Unravelling litigation of the Anthropocene

Inaugural address, spoken by,
Prof. Dr. Phillip Paiement

Tilburg University

Understanding Society

Prof. Dr. Phillip Paiement (1988) is full professor of Law & Governance in the Anthropocene at Tilburg University as of 1 September 2023. He studied international human rights law and criminal justice at Utrecht University and Socio-Legal Studies at Oxford University before obtaining his PhD at Tilburg Law School in 2015 with a dissertation titled 'Voluntary Sustainability Standards: Regulating and coordinating in transnational law'. He subsequently held Assistant and Associate Professor positions in the Department of Public Law, Jurisprudence and Legal History, and now the Department of Public Law and Governance in Tilburg.

Paiement's research primarily concerns issues of environmental and social sustainability within transnational law and governance. His dissertation and early scholarship focused on the roles of private actors – standard setting bodies, auditors and certification organizations – in developing, implementing and enforcing transnational rules across Global Value Chains which functionally integrated legal norms into private governance. Since 2019, Paiement has conducted research on transnational and national public interest litigation arising from the socio-ecological crises comprising the Anthropocene: climate change, biodiversity loss, large-scale land-use transitions and environmental pollution. His work combines doctrinal and empirical methods to understand the factors – legal, organizational, and ethical, among others – influencing the case work of lawyers working in climate and environmental NGOs and activism networks. With this research, he hopes to offer a more detailed account of the choices and contingencies shaping litigation which poses to drive transformative changes in environmental and climate governance. Since 2021, his research in the TransLitigate project has been generously supported by the European Research Council via a Starting Grant.

Since 2019, Paiement has worked with Prof. Han Somsen to develop and lead an interdisciplinary research community on 'Constitutionalizing in the Anthropocene' which has been financially supported by the MinOCW Sectorplan Rechtsgeleerdheid. He was a member of Tilburg University's Young Academy, and currently serves on the Ethics Review Board of the Law School. In addition to his research at Tilburg Law School, Paiement is the co-Convening Editor of the journal *Transnational Legal Theory*. From 2016-2021 he held a position on the board of the VSR (Dutch-Flemish Law & Society Association).

Unravelling litigation of the Anthropocene

Prof. Dr. Phillip Paiement

Inaugural address,
delivered in slightly abbreviated form on the occasion of the public acceptance of the position of professor of law and governance in the Anthropocene at Tilburg University on November 29th, 2024.

ISBN: 978-94-6167-537-8

www.tilburguniversity.edu

Unravelling litigation of the Anthropocene

Prof. Dr. Phillip Paiement

The climate of violence in October 2022

In October of 2022, two individuals from the UK climate action movement Just Stop Oil poured cans of tomato soup onto Vincent van Gogh's iconic 'Sunflowers' painting in the National Gallery in London. Through their actions they sought to draw attention to the increasing harm caused by climate change and the lack of climate action in the United Kingdom. Although National Gallery staff reported shortly after the incident that there was 'minimal damage' to the frame and none to the painting – which was covered in glass – the two activists were found guilty of criminal damage and sentenced to twenty-four months and twenty months of imprisonment, respectively. In his sentencing decision, Judge Christopher Hehir emphatically rejected the activists characterization of the act as an instance of civil disobedience, stating:

> I reject any suggestion that your offending can properly be described as peaceful or non-violent. Throwing the contents of a tin of soup in somebody's face would not be a peaceful act, and there is nothing peaceful about throwing the contents of tins of soup at a painting in an art gallery, with members of the public, including children, present.[1]

In particular, the Judge expressed condemnation for their intention to place the painting, a 'priceless' piece of 'humanity's shared cultural treasure', at risk to make a political statement.[2] Hours after Judge Hehir announced his sentencing decision, three more Just Stop Oil activists again threw tomato soup on the Sunflowers painting. Once more, the National Gallery swiftly announced that the painting had not been damaged.[3]

Also in October of 2022, Pakistan was nearing the end of five months of extreme flooding events caused by the combination of above average monsoon rains, a heat wave and rapid glacial melting. Earth system scientists demonstrated how the extreme flooding was linked to climate change and its impacts on regional weather in South Asia. Collectively, the extreme weather events resulted in the death of some 1,700 individuals, including at least 500 children, $15 billion

---

1 Rex v Pullmer and Holland, Southwark Crown Court, Sentencing Decision of 27 September 2024, §30.

2 Ibid, §17-8.

3 Gareth Harris, 'Three arrested after Just Stop Oil protestors throw soup over Van Gogh's Sunflowers—again' (27 September 2024) *The Art Newspaper, https://www.theartnewspaper.com/2024/09/27/just-stop-oil-protestors-have-thrown-soup-over-van-goghs-sunflowersagain*. Last accessed 30 September 2024.

in damage and another $15 billion in economic loss.[4] 8 million people were displaced from their homes, with nearly 1 million homes destroyed and another 1.5 million damaged.[5] According to the World Bank, the weather events alone were responsible for pushing some 8-9 million individuals below the poverty line.[6]

And yet, the law seemingly has no concept for the violence of these events and the actions which contributed to their manifestation. While our tradition of criminal law can readily judge the actions of Just Stop Oil protesters and the 'very harmful societal consequences' of their actions, it is – as we sit here today – rather incapable of evaluating the right and wrong of climate change.

The harm associated with climate change and its related socio-ecological crises is not limited to Pakistan, South Asia or the Global South. While developing economies certainly suffer in greater magnitude from the devasting consequences of climate change, the effects are also routinely felt here in Tilburg, the Netherlands and Western Europe. One year earlier, in July 2021, our neighbors in Belgium and Germany were devasted by flash flooding. Following the floods, Belgian Prime Minister De Croo characterized the 41 Belgian citizens who lost their lives as '*klimaatdoden*', 'the first Belgian victims of climate change', and announced a national day of mourning.[7]

Due to the achievements of Earth system scientists, the historical analysis of cumulative emissions from major emitters compiled by Richard Heede and his co-authors, and extreme event attribution in meteorology, we have increasingly compelling explanations of major emitters' contributions to the likelihood of such extreme weather events. These scientific accounts prompt us to ask whether those 41 Belgian citizens were not the first victims of climate change, but rather

4 World Bank, 'Pakistan: Flood Damages and Economic Losses Over USD 30 billion and Reconstruction Needs Over USD 16 billion - New Assessment' (28 October 2022), https://www.worldbank.org/en/news/press-release/2022/10/28/pakistan-flood-damages-and-economic-losses-over-usd-30-billion-and-reconstruction-needs-over-usd-16-billion-new-assessme. Last accessed 30 September 2024.

5 Government of Pakistan, NDMA Floods (2022) SITREP – 2022 (Daily SITREP No 158 Dated 18th November, 2022) https://reliefweb.int/report/pakistan/ndma-monsoon-2022-daily-situation-report-no-158-dated-18th-nov-2022. Last accessed 30 September 2024.

6 World Bank (n 4).

7 Alexander De Croo, 'Statement by PM Alexander De Croo at COP26' (Glasgow, 2 Nov 2021). https://www.premier.be/fr/world-leaders-summit-cop26.

something better characterized as ‘manslaughter with a deadly climate’. Of course, such a criminal offence does not exist, but the point I wish to raise is that our unfolding climate crisis begs us to ask whether it ought to.

The juxtaposition of these two parallel events in October 2022 – the Just Stop Oil activists’ civil disobedience in London and the destruction caused by extreme weather in Pakistan – illustrates why the Anthropocene challenges legal and governance scholarship. While scientists can patiently articulate how and why climate change is a simultaneous natural and human-driven process with devastating consequences to communities around the world, our legal systems still insist on registering these extreme weather events as thoroughly ‘natural’, without any recognition of contributory responsibility or intentionality. As such, I see it as my duty as the Professor of Law & Governance in the Anthropocene to research how the law does and should evolve in response to the violence of the Anthropocene, whether it be civil disobedient, natural, or otherwise.

