, is difficult to employ in the contemporary context. However, the proposition that emancipatory action needs to confront property still, or even: all the more, holds true in the Anthropocene. To halt the planetary crisis rooted capitalism's ever-expansive logic, whose most recent iteration is to be seen in 'green' market expansion, means to reject the idea that private property is an inevitable necessity. This requires to counteract private property, as an institution, and as a wider paradigm. Counteracting property has to happen in various ways: By contesting past appropriations, by preventing new ones, by calling its normalisation into question, and by challenging its underlying ideational foundations rooted in metaphysical individualism. By doing so, I aim to add a strategic dimension to the work of scholars such as Marie-Catherine Petersmann and Daniel Matthews who, among others, rightly insist that legal scholarship for the Anthropocene should be

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[99] Alain Pottage, 'Holocene Jurisprudence' (2019) 10 Journal of Human Rights and the Environment 153, 162.

[100] Ibid.

[101] O'Connell (n 87) 652.

foregrounding relationality and entanglement, rather than metaphysical individualism, looking at law through the prism of obligation,[102] or 'response-abilities of care'.[103]

The accounts above, I submit, are irreconcilable with capitalism's extraction of surplus-value and the idea of property. A strategy conducive to a shift towards obligation and care – or in other words: from 'having' towards 'being' – must strive to withdraw whatever place, subject, or object is concerned from fungible and alienable Western-liberal property. Contrary to the initial framing of the problem,[104] new materialism and Marxism alike appear to suggest that the issue is not *distribution*, but the processes of essentialisation, objectification, and appropriation. Throughout the history of capitalism, these processes have culminated into another dimension of distribution: In what Jaques Rancière calls the *distribution of the sensible* – the normalisation of extant proprietary relations.[105] Yet, human rights appear ill-equipped to challenge the distribution of the sensible: As noted above, mainstream as well as many critical approaches to human rights law and discourse see human rights firmly rooted in the Western-liberal tradition and thus tied to essentialisation and the possessive individual. While mindful of this critique, I argue that rights-based litigation may well be employed in a strategic sense, invoking a radical demand the reversal of appropriation and commodification, and towards the withdrawal of markets, as opposed to their further entrenchment. As critical theorists rightly point, rights often are used to merely soften capitalism's edges, rather than confronting it, and, with this, lead to a deeper entrenchment of markets, rather than their withdrawal.[106] However, invoked in strategic terms, rights claims do have unsettling force to act as what Emilios Christodoulidis has theorised as 'strategy of rupture',[107] calling into question what the dominant order takes for granted. With Illan rua Wall, I argue that in their collective and a-legal dimension, rights can summon a community around the utterance of a radical demand.[108] Only in this dimension, I argue, rights can confront and challenge structures, institutions, paradigms and processes that uphold and perpetuate the distributive injustices

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[102] Daniel Matthews, 'Law and Aesthetics in the Anthropocene: From the Rights of Nature to the Aesthesis of Obligations' (2019) 0 Law, Culture and the Humanities, 1.

[103] Marie-Catherine Petersmann, 'Response-abilities of Care in More-than-Human Worlds' (2021) 12 Journal of Human Rights and the Environment 102.

[104] Supra 13-18.

[105] Jacques Rancière, *Disagreement: politics and philosophy* (Minnesota University Press 1999).

[106] See eg Özsu (n 26).

[107] Emilios Christodoulidis, 'Strategies of Rupture' (2009) 20 Law and Critique 3, 10.

[108] See Wall (n 76).

of our time. Yet, once rights enter the juridical domain, they lose their transformative force and the radical demand must be conjured anew. It is this strategic dimension of rights I am interested in.

Against the rights critique of recent decades, which arguably often is rooted in the critique of imperialism and military interventions by the West carried out in the first decade of the 21st century, I suggest that rights-based climate and just transition litigation may, in varying ways, carry the radical, a-legal impetus hinted at above. Looking at three different sets of case law broadly associated with the rubric of 'climate litigation' and 'just transition litigation' respectively, I aim to explore what the various theoretical accounts discussed throughout the thesis can bring to the table when analysing emancipatory possibilities of rights, their disruptive potential, and their limitations in the context of 'green' market expansion. The three different types of cases broadly align with the different types of appropriation and uneven distribution linked to 'green' market expansion: Firstly, the uneven distribution of the carbon budget, secondly, the uneven distribution of land, and, thirdly, the given 'distribution of the sensible' that continues to uphold and legitimise the Western-liberal property paradigm underpinning much of the other two distributive injustices.

While the single-sided scholarly attention to a few 'sexy' high-profile cases has rightly been criticised,[109] my enquiry, too, focuses on 'landmark' cases which are seen to significantly push boundaries. The objective here is to hint at the limits radical demands encounter when entering the legal and institutional realm, even when the legal system in question is, to some extent, receptive to litigants' claims. With the selected cases, I do not strive to prove the points I am making throughout this thesis beyond doubt – rather, I would like to signpost another way of looking at rights-based litigation in the Anthropocene beyond crude distinctions between 'failure' and 'success', beyond conventional categorisations, beyond doctrinal or comparative lenses, but situated within the wider critique of the political economy centred on the possessive individual. The cases are chosen to cover the global North and the global South, as well as to include indigenous and non-indigenous claimants. Casting my net wide here is important: Because while much

[109] See Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 Journal of Environmental Law 483.

hope is set on avenues for transnational borrowing,[110] or for mainstreaming concepts that do not align with Western-liberal thought and are often found in indigenous onto-epistemologies,[111] my concern is with the limits for such 'transplants' – not on a doctrinal, but on a structural level. Drawing on Hans Lindahl's account on legal collectives, their boundaries, and fault lines, I am endeavouring to hint towards the point beyond which boundaries cannot be pushed.[112] Since striving to reach beyond this point is exactly what we should aim for and will never succeed.

1.6 Thesis structure and arguments

The second chapter of my thesis introduces the legal and institutional set-up that enables carbon markets – the most prominent and elaborate example of 'green' markets – to operate. It outlines the ideological foundations upon which market-based solutions to environmental protection rest, and conceptualises the proliferation of environmental markets as a facet of new constitutionalism. What makes 'green' market expansion particularly pernicious is that it turns pre-existing narratives upside down: While the extractive logics of capitalism have hitherto been linked to environmental destruction, capitalism now is presented as necessary to halt and reverse the damage it has previously caused. The commodification and marketisation of the atmosphere and nature more broadly appear as justified and indeed inevitable to protect our ecosystems and save the planet.

In the third chapter, I lay the theoretical groundwork for what follows. As highlighted previously in this chapter, Marxian and new legal institutionalist approaches to law suggest themselves as a frame to illustrate law's constitutive role in the capitalist political economy that forms the backdrop of 'green' market expansion. Both approaches emphasise the constitutive role of law in the capitalist political economy, however they differ in their appraisal of law's capacity to effect changes in the present order. While Marxian

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[110] See eg Philip Paiement, 'Urgent agenda: how climate litigation builds transnational narratives' in Emily Webster and Laura Mai (eds) *Transnational Environmental Law in the Anthropocene, Reflections on the Role of Law in Times of Planetary Change* (Routledge 2021) 121.

[111] Kathleen Birrell and Daniel Matthews, 'Re-storying Laws for the Anthropocene: Rights, Obligations and an Ethics of Encounter' (2020) 31 Law and Critique 275. The term 'onto-epistemology' refers to the 'study of practices of knowing in being' that rejects the separation between ontology and epistemology. See Petersmann 2021 (n 103) at n 13 quoting Karen Barard.

[112] Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (OUP 2013).

approaches stress that law's commodity form is inextricably linked to the capitalist mode of production, and that law, therefore, cannot be employed as a device to overcome it, new legal institutionalist perspectives do not negate this finding but nonetheless see value in legal 'tinkering' to bring about more equitable outcomes. Against accounts that see legal institutions largely amenable to the work of a globally operating class of lawyers in the service of a global capitalist class, it is vital to stress that the state remains important, not least as guarantor of individual property rights. As Marxist political philosophers including Antonio Gramsci and Nicos Poulantzas have pointed, states can be theorised as terrain of class struggle, though neither the ruling class nor the ruled are ever entirely unified but instead themselves enmeshed in intra-class struggles. While this framing is valuable in that it accounts for the existence as well as the complexity of power relations within states, it is not optimally suited to explain how states interact at a global scale, precisely because of the challenges to attribute complex phenomena to particular actors within states. Further, it does not account for the fora of transnational law where states play a peripheral, enabling, rather than a central role. Therefore, it is indicated to complement my theoretical 'toolkit' with a more functionalist approach that conceptualises states as legal collectives interacting with other legal collectives those being other states, but also other entities concerned with the creation of rules and subject to spatial and personal closures.

From looking at law as co-constitutive of the global, capitalist political economy, in the second part of the third chapter, I move on to explore law's potential as a device of resistance against capitalism's encroachment on ever more aspects of human and non-human life. In line with Marxian legal scholarship, I do not locate this potential within liberal law but in its force to be employed in a way that points beyond the given order by exposing its internal contradictions. In this vein, law can be utilised in strategic terms, with view to, eventually, transcend the present order. Legal argument may be employed as what Christodoulidis refers to as 'strategy of rupture',[113] or, as Rancière puts it, a dissensus that disrupts the 'distribution of the sensible' – of what is seen and heard, as opposed to what remains unseen and unheard by the dominant order.[114] With critical phenomenology, such dissensus is about how certain things appear *as* something *to* someone.[115] For a legal collective – such as a state – something appears as *strange* if it resides beyond the pale of

[113] Christodoulidis 2009 (n 107).
[114] Rancière 1999 (n 105).
[115] Christodoulidis 2021 (n 49).

the collective's legal order arranged around a normative point of joint action.[116] The strange, or 'a-legal', according to Lindahl, may be called forth to confront and challenge a legal collective's normative point of joint action. Though, while the collective might shift its boundaries incrementally, it cannot overstep the fault line, beyond which the a-legal resides, without becoming another, fundamentally different collective. Given the proverbial higher likelihood to imagine the end of the world than the end of capitalism, for modern nation states the latter firmly resides beyond the fault line. Yet, a strategy of rupture aims at calling forth the potentiality, even though this potentiality is not realised in the near term. Strategy understood in this way is never over and done with. Instead, its part of an open dialectic that inclines towards a goal, but potentially never reaches it.[117] Rights claims can carry this ruptural potential.

In chapter 4, I lay the foundations for chapters 5 and 6, by portraying the ideas of rights and property as co-original in Western-liberal thought. It is this linkage appears to make rights ill-suited for confronting 'green' market expansion since it focuses on the essentialised, possessive individual and its concern with 'having' rather than 'being'.[118] While some scholars see rights as inextricably linked to idealised conceptions of individual and property, and therefore ill-suited to be employed as a device of resistance against capitalist exploitation, others argue that rights' history is contingent and that rights retain a radical, extra-legal core that points beyond the given distribution of the sensible.[119] What appears clear though, is that human rights' disruptive potential cannot be thought of without thinking about property first.

The next two chapters mirror the two parts of chapter 3 that have theorised law as a phenomenon that is at once both, co-constitutive of capitalism, and avenue for resistance against it. Chapter 5 is concerned with property as an institution. In this chapter, I describe the multiple layers of proprietary relations at work in carbon and other ecosystem markets. The layers of proprietary relations can be linked to the various layers of distributive inequalities discussed above, i.e. the uneven distribution of the carbon budget, the uneven distribution of transition burdens and benefits, and the uneven distribution of access to, and

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[116] Lindahl (n 112).
[117] Christodoulidis 2021 (n 49).
[118] Wall (n 76).
[119] On the former position see eg D' Souza (n 78), on the latter eg Wall (n 76).

power over land upon which all other maldistributions rest. While property, in practice, is multifaceted and much broader than the classical Blackstonian framing as 'sole and despotic dominion' suggests,[120] the idea of property as private, individual, and absolute remains influential. This makes it difficult to fundamentally challenge existing distributions. Yet, it is important to acknowledge that those distributions are neither natural nor random, but instead the result of prior acts of appropriation. Appropriation is closely linked to the formalisation of prior factual situations through property rights, and once property rights are created, they gravitate towards those who are privileged in terms wealth and power. As such, uneven *distribution* is a consequence of prior processes *appropriation*. While property is subject to limitations and while collective dimensions of property – such as common property regimes – have become recognised more widely, this does not signify a retrenchment of capitalism, but rather its adaptability: What appear to be common property regimes from the 'inside' can still be appropriated from the 'outside' by higher-order rights holders, a risk that is particularly pertinent in the context of 'green' market expansion: If proprietary rights in carbon reside with actors outside the 'commons', this significantly constrains the possibilities within, since competing property claims emerge. These competing claims will have to be negotiated and risk to be resolved in favour of capital. As such, reforming property towards more 'inclusive' versions does not solve the problem, as long as it remains embedded in a globalised capitalist political economy.

Moving from property to rights in the sixth chapter, I look at the possibilities rights hold to counteract the further entrenchment of markets and confront previous rounds of appropriation. Against the criticisms of statism, individualism, and anthropocentrism highlighted above, counter-hegemonic renderings of rights have widened the circle of rights' subjects to include collective rights and rights for non-human entities. Yet, even in their more progressive renderings, rights are not entirely capable of escaping the trap of essentialism, reifying rights' subjects, thereby making them vulnerable to other subjects' counter-claims and co-option. Hence, scholars argue, what is required instead is attentiveness to mutual responsibility and community – among humans, as well as between humans and the non-human.[121] This more relational account contrasts with capitalism's tendency to sever parts from the whole that is illustrated by 'green' market expansion's

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[120] William Blackstone, *Commentaries on the Laws of England, Book II* [1766] (OUP 2016) 1.
[121] Petersmann 2021 (n 103).

tendency to divide the world into discrete ecosystem service units. Rather than the language of rights, obligations appear apposite to capture this more relational account focused on 'being' rather than 'having'. However, rights are nonetheless not useless: Despite their limitations in their institutionalised forms, they do hold potential, if only as 'promise of worlds other',[122] constructing an emancipatory imaginary.[123] As such, their power resides not with their legalised form, but as a vessel to carry radical demands.[124] Yet, rights must be invoked strategically, and deliberately to that end. As soon as rights claims enter the legal realm, they will lose their force. What remains, however, is an instance of immanent critique – that rights' promise of justice has not (yet) been fulfilled – building the basis for the formulation of a new, radical demand.

The seventh chapter brings together the findings of the preceding chapters, looking at the specific context of climate and just transition litigation. It does so through the lens of various distributive aspects previously discussed, namely: the uneven distribution of the carbon budget; the uneven distribution of access to and power over land upon which the distribution of transition burdens and benefits ultimately depends; and – thereby slightly shifting registers – the existing 'distribution of the sensible'. With a view to the first aspect, I highlight a set of cases in the global North that fall under the rubric of 'systemic mitigation litigation', that is: cases that aspire to compel governments to increase their ambition in reducing greenhouse gas emissions.[125] While the two cases I discuss in more detail – *Neubauer v. Germany* and *Klimaseniorinnen v. Switzerland* – have both widely been considered a success in that courts, at least partially, granted the applicant's claims, they also are illustrative in that they expose the limits of what can be achieved. Yet, it is important to acknowledge that the cases operate on different levels: in the legal, as well as in the discursive realm. In the legal realm, they are limited in that they produce a decision compatible with what appears acceptable for the legal collective in question. In the discursive realm, they articulate a radical demand, potentially transcending the given distribution of the sensible.

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[122] Douzinas (n 69).

[123] Anna Grear, 'Human Rights, Property and the Search of Worlds Other' (2012) 3 Journal of Human Rights and the Environment 169.

[124] Wall (n 76).

[125] See infra at 7.1.1.

I then move on to explore two other sets of cases, which, too, are seen to considerably push boundaries. Both involve the rights of indigenous communities and other minority groups. The *Fosen* judgment concerns two groups of traditional reindeer herders in Norway affected by a wind park development. In the *Atrato* decision, the Colombian Supreme Court for the first time afforded legal personhood to a natural feature – the Atrato river – as an expression of existing indigenous and minority rights. At face value, both judgments appear innovative in that they employ novel conceptualisations legal subjecthood. However, the affirmation of rights does not necessarily ensue material changes or, if it does, this does not necessarily imply a shift away from market entrenchment but may, to the contrary, co-opt communities into arrangements with transnational market actors. What is more, yet again, the legal innovation in question is grafted on top of existing opportunity structure – this time in that the structure affords particular groups particular rights. With this, rights create reified group categories and the legal innovations that venture beyond the Western-liberal rights paradigm are only available to those particular, siloed groups but not for anyone else who does not conform with the group characteristics in question. Group identity appears as legally constructed, rather than a shared, lived experience of struggle: Who counts, and on what terms, is imposed from the outside.

Those findings are instructive when thinking about law's potential to reverse appropriation, to enact a shift from 'having' to 'being', from proprietary modes of thinking towards a more relational one premised upon obligation and mutual responsibilities of care. For an existing legal collective to embrace this form of relational thinking would require to overstep a fault line and become other, markedly different legal collective. The collective would need to actualise its normative point of joint action to a degree that appears incompatible in the present political-economic set-up. What rights nonetheless may do is shifting boundaries, ever so slightly, leading to incremental, yet nonetheless important changes. As such, it is not so much about siding with 'pragmatists' or 'nihilists', but rather about acknowledging what rights, in any given instance, can or cannot do. This, in turn, can inform our thinking about when, where, and how we should employ them.

1.7 Reassessing rights critique, revisiting strategy

The original contribution of my thesis lies in the attempt of weaving together a range of topics and strands of thought which, to my knowledge, thus far have not extensively been thought of together: The critique of the political economy of 'green' market expansion,

various strands of human rights critique, and rights-based litigation. While my account is necessarily incomplete, and opens up more questions than it answers, I would argue that it provides for a worthwhile point of departure: for a critical appraisal, and a tentative endorsement of rights as a praxis to resist capitalism's intrusion into ever more aspects of human and more-than-human worlds.

Accounts highlighting the connections between law and the exploitative practices implied in the capitalist political economy often see themselves confronted with the choice between legal 'pragmatism' or legal 'nihilism'.[126] Should we, at all, engage with law despite its structural complicity with capitalist exploitation and domination? This tension is reflected by the fact that critical accounts, despite condemning human rights in the first place, often return to a position that justifies their use.[127] A mediating position sees rights as ambivalent, and thus contradictory in themselves in that they, at once, possess oppressive and emancipatory potential.[128]

My contention is that we do not have to choose between 'pragmatist' and 'nihilist' camps. Instead, I will argue for a differential understanding of rights. As *law*, rights are inextricably linked to the unjust order they – unsuccessfully – seek to confront. In their a-legal dimension, as *radical demands*, however, rights do carry emancipatory potential. By invoking rights as a strategy of rupture, or by way of immanent critique, legal rights can be deployed strategically, to confront the given order. In this instance, they act as carrier medium for a radical demand.

Looking at rights this way rejects the assertion that we should never resort to rights when seeking transformational change. Invoking rights to confront the existing political-economic set-up may well be one tactic, among others. Contrary to recent critiques of human rights discourse, rights may not always eclipse other modes of resistance, but instead support them by legitimising more radical modes of resistance. Yet, this approach requires us to interrogate what exactly is 'strategic' about 'strategic litigation', rather than

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[126] Margot E Salomon, 'Nihilists, pragmatists and peasants: a dispatch on contradiction in international human rights law' in Emilios Christodoulidis et al (eds) *Research Handbook on Critical Legal Theory* (Edward Elgar 2019).

[127] Ben Golder, 'Beyond Redemption: Problematising the critique of human rights in contemporary legal thought' (2014) 2 London Review of international law 77.

[128] Grear 2012 (n 123).

taking it for granted. And it requires us to reevaluate what we mean by ‘failure’ and ‘success’ when invoking rights. And only if the strategic invocation of rights continues, persistently, it can resist co-option.

2. ‘Green’ market expansion: Workings, ideology, implications

Contemporary approaches to environmental policy rely, to an increasing extent, on market mechanisms: Markets have become the main approach to climate change mitigation, and are about become a dominant feature in other areas, such as conservation and biodiversity protection.[129] The market mechanisms introduced by the present climate change framework are seen to delivering climate mitigation in a cost-effective manner, thereby offering an opportunity to raise ambition in reducing the world’s overall carbon footprint.[130] As I have pointed in the introduction, the monetisation and marketisation of environmental goods have been met with civil society resistance for a number of reasons, including, yet not reducible to, distributional concerns.[131] Yet, as this chapter highlights, the legal and institutional set-up that enables those markets to operate also insulates them from political contestation. It makes markets appear as if they were inevitable, thereby breaking resistance against them.

As hinted, in the introduction, my main focus here lies on carbon markets, although various aspects discussed throughout this chapter apply to other environmental markets, too. Yet, The first part of this chapter gives a brief overview over the history and general functioning of market mechanisms for emission reductions and situates them within the broader climate change regime. In the second part, I explore the rationale and ideological underpinnings of market-based approaches to environmental protection and hint at the most common criticisms levelled against them. These are mostly subsumed under the headline of ‘neoliberal environmentalism’ referring to the ‘outsourcing’ of environmental protection to private actors. Based on this understanding, in the third part, I suggest that the proliferation of ‘green’ markets can be conceptualised as a facet of new constitutionalism which, on a global level, removes the economic realm from political contestation.

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[129] John O’Neill, ‘Environmental Markets’ in Noel Castree et al (eds) *Companion to Environmental Studies* (Routledge 2018) 640. Markets can be defined as ‘institutional arrangements that involve the transfer of rights over goods and services between buyers and sellers using money as the medium of exchange’. Ibid.

[130] See Matthieu Wemaëre, ‘Article 6, Voluntary Cooperation/NDC’s’ in Geert Van Calster and Leonie Reins (eds), *The Paris Agreement on Climate Change: A Commentary* (Edward Elgar 2021) 148, 150.

[131] O’Neill (n 129) 641-43.

Importantly, human rights do not disappear in this context but, instead, may be complicit in further entrenching 'green' markets.

2.1 Market mechanisms: a cornerstone of transnational climate governance

The global landscape of climate law is characterised by fragmentation and institutional complexity.[132] Rather than forming a comprehensive, overarching regime, it consists of 'a loosely coupled, fragmented and decentralised set of specific governance processes, transnational institutions, standards, financing arrangements and programs'.[133] This amalgam is frequently referred to as 'climate governance' – the term 'governance' being deliberately posited in differentiation to 'government', pointing to the role of private actors in addressing societal issues.[134] In legal scholarship, such governance arrangements often referred to as 'transnational law', describing the 'bewildering array of multi-dimensional legal relations, made up of both public and private law, in an increasingly globalised world'.[135] Consequently, legal scholarship tends to refer to 'global climate law' or 'transnational climate governance' to describe the legal and institutional framework governing climate change and consisting of national, as well as international, public, as well as private, and 'hard', as well as 'soft' laws.[136] Within transnational climate law, markets have played, and continue to play, a dominant role as the following paragraphs illustrate.

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[132] Hanna-Mari Ahonen et al, 'Governance of Fragmented Compliance and Voluntary Carbon Markets Under the Paris Agreement' (2022) 10 Politics and Governance 235, 236.

[133] David Ciplet and J Timmons Roberts, 'Climate change and the transition to neoliberal environmental governance' (2017) 46 Global Environmental Change 148, 151.

[134] Rodolfo Sapianis et al 'Exploring the contours of climate governance: An interdisciplinary systematic literature review from a southern perspective' (2021) 31 Environmental Policy and Governance 46, 50.

[135] Matthew Canfield et al, 'Translocal legalities: local encounters with transnational law' 12 (2021) Transnational Legal Theory 335,343. The authors rightly notes that are many different accounts and definitions of transnational law which, at times, reflect highly divergent normative commitments. I here employ 'transnational law' in a broad sense along the lines of Philip Jessup as 'all law which regulates actions or events that transcend national frontiers' including both public and private international law, as well as 'other rules which do not wholly fit into such standard categories. See Philip C Jessup, Transnational Law (Yale University Press 1956).

[136] See eg Harro van Asselt et al, 'The evolving architecture of global climate law' in Leonie Reins and Jonathan Verschuuren, *Research Handbook on Climate Change Mitigation Law* (Edward Elgar 2nd edn, 2022) 17.

Simply put, carbon markets 'are markets in which participants exchange carbon credits or offset their carbon footprint'.[137] As of today, the global carbon market is divided into two major sectors, the so-called 'compliance' market, valued at nearly one trillion US Dollars, and the 'voluntary' market, valued at close to 5 billion.[138] In compliance markets, carbon credits are issued by sovereign entities as part of Emissions Trading Systems (ETS), while in voluntary markets carbon credits are issued by private certification organisations for the participation in an emissions reduction project, such as the planting of trees.[139] As discussed below, there is an increasing convergence between voluntary and compliance markets, as well as an increasing body of rules and standards governing both.

2.1.1 From Kyoto to Paris: regulation through carbon markets

Market-based approaches already featured in domestic policies to environmental protection when the first global climate protection framework, the Kyoto Protocol (KP), was adopted in 1997.[140] While the KP did set binding emission targets for developed countries, those parties did not need to achieve their targets through domestic emission reductions alone, but instead were permitted to do so via three market-based 'flexibility mechanisms', including the 'Clean Development Mechanism' (CDM).[141] In simplified terms, the CDM worked as follows: Developing countries with no binding emission targets were 'paid' to adopt less polluting technologies than they would otherwise have, in exchange for emission reductions which developed countries could count towards their own emission targets: Instead of building a high-emitting coal-fired electricity plant, for example, they were supposed to build a more climate-friendly installation such as a wind farm.[142] The difference between the carbon emissions hypothetically generated by the (not-built) high-emitting plant and the less emitting facility (that was built instead) was calculated and converted in so-called 'Certified Emission Reductions' (CERs) – also known as carbon

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[137] Raphael Calel, 'Carbon Markets: A Historical Overview' (2013) 4 Wiley Interdisciplinary Reviews: Climate Change 107.

[138] Raam Tambe, 'Investor State Dispute Settlement and Net Zero Initiatives: Case Study of Germany's Coal Exit Auctions' (2024) 25 Chicago Journal of international Law 301, 334-35.

[139] Ibid.

[140] Benjamin K Sovacool, 'The policy challenges of tradable credits: A critical review of eight markets' (2011) 39 Energy Policy 575.

[141] See eg Benoit Mayer, *International Law on Climate Change* (CUP 2018) 134. I will not cover the other market mechanisms – Joint Implementation and Emission Trading – here.

[142] Sovacool 2011 (n 140) 581. See also Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (CUP, 2nd edn, 2018) 183.

credits – which were sold to developed countries who could use the CERs towards their own CO_2-budgets prescribed by the KP.[143] CDM projects were largely implemented by private entities, funnelling private capital from the global North into 'green' development projects in the global South.[144] In theory, this should have enabled developing countries to finance green technologies they otherwise could not afford, while allowing developed countries to meet their obligations under the KP at lower cost.[145]

The KP eventually failed, mostly due to the refusal of the largest emitters among all countries to commit to binding emission reductions.[146] It was superseded by the Paris Agreement (PA) which was concluded in December 2015 and lays down the foundations for the management of climate change from 2020 onwards.[147] The PA introduces a goal of 'net-zero' emissions around the mid-21st century and requires all countries to implement climate mitigation targets in order to collectively reach this goal.[148] The agreement shifts the international climate change regime from a 'top-down' approach based on mandatory emission reductions towards a 'bottom-up' system with voluntary pledges of the state parties, where every party decides on its own how much it wants to contribute.[149] While the agreement imposes an obligation on the contracting parties to adopt measures towards the realisation of their climate mitigation commitments – Nationally Determined Contributions'(NDCs) – it does not prescribe any specific mitigation measure*s* but only that such measures have to be imposed.[150] One central instrument of the PA, enshrined in Article 6, is concerned with 'the voluntary cooperation in the implementation' of the targets set out by the parties.[151] The 'voluntary cooperation' envisioned in Article 6

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[143] Ibid. See also Mayer (n 141) 135.

[144] Axel Michaelowa et al, 'Evolution of international carbon markets: lessons for the Paris Agreement' (2019) 10 Wiley Interdisciplinary Reviews: Climate Change 1, 4; Dunalp and Sullivan (n 10). The binary of 'global North' and 'global South' is in itself problematic because the 'global South' denotes a concept fraught with colonial legacy reflecting a binary divide between 'empires' and 'colonies'. However, given the term's prevalence in literature and for the want of a better alternative, I will nonetheless employ the term if necessary. See Sam Bookman, 'Indigenous Climate Litigation in Anglophone Settler-Colonial States' (*Völkerrechtsblog*, 25 March 2022) <https://voelkerrechtsblog.org/indigenous-climate-litigation-in-anglophone-settler-colonial-states-context-cases-and-caution/> accessed 30 March 2022.

[145] Sovacool 2011 (n 140) 581. See also Ciplet and Roberts (n 133); Dupuy and Viñuales (n 142) 184.

[146] Mayer (n 141) 39-42; 137.

[147] Philip Sands and Jacqueline Peel, *Principles of International Environmental Law* (CUP, 4th edn 2018) 299.

[148] Ahonen et al (n 132) 238.

[149] Michaelowa et al (n 144) 12.

[150] Ibid.

[151] Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015) TIAS No 16-1104 [hereinafter PA] Article 6 (1).

functions via two different market-based mechanisms, as well as a non-market framework.[152] As such, Article 6 formally establishes international carbon markets within the scope of the PA as an essential means to reach the treaty's goals.[153] Over half of the NDCs put forward by the parties of the Paris Agreement intend to use or at least consider using carbon trading mechanisms which indicates that carbon markets are seen as a key tool when it comes to climate mitigation.[154]

Article 6 (2) provides for cooperative approaches that allow parties to use so-called 'internationally transferred mitigation outcomes' (ITMOs) in order to achieve their NDCs.[155] The provision allows ITMOs produced in one country to be transferred to another country which then can use those ITMOs in accounting towards this NDC.[156] In simplified terms: Greenhouse gas units 'saved' by one country can be transferred to another country which then will count these 'savings' towards its own targets of reducing greenhouse gases. Further, ITMOs can be bought by companies to offset their own emissions or transferred in market-based schemes such as the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA).[157] There are various ways to transfer ITMOs for example by linking domestic or regional emission trading systems or through bilateral agreements between states.[158]

Article 6 (4) establishes a new market-based mitigation mechanism to 'contribute to the mitigation of greenhouse gas emissions and support sustainable development'.[159] One of the mechanism's stated objectives is to 'incentivise and facilitate participation in the mitigation of greenhouse gases by public *and private* entities'.[160] The mechanism aims at certifying emission reductions or removals (ERRs) against a baseline in a system that is

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[152] Wemaëre (n 130) 150.

[153] Bassam Fattouh and Andrea Maino, 'Article 6 and Voluntary Carbon Markets' (*OIES Energy Insight 114*, May 2022) <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2022/05/Insight-114-Article-6-and-Voluntary-Carbon-Markets.pdf> accessed 27 November 2024.

[154] Dehm 2021 (n 11) 206.

[155] PA, Article 6 (2). See also Wemaëre (n 130) 150.

[156] Ibid.

[157] Fattouh and Maino (n 153) 3.

[158] Wemaëre (n 130) 151. See eg Implementing Agreement to The Paris Agreement between the Swiss Confederation and the Kingdom of Thailand (24 June 2022) <https://www.bafu.admin.ch/bafu/en/home/topics/climate/info-specialists/climate--international-affairs/staatsvertraege-umsetzung-klimauebereinkommen-von-paris-artikel6.html> accessed 27 November 2024.

[159] Wemaëre (n 130) 158.

[160] PA, Article 6 (4) (a). Emphasis my own.

internationally monitored.[161] Article 6 (4) PA is seen as the successor of the CDM under the KP.[162] Activities under the mechanism include emission reductions from project-based or programmatic activities, sectoral approaches, and policies and measures such as carbon pricing instruments.[163] Emission reductions under the mechanism should be additional to any reductions that would otherwise occur and should enable the parties to raise their ambitions towards higher NDC targets.[164] Outside of but connected with the institutional architecture of the international climate change regime, national, regional and subnational carbon markets have evolved across the globe since the beginning of the 21st century.[165] The most prominent example among regional carbon markets is the European Union Emission Trading System (EU-ETS) operating since 2005 and being the first and largest regional emission trading scheme.[166]

Generally, ETS can function in two different ways: Either as 'baseline-and-credit' or as 'cap-and-trade' system.[167] The former model generates emission entitlements when an entity develops an offset project – such as installing al low-energy technology – which reduces emissions in comparison to an established benchmark, as described previously in relation to the CDM.[168] The cap-and-trade model involves a regulatory entity allocating emission entitlements, which grant the right to emit in a volume equal to a pre-determined maximum level of allowable to emissions, which represents 'a transferable right to emit a substance that can create pollution', respectively greenhouse gases (GHGs) in the climate context.[169] Along the distinction between baseline-and-credit and cap-and-trade systems respectively, emission trading schemes differentiate between two different rights: Emission

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[161] Wemaëre (n 130) 159.

[162] Carbon Market Watch, 'Good-Bye Kyoto, Transitioning away from Offsetting After 2020' (Carbon Market Watch Policy Brief, April 2017) <https://carbonmarketwatch.org/wp-content/uploads/2017/04/Good-bye-Kyoto_Transitioning-away-from-offsetting-after-2020_WEB_1final.pdf> accessed 3 January 2025.

[163] Wemaëre (n 130) 160.

[164] Ibid 163-64.

[165] Michaelowa et al (n 144) 12.

[166] Kelvin F K Low and Jolene Lin, 'Carbon credits as EU like it: Property, immunity, tragiCO2medy?' (2015) 27 Journal of Environmental Law 377.

[167] Ibid 379.

[168] Hope Johnson et al, 'Towards an international emissions trading scheme: Legal specification of tradeable emissions entitlements' (Queensland University of Technology – Law & Justice Legal Studies, Research Paper No 17-03, 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924929> accessed 27 November 2024.

[169] A Denny Ellerman, 'A Note on Tradeable Permits' (2005) 31 Environmental and Resource Economics 123, 124.

allowances which 'represent the authorisation or entitlement to emit a certain amount of GHGs'[170], and carbon *credits*, which are generated privately and 'represent a reduction of GHG emissions resulting from a defined project activity, calculated on the basis of a comparison between the level of verified action emissions and a counterfactual scenario (defined as the baseline scenario)'[171] – such as the CERs generated under the CDM.[172] Hence, while emission allowances are traded under cap-and-trade systems, which set an overall cap to the maximum of emission allowances available in the system intended to decrease over time,[173] carbon *credits* operate in tandem with, or entirely separate from cap-and-trade systems, and are tied to the idea of *offsetting*. Offsetting, while taking various forms, essentially enables carbon emitting actors to continue emitting by paying for the privilege to do so.[174] Under the KP, offsets have been criticised for undermining the effectiveness of cap-and-trade systems, since cap-and-trade systems introduced in developed countries were linked to carbon offset programs in developing countries, resulting in higher emission allowances than available under the cap in principle.[175]

2.1.2 Voluntary carbon markets: creeping into the institutional framework

Beyond the legal and institutional architecture of international, regional and domestic bodies governing climate change and the carbon markets established by them, so-called 'voluntary' carbon markets (VCM) evolved.[176] Historically, the term 'voluntary carbon markets' referred to 'bottom-up' market-mechanisms by private institutions and actors outside of the KP, as opposed to 'compliance' markets' directed at meeting the mitigation targets under the KP and other cap-and-trade mechanisms. [177] In voluntary carbon markets, carbon 'credits' are not purchased to be used towards ensuring compliance with existing

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[170] Matthieu Wemaëre et al, 'Legal ownership and nature of Kyoto units and EU allowances' in David Freestone and Charlotte Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and Beyond* (OUP 2009) 35, 43.

[171] Ibid.

[172] Dehm 2021 (n 11) 191.

[173] See eg Edwin Woredman et al, *Essential EU climate law* (2nd edn, Edward Elgar 2022) 44-72.

[174] Buller (n 9) 77.

[175] See Dupuy and Viñuales (n 142) 183; Michaelowa et al (n 144); Sovacool 2011 (n 140) 581.

[176] Ahonen et al (n 132) 237.

[177] Natasha Affolder, 'Transnational carbon contracting: Why law's invisibility matters' in Claire Cutler and Thomas Diez (eds), *The Politics of Transnational Governance by Contract* (Routledge 2017) 215, 217-18; Lars H Gulbrandsen and Jørgen Wettestad, 'Carbon Pricing Under Pressure: Withering Markets?' (2022) 10 Politics and Governance 230, 231.

regulations but rather to meet certain standards such as 'carbon neutrality' or other environmental claims of corporations or individuals not (yet) under a duty to reduce or compensate for their emissions. As Tambe puts it, in voluntary markets 'corporations and individuals … purchase carbon credits … to claim they produce net zero emissions while still emitting an equivalent or greater amount'.[178] Participation in voluntary carbon markets has substantially increased in recent years, and further growth in demand for credits from the voluntary carbon market is projected in the foreseeable future, alongside rising prices of carbon units,[179] and with increasing numbers of 'net-zero' pledges by made by companies for reputational reasons.[180] While early pioneers of such 'voluntary' carbon transactions were largely NGOs, now, major financial firms are entering the market.[181]

The PA does not directly regulate voluntary carbon markets and within them, carbon credits can be issued and bought without any reference to the market mechanisms outlined in Article 6.[182] Instead, the emergence of voluntary carbon markets has triggered the development of countless privately managed standards.[183] Nowadays, a whole 'ecosystem' of standards, certification organisations, project developers and verifiers exists for voluntary carbon markets, in order to ensure that the credits generated are 'real, measurable and additional'.[184] Besides seeking to guarantee the effectiveness of emission reductions, private standards often aim to certify further aspects such as community benefits or biodiversity protection.[185] In the UK, two voluntary carbon markets are

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[178] Tambe (n 138) 335.

[179] Jill Robbie and Giedre Jokubauskaite, 'Carbon Markets, Public Interest and Landownership in Scotland' (Scottish Land Commission, Discussion Paper, May 2022) 2 <https://www.landcommission.gov.scot/downloads/628dea082d087_Land%20Lines%20Nat%20Cap-Carbon%20Markets,%20Public%20Interest%20and%20Landownership%20in%20Scotland.pdf> accessed 27 November 2024.

[180] Fattouh and Maino (n 153) 13.

[181] Affolder (n 177) 219–220.

[182] Fattouh and Maino (n 153) 8. Yet credits from voluntary carbon markets can be traded in compliance markets and vice versa, hence it is argued that the rules on voluntary carbon markets should be aligned with those of the rulebook to Article 6 PA. Ibid.

[183] Dehm 2021 (n 11) 195; Michaelowa et al (n 144) 10.

[184] Fattouh and Maino (n 153) 8. Such certification schemes include the Gold Standard, The Voluntary Carbon Standard, Green e-Climate, the Climate, Community & Biodiversity Standard, the Chicago Climate Exchange, Plan Vivo, Greenhouse Friendly VER+, ISO14064, Voluntary Offset Standard, Social Carbon and more. See Dehm 2021 (n 11) 195.

[185] Affolder (n 177) 224. For example, in the context of voluntary carbon markets, the 'Climate, Community and Biodiversity' (CCB) standards are the dominant standards for certifying 'co-benefits' from forest carbon credits. See Isabela Melo et al, 'Integrating multiple benefits in market-based climate mitigation schemes: The case of the Climate, Community and Biodiversity certification scheme' (2014) 35 Environmental science & policy 49.

presently operational: The Woodland Carbon Code (WCC) and the Peatland Code (PC), and further markets are currently under development.[186] The UK has recently introduced a duty for large companies to disclose their GHG emissions, and due to the general trend towards expanding requirements for emission reductions and mandatory reporting, participation in voluntary carbon markets has increased, leading to a higher demand for new carbon credits to offset emissions.[187]

While voluntary carbon markets, in principle, operate separately from compliance markets,[188] credits from voluntary carbon markets may be traded in compliance markets.[189] Further, project types and methodologies developed by 'voluntary' carbon markets governed by private institutions interact with and cross-pollinate compliance markets, increasingly blurring boundaries between the two segments.[190] Private systems designed for voluntary offsetting have been approved for the use in compliance markets, for example in the case of the Californian cap-and-trade scheme.[191] The PA contributes to this development by abolishing the distinction formerly made by the KP, between countries with and without binding mitigation targets, as well as the distinction between state- and non-state mitigation.[192] Under Article 6 PA, credits purchased in one carbon market can count as 'corresponding adjustment' (CA) and various countries permit the use of voluntary offsets to fulfil compliance obligations in certain circumstances, however, scholars caution that CAs still require more public regulation and oversight.[193]

2.1.3 Carbon markets as governance through contract

While global carbon markets, in principle, are established under the 'public' international climate regime, carbon contracts between investors and host countries or other actors are

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[186] See Scottish Government, 'Natural capital markets: Engagement paper' (16 April 2024) <https://www.gov.scot/publications/market-framework-natural-capital-engagement-paper/> accessed 27 November 2024.

[187] Robbie and Jokubauskaite (n 179) 2.

[188] Ibid 21.

[189] Tambe (n 138) 335.

[190] Ahonen et al (n 132) 238.

[191] Ibid.

[192] Ibid 238-9.

[193] Tambe (n 138) 335.

mostly enforced through private international law and/or investment law.[194] Hence, what distinguishes 'green' markets from other regulatory approaches such as traditional 'command-and-control' regulation or environmental taxes, is the fact that they require, for their operation, the creation of transferable rights for a stated price.[195] Hence, if carbon is meant to be made the subject of market exchange, this requires that the title on the emission reductions in question can be shifted, which, in turn, calls for the creation of a 'quasi-property right'.[196] As will be further discussed in more depth in chapter 5, the institution of property is instrumental in disentangling integrated ecologies into separable units required for 'green' market expansion to operate. [197]

In general, the legal relationship between a seller and a buyer of carbon 'credits' is structured through specialised contracts referred to as Emission Reduction Purchase Agreements (ERPAs) which legally delineate responsibilities and rights in relation to project management, allocate project risks and outline commercial terms including price, volume and delivery schedule of emission reductions.[198] While the legal form of contract provides parties with the flexibility to arrange for their own terms and arrangements, the standardisation of key terms via the development of template contracts has been promoted by key actors such as the World Bank whose model contracts have been taken up by the carbon trading industry.[199] Through standard form contracts, specific norms can be developed and disseminated outside of the formal, transparent deliberative processes of the UN climate negotiations.[200] The central role played by such standard contracts and their proliferation, scholars have stressed, raise 'pressing questions about legitimacy, democracy

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[194] Dehm 2021 (n 11) 168-169.

[195] Ibid 191-92. In line with Dehm's approach, I will not delve into the technicalities of various property rights regimes, but rather employ 'property as a lens or rubric for thinking about how rights in scarce and valued resources … are defined and allocated'. See also Johnson et al (n 168).

[196] Dehm 2021 (n 11) 178; 192. The general conditions of the model contracts envisioned to guide market arrangements under REDD+, for example, structure the legal relation is question as a 'purchasing agreement' requiring the seller to transfer 'the full legal and beneficial title and exclusive right' of emission reductions to the purchaser'. Ibid 190.

[197] See Nicole Graham, 'Dephysicalised property and shadow lands' in Robyn Bartel and Jennifer Carter (eds), *Handbook on Space, Place, and Law* (Edward Elgar 2021) 281, 285.

[198] Dehm 2021 (n 11) 178.

[199] Ibid 184-88.

[200] Ibid.

and the accountability of the trade associations who are the authors of these standard terms'.[201]

The voluntary markets operational in the UK, for example, have no independent legal authority, they were implemented through transactional practice based on contracts and rely on general laws of ownership.[202] The respective projects are registered in the UK Land Carbon registry and the tradeable carbon credits are generated by validation and verification through a range of accredited, private entities.[203] The codes aim at implementing the principle of additionality – that is: ensuring that an emission reduction would not have happened otherwise – and set certain requirements, for example regarding environmental quality.[204] However, validation and verification processes are no legal compliance audit, hence do not guarantee that legal requirements are met.[205] And while the projects realised under the WCC are subject to general legal constraints such as environmental laws, there is no investigation whether the respective projects comply with environmental regulations.[206]

The proliferation of carbon market mechanisms can be described as a trend towards 'governance through contract', which essentially is a 'a mode of governance that coordinates social, economic and political relations through bargaining and agreements between mainly private actors rather than hierarchical, state-based structures of command and control'.[207] While largely unregulated by states, Claire Cutler and Thomas Dietz argue, contracts determine winners and losers in the global economy and therefore have profound distributional consequences.[208] Since transnational governance through contract is aimed at certainty and efficiency, the authors note, '[d]istribution or redistribution is simply not part of the game'.[209] And while private organisations awarding labels related to

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[201] Joanne P Braithwaite, 'Standard form contracts as transnational law: Evidence from the derivatives markets' (2012) 75 The Modern Law Review 779, 780.

[202] Robbie and Jokubauskaite (n 179) 3.

[203] Ibid 4.

[204] Ibid 5-7.

[205] Ibid 7.

[206] Ibid.

[207] A Claire Cutler and Thomas Dietz 'The Politics of Private Transnational Governance by Contract: Introduction and Analytical Framework' in in Claire Cutler and Thomas Diez (eds), *The Politics of Transnational Governance by Contract* (Routledge 2017) 1.

[208] Ibid.

[209] Ibid 21.

sustainability can offer guidelines that may be incorporated in private contracts, those bodies lack coercive force and thus depend on voluntary participation.[210] As highlighted in the introduction to this thesis, the distributive effects of 'green' market expansion are complex, multifaceted, and often occur in tandem with, or on top of other distributive inequalities. As I will argue in chapter 5, these are often linked to uneven property relations in land.

2.2 Guiding ideology: 'market' environmentalism

The transnational law of 'green' markets is rooted in neoclassical economic thought and neoliberal ideology.[211] It relies on the price mechanism as guiding principle and sees transactions between private, property owning individuals and entities as the preferred way to regulate behaviour in a way that maintains a relatively stable environment for capitalism to operate at the lowest cost possible.[212] Yet, a reductionist understanding of the world as being made up of economic 'costs' and 'benefits' ignores the multiplicity of complex socio-ecological entanglements this world is made from.[213] This section highlights the logics upon which 'green' markets operate, and the problems associated with 'market' or 'neoliberal' environmentalism.

The turn towards 'governance' can be conceptualised as a direct response of the capitalist class against regulations imposed upon private industries after the rise of environmentalism in the 1960s and 1970 leading to the 'the devolving of power away from paralysed and hollowed-out federal regulatory agencies' and to the explicit targeting of confidence in the government to solve social problems in a decades-long campaign.[214] Yet, while 'green' markets' conceptual foundations can be found neoclassical economic theory dating back to the mid-20th century, their general logic is most prominently articulated in the 'Stern Review', a report published by the eponymous economist Nicolas Stern, commissioned by

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[210] Ibid 5.

[211] See eg Buller (n 9). Ideology generally refers to a particular beliefs, though is a complex philosophical concept which I will not unpack in its entirety. See Terry Eagleton, *Ideology. An introduction* (Verso 1991).

[212] See eg Michael C Blumm, 'Fallacies of free market environmentalism' (1992) 15 Harvard Journal of Law & Public Policy 371.

[213] See eg Rebecca Pearse and Steffen Böhm, 'Ten reasons why carbon markets will not bring about radical emissions reduction' (2014) 5 Carbon Management 325.

[214] Falzon et al (n 8) 189.

the UK government in 2006.[215] In essence, the report sees the climate crisis as an example of market failure which can be solved by 'internalising' the costs caused through carbon emissions – that is: to bring them into the market via the price mechanism. Once carbon (and other environmental harms) would be appropriately priced, so the theory goes, market actors incentivised by profit would move their economic activity away from high-emitting or polluting practices to reduce their costs.[216]

Market-based policies are most advanced in the context of climate mitigation, however, the same logics are applied, and increasingly so, to other elements of the ecological crisis such as biodiversity loss and habitat destruction.[217] Those approaches see carbon as one element within a broader set of 'ecosystem services'. Those can be defined as 'the ecological characteristics, functions or processes that directly or indirectly contribute to human wellbeing', which, besides climate regulation, for example include water regulation and supply, food production, waste treatment, genetic resources, or opportunities for recreational activities.[218] The concept of 'ecosystem services' builds upon the related notion of 'natural capital' which refers to the ecosystems that provide the ecosystem services mentioned.[219] As such, natural capital 'includes all elements of the environment, including natural resources, which provide benefits to people now and in future' provided that they are 'plausibly subject to management by people in some way to restore or recover, or to restrict use to non-significant rates of loss, or for use by future generations'.[220]

Proponents of market-based approaches towards environmental protection believe that those are more efficient and therefore superior to regulatory command-and-control regulation or treaties.[221] Dieter Helm, one of the most prominent advocates for the concept of natural capital, argues that argues that 'natural capital assets' – if accounted for and

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[215] Nicholas Stern, *The Economics of Climate Change: The Stern Review* [2006] (CUP 2007).

[216] Buller (n 9) 29.

[217] See eg Jerneja Penca, 'Marketing the Market: The Ideology of Market Mechanisms for Biodiversity Conservation' (2013) 2 Transnational Environmental Law 235.

[218] Robert Costanza 'Valuing natural capital and ecosystem services toward the goals of efficiency, fairness, and sustainability' (2020) 43 Ecosystem Services 1.

[219] Georgina M Mace 'The ecology of natural capita accounting' (2019) 35 Oxford Review of Economic Policy 54.

[220] Ibid 56. Often, natural capital and ecosystem services are treated as equivalent which confuses the 'stock' (capital) with the flow of goods and services. Ibid.

[221] See eg Stern (n 215).

managed correctly – 'provide the foundations for positive freedom, by providing for future generations' capabilities and choices'.[222] Conversely, critical scholars argue that 'neoliberal' or 'market' environmentalism's narrow frame of mainstream economic thought eclipses the broad range other perspectives available which enables certain forms of actions and actors while it marginalises others.[223] Monetary valuations of ecosystems rely on what is deemed valuable in the moment the valuation is undertaken and may miss elements that are difficult to value in monetary terms.[224] As such, markets may change social norms and values whilst crowding out intrinsic, non-financial values, thereby foreclosing alternative socio-ecological propositions and practices.[225]

Critical perspectives on 'neoliberal' environmentalism tend to see its narrow, seemingly 'objective' framings as a deliberate attempt downplay normative concerns and to de-politicise discourses over climate and environmental protection.[226] Markets, critics argue, do not call into question existing patters of distribution of wealth and power, which means that daunting political choices can be omitted.[227] They push attention away from the structural changes needed and instead sustain the illusion that ecological limits can be reconciled with capitalist imperatives of economic growth.[228] As Michael Goldman argues, 'green' neoliberalism has allowed the World Bank to incorporate its environmental critics and enabled it to 'expand into more places and insinuate its worldview into more lifeworlds than [it did] before',[229] thereby furthering its goal of 'restructuring and capitalisation of nature-society relations that exist as uncommodified or underutilised by capital markets'.[230] By way of developing new financial instruments and building 'supportive' policy and regulatory environments to promote 'market-readiness', the World Bank has consistently engaged in activities that '[pre-empt] a political decision within

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[222] Dieter Helm, 'Natural capital: assets, systems, and policies' (2019) 35 Oxford Review of Economic Policy 1.

[223] Dehm 2018 (n 80).

[224] Mace (n 219) 57.

[225] Dunlap and Sullivan (n 10) 558.

[226] See eg Ciplet and Roberts (n 133) 150-51 with further references; Buller (n 9) 43.

[227] Kathleen McAfee, 'Green economy and carbon markets for conservation and development: a critical view' (2016) 16 International Environmental Agreements: Politics, Law and Economics 333, 347.

[228] Ibid. See also Penca (n 217); Dehm 2021 (n 11) 407.

[229] Michael Goldman, *Imperial Nature: The World Bank and Struggles for Social Justice in an Age of Globalization* (Yale University Press 2006) 6.

[230] Ibid 7.

international climate negotiations'.[231] As such, Dehm maintains, despite its attempts to depict its work as merely a 'technical exercise', the World Bank's activities in fostering 'green' markets are deeply political, enabling it to exert a powerful normative effect on the development those markets.[232] As will be discussed in the next section, the policies outlined above can be seen as reflective of a wider trend to insulate the economic sphere from political contestation.

2.3 'Green' market expansion as facet of new constitutionalism

Despite the fact that 'neoliberal environmentalism' is often associated with deregulation and privatisation, 'green' market expansion operates in a complex interplay between laws and markets and between public and private domains.[233] And while markets are mostly associated with private contractual arrangements, those arrangements are facilitated by, and mediated through law.[234] In recent years, scholars argue, the world has entered into a new era of 'transnational' or 'new' constitutionalism where private actors increasingly engage in setting the parameters within which humans and non-human entities – including states – operate.[235] Yet, states still play an important role in enforcing and policing the boundaries set by private actors. This section argues that the proliferation of market mechanisms dominating our response to climate change and ecological crises is reflective of the move towards new constitutionalism, intensifying the grip of markets on every aspect of human and non-human behaviour and, by this, foreclosing avenues of collective agency.

In the past two decades, scholars rooted in various schools of thought have started to grapple with the rise of a 'new' form of constitutionalism: While the notion of constitutionalism is traditionally associated with norms governing fundamental questions about empowerment and constraint of authority in sovereign nation states,[236] constitutionalism 'beyond the state' sees the 'emergence of a multiplicity of civil

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[231] Oscar Reyes, 'More Is Less: A Case Against Sectoral Carbon Markets' (*Carbon Trade Watch*, 2011) <http://www.carbontradewatch.org/publications/more-is-less-a-case-against-sectoral-carbon-markets.html> accessed 9 December 2024.

[232] Dehm 2021 (n 11) 185.

[233] Ibid 43; supra 2.2.

[234] Grewal and Purdy (n 244) 14.

[235] See generally Stephen Gill and A Claire Cutler (eds), *New Constitutionalism and World Order* (CUP 2014).

[236] See Neil Walker, 'Taking Constitutionalism Beyond the State' (2008) 56 Political Studies 519.

constitutions beyond the nation states'.[237] While some scholars see these 'new' forms of constitutionalism to opening up new avenues with emancipatory potential,[238] critical scholars rooted in Marxist traditions refer to new constitutionalism as a specific polity, working systematically in behalf of particular interests.[239] From this perspective, new constitutionalism is not merely a set of neutral laws, regulations, and governance mechanisms associated with contemporary capitalism, but 'reflects a specific complex of dominant forms of political agency, as well as a set of actors, practices and forces in political and civil society – particularly large corporations'.[240] New constitutionalism's core characteristic, Emilios Christodoulidis argues, is the shift towards '*governance*': The differentiation between public and private dissolves, and the market principle, previously pertaining to the transactional nature of private law (as distinct from public law), is increasingly seen as guarantor of the circulation of public goods.[241]

Arguably, the market-centred climate regime described above is a paradigmatic example of new constitutionalism, interweaving private market frameworks with public law provisions that enable those markets to operate in the first place: As discussed earlier, the non-binding NDCs states are ought to set according to the PA established under the UNFCCC regime (a body of public international law), are expected, at least partly, to be achieved through the market mechanisms of Article 6 PA. [242] While the operationalisation of those markets is provided for by the 'Paris Rulebook', the markets themselves mostly operate through contractual agreements between private actors whose projects generate 'credits' which then can be counted towards a country's NDC. In regional or national cap-and-trade systems such as the ETS, high-emitting industries have binding emission targets, however, those targets are achieved through the trade of emission permits among private actors. Lastly, voluntary markets leave the 'regulation' of GHG emissions to the private actors themselves, relying on regulation through the reputational risk corporate actors face if they do not prove to be 'carbon neutral'. The voluntary markets themselves are not governed by state law, but instead by private standards and registries, for which, again, a market exists,

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[237] See eg Gunther Teubner, 'Fragmented Foundations, Societal Constitutionalism beyond the Nation State' in Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism* (OUP 2010) 327, 329.

[238] Ibid. To engage with the wide range of literature on various theories of 'new' constitutionalism would be a project of ist own. Instead, I will use the term as employed by Gill and Cutler .

[239] Gill and Cutler (n 335) 13.

[240] Ibid 4.

[241] Christodoulidis 2021 (n 49) 10.

[242] Supra 2.1.

where different providers compete to guarantee the highest 'gold' standards of integrity, including the social and environmental sustainability which is to be guaranteed by further sets of private standards. As hinted above, this pattern is not exclusive to climate governance, but instead becomes increasingly common across environmental protection, fuelling an ever expanding 'green' market.

Hence, the provision of public goods, such as a clean atmosphere or biodiversity rich habitats, is effectively outsourced to market mechanisms, as are the putative safeguards to ensure the social and environmental wellbeing of human and non-human natures affected by said market-mechanisms. As such, 'green' market expansion reflects new constitutionalism's tendency to close off private capital from public regulation, to replace public authority with private authority and to locate key powers in domains out of reach from popular pressure and democratic influence. New constitutionalism, as Stephen Gill formulates it, essentially consists of the 'efforts to insulate important economic agencies and agents from popular scrutiny and accountability, and this to narrow democratic control of the economy'.[243] As discussed above, in the context of carbon markets, this is reflected by development of contractual 'templates' with limited public oversight.

This process, however, is not straightforward, and should not be understood as retrenchment of the state, but the reordering of the state to conform to a particular vision of what the state should be.[244] State and state law are by no means absent, quite to the contrary, markets only exist in the presence of states or another central authority.[245] As David Singh Grewal and Jedediah Purdy note, neoliberalism is always mediated trough law: Disputes it addresses are embedded in in questions about the scope and nature of property rights, the constitutional extent of a government's power to regulate, the aims and techniques of administrative agencies and the extent to which personal liberty and equality are protected by fundamental rights or constitutional guarantees.[246] Hence, 'green' markets

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[243] Stephen Gill, 'Economic Globalization and the Internationalization of Authority: Limits and Contradictions' (1992) 23 Geoforum 269.

[244] David Singh Grewal and Jedediah Purdy 'Introduction: Law and Neoliberalism' (2014) 77 Law and Contemporary Problems 1.

[245] Joel T Millward-Hopkin, 'Natural capital, unnatural markets?' (2016) 7 WIREs Climate Change 13.

[246] Grewal and Purdy (n 244) 9.

do not operate entirely separate from public bodies, but in dynamic relationships with them.

