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Towards an Insurgent Ecological Law: limits and potentials of Law as an instrument to a just eco-social transition

Para um Direito Ecológico Insurgente: limites e potenciais do direito como instrumento para uma transição ecossocial justa

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Abstract

This article provides a constructive critique of Ecological Law, which has been proposed as a framework to overcome Environmental Law's subordination to economic growth and profit maximization in disregard for socioecological justice and biophysical planetary boundaries. The article critiques Ecological Law literature for its normativist positivist approach, which neglects to analyze law as a product of power relations and as a social form of capitalism, and for overestimating law's potential to transform the political economy. Additionally, the article addresses the shortcomings of the degrowth discourse, one of the bedrocks of Ecological Law. Finally, drawing on Pressburger and Pazello's conceptualization of Insurgent Law and literature on the praxis of movement lawyering in Brazil, the article proposes guidelines for an Insurgent Ecological Law. This approach combines Marxist critique of law with contributions to the strategic reflections of popular movements on their use of legal tactics as part of their struggles for a post-capitalist ecosocial transition.

Keywords: Ecological Law; Insurgent Law; Degrowth; Law and Marxism.

Resumo

Este artigo apresenta uma crítica construtiva ao Direito Ecológico, arcabouço que se propõe a superar a subordinação do direito ambiental ao crescimento econômico e à maximização do lucro, desconsiderando a justiça socioecológica e os limites biofísicos planetários. A literatura do Direito Ecológico é criticada por sua abordagem normativista positivista, que falha em analisar o direito como produto de relações de poder e como uma forma social do capitalismo, além de superestimar o potencial do direito de transformar a economia política. O artigo também examina criticamente as deficiências do discurso do decrescimento, um dos fundamentos do Direito Ecológico.

Com base no conceito de Direito Insurgente elaborado por Pressburger e Pazello e na literatura sobre a práxis da assessoria jurídica popular no Brasil, o artigo propõe diretrizes para um Direito Ecológico Insurgente. Esta abordagem combina a crítica marxista do direito com contribuições às reflexões estratégicas dos movimentos populares sobre o uso de táticas jurídicas em suas lutas por uma transição ecossocial pós-capitalista.

Palavras-chave: Direito Ecológico; Direito Insurgente; Decrescimento; Direito e Marxismo.

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1. Introduction[1]

A growing body of activists and scholars has been engaged in debates surrounding the potential of law to drive alternative economic models in response to the planetary ecological crisis. These discussions often assume that law and the state, being mutually constitutive of the economy, can either exacerbate environmental devastation and concentration of power and wealth, or its exact opposite. This article presents a critique of that general premise, and offers an alternative view of the law's potentials and limits as part of a strategy for a just eco-social transition.

I will not delve, here, into the failure of hegemonic Environmental Law to address the biodiversity crisis or promote the decarbonization of the economy, let alone facilitate a just transition. Although it is paramount to critically analyze the 'neoliberal turn' in environmental regulation in the past few decades (Kysar, 2005; Czarnezki and Fiedler, 2016) – with the proliferation of market-based instruments worldwide that have fostered processes of commodification and financialization of nature (Bracking, 2020; Pellizzonni, 2021; Buller, 2022), as well as 'carbon colonialism' (Dehm, 2016), 'green' land grabbing and accumulation by dispossession (Traldi, 2021), apart from legitimating additional polluting activities and fossil fuel extraction (Dehm, 2021) – this is not a task that this article will undertake.

I will address another kind of question here: whether a radical reimagining of the legal institutions that allegedly organize the economy could propel a more ambitious, post-capitalist ecological transformation strategy. More specifically, the article will provide a critical analysis of Ecological Law, presented by some legal scholars as an 'ecocentric' framework that overcomes the flaws of environmental law, is not subordinated to the imperative of capital accumulation, and provides a "deeper appreciation of ecological limits and notions of interhuman, interspecies and intergenerational justice" (Garver, 2021, p. 100).

The criticism developed here aims to foster a constructive dialogue with Ecological Law, much like Paul Burkett's (2006) critical analysis of Ecological Economics intended to contribute to it through the Marxist method of critique of political economy. The article's

[1] A draft of this paper was presented at the 'Law & Marxist Methods Spring School', organized by the Centre for Law & Social Change at City, University of London, in May 2024. I am grateful to Robert Knox for his valuable comments on that draft. Needless to say, any remaining inconsistencies in my argumentation are my responsibility alone.

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critique of Ecological Law points to three theoretical and strategic shortcomings in this literature: (i) its idealistic approach and lack of a sociological theoretical ground to analyze law as a product of power relations; (ii) its adherence to 'juridical ideology', overestimating the potential of law to transform political economy; (iii) its normativist positivism, neglecting law's relational character and its role as a social form of capitalism. Additionally, the article critically examines some of the limitations within the degrowth discourse, which is one of the primary bases for the Ecological Law framework.

The article mobilizes the Marxist critique of law and the state as social forms of capitalist mode of production to contest the notion that these are neutral instruments capable of either constituting an unfair and predatory global economic system or promoting radical alternatives to it. I do not propose, nevertheless, that the perspective of transforming law as a means for ecological transition be entirely set aside. In the final section, beyond Knox's (2012) general proposal for 'principled opportunism' in the tactical use of law, the article draws on Pazello's (2014) elaboration of 'Insurgent Law', an attempt to elaborate a synthesis of Marxist critique of law, Latin American legacy on critical theory of Law, and the praxis of the struggles of popular movements. Building on this framework, the article discusses the main distinctions between general "Ecological Law" and "Insurgent Ecological Law", and the role of the latter in the struggle for a just ecological transition and, ultimately, ecosocialism.

2. The emergence of Ecological Law as a new legal doctrine

Geoffrey Garver (2013) conceptualizes Ecological Law as a framework that radically addresses the multiple dimensions of the ecological crisis and ensures the "fair sharing" of resources and burdens among generations and countries, according to the principle of common but differentiated responsibilities. He lists ten features that ecological law should have:

> First, it should recognize humans are part of Earth's life systems. Second, ecological limits must have primacy over social and economic regimes. Third, the rule of ecological law must permeate all areas of law. Fourth, it should focus on radically reducing material and energy throughput. Fifth, it must be global, but distributed, using the principle of subsidiarity. Sixth, it must ensure fair sharing of resources among present and future generations of humans and other life. Seventh, it must be binding and supranational, with supremacy over sub-global

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> legal regimes as necessary. Eighth, it requires a greatly expanded program of research and monitoring. Ninth, it requires precaution about crossing global ecological boundaries. Tenth, it must be adaptive. (Garvey, 2013)

Garver was one of the authors of the "Oslo Manifesto" for Ecological Law and Governance (2016), drafted by an interdisciplinary group of experts at a workshop of the Ethics Specialist Group of the IUCN[2] Academy of Environmental Law Colloquium (ELGA, 2024). The Manifesto identifies as reasons for the "growing ecological crisis" the "dynamics of economic growth, population development and overconsumption", but also "the philosophy, ontology and methodology underpinning environmental law", which "is rooted in modern Western law with its origins in religious anthropocentrism, Cartesian dualism, philosophical individualism and ethical utilitarianism". Environmental law is criticized also for being fragmented, reductionist and weak relatively to "more powerful areas of law such as individualized property and corporate rights" (ELGA, 2016).

Ecological law, in contrast, is presented as a new approach "based on ecocentrism, holism and intra-/intergenerational and interspecies justice". It intends to go beyond "mere reform", and promote a "fundamental" change, reversing "the principle of human dominance over nature, which the current iteration of environmental law tends to reinforce, to a principle of human responsibility for nature". To accomplish this, "we do not need more laws, but different laws from which no area of the legal system is exempted", including "constitutions, human rights, property rights, corporate rights and state sovereignty" (ELGA, 2016).

In order to conduct that transformation, the Manifesto relies on "people committed to the change", particularly on environmental law scholars imbued with "critical self-reflection, imagination, courage, and a willingness to become truly eco-literate". It recognizes that values and principles of ecological law already manifest in different traditions, theories, movements and jurisprudence, and states the purpose of building a unifying framework for its promotion, as well as establishing the Ecological Law and Governance Alliance (ELGA), "a global, multi-disciplinary network of professionals and practitioners that seeks to transform law and governance to better protect the foundations of life" (ELGA, 2016; ELGA, 2017).

[2] The International Union for Conservation of Nature (IUCN) was founded in 1948, by governments and civil society organizations, to implement conservation projects worldwide (IUCN, 2024).

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Since 2020, a few books have contributed to the building of the framework of Ecological Law, expanding on Geoffrey Garver's 2013 foundational paper: 'Ecological law and the planetary crisis: a legal guide for harmony on Earth', by Garver (2021), 'The lens of ecological law: a look at mining', by Carla Sbert (2020), 'From environmental to ecological law', edited by Anker, Burdon, Garver, Maloney and Sbert (2021), and 'The ecological Constitution: reframing environmental law', by Lynda Collins (2021). A growing number of papers have also been published developing this approach (such as 'The framework of Ecological law', by Klaus Bosselmann, 2020, and 'Ecological law in the Anthropocene', by Peter Burdon, 2020), or applying it for different legal domains.

