Legal Place-making in Europe's Seas

*Laying the Foundations for a Human Rights-based Approach
to Maritime Spatial Planning in the EU*

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Abstract

A by now considerable body of critical social-scientific scholarship shows how the mechanics and outcomes of maritime spatial planning (MSP) processes affect those who depend on the ocean for their livelihoods, sustenance, and cultural survival. This rapidly expanding and evolving corpus of publications is, however, still largely lacking in legal perspectives. This even though law interacts with other normative systems grounded in economic and technoscientific rationality to shape human-ocean entanglements, in the process creating injustices of various hues. Against this background, and focusing on the planning processes taking place in Europe's regional seas, this thesis aims in the first instance to clarify how law contributes to the practices problematised by critical MSP scholars. In a subsequent step, the thesis aims to demonstrate how legal thought and practice might be relied upon in order to develop the solutions being sought. More specifically, the thesis makes the case for a human rights-based approach to the regulation and implementation of MSP, arguing that such an approach is well-placed to uphold and nurture the linkages between marine environmental health and human well-being. The thesis proceeds to identify the normative foundations that the proposed approach should be grounded on if it is to usher in a new era in the socio-legal construction of Europe's common maritime territory. This reflection provides a point of departure and a framework for further research on the applicability of established and emerging human rights standards to the marine realm.

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List of abbreviations

CBD	1992 United Nations Convention on Biological Diversity
CCS	1958 Geneva Convention on the Continental Shelf
CFCLRHS	1958 Convention on Fishing and Conservation of the Living Resources of the High Seas
CJEU	Court of Justice of the European Union
CMEMS	Copernicus Marine Environment Monitoring Service
COP	Conference of the Parties
EAGGF	European Agriculture and Guidance and Guarantee Fund
EC	European Community
ECHR	European Convention on Human Rights
EEA	European Environment Agency
EEZ	Exclusive Economic Zone
EMODnet	European Observation and Data Network
ERDF	European Regional Development Fund
ESDP	European Spatial Development Perspective
ESF	European Social Fund
ESPON	European Observation Network for Territorial Development
ETS	European Treaty Series
EU	European Union
GES	Good Environmental Status
GEOSS	Global Earth Observation System of Systems
GIS	Geographic Information System(s)
ICES	International Council for the Exploration of the Sea
ICJ	International Court of Justice
ILM	International Law Materials
IOC-UNESCO	Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization
IPBES	Intergovernmental Panel on Biodiversity and Ecosystem Services

IUCN	International Union for Conservation of Nature
LOSC	1982 United Nations Convention on the Law of the Sea
MSFD	Marine Strategy Framework Directive
MSP	Maritime Spatial Planning
MSPD	Maritime Spatial Planning Directive
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
SDGs	Sustainable Development Goals
SEA	Single European Act
SGEIs	Services of General Economic Interest
TAEU	Territorial Agenda of the European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UN DOALOS	United Nations Division for Ocean Affairs and the Law of the Sea
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS II	Second United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series

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Man is but a network of relationships, and these alone matter to him.

– Antoine de Saint-Exupéry

Chapter One – Introduction

1. Statement of research

In 2019, the Intergovernmental Panel on Biodiversity and Ecosystem Services (IPBES) released its long-anticipated assessment of the status and trends of the natural world, the direct and indirect causes of these trends, their implications for human well-being, and, importantly, the actions that can still be taken to stem the tide of deterioration. The report concluded that 'nature across most of the globe has now been significantly altered by multiple human drivers, with the great majority of indicators of ecosystems and biodiversity showing rapid decline'.[1] With specific regard to the ocean, the report observed that the direct driver with the second highest relative impact on the health of the marine environment was land- and ocean-use change.[2] It went on to note that, already in 2014, only 3% of the ocean was deemed free from human pressure while some 66% was found to be experiencing increasing, and increasingly severe, cumulative impacts (compared to 40% in 2008).[3] Predictably, the resulting decline in the richness and abundance of marine life was found to undermine the ocean's manifold contributions to human societies, including vis-à-vis food security and climate change mitigation and adaptation.

For their part, Europe's seas present a microcosm of the trends at work on a grand scale within the world ocean. Published in early 2020, the European Environment Agency's (EEA) latest report on the state of the environment underscores that cumulative pressures 'have reached a level where they not only impact marine species and habitats but are likely to jeopardise the essential structures and functions of marine ecosystems pushing against the limits for a safe operating space for humankind'.[4] Though it recognises the variation that exists

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[1] Sandra Díaz and others, *Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES 2019), 11.
[2] ibid, 29.
[3] ibid, 24.
[4] EEA, *The European Environment - State and Outlook 2020: Knowledge for Transition to a Sustainable Europe* (EEA 2020), 7.

across individual sea-basins and the fact that numerous species show signs of stabilisation and even recovery, the report also concedes that persisting patterns of biodiversity and habitat loss imply that 'the resilience of Europe's seas could be degrading' and that 'significant systemic changes may be under way'.[5]

Both reports employ the language of transformation when describing the steps needed to slow, halt, and, to the extent possible, reverse the damage inflicted on marine and coastal ecosystems. Key to bringing about the envisaged change is the deployment of appropriate area-based management tools, such as environmental impact assessments and marine protected areas. Equally important is the implementation of cross-sectoral, inter-agency approaches to ocean use management, marine/maritime spatial planning (MSP) being a case in point.[6]

This last recommendation is hardly surprising considering that MSP has come to constitute the dominant paradigm for ordering the distribution of human-ocean interactions across space and time. 'Dominant' because MSP is thought capable of performing a remarkable array of functions, from operationalising ecosystem-based approaches to resource management and enhancing environmental protection, to resolving conflicts between incompatible uses of ocean space and advancing the so-called 'blue economy'. These assumptions are reflected in the systemic discourse that has emerged around MSP within international and European Union (EU) bodies and fora with mandates relevant to ocean governance. Here, MSP is consistently cast as 'an integrative process to cope with the increasing demand for maritime space from traditional and emerging sectors while preserving the proper functioning of marine ecosystems'.[7] Also abounding are references to the role played by MSP in promoting transparency, sustainability, coherence, efficiency, adaptiveness, and evidence-based decision-making.

The portrayal of MSP within these high-level policy circles has been formative for, as well as further consolidated by, related scholarship. The enthusiastic, promotional tone employed by early champions of MSP worked to create a sense of momentum around its enactment, in the process piquing the interest of a lively and diverse assortment of researchers. Thus emerged a new epistemic community, whose members channelled their efforts towards the further conceptualisation and progressive operationalisation of MSP. To be certain, the studies carried out during this phase worked to demystify the institutional structures and the legal and policy regimes that underpin MSP, and to identify possible ways of improving

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[5] ibid, 139.
[6] Sandra Díaz and others (n1), 39-40 and 42; EEA (n4), ch 13-14 and part 3.
[7] 'Introduction to MSP' (*European MSP Platform*, date of publication unknown) <https://www.msp-platform.eu/msp-eu/introduction-msp> accessed 22 April 2022.

planning practice. Yet, in doing so, they did not go as far as to question the normative agenda of MSP or delve into the complexities and contradictions involved in its realisation. The need for this would only become apparent once a critical mass of experiences had accrued, which clearly demonstrated that, across jurisdictions and levels of government, the process and envisaged outcomes of MSP have tended to be grounded in a rationalist and economistic worldview. This is particularly true in the EU, where MSP discourse and practice draw their legitimacy from the presumed authority of the natural sciences and the positive spillover effects associated with technological innovation and economic growth. What the realities on the ground show is that these 'validating' factors are not in themselves sufficient to resolve conflicts among variably motivated users of ocean space. To the contrary, if relied upon undiscerningly, they can exacerbate existing tensions as well as give rise to new ones. To unpick this conundrum, scholars of MSP have had to immerse themselves in the *realpolitik* of planning, deconstructing and reassembling it with the help of critical theory. Thus arose the 'critical turn in MSP scholarship', bringing with it 'a deeper engagement with social processes such as power, justice, distributional impacts, and the potential for progressive forms of MSP'.[8]

The thesis is inspired by, and seeks to build upon, the preoccupations and methodologies of this budding field of inquiry. Its point of departure is the observation that, though rapidly evolving and expanding, the corpus of theoretically informed critical scholarship on MSP is still largely lacking in legal perspectives. This gap is a conspicuous one, especially when one considers how law can and does interact with other normative systems to (de)legitimise spatially and temporally determined human-ocean entanglements, in the process creating injustices of various hues.[9] Accordingly, the first question that the thesis asks is: *to what extent are the practices problematised by critical MSP scholars attributable to the multi-level legal framework that regulates marine planning and management in Europe's regional seas?* As will be discussed in the subsequent sections of this chapter and at various points throughout the thesis, the legal framework in question indulges two contradictory yet mutually reinforcing tendencies: on the one hand, it promotes abstracted, reductionist understandings of space, which discount place-based distinctiveness and disenfranchise constituencies at the margins of power and political influence; on the other

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[8] Wesley Flannery and others, 'A Critical Turn in Marine Spatial Planning' (2020) 19 Maritime Studies 223, 224.

[9] The author previously explored this in Mara Ntona and Mika Schröder, 'Regulating Oceanic Imaginaries: The Legal Construction of Space, Identities, Relations and Epistemological Hierarchies within Marine Spatial Planning' (2020) 19 Maritime Studies 241.

hand, it tokenises localised patterns of social-ecological engagement, preserving them only to commodify and package them for consumption in accordance with a neoliberal rationality.

Standing at the crossroads between these two paths, the thesis seeks to carve out a third way forward; one that accounts for the multifaceted ways in which human societies relate to the marine realm and makes certain that these are reflected in the legal frameworks that regulate MSP processes and steer their outcomes. The thesis contends that this can be achieved through the application of a human rights-based approach to the normativisation of MSP. The hypothesis behind this proposition is that planning initiatives motivated by, carried out in accordance with, and contested on the basis of human rights considerations will be more responsive to the needs and concerns of ocean-dependent and ocean-minded individuals, communities, and groups. This is because the normative language of human rights is uniquely capable of bringing into relief the values, cause-and-effect relationships, and uncertainties that law's capitalist-industrial framing of the ocean tends to downplay or, worse, disregard. From a more pragmatic viewpoint, the policy and advocacy tools associated with human rights can be used to foster patterns of human-ocean interaction which are more conducive to the desiderata of social and environmental justice.

Yet however confident the thesis may be in its advocacy of a human rights-based approach to the normativisation of MSP, it cannot help but recognise the challenges involved in its conception and implementation. A first key challenge stems from the fact that the proposed foregrounding of human rights represents nothing short of a paradigm shift for ocean law and governance, which have traditionally focused on sovereign interests and broadly construed communitarian ambitions (the subfield of fisheries law being a notable albeit partial exception). A second challenge concerns the material characteristics of ocean space and the resulting particularities of human-ocean entanglements, which render inappropriate the wholesale transposition of terrestrially-evolved human rights discourses, such as those pertaining to property. A third and related challenge concerns the contradictions that befall human rights discourse and practice, human rights being a versatile normative trope, which can be used both to legitimise and to subvert the planning practices and outcomes that critical MSP scholars seek to problematise.

The thesis does not shy away from these challenges. To the contrary, it places them at the centre of its methodological approach and its line of argument. Applying a critical, interdisciplinary lens to the de- and reconstruction of the legal framework that governs marine planning and management in Europe's regional seas, the thesis asks the following additional question: *how, if at all, can human rights be utilised to meaningfully challenge, as opposed to reinforce, unjust patterns of human-ocean interaction, and so provide a vehicle for the*

formulation and realisation of transformative blue futures?[10] In answering this question, the thesis contends with the inherent limitations and potential pitfalls of a human rights-based approach to MSP which faithfully reproduces the tenets of liberal legal and political thought. It proceeds to conjure an alternative model for the normativisation of ocean use planning; one that conceives of Europe's marine regions as coupled social-ecological systems, the continued resilience of which depends on the legal and administrative recognition and remediation of their respective and relational vulnerabilities. It is to this task that the thesis puts human rights.

These are the questions addressed and the arguments put forward in this and subsequent chapters. The remainder of this introductory chapter is structured as follows. Section 2 offers a brief account of the path that led to the emergence of MSP and the reasons for the latter's popularity with marine policy-makers and managers. Section 3 introduces the legal framework that has emerged around MSP in the EU, placing an emphasis on the Maritime Spatial Planning Directive. Particular consideration is given to the Directive's legal basis and what this suggests about the assumptions and expectations attached to the MSP processes transpiring in Europe's regional seas. Section 4 expands on how said assumptions and expectations act to reign in the transformative possibilities present within MSP. It also delves deeper into the critical turn in MSP scholarship, introducing the reader to its core problematique and the thesis' positioning within it. Section 5 sets out the reasons why it was decided to anchor the thesis' reimagining of the process and outcomes of MSP in human rights discourse and practice. Care is taken to acknowledge valid critiques of human rights and to explain how the thesis plans to address them. The sixth and final section provides a synopsis of the chapters that follow.

2. The emergence and early evolution of MSP

The past hundred years have witnessed dramatic changes in the range and intensity of human-ocean interactions. It is worth recalling that, at the dawn of the twentieth century, fishing was the foremost extractive activity taking place at sea. Although the sector had been rapidly growing since the arrival of steam-powered vessels in the mid-nineteen hundreds, stock depletion was not yet a widespread issue and it would take a few more decades of technical innovation before fishing effort would become so effective as to be unsustainable. Equally minor was the ecological footprint of commercial navigation, warfare, and the laying of submarine cables and pipelines, which, at the time, were the only other maritime activities of

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[10] This is a riff on Kathryn McNeilly, *Human Rights and Radical Social Transformation: Futurity, Alterity, Power* (Routledge 2018), 3.

note.[11] The limited scope of – and interaction among – these early uses of ocean space meant that tensions between different marine and maritime interests remained a rare phenomenon, encountered primarily in commercial and industrial shipping ports situated within highly congested urban areas or sensitive coastal environments.[12]

This picture of relatively peaceful coexistence is far removed from today's reality. Technoscientific advances have made it possible to use the ocean in ways that only a few decades ago would have belonged in the realm of capitalist imagination, giving rise to what has been described as 'an unprecedented period of industrialisation'.[13] Traditional ocean uses are now in direct competition with new and emerging activities, such as offshore renewable energy, aquaculture, and marine biotechnology. At the same time, the proliferation of supranational and international obligations relating to the protection of the marine environment and maritime cultural heritage, together with the escalating momentum of the coastal and maritime tourism sector, has led to conservation and restoration being recognised as important uses of ocean space in their own right.[14]

A natural corollary of the diversification and geographical expansion of human-ocean interactions is the emergence of '[c]ontentious, often subjective [debates]' over the spatial and temporal distribution of human activities in marine areas.[15] These debates can be said to revolve around three distinct types of conflict.[16] *User vs user* conflicts occur where the uses of ocean space required for the development of different sectoral activities are incompatible or have adverse effects on each other. Such conflicts are becoming progressively more frequent in nearshore areas, where a wide range of ocean users, from fishers and operators of renewable energy installations to companies involved in the extractive industries, are vying for access to contiguous, overlapping, or distant yet functionally connected sites.

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[11] Philip E Steinberg, *The Social Construction of the Ocean* (CUP 2001), 12-13.
[12] Charles N Ehler, 'Marine Spatial Planning: An Idea Whose Time Has Come' in Katherine L Yates and Corey JA Bradshaw (eds), *Offshore Energy and Marine Spatial Planning* (Routledge 2018), 6.
[13] Glen Wright, 'Marine Governance in an Industrialised Ocean: A Case Study of the Emerging Marine Renewable Energy Industry' (2015) 52 Marine Policy 77, 77. For a broader discussion on the industrialisation of the ocean see: Hance D Smith, 'The Industrialisation of the World Ocean' (2000) 43 Ocean & Coastal Management 11.
[14] Fanny Douvere and Charles N Ehler, 'New Perspectives on Sea Use Management: Initial Findings from European Experience with Marine Spatial Planning' (2009) 90 Journal of Environmental Management 77, 81.
[15] Crow White, Benjamin S Halpern and Carrie V Kappel, 'Ecosystem Service Tradeoff Analysis Reveals the Value of Marine Spatial Planning for Multiple Ocean Uses' (2012) 109 Proceedings of the National Academy of Sciences of the United States 4696, 4700.
[16] This analysis synthesises the typologies of social conflict put forward in two different publications: Till Markus, Sabine Schlacke and Nina Maier, 'Legal Implementation of Integrated Ocean Policies: The EU's Marine Strategy Framework Directive' (2011) 26 The International Journal of Marine and Coastal Law 59; Douvere and Ehler (n14).

User-environment conflicts, on the other hand, stem from the technology- and market-driven expansion of maritime activities and the cumulative pressure they exert on the marine environment, especially vis-à-vis the degradation of water quality and the loss of habitats. But user-environment conflicts may equally well be viewed from the opposite perspective. For instance, as much as the designation of 'no use' or 'limited use' zones furthers the aims of marine environmental protection, it may also trigger and/or consolidate hierarchical power relations of domination-subordination, enclosure-exclusion, and appropriation-dispossession, thus contributing to the marginalisation of vulnerable individuals, communities, and groups.[17]

Finally, conflicts may be *inter-ecological*, a term used to describe instances where trade-offs must be made between clashing environmental objectives. Offshore wind energy development is an oft-cited example of this predicament: although the deployment of renewable energy technologies is a core component of climate change mitigation strategies, offshore wind farms can also lead to 'increased noise levels, risk of collisions, changes to benthic and pelagic habitats, alterations to food webs, and pollution from increased vessel traffic or release of contaminants from seabed sediments'.[18] These prospects are rendered all the more concerning by the growing number of ecologically and biologically significant areas being identified as prime candidates for the development of renewable energy infrastructures.[19]

The three types of conflict sketched out above are further exacerbated by factors relating to the material configuration, function, and dynamics of marine and coastal ecosystems. The three-dimensional structure of ocean space provides fertile ground for tensions to take root and grow, insofar as it allows different uses to be made of the water surface, the water column, the seabed, and the sub-seabed, either simultaneously or sequentially.[20] Adding to these tensions is the 'restlessness' exhibited by the ocean's constituent elements – its currents, substances, sediments, and living inhabitants. Highly dynamic by nature, the way these elements move through space is subject to increasingly unpredictable non-linearities as a result of global climate change. It is now widely anticipated that ocean warming, acidification, and other climate-related drivers of change will soon lead

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[17] Nathan James Bennett, Hugh Govan and Terre Satterfield, 'Ocean Grabbing' (2015) 57 Marine Policy 61, 63. See also Elizabeth M De Santo, 'Missing Marine Protected Area (MPA) Targets: How the Push for Quantity over Quality Undermines Sustainability and Social Justice' (2013) 124 Journal of Environmental Management 137.

[18] Helen Bailey, Kate L Brookes and Paul M Thompson, 'Assessing Environmental Impacts of Offshore Wind Farms: Lessons Learned and Recommendations for the Future' (2014) 10 Aquatic Biosystems 1, 1.

[19] ibid.

[20] Robert W Duck, 'Marine Spatial Planning: Managing a Dynamic Environment' (2012) 14 Journal of Environmental Policy & Planning 67, 69; Alison J Gilbert and others, 'Marine Spatial Planning and Good Environmental Status: A Perspective on Spatial and Temporal Dimensions' (2015) 20 Ecology and Society 64, 66.

to '[l]arge irreversible shifts in the spatial distribution of species and seasonal timing of their activities', thus jeopardising the continued provision of a broad spectrum of ecosystem services[21] and pushing the ocean users who depend upon them to compete ever more fervently against each other.[22]

A siloed, single-sector approach is inherently ill-equipped to address the resulting conflicts, invariably leading to the production and perpetuation of fragmented governance frameworks. A partial antidote can be found in the elaboration and deployment of horizontally integrated planning tools as part of a holistic, ecosystem-based approach to the management of human-ocean interactions. Such tools are considered uniquely capable of enhancing the coherence and promoting the synergistic implementation of marine and maritime policies, thus '[fostering] a more rational and wise use of limited ocean space'.[23]

Enter MSP, perhaps the most prominent device of horizontal integration in the arsenal of modern ocean governance. The origins of MSP are often traced to the pioneering statutory and institutional arrangements that emerged around Australia's Great Barrier Reef Marine Park in the 1970s and 1980s. Central to these arrangements were multiple-use zoning plans aimed at reconciling two equally pressing imperatives: maintaining the natural and cultural integrity of the Reef and allowing 'reasonable' human uses to occur in a coordinated manner.[24] The Australian example set the tone for early MSP practice, casting spatial zoning as a means of facilitating the implementation of area-based conservation measures and ensuring that their success was not compromised by anthropogenic pressures.[25] This perception would, however, change over time, with MSP coming to be regarded as an exceptionally versatile instrument, capable of performing a broad range of functions relating to strategic economic development planning and ecosystem-based marine management.[26] This evolution is reflected in what is now the most widely-cited definition of MSP: a 'public process of analyzing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic, and social objectives that are usually specified through a political process'.[27]

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[21] Hans O Pörtner and others, 'Ocean Systems' in Christopher B Field and others (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability - Part A: Global and Sectoral Aspects* (CUP 2014), 414.

[22] Catarina Frazão Santos and others, 'Major Challenges in Developing Marine Spatial Planning' (2021) 132 Marine Policy 103248.

[23] Michaela Young, 'Building the Blue Economy: The Role of Marine Spatial Planning in Facilitating Offshore Renewable Energy Development' (2015) 30 International Journal of Marine and Coastal Law 148, 157.

[24] A general overview can be found in Jon C Day, 'Zoning - Lessons from the Great Barrier Reef Marine Park' (2002) 45 Ocean & Coastal Management 139.

[25] Fanny Douvere, 'The Importance of Marine Spatial Planning in Advancing Ecosystem-based Sea Use Management' (2008) 32 Marine Policy 762, 766.

[26] See, indicatively, Stelios Katsanevakis and others, 'Ecosystem-based Marine Spatial Management: Review of Concepts, Policies, Tools, and Critical Issues' (2011) 54 Ocean and Coastal Management 807.

[27] Charles Ehler and Fanny Douvere, 'Marine Spatial Planning: A Step-by-step Approach toward Ecosystem-based Management' (IOC-UNESCO 2009), 18.