In the case of cap-and-trade 'compliance' markets, such as the EU-ETS Directive, 'public' law sets overall targets, facilitates a market for private actors in working towards targets.[247] And even in 'voluntary' carbon markets, the state may act as a facilitator actively encouraging the wider roll-out of market mechanisms: While voluntary carbon markets in the UK were evolving mostly beyond the purview of the state for over a decade, the Scottish Government now is working on a 'natural capital market framework' to 'develop a values-led and high-integrity market for responsible private investment in natural capital'.[248] While the proposed framework sets out draft principles for the integrity of natural capital markets, it is not a piece of enforceable statutory law itself, rather, it operates an enabling device actively encouraging to increase the 'number, diversity and scale of projects ready for investment' and the 'the flow of private investment into a wider range of natural capital'.[249] The market framework is developed in an 'engagement and co-development process', and aspires to deliver community benefit through 'engagement, collaboration and community agency'.[250] These, however, are seen as consequential to the market framework rather than preceding it: The establishment of the market framework itself is treated as an inevitable given, for which the state will provide the optimal conditions to thrive. Those conditions include setting soft boundaries against market excesses through 'guiding principles' on community engagement and 'community benefit tools'.

As Claire Cutler and Thomas Diez observe, it is characteristic of new constitutionalism that corporate responsibilities tend to be governed through voluntary, soft and informal mechanisms, while corporate rights tend to be secured through hard, formal laws.[251] New constitutionalism, Christodoulidis notes, severs the notion of the 'common good' from tradition, mutuality and association, and instead defines it along the requirements of

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[247] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community.
[248] Scottish Government 2024 (n 186).
[249] Ibid 3; 15.
[250] Ibid 12.
[251] Cutler and Dietz (n 207) 12.

optimally functioning markets.[252] As such, communities are already constituted *within* the inevitable, pre-existing market. By absorbing the constituent into the constituted, new 'market' constitutionalism paves the way for the continuous co-option of critical voices: New constitutionalism's 'forever renewed, forever inclusive gesture allows every contestation to find its place in the mobilisation of those adaptive devices through which the constituent "excess" incorporated as productive to total market thinking'.[253] In the context of 'green' market expansion, local communities are likely to be co-opted into market-based arrangements through the assurance of 'guiding principles' and 'benefit-sharing' arrangements, institutionalising critique and protest, watering down demands, and demobilising opposition.[254] As hinted above, human rights law and discourse can in fact be complicit in processes of co-optation by 'softening' capitalisms edges while further entrenching market rule.[255] It is against this backdrop, that this thesis examines the potential and the limits of rights as device of resistance against the proliferation of 'green' markets and their intrusion in ever more spheres of human and non-human existence.

2.4 Conclusion

This chapter has highlighted that climate governance essentially is hybrid in nature, not neatly fitting into categories such as 'public', 'private', 'national', or 'international'. Within the institutional framework of the present climate change regime, carbon 'markets play a prominent role. While proponents see market-based approaches as the most efficient pathway to decarbonisation, critics highlight the risk of entrenching the status quo by locking in further emissions rather than reducing them, leading to the abandonment of other policies that would make more meaningful contributions to decarbonisation.[256] Further, 'green' market expansion is likely to benefit existing elites, to the disadvantage of already marginalized groups.[257]

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[252] Christodoulidis 2021 (n 49) 9.

[253] Ibid.

[254] On co-option see Dorothea Baur and Hans Peter Schmitz, 'Corporations and NGOs: When Accountability Leads to Co-optation' (2011) 106 Journal of Business Ethics 9; Jon Burchell and Joanne Cook, 'CSR, Co-optation and Resistance: The Emergence of New Agonistic Relations Between Business and Civil Society' (2013) 115 Journal of Business Ethics 741.

[255] Supra chapter 1.

[256] See eg Buller (n 9).

[257] Dunlap and Sullivan (n 10) 558.

I have argued that the 'multi-stakeholder governance' approach taken by the transnational climate change regime is reflective of new constitutionalism, understood as a re-arrangement of social and economic relations according to the preferences of transnational market actors. This implies that climate change and environmental destruction, as well as the responses thereto, are removed from political contestation and relegated to the economic realm.[258] Thereby, the fact that capitalism is causally linked to climate change and environmental destruction in the first place is obscured, and instead it is presented as the appropriate, and indeed inevitable solution.[259] This recalibration of public goals towards private interests may have significant effects on state sovereignty.[260]

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[258] Philip McMichael, 'Land grab governance and the crisis of market rule' in Oliver De Schutter and Balakrishnan Rajagopal (eds) *Property Rights from Below: Commodification of Land and the Counter-Movement* (Routledge 2019) 28, 37.

[259] Ibid.

[260] Ibid.

3. ‘Green’ market expansion and the law: theoretical angles

The preceding chapter has situated ‘green’ market expansion in the context of transnational law and suggested that the phenomenon can be best described as facet of new constitutionalism. Despite relegating formerly ‘public’ tasks to private actors, law, under new constitutionalism, is a central governing technique in constituting the power of capital in the emerging world order.[261] As highlighted in the introduction, ‘green’ market expansion will have discrete impacts depending on place and context – however, ‘burdens’ and ‘benefits’ will invariably falls onto an uneven terrain, potentially exacerbating existing inequalities, and creating new ones. I have further hinted that human rights which are frequently invoked as counter-concepts against the multiple injustices associated with ‘green’ market expansion are at a constant risk of market capture and co-option.

Despite often pictured as the ‘opposite’ of the state, markets are enabled by and depend upon state law: As such, legal institutions and legal rules influence the ways in which the new ‘green’ commodities are created and distributed. This section sets out a range of theoretical perspectives that will, throughout the thesis, assist to make sense of law’s role in ‘green’ market expansion – as a device that enables ‘green’ markets, as well as a tool to restrain, and, eventually, overcome them. In what follows, I lay out the theoretical and methodological foundation upon which my further analysis of the role of law and rights in the context of ‘green’ market expansion will rest. Loosely structured around the structure/agency binary, the conceptual framework I am outlining in this chapter assumes that law can be both: constitutive of the conditions causing and propelling capitalist exploitation and domination – but also capable of being employed tactically and strategically, as a tool towards overcoming them.[262] Law, and rights in particular, play and enabling role in further entrenching and extending the reach of markets in previously uncommodified domains. Yet, at the same time, also harbour the potential to resist the very order they create.

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[261] Stephen Gill, ‘Market civilization, new constitutionalism and world order’ in Stephen Gill and A Claire Cutler *New Constitutionalism and World Order* (CUP 2014) 29.

[262] On structure and agency in from a Marxist perspective See Steve Pratten, ‘Structure, agency and Marx’s analysis of the labour process’ (1993) 5 Review of Political Economy 403.

The framework introduced here is premised upon Marx' eleventh thesis on Feuerbach, which famously states that it is not only about 'inpertet[ing] the world in various ways; the point is to change it'.[263] Guided by a Marxian approach to law, my thesis aims at engaging in a critique of the political economy and law's role as a building block of social relations.[264] The first part of this chapter highlights that law can be seen as interrelated with, but not reducible to, the political-economic structure. Consequently, the political economy of 'green' market expansion is shaped by law and vice versa. The second part stresses that law, despite its intimate relationship with capitalism, can be employed strategically, to expose the inherent contradictions.

3.1 Law's constitutive role

In his book *The Poor Had No Lawyers*, Scottish land activist Andy Wightman describes how the institution of landownership in Scotland evolved under the political control of landowners and their agents in the legal establishment, highlighting the legal and political mechanisms that enabled vast areas of Scotland to be appropriated by private interests.[265] Indeed, legal theorists have variously pointed to law's complicity in erecting and upholding the capitalist political economy and in serving the interests of powerful elites: Marxist legal scholarship emphasises that law's commodity form is premised upon, and thus inextricably linked to, the capitalist mode of production.[266] Similarly, the more recent strands of scholarship such as law and political economy (LPE),[267] and new legal institutionalism have exposed role of law as an enabling device in present-day capitalism.[268] The difference between Marxist and other approaches critically interrogating

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[263] Karl Marx, 'Theses on Feuerbach' [1845; 1888] (Electronic Book Company 2001) 170.

[264] Emilios Christodoulidis and Marco Goldoni, 'Marxism and the political economy of law' in Emilios Christodoulidis et al (eds), *Research handbook on critical legal theory* (Edward Elgar Publishing 2019) 95, 100. The authors prefer the term 'Marxian' over 'Marxist', since it reflects a materialist methodology, but not a reductionist one that would treat law as a mere epiphenomenon of the superstructure. I will refer to Marxian legal theory in relation to recent critical legal theory drawing on Marxist traditions but will employ the term 'Marxist' when it comes to 20th-century scholars associated with Marxist political philosophy.

[265] Andy Wightman, *The poor had no lawyers*, *Who owns Scotland and how they got it* (Birlinn 3rd edn, 2015).

[266] Christodoulidis and Goldoni (n 264).

[267] Simon Deakin et al, 'Legal institutionalism: Capitalism and the constitutive role of law' (2017) 45 Journal of Comparative Economics 188.

[268] See eg Ioannis Kampourakis, 'Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe' (2021) 1 Journal of Law and Political Economy 301.

law's role in the capitalist political economy is that orthodox accounts of the former usually dismiss the possibility that law can be employed towards emancipatory ends, the latter find value in incremental 'tinkering' to achieve material improvements for the disadvantaged.[269] As such, the perspectives reflect a spectrum of critical legal scholarship on the political left ranging from 'legal nihilism' to more 'pragmatist' approaches.[270]

The first part of the following section touches upon the constitutive role of law: Marxist accounts are valuable for the present purpose in that they place emphasis on the historical and material context in which 'green' market expansion emerges. While traditional Marxist accounts highlight how form and content of law are reflective of social relations, law cannot be seen as a mere epiphenomenon but instead itself has the capacity to form social relations by privileging some actors over others.[271] This insight is shared by scholars concerned with what has become to be known as new legal institutionalism.[272] However, the two accounts differ in relevant ways, namely in their concern with different aspects (law's form vs. legal institutions) and the appraisal of law's capacity to engender social change (law's inability to transcend the present order vs. its value to effect changes within the existing order).

The second part of this section looks at ways to explain power dynamics at work within, as well as between states when shaping legal relations. Marxist political philosophy has conceptualised the state as terrain of class struggle, led by a ruling class not only through force, but by way cultural hegemony, whereby the ruled accept the ruling classes' preferences even if they do not play in their favour.[273] Yet, this conceptualisation does not account for the ways in which multiple legal regimes act and interact in the transnational sphere, in an era where states are no longer the only relevant actors in creating and shaping law. On a global level, one might, with contemporary legal theorist Hans Lindahl, conceptualise states as legal collectives that interact and collide with other legal

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[269] See eg Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

[270] On nihilism vs pragmatism see Salomon (n 126) 509.

[271] Christodoulidis and Goldoni (n 264).

[272] Deakin et al (n 267).

[273] Antonio Gramsci, *Selections from the Prison Notebooks* [1947] (International Publishers 1971). See also Bob Jessop, *Nicos Poulantzas: Marxist Theory and Political Strategy* (Macmillan 1985).

collectives.[274] Combined, the two approaches may account for a better understanding of the interrelation between states and markets characteristic of new 'green' constitutionalism.

3.1.1 Marxian vs. new legal intuitionalist approaches

Against liberal conceptions that strictly separate the 'social' from the 'legal', approaches associated with Marxist traditions of thought share the idea that what determines the form and content of law is not internal to the law itself but overdetermined by the undergirding social relations, namely what Marxist philosophy calls the 'relations of production'.[275] Karl Marx himself took varying views on law throughout his work and offered no systematic analysis of law as such.[276] However, generally speaking, Marxist thought is grounded in the idea of society as a construct containing a 'base' and a 'superstructure': The base, according to Marx, consists of the 'totality of ... relations of production' which 'constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure'.[277] History is seen as a dialectical relationship unfolding between 'real' facts consisting of the economic productive forces, and the abstract, ideological superstructure informed by the capitalist mode of production.[278] Given Marx' scant attention to law in his overall oeuvre, Marxism is often seen to hold a reductionist view of law, treating legal institutions as mere reflexes of underlying structures of production: In *The German Ideology*, Marx developed the argument that law is an institution that belongs to the superstructure – while the economic base of society ultimately determines the shape and nature of its institutions (such as law).[279]

Viewed that way, law is not constitutive of social and economic relations but rather functions to protect and enforce existing social relations – thus form and content of the

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[274] Lindahl (n 112).

[275] Marco Goldoni, *The Materiality of the Legal Order* (CUP 2022) 12-13. Cox explains the concept of 'mode of production' as follows: 'Production of physical goods plus the production of historical structures together constitute the material reproduction of society. It would seem that Marx meant something like this when he wrote about the mode of production.' See Robert W Cox, *Production Power and World Order* (Columbia University Press 1987) 396.

[276] Christodoulidis and Goldoni (n 264) 101.

[277] Karl Marx, 'A Contribution to the Critique of Political Economy, Part One Preface' [1859] in John F Sitton (ed) *Marx Today, Selected Works and Recent Debates* (Palgrave Macmillan 2010) 91, 92.

[278] Kang and Kendall (n 96) 25.

[279] Karl Marx, 'The German Ideology' [1846; 1932] (Electronic Book Company 2001). See also Christodoulidis and Goldoni (n 264) 95.

legal order are entirely determined by the structure of social relations.[280] However, the assertion that law is a mere superstructural phenomenon has variously ben rejected by Marxist legal theorists. For Soviet legal scholar Evgeny Pashukanis, law is not a mere epiphenomenon of the economic base.[281] Building on Marx' tenet that commodities are equalised as 'abstract labour' in exchange relations, Pashukanis argued that the legal form and the legal subject likewise result from the abstraction of social relations which emerge in and through commodity exchange.[282] As such, law conceives social relations as relations between possessors of commodities.[283] As Christodoulidis and Goldoni observe, for Pashukanis 'the nexus between subjects and their rights is proprietal': A right is the form in which possession is recognised.[284] Just as the commodity form makes all products of labour seem equal regardless of their origin, Claire Cutler notes, 'the legal form creates an appearance of equality between individuals as legal subjects'.[285] The presumption of juridical equality that undergirds capitalist market relations depoliticises them and conceals the social inequalities inherent to capitalist production:

> Legal regulation empties economics of politics and contestation by configuring the laws governing property and contract as part of the domain of civil society, economic markets and free and equal exchange between juridical equals … Law in the commodity form thus conceals the asymmetries in power and influence and the political economy of capitalist economic relations, presenting as rational and equitable relations that are inherently oppressive and unequal.[286]

Arguably, this 'appearance of equality' can be observed in the context of the transnational climate change regime discussed in the previous chapter. Emissions resulting from a vast array of different activities are equalised into tonne of CO_2, regardless of the different context in which they occur: The survival emissions of a gas cooker used by an extended family in the global South and the luxury emissions of an individual using their private jet from London to New York for a weekend of Christmas shopping are made 'the same' by

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[280] Goldoni 2022 (n 275) 15.

[281] Evgeny Pashukanis, *Law and Marxism: A General Theory* [1924] (Ink Links 1978).

[282] See eg Matthew Dimick 'Pashukanis' commodity-form theory of law' in Paul O'Connell and Umut Özsu (eds) *Research Handbook on Law and Marxism* (Edward Elgar 2021) 115.

[283] Ibid 119. See also Isaac Balbus, 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law' (1977) 11 Law and Society 571.

[284] Christodoulidis and Goldoni (n 264) 107.

[285] A Claire Cutler, 'Toward a radical political economy critique of transnational economic law' in Susan Marks (ed) *International Law on the Left: Re-examining Marxist Legacies* (CUP 2008) 199.

[286] Ibid 211.

the private law devices upon which market mechanisms rest.[287] The carbon 'credits' or ecosystem 'services' are subject to rights of ownership and contractual agreements between 'market participants' while asymmetries of wealth and power between those actors – between the global North and the global South as well as within countries and world regions – are concealed.

For Pashukanis, the legal *form* is an essential precondition for commodity exchange while law's content merely describes specific rules and their function in regulating such exchange.[288] Yet, Pashukanis' emphasis on law's *form* does not mean that he deemed law's *function* to be negligible: Taking contract law as an example, he wrote that '[p]olitical power can, with the aid of laws, regulate, alter, condition and concretise the form and content of this legal transaction in the most diverse manner'.[289] What legal content, however, cannot change that our society is structured around commodity exchange which relies on contract as a legal form. Pashukanis insight, Christodoulidis and Goldoni note, is 'that it is the very form of law as tied to the institution of subjectivity and private right that overdetermines content and ties the institution [of law] inexorably to the structure and logic of commodification'.[290]

This insight is relevant for the present endeavour: If law is so tightly entangled with the structure and logic of commodification, how then can it ever serve at emancipatory ends? Can it be employed in a way that resists and transcends 'green' capitalism's tendencies to integrate and co-opt those who are resisting it? – For structuralist Marxists, the answer question is no. While law, throughout history, often has appeared on the frontline of political and ideological struggle, Marxist accounts see this struggle to be limited by the pre-given functions of legal forms and institutions.[291] For them, the unfolding of

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[287] See Julia Dehm, 'One Tonne of Carbon Dioxide Equivalent (1tCO2e)' in Jessie Hohmann and Daniel Joyce, *International Law's Objects* (OUP 2018) 305.

[288] Dimick (n 282) 122.

[289] Pashukanis (n 281) 93.

[290] Christodoulidis and Goldoni (n 264) 108. Yet, Dimick (n 282) notes that while, for Pashukanis, there is a necessary, internal relation between the legal form and commodity exchange, the latter is only one area of legal regulation yet an important one and in its *function* the legal form moves well beyond the level of commodity exchange understood narrowly. Ibid 122.

[291] Roger Cotterrell, '*Law's Community: Legal Theory in Sociological Perspective* (OUP 1995) 119.

subjectivity in history would only ever repeat the logic of the reproduction of the structure of capitalism.[292]

Structuralist accounts of law – Marxist or otherwise – have been criticised for not attributing any significance to change, contingency and individual agency.[293] Against structuralist accounts, postmodern legal theory rejects the idea of a knowable, objective world, and challenges the presupposition of a 'knowing' subject, the attachment to normative foundations, or even the idea of legal unity based on a knowable reality and the positivist perspective of a top-down hierarchy of norms.[294] As Costas Douzinas puts it, the legal system itself 'abandons the unrealistic claim that it forms a consistent system of norms'.[295] Instead, postmodern law 'is constituted through a myriad of rules and regulations, statutes, decrees, administrative legislation and adjudication, formal judgments, and informal interventions and disciplines'.[296] As hinted in the introduction, against the backdrop of the Anthropocene, this more fluid, relational account of law has recently been extended to include relations and agencies beyond the human.[297] This, however, risks to further depoliticise the thinking about legal relations and obscure the structural companionship between law and capitalism.

As Ntina Tzouvala cautions: if law is seen to be wholly indeterminate, fluid, and contingent it is difficult to argue that is constitutive of relations of exclusion, domination, or exploitation.[298] Ioannis Kampourakis even suggests that the postmodern tenets of particularity, reflexivity and pluralism have failed to fulfil their transformative, emancipatory potential but, in contrast, have materialised in contemporary regulatory arrangements in a way that further entrenches the rule of markets as dominant principle of

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[292] Christodoulidis and Goldoni (n 264) 109. Contemporary Marxist scholar China Miéville, for example, revisits Pashukanis' theory and extends it to the international sphere. While acknowledging that international law is a determining force in global affairs, Miéville argues that it lacks capacity for emancipatory change and concludes that 'systemic amelioration of social and international problems cannot come through law'. See China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 318.

[293] Ntina Tzouvala, *Capitalism as Civilization: A History of international Law* (OUP 2020) 5.

[294] Ioannis Kampourakis, 'The Postmodern Legal Ordering of the Economy' (2021) 28 Indiana Journal of Global Legal Studies 101 [hereinafter Kampourakis 2021a] 106.

[295] Costas Douzinas, 'Postmodern Jurisprudence' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (OUP 2009).

[296] Ibid.

[297] Supra chapter 1.

[298] Tzouvala (n 293) 6.

social ordering.[299] Conversely, thinking through structures, Tzouvala argues, permits to embed legal analysis into broader considerations about the synergies between law and patterns of unequal distribution.[300] Yet, while law is complicit with capitalist exploitation, environmental destruction and the devaluing of human life, the author observes, 'law does not do so by being monolithic, but through the precise form assumed by its indeterminacy and instability'.[301]

Against the transnational, hybrid, fluid nature of climate law and governance, the emphasis on structure is valuable for not losing sight of the domination, exclusion and exploitation inherent to the capitalist mode of production, which, as the introductory chapter has hinted, occurs in the context of new 'green' solutions to capitalism's 'externalities' as much as elsewhere. This is the first step in my line of argument: To see legal relations as enabling devices for capitalist reproduction and the distributional inequalities it brings about in the context of 'green' market expansion. While Marxists insist that law's form overdetermines its function, other approaches attach more importance to law's function, as I will discuss in the next paragraphs.

New legal institutionalism: 'tweaking' legal rules

The idea that the economic sphere is constituted by law has not only been put forward by Marxist scholars, but also by economists associated with opposite side of the political spectrum, including neoliberalism's most prominent pioneer Friedrich August von Hayek, who assumed that the rule of law is the key factor in ensuring a functioning market economy.[302] From the second half of the 20th century, building on neoclassical economic ideas, the school of New Institutional Economics (NIE) drew attention to the role of institutions – including law – in securing functioning markets.[303] In recent decades, critical legal scholarship beyond Marxist approaches, too, has developed a renewed interest in the entanglements between law and political economy. Drawing on the insights of legal realism and institutional economics, Duncan Kennedy has illustrated how allegedly neutral

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[299] Kampourakis 2021a (n 294) 107.
[300] Tzouvala (n 293) 6.
[301] Ibid 219-220.
[302] See Thomas Biebricher, 'The rise of juridical neoliberalism' in Ben Golder and Daniel McLoughlin (eds) *The Politics of Legality in a Neoliberal Age* (Routledge 2017) 97.
[303] See eg Douglass C North, 'Institutions' (1991) 5 Journal of Economic Perspectives 97.

and largely invisible 'ground rules' in liberal societies, such as property and contract, in fact structure the process of production, privileging some parties over others and thereby leading to uneven distributive outcomes.[304] In a similar vein, a recent current of scholarship referring to itself as '(new) legal institutionalism' emphasises the role of law as a constitutive part of institutionalised power structures, and a major means through which power is exercised.[305]

Contrary to Marx – but arguably, to some extent, concurring with Pashukanis – legal institutionalists claim that law is constitutive of social relations and necessary for the definition of modern social classes.[306] However, unlike Marxist accounts, whose main point is that the legal form prevents any attempt to transcend the existing order by the means of law, new legal institutionalism focuses on law's capacity to effect changes *within* the existing order. In the institutionalist view, law is not a mere instrument of the powerful, but a power in and of itself: Law, Simon Deakin and his collaborators claim, 'can shift the balance of power as different actors discover how best to use the law to advance their interests'.[307] Hence, new legal institutionalism shares with Marxian scholarship the insight that law acts as a constitutive force within capitalism, yet accentuates individual agents' abilities to engender change *through* law, or, in other words: it gives more weight to law's *function* (as opposed to is form).

In this vein, Katharina Pistor, in her book *The Code of Capital: How the Law Creates Wealth and Inequality*, describes how lawyers employ basic modules of the legal 'code' – such as property and contract, among others, to create wealth, by bestowing certain critical attributes upon various assets.[308] With the help of this 'coding' through private law, Pistor claims, the assets are given a comparative advantage over others, in protecting old and creating new wealth, backed and enforced by the coercive powers of states.[309] Pistor's book has been lauded as to give evidence 'for the idea that although capitalism relies on the rhetoric of equality and merit ... it is actually a system of privileges instituted and

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[304] Duncan Kennedy 'The Stakes of Law, or Hale and Foucault!' (1991) 15 Legal Studies Forum 327.
[305] Deakin et al (n 267) 191-192.
[306] Ibid.
[307] Ibid.
[308] Pistor (n 269) 3.
[309] Ibid 21.

perpetuated by law'.[310] As Anna Chadwick notes, Pistor's account suggests that economic inequalities do not only result from the insistence upon the juridical equality of persons before the law in conditions of material inequality – as the commodity form theory suggests – but also are fuelled by juridical inequalities between different, pre-existing legal rights and regimes.[311] In this respect, new legal institutionalism resembles political economic approaches, such as social structure of accumulation theory, which – without specifically dealing with law – is concerned with the ways in which institutions support the process of capital accumulation.[312]

New legal institutionalism, at least implicitly, suggests the following: If law is seen as constitutive, it can be assumed that tweaking it will engender transformations of the relevant economic actions.[313] Pistor, for example, suggests eight 'key reforms' in order to 'roll back control by current asset holders … over the code of capital'.[314] While she anticipates that the reforms outlined may be less than some might have hoped for, the author argues that capital holder's power over the 'code of capital' is the result of persistent incrementalism and that such incrementalism equally could work as a viable push-back strategy.[315] Ioannis Kampourakis characterises new legal institutionalism as 'instrumentalist' approach towards law in that it pragmatically uses (state) law to advance goals of redistribution and democratic participation.[316] While law is seen as constitutive of capitalism and it is acknowledged that it therefore may not serve at overcoming it, instrumentalists perceive law as 'an empty vessel to be filled with substantive content that can either advance or hinder different normative agendas'.[317] Hence, while it might be difficult to radically revise the background rules underlying capitalist societies, such as property and contract,[318] instrumentalist positions nonetheless imagine the possibility of

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[310] Iagê Z Miola, '(De)coding Capital in the Periphery' (2020) 30 Social & Legal Studies 296, 297.

[311] Anna Chadwick, 'Capital Without Capitalism? Or Capitalism Without Determinism?' (2020) 30 Social & Legal Studies 302, 305.

[312] See Terrence McDonough, 'Social Structures of Accumulation, Contingent History and Stages of Capitalism' in David M Kotz et al (eds) *Social Structures of Accumulation: The Political Economy of Growth and Crisis* (CUP 1994) 72.

[313] Marco Goldoni, 'On the Constitutive Performativity of the Law of Capital' (2020) 30 Social & Legal Studies 291, 295.

[314] Pistor (n 269) 224.

[315] Ibid 229.

[316] Kampourakis 2021 (n 268) 312.

[317] Ibid 313.

[318] David Singh Grewal, 'The Laws of Capitalism: Book Review of Capital in the Twenty-First Century by Thomas Piketty' (2014) 128 Harvard Law Review 626.

democracy to achieve 'the renegotiation or even rejection of the broader limits placed by liberal institutions, such as property rights'.[319] However, as Kampourakis criticises, such possibility appears rather remote:

> Without developed mechanisms of global justice, redistribution, and transnational welfare, and absent a – highly improbable – coordinated inter-state effort to curb the structural power of private financial interests by means of international legal instruments, the instrumental approach appears to be missing the instruments that would allow it to become fully purposive and effective in the globalized economy of the twenty-first century.[320]

Another shortcoming of new legal institutionalism is its tendency to obscure the 'materiality relation', i.e. the broader social and economic processes that constitute capitalism that lies at the heart of Marxian legal theory.[321] In an institutionalist view, social reality in capitalist societies is seen to be constructed almost entirely by the codification and assemblage of legal institutions, suggesting a conception of law that, ultimately, is not socially embedded.[322] However, as Goldoni notes, institutions cannot be solely conceived as being made up by a hierarchy of legal norms, their connection with social relations is equally constitutive.[323] Contract, for example, is a legal as well as an economic institution and the logic of action of such an institution is not solely driven by legal norms.[324] Hence, while Marx' perspective may be read to underestimating law by dismissing it as mere epiphenomenon, fully determined by the material relation of the economic 'base', new legal institutionalism risks to overemphasise law at cost of neglecting the material realities fundamental to Marxist approaches. As such, Marxian legal theory and new legal institutionalist perspectives may delineate the spectrum of possibilities of law to serve at emancipatory ends. While Marxian theories of law highlight the limits of law to transcend capitalism, new legal institutionalism emphasises how, *within* legal orders, privileges and disadvantages can be allocated differently.

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[319] Kampourakis 2021 (n 268) 314.
[320] Ibid.
[321] Chadwick 2020 (n 304) 307.
[322] Goldoni 2020 (n 313) 295.
[323] Ibid.
[324] Ibid.

From an analytical point of view, the new legal institutionalist perspectives are valuable, too, in that they can inform a more nuanced understanding about what is, and what is not possible when trying to instrumentalise rights as a device of resistance against 'green' market expansion. As I will further discuss in chapter 5, property – as an institution as well as a paradigm – is a constitutive feature of 'green' market expansion.[325] The proprietary relations implied in 'green' market expansion are enabled – though not fully determined – by law. This means that 'tweaking' the law will influence how these relations look like. If property is ambivalent,[326] changes within the laws and practices may be effected to make property more amenable to distributive concerns and the mutual entanglements of human and non-human beings. Changes within property as an institution, in turn, may entice a shift in the dominant property paradigm, away from its conceptualisation as private, individual, and exclusive. Such a shift, as discussed in the following sections, is only possible with the help of nation states, among other legal collectives.

3.1.2 States and other legal collectives

Thus far, I have discussed the constitutive role of law without paying specific attention to the forces and actors involved in creating laws and shaping legal institutions. In the second chapter of this thesis, I have described the hybrid nature of the climate change regime between private and public, and highlighted new constitutionalism's tendency to 'outsource' the delivery of public goods – such as an intact environment – to the market. Yet, as hinted above, despite the privatisation associated with neoliberal environmentalism, 'green' markets, for their operation, depend upon states. Just as law cannot be seen as a mere epiphenomenon of the economic base, but instead is itself constitutive of the capitalist society, the state plays an active role in capitalism's progression. As Rob Hunter, puts it: 'The relation between state and capital should not be seen in terms of a parasitic growth battened upon a productive host; it is instead a co-productive relation.'[327] As such, it is vital to understand the role of the state in facilitating market-based approaches to

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[325] Infra chapter 3. The same, arguably applies to contract which, as discussed in section 1, are central for 'green' markets to operate. Yet, I will focus on property throughout this thesis because of its close ties with rights and subjecthood important from an earth system law perspective, as I will further unpack throughout this thesis.

[326] For this view see eg Grear 2012 (n 123).

[327] Rob Hunter, 'Capital and Climate in the Critique of the State' (*Legal Form*, 6 June 2019) <https://legalform.blog/2019/06/06/capital-and-climate-in-the-critique-of-the-state-rob-hunter/> accessed 26 November 2024.

climate and environmental protection by supplying the legal and institutional framework within which these markets operate.

For Marxists, the interests of a state's – yet heterogeneous – ruling class are decisive in shaping legal relations.[328] Yet, the multiple, transnational entanglements of 'green' market expansion – operating on various scales, across borders, through 'public' and 'private', 'soft' and 'hard' law – suggest that the state is not the sole agent relevant when it comes to contemporary arrangements of legal ordering. Accordingly, poststructuralists accuse Marxist accounts of overestimating the significance of state ordering and underestimating the autonomy of institutional or professional actors who, themselves, are involved in forms of ordering in society.[329] These perspectives are important, in that they acknowledge the agency of a wider range of non-state actors. While – as discussed above – note denying law's structural implications, new legal institutionalist scholar Pistor points that the legal 'coding' of capital is decentralized, yet increasingly global process.[330] In this view, states are merely providing 'a menu from which private parties get to pick and choose', while, at the same time, increasingly losing control the creation and distribution of wealth.[331] However, the continuing relevance of the state should not be underestimated: Not only as enabler of 'private' ordering, but, crucially, in the sense that property rights always require state power, for their enforcement as well as for their very creation: only the definition of property rights by state action can set the condition for private exchange and (private) ordering thereof.[332] Hence, it is relevant to acknowledging the central role states – and more accurately: specific states – play in enabling 'green' market expansion, while being mindful of the fact that states alone cannot fully account for the complex regime governing climate and environmental protection. Only by identifying who drives 'green' market expansion, one might be able to identify strategies of resistance.

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[328] See infra 74-76.

[329] Kennedy (n 304) 353. Michel Foucault, for example, famously emphasised the role of institutional and professional actors in creating what he calls a 'power/knowledge' regime. Ibid.

[330] See generally Pistor (n 269).

[331] Ibid 21.

[332] Sol Picciotto, 'Private or Public?' (2020) 30 Social & Legal Studies 311, 313.

Hegemony and class struggle

In the previous sections, I have argued that legal relations can be seen as an enabling device for 'green' markets to operate. Legal relations, in turn, are, albeit not exclusively, enabled by nation states: While processes of norm creation and enforcement become increasingly 'outsourced' to private actors, states continue to play a key role, not least in the creation and enforcement of property rights upon which private exchange rests. Therefore, it appears valuable to settle on an understanding about the ways in which power dynamics within nation states unfold, and the role of law played therein. As Marco Goldoni and Michael Wilkinson note, political activity selects – in an un-neutral way – which institutions are deemed conducive to a stable order.[333] Political activity also decides how exactly these institutions are shaped and organized, and where and how their boundaries are established. This, in turn, may have implications for the ways in which 'green' market expansion impacts on existing distributions of wealth, power, and privilege. When attempting to make sense of the political power relations internal to states under capitalism, Marxist political philosophy provides for a point of departure.

The most comprehensive Marxist account of the state arguably was developed by political sociologist and philosopher Nicos Poulantzas who, for his part, borrowed from Antonio Gramsci's notion of cultural hegemony.[334] Hegemony, alongside the coercive power of the state, involves the ability of a dominant group to impose its leadership upon other groups and to make the latter adopt particular values or beliefs, even if those do not play out in their favour.[335] The dominant group is by no means heterogenous, and struggles between different classes are seen to occur alongside struggles within classes.[336] Together, they form what Gramsci calls the 'historical bloc', 'the complex, contradictory and discordant *ensemble* of ... the social relations of production'.[337] As Hunter explains, the capitalist state 'is in no way a mere agent of a unified ruling class', however, it nonetheless seeks to maintain the conditions for capital accumulation and 'insulates' capitalist production and

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[333] Marco Goldoni and Michael A Wilkinson, 'The Material Constitution' (2018) 81 Modern Law Review 567, 584-85.

[334] For an overview see Jessop (n 273); James Martin (ed), *The Poulantzas Reader: Marxism, Law and the State* (Verso 2008).

[335] Pablo Ciocchini and Stéfanie Khoury 'Thinking in a Gramscian way: Reflections on Gramsci and law' in Paul O'Connell and Umut Özsu (eds) *Research Handbook on Law and Marxism* (Edward Elgar 2021) 139, 143.

[336] Ibid 146.

[337] Gramsci (n 273) 366.

exchange relations from political contestation.[338] It is through law, according to Gramsci, that the state 'renders the ruling group "homogeneous", and tends to create a social conformism which is useful to the ruling group's line of development'.[339] Law contributes to the development of what Gramsci called 'common sense' by generating and sustaining a worldview conforming to the needs of capitalist social reproduction.[340] Legislators, for Gramsci, thus play an important role in that they generate consensus for laws that allegedly are 'fair' and 'equal' thus contributing to social cohesion.[341] As such, law – be it statute or case law – contributes to the production and reproduction of hegemony.[342]

Building on Gramsci's work, Nicos Poulantzas understood law as a central element of hegemony and as technique to create cohesion and consensus, both within the dominant 'power bloc' comprising different fractions of the bourgeoise, as well as between the 'power bloc' and the dominated classes. [343] Poulantzas' work takes up Gramsci's analysis of the relation between state and civil society: In his view, too, the capitalist state is not simply an instrument in the hands of the bourgeoisie, but nonetheless structured in a way as to give them an institutional advantage.[344] State law is not seen as a direct instrument of the dominant class but linked to economic conditions – through values upheld by the dominant class and, eventually, shared by the masses.[345] As discussed in the previous section, the law of property and contract is removed from political contestation, appearing as a neutral set of rules that regulates the exchange of commodities between equal parties – despite the fact that those parties may, in reality, are often equal at all.

As will be detailed in chapter 5, this becomes apparent in the case of property: Property seen as an institution that is so fundamental to the ordering of Western societies that it is hardly ever questioned as an institution at all, and existing property relations are accepted as a given. Any intervention in existing property relations is widely deemed unfair.

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[338] Rob Hunter, 'Marx's critique and the constitution of the capitalist state' in Paul O'Connell and Umut Özsu (eds) *Research Handbook on Law and Marxism* (Edward Elgar 2021) 190, 194.

[339] Gramsci (n 273) 195.

[340] Bob Jessop, *State Theory: Putting Capitalist States in Their Place* (Polity Press 1990) 51.

[341] See Ciccorini and Khoury (335) 144.

[342] Ibid 146.

[343] Rafael Khachaturian, 'The state as social relation: Poulantzas on materiality and political strategy' in Paul O'Connell and Umut Özsu (eds) *Research Handbook on Law and Marxism* (Edward Elgar 2021) 173, 181.

[344] Ibid 182.

[345] See Chiccorini and Khoury (n 335) 144.

Equally, it appears widely accepted that the best way to protect the planet is to create new property regimes layered on top of existing ones through the creation of new 'green' commodities', even if the ensuing distributive inequalities at times spark some protests.[346] Now, the question that continues to riddle Marxian legal scholars, again, resurfaces: In how far is law capable to effectuate transformative change, given the odds seem stacked against such a transformation in the capitalist state dominated by a, yet heterogenous, 'power bloc' wedded to the idea of continuing economic growth?

Just as law cannot be reified and relegated to something static or monolithic, neither cam the state: Poulantzas' class theoretical approach rejects the conception of the state as either subject or object but instead conceptualises the capitalist state as constellation of social forces and powers to which the class struggle is immanent.[347] While Poulantzas' take on the state is often seen as example of structuralist Marxist thinking, Philip Jessop argues, that his account of the state is in fact a more relational one.[348] According to this reading, Poulantzas saw the state not as something external to class struggle but instead identified state institutions as the crucial sites where hegemony is constructed and consolidated. I will come back to this reading in my last chapter: Court rulings, too, can be seen as sites where hegemony is consolidated. This is why it is important to be cautious when looking at rights-based, strategic litigation: To acknowledge not only what is novel and what is exciting – but also what is confirmed and removed from contestation. As will be discussed, there is a certain risk that rights-based 'strategic' litigation further solidifies hegemonic paradigms and institutions.

Class contradictions, according to Poulantzas, 'are the very stuff of the state: they are present in its material framework and pattern its organisation; while the state's policy is the result of their functioning within the state'.[349] In this view law and the state are sites where social relations – including those of production and exchange – are constituted, hence relations of production and exchange are mutually constitutive with legal and political

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[346] An example in the Western context arguably is the 'yellow vest' protest in France. The protesters did not attack the carbon price as such, but the fact that it has been passed on to the consumers. See Morena et al (n 55).

[347] Khachaturian (n 343) 174.

[348] Jessop (n 273) 81-82.

[349] Nicos Poulantzas, *State, Power, Socialism* [1978] (Verso 1980) 132.

relations.[350] Poulantzas, throughout his work, took different views on the possibility of struggle on the terrain of the state – and hence through law: While his earlier work suggested that only a revolutionary party could act as counterweight to the state's advantages in organising hegemony, he later maintained that, precisely because the state is a condensation of class struggles, and because of the class contradictions running through the state, it 'can never be a monolithic bloc devoid of fissures',[351] and, as such, strategic terrain on which social relations can be modified.[352] Poulantzas' theory of the state is interesting in that it conceptualises the state as dominated by a set of powerful, yet heterogeneous actors, while it refuses to fall prey to a reductionist understanding that sees law as simple imposition of those actors' preferences.

The Western state's role in 'green' market expansion may well be conceptualised in these terms: As described in chapter 2, carbon contracts are a set of privately negotiated and regulated agreements concluded under the umbrella of the state and the applicable ground rules, involving various social actors, such as affected communities and environmental NGOs whose interests are said to be represented, while still privileging investors and market actors. Looking at the state's role through Poulantzas' lens does not negate complexity of the legal and institutional framework enabling 'green' market expansion, and the multiplicity of actors involved, but yet maintains that state and law gravitate towards the preferences of a capitalist class – which is evidenced by the very fact that markets are seen as central approach to solving the planetary crises of global warming and environmental destruction. Rights-based litigation can act as a counter-hegemonic strategy,[353] though as hinted above and as further discussed un the last chapter, there is a risk that hegemonic institutions and paradigms are re-iterated and solidified. Yet, to solely focus on states is obviously insufficient given the planetary nature of the multiple crises the earth system is facing and the transnational nature of the 'solutions' offered thereto. In a

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[350] Hunter 2021 (n 338) 194.

[351] Nicos Poulantzas, *Fascism and Dictatorship: The Third International and the Problem of Fascism* [1970] (New Left Books 1974); Nicos Poulantzas, *The Crisis of the Dictatorships* [1975] (New Left Books 1976).

[352] Khachaturian (n 343) 185. Though, according to Poulantzas, the state's terrain is skewed in favour of the dominant class.

[353] See eg Cotula 2020 (n 61).

next step, I therefore will widen the focus to explore which theoretical accounts may offer a lens that accounts for this transnational dimension.

Beyond states: Legal collectives in a globalised world

As previously noted, critics see carbon and environmental markets as a strategy of a polluting elite mainly located in the global North, aimed at avoiding daunting political choices that would involve a decisive turn away from existing patterns of production and consumption and the imperative of continuing economic growth.[354] Scholars in the field of international law and international relations have popularised Gramsci's concept of hegemony in the global context.[355] At global level, hegemony is seen to be established if one social class exports a mode of production favourable to its own interests to the entire world while convincing all others that this will be beneficial for them.[356] These – so called neo-Gramscian – perspectives, too, emphasise the link between legal institutions and concrete politico-economic structures and, in this vein, point to the role of international law in shaping the international order.[357]

Transposing the idea of class struggle to the global sphere, neo-Gramscians point to the emergence of a 'transnational capitalist class' (TCC) as globally oriented 'ruling class' that operates on a transnational level.[358] Legal scholars have employed point to the TCC's role in shaping the laws and institutions in the era of globalisation, arguing the focus of mainstream international law's scholarship on states as principal actors obscures the ways in which certain social groups and classes influence international law regimes and benefit from them.[359] These interests, TWAIL scholar B.S. Chimni argues, are codified in what he characterises as 'bourgeois imperialist international law', creating and protecting global property rights, codifying the rights of transnational corporations, and limiting the

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[354] Supra at 2.2.

[355] See eg Robert W Cox, 'Gramsci, Hegemony and International Relations: An Essay in Method' (1983) 12 Millennium 162.

[356] Ibid 171.

[357] Rémi Bachand 'Taking political economy seriously: *Grundriss* for a Marxist analysis of international law' in Paul O'Connell and Umut Özsu (eds) *Research Handbook on Law and Marxism* (Edward Elgar 2021) 356, 361.

[358] Leslie Sklair, *The Transnational Capitalist Class* (Blackwell 2001).

[359] BS Chimni, 'Prolegomena to a Class Approach to International Law' (2010) 21 EJIL 57.

economic autonomy of sovereign states.[360] While this argument has some purchase, in particular when looking at the ways how proprietary interests of transnational corporate actors are protected under international investment law, the approach is of limited value for the present endeavour. Since Marxist approaches themselves concede that classes – the 'ruling' as well as the 'ruled' – are heterogeneous and fragmented, additional theoretical accounts are required to make sense of the possibilities and limits that rights-based claims may encounter when invoked to counteract 'green' market expansion on a global scale.

In chapter 2, I have described the transnational character of climate change regime, where the boundaries between 'hard' and 'soft', between state law and private ordering, between local and global become increasingly blurred. Against the backdrop of globalisation, where new legal orders emerge without fitting into the state/international law paradigm, legal theorist Hans Lindahl suggests a 'general theory of legal ordering'.[361] As the author stresses, such an approach should not be confounded with a 'global' approach to law, since, very much to the contrary, 'legal globalisation can only come about in the form of *localisation* or emplacement of law'.[362] Lindahl claims that '[w]hat is profoundly misleading about all analyses of legal orders that take their cue from the notion of a scale, cartographic or otherwise, is that they are blind to the fact that while we can certainly use maps when thinking about the space of law, we are and remain *in* the space of law when using maps'.[363] According to Lindahl, '[t]he 'in-ness' of 'in' refers to being in a *space of action*, which is organized in terms of the contrast between inside and outside'.[364]

Hence, according to Lindahl, the rise of legal transnationalism does not mean that legal orders do not rely on claims to exclusive territoriality anymore.[365] Rather, manifold collective claims to exclusive territoriality emerge, and collective claims to exclusive territoriality are a condition of, rather than an antithesis to, legal pluralisation. In the context of 'green' market expansion, this means that state law, contractual agreements under the PA, bi-or multilateral investment treaties, regional human rights frameworks, and so forth, all form different legal collectives with competing claims over certain places.

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[360] Ibid 71. Emphases omitted.
[361] Lindahl (n 112).
[362] Ibid 261-62. Emphases in original.
[363] Ibid 262.
[364] Ibid.
[365] Ibid 105.

Lindahl claims: In a view that embraces states as but one type among various legal collectives, the doctrine of 'extraterritorial' applicability of human rights is a misnomer:

> When a state or a 'regional' collective, such as the EU, claims global validity for legislation which governs certain kinds of behaviour, it simply includes to that effect the entire globe within its territory… the spatial unity with respect to which the members of a collective are deemed to be mutually committed to authoritatively monitoring and upholding the spatial boundaries that indicate where certain behaviour ought or ought not to take place.[366]

In this, Lindahl writes, 'a claim to exclusive territoriality is the spatial explication of the identity of legal collectives'.[367] Legal collectives are not necessarily nation states but can be regional entities such as the Council of Europe (in its capacity as the signatories of the ECHR), or indigenous tribes, or private law regimes such as the 'lex mercatoria', or even multinational corporations such Shell governed by their own internal legal structure, whose territoriality consists of places dispersed across the planet, not congruent with national boundaries.[368]

While traditional Marxist perspectives on law see class struggle as the driving force in which law is co-constituted alongside the relations of production, Lindahl sees a variety of legal regimes emerging through a multiplicity of legal collectives who define themselves as such. And, while in a Marxist understanding, law is forged in an internal conflict resulting from the dialectical relationship between a ruling class and the rest, Lindahl's focus is more concerned with the conflict between multiple, spatially overlapping legal collectives. This does not (yet) say anything about the ways in which those multiple legal collectives come about, yet it seems evident from the suggestions listed above – ranging from indigenous communities, to transnational commercial law, or multinational corporations – that class struggle is not, or at least not always, sufficient to describe how legal collectives are constituted. Take Lindahl's example of the multinational oil company Shell: If Shell is conceived as legal collective of its own, class struggle does not immediately spring to mind as the way in which Shell's internal legal order comes about. Rather, struggle unfolds *between* the different legal collectives of, say, Shell and the

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[366] Ibid.
[367] Ibid.
[368] Ibid 56-76.

indigenous tribe on whose territory the company plans its operations: If Shell's operations threaten to destroy a natural feature which, under the Indigenous tribe's own law, is considered sacred, two different legal collectives raise claims to exclusive territoriality. As I will further explore in chapter 4, the idea of legal collectives' claims to exclusive territoriality gets further complicated by the commodification of carbon and other intangible ecosystem services. For now, it suffices to note that Lindahl's account does not seem to preclude the idea that legal relations are subject to struggles and power imbalances, or to negate that hegemony may play a role. Rather, it adds an analytical dimension that may assist in explaining how these struggles unfold.

Rather than focusing on the distinction between 'domestic' and 'foreign' legal spaces, Lindahl argues, attention should be directed towards the distinction between the spaces that a legal collective deems 'its own', as opposed to 'strange' spaces. Contrary to the distinction between 'foreign' and 'domestic' spaces which is contingent, Lindahl argues, the distinction of 'own' and 'strange' places is constitutive for any legal order as such.[369] Lindahl's point is the following: No legal order is thinkable absent a spatial closure. Even if not delimited in the classical manner of state territory, every legal order consists of a unity of spatially defined 'ought-places' determining who is ought to do what where and when. Secondly, no such unity of 'ought-places' could exist without what Lindahl calls a 'first-person plural preferential differentiation between inside and outside', that is: the distinction a collective draws between its own its own space and what lies beyond it, to which Lindahl refers to as 'strange places'.[370] The 'first-person plural' perspective refers to the collective self-identity of a certain group as a 'we', in contrast to 'the other' that does not form part of the collective.[371] Based upon this distinction, Lindahl argues that 'the limit between own and strange places is constitutive of legal orders as spatial orders'.[372]

To return to the examples of Shell and the indigenous tribe: The 'ought-places' of Shell – a vertically integrated multinational corporation – will be dispersed across the planet, including its headquarters, its offices, oil rigs, refineries, petrol stations, the sites of its carbon offset programme, and so forth. They will be subject to internal rules and codes of

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[369] Ibid 4.
[370] Ibid 74-75.
[371] Ibid 84.
[372] Ibid 76.

conduct, to applicable national laws, to transnational regulatory frameworks and standards they have committed to adhere to, for example through third-party verifiers for their carbon offsets.[373] Not everything will be relevant or applicable to everyone within this network, and the part-time employee of a petrol station may not feel particularly attached to, or even aware of, any corporate self-identity. Nonetheless, the collective will have its own 'ought places' relevant to what it does, where those part of the collective ought to comply with certain rules. The part-time petrol station worker will have to comply with the company's workplace safety protocol for petrol stations in certain country, which is part of a larger body of various workplace safety policies differing according to workplace and national laws etc. Meanwhile, the tribe located in the forest surrounding the to the petrol station will have different rules, and different ought-places, a particular tree species, for example, that is ought to be worshipped, because its thought of the place where the tribe members' ancestors reside. Not only sits this this tree spatially outside the legal collective that is Shell, but neither is the duty to worship a particular tree species intelligible from the collective's own first-person plural perspective. If the government grants Shell a lease over the forested land and cuts down the trees to enable fracking (in line with its normative point of joint action, to extract resources and generate profits) the ought-place of the tribe disappears. What, if Shell uses the leased land not for fracking but instead to offset its operations, and thus the trees remain available for the tribe to worship? What is the claim to exclusive territoriality in this case? – I will return to the question throughout the remainder of this thesis.

Lindahl's account is interesting because it acknowledges the plurality of legal orders along the lines spatial closures while abandoning the national/international dichotomy. To distinguish between a legal collective's 'own' and 'strange' places offers a valuable perspective on the transnational climate regime, the enabling role of law, and the limits rights-based approaches may face in this respect: A legal collective, such as the Council of Europe, might well identify some aspects of 'green' market expansion as 'own' or 'strange', depending on the question at issue. As discussed later in this section, the strange only ever appears when a legal collective is confronted with a question that evokes it. While the idea that states should, in some form, take responsibility for their GHG emissions does not appear strange anymore, when the Council of Europe was founded in

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[373] On this see supra 2.1.2.

1949, such a demand would have appeared strange. For none of its member states, let alone the Council of Europe as a whole, climate action would have formed part of any ought-place. This has certainly changed, as I will discuss when looking at rights-based climate litigation in chapter 7. Now, what then would elicit what comes to appear as strange? – As I will argue throughout my thesis, for legal collectives operating within the parameters of the capitalist mode of production, the strange is what resists and defies the logics of market thinking. The problem with 'green' market expansion is that it increasingly permeates every aspect of the living to an extent it becomes impossible to resist.

3.2 Contesting the market-paradigm through law

Against rigid structuralist assertions within Marxist thinking, Marxian legal scholars have attempted to identify 'crucial openings for resistance and contestation', providing for avenues 'for emancipatory politics both trough law and against law'.[374] Yet, given law's co-constitutive role the capitalist political economy, how can law, at all, be employed as a device of resistance against the ever-increasing reach of said political economy? This part explores how law – against its tilt towards the commodity form – can nonetheless be instrumentalised in working towards emancipatory ends. The conceptual toolbox assembled in the following paragraphs will assist my analysis of rights as a device of resistance in the final chapters of my thesis. In line with the theoretical accounts discussed earlier, rights may either be seen to effect incremental changes in existing institutions, leading to slightly different distributive outcomes – or, else, they may be conceived as inextricably linked to the capitalist mode of production. Though, even in the latter case, rights may serve at emancipatory ends: Not in their quality as *law*, but as carriers of radical demands.

Marxist political philosophy approaches avenues for societal transformation by way of immanent critique: While 'internal' critique relates to a mismatch between a stated norm and a practice that does not comply with this norm, or more simply, 'an inconsistency between what one says and what one does',[375] immanent critique does not assume a given norm against which compliance is measured, but instead highlights immanent problems

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[374] A Claire Cutler 'Gramsci, Law, and the Culture of Global Capitalism' (2005) 8 Critical Review of International Social and Political Philosophy 527, 528.

[375] Rahel Jaeggi, *Critique of Forms of Life* (Harvard University Press 2018) 197. Emphases in original.

and contradictions of particular social constellations and their inherent norms.[376] Immanent criticism, Rahel Jaeggi writes, 'is oriented less to the *reconstruction* or redemption of normative potentials than to the *transformation* of existing conditions'.[377] Marx' immanent critique of capitalism has demonstrated that the norms of general freedom and equality anchored in the bourgeois society and underpinning bourgeois society's institutions, are belied by the fact that those institutions, at the same time, systematically undermine freedom and equality.[378] According to Marx, immanent critique does 'not confront the world in a doctrinaire way with a new principle' but 'only wants to find the new world through criticism of the old one'.[379]

As hinted in the introduction, 'green' market expansion is symptomatic of the contradictions of our present epoch. The cure it proposes has caused the problem in the first place: The commodification of land, natural resources and human labour, and the creation of a globalised market for commodity exchange, divorcing humans from nature and dividing the physical environment into discrete, fungible units through property rights is now replicated – in an act of inverse repetition – in the form of markets in carbon and ecosystem services.[380] A Marxian perspective on law would aim at exposing this contradiction, as I shall do in the fifth chapter of this thesis when looking at the enabling role of property. Now, as pointed in the introduction, social movements exposing injustices linked to the present climate change regime often do so by way of invoking rights – not only on a discursive level, in the form of rights language, but also through the invocation of rights in courts of law. With this, however, a further contradiction arises since rights, by their very nature, are inextricably linked to the concept of property. – Again, the proposed cure appears to be linked to what constitutes the problem in the first place. I will expand on all of this throughout the rest of my thesis. For the remainder of this chapter, I am concerned with the question how law can assist in exposing these contradictions.

In the following subsections, along the lines of Gramsci's philosophy of praxis, I do identify strategy and tactics as two distinct, yet intertwined aspects of resistance. I then,

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[376] Ibid 190-91.
[377] Ibid 190.
[378] Ibid 196.
[379] Karl Marx, 'Brief an Arnold Ruge' in Arnold Ruge and Karl Marx (eds) *Deutsch-Französische Jahrbücher* (Imprimerie de Worms et Cie 1843) 37.
[380] Supra 2.2.

with critical phenomenology and open dialectics, point that strategy is about shifting the way in which things appear *to* someone *as* something. When it comes to analysing what this means in practice, in the context of legal interventions, I draw on Emilios Christodoulidis' account of rupture. Rupture can be explained by reference to Jacques Rancière's aesthetics as an interference with what he calls the 'distribution of the sensible', through the utterance of dissensus. Finally, with Lindahl, moments that rupture the distribution of the sensible can confront legal collectives with their limits, presenting a fault line beyond which a given legal collective will cease to exist and instead become a new one.

3.2.1 Law and strategy: exposing contradictions

As hinted above, for Marxist political philosophy is not merely about interpreting the world, but 'the point is to change it'.[381] As such, Marxism can be conceptualised as a 'philosophy of praxis', linking thought and action.[382] As discussed, for Marxian scholars, the avenues for changing the world *through* law is limited, given law's commodity form.[383] Yet, legal struggles can be employed tactically, as part of a broader political strategy, without the outcomes of those struggles necessarily being goals in themselves.[384] In this vein, law may be employed, by way of immanent critique, to expose the contradictions of 'green' market expansion, and highlight that commodification and marketisation – against assertions to the contrary – is anything but inevitable. Rights-based litigation, could, potentially, be instrumental in this respect: The *Klimaseniorinnen* case, for example, which I will discuss in the last chapter of this thesis, might well be construed in a way that confronts the current system and its continued reliance on fossil fuels facilitated by 'green' markets. Yet, as discussed throughout the following paragraphs, doing so requires invoking rights strategically, and not merely tactical, though the two are frequently confounded.

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[381] Supra p 62.

[382] See generally Gramsci (n 273) 334.

[383] Supra 3.1.1.

[384] See eg Honor Brabazon, 'Dissent in a Juridified Political Sphere' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 167.

While Marx' account of praxis is subject to some internal debate, it generally refers to the activity through which man creates and shapes himself and his historical human world.[385] The philosophy of praxis, Gramsci, notes, 'is realised through the concrete study of past history and through present activity to construct new history'.[386] Hence, praxis is twofold: In its first, negative moment, it engages in the critique of the purported necessity and inevitability of capitalism.[387] This critique paves the way for the second, positive moment of revolutionary praxis bringing forth a new world order.[388] By exposing the present legal and institutional set-up as a 'historical bloc' specific to the capitalist mode of production, avenues arise to organise counter-hegemonic resistance against the laws and institutions that constitute and uphold the capitalist mode of production.[389] While, from Gramsci's perspective, legal battles in and of themselves will not suffice to produce systemic change, they may nonetheless assist in destabilising the status quo, hence creating political conditions conducive to challenging the existing order.[390] Hence, Pablo Chiocchini and Stéphanie Khoury argue, legal struggles 'may to a certain extent create opportunities to contest hegemonic structures expressed in and through law', and thus prove tactically useful in pointing that the ideas protected by the legal system are the product of a particular ideology upheld by the ruling class.[391]

Yet, as Robert Knox has argued forcefully in the context of international law, it is important to acknowledge the difference between *strategy* and *tactics*.[392] Gramsci referred to the distinction between 'organic' and 'conjectural' movements' through which he sought to explain the logic of strategic and tactical intervention in the political sphere.[393] Strategy, according to Knox, relates to 'organic' phenomena, i.e. 'relationships which are relatively permanent, and serve as the basic or fundamental structure of the field in which the intervention is made' – which, in terms of a Marxist political economy critique, would come down to the capitalist mode of production and the relations of production of which it

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[385] Gajo Petrovic, 'Praxis' in Tom Bottomore et al (eds), *The Dictionary of Marxist Thought* (Blackwell 2nd ed 1991) 435.

[386] Gramsci (n 273) 427.

[387] Hans Lindahl, 'Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change'(2015) 22 Constellations 163, 165.

[388] Ibid.

[389] Cutler 2005 (n 377).

[390] Ciocchini and Khoury (n 335) 147.