The Ecological law framework deserves praise for crucial reasons: for its critique of the submission of environmental law to the accumulation of wealth[3], in disregard of biophysical planetary boundaries and ecological justice; for its holistic view, overcoming the fragmented interventions of environmental law that do not challenge the core of the (capitalist) economic regime; for valuing Indigenous peoples' cosmologies, traditional knowledge and right to self-determination; for its interdisciplinarity, although limited[4], and the integration of approaches such as ecological economics[5] and ecofeminism into legal scholarship.

Despite these merits, the ecological law doctrine presents fundamental shortcomings in its theoretical understanding of law and its relation to the economic system, as well as in the strategy it proposes to achieve the transformations it aspires to. They will be critically examined in the next section.

[3] It would be more precise to say "accumulation of capital", but the concepts of "capital" and "capitalism" are not used by most authors associated to ecological law, or are secondary to them. This relates to one of its theoretical shortcomings that we will analyze in the following section.

[4] As we will see in the next section, the interdisciplinarity in Ecological Law scholarship tends to be limited to an appropriation of some contributions of other disciplines as an inspiration to legal doctrine. There is little of a methodological interdisciplinarity, which would be more promising.

[5] Ecological Economics is a diverse and disputed field, with a variety of approaches, which turns it into a more fertile intellectual and political than Environmental Economics, most fully dominated by methodological individualism and commitment to market-based environmental policies. I follow Burkett (2006) on his assessment of Ecological Economics, its contributions and limits, and its proposal for it to embrace the class perspective and systemic critique of the capitalist mode of production proposed by the Marxist approach.

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3. Ecological Law's theoretical and strategic shortcomings

The Ecological law approach incurs in a normativist understanding of law and its relation to the economy. The premise, as explicit in the Oslo Manifesto but also throughout the authors cited above, is that changing legal norms is the main path to transforming the economy, reorienting it under principles of degrowth and ecological justice. They acknowledge that it is not enough to enact fragmented environmental statutes without broadly changing the fundamental laws that, in their view, organize the market and the state. Although this is an ambitious goal and a refuse of confining ecological rules to the margins of the legal system, it doubles down on the idea that changing legal institutions, mainly through the enactment of norms and the battle for its interpretation and application in courts, is the decisive instrument to transform the economy.

Beyond that, they rely on moral and intellectual virtues such as "truth, justice and courage" (ELGA, 2017), imagination and ecological literacy (ELGA, 2016), to spread the "values and principles" of ecological law and their embodiment in "practices, principles, policies, laws, constitutions, and courts around the world". They vaguely advocate for a "changed mindset" (Bosselmann, 2020), promoting "a revolution in thinking, a re-imagination of the mind, with a new language" (ELGA, 2017), overcoming anthropocentrism, Cartesian dualism, philosophical individualism, and ethical utilitarianism.

This section will critically assess the idealism, positivism and normativism that are manifest in such a theory of change and the correlated comprehension of the legal system and its potential to serve as an instrument for systemic social, economic and ecological change. The analysis will focus especially on Garver's work, for his foundational and central position in Ecological Law scholarship, but it applies more generally to the ELGA discourse and most of the aforementioned authors connected to it.

3.1. Idealism and the lack of a sociological understanding of the law

Marx and Engels criticize the "Young Hegelians" for their "fantasy" that "the relationships of men, all their doings, their chains and their limitations are products of their consciousness". The "demand to change consciousness amounts to a demand to interpret reality in another way", and thus the idealists assume that philosophical critique would be the means for the liberation of "man" from the religious illusions that "alienate" him, leading

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to political emancipation (Marx and Engels, 1845, Part I, A). The similarity with the discourse of Ecological Law, with its strategy focused on "a revolution in thinking, a re-imagination of the mind, with a new language", is striking.

The two materialist philosophers propose a different method: liberation occurs through a social and historical process, not a mere change of worldviews, law and other normative canons. As Marx (2005) stated, "the weapon of criticism cannot, of course, replace criticism of the weapon, material force must be overthrown by material force". Furthermore, social change requires the building of a new social *praxis*, different social relations of production, creation and adaptation of technologies, developing innovative forms of political organization and communication.

I am not criticizing Ecological Law authors simply for not being Marxists. My critique, on this point, is broader: they lack any robust theory to understand socioeconomic change and how the struggles between classes, nation-states, and social groups shape the law. One does not necessarily need to be Marxist to acknowledge that; other approaches could also guide this kind of analysis. Ecological Law authors, however, usually rely on none. They imply that a new legal framework will emerge through legislation, case law, and the spreading of a new legal doctrine and a reimagined mindset. This does not mean that they ignore, for example, the relevance of civil society organizations to exert influence on the ideas they propose. However, there is no theory in that regard: like most legal doctrines, Ecological Law fails to articulate or adhere to a consistent sociological understanding of the law and its transformations, its relations with other social systems, or its limits to promote economic change.

Garver's (2021b) analysis of the legal recognition of rights of nature, and the obstacles to its effectiveness, shows the shortcomings of this idealist and normativist positivist approach.

The Constitution of Ecuador, adopted in 2008, and Bolivia's legislation, since 2010, pioneered the recognition of the rights of nature (later followed by local and national laws and judicial decisions in a few other countries). Nevertheless, despite transformative policies conquered by social struggles[6] in the two South American countries, they have continued to

[6] There were important changes in those countries during the first administrations of Evo Morales and Rafael Correa, especially in Bolivia, through policies such as the nationalization of natural gas and a significant increase in Indigenous peoples' representation in positions in the three branches of the state. These conquers resulted from Indigenous and popular insurrections (Paz, 2012).

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operate under a persistent primary-export, neo-extractivist and dependent economic model that results in systematic violations of social and environmental rights, especially those of indigenous communities (Gudynas, 2009; Paz, 2012; Acosta, 2013). This is an important issue for the Ecological Law network, which "advocates for the rights of nature, and the further development of their scale, scope and practice" (ELGA, 2017). However, what explanation do they provide for the lack of effectiveness of these laws?

Garver praises rights of nature for placing "humans and nonhumans on equal footing within a holistic arena of interdependent rights", but points to the limits of this discourse, drawing on Anker (2017): "because they emerged from rights-based legal frameworks developed within an anthropocentric worldview, rights of nature risk perpetuating treatment of humans as separate from and superior to the rest of nature". He concludes, then, that although the recognition of rights of nature could serve as a transitional trend, it would be better, as Braverman (2018) proposes, to give people *naturehood* in the law. According to Garver, this latter proposal would be "a long-term endeavor involving major shifts in worldviews regarding the human-nature relationship that go far beyond the law" (Garver, 2021b, p. 90-91).

The extent of transformation achievable through law is notably limited, hence, by the prevailing worldviews, as the Young Hegelians would think. Garver considers that "rights-based frameworks more generally risk erosion of nature's rights if they are implemented and adjudicated without an accompanying significant global shift in relevant paradigms and power relationships". Although he mentions power relationships, he does not develop this idea, focusing on doctrinaire and ideological aspects: "the lack of specificity regarding the full extent and meaning of those rights leave them vulnerable to erosion. (…) In societies built on anthropocentric worldviews, the legal landscape is ripe for gradual erosion of nature's rights" (Garver, 2021b, p. 95).

Garver (2021b, p. 95-96) acknowledges that "erosion of nature rights is especially likely if they remain embedded in a growth-insistent capitalistic global economic system, as they are likely to be for quite a long time". Capitalism is mentioned, then, but in passing, as a secondary aspect and without any theoretical or concrete analysis, since he considers the fundamental factor undermining the respect for rights of nature and, more generally, ecological law, are anthropocentric worldviews. To go beyond the transitional recognition of rights of nature, this would be the task to be undertaken:

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> The long game (…) should be about addressing the deep entrenchment in law and other normative domains of worldviews that no longer make sense in light of what both traditional Indigenous knowledge and modern science reveal about what enhances and what impedes a harmonious human-Earth relationship (…). A true shift to ecological law requires this new form of enlightenment. (Garver, 2021b, p. 100).

The promotion of ecological integrity must then "also fully integrate the legal infrastructure that supports practices in finance, trade, property transactions, contracts, commercial enterprises, taxation and so on, all of which play important roles in the human-Earth relationship" (Garver, 2021a, p. 177). His idea of how to change the economy, to make it compatible with the demands of an ecocentric worldview, is clear: worldviews determine law and other normative domains in society, and these by their turn structure the organization of the economic and political institutions.

My critique of this position does not relate to the philosophical abstract debate about materialism and idealism. Even if one assumes that worldviews lie in the base of society, and law and ethics ultimately determine the economy, they still need a theoretical approach to understand how these factors interact with each other (unless they profess an absurdly full version of idealism), and a methodology to guide concrete analysis.