Thus conceptualised, MSP provides a broad canvas upon which institutional actors and stakeholders can sketch their vision for ocean governance. This chameleonic quality serves to explain why planning frameworks are already at various stages of elaboration and implementation in over 75 countries, a number that represents more than half of all coastal states.[28] It also lends credence to the claim that MSP will be in place in over half of all marine areas falling within national jurisdiction by the year 2030.[29] This projection includes the biophysically and geopolitically diverse space that makes up the 'common maritime territory' of the EU, where uptake has been steadily rising for the past few years. Certainly, in crowded areas with a history of competition over access to resources, Member States have long relied upon the ability of MSP to make tangible the incompatibilities and potential synergies among different maritime activities.[30] A case in point is the North Sea, where MSP has been widely utilised as a mechanism for identifying and resolving multi-stakeholder conflicts,[31] and for providing sustained impetus for the development of various maritime sectors.[32] For Member States lacking such a tradition, however, the pertinent policies and initiatives are largely being driven by the time-bound obligations set out in the EU Maritime Spatial Planning Directive (MSPD).[33]

3. The normative underpinnings of MSP in the EU

In line with prevalent trends, the MSPD attempts to strike a balance between environment- and development-oriented construals of ocean use planning,[34] portraying MSP as a mechanism for promoting 'the sustainable growth of maritime economies, the sustainable development of

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[28] Charles N Ehler, 'Two Decades of Progress in Marine Spatial Planning' (2021) 132 Marine Policy 104134.

[29] Catarina Frazão Santos and others, 'Marine Spatial Planning' in Charles Sheppard (ed), *World Seas: An Environmental Evaluation*, vol 3 (Ecological Issues and Environmental Impacts, 2nd edn, Academic Press 2019), 575.

[30] Douvere (n25), 765-766.

[31] Douvere and Ehler (n14), 297.

[32] Gavin Scarff, Clare Fitzsimmons and Tim Gray, 'The New Mode of Marine Planning in the UK: Aspirations and Challenges' (2015) 51 Marine Policy 96, 96; Helena Calado and others, 'Marine Spatial Planning: Lessons Learned from the Portuguese Debate' (2010) 34 Marine Policy 1341, 1344; Niko Soininen, 'Planning the Marine Area Spatially – A Reconciliation of Competing Interests?' in Ed Couzens, Tuula Honkonen and Melissa Lewis (eds), *International Environmental Law-making and Diplomacy Review 2012* (University of Eastern Finland 2013), 112ff.

[33] Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning [2014] OJ L 257/135 (MSPD), art 15.

[34] Elizabeth M De Santo, 'The Marine Strategy Framework Directive as a Catalyst for Maritime Spatial Planning: Internal Dimensions and Institutional Tensions' in Michael Gilek and Kristine Kern (eds), *Governing Europe's Marine Environment: Europeanization of Regional Seas or Regionalization of EU Policies?* (Ashgate Publishing 2015), 96.

marine areas and the sustainable use of marine resources'.[35] This decidedly neutral take is the culmination of a decade-long campaign on the part of the European Commission to market MSP as a cross-cutting, multi-functional process, which encompasses – but goes beyond – the protection and preservation of the marine environment.[36]

To be sure, several policy instruments adopted either shortly before or in parallel to the elaboration of the Directive referred to the role that MSP could play vis-à-vis the adoption of area-based management measures[37] and the development of Green Infrastructure[38] – a term used by the Commission to signify 'a strategically planned network of natural and semi-natural areas [...] designed and managed to deliver a wide range of ecosystem services'.[39] It was further suggested that a spatial planning system operating on the basis of the ecosystem approach would help maintain the cumulative impacts of maritime activities within levels compatible with the achievement of good environmental status of EU marine waters,[40] thus preserving the capacity of marine ecosystems to remain resilient in the face of mounting pressures.[41]

At the same time, MSP was heralded as a 'building [block] for a successful blue economy'.[42] The Commission repeatedly emphasised the need to reduce regulatory uncertainty and to prevent complex licensing and consenting procedures from delaying projects and raising costs.[43] Simplifying and streamlining said procedures was viewed as an essential

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[35] MSPD, art 1(1).

[36] Commission, 'Proposal for a Directive of the European Parliament and of the Council Establishing a Framework for Maritime Spatial Planning and Integrated Coastal Management' COM (2013) 133 final, 3.

[37] Commission, 'Towards a future Maritime Policy for the Union: A European Vision for the Oceans and Seas' COM (2006) 275 final, 10; Commission, 'Towards an Integrated Approach to Cultural Heritage for Europe' COM (2014) 477 final, 11.

[38] Commission, 'A European Strategy for more Growth and Jobs in Coastal and Maritime Tourism' COM (2014) 86 final, 5-6; Commission, 'Our Life Insurance, Our Natural Capital: An EU Biodiversity Strategy to 2020' COM (2011) 244 final, target 2.

[39] Commission, 'Green Infrastructure (GI) – Enhancing Europe's Natural Capital' COM (2013) 249 final, 3.

[40] As will be further discussed in chapter three, the achievement of good environmental status of EU waters is the overarching aim of EU marine environmental law and policy: Directive 2008/56/EC of the European Parliament and of the Council Establishing a Framework for Community Action in the Field of Marine Environmental Policy [2008] OJ L164/19 (MSFD), art 3.

[41] Commission, 'Towards a Strategy to Protect and Conserve the Marine Environment' COM (2002) 539 final, 21; COM (2006) 275 final (n37), 34; Commission, 'An Integrated Maritime Policy for the European Union' COM (2007) 575 final, 6; Commission, 'Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU' COM (2008) 791 final, 9; Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living Well, within the Limits of Our Planet' [2013] OJ L 354/171, annex para 21.

[42] Commission, 'Blue Growth: Opportunities for Marine and Maritime Sustainable Growth' COM (2012) 494 final, 6.

[43] In the case of renewable energy, for instance, it was suggested that strategic planning processes looking simultaneously at the spatial distribution of wind resources, constraints imposed by other maritime activities or interests, and electricity grid aspects reduce the risk of delays in, or failure of, projects at sea: Commission, 'Offshore Wind Energy: Action Needed to Deliver on the Energy Policy Objectives for 2020 and Beyond' COM (2008) 768 final/2, 4; Commission, 'Blue Energy Action Needed to Deliver on the Potential of Ocean Energy in European Seas and Oceans by 2020 and Beyond' COM (2014) 8 final, 6 and 9.

precondition for the stimulation of private sector interest in maritime activities,[44] particularly those involving large-scale investments in innovative products designed to last for several years, such as shipping, port infrastructure, and the exploitation of certain categories of offshore resources.[45] MSP would contribute towards these aims by offering a transparent process for selecting the optimal location for the development of maritime activities and, by extension, for arbitrating between competing sectoral interests.[46] Specifically, MSP would guarantee that the socioeconomic potential and spatial needs of more or less nascent maritime sectors, such as aquaculture and marine biotechnology, are adequately taken into account in decision-making processes.[47] Parallel to this, MSP would raise the visibility of different economic activities and cultivate linkages between the corresponding policy areas, thus ensuring that better-established maritime sectors, such as fisheries, are not disproportionately targeted by environmental regulations.[48]

Faced with this plurality of understandings, expectations, and levels of experience with MSP, the Union legislator opted for a light-handed but targeted approach: on the one hand, the MSPD endeavours to catalyse the deployment of ocean use planning and bring about a degree of convergence in Member State practice; on the other hand, the Directive accommodates difference, affording Member States ample leeway to develop appropriate institutional arrangements and to determine the spatial and temporal distribution of ocean uses in areas falling within their jurisdiction.

It would be useful at this point to draw attention to some of the tactical drafting choices that enable the Directive to walk this thin line. The primary focus of the following reflection is the Directive's legal basis, which has a lot to reveal about the instrument's rationale, content, and anticipated implementation. The insights gleaned from this analysis will serve as a basis

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[44] COM (2006) 275 final (n37), 34; COM (2008) 768 final/2 (n43), 8; Commission, 'Building a Sustainable Future for Aquaculture: A New Impetus for the Strategy for the Sustainable Development of European Aquaculture' COM (2009) 162 final, 5; Commission, 'Facing the Challenge of the Safety of Offshore Oil and Gas Activities' COM (2010) 560 final, fn 19; COM (2012) 494 final (n42), 5; COM (2014) 8 final (n43), 6.

[45] COM (2006) 275 final (n37), 21. This is of special relevance to emerging areas of economic activity, such as offshore mining. The Commission has suggested that the exchange of best practices in the area of MSP can increase investment in the discovery of new deposits of raw materials and ensure the sustainability of exploration and extraction activities: Commission, 'An Integrated Industrial Policy for the Globalisation Era: Putting Competitiveness and Sustainability at Centre Stage' COM (2010) 614 final, 19.

[46] COM (2006) 275 final (n37), 15-6; COM (2008) 768 final/2 (n43), 4; Commission, 'Progress Report on the EU's Integrated Maritime Policy' COM (2009) 540 final, 6. In the transport sector, for instance, the incorporation of port development into MSP can promote compliance with environmental legislation, particularly where investment is planned in ecologically sensitive areas: Commission, 'Partnership between the European Union and Africa. Connecting Africa and Europe: Working towards Strengthening Transport Cooperation' COM (2009) 301 final, 7.

[47] Commission, 'Strategic Guidelines for the Sustainable Development of EU Aquaculture' COM (2013) 229 final, 7.

[48] COM (2006) 275 final (n37), 23.

for problematising the apparent value-neutrality of the Directive's provisions and the implications that this holds for the MSP processes unfolding in Europe's regional seas. The observations offered in this regard are a preliminary step on the path to answering the first question that the thesis has set itself. It is posited that, being so equivocal, the Directive's normative foundations constrict its capacity to act as an effective legal safeguard against the emergence of unjust patterns of human-ocean interaction.

Mindful of the need to synthesise the diverse discourses that had come to surround ocean use planning, the European Commission's legislative proposal suggested that a legal instrument establishing an EU framework for MSP ought to '[cover] all policy areas of the Treaty on the Functioning of the European Union (TFEU) with an impact on coasts, seas and oceans'.[49] Consequently, the MSPD was adopted under Articles 43(2) (Agriculture and Fisheries), 100(2) (Transport), 192(1) (Environment), and 194(2) (Energy) TFEU.[50] According to the case-law of the Court of Justice of the European Union (CJEU), this multiplicity of legal bases signifies that the Directive is simultaneously pursuing a number of 'inseparably linked' objectives, none of which can be treated as being incidental to the others.[51] It should, however, be emphasised that the Directive does not seek to modify the Union *acquis* for any of the relevant policy areas, but, rather, to ensure its 'coherent and sustainable implementation'.[52] By the same token, the Directive does not envisage MSP as a vehicle for the adoption of new sectoral policy targets. To the contrary, the role of planning is to 'reflect, integrate and link' the objectives defined by national and regional sectoral policies, with a view to ensuring that the relevant initiatives are implemented in such a manner as not to be detrimental to each other, so that they may achieve their individual aims while jointly contributing to sustainable growth.[53]

The non-interventionist nature of the Directive is further corroborated by the fact that it was adopted under the first paragraph of Article 192 TFEU as opposed to the second. The former provision allows measures of secondary law aiming at environmental protection to be passed in accordance with the EU's ordinary legislative procedure, which involves joint adoption by the European Parliament (acting by a simple majority) and the Council (acting by a qualified majority) based on a proposal by the Commission. By way of derogation, Article

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[49] ibid, 3 and 5.
[50] ibid, 5; Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/1 (TFEU).
[51] Case C-155/07 European Parliament v Council [2008] ECR I-08103, paras 35-36. See also COM (2013) 133 final (n36), 5; Opinion of the Legal Service of the Council of the European Union on the 'Proposal for a Directive of the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal management', Document No. 12283/1/13 of 24 July 2013.
[52] COM (2013) 133 final (n36), 3.
[53] ibid, 5.

192(2) TFEU allows measures in certain politically sensitive areas, among which land use and town and country planning, to be passed in accordance with a special legislative procedure requiring unanimity of voting in the Council as well as consultation of the European Parliament, the Economic and Social Committee, and the Committee of the Regions. The *travaux préparatoires* of the MSPD reveal that, in the present case, the Union legislator argued against the applicability of Article 192(2) TFEU by narrowly interpreting town and country planning as a synonym of terrestrial planning.[54] This made it possible to frame MSP as a *sui generis* process, incapable of interfering with the Member States' closely guarded prerogatives in the area of land administration.[55]

This casual assertion and instrumentalisation of the land-sea divide raises pointed questions about law's tendency to disassociate the marine and terrestrial realms. Setting these questions aside for the time being, we cannot but concede that the Union legislator's choice of legal basis is defensible on grounds of non-prescriptiveness. According to the CJEU, Article 192(2) TFEU does not apply to 'general measures', i.e. measures which,

> whilst relating generally to town and country planning and land use in the
> Member States, do not regulate the performance of specific infrastructure
> projects or, although imposing certain limits on the way in which land may
> be used in the Member States, do not regulate the use to which the Member
> States plan to put their land.[56]

Both the *travaux préparatoires* and the final text of the MSPD show that the Union legislator was mindful not to interfere with the Member States' competence to determine the format and content of their maritime spatial plans.[57] Accordingly, and in line with the principles of subsidiarity and proportionality, it was suggested that MSP be loosely regulated by means of a framework instrument.[58] Whilst it was acknowledged that a more prescriptive act would guarantee a greater level of consistency across national implementing measures,[59] a framework instrument was thought to hold other, equally significant advantages: it would be binding upon the Member States without encroaching upon their competences; it would not unnecessarily burden those among them that already had MSP systems in place; and it would provide ample

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[54] ibid, 3.
[55] For a critique of this specific aspect of the Directive's legal basis, see Ludwig Krämer, 'The EU Directive 2014/89 Establishing a Framework for Maritime Spatial Planning' (2018) 15 Journal for European Environmental & Planning Law 24, 30-31.
[56] Case C-36/98 Spain v Council [2001] ECR I-00779, para 53.
[57] MSPD, recital 11; arts 4(3), 5(3), 7(2) and 8(2).
[58] COM (2013) 133 final (n36), 6.
[59] Commission, Impact Assessment accompanying the document 'Proposal for a Directive of the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal management' SWD (2013) 65 final, 45.

scope for maritime spatial plans to be tailored to the biophysical and socio-economic particularities of different ocean regions, as well as the Member States' legal and planning traditions.[60] As a consequence of these considerations, the Directive was limited to setting out minimum requirements for MSP, among which applying an ecosystem-based approach; accounting for land-sea interactions; pursuing coherence between the process and outcomes of MSP and those of integrated coastal management; using best available data; involving stakeholders; and cooperating with other Member States and third countries. The overall approach is indeed subtle enough to fit the Court's interpretation of a 'general measure', hence pre-empting the application of Article 192(2) TFEU.

It follows that the harmonising force of the Directive lies with its role in stimulating, facilitating, and coordinating the deployment of MSP across the common maritime territory of the EU. Here, harmonisation is understood not as a matter of regulation, but as one of shared milestones, information exchange, joint knowledge creation, and cooperative visioning, all with a view to fostering coherence among the planning and management initiatives occurring within the same sea basin. For its part, the thesis does not doubt the significance of these elements for the evolution of EU MSP. Nor does it have any misgivings about the political necessity and legal soundness of the restraint exhibited by the Union legislator (at least insofar as 'legal soundness' is synonymous with adherence to established technical rules of legal practice). The thesis does, nevertheless, see scope for questioning the open-endedness of the Directive's provisions and the extent to which it creates favourable conditions for policy capture.

4. The critical turn in MSP studies

To be sure, the MSPD contains some defences against the exercise of undue influence on planning processes and the adoption of socially and environmentally unjust decisions. Particularly significant for present purposes are the duties placed on Member States in connection to access to information and public participation.[61] The Directive specifically requires that all interested parties be informed, and that all relevant stakeholders and authorities as well as the public concerned be consulted, at an early stage in the development of maritime spatial plans.[62]

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[60] ibid, at 44-45.
[61] COM (2013) 133 final (n36), 3 and 6; MSPD, arts 9-12 and 14.
[62] MSPD, art 9(1).

The pertinent provisions are indicative of wider trends in international and EU environmental law, which is becoming increasingly cognisant of procedural environmental rights. They also reflect prominent tropes within the academic and policy discourse on ocean use planning. Indeed, in the years leading up to the adoption of the MSPD, seminal proponents of MSP had consistently argued that public participation would engender trust among stakeholders and ensure that maritime spatial plans enjoyed broad public support.[63] When preceded by activities aimed at 'increasing awareness, knowledge, skills, and institutional capacity', participation would also serve a constituency-building function, working to bring together 'a critical mass of people in the [area-being-planned] who are environmentally literate, imbued with environmental ethics, shared responsibilities, and shared actions towards the sustainable management of the marine environment'.[64] Public participation was accordingly considered as a 'human dimension criterion' for the application of the ecosystem approach to ocean use planning,[65] key for unpicking the complexity of marine social-ecological systems, understanding the interactions and cumulative effects of different ocean uses, and making certain that the objectives and modalities of MSP are societally determined.[66]

If these statements were to be taken seriously, they would suggest that planners have a responsibility to involve all those who have a legitimate interest in the outcomes of the planning process, offering them a seat at the decision-making table and a genuine opportunity to voice their needs, aspirations, and concerns. A different story is, however, told by those conducting empirical research into the real-world mechanics of MSP. Frazão Santos et al. argue that, on the ground, public participation and stakeholder engagement are more akin to 'communication through public comment' than the more 'interactive and proactive approaches' of 'facilitation, negotiation and consensus-building'.[67] Along similar lines, Flannery et al. note a tendency to implement MSP 'as a form of post-political planning, dominated by the logic of neoliberalism, and a belief in the capacity of managerial-technological apparatuses to address complex socio-political problems, with little attention paid to issues of power and inequality'.[68] They go on to posit that this façade of value-

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[63] Robert Pomeroy and Fanny Douvere, 'The Engagement of Stakeholders in the Marine Spatial Planning Process' (2008) 32 Marine Policy 816, 822; Charles Ehler and Fanny Douvere, 'Visions for a Sea Change: Report of the First International Workshop on Marine Spatial Planning' (IOC-UNESCO 2007), 83; Charles Ehler, 'Conclusions: Benefits, Lessons Learned, and Future Challenges of Marine Spatial Planning' (2008) 32 Marine Policy 840, 841.
[64] Pomeroy and Douvere (n63), 820.
[65] Catarina Frazão Santos and others, 'How Sustainable is Sustainable Marine Spatial Planning? Part I – Linking the Concepts' (2014) 49 Marine Policy 59, 60.
[66] Pomeroy and Douvere (n63), 816 and 822.
[67] Frazão Santos and others (n22), 2.
[68] Wesley Flannery, Noel Healy and Marcos Luna, 'Exclusion and Non-participation in Marine Spatial Planning' (2018) 88 Marine Policy 32, 32.

neutrality and scientific objectivity allows room for MSP to '[repackage] power dynamics in the rhetoric of participation' with a view to '[legitimising] the agendas of dominant actors'.[69] Granted, the identification of neuralgic maritime sectors and their enlistment as 'sponsors' or 'champions' of planning efforts is a necessary ingredient to the latter's success, especially at this early stage of implementation. Sectoral involvement becomes more problematic, however, where it is accompanied by a more or less explicit prioritisation of strategic objectives relating to economic growth at the expense of desiderata concerning social equity and environmental sustainability.[70] According to Jones et al., this is the very point where the practice of MSP detaches itself from its original, integrative agenda: having become 'decoupled from the ecosystem', MSP assumes a role which is essentially tantamount to strategic sectoral planning.[71] Thus conceived and performed, it is concerned less with safeguarding the linkages between social and ecological well-being and more with reaching the compromises necessary for bringing sectoral ambitions into fruition.

These and many other commentaries under the rubric of 'critical MSP studies' have brought to light the hidden, overlooked, and unforeseen trade-offs involved in ocean use planning, exposing its capacity to produce not only winners, but also losers. They have also demonstrated that the distribution of benefits, risks, and harms across actors is highly dependent on the hierarchy of ocean uses that planning initiatives are predicated upon. In response, critical commentators are advocating a differently motivated approach to MSP; one that entrusts the planning process with such tasks as alleviating coastal poverty, preserving cultural heritage, and promoting food security.[72] Their work is meant to be read as an invitation to move beyond merely describing MSP as a site of politics and power, and to begin formulating a theoretically-informed social-scientific research agenda aimed at recapturing and realising planning's 'radical potential'.[73]

The thesis responds to this call by showing that law is both a root cause of the problem that preoccupies critical MSP scholars and a crucial part of the solution. As subsequent chapters will demonstrate, the shortcomings of the MSPD are symptomatic of three chronic

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[69] ibid.

[70] Peter JS Jones, Louise M Lieberknecht and Wanfei Qiu, 'Marine Spatial Planning in Reality: Introduction to Case Studies and Discussion of Findings' (2016) 71 Marine Policy 256, 260.

[71] ibid.

[72] See, indicatively, Heather Ritchie and Geraint Ellis, ''A System that Works for the Sea'? Exploring Stakeholder Engagement in Marine Spatial Planning' (2010) 53 Journal of Environmental Planning and Management 701; Ralph V Tafon, 'Taking Power to Sea: Towards a Post-structuralist Discourse Theoretical Critique of Marine Spatial Planning' (2017) 36 Environment and Planning C: Politics and Space 258.

[73] Wesley Flannery, Jane Clarke and Benedict McAteer, 'Politics and Power in Marine Spatial Planning' in Jacek Zaucha and Kira Gee (eds), *Maritime Spatial Planning: Past, Present, Future* (Palgrave Macmillan 2019).

predicaments within environmental law. The first relates to the limitations inherent in a notion like sustainability, the weaker formulations of which have proven inadequate to the task of maintaining the ecological integrity of marine ecosystems. The second concerns the disconnect between the terrestrial and marine realms, and the latter's routine conceptualisation as a domain that serves society, but ultimately lies outside of it. This fracturing, which is common to regimes concerned with marine conservation and sustainable marine resource use, holds serious implications for the regulation and governance of maritime activities, leaving scope for the hegemonisation of growth-related discourses and practices. A similar risk arises from the third predicament, namely, the growing proceduralisation of environmental law. To the extent that this phenomenon leads substantive rules to be displaced by procedural ones, it holds the capacity to weaken or even undermine the environmental *acquis*.[74] This prospect becomes all the more likely where the proceduralisation of environmental law coincides with its deformalisation, which is to say 'the process whereby law retreats solely to the provision of procedures or broadly formulated directives to experts and decision-makers for the purpose of administering […] problems by means of functionally effective solutions and "balancing" interests'.[75]

Together, these three predicaments interact to prompt the emergence of variably motivated, institutionalised, and scaled decision-making spaces, in which constellations of technocrats and interest group representatives are relatively free to engage in an intransparent, exclusionary dialogue over the socio-material configuration of ocean space. Such fragmentation and enclosure is, however, unsupportable, especially at a time when we are seeing a stark increase in awareness regarding the ties that bind humanity to the ocean. This awareness is partly the result of the growing emphasis placed on land-sea interactions within the law, policy, and practice of marine and coastal management, which serves to draw attention to the onshore implications of maritime development and marine environmental conditions,[76] particularly with respect to the welfare of land-based communities.[77] It further stems from advances in the scientific understanding and popular communication of the manifold benefits that humanity derives from the ocean; that is, the processes, products, and features of marine and coastal ecosystems that support human well-being.[78]

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[74] Jutta Brunnée, *Procedure and Substance in International Environmental Law* (Brill | Nijhoff 2020), 110.
[75] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 Theoretical Inquiries in Law 9, 13.
[76] MSPD, recitals 9 and 16, as well as arts 4(2), 4(5), 6(2)(a) and 7.
[77] See, indicatively, Sue Kidd, Hannah Jones and Stephen Jay, 'Taking Account of Land-Sea Interactions in Marine Spatial Planning' in Jacek Zaucha and Kira Gee (eds), *Maritime Spatial Planning: Past, Present, Future* (Springer 2019).
[78] Marjan van den Belt and others, 'Scientific Understanding of Ecosystem Services' in UN DOALOS (ed), *The First Global Integrated Marine Assessment - World Ocean Assessment I* (CUP 2017).