Our many Anthropocenes

Over the course of 24 years, the Anthropocene has rapidly become one of the most pivotal conceptual frameworks for orienting and evaluating law and governance of our contemporary world. When it was first coined by Paul Crutzen and Eugene Stoermer in their brief essay from 2000, they sought to emphasize 'the central role of mankind in geology and ecology' by marking a disjuncture with the Holocene, the post-glacial geological epoch spanning the past ten to twelve thousands years.[8] The term offered a provocative consolidation of the increasing scientific consensus around the impact of human societies on climate change through the emission of greenhouse gases, on deforestation and species loss resulting from increasing human population and the expansion of urban infrastructure, and on large-scale changes to geochemical cycles in freshwater systems. Collectively, they argue, this impact is pushing fundamental aspects of the Earth system out of the relative equilibrium that characterized the Holocene.[9]

As a geological concept, the Anthropocene has faded quickly. Earlier this year, it was officially rejected as a new geological epoch by the International Commission on Stratigraphy, the international scientific body tasked with establishing global benchmarks of geological time scales. After fifteen years of deliberation on its status, the subcommission of experts felt that the emergence of human societies as geological actors is better understood as an event rather than a new epoch, at least for now.[10] This is unsurprising, as it would have been the first time that a newly recognized epoch coincided with the lifetimes of the commission's members. For the proposed 'golden spike' start date of the Anthropocene, the commission turned to a sediment layer from Crawford Lake, Ontario, dated to 1952, which contains traces of plutonium from the first hydrogen bomb tests, offering a compelling 'beginning point' for human geologic agency. Given that the Commission is used to working in hundreds of thousands of years, such recent geological records were clearly pushing up against the boundaries of their disciplinary comfort.

---

8 Paul J Crutzen and Stoermer, Eugene F., 'The "Anthropocene"' (2000) 41 Global Change Newsletter 17.

9 This thesis has since crystallized in the 'Planetary Boundaries' framework in Earth system science. See: Johan Rockström and others, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14 Ecology and Society 32; Will Steffen and others, 'Planetary Boundaries Guiding Human Development on a Changing Planet' (2015) 347(6223) Science.

10 Matthew Edgeworth and others, 'The Anthropocene Is More Than a Time Interval' (2024) 12 Earth's Future e2024EF004831.

Ironically, while the designation of the Anthropocene was rejected, the geological basis for such a paradigm shift continues to expand. An alternative proposal for marking the start of the Anthropocene relied on the 2014 identification of a new category of stone called 'plastiglomerate', found in abundance at Kamilo Beach in Hawaii.[11] This new stone is technically described as 'an indurated, multi-composite material made hard by agglutination of rock and molten plastic.'[12] In other words, plastiglomerate consists of an amalgamation of natural sediments and molten plastic which, once cooled, transforms into a novel geologic substance. Importantly, the researchers also determined that the melting of the plastic materials – bottle caps, lighters, netting, ropes and packaging – was not caused by lava flows or volcanic activity, but instead through anthropogenic processes, primarily campfire burning.

Plastiglomerate offers a helpful mnemonic device for illustrating how humans engage in 'terraforming', intentionally manipulating and modifying the Earth, its atmosphere and climate, and the many biogeochemical cycles which constitute the Earth as we understand it. As Kirsty Robertson eloquently describes:

> '[P]lastiglomerate indexically unites the human with the currents of water; with the breaking down, over millennia, of stone into sand and fossils into oil; with the quick substration of that oil into fuel; and with the refining of that fuel into polycarbons—into plastic, into garbage. From the primordial muck, to the ocean, to the beach, and back to land, plastiglomerate is an uncanny material marker. It shows the ontological inseparability of all matter, from the micro to the macro.'[13]

In our terraforming plastiglomerate constructions, we are in turn deconstructing a centuries-old ontological separation between natural and artificial matter, the same distinction which has prevented the violence of extreme weather events from registering as a legible form of harm before law.

The decision to reject the Anthropocene epoch came as a major disappointment to Earth system scientists who saw its potential recognition as a moment for

---

11 Patricia L Corcoran, Charles J Moore and Kelly Jazvac, 'An Anthropogenic Marker Horizon in the Future Rock Record' (2014) 24 GSA Today 4.
12 *Ibid*, 5–6.
13 Kirsty Robertson, 'Plastiglomerate' (2016) 78 e-flux Journal 2.

underscoring the broad scientific consensus on the structural and multifaceted impacts of human activities on the Earth system.[14] Instead of this authoritative labelling by geologists, the Anthropocene has been widely received through environmental sciences, humanities and social sciences – including law and governance research – as a useful, new conceptual framework for understanding human relationships with Nature, the Earth system or more-than-human worlds. Instead of one new geological epoch, we now face many Anthropocenes, many variants of this concept seeking to articulate different ways in which our disciplines are fundamentally disrupted by the planetary agency of humans.

For example, historians Christophe Bonneuil and Jean-Baptiste Fressoz offer a political and economic history of the rise of the Anthropocene, tracing its origins across the evolution of the military, the energy sector, industrialism and consumerism.[15] Their account identifies the powerful actors and institutions which concretely brought to rise the Anthropocene, and those who struggled in various ways against them, in contrast to a 'depoliticized' account in which '"we", the [entire] human species, unconsciously destroyed nature to the point of hijacking the Earth system into a new geological era.'[16] Anthropologists have made use of the Anthropocene in developing multispecies ethnographic methods for the study of more-than-human societies.[17] As Anna Tsing provocatively points out, if social means '"made in entangling relations with significant others," clearly living beings other than humans are fully social.'[18] With this methodological turn, multispecies ethnographers seek to better 'understand human sociality neither as conquest of other species nor as a parallel to other ways of being – but instead as an ingredient in social worlds in which both humans and non-humans live together.'[19] These are just a few examples

[14] Jan Zalasiewicz and others, 'The Meaning of the Anthropocene: Why It Matters Even without a Formal Geological Definition' (2024) 632 Nature 980.

[15] Christophe Bonneuil and Jean-Baptiste Fressoz, The Shock of the Anthropocene: *The Earth, History and Us* (Verso 2016).

[16] *Ibid*, 12.

[17] Anna Louwenhaupt Tsing, *The Mushroom at the End of the World: On the Possibility of Life in Capitalist Ruins* (Princeton University Press 2015); Sophie Chao, *In the Shadow of the Palms: More-Than-Human Becomings in West Papua* (Duke University Press 2022) <https://read.dukeupress.edu/books/book/3047/In-the-Shadow-of-the-PalmsMore-Than-Human> accessed 10 September 2024.

[18] Anna Louwenhaupt Tsing, 'A More-than-Human Sociality: A Call for Critical Description' in Kirsten Hastrup (ed), *Anthropology and Nature* (Routledge 2014) 27.

[19] *Ibid*, 40.

of the many ways in which the Anthropocene is disrupting the theoretical underpinnings and methodologies of the humanities and social sciences.

While geologists rejected an authoritative and global articulation of the dawn of the Anthropocene, the concept has instead taken on a life of plurality, with many variations of meanings across many disciplines. This is perhaps the most compelling account of its 'impact' on scientific research. For some, it is best understood as the Capitalocene, to explain the role of capitalism in generating the problematic human impacts on the Earth system through its specific 'way of organizing nature – as a multispecies, situated, capitalist world-ecology,' premised on the ever-expanding appropriation of 'Cheap Nature': natural resources and human labor.[20] This account builds on the recently re-discovered writings of Karl Marx on Capitalism's ecological rift caused by the interdependent social metabolism of labor and natural metabolism in the regenerative processes of ecology.[21] Writing in the context of early industrialization, Marx detailed the joint socio-ecological devastation caused by sudden urbanization as laborers moved to industrial centers, and the coinciding depletion of soil fertility in agricultural areas. For Marx, Capitalism was responsible for a new rift in socio-ecological cycles, as food stuffs travelled greater distances to cities leaving fertilizer resources in short supply, and urban centers correspondingly struggled with an overabundance of fertilizer in the form of human waste.[22] While this illustration is simplistic, it serves as a model of the harmful dynamics between capitalist forces and the disruption of interdependent social and natural reproduction that characterizes the Anthropocene. Climate change can then be described as the rift in capitalism's energy demands dramatically outpacing the natural processes of carbon removal and sequestration while simultaneously subjecting laborers to increasingly precarious forms of living. Or, in the more succinct lyrics of musician Phil Elverum: 'Compost and memory: There's nothing else'.[23]

---

[20] Jason W Moore, 'Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism' in Jason W Moore (ed), *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism* (PM Press 2016) 4; Jason W Moore, 'The Rise of Cheap Nature' in Jason W Moore (ed), *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism* (PM Press 2016) 116.