[391] Ibid 153.

[392] Robert Knox, 'Strategy and Tactics', (2012) 21 Finnish Yearbook of International Law 193.

[393] Gramsci (n 273) 177-178.

is composed.[394] Strategic questions are those aimed at critiquing and overturning those relations, while tactics deals with events that will not directly call the system into question. As Knox writes:

> For the majority of time the distinction between strategy and tactics is a necessary one because the critique of the basic structural logic of the system is *not* identical with every day struggles within it, and the critique of this structure is not one that has an immediate appeal to the majority of people.[395]

Looking at strategic litigation, say in the context of rights-based climate litigation, this implies that even if a majority of people – or in Lindahl's terms: the majority of a legal collective – can make sense of a certain lawsuit, such as, for example, *Klimaseniorinnen*, this does not imply that all those supporting the case would see it – or would like to see it – as part of a broader strategy, *contra* 'green' market expansion. In other words, it matters *who* initiates legal battles *based on which motives*, an if they are solely aimed at immediate, short-term changes or indeed part of a broader strategy. The difference is important, because even if a tactical intervention is successful, it may nonetheless be problematic in strategic terms.[396] – For example, as indicated above, what may look like a victory at face value, may in fact consolidate and solidify hegemonic positions. As Knox cautions, tactical struggles for reform should not be pursued for their own sake, but for the wider strategic goal.[397]

Yet, strategy and tactics both have their place, and there is no need for an 'either-or' decision between them.[398] Tactical interventions can be valuable in their own right: As Knox argues, for Marx, struggles through law are vital for the working class to be constituted as a political subject: Workers' legal struggle for shorter working hours is merely tactical, in that it does not, in itself, does anything that would overthrow the system – however, the struggle is necessary for the working class to come together as a class who, eventually, would become the vehicle for achieving the strategic goal of overthrowing capitalism.[399] Hence, beyond utilising law as a device of immanent critique exposing

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[394] Knox (n 392) 199.
[395] Ibid 200.
[396] Ibid 208.
[397] Ibid 219.
[398] Ibid 215-216.
[399] Ibid 218.

contradictions, law can also employed tactically, while still contributing to the strategic objective through the formation of a political subject. Further, building on the work of Marxist philosopher Georg Lukács, Knox advocates for what he calls 'principled opportunism' which approaches law from an instrumental perspective, subordinated to the political needs of the moment.[400] This does, however, imply 'that law should always be *openly* invoked instrumentally and *openly* subordinated to political considerations', meaning that any invocations of law are necessarily partisan and explicitly stated to support the movement, rather than defending certain rights.[401] An instrumental use of law might involve defending political activists from state prosecution, but could, also 'involve contesting the legality of certain state practices – particularly those which might be said to violate international human rights conventions – in order to publicly reveal these practices, and perhaps to constrain their future use'.[402] Still, in all those instances it is required that the legal argument is geared towards the strategic objective to build a movement aimed at overthrowing capitalism, rather than on its own terms.[403]

The above suggests that law, despite its structural linkage to the commodity form, may be invoked in ways contributing towards contesting the dominant market paradigm. In strategic terms, legal struggles can assist in unveiling the asymmetrical social relationships hidden by the legal form, and, with this, open up avenues for political challenge to them.[404] In the context of 'green' market expansion this implies, for example, exposing the contradiction between states' climate protection laws and their inability to reach the stated objective, or the distributive inequalities resulting from measures allegedly required to fix the crisis capitalism has caused in the first place. Further, if law is invoked openly towards strategic ends, tactical interventions, too may be useful, not least in that the contribute to the formation of the political subject, acting as a unifying force in current struggles against the multiple injustices caused by 'green' market expansion. As the next paragraphs will discuss, these struggles can be seen to unfold in what has been termed an 'open dialectic'.

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[400] Ibid 222-27.
[401] Ibid.
[402] Ibid 225.
[403] Ibid 219.
[404] Ciocchini and Khoury (n 335) 154.

3.2.2 Towards an 'open dialectic' of immanent criticism

As discussed above, law may be employed strategically, exposing internal contradictions of the dominant order. The following paragraphs explore how exactly this can be achieved – namely, by pointing that things we tend to see in a certain way could well be seen otherwise. As Daniel Matthews notes, there is no meaningful, unmediated access to the world: the conceptual and cognitive scaffolding that we erect allows us to grasp the world in certain configurations, rendering us sensitive or insensitive to objects, relations and actions in distinctive ways.[405] The legal concepts we privilege, and the 'law stories' that we tell, constitute what Costas Douzinas has described as a 'legal screen' interposed between the subject and the social realm 'filtering the objects of vision and determining the ways we see and are given to the world to be seen'.[406] Yet, as will become clear throughout the remainder of this section: What we tend to see, is premised upon what has been seen before. As Marx observed in *The Eighteenth Brumaire of Louis Bonaparte*:

> [T]he tradition of all the dead generations weighs like a nightmare on the brain of the living. And just when they seem engaged in revolutionising themselves and things, in creating something that has never yet existed, precisely in such epochs of revolutionary crisis they anxiously conjure up the spirits of the past to their service and borrow from them names, battle cries, and costumes in order to present the new scene of world history in this time-honoured disguise and this borrowed language.[407]

In other words: Whatever present-day arrangements attempt to build anew, they must take recourse as to what is already been there. And what already has been there carries certain predispositions and therefore is never neutral. However, while capitalism came about as a historically specific mode of production, the historicity of capitalism also offers the prospect of its overcoming.[408] What is there already is not inevitable. Junctures existed, where what had been decided might as well have been decided otherwise.

'Green' markets are not only perpetuating patterns of distributive inequality. They also tend to co-opt critical voices, thereby becoming to appear inevitable. – What then, could

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[405] Matthews (n 102).

[406] Costas Douzinas, 'A Legal Phenomenology of Images' in Oren Ben-Dor (ed) *Law and Art: Justice and Aesthetics* (Routledge 2011) 247, 253.

[407] Karl Marx, 'The Eighteenth Brumaire of Louis Bonaparte' [1852] in Terrell Carver (ed) *Marx: Later Political Writings* (CUP 2012) 31, 32.

[408] Tzouvala (n 293) 24.

counteract those tendencies? What could possibly be different? There is no definite answer. Immanent critique, by its very nature is a dynamic process, 'leading from a deficient practice to a new one … [and] becomes a progressively richer and more differentiated experiential process'.[409] This occurs precisely because immanent critique does not involve the one-sided destruction and supersession of a deficient position according to a given, external norm. As Jaeggi notes: 'The norm to be realized is not already present in reality as an ideal; hence, its realisation is not something that can be called for in a correspondingly straightforward way.'[410] Instead, the process of criticism must be understood as one of enrichment and differentiation.[411] Immanent critique is not something that can ever be done with, though, at the same time, it still holds the promise of resolving contradiction. Again, Jaeggi:

> [I]mmanent criticism is not tied to a romantic-harmonistic ideal of consistency, that is, something like the idea of overcoming conflicts once and for all. But in contrast to positions that perpetuate contradictoriness as such, it regards the latter as a mobile element that demands to be overcome, however provisionally.[412]

Building on Bernhard Waldenfels' *Phenomenology and Marxism*, Emilios Christodoulidis emphasises the role of contradiction, and the ways in which phenomenology may assist in thinking about potentiality, engaging in an 'open dialectic'.[413] A critical phenomenology, the author notes, assists in opening up avenues for 'a vison that transforms the seen'.[414] The phenomenological method builds upon the insight 'that the givenness of things in the world cannot be thought of independently of their givenness *to* structures of intentionality'.[415] What appears meaningful, 'is what appears *as* something *to* someone'.[416] As for an example relevant to the present enquiry: what appears to *as* a forest *to* most people in the Western world, might appear *to* Indigenous communities *as* residence of their ancestors, while, with 'green' market expansion, the same forest, again, may *to* natural capital accountants appear *as* 'stock' that can be commodified and translated into monetary

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[409] Jaeggi (n 375) 204.
[410] Ibid 208.
[411] Ibid 209.
[412] Ibid 210.
[413] Christodoulidis 2021 (n 49) 534.
[414] Bernhard Waldenfels et al (eds) *Phenomenology and Marxism* (Routledge and Kegan Paul 1984).
[415] Christodoulidis 2021 (n 49) 532.
[416] Ibid.

values. Arguably, in Lindahl's terms, things appear *as* something (different) *to* (different) legal collectives.

A critical phenomenology in Waldenfels' sense, Christodoulidis notes, harbours an open dialectic, characterised, firstly, by 'a unity between the whole and its parts that unfolds in time', secondly, by a 'succession of stages … and thus a directionality and a forward temporality', and, thirdly, a relation of 'reciprocity between subject and co-subject that stand towards each other in a relation of co-evolution and co-constitution'.[417] For the dialectic to be open, firstly, 'the whole must be understood as an open horizon, one whose telos is not already envisioned in the completion of a form'.[418] Secondly, while it features a directionality, the openness of the dialectic means that nothing warrants that the process will ever reach its goal.[419] Thirdly, the dialectic is open in that the dynamic of co-implication and reciprocity between subject and co-subject is not necessarily striving towards reconciliation.[420]

As for the first characteristic of the open dialectic – the unity between the whole and its parts – it has been observed that capitalism works exactly in the opposite direction, severing parts from the whole and make them appear as the reality of commodified exchange.[421] This dimension appears to be evident in the context of 'green' market expansion: Ecosystems are subdivided into fungible 'units', subjected to market exchange: As shown before, those units can be 'stacked' for example, or 'bundled', and interact with other parts of the whole such as the requirement to deliver 'community benefit'. Yet, when striving towards the opposite direction, towards transcending the capitalist mode of production and law's commodity form '[t]he whole is not yet determined'.[422] To stick with the present example: What defines an ecosystem, what the forest consists of, cannot be enumerated: The plants, the animals and insects, the people, the inert matter, the relations between them, all of this cannot be grasped in the entirety of what the ecosystem actually

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[417] Ibid 534-35.
[418] Ibid 534. Emphases omitted.
[419] Ibid 535.
[420] Ibid.
[421] Ibid.
[422] Ibid 534.

is or will be. I will return to this in chapter 6 when discussing the critique of rights' essentialism.

As discussed above, an open dialectic further involves a directionality and a forward temporality, 'a succession of stages, of affirmation, negation and supersession', which, inclines towards, but potentially never reaches its goal.[423] As such, Christodoulidis observes, the open dialectic, 'involves a to-and-fro, an oscillation between temporal modalities, progress, discontinuity, interruption and reversal'.[424] As the author notes:

> There is something very important about how we understand *genealogy* in this, in other words, about how we rethink the historical emergence of what we take for granted, and how we put that historical emergence to question … Link contradiction to genealogy, and it unsettles the narrative orderings of succession, of simultaneity, of futurity, of origin, releases them from sequence, paces and punctuates the past otherwise. Most importantly, it releases the thinking of the past from the points in time when certainties were installed that sent historical trajectories on their way.[425]

With this, an open dialectic, Christodoulidis claims 'forces us … to re-conceive historical processes as anything but inexorable'.[426] In other words: another world is possible, could have been possible at any time, albeit never complete. In this vein, an open dialectic counteracts determinist assumptions, it opens up potentiality – but potentiality is, by its nature, infinite and devoid of clear contours. Linking this observation back to the question of strategy, this means: How does this 'to-and-fro' unfold, and how does it bring about the formation of the subject working towards the goal (that may never be achieved)? Or, for the present enquiry: How does whatever resists and transcends 'green' market expansion come into being?

Here, the third characteristic of an open dialectic comes into play, which is concerned with the ways in which subject and co-subject interact.[427] This dimension of dialectic is about 'the relations of reciprocity and recognition, the patterning of collectivity and association, the open processes of conflict and cooperation'.[428] It is at this 'lifeworld sites of subject

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[423] Ibid 534-35.
[424] Ibid 536.
[425] Ibid.
[426] Ibid 537.
[427] Waldenfels (n 414) 103.
[428] Christodoulidis 2021 (n 49) 537.

formation and intersubjectivity' where contradiction is most useful for a critical phenomenology: For Marx, Christodoulidis explains, contradictions mark 'a shortfall of the categories available to us to make sense of the processes of value production and social reproduction, the mismatch between the categories of thought and the modes of social being' in concrete historical situations.[429] Contradiction does not carry a fixed set of abstract, normative propositions: Rather, is an existential event, a 'lived incomprehensibility' that carries potential energies towards the outrage against suffering and opens up possibilities for redress.[430] The point is, as Christodoulidis highlights, that categories at disposal are always caught up in a language that carries the deficit they are ought to take care of: Critical thought must be located 'in-between' the semantic reach of the categories carrying their deficit, not as already formulated counter-claim, but as 'the unsettling of given and programmed selections'.[431] The task is to expose contradiction, in that it 'disturbs the ways in which meaning is settled, the ways it sediments and ossifies; it disturbs what is thus constituted as familiar, as natural and as given'.[432]

The contradiction of the present climate change regime arises in that it frames climate change as 'common concern',[433] yet, at the same time, relies on commodification and privatisation to give effect to the common concern. It obscures the fact that commodification and privatisation for the extraction of surplus value have caused the problem in the first place. Instead, 'green' markets are naturalised as an inevitable given, as a necessity to solve the crisis. In this vein, immanent critique would aim at exposing that the creation of property rights in the atmosphere or other environmental 'goods' only arises, because the creation of property rights has enabled their destruction.[434] Yet, within law, there is no category available that could formulate a normative claim *contra* the creation of those rights: The only category apparently available would be other rights of other subjects – 'human' rights, for example. However, as will be discussed in chapter 4, human rights are not the antithesis to property, but instead inextricably linked with it: they

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[429] Ibid 538.
[430] Ibid.
[431] Ibid 539.
[432] Ibid 532.
[433] See supra 1.4
[434] I will return to the question of property in more detail in chapter 5.

denote a mode of 'having', rather than 'being'.[435]– There is on fixed 'other' to property with which it could be replaced for the better.

In the introduction, I have exposed 'green' market expansion as a phenomenon linked to various layers of distributive inequalities. This characterisation is itself reflective of the challenge described in Marx' *Eighteenth Brumaire*: While I have pointed to the uneven distribution of the carbon budget in an attempt to sketch out the issue at stake, the real problem is not the *distribution* of the carbon budget, but that there *is* a budget in the first place. What Christodoulidis hints at, becomes visible in climate justice movements: Articulating the existential deficit they are resolved to redress, said movements are caught up in the liberal language of 'justice' and 'rights' as the only categories available to them. How then could 'unsettling', 'disturbing' or 'interruption', at all, express itself through law, respectively legal action? Can rights, ever, serve as device that interrupts, or do they end up doing the opposite? I will further unpack this in the remainder of this chapter.

3.2.3 Resistance and subject formation: rupture, politics, a-legality

As hinted in the introduction, my thesis is concerned with rights' capacity to be employed as a device of resistance. Resistance through rights faces two interrelated problems: Firstly, rights language and discourse of social movements are constantly at risk of being captured and co-opted by the forces they strive to counter.[436] Secondly, rights are themselves part of the hegemonic structure that enables the market paradigm of new 'green' constitutionalism. If states and international institutions are complicit in 'green' market expansion, how can rights, mediated through those very states and international institutions, ever serve as a device of emancipation and resistance? – My hypothesis is that, despite the intimate relationship between property, rights, and capital – which will be discussed at length throughout the next chapters – rights may be employed as a 'strategy of rupture' that carries the refusal to yield to market capture. Rupture, however, is a fleeting phenomenon. It operates against law's powers of homology and its mechanisms of deliberate deadlock, which will inevitably kick in when confronted with manifestations of rupture. I will unpack these terms and their relevance for my work throughout the following paragraphs. In brief:

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[435] Infra at 6.3.
[436] Grear 2014 (n 66).

While rights-based litigation may may rupture whatever is constituted as familiar, natural, and given, homology and deliberate deadlock present the limits that litigants encounter when attempting to deploy rights at emancipatory ends in court cases.

Christodoulidis: strategy of rupture

While law as an institution facilitates the integration of capital, Christodoulidis argues, it can (and must) be nonetheless, too, deployed as a means of critique, within and outwith the courtroom. However, efforts towards strategies of rupture trough law come up against the 'institutional' nature of law:

> [I]nstitutions reduce the contingency of human interaction, they entrench models of social relationships and, in that, hedge in imaginative political uses and opportunities. In all this they afford a limited language to challenge entrenchment and, with it, remove the purchase point for 'rupture'.[437]

The institution of law limits rupture's force through two key features which Christodoulidis calls the 'powers of homology' and laws mechanism of 'deliberate deadlock'.[438] Homology is about repetition, entrenchment and reduction and finds its expression inter alia in its characteristically conditional form ('the "if … then" structure of law').[439] This structure enables law to strike a relative balance between stability and innovation: Innovations 'can only be grafted onto what already exists, and what already exists sets the thresholds of what might count as relevant information, *what* and under what circumstances may count as "surprise" in the system'.[440] There are limits as to what law can incorporate that is 'new', as opposed to what is 'business-as-usual' without jeopardising laws function to enable coherence and stabilise expectations as expressed in the notion of the 'rule of law'.[441] This implies that political and thus destabilising claims will, at some point, have yield to protected expectations.[442] This means that homology sets narrow limits to strategic, political intervention through rights-based claims. I will come back to this in the last chapter, when exploring the transformative potential of climate litigation, arguing that

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[437] Christodoulidis 2009 (n 107) 10.
[438] Ibid.
[439] Ibid.
[440] Ibid 11.
[441] Ibid.
[442] Ibid.

law's homology limits what the respective lawsuits can achieve in terms of substantive outcomes.

Deliberate deadlock refers to the 'blocking of opportunities of redress',[443] and can occur in numerous instances, which I will not cover here in their entirety. One particularly interesting example for the present context is the distribution of competences, 'the legal "economy" of jurisdiction' and the question of standing 'or rather the lack of it', all of it underpinning 'law's complex attributions of harm and responsibility and its organisation of irresponsibility'.[444] Other instances of deliberate deadlock relate to the shift from '*substance*' to '*procedure*', and the subsequent 'mutation of the latter into the varieties of '*social dialogue*'.[445] Substantive protections are made redundant in this model, where different actors with diverging interests 'meet as "partners" in communicative exchange, both making and receiving the law'.[446] Yet such 'dialogue' may be selective in who exactly counts as 'partner' and who is not represented, it ignores that those who are, may not all be vested with equal bargaining powers or legal guarantees backing those powers, and it may not provide for any procedural guarantees that would prevent the 'dialogue' to be captured by one side or the other.[447] Again, I will return to this in chapter 7, where I argue that deliberate deadlock can be observed in the context of climate litigation.

Against those constraints, Christodoulidis and other scholars informed by Marxist strands of thought have drawn on Third-World Marxist lawyer Jacques Vergès' 'strategy of rupture', which proposes that rather than using legal *argument*, the legal *situation* should be utilised to promote political goals.[448] As Knox explains, 'the ruptural strategy uses the spectacle and publicity of law, to directly undermine the law by launching a political attack on the existing order'.[449] The crux of any strategy of rupture, is to ensure that the act of resistance in question is not 'absorbed, integrated or co-opted into the system against which it stands'.[450] As hinted in the introduction, claims of injustice are not, or at least not always, ignored by market actors: Instead, they are productively incorporated, through

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[443] Ibid 10.
[444] Ibid 12.
[445] Ibid 13.
[446] Ibid 13.
[447] Ibid 13-14.
[448] Knox (n 392) 225.
[449] Ibid.
[450] Christodoulidis 2009 (n 107) 5.

reassurances of compliance with rights, of environmental and social integrity, or through benefit sharing arrangements, co-opting critical voices and further entrenching the market logic.[451] Conversely, strategy of rupture operates against capitalism's tendency to capture, colonise, and co-opt the very terms of freedom or emancipation in which critique against capitalism often is articulated.[452]

Rupture consists of 'a refusal on part of the emergent collectivities to define themselves through terms of reference available to them; a refusal of the representational space afforded to them and the extant distribution of speaking positions'.[453] As such rupture is concerned with negation and withdrawal in a gesture in which those employing strategy do not accept the representational space that is allocated to them.[454] With critical phenomenology one might say: someone or something insists to appear *as* something different *to* the existing order than what the order presently provides for. In the context of rights-based litigation this means that claimants do not appear as actors within a market society whose rights need to be weighed against the rights other actors in this society premised upon commodity exchange. As Christodoulidis notes, strategies of rupture need to take the form of negation on the level of meaning-construction, 'impossible for capitalism to thematise productively'.[455] They involve a subversion of capitalism's imperative 'to produce and valorise'.[456] – At the bottom line, against the backdrop of 'green' market expansion, I submit that this implies the negation of Western-liberal property relations, and the rejection of a worldview based on 'having' rather than 'being'. I will unpack this further throughout the rest of the thesis. In a next step, I explore in greater detail with how the refusal of the 'extant distribution of speaking positions' can be theorised.

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[451] Supra at 2.3.
[452] Christodoulidis 2009 (n 107) 9.
[453] Christodoulidis 2021 (n 49) 518.
[454] Ibid.
[455] Ibid 522.
[456] Ibid 521.

Rancière: dissensus disrupting the 'distribution of the sensible'

One approach towards contestation, towards, in Christodoulidis' words, 'definin[ing] itself incongruently' to a given field of reference,[457] starts with French philosopher Jacques Rancière, and his conception of *politics* and *dissensus*. *Politics*, in Rancière's understanding, does not occur in the everyday micropolitics of Washington or Westminster, but rather in rare moments of disruption of the normal course of things.[458] As Rancière writes:

> Politics is generally seen as the set of procedures whereby the aggregation and consent of collectivities is achieved, the organisation of powers, the distribution of places and roles, and the systems for legitimising this distribution. I propose to give this system of distribution and legitimisation another name. I propose to call it the *police*.[459]

The essence of the 'police', according to Rancière, 'is neither repression nor even control of the living. Its essence is the manner of partitioning the sensible.'[460] As Illan rua Wall formulates it: 'The everyday politics of the police order is a process of counting, of managing who and what counts, and the manner in which they count.'[461] Or, as Sean Sayers notes: '[T]he distribution of the sensible sets the divisions between what is visible and invisible, sayable and unsayable, audible and inaudible.'[462]

The term 'politics', according to Rancière, should be reserved 'for an extremely determined activity antagonistic to policing'.[463] Politics occurs 'when those "who have no part in anything" protest, in the name of the overarching community, against the wrong inflicted by other parties'.[464] Against the distribution of the sensible as established by the police, politics 'makes visible what had no business being seen, and makes heard a discourse where once there was only place for noise; it makes understood as discourse

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[457] Ibid.

[458] Wall (n 76) 93.

[459] Rancière 1999 (n 105) 28.

[460] Jacques Rancière, 'Ten Theses on Politics' (2001) 5 Theory & Event.

[461] Wall (n 76) 94.

[462] Jean Sayers, 'Jacques Rancière (2004) The Politics of Aesthetics: The Distribution of the Sensible' (*CultureMachine*, no date) <https://culturemachine.net/reviews/ranciere-the-politics-of-aesthetics-sayers/> accessed 9 December 2024.

[463] Rancière 1999 (n 105) 29-30.

[464] Ibid 8.

what was once only heard as noise'.[465] While this needs further unpacking, what immediately comes to mind when thinking of 'those who have no part' is the climate justice movement: the youth protesters organising themselves globally, across jurisdictional boundaries, collectively calling out those who hide away behind the legal bulwarks of jurisdiction and standing from being held responsible for the harm inflicted on those who suffer the most – the peoples of the global South, the indigenous communities, the youth, the unborn, the non-human.[466]

To the order of the police, the claims of those who have no part are unintelligible.[467] The wrong in question 'consists in the withdrawal of the language in which redress to injustice might be sought'.[468] Hence, the wrong 'denie[s] [those who have no part] a collective speaking position and a political claim'.[469] As such, the wrong inflicted upon 'those who have no part', Christodoulidis argues, is not merely the exclusion of those who 'have no part', but also the sealing over of that exclusion: the wrong inflicts invisibility. Because of the ways in which the police distributes the sensible, Rancière argues, politics proper must take the form of *dissensus*: Dissensus, in this sense, contrasts with the distribution of meaning orchestrated within the police around the politics of consensus and rational discourse. [470] Consensus, Wall observes, in not only about settling political conflicts through negotiation and agreement:

> It means the attempt to get rid of politics by ousting the surplus subjects and replacing them with real partners, social groups and so on. Correspondingly, conflicts are turned into problems that have to be sorted out by learned expertise and a negotiated adjustment of interests. Consensus means closing the spaces of dissensus by plugging the intervals and patching over the possible gaps between appearance and reality or law and fact.[471]

Conversely, a dissensus 'is not a conflict of interests, opinions or values; it is a division put in the "common sense": a dispute about what is given, about the frame in which we see

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[465] Ibid 30.

[466] On recent developments in the climate movement See Joost de Moor et al, 'New kids on the block: taking stock of the recent cycle of climate activism' (2020) 20 Social Movement Studies 619.

[467] Thanks to Dr Giedre Jokubauskaite for highlighting that is not about the lack of language but rather about its intelligibility.

[468] Christodoulidis 2021 (n 49) 518.

[469] Ibid 519.

[470] Ibid 492.

[471] Wall (n 76) 123.

something as given.'[472] Rancière sees such dissensus arising in eighteenth-century women's rights activist Olympe de Gouges and her *Declaration of the Rights of Women and the Citizenness*, in that it was unintelligible in the political discourse of her contemporaries: Standing before the guillotine, she declared that if women were entitled to go to the scaffold, they also were entitled to participate in the assembly.[473]

While the contemporary example is obviously less dramatic, there is a parallel between Olympe de Gouges act of dissensus, and the then fifteen-year-old Swedish climate activist Greta Thunberg, who, in August 2018, vowed to skip school to protest outside the Swedish parliament until the national elections, and kept up her 'school strike for climate' every Friday thereafter, creating what became a global youth movement under the banner 'Fridays For Future'.[474] Thunberg's protest can be construed as an act of exposing the disparity in agency afforded to the youth by the given distribution of the sensible. Read this way, her 'school strike for climate' is a way of saying: If young people are entitled to go to school to prepare themselves for their adult life in the future, they are also entitled to have a say in the politics of global warming which are likely to have a severe impact on their entire adult life. Thunberg did choose not to with the representational spaces afforded to a fifteen-year-old, such as, say, a group of teachers organising a joint letter by their students to the county's politicians.

Half a year after starting her protest, Thunberg sat in front of the World's political leaders and billionaire entrepreneurs at the World Economic Forum in Davos, telling them: 'I don't want you to be hopeful. I want you to panic. I want you to feel the fear I feel every day. And then I want you to act'.[475] This statement arguably carries what Christodoulidis means when stating that dissensus 'is an act of negation which marks a break with the

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[472] Jacques Rancière, 'Who is the Subject of the Rights of Man?' (2004) 103 South Atlantic Quarterly 297, 304.

[473] Ibid. As Christodoulidis explains: 'For Rancière, in that statement she contests the border that separates the private sphere in which she 'properly' belongs as a woman, and the public sphere to which she does not, but within which her execution is mandated. Politics, he says, is about that border, politics occurs as crossing it … For Rancière the act is an act of dissensus because it does not respect the boundary of the order that organises the processes of reaching consensus within given demarcations of political space.' See Christodoulidis 2021 (n 49) 553.

[474] Johnathan Watts, 'Greta Thunberg, schoolgirl climate change warrior: "Some people can let things go. I can't"'(The Guardian, 11 March 2019) <https://www.theguardian.com/world/2019/mar/11/greta-thunberg-schoolgirl-climate-change-warrior-some-people-can-let-things-go-i-cant> accessed 3 January 2025.

[475] Ibid.

understandings that have been offered to rationalise the situation, a break with the available "distribution of the sensible" … in which political discourse attributes meaning to actions and events'.[476] Thunberg does not want politicians to *talk*, to deliberate and negotiate over the planet's future – she wants them to *panic* and to act upon it. As Wall notes: '[D]issensus is not the disagreement of petty politics … it resides on an ontological level.'[477] Thunberg's dissensus exposes the intervals, the gaps between appearance and reality, in the 'consensus' reached at each of the consecutive rounds of negotiations under the UNFFCCC. This consensus is reflective of how the sensible is distributed when the PA for example states, that the agreement has been reached, '… noting the importance *for some* of the concept of "climate justice", when taking action to address climate change'.[478] According to the given distribution of the sensible, climate justice is important for some, but not for everyone, and therefore rather negligible.

Dissensus calls into question how the dominant order conceptualises notions such as rights-bearers, freedom, or equality.[479] It challenges the ways in which a given order partitions between who counts, as opposed to who has no part in any given setting. With this, utterance of dissensus is linked to political subjectification, that is: 'the notion of becoming-subject'.[480] Importantly, as Wall notes, the distribution of the sensible may well count different subjects for different purposes: The same people may count in one respect, but not in another by the everyday order.[481] The climate refugee stranded in another country counts, in that she must abide by the domestic laws, must not steal or trespass. She may even have rights, such as not be killed arbitrarily or subjected to ill-treatment. In these respects, she counts. At the same time, she has no right to vote, to democratic participation. The adult citizens of said state count in various respects, they have set of rights and duties vis-à-vis that state, though they only count *as* citizens that states. The distribution of the sensible does not afford them any rights, to demand – in solidarity with the climate refugee

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[476] Christodoulidis 2021 (n 49) 510.

[477] Wall (n 76) 122.

[478] PA, preamble. Emphasis my own.

[479] Christodoulidis 2021 (n 49) 553-554.

[480] Ibid 493.

[481] Wall (n 76) 94. As Rancière notes: 'Man and Citizen do not designate collections of individuals. Man and Citizen are political subjects. Political subjects are not definite collectivities. They are *surplus names*, names that set out a question or a dispute (*litige*) about who is included in their count. Correspondingly freedom and equality are not predicates belonging to definite subjects. Political predicates are open predicates: they open a dispute about what they exactly entail and whom they concern in which cases.' Rancière 2004 (n 472) 298.

– that their state should protect other states' citizens from the climate disaster by giving them a new home (except in very grave circumstances) – or by doing more to hat the crisis in the first place.

While example is quite abstract, it serves at illustrating what dissensus is about: Despite the global nature of the climate catastrophe and the globalised response thereto, the order of the police has a very specific way of partitioning what, where, and when someone is ought to utter a claim – for a right, for example – and by whom such a claim will be deemed uncalled for, or, in other words: When such a claim appears as *strange*.[482] As I will explain in greater detail in chapters 6 and 7, dissensus may well take the form of a claim uttered in the language of rights. Since while rights *as law* reside firmly within the distribution of the sensible, there is another way to employ rights – as strategy of rupture, as a carrier of a radical demand. In the final paragraphs of this section, I turn to the question how dissensus appears in, respectively: *to*, existing legal collectives.

Legal collectives' limits: A-legality

As outlined before, Lindahl presents a useful way of thinking about legal collectives beyond the state in the era of transnationalisation.[483] We have seen that legal collectives will emerge through a certain spatial (as well as temporal, personal and substantial) closure. Such collectives can be vastly different things, from indigenous tribes to 'conventional' nation states, to multinational corporations. The following paragraphs further unpack Lindahl's approach to account for the instances in which rupture, through the utterance of dissensus, comes to the fore within a specific legal collective. In those instances, legal collectives are confronted with what Lindahl refers to as 'a-legality'. A-legality, as I will argue, signifies the 'other', that lies beyond the capitalist mode of production which law – qua Marxian perspectives – cannot transcend. As such, it assists in the delimitation of what the invocation of rights seeking transformative change can, and what it cannot do.

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[482] See Lindahl infra p 105.
[483] See supra at 3.1.2.

The character of a legal collective, for Lindahl, 'is defined by recognisable patterns of behaviour that respond to concrete mutual normative expectations about who ought to do what, where and when' which presupposes, at least to some extent, a collective point of view.[484] A legal collective only exists as such if it engages in an act of self-closure: A collective includes what it calls 'law' as opposed to 'non-law', by which Lindahl does not mean other kinds of normative orders, but simply anything that 'falls beyond the pale of a collective's legal order'.[485] From the collective's viewpoint, legal, as well as illegal behaviour falls under the heading of law, while non-law designates the collective's other, all the rest. As Lindahl explains:

> Non-law is a residual (rather than negative) category because it encompasses everything that is irrelevant and unimportant with a view to realising the normative point of joint action by a given collective. Hence the closure which separates law from non-law does not involve 'picking out' and describing what falls beyond the compass of law; for non-law would then cease to be a residual category. In other words, a legal collective never entirely 'knows' what it relinquishes to its domain of non-law; no 'decision' can be taken about everything which closure abandons to non-law. This means that non-law is the domain over which a legal collective exercises no control.[486]

Note what has been said about contradiction and open dialectics before: There is no fixed normative proposition, no 'other' of property that one could invoke to present a better, final alternative.[487] Whatever comes up as a potential alternative resides in the domain of non-law. As such, it is impossible to grasp and define, until it appears *to* any given legal collective.

The divide between a legal order and what it leaves unordered, according to Lindahl, is a limit. In contrast to boundaries, which join and separate elements within a unity – such as defining when a behaviour is legal as opposed to illegal – a limit

> marks the discontinuity and asymmetry between legal (dis)order and its correlative domain of the unordered. *Limits are neither legal nor illegal* because the distinction between the legal and the illegal presupposes spatial, temporal, subjective, and material

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[484] Lindahl (n 112) 84-85.
[485] Ibid 92.
[486] Ibid 93.
[487] Supra at 3.2.2.

> boundaries which join and separate dimensions of behaviour within the unity of a legal order.[488]

Yet a limit only ever appears indirectly, through situations which call into question the boundaries between legal and illegal as drawn by a collective. This is where a-legality comes into play:

> [A]-legality concerns behaviour and situations that, having been relegated to the sphere of what a legal collective views as irrelevant and unimportant, *emerge* therefrom to question what a concrete collective calls legal (dis)order. By questioning how a legal order sets the *boundaries* that give shape to the distinction between legality and illegality, a-legality challenges how a concrete legal collective draws the *limit* between legal (dis)order and the unordered.'[489]

A-legality does not always *deliberately* contest how a legal collective distinguishes between what is important and what is not. By way of an example, Lindahl refers to the progressive sharpening of environmental laws against behaviour that used to be viewed as legal because environmental concerns did lie beyond the pale of legal collective's normative point of joint action: 'Such concerns were unimportant and, as such, belonged to the domain of the unordered; environmentally destructive behaviour *emerged* as a question for legal collectives, even though such behaviour did not intend to contest what counted as legal behaviour'.[490] Yet by calling legal boundaries into question, a-legality intimates other possibilities, that is: different ways of delimiting what is legally relevant and what is not. 'A-legal behaviour', Lindahl writes, 'is behaviour in which the unordered manifests itself within the legal order as another possible ordering of behaviour which interferes with the practical possibilities made available by the legal collective it questions'.[491] As Christodoulidis formulates it, a-legality 'must make some kind of intrusion into the domain … of legality if it is going to bring into question legality's normal, quotidian distributions of entitlement and right',[492] or, as we might say with Rancière: the distribution of the sensible.

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[488] Lindahl (n 112) 95.
[489] Ibid 158.
[490] Ibid 159.
[491] Ibid 158.
[492] Christodoulidis 2021 (n 49) 513.

Since a-legality is a relational concept that depends on the specific legal collective it 'intrudes', there can be no answer to the question 'what is a-legal?'.[493] Instead, taking a phenomenological turn, Lindahl invites us to ask: '"What is the mode of appearance of a-legality?" In other words, how does behaviour appear as more and other than merely legal or illegal, and to whom?'.[494] Borrowing from phenomenologist Edmund Husserl, Lindahl sees a-legality appearing as the 'strange'.[495] The legal order in which one, in principle, knows who ought to do what, where, and when, partakes the structure of what Husserl calls *Heimwelt* (home-world), a world 'already known, already familiar'.[496] In contrast with the familiarity of the home-world, Husserl observes that 'the strange is first of all the incomprehensible strange', yet, as he adds, 'anything, however strange, still has a core of what is known, for otherwise it could not be experienced at all, not even as strange'.[497] Lindahl transposes this observation to the appearance a-legal behaviour appears as something that 'still has a core of what is known'.[498] – Can the a-legal appear through the invocation of rights? It may well do, as the two following examples indicate.

Say, a citizen of a country had claimed in 1949,[499] that her home state, by not protecting the atmosphere form excessive GHG emissions, would violate here right to life and that the respective activities therefore should be regulated. Back then, the Council of Europe was aware of the right to life it had just enshrined in the new legal instrument it had created. Yet, the theory that the burning of oil and coal could lead to massive climatic change was not widely known.[500] What was known to the legal collective was that certain behaviour of private market actors can have negative consequences and therefore must be regulated – for example the treatment of factory workers. It would have remained incomprehensible, why the burning of oil and coal should be regulated. A demand to that end would have appeared as strange. Now, for another example: A citizen in 2024 claims that her home state violates the rights of *another* countries' citizens by entering an agreement under Article 6 PA, buying carbon credits from a reforestation programme that not only displaces

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[493] Lindahl (n 112) 159.
[494] Ibid.
[495] Ibid 160.
[496] Quoted ibid.
[497] Ibid.
[498] Ibid.
[499] As per the example above at 82.
[500] However, see Bert Bolin, *A History of the Science and Politics of Climate Change* (CUP 2010) Part I.

the local population, but also is financed by a tech-billionaire to whose growing fortune the sale of any credits contributes. A lot in this scenario could possibly qualify as known: That the tech billionaire amasses a fortune to an extent that it may destabilise entire political systems, that the reforestation programme in question is likely to displace people, even that carbon markets are denounced as morally reprehensible, 'false' solutions. At the same time, it arguably appears as strange to the state in question that rights are to protect citizens of *another* state. Even more strange it appears to ask from the state to stop engaging in the market exchange of carbon. While this exchange – or the fact that carbon can, at all, be subject to property rights – may appear morally reprehensible to some, yet there is no question about it being legal or illegal *in principle*. It is just happening. Asking to stop it, appears strange. The normative point of the a-legal behaviour remains out of reach from the perspective of the legal collective in question: '[A]-legality questions a concrete legal collective by demanding the realisation of practical possibilities which *block* or *obstruct* the realisation of the practical possibilities made available by a legal order.'[501] Asking a state to disengage with carbon markets, would imply to block the possibilities made available to the state to engage in carbon trading as provided for by the PA to which it is a signatory.

For Lindahl, a-legal behaviour is, at the same time, 'inside and outside the legal order': It is inside, in that it is accessible, either as illegal behaviour, or as behaviour that is not sanctioned by law – but it is outside, because it is inaccessible in terms of its normative point'.[502] Lindahl distinguishes between 'strong' and 'weak' dimensions of a-legality. In its weak dimension, a-legality appears from the domain of the unordered, but is, in principle, orderable by the legal order in question. The weak dimension of a-legality requires 'other practical possibilities than those which have been actualised as legal empowerments, but which nonetheless remain within the realm of the collective's *own* legal possibilities'.[503] The legal collective can respond to this challenge by resetting the boundaries of legality and illegality, by shifting the limit between legal (dis)order and the unordered: At some

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[501] Lindahl (n 112) 160. Lindahl, throughout his book, refers to the example of a group of French activists who, to protest against governmental reforms targeting the poor, entered a luxury department store and loaded their panniers with pricey victuals for which they refused to pay and which they subsequently distributed the among unemployed persons queuing in front of the governmental employment offices. His point is that while this behaviour may well qualify as illegal, it withdraws itself from an instant normative qualification.

[502] Ibid 160-161.

[503] Lindahl (n 112) 164.

point, it appeared expedient for states to shift the legal boundaries to regulate their fossil fuel consumption, which, to some extent, remains within the realm of their own legal possibilities. While only minimalist and incremental – for example through the ban of oil boilers or petrol and diesel cars – as a general matter, fossil fuel consumption moved from the unordered to the legally ordered, thereby shifting a limit. Within this limit, the boundaries between legal and illegal may be re-drawn, for example by more activities or installations involving fossil fuels transitioning from being formerly legal, to becoming illegal.

Contrastingly, the strong dimension of a-legality cannot be accommodated by a given legal collective within the range of possibilities accessible to it. If weak a-legality involves a normative claim towards at what is unordered but orderable, in its strong dimension, a-legality denotes a normative claim 'to the extent that it is *unordered and unorderable*'.[504] The legal collective cannot include the a-legal in its own normative terms, since it exceeds the legal empowerments that are available or could be made available by it. Hence, while in its 'weak' dimension', challenges posed by a-legality can be responded to by shifting the limit between legal (dis)order and the unordered, a-legality in its strong dimension 'lays bare a *fault line* between what a collective can order – the orderable – and what it cannot order – the unorderable'.[505] Unlike limits, fault lines cannot be shifted: 'they must be *overstepped*, and in being overstepped lead from one legal collective into another'.[506] As such, Lindahl argues, a fault line 'marks the *end* of a legal collective in the spatial and temporal senses of the term: a place and a time beyond which it can no longer exist'.[507] Which possibilities a collective has at its disposition, as opposed to what surpasses these, 'only becomes apparent retroactively, *après coup*, in the authoritatively mediated responses to a-legality'.[508] The authoritative assessment about which practical possibilities are a collective's own possibilities can take the form of an individual norm such as a court ruling, or a general norm such as a statute and it allows the collective to re-identify itself and subsist as such over time.[509] Confronted with a strong dimension of a-legality, however, Lindahl contends, a collective cannot legitimate itself with respect to what

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[504] Ibid 165.
[505] Ibid 175.
[506] Ibid.
[507] Ibid.
[508] Ibid 177.
[509] Ibid 207.

radically questions it – it cannot shift but only suspend or violate constitutional norms. In other words: 'A politics of a-legality can only respond to unorderable normative claims by acknowledging that they belong to an outside which it ought to safeguard *as* an outside.'[510] Returning to the examples above: A claim towards refusing a state (and its inhabitants) to engage in market exchange, or to abolish private property, tout court, would arguably not lie within the practical possibilities of any modern state order, given that property sits at the very core of rights and values protected by national constitutions.[511] In Marxian terms: Whatever transcends the commodity form of law clearly lies beyond the fault line of modern nation states.

It appears conceivable to call forth the a-legal through strategic litigation triggering the 'authoritatively mediated response' through a court decision. As I will argue in chapter 5, rights-based litigation may well redraw the boundaries between legal and illegal and shift the limit between the ordered and the unordered (and, in that, engage a-legality in its weak form). A *law* – in line with new legal institutionalist accounts – the invocation of rights may shift boundaries, entailing a shift in existing distributions. Yet, when innovative interpretations are suggested and tested in court decisions, the interruption takes place within the referential unity of the legal system, as a question of legal interpretation.[512] There is no meta-level disruption of the normative order, or with its distribution of entitlements.[513] While legal interpretation might well function as internal critique, the 'interruption' is still handled within the referential unity of the legal system. As such, *legally* speaking, demands for 'system change' will not – and indeed cannot – succeed in courts.

Yet, there is another, additional role for rights: as *demands*, they might call forth the a-legal in its strong dimension. Christodoulidis points to a-legality's quality as negation: As a 'strange', a-legality 'is never imported as affirmation but remains the sign of persistent negativity'.[514] As such, a-legality may confront the and resist the mechanisms that remove the collective's order from contestation.[515] For Christodoulidis, a-legality as negation only

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[510] Ibid 254.
[511] This will be discussed in the following chapter.
[512] Christodoulidis 2021 (n 49) 514.
[513] Ibid 515.
[514] Ibid 513.
[515] Ibid 511.

makes sense in what Lindahl considers to be its 'strong' dimension: For a-legality to be productive as negation, it must carve out a space for itself.[516] The negation introduced a-legality is not, cannot and should not be productive to the order of things: it professes a radical discontinuity, the emergence of something novel'.[517] Insisting on the negative, Christodoulidis claims that a-legality's demand is irreducible to the semantic field of legality: 'Unless it is sustained *politically* as a refusal to yield to it … legality will only ever call "the a-legal" forth … by calling it into line'.[518] Hence, for Christodoulidis, a-legality cannot be entertained in the domain of legal meaning yet has the potential to be instructive of rupture and the relation between legality and the political as well as in the context of strategy. Consequently, while for Lindahl a-legality – in its weak dimension – 'irrupts' from the outside to reform the system, for Christodoulidis a-legality solely gains traction if it refuses to yield to legal reform.

The final two chapters of this thesis will deal with the role human rights play in this respect. However, before I turn to right's potential to lever agency, I will need to explore how 'green' market expansion is constituted by and through law and, how law's shape the dominant 'economy of representation' against which any claim of *politics*, of a-legality in its strong sense, must be uttered.

3.3 Conclusion

The present chapter has laid the foundation for my analysis of law's role in new 'green' constitutionalism. As I have argued in the first part, law – by its very form, and through its institutions – does play a constitutive role, in further entrenching the market paradigm of new constitutionalism. In the second part of this chapter, I have pointed that law can be employed strategically, as strategy of rupture, as *politics* proper, confronting the existing order with dissensus, with a negation it cannot productively integrate and co-opt, thereby acting as immanent critique.

As Jaeggi notes, immanent critique not only exhibits, but also produces connections – it is concerned with analysing a given social situation 'in a way that establishes a connection

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[516] Ibid 516.
[517] Ibid 517.
[518] Ibid.

that would not be visible without the analytical procedure of the critic', since it is only against this background that something may appear as internally contradictory.[519] This is my attempt here: To establish connections and to expose the contradictions they are fraught with. There is more than one connection to be made: Firstly, the connection between the regulatory approach to climate change (as a 'common concern') via market mechanisms and the institution of property. Secondly, the connection between the institution of property and the original act of appropriation, on which subsequent maldistributions rest. And, thirdly, the connection between property and (human) rights.

For Jaeggi, a dialectical contradiction denotes 'two contradictory components of a connection [that] are at the same time constitutively dependent on each other, so that what appears to be unconnected is shown to be connected'.[520] As will become clear throughout the remainder of the thesis, property and human rights express such a contradiction: Only through rights' metaphysical, essentialist rendering, property rights and human rights come into being. In their legalised form, all human rights are proprietary. Hence, confronting property rights means confronting them with other, proprietary claims. The method of immanent criticism, Jaeggi concludes, starts from necessary systemic contradictions, to become 'the ferment of a transformation process that overcomes the deficiencies of the situation marked by these contradictions'.[521] This means, that 'the means for solving the problem or the crisis are located *in* the situation itself', the transformation process is prefigured in the situation though it exceeds and thereby transcends it.[522] Transcending the contradictions of 'green' market expansion, I will argue in the next chapters, requires transcending property.

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[519] Jaeggi (n 375) 207.
[520] Ibid 208.
[521] Ibid.
[522] Ibid 209.

4. The common roots of rights and property

The previous chapter has highlighted that law, at once, is both: A constitutive element of capitalist relations of production, but also a device that employed strategically, to expose the inner contradiction of the present system. Looking at the category of rights is illustrative in this respect: Given the intimate relationship of human rights and private property in the European intellectual tradition, some critical scholars have questioned human rights' capacity to carry any emancipatory potential in present-day circumstances.[523] Others have instead stressed that both, property and human rights, are ambivalent, and that both, at once, hold oppressive and emancipatory potential.[524] To the latter end, human rights have been described as 'floating signifiers' which, in themselves, are not linked to any particular 'signified' or concept, and, as such, open to be co-opted in social, political, and legal struggles for whatever end those invoking human rights see fit.[525]

While highlighting the tension between the those two positions, I am not aiming at resolving this tension in one way or the other. Rather, what I want to stress is the following: Firstly, whenever human rights are invoked against particular symptoms of 'green' market expansion, they are invoked against some form of proprietary claims. Secondly, at the same time, human rights are proprietary in themselves: they express a claim of 'having', rather than 'being'. Thirdly, it is possible to employ rights on a different register, that speaks to a mode of 'being', rather than 'having'. This, however, only happens outwith the realm of liberal law which remains tethered to law's commodity form. Looking at rights this way, helps to explain which possibilities human rights may harbour to confront 'green' market expansion on one hand, and, on the other, which limits rights claims will encounter in this respect.

In the two chapters following this one, I will further unpack my claim. In this chapter, I briefly discuss the common roots of property and human rights, highlighting that property rights, too, essentially are human rights. As such, any claim invoking human rights against 'green' market expansion arguably is confronted with a counter-claim towards the

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[523] See eg Baxi (n 78); D'Souza (n 78).
[524] Grear 2012 (n 123) 182.
[525] Douzinas (n 69) 255.

protection of existing property rights against which competing claims must be balanced. In the following chapter 5, I describe how 'green' market expansion essentially rests on multiple layers of proprietary rights which are the result of prior acts of appropriation, namely: the appropriation of land, and the more recent appropriation of the atmosphere. By commodifying ever more aspects of life, property rights interpenetrate entangled ecosystems, severing parts from the whole, resulting in the diremption of communities. Property rights and the avenues they provide for accumulation may – with new legal institutionalism – be 'tweaked' to effect more equitable outcomes, yet the western-liberal property paradigm remains dominant. In chapter 6, I look at rights' potential to confront the Western-liberal property paradigm. While recent proposals to extend rights' subjects remain influenced by the Western-liberal human rights paradigm, human rights claims may act as a carrier medium for radical demands, rupturing the given distribution of the sensible.

4.1 Liberal individualism, property, and the origin of subjective rights

Contemporary accounts of often assume that human rights and property serve contrasting, inherently contradictory ends.[526] This characterisation is reflected in common law jurisdictions where human rights and traditional property rights are seen to exist in a relation of tension that has to be negotiated.[527] From this perspective, human rights can be seen as a counter-discourse that challenges the exclusionary discourse of dominant property paradigms.[528] Yet, Radha D'Souza points to the paradox arising when social movements invoke rights, given their intimate relationship with property: 'On the one hand, critical scholars and activists complain about commodification that puts money value on everything. On the other hand, they affirm the rights to tangible and intangible "things".'[529] As such, the author notes, rights and commodification 'are in fact mirror images' since they both presuppose proprietary relationships.[530]

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[526] Grear 2012 (n 123) 181-82.
[527] Ibid 184.
[528] Kevin Gray and Susan Gray, 'Civil Rights, Civil Wrongs and Quasi-Public Space' (1999) 1 European Human Rights Law Review 46.
[529] D'Souza (n 78) 59.
[530] Ibid.

Historical analyses indeed emphasise that the very idea of subjective rights first emerged from the idea of *dominium* over property.[531] As Christoph Menke notes, private property is 'the basic category of subjective rights'.[532] Indeed if rights are understood as descendants of the Western-liberal tradition, the right to property stands at the very beginning: Seventeenth-century philosopher John Locke's *Second Treatise of Government* is often cited as the foundational text for human rights given its influence in the build-up to the American and French revolutions.[533] For Locke, 'every man has a property in his own person: this no body has any right to but himself'.[534] By 'being master of himself, and proprietor of his of person', man, through his labour, rightfully appropriates what previously has been common.[535] As such, man is seen as the proprietor of his very own 'properties': Life, liberty and estate.[536] Hence, the core commitment of liberalism is the commitment to alienable property as inalienable right.[537] Rights, for Locke and other Enlightment thinkers, were called on to explain and justify the origins and distributions of private property: Against feudal property privileges and in order to legitimise the appropriation of land, they argued that labour was the justification for private property and the reason why some were entitled to more wealth than others.[538]

The advent of rights coincides with transition from feudalism to capitalism in which Western-liberal property's rendering as an abstract legal relation came about: A shift from 'land law', where people held non-exclusive rights in land, towards property law, 'through which a person or a legal entity owns an exclusive abstract legal right in relation to a commodifiable resource or asset (such as land)'.[539] With the process of enclosure between the 16th to 18th century, an absolutist conception of property gained foothold: Property and property rights in 'things' like land were now considered to be absolute, private and individual in nature.[540] Hence, a shift took place from a more relational conception of

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[531] Douzinas (n 69) 244.
[532] Christoph Menke, *Critique of Rights* (Polity Press 2020) 147.
[533] Wall (n 76) 28.
[534] John Locke, *Second Treatise on Government* [1690] (The Floating Press 2016) para 27.
[535] Ibid para 44.
[536] Ibid para 123.
[537] D'Souza (n 78) 20.
[538] Ibid 66.
[539] Graham (n 197) 282.
[540] Ireland (n 7) 269.

property towards a more reductionist, individualistic and possessive one.[541] The reification of property as 'thing' went hand in hand with the rise of the capitalist market economy and the 'replacement of old limited rights in land and other valuable things by virtually unlimited rights'.[542] Whoever had absolute property in a 'thing' could assert it against the rest of the world, whereas those with other rights relating to the property, such as use-rights, only could assert them against all others but not the owner.[543] Property, with 18th-century jurist William Blackstone, became 'sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual'.[544] While this conception of property describes an ideal type, rather than reality, Blackstone's conception remains 'powerfully suggestive ... [and] still moulds our thinking about property'.[545]

The intimate relationship between property and rights in Western liberalism has led political philosopher C.B. MacPherson to conclude, that this very relation has become the organising grammar of the political vocabulary, leading to a world of 'possessive individualism', where the individual is seen as the proprietor of 'his own person and capacities'.[546] In this view, the subject of human rights is the 'possessive individual' whose 'property and properties' are the object of protection.[547] For Locke, Wall explains, the purpose of all social compacts is the preservation of property, to which not only material goods and individual liberties belong but also one's very own life is conceptualized as a 'man's property' in his own person. [548] As Nichols observes:

> [I]n Western legal and political thought there is a tight relation between rights and property, between *ius* and *dominium*. So close is this association that the two are often spoken of as if virtually synonymous. It is not merely the case that property is considered an important species of right but rather the inverse: rights are legal

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[541] CB MacPherson, *Property: Mainstream and Critical Positions* (Toronto University Press 1978).
[542] Ibid 7.
[543] Pistor (n 269) 30.
[544] Blackstone (n 120).
[545] Carol Rose, 'Canons of Property Talk, or, Blackstone's Anxiety' (1998) 108 Yale Law Journal 601, 603–4.
[546] CB MacPherson, *The Political Theory of Possessive Individualism* (OUP 1962) 3.
[547] Wall (n 76) 38.
[548] Ibid.

> constructs we routinely conceptualize as possessions of personhood, as objects of personal ownership. My rights are precisely that: *mine*.[549]

Possessive individualism's subject is a 'possessing' individual that needs to be protected against other possessing individuals who could damage its 'properties'.[550] In consequence, this means that entirety of modes of being is reified and human 'properties' like free expression, movement and association are protected in the same way as stocks, shares, enclosed land and houses, that is: as a way of 'having', rather than 'being'.[551]

The link between human rights and property in liberal thought was already exposed by Marx, who, in *On the Jewish Question*, held that '[t]he practical application of the human right of freedom is the right *of private property.*'[552] For Marx, the human right of freedom 'is not based on the connection of man with man, but much more on the separation of man from man', and that '[i]t is the *right* of this separation, the right of the individual who is *limited,* enclosed within himself'.[553] Marx argued that with 'freedom' becoming increasingly understood as the 'freedom from others', the right to property could effectively be seen as an antithesis to solidarity, as 'the right to enjoy and dispose of one's possessions as one wills, without regard for other men and independently of society', that is, 'the right of self-interest'.[554] With this, the introduction of individualised rights, for Marx, has wider implications for the organisation of society.

As discussed previously in chapter 2, Marxist jurists – most prominently Evgeny Pashukanis – have pointed to law's conditionality on the 'commodity form', that inextricably links law to the to a structure consisting of individualised, commodity exchanging subjects.[555] In this vein, Christoph Menke, notes it is the very form of *rights* – upon which modern law rests – that has disempowered the political community in that it legitimised, and naturalised the elevation of the individual over and above the social.[556] As

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[549] Robert Nichols, *Theft is Property! Dispossession and Critical Theory* (Duke University Press 2020) 122. Emphases in original.
[550] Wall (n 76) 38.
[551] Ibid 43.
[552] Karl Marx, 'On the Jewish Question' [1843] in Joseph J O'Malley (ed) *Marx, Early Political Writings* (CUP 1994) 28, 45.
[553] Ibid.
[554] Nichols (n 549) 132.
[555] Supra at 2.1.1.
[556] Menke (n 532) 3.

he insists: 'The form of rights comes before their content, goal and effect, because this form is not neutral.'[557] Throughout his book, Menke traces how the emergence of individual, claims-based rights has replaced classical, normative conceptions of justice with a conception that emphasises the protection and validation of individual autonomy.[558] The author argues that while in antique societies law served a social function, the emergence of private property and the private sphere required new mechanisms to protect individuals' rights individuals over their private domains.[559]

For Marx, as Menke explains, the bourgeois revolutions and their declaration of rights *naturalise* the social, which happens when something becomes the content of legal claims: The equal rights declared in the revolutions 'combine normativity and facticity'.[560] While they involve a normative claim towards equality, 'they do this by – actively – presupposing factual conditions that they thereby remove from political governance'.[561] As a result, the declaration of rights, gives rise to a 'civil' society, thereby degrading politics into administration, into the *police*.[562] For Marx, bourgeoise revolution 'resolves civil life into its component parts without revolutionising these components themselves or subjecting them to criticism'.[563] In other words: the creation of rights afford formal equality to the members of a society that, however, is characterised and structured by prior factual inequalities. Through introducing rights, these inequalities are normalised and removed from political contestation. As a result, capitalist property relations nowadays are seen as a natural condition requiring no further justification or explanation.[564]

According to Marx, capitalist exploitation only succeeds, when the available range of possibilities within view, for the exploited, appears as natural.[565] Capitalism's possibilities only appear as natural and inevitable givens if one does not (or cannot) recognise that the background structuring conditions that make these possibilities available are a product of

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[557] Ibid.
[558] Sabeen Ahmed, 'Critique of Rights' (2022) 21 Contemporary Political Theory 45.
[559] Ibid.
[560] Menke (n 532) 3.
[561] Ibid.
[562] Ibid 3-4. Police here is understood in the sense Rancière employs it, see supra at 2.2.3.
[563] Marx 1843 (n 552) 49.
[564] D'Souza (n 78) 66.
[565] Nichols (n 549) 63.

an arbitrary, and historically contingent set of circumstances.[566] Arguably, the same applies in the context of 'green' market expansion. Markets are made to appear inevitable to solve the environmental crisis. The Scottish government, for example, promotes 'green' private investment by stating that a 'finance gap' of about 20 billion pounds exists with regard to achieving net-zero targets and that '[t]here is simply not enough public money to fill this gap, nor would it be fair to use public money in this way'.[567] That there well would be other ways to achieve significant emission reductions, namely by cutting down fossil fuel extraction, or by encouraging carbon-sequestrating land management practices through command-and-control legislation instead of financial incentives, is obscured.