Ironically, the Ecological Law authors' idealist view of society and social change incurs in the Cartesian dualism they intend to overcome. Marxist understanding of *social praxis* is far more complex and less dualistic: its materialism "reflects the activity that transforms things (that creates 'things,' works or products) and never the things themselves" (Lefebvre, 1977 [1970], p. 52). Conscience, ideologies, worldviews, are not external to this: theory and praxis, or contemplation and activity, are not opposed in materialist philosophy. Praxis, in the materialist sense, is "the real historical mediation of spirit and matter, culture and nature, man and the universe, theory and action, existents and existence, epistemology and ontology" (Kosík, 1976, p. 139)[7].

Garver and other Ecological Law authors fail to analyze fundamental factors that could explain why the rights of nature have not effectively facilitated a transition for an ecological economy in Bolivia and Ecuador. They overlook critical aspects such as these countries' peripheral position in the international division of labor, or the classes and class fractions that control their states and economies. Their approach lacks both theoretical

[7] Kosik could be criticized for his anthropocentric view of social praxis and its relationship with nature, but I will not discuss this in this article. This issue remains an important topic of debate among Ecological Marxists.

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understanding and concrete analysis of how the hegemonic struggle between classes and class fractions shapes legal norms (including the subordination of some legal orders to others, considering the reality of legal pluralism) and affects their enforcement. Legal doctrines and methods, as well as legislation and judicial decisions, can contribute to the transformation of the law and society, but only to a limited extent, as remarked by many authors in the Marxist tradition (e.g. Lyra Filho, 1981, p. 17).

3.2 Juridical ideology: the excess of expectations over the transformative power of Law and policy

Garver realizes that incorporating norms with ecological content into the legal system alone is not enough to steer the economy in a sustainable direction. He proposes a "lock-in assessment framework to transition the legal system and related systems toward a mutually enhancing human-Earth relationship". This approach aims to overcome features entrenched in the global economic, political, and legal systems – "such as a strong commitment to growth, capitalism, strong state sovereignty and property rights and relatively unrestricted markets" – that perpetuate mutually reinforcing inequalities in wealth, income, and access of individuals and organizations to the political process, undermining the possibilities of regulation and policies for environmental protection. The Ecological Law approach seeks, therefore, to "assess and respond to lock-in features" through which the legal system contributes to such concentration of power and wealth and its harmful ecological effects (Garver, 2021a, p. 171- 174).

This holistic integration of a Law and Political Economy (LPE)[8] perspective into Ecological Law represents a significant step forward compared to Environmental Law's fragmented and subordinated condition. Nonetheless, Ecological Law authors, like their LPE colleagues, fail to take into account and to analyze the structural limits of law to change the capitalist economy. They reproduce the ideological misconception of "juridical socialism",

[8] Beyond Garver (2021a, p. 183-223), who undertakes an analysis of the legal contours of international trade and investment regimes and a proposal on how they must change towards an "ecologically bounded legal regime for trade in the Anthropocene", it is hard to find this kind of LPE analysis in the literature directly associated with Ecological Law. It is possible to find a few publications that share strong premises and ideas with Ecological Law approach without mentioning this specific expression or the authors associated with it. Fyock's (2022), for example, undertakes a similar effort of reimagining International Economic Law to embody the paradigm of degrowth. His proposals are welcome, but the critique made here to Ecological Law theoretical and strategic limits is also applicable to Fyock's contribution. They also apply, more generally, to most of Law and Political Economy scholarship.

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which assumes that economic and social relations are “founded on the law and created by the State” (Engels and Kautsky, 1977).

In his study of the workers’ struggle for legislation to ensure minimally decent working conditions in the factories, Marx analyzes how the resistance of capitalists to the approval and enforcement of these laws is rooted in systemic limits imposed by the demands of capital accumulation. He cites that, although English doctors unanimously declared that factories must ensure at least 500 cubic feet of breathing space for each worker, sanitary officers and factory inspectors repeatedly reported that it was impossible to make capitalists comply with this requirement. These officers, thus, “in fact, declare that consumption and other lung diseases among the workpeople are necessary conditions to the existence of capital” (Marx, 1887, Chapter 15, Section 9). Marx explains that under the conditions of that time, enforcing this very basic sanitary rule would decisively threaten the functioning of thousands of small employers, undermining the conditions for capital accumulation.

Overcoming methodological individualism, Marx understands capitalism as a social system that imposes itself on agents, including members of the ruling class. The capitalist drive for infinite accumulation does not depend on the subjective preferences, worldviews, or religious ethics of individual capitalists; it is coerced on them through the mechanisms of competition and the dynamics of centralization and concentration of capital linked to it (Fine, 1991, p. 2-4). They are hence compelled to fight against legal regulation that undermines their profits. If the legislation is radical enough to make capital accumulation unviable, it will hardly be approved, and if it is, it will be even harder to enforce, eventually requiring the overthrow of the ruling class and the system.

States cannot use the law to shape market relations as they wish. As Copley and Moraitis (2021) explain, the Polanyian thesis of the ‘mutual constitution’ of states and markets overlooks the self-reproducing and dominating logic of market relations in the capitalist political economy: the state - to which law is structurally coupled, in capitalism (Mascaro, 2013) - underpins their constitution but cannot control them. In this sense, they take on an alienated form, and states are constrained to favor capital accumulation and competitiveness, undermining the protection of labour and the environment.

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This understanding does not come from some generalization about 'the economy'[9] as the dominant force in every society, but from a specific analysis of societal organization under the capitalist mode of production, in which capital accumulation is the primary driving force. Law is not a mere appendix to capital: law and the state are *relatively autonomous* under capitalism (Poulantzas, 1978). It is important to stress, nevertheless, that such autonomy remains always *relative*. Although Modern society entails a process of functional differentiation of its subsystems, this occurs in an asymmetrical way, where the world economic system operates as the dominant one, with its imperative of capital accumulation (Jessop, 2014).

The administration and reform of the state apparatus (or parts of it) by the subalternized classes, without the direct seizure of the means of production, do not break with the structural separation between economy and politics under capitalism, which is one of the roots of the tyrannical domination of capital over workers at the core of their productive activity (Wood, 1981). In this regard, Barreto's critique of the 'Green New Deal' strategy also applies to Ecological Law, since both center on institutional change:

> [The Green New Deal literature] proposes to challenge all the pillars of modern capitalist society within the realm of institutional politics, precisely one of the main arenas where conflicts find resolutions most suitable for the reproduction of capitalist society. (…) There is indeed a diffuse and persistent appeal for popular pressures that would somehow be capable of redefining the range of possibilities in institutional politics. Obviously, depending on the level of these pressures and the new balances of power that may be established, it is possible to obtain certain concessions from capital, but, as Gramsci (2014, p. 49) asserts, 'it is indubitable that such sacrifices and such compromises cannot involve the essential'. And concerning the ecological themes addressed here, the essential can be easily understood as profit, property, and growth. Therefore, the challenges we face demand a popular mobilization with truly insurrectionary energy, capable of assuming collective command and control of the directions that need to be taken. If it is not yet in place, our most immediate task is to establish it!" (Barreto, 2020, p. 89-90).

The concessions that can be wrested from capital result from various forms of struggle of the working class and other subalternized social groups. As Marx notes, "the creation of a normal working-day" was "the product of a protracted civil war, more or less dissembled, between the capitalist class and the working-class" (Marx, 1887, Chapter Ten, Section 7). From Ferdinand Lassalle to Hermann Heller, apart from a variety of authors in the

[9] Marx thesis was not that 'the economy', but *social relations* of production constitute the base of society. By undertaking the critique of political economy, and particularly of commodity fetishism in capitalism, he demonstrated that "economic" relations, "concealed by the relationships between things (products, commodities, sums of money), are relations between living and active men" (Lefebvre, 1977, p. 33).

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Marxist tradition, many legal theorists have understood that the normative force of law depends on the battle of forces behind formal institutions. Ecological Law has yet to incorporate this comprehension to its theoretical and methodological framework, developing research that is consequent to it.

Moreover, it is not enough to adopt a set of norms and policies, even with strong support from popular organization, to address the systemic changes needed to confront ecological collapse. The capitalist mode of production articulates itself through *social forms* – commodity-form, value-form, money-form, and others – that structure capital as the dominant social relation of exploitation of labor power[10] and expropriation of nature (Foster and Clark, 2018), thus conditioning the specific development of legal-political institutions. Law itself is one of these social forms, as we will analyze in the next section.

3.3 Normativist positivism and the neglect of law as a social form of capitalism

The reduction of law to norms and decisions fails to understand its *relational* structure, in two senses. First, as aforementioned, the contents of the laws result from the hegemonic struggles between social classes and groups. Second, law, as a social relation, is a social form of capitalism, as theorized by Evgeny Pashukanis[11].

Following Marx's method in *Capital*, Pashukanis builds his general theory of law not by resorting to some idea of human nature or society in general, but by analyzing it as a historically specific form: the generalization of human relations into legal relations is a cornerstone of the development of capitalism. Previously, there was law, but not the legal form, systemically differentiated from and dominant over other forms of regulating social relations, such as religion (Pashukanis, 2002, p. 40-44)[12].