[21] Kohei Saito, *Marx in the Anthropocene: Towards the Idea of Degrowth Communism* (Cambridge University Press 2022).

[22] *Ibid*, 30.

[23] Mount Eerie (Phil Elverum), 'Earth', *Now Only* (P.W. Elverum & Sun, 2018).

Along a similar vein, the Plantationocene emphasizes the historical trajectories that have led to our present Anthropocene crises. The colonial plantation system was premised on the enclosure and privatization of land, the persecution of local labor, the importation of a slave or indentured labor force, and the relocation of plants and animals for monoculture agricultural enterprises. According to this view, the plantation model continues to define global economic exploitations of natural resources today, with consistent patterns of racialized exploitation of labor and the 'relocations of the substances of living and dying around the Earth as a necessary prerequisite to their extraction'.[24] In other words, to answer the question 'how did we get here' these authors point to 'the systemic practice of [the] relocation [of life and death] for extraction.'[25]

In the context of 2024, the Plantationocene brings into picture the ongoing social and ecological destruction of Palestine-Israel as an integral feature of the modern colonial plantation. Israeli environmental law scholar Irus Braverman has described how Israel's nature conservation regime has always operated through a system of biological warfare, pitting species that are endeared by Zionist imageries of the landscape, 'the fallow deer, gazelles, wild asses, griffon vultures, and cows against the goats, camels, olives, akkoub, and hybrid goldfinches on the Palestinian side.'[26] The result is nature conservation through 'settler ecology', governance strategies which achieve Palestinian land dispossession through the enclosure of landscapes as natural parks and 'exert control over bodies through the regulation and mobilization of animals, plants, and other forms of life.'[27] More than a year into Israel's bombardment of Gaza, the plantation lingers as a haunting framework for its destruction. The Food and Agriculture Organization of the United Nations reports that two-thirds of Gaza's croplands have been destroyed in Israel's campaign of starvation against the Palestinian people's

[24] Donna Haraway and others, 'Anthropologists Are Talking – About the Anthropocene' (2016) 81 Ethnos 535, 557. See also Donna Haraway, 'Anthropocene, Capitalocene, Plantationocene, Chthulucene: Making Kin' (2015) 6 Environmental Humanities 159. On racialized exploitation in the Anthropocene, see Kathryn Yusoff, *A Billion Black Anthropocenes or None* (University of Minnesota Press 2018).

[25] Haraway and others (n 24) 557.

[26] Irus Braverman, *Settling Nature: The Conservation Regime in Palestine-Israel* (University of Minnesota Press) 5–6.

[27] *Ibid*, 6.

food sovereignty.[28] Additionally, just 120 days into the bombardment, political geographers estimated the carbon impact of Gaza's destruction, claiming it would require 60 million tonnes of carbon to rebuild Gaza, an amount equivalent to nearly a century of Palestine's current annual emissions.[29] Nabil Echchaibi best captures the paralysis of Europe's legal and academic institutions amid this paradigmatic destruction of the possibility of life in Gaza, with words underscoring the socio-ecological alienation of the Plantationocene: 'We are zombies auditioning for humanity.'[30]

Another variation of the Anthropocene is also tied to the concerning prevalence of monocultural plantations but instead emphasizes their tremendous impact on biodiversity. According to Edward O. Wilson, the unfolding sixth mass extinction – though the first driven by humans – ought to be called the 'Eremocene', or the 'Age of Loneliness'. This term, in his view, best circumscribes our current situation, 'in which the planet exists almost exclusively by, for, and of ourselves' with 'people, our domesticated plants and animals, and our croplands all around the world as far as the eye can see.'[31]

Finally, for some the Anthropocene is more of a normative than analytic rupture, an invitation for humans to harness their agency for benevolent planetary stewardship. In their view, the 'good Anthropocene' should not be viewed 'as a crisis, but as the beginning of a new geological epoch ripe with human-directed opportunity.'[32] Critics have compared the 'good Anthropocene' view of ecomodernists to a 'theodicy' – a theological argument explaining the presence of evil amid an ever-presence and ever-powerful benevolent deity. The premise of the 'good Anthropocene' argument, then, is that the 'sufferings that may have to be endured in the short term will be vindicated in the marvelous world we

[28] FAO, 'Gaza: Geospatial data shows intensifying damage to cropland' (3 October 2024); Michael Fakhri (UN Special Rapporteur on the right to food), 'Starvation and the right to food, with an emphasis on the Palestinian people's food sovereignty' (A/79/171, 17 July 2024).

[29] Benjamin Neimark and others, 'A Multitemporal Snapshot of Greenhouse Gas Emissions from the Israel-Gaza Conflict' (5 January 2024), available on SSRN, http://dx.doi.org/10.2139/ssrn.4684768. Last accessed 27 October 2024.

[30] Nabil Echchaibi, 'A Scream for Gaza' (2024) 50 Critical Sociology 1021.

[31] Edward O Wilson, *Half-Earth: Our Planet's Fight for Life* (Liveright 2016).

[32] Erle Ellis, 'The Planet of No Return: Human Resilience on an Artificial Earth' (2011) 2011 Breakthrough Journal.

will create in the good, the *great*, Anthropocene.'[33] The vision appears to many as a naïve or misleading depiction of a technology-fueled, planetary utopianism with humans as gods, deploying geoengineering aerosols into the skies in our attempt to conquer the sun. If only we heard Icarus' warning as he plummeted toward the sea.

In sum, we are situated today amid many Anthropocenes. (One scholar identified as many as 80 alternative nomenclatures).[34] Each variant speaks to a different facet of the shortcomings that the humanities and social sciences face in addressing the unfolding socio-ecological crises (or 'opportunities' for the ecomodernists). Each discipline is undergoing its own reckoning with the transformations needed in order to grapple with the new forms of agency, vulnerability, profits and injustice that the Anthropocene thesis illuminates.

How, then, does the Anthropocene impact law and governance research? For the past five years I've been working on this question with an exceptional group of colleagues at Tilburg Law School. More specifically, we have examined 'the main challenges that arise with conceptualizing and understanding how, and to what ends, living conditions in the Anthropocene can be "constitutionalized" in and by law.'[35] Together we have outlined how the Anthropocene poses to transform: first, notions of agency and representation among legal relations between humans and nonhumans; second, the regulatory interaction between Earth systems and emergent biogeochemical technologies; and third, the institutional plasticity of law and governance: its ability to transform into new designs that attend to more-than-human concerns and multispecies justice. Along the way I have had the tremendous opportunity to learn from and with excellent scholars at Tilburg Law School working in legal philosophy and theory, socio-legal studies, international and European environmental law, law & technology, cultural heritage law, and urban law and governance, among many others. These individuals have collectively helped shape my understanding of the Anthropocene horizon towards which our overlapping research fields are headed.

---

33 Clive Hamilton, 'The Theodicy of the "Good Anthropocene"' (2016) 7 Environmental Humanities 233, 235.

34 Franciszek Chwałczyk, 'Around the Anthropocene in Eighty Names—Considering the Urbanocene Proposition' (2020) 12 Sustainability.

35 Floor Fleurke and others, 'Constitutionalizing in the Anthropocene' (2024) 15 Journal of Human Rights and the Environment 4, 7.

The lens of litigation

In the coming years, my research will focus on a particular activity of law and governance: the process of litigation. Approaching law and governance through the lens of litigation offers many opportunities to unravel the challenges that the Anthropocene poses to justice and equity. Litigation is, most evidently, a process of conflict resolution amid dispute of legal interests. And we can expect greater and greater conflicts as the climate and environmental crises continue, and the energy transition unfolds. For most industrialized economies, the shift to renewable energy amounts to the largest infrastructural project since the 1950s post-war years. The changes to our physical surrounding necessitated by the energy transition, in addition to adaptation measures for the already on-going effects of climate change, will spark tense disputes about labor rights, property rights and investment protections in industrial sectors which will necessarily shrink, cease to exist, or dramatically innovate.