These developments are working to clarify the roles, responsibilities, and interests of different actors with respect to the marine environment. It bears noting in this regard that the notion of environmental corporate social responsibility features increasingly prominently in the academic and policy debate over sectors and issues such as shipping,[79] ocean energy,[80] and marine plastic litter and microplastics.[81] This suggests a growing movement in support of the integration of social and environmental concerns into the operations of corporate actors, as well as an expectation that the latter will engage with potentially and actually affected constituencies. Parallel to this, commercial and subsistence fishers and other 'sectoral stakeholders' who rely on healthy marine ecosystems for their livelihoods perceive themselves as vulnerable to a range of environmental contingencies, among which climate change, habitat loss, and invasive species.[82] For its part, the wider European *demos* appears capable of grasping the breadth and immediacy of anthropogenic pressures on the marine environment, harbouring particular concerns over marine pollution, ocean acidification, and the unsustainable exploitation of living and non-living resources.[83] What is more, the public frames these concerns 'in terms of multiple, rather than isolated, impacts', demonstrating a readiness to engage with the interactions between different stressors.[84]

This growing sensitisation to the need to safeguard the ecological integrity of marine ecosystems as a matter of ocean as well as human well-being is taken here to suggest a certain degree of critical receptivity to the role that MSP plays in triggering and perpetuating, but also in subverting, unjust patterns of distribution (of recognition, power, resources, and environmental risks and harms).[85] What is still largely lacking is an evocative normative language, widely shared within and between Europe's maritime regions, that is capable of capturing and conveying the multifaceted ways in which individuals, communities, and groups

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[79] Irene Fafaliou, Maria Lekakou and Ioannis Theotokas, 'Is the European Shipping Industry Aware of Corporate Social Responsibility? The Case of the Greek-owned Short Sea Shipping Companies' (2006) 30 Marine Policy 412.

[80] Angelica Bonfanti and Francesca Romanin Jacur, 'Energy from the Sea and the Protection of the Marine Environment: Treaty-Based Regimes and Ocean Corporate Social Responsibility' in Nigel Bankes and Seline Trevisanut (eds), *Energy from the Sea: An International Law Perspective on Ocean Energy* (Brill Nijhoff 2015).

[81] Micah Landon-Lane, 'Corporate Social Responsibility in Marine Plastic Debris Governance' (2018) 127 Marine Pollution Bulletin 310.

[82] See, indicatively, Rachel Tiller and Russell Richards, 'Ocean Futures: Exploring Stakeholders' Perceptions of Adaptive Capacity to Changing Marine Environments in Northern Norway' (2018) 95 Marine Policy 227.

[83] Stefan Gelcich and others, 'Public Awareness, Concerns, and Priorities about Anthropogenic Impacts on Marine Environments' (2014) 111 Proceedings of the National Academy of Sciences of the United States of America 15042.

[84] ibid, 15045.

[85] Jan PM van Tatenhove, 'Marine Spatial Planning: Power and Scaping' (2016) 17 Planning Theory & Practice 132, 132; Sue Kidd and Geraint Ellis, 'From the Land to Sea and Back Again? Using Terrestrial Planning to Understand the Process of Marine Spatial Planning' (2014) 14 Journal of Environmental Policy & Planning 49, 62.

relate to the marine realm. Such a language can fuel and sustain social movements tied to the ocean, enabling their proponents to paint stirring pictures of the spatial futures they desire and to advocate for the policies and instruments necessary to bring them about.[86] The thesis looks for this language in human rights.

5. The untapped potential of human rights

It must be noted at the outset that the nexus between human rights and the environment is the subject of a complex and diverse field of academic research. Like any other study that engages with such a field, the thesis does not exhaust the many angles of the topic at hand. Rather, it adopts an eclectic and integrative position, fusing together insights offered by scholars working within different disciplines and speaking from different positionalities. Its decision to do so is based on a twofold rationale. Generally speaking, a cross-cutting approach makes it possible to develop an argument which is grounded in law without being constrained by it; that is to say, an argument whose core tenets showcase the added value of a critical legal perspective on MSP while at the same time offering points of departure for meaningful interdisciplinary exchange. More concretely, a cross-cutting approach helps us place law in its social-ecological context. This is crucial because, unless carefully and sensitively contextualised, law is unlikely to support the construction of planning paradigms that spur and nurture social movements tied to the ocean, particularly ones that go against the grain of the neoliberal agenda.

Against the background of these introductory comments, the remainder of this section gives a brief and highly selective overview of the mainstream legal debate on human rights and the environment. It also explains how human rights are used in the specific context of this study: not so much as a moral principle or a legal doctrine as much as a *socio-spatial discourse and practice* (an understanding which encompasses but ultimately transcends the moral and the legal).

Let us begin by observing that environmental law scholars and practitioners have long recognised and endeavoured to harness the possibilities that arise from human rights' central positioning within the modern legal and political order. As Bollier and Weston characteristically remark, human rights 'constitute maximum claims on society, fundamental public order values or goods at the apex of public policy, juridically more elevated than

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[86] David Bollier and Burns H Weston, 'Reimagining Ecological Governance through Human Rights and the Rediscovery of the Commons' in Anna Grear and Evadne Grant (eds), *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar 2015), 267.

commonplace standards, laws, or other policy choices that are subject to everyday revision or rescission for lack of such ordination'.[87] Morgan makes an analogous claim, referring to human rights as the 'pre-eminent discourse of normative evaluation' in contemporary societies.[88]

Being endowed with such gravitas, it is hardly surprising that human rights would be viewed as a means of overcoming the growing pains of a field of legal scholarship and practice which, though no longer nascent, is nevertheless still searching for the most effective ways of bringing its aims to fruition. Of particular interest in this regard is the capacity of human rights language to reframe social-ecological desiderata as entitlements, to be secured through a political and legal contract with the state and other key actors.[89] Human rights can also be relied upon as authoritative guideposts for the interpretation of substantive standards of protection and the balancing of competing interests and norms.[90] They can further serve as a source of criteria and principles on the basis of which to design decision-making safeguards of a procedural nature, including with respect to stakeholder engagement and public participation. Finally, human rights can reveal overlooked points of synergy and tension between different policy agendas, thus allowing for the dissolution of sectoral silos and the facilitation of systemic thinking. Whichever of these functions of human rights one decides to focus on, the assumption remains the same: where human rights are incorporated into the lexis and praxis of environmental regulation, policy, and management, they add a potent tool in the arsenal of those intent on promoting ecological and public health goals at different levels and in different arenas of decision-making, from town halls to ministerial corridors and courtrooms. It is on this basis that a human rights-based approach to environmental protection is identified as an important complement, perhaps even an alternative, to the traditional diptych of prescriptive, 'command-and-control' regulations and market-based measures.[91]

Lending credence to this proposition is the gradual crystallisation of what it means to recognise the existence of a nexus between human rights and the environment as a matter of law. Of particular note here is the progress made to date towards the 'greening' of well-established human rights, such as the rights to life and health; the growing regularity with which procedural environmental rights have been enshrined within multilateral environmental agreements concluded at the global and regional levels; and the move within regional human

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[87] ibid, 267; Dinah Shelton, 'Whiplash and Backlash - Reflections on a Human Rights Approach to Environmental Protection' (2015) 13 Santa Clara Journal of International Law 11, 21.
[88] Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Routledge 2016), 70.
[89] Paul Gready, 'Rights-based Approaches to Development: What is the Value-added?' (2008) 18 Development in Practice 735, 738.
[90] Bollier and Weston (n86), 267.
[91] Shelton (n87), 21.

rights systems towards the recognition of a right to an environment of a certain quality.[92] Equally worth mentioning are the lived experiences of judges, legislators, academics, civil society organisations, and different categories of rights-holders, which are (and have for some time been) exhibiting a clear tendency towards convergence. Together, these advances have given rise to a more concrete understanding of what the international community expects of state and non-state actors vis-à-vis human rights as they relate to the enjoyment of a safe, clean, healthy, and sustainable environment.[93] They have also paved the ground for high-level efforts to distil, clarify, and, to an extent, codify key aspects of the way in which human rights intersect with environmental protection.

The UN Human Rights Council has led work in this area since 2012, when it decided to appoint an independent expert – and, later, a special rapporteur – with a mandate to study the relevant obligations of states and to identify and disseminate best practices pertaining to the use of human rights obligations and commitments to inform, support, and strengthen environmental policy-making. The first incumbent to this office, John Knox, concluded his tenure with the publication of sixteen 'Framework Principles on Human Rights and the Environment'.[94] The Principles are not generative of new norms and conventions. Rather, each dictum, and the commentary that accompanies it, reflects the application of existing human rights standards in the environmental context. A first cluster of principles accordingly deals with states' procedural obligations in terms of assessing environmental impacts on human rights and making environmental information public, facilitating participation in decision-making, and providing access to remedies for harm. A second cluster refers to states' substantive obligations to adopt legal and institutional frameworks that protect against environmental harm which interferes with the enjoyment of human rights, including harm caused by private actors. A third cluster focuses on non-discrimination and other obligations of states relating to the protection of members of vulnerable groups, including women, children, and indigenous peoples.

The Framework Principles are best regarded as an important milestone in the debate on human rights and the environment rather than its endpoint. Indeed, since their publication in early 2018, the relationship between the two fields has continued to evolve. Most recently, the international community took the momentous step of formally affirming the existence of

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[92] Stephen J Turner and others (eds), *Environmental Rights: The Development of Standards* (CUP 2019).
[93] Stephen J Turner, 'Introduction' in Stephen J Turner and others (eds), *Environmental Rights: The Development of Standards* (CUP 2019), 13-14.
[94] John H Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (24 January 2018) UN Doc A/HRC/37/59.

an autonomous right to a safe, clean, healthy, and sustainable environment.[95] Adopted in late 2021, the relevant resolution of the UN Human Rights Council notes the interlinkages between said right and other rights which are in accordance with contemporary international law. It also calls upon states to undertake concerted and collaborative efforts to honour any and all duties they hold in this connection, as these are reflected in different international instruments and the Framework Principles.

Similar activity can be observed in the European context, indicating the enduring (even if uneven) dynamism of the regional human rights systems. Also in late 2021, the Parliamentary Assembly of the Council of Europe passed a resolution calling upon member states to 'build and consolidate a legal framework – domestically and at the European level – to anchor the right to a safe, clean, healthy and sustainable environment, based on the UN guidance on this matter'.[96] The resolution goes on to suggest that, at the European level, this anchoring could be enacted through new legally binding and enforceable instruments, such as additional protocols to the European Convention on Human Rights (ECHR)[97] and the Revised European Social Charter (RESC).[98] It remains to be seen whether the proposed expansion of the European human rights system will materialise and, if so, whether the supranational canonisation of the right to a healthy environment will be enough to usher in a new era of multi-level and multi-actor environmental governance within and around the borders of the EU.[99]

These forward steps and prospects notwithstanding, attempts at cultivating a normative link between human rights and the environment remain contested.[100] Sceptics regard human rights as emblematic of the binary logic upon which Cartesian anthropocentrism rests; a logic which separates the human from the non-human in ways that undermine relationality and perpetuate human exceptionalism (and, by extension, human privilege). Another point of contention is the emphasis that human rights law places on the 'possessive individual', capitalist societies' compulsive preoccupation with the acquisition and protection of property being inconducive to ecologically-minded modes of social organisation. A related

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[95] 'The Human Right to a Safe, Clean, Healthy and Sustainable Environment', UNHRC Res 48/13 (5 October 2021) UN Doc A/HRC/48/L.23/Rev.1, paras 1 and 2.

[96] CoE Parliamentary Assembly, Resolution 2396 (2021) (29 September 2021), para 14. See also Recommendation 2211 (2021) (29 September 2021).

[97] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, 213 UNTS 222.

[98] European Social Charter (Revised) (adopted 3 May 1996, entered into force 1 July 1999) ETS 163.

[99] It bears noting that the Council of Europe's Committee of Ministers, which has the final say on whether to draft a new protocol to the ECHR, took no action on a similar request from the Parliamentary Assembly in 2009. Overall, the European human rights system has been the most reluctant to recognise the existence of an autonomous right to an environment of a certain standard.

[100] See, indicatively, Conor Gearty, 'Do Human Rights Help or Hinder Environmental Protection?' (2010) 1 Journal of Human Rights and the Environment 7.

criticism concerns the impossibility of arriving at a single universal understanding of human rights. This impossibility leads one to wonder how human rights can be meaningfully invoked and enforced within the pluralistic societies of modern liberal democracies, where majority rule, administrative discretion, and judicial oversight coexist in a principled albeit fragile balance. The drawbacks of the universality thesis become all the more evident when one ventures outside the physical and institutional spaces where the Western normative tradition reigns supreme. In this parallel juridical universe, human rights are frequently perceived as instruments not of emancipation and empowerment, but of 'neo-colonial dominion'.[101] A more practical point relates to the challenges involved in the operationalisation of a right to an environment of a certain standard. For the disenchanted, said right is destined to suffer the same fate as 'other human rights guarantees which are more honoured in the breach rather than in the observance, with weak governmental commitment and ineffective enforcement structures combining to make the supposed advance worse than useless'.[102]

These claims beg the question: can critically disposed legal scholars be bona fide proponents of a human rights-based approach to environmental planning and management? The thesis contends that this question can be answered in the affirmative. In seeking to translate this claim into a distinctive and rigorous line of scholarly inquiry, the thesis approaches the nexus between human rights and the environment as a field of interdisciplinary research; that is to say, as a cross-cutting area of academic thinking and practice which promotes the unification of knowledge. It does so with the help of two theoretical movements that, each in its own way, push legal scholars to venture beyond their disciplinary comfort zone: legal geography (discussed in section 5.1) and relational theories of legal and political subjectivity (discussed in section 5.2).

5.1. Towards a spatial understanding of human rights

In his landmark essay on the relationship between human rights and environmental protection, Gearty argued that it is sociology – rather than his native discipline of law (or the kindred discipline of philosophy) – that offers the most fertile ground for forging mutually beneficial connections between the two fields. Gearty is driven to this conclusion by sociology's this-worldliness and its weariness of metaphysical essentialism, the latter being an ontological and epistemological *faux pas* that both law and philosophy are prone to. Indeed, sociologists tend

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[101] Johannes M Waldmüller, '"Living Well Rather Than Living Better": Measuring Biocentric Human-Nature Rights and Human-Nature Development in Ecuador' (2015) 5 The International Journal of Social Quality 5, 16.
[102] Gearty (n100), 19.

to broach human rights as 'a term whose meaning is constructed, not discovered, and which is therefore capable of change, indeed has changed over the generations, and will alter again in the future'.[103] And how could it be otherwise when the very purpose of human rights is to 'control abuses of power' and to equip activists with 'a language of protest and a platform for change'?[104]

This clear-headed acknowledgment of the contingency of human rights has a dual effect on the researching mind, both liberating and galvanising it. Having abandoned all pretence of being the discoverers and guardians of an absolute and 'hitherto inaccessible truth',[105] scholars working within the sociological tradition are free to channel their energies towards analysing 'the social, political, cultural, and comparative construction of human rights histories, institutions, discourses, and futures as well as the social structures, relations, and practices that will most fully support the realization of human rights in the world'.[106] Though resolutely down-to-earth, this task has radical potential. Bringing it to fruition requires the elaboration of a process-oriented, multi-perspectival, and contextual research agenda, which in turn gives rise to a 'vibrant, fluctuating, intentionally indefinable' approach to the study of human rights.[107] Contrary to what one might expect, this enhances rather than undermines the critical potency of a sociological lens. It does so in two distinct ways: on the one hand, it encourages fertilisation across disciplines, methods, and regions; on the other hand, it allows for the cultivation of feedback loops between academic research and real-world advocacy.[108]

Let us linger for a moment on this last strength of sociologically-inspired research on human rights, for it is of special interest to Gearty. In particular, let us highlight that a sociological perspective makes it easier to conceive of a human rights-based approach to environmental protection as a versatile vehicle for the mobilisation of social movements seeking to prevent and disrupt unjust patterns of social-ecological interaction, whether that be through a 'strategic engagement with existing institutions' or the development of new 'discursive hubs' that will 'facilitate further jurisgenesis and contestation'.[109] Within these established and emergent fora, the rhetoric of human rights is employed in numerous and varied ways, including as a springboard and guide for *social visioning* (a potentially

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[103] ibid, 15.
[104] ibid, 7.
[105] ibid, 11.
[106] ASA, 'Section on Sociology of Human Rights' (ASA 2009), 1.
[107] Gearty (n100), 11.
[108] Mark Frezzo, 'Critical Theory, Sociology and Human Rights' in Birgit Schippers (ed), *Critical Perspectives on Human Rights* (Rowman & Littlefield 2019), 186ff.
[109] Andreas von Arnauld and Jens T Theilen, 'Rhetoric of Rights: A Topical Perspective on the Functions of Claiming a 'Human Right to…'' in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (CUP 2020), 49.

transgressive role that goes beyond the prevention and redress of violations to tackle questions of individual and collective realisation). It is submitted that this understanding of human rights is pragmatic enough to serve as 'a workable framework for mediating conflicting interests' as well as 'a basis for settlements that are accepted by local people as legitimate'.[110] It is also affective and utopian enough to inspire 'a free play of the imagination' which crystallises 'our individual and collective responsibilities not only to ourselves and to each other but also to all those other "others" that comprise what we usually refer to as "external" nature'.[111] Thus conceived, human rights become a phrase around which to articulate alternative *loci* of opposition to power, forge new bonds of solidarity, and develop fresh construals of justice.[112]

It is these sorts of insights that legal scholars open themselves up to the moment they concede that the relationship between human rights and the environment constitutes fertile ground for interdisciplinary research. Naturally, there is no single blueprint for the inquiries that this concession will trigger. To the contrary, in their efforts to expose and remedy law's limitations, or to highlight the contributions law stands to make to debates it has traditionally been absent from, different scholars will opt for different disciplinary combinations. For its part, the thesis considers the merits of Gearty's legal-sociological approach, but ultimately settles on a legal-geographic line of investigation. There are two reasons for this. For one, geography can just as readily accommodate a constructivist and instrumentalist approach to human rights. The term 'constructivist' is used here to describe an approach which recognises that human rights discourse and practice 'serves to produce space yet, in turn, is shaped by a sociospatial context'.[113] The term 'instrumentalist', on the other hand, alludes to an approach which casts human rights as a means to an end rather than an end in themselves.[114] So construed, human rights assume the role of a meaning- and world-making device which mediates our understanding of and engagement with the empirical world, in the process producing dynamic systems of material and immaterial relations. This creates scope for the formulation of new (and the rearticulation of existing) rights as a means of accounting for changes not so much in human nature, but, rather, 'in the habitat in which that nature has to exist'.[115]

This brings us to the second reason why the thesis chooses to bring law into dialogue with geography. This concerns the disposition of the scholarly field to which the thesis seeks

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[110] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP 2009), 423.
[111] David Harvey, *Spaces of Hope* (Edinburgh University Press 2000), 163, 182 and 213.
[112] Gearty (n100), 11.
[113] Nicholas K Blomley, *Law, Space, and the Geographies of Power* (Guilford Press 1994), 51.
[114] Gearty (n100), 14.
[115] ibid.

to contribute, namely, critical MSP studies. As already noted, MSP is a public process through which to analyse and regulate the distribution of human-ocean interactions across space and time, and this with a view to advancing politically determined economic, social, and environmental objectives. It follows that, were human rights to enter the picture, they would be assigned functions related to not only *social*, but also *spatial visioning*. What this entails can be determined by reference to critical geographic works such as David Harvey's *Spaces of Hope*. Here Harvey offers a compelling exploration of how human rights can be used to advance a new type of utopian thought, which he refers to as 'dialectical utopianism'.[116] This is an explicitly spatiotemporal endeavour, sensitive to 'the multiple intersecting material processes' that tether us to 'the fine-spun web of contemporary social-ecological life'.[117] It is also a radical endeavour, seeking to carve out a path to 'the collective mechanisms and cultural forms requisite for self-realization outside of market forces and money power', and to 'bring the social order into a better working relation with […] ecological conditions'.[118] It is to this purpose that Harvey puts human rights, summoning them as 'meaningful ideas upon which to let our imaginations roam as we go to work as insurgent architects of our future'.[119] Here lies an important parallel between Harvey and Gearty (and the author's own positionality). Both commentators are critically disposed and transparently interested in promoting leftist political action. Both commentators are also cautiously confident in their belief that a pluralistic and ecological understanding of human rights provides a solid basis upon which to build a modern, future-oriented socialist movement, capable of operating across levels and forms of social organisation.