Pashukanis (2002, p. 43) assumes that "the genesis of the legal form should be sought in the relations of [commodity] exchange". Capitalism constitutes legal subjects as abstractly free and equal possessors of private property rights, being able to celebrate exchange relations through contracts in the market. This commodity-form theory of law does not

[10] According to Marx's definition, "capital is not a thing, but a social relation" (Marx, 1887, Chapter 33).
[11] Although Poulantzas criticized Pashukanis's theory, I rely on both, understanding that they complement each other.
[12] The Pashukanian view of law as a specific order "owned only by the bourgeoisie and capitalism, and which they have implanted at the center of society", is not so different from Max Weber's, although they theorized it in highly different manners (Negri, 2017, p. 44).

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overlook law's role in the realm of production, in the exploitation of labour by capital, just as Marx does not consider the mode of exchange as independent of the mode of production. The commodity-form and the legal form connected to it are both fundamental to the value form, to the exploitation of wage labor: only in capitalism, "where the proletarian figures as a subject disposing of his labour power as a commodity, is the economic relation of exploitation mediated legally, in the form of a contract" (Pashukanis, 2002, p. 45).

"Legal fetishism complements commodity fetishism": highly unequal and exploitative social relations of production appear not only as relations between things, as Marx had stated, but at the same time as "relations between the wills of autonomous entities equal to each other" (Pashukanis, 2002, p. 117). This has profound objective effects in the organization of capitalism: legal subjectivity, which regulates commodity exchange as a relation between formally autonomous and equal persons, "is not only an instrument of deceit and a product of the hypocrisy of the bourgeoisie, (…) but is at the same time a concretely effective principle which is embodied in bourgeois society" (Pashukanis, 2002, p. 40).

Law as a form "unfolds not as a set of ideas, but as a specific set of relations" (Pashukanis, 2002, p. 68). Law is not a mere ideological epiphenomenon of economic relations: "beyond the abstract and scholastic opposition between structure and superstructure, law is dialectically considered as a form of the real process of exchange, and as the face of exchange value" (Negri, 2017, p. 12). Wood (1981) comment on Marx also applies to the understanding of the Soviet jurist in this regard: the productive base of society is not simply reflected by 'superstructural' institutions, it "exists in the shape of social, juridical, and political forms – in particular, forms of property and domination".

I will not delve more profoundly into Pashukanis analysis here, or in the literature that has developed and debated it. Even for those critical of specific aspects or insufficiencies of his concept of the legal form, his theoretical-methodological contribution is inescapable, for analyzing law beyond its normative contents or institutional designs, and looking for its relational structure, its constitution as a social form of capitalism, a central part of a society of commodity producers. "The legal form is the form of a particular kind of relationship. Rules can only be derived from that relationship" (Miéville, 2004, p. 283). This does not mean that the specific contents of the laws are not important. It implies that to overcome capitalist social relations of production and exchange, with their predatory relationship with nature, it

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is not enough to build a different law with radically different contents, whether it called Ecological, Socialist or Ecosocialist (Dalla Riva and Silva, 2024).

Ecological Law's focus on reforming the laws to enhance their enforceability against economic and political 'lock-ins' and even to challenge capitalist imperatives – attempting to overturn a system through its own constitutive forms – resembles the classic tale of Baron Münchausen, who claimed to have escaped from a swamp by pulling himself up by his own hair. Ecological Law's strategy leads to a watery grave in the legal swamp of capitalism.

Finally, it is fundamental to acknowledge that racist, patriarchal and colonial power relations, constitutive of Modern societies, are structurally coupled with the social forms of capitalism (Almeida, 2019; Buckel, 2021)[13]. The fight against these structures of oppression and environmental racism (a concept, by the way, widely neglected by Ecological Law authors) demands to address the legal form, beyond particular policies and institutional arrangements.

3.4 The limits to Degrowth

As stated before, Garver conceives Ecological Law as the legal complement to degrowth economics, which aims at "reducing excess resource and energy throughput, while at the same time improving human well-being and social outcomes" (Hickel, 2020). Degrowthers argue that GDP (Gross Domestic Product) is not a good metric for measuring human well-being, and its continued expansion leads to planetary ecological catastrophe. Challenging 'sustainable development' and 'green growth', the mainstream approaches promoted by multilateral organizations, degrowth scholars argue that it is not viable to reconcile continuous world GDP expansion with necessary and urgent environmental measures such as the reduction of carbon emissions at the necessary rate to avoid climate collapse (Hickel and Kallis, 2019). Some eco-Marxists, such as Barreto (2018), have also made this claim.

Degrowthers plan to improve the living conditions of the majority of the population of the world while "reducing ecologically destructive and socially less necessary forms of production, like sport utility vehicles, private jets, mansions, fast fashion, arms, industrial

[13] Although patriarchy, notably, precedes capitalism as a structure of social domination, it is reconfigured within it through a process in which the legal form plays a fundamental role (Buckel, 2021, p. 254-255).

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beef, cruises, commercial air travel, etc". Furthermore, they propose taking measures to limit elite consumption and consumerism: "cutting advertising, extending product lifespans (banning planned obsolescence and introducing mandatory long-term warranties and rights to repair), and dramatically reducing the purchase power of the rich" (Hickel, 2023).

Degrowth aims of "downscaling affluent economies and their material flows in a just and equitable manner" (Kallis, 2015, p. 1). This also implies acknowledging inequalities in the world-system: "the core capitalist/imperialist countries, which constitute the main source of the problem, must seek a 'prosperous way down'" (Foster, 2023a). This would allow the peripheral and poorer countries, with low ecological footprints, to grow their throughput of energy and materials, making possible "the convergence of per capita consumption in physical terms in the world as a whole" (Foster, 2023a). The purpose, therefore, is not to reduce production and consumption in all forms or sectors, or in every place, but to provide a global reduction by mainly targeting the richest countries and social classes.

Before degrowthers, Marxists have long criticized capitalism for its drive for ceaseless accumulation of capital, observing that this did not revert for the common good and promoted systemic ecological destruction. They propose to organize the economy to meet social needs and ensure ecological sustainability through collective democratic planning. Furthermore, Ecological Marxists have been critical to the lack of centrality of ecological preoccupations in the socialist experiences in the 20th century – although observing that they have been less harmful to the environment than the West capitalist bloc[14]. It is not surprising, therefore, that a convergence have been advancing between some adepts of these two tendencies, generating ideas for an "ecosocialist degrowth" (Löwy *et al.*, 2022; Foster, 2023a; Löwy, 2023).

It is important to consider, however, the criticisms from other Marxists to the degrowth movement. Despite some inconsistencies in Huber's arguments, he correctly

[14] "The Soviet Union's environmental record with respect to pollution, while hardly satisfactory, was generally favorable when compared to the United States, with roughly equal populations. The Soviet Union's per capita sulfur dioxide, nitrous oxide, particulate matter, and carbon dioxide emissions were all far below those of the United States, while its per capita carbon dioxide emissions actually declined in its final years. The per capita ecological footprint of the Soviet Union, the most comprehensive measure of environmental impact, was far lower than that of the United States, with the gap increasing in the 1980s, as the U.S. per capita ecological footprint continued to grow while that of the USSR leveled off. (…) Cuba, though a poor country faced with a perpetual economic blockade from the United States, has long been recognized as the most ecological nation on Earth, according to the World Wildlife Federation's Living Planet Report. Cuba was able to demonstrate that a country can be rated highly on human development while having a low ecological footprint. This is due to its placing human development for the population as a whole, including environmental conditions, at the forefront of its planning" (Foster, 2023a).

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asserts that the degrowth discourse often fails to fully assess the ecological crisis as a problem of power: it is fundamental to challenge capitalists' control over production and investment decisions, and this will only be achieved by an opposing and massive social force. Degrowth chooses as its core target "not a class, but an ideology: growth" (Huber, 2022, p. 129). It is not a coincidence that Ecological Law, deeply influenced by that approach, reproduces its method by focusing its critique on ideologies and normative frameworks rather than on the capitalist system and the ruling class, as previously criticized here.

The shortcomings in degrowth literature regarding an adequate theory and concrete analysis of ecological struggle as a problem of power manifests in Kallis's (2015, p.4) view that a degrowth transition "would be resolutely non-violent", which would constitute, according to him, one of its key differences from socialist revolutions in the 20th century. Contradictorily to this, the Kurdish struggle in Rojava (the Democratic Federation of Northern Syria), highly praised by many degrowthers – for the convergence between its 'democratic confederalism' and degrowth regarding the core aims of ecological sustainability, gender emancipation, and decentralization of political power and economic decisions – recurs to armed struggle against state oppression and the Islamic State terrorist organization. As Ayla Akat Ata explains, "the Kurdish movement is antimilitarist, but in this life-or-death context, it is a privilege to say that you are non-violent" (Daudén, 2016).