But litigation is also a mechanism whereby the law is brought to bear on new questions, fact patterns, and societal problems that we are confronting or asking for the first time. As a jurisdiction, the Netherlands is at the forefront of climate litigation pushing new questions. Do human rights obligations require the State of the Netherlands to adopt more aggressive climate mitigation measures? The Supreme Court's affirmative answer to this question in its 2019 *Urgenda* decision laid the path for hundreds of subsequent human rights-based climate cases to be filed throughout Europe and abroad. Now, the courts face a subsequent question: does the duty of care held by major emitters, such as Royal Dutch Shell plc, towards Dutch residents require them to reduce emissions by 45% before 2030, despite the lack of a legislative or policy framework compelling such mitigation measures?

These questions precipitate further challenges to our understanding of the Rule of Law. Does litigation of the climate crisis and environmental justice invite courts to overstep their appropriate role within the *trias politicas*? When the Dutch courts order the government to develop a new national climate policy premised on 25% emissions reductions, are they acting as legislator. My starting point is informed by John Denvir's analysis that public interest litigation of this sort plays not just an appropriate, but rather an essential, role in ensuring the implementation and enforcement of law, particularly when it is politically

undesirable to uphold legal standards and protections.[36] In a similar manner, Handmaker and Taekema describe the legitimate use of legal mobilizations as a counterpower to systemic injustices in a legal system by claiming rights, strengthening procedures and institutions which protect fundamental legal values, and steering organs of government towards more lawful exercises of their powers.[37] And I look forward to learning from and with Prof. Christina Eckes and her research team at the University of Amsterdam who have been funded by the European Research Council to study the consequences of strategic climate litigation on democratic institutions and processes.

Litigation also serves as an opportunity for stories to be told, stories about right and wrong, justice and harm. How does an individual with Multiple Sclerosis and Uhthoff's syndrome experience the increasingly hotter summers in our new climate? How are family farmers' businesses affected by extreme weather patterns, both drought and precipitation? When these stories are told through the process of litigating, they are shaped, constrained and enunciated by the formality of legal procedure and legal rules of behavior. Goodrich describes the awkwardness of storytelling through legal procedure with the warning that, 'irrespective of the aura of rationality and specialism that surrounds legal hearings, they are best depicted not in terms of the law's own image, that of impartiality and the inexorable necessity of the application of pre-existent rules of statute and precedent, but rather in terms of the uneven exchange that characterises the flawed dialogue or "distorted communication" of the most contemporary bureaucratic discourses.'[38] Despite the distorted effects of narrating through law, individuals, civil society organizations, corporations and governments frequently turn to litigation and the courts as a communication strategy, in addition to seeking effective protection of their legal interests.

Finally, litigation also offers an introspective mechanism of law's own inconsistencies. It is a procedure whereby apparent contradictions within law's normative frameworks can be brought to attention and temporarily resolved. Following Luhmann, litigation reflects the evolutionary achievement of legal

[36] John Denvir, 'Towards a Political Theory of Public Interest Litigation' (1976) 54 North Carolina Law Review 1133.

[37] Jeff Handmaker and Sanne Taekema, 'O Lungo Drom: Legal Mobilization as Counterpower' (2023) 15 Journal of Human Rights Practice 6.

[38] Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Wiedenfeld and Nicolson 1990) 185–6.

systems whereby 'law itself is a source of conflict in the first instance that often [...] leads to conflicts in which both of the parties refer to law'; this offers moments of legal reasoning during which 'law is, as it were, passing judgment on itself'.[39] So if my task is to identify how law does and should evolve in response to the many Anthropocenes, this focus on litigation concentrates analysis on the internal inconsistencies within law which, having laid dormant through the stability of the Holocene, are now emerging as disruptive sources of conflict.

[39] Niklas Luhmann, *Law as a Social System* (Oxford UP 2004) 263.

Unravelling the Anthropocene through litigation

In the TransLitigate project – generously funded by the European Research Council – I work with my colleagues Juan Auz, Thalia Viveros Uehara and Rebecca Fenn to study four fields of climate and environmental litigation which address key facets of the Anthropocene. Those four, interrelated fields are: first, climate change litigation, including issues of mitigation, adaptation and the just energy transition; second, litigation of large-scale transfers of land ownership and utilization, including the transition of forest and smallholder agriculture lands into monocultural plantations, carbon offsetting projects and renewable energy infrastructure; third, litigation related to the tremendous ongoing decline in global biodiversity, including due to land-use transitions, climate change and the effects these processes have on critical habitats; and fourth, litigation arising from activities which pollute the living environment, stemming from both historical pollutants and novel chemical pollutants. Collectively, these four fields of litigation can help unravel issues of justice, obligation and right which characterize the Anthropocene. These fields of litigation help unravel the complexity of our contemporary moment by offering different narratives of what has gone wrong with our legal and governance systems, where they have fallen short and how they have facilitated the rise of these unfolding crises. For the purposes of brevity and coherence, I limit the following discussion to examples from climate change litigation.

Collective action failures

Some cases depict our legal systems as having failed in overcoming collective action challenges. Climate change mitigation is often described as a collective action problem[40]: many actors (most importantly, a few dozen high emitting countries and a hundred or so of the top emitting corporations, so-called 'Carbon Majors') each need to take significant mitigation measures in order for the planet to remain within a 2° C maximum warming trajectory in the long term and thereby avoid both the most devasting and unknown impacts of global warming. For all practical purposes, these actors have already failed to develop the collective action needed to achieve the more aggressive goal of limiting average warming to 1.5° C. When the Paris Agreement entered into force in 2015, it was viewed as a step in the right direction towards addressing the fundamental collective action problem of climate mitigation. While it failed to incorporate an unequivocal

[40] For discussion of this prior to the Paris Agreement, see Daniel H Cole, 'Climate Change and Collective Action' (2008) 61 Current Legal Problems 229.

and explicit obligation for states to engage in sufficient climate mitigation, its ratcheting mechanism and global stocktake process offer governance tools that, in theory, could usher the international community into collective action.[41]

Litigation which seeks to crystallize a state obligation to engage in sufficient mitigation measures responds to this collective action shortcoming in the international climate regime. The familiar 2019 judgment in *Urgenda* does just this by weaving together the Paris Agreement maximum warming goals, the EU's mitigation commitments, and the human rights impacts of warming scenarios beyond 2° Celsius. Urgenda's claim was successful in articulating a binding state obligation to reduce emissions by 25% before 2020, forging it out of a diverse set of legal instruments, none of which explicitly contained this obligation on their own.[42] Similar cases have been taken up before other courts in and outside of Europe, including success in both neighboring Belgium and Germany, with the *Klimaatzaak* and *Neubauer* decisions. Yet, the collective action challenges of climate mitigation remain complex and enduring. As I write this address in late October of 2024, the Netherlands Environmental Assessment Agency *(Planbureau voor de Leefomgeving)* estimates that the Netherlands has less than a 10% chance of achieving its legal obligation to reduce emissions by 49% before 2030.[43] Without substantial improvements to climate mitigation policy, it is to be expected that we will see a second-generation of Urgenda claims in the coming years.

Regulatory failures

Other instances of climate litigation assume that the climate crisis is a result of regulatory failures and the insufficient implementation of legal and policy frameworks for meeting necessary mitigation levels. The ongoing proceedings in *Milieudefensie et al v. Royal Dutch Shell plc* here in the Netherlands offers a helpful

[41] Alexander Zahar, 'Collective Obligation and Individual Ambition in the Paris Agreement' (2020) 9 Transnational Environmental Law 165.

[42] Notably, the Supreme Court rejected the State's argument, rooted in the collective action *problematique*, about the lack of causality between the State's actions and the human rights impacts caused by climate change: 'the defence that a state does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted. Nor can the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale, be accepted as a defence.' Supreme Court, the Hague, 20 December 2019, ECLI:NL:HR:2019:2006, para. 5.7.7 (*Urgenda*).