Bringing all these elements together, we get a sense of how human rights language and practice could render MSP an arena *par excellence* for the dialectical formulation of transformative social-ecological imaginaries. To unpick what the notion of transformation signifies in this context, one may draw on Albrechts:

> Transformative practices oppose a blind operation of market forces and involve constructing 'desired' answers to the structural problems of our society. To will particular future states into being is an act of choice involving valuation, judgment and the making of decisions that relate to human-determined ends and to the selection of the most appropriate means for coping with such ends. 'Futures' must symbolize some good, some qualities and some virtues that the present lacks (diversity, sustainability,

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[116] It bears noting that Harvey has had an influence on Gearty's thinking. See, indicatively, Conor Gearty, 'Neo-democracy: 'Useful Idiot' of Neo-liberalism?' (2016) 56 British Journal of Criminology 56.
[117] Harvey (n111), 199.
[118] ibid, 195 and 199.
[119] ibid, 248.

equity, spatial quality, inclusiveness, accountability). Speaking of quality, virtues and values is a way of describing the sort of place we want to live in, or think we should live in.[120]

It follows that transformation is an inherently normative exercise concerned 'with values and meanings, with "what ought to be" and "what could be"'.[121] In the absence of an ideational compass that will steer spatial change towards social-ecological flourishing, 'we risk adopting a pernicious relativism where anything goes'.[122] This is precisely why the thesis takes issue with the thin values that underprop the MSPD, which suggest rather than demand that planning initiatives aim to safeguard the ecological integrity of Europe's seas and the well-being of those who depend upon them. In response, the thesis proposes that human rights be incorporated into the *lingua franca* of EU MSP. They may then serve as a basis for determining who should be invited to take a seat at the proverbial table; as a tool for detecting, framing, and mediating power asymmetries; and as a means of attuning MSP to 'an ethic of respect for nature, sufficiency, interdependence, shared responsibility, and fairness, and […] a logic of integrated global and local citizenship that insists upon transparency and accountability in all activities that affect the integrity of the environment'.[123] The result will – hopefully – be a new tradition of MSP, which is better equipped to cope with questions of fairness and equity, to navigate conflicts, to involve vulnerable and marginalised actors, to integrate different types of expertise and knowledge, to trigger behavioural change, and, most radically, to 'use the "impossible" as emancipatory imagination'.[124] Yet, before human rights can be put to these tasks, their ontological underpinnings must be drastically reconsidered.

5.2. Towards a relational understanding of human rights

To date, marine environmental legal studies have engaged with the debate on human rights and the environment to a very limited extent. Accordingly, the moment we currently find ourselves in can be described as one of critical self-reflection, blue-sky thinking, and agenda-setting, all with the aim of determining how, if at all, human rights can help redefine our relationship with the ocean in beneficial ways.

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[120] Louis Albrechts, 'Enhancing Creativity and Action Orientation in Planning' in Jean Hillier and Patsy Healey (eds), *The Ashgate Research Companion to Planning Theory: Conceptual Challenges for Spatial Planning* (Routledge 2016), 218.
[121] ibid.
[122] ibid.
[123] Bollier and Weston (n86), 271.
[124] Louis Albrechts, 'Reframing Strategic Spatial Planning by Using a Coproduction Perspective' (2012) 12 Planning Theory 46, 52-53.

Often described as 'distant and transient', this relationship has been profoundly shaped by the perceived physical disconnect between the terrestrial and marine spheres.[125] This schism has led to a cognitive and emotional detachment from the ocean, evident in the pervasive construal of the latter as 'a space used *by* society' rather than a 'space *of* society'.[126] For their part, the laws that underpin ocean governance both reflect and further entrench this framing. Placing their focus on matters of safety, employment, and welfare, they conceive of human-ocean interactions in 'fragmented terms of work, trade and exploitation'.[127] This serves to accentuate a narrow set of human rights discourses relating to the deterrence of human trafficking and forced labour,[128] while alternative accounts, including those seeking to unpack the interconnectedness between human rights and the environment, remain shrouded in obscurity.[129]

Faced with this reality, the thesis calls upon relational theories of legal and political subjectivity to perform three interconnected functions: first, bring into relief the diverse relationships that people have with the ocean; second, enable the articulation of these relationships in human rights terms; and, third, ensure that the ensuing processes of articulation question – rather than reproduce – the tenets of liberal legal and political thought. The latter aim is of crucial significance, liberalism's symbiotic relationship with market capitalism giving rise to a number of structural hindrances to the articulation and pursuit of spatially- and temporally-sensitive notions of social and environmental justice.

The precise insights that the thesis seeks to extract from relational theories of legal and political subjectivity will become clearer in chapter two. For present purposes it suffices to offer a brief overview of said theories' origins and motivations, and to demonstrate how they resonate with the legal-geographic component of our methodology.

A key point to mention at the outset is that the theories in question represent an attempt on the part of communitarian and feminist scholars to dismantle the liberal conception of the autonomous subject. A case in point is Jennifer Nedelsky, a formative figure in the field whose work has had a profound influence on the design of the present study. Nedelsky speaks of her own feminism and the emergence of feminist scholarship as having catalysed her decision to develop a relational approach to thinking about the self and, by extension, about core human values and the ways in which these become enshrined in law. It follows that Nedelsky intended

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[125] Richard Barnes, 'Environmental Rights in Marine Spaces' in Sanja Bogojevic and Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018), 65.
[126] Steinberg (n11), 20; emphasis in the original.
[127] Barnes (n125), 66.
[128] Commission, 'Developing the International Dimension of the Integrated Maritime Policy of the European Union' COM (2009) 536 final, 5.
[129] Barnes (n125), 50.

to contribute to a wider intellectual project, premised on 'a shift in emphasis that moves relationship from the periphery to the center of legal and political thought and practice'.[130] This is far more radical an endeavour than may appear on the surface. To grasp why that is so, one need only recall liberal theorists' unyielding tendency to construe the human subjects of law and rights as 'freestanding individuals who need protection from one another'.[131] This is an atomistic, defensive construal, which casts '[t]he selves to be protected by rights […] as essentially separate and not creatures whose interests, needs, and capacities routinely intertwine'.[132] Conversely, a relational approach assigns consequence to *interactions*. These matter 'not simply because [people's] interests may collide', but because 'each individual is in basic ways constituted by networks of relationships of which they are a part' – relationships of power, trust, responsibility, and care.[133]

For its part, law is 'one of the chief mechanisms (both rhetorical and institutional) for shaping the relationships that foster or undermine [the] values' that people care about.[134] Its importance in this connection is twofold. On the one hand, law's tangible impact on the world renders it an important way in which abstract notions such as justice are given concrete practical significance. On the other hand, law participates in the processes whereby collective desiderata become imbued with meaning. Of particular interest here is how the language of law, including and especially the language of rights, reinforces and legitimises the conceptual frameworks implicated in the articulation of 'what a given society sees as essential to humanity or to the good life for its members'.[135] For Nedelsky, coming to terms with this reality leaves few choices other than to strive to reorient interpretations and expectations of rights from protection against others to 'mutual self-creation and sustenance', and from conflict mediation to structuring relationships in ways that foster core human values.[136] In proposing this, Nedelsky does not, of course, reject 'the notion of the unique, infinite value of each individual, and the value of interiority, and the value of the ability of individuals to shape their own lives'.[137] What she denounces are the liberal variants of these ideals, which fail to acknowledge the central role that relation plays in each of them. In response, Nedelsky calls for 'a relational approach to law which will help articulate and reinforce a conception of the self that will foster

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[130] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2012), 3.
[131] ibid, 19.
[132] Jennifer Nedelsky, 'Reconceiving Rights as Relationship' (1993) 1 Review of Constitutional Studies 1, 12.
[133] Nedelsky (n130), 19.
[134] ibid, 3 and 72-73.
[135] ibid, 241.
[136] ibid, 10 and 245; Nedelsky (n132), 12.
[137] ibid, 36.

optimal relations among people and the planet they live on'.[138] She proceeds to propose a line of inquiry designed to help conduct debates about the meaning and effects of law (including rights) in relational terms:

> First, one should ask how existing laws and rights have helped to construct the problem being addressed. What patterns and structures of relations have shaped it, and how has law helped shape those relations? The next questions are what values are at stake in the problem and what kinds of relations promote such values. In particular, what kind of shift in the existing relations would enhance rather than undermine the values at stake? […] What interpretation or change in the existing law would help restructure the relations in the ways that would promote a given value?[139]

The affinity between these questions and the ones we set ourselves at the outset of this study are clear. But this is not where the parallels end. In Nedelsky's reference to 'optimal relations between people and the planet they live on' lie two key points of complementarity between her work and ours.[140] First, Nedelsky is concerned not only with relations between individuals or between individuals and state and non-state actors, but also with *relations between individuals and their surrounding environment*. She explicitly states in this regard that there is a fundamental interconnectedness between human beings and the 'earth and her many life forms'.[141] Second, Nedelsky is concerned both with *personal relations and wider relational patterns*, including patterns operating at the global or macro-regional level. She posits in this regard that, once we begin to think in relational terms, and once we grasp how personal relationships and choices are inevitably shaped by wider dynamics, then we see how these relationships intersect with national and regional institutions, which in turn interact with global markets and institutions, as well as with relations of economic and political power generated over centuries. Crucially, 'all these levels of relationship are affected by – and have affected – still larger patterns, such as global warming'.[142] It follows that although Nedelsky does not directly engage with the notion of *scale*, this is nevertheless central to her theoretical framework. This is important to highlight, scale being a concept that can be understood in different ways, each uniquely but equally relevant to the argument that the thesis seeks to advance. The thesis' examination of law's involvement in high-, medium-, and low-level processes of maritime territorialisation is indicative in this regard. Equally indicative is the

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[138] ibid; see also 65-66.
[139] ibid, 74.
[140] ibid, 19-20.
[141] ibid, 22.
[142] ibid, 19 and 21.

case the thesis makes for an understanding of human rights which is at one and the same time individual *and* collective, localised *and* globalised, these two dual perspectives being key to any attempt to use human rights for the purposes of promoting social and environmental justice across levels and forms of social organisation.

Let us now turn to Nedelsky's brief engagement with the notion of *situatedness.* This is worth highlighting because it allows us to synthesise relational theories of legal and political subjectivity with relational theories of space, the latter being central to the conceptual and methodological frameworks employed by legal geographers. In broad strokes, Nedelsky uses situatedness as

> a way of describing the epistemological ecology in which we are simultaneously constituting and constituted. We are constituting because meaning arises in the imaginative interaction of the human being with the environment. We are constituted because the situated quality of human existence means that both the physical and social environment with which we interact is already formed by the actions of those who have preceded us.[143]

This understanding of situatedness implies the following logical sequence: co-constitution leads to interconnectedness, which in turn gives rise to interdependence and mutual vulnerability. Nedelsky posits that this normative chain of interaction can (indeed must) inform how we approach 'any of the core puzzles of law or politics, such as justice, mutual obligation, or the good life'.[144]

The thesis endorses this proposition but recognises the need to clarify what it means from the perspective of human beings' relationship with the environment that surrounds them (both natural and artificial). It looks for answers in the work of scholars like Anna Grear, who seek to unpick the 'lively material entanglements between humans and more-than-human "nature"', as well as the ways in which these entanglements – and law's treatment of them – are implicated in instances and patterns of injustice.[145] The pertinent studies promote a fuller understanding of normatively potent dimensions of the human self, such as *embodiment* and *affectability*, as well as a more robust awareness of the spatial embeddedness of human–non-human relations. This allows them to eschew the artificial separation between the 'social' and the 'environmental', and to establish a non-binary ontology upon which to hang relationally-formulated notions of human rights. It also enables them to paint a convincing picture of how

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[143] ibid, 32, citing Steven L Winter, 'Indeterminacy and Incommensurability in Constitutional Law' (1990) 78 California Law Review 1441, 1486.
[144] ibid, 28.
[145] Anna Grear, *Environmental Justice* (Edward Elgar 2020), page unavailable.

law – and, by extension, the social processes that law regulates – can be rendered more responsive to 'situated subjectivities, consciously *positional* viewpoints (and their limits) and […] the cooperative and agonistic nature' of any form of negotiation among actors with diverse perspectives and interests vis-à-vis the environment.[146]

It is evident from the foregoing that the relationalisation of human rights is consistent with their spatialisation. Indeed, if followed to their natural conclusion, the agendas embodied by these two terms lead to the same instrumentalisations of human rights: human rights as a 'strong meta-narrative […] that connects the environment to intrinsic human interests';[147] and human rights as building blocks for the construction of political/metaphorical and natural/physical spaces in which relationships between human and non-human actors can be forged, nurtured, and, where necessary and desirable, transformed.

As we approach the end of this section and gear up to explore the possibilities presented by these different but complementary ways of harnessing the discourse and practice of human rights, let us reiterate an important caveat. While resolutely enthusiastic about what a space-sensitive and relational notion of human rights can do for the normativisation of MSP, the thesis recognises the need to adopt a measured and considered outlook. This is both with a view to responding to valid critiques of human rights-based approaches to environmental protection and in acknowledgment of how foundational the present moment is likely to prove for our future relationship with the ocean. Accordingly, although it concedes that certain extant environmental human rights standards can be applied in the marine context directly and with relatively little controversy, the thesis foregoes a prescriptive discussion of human rights law for something more conceptual and speculative. It does so in an effort not to take the notion of human rights for granted, to critically unpick its genealogical baggage, and to tailor it to the particularities of the ties that bind human beings to ocean spaces. It is only then that human rights can succeed in recasting marine planning and management from a technocratic and apolitical exercise rooted in cost-benefit analysis to a socially- and materially-sensitive quest for the outcome that best conforms to ideas of justice. This conclusion, and the journey it takes to reach it, represents the thesis' original contribution to critical MSP studies and the debate on human rights and the (marine) environment.

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[146] Anna Grear, 'Towards a New Horizon: In Search of a Renewing Socio-Juridical Imaginary' (2013) 3 Oñati Socio-Legal Series 966, 983; emphasis in the original.
[147] Barnes (n125), 51.

6. Structure of the thesis

As already stated at the beginning of this chapter, the thesis aims to answer two questions. First, to what extent are the issues problematised by critical MSP scholars attributable to the multi-level legal framework that regulates marine planning and management in Europe's regional seas? And, second, how, if at all, can human rights be utilised to meaningfully challenge, as opposed to reinforce, unjust patterns of human-ocean interaction, and so provide a vehicle for the formulation and realisation of transformative blue futures?

How the thesis goes about addressing these questions is closely informed by the legal-geographic and relational frame of analysis to which it is committed. It will be apparent by now that this frame directs our attention to the reciprocal constitutivity of the legal, the social, and the spatial. It hardly needs stating that this is an intricate phenomenon amenable to a multitude of readings. Following on from this, it is near-impossible to provide an exhaustive account of how the phenomenon transpires, especially if one does not wish to define the scope of their study overly narrowly (and we do not). It is equally difficult to weave a linear narrative which proceeds in tidy steps towards something resembling a conclusive finale (as would be the case, for instance, with a study structured around the traditional triptych of cause, effect, and remedy).

The thesis navigates these challenges by employing a mix of epistemological lenses through which to examine the forces at work in the socio-material construction of Europe's regional seas. Seemingly muddled, this approach can be defended on several different grounds. First, it is consistent with our Janusian framing of law as an agent that is both problem-generating and problem-solving in nature. Second, a more polyphonic and circular mode of argument can alert the reader to legal-socio-spatial path dependencies that may otherwise have remained unnoticed. Third, and relatedly, the structure that the analysis assumes under the proposed approach is far less arbitrary and chaotic than one might expect. As themes begin to recur – and they quickly do – the reader realises that there are 'braided lines of inquiry'[148] running through the text, endowing it with coherence and clarity. Fourth, and more generally, the kind of patchworking attempted here draws attention to the points of synergy and divergence between different schools of thought. The aim is not to prove that one school is superior to the others, but to develop a cumulative argument, which digs deeper into the reciprocal constitutivity of the legal, the social, and the spatial as it goes along (and is all the stronger for it). A final defence of the proposed approach is that it accommodates pluralism

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[148] Irus Braverman and others, 'Introduction: Expanding the Spaces of Law' in Irus Braverman and others (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press 2014), 1.

and dissonance, which we regard as necessary features of legal-geographic and relational research *lato sensu*. Indeed, any project purporting to have 'solved' the legal-socio-spatial puzzle would be utterly misguided. Accepting this allows us to eschew some of the more constraining tropes of human rights theory and scholarship, particularly its desire to arrive at a point of closure, definitive and universal.[149] Where we will have taken our reader when all is said and done is, rather, a point of departure, from which the contestation of the relationship between humanity and the ocean can begin anew.

Let us now outline the structure of the thesis. Chapter two exposes the biases that underlie the socio-legal construction of the ocean in the European context. Borrowing from the 'blue' and 'spatial' turns in the humanities and social sciences, the chapter demonstrates how the ocean's material qualities have shaped European perceptions of humanity's presence in, attachment to, and dependence on the marine realm. It goes on to show how said perceptions became reflected in, and have been further engrained by, the laws that govern human-ocean interactions. This legal field is revealed to be one reigned by spatial abstractions and narratives of technological and economic modernisation. Consequently, it fails to provide a complete account of the space- and place-making processes through which marine social and ecological systems are co-constituted. This preliminary finding sheds light on the reasons why human rights have remained absent from legal discourses concerned with the ocean. Just as saliently, it offers a springboard from which to pursue a new normative tradition; one that moves away from conceptions of ocean space as a 'container' of natural resources and a temporary background to human activities, and towards its meaningful peopling.

The last substantive section of chapter two takes a step in this direction by attempting to identify and consequentialise different kinds of human-ocean interaction through a deeper engagement with relational thinking. Understood as an epistemological paradigm that 'shifts our analytical focus to the ways in which entities, thought of as processes rather than existents, become entwined',[150] relational thinking is already widely engaged in by spatial theorists interested in 'the embodied and biological nature of being in space'; that is, in the heterogeneous relations which tether social actors to particular spatial domains.[151] As was already discussed in section 5.2, relational thinking is equally central to the work of structuralist human rights theorists intent on exploring how rights (and law more generally) act to configure relations of power, trust, responsibility, and care. The chapter undertakes an

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[149] See, indicatively, Michael DA Freeman, 'Upholding the Dignity and Best Interests of Children: International Law and the Corporal Punishment of Children' (2010) 73 Law and Contemporary Problems 211, 251.
[150] Christopher Watts, *Relational Archaeologies: Humans, Animals, Things* (Routledge 2014), 1.
[151] Jonathan Murdoch, *Post-structuralist Geography: A Guide to Relational Space* (SAGE Publications 2006), 3.

ecologically-informed synthesis of these two strands of relational research. It posits that the composite insights generated by this exercise can facilitate the contextualisation of human rights and, thus, their conversion into tools of socio-spatial visioning. In particular, when brought into dialogue with one another, relational studies on space and human rights can expand and deepen our understanding of the intra-human and human-ocean relationships that a human rights-based approach to MSP must seek to uphold and nurture. They can also support the development of institutional architectures and legal capacity-building initiatives which are conducive to the sustenance and flourishing of social movements tied to the common maritime space of the EU.

Chapters three and four identify elements of existing legal and policy frameworks of relevance to MSP which can be harnessed or repurposed to these ends. More specifically, chapter three explores how the hybrid (scientific and legal) concept of the ecosystem approach can be used to render the MSP processes taking place in Europe's regional seas more sensitive to the complex interactions that characterise marine social-ecological systems and, hence, to the relationality between human well-being and marine environmental health. The chapter begins by unpacking the key tenets of the ecosystem approach to marine planning and management under EU law. The analysis shows that the pertinent instruments are imbued by an ethics of scientific and technological-managerial rationality which contributes to the emergence of unjust patterns of human-ocean interaction in two distinct ways: on the one hand, it gives rise to an understanding of what counts as legitimate spatial knowledge which is at best short-sighted and at worst exclusionary; on the other hand, it promotes a radical rescaling of the institutional structures that underpin marine planning and management, in the process altering the power relations between those engaging in or benefitting from different uses of ocean space. The result is that important dimensions of social-ecological well-being are left unaccounted for, with the consequences of this omission being gravest for lower-level actors who are not associated with neuralgic sectors of the blue economy.

The chapter proceeds to demonstrate that the articulation of the ecosystem approach found in international biodiversity law offers a more holistic depiction of humanity's relationship to nature. Albeit imperfect, the balance that this articulation strikes between accommodating the human subject and displacing it from its position of primacy is arguably the closest that international law gets to a socialised notion of ecological integrity, i.e. one that 'focuses on enhancing the resilience of the biosphere as a social-ecological system'.[152] International biodiversity law can, accordingly, be relied upon to strengthen the legal-

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[152] Peter Bridgewater, Rakhyun E Kim, and Klaus Bosselmann, 'Ecological Integrity: A Relevant Concept for International Environmental Law in the Anthropocene?' (2015) 25 Yearbook of international Environmental Law 61, 75.

institutional and socio-political frameworks that underpin MSP, nurturing meaningful linkages across jurisdictions and levels of government, as well as promoting context-sensitive, collaborative, and stewardly modes of marine planning and management. In pursuing this line of argumentation, the chapter joins the ranks of a small but growing corpus of works which identify this particular iteration of the ecosystem approach as a vehicle for promoting the mutual supportiveness of environmental and human rights law.[153]

As will have become apparent to the reader by the end of chapter three, one of the most valuable contributions that the ecosystem approach can make in this respect is in terms of clarifying the nature, content, and functions of what are commonly referred to as collective environmental rights. This category of rights assumes increased importance in the marine context due to the ocean's unique socio-materiality, which pushes us to think of related interests and entitlements in communal and intersubjective (rather than individual and fragmentary) terms. It is also a natural focus for a study that conceptualises human rights as a rhetorical-performative scaffolding upon which to base the dialectical production of ocean space. Further work is, however, needed in order to spatialise the collective dimensions of the human rights-environment nexus, and to do so in a way that is consistent with the processes and tropes that give shape to the common maritime space of the EU.

Chapter four takes an exploratory step in this direction by delving into EU cohesion policy, i.e. the Union's strategy to promote the overall harmonious development of its Member States and regions. Engaging with this long-standing field of Union action makes it possible to translate in EU spatial speak the combined message of chapters two and three: namely that, if construed within the paradigm of international biodiversity law, a human rights-based approach to the normativisation of MSP can support the elaboration of marine plans which more fully account for the complex web of relationships between humanity and the ocean. At the heart of this translation project are the parallels between the overarching objective of the ecosystem approach under international biodiversity law (i.e. social-ecological well-being) and the overarching objective of EU cohesion policy (i.e. balanced territorial development). Conscious of the ambiguity that surrounds these two notions, the chapter aims to open up new terrain for their mutual conceptual clarification and reciprocal normative enhancement. More specifically, social-ecological well-being is used to tease out the tacit assumptions underlying EU cohesion policy, particularly as regards its limited and reductive construal of human needs, aspirations, and concerns relating to the marine environment. Balanced territorial development, on the other hand, is called upon to clarify the spatiality of social-ecological

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[153] Elisa Morgera, 'The Ecosystem Approach and the Precautionary Principle' in Elisa Morgera and Jona Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar 2017), 77ff.

well-being, and to help flesh out its collective dimensions in a way that resonates with the EU MSP community. This analysis results in the identification of *spatial justice* as a helpful guiding ideal for the conceptualisation and operationalisation of a human rights-based approach to MSP. It is posited that, as a spatially-sensitive fusion of social and environmental justice, spatial justice can assist us in making sense of the worldly ways in which we relate to ourselves, to other people, and to the non-human world. Equipped with this understanding, we can begin to rethink the subjects and objects of human rights as they apply to ocean space. We can also work to render the planning frameworks and processes more cognisant of the manifold geographies of necessity, need, and desire that underlie marine social-ecological systems. Finally, we can push for matching geographies of provision to be developed and, where they already exist, to be preserved, enhanced, and, if necessary, restored.