In Brazil, some Amazonian Indigenous peoples have been recently organizing armed groups to defend their territories against loggers, miners, land grabbers and other threatens (Camargos and Laet, 2022). This has also happened throughout the last decades – and centuries – in different countries in Latin America. We should not forget that although the indigenous peasants' Zapatista communities in Chiapas, Mexico – another reference for the degrowth movement – have not been conducting an armed insurrection in the last few decades (after their initial armed rebellion in 1994), they have not handed over their weapons. EZLN military commander Moisés recently declared, in the celebration of the thirty years of their uprising: "We don't need to kill the soldiers and the bad governments, but if they come, we will defend ourselves" (Santos Cid, 2024). This is not an abstract sentence: the Zapatista communities in Chiapas have been threatened by both state and non-state (or parastatal) actors. In Chile, the Coordinadora Arauco-Malleco (CAM), which fights for the autonomy of the Mapuche people, is also an armed Indigenous movement (Barbosa and Rosset, 2023, p. 130)

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As Boonen (2018, p. 59) points out, “every political project envisioning a fundamental transformation of society (even those willing to adopt the principle of non-violence) will at some point have to reflect on the relation between transformational politics and violence”. It is necessary to refuse the fetishization of political violence and militaristic deviations, which constitute a problem for strategy and not just principle matters. However, violence has been and might continue to be necessary both in defense of traditional forms of social life - and of their metabolic relation with nature - by groups such as Indigenous peoples and agrarian communities, which are central to the degrowth agenda, and for “new forms of life” (Boonen, 2018, p. 72), as well as for an insurgent political organization in urban scenarios.

The insufficiencies of theoretical elaboration on the uses of violence by oppressed and insurgent groups are far from being the main problem in degrowth literature. However, they manifest its deeper insufficiencies in analyzing the transformation it proposes as a problem of power relations. Kallis himself coauthored a paper with D’Alisa (2020) in which they acknowledge the lack of a theory of the state and strategies to overcome power asymmetries in degrowth literature. Some of the shortcomings previously criticized in the Ecological Law scholarship connect to this gap.

This problem could be addressed by degrowth literature. This has begun to take shape through works such as that by D’Alisa and Kallis (2020), who propose a Gramscian framework to that end. It is a valuable contribution (although I have some theoretical disagreements with them), but only the start of a complex debate that poses an entire research agenda in which critical legal scholars should participate. The proposal for an ‘Insurgent Ecological Law’, which I will outline in the next section, connects directly to this.

Another gap in the degrowth literature consists of a lack of deeper engagement with planning, according to Durand, Hofferberth and Schmelzer (2024), who have proposed an agenda-setting framework to that end. Foster (2023a) urges degrowthers to overcome their prejudice against central planning, arguing that the problems in the Soviet planning experience were not due to its centralized character, but to the authoritarian and bureaucratic way it was conducted. A democratic and participatory planning system that operates “at various levels, from workplace to local to national”, is the only “conceivable way of effectively addressing the planetary ecological emergency” (Foster, 2023a). This raises challenges to which socio-legal and law and political economy research, beyond the doctrinaire and normativist approach, should contribute.

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Finally, 'degrowth' is not a good name for the movement and the approach that seeks to overcome the fetishization of GDP growth and limit economic production and consumption to ecologically sustainable levels, for three reasons.

First, although that approach is "likely to lead to a slower rate of GDP growth, or perhaps even to a reduction in GDP" (Hickel, 2020), depending on the efficiency of that process, this is not a goal but a circumstance: the purpose is to limit the use of natural resources and energy to ecologically adequate levels, not necessarily diminish GDP (as it induces the wide audience to think, considering that 'growth' is immediately associated with this). Moreover, the limits to resources and energy might grow over time: as Napoletano (2024) argues, "both growth and degrowth are strategies in response to material conditions rather than absolute principles". It is necessary to deconstruct the fetishization of growth and to organize the economy, under collective democratic planning, to respect ecological limits. However, this does not convert 'degrowth' or stagnation in the use of energy into an abstract principle or a permanent necessity, although it might be necessary for certain periods, including the present.

Second, to make the economy compatible with ecological limits, decoupling – reducing the intensity of environmental impact relative to GDP – although not sufficient, is fundamental. Degrowthers seldom give this the relevance it should have. As Warlenius (2023) calculates, if decoupling rates over the next 30 years are only 4% (which degrowthers Hickel and Kallis regard as the maximum feasible), meeting the target for carbon emissions needed to limit global warming to a maximum 1.5°C would require a yearly GDP loss of 6.2% for 30 years, ending with a GDP 86% smaller than in 2021. The target of 2°C would still demand, in a scenario of global convergence of per capita income levels, a degrowth of 75% to 86% for the economies of the US, Europe, Japan and Australia over 30 years, as well as around 20% of the Chinese and Russian GDPs; even Argentina, for example, would have to reduce its GDP by 8% over that period (not at an annual rate, but by the end of 30 years).

Warlenius observes that Hickel and Kallis's estimation that decoupling could not be higher than 4% relies on a very limited set of policies. It is surprising that while they envision bold policies to promote degrowth and do not back down due to the difficulty of making them politically viable, they do not apply this same approach to decoupling. They are correct in the evaluation that capitalists, tied to the search for profit maximization, will not promote decoupling at significant rates. However, as Warlenius (2023) argues, decoupling "does not

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follow from the spontaneous operation of the market forces, yet can be produced socially and politically, and will most likely require forceful state action based on popular support".

Jackson, Hickel and Kallis (2024), in a response to Warlenius, argue that a decoupling rate of 7% over the next few decades would still require a significant contraction of global GDP, resulting in a GDP 65% smaller by 2050. My point here is not to deny this necessity, but to stress that an ecosocial just transition requires a strong effort at decoupling, while the degrowth discourse often neglects this in its emphasis on the insufficiency of such a strategy.

Third, while 'ecosocialism' puts at the forefront the need to socialize power over the economy, 'degrowth' is a term that does not carry any class content. I am not referring to the degrowth program, but to the term itself, which is important because it identifies a current of thinking and activism, communicating the center of its concerns and strategy. If we agree that the majority of the world's population should have access to better standards of material life, and that poor countries do not need actually to seek 'degrowth' but a green growth model (although not centered on GDP or 'growth' fetishized discourse), it is counterproductive to build our discourse for ecological transformation around the vague and generalist banner of "degrowth".

Class antagonism, as well as the systemic and frontal opposition to the logic of capital, should be at the center of our discourse, as implied by the term *ecosocialism*. Furthermore, it is regrettable that the degrowth discourse often focuses its criticism on individual consumption by the upper classes. Although that is relevant, it is far more crucial to combat the environmental damages caused by the imperialist military-industrial complex – which, apart from being a major direct contributor to exacerbating both the climate and biodiversity crises[15], plays a pivotal role in affirming the hegemony of the system that is making the planet uninhabitable while exploiting and marginalizing peoples and the working class –, fossil fuel industries, and capitalist production more generally. We must avoid the pitfall of framing ecological discourse as a moralistic critique against excessive individual consumption, which could be addressed mainly through new habits and the spread of a new ethics and thinking. To face the ecological collapse, there is no other way than the struggle

[15] The US military is the world's largest institutional consumer of hydrocarbons. It emits more greenhouse gases than many medium-sized countries (Belcher et al., 2019). The major environmental impacts of military operations and wars have been systematically overlooked and often shadowed under the pretext of national security reasons (Vuong, Nguyen and La, 2024).

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for the socialization of power over the production of social life and its relationship with nature.

4. Towards an Insurgent Ecological Law

4.1 Ecological Law as a Tactical Framework

The previous section highlighted the structural limits of the law as a means to change society and the economy, especially the herculean challenge of addressing the planetary environmental collapse. Nonetheless, this does not mean that the perspective of transforming the state and the law should be entirely set aside. It is necessary to fight in the legal arena without being confined to legal fetishism and the law's narrow horizon and methods.

Robert Knox highlights the importance of the distinction between strategy and tactics in this context. As he summarizes it, while the former refers to the methods used to achieve long-term goals and addresses the structure, the latter concerns the methods through which achieve shorter-term objectives. Although they cannot be isolated from each other, strategy needs "to be informed in a greater sense by 'theory' (…), as it becomes more important to understand and unpack the logic of the system", whereas tactics "are concerned with conjunctural moments" (Knox, 2012, p. 199-200).

Knox argues that progressive forces and critical scholars often intervene in legal-political situations tactically, but many times frame their action as strategic, "foreclosing the possibility of an actual strategic intervention" (Knox, 2012, p. 205). Without an overarching strategic vision, the tactical adoption of liberal legalism by critical scholars, lacking reflection on the strategic problems this may pose, leads to a capitulation to the limits of the existing order (Knox, 2012, p. 208, 2011).

It is usually not possible to choose between using law or not, since it is both pervasive and inevitable in capitalist society, for reasons explained by Pashukanis. The question posed by strategy is rather "on what terms is it possible to use the law *without* fatally undermining long term, structural considerations" (Knox, 2012, p. 215). Following Marx's analysis in *Capital*, Knox (2012, p. 2018) observes that struggles such as that for the regulation of the length of the working day are "vital to the constitution of the working class as a *political*

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subject", "the only vehicle that would be capable of overthrowing capitalist social relations". Thus, a tactical intervention is "framed and directed" by the strategic goal of the socialist revolution. As Rosa Luxemburg stressed, there is no necessary opposition between reforms and revolution: the struggles for social and democratic reforms, through trade unions or parliamentary practice, prepare the proletariat as an agent for socialist transformation, helping to create the *subjective* factor for it, although they cannot realize socialism *objectively*, as this is not achievable within the framework of reforms of the capitalist state (Luxemburg, 1986).