[43] Rob Koster, 'Industrie loopt achter met halen van klimaatdoelen' (NOS, 20 October 2024).

illustration of such a case.[44] The plaintiffs claim that Shell's duty of care to Dutch residents requires the company to reduce its Scope 1,2 and 3 emissions to 45% by the end of 2030. Notably, Shell points to its compliance with the regulatory framework established by the EU's Emissions Trading System (ETS), as well as other legislative frameworks controlling the licensing and permitting of its activities around the world.[45] How then, it asks, can it be held liable for emissions activities which result from business activities taken in compliance with applicable regulatory frameworks? Shell is correct in its argument that there is no legislative framework requiring them to reduce emissions along the lines that Milieudefensie has argued. In its decision, the District Court emphasized 'there is no well-defined and concrete specification for the method according to which the timing of the various companies must be applied in working towards the goal of net zero emissions in 2050.'[46]

Milieudefensie's complaint was raised amid a legal context in which the legislative branch had avoided taking difficult regulatory measures regarding the emissions of energy companies, which are coincidentally some of the largest emitters worldwide when accounting for Scope 1,2 and 3 emissions. One would be forgiven for being perplexed at this regulatory shortcoming, although it could be explained as a political choice to let markets, emissions trading schemes and consumer behavior drive reduction pathways. Regardless, we are left with the legal question as to whether and how this regulatory failure affects Shell's duty of care. Does it indemnify Shell from liability related to emissions which result from business activities taken in compliance with legislative and regulatory frameworks? According to the District Court, it does not, in part because the regulatory frameworks which do apply either cover only small portions of Shell's emissions (e.g. EU ETS) or do not regulate the emissions corresponding with its business activities (e.g. permitting and licensing of facilities, extraction activities, etc.).[47]

Similar arguments continue to be raised in other cases against private actors, such as in claims brought by *Deutsche Umwelthilfe* against the automobile

44 Floor Fleurke and Lodewijk Smeehuijzen, 'Milieudefensie versus Shell; Een Verkenning' (2018) 30 Nederlands Juristenblad 2232, 2235.
45 District Court, the Hague, 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Milieudefense et al*), para. 4.4.44-4.4.48.
46 *Ibid*, para. 4.4.36.
47 *Ibid*, para. 4.4.47-4.4.48.

manufacturers Mercedes and BMW, decided in 2023 by the Higher Regional Courts of Stuttgart and Munich.[48] In contrast to the claim against Shell, the German transportation sector is regulated by EU and German legislation with a comprehensive framework that purportedly leads to climate neutrality by 2035, earlier than required by the German Federal Constitutional Court's decision on the country's national climate law.[49] The courts have been clear in expressing that the sufficiency of this regulatory framework precludes the ability for horizontal claims premised on fundamental rights impacts against the car manufacturers directly: 'Since the plaintiffs could not make a claim against the State for corresponding action, they are also not entitled to the claims asserted against the defendant because its currently lawful production and sale of its vehicles with internal combustion engines, and thus also the greenhouse gas emissions generated during the operation of these vehicles, is lawful.'[50] Read in juxtaposition with the *Milieudefensie* decision, these cases offer a helpful starting point in sorting through situations of regulatory failure, where the national or European legislator has and has not provided sufficient regulatory guidance as to how and when an industry or economic sector is lawfully required to reduce its emissions in the collective pathway to a zero carbon future.

While we have been speaking of climate litigation amid general regulatory failures – instances where legislatures have failed to specify sufficient legal frameworks for emissions reduction – litigation also occurs in instances of market governance failure, when consumers interests are insufficiently protected. These cases illustrate how our economic laws have failed to effectively reign in undesirable economic activities affecting the climate. For example, the climate action group FossielVrij NL filed a claim against KLM for using misleading

48 Higher Regional Court of Stuttgart, 8 November 2023, ECLI:DE:OLGS-TUT:2023:1108.12U170.22.00 (DUH v Mercedes-Benz AG); Higher Regional Court of Munich, 12 October 2023, ECLI:DE:OLGMUEN:2023:1012.32U936.23.0A (DUH v Bayerische Motoren Werke AG).

49 BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18 -, paras. 1-270.

50 'Der Gesetzgeber hat – zumindest im Verkehrssektor – eine verfassungskonforme und zur (vollständigen) Klimaneutralität führende Regelung geschaffen (1). Diese steht Direktansprüchen gegen den Staat entgegen (2), sofern solche Ansprüche überhaupt grundsätzlich bejaht werden (vgl. hierzu: Voland NVwZ 2019, 114: zur Übertragbarkeit der „Urgenda-Entscheidung" ins deutsche Recht). Da die Kläger den Staat nicht auf ein entsprechendes Handeln in Anspruch nehmen könnten, stehen ihnen auch gegen die Beklagte die geltend gemachten Ansprüche nicht zu, weil deren aktuell rechtmäßige Produktion nebst Vertrieb ihrer Fahrzeuge mit Verbrennungsmotor, und damit auch die beim Betrieb dieser Fahrzeuge entstehenden Treibhausgasemissionen, nicht rechtswidrig ist (3).' Higher Regional Court of Stuttgart, *DUH v Mercedes-Benz AG*, para. 97.

claims about Sustainable Aviation Fuels and the company's Co2ZERO carbon offsetting service in its 'Fly Responsibly' advertisement campaign. The District Court of Amsterdam found 15 of KLM's ad statements to have violated legislative rules on unfair commercial practices, in particular rules related to 'Green Claims'.[51] In the court's words, KLM's campaign presented 'an overly rosy picture of the (limited) environmental benefits that can be achieved with a customer contribution to reforestation or [Sustainable Aviation Fuels].'[52] In the weeks following the decision, the European Commission and consumer protection authorities notified 20 airlines operating in the EU that their recent or ongoing advertisements related to carbon offsetting services were potentially violating rules on unfair commercial practices, giving them 30 days to take necessary corrective measures.[53]

FossielVrij NL's case implies a concern that misinformed consumers and their air travel create an obstacle to sufficient climate action in the Netherlands and Europe. However, in leveraging the opportunities of consumer protection rules, the claim further buttresses the governance pathway emphasized by Shell in its proceedings against Milieudefensie: namely, the view that emission reductions should be primarily determined through the action of appropriately-informed and rationally-minded consumers operating in the market place. The case reifies the appropriateness of marketing airlines' services, and distinguishes it from other categories of products or services for which marketing has been effectively prohibited, such as tobacco products. Even KLM claimed to be satisfied with the outcome, stating: 'It is good that the court gives us more clarity about what is possible and how we can continue to communicate transparently and honestly about our approach and activities.'[54] This approach concerningly invests into a paradigm of self-responsibilizing consumers with a paralyzing effect, as the cultural theorist Slavoj Zizek describes:

> This ecological ideology treats us as a priori guilty, indebted to Mother Nature, under the constant pressure of the ecological superego agency which addresses us in our individuality: "What did you do today to repay your debt to

51 District Court, Amsterdam, 20 March 2024, ECLI:NL:RBAMS:2024:1512 *(FossielVrij NL)*.
52 *Ibid*, para. 4.51.
53 European Commission, 'Commission and national consumer protection authorities starts action against 20 airlines for misleading greenwashing practices' (30 April 2024).
54 Ajit Niranjan, 'Dutch airline KLM misled customers with vague green claims, court rules,' *The Guardian* (20 March 2024), quoting KLM spokesperson Marjan Rozemeijer.

> nature? Did you put all your newspapers into a proper recycling bin? And all the bottles of beer or cans of Coke? Did you use your bike or public transport instead of your car? Did you open the windows wide rather than firing up the air conditioning?" The ideological stakes of such individualisation are easy to see: I get lost in my own self-examination instead of raising much more pertinent global questions about our entire industrial civilization.[55]

To summarize, in litigation of market governance failures, we find an Anthropocene created and maintained by the poorly informed consumer and the improperly functioning market. But it is also an Anthropocene of obliviousness to the structural economic forces of the climate crisis and the reality that, over the past decades, entire societies of informed rational consumers have materially benefited in a tremendous fashion from precisely the irresponsible consumerism under scrutiny.

Epistemic failures

A third category of climate cases could be described as litigation which challenges how the legal system has historically achieved epistemic closure of the climate crisis. These cases seek to redefine what factual considerations ought to be treated as relevant when evaluating the lawfulness of decisions and actions that contribute to global warming. Many examples can be found of litigation which challenges the incompleteness of Environmental Impact Assessments that fail to account for the diverse ways in which a project or activity will result in greenhouse gas emissions.