The concluding chapter will reflect on the original contributions to academic and policy debates that the thesis has offered, and identify areas for further research.

Chapter Two – Normativising ocean space: Archetypes and alternatives[1]

> Even for the mythographer Roland Barthes, the ocean resists signification: "Here I am before the sea; it is true that it bears no message". Yet signify it does, although in a manner beyond resolve. Is it the void beyond and outside of the terrestrial real? a blank interstitial element? Is it a pure void that activates the terrestrial symbolic system? Is it the real beneath the floating discontinuousness of land; the universal syntax? The ambiguity that inheres in the ocean's very liquid element renders it uncertain whether it is "another vast metaphor or an indifferent energy flatly separated from human discourse".[2]

1. Introduction

This chapter aims to identify and counter aspects of the European worldview that may cast doubt upon the appropriateness and relative merits of a human rights-based approach to the normativisation of MSP. The chapter begins by articulating and substantiating two claims. First, that the absence of human rights discourses from contemporary ocean governance – a field of international law and international relations with decidedly European origins[3] – is the product of deep-rooted cultural biases which cast the sea as an asocial and apolitical space, land's negative counterpart. Second, that these biases, which have long been prevalent in high-

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[1] Sections 3.2.2 and 4 of this chapter draw on Mara Ntona and Mika Schröder, 'Regulating Oceanic Imaginaries: The Legal Construction of Space, Identities, Relations and Epistemological Hierarchies within Marine Spatial Planning' (2020) 19 Maritime Studies 241.

[2] Christopher L Connery, 'The Oceanic Feeling and the Regional Imaginary' in Rob Wilson and Wimal Dissanayake (eds), *Global/Local: Cultural Production and the Transnational Imaginary* (Duke University Press 1996), 290, drawing on Roland Barthes, *Mythologies* (Annette Lavers tr, Noonday Press 1972 (1991 reprinting)), 111-112; Rob Wilson, *American Sublime: The Genealogy of a Poetic Genre* (University of Wisconsin Press 1991), 26.

[3] Ram Prakash Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (Martinus Nijhoff Publishers 1983), 3.

level processes of maritime territorialisation driven by public international law, are now shaping medium- and low-level processes of maritime territorialisation driven by EU and national law, with particular emphasis on instruments dealing with marine planning and management. The chapter proceeds to set out an alternative understanding of humanity's relationship with the ocean, which it intends to use as a basis for the conceptualisation of a human rights-based approach to the normativisation MSP. At the heart of this conception is a view of ocean spaces as 'peopled seascapes', in which the social and the ecological are engaged in spatially embedded processes of mutual constitution.

Before advancing any further, it is worthwhile to situate the chapter within the wider debate regarding the production of ocean space. Research in this area often takes its point of departure in the unruly materiality of the marine element, which has a profound impact on how we position ourselves within and vis-à-vis ocean spaces. The obvious observation to make in this respect is that the ocean's unique physical attributes – its 'wavering surface, tidal rhythms and unbounded connectivity'[4] – prevent 'permanent, sedentary habitation' whilst allowing more fluid and ephemeral forms of emplacement.[5] Within European culture and thought, this unamenability to human settlement led to the sea's construal as a cognitive and geophysical domain that was distinct and fundamentally different from land; a 'dissociating space' where traditional ways of relating to one's environment became suspended.[6] This was reflected in the ways in which the ocean was experienced, philosophised, and regulated: as 'an uninteresting abyss that separates the places that "matter"' and as a 'marginal region' that is relatively immune to, and has a negligible impact upon, the natural and social phenomena that characterise the rest of the world.[7]

Reflexive and habitual, this framing would not be meaningfully questioned until the latter part of the twentieth century, when the intensification of anthropogenic pressures on the marine environment, together with the crystallisation of the manifold linkages between marine and terrestrial systems,[8] created a need for critical, theoretically-informed reflection on the socio-spatial dimensions of human-ocean interactions. Indeed, over the past few decades, scholars have begun to view the ocean as a subject worthy of scientific inquiry, both in its own right and as an arena for testing and refining research questions of broader relevance. The ensuing debate has seen a number of previously 'land-locked' humanistic and social-scientific disciplines open themselves up to the marine element, allowing it to reorient their research

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[4] Anne-Flore Laloë, *The Geography of the Ocean: Knowing the Ocean as a Space* (Routledge 2016), 1.
[5] Philip E Steinberg, 'Navigating to Multiple Horizons: Toward a Geography of Ocean-Space' (1999) 51 The Professional Geographer 366, 367.
[6] Stefan Helmreich, 'Nature/Culture/Seawater' (2011) 113 American Anthropologist 132, 134.
[7] Steinberg (n5), 367.
[8] This point will be addressed in greater detail in chapter three.

objectives and methods towards the study of geographies of the sea, whether 'imaginative, aesthetic and sensuous' or 'material and social'.[9]

This shift in focus, which we can describe as the 'blue turn' in the humanities and social sciences, has been facilitated by, and has served to further advance, the same disciplines' 'spatial turn'. The aim of the latter movement is to re-examine spatial categories long assumed to be unquestionable, such as space, place, and territory.[10] Its inspirations are the myriad reshufflings brought about by globalisation, which call for a more holistic view of the world, grounded in 'new divisions, circuits, and configurations'.[11] The resulting studies have shone a spotlight on the oceanic dimensions of the economic, cultural, and biological exchanges that shape contemporary life. They have also utilised the marine element as an epistemological conduit by which to clarify and deconstruct contested socio-spatial polarities, such as nature/culture, materiality/abstraction, transience/rootedness, and connectivity/separation. In doing so, they have demonstrated that the ocean is a multi-layered, at times even contradictory spatial entity, capable of occupying both ends of each of these spectrums at once. It is this very quality that Steinberg seeks to capture by describing the ocean as 'a world of mobilities, betweeness, instabilities and becoming'.[12] It is also what Boelhower wishes to convey when he states that the sea is 'fundamentally a space of dispersion, conjunction, distribution, contingency, heterogeneity, and of intersecting and stratified lines and images – in short, a field of strategic possibilities in which the Oceanic order holds all together in a common but highly fluid space'.[13]

This is where the thesis comes in: to demonstrate that the prospects of one strategic possibility materialising over another are highly dependent on law, a normative system that both reflects and constitutes social perceptions and physical manifestations of space, serving to 'naturalise' particular socio-spatial realities. This is a key takeaway from legal geography and relational theories of legal and political subjectivity – two streams of scholarship that, as chapter one already noted, make the interconnections between the legal, the social, and the spatial, 'and especially their reciprocal construction, into core objects of inquiry'.[14] In

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[9] David Lambert, Luciana Martins and Miles Ogborn, 'Currents, Visions and Voyages: Historical Geographies of the Sea' (2006) 32 Journal of Historical Geography 479, 480.

[10] This point will be addressed in greater detail in chapter four.

[11] Christopher Connery, 'There Was No More Sea: The Supersession of the Ocean, from the Bible to Cyberspace' (2006) 32 Journal of Historical Geography 494, 495.

[12] Philip E Steinberg, 'Of Other Seas: Metaphors and Materialities in Maritime Regions' (2013) 10 Atlantic Studies 156, 156. See also Karine Gagné and Mattias Rasmussen, 'Introduction – An Amphibious Anthropology: The Production of Place at the Confluence of Land and Water' (2016) 58 Anthropologica 135, 137.

[13] William Boelhower, 'The Rise of the New Atlantic Studies Matrix' (2007) 20 American Literary History 83, 92-93.

[14] Irus Braverman and others, 'Expanding the Spaces of Law' in Irus Braverman and others (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press 2014), 1.

grounding its methodological approach in these scholarly movements, the thesis equips itself with the tools it needs to put law into critical perspective. As the reader will anticipate, the ensuing reflection reveals legal phenomena to be multi-faceted and contradictory in their own right, having the capacity not only to marginalise and exclude, but also to integrate and safeguard.

This contingent perception of law informs the two research questions posed at the outset of this study, both of which are addressed in the present chapter. As the reader will recall, the first of these questions assumes law's complicity in the emergence, exacerbation, and perpetuation of socially and environmentally unjust patterns of human-ocean interaction, whereas the second its capacity to serve as one of multiple morally charged contexts in which remedies against social and environmental injustices must be sought. Against this background, the ensuing analysis is structured in three parts. Section 2 offers a broad overview of the spatial narratives that emerged around the ocean between the classical and early modern periods. The aim of this exposition is to reveal the deep-time origins of European societies' apparent detachment from the ocean and to show how this detachment set the tone for the ocean's juridification. Against this background, section 3 provides a critical introduction to the legal framework that underpins MSP. The discussion revolves around two *foci*: first, law's propensity to promote abstracted, reductionist understandings of ocean space; and, second, its tendency to underplay the spatially manifesting tensions brought about by modernity and globalisation, and by the economic and technoscientific paradigms these processes are associated with. It is argued that these traits lead law to discount the socio-cultural and ecological specificity of the spaces it intends to regulate, obscure the ways in which this specificity is evolving (or, perhaps, being eroded), and disenfranchise the individuals, communities, and groups that this specificity is most ardently embodied by. Section 4 concludes by beginning to carve out an alternative path, where law is not a vehicle for the ocean's othering, but for its familiarisation.

2. The ghosts of oceanic imaginaries past

This section provides a selective overview of the ways in which the ocean was socially constructed between the late classical and early modern periods. As will quickly become apparent to the reader, whether we look at it from a religious, philosophical, artistic, scientific or legal viewpoint, the treatment of the ocean within Western culture and thought has largely revolved around its fluidity and its vastness. The feelings of strangeness, alienness, and otherness that these physical attributes evoke, the material and discursive practices they

inspire, and the ontological and epistemological paradigms they appear to lend themselves to have all conspired to cast the ocean as a *frontier* whose transcendence, whether desirable or not, is a distinct mark of modern civilisation. The section argues that tracing the genealogy and manifestations of this phenomenon is a necessary first step towards exposing the historical rootedness of the spatial imaginaries underlying contemporary ocean law and governance. It is also a prerequisite for any attempt to develop a place-based, human-inclusive approach to ocean governance at large and to MSP in particular.

2.1. The oceanic sublime, fear, and the allure of the unknown

In considering the particular nature of the ocean as an object of Western culture and thought, Connery suggests that we turn our sights to early Christian literature, this being the origin of an enduring tradition of 'ocean-annihilating' imagery and rhetoric.[15] The antagonism towards the marine realm is particularly palpable in the biblical creation story, which begins with a depiction of the Earth as a formless void, deeply concealed under dark waters. This murky, amorphous world-mass was brought from chaos into order in the first two days of creation, when God separated light from darkness and then proceeded to make the firmament, a vast solid dome that divided the primordial ocean into upper and lower portions so that dry land could appear. Rather than an instance of 'creation *ex nihilo*', the cosmogonic act was 'an ordering', the object of which was 'the waters' and which signalled a transition to a spatially and temporally differentiated world.[16] Yet there remained a persistent preoccupation with the possibility of the sea regaining its all-engulfing omnipresence, evident in the divine warrior Yahweh's repeated confrontations with the watery element. This concern is also discernible in the revelatory vision of the New Jerusalem, that eschatological and utopic city where God and humanity would be united at the end of time. This would be a carefully measured and plotted space, bounded, delimited, and un-wild.[17] Most crucially, it would be a space from which the sea – that symbol of 'the chaotic power of un-creation'[18] – would be entirely absent.

Reading these passages, one comes to regard the sea as 'that state of barbaric vagueness and disorder out of which civilization has emerged and into which, unless it is saved

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[15] Connery (n11), 498.

[16] ibid, 501, drawing on Nick Wyatt, *Myths of Power: A Study of Royal Myth and Ideology in Ugaritic and Biblical Tradition* (Ugarit-Verlag 1996).

[17] ibid, 504; Richard R Bohannon, 'Religion and the Urban Environment' in Whitney A Bauman, Richard R Bohannon and Kevin J O'Brien (eds), *Inherited Land: The Changing Grounds of Religion and Ecology* (Pickwick Publications 2011), 226, drawing on Catherine Keller, *Apocalypse Now and Then: A Feminist Guide to the End of the World* (Beacon Press 1996).

[18] M Eugene Boring, *Revelation* (John Knox Press 1989), 216.

by the effort of gods and men, it is always likely to relapse'.[19] Its daunting physicality renders it not just 'the defining opposite' of land, but, rather, its 'pure antithesis'; a threatening entity to be feared, conquered, and tamed.[20] In this framing Connery sees an 'overpowering sense of elementalism', which he believes distinguishes the Christian scriptures from other oral and textual traditions featuring sea myths or cosmological stories depicting land emerging from the sea.[21] He is, however, careful to note that the maritime tropes employed by the biblical author do not necessarily reflect a culturally-specific perception of the sea as a 'maleficent' presence. To the contrary, early scientific and philosophical musings on the origins and workings of the universe had identified water as the first principle of the world and the sea as the source of all earthly life.[22] This, at a time when the Mesopotamian and Eastern Mediterranean regions were witnessing the formation of a sort of proto-mercantilist economic system as more and more peoples developed rich and widespread seafaring traditions. Besides, the terrestrial realm would have presented far more immediate threats for the societies of that time, among which invasions and water- or air-borne diseases. And yet the sea was emerging as 'a kind of sublime and inassimilable "other", not so much a power over humans, but an element outside and alien to the human, and outside time'.[23] It is this perception of the marine realm as '[a] non-place, [an] unknowability, [a] human-nature negating space' that, in the late classical and post-classical periods, made it the ideal metaphorical stand-in for chaos.[24]

Somewhat ironically, it is also what allowed the ocean to serve as the 'activator' of modern Western history.[25] In the words of Hegel:

> The sea gives us the idea of the indefinite, the unlimited, and the infinite;
> and in feeling *his own infinite* in that Infinite, man is stimulated and
> emboldened to stretch beyond the limited: the sea invites man to conquest,
> and to piratical plunder, but also to honest gain and to commerce. The land,
> the mere valley-plain attaches him to the soil; it involves him in an infinite

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[19] Wystan Hugh Auden, *The Enchafèd Flood or the Romantic Iconography of the Sea* (Faber and Faber 1951), 17.
[20] Connery (n11), 499.
[21] ibid.
[22] On the treatment of water by early Greek philosophers see, indicatively, Abraham Feldman, 'Thoughts on Thales' (1945) 41 The Classical Journal 4, 5; Gerard Naddaf, *The Greek Concept of Nature: The Politics of Theory-Building and Pedagogy in Composition* (State University of New York Press 2005), 88ff; Edward Hussey, 'Heraclitus' in Anthony Arthur Long (ed), *The Cambridge Companion to Early Greek Philosophy* (CUP 1999), 98-99.
[23] Connery (n11), 502.
[24] ibid, 508.
[25] Connery (n2), 296.

multitude of dependencies, but the sea carries him out beyond these limited circles of thought and action.[26]

Connery builds upon Hegel's position by arguing that the evocative, mobilising power of the oceanic sublime was one of the principal catalysts for the birth of modernity and the rise of Western capitalism. Its influence intensified over the course of several centuries of European maritime imperialism; a period that saw the 'god-contested sea' of the biblical text become the spatially realised 'world ocean' of the Age of Discovery.[27] This transformation was made possible largely through the harnessing and channelling of the 'oceanic feeling', that sense of limitlessness and boundlessness inspired by the marine realm.[28] Formerly the impetus for casting the sea as an agent of disorder, this sentiment was now a motivating factor for the ocean's conceptualisation as a vast, hollow expanse mutely awaiting human signification.[29] Among other meaning-giving acts, its cognitive conquest would transpire through daring nautical journeys, which, in line with the dominant political and economic ideals of the time, were motivated by an expansionist agenda. It follows that, already at this early period, the social construction of ocean space was oriented towards its economic instrumentalisation and the attainment of sovereign aims.[30]

2.2. The advent of the geo-coded ocean and the birth of the modern law of the sea

As noted above, seafaring played a key role in the demystification of ocean space. A case in point is the journey that the Spanish explorer Ferdinand Magellan undertook in the autumn of 1519 in quest of a direct westerly route to the coveted Spice Islands of Asia. Completed three years later, this expedition marked the first recorded crossing of the Pacific Ocean and the first successful attempt to circumnavigate the world. In confirming the spherical shape of the earth and establishing the connectivity of its oceans, it emphasised the need to give greater attention to the models and implements used in depicting them. And in clarifying the size of the Pacific and, by extension, the length of its shores, it made apparent just how much of the world had yet to be charted (and, in a next step, colonised). The cosmography of the classical and post-

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[26] Georg Wilhelm Friedrich Hegel, *The Philosophy of History* (Prometheus Books 1991), 90; emphasis in the original.

[27] Connery (n11), 504.

[28] The term is borrowed from a Romain Rolland quote paraphrased in Sigmund Freud, *Civilization and Its Discontents* (W W Norton 1961), 11-12.

[29] Connery (n2), 290, drawing on Wilson (n2).

[30] Philip E Steinberg, 'Transportation Space: A Fourth Spatial Category for the World-system Perspective ?' in Paul S Ciccantell and Stephen G Bunker (eds), *Space and Transport in the World-system* (Greenwood Publishing Group 1998), 27, drawing on Michel Mollat du Jourdin, *Europe and the Sea* (Blackwell 1993).

classical periods was, thus, cast into question, and a new cartographic tradition emerged, aimed at servicing the needs of long-distance navigation.

A key outcome of this endeavour, and one whose impact still resonates to this day, was the publication of Gerardus Mercator's famous world map of 1569. In creating it, the Flemish cartographer employed a revolutionary cylindrical projection, so called because it treated the points on the globe's surface as points on the flattened surface of a cylinder. This made it possible to translate the three-dimensionally curved lines of latitude and longitude used in spherical mapping into a two-dimensional grid of straight lines intersecting at right angles. The resulting map was endowed with a unique capacity to represent courses of constant bearing as straight lines, making the underlying projection the new standard for nautical chart-making.[31] Yet, although invaluable to mariners, this mapping trope served to normalise the depiction of the ocean as a flat, homogeneous, and static space – a reductive portrayal that, as discussed further below, would go on to become a key point of contention in critical cartography and critical ocean studies.

Crucially, this re-imagining of the ocean is inextricably linked with the ideological foundations of the modern law of the sea. The evolution of the law of the sea 'is to a large extent the story of the development of the "freedom of the seas" doctrine and the vicissitudes through which it has passed over the years'.[32] The doctrine's lineage is longer than many accounts would suggest, with freedom of navigation and maritime commerce having been an accepted principle of Roman and Greek law, as well as one espoused by the seafaring nations of the Indian and Southeast Asian oceans.[33] Yet, following the disintegration of the Roman Empire, the principle had slipped into relative oblivion. In fact, the Middle Ages saw several attempts to appropriate large portions of the sea in order to counteract the spread of piracy and project maritime power in ever more remote corners of the world. These included bids by Venice and Genoa in the South, by various Scandinavian countries in the North, and by successive English monarchs claiming jurisdiction over the so-called 'Sea of England' in the West.[34]

The pursuit of exclusivity intensified in the fifteenth and sixteenth centuries, a period marked by the ascendance of Spain and Portugal as Europe's prevailing long-distance powers.

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[31] John R Short, *Making Space: Revisioning the World, 1475-1600* (Syracuse University Press 2004), 31-32.

[32] Ram Prakash Anand, 'Changing Concepts of Freedom of the Seas: A Historical Perspective' in Jon M Van Dyke, Durwood Zaelke and Grant Hewison (eds), *Freedom for the Seas in the 21st Century: Ocean Governance and Environmental Harmony* (Island Press 1993), 72.

[33] Anand (n3), 34.

[34] Thomas Wemyss Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters, with Special Reference to the Rights of Fishing and the Naval Salute* (W Blackwood and Sons 1911), ch1.

In 1493, Pope Alexander VI issued a Bull granting Spain rights to all lands discovered or to be discovered beyond a north-south line drawn 100 leagues west of the Azores and Cape Verde Islands in exchange for a feudal obligation to convert the inhabitants to the Christian faith.[35] A subsequent Bull[36] extended this grant to include 'all islands and mainlands whatever, found or to be found […] in sailing towards the west and south'.[37] The definitive determination of the navigational frontier was, however, left to the discretion of the two nations. The matter was settled with the 1494 Treaty of Tordesillas, which adjusted the demarcation line in such a way as to effectively concede control over the East Indies, Africa, and a considerable portion of the South American continent to the Portuguese, and the rest of the Americas to the Spanish.[38]

These instruments can be regarded as the first example of 'linearly defined claims to political authority' over abstract space – a principle of cartography that formed one of the key socio-spatial innovations of the colonial era.[39] Although the Bulls and the Treaty did not place the sea under the possession of Spain and Portugal,[40] they did, nevertheless, imply that it had been divided into distinct 'spheres of influence' over which the two nations were granted 'rights of stewardship'.[41] This latter notion 'embodies an assumption of power', with the 'stewarding entity [being] presumed to have a right to exert control both over the resource or space being stewarded and over others who might wish to use the stewarded resource in a contrary manner'.[42] Equipped with this authority, Spain and Portugal proceeded to construct the sea in a manner supportive of their respective strategies for claiming political domination and commercial monopoly over distant lands: the Spanish used their sea power to establish and maintain exclusive resource extraction and trade relations, and the Portuguese to control

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[35] See 'The Bull *Eximiae Devotionis* (Alexander VI), 3 May 1493' in Frances Gardiner Davenport (ed), *European Treaties Bearing on the History of the United States and its Dependencies to 1648*, vol 1 (Carnegie Institution of Washington 1917), 68.

[36] See 'The Bull *Inter Caetera* (Alexander VI), 4 May 1493' in Davenport (n35), 77.

[37] David S Berry, 'The Caribbean' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012), 580. See also Mamadou Hébié, 'The Acquisition of Original Titles of Territorial Sovereignty in the Law and Practice of European Colonial Expansion' in Marcelo G Kohen and Mamadou Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar 2018).

[38] See 'Treaty between Spain and Portugal concluded at Tordesillas' in Davenport (n35), 84.

[39] Alexander Anievas and Kerem Nisancioglu, 'Troubling Time and Space in World Politics: Reimagining Western Modernity in the Atlantic Mirror' in James Christie and Nesrin Degirmencioglu (eds), *Cultures of Uneven and Combined Development: From International Relations to World Literature* (Brill 2019), 107-108.

[40] Opposing views have been put forward on this point. Churchill and Lowe posit that the 1493 and 1494 instruments were 'really no more than delimitations of spheres of influence in the new territories then being colonised' while Fulton maintains that Spain and Portugal 'divided the great oceans between them': Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea* (2nd edn, Manchester University Press 1988), 165; Fulton (n34), 4-5.