Relying on Lukács and Pashukanis, Knox asserts that the abolition of law is the strategic goal that should guide the tactical use of law. To overcome the fetishization of law, the working class should regard it as a simple power factor to be "subordinated to the political needs of the moment", ensuring that law's "form and structure is not able to break up and block any social movement" (Knox, 2012, p. 221). In this sense, he proposes 'principled opportunism' as a category to guide the tactical use of law while keeping reflective on the risks and limits in that use, imposed by the legal form: "pursuing a legal strategy can break up collective solidarity, and renders progressive forces unable to address the systemic causes of social problems. Indeed, to mount a legal strategy is to risk legitimating the structures of global capitalism" (Knox, 2009, p. 433).

Throughout this article, I have criticized the attempt to address the ecological crisis through law and policy without challenging capitalist social forms. However, the tactical use of the law is unavoidable, at least for defending activists and movements against repression and criminalization, even if this defence does not rely primarily on legal means. Furthermore, the tactical struggle for law and policy reforms can be a tool for empowering the political subject necessary to overthrow capitalism and halt the planetary destruction it causes. Nonetheless, it is essential to reflect on the strategic limits and risks implied by these tactics and how to better frame them.

Building a legal doctrine like Ecological Law can be useful in supporting tactical objectives, whether in judicial litigation or in advocacy actions targeting international organizations, national parliaments, and governments. Nevertheless, there is a cost to spreading the illusion that through advancing a new legal framework it would be possible to address the environmental crisis and build a transition to a post-capitalist sustainable society. This approach forecloses the need for a strategic alternative that goes beyond juridical

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ideology, pointing to the overthrowing of capitalist social forms through the socialization of the means of production and reproduction.

The challenge, then, is to advance 'Ecological law' as a tactical framework in certain scenarios where it can be helpful, without confining the struggle for a post-capitalist ecosocial transition to a discourse and methods of action tamed by legal fetishism and the legal form.

The struggle against the law should be conducted continually, not just in extraordinary, revolutionary circumstances. As Pashukanis explains, law is not merely an ideological phenomenon or of secondary importance to capitalism. This is precisely why it is important to fight the law: not because it matters less, but because it matters greatly, as a social form of capital (Cava, 2013, p. 7). That struggle must be conducted through collective social practices, not only theoretical critique. The question of how this strategic orientation could shape tactical methods demands further reflection and criteria. The conceptual elaboration of 'insurgent law' responds to that quest.

4.2 Insurgent Law and the tradition of 'popular [movement] lawyering' in Brazil

Ricardo Pazello (2010, 2014) develops "insurgent Law" as an approach that emerges from the synthesis of Marxist critique of law, Latin American decolonial and Marxist dependency theories, and the praxis of the struggles of popular movements. It does not consist of a new version of 'juridical socialism', but rather a framework to guide tactical uses of law while following Marx and Pashukanis in the radical critique of the legal form. Pazello did not invent the concept of insurgent Law; he and Ribas (2009) took up the original collective elaboration of this framework by popular lawyers (*advogados populares*) who integrated the Popular Legal Aid Institute (*Instituto Apoio Jurídico Popular*), a group of movement lawyering that worked with popular movements in Rio de Janeiro, Brazil. The Institute was coordinated from its foundation in 1987 until 2001 by Miguel Pressburger, who grounded insurgent Law mostly on Pashukanian bases, although not in a systematic manner (Pressburger, 1990; Pazello, 2016, p. 107). Pazello builds a more rigorous theoretical foundation for insurgent Law and systematizes its methodologies.

Insurgent Law is grounded in the praxis of popular movements in Latin America, conceived as "an organizing mediation between the objective and subjective senses of class

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that incorporates ethnic and gender conditions". They are more specific than social movements (which can also include conservative and bourgeois forms of social organization) and less particular than labor movements, which are "a subjective specification of the class which is one among the possible realities of the popular movement". Popular movements – encompassing labour unions, thus, by this definition, but also an array of other organizing forms – are envisioned as the "historical subject" of the rupture with the three articulated structures of social division under the modern-colonial capitalist world system: class, gender and race (Pazello, 2018, p. 1558-1559).

To frame such a strategic guideline that enlarges the conception of the working class to envision a broader subject for overcoming capitalism in Latin America, Insurgent Law draws on Latin-American Marxists such as José Carlos Mariátegui (the Peruvian Marxist who envisioned an "Indo-American Socialism" horizon and strategy for the revolution in his country, in the 1920s) and dependent theorists, as well as on decolonial authors. The 'liberation politics' formulated by Enrique Dussel is the key to this unifying framework of a decolonial Marxism: "Without the decolonial turn and liberation, socialism empowers the classes, but loses its specific horizon for the periphery of the system. But without socialism and liberation, the decolonial turn is just an intellectual proposal" (Pazello, 2018, p. 1563).

Another brick in the building of insurgent law is the Latin-American tradition of critical legal thinking. Pazello (2018, p. 1581-1586) highlights contributions made especially in Mexico and Brazil from authors such as José Antonio de la Torre Rangel, who proposed the idea of a "law born of the people" as a "liberation arm"; Óscar Correas, who developed a critique of juridical ideology and defended the emancipatory power of legal pluralism, especially to Indigenous peoples; and Roberto Lyra Filho, who in the 1980s undertook a heterodox reading of Marx to sustain his proposal of a "Law found on the street", produced dialectically by the collective struggles for social emancipation. Although all these authors lack a critique of the legal form and the horizon of its abolition, they offer important elements for creating a framework for the tactical uses of law. Conversely, Pazello values the works of Brazilian Marxists who have returned to Pashukanis to radicalize the critique of law, particularly the fundamental work by Márcio Bilharinho Naves (2000), followed by others like Celso Naoto Kashiura Júnior and Alysson Mascaro, but observes they have not addressed the challenge of the tactical uses of law (Pazello, 2018, p. 1586-1587).

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Finally, a fundamental source for the elaboration of insurgent law is the historical experience of *assessorial jurídica popular* ("popular advocacy" or "popular legal assistance"), developed both through *advocacia popular* ("*popular lawyering*" or "*people's lawyering*") and university projects providing legal assistance to popular movements. These experiences emerged from the organic political relationships between popular movements and legal scholars, lawyers and law students, developing the critique of law while simultaneously engaging with its tactical uses by these movements.

Knox (2012, p. 222) mentions in passing Ceric's[16] Gramscian view of movement lawyers as organic intellectuals, praising their actions as examples of principled opportunism, as the law is used as a tool openly subordinated to the political-strategic goal of strengthening social movements. He also follows Ceric in the view that legal scholars can have a political intervention by contributing to making the practices of activists informed by critical theory, helping to combat legal fetishism and the illusions of legal liberalism. Finally, as legal experts in their fields, they could provide legal arguments or connections to activists in their use of law (Knox, 2012, p. 229). Insurgent law incorporates these conceptual and practical ideas, yet transcends them, in a threefold manner.

First, Insurgent Law does not relate to the tactical use of law by 'progressive' forces in general (as Knox writes it), but specifically by *popular movements*, as previously explained. This comprises not only the combat for the reinterpretation of law in favor of popular classes but also other uses, such as the construction of an 'insurgent legal pluralism' that Pazello theorizes as a "latent dual power" capable of challenging the order imposed by the ruling class (Pazello, 2010, p. 179-196). This does not imply that legal pluralism overcomes capitalist domination by itself, but it can serve as a means both for resistance and for 'pre-revolutionary' revolts and organization[17].

Although the elaboration of insurgent Law is rooted in the praxis of popular movements in the Latin American context, I propose to generalize the concept for broader

[16] Knox cites an unpublished paper by Ceric, but her PhD thesis offers a more developed version of her arguments (Ceric, 2020).

[17] Legal pluralism does not necessarily consist on a manifestation of a "latent dual power", according to Pazello. He differentiates between an 'asymmetric' and a 'dual' use of law, both associated to legal pluralism. The 'asymmetric' use refers to processes of resistance that seeks for the recognition and respect of the law built by the subaltern classes and groups (such as Indigenous peoples), coexisting with the State's law without submitting to it in certain territories and sets of social relations, but without challenging its general validity. In the 'dual' use of law, there is an overall contestation of the law imposed by the ruling class and the affirmation of the insurgent legal order as an alternative to supplant it – although tactically, because the strategic horizon consists on the extinction of the legal form itself (Pazello, 2018, p. 1592).

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application in other regions of the world and in the international arena. It is crucial, in each socio-spatial context, to analyze which organized social forces among subalternized groups – integrating struggles along class, gender, and race lines against capitalist domination – could serve as the foundation for the production of insurgent Law, much like popular movements do in Latin America. Insurgent law is linked to the strengthening of the organization of these social subjects.