Last year, Greenpeace Nordic and Nature & Youth (*Natur og Ungdom*) challenged three decisions of the Norwegian Ministry of Energy which approved plans for developing and operating new petroleum fields in the North Sea.[56] Their grounds for challenging the Ministry's approval decisions were based on the projects' impact assessments which never accounted for the potentially harmful effects of the combustion emissions of the petroleum. Importantly, the emissions from combustion – so called Scope 3 emissions – constitute 95% of the total emissions from petroleum extraction. So excluding them from assessment

[55] Slavoj Zizek, 'Yes, it's a climate crisis. And your tiny human efforts have never seemed so meagre,' *Independent* (20 September 2019).

[56] Oslo District Court, 18 January 2024, 23-099330TVI-TOSL/05 (*Greenpeace Nordic and Nature and Youth Norway*).

effectively excludes the climate change consequences of oil and gas extraction. The crux of the problem is that legislative frameworks for Environmental Impact Assessments provide minimal guidance about assessing climate change or the relevance of Scope 1, 2 and 3 emissions. Norway's legislative framework for the assessment of extraction projects only requires a description of the 'environmental aspects' of the project.[57] In contrast, the EU's Environmental Impact Assessment Directive requires that assessments include the 'direct and indirect effects of a project' on 'human beings, flora, fauna, soil, water, air, *climate*, the landscape, material assets and cultural heritage.'[58] In its decision, the Oslo District Court ruled that the national legislative framework on impact assessments had to be interpreted in light of the EU's Directive, Article 112 of the Norwegian Constitution (the right to a healthy environment), and the Norwegian Supreme Court's jurisprudence on this constitutional right in the context of EIAs.[59] It found that, when read in conjunction, these legal provisions require impact assessments to include the effects of combustion emissions resulting from petroleum extraction, a conclusion that directly contradicts the viewpoint of a majority of the Norwegian parliament.[60] The decision, which is currently pending appeal, invalidated the licenses for three petroleum extraction projects and substantially changed the types of information that needs to be weighed in evaluating whether such projects are permitted in the future. Quoting the minority opinion in a previous Supreme Court decision, the Oslo District Court emphasized that assessments must 'be objective and sufficiently comprehensive and complete to give the public real insight into the effects' of the proposed projects. In other words, the epistemic opening of EIAs to include information about projects' climate consequences is an essential step for informed public decision-making.

This instrumentalization of EIAs for climate action is not a new phenomenon. Since 2010, it has been a principal strategy used in the Sierra Club's efforts to decommission hundreds of coal-fired power plants across the United States. Frustrated with the consequences this strategy has for slowing down natural resource extraction projects, the State of Montana's legislature went so far

57 Act 29 November 1996 No. 72 relating to petroleum activities ('Petroleum Act'), §4.2.
58 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification), OJ L 26, 28.1.2012, p. 1–21, art. 3. Emphasis added.
59 *Greenpeace Nordic and Nature and Youth Norway* (n 56), para. 3.5.3.
60 *Ibid*, para. 3.5.5.

as amending its Environmental Policy Act in 2023 to expressly prohibit 'an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders' in environmental assessments.[61] That legislative counter-action to the instrumentalization of EIAs subsequently became the subject of litigation led by the climate action organization Our Children's Trust on behalf of 16 youth plaintiffs residing in Montana. The trial court ruled that the limitation clause in the amending legislation infringed upon the plaintiff's rights to a clean and healthy environment – enumerated in the Montana State Constitution – and lacked a 'compelling governmental interest' justifying the infringement.[62]

Across these legal proceedings which challenge the epistemic limits of environmental impact assessments we see a reimagination of legal boundaries between the natural and artificial. While EIA's have been in use for many decades in these jurisdictions, in its only in the past fifteen years that climate change impacts of projects have begun to be recognized as an 'environmental impact' of human artifice. Prior to this, direct and indirect impacts on the climate were implicitly bracketed off as irrelevant – or, as I would characterize it 'natural' – consequences which merely coincide with projects rather than resulting from them, and thus remained beyond the scope of governance processes. In sum, these cases illustrate how legal systems facilitated the rise of the Anthropocene in their epistemic closure to systemic environmental and climate harm, and seek to transform them accordingly.

Decolonial claims

While the previous categories of climate cases highlight different types of failure in the legal system which have contributed to our climate crisis – through collective action, regulatory and epistemic failures – this final category instead underlines the success that law has had in creating and maintaining sacrifice zones common to colonial systems of rule. As Carmen Gonzalez describes, carbon capitalism – including the law and governance structures which facilitate it – has produced sacrifice zones of 'expendable people and expendable geographic locations' through 'displacement, dispossession, and the poisoning

[61] Montana Environmental Policy Act (MEPA), Mont. Code Ann. §75-1-201(2)a.
[62] Montana First Judicial District Court – Lewis and Clark County, Helena, 14 August 2023, CDV-2020-307 *(Held et al. v. State of Montana et al.)*, paras. 58 & 63.

of land, air and water'.[63] Communities facing the 'slow violence'[64] of these conditions are increasingly turning to litigation and the courts in their pursuit of redress for the loss and damage they experience.

Of most immediate relevance is a pending lawsuit brought by Greenpeace against the State of the Netherlands for its failure to develop climate mitigation and adaptation policies that respond to the specific and aggravated climate risks that the residents of Bonaire face. Their claim situates the contemporary climate risks facing this Caribbean island community amid a historical colonial process of underdevelopment and exploitation.[65] Despite the economic and infrastructural disadvantage that the island faces in tackling climate-related extreme weather, they claim that the Dutch State's climate governance continues to offer less protection to its residents than it does to the residents of its European territories. Furthermore, they characterize this unequal treatment as a form of racial discrimination.[66] Through these claims, the Greenpeace Bonaire litigation responds to a critical oversight in previous climate decisions from the Dutch courts, where considerable emphasis has been placed on the climate considerations facing the European territory of the Netherlands, and its overseas municipalities have been seemingly forgotten.[67] Procedural rules related to standing have likewise restrained the considerations of Dutch courts to only the legal interests of residents of the Netherlands, excluding the consequences that climate change poses to other societies.

In Germany, one of Europe's first Loss & Damage cases is nearing a decision in the trial court. In 2015, Saúl Luciano Lliuya filed a claim against the German energy company RWE, requesting injunctive relief and damages for the risks of flash flooding that RWE allegedly created through their greenhouse gas emissions. Rapid glacial melting due to climate change increases the risk of flash floods in the village of Huaraz in Peru, where Lliuya owns a home. According to the plaintiff, the company – one of the largest emitters in Germany – is

63 Carmen G. Gonzalez, 'The Sacrifice Zones of Carbon Capitalism: Race, Expendability, and Loss and Damage' in Meinhard Doelle and Sara L Seck (eds), *Research Handbook on Climate Change Law and Loss & Damage* (Edward Elgar Publishing 2021).
64 Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press 2013).
65 Dagvaarding in *Stichting Greenpeace Nederland et al v De Staat der Nederlanden*, 11 January 2024.
66 *Ibid*, para 9.18.
67 See, for instance, the extensive discussion of the climate impacts facing the Wadden region, mentioned 49 times in the *Milieudefensie* decision (n 34).

responsible for 0.5% of global emissions since the beginning of industrialization. As such, Lliuya is seeking compensation for 0.5% of the costs (approximately €17.000) that he and local public authorities have incurred in setting up drainage systems to reduce the risk of flooding.