Only because existing property relations in the capitalist economy are seen as an inevitable given, and only because changing something about them appears as undue interference in individuals rights, requires to address the crisis through market exchange and the creation of further property rights. Meanwhile, human rights, qua Marx, can be seen complicit in this development, in that they remove existing allocations of property from contestation: Human rights purport to give everyone equal rights in a highly unequal world,[568] where rights to property extremely unevenly distributed. With this, the question arises: Can human rights, at all, serve at emancipatory ends to confront 'green' market expansion, given that they help to conceal and normalise the uneven distribution of property – or are they, conversely, complicit in further entrenching 'green' markets, thereby potentially exacerbating distributive inequalities?

4.2 Contingent histories of property and human rights

In line with Marx' critique of rights, contemporary scholars rooted in Marxist and TWAIL traditions have argued that the right to property, alongside colonial subjugation, is the constitutive element of the modern human rights paradigm.[569] Thus for critics, '[t]he subject at the heart of the notion of modem human rights emerges as the patriarchal, raced

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[566] Ibid. This question is closely linked to Marx' discussion of ideology, however, I will not expand on this concept here in detail. See on ideology: Thomas Klikauer, 'Business Ethics as Ideology' (2017) 45 Critique 81.

[567] 'Nature Investment Partnership: FAQs' (Nature Scot, 2024) <https://www.nature.scot/doc/nature-finance-pilot-faqs> accessed 9 December 2024.

[568] Moyn 2018 (n 64).

[569] See eg Baxi (n 78); D'Souza supra (n 78).

and appropriative rational property owner'.[570] Yet, others object to a view that, qua the above, depicts human rights as inextricably linked with a Western-liberal property paradigm based on exclusion. Anna Grear, for example, argues that human rights and property potentially share a 'productive contingency' that might be exploited in the cause of environmental and distributive justice.[571] For Grear, the meanings of human rights are always 'up for grabs', they 'remain 'contestable, semantically and semiotically unsettled, radically porous, open to co-option, colonization and, importantly, never, ever above the interplay of power relations'.[572] While they may be colonised by transnational corporations, they may equally harbour 'the emancipatory the present limits of rights in the name of rights and the justice they reach for'.[573]

Other scholars have pointed that the nexus between rights and property that dominates much of rights' understanding is not inevitable: Ilan rua Wall challenges the necessity of conservative presuppositions about rights such as liberal capitalism, individualism, statism and even law, narrowly conceived, that foreclose the possibilities immanent in the discourse.[574] He questions the dominant narratives of human rights and points to the need to understand the heterogeneity of their history. To see human rights solely as descendants of the liberal tradition, he argues, misses the significance of the democratic in human rights.[575] Rights, he notes, 'have been a strategy or technology of many different and radically conflicting political theories.'[576] However, the possibilities rights were seen to hold have been closed by a selective historiography: For example by privileging the use of rights in the abolition of slave trade while at the same time silencing the way human rights were employed in the Haitian revolution. When the slaves revolted in the latter, Wall observes, it was the property itself that revolted and challenged the existing property system.[577] Haitian slaves, he writes, 'materially instantiated a different and radical human rights designed to rupture the given state of the situation'.[578] Conversely, the abolition of the slave trade happened in a top-down manner and merely out of an economic rather than

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[570] Grear 2012 (n 123) 180.
[571] Ibid 182.
[572] Ibid 177.
[573] Ibid.
[574] Wall (n 76) 134.
[575] Ibid 3.
[576] Ibid 27.
[577] Ibid 18.
[578] Ibid 20.

humanitarian reasons.[579] Yet, it is the latter event, not the former that has become to be seen as an important landmark in the history of human rights.

In a similar vein, concerned with the genesis of property in its 'homelands' through the enclosure movement, Susan Marks describes the process in which Western-liberal property conceptions took precedence over succumbing worldviews that would not see private property or the prevalence of markets as an inevitable necessity.[580] Tracking the parallel histories of 'diggers' and 'levellers' movements resisting enclosure in 17th-century England,[581] the author highlights how 'diggers' claimed that the new freedoms gained through the English civil war – including the freedom to own private property – 'were freedoms that left the people as a whole in bondage' and what was required instead was 'common freedom',[582] and that no man had fought said war to 'enslave himself, to give power to men of riches, men of estates, to make him a perpetual slave'.[583] Early rights discourses in Britain, Marks argues, carried a – largely forgotten – radical tradition of human rights that pre-dates and contrasts the commonly invoked assertion that human rights' 'origins' can be found in the French and American revolutions.[584] As the author points out, conception of freedom that animated some of the early human rights theorists such as Mary Wollstonecraft and Thomas Spence was seen to encompass access to land and resources, rather than just freedom from undue interference of a powerful sovereign with and individuals' civil and economic liberties.[585] These theorists, Marks argues, shared – to various degrees – the critique of the 'persistence of feudal forms of inherited privilege' and concerns about the material 'conditions in which popular sovereignty would be realised'.[586] However, most of these more radical accounts have fallen into oblivion, eclipsed by prominent figures such as Thomas Paine – the author of *Rights of Man* and – erasing alternative proposals specifically concerned with '[t]he division of property; immense wealth and squalid poverty; privilege linked to aristocratic descent, and both in

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[579] Ibid 23-24.

[580] Susan Marks, *A False Tree of Liberty: Human Rights in Radical Thought* (OUP 2019).

[581] The terms refer to the actions of digging out hedges and tearing down fences in the agrarian movement in England resisting the enclosures of the 17th century. While the 'levellers' advocated for equal rights, they did not support the idea of common ownership as supported by the more radical 'diggers' or 'true levellers' around protestant reformer and activist Gerrard Winstanley (Ibid Chapter IV).

[582] Gerrard Winstanley in Marks 2019 (n 580) 89.

[583] Thomas Rainborough quoted in Marks 2021 (n 580) 78.

[584] Marks 2019 (n 580).

[585] Ibid.

[586] Ibid 117.

turn linked to the accumulation of riches … [and] wage-slavery'.[587] With this, Marks unveils a rights tradition 'in which what is important is not the right to property, but instead the dispossession of the unpropertied'.[588]

Human rights history, Wall argues, was 'pacified' and 'purified' from the events like the ones just described. Instead, dominant textbook variants depict human rights as a story of continuous progress along a clear, retraceable path. The repetition of the world history as 'human rights story' elides the contingency and heterogeneity human rights history – and renders the current human rights system necessary.[589] The effect of this reduction of heterogeneous historical movements is that the radical of rights is withdrawn, the 'radical heart' of human rights is limited to its historical specificity.[590] This suggests that human rights may well be thought otherwise. As Grear argues: despite the fact that human rights share fundamental ontological suppositions with liberal property paradigms and liberal legal systems, there remains a human rights energy which reaches 'beyond' the 'now' of law towards the 'not yet' of justice as law's endlessly elusive horizon.[591] However, as Marks stresses, it is required to be attentive to the ways in which particular distributions, material orderings, and ideational continuities may create historical forces that drive historical developments in certain directions.[592] The author insists that while current arrangements can be changed, this change unfolds within a context that includes systematic constraints and pressures', which means that 'things can be, and quite frequently are, contingent without being random, accidental, or arbitrary'.[593]

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[587] Marks 2019 (n 580) 120. Tough Marks stresses that Paine himself – though not widely discussed today – advocated for agrarian justice and some redistributive property reforms. See Anna Chadwick, 'Re-appropriating the Rights of Man: some reflections on A False Tree of Liberty by Susan Marks' (2021) 9 London Review of International Law 407, 415.

[588] Marks 2019 (n 580) 3.

[589] Wall (n 76) 13-14.

[590] Ibid 14-15.

[591] Grear 2012 (n 123) 178. See for this argument in general Douzinas (n 69).

[592] Chadwick 2021 (n 587) 413.

[593] Susan Marks, 'False Contingency' (2009) 62 Current Legal Problems 1, 2.

4.3 Conclusion

While human rights' contested history is subject to a wider debate of its own,[594] my point here is that human rights and property cannot be thought of as entirely separate, or necessarily contradictory things, but instead are interrelated in complex and manifold ways which I will further unpack throughout the next two chapters. The intimate connection between human rights and property suggests that it is worth looking carefully, not only at the rights claims expressed in the context of 'green' market expansion, but as well at the structuring background conditions against which these rights claims are expressed. Scholars' appraisals of rights' emancipatory potential despite their roots in Western-liberal thought vary. On one side of the spectrum, D'Souza contends that rights' binary structure rooted in the thinking of the Enlightment era sits uncomfortably with the world's contemporary institutional architecture which dissolves the dualism between 'public' and 'private', between 'state' and 'citizen', to include anything and everyone – corporations, states, labour and civil society organisations – as a subjects of rights into the totality of a 'stakeholder' society.[595] On the other, Cotula argues that the emancipatory potential of human rights in struggles for social justice cannot be limited to the ways in which those rights have previously been construed in mainstream fora or in the light of their purported historical origins, but instead must take into account how their invocation may create ruptures within existing ideational matrices.[596]

As I will further unpack throughout the remaining chapters, my contention is that both propositions are correct. Regardless of whether or not rights can be thought of independently, detached from the Western-liberal property paradigm, it is required to look at the ways in which property is implicated in 'green' market expansion. Since whatever human rights claims are expressed to confront processes of commodification and marketisation, they will operate against opposing property rights. As noted above, scholars have pointed that property, as well as human rights, may be conceptualised in a way that transcends the confines of individualism and exclusion associated with Western-liberal renderings of property and rights. The next chapter explores the role of property, as a legal

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[594] See for contrasting positions: Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010) and Anne Orford, *International Law and the Politics of History* (CUP 2021).

[595] D'Souza (n 78) 61. Arguably, this proposition is largely congruent with the critique discussed under the rubric of new constitutionalism.

[596] Cotula 2020 (n 61) 517.

institution as well as a wider paradigm, and interrogates property's boundaries and limits. The following chapter then turns to human rights and their capacity to transcend their Western-liberal roots.

5. Property's constitutive role in 'green' market expansion

In the third chapter, I have discussed two theoretical approaches critically engaging with law's constitutive role in the political economy: While traditional Marxist accounts highlight that the legal form is inextricably linked to commodity exchange and thus to the capitalist mode of production, new legal institutionalism, too, emphasises the role of law as an enabling device in capitalism, but stresses that, depending how law is 'tweaked', more or less equitable outcomes are possible. In the preceding chapter, I hinted that looking at rights' potential requires to look at property first, given property itself, is the very basic category of legal rights.

This chapter highlights how property, as a legal institution and as paradigm,[597] is central to market-based approaches to climate mitigation and environmental protection more broadly: The property rights created by 'green' market expansion overlap and blend with existing property relations in multifaceted ways. As such, property rights in 'green' commodities precipitate upon on an uneven landscape that has been formed by prior processes of appropriation and commodification through law. As Christodoulidis observes, law is the 'major facilitator of the integration of capital, both underwriting the distribution of advantage and principle in society and releasing … an ever increasing range of range of commodities into the flow of capital'.[598]

Arguably, the very emergence of 'green' market expansion is owed to the reluctance to interfere with and restrict private property rights in the first place: Its necessity only arises, because the dominant property conception sees interventions through 'command and control' legislation as interference with individual liberty which, while potentially not unconstitutional, still is not deemed desirable. It also appears noteworthy that holding on to a framing that sees state intervention as 'limitations' of an otherwise nearly 'absolute' right implicitly acknowledges the owner's entitlement to rent-seeking: If not prohibited by law, the power of property enables its holder to extract value. Instead of prohibiting environmentally detrimental activities, 'green' markets open up another avenue for

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[597] On property as an institution See Jim W Harris, *Property and Justice* (Clarendon Press, 1996).
[598] Christodoulidis 2009 (n 107) 10.

property – in land, above all – to exploited to extract surplus value. Even if property is not absolute, it still enables the accumulation of wealth and power.

5.1 'Green' markets: layers of proprietary relations

Carbon markets do not operate in isolation, but instead are entangled in a complex set of proprietary relations. This includes the ownership of units generated and traded (such as carbon 'credits'), the ownership of the source producing carbon 'units' (such as a forest or a renewable energy infrastructure), and the underlying ownership of the land upon which this source is located.[599] In most cases, human rights claims will not arise from the existence carbon markets as such, but instead from the source producing carbon commodities, or from competing demands over the underlying land. An example in this respect is the *Fosen* case discussed in chapter 7, concerning competing claims over land from the local indigenous reindeer herders and a wind-power consortium.[600] Hence, while the objects traded in carbon markets, generally speaking, can be conceptualised intangible 'quasi-property rights',[601] these intangible property rights, for their creation, depend on tangible, physical assets which themselves are subject to property rights. Hence, while property rights in carbon are a constitutive element of 'green' markets, they do not exist in isolation.

Whatever source generates carbon 'credits', those credits, economically, arguably are but only one factor within a larger assemblage.[602] The *Fosen* case, again, is an example where the prospect to generate income from carbon markets was one contributory factor, alongside public subsidies, and the desire to invest in an export renewable energy that has led to the erection of the infrastructure that was deemed incompatible with the traditional land use by the Indigenous inhabitants.[603] Another example would be the purchase of a

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[599] Steven A Kennett et al 'Property Rights and the Legal Framework for Carbon Sequestration on Agricultural Land' (2005) 37 Ottawa Law Review 171, 206; Dehm (n 11) 261.

[600] Infra at 7.2.

[601] Dehm 2021 (n 11) 178; 192. The general conditions of the model contracts envisioned to guide market arrangements under REDD+, for example, structure the legal relation is question as a 'purchasing agreement' requiring the seller to transfer 'the full legal and beneficial title and exclusive right' of emission reductions to the purchaser'. Ibid 190.

[602] Assemblage here is employed in a general sense 'as number of things gathered together; a collection, group, cluster' see Oxford Dictionary <https://www.oed.com/dictionary/assemblage_n?tab=meaning_and_use> accessed 4 December 2024.

[603] Infra at 7.2.2.

Scottish estate by a 'green' investor: As research on the Scottish land market suggests, investment opportunities in carbon markets may be seen as but only one factor among others, including the availability of grants and subsidies, tax exemptions providing opportunities to minimise the tax burdens of high net-worth individuals, speculation on rising land prices, and profits from residential and commercial developments.[604]

Carbon markets are best seen to create an *additional* layer of property rights on top of existing ones, creating a complex and fragmented landscape of multiple, overlapping, and interdependent proprietary relations. While property is a 'dangerously slippery word',[605] which may refer to very different things depending on context and jurisdiction,[606] proprietary rights are – generally speaking – enforceable against anyone who interferes with the exercise of the property right.[607] 18th-century jurist William Blackstone famously described the right to property as the 'sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'.[608] As such, they give owners significant powers non-owners who may bear the brunt of the owner's conduct.[609]

As a right to exclude, private property amounts to a private form of power exercised by the owner which is operationalized through property's legal form: Property law creates a system that 'necessarily gives private owners power over non-owners'.[610] This finding is

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[604] Hollingdale (n 39).

[605] Low and Lin (n 166) 387.

[606] Lorenzo Cotula, 'International Investment Law and Climate Change: Reframing the ISDS Reform Agenda' (2023) 24 Journal of Investment and Trade 766, 774. As Tom Allen puts it, the exact meaning of 'property' does vary according to its function in a given context, 'and so we might conclude that it simply has no general meaning'.[606] There is no fixed immutable list of rights that attach to property. See Tom Allen, *The Right to Property in Commonwealth Constitutions* (CUP 2009) 119.

[607] Johnson et al (n 168) 5. In general, civil as well common law systems characterise rights either as proprietary (rights *in rem*) or contractual rights (rights *in personam).* See eg Max Radin, 'Fundamental Concepts of the Roman Law' (1925) 13 California Law Review 207. Yet the distinction between the two is often not entirely straightforward. Instead, much will depend on 'the relations and notions that flow between people, things and actions' when determining whether something is property or not. See Geoffrey Samuel, 'Property Notions in the Law of Obligations' (1994) 53 The Cambridge Law Journal 524, 544.

[608] Blackstone (n 120).

[609] Supra 5.1.

[610] Margaret Davies, 'Re-forming property to address eco-social fragmentation and rift' (2021) 12 Journal of human Rights and the Environment 13, 30. As such, the author writes, private property is 'a form of private power exercised by the owner over the rest of humanity and over nature'. Ibid. See also Pistor (n 269); Margaret Davies, *Property: Meanings, Histories, Theories* (Routledge 2007); André J Van der Walt, 'Property and Marginality' 81, in Gregory Alexander and Eduardo Peñalver (eds) *Property and Community* (OUP 2010).

not new, almost a century ago, legal realists have, in the domestic context, highlighted how the private relations of property and contract create public forms of authority, power and coercion amounting to 'economic sovereignty'.[611] Robert Hale demonstrated that those with the power to acquire all the rights of ownership in the products produced from a site are thereby (provided property rights are enforced by the state) delegated by the law 'a discretionary power over the rights and duties of others'.[612] Similarly, Morris Cohen argued that when property law protects future revenue from property, alongside an economic power to command the services of those who are economically dependent, 'we have the essence of what had historically constituted political sovereignty'.[613] Hence, property and property rights, particularly in productive resources, are about power, and about power not only over things, but over other people.[614]

5.1.1 Property in carbon, property in land

While Blackstone's absolutist conception of property hardly exists in present-day practice, it remains influential in shaping the dominant property paradigm.[615] Especially in the Anglo-American legal tradition, private property is deemed to occupy a superior position as 'keystone right' which may accommodate restrictions only by way of exception.[616] In the United States, for example, property protection is guaranteed by the so-called 'takings clause' enshrined in the Fifth Amendment to the United States Constitution, according to which no private property shall be taken for public use without just compensation. The clause does not only protect outright expropriation, but also has given rise to the doctrine of 'regulatory takings' according to which the government must pay compensation if

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[611] Dehm 2021 (n 11) 176.

[612] Robert L Hale, 'Coercion and distribution in a supposedly non-coercive state' (1923) 38 Political Science Quarterly 470.

[613] Morris R Cohen, 'Property and sovereignty' (1927) 13 Cornell Law Quarterly 8.

[614] Ireland (n 7) 281.

[615] According to the Oxford English Dictionary, a paradigm denotes a 'pattern or model, an exemplar; (also) a typical instance of something, an example' <https://www.oed.com/dictionary/paradigm_n?tab=meaning_and_use#31853767> accessed 3 December 2024.

[616] See James W Ely, *The guardian of every other right: a constitutional history of property rights* (OUP, 3rd edn, 2008). See also Ireland (n 7) 279; Lynda L Butler 'Property's Problem with Extremes' (2020) 55 Wake Forest Law Review 11-12; AJ Van der Walt *Property in the margins* (Hart Publishing 2009) 15.

regulatory reforms incidentally impact on the value of a person's property right.[617] Similarly, under international investment law, corporate property enjoys strong protection, requiring the payment of compensation if a host states' exercise of public authority unduly interferes with protected rights or expectations.[618] As highlighted in chapter 2, new constitutionalism involves the tendency to grant 'hard', enforceable rights to transnational corporate actors, while human rights are protected through 'soft', non-binding codes of conduct.[619] This creates a significant power imbalance in favour property holders, including private actors operating in 'green markets'.

As hinted, there is a tendency to conceptualise carbon credits and allowances – defined as equivalent to $1tCO_2$ – as 'hybrid regulatory created property right'.[620] Even if the property right is created by a public body in the first instance – in the case of emission allowances in an ETS, for example – the allowances are generally considered to be property once they are allocated to an operator via auction or trade.[621] The characterisation of carbon commodities as property may affect whether a holder may bring a claim against a national government for interfering with their property rights guaranteed by state law and

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[617] Johnson et al 12. More generally, 'regulatory takings' are concerned with the question whether an interest that a state acquires as a result of regulation amounts to property and therefore warrants compensation. See Allen (n 606) 122.

[618] Cotula 2023 (n 606) 772-73. Technically, investment treaties protect investments, rather than property, and while the two notions overlap, they do not coincide. However, while investments can take many forms, including arrangements outside formal property relations, Cotula stresses that property is a dynamic notion. A dynamic understanding, property does not only encompass holding a formal legal title in specific assets, but may also encompass expectations and revenue generating potential. Ibid. Indeed, most claims under ISDS are not concerned with direct or indirect expropriation – the latter referring to cases where a government interferes with (but does not take ownership of) an investment – but instead complain about breaches of 'fair and equitable treatment' (FET) standards.[618] FET is employed to determine whether an investor could reasonably have expected that regulations, taxes and other measures would stay the same for the duration of an investment.[618] See Hui Pang, 'Investor-State Dispute Settlement in Renewable Energy: Friend or Foe to Climate Change?' in: Jolene Lin and Douglas A Kysar (eds) *Climate Change Litigation in the Asia Pacific* (CUP 2020) 144; Kyla Tienhaara et al, 'Investor-state dispute settlement: obstructing a just energy transition' (2023) 23 Climate Policy 1197, 1200.

[619] Supra at 2.3.

[620] Carol M Rose, 'Expanding the choices for the global commons: Comparing newfangled tradable allowance schemes to old-fashioned common property regimes' (1999) 10 Duke Environmental Law & Policy Forum 45. The UK High Court decided in 2012 that allowances under the ETS were considered to be 'property right of some sort' under English common law. See *Armstrong DLW GmbH v Winnington Networks Ltd,* [2012] EWHC 10 (Ch). Similarly, in 2017, the European Court of Justice treated ETS allowances as 'possessions' or 'assets'. See *Arcelor Mittal Rodangeet Schifflange SA v State of the Grand Duchy of Luxembourg*, Case No C321/15 [2017] ECLI EU C 2017 79.

[621] Johnson et al (n 168) 8; Leonie Reins et al, 'Legal nature of EU ETS allowances – Final report' (European Commission, Directorate-General for Climate Action 2019) 48 <https://data.europa.eu/doi/10.2834/014995> accessed 3 December 2024. The report, however, is careful not to make any suggestions to whether allowances *should* be qualified as property.

constitutional norms.[622] For example, it has been submitted that the holder of an emission entitlement could hold the state liable in case it adjusts its ETS in a way that deprives the holder of some or all of the entitlement's value.[623] The US 'takings' doctrine further could apply if the government introduces command-and-control regulations that make cleaner technologies and processes mandatory, thereby affecting the value of existing emission entitlements.[624]

Potentially, claims relating to property rights in carbon could as well arise under investor-state dispute settlement (ISDS),[625] however, as of today, disputes around property protection in the context of decarbonisation efforts rather concern legitimate expectations arising from fossil fuel extraction licenses.[626] One recent example is the *Rockhopper* award concerning claims of unjust expropriation of an oil and gas company in the context of Italy's decarbonisation policy.[627] Yet, ISDS cases have started to concern renewable energy production, too: As of spring 2019, 43 ISDS cases were failed against Spain due to a change in the country's energy policy including a reduction of renewable energy subsidies and the imposition of a 7 per cent tax on renewable energy power plants.[628] This example aptly demonstrates that the relation between state and capital under neoliberal environmentalism is not only 'a parasitic growth battened upon a productive host',[629] but instead actively complicit in 'green' market extension, creating enforceable proprietary claims on behalf of financial and corporate actors. The complex interlinkage between 'green' markets, subsidies, foreign investment and renewable energy is also illustrated by the *Fosen* case discussed in chapter 7, concerning indigenous resistance against a wind farm project.

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[622] Johnson et al (n 168) 5.

[623] Ibid 12. Emphases omitted. See also Low and Lin (n 166) 382.

[624] Ibid 13; Henry A Span, 'Of TEAs and Takings: Compensation Guarantees for Confiscated Tradeable Environmental Allowances' (2000) 109 The Yale Law Journal 1983, 1990. To that end, in order to avoid claims under US 'takings' doctrine, California's ETS, for example, explicitly states that emission entitlements do 'not constitute property or a property right'. See Johnson et al (n 168) 12.

[625] See Raúl Pereira de Souza Fleury, 'Carbon Credits and Carbon Markets: Future Challenges for ISDS' (2023) 40 Journal of International Arbitration 495.

[626] Tienhaara et al 2023 (n 618)

[627] See Toni Marzal, 'Polluter Doesn't Pay: The Rockhopper v Italy Award' (*EJIL:Talk!*, 19 January 2023) <https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award/> accessed 6 January 2025.

[628] See Pang (n 618).

[629] See Hunter (n 327).

Generally, investment treaties constrain states' policymaking to the extent that they guarantee foreign investors protection from actions that would substantially deprive those investors of the value of their investment or undermine it their legitimate expectations of future revenue and profit.[630] Even though this will not offer investors protection from any changes in a host states' regulatory regime, several cases have found that investors may expect 'stable and equitable conditions of the legal and business framework'.[631] It has been found that the mere threat of filing ISDS lawsuits against particular policy changes in one country may effect a 'regulatory chill' across different jurisdictions, delaying the uptake of pubic policies that involve the introduction of regulations that may affect the investors' profits.[632] Hence, while framed in neutral technical language, the transnational investment law regime is intrinsically linked to the distribution of wealth and power.[633]

If fossil fuel extraction is protected though proprietary rights under international investment law, this influences states' capacities to adjust their share in GHG emissions contributing to the depletion of the carbon budget. With this, legal realists' finding that property endows owners with sovereign-like powers obtains a planetary dimension: Property, and the protection it enjoys, grants property holders powers to decide over continued fossil fuel extraction, which, in turn, will decide over the fate of the global climate. Yet, while property rights in carbon are essential for 'green' markets to operate, the constitutive role of property in 'green' market expansion is not confined to carbon commodities since, as pointed previously, the creation of new carbon 'credits' relies on property in underlying resources which, ultimately, depends on property in land. Yet, property in land is, in itself, often structured by a complex set of proprietary relations.

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[630] Tienhaara et al 2023 (n 618) 1200.

[631] See Pang (n 618) 147.

[632] See Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 Transnational Environmental Law, 229.

[633] Cotula 2023 (n 606) 787. On the relation between investment treaties and global inequality, see Nicolás M Perrone and David Schneiderman, 'International Economic Law's Wreckage: Depoliticization, Inequality, Precarity' in Emilios Christodoulidis et al (eds), *Research Handbook on Critical Legal Theory* (Edward Edgar 2019) 446; Gus Van Harten, *The Trouble with Foreign Investor Protection* (OUP 2020) 1-6. While most domestic courts as well as the ECtHR adopt a deferential standard when assessing whether regulatory measures affect an investment to such an extent that the investor must be deemed to have been expropriated, arbitral tribunals have been require states to compensate foreign investors at full market value or, by applying the standard of general international law whereby states must 'wipe out all the consequences' of their conduct, to pay investors the cash flow they would have earned had the measure not been implemented, which may add up to very large sums. The present investment law regime has come under increasing pressure, and attempts to reform the system are currently underway.

Underlying property relations: Land

The existence of commodified carbon 'units' – which then can be circulated as 'intangible quasi-property rights' is dependent upon a source producing those units. While carbon commodities in ETS initially are created through stipulating the existence of a limited number of allowances that is planned to decrease over time,[634] additional emission reductions or carbon 'credits' depend on natural or technical processes in which emissions are reduced or avoided – for example by establishing carbon sinks such as forests, or by building a renewable energy infrastructure that is eligible to produce 'avoided emissions' under a baseline credit system such as the CDM.[635] Consequently, it has been suggested to distinguish between *carbon as property* which can be assigned to whomever holds or buys the respective carbon 'allowances' or 'credits', and *carbon rights* more closely tied to the source of emission reductions and either flow from the *ownership of the asset* or the *control of the activity* that lead to reduction of GHGs by ways of avoided emissions or enhanced sequestration.[636] As such, carbon rights link the intangible commodity of carbon 'credits' with the physical world that is required to store carbon and to generate emission reductions in the first place.

Carbon rights are multifaceted, context-dependent and difficult to categorise,[637] however, generally, those rights, too are mostly referred to in the literature as type or form of property right.[638] As such, carbon rights, too, might – in the future – be subject to the protection of legitimate expectations of investors. Yet, as hinted above, those rights are, in complex ways, entangled within a broader assemblage, potentially including infrastructure assets, subsidies, and proprietary rights in land. Consequently, 'green' market expansion plays an increasingly important role in land rush dynamics.[639] Those dynamics themselves, too, are undergirded by a combination of property rights, contractual instruments, and

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[634] Supra at 2.1.

[635] Ibid.

[636] Anna Knox et al, *Forest Carbon Rights Guidebook: A Tool for Framing Legal Rights to Carbon Benefits Generated through REDD+ Programming* (USAID 2012). As Dehm writes: Such a property right in sequestered carbon – or the 'carbon *actually* retained by the soil or vegetation' – is not a right in or an attribute of the land per se, but rather the right to a 'potential "product" or value of the land'. See Dehm 2021 (n 11) 171.

[637] Yet, in line with Dehm 2021 (n 11) 257, the focus here is not on addressing 'the unresolved, and often jurisdiction- specific, technical legal questions relating to the definition and characteristics of carbon rights' but instead concerned with the powers conveyed by carbon rights within the green economy.

[638] Kennett et al (n 599).

[639] Fairhead et al (n 17).

transnational trade and investment rules.[640] In some situations – for example if a Scottish estate-owner plant trees on her land and sells the credits generated though the WCC – the property rights in land and carbon rights converge. In other instances, arrangements between landowners and parties developing a project aimed at carbon sequestration or avoidance may take the form of a lease or a transnational investment contract.[641]

Such agreements, again, are likely to be subject to stringent standards under international investment law, protecting foreign investors from governments' exercise of regulatory powers.[642] As mentioned above, this may result in host states' reluctance to interfere with respective projects, even if human rights concerns arise. However, as Lorenzo Cotula stresses, transnational land deals often merely accelerate pre-existing processes of commodification and social differentiation, and public policies are often the main drivers of large-scale land acquisitions .[643] As Philip McMichael observes, the alienation of land by national governments through long-term lease agreements with private investors leads to a 'sovereignty paradox': Political leaders and local elites, by way of exercising sovereign powers they have at their disposal, hand over those powers to transnational corporate actors.[644] Again, it becomes apparent that 'green' market expansion does not occur against, but instead in complicity with the state.

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[640] Özsu (n 26) 225.

[641] Kyla Tienhaara, 'The potential perils of forest carbon contracts for developing countries: Cases from Africa' (2012) 39 The Journal of Peasant Studies 551. As noted above, interests in things that fall short of full ownership may nonetheless qualify as property when it comes to protection against interference with property rights. See Allen (n 606) 122.

[642] Lorenzo Cotula, 'The New Enclosures? Polanyi, international investment law and the global land rush' (2013) 34 Third World Quarterly 1605, 1607. The author notes that it is 'safe to say that the acquisition of rights over land for plantation agriculture … would qualify as a protected investment under virtually all investment treaties, and also under customary international law'. Ibid 1615. Arguably, the same applies to the acquisition pf land for planting trees for carbon sequestration through renewable energy projects.

[643] Ibid 1611. As David Schorr stresses, in a colonial context, 'public' things 'may well be the results of prior thefts and appropriations', and that the central role that forced collectivisation in the context of colonial dispossession – often operating alongside and in tandem with, rather than in necessary opposition to privatisation – must not be ignored. See David Schorr, 'Savagery, Civilization, and Property: Theories of Societal Evolution and Commons Theory' (2018) 19 Theoretical Inquiries in Law 507.

[644] McMichael (n 258) 37.

5.1.2 Property as bundle of rights

Property theorists have variously stressed that property is, in fact, not a 'thing', but a set of relations.[645] Against absolutist renderings of property, 'green' markets are illustrative of a property conception that sees property as 'bundles' of rights.[646] Recent approaches to that end are commonly associated with the work of political scientist and economist Elinor Ostrom and her colleagues who conceptualise property as a set of different rights to undertake particular actions in specific domains.[647] They identify five property rights for so-called common-pool resources, i.e. resources that can be used simultaneously in different ways by various actors: (1) Access: the right to enter a defined physical area and fully enjoy its non-subtractive benefits; (2) withdrawal: the right to obtain resource units or products of a resource system; (3) management: the right to regulate internal use patterns and to transform the resource by making improvements; (4) exclusion: the right to determine who will have access rights and withdrawal rights, and how these rights may be transferred; (5) alienation: the right to sell or lease management and exclusion rights.[648] Each of those components can be individually assigned to different persons according to their position in relation to the property, yet only owners enjoy all of the rights enumerated towards the property in question.[649] Arguably, markets in carbon and other 'green' markets are precisely enabled by a conceptualisation of rights as a 'bundle' that permits to create various layers of property rights within one single resource. For the context of ecosystem service payments, Thomas Sikor and Colleagues propose a slightly revised framework distinguishing between use rights, control rights, and authoritative rights.[650] The latter, highest-order rights include 'definition rights', which relate to the power to define a resource in ways that delimit the 'discretionary space available for the exercise of control

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[645] See among many O'Connell (n 87).

[646] See eg David Takacs, Forest Carbon: Law and Property Rights (Conservation International 2009) 14; Lasse Loft et al, 'Taking stock of carbon rights in REDD+ candidate countries: Concept meets reality' (2015) Forests 1031.The conceptualisation of property as a 'bundle of rights' is not new, and scholars have variously attempted moving beyond unitary conceptions of property, rethinking property rights as a bundle of several types of rights in relation to natural resources. See eg Antony M Honoré, 'Ownership' in Anthony Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 107.

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

[648] Ibid.

[649] Ibid.

[650] Thomas Sikor et al, 'Property rights regimes and natural resources: A conceptual analysis revisited' (2017) 93 World Development 337.

rights', and 'allocation rights', that is, the 'right to assign control rights to particular actors'.[651]

If higher-order rights are exclusively granted to state agencies and transnational actors (be it financial institutions, development agencies or private/corporate investors), payments for ecosystem services, such payments, the authors argue, may be understood as a form of 'compensated exclusions' which is, however, a minimal redress for denying local communities' a role in exercising control and authoritative rights.[652] As will be discussed in chapter 7 in relation to the *Fosen* case, this finding not only applies in the context of forest governance but also in cases where other 'green' developments, such as renewable energy projects, encroach upon indigenous lands. The disaggregation of different rights in the 'bundle' of property rights, does not only open up additional avenues to extract surplus value from a certain resource – it also may create or perpetuate inequitable situations by creating a layered, multilevel system of rights where 'lower order' rights of access and use reside with local communities, while 'higher-order' rights to excise authority and control over resources are granted to international actors.[653] Whilst exercising their lower-order rights, local actors may be embedded in in what has been termed 'conditional localised self-governance', in which higher-order rights ensure that self governance is only exercised in specific ways that facilitate 'global' interests.[654] Thus, even if rights to access, use and benefits have been devolved to a lower level, the ways in which those rights are exercised may already have been determined by higher-order rights holders.[655] Consequently, looking at proprietary rights granted at local levels must be accompanied by scrutinising how they are enmeshed in broader governance frameworks and power relations.[656]

The conception of property rights as 'bundle' enables transnational market actors' grip on individuals: Just as in other contexts such as the production of food crops or biofuels, 'green' markets may not even require the formal acquisition of land, but can extract surplus value from local populations and peasant farmers by entrepreneurialising them through

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[651] Ibid 340.
[652] Ibid 338.
[653] Dehm 2021 (n 11) 257; 270.
[654] Ibid. Emphasis in original.
[655] Ibid 283.
[656] Ibid 293.

creating dependencies on global value chains.[657] Instead of growing food for themselves, they grow carbon 'credits' to supply the resource and carbon intensive lifestyles of the affluent in the global North. Since the property in the carbon they produce, ultimately, belongs to someone else, they have not much of a choice than to continue if they want to sustain their living – in particular if growing carbon is the pathway that is envisioned and supported by regional and national authorities as well as international development agencies.[658]

I will briefly return to Lindahl's account of legal collectives to illustrate the above. Again, take the example of the multinational oil company Shell and the indigenous forest-dwelling community I made in chapter 3.[659] This time, Shell takes a lease over the land – but upon falling oil and gas prices, and contrary to its initial intentions, Shell decides not to use the land for fracking but instead to manage and restore the forest to offset their own carbon emissions, or to sell the emission reduction certificates to other companies. The indigenous community is allowed to exercise its access rights, practice a subsistence lifestyle by hunting and harvesting fruits, and worship their ancestors who are believed to live in a certain tree species. Since the indigenous community has no business in engaging in transnational carbon markets and can do whatever it did before, regardless of Shell's involvement in these markets, no competing claims over exclusive territoriality arise. The host state is happy that Shell's carbon investment and the indigenous peoples can co-exist, mostly without any incidents. As far as the normative point of joint action is concerned, no competing claims to exclusive territoriality arise between the three collectives (the state, Shell, the indigenous peoples).

Now, what if Shell – still retaining the management rights, which it exercises through a subsidiary company – decides to replace that tree species with another one, that grows more rapidly and has a better capacity to store carbon? – In this case, every single specimen of the sacred tree represents a conflict between two competing claims over exclusive territoriality which can only be resolve in favour of one (cutting down) or the other (do not cut down). In another scenario, the Indigenous peoples do only have the use,

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[657] See ibid 282-83.

[658] On entrepreneurialising local populations see Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books, 2015).

[659] Supra 3.1.2.

but also the management rights, deciding themselves what trees to plant and which ones to fell, getting rewarded for successfully managing the forest, with higher rewards being paid if faster growing species are planted. Eventually, this leads to internal conflicts among the indigenous community about what should be prioritised: the ancestors' trees in which some of the members of the community have stopped believing long ago, or the higher reward held in prospect? Since more members of the community are concerned about the deterioration of their material conditions, they decide to cut down their ancestors' trees ands replace them with the more efficient species. The ancestors are now worshipped in a shrine that has been built for this purpose instead. The normative point of joint action of the indigenous legal collective has shifted, in terms of who is doing what, where, and when. As the *Fosen* case discussed in chapter 5 will show, despite very different circumstances, this example is not merely hypothetical.

Now, in a third scenario, the carbon price falls drastically since the major emitters have left the Paris Agreement, and oil and gas prices instead rise due to the outbreak of severe conflicts across the globe. Shell therefore abandons the idea of using the forest for carbon offsetting but instead opts to engage in fracking in the forested area. The host state does not approve of this and plans to enact legislation prohibiting fracking, yet Shell threatens to sue the host state under the bilateral investment treaty for a sum that amounts to a significant share of that state's GDP and therefore decides to tolerate Shell's conduct. The indigenous community is forced to give up its traditional lifestyle, some of its members relocate, others stay and work in the fracking industry. With the dissolution of the community, there is no longer a normative point of joint action.

In a fourth scenario, Shell does not take a lease over the land in the first place. Instead, in collaboration with the host state, the company offers to compensate individual members of the community for the carbon they sequester by managing a certain part of the forest in exchange for the carbon rights generated through the management practice: In order to enable this, the commonly held land gets divided into parcels that are held by individual families.[660] An international consortium of property developers sees the thriving forest in a mild climate as an ideal spot to create holiday homes. They offer the indigenous families a

[660] See for a similar example Chadwick et al 2024 (n 68).

comparatively attractive sum for selling their land parcel. Gradually, the community dissolves, the normative point of joint action vanishes.

This is a fictional and simplified scenario. The ways in which 'green' market expansion impacts on land and those who live on an off it will vary. The point here is that just because property rights to one resource – namely land – are not individual and absolute, this does not necessarily mean that they yield more equitable outcomes when it comes to the distribution of wealth and power. Further, the example illustrates that 'green' market expansion does not happen in isolation, but on top of existing dynamics with which it interacts in complex and multifaced ways. As will be discussed in the next section, these dynamics are not a result of any sort of market failure, but intrinsic to commodification and marketisation.

5.2 Property as appropriation: making and taking of property rights

As Stephen Gill and Claire Cutler note, 'the power of capital does not spring spontaneously as if from the virgin soil, but has historical as opposed to natural roots'.[661] In the previous section, I have discussed the constitutive role of property as an institution, and the ways in which various proprietary rights imbricate in 'green' market expansion. This section further problematises the fact that 'green' markets, firstly, do not operate on a neutral terrain, and, secondly, are themselves not created in a neutral way. Rather, they depend on prior processes of *appropriation* in which things – such as land and the atmosphere – were turned into property. Once things are appropriated and commodified, they are vulnerable to accumulation and elite capture. 'Green' markets hardly ever acknowledge the fact of prior accumulation as such, but instead, at least implicitly, purport to come to work against the backdrop of a contingent set of circumstances, thereby disavowing the structural violence linked to ways in which those circumstance came about in the first place.

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[661] Gill and Cutler (n 335) 18. See also Tzouvala (n 293) 23-24.

5.2.1 Enclosure and exclusion

The dominant property paradigm is generally characterised by two interrelated features: Abstraction and exclusion. These characteristics are linked to the genesis of Western-liberal property rights, which, as hinted in the previous chapter, replaced more a open and relational property concept. The processes of abstraction and exclusion are often exemplified by Britain's enclosure movement – culminating in the in the 18th century enclosure acts – which converted commonly held land into private property and extinguished previous rights to use private land in certain ways.[662] Activities previously considered a legitimate exercise of certain rights (such as grazing or gathering firewood) were criminalised and the regulation of land by custom and community ceased.[663] This transition from a land-based to a property rights-based model made it possible to freely alienate land and thus enabled the creation of national and global land markets through which wealth could be produced and accumulated.[664]

Marx referred to the process of enclosure described above as 'primitive accumulation' which, for him, was the precondition for capitalism to develop: Driven off the common lands from which they previously subsisted, peasants were turned into a 'surplus population' forced to sell their labour power in the nascent centres of industrialisation.[665] Yet, as Polanyi has pointed, contrary to the liberal ideal of a 'free' market, the road to this market was, in fact, 'opened and kept open by the enormous increase in continuous, centrally organised and controlled interventionism' which, through various legal reforms, consolidated previous enclosures.[666] Accordingly, scholars have hinted at the usefulness of the concept of primitive accumulation in the context of contemporary land-grabs to highlight the fact that the forcible expropriation of people is not achieved through internal mechanisms and dynamics of capitalist exchange relations, but through the coercive power of the state, including the coercive power of law.[667]

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[662] Ireland (n 7) 269.

[663] Ibid.

[664] Graham (n 197) 283.

[665] Özsu (n 26) 219.

[666] Polanyi (n 5) 146.

[667] Özsu (n 26) 219. For Özsu, the concepts usefulness derives from its recognition that the capitalist mode of production – which primarily generates surplus value through economic exploitation – 'is structurally dependent upon periodic waves of expropriation and displacement that are made possible by strong

However, as Robert Nichols notes, rather than with intrinsic injustices inflicted by primitive accumulation through land enclosure, Marx' main concern rests with the processes' role in creating a class of proletarianized workers.[668] As such, the account of primitive accumulation disregards instances of colonial dispossession where people were not driven off their lands to be exploited in emerging capitalist labour markets, but instead to make room for large-scale agricultural production and extractive industries.[669] Primitive accumulation therefore, 'is not Marx' story of property as such', it is 'the historically specific account of the origins of *capitalism'*,[670] and, as such concerned with capital's emergence out of non-capital, rather than subsumption of noncapital by already existing capital.[671] Since this chapter is concerned with the role of property, rather than capitalism in general, primitive accumulation does not fully explain the processes at work in 'green' market expansion which arguably is connected to the latter category, i.e. subsumption of noncapital by already existing capital.

In the context of 'green' markets, too, the creation of surplus value is not primarily undertaken through the exploitation of people, but through value extraction from the land itself, often requiring their displacement. While Marx predominantly was concerned with the *effects* of primitive accumulation, the focus here is on the *preceding process* that Polanyi later would call 'perhaps the weirdest of all the undertakings of our ancestors' – the process in which 'land' became rendered as 'property'.[672] This process essentially relies on the creation of modern property rights, instituting modern law's commodity form and thereby enabling the creation of capitalist market exchange. As will be further discussed in this section, the rise of 'green' markets can be thought of a similar process of enclosure and

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infusions of legally formalized violence and that forcibly alienate producers from the means of production'. Ibid 223.

[668] Nichols (n 549) 27.

[669] Ibid 27-28; 80.

[670] Ibid 80. Emphasis in original.

[671] Ibid 69. For this reason, Nichols submits, the colonial policies of the nineteenth and twentieth century are not analogous to processes of primitive accumulation in seventeenth-century England and, therefore, primitive accumulation cannot, without considerable reconstruction, be coherently extended to define a feature or dimension of contemporary capitalism. Ibid 69-70. There is considerable scholarly debate about whether primitive accumulation denotes a historically specific and completed process relating to the enclosure in capitalism's European 'homelands', or an ongoing phenomenon that has since moved towards the 'periphery' in the form of ongoing colonial dispossessions. I will not expand on this in detail here since, for the present purpose, appropriation provides for a suitable concept.

[672] Polanyi (n 5) 187.

subsequent redistribution of entitlements through market exchange – which may be aptly described by Carl Schmitt's *Nomos der Erde*.[673]

5.2.2 Schmitt's Nomos and the genealogy of the Anthropocene

As Margaret Davies argues: under capitalist conditions, all human-nature transactions may be viewed as 'not [as] an exchange but rather [as] an appropriation'.[674] Appropriation features prominently in the work of German jurist Carl Schmitt, whose *Nomos der Erde* has been variously employed by contemporary scholars to draw attention to the figure of appropriation or 'taking' as a key concept characterising the Anthropocene.[675] While Schmitt is mostly known for his close affiliation with the Nazis, to contemporary philosophers *Nomos* is of analytical value when looking at jurisprudence in the Anthropocene, in that it 'takes seriously the fabrication of space in relation with power'.[676] As Alain Pottage argues, even those who – rightly – are wary of Schmitt, will find in *Nomos*, and more explicitly his theory of 'land-appropriation' [*Landnahme*], 'a sense of "land-grab" that resonates closely and intensely with [the] understanding of the genealogy of our current situation'.[677]

For Schmitt, the act that founds a legal order requires an initial taking, in that 'no human being can give, distribute and apportion without taking'.[678] This primordial act is one of appropriation, *Landnahme*, a 'taking of land'.[679] Apparently drawing on John Locke, Schmitt notes the act of *Landnahme* generates a 'radical title', which informs the subsequent devolution and distribution of property rights.[680] Upon the original act of appropriation, a 'people' is able to distribute land and produce from it.[681] According to

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[673] Carl Schmitt, *Nomos of the Earth* [1950] (Telos 1996).
[674] Davies 2021 (n 610) 24.
[675] Pottage (n 99).
[676] Bruno Latour, 'Meeting on Carl Schmitt's Nomos of the Earth – a Report' (2015) <http://modesofexistence. org/meeting-on-carl-schmitts-nomos-of-the-earth-a-report/> accessed 5 December 2024.
[677] Pottage (n 99) 156.
[678] Carl Schmitt, 'Nomos-Nahme-Name' in *The Nomos of the Earth* (Telos, London 2003) 336.
[679] Lindahl (n 112) 195.
[680] Pottage (n 99) 171.
[681] Ibid.

Schmitt, the trinity of appropriation, distribution, and production builds a fundamental category of analysis for human and social sciences:

> Each of these three processes – appropriation, distribution, and production – is part and parcel of the history of legal and social orders. In every stage of social life, in every economic order, in every period of legal history until now, things have been appropriated, distributed, and produced. Prior to every legal, economic, or social theory are these elementary questions: Where and how was it appropriated? Where and how was it divided? Where and how was it produced?[682]

While developed from a very different ideological vantage point, Schmitt's questions link to historical materialisms' attention to genealogy, to an enquiry how present-day arrangements – upheld and secured by law – came into being in the first place. As will become clear throughout the remainder of this section, this is not only relevant for the question of land, but equally for subsequent appropriations, including the appropriation of the atmosphere building the foundation for the commodity exchange in 'green' markets.

According to Pottage, Schmitt's *Nomos* provides for an account 'of how legal order emerges not from a juridical mastery of cartographic space, but from appropriational events that precede and ground the order of positive law, and which condition its interpretation and operation'.[683] For Schmitt, Pottage argues, '[l]egal and political orders unfold from the space that is created by the act of demarcating and cultivating land'.[684] In the context of colonial dispossession, Cornelia Vismann draws on Schmitt's *Nomos* to illustrate how occupation and appropriation was justified by the alleged emptiness of land: 'The land that has no visible order imprinted in the soil is the land that authorises, merely by the absence of any order, the imprinting of such an order, which is to say, the occupation of the land.'[685] Land was appropriated upon ist apprehension of being *terra nullius*, an 'empty space' to be demarcated and cultivated.[686] Appropriation was justified in terms of its putative 'originality' which obscured prior land use arrangements thereby 'clearing the ground', allowing land to be figured as devoid of any visible order.[687] As

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[682] Schmitt (n 673) 1950 327-28.
[683] Pottage (n 99) 165.
[684] Ibid.
[685] Cornelia Vismann, 'Starting from Scratch: Concepts of Order in No-man's Land', in Bernd Hüppauf (ed), *War, Violence and the Modern Condition* (De Gruyter, Berlin 1997) 46, 51.
[686] Ibid.
[687] Pottage (n 99) 166.

Pottage argues, 'one finds in Nomos not only a compelling insight into the originary force and persistence of colonial appropriation, but also a sense of how this persistence was facilitated by the power to produce the topology within which those appropriations could be construed as legitimate'.[688]

For Schmitt, appropriation is a continuing process:

> from the land-appropriations of nomadic and agrarian-feudal times to the sea-appropriations of the 16th to the 19th century, over the industry-appropriations of the industrial-technical age and its distinction between developed and under-developed areas, and, finally, to the air-appropriations and space-appropriations of the present.[689]

With the technological production of things that can qualify as intangible property, a mode of production arises which is 'not premised on appropriation as the seizure of terrestrial materials or media', featuring an economy in which things that are 'beyond the measure of our physical senses' are rendered 'capable of being possessed', by way of technical and economic practices and discourses that render them perceptible and appropriable.[690] In other words, as Pottage notes: 'the medium or object of appropriation changes, but the logic of appropriation as the taking of a radical title remains constant'.[691]

As Pottage observes, critical theories of the Anthropocene rearticulate this sense of persistence of appropriation: Firstly, through the insistence that present-day asymmetries manifested in the distribution of environmental 'goods' and 'bads' are rooted in processes of appropriation and spoliation that began with the colonial era, and, secondly, by applying the concept of appropriation a variety of contemporary phenomena.[692] Indeed: Schmitt's *Nomos* can be employed to capture both: the appropriation of the atmosphere, as well as the uneven landscape created by the appropriation of land upon which 'green' market expansion precipitates. Further, Schmitt's triad of appropriation, distribution, and

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[688] Ibid 168. Cf Nichols (n 549) 54, who criticises that Schmitt's *Landnahme* and its application in political and legal theory merely sees the colonial context as a *field of application* of the concept originally describing European modes of territorial organisation: 'The colonial world is … treated as an *example* to which the original concepts apply rather than a *context* out of which a proximate yet distinct vocabulary may arise.'

[689] Carl Schmitt, 'Nomos-Nahme-Name' (n 678) 346-7. Emphases in original.

[690] Pottage (n 99) 170-171.

[691] Ibid 166.

[692] Ibid 166-67.

production can be usefully employed to describe the subsequent effects resulting from appropriation.

5.2.3 The appropriation of land and atmosphere

The principles that justified colonial occupation and appropriation highlighted by Vismann, re-emerge in the context of the international climate change regime, as Fahana Yamin highlights: The author observes that the approach taken to allocate emission quota under the KP reflects 'two traditional legal principles regulating the appropriation of things and territory historically favoured by [countries of the Global North]': firstly that 'whoever possesses as territory and exercises actual control over it acquires a legal title'; and secondly, where something is consider *terra nullius* 'the "first come-first served" principle establishes title, provided there is an actual display of sovereignty and authority'.[693] In a similar vein, Andreas Folkers reworks Schmitt's figure of *Landnahme* into a figure of 'atmosphere appropriation': Industrial powers appropriate the atmosphere by polluting it, they make it property to themselves to the exclusion of former colonies or dependencies and future generations.[694]

As Nichos argues in the context of colonial dispossession, the process whereby property in land came into being involved a peculiar fusion of 'making' and 'taking', creating an object 'in the very act of appropriating it'.[695] This fusion of 'making' and 'taking' of property also occurs in the case of 'green' market with the creation of carbon 'credits' and other 'green' commodities: As hinted above, the intuitional architecture of the climate change regime appropriated the atmosphere in a way that privileged historical polluters and allocated quasi-property rights in carbon to be traded in the market mechanisms central to the climate change regime. As Dehm notes, while international climate regime is authorised by invoking a 'common concern of humankind', it promotes policies that

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[693] Fahana Yamin, 'Equity, entitlements and property rights under the Kyoto Protocol: The shape of "things" to come' (1999) 8 Review of European Community and International Environmental Law 265, 270.

[694] Andreas Folkers, 'Resilienz als Nomos der Erde. Earth System Governance und die Politik des Anthropozäns', in Henning Laux and Anna Henkel (eds), *Die Erde, der Mensch und das Soziale: Zur Transformation gesellschaftlicher Naturverhältnisse im Anthropozän* (Transcript 2018) 137.

[695] Nichols (n 549) 145. The close interlinkage of 'making' and 'taking' of property can also be observed in contemporary instances of elite capture accompanying the formalisation of tenure rights in the Global South. See also Oliver De Schutter and Balakrishnan Rajagopal (eds) *Property Rights from Below: Commodification of Land and the Counter-Movement* (Routledge 2019) 5-6.

further marginalise the interests of those who are already most vulnerable to climate change through its support for and establishment of international carbon trading and offsetting strategies effectively introducing forms of 'carbon colonialism' or 'CO_2lonialism'.[696]

Upon appropriation: abstraction and accumulation

Property is allocated unevenly in its very creation trough appropriation. Yet, once it is created, through its rendering as an abstract legal entity – that is: by moulding it into its *legal form* – it acquires distinct 'properties' which, in themselves, raise various issues. As Nichols notes: when colonisers recognised property relations, 'they did not simply steal a stable, empirical object called "land" from Indigenous peoples'.[697] Rather, when transferring control over the land, 'they also recoded its meaning, rendering it a relatively abstract legal entity'.[698] Property rights are generally associated with the reduction of things to a fungible form, that is: the possibility to make them subject to transaction and to value them in monetary terms.[699] Critical property law scholar Nicole Graham employs the term 'dephysicalised property' to highlight that is the abstract legal right which has become to be seen 'as the true value and object of a property relation'.[700]

This entails that, whatever becomes the object of 'property' is reduced to become a unit defined by a certain exchange value: Through property's abstraction, as Davies puts it, '[a] patch of land that supports ecological diversity can be exchanged via the medium of money for a specified number of plastic buckets'.[701] Through making things fungible and convertible into monetary value, their distinct characteristics and wider value are 'flattened'.[702] The conception of property as bundle of rights discussed in the previous section, to some extent, works against this flattening by assigning various rights to various characteristics: The ownership of a patch of land may differ from the ownership of a particular tree on that land, which, again, may differ from the rights to obtain the fruits

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[696] Dehm 2016 (n 80).
[697] Nichols (n 549) 145.
[698] Ibid.
[699] See eg Cotula 2013 (n 642) 1616.
[700] Graham (n 197).
[701] Davies 2021 (n 610) 28.
[702] Ibid.

from this tree, or the carbon rights stored in the very same tree. The latter case requires even a higher degree of abstraction: To imagine one tonne of CO_2 can be imagined as a 'thing' or 'object'.[703] Yet, again, the flattening effect of property as a legal form, as discussed, will make very different things 'the same',[704] including the survival emissions of a gas cooker in the global South, and the luxury emissions of a weekend Christmas-shopping trip from London to New York.

Further, as Davies argues, since there is no limit as to the objects of property – be it land, or plastic buckets, or tonnes of CO_2 – any single person can own, accumulation of property amounts to accumulation of power over others.[705] As such, not only does the initial creation of property hinge upon pre-existing power relations – it also has the potential to further skew them. As Nichols puts it:

> [I]n the context of highly stratified and hierarchically ordered social relations, those in positions of relative power and privilege tend to view the codification of some object of interest under the rubric of 'property' as a means of securing access and control to it. For them, property anchors and solidifies. Conversely, for those in positions of relative weakness and subordination, the rendering of something into a property form is frequently the first step to losing control over it, since it is also a way of making things more alienable and fungible. For the first, property is a congealing agent. For the second, it is a solvent. What matters then is less whether or not one has a proprietary interest in something but rather the background power relations that give property its specific valence in any given context.[706]

This observation can be illustrated by the formalisation of property rights in land as promoted by neoliberal development policies. In the 1990s, economist Hernando de Soto famously popularised the idea that the formalisation of private property rights is the best way to protect the poor and marginalised.[707] De Soto argued that formal titling will guarantee security of tenure, which, in turn, would encourage the landholders to make investments in their land thereby increasing productivity and improving their living

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[703] Dehm 2021 (n 11) 193.
[704] Dehm 2018 (n 80).
[705] Davies 2021 (n 610) 30.
[706] Nichols (n 549) 142.
[707] Ben Cousins, 'Capitalism obscured: the limits of law and rights-based approaches to poverty reduction and development' (2009) 36 The Journal of Peasant Studies 893.

conditions.[708] Titling, according to de Soto would also allow owners to access mortgages to raise the funds necessary for those investments.

However, as Olivier De Schutter and Balakrishnan Rajagopal note, in this argumentation security of tenure is but only one side oft he coin, while the other ist the establishment of a market in land rights ensuring that productive assets reside with the most economically efficient users.[709] This, the authors observe, 'is not about preserving the rights of the land user by strengthening ownership rights' but, to the contrary, 'about commoditizing land to make sure its productive function is maximized by being used by buyers with the deepest pockets'.[710] As such, land demarcation and registration programs have been shown to result in processes of commodification and indirect dispossession, 'including through transactions under varying economic and political pressures after the issuance of titles'.[711] In settings where land control and distribution is highly unequal already, a de-politicised, technical-oriented formalisation of previously informal property rights is likely to consolidate existing unequal land access.[712] And, as, as Jennifer Franco and colleagues stress, even in situation where informal property in land is more evenly distributed, '[i]ssuing a paper title does not in itself change the balance of power in society into a permanently supportive one, while converting poor people's rights into property rights can also expose them to the insecurity brought about by the forces of the free market'.[713]

The process of titling may itself be captured by elites buying up titles from the poor at initially low prices.[714] And those who are able to hold onto their title will need to take out loan to finance the necessary investments, exposing themselves to the risk that debts will accumulate and that, eventually, the land will be seized by the lender.[715]As De Schutter and Rajagopal observe:

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[708] Hernando de Soto, *The Mystery of Capital Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books 2003).