[41] Philip E Steinberg, 'Lines of Division, Lines of Connection: Stewardship in the World Ocean' (1999) 89 Geographical Review 254, 257.

[42] ibid, 257.

connections with the Indian mainland and to establish themselves in the Indian Ocean, i.e. the conduit for trade with East and Southeast Asia.[43]

It is in this historical context that the principle of the freedom of the seas was revivified. Its return to the forefront of academic and political discourse came in the spring of 1609, when the Dutch jurist Hugo Grotius published his famous booklet *Mare Liberum*, or 'The Free Sea'.[44] Widely regarded as 'the first, and classic, exposition of the doctrine of the freedom of the seas',[45] Grotius' treatise was written in defence of the right of the Dutch to navigate the Indian Ocean in order to trade with the East Indies. It also helped them repudiate the restrictions that the British had placed upon their North Sea herring fishery in an effort to assert dominion and sovereignty over the 'British seas'.[46]

At the heart of Grotius' case was a view of the world as a community of 'equivalent, sovereign, territorial states'.[47] This take – which, as Steinberg notes, is strikingly prescient of the norms of international relations that would be consolidated some forty years later in Westphalia – provided the necessary foundation for declaring that the space between states is *res extra commercium*, 'a space that, because of its position and function within this community, is dissociated from the full package of rights to possession, exclusion and alienation that normally may be claimed by holders of property'.[48] Grotius arrived at this conclusion through a twofold argument: first, owing to its vastness and its unsuitability for permanent human habitation, the sea cannot be occupied and, therefore, cannot be possessed or owned; second, the sea should be free for navigation and fishing because natural law forbids ownership of things that appear 'to have been created by nature for common use', which is to say, things that 'can be used without loss to anyone else'.[49] Setting aside its inconsistencies, particularly its placing of navigation and fisheries on a largely equal footing even though the latter activity is, in fact, capable of diminishing the common usefulness of the sea, Grotius' line of argumentation holds great relevance for the present study as it represents an 'early recognition of the essential link between the proper legal regulation of the oceans and the

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[43] ibid, 257-258.

[44] Hugo Grotius, *The Freedom of the Seas, or, The Right which Belongs to the Dutch to Take Part in the East Indian Trade* (translated with a revision of the Latin text of 1633 by Ralph Van Deman Magoffin, Lawbook Exchange 2001).

[45] WSM Knight, 'Seraphin de Freitas: Critic of Mare Liberum' (1925) 11 Transactions of the Grotius Society 1, 1.

[46] Rosemary Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff Publishers 2004), 19.

[47] Philip E Steinberg, *The Social Construction of the Ocean* (CUP 2001), 91.

[48] ibid.

[49] Jon M Van Dyke, 'International Governance and Stewardship of the High Seas and Its Resources' in Jon M Van Dyke, Durwood Zaelke and Grant Hewison (eds), *Freedom for the Seas in the 21st Century: Ocean Governance and Environmental Harmony* (Island Press 1993), 14.

practical reality of ocean use'.[50] In other words, Grotius' defence of *mare liberum* stemmed from an acknowledgment of the ocean's unique materiality and spatiality. It regarded these through the prism of both conventional legal doctrines and reason-based moral considerations, and deducted that the regime governing ocean use can – indeed *should* – be materially different to the one governing the acquisition of territory.

However logical, Grotius' thesis failed to gain traction. To the contrary, the following decades witnessed a lively '"battle" of wits and books' as jurists sought to dismantle the doctrine of *mare liberum* and legitimise European nations' sovereign claims over vast oceanic expanses, this being an essential precondition for controlling trade routes and excluding foreigners from coastal fishing areas.[51] Most notable among these efforts was that of John Selden,[52] who held that the sea was finite and amenable to being divided into clearly demarcated and 'bounded' segments on the basis of nautical science or by reference to identifiable geographic features, such as islands and rocks. This belief in the divisibility of ocean space and the exhaustibility of the resources found therein led Selden to argue that the establishment of dominion over the sea was both practicable and necessary. His doctrine of *mare clausum* (closed seas) resonated with European nations' colonial ambitions and commercial aspirations, and went on to become the hallmark of the mercantilist era. The paradigm would not shift until the advent of industrial capitalism, the exigencies of which could not be adequately serviced by a rigid conception of the ocean as a space in which to exercise *imperium*. In their quest for larger markets, new sources of raw material, and investment opportunities for surplus capital, European nations would inadvertently gravitate towards a liberal spatial arrangement that fostered competition.[53] In so doing, they would recast ocean space as a great commons in which exertions of power ought to be kept to a minimum so as not to 'impose barriers to friction-free transport between the developable terrestrial places of "society"'.[54]

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[50] Richard Barnes, *Property Rights and Natural Resources* (Bloomsbury Publishing 2009), 169ff.
[51] Ram Prakash Anand, 'Non-European Sources of the Law of the Sea' in Peter N Ehlers and others (eds), *Marine Issues: From a Scientific, Political and Legal Perspective* (Martinus Nijhoff Publishers 2002), 24-26.
[52] John Selden, *Mare Clausum: Of the Dominion, or, Ownership of the Sea* (translated from the Latin text of 1635 by Marchamont Nedham, Lawbook Exchange 2004).
[53] Anand (n51), 26.
[54] Steinberg (n47), 150.

2.3. Winds of 'progress', tide of resistance

As the politico-legal regime governing ocean use vacillated between *mare clausum* and *mare liberum*, the ocean underwent a period of scientific elucidation. The Age of Discovery yielded a large volume of information about the world, which geographical knowledge – at the time characterised by a '"chaotic empiricism" which fused new claims with old learning and lore' – struggled to integrate into a cohesive disciplinary narrative.[55] This changed in the seventeenth and eighteenth centuries, as oceanic journeys grew in number and expanded in scope. Ships assumed the role of 'floating instruments' and 'mobile laboratories' facilitating the systematic accumulation of maritime observations by sailors and mariners, as well as astronomers, naturalists, and artists.[56] With physical phenomena becoming increasingly well-documented and -understood, and cartographic methods ever more refined, it gradually became possible to organise the anecdotal insights amassed by these disparate actors into a structured and principled epistemic field. Emerging criteria and guidelines concerning the scientific method were used to filter out the metaphysical and the phenomenological, and to create out of what remained a 'defensible, reliable, and permanent body of verifiable facts'.[57] This distillation formed part of a wider endeavour, the so-called 'project of modernity'. The Enlightenment philosophers that launched it did so in an effort to develop science that was 'objective', morality and law that were 'universal', and art that was 'autonomous'.[58] Having become unshackled from the perceived absurdities of myth, religion, and superstition, these cognitive domains would form a body of 'specialised culture' capable of supporting a more 'rational organization of everyday social life'.[59]

The impact of these desiderata on the evolution of marine science is palpable enough to speak of a distinct, 'oceanic' Enlightenment; an era of 'mathematical, geographical, and philosophical agreement in relation to the enterprise of knowledge making at sea and about the ocean-space'.[60] According to Laloë, the start of this period can be traced to the publication of René Descartes' *Discourse on Method* (1637), a 'user guide' for epistemic reasoning and a driving force behind many of the Enlightenment's cartographic advancements. The end can, in turn, be placed at 1876, the year when the British research vessel HMS *Challenger*

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[55] Robert J Mayhew, 'Cosmographers, Explorers, Cartographers, Chorographers: Defining, Inscribing and Practicing Early Modern Geography, c. 1450-1850' in John A Agnew and James S Duncan (eds), *The Wiley-Blackwell Companion to Human Geography* (Blackwell Publishing 2011), 28-29.

[56] Richard Sorrenson, 'The Ship as a Scientific Instrument in the Eighteenth Century' (1996) 11 Osiris 221.

[57] Laloë (n4), 92.

[58] Jürgen Habermas and Seyla Ben-Habib, 'Modernity versus Postmodernity' (1981) 22 New German Critique 3, 9.

[59] ibid; David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Wiley Blackwell 1989).

[60] Laloë (n4), 92 and ch4 more broadly.

completed its lengthy and arduous journey of exploration around the Atlantic, Pacific, and Southern Indian Oceans. The outcome of this expedition, a multi-volume report comprising findings on the chemical composition of seawater, the distribution of marine organisms at different depths, the nature and characteristics of seafloor sediments, and the circulation of ocean currents, is considered by many to have marked the birth of modern oceanography and to have shed new light on the sea's economic potential. Yet, although the *Challenger*'s voyage epitomised the Enlightenment's inquisitive and progressive spirit, it made use of technology that was very much grounded in the nineteenth century, a pre-modern era. It is, therefore, the ideal segue way between the age of oceanic reconnaissance and what succeeded it, namely, the first phase of maritime industrialisation.

The Industrial Revolution (1780-1830) – which, by many accounts, was a direct by-product of the scientific progress achieved during the Enlightenment – brought with it a steady increase in the size of ships, as well as improvements in the sophistication of their design.[61] An important milestone was reached in the mid-1880s, when steam-powered vessels began to supplant sailing ships at a rapidly accelerating rate. This development served as a catalyst for the intensification of transoceanic movements of people and goods, solidifying the role of the sea as one of the foremost *loci* of globalisation. It was also what enabled the fisheries sector to meet the steeply rising demands placed upon it by economic expansion, population growth, and urbanisation. Parallel to this, the introduction of cruising by steamship, together with the large-scale deployment of railways and the establishment of the first seaside resorts, contributed to the advent of tourism and recreation as important ocean uses in their own right. Steamships were equally used for the laying of the first undersea telegraph cables, another nascent ocean use that would soon become accepted as a key freedom of the seas.[62]

Yet, as would soon become apparent, the influence exercised upon the marine environment by these technological advancements and associated socio-economic trends was potentially destructive. Indeed, as fishing effort escalated, many stocks began to decline and, in some instances, even collapse. This phenomenon would continue in ebbs and flows over the following decades, as would the ill-conceived and -executed efforts to develop residential, industrial, and amenity structures in coastal areas, many of which were of an environmentally sensitive nature. The pressures exerted upon marine and coastal ecosystems by such 'direct'

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[61] For an overview of the changes that transpired in this period, see Hance D Smith, Juan Luis Suárez de Vivero and Tundi S Agardy, 'The World Ocean and the Human Past and Present' in Hance D Smith, Juan Luis Suárez de Vivero and Tundi S Agardy (eds), *Routledge Handbook of Ocean Resources and Management* (Routledge 2015).
[62] Anand (n32), 134.

uses were further amplified by the introduction of pollutants from land-based sources, which, although not yet a matter of popular concern, was decidedly underway.

But even as human-ocean interactions proliferated and their negative implications began to make themselves known, the ocean itself remained viewed as a boundlessly resilient space or, at the very least, as a space possessing a boundless recuperative capacity. It was also regarded as a realm that was immune to the social dynamics unfolding on *terra firma*, as well as one lacking distinct social dynamics of its own.[63] A consequence of this was that the ocean eluded the socio-spatial labels of 'territory' and 'place', which, under industrial capitalism, were reserved for areas that provided amenable conditions for fixed capital investment. At the same time, it was clear that the ocean performed functions that were critical to the capitalist-industrial apparatus. Key among them was the provision of a seemingly ceaseless supply of living and non-living resources, and of a transport surface that states could use to pursue long-distance trade and to consolidate their overseas empires. This recognition of the strategic economic significance of ocean uses, together with the need for an approach to governance that accounted for their spatiotemporally transient nature, gave rise to a fittingly hybridised regime. The lion's share of ocean space was brought under the stewardship of the international community, which was to intervene only to the extent necessary to ensure unimpeded, frictionless mobility. Parallel to this, states asserted their jurisdiction over the 'territorial sea', a variably but moderately delimited area adjacent to the coast, which served as a vehicle for the protection of local fishing interests, for security, and for exercising powers pertaining to customs and public health.[64]

In light of the above, one may argue that the progressive scientification and technification of the ocean contributed to its normative construal as a *sui generis* space, sharply dissimilar to its terrestrial counterpart. This is, however, equally true of the idealisation of the ocean within Romantic thought, literature, and art, which is the final trope that this section will explore. Conceived as a counter-movement to the Enlightenment and the Industrial Revolution, Romanticism sought to problematise their underlying value systems and the strict reason-based approaches they used to pursue them. At the core of its critique was a concern with what Weber compellingly described as 'the disenchantment of the world – its loss of magic'.[65] This predicament was evident across all facets of Western society, which, at the time, was becoming ever more secularised and bureaucratised. Sustaining these trends was the era's

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[63] Steinberg (n47), ch 4.

[64] Winston Conrad Extavour, *The Exclusive Economic Zone: A Study of the Evolution and Progressive Development of the International Law of the Sea* (Institut Universitaire de Hautes Études Internationales 1979), 11ff.

[65] Max Weber, *Charisma and Disenchantment: The Vocation Lectures* (New York Review of Books 2020), 40.

technoscientific and economic dialectic, whose dichotomising undercurrents promoted the alienation of the outer from the inner, the non-human from the human, and the natural from the cultural. Its proponents resisted the idea that nature was an entity capable of exerting a force or agency of its own, seeing this as a conduit to backwards beliefs and practices. In its place, they pursued a narrative of 'human mastery' over a 'de-animated' nature that was 'devoid of ethical considerability' – a framing that served to justify the treatment of the earth and its 'resources' as freely available to be appropriated, processed, and traded.[66] In response, the Romantics attempted to reinvigorate the sacral traditions, reflexes, and memories of the past. Critical to this endeavour was the reinstatement and reconfiguration of the ways in which nature was perceived, valorised, represented, and related to.

Although the ocean was but one of the natural components these efforts were directed at, it is in many ways emblematic of Romanticism's core preoccupations and messages. This is evident in the way that the Romantics utilised the oceanic feeling, which, in this context, represented the sense of immersion and dissolution that one experiences when confronted with the vastness of the sea.[67] Oceanic imagery was called upon to convey the alienation and loss of control felt by the human subject in a world that globalisation, mechanisation, and the demise of traditional societal structures were rendering increasingly anarchical. The sea was invoked as a metaphor for 'the eternal unfolding of time in a universe whose nature felt more liquescent than geometrical – more eternally in flux than permanent'.[68] Its materiality was cited as evidence of the futility of intellectual attempts to attain 'god-like omnipresence by way of linear perspective, naturalising laws, and the charting of land and water'.[69] Thus, at a point in history when the 'environment was being astonished with the skeleton geometries of iron and steel construction, and the power, noise and smoke of steam-driven machinery',[70] the marine element served as a symbol of constant movement, uncertainty, and transience – an immitigable challenge to human plans and aspirations.[71] However, even though the Romantics viewed the wildness of the sea as something to be cherished and nurtured rather than denigrated and subordinated, their thesis still stemmed from a conceptualisation of the sea as an 'other'.[72] Consequently, and somewhat ironically, the impact that Romanticism had upon

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[66] Kate Rigby, 'Romanticism and Ecocriticism' in Greg Garrard (ed), *The Oxford Handbook of Ecocriticism* (OUP 2014), 62.
[67] Steven Z Levine, 'Seascapes of the Sublime: Vernet, Monet, and the Oceanic Feeling' (1985) 16 New Literary History 377, 377.
[68] Howard F Isham, *Image of the Sea: Oceanic Consciousness in the Romantic Century* (Peter Lang 2004), 41.
[69] Stefanie Hessler, *Prospecting Ocean* (MIT Press 2019), 81.
[70] Isham (n68), 41.
[71] ibid, 32-33.
[72] Steinberg (n47), 118.

the social construction of the ocean was in many ways analogous to that of the movements it strove to subvert.

This snapshot of human-ocean interactions at the turn of the twentieth century concludes the discussion of the narratives and imaginaries which have informed the social construction of ocean space in the modern period. The picture that emerges is one of several coexisting, partly clashing and partly mutually reinforcing, spatialities: the spatiality of the marine environment itself, which was becoming better understood in terms of its geographic features, biogeochemical processes, and living and non-living denizens; the spatiality of marine scientific knowledge production, which involved both emplaced research and the exchange of insights, ideas, and values between intellectual communities situated on the ocean's margins; the spatiality of *mare clausum* and *mare liberum*, in which one may include the spatiality of the politico-academic campaigns and legal instruments that underpinned the articulation and enactment of each doctrine; the spatiality of industrialisation, which became increasingly prevalent as technoscientific advancements caused ocean uses to rapidly expand in range and intensity; and the spatiality of the oceanic sublime, which romanticised the ocean as 'pure' wilderness.

Two interim observations can be made at this point. First, although the above-outlined spatial agendas were variously and even contradictorily motivated, it is, nevertheless, possible to discern a single unifying thread running through them all; that is, the tendency to construe the ocean as a frontier, 'a space that both reminds society of its limits and that suggests that these limits can be transcended'.[73] It will be apparent by now that the latter, more aspirational framing of the oceanic frontier resonated with those who aligned themselves to liberal modernity, leading them to approach the sea as a space of opportunity or, to use Steinberg's words, a space of opening.[74] To them, the marine realm offered resources to fuel economic growth and improve standards of living, as well as a setting for the positive deployment of human energy and the progressive development of human culture.[75] However, although the political and socio-cultural reverberations of the oceanic frontier were undoubtedly potent, it is its perceived economic potential that appears to have ultimately determined how it was engaged with as a spatial entity.

This brings us to our second, at this point still tentative, observation, namely that the oceanic frontier is predominantly economic in nature. The cogency of this proposition is clearly evidenced by the spatial discourses that emerged around the marine realm between the

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[73] Philip E Steinberg, 'The Ocean as Frontier' (2018) 68 International Social Science Journal 237, 237.
[74] ibid.
[75] For comment, see Helen M Rozwadowski, 'Arthur C. Clarke and the Limitations of the Ocean as a Frontier' (2012) 17 Environmental History 578.

fifteenth and early twentieth centuries. Indeed, by the First World War, the ocean was widely regarded as a space which, although asocial and apolitical in and of itself, nevertheless served a number of socially and politically significant economic functions: it was a pathway to prospective trading partners and new terrestrial spheres of influence; a conduit for the movement of people, goods, and information; and a reservoir of raw materials and food. These functions were reflected in the customary legal norms that emerged around ocean space during this time, which acted to validate and further entrench the pre-eminence of economic functionality vis-à-vis other grounds for its valorisation. Crucially, in doing so, they set a forceful tone for the ocean's juridification and territorialisation in the late modern (contemporary) period. It is to this matter that we now turn our attention.

3. The socio-legal construction of ocean space in the late modern period

This section departs from a simple observation: like any other geographical frontier of an essentially economic nature, the ocean is a space not only of opening (i.e. a space where limits are acknowledged and overcome), but also of closing (i.e. a space where limits are reimposed and enforced).[76] This is because, arguably, a certain degree of enclosure is necessary in order to ensure that the frontier's resources are optimally – meaning systematically and maximally – exploited. Though reasonable on its surface, this last assumption has been called into question by critical ocean scholars, who caution that the spatial practices implicated in the opening and closing of the 'wild blue frontier'[77] serve as pathways to the 'erosion and seizure' of the marine commons.[78] The section draws on this scholarship, broaching it through the dual lens of legal geography and relational theories of legal and political subjectivity. Such a reading offers a number of entry points for exploring how law interacts with other normative systems rooted in economic and technoscientific rationality to consolidate and render hegemonic the instrumental, productive dimension of the ocean's spatiality.

What quickly becomes apparent is that, albeit one among several *loci* of enclosure, the legal sphere constitutes 'a privileged domain' of inquiry by virtue of its unparalleled capacity to shape the balance between such diptychs as individual/society,

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[76] Steinberg (n73), 237.

[77] The phrase is borrowed from Elliott A Norse, 'Ecosystem-based Spatial Planning and Management of Marine Fisheries: Why and How?' (2010) 86 Bulletin of Marine Science 179.

[78] Alvaro Sevilla-Buitrago, 'Capitalist Formations of Enclosure: Space and the Extinction of the Commons' (2015) 47 Antipode 999, 1005.

subjective/objective, and public/private.[79] This capacity stems in no small part from the normative potency of legal classification – a staple of all law-making initiatives. The legislator will typically identify *groups* 'fit to be abstracted into [*legal persons*], [subjects] or [objects] of a given legal relation'; *places*, *things*, or *activities* 'fit to be abstracted into the *material legal base* of a legal relation'; and *interests* 'fit to be abstracted into the *primary legal objective* of a legal relation, consecrated as a right or protected by a duty'.[80] The ensuing legal relations are often superimposed on each other, rendering an area, an interest, or an activity the target of overlapping legal constructs, the interaction of which is mediated through power modifiers. Importantly, and as will be discussed in greater detail in section 4.2, this layering of legal relations and the delegation of powers that accompanies it are constitutive of socio-spatial boundaries: both literally (materially, physically) and metaphorically (abstractly, normatively), the rights of one legal subject begin where the rights of another end. By the same token, the more extensive a legal subject's power is, the more limited another's freedom.[81]

In examining the *modus operandi* and implications of legal classification as it pertains to the oceanic context, the section takes its point of departure in the 1982 UN Convention on the Law of the Sea (LOSC).[82] The rationale behind this narrative choice is readily discernible. Hailed as a 'constitution for the oceans' at the time of its adoption[83] and praised for the sustained vitality it has demonstrated in the years since,[84] the Convention is an enduring blueprint for processes of maritime territorialisation; that is, processes of boundary drawing and designation aimed at dividing ocean space into actionable spheres of power and control. The jurisdictional gradient it introduces performs a number of important functions in this regard: it places clear spatial limits on sovereign claims to ocean space and resources; it provides a strategic orientation for actions aimed at protecting the marine environment and managing maritime activities; and it dictates the normative visibility enjoyed by different maritime actors, including those of a non-institutional, non-state, and non-corporate nature. For its part, MSP represents the mature phase of maritime territorialisation, its mission statement promising a more integrated, forward-looking, and consistent approach to decision-making regarding the use of ocean space. MSP can, thus, be said to presuppose – and to be a

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[79] ibid.

[80] Philip Allott, 'Power Sharing in the Law of the Sea' (1983) 77 American Journal of International Law 1, 9; emphasis in the original.

[81] ibid, 10-11.

[82] 1982 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 21 ILM 1261 (LOSC).

[83] Tommy TB Koh, "A Constitution for the Oceans', Remarks Made by the President of the Third United Nations Conference on the Law of the Sea' in UN, *Official Text of the UNCLOS with Annexes and Index* (UN 1983), xxxiii.