The legal grounds of Lliuya's claim are found in the German Civil Code's rules on property nuisance (§1004). Although the German Civil Code has been in effect for more than a century, this is the first time that it is being applied to such a globally dispersed form of interference as climate change. Indeed, property nuisances are typically limited to spatially proximate activities, such as air or water pollutants from immediate or nearby locations which affect a property. In the Dutch civil code, the spatial proximity is acknowledged in the title under which the nuisance provision is found, 'Powers and obligations of owners of neighboring parcels' (*Bevoegdheden en verplichtingen van eigenaars van naburige erven*).[68] However, even in 1899, official commentary accompanying the German Civil Code explicitly rejected the premise that unlawful interferences were limited to those from proximate sources. Benno Mugdan's seemingly prophetic commentary reads as follows:

> Some types of effects cannot be kept within specific boundaries. *We live at the bottom of a sea of air.* This circumstance necessarily means that human action extends into the distance. [...] If the permission or prohibition of such an immission is to be determined, one must not only consider the relationship of neighbor to neighbor; rather, the scope of the owner's right can be made to bear on all people. [...] Someone who causes or spreads imponderabilia must know that these go their own way. Their propagation across the border can be attributed to them as a consequence of their action.[69]

On the basis of this interpretation of property nuisance, Lliuya's modest claim for damages intimates a more fundamental shift in liability for property damage – within and beyond Germany – that results, in part, from the historic and ongoing emissions of actors under Germany's jurisdiction. If successful, this

68 Burgerlijk Wetboek Boek 5 (Zakelijk rechten), Titel 4.

69 Benno Mugdan, *Die gesammelten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, III. Band: Sachenrecht* (1899, R. v. Decker's Verlag) 146. I credit Noah Crawford-Walker for bringing this historic commentary to the author's attention and for the translation into English. See Noah Walker-Crawford, 'Climate Change in the Courtroom: An Anthropology of Neighborly Relations' (2023) 23 Anthropological Theory 76, 88. Emphasis added.

litigation intervenes in the material consequences of climate change, offering compensation to those living in places and situations commonly disregarded as sacrifice zones for our global carbon capitalism.

The material consequences that come with this ambitious application of property nuisance rules have caught the attention of other legal mobilizations in the (post-) colonies. In two separate ongoing proceedings, public authorities in Hawaii and Puerto Rico's municipal and county governments have filed lawsuits against an extensive list of oil and gas corporations operating in the United States, with claims brought on the basis of the public and private nuisances caused by the defendants' products (among other claims).[70] Here, too, the plaintiffs' claims seek to bring distributive justice to the colonial sacrifice zones of the climate crisis, juxtaposing the communities and places who are already enduring property damage from violently extreme weather with the actors who principally profit from the activities causing that harm.

In summary, the cases which Juan Auz and I call in our working paper 'the decolonial turn in climate litigation' unravel the Anthropocene along different lines than the previous categories. They position the conflicts of climate change and climate governance amid historical and contemporary processes of extraction and exploitation of natural resources, land, capital and labor and pursue litigation as part of a reparative political struggle. Rather than focus on a particular failing of law in the Anthropocene, this form of litigation offers more of an immanent critique, emphasizing law's success in rendering the communities and natural resources of sacrifice zones unprotected as 'Cheap Nature'[71], while enriching the material conditions of life in Europe, North America and other pockets of affluency and wealth around the world. Litigation, then, offers a space and moment to publicly announce the injustices bound up in law's contribution towards our Anthropocene crises.

[70] City and County of Honolulu v. Sunoco LP et al., Circuit Court of the First Circuit – State of Hawai'i, No. 1CCV-20-0000380, filed 9 March 2020; Municipalities of Puerto Rico v. Exxon Mobil Corp et al., United States District Court District of Puerto Rico, No. 3:22-cv-01550, filed 22 November 2022.

[71] Moore (n 20).

Unearthing the case work within transnational legal networks

How, then, does one research unravelling litigation of the Anthropocene? With these simultaneously global and local crises, litigation of the Anthropocene occurs everywhere at once, in domestic courts, international tribunals, regional human rights courts, international commercial arbitration panels, and non-judicial dispute mechanisms such as the OECD's National Contact Points and the World Bank's Compliance Advisor Ombudsman.

In the TransLitigate project, Thalia, Juan, Rebecca and I combine doctrinal analysis with an empirical study of the professional tasks, the case work, that attorneys engage in while bringing these cases to life. We situate this litigation within the context of transnational social movements and advocacy networks which are supporting, influencing and informing national and local legal mobilizations. Yet, while the sociological and organizational studies literature on transnational social movements is quite robust, it falls considerably short in identifying and assessing the more specific position of legal professionals that work in and with social movements. While Anne-Marie Slaughter's work on transjudicial communication has sparked considerable research in the methods and impacts of judicial collaboration and networking across jurisdictional borders, a corresponding account of the work of lawyers in the development of cases is still very much lacking.[72] Instead, lawyers remain indistinguishable from other types of actors involved in social movements and legal mobilization – including community organizers, campaigners, financiers, and lobbyists – in the current state of the art.

The sociological scholarship on transnational legal professionals has biased towards covering the work of commercial lawyers, and theoretical frameworks driven by Bourdieu's theory of social capital. This framework, developed most prominently by Yves Dezalay and Bryant Garth in their study of the formation of modern international commercial arbitration, emphasizes how the social capital of lawyers – their expertise, educational background, career paths and personal and familial relationships – placed them within a transnational *field* of lawyers competing for business as arbiters.[73] Their subsequent study of lawyers and

[72] Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99; Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191.

[73] Yves Dezalay and Bryant G Garth, Dealing in Virtue: *International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996).

economists shaping the economic globalization of Latin American states further refined their use of Bourdieusian social theory, and emphasized its utility for understanding competitive dynamics among lawyers who seek to acquire power and influence in institutional contexts.[74] Yet, Dezalay and Garth's framework is poorly suited for studying public interest and community-driven lawyers whose aspirations do not coincide with institutional dominance and competitive success in enlarging their market share of legal services. Instead, their work is more often situated at the margins of their profession, with low salaries, precarious organizational funding, and a practical requirement to work across disciplinary specialties as litigators, legal advisors, campaigners and community-organizers.[75] While competitiveness remains relevant – in terms of competing for financing, for media attention, for political support of their campaigns and tactics – the success of lawyers litigating the Anthropocene is also determined by their ability, willingness and proficiency in *collaborating* across firms and organizations, political ideologies and legal jurisdictions. Their work, then, reflects more the transnational legal mobilizations of Teubner's capillary societal constitutionalism than the social capital wielding institution builders in Dezalay and Garth's work.[76]

Within the scholarship on public interest law there has been greater attention for the organizational and professional practices commonly found among the public interest lawyers litigating the Anthropocene. However, the literature stubbornly presumes that public interest lawyering practices must originate in the United States and be subsequently transplanted to other national contexts abroad. These analyses focus on the structural factors that determine the successfulness of transplants.[77] Instead, in my research I reject the presumption that public interest law practices all originate in the United States, and instead examine how

74 Yves Dezalay and Bryant G Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (University of Chicago Press 2002).

75 Gerald P López, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (Westview Press 1992).

76 Gunther Teubner, Constitutional Fragments: *Societal Constitutionalism and Globalization* (Oxford UP 2012).

77 See, for instance, the many case studies of US transplants in Austin Sarat and Stuart Scheingold, 'State Transformation, Globalization, and the Possibilities of Cause Laywering: An Introduction' in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering and the State in a Global Era* (Oxford University Press 2001); Stephen Meili, 'Cause Lawyering for Collective Justice: A Case Study of the Amparo Colectivo in Argentina' in Austin Sarat and Stuart Scheingold (eds), *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice* (Stanford University Press 2005).

they are constructed and transformed through transnational peer networks of lawyers, shifting modes of intervention around jurisdictions to leverage strategic opportunities. It comprises a transnational approach to the movement of ideas, strategies and resources across formal and informal communities and networks of public interest lawyers.[78]

Within the context of transnational professional networks, we study how lawyers look to control issues through their professional tasks. Issue control, a concept borrowed from Andrew Abbott's work in the sociology of professions, encompasses 'a profession's understanding of its tasks, including the technologies with which they work, the facts and objects they encounter, the cultural structures within which they are situated, and their subjective construction of governance problems.'[79] Professional tasks concern 'how they classify, reason, and take action on identified problems, or how they diagnose, infer, and treat their identified problems.'[80] The negotiation of control over these tasks takes place simultaneously in two types of forums, both within competitive and collaborative network relationships, as well as within the organizations a professional group is embedded (e.g. firms, governance institutions, civil society organizations, ENGOs). Our model of transnational collaboration among litigators thus considers both questions of issue control within litigator networks, as well as the recursive influences between those networks and the litigators' organizational environments. Finally, it seeks to analyze transnational legal professional groups in different forms, both those exhibiting more loose and disparate network-like characteristics,[81] or more tightly embedded communities,[82] which may affect the dynamics of issue control.