[709] De Schutter and Rajagopal (n 695) 5-6.

[710] Ibid 6.

[711] Cotula 2020 (n 61) 500.

[712] Jennifer Franco et al, 'Democratic land control and human rights' (2015) 15 Current Opinion in Environmental Sustainability 66, 69.

[713] Ibid.

[714] De Schutter and Rajagopal (n 695) 5.

[715] Ibid 6.

> The commodification of land, in such a case, will have made the loss of land possible, rather than having protected the land user from its risk. This is the sad story of many rural households in the Global South, but it is also the drama of many families in rich countries who were lured into borrowing during the housing bubble of the early 2000s and who were then threatened by evictions once the interest rates went up and the value of their houses fell.[716]

As the authors stress, this is not a failure of the system or a problem that could be remedied, but instead 'it is *inherent in the very process of commodification of property rights* that gives property its value'.[717] Hence, in this scenario, too, 'making' and 'taking' of property are closely linked: While the newly created title, in theory, resides with the original owner, making it alienable and fungible will force those in a weak and disadvantaged position to surrender their rights to the market. With this, the allocation of use rights is dictated by purchasing power, rather than need.[718] Similar processes of accumulation are arguably already occurring in the context of property rights in carbon and other ecosystem services – which, in turn, impacts in complex ways on accumulation and exclusion processes in relation to land.

The dynamic linking the creation of property rights to subsequent processes of accumulation is replicated with 'green' market expansion: By allowing investors and transnational corporations to globally control and exercise pollution rights, they can offset the impact of their conduct on the earth system, 'profitably and at a distance' – at the expense of local populations and ecosystems.[719] Through the creation of fungible property rights in carbon, 'green' market expansion enables the buyers with the deepest pockets the accumulation of these rights. With this, property rights in carbon are complicit in creating a global 'polluter elite',[720] capable of retaining its carbon-intensive lifestyle while outsourcing the consequences thereof to the 'shadow' places, which remain conveniently out of sight.[721] In terms of Schmitt's triad of accumulation, distributions, and production: Upon the uneven appropriation of carbon and other 'green' commodities, these are unevenly distributed towards those with the greatest purchasing power, and upon this

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[716] Ibid.
[717] Ibid. Emphases in original.
[718] Ibid 8.
[719] McMichael (n 258) 34.
[720] See Kenner (n 16).
[721] See Plumwood (n 33).

uneven distribution further maldistributions are produced by the effects the continued pollution of terrestrial ecosystems and the atmosphere.

Effects of property in carbon on property in land

As discussed in the previous section, the production of carbon commodities is, in one way or the other, contingent upon land. The possibility to accumulate, and generate profits from carbon commodities impacts on the value of property in land, thereby fuelling land rush dynamics: As indicated in the introduction, around the time COP26 was held in Scotland, land prices skyrocketed – though, the most significant increase in value occurred in what previously was considered 'low quality' farmland, which suddenly became more attractive for carbon market investment.[722] As McMichael notes, property relations no longer simply exclude by enclosure: Globally, public authority is realigned with the task of 'planetary rational planning', whereby a proprietary ontological claim is placed over any available resource, in the name of global security.[723] The use value of land is not determined by life-world production the meeting needs of the land users, but instead by the exchange value that arises from the accumulation of the land's fungible products – such as crops or carbon.[724] This is not a new phenomenon exclusive to 'green' markets, but instead characteristic of globalised commodity exchange, yet 'green' market expansion adds another layer, potentially amplifying existing dynamics of accumulation. With the crisis accelerating, space land that previously has been deemed of limited value, now is opened up to new avenues of accumulation. And, as hinted above, with new constitutionalism, power is shifted away from sovereign territorial states towards transnational market actors.

As McMichael argues, we currently witness shift in the meaning of 'state-controlled territories', from a spatial, to a relational understanding: 'How territory is governed and exploited is not simply the domain of sovereign states, rather it depends on the mode of states' participation/complicity in international regimes (trade and carbon) that transform conditions for land users.'[725] Not only land, but also the ecosystem processes that depend

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[722] McMorran et al (n 28).

[723] McMichael (n 258) 37.

[724] Ibid 34. Yet, while the trade of crops still requires the physical relocation of the commodity, the trade of carbon merely requires the entering of data in an online registry.

[725] Ibid 35.

on it are being enclosed within a de-territorialised, global regime of standardised commodification.[726] Previously, during in the enclosure movement, land was abstracted and enclosed to become a fungible entity, replacing a relational concept of property with a spatial one – now, we witness a reversal back to a relational understanding of property, where various fragmented elements within one parcel of land are subject to a range of discrete property relations. This time, those relations are not localised ones built on subsistence and need, but instead enmeshed in a globalised market geared towards extraction of profits.

With Lindahl, one might say, appropriation establishes a legal collective's claim to exclusive territoriality. While the atmosphere cannot be subjected to such claims of exclusive territoriality, the appropriation of the atmosphere nonetheless impacts on territorial claims: Firstly, it has an impact on the use, as well as the exchange value of land, further driving dynamics of accumulation. Secondly, it further fragments and perforates existing spatial orders, leading to an intensification of capitalisms grip on ever more aspects of life. As I will argue in the final chapter, this ever more granular interpenetration makes the resistance against capital ever more difficult. For now, however, I move on to the final section of this chapter, looking at properties' boundaries and limits to explore how they might assist in confronting and resisting 'green' market expansion.

5.3 Property's boundaries and limits

In the pervious section, I have pointed that the very creation of property may ensue distributive inequalities favouring those who find themselves in a position of relative power to claim or acquire ownership over a finite resource – be it land, or the atmosphere's capacity to absorb CO_2. Once created, property will gravitate towards those who have the wealth, the power, and the lawyers to acquire and defend it. Yet, as Davies observes, 'not all property is privately owned and not every aspect of privately owned property is exclusively under the power of its owner'.[727] As already indicated, against assertions of Western-liberal property being 'absolute' and 'individual', property does have boundaries;

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[726] Ibid.
[727] Davies 2021 (n 610) 30.

property may well be conceptualised as collective, rather than individual; and increasingly, non-Western models of 'proprietary' relationship are recognised in mainstream institutions.

In this vein, scholars have explored the avenues opened up by social movements to reshape the institution of property, engaging in creating 'property rights from below' featuring alternatives to the dominant property paradigm and the distributional consequences it regularly causes.[728] In this view, property may well be 'tweaked' – not least through the outcomes of legal disputes. However, despite the radical, emancipatory potential of alternative approaches to property, these are not immune to co-option through market forces. In line with Marxist critiques of law's commodity form, I argue that the very concept of property makes it impossible to avoid market capture – because enabling market exchange is its very essence. Therefore, radical opposition against 'green' market expansion must not strive for re-inventing property in more inclusive forms, but for doing away with property altogether.

5.3.1 Property's restrictions through law

Liberal legal theory emphasises the social and economic power flowing from property ownership and stresses the importance of limiting state powers so as to protect individual choices, hence property is regarded as 'an area of personal inviolability into which the state may not intrude'.[729] However, while a state is ought to respect the institution of property, it may modify property rules and distributions in certain circumstances, including powers to take, tax, and regulate property without the consent of individual property owners.[730] Accordingly, property owners' freedoms may, for example, be restricted through government regulation such as building standards or environmental laws.[731] Yet, especially in common law jurisdictions, courts tend to adopt an expansive reading of property, while rarely ever explaining why exactly the protection of property is desirable.[732] Generally, liberal constitutions contain a provision that guarantees a right 'not to be deprived of property without compensation'.[733] Regulation of property does not per se justify claims

[728] De Schutter and Rajagopal (n 695); Cotula 2020 (n 61).
[729] Allen (n 606) 8.
[730] Ibid 1.
[731] Davies 2021 (n 610) 30.
[732] Allen (n 606) 8.
[733] Ibid 122.

for compensation, however, in certain instances courts will find that the practical impact may be as severe as that of an outright expropriation.[734] This, for example, concerns cases where governments seek to achieve redistribution of property to further social welfare goals, or compulsory state powers to acquire private property for the public benefit.[735]

Beyond national constitutions, the right to property is enshrined in Article 1 of the Additional Protocol to the ECHR, which states that '[e]very natural or legal person is entitled to a peaceful enjoyment of his possessions', but makes the important qualification that no one should be deprived of his possessions 'except in the public interest and subject to the conditions provided for by law and the general principles of international law'. The article goes on to stipulate that this should not 'in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.

In contrast to the approaches taken by arbitral tribunals in investor-state disputes and most common law jurisdictions which require full compensation equalling to market value,[736] the ECtHR, in his right-to-property jurisprudence, merely requires states to strike an overall 'fair balance' between public and private interests when establishing whether compensation for state interference with private property rights is due and on what terms.[737] Public purpose interventions that affect entire sectors may involve lower amount of compensation as long as the compensation is reasonably related to market value and the action in question strikes a fair balance between public and private interests.[738] In *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, the applicants had alleged that their property rights were violated when Ireland imposed a ban on mussel seed fishing in line with EU environmental regulations. The Court ruled that state's obligations under EU environmental law attract a wide margin of appreciation, and that the respondent state had

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[734] Ibid 125.

[735] Ibid 202-203.

[736] Ibid 224-252. However, cf Pang (n 618) who indicates that arbitral tribunals increasingly adopt the principles of proportionality and margin of appreciation developed by the ECtHR. Yet, as discussed late on, this may not be reflective of a tendency to tame ISDS but rather of the proliferation of rights to be extended towards a multiplicity of subjects including transnational corporations.

[737] *James and others v United Kingdom* (ECtHR, 21 February 1986) para 54. See Cotula 2023 (n 606) 777.

[738] Cotula 2023 (n 606) 778. The author cites *Lithgow and others v United Kingdom* App no 9006/80 (ECtHR, 24 June1986) para 121. In *Scordino v Italy* App no 36813/97 (ECtHR, 29 March 2006) paras 95–97.

not violated the applicants rights by not compensating them for losses resulting from the temporary ban.[739]

The very different approaches taken by the ECtHR and arbitral tribunals respectively, when deciding over investor-state disputes demonstrate: Property and property rights lack an essence which transcends temporal and spatial specificities – they remain contextually bound.[740] While property rights are protected by constitutions, those constitutions hardly ever define what exactly property is – rather, it falls to courts to discern property's specific contents by matching actual practices to legal concepts.[741] Therefore, with new legal institutionalists, property may well be 'tweaked', or, as Lindahl might say, the boundaries of property as an institution can be shifted.[742] Such a shift can be induced by institutional reform or through interventions from 'below', by non-state, civil society actors contesting existing property entitlements.[743] Both shall be addressed briefly just now.

Modifying property relations through institutional reform

Existing allocations of property rights may be challenged via institutional pathways: In the context of property rights in land, land reform policies are aimed at redistributing the power over land. [744] Where land governance patterns historically favour certain elites, democratising access and control requires to deliberately change the institutional patterns of land access and control in favour of those who have, hitherto, been excluded'.[745] Earlier in this chapter, I have highlighted that the power of property does not only stem from the strong protection of property rights, but also from the entitlements that come with them. Consequently, land reform may not only be pursued by means of the direct redistribution of land, but also through reforms of the land tenure system, market reform and taxation policy, among others.[746] One example how the dynamics around accumulation related to property in land may be 'tweaked' can be found in the context of the accelerated Scottish

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[739] *O'Sullivan McCarthy Mussel Development Ltd v Ireland* App no 44460/16 (ECtHR 6. June 2018).
[740] Ireland (n 7) 261-62.
[741] Pistor (n 269) 25-28. See also Allen (n 606) 119.
[742] Supra chapter 2.
[743] De Schutter and Rajagopal (n 695) 9.
[744] Wightman (n 265) 311.
[745] Franco et al (n 712) 66-67.
[746] See Wightman (n 265) 311.

land market cited previously: Changes to the WCC introducing mores stringent standards when accounting for the eligibility of woodland projects under the code (i.e. the capacity to produce VCM 'credits') were seen to dampen the price hikes in plantable land witnessed previously.[747]

Human rights, too, are seen to provide for a powerful tool, not only to protect access to land where it exists, but also to promote redistribution of access to land, and to restore land access and control where it has been lost.[748] However, as Franco and colleagues caution, '[h]istorically, it is common to see progressive land reform laws that, when the existing balance of state and social forces changed, became stalled after a brief moment of reformism'.[749] Further, international investment protection sets narrow limits to any redistribution of existing property entitlements: Since investment protection treaties entitle investors to market-value compensation 'independently ... of the number and aim of the expropriations done',[750] arbitral tribunals have ruled out that states may discount compensation in large-scale redistributive reforms.[751]

The Scottish land reform policy, for example, while in theory effecting a decisive shift in the power balance between landowners and communities, did, thus far, not entail a marked change in terms of Scotland's highly concentrated pattern of landownership.[752] As such, politics of land reform are likely to 'represent the pursuit of what is least disruptive, the minimum possible reform to retain support and argue that promises have been fulfilled whilst alienating the fewest and committing the least possible amount of public money', as one author has observed.[753] The problem arguably rests with the dominance of a property paradigm that is rooted in the strong protection for existing, individual property claims: Once property is allocated and distributed, it becomes very difficult to bring about changes

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[747] Merrell et al (n 29) 10-11.

[748] Franco et al (n 712).

[749] Ibid 69.

[750] *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No ARB/05/6, Award (22 April 2009) para 124. Cf Ina Corporation v The Government of the Islamic Republic of Iran, Iran-US Claims Tribunal, Award (13 August 1985) 378, where less than full compensation was considered but, in the end, full compensation was nonetheless ordered.

[751] Cotula 2023 (n 606) 778.

[752] Charles R Warren and Annie McKee, 'The Scottish Revolution? Evaluating the Impacts of Post-Devolution Land Reform' (2011) 127 Scottish Geographic Journal 17. This has not markedly changed in the meantime.

[753] Ewen A Cameron, 'Unfinished Business: the land question and the new Scottish Parliament' (2001)15 Contemporary British History 83.

in the distribution of existing entitlements other than through the market mechanism which is seen as the predominant way in which transfer of property rights is ought to take place.

5.3.2 Challenging Western-liberal property 'from below'

As hinted above, property relations may also be called into question by social movements: To that end, Oliver De Schutter and Balakrishnan Rajagopal have compiled a set of examples concerned with what they call 'property rights from below'. The edited volume sheds light on social movements' contributions in challenging dominant conceptions of property and natural resource allocation, to initiate a 'shift away from privatisation and commodification and toward the revival of the commons'.[754] Examples range from urban resistance through disobedience by civil rights movements,[755] to the Brazilian Landless Rural Workers' Movement (MST) occupying private land to form so-called 'agrarian reform settlements',[756] and the rights claims voiced by the transnational agrarian Movement La Via Campesina.[757]

While the latter example emphasises the establishment of a rights framework,[758] the former two cases a are rather concerned with direct action. Yet, arguably all three perspectives aim at shifting property's boundaries from what André van der Walt calls property 'in the margins'. He writes:

> Property law is not possible without attention, at some level, to property rights and the power they entail . . . [But we also need] to imagine a perspective on property that includes, in a meaningful way, the interests of those who are not 'normally' considered part of the property elite, without automatically reducing them to the status of weakness and dependency . . . To think about property in the margins also implies taking note of

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[754] De Schutter and Rajagopal (n 695) 9.

[755] Sonia Katyal and Eduardo Peñalver, 'Urban Squatters' in Oliver De Schutter and Balakrishnan Rajagopal (eds) *Property Rights from Below: Commodification of Land and the Counter-Movement* (Routledge 2019) 88.

[756] Sergio Sauer and Luís Felipe Perdigão de Castro, 'Land and territory: struggles for land and territorial rights in Brazil' in Oliver De Schutter and Balakrishnan Rajagopal (eds) *Property Rights from Below: Commodification of Land and the Counter-Movement* (Routledge 2019) 113.

[757] Priscilla Claeys, 'The Right to Land and Territory: New Human Right and Collective Action Frame' in Oliver De Schutter and Balakrishnan Rajagopal (eds) *Property Rights from Below: Commodification of Land and the Counter-Movement* (Routledge 2019) 131.

[758] This will be discussed in more detail in the next chapter See infra at 6.2.1.

> the strong positions that sometimes feature in the margins, particularly when they are founded on direct rejection of or confrontation with the dominant property regime.[759]

According to the author such 'property law in the margins' may be founded in the actions of 'property outlaws', activists and squatters, who refuse to conform to conventional property structure.[760] As Eduardo Peñalver and Sonia Katyal argue, 'property outlaws' expose the paradox of a system of property, which 'is at once stable, perhaps even essentially so, and yet this seemingly ordered system at the same time masks a pervasive, but constructive, instability that is necessary to prevent the entire edifice from becoming outdated'.[761] The lawbreaker, the authors write, 'occasionally forces shifts of entitlements and law', and property owes much of its stability to the acts of the lawbreaker.[762] As such, Lindahl argues, there is strength in marginal positions, given that the spatial and material boundaries of property are established in precisely in those instances where those boundaries are crossed and questioned.[763]

Contesting the dominant property paradigm may occur through the mobilisation of the human right to property itself, and the right to property may effectively be employed to legitimise the conduct of 'property outlaws': Cotula describes how indigenous peoples in Africa and the Americas have sought to mobilise the internationally recognised human right to property to advance their own idea of land as inalienable and collective, articulating a more complex relationship between people and territory, 'whereby land are interrelated with history, culture, way of life and sense of belonging'.[764] In some instances, human rights were seen to lending moral support to, and thereby legitimising more radical forms of resistance through direct action, including the occupation of land.[765] Accordingly, the author argues, recent human rights jurisprudence, has considerably broadened the scope of the right to property: While the liberal tradition tends to conceptualise the right to property in the protection of individual ownership of an asset valued in monetary terms,

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[759] Van der Walt (n 610) 242-43.

[760] Ibid 243.

[761] Eduardo M. Peñalver and Sonia Katyal, 'Property Outlaws' (2007) 155 University of Pennsylvania Law Review 1098. Accordingly, Lindahl argues, the qualification of persons who transgress the spatial boundaries of property law as 'landless' or 'homeless' is not only privative – such transgressions also intimate other possible configurations of property law. Lindahl (n 112) 54.

[762] Ibid.

[763] Lindahl (n 112) 54.

[764] Cotula 2020 (n 61) 494.

[765] Ibid 503.

regional human rights now protect a diverse set of rights, including collective tenure systems and recognise the social, cultural, and spiritual dimensions of land and natural resources.[766]

Against property's individualism: collective property

While property is not entirely absolute, it is not necessarily individual in nature, either. The individualistic framings of dominant property conceptions have variously been challenged, and attention has been drawn to alternative understandings of property as 'commons'.[767] In this vein, Grear suggests that an emphasis on common property – as an alternative, non-individualistic property concept – could provide for a powerful counter-strategy against exclusory property claims.[768] From community landownership in the Scottish Western Isles,[769] to the communal land governance of the Mexican ejdo system,[770] or community owned and managed land in REDD+ pilot projects,[771] models of common property in land and resources exist in different varieties across the planet. Even in some international treaties, the right to property is understood in collective, rather than exclusively individual terms.[772] However, as will become clear throughout the following paragraphs, the framing of property as commons may be deceptive. Commons traditionally have been imagined as 'outside and against' private property regimes.[773] Yet, critics have problematised that contemporary debates surrounding the commons continue to be organised around simplistic, binary contrasts between individualised 'private' property' rights on one hand, and generic and historically uninformed calls for a 'return to the commons' on the other.[774]

In response to the resistance to land privatisation programmes in the global South, since the early 1990s there has been a 'cautious and qualified acceptance' of the commons by institutional actors such as the World Bank who now would see common property regimes

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[766] Ibid 495.
[767] See De Schutter and Rajagopal (n 695).
[768] Grear 2012 (n 123) 190.
[769] See Warren and McKee (n 752).
[770] Chadwick et al 2024 (n 68) 14.
[771] Dehm 2021 (n 11) 292.
[772] See eg International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (adopted 21 December 1965) Article 5 (v) referring to the right 'to own property alone as well as in association with others'. See also the discussion on UNDROP infra at 6.2.1.
[773] Dehm 2021 (n 11) 271.
[774] Nichols (n 549) 154.

(CPRs) – under certain conditions – as a 'rational' mode of management.[775] In its key report *Land Policies for Growth and Poverty Reduction*, published in 2003, the World Bank, while still according a strong priority to individual property rights, conceded that 'the almost exclusive focus on formal title' in earlier policy documents was inappropriate,[776] and reflected a growing awareness that, due to the 'complexity of the institutional structures involved, in most situations simply introducing private property rights will be neither feasible nor cost-effective'.[777] Even more critical, in his then role as UN Special Rapporteur on the right to food, Oliver de Schutter expressly positioned customary use-rights as favourable to 'Western' conceptions of individual property and criticised 'the privatization of the commons that results from the generalization of a Western notion of individual property rights over land'.[778]

However, as Usmut Özsu highlights, rather than advancing a comprehensive critique of the accumulative logic driving large-scale foreign investment in land, de Schutter's account merely offers 'a set of palliative measures designed to socialise some of its less "humane" features' by emphasising need for greater regulatory oversight, enhanced respect for human rights, formal recognition of customary use rights, and a renewed commitment to sustainable agricultural development.[779] As hinted above, common property regimes and are not necessarily incompatible with capitalism: As Dehm argues, commons arrangements 'no longer appear as potentially disruptive alternatives to regimes of private property rights and globalised markets, but instead [have] become a means to facilitate ever greater expansion of capitalist market relations'.[780] The author highlights how 'green' market instruments, particularly in the global South, may rely on a combination of private property rights and common property regimes.[781] REDD+ reflects this hybridity, defying a dichotomous understanding between 'markets' and 'commons', instead warranting a closer

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[775] Dehm 2021 (n 11) 272.

[776] Klaus W Deininger, 'Land Policies for Growth and Poverty Reduction' (The World Bank and OUP 2003) <https://documents1.worldbank.org/curated/zh/485171468309336484/310436360_20050007001644/additional/multi0page.pdf> accessed 3 January 2025.

[777] Ibid.

[778] Oliver De Schutter, 'The Green Rush: The Global Race for Farmland and the Rights of Land Users' (2011) 52 Harvard International Law Journal 503.

[779] Özsu (n 26) 230.

[780] Dehm 2021 (n 11) 259.

[781] Ibid. See also Rose (n 620) 70.

examination as to how these different institutional forms have been combined in multilevel arrangements including 'local' as well as 'global' actors.[782]

The recognition of customary property regimes through mainstream institutions such as the World Bank, Dehm argues, can be seen as a deliberate strategic move 'to enable the commons to be incorporated into global capitalist strategies of accumulation'.[783] Accordingly, the respective models 'promote *conditional* localised self-governance, but in doing so operate to ensure that local self-governance is only *exercised in specific ways* that facilitate "global" interests'.[784] This form of 'conditional' self-governance is rooted in the understanding of property rights a s 'bundle' discussed above.[785] Taking cue from Ostrom's work, as well as on insights from the literature on legal pluralism, Ruth Meinzen-Dick and Rajendra Pradhan argue that the disaggregation of rights to natural resources could facilitate the co-existence of multiple different legal regimes, where the different regimes govern these different levels of rights.[786] However, as Dehm cautions, embedding common property regimes in decentralised, 'multi-level governance' models does not necessarily confer local agency and empowerment: This form of decentralisation, Dehm argues, should not be understood as a process of democratisation, but instead, as hinted above, as a conditional model of self-governance aimed at ensuring compatibility with global interests and agendas.[787]

The example of resource governance as involving a 'bundles' of rights, Dehm argues, is reflective of this tendency: Even if rights to access, use and benefits have been devolved to a lower level, 'the way such rights can be exercised has already been determined by higher-order rights holders'.[788] Even if forest dwellers use the forest they inhabit as common pool resource, 'green' market expansion enables to appropriate the forest by introducing an additional layer of property rights: the forest as a whole is seen as a carbon stock/sink that can be capitalised through its integration in global carbon markets. Carol

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[782] Dehm (n 11) 258. See Elinor Ostrom, 'Beyond markets and states: Polycentric governance of complex economic systems' (2010) 100 American Economic Review 1.

[783] Dehm (n 11) 271.

[784] Ibid. Emphases in original.

[785] Supra qt 2.5.1.

[786] Ruth S Meinzen-Dick and Rajendra Pradhan, 'Implications of legal pluralism for natural resource management' (2001) 32 IDS Bulletin 10.

[787] Dehm 2021 (n 11) 282-283.

[788] Ibid 283.

Rose has highlighted that depending on the point of view, common property regimes can take a dual character: Although members of a group may treat a certain resource – such as a forest – as a 'commons' among themselves, 'with respect to the rest of the world that resource is property'.[789] As such, common property regimes 'may look like a commons on the inside, but they are property on the outside'.[790]

Once commons are delineated in this way, it becomes possible to integrate them into broader institutional arrangements – such as transnational carbon market frameworks.[791] Consequently, looking at rights granted at local levels must be accompanied by scrutinising how they are enmeshed in broader governance frameworks and power relations.[792] In the era of 'green' market expansion, national and regional government, in partnership with international institutions and private investors, will set limits to the ways in which communal resource management is governed on the 'inside'.[793] Literature on REDD+ has amply documented how the management 'options' for forest conservation in community forests have been implemented in a way that obstructs the principles of collective action by which common property regimes – in theory – should be governed: Overall, projects suffered from limited sharing of information and decision-making authority with communities, a general absence of free, prior, and informed consent (FPIC), and a lack of defined benefit sharing and conflict resolution arrangements.[794]

As such, the layered system of rights in the carbon economy can be conceptualised as a legal technology whereby authority to determine how land is used is transferred to international actors, further marginalising local actors, even if they retain some use-rights or receive certain benefits.[795] As George Caffentzis an Silvia Federici have pointed, the strategic adoptions of the commons discourse by development institutions serves at foregrounding an understanding as compatible with the smooth functioning of global markets, while standing in stark contrast to a conception of the commons as modes of

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[789] Rose (n 620) 48.

[790] Ibid.

[791] Ibid; Dehm 2021 (n 11) 275.

[792] Dehm 2021 (n 11) 293.

[793] See eg Abdon Awono et al, 'Tenure and participation in local REDD+ projects: Insights from southern Cameroon' (2014) 35 Environmental Science & Policy 76.

[794] Abdul-Razak Saeed et al, 'Are REDD+ community forest projects following the principles for collective action, as proposed by Ostrom' (2017) 11 International Journal of the Commons 572.

[795] Dehm 2021 (n 11) 293.

social relations radically antagonistic to capitalist globalisation and demands for deeper societal transformation.[796] Such a conceptualisation of the commons does not only enable their incorporation into global markets, but also does so in ways that neutralise the radical critique by which the commons, as a political principle, confronts property and capitalist relations.[797]

The individual configuration of common property regimes, their functioning, and the ways in which they are embedded within the wider context will greatly vary. However, the point to highlight here is that the 'common' property cannot just be juxtaposed to 'private' property as the more just or equitable alternative. Even if common property regimes and scholarly approaches thereto acknowledge and problematise Western property conceptions for their individualist-absolutist outlook, they often carry an implicit disavowal of any action that would radically challenge those conceptions at a structural level. As Özsu argues, rights are complicit in this disavowal, by softening the edges of the effects of appropriation, accumulation and dispossession, rather than genuinely calling them into question.[798] I will come back to this argument in next chapter. Beforehand, I will briefly touch upon the approaches that aim at radically transforming 'property' to become something different.

5.3.3 Beyond property

The preceding section has highlighted that property is in fact less monolithic than the Blackstonian framing as 'sole and despotic dominion' suggests: It is subject to limitations or open to collective forms. However, as discussed, even unorthodox conceptions of property such as common property regimes are at the risk of being co-opted and incorporated into a globalised market economy. Yet, capitalism has not existed always and everywhere. Throughout history, communities around the world have sought to counter Anglo-European conceptions of property, and the underlying philosophies and practices

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[796] George Caffentzis, and Silvia Federici, 'Commons against and beyond capitalism' (2014) 49 Community Development Journal 92.

[797] George Caffentzis, 'The future of "the commons": Neoliberalism's "Plan B" or the original disaccumulation of capital?' (2010) 69 New Formations 23.

[798] Özsu (n 26).

remain alive until today.[799] Traditional systems often rely on 'inherently more fluid conceptions of space and territory, and even of communities themselves'.[800] While it has been argued that all societies have a *social* institution of property, not in all societies property would encompass all things, land in particular.[801] Further, even where individual property claims in land existed in pre-capitalist societies, they were not necessarily premised upon the extraction of surplus value but rather delineated the use-rights of different families.[802]

As Nichols highlights, land is a 'highly culturally and historically specific object in which one could invest property claims' and '[i]t is not the case that all societies – even most societies – have had such a concept, let alone a set of legal and political institutions to enforce claims around it, or a market through which it could be traded'.[803] The author draws on the following example to illustrate this point: When colonising what have come to be known as New Zealand in the 19th century, the colonisers came to notice the indigenous Māori did not tend to allocate property rights to land through a geospatial 'grid' system where a person would own a discrete zone of space over which they would exercise exclusive control.[804] Rather, individuals or families 'could claim a proprietary interest to a certain kind of activity within a circumscribed context, for example, a right to fish from *this* stream, or collect fruit from *that* tree, at this time of year, and so on'.[805] Property rights so conceived were functional and hence coexisted and overlapped in the same geographic space.[806] While this, at first glance, resembles the 'bundle' approach Ostrom and collaborators have developed for managing 'common pool' resources, the decisive difference is that, at that point, the Māori system was not embedded in a globalised market.

Scholars have pointed that 'green' market expansion may inappropriately impose Western conceptions of individual property on indigenous communities whose worldviews will rest

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[799] Sarah Keenan, 'Property: Changing Formations of Having and Being' in Simon Stern et al (eds) The Oxford Handbook of Law and Humanities (OUP 2019) 456. See also: Glen S Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press 2014)

[800] Cotula 2020 (n 61) 499.

[801] Grear 2012 (n 123) 186.

[802] Rauna Kuokkanen, 'From Indigenous private property to full dispossession – the peculiar case of Sápmi' (2023) 11 Comparative Legal History 23.

[803] Nichols (n 549) 31.

[804] Ibid 47.

[805] Ibid.

[806] Ibid.

on very different ontologies and epistemologies than those characterising Western property regimes.[807] Looking for alternative onto-epistemologies beyond the Western-liberal template, mainstream legal scholarship increasingly is seeking inspiration and guidance of 'place-emergent' legal narratives of indigenous peoples.[808] Davies, for example, calls for a 'collective and widespread regeneration of legal concepts', to conceptualise property as 'human and nonhuman habitat' which requires a 're-forming' of property as an idea, a practice, and an institution.[809] This, the author concedes, is not an easy endeavour given that 'thought and practice of property engages an entire ontological landscape for which subjects are separate from objects and human individuals control "external" things'.[810]

Contrary to Western modes of thought, many indigenous ontologies are built on a relational understanding, that perceives the emergence of living entities in their ecological and continuously lived connections.[811] Mary Graham, an Aboriginal philosopher of the Kombu-merri people, for example, argues that relationships between people are always contingent upon the relationships between people and the land: 'The land, and how we treat it', she writes, 'is what determines our human-ness'.[812] This framing resonates with the way Mississauga Nishnaabeg scholar and activist Leanne Betasamosake Simpson conceptualises the opposite of colonial dispossession, which she sees not in possession, but in 'deep, reciprocal, consensual attachment'.[813] As Simpson writes: 'Indigenous bodies don't relate to the land by possessing or owning it or having control over it. We relate to

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[807] Birrell et al, 'Climate change and REDD+: property as a prism for conceiving Indigenous people's engagement' (2012) 3 Journal of Human Rights and the Environment 196. Given the growing body of literature that queries the appropriateness liberal notions of individual property rights for Indigenous peoples and other local communities, it has been suggested to integrate customary legal systems into carbon market frameworks to achieve more 'sustainable' outcomes. However, as already discussed in relations to common property regimes, integrating local, customary legal systems into larger 'multi-level governance' arrangements means that those customary legal systems are 'strategically recognised in ways that facilitate their incorporation into global capitalist strategies of accumulation such that they can used as a means of expanding market discipline rather than representing an alternative to, or even critique of, such relations'. See Dehm 2021 (n 11) 291–93.

[808] Davies 2021 (nX) 14.

[809] Ibid.

[810] Ibid.

[811] Arturo Escobar, 'Thinking-Feeling with the Earth: Territorial Struggles and the Ontological Dimension of the Epistemologies of the South' (2016) 11 Revista de Antropologia Iberoamericana 11. See also Bradley Bryan, 'Property as Ontology: On Aboriginal and English Understandings of Ownership' (2000) 13 The Canadian Journal of Law & Jurisprudence 3.

[812] Mary Graham, 'Some Thoughts About the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 Australian Humanities Review 181.

[813] Leanne Simpson, *As We Have Always Done* (University of Minnesota Press 2017) 43.

the land through connection – generative, affirmative, complex, overlapping, and nonlinear relationship'.[814]

One way how modern law and politics came to acknowledge those complex interrelations is by granting the status of personhood to land, which, according to Nichols, may point to the emergence of a 'a nascent regime of stewardship and care of the earth, guided by Indigenous leadership'.[815] In 2014, the former national park in Aotearoa's[816] Te Urewera region was dissolved and instead the area was recognized as a legal entity with 'all the rights, powers, duties, and liabilities of a legal person'.[817] Te Urewera is now recognised to possess 'an identity in and of itself', which should inspire 'people to commit to its care'.[818] While everyone is called to this work of care, particular duties are imposed on the Tuhoe, who, along with a board of governance, are charged 'to act on behalf of, and in the name of, Te Urewera'.[819] Te Urewera was later joined by two other nonhuman legal persons: Mount Taranaki, a volcanic cone mountain; and Whanganui, the third-largest river in Aotearoa.[820] All of those entities possess legal rights akin to those afforded human beings, protecting them from defilement and degradation.[821]

As Davies notes, the challenge for mainstream legal scholarship is how ideas of responsibility can be integrated into legal ownership, particular into legal ownership over land.[822] One attempt in this direction has been made by a number of scholars associated with what came to be known as 'earth jurisprudence'.[823] Earth jurisprudence's insights, Helena Howe argues, require a fundamental re-assessment of property relations: The author suggests to harmonise existing property regimes with a superordinate ecological law, in which 'property would be given content and form by reference to the common good

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[814] Ibid.

[815] Nichols (n 594) 149.

[816] Aotearoa is the Māori name for what has become known as 'New Zealand' through British colonisers.

[817] In Nichols 147. See also Katherine Sanders, '"Beyond Human Ownership": Property, Power, and Legal Personality for Nature in Aotearoa New Zealand' (2018) 30 Journal of Environmental Law 207; Andrew Geddis and Jacinta Ruru, 'Places as Persons: Creating a New Framework for Maori-Crown Relations' in Jason Varuhas (ed), *The Frontiers of Public Law* (Hart Publishing 2020).

[818] Government of New Zealand, Te Urewera Act (2014), sections 12 and 13.

[819] Ibid.

[820] Sanders (n 817).

[821] Nichols (n 549) 148.

[822] Davies 2021 (n 610) 33.

[823] See eg Peter D Bourdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2015).

of human and non-human nature'.[824] However, as will be further discussed in chapter 5, the approach of earth jurisprudence does not adequately reflect multiple, overlapping, and reciprocal relations between the humans and their non-human environments, as it remains individualistic in its outlook.[825]

Other scholars have stressed the localised, and relational dimension that novel property conceptions need to embrace: Robyn Bartel and Nicole Graham suggest, a move towards a more localised understanding of property is required to develop consciousness for person-place attachment, and to find ways to strengthen its protection in law.[826] And Davies maintains that '[a] relational understanding of property would … involve flattening the hierarchies between owner and owned and those between owner and non-owner, as well as comprehending all as components of a networked agency'.[827] The author suggests that a more equal relationship between owners and non-owners may be promoted in various ways such as 'limit[ing] destructive forms of accumulation, improving distributions of property, and rigorously protecting and strengthening the commons and public space'.[828] Davies then goes on to claim that '[m]ore radical change is also warranted' which would 'acknowledge that property is a gift from the commons to the individual', not an entitlement.[829]

Though inadvertently, the formulation of property as a 'gift' falls back into Western-liberal property's individualistic rendering and, moreover, is cynically dismissive of the violent acts of dispossession communities have witnessed across time and space, and the struggles of peoples related to these processes. While first invoking radically different onto-epistemologies of indigenous scholars, Davies then falls back into the Western-liberal property paradigm which she sees as in need for adjustment, along unspecific claims towards fairer distribution and some form of 'commons'. Grear argues that it is important to strategically reformulate property *as property*, even if merely rhetorically, to counteract the dominant property ideology.[830] As such, property should be reimagined to embrace a

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[824] Helena Howe, 'Making Wild Law Work – The Role of "Connection With Nature" and Education in Developing an Ecocentric Property Law' (2017) 29 Journal of Environmental Law (2017) 19, 27.
[825] Infra at 6.2.2.
[826] See Robyn Bartel and Nicole Graham, 'Property and Place Attachment: A Legal Geographical Analysis of Biodiversity Law Reform in New South Wales' (2016) 54 Geographical Research 267.
[827] Davies 2021 (n 610) 35.
[828] Ibid 36.
[829] Ibid.
[830] Grear 2012 (n 123) 190.

'radical inclusory conception of property carrying a deep sub-text of vulnerability-responsive, eco-humane responsibility, obligation and eco-social propriety' responsive to considerations of distributive and environmental justice.[831]

As Cotula concedes, 'even a reconfigured right to collective property can translate into outcomes that are coextensive with resource extraction and commodification'.[832] Since property rights are not absolute but subject to limitations, these limitations equally apply to indigenous and collective property rights which may be balanced against competing claims.[833] Further, while the right to property may afford protection to indigenous communities, 'it can also undermine some of the fundamental parameters of indigenous peoples' relationship with their surrounding environment'.[834] As the author notes:

> '[I]n articulating demands through legal notions that are so deeply implicated with the status quo, advocacy strategies may become more vulnerable to capture – for example with contestation farmed in property terms paving the way to processes such as land demarcation and registration, that could ultimately compound the commodification of natural resource relations'.[835]

As such, the right to property may be reconfigured to resonate with indigenous conceptions of land, yet, this does not necessarily challenge the foundational parameters of the system.[836]

One might argue that reformulating property *as* property this equals the confusion between strategy and tactics discussed earlier.[837] The problem with any 'progressive' conceptualisation of property appears to be that it always folds back onto the dominant Western-liberal model. In this vein, Nichols points that the dilemma faced by those voicing critique against dispossession is that they often find themselves constrained by the vocabularies available to them, that is: the language of property and possession which functions as a dominant mode of political expression 'to the extent that it has become difficult to voice opposition to these processes without drawing upon the conceptual and

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[831] Ibid 195.
[832] Cotula 2020 (n 61) 497.
[833] Ibid.
[834] Ibid 498.
[835] Ibid 516.
[836] Ibid.
[837] Supra 3.2.1.

normative frameworks they have generated'.[838] Thus, as with Marx' *Eighteenth Brumaire*: The tradition of all dead generations weighs like a nightmare on the brains of the living.

Dene political theorist Glen Coulthard, too, stresses the relational dimensions of people and land when pointing that indigenous struggles around the question of land against capitalist imperialism must be conceptualised as 'struggles not only *for* land, but also deeply *informed* by what the land as a mode of *relationship* ought to teach us about living our lives in relation to one another and our surroundings in a respectful, non-dominating and non-exploitative way'.[839] Yet, the important aspect here is the element of *struggle*, a struggle that is not centred on land as 'property' or 'territory', but instead 'over the very meaning of the relationship between human societies and the broader ecological worlds in which they are situated'.[840] Arguably, this struggle may be understood as the struggle to move away from property as an institution (or even an ontological category) altogether. The struggle is not about conceptualising property *otherwise*. It is about doing away with property – about disrupting the distribution of the sensible.[841]

Property as a limit

The above suggests, in line with the tenets of new legal institutionalism: Property may well be 'tweaked'. The entitlements that come with it can be limited, more responsibilities can be attached to it, different rights relating to the object in question may be divided differently among different stakeholders, its transfer may be subject to certain conditions. As Butler notes, changes of property law through courts occur incrementally but can have a vital impact on property law by making course corrections and updating expectations and obligation to fit into present-day conditions.[842] Yet, these incremental shifts will not suffice to move the dominant property paradigm anywhere near enough towards the onto-epistemologies of non-capitalist societies discussed above. One option is to conceptualise

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[838] Nichols (n 549) 145. As the author observes, indigenous people often see themselves confronted with accusations putting forward a set of contradictory claims, 'namely, that they are the original and natural owners of the land that has been stolen from them, *and* that the earth is not something in which any one person or group of people can have exclusive proprietary rights'. Ibid 6.

[839] Coulthard (n 799) 13.

[840] Nichols (n 549) 151.

[841] See Rancière supra 3.2.3. Cf Grear 2012 (n 123) who proposes an alternative, inclusory ontology of property instead.

[842] Butler (n 616) 29.

the more relational accounts beyond the Western-liberal property paradigm along the lines of Grear's proposal as 'inclusionary' property. Yet, as seen above, this does not solve the problem arising from commodification marketisation: Even inclusionary property, even common property regimes, can be integrated into market frameworks which will exert authority from the 'outside' over what appears as property from within. Higher-order rights-holders thereby constrain the possibilities of what a actors *within* CPRs are ought to do what, where, and when (e.g. deciding whether felling the tree heat to their home, or keep it standing to worship their ancestors).

In a capitalist political economy, there will inevitably be ought-places that a legal collective opens up and keeps opened up for processes of appropriation and the extraction of surplus value. While from a Western-liberal perspective, a world without property appears strange, other legal collectives may see it exactly the opposite way. Yet, for capitalist nation states, extracting surplus-value is very much part of the normative point of joint action defining who is ought to do what, where, and when – even if not all forms of surplus-value extraction are permissible. In other words: Within property as an *institution*, boundaries can be shifted. Meanwhile, the Western-liberal property *paradigm* largely remains as a limit. – However, in theory, at least, it would be possible to redefine tangible or intangible objects in a way that does not lend itself to market exchange and value-extraction.

A legal collective may decide that the monetary valuation and market exchange of certain things are no longer part of the collective's normative pint of joint action. Such things exist in legal orders: Interpersonal relationships, for example, are not subject to property laws. Or human body parts, which domestic legal orders traditionally exclude from the capacity of becoming subject to market exchange.[843] A legal collective could likewise decide that other 'things' are no longer subject to monetary valuation or market transaction: such as ideas, or carbon, or land. As history of property shows, there well was a time when they all were not. As such, it appears possible – in theory – to reverse appropriation. As discussed above, proprietary relations, and even individual property, *did* exist before the advent of capitalism, and they did involve exclusion and exploitation – yet, they were not geared

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[843] See eg Imogen Goold, 'Property in human body parts' in Chris Bevan (ed) *Research Handbook on Property, Law and Theory* (Edward Elgar 2024) 361. Although, as the author observes, with medicinal technology advancing, this question is not as clear-cut anymore.

towards the systematic extraction of surplus value. If we understand property in this way, it is not about developing more inclusionary visions of property as a concept. It is about abandoning it altogether. Within a capitalist political economy, this is what remains unsayable and unheard. Once property is appropriated and has thus has become property *as such* – i.e. a fungible unit created to become the subject of market exchange – it appears unsayable to reverse this process.[8] Asking for the unmaking property, by withdrawing it from the system of exchange and value production, is to challenge the given distribution of the sensible. A demand for the complete reversal of capitalist appropriation – rather than towards minor adjustments of existing distributions – is not intelligible to the present order of the capitalist state. It resides beyond the fault line of the state's normative point of joint action, thereby calling forth the a-legal. The next chapter will interrogate the potential of human rights to challenge the existing distribution of the sensible – by articulating a radical demand whereby the a-legal is called forth. As will be discussed in the final chapter, this may well happen through rights-based litigation.

5.4 Conclusion

Even if property, as an institution, is conceptualised towards more 'inclusive' renderings that depart from its Western-liberal framings as private, individual, and absolute, it remains problematic: While property is subject to limitations, and while the boundaries of property may be shifted, the continued influence of the conventional Western-liberal property paradigm prevents a radical redistribution of entitlements. And while common property regimes are acknowledged or even promoted by dominant institutions, in a globalised world economy, what appears to be 'common property' on the inside, may well appear as 'private' – and therefore appropriable – from the outside. It speaks to the power of property paradigms, that even the most critical analyses seek to reformulate property's parameters rather than abandoning property as a concept altogether.[844] Meanwhile, however, the Marxist critique of the legal form remains valid. The creation of property as an abstract, legal form arises from the very objective to enable commodity exchange through markets. Yet it is this very function of property as legal form that contrasts with the relational

[844] Karen Morrow and Anna Grear, 'Rights and Property Paradigms: Challenging the Dominant Construct Hegemony' (2012) 3 Journal of Human Rights and the Environment 169.

understandings of reciprocity and care prevalent at least in some pre- and non-capitalist societies.

The reluctance of critical scholars in doing so reveals the dilemma between 'pragmatism' and 'nihilism' outlined in the previous chapter: While one is inclined to suggest doing away with law's commodity form and property altogether, the prospects of this happening appear remote. In line with new legal institutionalism's perspective, attempts are being made towards 'legal tinkering', to conceptualise property in novel ways that break with the Western-liberal paradigm premised upon individualism and exclusion. However, these accounts tend to neglect the fact that at the beginning of every modern property regime stands an originary act of appropriation which can only be undone by abandoning property altogether. While the practical possibilities of doing so may be limited, this step in thinking is important when looking the possibilities to express radical resistance through law. As the remaining chapters will discuss, human rights do have a role to play in this respect: They enable the a-legal to make an 'intrusion' into the 'home-world' of legality.[845] They can carry the strange – a claim against appropriation – and by acting as a carrier medium, the strange is not entirely strange, it retains a residue of what is known.[846]

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[845] Supra at 104.
[846] Infra chapter 7.

6. The disruptive potential of rights

In chapter 4, I have highlighted the close interlinkage of private property and human rights in the intellectual history of the West since the Enlightment era. As I have pointed, this linkage is not an inevitable necessity – other conceptions of human rights were advanced throughout history. However, these alternative visions of rights have been largely erased from mainstream accounts through selective historiographies. In chapter 5, I have outlined how property is constitutive of 'green' market expansion: As an institution, it structures the market exchange of intangible 'green' commodities, as well as the underlying property relations in land. As a wider paradigm, Western-liberal property and its position as 'keystone' right protecting extant property relations makes market-based approaches the preferred option to solve the environmental crisis. While property may be 'tweaked' to engender more equitable outcomes in distributive terms, and while alternative conceptions of property increasingly feature in mainstream discourses and institutions, these are not necessarily immune from market capture and extraction of surplus value.

In this chapter, I explore human rights' possibilities to be invoked against the dominant Western-liberal property paradigm. The first part of this chapter is concerned with a range of aspects discussed among scholars when it comes to the limits of rights' emancipatory potential. The second part inquires into conceptions of rights that move beyond human rights' individualism and anthropocentrism to include collective and more-than-human perspectives. In the third part, I link human rights back to the conceptual tools introduced in chapter 3, exploring how human rights may be invoked as a way to engender rupture, utter dissensus, shift boundaries, and confront legal collectives with their fault lines. As hinted in the previous chapter: for Western-liberal legal systems, the principal protection of extant property relations through Western property laws constitutes a fault line. If property is constitutive of 'green' market expansion as suggested in chapter 5, then human rights must be capable of being asserted in a way that challenges, opposes, and eventually shakes up existing property relations structured along the dominant Western-liberal property paradigm.

6.1 Human Rights: Contemporary debates

This part highlights three scholarly debates around human rights and situates my thesis within critical scholarship on human rights' role in the Anthropocene: the distinction

between human rights law and discourse; the debate around rights' powerlessness against social injustices and their potential complicity in perpetuating them; and the critique of rights 'metaphysical individualism' that singles out and separates human rights' subjects, thereby reinforcing possessive understandings of rights and their appropriation through market actors.

6.1.1 Rights as law vs. rights as discourse

To begin with, it is very often by no means clear what people mean, when they refer to 'human rights' or 'human rights movements'.[847] Among the plethora of actors promoting rights there will be different understandings of their history, their philosophical presuppositions and expectations, and whoever advocates for any specific right will find themselves within a distinct type of institutional setting and that carries particular ideological orientation towards rights.[848] As such, the cornerstone of modern human rights law, the Universal Declaration of Human Rights (UDHR), has been labelled 'an ideologically schizophrenic document, made up of layer on layer of different philosophies, politics, cultural values and ideologies'.[849] This makes human rights an elusive and highly unspecific phenomenon.

Arguably, one of the main challenges arises when trying to distinguish between human rights as political *discourse*, and human rights *law*: While 'orthodox' approaches to human rights are likely to conceptualise a strictly *legal* framework,[850] a broader conception will approach human rights from the perspective of social movements – as moral or ethical argument, or political tool employed to effect changes within the globalised capitalist order.[851] With a view to the latter, it has been observed that rights' language now provides for 'dominant mode of expression for political claims'.[852] Famously, Samuel Moyn has argued that the popularity of human rights effectively materialised from the 1970s

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[847] See eg Richard A Wilson, 'Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law' in Mark Goodale and Sally Engle Merry (eds), *The practice of human rights: tracking law between the global and the local* (CUP 2007) 349.

[848] D'Souza (n 78) 7.

[849] Wall (n 76) 33.

[850] See Wall (n 76) 2.

[851] See eg Amaryta Sen, 'Elements of a Theory of Human Rights' (2004) 32 Philosophy & public affairs 315.

[852] Golder 2014 (n 127) 78.

onwards, exactly as other political visions imploded. Invoking a vision of 'another, better world of dignity and respect'[853], they presented 'a moral alternative to the bankrupt political utopias'.[854]

While Moyn's thesis remains controversial, it points to an important aspect of contemporary human rights critique: The tension between rights and politics. Rights *discourse* and rights as *law* are not neatly separable given that the political might, occasionally, spill over to the legal – for example by way of strategic litigation aimed at pushing the boundaries of what is deemed to be covered by a given legal rule.[855] The unfolding dynamic has attracted criticisms of 'channel[ing] societal discord into the legal process, and thereby channel political contention into the legal process'.[856] A recent illustration is provided for by the *Klimaseniorinnen* case decided by the ECtHR in spring 2024 which will be further discussed in the last chapter: The Court's ruling that Switzerland's climate polices are insufficient to protect the applicants' rights has been decried as a 'political' judgment by critics.[857]

The tension between 'law' and 'politics' is related to the question whether expansive interpretations of existing human rights are desirable or not. Scholars from different traditions of thought have cautioned against expansive readings to rights, for example due to concerns of rights to constantly 'overpromise' and underachieve,[858] or a 'rights inflation' eroding the legitimacy of a set of core rights securing civil and political freedoms.[859] I will, however, not discuss the wide range of literature concerned with what exactly rights should or should not cover, or how exactly the boundaries between 'law' and 'politics' should be drawn.[860] The point here is that the boundaries between human rights as *law*, and human

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[853] Moyn 2010 (n 594) 4.

[854] Ibid 5.

[855] This will be discussed at length in the last chapter.

[856] Wilson (n 847) 351.

[857] See Ulrich Meyer, 'Der Menschenrechtsgerichtshof hat den Rubikon überschritten' (*NZZ online*, 12 April 2024) <https://www.nzz.ch/meinung/egmr-und-klimaseniorinnen-den-rubikon-ueberschritten-ld.1825593> accessed 17 December 2024.

[858] David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 Harvard Human Rights Journal 101.

[859] See Michael Ignatieff, Human Rights as Politics and Idolatry (Princeton University Press 2001). For a counter position Jens T Theilen, 'The inflation of human rights: A deconstruction' (2021) 34 Leiden Journal of international Law 1.

[860] For an overview see eg Bård A Andreassen (ed), *Research Handbook on the Politics of Human Rights Law* (Edward Elgar 2023).

rights as *discourse* are blurred and that critical rights literature, very often, does not explicitly distinguish between the two. Arguably, this 'blurring' is inevitable when looking at rights as an – explicitly political – device of resistance employed by social movements: as explicitly *legal* arguments in the courtroom, or as a more general normative claim that transcends the legal realm.

In his book *Human Rights an Constituent Power* Illan Rua Wall takes an approach that mediates between 'orthodox' approaches to human rights as *law* 'proper' and approaches that see rights primarily as political 'tools'. For Wall, human rights discourse situates itself between a *political demand* and a *juridical decision*, and as such incorporates two opposing poles.[861] Importantly, there is not a choice between one or the other, as Wall writes.[862]

> It is the difference and the constant tension between the poles of human rights that make them such a crucial part of modern politics and law. There is a constant contamination between them. Thus, there can be no proper, given and static essence of human rights. Rather, there is a constant *oscillation or vibration* between the poles of limitation and creation, a certain trembling between decision and demand. It is neither pole that defines human rights but the oscillation, trembling or vibration itself.

I return to Wall's conception of the human rights as oscillating between decision and demand in the last part of this in this chapter. Next, I touch upon a range contemporary critiques of rights questioning their emancipatory potential and their usefulness in effecting radical change.

6.1.2 Powerless companion or structural complicity?

Against the push of social movements calling for an expansive reading of human rights, not least to tackle global inequality, critical human rights scholarship points to the fact that human rights are ill-equipped to tackle this problem as they, at least in their legalized forms, do not purport to provide an egalitarian agenda.[863] Existing human rights instruments are seen to lack ambition when it comes to questions of distributive justice,

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[861] Wall (n 76) 1. Italics added.
[862] Ibid 4.
[863] Brinks et al (n 63).

and existing minimalist declarations or judgments of international human rights bodies have often failed to deliver the hoped-for results due to non-compliance and the lack of enforcement.[864] As Moyn notes, '[i]t is perfectly possible to imagine a fully achieved local and global regime of human rights protection that simultaneously features the worst hierarchy of wealth and other primary goods known to history'.[865] As for the most obvious example, how little human rights in fact promise, he points out to the rights enumerated in the International Covenant on Economic, Social, an Cultural Rights (ICESCR): They merely guarantee a minimum floor protection of elementary needs such as food, health and housing, 'rather than a fuller bodied egalitarianism'.[866] Against the glaring distributional injustices of our time, Moyn concludes, human rights 'have been condemned to watch but have been powerless to deter'.[867]

Wendy Brown argues that it is the specific structure of human rights that makes them particularly unsuitable to overcoming structural inequalities of income and wealth, since they provide for a moral discourse centred on pain and suffering – rather than political discourse of comprehensive justice.[868] In as far as human rights empower people 'to choose what one wishes to live and die for', they only do so within the confines of liberal individualism, disregarding 'the historical, political, and economic constraints in which this choice occurs'.[869] As Wall notes: 'The fundamental problem of privilege or more accurately prior accumulated property is not something that usually is considered a major human rights issue.'[870] Yet, as Brown and others have criticised, human rights do not only do little to address existing distributive inequalities: By defining rights as choice within the given, structural constraints, those constraints, according to critics, are effectively codified and thus reinforced.[871] Consequently, scholars associated with Marxist or post-Marxist traditions have criticised human rights as not only being 'powerless companions' but indeed complicit capitalist exploitation.[872]

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[864] Cotula 2020 (n 61) 497-82.
[865] Moyn 2016 (n 64) 161.
[866] Ibid 161-162.
[867] Moyn 2014 (n 64) 151.
[868] Brown (n 65).
[869] Ibid 455.
[870] Wall (n 76) 25.
[871] Brown (n 65) 455.
[872] For a discussion see Cotula 2020 (n 61).

As discussed in chapter 4, Marx has pointed that the expansion of formal, juridical right may coincide with, and even facilitate new forms of domination.[873] His famous critique of rights in *On the Jewish Question* builds on the insight that abolishment of the formal discrimination of the Jewish community in the realm of right was coextensive with the deepening of substantive inequalities: Those substantive inequalities, Marx argued, were representative of new forms of social discrimination, and even harder to get by, given that liberation was increasingly understood as 'freedom from others'.[874] Consequently, contemporary scholars associated with Marxist traditions of thought have generally adopted a critical view of human rights as an emancipatory device ranging from 'nihilist' dismissals of human rights (and law more generally),[875] to slightly more 'pragmatist' accounts which, while mindful of rights' limitations, nonetheless see value in resorting to human rights in some instances.[876]

Human rights may, in fact, be complicit to capitalist and imperialist agendas and counterproductive in terms of emancipatory politics: In her book *What's Wrong with Rights*, legal scholar and social justice activist Radha D'Souza illustrates how human rights discourse invoked by new social movements has been co-opted by the institutions of transnational capitalism and serves at further market entrenchment and expansion.[877] By blindly relying on human rights, the author argues, social movements are actively foreclosing alternatives to capitalist models of society.[878] Human rights discourse thus has the potential to silence and displace other modes of emancipatory thinking and other avenues for the pursuit of social justice.[879] Additionally, it has been suggested that

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[873] Supra chapter 4.

[874] See Nichols (n 549) 132.

[875] Miéville (n 292). Revisiting Pashukanis, the author argues that international law – and rights as part of it – holds no potential for any 'systematic progressive political project or emancipatory dynamic' whatsoever. Accordingly, law may be used in a reformist sense, but this is only of limited value, given the underlying commodity form. Ibid 130-31.

[876] See Salomon (n 126) 509.

[877] D'Souza (n 78).

[878] I will not engage in more depth with the theorisation of 'new' vs 'old' social movements. Generally, the latter term is employed to refer to traditional labour movements whereas the former denotes movements such as gay or animal welfare rights groups who are, at face value, not primarily focused on economic concerns. As D'Souza notes, the distinction is unhelpful since what really is at issue is a shift from *political* to the *social* which is not merely semantic but instead denotes a shift towards accommodating critique *within* transnational capitalism rather than confronting it. Ibid 69-71.