[84] Richard Barnes, 'The Continuing Vitality of UNCLOS' in Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (BIICL 2016).

means of giving effect to – the legal categories put in place by the LOSC. It follows that, to understand and to effectively problematise exclusionary approaches to MSP, we must first familiarise ourselves with the history, content, and practical legacy of the Convention. The issue areas emerging from this exercise will go on to inform the concluding section's agenda-setting advocacy for a human rights-based approach to the normativisation of ocean use planning.

3.1. An introduction to coastal state jurisdiction under the LOSC

As previously noted, at the dawn of the twentieth century, the law of the sea was predominantly customary in origin. Though several attempts had been made to appropriate more substantial parts of the ocean, state practice supported the crystallisation of but a single maritime zone: the territorial sea, a narrow band of water adjacent to the coast in which states exercised full sovereignty subject to certain duties owed to foreign ships exercising their so-called 'right of innocent passage'. The seaward limit of this area was specified on the basis of distance from the shore, whether fixed in terms of miles or based upon the 'line-of-sight' doctrine[85] or the 'cannon shot' rule.[86] This multiplicity of possible bases of measurement and some residual divergence in state practice notwithstanding, there was general agreement that a three-nautical-mile territorial sea was consistent with international law.[87] The remainder of the world ocean constituted the high seas, an area where 'flag states' exercised all the freedoms traditionally associated with the marine realm and where 'coastal states' enjoyed a limited set of functional rights.[88]

Things began to shift in the 1920s, when the changes that befell the global power structure in the aftermath of the First World War, together with the emergence of an institutionalised, multilateral approach to international law and international relations, triggered the first concerted attempts – both scholarly and official – to codify long-standing

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[85] Extension of a nation's jurisdiction as far as a person standing at sea level could see.
[86] Extension of a nation's jurisdiction based on the range of shore-based artillery. This rule is encapsulated in Bynkershoek's words '*terrae dominum finitur, ubi finitur armorium vis*' (the dominion of the land ends where the range of weapons ends): Cornelius van Bynkershoek, *De Dominio Maris* (2nd edn, Leyden 1944), 44.
[87] Alan Vaughan Lowe, 'The Development of the Concept of the Contiguous Zone' (1982) 52 British Yearbook of International Law 109, 123 and 147.
[88] Namely the right of hot pursuit on the high seas and enforcement rights concerning, in particular, matters relating to customs within a narrow zone contiguous to the territorial sea: Tullio Treves, 'Historical Development of the Law of the Sea' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2016), 7.

norms and practices regarding the exercise of control over ocean space.[89] But states would soon venture beyond codification of the law of the sea and towards its progressive development. Driving the reorientation of their efforts were two distinct trends: a growing concern over the continuing sustainability of fish stocks and a mounting interest in the extraction of spatially fixed marine resources, from oil to minerals and, down the line, farmed aquatic organisms. By the end of the Second World War, this potent mixture of caution and ambition had given rise to a view of the ocean as a spatial entity that was 'claimable, controllable, governable, and, with the advent of offshore aquaculture, even amenable to infrastructural improvements'.[90] The reality of human-ocean interactions thus outgrew the absolute, black-and-white dichotomy of *mare clausum* vs. *mare liberum*. Going forward, the legal regime underpinning ocean governance would have to be painted in more nuanced shades of grey.

In the first instance, states tried to bridge this normative gap through unilateral action. This was the case of the 1945 Truman Proclamations on the continental shelf and coastal fisheries, which marked a turning point towards the acceptance of coastal states' claims to exclusive rights over renewable and non-renewable resources beyond the limits of the territorial sea.[91] The former instrument was more radical in scope and intent. It sought to extend the jurisdiction and control of the US to the resources of the seabed and subsoil of the continental shelf beneath the high seas but contiguous to its coast. The rationale behind this move was threefold: first, the exploitation of resources situated on the continental shelf had been made possible by modern technology; second, recognised jurisdiction over such resources was necessary; and, finally, the exercise of such jurisdiction was just and reasonable. In light of these considerations, the Proclamation concluded that the resources of the shelf contiguous to the territory of the US 'appertained' to it and were 'subject to its jurisdiction and control' – a proposition that was said to bear no consequence on the character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation. In arguing so, the Proclamation rejected the oft-argued proposition that the continental shelf was

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[89] Of particular significance were the scholarly attempts made under the auspices of the Harvard Law School and the Institut de Droit International, and the formal effort made in the framework of the League of Nations. The latter culminated in the 1930 Hague Conference on the Codification of International Law: Shabtai Rosenne, *League of Nations Conference for the Codification of International Law (1930)* (Oceana Publications 1975); Jesse S Reeves, 'The Codification of the Law of Territorial Waters' (1930) 24 The American Journal of International Law 486.

[90] Steinberg (n73), 238.

[91] 'Presidential Proclamation No. 2667: Policy of the United States with respect to the natural resources of the subsoil and the sea bed of the continental shelf' (28 September 1945) 10 Federal Register 12303; 'Presidential Proclamation No. 2668: Policy of the United States with respect to coastal fisheries in certain areas of the high seas' (28 September 1945) 10 Federal Registry 12304.

res communis.[92] It also avoided explicitly founding assertion of jurisdiction on the occupation of *terra nullius*.[93] Instead, it justified the action taken on the assumption that the continental shelf was the geological extension of the coastal state and that the latter had a reasonable right to regulate activities off its shores – an arguably more palatable suggestion.

The Proclamation set off a chain reaction, with a number of states putting forward claims similar to those of the US whilst acknowledging that, based on reciprocity and subject to mutual consultation, other members of the international community had similar entitlements. The notion, limits, and regime of the continental shelf as a distinct maritime zone were subsequently laid out in the 1958 Geneva Convention on the Continental Shelf (CCS),[94] one of the four instruments adopted at the First UN Conference on the Law of the Sea (UNCLOS I).[95] It was specified that, within this zone, the coastal state had sovereign rights for the purposes of exploring and exploiting mineral and other non-living resources, as well as living organisms belonging to sedentary species.[96] It was further stipulated that these rights were exclusive in nature, in the sense that, if the coastal state did not explore the continental shelf or exploit its natural resources, no one else could undertake these activities without its express consent.[97] Finally, it was prescribed that the rights of the coastal state were independent of 'occupation, effective or notional' or 'of any express proclamation'.[98] In other words, the continental shelf, much like the territorial sea, constituted an attribute of the state *ab initio*. The International Court of Justice (ICJ) would reiterate this in unequivocal terms in its seminal 1969 judgment in the *North Sea Continental Shelf* cases:

> the rights of the coastal State in respect of the area of continental shelf that
> constitutes a natural prolongation of its land territory into and under the sea
> exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and
> as an extension of it in an exercise of sovereign rights for the purpose of
> exploring the seabed and exploiting its natural resources. In short, there is
> here an inherent right.[99]

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[92] Common property.
[93] Empty land; land not legally belonging to anyone.
[94] Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311 (CSS).
[95] Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11; Convention on the Territorial Sea and Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205; Convention on Fishing and Conservation of the Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285 (CFCLRHS).
[96] CCS, art 2(1) and (4).
[97] CCS, art 2(2).
[98] CCS, art 2(3).
[99] *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)* (Merits) [1969] ICJ Rep 3, paras 17-19.

The Court went on to state that the relevant provisions of the CCS ought to be 'regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law'[100] – an authoritative testament to how quickly the principle of coastal state rights over the continental shelf had become a *locus communis* among the members of the international community.

Less immediate was the normative mainstreaming of the exclusive economic zone. The Truman Proclamation on coastal fisheries had been a moderate instrument that did not stray far from established tenets of international law. Specifically, it ascertained the competence of the US to regulate and control fishing activities in high seas waters contiguous to its coasts – a proposition that was substantially narrower than a claim over the resources themselves. The Proclamation further clarified that this competence was only applicable in areas that had been exclusively fished by US fishermen and only to the extent that its exercise did not infringe upon the interests of other states. More controversial was the 1952 Santiago Declaration, with which Chile, Ecuador, and Peru sought to assert their sovereignty and jurisdiction over the water column, the seabed, and the subsoil of an area extending to a minimum distance of 200 nautical miles from their coasts.[101] It has been suggested that the drafters of the Declaration did not aspire to the immediate and widespread acceptance of their claims, which clearly exceeded what constituted standard state practice at the time. Rather, and similarly to what the US had achieved with the Truman Proclamation on the continental shelf, the three states meant to trigger a domino effect that would, in due course, lead to the formation of a new rule of custom.

The international community was, however, reluctant to make so considerable a concession. Accordingly, the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas went only as far as to affirm the 'special interests' of coastal states regarding the management of the living resources of the high seas adjacent to their territorial sea – the breadth of which, it bears noting, was itself still contested at this point.[102] The possibility of inaugurating a 12-nautical mile fishery zone was subsequently discussed at the Second UN Conference on the Law of the Sea (UNCLOS II), but the negotiations were inconclusive. Yet, despite the persisting ambiguity surrounding the spatial extent and substantive content of the coastal state's rights and duties outside the strict limits of its

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[100] The Court was specifically referring to the first three articles of the Convention, to which contracting parties could not make reservations: *North Sea Continental Shelf*, para 63.
[101] Declaration on the Maritime Zone, signed at Santiago on 18 August 1952. As noted by Treves, 'the Declaration is formulated as a proclamation directed by the three participating parties to the rest of the world, and not as a treaty': Treves (n88), 12. This notwithstanding, it was registered as a treaty with the UN in 1976: UN Treaty Registration No 14758.
[102] CFCLRHS, arts 6 and 7.

sovereign territory, the 1960s would see state practice embrace this relatively modest enclosure of ocean space. By the time that the ICJ would render its 1974 judgment in the *Fisheries Jurisdiction Cases*, it was able to speak of the 12-nautical mile fishery zone as a nascent rule of customary international law.[103]

The early 1970s did, nevertheless, see a number of African and Latin American states revisit the precedent set by the Santiago Declaration, making claims to a 200-nautical mile 'exclusive economic zone'[104] or 'patrimonial sea'.[105] To understand the rationale behind these bids and how they influenced the negotiations that preceded the adoption of the LOSC we must first take a brief detour to consider the wider political project they formed part of. The post-World War II decolonisation movement triggered a concerted effort to reimagine and restructure the world political economy with a view to levelling the historically uneven playing field of international relations and narrowing disparities in states' economic capabilities. At the helm of this effort were the sovereign state system's newest entrants, who resisted 'their apparent structural subjugation within the international economic order', seeing it as 'the continuation of colonialism in a new guise'.[106] This perception led to the institution in 1964 of the Group of 77, a coalition of developing and newly independent states seeking to promote its members' collective interests and create an enhanced joint negotiating capacity in the UN. Over the next two decades, the Group would go on to pursue a dynamic and far-reaching campaign of legal and institutional reform, which touched upon, inter alia, matters of trade, finance, corporate accountability, and human rights.

The ensuing debate, which transpired largely under the rubric of the 'New International Economic Order',[107] inspired a large number of declarations, charters, and resolutions reflecting developing states' core preoccupations and demands. Key among them

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[103] *Fisheries Jurisdiction (United Kingdom v. Iceland)* (Merits) [1974] ICJ Rep 3, paras 49-54; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)* (Merits) [1974] ICJ Rep 175, paras 41-46. For comment see Kvinikhidze Shalva, 'Contemporary Exclusive Fishery Zones or Why Some States Still Claim an EFZ' (2008) 23 The International Journal of Marine and Coastal Law 271.

[104] Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea, held in Yaoundé between 20-30 June 1972. The text was reproduced in UNGA 'Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction' (1972) UN Doc A/8721. For comment, see Tayo O Akintoba, *African States and Contemporary International Law: A Case Study of the 1982 Law of the Sea Convention and the Exclusive Economic Zone* (Martinus Nijhoff Publishers 1995).

[105] Declaration of Santo Domingo approved by the meeting of Ministers of the Specialized Conference of the Caribbean Countries on Problems of the Sea, held on 7 June 1972. The text was reproduced in UN Doc A/8721. For comment, see L Dolliver M Nelson, 'The Patrimonial Sea' (1973) 22 The International and Comparative Law Quarterly 668; Andrés Aguilar, 'The Patrimonial Sea or Economic Zone Concept' (1974) 11 San Diego Law Review 579.

[106] Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (OUP 2013), 44.

[107] For comment see Robert W Cox, 'Ideologies and the New International Economic Order: Reflections on Some Recent Literature' (1979) 33 International Organization 257.

were the 1974 UN General Assembly Resolutions enshrining the Declaration on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States. The former instrument proclaimed the international community's determination to establish a new international economic order based on equity, sovereign equality, interdependence, common interest, and cooperation among all states, which would correct inequalities and redress injustices, making it possible to eliminate the widening gap between developed and developing states.[108] In addition, both instruments stipulated that every state had full permanent sovereignty over its natural resources and economic activities, and that no state was to be subjected to economic, political, or any other type of coercion aimed at preventing the free and full exercise of this inalienable right.[109]

The ocean served as an important background against which to test the seriousness of these statements. In fact, the law of the sea had been engaging with issues of inter-state justice since the 1940s and 1950s, when the foundations of the regime governing the continental shelf were laid. It is worth recalling in this respect that the alternative to the *ab initio* doctrine – that is, a 'first come, first served' doctrine that would base the attribution of ocean space on possession or control – had been precluded by the drafters of the CCS in order to prevent a 'rush and grab' at the expense of developing states.[110] Undoubtedly, this move had served to assuage a first wave of concerns over ocean grabbing. It did not, however, account for the areas that still remained outside the scope of national jurisdiction, which could plausibly be appropriated through occupation by militarily potent and technologically advanced states – a risk that was becoming increasingly tangible as the exploitation of the mineral resources of the deep seabed came within technological reach. It was for this very reason that, in his famous 1967 address to the UN General Assembly, the Permanent Representative of Malta, Arvid Pardo, urged delegates to consider the resources of the deep seabed as the common heritage of mankind.[111] The international community responded with a declaration of principles that reflected Pardo's recommendations and fleshed out their normative implications.[112] It also

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[108] Declaration on the Establishment of a New International Economic Order, UNGA Res 3201(S-VI) (1 May 1974) UN Doc A/Res/29/3201, preamble.

[109] UN Doc A/Res/29/3201 (n107), para 4(e); Charter of Economic Rights and Duties of States, UNGA Res 3281(XXIX) (12 December 1974), art 2(2)(a). Arguably, the normative core of this latter rule was already encapsulated in traditional jurisdictional principles of international law, which recognised that all persons and property within a state were subject to its control. Even so, the notion of 'permanent sovereignty' had considerable mobilising force, potently evoking the anxieties of a post-colonial, newly globalised, and increasingly capitalised world: Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015), 36.

[110] Lea Brilmayer and Natalie Klein, 'Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator' (2001) 33 New York University Journal of International Law and Politics 703, 710-711, drawing on *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)* (Separate Opinion of Jiménez de Aréchaga) [1982] ICJ Rep 18, para 70.

[111] UNGA, First Committee Debate (1 November 1967) UN Doc A/C.1/PV.1515-1516.

[112] UNGA Res 2749 (XXV) (17 December 1970).

moved to convene the Third UN Conference on the Law of the Sea (UNCLOS III), tasking it with 'the establishment of an equitable international regime' for the resources of the deep seabed and 'a broad range of related issues'.[113] Already broadly defined, the mandate of the Conference was soon expanded to '[the adoption] of a convention dealing with all matters relating to the law of the sea'.[114]

It follows that the negotiations which preceded the adoption of the LOSC were more outwardly politicised than previous processes. For newly independent states, UNCLOS III presented an opportunity to meaningfully participate in the revision of a key segment of international law, which, in their view, had long served the interests of industrialised states.[115] Accordingly, their energies were channelled into advocating the creation of new international institutions that would advance both communitarian and sovereign agendas.[116] The influence of the communitarian agenda is palpable in the regimes governing deep-seabed mining, the protection of the marine environment, marine scientific research, and marine technology transfer, all of which place an emphasis on multilateral cooperation and the interests and needs of developing (but also land-locked and geographically disadvantaged) states.[117] The impact of the sovereign agenda, on the other hand, is more palpable in the substantive law of the maritime zones falling within the limits of national jurisdiction. The relevant provisions added flesh to the bones of the continental shelf regime; fixed the breadth of the territorial sea at 12 nautical miles; designated archipelagic waters as a new category of jurisdiction; and, perhaps most crucially, enshrined the concept of the exclusive economic zone (EEZ), an area extending up to 200 nautical miles from the baseline over which the coastal state was granted a bundle of functionally defined sovereign rights.[118]

Theretofore taboo, the concept of the EEZ had become more favourably regarded as UNCLOS III had progressed, with the international community coming to accept this new maritime zone both as a means for combatting unsustainable patterns of resource exploitation and as a way of giving effect to the doctrine of permanent sovereignty over natural resources.[119] Yet, for the EEZ to actually be endorsed, the underlying regime had to strike a fine balance between 'the creeping jurisdictional aspirations' of developing coastal states, who

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[113] UNGA Res 2750C (XXV) (17 December 1970), para 2.
[114] UNGA Res 3067 (XXVIII) (16 November 1973), para 3.
[115] Lawrence Juda, 'UNCLOS III and the New International Economic Order' (1979) 7 Ocean Development & International Law 221, 225.
[116] Barry Buzan, ''United We Stand…': Informal Negotiating Groups at UNCLOS III' (1980) 4 Marine Policy 183.
[117] LOSC, parts XI, XII, XIII, and XIV respectively.
[118] LOSC, part V.
[119] Roderick C Ogley, 'The Law of the Sea Draft Convention and the New International Economic Order' (1981) 5 Marine Policy 240, 242.

advocated the most radical enclosure of the marine commons yet, and the economic and military interests of developed flag states, who sought to avoid any undue interference with their high seas freedoms.[120] Accordingly, the EEZ was configured as a discretionary zone; one that has to be proclaimed to produce the full range of legal consequences envisaged in the LOSC. It is also a spatially and substantively flexible zone, granting the coastal state the capacity 'to essentially pick and choose the specific functions it wishes to exercise in the marine area it decides to designate as such'.[121] These functions refer to the coastal state's sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.[122] They also refer to its jurisdiction to establish and use artificial islands, installations and structures; conduct marine scientific research; and protect and preserve the marine environment.[123] However, as the LOSC clearly asserts, other states continue to enjoy the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, as well as other internationally lawful uses of the sea related to these freedoms.[124]

In 1985, a mere three years after the adoption of the Convention, the ICJ stated in its judgment in *Libya v. Malta* that the institution of the EEZ with its rule on entitlement by reason of distance had become part of customary law.[125] This assertion, which the Court characterised as 'incontestable', left little room for doubt as to the acceptance that this novel jurisdictional concept had come to enjoy among the members of the international community. This is not, however, to say that the EEZ ceased to be a contentious concept. As Rothwell and Stephens have remarked, 'settling the juridical character of the EEZ as a distinctive maritime zone that is *sui generis* and *sui juris*' is part of the 'unfinished business' of the LOSC.[126] On paper, the rights enjoyed by the coastal state and other states within this zone appear to be of a functional, essentially economic nature.[127] However, state practice to date shows that domestic legislation 'has tended to expand national jurisdiction', which indicates that the EEZ could 'gradually

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[120] LOSC, arts 56 and 58. For comment, see Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff Publishers 2007), 62.
[121] ibid, 95.
[122] LOSC, art 56(1)(a).
[123] LOSC, art 56(1)(b).
[124] LOSC, art 58(1).
[125] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Merits) [1985] ICJ Rep 13, para 34.
[126] Donald Rothwell and Tim Stephens, *The International Law of the Sea* (1st edn, Hart Publishing 2016), 97, drawing on Ivan Shearer, 'Oceans Management Challenges for the Law of the Sea in the First Decade of the 21st Century' in Alex G Oude Elferink and Donald R Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Martinus Nijhoff Publishers 2004), 10.
[127] Gavouneli (n120), 68-69, drawing on Brilmayer and Klein (n110).

develop towards a territorial concept'; one that is more akin to the territorial sea and the continental shelf.[128]

At the same time, the continental shelf regime is itself evolving, the LOSC having partially altered the zone's legal nature and foundations.[129] The relevant provisions entitle the coastal state to a continental shelf of a minimum breadth of 200 nautical miles, the establishment of which is independent of the physical attributes of the sea-bed and the subsoil.[130] The latter assume significance where the natural prolongation of the coastal state's territory spreads beyond the 200 nautical mile point, in which case shelf rights extend up to the outer edge of the continental margin. It follows that, as it currently stands, the juridical concept of the continental shelf is defined not only by geomorphological factors, but also, and primarily, by distance from the shore. In both the EEZ and the continental shelf regimes, then, geographical distance emerges as a key instrument for translating the coastal state's 'close and special relationship' to offshore spaces into operational terms.[131] As the two regimes become increasingly convergent in terms of their *ratio legis*, their foundations, and their evolution through customary law, it seems plausible that a single, homogeneous maritime zone will crystallise over time, within which the coastal state will seek to exercise powers more analogous to territorial sovereignty than sovereign rights.

Whether one is convinced by this scenario or not, the question remains: how is the socio-legal construction of ocean space evolving now that about a third of it constitutes in some way, shape or form *territory*?

3.2. Maritime territorialisation as a performance of capitalist sovereignty

The territorialisation of a geographic frontier is a process entailing both external (international) and internal (domestic) components. The former pertains to the demarcation of borders and the regulation of states' *inter se* relations; the latter to the exercise of state power for the purposes of allocating and realising resource access rights.[132] To begin with, the open frontier is framed as *terra nullius* or *terra incognita*.[133] To realise its economic potential, this unfamiliar, presumably anarchic environment is brought within the politically legitimated

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[128] Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation* (CUP 2015), 118.
[129] LOSC, art 76(1).
[130] *Libya v. Malta*, para 34.
[131] Cottier (n128), 95ff.
[132] This distinction is borrowed from Peter Vandergeest and Nancy Lee Peluso, 'Territorialization and State Power in Thailand' (1995) 24 Theory and Society 385, 387.
[133] Land that has never been explored or mapped; uncharted territory.

ordering sphere of the nation-state. Once it has been claimed and converted into 'territory', it enters the arena of 'centralised, bureaucratic, middle-range planning', which, in Western societies, seeks primarily to sustain the capitalist mode of production.[134] A prerequisite of such planning is the establishment of spatial boundaries which will enable the state to assert its control over natural resources, both in terms of regulating the behaviour of the persons subject to its jurisdiction and in terms of defending its authority against internal and external threats.[135] Law plays a key role in this regard, with ownership rights, permits, and other statutory entitlements being used to moderate access to the functional areas arising from sovereign appropriation and, during the early stages of the frontier's internal territorialisation, to encourage prospective investors to undertake the risks associated with its exploration and development. At the same time, steps are taken to promote the long-term sustainability of resource extraction. The measures adopted to this end may be prescriptive and coercive in nature (e.g., binding emission targets) or incentive-based (e.g., green taxation).