Second, Insurgent Law encompasses the rich arsenal of tactics developed over decades of "popular legal assistance" or "popular advocacy" praxis in Latin America, particularly in Brazil, deploying a variety of methodologies: beyond assistance in litigation, systematic practices of *popular education*, *action research* / *activist research* and *theater of the oppressed*. Each of these methodologies has decades of combined practice and theoretical elaboration, drawing on the foundational works of Paulo Freire (*Pedagogy of the Oppressed*), Orlando Fals Borda (on activist research and popular participation[18]) and Augusto Boal (*Theater of the Oppressed*), from the 1960s and 1970s.

These methods deeply intertwine within popular legal assistance praxis: the theater of the oppressed is one of the methodologies used in popular education, which, in turn, is part of the activist research approach (Pazello, 2016, p. 99-104). Consequently, popular legal assistance, which plays a pivotal role in Insurgent Law, consists of a rich *praxis* that unifies intervention methods with their underlying theoretical foundations, subjected to continuous rethinking through collective reflection on their application, always in cooperation and critical dialogue with popular movements.

In that context, litigation also assumes a pedagogical aspect, differing from its general use by 'progressive' forces: as Pressburger highlighted in the 1980s, "traditional lawyering, no matter how brilliant and well-conducted it may be, does not contribute to the advancement of the people's level of consciousness", because it substitutes popular political action, whereas the educational role of the people's lawyer implies "not replacing the people's role in their struggle" (Pressburger apud Pazello, 2016, p. 111).

The tradition of popular legal assistance, from which Insurgent Law draws, actively seeks to overcome such substitution effect and over-reliance on legal means by social movements, even when they resort to them tactically. Furthermore, the critical dialogue

[18] Varella, herself an experienced popular/movement lawyer (*advogada popular*), has elaborated further on activist research in Latin America in her PhD thesis. See Varella and Jaumont, 2016.

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between popular lawyers and social movements regarding their litigation initiatives serves as a form of action-research, contributing to the deepening and dissemination of a radical critique of the judicial system, including institutions like the police (Medeiros, 2016, p. 120-122, 134). This pedagogical effort is undertaken not merely through preaching by lawyers or legal scholars, but by establishing an organic relationship with movements and applying the aforementioned methodologies to co-produce critical knowledge with them[19].

Mariana Prandini Assis (2021) outlines the distinctions between people's lawyering and strategic litigation/public interest law approaches. In the former, "politics is at the forefront: law works as a mere instrument to gain leverage in the political arena", and movement leaders "are the protagonists of the actions, and they speak publicly on behalf of the group they represent". Conversely, in the latter, "politics is made invisible: every conflict is stripped off its political issues and presented as a rights dispute", with lawyers and NGO officials assuming the role of public spokespersons, focusing solely on the legal aspects of the case rather than broader political action (Assis, 2021, p. 21). Drawing also on Cardoso (2019), she observes that while public interest law "is issue or cause-oriented, and is more interested in institutional change – legal reform, public policy, and jurisprudence", people's lawyering work "behind social movements", seeking primarily to contribute to their empowerment through a horizontal, dialogic, and collaborative relationship where knowledge exchange occurs both ways (Assis, 2021, p. 20).

Third, Insurgent Law encompasses two kinds of organized initiatives aimed at transforming legal education and research. The first one is the construction of "autonomous spaces and institutions for the production and circulation of knowledge, managed by social movements and political organizations" (Varella and Jaumont, 2016). A prime example is the Research Institute for Rights and Social Movements (IPDMS), established as a national research network in Brazil, since 2012. It emerged from collaborations among social movements, scholars, and members of the Brazilian National Network of Popular Lawyers (RENAP), a grassroots organization founded in 1995 with strong ties to the Landless Workers Movement (MST). Ricardo Pazello served as the first Secretary-General of IPDMS[20].

The second kind of initiative for transforming legal education and research consists of students-led centers for Popular University Legal Assistance (AJUPs) institutionalized as

[19] Ceric (2020) also examines the 'radical legal pedagogy' praxes of movement lawyering collectives, focusing in Canada and the US.
[20] https://www.ipdms.org.br/quem-somos/

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'popular extension projects' in many universities in Brazil. While these projects cooperate with popular movements, they also have impacts on Law Schools from within. According to Pazello, the university is also a social form of capitalism (although it precedes it) that should be tactically disputed. The Popular University is a key concept used by the 'extensionist' and student movement in Brazil over the past few decades to synthesize its project of transforming the university through a combination of methods and tactics such as activist research and popular education projects with social movements, the massive democratization of access to the university for working class, black, and indigenous students, and the empowerment of students in university management and in the elaboration of political-pedagogical projects. It draws on theoretical elaborations by authors such as Paulo Freire, Álvaro Vieira Pinto and Darcy Ribeiro, as well as in the Latin-American student movements' legacy, including the landmark Cordoba university reform movement in 1918, in Argentina.

As Knox (2021) observes in a text discussing racialization and the role of black scholars, nowadays "radical movements often lack the resources and infrastructure to produce and sustain their own intellectuals[21]. Accordingly, a large number of radical thinkers today are based largely within the university sector". This underscores the relevance of initiatives and struggles aimed at transforming universities in their pedagogical approaches and institutional organization. Knox emphasizes that it is not enough to "decolonize" their curricula while they "launch attacks on the lowest paid, racialised staff, provide research to support imperialist initiatives, and collaborate with agents of the state against international students".

It is not enough to produce critical theory of law; it is necessary to build or reconstruct the institutional apparatuses in which it is elaborated and disseminated. Extension projects play a pivotal role in this endeavor in Brazil through their critical pedagogical praxis and by contributing to the integration of social movements into the struggle for the 'popular university'. This is fundamental to Insurgent Law (Pazello, 2016, p. 101).

[21] I would add that this is not simply a matter of lack of material resources, but also of priorities. In many political organizations, there is a tendency to view theoretical production and research activities as unimportant.

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4.3 Towards an Insurgent Ecological Law

This section proposes six guidelines for an insurgent approach to Ecological Law, building on the framework outlined in the previous section, which draws upon the praxis of popular legal assistance in Latin America, particularly in Brazil, deeply connected to social movements with powerful ecological dimensions. These include the Landless Workers Movement (MST), Indigenous and Quilombolas[22] communities' struggles, the Movement of Peasant Women (MMC), the Movement of those Affected by Dams (MAB), the Movement for Popular Sovereignty in Mining (MAM, and the Movement of Homeless Workers (MTST), among others. Although I primarily draw on Brazilian experiences and literature on the topic, many similar movements exist worldwide, and these guidelines are thought to be broad and adaptable to fit diverse contexts.

First, to address the socio-ecological crisis, Insurgent Ecological Law aims at the decommodification of social relations and their metabolic relation with nature. It opposes, therefore, the regulatory approach that presumes capital's pursuit of ceaseless accumulation and maximization of profit should remain the primary driver of the economy, attempting merely to limit it or redirect it in an allegedly green way. Besides failing to achieve urgent environmental goals (for example, the reduction of greenhouse gas emissions in the scale and pace needed, as explained by Barreto, 2018, and Cristophers, 2024), the market-oriented approach reproduces social-ecological patterns of exploitation, spoliation and devastation.

Insurgent Ecological Law encompasses the use of Keynesian measures, but its tactics go beyond that. 'Green New Deals' proposals, for example, although sometimes presented as radical 'non-reformist reforms', frequently do not challenge capitalist tendencies of commodification of social life and endless accumulation, as observed by Foster (2023a). While the ecosocialist planning of the economy and the abolition of the commodity form and the value form depend on the correlated extinction of law as a social form of capitalism (a strategic goal, thus, for Insurgent Ecological Law), a range of legal tactics can be employed not simply to attenuate the worst effects of the capitalist mode of production, but to strengthen popular movements in their struggles against the commodification and expropriation of nature. These uses of law can occur in both conditions of resistance and

[22] Quilombos are communities that were first established by African descent people who escaped slavery in Brazil. Some of them persist to this day, and Brazil's 1988 Federal Constitution recognizes the right of the quilombolas (people who live in the quilombos) to the lands they occupy.

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extraordinary situations of 'insurgent legal pluralism', connected to the emergence of duality of powers.

Second, lawyers and legal scholars' professional work is ancillary to Insurgent Ecological Law, not because the law is secondary, but because the protagonists in the fight for its abolition and its insurgent tactical uses are collective subjects. Understanding law as a social relation, this approach does not assume that significant transformations to it would occur fundamentally through the enactment of new legal norms and their enforcement via public policies and judicial decisions, although all of these can be important. Social transformation depends on building popular power from the ground up, inventing and expanding new modes of producing social life and its relationship with nature. Lawyers and legal scholars play a fundamental role in this endeavor by technically assisting popular movements and engaging in critical dialogue to produce knowledge with them about the (anti)legal dimensions of their struggles.

Third, Insurgent Ecological Law deploys a variety of methodologies integrated into movement lawyering, notably activist research and popular education, which can utilize a variety of arts and communication methods, such as those in the tradition of the Theater of the Oppressed. These activities are undertaken not solely by lawyers, law students, and legal scholars, but also by professionals from other disciplines and people with different epistemic backgrounds, promoting an interdisciplinary and undisciplinary approach that integrates scientific, artistic and popular knowledge to critically and strategically rethink law.