[879] Ibid. See also: Golder 2014 (n 127) 78; Kennedy (n 858) 108-109. Along the Marxist line of critique, D'Souza argues that rights contribute to upholding 'illusion of the epoch': that liberal democracy and transnational capitalism can be reconciled. The illusion relies on 'boxing in economic issues from

conceptions of socio-economic rights appear to lend further support to a growth-centric economic model, rather than confronting it – by positing economic growth as a necessary component for realising rights to food, health, or housing.[880]

The critique thus is that a focus on human rights, in David Kennedy's words, 'insulates the economy': It defines problems and solutions in ways not likely to change the economy by foregrounding problems of participation and procedure at the expense of distribution and hence implicitly legitimating existing distributions of wealth, status and power in societies.[881] Borrowing from Roberto Unger's concept of 'false necessity' –in a nutshell: that things do not, necessarily, have to be as they are, but could be otherwise – Marks introduces the notion of 'false contingency' to draw particular attention to the broader, structural context in which human rights – and the critique thereof – are situated. While it is a central tenet of progressive thought that history is a social product, not given, but made, and therefore, in principle, can be made anew, the author insists that possibilities are framed by circumstances.[882] The insistence on this is essential, Marks argues, because *if* injustices of the present order 'are made to appear as though they were random, accidental and arbitrary', the prospects of changing them drop out of sight.[883]

Drawing on the report of the UN Special Rapporteur on the Right to Food on the food crisis following the surge in food prices in 2007, [884] Marks illustrates what 'false contingency' may look like: While the report acknowledges the 'root causes' for the crisis – such as structural adjustment policies, aid conditionalities, trade rules, climate change, carbon trading, peak oil, financial speculation, land speculation, and international inefficiency or indifference – it primarily frames the problem as a lack of attention to the right to food and policy failures, thereby disavowing the systemic, material base for malnutrition: the global economy which generates food crises, not contingently but as part

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political issues and political issues from ideological and cultural ones' which makes it difficult to establish the interrelationships between politics, economics and ideology. Ibid 56-57.

[880] Chadwick et al 2024 (n 68) 23. See also Wouter Vandenole, 'Planet and People: making human rights distributive by design' in Suzanne Egan and 587(eds), *Poverty and Human Rights: Multidisciplinary Perspectives* (Edward Elgar 2021) 105, 109-10.

[881] Kennedy (n 858) 109.

[882] Susan Marks, 'False Contingency' (2009) 62 Current Legal Problems 1, 2.

[883] Ibid 20.

[884] Olivier De Schutter, 'Crisis into opportunity: reinforcing multilateralism' (Report of the Special Rapporteur on the right to food, 21 July 2009) UN Doc A/HRC/12/31.

of its logic.[885] Marks' example illustrates what Wendy Brown calls the 'politics of fatalism' of human rights: While abuses are condemned, no attention is directed towards the forces that produce them, and while one is urged to relieve suffering, no in-depth enquiries are made into why it occurs.[886]

A similar observation can be made in the context of 'green' market expansion: The climate disaster is lamented about, the continued reliance on fossil fuels is widely condemned – yet, the structural causes rooted in capitalisms' imperative to continuous economic growth and the extraction of surplus value are largely ignored and the problem instead is framed as policy failure. Emphasis is placed on improving procedures for participation and benefit-sharing, instead of contemplating how the crisis could be averted otherwise. Yet, as Marks reminds us: 'if the problems are systemic, the solutions must equally be systemic'.[887] She exemplifies this with the case of poor people living in an area subject to large-scale land acquisitions: They 'could take part in every decision involved, the circumstances that link their poverty with others' affluence would remain unaffected'.[888] Public participation would not alter the circumstances that lead foreign investors to prioritise profit over the benefits of the local population when buying up large pieces of land.[889] In a similar vein, one may conclude: Public consultation and benefit-sharing in carbon sequestration or 'green' energy projects supplying carbon markets leave the circumstances that lead market actors to engage in 'green' market expansion unaffected.

Attempts to explain human rights violations, Marks argues, may themselves eclipse the systemic context that provides the base for their occurrence.[890] Even where the connection between human rights violations and their socio-economic context is acknowledged by human rights organisations, this analysis is not adequately reflected in their recommendations.[891] The work of the Special Rapporteur on the Right to Food concerned with land grabbing highlighted in the previous chapter is another example: While acknowledging the structural underpinnings of land grabbing practices, Özsu argues that

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[885] Susan Marks, 'Human Rights and Root Causes' (2011) 74 The Modern Law Review 57, 69.
[886] Marks 2013(n 65) 229. Brown (n 65).
[887] Marks 2011 (n 885) 69.
[888] Ibid 69-70.
[889] Ibid 70.
[890] Ibid 75.
[891] Ibid 73.

the report does not offer any fundamental alternatives but instead mere 'palliative' measures to soften the worst impacts.[892] The identification of 'root causes' may reveal some aspects that explain human rights abuse – they may, however, conceal others: By mainly focusing on the victims of human rights violations, this permits the beneficiaries, 'those who (directly or indirectly) live on the practices and processes that victimise others … to remain comfortably out of sight'.[893] And, this, again, Marks argues, makes human rights violations falsely look as if they were entirely contingent, as if they belonged to the order of nature and that therefore there is no point in trying to change them.

In other words: If human rights are invoked to mitigate the impacts, rather than to confront extant property relations, they effectively reinforce them. The question is: can human rights, at all, do otherwise? While Marks' 'false contingency' points that that the present order is by no means inevitable, Ben Golder draws on the term to suggest that the context of global capitalism sets a limit to the 'contingency' of the future possibilities human rights may hold.[894] He highlights that despite human rights' alleged openness, the what continues to be prioritised is 'a familiar set of rights functional to the operation of market exchange'.[895] Consequently, he claims, a dissident vision of human rights that challenges the operation of market systems appears to be unrealisable:

> A human right collectively to control the means of production is simply unintelligible under these conditions: or, capital presents a material limit to the contingency of human rights. In other words, human rights might look like an open political discourse wherein different understandings of humanity can be inscribed, but its claimed openness is conditional upon any vision of humanity not seriously challenging reigning economic orthodoxy.[896]

Indeed, the last chapter this thesis suggests that Golder's argument has some purchase when looking at the material outcomes of rights invocations through strategic climate and just transition litigation. At the same time, as I will further discuss, invoking rights

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[892] Supra at 5.3.2
[893] Marks 2011 (n 885) 76.
[894] Golder 2014 (n 127).
[895] Ibid 111.
[896] Ibid 112.

strategically, to confront the dominant mode of production, is not futile. It has the potential to carry the utterance of dissensus, disrupting the distribution of the sensible.[897]

6.1.3 Discursive openness vs. institutional essentialisation

The proliferation of rights claims in recent decades demonstrates that the malleable language of human rights may accommodate not only 'political program of revolutionaries and dissidents', but can equally provide for a powerful legitimising resource for transnational corporations and powerful states.[898] In this vein, critical scholars have observed that rights discourse has increasingly become appropriated to serve the interests of global capital, and that corporate actors themselves have been afforded protection as victims of human rights abuses, stretching human rights' semantic structure 'to the point where they become a meaningless, all-embracing reference for anything thought to have ethical importance or a claim for inclusion within the legal community of concern'.[899] Citizens are no longer the only rights-bearing subject, instead, they are accompanied by legal persons – such as corporations – personified, autonomous beings with property rights and, increasingly, other 'human' rights of their own.[900]

Against critiques of human rights' structural complicity in imperialist and neoliberal agendas, scholars have variously sought to retrieve a more resistant and revolutionary understanding of human rights.[901] Poststructuralist accounts have attempted to retrieve such an understanding by pointing that the 'human' subject of human rights is a volatile and contested construction, formed through discourse and regimes of power, and, consequently, rights would appear as 'as thoroughly political creations, dependent upon the political/discursive/strategic viability of rights claims and their consequent observance and

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[897] See Rancière supra 3.2.3.

[898] Douzinas (n 69) 1. I avoid to discuss the general debate around law's indeterminacy. For a critical appraisal see Tzouvala (n 293).

[899] Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan 2010) 47.

[900] D'Souza (n 78) 67. As Steininger observes, investors in arbitration cases nowadays themselves invoke human rights arguments, particularly the right to property and a fair trial – which may in fact weaken rights claims raised against excessive investor protection. See Silvia Steininger, 'What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration' (2018) 31 Leiden Journal of International Law 33, 45.

[901] See eg Douzinas (n 69).

enforcement', reflecting particular political aims, alliances, and projects.[902] As Douzinas notes, '[t]he concept of rights is flexible rather than stable, fragmented rather than unitary and fuzzy rather than determinant'.[903] Rights, he argues, are symbolic constructs with scant regard for ontological categories, and as, such, they do not refer to material entities in the world.[904] Instead, they are 'pure combinations of legal and linguistic signs', referring to other signs, words and so forth, which means that anything that we can think of can become subject of rights.[905] Douzinas' argument aligns with the general poststructuralist rights critique which, against orthodox understandings, rejects the idea that there is a universal and atemporal 'human' essence that could serve as the basis of rights claim.[906] If rights were to be based upon some determinate, metaphysical sense of humanity, Golder summarises this line of critique, 'that very fixing of the human would of necessity circumscribe the scope of possible future social relations'.[907]

The problem is that the juridification of rights requires such a 'fixing' of the 'human' – or who/whatever else is ought to become a subject of rights: Wall argues that, through circumscribing particular, individual rights, human rights law designates a basic understanding of the human: 'S/he must eat, live, drink, talk, associate, work, etc., and therefore have a right to do these things.'[908] As such, human rights furnish a fundamentally metaphysical vision of the human: The essence of what is 'human' becomes enumerated in a number of given rights, thereby closing off the openness of the world.[909] For Douzinas,

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[902] Ben Golder, 'Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures of Rights' (2011) 20 Social & Legal Studies 283, 291.

[903] Douzinas (n 69) 254.

[904] Ibid.

[905] Ibid.

[906] Golder 2011 (n 902).

[907] Ibid 289. As Wall (n 76) notes, poststructuralist rights critique overlaps with Martin Heidegger's critique of humanism: While the persona Heidegger, just as Schmitt, is problematised for his endorsement of the Nazi regime, scholars find value in his critique of humanism, especially in the concept of *being-in-the-world*: Broadly speaking, Heidegger claims that humanism is misguided when aiming at distilling a final, metaphysical essence of the 'human being', since there is no god or source of meaning beyond the world. Rather, there is 'being' (the state of everything that *is*) and 'beings' (human or non human) as particular entities in the totality of being: By just looking at 'beings' the fundamental value of 'being' is missed. Ibid 36-37.

[908] Wall (n 76) 37.

[909] Ibid 37-38. The trap of trying to 'exhaustively write [the human] nature' persists and occurs in rights-based political activism: Wall cites Raoul Vaneigm's *Rights of Human Beings: On the Sovereignty of Life as Surpassing the Rights of Man* as an example. Vaneigm, Wall notes, attempts to expand the catalogue of 'human' rights beyond what is usually understood as such but, according to his critics, in this only provides for 'just another rendering of the human which ultimately can be easily accommodated within the capitalist-liberal tradition'. Ibid 136.

understanding rights as radically open makes them amenable to interpretations that may well differ from liberal humanism that is usually associated with modern human rights' roots. While those interpretations will not – and effectively cannot – materialise, rights are of symbolic importance in that they 'inscribe futurity in law',[910] they hold a promise of a (yet ever elusive) horizon of justice to come.[911]

Yet, Christodoulidis cautions that the poststructuralist assertion that no determination will ever exhaust the meaning of human rights cannot – in and of itself – be understood as a sign of empowerment and resistance to the order of capital, but instead 'is merely a suggestion that capital will renew itself by feeding off excess'.[912] Despite the poststructuralist insistence towards rights' radical openness, the assertion of 'new' rights and new subjects risks their essentialisation and reification. In other words: Whatever new rights, whatever new subjects come to the fore, these are always at the risk of being co-opted and integrated into the capitalist order. As long as rights are not invoked in a way that confronts and ruptures this order, i.e. in a way that is incongruent with the commodity form of rights, they can be appropriated: A tree may be seen as a subject of rights, for example, it may be granted the right to life – this does not save it from being subject to the extraction of surplus value (for example through the establishment of proprietary claims over sequestered carbon). The tree's right to life becomes linked to – and, potentially, conditional upon – the value that keeping it alive for supplying the international carbon market. Any new rights holders risk to become reified, closed-off categories amenable to the arithmetic of the capitalist order of the police that counts and boxes them, to appear *as* something that *has* certain 'properties' (such as the capacity to store carbon), but not others (such as being the home of the ancestors' spirits).[913] In another instance, an indigenous tribe may have the right to have their ancestors' trees protected through rights *qua* their affiliation with this tribe, *qua* their categorisation as indigenous peoples – but others may not because they not qualify as subjects entitled to have that particular right.

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[910] Douzinas (n 69) 369.
[911] Ibid 337. See also Grear 2012 (n 123).
[912] Christodoulidis 2021 (n 49) 520.
[913] See on this the discussion on the distribution oft he sensible and critical phenomenology in chapter 2.

At this point, the link between rights and property and the characterisation of rights' subjects as 'possessive individuals' discussed in chapter 4 resurfaces. The subjects and the rights they 'have' will assert them against each other in a market that exchanges and negotiates competing rights claims: Rights to benefit-sharing for the local communities affected by a carbon sequestration project are pitted against the property rights of the foreign investor – and through law's alleged neutrality, this 'balancing's seen as a fair exchange between equal partners (who, in reality, are not equal at all – not only with regard to the strength of their proprietary rights, but also with regard to the powers to assert and enforce them). As I discuss later in this chapter and in the final chapter, the point about essentialising and thereby reifying particular subjects of rights is important – in that it may serve at closing off and limiting structural concerns to particular groups, such as indigenous peoples.

6.2 Rights beyond the possessive individual

Against the various strands of human rights critique outlined above, scholars have suggested that rights can and should be understood differently, in terms that radically break with their purported Western-liberal roots, their connection with private property, and their characterisation as essentialised, metaphysical expressions. With a view to the latter, Marks' human rights history discussed in chapter 4 highlights that historical invocations of rights were not only about the movement of ideas, abstract notions of rights – but instead about the material entanglements of human rights discourses concerned with 'money, death, enclosure, trees…, and living'.[914] Marks, Chadwick comments, 'is very attentive to the point that…human rights are not something fixed – they may have a particular institutional expression but that expression is contested', and that rights-discourses were well employed as a device to contest the morality and legitimacy of the new political and economic order emerging in the Enlightment era.[915] In the contemporary context, too, scholars, particularly from the global South, have pointed to the diversity of human rights modes, ranging from a technique of global governance on one side of the spectrum, to an 'insurrectionary praxis' destabilising and disrupting political and economic power on the

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[914] Marks 2019 (n 580) 19. See also the review by Daniel R Quiroga-Villamarín, 'Susan Marks, A False Tree of Liberty: Human Rights in Radical Thought' (2021), 21 *Human Rights Law Review* 252.

[915] Chadwick 2021 (n 587) 413-14.

other.[916] In this view, rights can in fact be employed in a way that emphasises collective dimensions, thereby questioning the individualistic and individualising nature of liberal human rights, and they may well be wielded successfully to contest the transnational arrangements that underpin the contemporary political economy.[917]

Cotula argues that much of the human rights critique discussed above wrongly focuses on institutionalised human rights actors and frameworks, ignoring the agency of social actors – such as agrarian movements, indigenous peoples, trade unions, grassroots movements and NGOs – harnessing rights' emancipatory promise to sustain their struggles.[918] As hinted in the previous chapter, social movements in the global South have variously deployed conventional human rights – namely: the right to property – towards counter-hegemonic objectives, resisting natural resource extraction on their ancestral lands, and advancing relational understandings of humans and their surrounding environment, grounded in collective and socio-cultural conceptions of land and resources.[919] As noted, the affirmation of indigenous property rights has in turn helped to justify more radical strategies such as land occupation.

Beyond the appropriation of existing rights and their deployment towards unconventional ends, new rights emerge, ostensibly less compatible with the logics of capitalist market exchange, private property and the extraction of surplus value. Two recent developments in this respect concern, firstly, so-called 'third generation rights' – most noteworthy the *Declaration on the Rights of Peasants and Other People Working in Rural Areas* – and, secondly, rights of nature affording subjecthood to natural features such as mountains, rivers, or ecosystems. Both categories appear valuable to explore as devices confronting 'green' market expansion', and the extant property paradigm which it seeks to protect. However, in line with the observations in the previous sections, these novel rights, too, are not entirely capable of escaping the trap of individualism and essentialisation.

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[916] Baxi (n 78) 10-22.
[917] Cotula 2020 (n 61) 518.
[918] Ibid 482-84.
[919] Supra at 5.3.

6.2.1 Third-generation rights

In reaction to Eurocentric and individualised corpus of international human rights law (IHRL), mobilisation by grassroots movements and countries in the global South has led to the creation of new human rights instruments, reconceptualising rights as a in a way capable of challenging the structural characteristics of the global political economy.[920] Contrary to the legally binding treaties or conventions, those instruments often take the form of non-binding declarations and include the Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP),[921] and the Declaration on the Rights of Indigenous Peoples (UNDRIP).[922] The declarations advance so-called 'third-generation rights' which often include collective rights, solidarity rights, or rights of collective classes, and therefore do not easily fit into the categories of either civil and political, or economic, social and cultural rights.[923]

Third generation rights are rooted in movements that critically respond to the Western-liberal model of mainstream approaches to IHRL and who tend to see rights as a means of resistance against an unjust and inequitable political economy.[924] Their creation can be contextualised within a wider process of transnational political mobilisation against the increasing pressures resulting from structural adjustment policies and trade liberalisation in the global South from the 1990s onwards.[925] In contrast to orthodox readings of human rights law, these approaches are often highly critical of sovereign states, many of them previously dominated by colonial powers.[926] From the viewpoint of subaltern and critical perspectives, the further empowering states to 'respect, protect, and fulfil' civil and political, as well as social, economic, and cultural rights 'overlooks the fact that states … are deeply coloured by colonial histories and by neoliberal conceptions of economic

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[920] Chadwick et al (n 68) 23.
[921] United Nations Declaration on the Rights of Peasants (Resolution adopted by the UN General Assembly, 17 December 2018) A/RES/73/165.
[922] United Nations Declaration on the Rights of Indigenous Peoples (Resolution adopted by the UN General Assembly, 2 October 2007) A/RES/61/295.
[923] Chadwick et al 2024 (n 68) 23.
[924] Ibid.
[925] Cotula 2020 (n 61) 505.
[926] Chadwick et al 2024 (n 68) 24.

development that create the social and economic conditions in which human rights are routinely violated'.[927]

Examining the enjoyment of human rights in rural contexts in the Global South, scholars find that state governments may often be 'either unable – due to lack of effective control over parts of their territory, or due to lack of resources – or unwilling – due to corruption or internal power struggles – to intervene to ensure the realisation of rights in practice'.[928] As Chadwick and colleagues note, by presupposing a hierarchical legal order on whose top sits a government capable of controlling the behaviour of all agents within its territory, dominant approaches to IHRL 'install a Eurocentric ideal of state sovereignty and sovereign equality as a *sine qua non* of a universal IHRL', which does not account for the mismatch between this ideal and the realities of governance in most countries and for the particular political conditions and colonial legacies that are causing this mismatch in the first place.[929] Due to this fetishisation of the state under IHRL, Oche Onazi criticises, 'the possibilities of realising human rights are placed within the potential and limits of state action, apart from the relationship between individuals being mediated through the state'.[930] Consequently, as Cotula cautions, the adoption or affirmation of third-generation-rights by states does not necessarily mean that they will engender material changes: The adoption of 'progressive' legal texts has, at times, been sought by governments in the global South as a strategy to respond to the tensions arising from resource conflicts in the context of extractivism while the development model creating theses tensions in the first place remains unchanged.[931] This arguably is, to some extent, is the case in relation to Colombia's *Atrato* judgment discussed in chapter 7.

While third generation rights move away from Western-liberal conceptions of rights centred on state and individual, they, too, have limits. Not only, in that their articulation at institutional level only results in non-binding declarations, but also that they might fall prey to co-option: Margot Salomon illustrates in the case of the UNDROP that third

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[927] Ibid.

[928] Katie Sandwell et al, 'A View from the Countryside: Contesting and constructing human rights in an age of converging crises' (Transnational Institute Report, 2019) <https://www.tni.org/files/publication-downloads/web_countryside.pdf> (accessed 29 December 2024) 6.

[929] Chadwick et al 2024 (n 68) 25.

[930] Oche Onazi, *Human Rights from Community: A Rights-Based Approach to Development* (Edinburgh University Press 2013) 24.

[931] Cotula 2020 (n 61) 491-92.

generation human rights may tame the injurious tendencies of capitalist globalisation but, at the same time, also normalise the status quo. Drafted in a bottom-up process led by of civil society organisations spearheaded by *La Via Campesina* Peasant Consortium – a transnational network of agrarian social movements – the UNDROP aimed at responding to the pressures of globalisation on peasants and other people working in rural areas and at salvaging their relationships to land, water and nature on which they depend for their livelihoods.[932] Including provisions such as a 'right to seeds', a 'right to land', or a right to an adequate standard of living and 'facilitated access to the means of production', one reading of the UNDROP may well see the declaration as containing 'rights against capitalism' that 'reflect an effort to challenge the forced shift from nonmarket to global market economies and values' and as such offers normative claims against dominant values that sustain the structural connection between international law and commodification.[933]

Such readings, however, can be contrasted with others: The declaration itself states that other 'relevant international agreements' should be interpreted in a manner consistent with the human rights as applicable to peasants.[934] Salomon argues, that by seeking normative assurances that human rights will be brought to bear on other areas of international law (such as trade, investment and finance), the regimes that constitute and sustain global capitalism are validated and taken as a given.[935] To rely on law *as it is*, she writes, leaves no other option than to seek to mitigate its most glaring excesses – at the cost of 'legitimating the system that one seeks radically to change'.[936] Further, while the declaration considerably departs from conventional human rights approaches and features a strong social justice component, it does not rule out the further penetration of rural livelihoods by capitalist modes of production and extraction, as long as conditions on impact assessments, good-faith consultation and 'fair and equitable' benefit-sharing arrangements are met.[937] Hence, in line with the critique by D'Souza and others discussed

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[932] Salomon (n 126) 514.

[933] Ibid 514-16.

[934] UNDROP Article 2 Para 4.

[935] Salomon (n 126) 516-517. Yet, it has to be noted that while a draft version of the UNDROP explicitly stated that states 'elaborate, interpret and apply international agreements and standards, including in the areas of trade, investment, finance, taxation, environmental protection, development cooperation and security, in a manner consistent with their human rights obligations', the explicit enumeration of these other legal instruments is no longer part of the final version adopted by the UNGA, which, at least on a rhetorical level, makes them seem less dominant when weighed against the provisions of the UNDROP.

[936] Salomon (n 126) 517. Emphasis in the original.

[937] Cotula 2020 (n 61) 513-514.

in the first part of the chapter, the example illustrates that even 'progressive' articulations of human rights can serve to limit, rather than open up progressive imaginaries: The declaration, in its de-radicalised form capable of winning political majorities, Salomon argues, risks 'narrowing the possibility even to imagine alternative forms of social organisation and alternative arrangements to global capitalism'.[938]

It is too early to assess the full impact of the declaration since much depends on the ways in which the rights enshrined in UNDROP will be implemented and applied.[939] Yet, the explicit incorporation of the right to land establishes a direct relationship between people and land, providing more explicit normative foundations for redistributive land reform.[940] On one hand, this may mean that more land is effectively put into the hands of local communities (rather than outside corporate actors), potentially withdrawing this land from marketisation and commodification accelerated and exacerbated by 'green' market expansion – though not necessarily. In the Colombian *Atrato* case discussed in chapter 7, the implementation of the 'biocultural' rights derived from national third generation rights remains challenging – and it appears that they have, to some extent been replaced by the less politically charged frame of legal personhood for nature. Yet, third-generation rights can provide for a valuable lens to measure governments' commitments: The Mexican case study by Chadwick and colleagues demonstrates how UNDROP may be usefully employed to measure states' putative commitments to emancipatory concepts such as food sovereignty against the reality, unveiling that states in fact may pursue a very different vision of development, geared towards realising with the interests of state actors and private investors.[941]

Further, issues may arise from the fact discussed above, that rights – at least in their legalised form – always require some form of closure as to who 'counts' as legal subject in a given case, as opposed to who does not. As Wall observes: Even if rights propose to be 'communitarian', they remain individualistic in their outlook.[942] While 'collective' or 'group' rights are understood as a pool of individuals invoking their rights together, the

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[938] Salomon (n 126) 523.
[939] Cotula 2020 (n 61) 509.
[940] Ibid.
[941] Chadwick et al 2024 (n 68) 4.
[942] Wall (n 76) 38.

starting point is always one, to which others are added.[943] As such, the problem of the individual is not solved by turning the hierarchy of value upside down putting community first, it is not about a priority within a field of political choices: 'The basis of the individual lies in the very question of the subject, that is, on a metaphysical level. To think differently about human rights it would be necessary to think again about the human *being*'.[944] What is most problematic about human rights, Wall concludes, is 'the manner in which they seek to fix and enforce limited idea of humanity; and the manner in which we fail to understand the fundamental togetherness from which any ontology of human being must begin.'[945] Confronted with the challenges posed by the Anthropocene, increasingly, scholars are starting to grapple with questions of being and togetherness, not only in relation to an ontology of the *human* as individuated subject of liberal law, but with the earth system as a whole.[946] As the next section highlights, the problem of rights' individualism is not resolved but rather replicated by extending legal subjecthood to non-human entities.

6.2.2 Rights of nature

The recent decade has seen increasing support for a right to a healthy environment.[947] In August 2022, the United Nations General Assembly (UNGA) affirmed the existence of a Human Right to a Clean, Healthy and Sustainable Environment.[948] Yet, as Marie-Catherine Petersmann observes, a right *to* a healthy environment is anthropocentric in its outlook and conforms to a liberal-individualist framing of ecological concerns by 'reinscrib[ing] a liberal individualisation of ecological concerns, which by their very nature exceed such categorisations'.[949] Hence, a 'human' right to healthy environment merely protects the life of atomised individual human victims. Human rights instruments such as the ECtHR, Petersmann argues, exactly reproduce such an 'individualised' and 'organism-centric investigation of life' by constituting the 'human' and the 'environment' as atomised

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[943] Ibid 95.

[944] Ibid 97. Emphasis in original.

[945] Ibid 43.

[946] Birrell and Matthews (n 111).

[947] See eg Hendrik Schoukens and Farah Bouquelle (eds), *The Right to a Healthy Environment in and Beyond the Anthropocene* (Edward Elgar 2024).

[948] The Human Right to a Clean, Healthy and Sustainable Environment (Resolution adopted by the UN General Assembly, 28 July 2022) A/RES/76/300.

[949] Petersmann 2021 (n 103) 776.

subjects and objects of law.[950] The rights invoked in the high-profile climate cases pending before the ECtHR, the author observes, are the rights of human victims: 'These are not bodies of water. These are not bodies of air. These are the bodies of individuated humans.'[951]

Beyond *human* rights *to* a healthy 'environment', scholars have explored avenues to bestow rights upon nature itself, leading to various 'natural' features such as rivers, mountains, or habitats across the planet being afforded 'legal' personhood.[952] Rights of nature are associated with what has come to be known as 'Earth Jurisprudence': This strand of scholarship assembles a range of perspectives advocating for a shift away from Western law's anthropocentrism and drawing attention to the environment and the non-human forms of life on which human communities ultimately depend.[953] As Matthews explains: 'In seeking to champion an 'eco-centric' worldview, Earth Jurisprudence situates human laws in relation to a set of ecological imperatives for sustainability and the diminution of environmental harm.'[954] Earth Jurisprudence scholar Cormac Cullinan employs the term 'wild law', to set out the 'fundamental rights' that all beings oft he biosphere have, 'including the right to exist, to a habitat or a place to be and to participate in the evolution of the Earth community'.[955]

This account has guided the Universal Declaration of the Rights of Mother Earth, adopted by the Peoples World Conference on Climate Change and the Rights of Mother Earth in April 2010, and is reflected in governments' acts of granting legal personhood to natural features such as mountains or rivers.[956] In Cullinan's view, all members of the 'earth community' have distinctive, inalienable and incommensurable rights, and 'the rights of each being are limited by the rights of other beings to the extent necessary to maintain the integrity, balance and health of the communities within which it exists'.[957] Yet, as

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[950] Ibid 792.

[951] Ibid 795.

[952] See generally eg Francine Rochford, *Environmental Personhood: New Trajectories in Law* (Routledge 2024).

[953] Daniel Matthews (n 102) 7.

[954] Ibid 6.

[955] Cormac Cullinan, 'A History of Wild Law' in Peter Bourdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011) 12, 13.

[956] Matthews (n 102) 7.

[957] Cullinan 2011 (n 55) 13.

Matthews argues, this conception of natural features as rights-bearers is problematic fort wo reasons: Firstly, such a view foregrounds 'individuated rights that supposedly attach to discrete ecological monads'.[958] In this view, 'human rights are for humans; rivers rights, for rivers; aardvark rights, for aardvarks and so on'.[959] Hence, while rights of nature break with the traditional humanism of rights and offer a corrective to the narrow, anthropocentric focus on *human* life by including non-human natures, they nonetheless remain liberal in their outlook since they only protect individualised victims.[960]

Moreover, rights of nature still presuppose the necessity of the state or some state-like authority that can adjudicate on the conflict between rights claims: For Matthews, '[r]ights only make sense in relation to some adjudicative "third" that is able to resolve conflicts between competing rights claims', and by relying on rights, we 'tacitly acknowledge that such claims ought to be recognised and enforced through existing state structures, juridifying any claims made in their name and presupposing a set of adjudicatory mechanisms that serve as the ultimate arbiter of their meaning'.[961] As such, endeavours striving for a broader incorporation of 'non-human' natures may push the boundaries of what is understood as a subject deserving protection but nonetheless build on a legal imaginary of strict ontological and epistemological separation between the human and the non-human.[962] Such a view still tends to conceptualise political and legal actions as originating only from human power relations, thereby '(re)inscribing an imaginary that views nonhumans as inert, passive, or dead matter amenable to human control'.[963]

Hence, rights of nature still are dependent upon human institutions, namely states, for their articulation and enforcement. As Nichols cautions, organised systems of ecological protection and care – such as affording certain habitats legal personhood – while posing significant challenges to mainstream proprietary frameworks, 'they are nevertheless also compromises with extant legal and political orders'.[964] The entities and Peoples in question must often seek legal protection from the very states previously engaged in domination and

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[958] Matthews (n 102) 10.
[959] Ibid 9.
[960] Petersmann 2022 (n 62) 780
[961] Matthews (n 102) 10.
[962] Petersmann 2022 (n 62) 785.
[963] Ibid 787-88.
[964] Nichols (n 549) 157.

dispossession.[965] Further, respective approaches bear a risk of reifying 'nature' as a static object 'rather than a dynamic set of living relations that exceed any particular legal codification', or as a 'subject' who is required to prove its worth through the moral evaluation of personhood.[966] As such, granting legal personhood to the Whanganui River can, at best, be seen as an 'approximation in law', reflective of the constricted and constrained conditions of Indigenous political articulation.[967] Consequently, Nichols summarises:

> Structures of stewardship, care, responsibility, and legal personhood for land are not, in and of themselves, definitive solutions to the challenges facing us with regard either to ecology or the contemporary legacies of colonial dispossession … because each of these 'solutions' enters into a field of power already saturated with meaning and striated by relations of domination.[968]

Breaking with the idea of individualised subjects, new materialist scholars argue that any response to the challenges posed by the Anthropocene warrant a renewed focus on *materiality* that refuses endorse long-held assumptions between nature and culture, subject and object, material and discursive, and so forth.[969] Against Western-liberal ontologies, Margaret Davies suggests to embrace a notion of 'natureculture' in which the nature/culture divide is replaced by a continuum, to reattune legal thinking to a complex, living planet. In her book *EcoLaw: Legality, Life, and the Normativity of Nature*, Davies points to 'the individualizing tendencies of liberal thought reflected in organism-centric investigations of life'.[970] By 'organism-centric', Davies means those 'investigations of life' that foreground 'the compulsion of the single entity rather than its relational existence and it co-productive capacities and relances'.[971] Such a focus on single individualisms, instead of their entanglements, reinforces individualised understandings of life instead of relational and compositional ones.[972] As the author writes:

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[965] Ibid.
[966] Ibid.
[967] Nichols (n 549) 158.
[968] Ibid.
[969] See most prominently Margaret Davies, *Law Unlimited: Materialism, Pluralism and Legal Theory* (Routledge 2017).
[970] Davies 2022 (n 98) 7.
[971] Ibid 68.
[972] Petersmann 2022 (n 62) 790.

> A theoretical objective would be to find concepts of law that are part of [natureculture] rather than entirely abstract. This is not only a question of devising law or a theory of law that enshrines, for instance, an ethic of ecological care or the values of stewardship, though these strategies are important. Rather it involves re-orientating ideas about the origins of law so that law can be regarded as emerging from non-hierarchical relationships between persons and things.[973]

A conceptualisation of law along Davies' lines fundamentally differs from this thesis' vantage point rooted in Marxian legal theory: In general, new materialist approaches resemble Marxist approaches in that they are concerned with the 'materiality relation', i.e. the material practices and circumstances in which the legal is embedded.[974] However, contrary to traditional Marxist accounts, new materialism generally assumes a 'flat' ontology of connections and interactions between objects – which possess their own agency – but no hierarchies. As such, new materialist approaches reject 'old' materialism's insistence on structure and privileged forms of agency, or the ontological distinction between individuals and institutions.[975]

Instead, as indicated above, for new materialism, the world consists of a web of intricate relations among nodes.[976] Compared to the Marxist tradition, for whom the material aspect of the social and legal order is intrinsic to the relation between human labour and nature, new materialism's ontology is more expansive and inclusive in its conception of materiality.[977] In new materialist thinking, there are no social systems or hidden structures, 'there is no preordained order but, rather, a process where an unforeseeable number of actants converge or associate and produce a series of effects'.[978] Materiality is thus conceptualised as 'a constant composition and re-composition of networks and networks of networks'.[979]

Yet, legal approaches drawing on new materialist insights do not necessarily negate that some actors are more influential than others: Drawing on the insights of Davies and others, Petersmann advocates for adopting a 'more-than-human' perspective on law that does not

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[973] Davies 2017 (n 969) 72.
[974] Supra 3.1.
[975] Goldoni 2022 (n 275) 46-47.
[976] Mariano Croce, *Bruno Latour* (Derive Approdi 2020) 18.
[977] Goldoni 2022 (n 275) 48.
[978] Ibid 48. 'Actants' is a technical term coined by Bruno Latour denoting anything (animate or inanimate) contributing to agency by acting or being acted upon. Ibid.
[979] Ibid 49.

just extend the subjectivity of the human onto the non-human but rather strives to 'reconfigure legal thinking and practices as enactments of entangled agencies between humans and nonhumans *with differential and asymmetrical power relations*'.[980] The insistence on differential and asymmetrical power relations is important, since, as I will argue in the final chapter, to reconceptualise the world along 'more than human' perspectives will require to overcome the asymmetrical power relations among humans first. Yet, when it comes to critically interrogate rights' capacities to confront 'green' market expansion, Petersmann's perspective is valuable, since law conceptualised that way appeals to a need to 'make visible the properties of life that evade and exceed rights formulations', and to call out what human rights bodies and instruments erase when they (re)produce the human, the non-human, and the inhuman.[981] Petersmann calls to conceptualise legal relations as a 'constitution of the living' that 'conceives of ecological care beyond the disciplinary limits of human rights law and its enclosure of thought' that conceptualises the 'living' only through the prism of liberal, individualised and subjective rights.[982] – One way of approaching this more relational conception, is to focus on obligations instead of rights.

6.3 Rights as carriers of radical demands

Thus far, this chapter has discussed two – interrelated – strands of contemporary rights critique: Firstly, rights' structural complicity in perpetuating the injustices of the present political economy; and, secondly, rights' tendency towards 'metaphysical individualism' which, despite the principal discursive openness of rights, folds them back onto the possessive individual, thereby preventing us from adopting a more complex onto-epistemology of entanglement and co-dependence. Looking at third-generation rights and rights of nature, I have argued that novel conceptions of rights and their subjects may open up possibilities for contesting and challenging the current political-economic set-up, but that rights (with or without the prefix 'human') remain individualistic in their outlook. This means that they will always be subject to balancing, to the assertion of one (human or non-human) individual's right against the rights of another. With Marxian legal theory, this

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[980] Petersmann 2022 (n 62) 788. Emphasis my own.
[981] Ibid 798.
[982] Ibid 797-98.

means that the competing rights claims of very different actors (indigenous peoples, trees, corporations) are made to look like a negotiation between free and principally equal subjects.

In this section, I argue that rights' legal *form*, irrespective of their content,[983] indeed may not escape the trap of metaphysical individualism, though that they might adopt a *function* that – temporarily – surpasses it. Rights, so my central argument goes, can summon a community around a radical demand, a dissensus that, qua Rancière, disrupts the distribution of the sensible. The section starts by exploring the notion of obligation – not as negative correlate to rights, but as richer concept capable of accommodating the relational accounts called for by new materialist scholars. While the existing legal opportunity structure – precisely because it is structured around the possessive individual – largely prevents emphasis on obligation within legal claims, rights can nonetheless act as carriers for demands of obligation and togetherness, surpassing capitalism's arithmetic, its separation into 'mine' and 'yours'. The rupture caused through the utterance of radical demands confronts extant legal collectives with a fault line – which, as previously discussed in chapter 4, very often correlates with the Western-liberal understanding of property and the extraction of surplus value.[984]

6.3.1 Beyond rights: towards obligations and 'response-abilities'

Against the narrow understanding liberal human-centred agency, Petersmann suggests to reconfigure legal thinking along 'response-abilities of care', to call into question the onto-epistemological premises of existing legal regimes for environmental protection.[985] Responsibility – instead of rights – provides for an alternative frame when looking to conceptualise law in a way more responsive to the challenges posed by the Anthropocene: Considering the institutional and discursive limitations of rights and the ambivalence of rights language, scholars have instead suggested to shift the focus from rights to obligations, understood to precede and exceed the 'rights – duty' correlate central to

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[983] See Pashukanis supra at 3.1.1.
[984] Supra 5.3.3.
[985] Petersmann 2021 (n 103).

modern law.[986] Borrowing from Simone Weil, Matthews proposes to think about lawful relations as obligations instead of rights, and, rather than privileging state law as an object of critical attention, 'to turn to the more fundamental question of the *ordering of associations*', as this 'bring[s] more clearly into view the forces and relations to which the changing climatic situation urges sensitivity'.[987] The author writes:

> Obligations – as the etymology in *ligare* suggests – are ultimately concerned with *binding beings*. With the advent of the 'age of rights', any talk of *bonds, duties, obedience* and *obligations* has largely lost its purchase on our collective legal and political imaginaries. Nonetheless, in the context of environmentalism, which increasingly frames its political ambitions through an account of our 'attachment to place' and the complex imbrications and entanglements of human and non-human actors, a renewed focus on the discrete labours of *obligation* as a primordial form of *binding beings* can help re-order the old hierarchies that structure modernity's worldview.[988]

While obligations can be seen as correlates to rights under positive law, Matthews argues that obligations also 'speak to broader and more basic concerns with the bonds and duties that constitute a range of communal practices'.[989] Obligations in this most basic sense, the author maintains, 'are best approached within an *ontological* and *communal* register, engaging the very *being* of given actors whose practices necessitate ordered relations with others'.[990]

Weil sees obligations to speak to the 'rootedness' of place and community an antidote to the prevailing conditions of modern uprootedness.[991] The proliferation of rights, for Weil, is reflective of a general 'uprootedness' of the human condition which is reflected by the fact that modern political life is mediated through a set of institutions such as courts, tribunals, legislatures which she describes as a 'middle region' between the scared and the profane.[992] Rights, according to Weil, 'hang in the middle air, and for this very reason they

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[986] Birrell and Matthews (n 111) 276. See also Peter D Burdon, 'Obligations in the Anthropocene' 2020 31 Law and Critique 309.

[987] Matthews (n 102) 11. Emphasis in original.

[988] Ibid 12. Quotation omitted.

[989] Ibid 13.

[990] Ibid.

[991] See Simone Weil, 'Draft Statement for a Statement of Human Obligations' in Sian Miles (ed) *Simone Weil: An Anthology* (Penguin 2005) 221.

[992] Simone Weil, 'Human Personality' [1943] in Sian Miles (ed) *Simone Weil: An Anthology* (Penguin 2005) 69, 86.

cannot root themselves in the earth'.[993] They are linked to questions of measurement and exchange, to the juridical economy of claim and counter-claim.[994] This critique of rights resonates with the problem of rights' metaphysical individualism that requires to abstract and sever rights' subjects from their context, to mould them into a form that is intelligible to the given order of the police.[995]

Importantly, for Weil, there is a deeper, existential register of obligation that precedes and exceeds the jural correlate of 'right-and-obligation': There is a difference between an obligation owed at law and obligations that are immanent to communal life, prior to institutionalisation or codification.[996] This more radical sense of obligation is revealed, according to Weil, by the 'infallible cry' of injustice that asks: 'why am I am being hurt?'.[997] The infallible cry reveals the fragility to the human condition, demanding our attention, response, assistance, and care by virtue of our *being-in*-community, and points to the forms of reciprocity and solidarity that this must entail.[998] The 'infallible cry' cannot be resolved by translating it into the regime of rights, since speaking of 'solving' such a claim of injustice carries the inference of calculability and the balancing of interests, and, as such, may lead to the dissolution of the more primary obligations that bind actors in a community,[999] As such, Birrell and Matthews note '[o]bligations – unlike predominant renderings of rights – more readily evoke ontological and existential concerns that persist beneath or beyond state institutions and the forms of subjectivity that they install'.[1000]

For Christodoulidis, Weil's crucial insight is that rights should be seen as the imperfect and partial mechanism by which the fundamental values of reciprocity, community and solidarity are translated into a legal form.[1001] In the movement from (extra-legal) obligation to (legal) right, something gets lost along the way: The fundamental cry of injustice 'spoken from the depth of the heart', for Weil, is transformed into 'a shrill nagging of

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[993] Simone Weil, *The Need for Roots* (Routledge 2001).
[994] Matthews (n 102) 13.
[995] In Rancière's sense. See supra 3.2.3.
[996] Matthews (n 102) 14.
[997] Weil 1943 (n 992).
[998] Matthews (n 102) 14.
[999] Weil 1943 (n 992) 93.
[1000] Birrell and Matthews (n 111) 284.
[1001] Emilios Christodoulidis, 'Dogma, or the Deep Rootedness of Obligation' in Daniel Matthews and Scott Veitch (eds) *Law, Obligation Community* (Routledge 2018) 4.

claims and counter-claims'.[1002] Christodoulidis argues that this structure indicates that there are resources *within* juridical language that can express the values of reciprocity, community and solidarity central to the prior, radical sense of obligation.[1003] However, as Matthews argues, the onset of the Anthropocene and the unfolding climate crisis require a reconfiguration of the themes of solidarity, reciprocity and community, moving beyond their humanistic and decidedly anthropocentric heritage.[1004] Obligations understood more broadly as the 'ligaments' of all associative life (and not merely human community) permit to acknowledge the relationalities between the human-and the non-human, and the community of humanity with nonhuman animals, ecosystems, as well as geological or planetary forces and processes.[1005]

Indigenous onto-epistemologies

Onto-epistemologies building on relationality and mutual responsibility challenging the modernist rendering of the abstracted and hierarchised rights-bearing subject are often found in indigenous, non-Western traditions of thought and are employed 'irrespective of and, frequently, in defiance of modernist epistemological framings'.[1006] Consequently, Matthews and Birrell suggest to work towards ethical encounters between indigenous and non-indigenous jurisprudential traditions, without fetishising or appropriating the former, to critically examine the limits of modernity's legal and political imaginary.[1007] How such an encounter may look, can be illustrated by two distinct examples: Firstly, as discussed with Cotula in the previous part of this chapter, indigenous communities have, through litigation, variously attempted to reformulate their own relational concept of land in Western-liberal property terms to defend the land they belong to from extractivist endeavours. The second example concerns the struggle for indigenous self-determination as described by Mohawk legal scholar Patricia Monture-Angus.

> Although Aboriginal Peoples maintain a close relationship with the land … it is not about control of the land. … Earth is mother and she nurtures us all. … Sovereignty,

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[1002] Weil 1943 (n 992) 84.
[1003] Christodoulidis 2018 (n 1001).
[1004] Matthews (n 102) 15.
[1005] Birrell and Matthews 2020 (n 111) 284.
[1006] Ibid 287.
[1007] Ibid 287-289.

> when defined as my right to be responsible … requires a relationship with territory (and not a relationship based on control of that territory). … What must be understood then is that Aboriginal request to have our sovereignty respected is really a request to be responsible. I do not know of anywhere else in history where a group of people have had to fight so hard just to be responsible.[1008]

In the first example, indigenous communities translate a non-Western conception of land into a claim intelligible to the dominant order: In Weil's terms, the infallible cry 'why are we being hurt' is translated into 'shrill nagging claims'. Conversely, in Monture Angus example, a traditionally rights-based claim is translated in a duty-based one: a request to be responsible.[1009]

The two examples help to highlight two things: Firstly, the 'encounter' between Western-liberal and indigenous onto-epistemologies is not an encounter between equals: To make the more relational understandings of land and nature heard, they have to be translated into the hegemonic language of property rights, arguably with considerable losses since some aspects and concepts are not translatable, not intelligible to the dominant order. The indigenous claims are subsumed into the dominant rights language, not vice versa. This resonates with Christodoulidis' observations on poststructuralist accounts of rights: Just because rights are capable of extending their meaning, this is, in itself, not a sign of empowerment or resistance.[1010] Yet, secondly, it highlights that both, obligation and right, form parts of juridical language broadly conceived.[1011] For Christodoulidis, the movement from obligation to right introduces a '*faultline within* the institutional language of law', creating a contradiction 'between dignity promised and indignity delivered; between the promise of responsibility and the denial of fragility; between the promise of solidarity and the delivery of "shrill" contention and claim of right', opening up the field for immanent critique.[1012] With this, as I unpack further in the next section, rights can act as carriers of radical demands, exposing the fault lines of a given legal collective.

[1008] Patricia Monture-Angus, *Journeying Forward* (Fernwood 1999) 36.
[1009] See Nichols (n 549) 30.
[1010] Christodoulidis supra at 181.
[1011] Christodoulidis 2018 (n 1001) 11. Emphasis in original.
[1012] Ibid 11.

6.3.2 Rights beyond essentialism

As discussed in the previous sections, obligations might be thought of as 'the primary ligaments of associative life', directing legal thinking towards what rights (of humans and nature alike) fail to grasp.[1013] Yet, rights – rather than obligations – are what existing legal opportunity structures have to offer. How can the invocation of rights, if at all, speak to the deeper, 'rooted', register of obligations? Critical legal theory, Christodoulidis insists, 'has always promised an emancipatory moment in law itself, the promise of the "exploitation" of the institutional imagination to disturb or reverse what appear as legal determinations and legal givens'.[1014] This requires to return to the relationship between (human) rights invoked as human rights law, and a broader rights discourse that transcends the legal realm and spills over into the political. The following sections will set out a reading of rights that, at the same time, acknowledges their limitations as well as their emancipatory potential to rupture the established legal and institutional givens. My account here extensively draws on Wall's reading of rights as 'trembling' between decision and demand. Walls theory is useful to explain the functioning of 'strategic' rights-based litigation as a device of resistance against 'green' market expansion.

Rights between decision and demand

While rights discourses transcend the domain of the legal, juridification, Wall notes, still 'forms much the horizon of meaning of much of modern human rights'.[1015] Orthodox human rights discourse, the author argues, often denies the aspect of the political and instead tends to frame human rights as 'authoritative demands'.[1016] Human rights are structured by prior authorisation, and any resistance expressed in human rights terms is, in fact, uttered in the language of the state (or the respective regional or international institution of which states are parties).[1017] While enabling resistance to (state) power, rights simultaneously (re)inscribe (state) power: The political demand, formulated in rights language, is tied to the juridical, and hence dependent on the juridical for its completion:

[1013] Matthews (n 102) 13.
[1014] Christodoulidis 2009 (n 107) 17.
[1015] Wall (n 76) 118.
[1016] Ibid 1.
[1017] Ibid.

the decision of an authority.[1018] The tension between political demand and decision is resolved by privileging the latter.[1019]

In line with the poststructuralist tenet of rights' principal openness, Golder argues, drawing on Michel Foucault, that rights may be understood as 'ambivalent artifacts': In the service of political struggles, they can be strategically employed to challenge, and reach beyond existing institutions – however, they simultaneously determine and constrain the subjects who mobilise them.[1020] Rights in this sense can be framed as political tools, assisting in the construction of different political and social visions while competing with other rights and other political visions and idioms and thereby opening up a richer, more self-reflexive rights discourse.[1021] Yet, as discussed above, this principal openness alone does not, in and of itself, signify empowerment and resistance. To the contrary, even if employed as a tool in struggles against capitalist exploitation and dispossession, rights subjects' may be co-opted into market-based arrangements, as will be further discussed in the next chapter when looking at the *Fosen* case.[1022] As Golder cautions:

> '[W]e must ask whether a focus upon the utopian horizon of the re-writability of rights, of the semiotic indeterminacy of the human and the de-constructiblility of rights, fails to take proper notice of the material, disciplinary conditions of rights regimes – conditions which structure rights claims in advance'.[1023]

Indeed, Petersmann has observed before, and as will be discussed in the last chapter in greater detail: The claimants in climate litigation cases before the ECtHR may push boundaries when it comes to defining the scope and content of the substantive provisions involved, but they are constrained by the limits in terms of standing or jurisdictions They are individuals, residing in Europe – not islanders whose livelihoods are threatened by flooding, not indigenous peoples, not rivers or trees. In other instances, before an international treaty body, such as the UNHRC, claimants may be islanders, or indigenous peoples. Perhaps they will even claim rights on *behalf* of a river or a mountain, but they are

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[1018] Ibid.

[1019] Ibid 1-2.

[1020] Golder 2011 (n 902) 297. Since this is outwith the scope of this thesis avoid discussing the relation between rights and governmentality/biopolitics. On issue see Wall (n 76).

[1021] Ibid.

[1022] Infra at 7.2.

[1023] Golder 2011 (n 902) 291.

constrained in relation to the claims they are able to make. The constraints, as will become clear in the next chapter, reside in the legal opportunity structure available, which, in turn, is structured by the wider political economic context.

Rights as 'being' rather than 'having'

Against the constraints of legal and institutional expressions of rights, as hinted throughout this chapter, there is a dimension of rights that precedes their juridified form: With Weil and Christodoulidis, rights are merely the imperfect translation of a prior sense of obligation which is rooted in solidarity, reciprocity and community.[1024] Solidarity, reciprocity and community are antagonistic to the individualising tendencies of modern rights: They defy liberal rights' possessive individualism in that they speak to a mode of 'being', rather than 'having' rights which the 'the monadic individual obsessed with the risks to its properties' seeks to protect against other rights holders' 'properties'.[1025] In this respect, Martin Heidegger's conception of *dasein* ('being there'), Wall argues, is useful in that it points to 'the necessity of escaping the confines of the monadic individual obsessed with the risks to its properties'.[1026]

Heidegger does not start its thought experiment with the individual or the subject but rather assumes that one self's 'being there' is, in an originary sense, constituted by being-with others.[1027] As Wall explains: 'One is always already in-the-world, always already with others and always already there.'[1028] Hence, the world as Heidegger sees it, 'is not a collection of objects and subjects, but rather is understood as a web of relations in which beings share being'.[1029] Thus, Wall concludes: '[T]he possessive individual as a fundamental unit of thought is a fiction. It is a way of misunderstanding being.'[1030] Note how this resonates with the critique of rights of nature discussed above, which, however,

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[1024] Supra at 197.
[1025] Wall (n 76) 42-44.
[1026] Ibid 42.
[1027] Martin Heidegger, 'Letter on Humanism' in *Basic Writings. From Being and Time to the Task of Thinking* (Harper & Row 1977) 200.
[1028] Wall (n 76) 40.
[1029] Ibid 39.
[1030] Ibid.

ventures even further to explicitly embrace modes of 'being' that include not only human collectives, but extend this thinking to the more-than human.[1031]

Yet, Wall reminds us, caution is warranted when operating with the concept of 'community' which 'increasingly becomes burdened and over-determined by the metaphysical'.[1032] Asserting the metaphysical 'essence' of the community equals to delineating its border and, with this, 'community' appears as a process of inclusion/exclusion, rather than a fundamental being-together.[1033] Heidegger himself provides for a striking example of this danger with his embrace of fascism and its understanding of 'Volk', which delimits who is ought to belong within the confines of the community and who should remain outside. Thus, 'community' risks to fall into the same metaphysical trap as the attempts to insulate some kind of 'human' essence discussed above. For this reason, the introduction of collective rights does not solve the puzzle.

For Rancière, human rights have a double character, once when written and once when performed.[1034] In their written form – in the UDHR, the Covenants and all other authoritative legal sources – they remain 'part of the configuration of the given', the order of the police which establishes the distribution of the sensible, that is: who counts. The 'Rights of Man', however, have a second disposition. As Rancière states:

> Man and citizen do not designate collections of individuals. Man and citizen are political subjects. Political subjects are not definite collectivities. They are surplus names, names that set out a dispute (litige) about who is included in their count. Correspondingly, freedom and equality are not predicates belonging to definite subjects, Political predicates are open predicates: they open up a dispute about what they exactly entail and whom they concern in which cases.[1035]

The subject of *politics* is not the reified subject, 'not the proletariat, the poor, or minorities. On the contrary, 'the only possible subject of politics is the people or the demos, i.e. the supplementary part of every account of the population'.[1036] As such, Wall argues, human

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[1031] See supra at 5.2.2.
[1032] Wall (n 76) 107.
[1033] Ibid.
[1034] Jacques Rancière 2004 (n 197).
[1035] Ibid 305.
[1036] Gabriel Rockhill, 'Translator's Introduction' in Jacques Rancière, *Dis-agreement – Politics and Philosophy* (University of Minnesota Press 1999) 3.

rights 'name both a limitation … and a political subjectivisation that goes beyond "inclusion"' in any human rights instrument.[1037] Becoming-subject, so conceived, escapes the trap of metaphysical individualism and the possessive individual: Rights subjects form around a particular demand, an 'infallible cry', a dissensus that ruptures the given distribution of the sensible – such as extant property relations based on Western-liberal understandings and resulting from prior appropriations.[1038] By this, in Lindahl's terms, an legal collective might be confronted with a fault line.

Becoming-subject through struggle

As discussed previously in this, as well as in the preceding chapter, scholars have suggested to take inspiration from – yet pluralistic and diverse – indigenous onto-epistemologies when confronting the Western-liberal property paradigm. As I have suggested, given the dominance of Western-liberal property, and the risks this poses in terms of co-option and market capture, we might better avoid the concept of 'property' altogether. Cynically though, as discussed earlier in this chapter, indigenous peoples may precisely need to rely on the concept of property to realise their modes 'being' that – to various degrees – deviates from the anthropocentric worldview revolving around the possessive individual. This does not only (or not necessarily) encompass invoking the right to property as such, but also the rendering as a possessive subject 'having' rights.

Nichols has pointed that indigenous struggles against dispossession have served to constitute group identification and subjectivity, 'as an enacted and embodied mode of structural critique'.[1039] Hence the focus, he writes 'is on the normative claims of Indigenous peoples – claims that express an experience of injustice – but also how the very activities of claims-making give new shape and content to the subjectivities of the claimants, in this case, the political identity of "Indigenous"'.[1040] The author argues that 'normativity is … related, but not reducible, to subjectivity (why a thing is wrong, and for

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[1037] Wall (n 76) 122.
[1038] See supra at 5.2.
[1039] Nichols (n 549) 85.
[1040] Ibid 86.

whom)'.[1041] With Marx, Nichols conceptualises this constitutive process as one combining two critiques: The critique of alienation, and the critique of diremption.[1042] He explains:

> Whereas alienation generally imagines a unified collective subject alienated from itself in some relevant way, the critique of diremption is more commonly partisan, envisioning the freedom of one subject in direct opposition to the tyranny of another. Marx's way to square these two forms of critique was to figure the struggle of the proletariat against the diremptive splitting of humanity (expressed as class domination and exploitation) as containing the potential for a universal human emancipation against the alienating tendencies of capital. In this way, a particularistic and partisan struggle could also become a universal one (the movement from *an sich* to *für sich*).[1043]

Nichols argues partisan struggles linked to particular historical processes may target one group in particular, but may nevertheless contain 'a dimension of concern to us *in general'*.[1044] While Indigenous peoples have always resisted dispossession, they do not have 'always done so *as* Indigenous peoples', but instead, 'the very idea of indigeneity was, in part, forged in and through this mode of resistance'.[1045] Rounds of dispossession associated with the expansion of natural resource extraction from the mid-twentieth century generated new waves of 'pan-Indigenous' legal and political mobilisation, drawing together 'otherwise far flung and disparately located communities who nevertheless had a basis on which to build a common struggle'.[1046] They all were 'groups that had been dispossessed of much of their territory and wanted to re-establish connections to places of significance to them in order to restore a sense of who they were in the wake of dispossession'.[1047] This means that indigeneity, as a wider political and legal concept that has been partially informed by the common resistance against dispossession, may already be defined, in part, as critical *praxis*.[1048]

[1041] Ibid. Nichols also points to the 'belatedness of normative evaluation', emphasising that critique always comes 'after the fact', in the sense 'that it is motivated and informed by social group categories that are themselves produced by the very processes under consideration'. Ibid 87.

[1042] Ibid 99.

[1043] Ibid.

[1044] Ibid. Emphasis in original.

[1045] Ibid 110.

[1046] Ibid 109.

[1047] Miranda Johnson, *The Land Is Our History: Indigeneity, Law, and the Settler State* (OUP 2017) 3-4.

[1048] Nichols (n 549) 111-12.

In the face of the continuing appropriation of land, nature, and the atmosphere seeing rights-based litigation as set of distinct, yet related struggles against capitalism and 'green' market expansion appears tempting. However, this raises various issues, not only by lumping together indigenous and non-indigenous struggles despite the distinctiveness of colonial dispossession, but also: How do we avoid essentialising communities of struggle: If the 'indigenous' itself becomes a static, essentialised category, it, again, risks to be co-opted and integrated within a wider system of various rights-holders (trees, indigenous peoples, transnational corporations) whose rights they 'have' are subject to balancing and negotiation. As such, there is an urgent need to avoid what Gayatri Spivak has called 'strategic essentialism',[1049] since it exactly conforms the logic of the police who decides who and what counts for which purposes within the give distribution of the sensible.[1050] It does not necessarily rupture anything, but, in the worst case, reinscribes the status quo. Yet, given rights, indigenous and otherwise, is what is at our disposal, how can we invoke them, strategically, in a way that brings us closer to new materialism's call for mutual 'response-ability', community, and care? As I will discuss in the final section of this chapter: We only can by keeping on trying.