---

78 This approach builds on Stephen Meili, 'Latin American Cause-Lawyering Networks' in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering and the State in a Global Era* (Oxford University Press 2001); Scott L Cummings and Louise G Trubek, 'Globalizing Public Interest Law' (2008) 13 UCLA Journal of International Law & Foreign Affairs 1; Miriam Saage-Maaß and others (eds), *Transnational Legal Activism in Global Value Chains: The Ali Enterprises Factory Fire and the Struggle for Justice* (Springer 2021).

79 Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (University of Chicago Press 1988) 39–40.

80 Leonard Seabrooke and Lasse Folke Henriksen, 'Issue Control in Transnational Professional and Organizational Networks' in Leonard Seabrooke and Lasse Folke Henriksen (eds), *Professional Networks in Transnational Governance* (Cambridge University Press 2017) 9.

81 Margaret E Keck and Kathryn Sikkink, 'Transnational Advocacy Networks in International and Regional Politics' (1999) 51 International Social Science Journal 89.

82 Marie-Laure Djelic and Sigrid Quack, 'Transnational Communities and Their Impact on the Governance of Business and Economic Activity' in Marie-Laure Djelic and Sigrid Quack (eds), *Transnational communities: shaping global economic governance* (Cambridge University Press 2010).

Practically speaking, we aim to unearth how lawyers working in Anthropocene litigation seek to achieve issue control amid three key 'double positions' that create the possibility of friction: first, between the organizational interests of their clients and their position within transnational legal professional networks; second, between the national legal community in which they are trained and the transnational fields of litigation and advocacy in which they work; and third, between the long-term strategies of their field and the short-term tactics in their immediate case work. Finally, we aspire to account for the ethical challenges which arise in this emerging form of public interest litigation, with legal practices that seek to integrate community-driven lawyering with strategic litigation models, spanning geographically the localities of marginalized communities most affected by Anthropocene crises and the centers of global capitalism where powerful actors are domiciled. As the scholarship on formal professional ethics in the field of legal services increasingly acknowledges ethical responsibilities for the environmental and climate harms created (in part) by their clients, our investigation gravitates away from formal ethical rules of the profession.[83] It hopes to account for the growing practical ethics of transnational public interest law and how they guide decision making inside and outside case work, a field of ethical concerns that is both more complex and more demanding than the limited, formal rules governing the profession.

[83] Steven Vaughan, 'Existential Ethics: Thinking Hard About Lawyer Responsibility for Clients' Environmental Harms' (2023) 76 Current Legal Problems 1.

Conclusion

In conclusion, I did not chose to pursue the questions and lines of investigation presented here because I believe that climate and environmental litigation will save us from catastrophe. The most optimistic of climate litigation scholars would characterize the impact of litigation as, at best, one of many important drivers or catalysts[84] of climate governance. In its 6th Assessment Report on Climate Mitigation, the UN's Intergovernmental Panel on Climate Change described litigation as an important avenue by which civil society actors can 'affect the outcome and ambition of climate governance.'[85] Following a more pessimistic approach, I prefer to characterize these fields of litigation as inevitable processes with gross variations of influence on local, national and international governance decisions about the Anthropocene crises, including questions of distributive and reparative justice. Governance will certainly transform as these crises continue unfolding, and litigation will contribute to shaping and defining life in the Anthropocene. With these assumptions in mind, the case work of public interest lawyers – including their understanding of doctrine and jurisprudence, their evaluations of judicial receptiveness, their organizational and professional identities, and their professional sense of ethics – offer valuable insights into which questions the law will confront – the questions that law will ask of itself – as it transforms amid the pressures of the Anthropocene.

In approaching litigation as a phenomena which unravels the Anthropocene and its crises, I do not wish to suggest that these cases will make it any easier to understand, let alone govern, the socio-ecological challenges they address. Inspired by the work of Michael Riegner, Maria Cecilia Oliveira and Luis Eslava in their Amazon of Rights project,[86] I fixate on litigation because it offers an understanding of law amid the Anthropocene that adds to the complexity, the difficult of the challenges. For, if we have made any error as a legal academy thus far, it is in assuming that these crises require a simplification of law. I see this tendency in the well-intentioned projects that aspire to develop a new constitution, or new fundamental legal principles, for the Anthropocene,

[84] Sam Bookman, 'Catalytic Climate Litigation: Rights and Statutes' (2023) 43 Oxford Journal of Legal Studies 598.
[85] IPCC, 'Climate Change 2022: Mitigation of Climate Change – Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (2022) 1358.
[86] For information on the project, see https://amazoniarights.com/. Last accessed 28 October 2024.

including scholarship developing Earth System Law,[87] Earth Jurisprudence,[88] or Ecocide. It is easier to develop new frameworks and principles than to repair those which are broken. These projects remind us of the line in Huxley's *Brave New World*: 'We always throw away old clothes. Ending is better than mending, ending is better than mending, ending is better...'[89] And they fall crucially short of identifying a viable political pathway for the transformations they seek to achieve. Instead, I offer an analysis of litigation as a redemptive legal practice,[90] an imperfect and incomplete mending of broken legal systems and institutions, contributing to a constitutionalism of life in the Anthropocene that aspires to be just and reparative for this broken world.

87 Louis J Kotzé, 'Earth System Law for the Anthropocene' (2019) 11 Sustainability 6796; Louis J Kotzé and others, 'Earth System Law: Exploring New Frontiers in Legal Science' (2022) 11 Earth System Governance 100126.

88 Peter D Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge 2015); Peter D Burdon, 'The Great Jurisprudence' in Peter D Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011).

89 Aldous Huxley, *Brave New World* (1932, 1946, Harper & Row Publishers) 58.

90 Robert Cover, 'Nomos and Narrative' in Martha Minow, Michael Ryan and Austin Sarat (eds), *Narrative, Violence, and the Law: The Essays of Robert Cover* (The University of Michigan Press 1993) 34.

Gratitude

My journey to this position as Professor of Law and Governance in the Anthropocene would not have taken place without the support, encouragement and camaraderie of many colleagues, friends and family. Hans and Anne, you both inspired me as a PhD candidate, and supported me in the years following Willem's tragic death. The three of you remain integral to my image of Tilburg Law School and it saddens me that I will soon be the last of us in the faculty. Arie, Floor, Han, Jonathan, I have learned tremendously from each of you over the past five years as you helped forge Tilburg into *the* law school for all things Anthropocene. Thanks to the expertise you have shared with me, I feel like I can now moonlight as an environmental law specialist. Laura, Marie, Emre, Sophie, your creativity and hard work inspire me each week, and I eagerly watch to see where your research continues to take you. I only regret that you could not have stayed with us longer. Juan, Thalia and Rebecca, my comrades in TransLitigate, I could not have asked for a more talented team to embark with on this project. Your enthusiasm keeps me going when the progress slows, and your values ensure that we maintain a critical focus on justice amid the inequities of our Anthropocene. Danse, Juan and Ben, thank you for your patience as my first PhD students, while I was still learning what it meant to be a mentor and a supervisor. Michiel, each year I admire and learn more from your committed pursuit of transforming our university into a forum for critical thought and exchange in pursuit of emancipation and democracy. Morag, you taught me everything I know about teaching, and you showed me how our passion as educators can make a difference in our students' lives and careers. Mike, with the start of every academic year I now look forward to our long-winding conversations between the vine rows at Dassemus. Our friendship is invaluable to me. Peer, your mentorship and trust have always been a tremendous source of encouragement, both when I first encountered the field of transnational law, and now as your fellow Convening Editor of Transnational Legal Theory. You never had to believe in the value of my research, but you did and I am ever thankful.

To my friends outside of work, Bobby, Bram, Jules, Geertjan, Robert, Malini, Hasan, Pieter, Angela, Megan, Hans, Luisa, Dylan and everyone else I have not mentioned: thank you for the happy moments together and your support when life is rough. And thanks to those who have been with me for much longer. To Paul, Barbara, Dian, my Dutch family, for welcoming me into your lives. To my sisters, Renee and Claire, for keeping me humble and reminding me that there is much more to life than work. To my parents, for trusting me, instilling me with

a sense of determination, and supporting me every step of the way, even when it took me far from home. To Nina, for all the joy you bring. To Sacha, my love, for everything.

I have spoken. Ik heb gezegd.

Colophon

design
Beelenkamp ontwerpers, Tilburg
photography cover
Maurice van den Bosch
layout and printing
Studio | powered by Canon