Fourth, it is vital to establish or strengthen autonomous institutions and networks for the production and dissemination of critical knowledge on Ecological Law, and to forge organic connections between them and popular movements and subaltern groups' organizations. The Research Institute for Rights and Social Movements (IPDMS), in Brazil, is a prime example, although it faces challenges such as funding difficulties. ELGA, the Ecological Law and Governance Alliance, is a highly promising initiative in that direction. However, in order to be a vehicle for the construction of Insurgent Ecological Law, it would need to address some of the flaws and limits in its strategic view of Law and social change, previously criticized in this article, and rethink its organization discourse, methods and practices accordingly.

Fifth, Insurgent Ecological Law should transcend the national scope in its program, research agenda, and organizing initiatives, constituting and connecting to international

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networks of movements and researchers as part of "a new eco-territorial internationalism" (Bringel and Fernandes, 2024). ELGA, once more, is a promising initiative to contribute in that direction, despite the need for a more profound strategic debate within it. Ecological Law networks must seek further integration into wider platforms such as the Global Tapestry of Alternatives[23] and, in Latin America, the Ecosocial and Intercultural Pact of the South[24].

Sixth, although we need to redefine the entire curriculum of Law Schools according to an eco-centric perspective, this alone is not enough. It is also crucial to redesign the institutional organization of Law Schools and universities, encompassing their power dynamics and control over funding sources, labor relations, improving access for students from marginalized groups and ensuring their retention, as well as transforming political-pedagogical projects, research agendas and methods. To achieve this, the Insurgent Law approach advocates for mobilization and organization by students and workers (including scholars) within universities, alongside continuous dialogue and alliance with popular movements, recognizing them as vital allies in building a popular and ecological university.

One of the most advanced experiences in that direction has been the establishment of special classes within undergraduate Law programs at Brazilian public universities, in cooperation with the National Institute for Colonization and Agrarian Reform (INCRA) and rural social movements such as the Landless Workers Movement (MST), to admit students who are agrarian reform settlers. The Federal University of Goiás (UFG) pioneered this effort in 2007, following similar initiatives in other undergraduate programs – such as "Pedagogy of the Land" and "Agronomy with an emphasis on Agroecology and Sustainable Rural Systems" – at a few public universities in Brazil, as part of the broader National Program of Education in the Agrarian Reform (Pronera).

This policy has a strong ecological dimension, as the rural movements involved in it defend an agroecological project centered on guaranteeing popular food sovereignty through productive practices which are harmonic with the environment. The MST, for example, has been the largest producer of organic rice in Latin America in recent years. Agroecology stands in opposition to the agribusiness model, characterized by extensive monoculture aimed at producing commodities for export and generating profits for large landowners, transnational companies and financial capital, through the predominance of

[23] https://globaltapestryofalternatives.org/
[24] https://pactoecosocialdelsur.com/

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practices that are harmful to the environment and human health, such as large-scale deforestation and the intensive use of chemical pesticides, fertilizers and herbicides (Leonel Júnior, 2018).

Analyzing two of these special classes in different universities, Barros observes that they marked a radical break with traditional legal education and constituted emancipatory pedagogical practices by designing an undergraduate Law program not only to benefit agrarian reform settlers, but *with* them. The political-pedagogical projects of both classes, drawing on the critical pedagogy of Paulo Freire, were elaborated in dialogue with rural social movements, and stated the goal of forming lawyers with technical skills and critical thinking to contribute to their struggles (Barros, 2015, p. 125-139).

Such a pioneering initiative by the Federal University of Goiás, in a state where the agribusiness sector holds strong economic and political power, faced strong reactions from conservative forces. This led the Public Prosecutor's Office (*Ministério Público*) to fill a lawsuit to demand the extinction of the class, obtaining a favorable ruling in 2009 (Barros, 2015, p. 42, 76-103). Euzamara de Carvalho, a lawyer and member of the Landless Workers Movement (MST) who was among the 60 students in the special class, recounted that they "suffered prejudice for being northeasterners[25], landless, and Black". Furthermore, she noted that "peasants occupying seats in the Law course, studying and learning the laws to use them in favor of the peasant struggle, bothered not only the Public Prosecutor's Office at the time, but also the press" (Mata and Soveral, 2022).

A superior court overruled that decision a few months later in 2009. The movements, the university and INCRA (the federal institution responsible for the agrarian reform policy) had previously built a network to support their initiative, involving the Bar Association of the state of Goiás (OAB-GO), the Ministry of Education, and progressive sectors within the Public Prosecutor's Office and Judiciary. The inaugural lecture for the special class, in 2007, was given by Eros Roberto Grau, who was then a Supreme Court justice and Full Professor of Economic Law at the University of São Paulo.

In 2012, hundreds of peasant women occupied the rectory building of the Federal University of Goiás to demand the establishment of more special classes like the first one, which was about to graduate (Veiga, 2012). After further pressure and advocacy over the following years, the university established a new special class in the Law undergraduate

[25] Many of the students admitted to that class where from the Northeast of Brazil.

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program in 2016, along the same model as the original. Similar classes for agrarian reform settlers, developed through cooperation with INCRA and rural social movements, were also launched by other public universities in the Northeast, South, and North regions of Brazil (RBA, 2019).

If a popular movement can count on lawyers among its own ranks, it becomes more technically adept at fighting in the legal arena (where it is constantly harassed if it threatens capitalist interests), and is likely in a better position to do so with greater autonomy, politically determining the tactics to be employed. Moreover, if these lawyers were trained through a critical legal education – both in contents and methods –, they would be better equipped to actively combat legal fetishism within the movement. Nevertheless, easier access to legal tools might lead the movement to rely more on them, reinforcing legal fetishism in its praxis. Even if they have received critical training, these lawyers may still be tempted to sacrifice some of the movement's political goals in the name of a win in court. As Lenin (1962) warned in a letter in 1905, "it is better to be wary of lawyers and not to trust them, *especially* if they say that they are (…) Party members".

Insurgent Ecological Law acknowledges the contradictions inherent in using legal tactics within social struggles that envision an ecosocialist horizon, even when these tactics are guided by a continuous strategic reflection by movements and political organizations. We must resist the two opposing temptations to either accommodate these contradictions by eliminating radical critique of law, or adopt the position of 'beautiful souls' (Hegel, 1807, C, BB, C, c), retreating from the impurities of the legal form intrinsic of capitalist society, in which radical collective subjects are still enmeshed.

5. Conclusion

Following Marx's critical remark that lung diseases among the workpeople were indispensable conditions for the existence of capital in England in the 19th century, we can assert, drawing on empirical and theoretical analyses such as those undertaken by Marques (2015) and Malm (2016), that the global crises of climate and biodiversity are necessary for capitalism today. To address the environmental collapse at its roots, we must build a postcapitalist ecosocial transition.

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Reflecting on the potentials and limits of law as an instrument for that endeavor, this article presented a constructive critique of the Ecological Law framework and its foundation in the degrowth discourse. As a legal doctrine that serves as a foundation for arguments in judicial litigation and for the dispute over the production of legislation, Ecological Law can be useful tactically for socio-ecological struggles. Nonetheless, Ecological Law authors deeply overestimate the potential of law – understood in a positivist normativist fashion – to transform the economy and society. Movements for an ecosocial transition must not fall into the pitfall of centering their strategy on changing law through acting within current institutions. Building on Pashukanis's *relational* understanding of modern law, connected to the commodity form, the article argued for the need to supplant the legal form, intrinsic to capitalism and its ecological destruction, through struggles by the working class and subalternized groups that constitute and propose alternative ways of organizing society and its metabolic relation with nature.

As the Brazilian poet Carlos Drummond de Andrade once wrote, "The lilies are not born from the laws" ("*Os lírios não nascem das leis*"). The ecosocialist spring will not come through legal means. While the subalterns endure capitalist winter, however, law might still be useful in their struggle for survival and in expanding their power, provided they avoid the weakening trap of 'juridical ecologism'. Finally, then, drawing on Pressburger and Pazello's conceptual elaboration on Insurgent Law and literature on the praxis of movement lawyering in Brazil, the article proposed some guidelines for an Insurgent Ecological Law.

Insurgent law refers to an array of methodologies that transcend significantly the notion of law centered on judicial litigation and the dispute over the production of norms. As Soares (2017, p. 193) stresses, drawing on Gramsci and Stutchka, the dispute for hegemony by the subaltern bloc demands the enlargement of the concept of law. Insurgent law encompasses methodologies of popular education and activist research *with* popular movements to develop critical legal pedagogies, theories and analyses; movement lawyering to collaborate with popular movements in litigation while combating legal fetishism and the confinement of political action to legal means; the fight for the 'popular and ecological university'; and the conceptual and practical defense of legal pluralism, which could even serve the emergence of duality of powers in extraordinary situations. This approach goes beyond the 'opportunistic' (even if principled, as proposed by Knox) fragmented use of law by progressive forces. Insurgent Ecological Law consists of a framework that seeks to

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combine the radical critique of law as a cornerstone of capitalist socio-ecological destruction with contributions to the methodologies and strategic reflections of popular movements on their uses of law, broadly understood, as part of their struggle for an ecosocial transition.

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