6.3.3 'Right-ing' and constituent power

To avoid the trap essentialisation and reification, those invoking rights cannot be conceptualised as a single, stable community, they cannot possess an identity to vindicate or a shared bond of belonging for which they seek recognition.[1051] As Wall notes:

> There is no transcendent, pre-given, sense or truth which could legitimate struggle… Rather, in each case there is a sense of struggle in community against injustice. This struggle cannot be universal, except insofar as the struggle is shared by those who fight the same phenomenon. However, this "solidarity" is immediately confronted with the fact that it is never the "same phenomenon". It would bever take the same form, but

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[1049] Gayatri Spivak, *The Postcolonial Critic: Interviews, Strategies, Dialogues* (Routledge 1990). For a critique see Knox (n 392).

[1050] Rancière supra at 3.2.3.

[1051] Wall (n 76) 127. Wall here draws on French philosopher Jean-Luc Nancy, who, instead of seeing the community and the individual as distinct entities, employs the notion of 'singularity' to denote a merging the 'I' and the 'We' to become inseparable: 'Singularity refers to the subject's uniqueness that arises through the "we" but cannot be captured, subsumed or understood in the "we"'. Quoted in Wall 124.

> would take on a singularity of its own. Each time, something new, each time, the creation *ex nihilo* of the world.[1052]

Against dominant liberal conceptions of rights, Wall contests a view that sees the subject of human rights with its 'properties' as already existent. He draws on the term 'right-ing',[1053] to describe his approach towards human rights 'as an event to be created each time rather than a property to be protected'.[1054] With this, Wall links the articulation of rights to the moment of constituent power – to political, collective, and a-legal dimensions of rights. 'Right-ing', for Wall, describes human rights' 'trembling' between authoritative decision and political demand: 'Right-ing is the demand for the impossible, which forces a revaluation of the possible … It shifts the emphasis in rights from the fetishistic focus on already given legal or quasi-legal texts.'[1055]

Right-ing, according to Wall, retrieves the radical core of human rights that has previously withdrawn. Righting denotes the instance in which rights are utilised in way that resists the given distribution of the sensible.[1056]

> 'Right-ing' … is creation from the nothing of manners and modes of being-together. It names the moment that human rights are utilized in an alegal fashion to draw together and resist the given … 'distribution of the sensible'. However, this creation of world itself acts on and (re)creates human rights. Without calcification or authority, human rights name a very different process; a demand, a gathering. Each time, singular; each time, common.[1057]

By 'calcification', Wall names the risk that lies in the authoritative restatement of rights: 'Human rights become radical only when they are appropriated.'[1058] Accordingly, '[r]ight-ing cannot be undertaken by governments, it cannot be found in the decisions of this or that

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[1052] Wall (n 76) 131.

[1053] Ibid 145. The term 'right-ing' was originally coined by Costas Douzinas for whom it stands against essentialism: 'Some human rights may be consistent with non-metaphysical humanism. But the overall form of the social bond would change from rights and principles to being-in-common, to the public recognition and protection of the becoming-humans with others. A dynamic process which resists to hold humanity to an essence decided by the representatives of power. To coin a term, this would be a process of "righting" and not a series of rights and, like writing, it would open Being to the new and unknown as a condition of its humanity'. See Douzinas (n 69) 215-16.

[1054] Wall (n 76) 133.

[1055] Ibid 146.

[1056] Ibid 131. See Rancière supra 3.2.3.

[1057] Ibid.

[1058] Ibid 145.

authority'.[1059] Rather, Wall explains, 'right-ing occurs when a group gathers around the saying of a demand. Hence, '[i]t is not a matter of fitting radical demands into the traditional form, but of re-forming and reappropriating rights through the radical demand'.[1060] As such, human rights draw together both, government and resistance, while the immanent tension between the two is never resolved. Human rights, 'can at once hold the possibilities of open opposition but they can also be a tool of empire or government: they are differential in essence'.[1061]

The demand uttered in the instance of 'right-ing' challenges the state of the present situation. It disrupts the given distribution of the sensible. Wall suggests that disrupting the current 'distribution of the sensible' might tend towards 'some aspect of anti-capitalism' since the in the neo-liberal post-political age the economic tends to entirely over-determine other discourses. [1062] Right-ing, Wall argues, stands against the 'transformation of desire into right which is intrinsic to the liberal-capitalist system'.[1063] Only through an understanding of 'right-ing', I submit here, we can conceptualise human rights in a way capable of confronting new constitutionalism and 'green' market expansion. In line with the observations in this and the preceding chapter the targets of rights claims that want to challenge and confront 'green' market expansion is Western-liberal property: as a legal institution, as well as a wider paradigm linked to the preservation of extant property relations and the extraction of surplus value. For Western legal collectives, qua Lindahl, the existence and protection of property presents a fault line. Calling forth a mode of being that transcends the liberal frame the possessive individual means calling forth the a-legal. To meet the claim requires the legal collective to end and become a different one.

'Right-ing' can be employed as a strategy of rupture – yet, once the radical demand enters the legal and institutional realm, the radical withdraws: the a-legal part of the claim is severed, law's power of homology and deliberate deadlock kick in.[1064] The claim is made to conform with the parameters of the system it is uttered in. Because of this, once the demand has entered the juridical, a new community must gather, to reformulate and utter

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[1059] Ibid 143.
[1060] Ibid 140-141.
[1061] Ibid 133.
[1062] Ibid 143.
[1063] Ibid 146.
[1064] See Christodoulidis supra 3.2.3.

the demand anew. Arguably, 'right-ing' can be seen as an instance of open dialectics, in that it strives towards an open horizon, 'whose telos is not already envisaged as the completion of a form'.[1065] It avoids the trap of Marx' *eighteenth Brumaire*, of 'the tradition of all the dead generations [that] weighs like a nightmare on the brain of the living',[1066] in that it defies the categories the present order has at its disposal. By doing so, it opens up avenues to think of rights' subjects as radically open; and, since for radically open subjects there cannot be a fixed number of predefined 'rights', their demands arise as possibilities beyond the imaginaries of Western-style liberal individualism. As I will argue in the next and last chapter, in climate and just transition we may well discover a process of 'right-ing'.

6.4 Conclusion

Despite the valid critique exposing legal rights' structuring around the possessive individual, rights might as well be understood differently. Through 'righti-ng', human rights claims can act as a carrier medium for radical demands. Rights so understood, capture the moment when a group gathers to say a demand. With this, they are capable of rupturing the distribution of the sensible, thereby calling forth the a-legal. In a capitalist political economy, the a-legal manifests itself by pointing to a world without property – not only in the form of property rights to things or land, but without 'properties' understood in a wider sense, as a mode of 'having' rather than 'being'. With this, the a-legal not only hints towards a world without property, but also a world without rights, towards a deeper sense of obligation, to a mode of being together, of community, reciprocity and care advocated for by new materialist thinking.

[1065] Christodoulidis supra 91.

[1066] Supra at n 407. In the context of the Anthropocene, and inspiring New Legal Materialism's accounts, 'Actor-Network' theorist Bruno Latour has employed this argument of openness towards 'Nature' as a whole: Drawing on the 'Gaia hypothesis', developed by chemist James Lovelock and co-developed by microbiologist Lynn Margulis in the 1970s, Latour articulates the planetary system not as a transcendent 'Nature' constituted by a unified code, but as a messy and emergent set of relations that lack final closure. As the author argues: 'It is. . . [the] total *lack of unity* that makes Gaia *politically* interesting. She is not a sovereign power lording it over us. Actually in keeping with what I see as a healthy Anthropocene philosophy, She is no more unified an agency than is the human race that is supposed to occupy the other side of the bridge. . . This is why Gaia-in-us or us-in-Gaia, that is, this strange Moebius strip, is so well suited to the task of composition. It has to be composed piece by piece and so do we.' In: Bruno Latour (n 97) 95. I will, however not further engage with Latour's take on the Gaia hypothesis which would take me beyond the scope of the present thesis.

Yet, once the demand enters the juridical domain, it subordinates itself to the capitalist economy of representation and the possibilities available therein. As Cotula notes:

> 'By resorting to the instruments of positive law, social actors must translate their demands into conceptual categories – such as the right to property – that are associated with dominant economic and political organisation. In harnessing such hegemonic concepts in counter-hegemonic terms, and in locating social justice advocacy within institutionalised human rights processes, strategies to "juridify" inherently political disputes must operate "within the system"'.[1067]

This does not mean that we should stop using rights in their originary, radical sense which arguably rather resembles the concept of obligation. And, against the Marxist critique that they may foreclose other avenues of resistance, Cotula's work demonstrates that, to the contrary, rights may also enable resistance in other forms. He notes:

> '[A]ppropriating human rights can catalyse public mobilisation in ways that go significantly beyond the perimeter inscribed by a strict juristic interpretation of the legal concepts at play: while juristic notions are necessarily central to the legal case, public mobilisation around the litigation can involve more far-reaching – and radical – social and discursive practices.'[1068]

Instrumentalising human rights in social struggles can push boundaries of legal interpretation, and, ultimately, reconfigure the normative contours of the rights themselves.[1069] However, doing so may, indirectly, also expose legal collectives' fault lines. As Wall clarifies, *'[t]here is not some sort of "other" human rights* that we could oppose to the current practices.'[1070] Instead, he describes human rights as 'a complex ideology with a heterogeneous potential'.[1071] He writes: '[Rights] must be put together again and again. *There is neither model nor warranty, just the possibility of endless experimentation.*'[1072] We should not stop asserting rights strategically, as carrier medium for radical demands. We just need to be attentive to what happens if we do. And never satisfied with what has been achieved. As the next and last chapter demonstrates in the context of climate and just transition litigation, it is important to lift the gaze beyond the

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[1067] Cotula 2020 (n 61) 515.
[1068] Ibid 503.
[1069] Ibid. See in a similar vein Nichols (n 549) 158.
[1070] Wall (n 76) 133-34. Emphasis in original.
[1071] Ibid 134.
[1072] Ibid. Emphasis in original.

boundaries that have been shifted – to look at the limits beyond which no such shift can occur.

7. Rights-based litigation: pushing boundaries, exposing fault lines

Climate change has been described as 'legally disruptive', in that it breaks with the continuity of existing legal practices and doctrinal 'business as usual' and instead requires responses that go beyond the application and incremental developments of existing rules.[1073] Consequently, scholars have argued law that must be reimagined in a in a way that 'cuts across silos, captures the bigger picture, and opens the closures of law to multiple stakeholders, including the marginalized, the unborn, and the non-human'.[1074] Rights are one tool to stimulate such a reimagination. However, such reimagination encounters structural challenges, rooted the very form of law and rights. What is more: opening up law to include more subjects within its remit, does not necessarily entail the shift towards a mode of 'being' rather than 'having', towards community, reciprocity, and care within more-than-human communities.

This chapter discusses three sets of cases loosely aligned with the structure outlined in the introduction: The unjust appropriation and subsequent distribution of the carbon budget, the appropriation of land, and, on a slightly different register, the 'distribution of the sensible' upon which the other maldistributions rest. Drawing on Lindahl's account of strong and weak a-legality, I contend that litigation may shift boundaries; it may, with new legal institutionalism, 'tweak' the law to result in slightly more equitable outcomes. Litigation may disrupt the given distribution of the sensible, and act as immanent critique, exposing the contradiction between rights' promise and the unjust order rights uphold. However, rights' invocation may also cement the status quo, reinscribe hegemony and co-opt rights' subjects thereby weaking resistance. Rights understood in this sense are differential in nature. Climate and just transition litigation thus may be seen as an instance of 'right-ing'.[1075]

The cases discussed expose the differential nature of human rights claims – as radical demands, disrupting the distribution of the sensible, and as legal articulation, reinstating

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[1073] Elizabeth Fisher et al, 'The Legally Disruptive Nature of Climate Change' (2017) 80 The Modern Law Review 174.

[1074] Louis Kotzé et al, 'Earth System Law: Exploring new frontiers in legal science' (2022) Earth System Governance 100126.

[1075] Wall supra at 6.3.3.

the distribution of the sensible. Rights understood this way can be employed strategically, defying the binary between 'pragmatism' and 'nihilism'. The implications are twofold: Firstly, it requires us to think carefully, about how we evaluate failure and success – in the light of the overarching strategy – to, eventually, overcome the capitalist mode of production. Secondly, it makes clear that once the claim has been settled, the struggle continues, the radical demand must be uttered over, and over again.

7.1 Climate mitigation litigation: Litigating the appropriation of the atmosphere

In the introduction, I have pointed that 'green' market expansion exacerbates existing distributive inequalities and creates new ones, starting with the uneven distribution of the carbon budget. In chapter 5, I have argued that the uneven distribution results from an initial, unjust act of appropriation linked to the creation of property rights in carbon. In this section, I argue that the 'high profile' climate litigation cases following the seminal *Urgenda* decision in the Netherlands may well be read as attempts to expose the injustice linked to the atmosphere's initial appropriation and the subsequent uneven distribution of the carbon budget.[1076] As discussed in the introduction, I deliberately have chosen 'high profile' cases that are seen to be the most prominent, and most promising ones, since they are best placed to explore both: The possibilities, as well as the limitations of rights-based systemic mitigation litigation.

Systemic mitigation litigation illustrates rights' 'trembling' between decision and demand. It shows how a community gathers around a radical demand. This demand then is uttered in the language of rights, that is: in the language and the modes of appearance made available by the given distribution of the sensible. However, through the mismatch between the underlying radical demand and the legal claim, the distribution of the sensible is disrupted, yet, only for a short moment in time. There is a risk that the initial radical demand disappears out of sight, and a strategic move turns into a merely tactical one. Once the demand has entered into the legal realm, formulated as individual rights, it falls prey to law's power of homology and its mechanism of deliberate deadlock. What is more: Inadvertently, on the back of the process that turns the radical demand into an

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[1076] Supra at 5.2.

authoritatively mediated decision, hegemonic positions and paradigms may be reaffirmed and thereby strengthened. Nonetheless, a residue of the radical remains, ready to be rekindled and conjured anew.

7.1.1 Systemic mitigation litigation: recent examples

Global North jurisdictions have, in recent years, seen a surge in what has become known as 'systemic mitigation litigation': cases that challenge states' insufficient overall efforts to reduce GHG emissions.[1077] What litigants essentially seek to achieve is that the respective respondent states pursue more ambitious mitigation targets (or at least have a credible plan to stick to their existing targets), which also implies that they will contribute more in terms of their 'fair share' towards the global efforts to reduce GHG emissions. Yet as argued throughout this section, the filing of the cases as such can – at least in some instances – be construed as a more radical claim, against the unjust appropriation of the atmosphere to the detriment of the existing youth and the generations to come. Systemic mitigation litigation arguably was set in motion by the *Urgenda* case filed by the eponymous Dutch NGO on behalf 886 Dutch citizens, leading the Dutch Supreme Court to rule that by failing to reduce GHG emissions by at least 25 percent by end-2020, the Dutch government violates its duty of care towards its citizens, which was seen to include the substance of the right to life and the right to private and family life under Articles 2 and 8 ECHR respectively.[1078] Other domestic cases followed suit, drawing upon existing case law regarding a state's 'positive' obligations' or 'duties to protect' which require states to take reasonable and appropriate measures to minimise or prevent foreseeable and sufficiently serious risks of harm to the protected rights of those within their jurisdiction.[1079]

[1077] Maxwell et al (n 77) 38. Thus far, this pattern regarding the type of complaint and the geographical location of those invoking it can also be observed in climate cases pending before international human rights bodies. See Riccardo Luporini and Annalisa Savaresi, 'International human rights bodies and climate litigation: Don't look up?' (2023) 32 Review of European, Comparative & International Environmental Law 267.

[1078] *State of the Netherlands v. Urgenda Foundation*, Case No [2015] HAZA C/09/00456689 (Supreme Court of the Netherlands, 12 December 2019) [hereinafter *Urgenda*].

[1079] Maxwell et al (n 77) 40.

Neubauer, KlimaSeniorinnen, Duarte Agostinho

In some instances, systemic mitigation litigation was successful in domestic courts, most notably in the German *Neubauer* case, where the Constitutional Court declared the domestic Federal Climate Act to be partly unconstitutional since it does not sufficiently protect young people against future infringements and limitations of their existing fundamental rights resulting from climate change.[1080] In the case of *KlimaSeniorinnen v Switzerland*, a group of elderly women filed a complaint at the ECtHR after the Swiss courts had rejected their claims aimed at forcing the Swiss authorities to adopt more stringent and ambitious climate policies. The Strasbourg Court affirmed a violation of Articles 6 para 1 ECHR (access to court) and 8 (right to private and family life) ECHR.[1081] Both cases have been discussed extensively elsewhere.[1082] I therefore only briefly outline the cases before moving on to the aspect relevant in relation to strategy and rupture.

The *Neubauer* judgment by the German Constitutional Court responds jointly to four similar complaints, directed at the German Climate Change Act which was deemed insufficient: The eponymous *Neubauer* application involved teenagers and young adults specifically affected by climate change, most of them in their capacity as farmers located close to the coast or as children thereof.[1083] Of the three other applications, one was mainly filed by children, respectively their legal representatives,[1084] one by a handful of adults and one minor accompanied by two environmental organisations,[1085] and one by fifteen adult inhabitants of Bangladesh and Nepal claiming that climate change – to which Germany's excess GHG emissions are a contributory cause – is threatening their existence in various ways.[1086] The Constitutional Court argued that the German Constitution requires to safeguard fundamental freedoms over time which requires to 'spread the opportunities associated with freedom proportionately across generations', which does not permit to

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[1080] *Neubauer and others v Germany*, Cases No BvR 2656/18/1 [hereinafter *Göppel et al*]; BvR 78/20/1, [hereinafter *Yi Yi Prue et al*]; BvR 96/20/1 [hereinafter *Steinmetz et al*] BvR 288/20 [hereinafter *Neubauer*] (Federal Constitutional Court of Germany, 24 March 2021).

[1081] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* App no 53600/20 (ECtHR, 9 April 2024) [hereinafter *KlimaSeniorinnen*].

[1082] See references throughout this section.

[1083] *Neubauer*.

[1084] *Steinmetz et al*.

[1085] *Göppel et al*.

[1086] *Yi Yi Prue et al*.

unilaterally offload the greenhouse gas reduction burdens to the future.[1087] The more emissions are permitted until 2030, the Court held, the greater is the risk that the state will have to intervene more quickly and strongly curtailing fundamental rights in the future. Further, the Court found that the guarantee of Article 20a of the German basic law – which enshrines commitment to protect then natural foundations of life and animals on behalf of future generations – requires to 'treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence'.[1088] From this, the Court deduced a duty to specify the further course of GHG reduction targets more precisely at an early stage.

In spring 2024, the ECtHR handed down its verdict in *Klimaseniorinnen*. The applicants consisted of an association – 'Verein KlimaSeniorinnen Schweiz' – whose members are women living in Switzerland, most of them over 70 years old, and four individual applicants over 75 who complained to suffer from health impairment due to heatwaves.[1089] They claimed, inter alia, that the omission of the Swiss state to implement adequate GHG reduction measures has violated their rights under Articles 2 and 8 ECHR, and that the Swiss authorities, by refusing to deal with the substance of their case, had violated the procedural guarantees of Articles 6 and 13. While the claimants maintained that their standing and the substantive violations are grounded in the significantly increased risk of heat-related mortality and morbidity as climate change worsens, they also maintained that Switzerland's current climate strategy falls short of meeting a 'fair share' contribution towards the global mitigation target.[1090] To support their latter claim, they cited evidence as to Switzerland's excessively high per-capita carbon footprint.[1091] The Swiss authorities had rejected the applicants' claims on the grounds that the general purpose of their request was to achieve a reduction in CO_2 emissions worldwide and not only in their immediate surroundings.[1092] The ECtHR did not grant the applicants' individual complaints, but found that organisations may, under certain circumstances, have standing before the Court,[1093]

[1087] *Neubauer* Headnote 4; para 183.
[1088] Ibid Headnote 4.
[1089] *KlimaSeniorinnen* paras 10-21.
[1090] Ibid para 303.
[1091] Ibid para 70.
[1092] Ibid 282.
[1093] Ibid para 502.

and that states must have an appropriate system of climate governance in place, including a binding national regulatory framework and adequate implementation measures.[1094] At the same time, the Court also handed down its verdict in two other cases, including *Duarte Agostinho and Others* filed by six young people from Portugal against their home state and 32 other states.[1095] Similar to *Neubauer* and *KlimaSeniorinnen*, the applicants claimed that the respondent states' failure to act decisively in combatting climate change violates their rights to life (Article 2), their rights to private and family life (Article 8), as well as the prohibition of discrimination (Article 14). The case was declared inadmissible due to non-exhaustion of local remedies in the applicants' home state, and for lack of standing in relation to the other states.

7.1.2 Distributive aspects

Arguably, the Courts, in *Neubauer* and *KlimaSeniorinnen* pronounce themselves on distributional aspects, most notably from an intergenerational perspective as discussed shortly. Yet, a word of caution is warranted at the very outset: The reactions to the most recent systemic mitigation litigation cases demonstrate the courts' pronouncements may be open to diverse, if not conflicting interpretations. In *KlimaSeniorinnen*, the Court suggested that reaching net-zero in the next three decades was 'genuinely feasible' and warranted 'to avoid a disproportionate burden on future generations'.[1096] While some have interpreted the statement as a nod towards intergenerational justice,[1097] others have pointed that this reasoning effectively comes down to a 'grandfathering' approach favouring historical polluters in the wealthy global North in that it assumes everyone will be able to achieve net-zero at the same point in time.[1098] Indeed, in both, *Neubauer* and *KlimaSeniorinnen*, the respective courts have built their argumentation upon two methodological premises which, taken together, may well be construed as a statement in distributive terms: The assumption of equal global per-capita emissions, and the idea of a national carbon budget equalling a share of the Intergovernmental Panel on Climate

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[1094] Ibid paras 549-550.

[1095] *Duarte Agostinho and Others v Portugal and 32 Others* App no 39371/20 (ECtHR, 9 April 2024).

[1096] *KlimaSeniorinnen* para 549.

[1097] Pedersen (n X).

[1098] Gerry Liston, 'Reflections on the Strasbourg climate rulings in light of two aims behind the Duarte Agostinho case' (*EJIL:Talk!*, 7 May 2024) <https://www.ejiltalk.org/reflections-on-the-strasbourg-climate-rulings-in-light-of-two-aims-behind-the-duarte-agostinho-case/> accessed 28 November 2024.

Change's (IPCC) global carbon budget proportionate to the respective country's population in comparison with the global overall population.[1099] In both cases the argument is that this national climate budget would be used up long before reaching the net-zero targets set by the national policies challenged by the litigants.[1100] However, a per-capita approach – even if more ambitious that what respondent states are currently doing – yields inequitable results if it only distributes the remaining carbon budget but leaves aside historical responsibilities and disregards the differential capabilities and needs, including dependency survival emissions.[1101] In fact, while such an approach can be construed as a fair *distribution* of the *remaining* carbon budget, it disregards the *initial appropriation* of the atmosphere by historical polluters. With this, the judgments support an ostensibly value-neutral approach which is, in fact, however, deeply biased. Further, while it has been suggested that the ECtHR has left a door open to consider 'embedded emissions' when looking at carbon budget in the future – that is: counting in the emissions caused in the production processes of goods imported into a state – this possibility appears rather remote.[1102]

Intergenerational distribution

Distributive concerns in relation to the carbon budget do not only have a spatial, but also an intertemporal dimension.[1103] Youth-based climate litigation in particular, is seen to produce a shared narrative of intergenerational equity.[1104] Yet both, Neubauer (young people) and KlimaSeniorinnen (elderly women) have been deemed noteworthy in their pronouncements on intergenerational justice. While the entire case has been discussed at length elsewhere,[1105] what I would like to highlight here is that *Neubauer* arguably makes a

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[1099] *Neubauer* paras 213-237; *KlimaSeniorinnen* paras 269-273.

[1100] Stephen Humphreys, 'A Swiss human rights budget?' (EJIL:Talk!, 12April 2024) <https://www.ejiltalk.org/a-swiss-human-rights-budget/> accessed 28. Nobember 2024.

[1101] Kate Dooley et al, 'Ethical choices behind quantifications of fair contributions under the Paris Agreement' (2021) 11 Nature Climate Change 300, 301-02.

[1102] Andreas Buser, 'A Human Right to Carbon Import Restrictions? On the Notion of 'Embedded Emissions' in Klimaseniorinnen v Switzerland' (*EJIL:Talk!*, 16 April 2024)
<https://www.ejiltalk.org/a-human-right-to-carbon-import-restrictions-on-the-notion-of-embedded-emissions-in-klimaseniorinnen-v-switzerland/> accessed 28 November 2024.

[1103] See O'Neill (n 129) 641.

[1104] Larissa Parker et al, 'When the kids put climate change on trial: youth-focused rights-based climate litigation around the world' (2022) 13 Journal of Human Rights and the Environment 64, 79.

[1105] See eg Kotzé (n 60).

statement in distributional terms: In Neubauer, the Court held that the German Constitution, 'imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations'.[1106] Accordingly, the present generation should not be allowed to consume large portions of the remaining CO_2 budget while bearing a relatively minor share of the reduction efforts, offloading a drastic reduction burden to subsequent generations who would, as a result, likely have to shoulder serious restrictions on their personal freedom.[1107] Commentators have heralded this verdict as one of the clearest articulations by a court that states must 'fully embrace and account for the rights and interests of future generations in ways that do not unfairly defer mitigation obligations onto future generations'.[1108] Even in Klimaseniorinnen, where the applicants themselves evidently cannot be qualified as 'young people', the ECtHR pronounced itself on the question by stating that climate change policies 'inevitably involve issues of social accommodation and intergenerational burden-sharing, both in regard to different generations of those currently living and in regard to future generations'.[1109]

One particularly interesting aspect in this is not only the general acknowledgment of the intergenerational dimension of climate change as such, but the courts' pronouncements on the questions of agency (or the lack thereof) in political decision-making processes. The German Constitutional Court, in *Neubauer*, acknowledged this lack of agency when stating that the raison d'être of Article 20a invoked by the applicants is that

> [t]he democratic political process is organised along more short-term lines based on election cycles, placing it at a structural risk of being less responsive to tackling the ecological issues that need to be pursued over the long term [and] also because future generations – those who will be most affected – naturally have no voice of their own in shaping the current political agenda.[1110]

The ECtHR, too, affirmed this dimension in *KlimaSeniorinnen*.

[1106] *Neubauer* para 183.
[1107] Ibid para 192.
[1108] Louis J Kotzé and Henrike Knappe, 'Youth movements, intergenerational justice, and climate litigation in the deep time context of the Anthropocene' (2023) 5 Environmental Research Community 025001.
[1109] *KlimaSeniorinnen* para 419.
[1110] *Neubauer* para 205.

> [H]aving regard to the prospect of aggravating consequences arising for future generations, the intergenerational perspective underscores the risk inherent in the relevant political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy-making, rendering that risk particularly serious and adding justification for the possibility of judicial review'.[1111]

When granting standing to the applicant association, the Court did so explicitly on the grounds that where intergenerational burden-sharing is of particular importance, 'collective action through associations or other interest groups may be one of the only means through which the voice of those at a distinct representational disadvantage can be heard and through which they can seek to influence the relevant decision-making processes'.[1112]

As such, it appears correct that, as it has been argued elsewhere, that systemic mitigation litigation can expose the fact that existing social, legal and political structures have so far largely denied the agency of today's youth and future generations.[1113] *Neubauer* and *KlimaSeniorinnen* indeed show a certain awareness to the problem of intergenerational justice in general, as well as disadvantaged position of democratically marginalised groups in contemporary democratic decision-making.[1114] Yet, it is important to examine closely, what exactly has been granted. In *Neubauer*, the Court affirmed that a subjective dimension can be derived from Article 20a of the German Constitution, as far as the applicants *freedoms* appear to be at risk: It held that the claimants do have a subjective right that greenhouse gas reduction burdens imposed by the respective provision are not 'unilaterally offloaded onto the future'.[1115] However, as far as the provision was invoked out of the necessity to 'treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence', the Court denied that applicants could derive any subjective rights.[1116] Instead, it stressed that 'this duty to afford intergenerational protection has a solely objective dimension because future generations –

[1111] *KlimaSeniorinnen* para 420.

[1112] Ibid para 554.

[1113] Parker (n 1104) 68-69.

[1114] Aoife Nolan, 'Inter-generational Equity, Future Generations and Democracy in the European Court of Human Rights' Klimaseniorinnen Decision' (*EJIL:Talk*!, 15 April 2024) <https://www.ejiltalk.org/inter-generational-equity-future-generations-and-democracy-in-the-european-court-of-human-rights-klimaseniorinnen-decision/> accessed 28 November 2024.

[1115] *Neubauer* Headnote 4.

[1116] Ibid.

either as a whole or as the sum of individuals not yet born – do not yet carry any fundamental rights in the present'.[1117] In other words: While subjecthood is afforded to the claimants as far as their freedoms restricted by shrinking CO_2 budgets are concerned, they are not afforded subject status and that would confer a subjective right and a corresponding state duty to preserve the natural foundations of life. Furthermore, the Court firmly rejected to elaborate on the existence of a fundamental right to an ecological minimum standard of living and the right to a future consistent with human dignity.[1118] The Court also clarified that the objective rights enshrined in Art 20a GG – just as constitutional rights more generally – are subject to balancing: While 'the obligation to take climate action is accorded increasing weight as climate change intensifies', it held that in Art 20a 'does not take absolute precedence over other interests' and must, in cases of conflict, 'be balanced against other constitutional interests and principles'.[1119]

As discussed later in this chapter, while formally acknowledging the deficit in terms of agency for the generations to come, this does not imply that the distribution of the sensible has shifted – quite to the contrary, the unheard remains unheard precisely because pretence is made that it will be ensured that 'legitimate' concerns are being heard.

Global justice

From a global climate justice perspective, the impact of systemic mitigation litigation appears limited: While the consequences for people outwith the Swiss territory had deliberately – tactically – been omitted by the litigants in *KlimaSeniorinnen*, in *Duarte D'Agostinho*, the ECtHR held – after an expansive elaboration about is case law on extraterritorial jurisdiction – that accepting the applicants' arguments would expand extraterritorial jurisdiction and responsibilities under the Convention 'towards people practically anywhere in the world' which would turn the ECHR 'into a global climate-change treaty' which, according to the Court, 'finds no support in the Convention'.[1120] In *Neubauer*, the Constitutional Court limited itself to find that that the existing *German* CO_2 budget should be distributed more fairly among present and future *German* residents.

[1117] Ibid para 146.
[1118] Ibid para 113-114.
[1119] Ibid Headnote 2a; para 198.
[1120] *KlimaSeniorinnen* para 489.

While not denying standing to the applicants from Bangladesh an Nepal in principle,[1121] the Court then went on to declare that no duty of care exists towards the applicants, and that their suffering was not a problem the German state could deal with, since the German state's actions or omissions would not constrain the freedoms of people living elsewhere.[1122] Generally, the Court did not seem all too concerned about the global consequences of the climate crisis, stating that while the more ambitious of 1.5°C target of maximum temperature increase may be advisable to tackle climate change, human life and health might be sufficiently protected by the Paris target of keeping the increase 'well below' 2°C.[1123] It also mentioned that '[i]t is not evident that the health consequences arising from 2°C global warming and from the associated climate change in Germany could not be alleviated by supplementary adaptation measures in a manner that would be sufficient under constitutional law'.[1124]

Beyond the uneven distribution of the carbon budget, respectively the appropriation of the atmosphere by historical polluters, the cases do not address the fact that upon this uneven distribution further maldistributions occur, through the effects of 'green' market expansion. In *Neubauer*, all of the linked applications were targeting the Federal Climate Act for its insufficient mitigation ambition and did – for the large part – not specify *how* mitigation should be achieved – which appeared not only to be a secondary consideration, but would been of no avail anyway: According to the Court's settled case law, a violation of the constitutional duties to protect can only be established if no measure whatsoever has been taken by the legislator, or if the adopted provisions and measures are manifestly unsuitable or completely inadequate for achieving the required protection goal or at least fall significantly short of reaching that goal.[1125] Similarly, and in line with its general approach, the ECtHR held in *KlimaSeniorinnen* that states have a wide margin of appreciation in relation to the measures or means they choose to reach their climate targets.[1126]

While the claimants in *Neubauer* targeted the EU-ETS, they only did insofar they claimed that Germany should be prohibited to sell any surplus emission reductions to other EU

[1121] *Neubauer* para 101
[1122] Ibid para 173-181.
[1123] Ibid para 163.
[1124] Ibid para 167.
[1125] Ibid para 152.
[1126] *KlimaSeniorinnen* para 543; 549.

states, since the EU targets in themselves were deemed insufficient by the applicants.[1127] The claim was dismissed by the Court who argued that the applicants did not address the various flexibility mechanisms contained in the ETS in detail and did not demonstrate 'how their usage, when viewed from a European or global perspective, could diminish the overall effectiveness of climate action'.[1128] Other claimants generally pointed to dysfunctionalities of present emission trading schemes,[1129] but did not contest that it is entirely left to the legislator's discretion *how* the required GHG reductions should be achieved.[1130] Neither did they make any claims towards a 'system change', but instead argued in their submission that ambitious mitigation policies could further economic growth.[1131]

The courts' lack of any meaningful engagement with the transnational dimension of climate change, and the cases' ignorance of the flaws in the legal and institutional response thereto suggests that 'systemic' mitigation litigation – in its aims as well as in its outcomes – is less systemic than the term suggests. The reason for this is to be found in the legal opportunity structure which limits the avenues for redress to the circumstances that lie within a legal collective's own possibilities. This also narrows down the option to express radical demands through the medium of rights claims as discussed in the next subsection.

7.1.3 Radical demands vs. legal opportunity

Cases such as the ones just discussed have been referred to 'catalytic' climate litigation: Their key feature is their relationship to the political process.[1132] The notion is borrowed from the IPCC who describes litigation as a 'catalysing condition' which 'serve[s] to overcome the inertia that often operates as a barrier to action and motivate individuals and organisations to initiate or accelerate action'.[1133] Among scholars as well as the wider

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[1127] *Neubauer* paras 69-76.

[1128] Ibid para 104.

[1129] Geulen & Klinger Rechtsanwälte, 'Verfassungsbeschwerde YiYi Prue et al gegen die Deutsche Bundesregierung' (10 January 2020) 141-143; 143. <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200113_11817_complaint.pdf> accessed 5 January 2024.

[1130] Ibid 108; 147; 162.

[1131] Ibid 125.

[1132] Sam Bookman, 'Catalytic Climate Litigation: Rights and Statutes'(2023) 43 Oxford Journal of Legal Studies 598, 601.

[1133] Ibid 602.

public, 'catalytic' litigation has sparked considerable debates around the separation of powers, and the capacity of courts to intervene in areas that are generally considered the domain of politics.[1134] Yet, it is precisely the objective of catalytic climate litigation to force political branches to change existing high-level policies – by evaluating them against high-level rights-based standards.[1135] Though, as the cases just discussed show: those rights-based standards in themselves are not enough. The fact, that the standards are, in themselves, not ambitious, also impact on which legal claims are brought by whom.

The success of rights-based climate litigation, including the systemic mitigation cases just discussed, hinges upon the existence of a suitable legal opportunity structure including constitutionally entrenched rights or the direct incorporation of regional human rights law, permitting courts to intervene if state conduct or omission is inconsistent with protected rights.[1136] Yet entrenching human rights in constitutional provisions is not enough: *Urgenda* initially was based on a duty of care specific to Dutch law, and Articles 2 and 8 ECHR only served as means to concretise said duty.[1137] In the case of *KlimaSeniorinnen* where no such duty existed under domestic law, the case was dismissed by domestic courts. Hence, legal opportunity structures determine which claims are being brought by whom. And some structures are more conducive to rights-based claims than others. In many developed countries of the Anglosphere, rights-based climate mitigation claims have almost universally been rejected.[1138]

Despite their common classification as 'strategic', rights-based climate litigation cases are often tactical in nature, that means: geared towards what promises the best avenues for success which will, in turn, generate more attention.[1139] Hence most often, strategic litigation will select the applicants who are most likely to 'tick the boxes' of the respective admissibility criteria, and whose situation comes as close as possible to a violation of any substantive rights. *KlimaSeniorinnen* – on the level of the *legal argument* – was about a group of mostly white, mostly middle class woman, of an age that roughly equals the

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[1134] Bouwer (n 109) 20-21.

[1135] Bookman (n 1132).

[1136] Ibid 604-605.

[1137] See Maxwell et al (n 77). Similarly, a successful case in Belgium involved a similar duty of care. See *Klimaatzaak ASBL v Belgium*, Brussels Court of Appeal, case 2021/AR/1589, Judgment of 30 November 2023.

[1138] Bookman (n 1132) 604-05.

[1139] See Knox supra 2.2.1.

average global life expectancy,[1140] claiming to suffer a heightened risk of illness and death through climate change. Yet, neither were these women the only, or even the main subjects of the underlying demand, nor were their claims the only, or even the main reason why rights were invoked in the first place. Just like most of the rights-based climate cases receiving the lion's share of attention, *KlimaSeniorinnen* was initiated, financed and supported throughout by an international NGO who explicitly frames the case as fight for climate justice.[1141] And this broader fight, arguably, can be seen as a strategic one.

Invoking rights strategically requires to strike a delicate balance between conforming with the requirements set by the legal opportunity structure, while, at the same time, asserting that this is about more than what is afforded by the legal opportunity structure – but not to an extent so that the legal claim becomes entirely implausible. Arguably, *Neubauer* and *Klimaseniorinnen* managed to strike this balance to some extent. What results, is that rights subjects are somewhat separated and distanced from the rights' claim invoked: The claim is not – not really – about the rights of a set of individual subjects. It has a decisively collective dimension. Interestingly, *in KlimaSeniorinnen*, the Court appears to acknowledge this – to some extent – by affording standing not to the individual claimants, but instead to the association representing the individuals – with the argument that collective action through interest groups may, for some, be the only way to influence decision-making processes. While granting standing to associations in proceedings before the ECtHR is a significant legal innovation,[1142] this does not fundamentally change anything about rights' tilt towards possessive individualism, even if not single individuals, but instead groups of individuals are concerned.

The question who is mobilising the law and why is important – and equally important is the question who is not, and it has been rightly stressed that the attention to the 'sexy' high-profile cases may distract from other struggles and people not represented by organisations

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[1140] See Saloni Daatani et al 'Life Expetancy' (Our World in Data) <https://ourworldindata.org/life-expectancy> accessed 30 November 2024.

[1141] See Greenpeace Switzerland 'Klimagerechtigkeit' <https://www.greenpeace.ch/de/erkunden/klima/klimagerechtigkeit/> accessed 28 November 2024. However, as Grear 2014 (n 66) notes, climate justice is a contested term prone to co-option, hence it is not necessarily reflective of a strategy against capitalism in general, or 'green' market expansion in particular. Accordingly, it matters, what exactly in invoked when initiating 'strategic' lawsuits in the first place.

[1142] Marko Milanovic, 'A Quick Take on the European Court's Climate Change Judgments', (*EJIL:Talk!*, 12 April 2024) <https://www.ejiltalk.org/a-quick-take-on-the-european-courts-climate-change-judgments/> accessed 6 January 2024.

with financial clout and professional PR departments.[1143] This observation resonates with the more general structural critique of rights to foreclose and obscure other avenues of resistance. Further, as discussed in the second section of this chapter, the affirmation of rights may make the subjects in question all the more vulnerable to co-option and further entrench, rather than resist dynamics of commodification and marketisation. NGOs are themselves often caught up in the dynamics of a deepening dependency on markets.[1144] And as the context of climate activism in particular demonstrates, civil society organisations and NGOs will pursue a wide range of normative commitments, from decidedly anti-capitalist positions to full-on complicity with 'green' market expansion.[1145] The litigants in the systemic mitigation cases did not target 'green' market *expansion* but rather the premises upon which 'green' markets operate and are enabled in the first place. They did not question the existence of carbon markets per se. As will become clear throughout the remainder of this chapter, they could not, even if they wanted: such a claim would simply not find any anchor in the existing legal opportunity structure.

All that said, it is important not to contemplate systemic mitigation in isolation: Social movements may well pursue litigation alongside, rather than in lieu of other, more radical forms of expression, including direct action and protest.[1146] As discussed in chapter 6, social actors can shift registers, employing legal arguments to legitimise direct action tactics that would otherwise contravene positive law.[1147] Understood on this register, systemic mitigation litigation may be understood as 'right-ing': As a group gathering around a radical demand.[1148] Not as reified subject of rights, not as 'the elderly', or 'the youth' but as political subject challenging the distribution of the sensible. Not as possessive individuals concerned with protecting their own 'properties' of life, but on behalf of 'those

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[1143] Lisa Vanhala, 'Why ideas and identity matter in climate change litigation' (*Open Global Rights*, 28 June 2020) <https://www.openglobalrights.org/why-ideas-and-identity-matter-in-climate-change-litigation/> accessed 30 November 2024.

[1144] See Grear 2014 (n 66).

[1145] Ibid.

[1146] Chris Hilson, 'New social movements: the role of legal opportunity' (2002) 9 Journal of European Public Policy 238.

[1147] Cotula 2020 (n 61) 517.

[1148] Supra a 6.3.3.

wo have no part',[1149] demanding to be part of everything, in a cry towards solidarity, reciprocity and community.[1150]

7.1.4 Strategy of rupture vs. homology and deadlock

For the cases discussed in this section, one may observe, in Lindahl's terms: The concern for a globally just distribution of the carbon budget – resulting from its unjust appropriating in the first place – emerges for the legal collective (the German state, the Council of Europe). There is an intrusion in to the 'home-world' of legality, questioning the quotidian distributions of entitlement and right.[1151] With the court rulings, the normative point of joint action actualises, though only ever so slightly: The low level of specificity in existing reduction pathways is deemed illegal. Confronted with an instance of weak a-legality, the boundaries between legal and illegal have been incrementally shifted and redrawn accordingly.[1152]

While some commentators have heralded the *KlimaSeniorinnen* verdict as 'transformative',[1153] others stressed that, overall the ECtHR's recent climate change case law 'is as sobering as it is unsurprising', in that rights protection afforded by the ECHR is decisively not about climate justice.[1154] Both positions have their purchase. Arguably, not everyone celebrating the judgment as groundbreaking are simply naïve. Rather, I submit, this is a necessity if think of the lawsuit in terms strategy: Tactics is to win the case, however small the win effectively is on doctrinal and material grounds. Strategy is to purport that the win is about something bigger. The ruptural potential reveals itself indirectly, in the reactions that a verdict triggers: Not only in Switzerland against whom it was directed, but also in the UK, the *KlimaSeniorinnen* judgment, provoked harsh

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[1149] Rancière supra at 3.2.3.

[1150] Supra at 6.3.1.

[1151] See Christodoulidis supra at 169.

[1152] See supra 3.2.3.

[1153] Maria Antonia Tigre and Maxim Bönnemann, 'The Transformation of European Climate Change Litigation: Introduction to the Blog Symposium' (*Climate Law A Sabin Center blog*, 9 April 2024) <https://blogs.law.columbia.edu/climatechange/2024/04/09/the-transformation-of-european-climate-change-litigation-introduction-to-the-blog-symposium/> accessed 29 November 2024.

[1154] Lea Raible, 'Priorities for Climate Litigation at the European Court of Human Rights' (EJIL:TALK! 2 May 2024) <https://www.ejiltalk.org/priorities-for-climate-litigation-at-the-european-court-of-human-rights/> accessed 28 November 2024.

reactions from parts of the political spectrum demanding to leave the ECHR.[1155] This suggests: Despite the respective claims formed by the legal opportunity structure available, *KlimaSeniorinnen*, to the wider public, did not appear as the individual claims of a handful of elderly women, but instead as a claim that demands more fundamental, structural change. Arguably, this is even acknowledged by the Court, in that it does not grant standing to the applicants *as* individuals, but instead creates a route for organisations to bring claims on their members' behalf. Likewise, *Neubauer* was not predominantly rendered as a claim of individual farmers' children, but as the concern of a generation still having an entire life in front of them. As such, the cases – though not their substantive outcomes – express and signify a radical demand. They expose how the 'common but differentiated responsibilities' for the 'common concern of humankind',[1156] in reality appear to be largely offloaded to others – to the people in the global South, to future generations. With this, the demand may be seen as speaking to the deeper register of obligation, rather than right: to community, reciprocity, and care.

Arguably, there is indeed something ruptural in taking the protests against fossil fuel-driven capitalism from the streets to the courtrooms, from, as Lindahl would have it, the a-legal into the legal realm. The very act of claiming that states violated the claimants' rights by not acting upon the unfolding crisis introduces a moment of rupture: The institutions of the system are confronted with an infallible cry: 'Why are we being hurt?'.[1157] The 'we', in this instance, are not only the Swiss elderly women, or the German children of farmers: The 'we' asserts itself as a political subject of all those who are threatened by the Western world's failure to act in the face of the catastrophe. The moment of rupture, however, is fleeting. Because for the cry to be heard – though not necessarily listened to – it needs to be translated into the form of rights. Through its invocation in the legal form of rights, the radical demand emerges and collapses at the very same time. By the transformation into rights, the radical demand gains and loses its force: It enters the stage in the domain of the *police* that allows the demand to be heard, but it forfeits its axiomatic sense of equality and translates into the 'shrill and nagging claims and counter-claims'.[1158] The very opportunity

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[1155] Andrew McDonald, 'How a group of elderly Swiss women could take the UK out of the European Court' (*Politico*, 11 April 2024) <https://www.politico.eu/article/uk-echr-switzerland-climate-ruling-could-blow-up-uk-politics/> accessed 28 November 2024.

[1156] Supra at 1.4.

[1157] Supra 6.3.1.

[1158] Weil supra 196.

structure of the legal systems at hand requires to translate the cry of injustice into something different: The demand to act decisively in the face of the catastrophe and to contribute a fair share towards averting the disaster is translated into the rights of individuals or groups of individuals. Through this translation, not only something gets lost on the way – it also allows the dominant institutions, to partition the claims along the order of the police, along the distribution of the sensible, as I will discuss in following the following paragraphs.

Limiting the political

As discussed throughout this thesis, once the radical demand is converted into the language of the *legal*, it loses its force. A careful analysis of systemic mitigation cases exposes how the legal system limits the intrusion of the political – through law's power of homology and its mechanisms of deliberate deadlock intrinsic to law's function to maintain the stability of expectations.[1159] What is more: once the claim is translated into the language of and taken up by the intuitions of the 'middle range', as Weil would have it, it eventually serves at constructing and solidifying hegemonic positions, reinstating the existing distribution of the sensible. I further unpack this claim in the following paragraphs.

As we have seen wit Christodoulidis, homology is about repetition, entrenchment and reduction that can be found in the 'if … then' structure of law, which permits innovation only insofar as they can be grafted upon what already exists.[1160] Claims that are too 'political' will, inevitably, have to yield to protected expectations. Law's power of homology already kicks in when the litigants' demand is formulated in *legal* terms. It is tailored towards the possibilities offered by the available opportunity structure, knowing that 'success' is most likely to be achieved only in terms of some minimal innovation, some grafting on top of pre-existing doctrines and lines of argumentation. What is realistically achievable is only so through minor alterations, on the premises of what the existing structure deems acceptable while not compromising the stability of expectations. Such innovations can, for example, take the form of widening the circle of subjects – such

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[1159] See Christodoulidis supra at 3.2.3.
[1160] Ibid.

as in *KlimaSeniorinnen*, to include associations –, or to re-interpret an existing norm – such as Article 20a on the German Constitution in *Neubauer*.

For any claims that go beyond anything that could be dealt with by the existing order through an incremental shift, through grafting on top of what already exists, law's mechanism of deliberate deadlock is triggered – the blocking of opportunities for redress which limits rights' transformative potential. Whatever is too daring, aspiring for more far-reaching transformation, gets struck down – due to lack of jurisdiction, due to claimants not having exhausted the local remedies, as in the *Duarte Agostinho* case. The decision is perfectly understandable from an institutional perspective, and of course, the Court had good reasons to decide like it did, building on its previous case law.[1161] Yet, it illustrates how the Court's verdicts reinforce the boundaries a collective draws, and reaffirm what remains beyond its limits – for example the idea of taking on responsibility for the consequences of state conduct beyond its own territory. The detailed reasoning on extraterritorial jurisdiction in *Duarte Agostinho*, which I am not discussing here in detail, is seen to preclude other, more modest claims – for example in relation to transboundary harm – which has led one commentator to state that 'we are all worse off with this case being decided … than with the case not being brought at all'.[1162] Similarly, in *Neubauer* the Court was eager to clarify that the German state would not have any obligations towards anyone affected beyond the German territory, which luckily would, in the Court's view, not be affected in a way the German state could not cope with, even under the higher global warming threshold of 2 degrees. Also, it explicitly confined its assessment on the threats to *human* life and health, remaining decidedly anthropocentric in its outlook, thereby disavowing the – scientifically established –consequences the rise in temperature has for the planet's ecosystems (including those in Germany). – Meanwhile, the elderly Swiss women did not ask for affording rights to anyone wildly unusual in the first place (such as foreigners, let alone future generations, or ecosystems) and got rewarded. The message the Court rulings send here: Be modest in what you are asking for.

[1161] See on this eg Raible (n 1154) and Milanovic (n 1142).
[1162] Milanovic (n 1142).

Re-inscribing hegemony

This then relates to another problematic aspect: The verdicts reaffirm and solidify hegemonic positions and paradigms. As noted above, framings of per-capita emissions of the remaining carbon budget as 'fair shares' obscure the historical injustices linked to the appropriation of the atmosphere by global North which arguably lied at the heart of the radical demand the preceded the respective lawsuits. Both judgments stress that it is entirely up to the member states how exactly the emission reductions should be achieved, thus not working against, but rather reinforcing 'green' market expansion. The argument made in relation to carbon markets by the litigants in Neubauer was rejected through homology and deliberate deadlock: It was not compatible with the provisions made available through the legal opportunity structure, making it easy for the Court to reject respective claims as not being sufficiently substantiated.

Furthermore, the *Neubauer* decision is reflective of the deep entrenchment of Western-liberal individualism's core tenets: The Constitutional Court affirmed the applicants' *freedoms*. Notably, this is not something the young claimants had demanded. The applicants claimed that the Federal Climate Act violates their human dignity and their rights to life, as well as the freedom of occupation, and the guarantee of property.[1163] The court rejected that the state had violated any duty to protect the applicants in those respects. Thus, the Court applied a strict separation between freedoms (which it affirmed) on one hand, and rights with corresponding state duties (which it rejected). It did so by arguing that the relevant constitutional provision only has an objective dimension which does not confer any subjective rights,[1164] but rather obliges the state to make sure that individual freedoms will not be unduly restricted in the future.[1165] Freedom, according the Court's opinion, also manifests itself possibility to emit GHGs: It held that protected freedoms encompass 'the numerous forms of private, professional and economic activity that still directly or indirectly cause CO_2 to be released into the Earth's atmosphere',[1166] and that the present depletion of the CO_2 budget poses a risk to future freedoms.[1167] Hence, it was not the applicants rights to life and property, or the integrity of the ecosystem that the Court

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[1163] *Neubauer* para 100.
[1164] Ibid para 112.
[1165] Ibid para 122.
[1166] Para 184.
[1167] Para 186.

deemed to be threatened by the legislator's omission as they claimed, but rather: their freedoms as future consumers. Meanwhile, new constitutionalism's tendency to insulate the globalised economy is reaffirmed: How exactly, states should comply with their minimal emission reduction duties is up to them. The decision is relegated to the domestic political process. And there, as we shall see in the next part of the chapter, rejecting markets is simply not an option.

Against the rupture the courts are confronted with in systemic mitigation cases, the order of the police, in Rancière's terms, reinstates the given distribution of the sensible: It validates who and what counts, as opposed to what is relegated to the sphere of the unheard and unseen. Largely, what resided beyond the pale of the collective's legal order remains there: the people from Nepal and Bangladesh, the unborn, the future generations remain irrelevant and unimportant.[1168] Arguably the collective must do so, since including them would transcend the realm of the collective's *own* legal possibilities it has at its disposal: The legal collective that is the German state, or the Council of Europe, may shift its normative point of joint action to include said subjects or collectives, but this would require it to shift it to an extent that oversteps the fault line, for the legal collective to break with existing understandings of the very foundations on which the liberal nation state rests. With this, contradiction is exposed: Through their very existence, operating in a mode of 'having', rights need to be balanced with other rights that subjects *within* the legal collective 'have'. The internal contradiction arises since the claimant's rights cannot fully be realised, precisely because they collide with other rights – namely, though not explicitly, the right to property. The applicants' rights protected by the constitution, it is being affirmed, may need to be balanced with other rights. As far as the claimants in Bangladesh are concerned, contradiction also appears on another, global level: The universal promise of rights cannot be fulfilled, precisely because the specific balancing of various rights within one legal collective – such as the German state, or the group of states that forms the Council of Europe – will preclude certain outcomes in another – such as the state of Bangladesh.

Yet, once the cases have been settled, despite law's homology and deliberate deadlock, a residue of the radical demand remains and can be exploited productively, by pointing to the

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[1168] See Lindahl supra 3.2.3.

fact that the demand has not been fulfilled, that justice has not been achieved. Hence, once the whole process has come to an end, it must start anew. One thing that is important in this respect comes down to the question of strategy and tactics: As highlighted earlier, it is crucial to invoke strategical arguments deliberately and explicitly: Only because the applicants in systemic mitigation cases are open about their political objectives, about the changes they want to effect, about the fact that they employ rights merely as tools and pick and choose them according what appears to be most promising with a view to the legal opportunity structure in question, only because all of this, those cases are looked at in the light of a bigger demand, as a cry of injustice, rather than individual claims of elderly women, or children of farmers, and so forth. Only with this, the political comes to the fore.

7.2 Litigating the appropriation of land

As climate litigation develops as an analytical category and scholarly discipline, new sub-categories emerge. In recent years, an increasing number of publications has started grappling with what is being referred to as 'just transition litigation': Cases that are not concerned with the lack of ambition when it comes to climate action, but rather with the way in which climate action is carried out, including impacts on the enjoyment of human rights.[1169]

The *Fosen* ruling is illustrative of a range of things discussed throughout this thesis: Firstly, it reflects an instance where two different legal collectives' claims towards exclusive territoriality collide. In the dispute at hand, this claim can only be resolved in favour of one or the other. Secondly, it shows how economic tends to overdetermine everything else: It is the language of economic rationality that guides the distribution of the sensible. Thirdly, it shows, that, between equal rights, the forces of state and capital decide.[1170] The dispute, that cannot be solved on the level of rights, is settled by creating facts. While the subjects' rights are affirmed, they are co-opted into 'green' market arrangements. Finally, however, there remains an instance of immanent critique: The

[1169] Annalisa Savaresi and Joana Setzer, 'Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers' (2022) 13 Journal of Human Rights and the Environment 7, 29.
[1170] Borrowing from Miéville (n 292) who borrows from Marx.

promise of justice remains unfulfilled, the cry of injustice is not entirely silenced, it keeps on haunting and disturbing the ways in which the sensible is being distributed.

7.2.1 Just transition litigation: the *Fosen* case

Just transition litigation is directly concerned with 'green' market expansion's maldistribution of 'burdens' and 'benefits' on the ground – and, as discussed in chapter 5, those burdens and benefits are often inextricably linked to and contingent upon questions of land and tenure.[1171] The *Fosen* judgment concerning the erection of two wind parks in indigenous Sami territory illustrates those interlinkages and points to both, the possibilities and constraints of rights-based just transition litigation.[1172] The case, in many respects, reflects the problematics associated with 'green' market expansion, namely the continued focus on economic growth and the accompanying narrative of inevitability when it comes to 'green' infrastructure or investment. At the same time, it demonstrates that rights may well shift boundaries, though they do not prevent market expansion.

The Sami are an Indigenous minority scattered across Norway, Sweden, Finland, and Russia, consisting of about 80.000 individuals, approximately half of them residing in Norway.[1173] Traditionally subsisting of reindeer husbandry, reindeer herding is still an essential part of the Sami culture, despite only 10 to 15 per cent of all Sami still being involved in this practice.[1174] The Sami have been subjected to dispossession and forced assimilation politics by the Norwegian state from the mid-19th century onwards, and while their right to self-determination including specific claims to their ancestral lands, water, and natural resources is internationally recognised, these claims often clash with competing claims to make use of land and resources.[1175] In the past, the Sami People have repeatedly witnessed restrictions in the use of their traditional reindeer pastures by fragmented

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[1171] Supra at 5.1.

[1172] Supreme Court of Norway, *Statnett SF et al. v. Sør-Fosen sijte*, HR-2021-1975-S (11 October 2021) official English translation available at <https://www.domstol.no/globalassets/upload/hret/translated-rulings/hr-2021-1975-s.pdf> [hereinafter *Fosen*] accessed 2 December 2024.

[1173] Lilja Mósesdóttir, 'Energy (in)justice in the green energy transition. The case of Fosen wind farms in Norway' (2024) 77 Technology in Society 1, 3.

[1174] Ronja Stubbe, 'Discursive Realignments in the Fosen Supreme Court Case: A discourse analysis of the conflict between wind energy and Sami self-determination in Norway' Master Thesis in Environmental Science (Swedish University of Agricultural Sciences, 2024) < https://stud.epsilon.slu.se/20243/1/stubbe-r-20240701.pdf> accessed 2 December 2024.

[1175] Ibid.

development of infrastructure and administrative encroachment, to enable mining, forestry, hydropower, and tourism.[1176] Many Sami communities thus see wind power projects as reinforcing long-standing inequalities and injustices, the Sami Council (an NGO consisting of Sami representatives from different countries) has referred to wind power projects as 'green colonialism'.[1177]

In substance, *Fosen* concerned the erection of two windfarms by an international consortium of energy providers on the Norwegian Fosen peninsula which were put into operation in 2019 and 2020 respectively.[1178] The operator, Fosen Vind DA is a joint venture company between the state-owned energy company Statkraft as the majority shareholder, another Norwegian renewable energy company owning less than ten per cent of the shares, and an European investor consortium holding 40 per cent of the shares.[1179] From 2010 onwards, investments in wind power in Norway have been encouraged by introducing a combination of state subsidies and tradable permits for 'green' energy production ('green certificates'), securing profitability and predictability for investors.[1180] Yet, since the state subsidies for those 'green certificates' were about to lapse, Fosen Vind DA needed to ensure that wind farms became operational by 2021 in order to fully capitalise on the advantages offered by the state-sponsored electricity certificates programme.[1181]

Together with four other wind farms, the Fosen wind park forms the second largest on-shore wind-power project in Europe.[1182] In 2016, just after construction of the turbines had begun, protesters demanded to halt the construction on the site which is traditionally used as late winter pasture by two groups of reindeer herders belonging to the local Indigenous Sami people who refer to themselves as 'siida' (in North Sami language) and 'sijte' (in South Sami language) respectively. The sijte had appealed to the regional District Court

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[1176] Ibid.

[1177] Eva Maria Fjellheim, 'Wind Energy on Trial in Saepmie: Epistemic Controversies and Strategic Ignorance in Norway's Green Energy Transition' (2023) 14 Arctic Review on Law and Politics 140.

[1178] Supreme Court of Norway, *Statnett SF et al. v. Sør-Fosen sijte*, HR-2021-1975-S (11 October 2021) official English translation available at <https://www.domstol.no/globalassets/upload/hret/translated-rulings/hr-2021-1975-s.pdf> accessed 2 December 2024.

[1179] Stubbe (n 1174) 34.

[1180] Mikaela Vasstrøm and Hans Kjetil Lysgård 'What shapes Norwegian wind power policy? Analysing the constructing forces of policymaking and emerging questions of energy justice' (2021) 77 Energy Research & Social Science 1.

[1181] Mósesdóttir (n 1173) 8.

[1182] Stubbe (n 1174) 34.

against the Ministry of Petroleum and Energy's licencing and expropriation decisions, arguing that the projects violates their rights under Article 27 of the International Covenant on Civil and Political Rights (ICCPR), that is, minorities' right to enjoy their own culture.[1183] The District Court found that the Windfarm project would not amount to a violation of Article 27, but awarded damages around NOK 8.9 million and NOK 10.7 million – roughly equalling around one million USD – for the sijte and the siida respectively. The sijte and the wind park operators both appealed the verdict. The latter deemed the damages awarded excessive, the former argued that the whole project was incompatible with Article 27 ICCPR, as well as with the right to property under Article 1 Protocol 1 ECHR and Article 5 (d) (v) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The Court of Appeal confirmed that the project would not violate any of the provisions invoked by the Sami.[1184] As a starting point, it assumed a so-called 'minimum factor' defining a threshold below which the number of reindeer and/or their slaughter weights would not permit the Sami to operate reindeer husbandry as a profitable or cost-effective business.[1185] While it acknowledged that the pastures would be lost and the windfarms thus threatened the very existence of reindeer husbandry on Fosen, it held that it was possible for the two Sami groups to introduce winter feeding of the reindeer as a replacement and that therefore no violation of Article 27 ICCPR occurred. Instead, it roughly quadrupled the damages awarded to both groups to enable the said winter feeding. Again, the wind park operators appealed against the damages awarded, and the sijte, largely supported by the siida, against the practice of awarding of damages as means to deal with the loss of their lands resulting from the licence decision, this time only on the grounds of the provisions of ICCPR and ICERD, but not the right to property under the Additional Protocol to the ECHR. Article 27 ICCPR reads as follows:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other

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[1183] District Court rulings are not available in English but are quoted in the English translation of the Supreme Court ruling.

[1184] *Fosen* para 145.

[1185] Ibid para 81.

> members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[1186]

A first objection to the Sami groups' claims by Fosen Vind who, alongside the Norwegian state, represented the wind park operators, concerned a matter of standing. They argued that 'Article 27 ICCPR protects physical persons only, not groups of individuals',[1187] which would imply that no individual rights were conferred to the Sami groups and that they neither could appeal to the UN Human Rights Committee on behalf their members. The Supreme Court rejected this argument: It held that 'Article 27 at the outset protects individuals in a minority' but that 'the minorities' culture is practiced in community, which gives the protection a collective nature'.[1188] With regard to reindeer husbandry, according to the Court, this is expressed by the fact that the Sami pasture rights are collective and conferred on each individual Sami group, with various groups of people practicing reindeer husbandry jointly in specific districts and that it is therefore difficult to draw a sharp distinction between the individuals and the group.[1189] While the groups had a limited capacity to sue and be sued, the Supreme Court held that they must have the capacity to act as a party to be able to invoke the individual rights of their members.[1190]

On substantive grounds, Fosen Vind reiterated the interpretation of Article 27 ICCPR developed by the Court of Appeal but added that the Court did overestimate the negative consequences of the wind farms and that the availability of late winter pasture was not a 'minimum factor' decisive for the numbers of reindeers the herders could have.[1191] Further, it argued that a consultation of the Sami groups had taken place, and that a balancing against other interests of society contradicts the finding of any violation since '[t]he significance of "the green shift" is massive'.[1192] The Supreme Court countered that Article 27 does not allow to strike a balance between the rights of indigenous peoples and other legitimate purposes, and that therefore a proportionality assessment balancing other interests of society against minority interests must be ruled out.[1193] However, it went on to

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[1186] Ibid para 57.
[1187] Ibid.
[1188] Ibid para 106.
[1189] Ibid.
[1190] Ibid para 110.
[1191] Ibid para 51.
[1192] Ibid para 53.
[1193] Ibid para 124; 129.

explain, in situations where the rights under Article 27 conflict with other rights in the Convention, conflicting rights must be balanced against each other,[1194] and that 'the right to a good and healthy environment may…be such a conflicting basic right', hence, that 'the consideration for "the green shift" may be relevant'.[1195] The Court went on to state:

> [T]he starting point must be that Article 27 aims at protecting the right to cultural enjoyment. As mentioned, reindeer husbandry is a form of protected cultural practice while at the same time a way of making a living. The economy of the trade is therefore relevant in a discussion of a possible violation. The relevance must be assessed specifically in each individual case and must depend, among other things, on how the economy affects the cultural practice … [T]he rights in Article 27 are in any case violated if a reduction of the pasture deprives the herders of the possibility to carry on a practice that may naturally be characterised as a trade.[1196]

The Court rejected the argument by Fosen Vind that the production income from reindeer husbandry was never enough to make a living,[1197] and that while the right to a good and healthy environment may be relevant in the context in question, 'the green shift' could equally 'have been taken into account by choosing other – and for the reindeer herders less intrusive – development alternatives'.[1198] Yet, it did not rule out that expropriations may be justified and that remedy measures by the authorities or the expropriator to minimise the disadvantages of an interference must be taken into account when assessing whether Article 27 has been violated. Depending on the circumstances, such measures may keep the interference below the threshold for violation, however, the model of winter feeding as proposed by the Court of Appeal would deviate considerably from traditional, nomadic reindeer husbandry. The Supreme Court held that winter feeding was never tried out before in Norway, nor had any information been provided 'on the effect of such a model, or on animal welfare, based on experience from other countries'.[1199]

Yet, beyond declaring a rights violation, the Court did not give any specific orders as to what should happen with the wind farms in question.[1200] Two years after the Court's ruling

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[1194] Ibid para 130.
[1195] Ibid para 131.
[1196] Ibid para 134.
[1197] Ibid para 138.
[1198] Ibid para 143.
[1199] Ibid para 147.
[1200] Mósesdóttir (n 1173).

the facilities in question still remained in operation. and climate justice activists joined the Sami applicants in protests demanding to dismantle the plants.[1201] In December 2023 and March 2024, Fosen Vind and the Norwegian government achieved a settlement with the sijte,[1202] and the siida respectively.[1203] The wind turbines will remain in operation, yet the reindeer herders will have a veto right over any operation of the wind farm once the concession period has lapsed and the Norwegian Ministry of energy has started an investigation process to identifying additional areas for reindeer grazing outwith the wind park development.[1204] In addition, Fosen Vind has agreed to annual financial contributions of approximately 7 million NOK over the entire operation period, amounting to a total of approximately 175 million NOK for each group.[1205] In the case of Nord-Fosen, the Norwegian government will also allocate a fixed amount of 0.1 øre per kilowatt-hour generated by the wind farm directly to the reindeer herding community, which is estimated to yield additional 2 million NOK annually.[1206]

7.2.2 Layers of proprietary relations implicated in 'green' market expansion

The *Fosen* case is illustrative of the complex entanglements of various layers of proprietary rights created through 'green' market expansion. Further, it highlights the multifaceted nature of property as institution: Property does not have to be private, individual, or absolute yet may, nonetheless, involve cause significant power imbalances. While what impacts the Sami peoples on the ground is the physical installation of the wind farm, the construction and licensing of this wind farm was incentivised by subsidies for

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[1201] Ibid; Stubbe (n 1174).

[1202] Norwegian Government, 'Agreement between Sør-Fosen Sijte and Fosen Vind' (19 December 2023) <https://www.regjeringen.no/en/aktuelt/agreement-between-sor-fosen-sitje-and-fosen-vind/id3019277/> accessed 6 January 2023.

[1203] Norwegian Government, 'Agreement between Nord-Fosen siida and Roan Vind'(6 March 2024) <https://www.regjeringen.no/en/aktuelt/agreement-between-nord-fosen-siida-and-roan-vind/id3028614/> accessed 6 January 2023.

[1204] North Wind Research, 'Deal reached in Fosen wind case' (7 March 2024) <https://www.northwindresearch.no/news/deal-reached-in-fosen-wind-farm-case/> (accessed 6 January 2024).

[1205] Reuters, 'Dispute over Norway wind farm continues despite partial deal' (19 December 2023) <https://www.reuters.com/business/energy/dispute-over-norway-wind-farm-continues-despite-partial-deal-2023-12-19/#:~:text=One%20group%20of%20reindeer%20herders,Vind%20said%20late%20on%20Monday.> accessed 6 January 2024.

[1206] See Northwind Research (n 1205).

producing renewable energy, which, in turn, would enable the recipients to generate profits from carbon markets through the sale of 'green certificates'.[1207]

As hinted above, beyond the initial appropriation of the carbon budget, carbon markets very often do not create distributive inequalities themselves but rather act as a contributory cause or amplify existing dynamics.[1208] Moreover, a complex interplay exists between private and public sector when it comes to the creation of 'hybrid' private property rights through the establishment of carbon markets.[1209] As discussed in chapter 5, investment protection does not only protect formal property rights but, as noted with regard to the renewable energy cases under the ECT in Spain, may also concern the 'legitimate expectation' to receive state subsidies.[1210] Norway has not ratified the ECT, however, the decision to compensate the Sami (rather than the wind-park operators) may imply that the latter option would have been more costly for the Norwegian state,[1211] even without claims under arising under the ECT.

As discussed, the creation of 'quasi' property rights in carbon, at the bottom line, depends on the availability of land: either for carbon sequestration (predominantly through afforestation), or for renewable energy production, such as in the *Fosen* case. As such, 'green' markets raise complex questions in terms of land rights and tenure, which also is the case in the context discussed: While the Sami have their own parliament and some devolved competences towards cultural self-determination, their rights do not include formal land ownership rights over the territories traditionally used for reindeer herding.[1212] Precisely because this lack of formal ownership rights, indigenous communities find themselves in a weak position when negotiating over the expropriation of land in their territories.[1213]

[1207] A green certificate is defined as: 'An official record proving that a specified amount of green electricity has been generated. Green certificates represent the environmental value of renewable energy production. The certificates can be traded separately from the energy.' See European Environmental Agency <https://www.eea.europa.eu/help/glossary/eea-glossary/green-certificate-electricity> accessed 2 December 2024.

[1208] Supra at 1.2.

[1209] Supra at 5.1.

[1210] Ibid.

[1211] Mósesdóttir (n 1173) 10.

[1212] Ibid 3.

[1213] Ibid 11.

The lease to Fosen Vind DA has resulted in competing claims over the land both stemming from some form of proprietary right (the rights resulting from the lease, versus Indigenous property rights). Yet the fact that Fosen Vind DA only held time-limited lease, rather than outright ownership, opened the door to negotiate a veto right for the indigenous communities affected, with the option to end operations of the windfarm once the lease period has lapsed. With new legal institutionalism, one may conclude different outcomes may be achieved depending on different configurations of legal institutions (such as making the continuity of one actors' proprietary claim contingent upon another one's approval). On the other hand: by the time the lease has lapsed, the traditional practice of reindeer herding might not exist anymore.[1214]

The competing property claims of the Norwegian government and Fosen Vind DA on one hand, and the Sami on the other, arguably can be framed in Lindahl's terms as a collision of two legal collectives' normative point of joint action as to do what, where, and when.[1215] Both collectives assert an exclusive claim to territoriality that can only be resolved in favour of one or the other (either reindeer herding or wind energy production). The supreme Court decision exposes those conflicting claims but does not resolve the conflict. Instead, the conflict is settled politically – in favour of state and corporate actors. I shall further discuss this now.

7.2.3 A-legality, property, surplus-value

The events following the 2021 Supreme Court judgment illustrate the problem I have outlined in chapter 2: The co-option of the claimants despite their initial resistance against the project and the attempted infliction of invisibility by the dominant actors. Further, the settlement of the case illustrates how rights claims may summon a-legality in its weak, as well as in its strong form.

The Sami, the Norwegian state, and even the energy consortium are all different legal collectives in Lindahl's account, all having their own normative point of joint action as to do what, where, and when. As noted above, a legal collective requires some form of spatial

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[1214] See Stubbe (n 1174) 67.
[1215] Supra at 3.1.2.

closure. In this instance, two competing claims over the same territory collided: the preference to keep and operate wind turbines (by the state and Fosen Vind DA) and to dismantle them (Sami). One or the other has to yield. The claim of the Sami herders confronts the Norwegian state with a-legality in its strong dimension. As we have seen before, a-legality only ever reveals itself after the fact. Accepting the dismantling of the turbines is not an option for the government, since it would entail significant disadvantages for the business location in terms of attractiveness for future investments and potentially high costs to compensate the operators. As I have claimed in chapter 5, a conception of property that is, *tout court*, not amenable to surplus-value production lies beyond the pale of the legal collective that is the Norwegian nation state.

Yet, boundaries have been shifted incrementally: The continuation of the wind park beyond the concession period is subject to the Sami herder's approval, which strengthens their position in relation to their land rights. In the light of the fact that the wind turbines would have been taken in operation anyway, the *Fosen* judgment has brought some improvements for the affected communities in terms of the recognition of indigenous knowledge, impact assessment and decision making, as well as the veto-right in continuation once the concession period has lapsed, and, of course, the monetary compensation that turned out to be considerably higher than what was initially expected.[1216] However, this is not what the litigants had asked for. Distributive justice, according to the litigants' understanding, as expressed media debate following the case, would only be achieved by dismantling the turbines.[1217]

Even if strategic considerations invoked openly, there is a risk that rights' subjects are rendered vulnerable to co-option once their rights have been affirmed. The *Fosen* case illustrates that the radical does not reside with rights as such: What started as resistance of communities of place against state and capital, ended in the settlement that further entrenches the capitalist mode of production and intensifies its entanglements with alternative modes of being: Instead of halting the development and dismantling the turbines, the Sami reindeer herders are co-opted into an arrangement with the wind park operators, integrating them in a globalised 'green' economy. In fact, there were not too

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[1216] Mósesdóttir (n 1173).
[1217] Ibid.

many options: As one of the Nord-Fosen herders indicated, there would have been a desire to continue the fight and lodge another case at the Supreme Court, however, this appeared to be risky, since the lengthy proceedings would probably mean that the reindeer herding industry would have perished.[1218] Therefore, it appeared more sensible to enter into the agreement providing for alternative pastures. Furthermore, for the non-herder majority of the respective communities, a continuation of the operations combined with the compensation offered appeared more attractive. Weighing up the available options, upholding the radical critique became to appear too costly.

The indigenous communities in question are not passive victims in the settlement process, yet, their material circumstances may lead to decisions in favour of the 'rational choice' upon which capitalism's logic operates. This is what makes processes of co-option particularly pernicious: In the short-term, the arrangements appear beneficial to those involved – though they come at a cost of creating new dependencies limiting the future choices a collective may have at its disposal, including the choice to withdraw from the economic arrangements they have become part of and, potentially, dependent upon. Meanwhile, the state and the wind park operators can claim that human rights are being respected and fulfilled. Without being strategically linked to the radical demand, rights are hanging 'uprooted' in the middle region,[1219] disconnected from the material circumstances that have engendered their invocation. However, the order of the police does not fully succeed in containing the radical demand. In the media discourse and the literature, the position that the Sami have been co-opted into an arrangement they did not want features strongly. An instance of immanent critique remains: Despite the affirmation of their rights, justice, for the Sami, has not been achieved. The case of the wind turbines at Fosen, for now, may be lost. Yet, the struggle continues.

With a view to the rights critique discussed in the previous chapter, *Fosen* is illustrative of D' Souza's point: While the Court, this time, held that the Sami herder's rights are not open to a balancing exercise, it explicitly left the door open to decide differently in the future. With this, the indigenous rights over land are opened up to negotiation, should competing claims require it, thereby weaking the Sami herder's position. Another noteworthy

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[1218] Stubbe (n 1174).
[1219] Weil supra at 6.3.2.

observation is how the Court justified the reasoning to affirm the applicants' rights: It linked the right to enjoy their culture to the characteristic of the reindeer herding activity as *as* a trade. While this characterisation resulted from the claims and counter-claims invoked by both sides throughout the proceedings, the fact that the Court built its argumentation on the economistic framing of reindeer herding as a trade arguably is reflective of the distribution of the sensible: Had the herders kept their reindeer for other purposes, would their cultural rights be less worthy of protection?

7.3 Litigating the 'distribution of the sensible'?

In chapter 5, I have claimed that the various layers of maldistribution involved in 'green' market expansion – of the carbon budget, as well as the underlying land – are effectively premised upon another distribution: The one that Rancière calls the distribution of the sensible. In Western capitalist societies, I have argued, claims that fundamentally call into question existing property relations, or property as legal form amenable to the extraction of surplus value, will remain beyond the pale of the legal collective. The settlement of the *Fosen* case supports this proposition: A solution that involves the retrenchment of capitalism does not appear to be an option. In chapter 6, I have outlined emerging conceptions of rights that transcend the Western-liberal rights' individualism and anthropocentrism: 'third generation' rights that break with conceptions of rights rooted in Western-liberal thought, instead including counter-hegemonic visions of societal organisation, and natural features have variously been granted legal personhood, becoming subjects of rights in various places across the planet.[1220] Yet, as scholars have highlighted, these novel conceptions of rights may not avoid the trap of metaphysical essentialism, remaining individualistic in their outlook.

Atrato and the *Columbian Youth* case demonstrate various issues arising with rights, and the attempt to extend them to become more responsive to the challenges of the Anthropocene. Firstly, they reflect the force and the dangers of metaphysical individualism, and how Western-liberal ideas remain powerful, even in domains that expressly seek to resist them. They show how emancipatory, counter-hegemonic concepts are ousted and replaced by others that can accommodate all sorts of normative propositions

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[1220] Supra at 6.2.

without confronting capitalism as such. Secondly, the cases illustrate how the construction of legal subjectivity assists in distributing the sensible along the fault lines that cannot be overstepped: The dominant order relegates the onto-epistemologies that do not conform with Western-liberal rationality to the confined spaces it affords them, thereby preventing them from spilling over into other domains. With this, concepts of rights and subjecthood might not serve at confronting 'green' market expansion, but instead lead to a deeper enmeshment of capitalism in the 'web of life'.[1221]

7.3.1 The *Atrato* case: Giving rise to 'biocultural' rights

The *Atrato* case was filed via an *accion tutela* – the Colombian version of the *amparo*, a special procedure present in all Latin American Constitutions, providing for the protection of fundamental rights in an expedited manner – by a Colombian NGO on behalf of local indigenous and afro-descendant communities.[1222] Since the 1980's, communities and ecosystems in the Atrato basin, located in the North-West of the country, have been increasingly affected by – mostly illegal – mining activities including heavy machinery and toxic substances, leading to severe environmental impacts and grave risk for human health, water supply and food security.[1223] The applicants claimed that governmental authorities were failing to protect their rights to health, water, food security, healthy environment, culture, and land property, arguing that illegal natural resource extraction activities are the main cause of Atrato River's pollution and thus of their rights violation.

The Colombian Constitutional Court held that environmental protection is 'a fundamental objective' and 'transversal element of the Colombian constitutional order' and that 'the greatest challenge contemporary constitutionalism faces consists in safeguarding and effectively protecting the environment'.[1224] It was the first time the Court explicitly took an explicit eco-centric approach to environmental protection,[1225] which, as the reasoning states, 'starts from the basic premise that the earth does not belong to humans and, on the

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[1221] See Moore (n 4).

[1222] Philip Wesche, Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision (2021) 33 Journal of Environmental Law 531, 534.

[1223] Ibid 536-38.

[1224] *Atrato Centro de Estudios para la Justicia Social 'Tierra Digna' y otros v. Presidente de la República y otros*, Corte Constitucional [Constitutional Court], Sala Sexta de Revision [Sixth Chamber] (Colombia) No T-622 of 2016, 10 November 2016 (English translation) [Hereinafter: *Atrato*].

[1225] Wesche (n 1222) 539.

contrary, assumes that humans belong to earth, as any other species'.[1226] The Court went on to emphasise Columbia's ethnic and cultural pluralism and the ways in which indigenous and afro-descendant communities are linked to nature and biodiversity, introducing the concept of 'biocultural rights', those being:

> [T]he rights that ethnic communities have to administer and exercise autonomous guardianship over their territories – according to their own laws and customs – and the natural resources that make up their habitat, where their culture, their traditions and their way of life are developed based on the special relationship they have with the environment and biodiversity.[1227]

Biocultural rights, according to the Court, result 'from the recognition of the deep and intrinsic connection that exists between nature, its resources, and the culture of the ethnic and indigenous communities that inhabit them, which are interdependent with each other and cannot be understood in isolation'. Biocultural rights thus 'are not simply property claims in the typical sense of the economy or the market, in which they can be an alienable, commensurable and tradable resource; rather ... [they] are the collective rights of communities that carry out roles of traditional administration according with nature, as conceived by Indigenous or traditional ontologies'.[1228] The judgment further quotes Colombian-American Anthropologist Arturo Escobar and his critique of the Western development model based on economic growth,[1229] and then concludes that 'the central premise on which the conception of bioculturalism and biocultural rights is based on a relationship of profound unity between nature and the human species'.[1230]

The Court argued that, while the importance of the environment pertains to 'the human beings that inhabit it and the need to have a healthy environment to live a dignified life and in well being conditions', the environment is also relevant 'in relation to the other living

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[1226] *Atrato* para 5.9.

[1227] Ibid 5.11. The Court borrows the concept of biocultural rights from Kabir Sanjay Bavikatte. See Kabir Sanjay Bavikatte and Tom Bennett, 'Community stewardship: the foundation of biocultural rights' (2015) 6 Journal of Human Rights and the Environment 7.

[1228] Ibid para 5.14.

[1229] Ibid para 5.15.

[1230] Ibid para 5.17. The Court retrieved the existence of biocultural rights from various international legal instruments: The ILO Convention 169 on Indigenous and Tribal Peoples (1989); the Convention on Biological Diversity (1992); the United Nations Declaration on the Rights of Indigenous Peoples; the American Declaration on the Rights of Indigenous Peoples (2016); and the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003).

organisms with whom the planet is shared, *understood as stocks worthy of protection in themselves*'.[1231] As the Court stated: 'It is about being aware of the interdependence that connects us to all living beings on earth; that is, recognizing ourselves as integral parts of the global ecosystem … rather than from normative categories of domination, simple exploitation or utility.'[1232] From this, the Court came to the conclusion that 'justice for nature must be applied beyond the human scenario and must allow nature to be subject to rights'. Such a perspective, according to the Court, deviates from the government's prevailing vision which 'is an economic one, where biodiversity, genetic material and associated traditional knowledge are seen as susceptible to appropriation, industrial use and source of economic gains'.[1233] Importantly, by its reference to biocultural rights, the Court did not invent anything new but rather stressed that the recognition of cultural diversity enshrined in the Colombian constitution necessarily implies the protection of biodiversity and vice versa.[1234] As such, *Atrato* gives expression to constitutionally enshrined third-generation rights 'account[ing] for the rights, interests, and tenures of Indigenous peoples by preserving practices related to the kinship of ethnic communities and their duty of stewardship towards nature'.[1235]

Legal innovation vs. practical implementation

From the vantage point of theoretical perspectives that try to make sense of law and rights in the Anthropocene, the argumentation in *Atrato* is remarkable: The quoted parts of the Court's reasoning defy the objections raised against 'rights of nature' outlined in the previous chapter: Contrary to the criticisms levelled against rights of nature, the judgment does not foreground 'the individuated rights that supposedly attach to discrete ecological monads',[1236] neither does it embrace a view that would, tout court, 'offer a minimalist alternative that can be accommodated within the bounds of industrial capitalism'.[1237] Rather, the conception of biocultural rights is attentive to the 'ligaments of associative life'

[1231] Ibid para 9.27

[1232] Ibid.

[1233] Ibid para 9.31.

[1234] Wesche (n 1222) 540.

[1235] Elizabeth Macpherson et al, 'Constitutional Law, Ecosystems, and Indigenous Peoples in Colombia: Biocultural Rights and Legal Subjects' (2020) 9 Transnational Environmental Law 521, 538-39.

[1236] Matthews supra at 190.

[1237] Burdon 2020 (n 986) 315.

in its human and non-human forms,[1238] and arguably does not sit far away from Davies' idea of 'natureculture' when pointing to the 'relationship of profound unity between nature and the human species'.[1239]

In its verdict, the Court entrusted the government and the communities inhabiting the Atrato basin, mandating each side to select one representative to form a commission of guardians, consisting of these representatives and an advisory group, including environmental organisations.[1240] A distinctive feature of the *Atrato* ruling is that the river's legal recognition is coupled with a comprehensive set of procedural orders to formulate public policies to protect the rights of the river and monitor their implementation.[1241] However, giving effect to the judgment in practice remains challenging: A recent case study on the material implications of the *Atrato* judgment for local communities has found that significant implementation barriers exist.[1242] Those relate to the fact that the national government does not provide the financial resources for implementing the policies designed to give effect to the judgment, and to the challenges of ending illegal mining – due to corruption, the influence of mining-related actors in local politics, and the economic dependency of a large part of the local population on the illegal mining activities.[1243]

This arguably reflects, to some extent, the critique discussed in chapter 6: States in the global South, may, for various structural reasons, not be able to implement and enforce rights in the same way as Western jurisdictions.[1244] While Latin America can draw on a rich tradition of environmental human rights jurisprudence from the 1990s onwards, scholars argue that the political-economic context of extractivism combined with 'hyper-presidentialist' political systems pose systemic constraints to climate litigation and its implementation.[1245] Despite commitments to the contrary, many Latin American states lack the capacities and incentives to adopt post-extractive economic reforms: State's abilities to enforce obligations under human rights or environmental law are constrained by the

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[1238] Matthews (n 102).
[1239] See Davies supra at 3.2.2.
[1240] Atrato para 10.2.
[1241] Wesche (n 1222) 440.
[1242] See generally Ibid.
[1243] Wesche (n 1222) 551-54.
[1244] Supra at 6.2.1.
[1245] Juan Auz, Human rights-based climate litigation: a Latin American cartography 13 Journal of Human Rights and the Environment 114, 130-31.

existing institutional architecture, featuring agreements with international financial institutions and protecting public and private investors' interests under bilateral investment treaties.[1246] However, the lack of implementation – which arguably is a general problem – is not my main concern here. Rather, as discussed in the following sections, the frame of legal personhood for nature has watered down the initially radical innovation made in *Atrato*.

7.3.2 Legal personhood, essentialism, and the retrenchment of the radical

As hinted above, the *Atrato* judgment is highly specific to the particular context, in a constitutional set-up that recognises particular third-generation rights for specific groups, namely indigenous and afro-descendant peoples' collective property rights over their lands and decision-making power over natural resource management.[1247] The land in the Colombian department of Chocó (where the claimants are located) is almost entirely subject to collective land titles, and the local communities – organised in in community councils and indigenous reservations – enjoy rights to self-government, which formed the basis of the Court's innovation in conceptualising the claimants' rights as 'biocultural' rights.[1248] Contrastingly, the concept of legal personhood for natural features was a concept the Court borrowed from the model for the Whanganui River in Aotearoa.[1249] The applicants had never asked to be the representatives of the river as a legal person.[1250] As one of the newly appointed 'guardians' of the river quoted in the abovementioned case study said:

> For [the local communities], the figure of the river as a legal subject continues to be somewhat distant, a little strange. To identify it as a subject, with own rights, own interests, that is not so clear to them. … I feel that they are, above all, representatives of

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[1246] Auz (1245).

[1247] Macpherson et al (n 1235) 527. Yet, as Wesche notes, the context of the *Atrato* verdict is characterised by violent confrontations between armed groups, themselves involved in or complicit with the illegal mining activities as well as intimidation and corruption of regulatory authorities. It was against this factual backdrop that the Supreme Court ruled in favour of the applicant communities. See Wesche (n 1222) 537-38.

[1248] Wesche (n 1222) 535.

[1249] Macpherson et al (n 1235) 531.

[1250] Wesche (n 1222) 554.

> their communities and only in a second place, representatives of the river. That figure has not transcended so much.[1251]

Unfortunately, what appears to survive in the long term, is exactly the liberal idea of legal personhood for natural features, rather than the more radical concept of biocultural rights. The Colombian Constitutional Court's jurisprudence is particularly noteworthy when it comes to awarding legal personhood to nature: Since its seminal *Atrato* ruling in 2016, the Court has granted legal personhood to a number of other rivers, as well as declaring the Amazon, as an entire ecosystem, to be a subject of rights of its own.[1252] However, as I will discuss throughout this part, scholars have observed that the Court's jurisprudence has evolved: While *Atrato* featured a radical vision giving expression to a range of third-generation rights, subsequent case law is seen to ignore the rights of indigenous peoples to their traditional territories and their role in ecosystem management and protection.[1253]

In the *Colombian Youth Case* decided in 2018, the litigants sought to halt the deforestation of the Amazon region. Like *Atrato*, the case was filed under an *accion tutela*, by 25 young people advised by a national NGO.[1254] In its verdict, the Colombian Constitutional Court recognised the correlation between deforestation, climate change and the violation of the rights of present and future generations, and granted the Amazon legal personhood, stating that 'in order to protect this ecosystem vital for our global future … the Colombian Amazon is recognized as a "subject of rights," entitled to protection, conservation, maintenance and restoration led by the state and the territorial agencies'.[1255] – However, as Elizabeth Macpherson and colleagues note, the Court did not consider biocultural rights, the impact of climate change and deforestation on indigenous people, or indigenous land tenure, despite the fact that indigenous territory covers over 50 per cent of the Colombian Amazon extension.[1256] Instead, the authors observe, '[t]he analysis of solidarity towards "others" simply lumped Indigenous communities in with the other communities concerned about the Amazon, including the applicants, who lived in urban centres like Bogotá and

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[1251] Quoted in Wesche (n 1222) 549.

[1252] Macpherson et al (1235).

[1253] Ibid 525.

[1254] Auz (1245)126.

[1255] *Andrea Lozano Barragán, Victoria Alexandra Arenas Sánchez, Jose Daniel y Felix Jeffry Rodríguez peña y otros v Presidente de la República y otros*, (2018) Corte Suprema de Justicia [Supreme Court], Sala de Casación Civil [Appeals Chamber], STC4360-2018 A (Colombia) [Hereinafter: *Colombian Youth Case*] para 45.

[1256] Macpherson et al (n 1235) 536.

were removed from the local context and its challenges'.[1257] Indigenous peoples' communities were integrated into the action plan for the implementation of the judgment which refers to a strategy developed under the UN REDD programme.[1258] The strategy involves the consolidation of territorial governance to include indigenous people, their holistic worldview and their community organisations as 'a necessary part of the inter-institutional coordination for the proper management of the Colombian Amazon'.[1259] As such, the frame of legal personhood for nature has the potential to co-opt natural features and local communities into market-based arrangements, rather than resisting them. Further, more radical concepts and agendas such as the previously developed biocultural rights may be displaced.

Other Colombian cases on river protection following the seminal *Atrato* decision, too, adopted the idea of legal personhood for nature, but refrained to return to the concept of biocultural rights.[1260] Instead of the decidedly anti-capitalist outlook of the biocultural rights affirmed in *Atrato*, the *Colombian Youth* case enables a frame in which indigenous communities are responsibilised in transnational governance arrangements,[1261] and rendered as 'stakeholders' within the 'green' economy, rather than attentive and responsive to the ecosystem they belong to. That said, the frame of 'indigenous' is equally problematic: As Petersmann notes, while fitting applicants' concerns into specific moulds of 'indigeneity' might grant them better legal protection, those representational legal frames reduce cultural minorities and indigenous peoples to conform to socially constructed imaginaries.[1262]

This risk is linked to the transnationalisation of rights-based strategic litigation: Internationally operating networks of experts and human rights lawyers affiliated with a range of NGOs master litigation strategies, share a common legal discourse and are proficient when it comes to the latest developments and 'precedents' across jurisdictions.[1263] However, cross-jurisdictional and cross-cultural referencing by legal

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[1257] Ibid.
[1258] Ibid.
[1259] Ibid 537.
[1260] See generally ibid.
[1261] On responsibilisation and multi-level governance in REDD+ see Dehm 2021 (n 11).
[1262] Marie-Catherine Petersmann, 'Contested Indigeneity and Traditionality in Environmental Litigation: The Politics of Expertise in Regional Human Rights Courts' (2021) 21 Human Rights Law Review 132.
[1263] Ibid 154.

experts may lead to unintended consequences for the identity and perception of the peoples they represent.[1264] Success in courtrooms requires specific legal, argumentative, and epistemic strategies which, in the context of indigenous and minority claims, often leads to a 'two-way process of translation': Expert witnesses apply Western legal tools, concepts, and procedures to indigenous peoples' local realities, while indigenous peoples reframe their cosmological and ecological systems in terms of Western concepts to position themselves politically.[1265] This process 'mobilises a specific human rights idiom, narrative and frame in which indigenous peoples' and minorities' concerns must fit'.[1266] There is a risk that courts and experts engage in 'anthropological cherry picking' or 'mainstreaming', generalising reified ideals of indigeneity through the extension of highly context-dependent observations to different peoples and places.[1267]

The takeover of highly locally specific cases by internationally operating NGOs may lead to what Gabrielle Lynch has called 'constructed indigeneity' as an ostensibly successful strategy in a global environment 'concerned about the plight of indigenous peoples'.[1268] The author claims that in this, there is a risk that indigeneity becomes a brand identity aimed at a global justice audience, or as a means to mobilise resources through an – often unequal – relationship with external actors.[1269] The 'modern obsession' with the 'politics of recognition' which are popular at a global level, Lynch argues, obscures the original problem of the uneven distribution of wealth and power.[1270] The author argues that the overall attention directed towards minority rights may detract from potentially more productive forms of political protest. In a similar vein, Coulthard has argued that politics of

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[1264] Ibid 153.

[1265] Ibid 149-50.

[1266] Ibid 150. As the author notes, expert-based pro-indigenous activism may unintentionally replicate symbolic constructs with important political and legal implications for affected communities: On one hand, framing their concerns as 'traditional rights' may grant them stronger protection, however, it also associates them to pre-fixed ideals and may erect an artificial binary between 'traditional' versus 'modern'.

[1267] Ibid 153-54. As the author observes, litigation strategies that picture indigenous peoples and cultural minorities as living 'in harmony with nature' shift the epistemic battleground towards the question how the category of the 'indigenous' is established: Denouncing the litigants in question of embracing 'modern' or 'secular' practices, respondent states deny indigenous people's rights *as* indigenous peoples, i.e. states claim that the respective rights do not apply since the people in question cannot be qualified as 'indigenous'. Ibid 137.

[1268] Gabrielle Lynch, 'Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples' Rights and the Endorois' (2012) 111 African Affairs 24, 30.

[1269] Ibid 31.

[1270] Ibid 44-45.

recognition reinscribe indigenous peoples' colonial subjectivity,[1271] and Fraser who has warned that questions of recognition, wrongly understood, may lead to the displacement of redistributive struggles, and to the reification of group identities.[1272]

Strategic essentialisations of indigeneity may be seen as a mirror image of commodification: They make things 'the same' despite being different, spatially rooted and contextually bound.[1273] They may be complicit in, rather than opposing capitalist accumulation,[1274] and, as discussed in chapter 4, formulated as rights claims, they may obscure more fundamental questions around uneven distributions of wealth and power and foreclose other avenues of resistance. This is not to say that legal intervention by NGOs always essentialises groups, or distracts from distributive problems, or that legal transnational legal borrowing is always misplaced. Rather, it is reflective of the problem that attaches to the very form of rights: Rights, as a mode of 'having' rather than being renders indigenous communities as essentialised category whose 'properties', including their rights to the land, can be negotiated and balanced with the 'properties' of other possessive individuals (including transnational corporations and foreign investors), all belonging to a totality of 'stakeholders' in the 'green' market economy, featuring a set of competing claims. – And, as discussed above, the risk there is that, between equal rights, capital prevails.

Affording river rights to rivers, aardvark rights to aardvarks, and indigenous rights to indigenous peoples, and so forth, carries the risk that indigenous peoples (and rivers, and aardvarks) become reified and closed-off categories, even if their interdependencies within are acknowledged: That specific river, the ecosystem, the people, their cultures, their relations and entanglements are separated from the rest of the world. On the inside, Indigenous rights might indeed enable a mode of 'being', rather than 'having'. From the outside, the Western-liberal paradigm sees the same rights as something that indigenous people *have* – and all others have not, and cannot have. However, this does not necessarily imply that they are immune to appropriation. Note Roses' observation earlier about

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[1271] Coulthard (n 799).
[1272] Nancy Fraser, 'Rethinking Recognition' (2000) 3 New Left Review 107.
[1273] See Dehm 2018 (n 287).
[1274] For this argument see Coulthard (n 799).

common property regimes: what is a commons on the inside, may well be property from the outside.[1275] I further discuss this in the next, and final part.

7.3.3 Subjecthood, legal collectives and distribution of the sensible

Against uncritical transnational 'borrowing' of legal strategies and concepts, scholars have advocated to adopt a frame of 'translocal legalities', accounting for emergent forms of normativity constituted through 'grounded encounters' with local and transnational legal practices, discourses, subjectivities, and forms of resistance.[1276] Despite the problems discussed above, and despite very unique legal opportunity structure provided for by the Colombian constitutional set-up,[1277] the Colombian cases are seen to bear significance for transnational legal cross-fertilisation 'reveal[ing] inroads for better protection of Indigenous river and ecosystem rights and interests elsewhere'.[1278] While, as discussed above, transposing legal concepts from one 'indigenous' context to another is problematic for various reasons, transposing indigenous concepts into the non-indigenous realm appears practically impossible – due to the very structure of these rights themselves an the way they operate within the distribution of the sensible.

The ruptural potential of rights, as discussed, lies in their capacity to carry a radical demand which, qua Rancière, disrupts the distribution of the sensible through an act of dissensus from those who have no part. The problem with expanding rights subjects to include specific groups is that rupture loses its force. There cannot be any radical demand uttered through rights since – in theory – the marginalised groups and their rights are already part of the order of the police. This becomes apparent looking at the *Atrato* case: The claimants count *as* indigenous and afro-descendant communities, since it is exactly in their characteristic *as* indigenous and afro-descendant communities that the Constitution affords them protection. Arguably, *Atrato* does not encounter a fault line in Lindahl's terms. To the legal collective in question, the claims do not appear as strange, they do have

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[1275] Rose supra at 5.3.2.

[1276] Canfield et al (n 135).

[1277] Beyond the tutela/amparo mechanism, Columbian constitutional law features a particular peculiarity developed by the Colombian Supreme Court, of so-called 'dialogical judicial activism', whose interference with the legislative would be considered inconsistent with the separation of powers in other countries. See Wesche (n 1222) 540.

[1278] Macpherson et al (n 1235).

their roots in the Constitution. As discussed above, the Court did not invent new rights, it affirmed that recognition of cultural diversity enshrined in the Colombian Constitution necessarily implies the protection of biodiversity and vice versa. What has been affirmed by the Court does – in theory – lie within the legal collective's *own* possibilities. The juridical affirmation of biocultural rights is only possible because the distribution of the sensible affords these rights to particular communities – and only those communities. What the Court did invent was the legal subjecthood of the Atrato river – though that was not a demand that had ever been uttered.

The affirmation of biocultural rights is merely an expression of indigenous and afro-descendant rights to common property in their lands and to self governance – 'the rights that ethnic communities have to administer and exercise autonomous guardianship over their territories according to their own laws and customs'.[1279] As hinted above, the problem with the *Atrato* decision lies in the lack of enforcement, rather than in the lack of rights. Yet, this also means that legal innovations within the context of indigenous rights remain confined to this particular context. In relation to the *Fosen* case, I have argued that for nation states operating in a globalised capitalist economy, renderings of property that deviate from the Western-liberal paradigm in that they fundamentally challenge extant property relations, or the extraction of surplus value, present a fault line. On a global level, indigenous onto-epistemologies es expressed trough *Atrato's* affirmation of biocultural rights operate within, not outwith the distribution of the sensible: they are rights of indigenous peoples – not of anyone else. Extending the underlying ideas beyond the indigenous context will – for structural or ideological reasons – reside beyond the pale of states as legal collectives.

Hence, the acknowledgement of indigenous communities' rights through mainstream institutions and instruments is not necessarily emancipatory, but instead can be seen as a strategy to contain them. And while concerns for more-than-human 'response-abilities of care' often are prevalent indigenous onto-epistemologies, they are unlikely to spill over into other domains and, moreover, they do not prevent the further intrusion of markets. With this, it becomes apparent why ever more complex and integrated models of ecosystem services commodified through 'green' market expansion are a cause for grave

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[1279] *Atrato* para 5.11.

concern: While operating on the premises of commonality and care on the inside, indigenous common spaces risk to get appropriated from outwith by other actors such as 'green' investors, transnational corporations, states, and international institutions engaging in carbon or other ecosystem service markets, exercising authoritative control over how the rights 'inside' the commons are exercised. If outside actors retain higher-order rights within the commons, this bears the risk of communities becoming more dependant upon the respective market arrangements and more reluctant to object to and resist them. As the discussion of the *Fosen* case has shown, this scenario is not merely hypothetical.

Yet, all of the above does not mean that we should stop asserting rights, if only to expose that their promise of justice does not materialise in practice. This, as hinted in chapter 5, may give in turn moral leverage for other, more radical forms of protest.

Towards a constitutionalism for the Anthropocene?

As discussed in the introduction to this thesis, legal theorists have ventured to sketch out a 'constitutionalism for the Anthropocene' premised on a reconceptualization of legal relations as part of more-than-human collectives, recognising shared vulnerabilities of humans and non-humans interacting in relations premised on care. As noted, this constitutionalism for the Anthropocene is fundamentally different from the new constitutionalism of the present climate regime outlined in the second chapter. Arguably, while new 'green' constitutionalism and the further entrenchment of capitalism explored throughout this thesis occupy one pole of the spectrum of possibilities, the constitutionalism for the Anthropocene, which re-conceptualises legal relations as part of more-than-human collectives, sits on the other end.

In line with its relational outlook, conceptualising legal relationships along the parameters of more-than-human entanglements, the authors suggest that new representational practices are required to constitutionalise more-than-human relations as political and legal collectives.[1280] Yet, they concede that while novel approaches towards law and legal subjecthood emerge, at the same time, we have to grapple with the given realities of law's present institutional architecture, that is: the actual regulatory and legal practices as

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[1280] Floor et al (n 51).

organised, authorised, and routinely implemented and enforced in domestic, international, regional and transnational systems.[1281] The discussion in this chapter demonstrates the challenges a re-conceptualisation of law along the lines of the vision towards a constitutionalism for the Anthropocene encounters: It not only highlights the problem how to transform non-human agency into languages and concepts intelligible to the present legal system, but also the challenge how these concepts can make an intrusion into the 'home-world' of legal collectives built upon the Western-liberal model, even if only to appear as 'strange', calling forth a fault line.

Against approaches attempting to reconceptualise law as 'emerging from non-hierarchical relationships between persons and things',[1282] it has been argued that human beings 'are the only animal with the power to influence the Earth system', and that, consequently, environmental law and ethics must begin from, and be ordered around, human beings, in a way that is grounded in humility, precautions and obligation.[1283] I would be inclined to agree insofar, as that without such a grounded-ness in humility and obligation, it appears difficult to move towards anything even more radically different from the current point of departure. An under the present political-economic configurations, even this move appears to present a challenge. If the paradigm of Western-liberal property, premised upon the extraction of surplus value, presents a fault line beyond which states are not able or willing to venture, and if, as I have previously contended, a re-conceptualisation of law as non-hierarchical is not compatible with the Western-liberal property paradigm (except in spaces where the distribution of the sensible permits it, such as indigenous territories), this implies that to realise a constitutionalism for the Anthropocene, new legal collectives will need to come into being.

As seen with Lindahl, legal collectives are not necessarily states: They can be indigenous communities with relative autonomy, or corporations, or a community-owned island in Inner Hebrides – what matters is that the collectives coalesce around normative point of joint action, and a certain degree of personal, temporal, and spatial closure defining who is ought to do what, where, and when. Within such collectives, indigenous or not, it may well be possible to tinker with new legal imaginaries – as long as it does not interfere with other

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[1281] Ibid 18.
[1282] Davies 2017 (n 969) 72.
[1283] Burdon (n 986) 310-11.

legal collectives' claims to exclusive territoriality. Yet, as Lindahl observes, borrowing from Schmitt's concept of *Landnahme*, establishing al legal collective involves an act of taking. Lindahl reminds us that in fact the legal collectives that most of us most obviously belong to – i.e. nation states – are in fact 'the outcome of an occupation, albeit an occupation that, for many, has ceased to be experienced as such and becomes the taken for granted and familiar space a collective calls its "own"'.[1284] He writes:

> Collective self-identification involves a closure that, if successful, imposes and consolidates itself over and against extant legal collectives. Land must be taken if a novel collective is to identify itself, which means that to a lesser or greater extent it must be seized, taken away, from extant collectives in the form of a novel unity of ought-places in which at least certain forms of behaviour cease to fall under the aegis of the former.[1285]

My preliminary, rather bold hypothesis – which will require further substantiation – would be: For a new constitutionalism for the Anthropocene to emerge, we must take land to withdraw it from commodity fetishism and value-extraction. We must reverse capitalism's appropriations, past and present. This movement of reversal pulls in the opposite direction of what we currently witness with 'green' market expansion, which integrates ever more granular aspects of more-than-human ecosystems into globalised value chains, severing parts off the whole. This process would, of course, be piecemeal and open-ended. Yet, the discussion on 'property rights form below' in chapter 5 hints that there are instances where such re-appropriations have been successful, if only ever partly so, and that rights, despite all the deficits they carry, might indeed help. – To reverse past appropriation, to undo property, we might need to rely on rights in the first place. In the spaces so created and/or defended against markets' grip, we can try and think, as humans, about the ways in which being-in-community with more-than-human collectives may look like from a legal perspective.

7.3.4 Conclusion

In this chapter, I have conceptualised contemporary movements of climate and just transition litigation as an instance of 'right-ing', a trembling between authoritative decision

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[1284] Lindahl 195
[1285] Ibid.

and radical demand. On the level of rights as *law*, human rights may assist in forming a countermovement, making 'green' market expansion's repercussions more benign for the individuals or groups affected. At the same time, this can (and often will) further entrench the capitalist mode of production, rather than confronting it. As *radical demands*, however, rights claims may can work as carriers of calls towards a more fundamental transformation, transcending the current system that relies on exploitation human and non-human natures, towards a 'being-together' of more-than human collectives, grounded in mutual responsibility and care.

In all three sets of cases discussed above, boundaries have been shifted. However, upon closer examination, the cases also expose the fault lines that cannot be overstepped. In the global political economy, I have argued, a rendering of property that permits the extraction of surplus value presents such a fault line for most, if not all nation states. However, indigenous communities who would be best placed and, arguably, most inclined to assert a fundamentally different visions of being, are bound by the constitutional set-up of the nation state within which they find themselves – their 'host state', if one, cynically, wants to employ the language of international investment law – and the way this states' order of the police distributes the sensible. Their rights claims, however extensively construed, are always likely to collide with the claims of other subjects who, too, have their place in the nation state's normative point of joint action. The state will negotiate between a range of different actors and regimes and their claims towards exclusive territoriality: indigenous peoples, minorities, international institutions, transnational corporations.

And, as long the capitalist mode of production, overall, prevails, the Western-liberal property paradigm and its intrusion into previously uncommodified domains will be difficult to overcome. The only chance for, say, an indigenous community – which, as we have seen, is in itself not a monolithic, closed-off entity – to escape from having its rights claims balanced, negotiated and, eventually, co-opted, arguably, is to dissociate from the nation state who not only is the arbiter over their rights,[1286] but also will, as a matter of material fact, decide over their fate – even rights are affirmed, as seen in the *Fosen* and

[1286] One might argue that the state is not the ultimate arbiter when it comes to rights claims given regional human rights bodies and international human rights instruments. However, given that these instruments respect (and indeed are built upon) state sovereignty, there are limits to what regional or international bodies may or may not say. Yet, this discussion would take me beyond the scope of this thesis.

Atrato cases. In other words: the only option for a community within a nation state to, uncompromisingly, advance a different onto-epistemology, without having to negotiate it with other subjects' rights claims, is secession and isolation. This option, in turn, changes the 'host' state itself: it will cease to be the same state, thereby crossing a fault line. Yet, with this, not only complex questions around sovereignty and self-determination arise – more dangerously, this option only replicates the fallacy of rights to create closed-off categories on another level, thereby fuelling an emerging and highly concerning trend which sees nation states dissolved into privatised, gated communities.[1287]

Rights may – in tandem with other tactics – be the best option we have available for now. Their assertion may come at the risk of co-opting communities and enmeshing them deeper in capitalism. However, they may also – yet to a limited extent – crave out spaces that resist the extractive logics of new constitutionalism, 'green' or otherwise. As hinted in chapter 5, there are models of collective 'property' within the state – from Mexican ejidos to community-owned islands in Scotland – that can operate not entirely autarkic, yet to a significant extent independently from globalised value chains. If rights can bring us closer to these models of being-with, we should – while staying vigilant, and suspicious about their emancipatory potential – not entirely dismiss them.

Employed tactically in individual legal battles, rights can be part of the wider strategy towards calling into question, and, eventually, transcending the capitalist mode of production. Rights in themselves are not enough. However, their continued invocation, alongside more radical forms of direct action and resistance, will give these latter forms of resistance an aspect of intelligibility to the dominant order. As we have seen with Lindahl, the strange is not entirely strange. It always retains nucleus of what its known. If rights assist can in transforming what can be seen, something that existed beyond the pale of the collective's legal order, suddenly, might appear as strange. It might remain to appear *as* strange, but it does *appear*. And even if fault lines may not be overstepped, boundaries may be shifted, and then shifted again.

The radical invocation of rights beyond the individualised, human, property-owning subject, and the fleeting collectives it brings to being, unfolds in an open dialectics: It

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[1287] See Rachel Corbett, 'Land of Liberty' (New York Times Magazine, 1 September 2024).

engages in ‘a to-and-fro’, an oscillation between temporal modalities, progress, discontinuity, interruption and reversal’, inclining towards an end point but potentially never reaches it.[1288] Along the way, it exposes contradiction, in that it ‘disturbs the ways in which meaning is settled, the ways it sediments and ossifies; it disturbs what is thus constituted as familiar, as natural and as given’.[1289] Rights do have a place within a wider strategy of resistance. We just need to be careful to interrogate who invokes them for what reason in any given instance, and what their invocation may or may not achieve.

[1288] Christodoulidis supra at 93.
[1289] Ibid.

8. Concluding reflections

Throughout my thesis, I have shown that we cannot think about confronting the distributive injustices of 'green' market expansion through rights without thinking about property. And we cannot think about property in the context of 'green' market expansion without thinking about land. Even the unjust distribution of the intangible 'carbon budget', ultimately, rests on the distribution of land. As Andy Wightman notes: 'Land is about power. It is about how power is derived, defined, distributed and exercised. It always have been and it still is thanks to a legal system that has historically been constructed and adapted to protect the interests of private property.'[1290] – Throughout history, what is 'private' has changed: The conception of private property as a fenced-off piece of land under the 'sole and despotic dominion' of its owner has yielded to more granular understandings, with 'bundles of rights' being allocated to different holders. Yet, any human rights claim confronting 'green' market expansion will, on some level, weighted against existing property rights – be it in carbon, in land, or in 'protected expectations'.

In my thesis, I have attempted to bring the phenomenon of rights-based litigation in the Anthropocene into conversation with a range of theoretical accounts, namely the Marxist critique of the political economy, legal institutionalism, various strands of contemporary human rights critique rooted in Marxist, as well as in poststructuralist traditions, recent legal scholarship inspired by new materialism, and Lindahl's functional thinking about legal collectives and their boundaries, limits, and fault lines. While my conceptual toolbox grew consistently throughout my work, leading to a very broad rather than a very deep enquiry, my choices are not arbitrary, and, so I would argue, justified: They bring together things that have, to my knowledge, not (yet) been thought of together in this way. The motivation in doing so is not merely academical, but geared towards an understanding of rights as praxis: As a device to confront the expansion of market-thinking into ever more domains being, and to counteract commodification and its tendency to abstract and pull apart what, in fact, is entangled and co-dependent in a complex ways.

[1290] Wightman (n 265) 402.

Now, responding to my initial research question – can human rights be deployed as a device of resistance against 'green' market expansion? – the answer is the one you are most likely to expect from a lawyer: It depends. As various scholars have observed, rights are a differential concept bearing heterogeneous potential. My inquiry into three strands of recent case law associated with 'climate' and 'just transition' litigation has demonstrated that both, at once, can be true: On one hand, rights continue to be closely linked to ideas of an essentialised, individual, possessive human subject concerned with protecting its tangible and intangible 'properties' which it has to assert against the properties of others. This observation also holds true for collective rights' subjects such as indigenous peoples who see 'their' cultural rights confronted with potential counter-claims required in the name of the 'green shift'. Further, the emergence of novel rights subjects such as rivers or ecosystems does not necessarily reflect a shift towards alternative onto-epistemologies centred on 'being-with', but rather legitimise their integration into transnational governance structures linked to market-based approaches. On the other hand, rights in their a-legal dimension can productively be employed, as a strategy of rupture and immanent critique: in this instance, the legalised language of rights acts as a carrier medium for a demand of a community that cannot be contained in the structures law has at its disposal. This demand is incongruent to the possessive structure of liberal rights: it speaks to the register of obligation, of community, reciprocity, and solidarity.

The biggest hurdle when moulding radical demands into rights claims, I would suggest, is to do so in a way that is plausible enough to find an access point into the 'home-world' of legality, while, at the same time, avoiding the trap of essentialism. Just as the silos of 'indigenous' and other essentialised and reified rights 'subjects' may obscure the underlying structural concerns linked to the capitalist mode of production, so does a categorisation of respective case law along similar categories such 'indigenous' or 'youth-based' climate litigation, or 'just transition litigation'. However, lumping all these together into one frame as 'transformative' or 'emancipatory' action is equally problematic, in that it obscures how structural concerns play out differently in different contexts and in that it disavows the uneven field within which all these developments occur. This is not to say exercises of 'mapping' and 'categorising' are useless, to the contrary, the are vital in that they make it manageable for researchers to deal with the ever-growing amount of case law. However, the point is not to stop there.

The discursive shift occurring from radical biocultural rights towards the more accommodating concept of legal personhood for natural features in the Colombian case law demonstrates the responsibility of, and the task for, critical legal scholarship: Reflecting critically what exactly we promote when directing our attention towards particular concepts. For this reason, scholarly engagement linking law with more-than-human perspectives is important. Yet, we need to remain mindful about what we are up against. As I have claimed throughout this thesis – admittedly somewhat unsubstantiated – the ideas of mutual more-than human entanglement, community, and care are fundamentally incompatible with a globalised political economy whose mode of production is centred on the extraction of surplus value. This is not to say that we should not engage with the ideas borrowing from new materialisms' insistence on entanglement of differentiated more-than-human agencies and the onto-epistemologies more attuned with them. It is to say that as long as we do not, strategically, confront capitalism *as* capitalism, it will remain easy for the dominant order to contain the thinking that radically challenges its very foundations, including the legal form itself.

How can we, as humans, if at all, employ legal rights in a sense that speaks to the more relational, more-than human? In my work here, I have only scratched the surface. Yet, my cautions proposal would be: By employing rights as a strategy of rupture that calls into question the existing distribution of right and entitlement and exposes the possibility of 'worlds other'. And as means of immanent critique, exposing that existing, 'progressive' rights' emancipatory promise has not (yet) been achieved. With Marxism, this strategy would need to strive to, eventually, overcome capitalism – which, as a whole, appears as a very remote horizon, and a daunting task to work towards. What we can do, however, is to try and use law to carve out spaces that resist appropriation and value-extraction. Fundamentally, this requires to resist appropriation, and to re-appropriate and de-commodify land, whatever small parcels. Our attempts may not always be successful, as the *Fosen* case demonstrates. Yet, as it also signals: Attempts are not useless. They can spark something, a radical demand, they can sustain, in Monture-Angus' words, the fight 'to be responsible'.[1291]

[1291] Supra at n 1008.

The quest is not a straightforward one. Rather, it unfolds in an open dialectic, a constant to-and-fro, inclining towards a goal, whose contours are not yet clear, and which possibly will never be reached. A-legal, ruptural demands uttered through the medium of rights are confronted with law's homology and its mechanism of deliberate deadlock. Rights subjects emerge as a community around the demands they utter, their demands gain traction, at times effecting a slight shift of boundaries, but then fold back into the given distribution of the sensible. Justice has not been achieved, a new community must form around new, radical demand. As Cotula notes: '[F]or all its limitations, mobilising human rights can touch a nerve capable of upsetting political and economic interests'.[1292] – Arguably, this is what rupture and immanent critique is about. And what strategic litigation based on rights should be about. Not for its own sake, but as one element within the wider strategy. Not as an end in and of itself, but over, and over again.

[1292] Cotula 2020 (n 61) 502.

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