But law is not formulated, implemented, and enforced in a vacuum. In seeking to transform a geographical frontier from a disorderly commons to a rationally and dynamically utilised resource complex, governmental and other hegemonic actors use law synergistically with other normative systems involving their own more or less obvious means of enclosure, among which the fixing of flags, the drawing of lines on maps, and the subjection of the frontier and its resources to economic calculations and to scientific models and systems of categorisation.[136] Regardless of the precise mix of regulatory and non-regulatory measures used in effectuating enclosure, the result will be a set of divisions 'between individual and society, between subjective and objective, and between private and public'.[137] Being rooted in dominant, purportedly apolitical rationalities associated with law, economics, science, and technology, these divisions will, in turn, produce spatial configurations and significations of an authoritative hue. However, as various strands of critical environmental and geographical thinking have shown, the closed frontier – not to mention the frontier-being-closed – is a multifaceted spatial entity, which is rife with contestation.

There are several reasons for this. On the one hand, in seeking to provide an impression of rational spatial organisation, enclosure tends to rely upon – and to reinforce – an abstract, reductionist understanding of space. Law is complicit in this. Its 'defensiveness' against locational specificity can be ascribed to a formalist understanding of its social function,

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[134] Martin Carnoy, *The State and Political Theory* (Princeton University Press 1984), 137.
[135] Bob Jessop, 'The TPSN Schema: Moving beyond Territories and Regions' in Anssi Paasi, John Harrison and Martin Jones (eds), *Handbook on the Geographies of Regions and Territories* (Edward Elgar 2018), 90.
[136] Steinberg (n73), 237. This will be further discussed in chapter three.
[137] Michael Hardt and Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (Penguin 2005), 202.

which regards spatial abstraction as a prerequisite for maintaining law's 'purity' and its efficacy in addressing the various tasks and questions referred to it.[138] Critical legal theorists posit that, although it may provide a semblance of uniformity of treatment before the law, this 'dephysicalised' approach detracts attention from localised interactions and fusions between the corporeal, the social, and the spatial.[139] In so doing, it marginalises experiential knowledge and contextual interests and values, hence inflicting, perpetuating, and exacerbating injustices. Similar arguments have been advanced with respect to cartographic positivism, i.e. the notion that the map-making process and its outcomes are 'objective', 'detached', 'neutral', 'transparent', 'exact', and 'accurate'.[140] Insights from critical cartography illustrate that, to the contrary, the practice of mapping is 'performative, participatory and political', and that the map does not merely represent lived reality, but actively produces it.[141] Crucially, it does so from within the confines of the cartographic trade. By this is meant that the mapping endeavour necessarily entails a degree of simplification and hierarchisation of features and processes, ultimately granting only a static, partial, and distorted depiction of complex landscapes and seascapes, and of the social-ecological interactions occurring therein.[142]

By either wholly or partially emptying the frontier of pre-existing relationships, law and cartography allow for its seizure and repurposing. The new uses it is subjected to are largely determined by the ideology and practice of neoliberalism, which cast enclosure as a means of facilitating the production and circulation of commodities within global and regional systems of trade and consumption, rather than a tool for achieving alternative objectives relating to subsistence livelihoods, cultural reproduction, and ecological integrity. Even where it is called upon to promote environmental protection, enclosure readily becomes a vehicle for 'fortress' or 'coercive' conservation, an approach to the preservation of ecosystems and species which 'forcibly removes and dispossesses resource-dependent people' from terrestrial and marine spaces, 'else subjecting them to economic displacement'.[143] On paper, the

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[138] Luke Bennett and Antonia Layard, 'Legal Geography: Becoming Spatial Detectives' (2015) 9 Geography Compass 406.

[139] Robyn Bartel, 'Place-thinking: The Hidden Geography of Environmental Law' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law* (Edward Elgar 2017), 160.

[140] John H Andrews, 'Meaning, Knowledge and Power in the Map Philosophy of J.B. Harley' in Paul Laxton (ed), *The New Nature of Maps: Essays in the History of Cartography* (Johns Hopkins University Press 2002), 5.

[141] Jeremy W Crampton, 'Cartography: Performative, Participatory, Political' (2009) 33 Progress in Human Geography 840, 840.

[142] Paul Robbins, 'Fixed Cartographies in a Portable Landscape - The Causes and Consequences of Land Cover Categorization' in Karl S Zimmerer and Thomas J Bassett (eds), *Political Ecology: An Integrative Approach to Geography and Environment-Development Studies* (Guilford Press 2003).

[143] For comment see Wolfram Dressler and others, 'From Hope to Crisis and Back Again? A Critical History of the Global CBNRM Narrative' (2010) 37 Environmental Conservation 5, 6. For examples of marine protected areas that this critique applies to and comment see Peter H Sand, 'Public Trusteeship for

enactment of this alienation seeks to restrict the extractive activities taking place within the designated site with a view to shielding it from the pressures of commodification and marketisation. But a closer look reveals that even such publicly owned and minimally developed sites can be instrumentalised for the purposes of capitalist production. Indeed, 'through neoliberal conservation practices, [protected areas] are able to become capital themselves in the form of environmental services, spectacles, and genetic storehouses'.[144] This appears to be equally true of cases where the management of a site is entrusted to a local community. Although grassroots approaches to conservation have been advanced as a means of '[bringing about] more locally relevant and equitable forms of conservation', the reality of their implementation shows that they tend to promote 'livelihood designs that align with free market principles', pushing people to become dependent on industries they have little control over and which deliver negligible returns.[145]

The above observations provide a critical framework for interrogating how processes of maritime territorialisation work to promote the unjust enclosure of the marine commons. In pursuing this thread, the analysis draws a parallel between external territorialisation and the subjective, spatial, and relational categories established under the law of the sea (section 3.2.1), and between internal territorialisation and the spatiotemporal distribution of human-ocean interactions via ocean use planning (section 3.2.2).

3.2.1. The distribution of space and power under the LOSC: Old legacies, new institutions

We may begin our reflection with the uncontroversial claim that the law of the sea is part of 'the panorama of [public international law] related to spaces'.[146] Throughout its history, its development has been driven forward by a productive vacillation between the sovereignty of the coastal state, which 'atavistically' purports to expand its power seaward, and the freedom

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the Oceans' in Tafsir Malick Ndiaye, Rüdiger Wolfrum and Chie Kojima (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (Martinus Nijhoff Publishers 2007); Peter H Sand, 'Fortress Conservation Trumps Human Rights?: The "Marine Protected Area" in the Chagos Archipelago' (2012) 21 The Journal of Environment & Development 36; Elizabeth M De Santo, Peter JS Jones and Alice MM Miller, 'Fortress Conservation at Sea: A Commentary on the Chagos Marine Protected Area' (2011) 35 Marine Policy 258; Peter H Sand, 'Marine Protected Areas and Ocean Stewardship: A Legal Perspective' (2018) 19 Biodiversity 114.
[144] Alice B Kelly, 'Conservation Practice as Primitive Accumulation' (2011) 38 The Journal of Peasant Studies 683, 683-684.
[145] Dressler and others (n143), 5 and 13.
[146] Giovanni Distefano, *Fundamentals of Public International Law: A Sketch of the International Legal Order* (Brill 2019), 99.

of the high seas, a principle which reflects the perceived impossibility of subjecting ocean space to human control.[147]

For its part, the LOSC is more than a snapshot of where the balance between sovereignty and freedom has lain at a particular moment in time. Its resilience is a testament to the continued acceptability and even the compellingness of the compromises its drafters were able to reach. These were made possible largely through the innovative negotiating techniques employed over the course of UNCLOS III, which suggest an awareness of the interrelatedness of the issues being addressed, as well as a certain preoccupation with the longevity of the instrument under elaboration. Reference must be made in this regard to the Conference's consensus-oriented rules of procedure, which provided that voting be resorted to only when all efforts at reaching agreement on substantive matters had been exhausted. Equally important was the so-called 'package deal approach', which encouraged bargaining across issue areas, thus allowing for the reconciliation of the diverging desiderata harboured by individual states, groups of states, and the international community as a whole.[148]

But compromise is also, and more substantively, a question of timing and 'ripeness'. In other words, conflict resolution is more or less attainable depending on the abundance and maturity of conciliatory factors, as well as the severity of the implications which are likely to follow from an extended stalemate. At a minimum, then, the LOSC can be perceived as the elaborate system of *quid pro quos* that was needed to unlock and harness the potential of the oceanic frontier.[149] More meaningfully, it can be regarded as evidence of the crystallisation of a collective maritime consciousness, itself the product of a centuries-long process of oceanic space-making during which ideological, institutional, political, and economic forces worked to steer the regime governing sovereignty at sea in a markedly different direction to its terrestrial counterpart.

To understand how this evolution is perceived within mainstream legal discourse we may look to a 2001 study by Brilmayer and Klein, which investigated the reasons behind the dissimilar treatment of sovereign rights on land and at sea. The authors offer two justifications. The first concerns the dissimilar histories of the respective property rights systems. It is argued that the earth's land surfaces were divided 'mostly at a time when there were no international institutions for allocating property rights, and during a time when war was not outlawed'.[150] Land was, therefore, allocated primarily through 'physical appropriation by powerful

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[147] Gavouneli (n120), 1-2.
[148] Yoshifumi Tanaka, *The International Law of the Sea* (3rd edn, CUP 2019), 35-36.
[149] The phrase is borrowed from Norse (n77).
[150] Brilmayer and Klein (n110), 704.

states'.[151] The ocean, on the other hand, eluded occupation in the traditional sense by virtue of its unique materiality. Consequently, it would not outgrow its legal characterisation as *res communis* until the practical means for making exclusive use of ocean space had come into existence. By that point in time, the legal institutions for effective allocation were also in place, as was the will to base distribution on criteria other than power politics. These factors converged to make the division of ocean spaces a process rooted in law rather than force, to be conducted 'in accordance with basic notions of fairness'.[152] Drawing on international relations theory, Brilmayer and Klein conclude that this norm-based approach – which, it bears noting, involves mandatory dispute resolution[153] – has given rise to a 'cooperative' jurisprudence that is considerably more 'egalitarian' and 'idealistic' than the jurisprudence of land territory.[154]

The second point concerns the ocean's economic value. The authors argue that land is valued by its possessor even in the absence of a solid legal title because of its susceptibility to physical occupation. The latter is a good in and of itself, giving people 'a place to build their houses, grow their food, raise their children, and interact with their immediate neighbors and their extended communities'.[155] The sea, on the other hand, is primarily valued for the resources it carries. And although resource extraction may involve a certain degree of physical occupation in the form of spatially emplaced infrastructure, it requires little more from humans than their transient passage through vast ocean spaces. This has important implications for the legal construction of sovereignty. Specifically, it calls for the establishment of a system by which to allocate internationally recognised and marketable titles over marine areas. Such a title allows the holding state to exclude other users from the space falling within its ambit – a *conditio sine qua non* for the state to be able to directly exploit the living and non-living resources brought within its jurisdiction, as well as trade access to them on world markets. Brilmayer and Klein identify this as a key motivating factor for the adoption of the LOSC and for the elaboration of the complex system of compromises that underpins its provisions.[156]

The argument advanced by Brilmayer and Klein aptly conveys the centrality that physical occupation holds for the social valorisation of space and, by extension, for the strategic direction of its territorialisation and juridification. The preceding analysis already hinted at this point, which must inform any attempt at critically deciphering the rules making

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[151] ibid.
[152] ibid.
[153] LOSC, part XV.
[154] Brilmayer and Klein (n110), 705.
[155] ibid, 730-731.
[156] Robin Churchill, 'The 1982 United Nations Convention on the Law of the Sea' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2016), 26.

up the contemporary law of the sea. At the same time, this argument is indicative of some of the presuppositions that characterise this field of international law-making and the scholarship that has emerged around it. For instance, the authors state that a key reason why the LOSC regime for allocating sovereign rights over ocean space was accepted 'without a fight' was that, given the long history of *res communis*, states 'were being required only to forgo an opportunity to appropriate a disproportionate share of an area that previously had had *no owners*'.[157] The validity of this proposition can be appraised on two levels. On the one hand, there is no doubt that long-held imaginings of ocean space as vacant and masterless played a part in shaping the agenda of UNCLOS III and the way in which different states positioned themselves towards the package of issues under negotiation. One can, however, concede this point and still call into question the underlying assumption; namely, that the areas opened up to appropriation by the LOSC were not subject to any vested interests capable of being infringed by the expansive territorial and jurisdictional claims advanced in the wake of the Convention's adoption. The present study argues that, in making this assumption, the international legislator missed an opportunity to conceive the subjects of the law of the sea in an inclusive, pluralistic manner, which goes beyond the aspirations of capitalist sovereignty to encompass the full breadth and diversity of human-ocean interactions.

Lending credence to this critique is Allott's comprehensive typology of the legal persons who constitute the subjects of rights and duties under the Convention.[158] Out of the 57 persons identified, the vast majority are variations of international institutions and state actors. Where natural and legal persons enter the picture, it is in their capacity as organs of the state (e.g., diplomatic agents), as perpetrators of acts which contravene the law of the sea (e.g., persons in control of a pirate ship), as maritime professionals (e.g., the master and crew of a ship), or as economic agents (e.g., companies involved in deep-seabed mining). One exception are the references that the Convention makes to 'mankind' and 'mankind as a whole', though, arguably, these are so abstract and so interwoven with notions of global justice that it is difficult to see how they could be meaningfully and effectively invoked in concrete decision-making contexts at the national and sub-national levels. Another exception are the references to 'fishing communities', whose economic interests the coastal state must take into account when exercising its discretionary powers for determining the allowable catch of living resources in its EEZ, as well as when allocating surpluses to other states. Although significant, these references do not go as far as to establish a duty to consult fishing communities based on their recognised territorial rights over resources. Moreover, these references are limited in

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[157] Brilmayer and Klein (n110), 730-731; emphasis added.
[158] Allott (n80), 9 and 28-30.

their subjective scope, which falls decidedly short of the rich patchwork of users and interests found in modern seascapes.

Similar patterns emerge when one surveys Allott's typology of the legal sea areas and legal relations encountered in the LOSC. At the heart of this typology is the distinction between areas *within* and *beyond* national jurisdiction. The latter category comprises the high seas, where states may exercise traditional freedoms as these have been qualified by the LOSC and other provisions of international law;[159] and the seabed beyond national jurisdiction, or 'the Area', which constitutes the common heritage of mankind.[160] More interesting for present purposes is the former category, namely areas falling within national jurisdiction. These are sub-divided into a number of sequential or overlapping maritime zones, which may be visualised as concentric circles radiating outwards from the coastal state's baseline.[161] Within these zones, the coastal state enjoys either sovereignty or sovereign rights for the purposes of exploring and exploiting natural resources. It is also primarily responsible for adopting and enforcing regulations governing uses of the sea, both by its nationals and the nationals of other states, subject to various obligations set out in the LOSC and other provisions of international law. These rights and competences are to be exercised in such a manner as not to infringe upon the interests of the international community, particularly as regards the needs of cross-border communication and those of intensified and more institutionalised cooperation for the exploitation of common resources and the protection of the marine environment.

To be sure, the spatial and relational categories enshrined in the LOSC go a long way towards '[providing] a stable jurisdictional framework and [consolidating] the rule of law at sea'.[162] In turn, such a framework is indispensable to the attainment of the Convention's overarching objective; namely, '[to] contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole'.[163] Regarded from the perspective of external territorialisation, this consecration of ocean space towards communitarian aims appears capable of steering the exercise of state power in the direction of the international public interest. It is only when we employ the lens of internal territorialisation that the limitations of the Convention come into focus. It then becomes clear that neither the references to specific groups of states nor to 'mankind as a whole' can in their vagueness account for the spatially manifesting interests and needs of individuals, communities, and groups. What is more, subjective abstraction leads to spatial

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[159] LOSC, arts 86-87.
[160] LOSC, art 1(1)(1).
[161] LOSC, arts art 2, 8, 33, 46-55 and 76.
[162] Irini Papanicolopulu, *International Law and the Protection of People at Sea* (OUP 2018), 102.
[163] LOSC, preamble.

and relational abstraction, concealing from view areas and species holding particular cultural or religious significance, as well as areas and resources contributing to the livelihoods of the poor and the vulnerable. It equally obscures maritime rights which far pre-date the adoption of the LOSC, such as the hunting and fishing rights of indigenous peoples and the customary tenure rights held by small-scale maritime societies.[164]

The LOSC's impersonally defined circle of concern can be challenged on several grounds. At an abstract level, one may posit that, in our globalised, post-modern era, the nation-state cannot be unreservedly portrayed as the sole carrier of vested interests, its territory the only possible container of political, economic, and socio-cultural relationships. More concretely, one may remark that the drafters of the Convention failed to recognise that the historic construction of the ocean as a space of freedom had, over time, led to the emergence of multiple, heterogeneous maritime *demoi* with diverse 'stakes' in – and bases for attachment to – ocean space. This blind spot has been perpetuated by those tasked with interpreting and applying the Convention, many of whom are willing to take its rhetoric of global equity at face value. The present study resists this temptation. It posits that, in reflecting on whether the contemporary law of the sea merits the accolades of egalitarianism and idealism attributed to it by Brilmayer and Klein, one must also evaluate the consideration it affords to the interests of non-institutional, non-state, and non-corporate actors. This is not to belittle the lasting significance of ethical concerns associated with inter-state relations or the role that the LOSC has played in bringing such concerns into relief and even alleviating them. It is simply to acknowledge that the power and justice issues arising at the intra-state level merit greater attention in an era where the term 'ocean grabbing' is used more in reference to MSP than the delineation and delimitation of sovereign maritime boundaries.

3.2.2. The distribution of space and power under MSP: A missed opportunity for transformation?

The LOSC is said to have marked the end of a historic era of maritime multilateralism, during which states fought both to preserve the ocean as a universally accessible 'planar surface of connection'[165] and to instrumentalise it for the purposes of narrowing global inequalities. What has followed since is an era of maritime nationalism, which has seen states gradually shift their

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[164] Sandy Kerr and others, 'Rights and Ownership in Sea Country: Implications of Marine Renewable Energy for Indigenous and Local Communities' (2015) 52 Marine Policy 108.
[165] Kimberley Peters, 'Ocean Regions' in Anssi Paasi, John Harrison and Martin Jones (eds), *Handbook on the Geographies of Regions and Territories* (Edward Elgar 2018), 512.

focus away from communitarian aims and towards the exploration and exploitation of their expanding maritime territories.[166]

This transition has been facilitated by a new generation of regulatory and policy instruments and politico-administrative arrangements, which, although sharing a general, strategic focus on the ocean, have, nevertheless, been quite distinct in terms of their pursued objectives, which range from the political (e.g., demonstrating leadership in ocean affairs) and the technoscientific (e.g., acquiring access to seabed resources) to the economic (e.g., developing a globally competitive blue economy) and the social (e.g., promoting public-private partnerships).[167] Combined, these initiatives have had the effect of gradually orienting ocean governance towards '[the] securing [of] such national interests as energy, food, and trade flows contributing to the globalization of centers of production'.[168] At the same time, states have taken steps towards the formulation and operationalisation of a comprehensive, integrated approach to environmental protection; one that accounts for multiple uses of ocean space, subjecting them to principles of sustainability, precaution, and ecosystem-based management.[169] In doing so, they have been careful not to let the imperative of environmental protection act as an impediment to the attainment of political and socioeconomic aims. Rather, they have conceived of it as a vehicle for expanding and consolidating their rights and jurisdiction over ocean space, and for legitimising extractive activities taking place within 'reasonable' limits.[170]

All these trends can be seen reflected in the discourse and praxis of MSP, the advent of which constitutes one of the hallmarks of maritime nationalism. It bears noting in this respect that the MSPD characterises ocean use planning as 'the logical advancement and structuring' of the rights and obligations assumed by states under the LOSC, as well as a practical tool to assist them in the discharge of their duties.[171] It also cautions that its provisions must not be construed to interfere with the rights and jurisdiction deriving from the Convention, and that their implementation is not to influence the delineation and delimitation of maritime boundaries.[172] It follows that the LOSC entails a preliminary, high-level allocation of space and powers which necessarily informs the spatiotemporal distribution of human-ocean interactions through MSP. In turn, MSP removes the law of the sea from the distant

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[166] Juan L Suárez de Vivero, 'Marine Policy: Europe and Beyond' (2007) 15 Willamette Journal of International Law and Dispute Resolution 167, 168.
[167] ibid, 178.
[168] ibid.
[169] ibid, 169-170.
[170] Rothwell and Stephens (n126), 516-517.
[171] Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning [2014] OJ L 257/135 (MSPD), preambular para 7.
[172] MSPD, art 2(4).

sphere of intergovernmentalism and brings it into the realm of low-level politics, making the implications of its value hierarchy concrete and tangible for flesh-and-blood actors. Here, regulatory tools (e.g., area-based management measures) work alongside scientific methods and techniques (e.g., environmental modelling), representational devices (e.g., maps), information management technologies (e.g., geographic information systems), and economic policy tools (e.g., development strategies) to 'gentrify' marine spaces, further emptying them of the social lives they carry within them and reconstructing them in ways which increasingly reflect the differentiated rights of access that characterise the terrestrial realm.[173]

The resulting patterns of ocean use find their legitimation in legal, economic, and technoscientific positivism. Their claim to objectivity and rationality is grounded in legal provisions calling for the conducting of environmental impact assessments and the use of 'best available data' and 'recognized scientific methods'.[174] It is also supported by the common association between MSP and the ecosystem approach. The MSPD, for instance, states that ecosystem-based planning can help ensure that pressures from anthropogenic sources are kept within levels compatible with the achievement of 'good environmental status'.[175] In turn, the determination of what qualifies as good environmental status is based on a set of qualitative descriptors laid out in EU marine environmental legislation. These concern the structure, functions, and processes of marine ecosystems, together with the associated physiographic, geographic, geological, and climatic factors, as well as the relevant physical, acoustic, and chemical conditions.[176] This example lends credence to the claim that, although public participation is widely regarded as a criterion for its implementation,[177] the ecosystem approach has ultimately developed into a process which treats natural science data as the primary basis for identifying management needs and for setting objectives and thresholds.

To be sure, scientific knowledge has a fundamental role to play within environmental decision-making. At the same time, its uncritical depiction as neutral has the effect of obscuring the complexities, cultural contestations, and power asymmetries underlying the processes involved in its production.[178] We may point here to the budding discourse on social-

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[173] Barry J Ryan, 'Security Spheres: A Phenomenology of Maritime Spatial Practices' (2015) 46 Security Dialogue 568, 570.

[174] See, for instance, MSPD, preambular paras 18 and 23, art 10; LOSC, arts 61(2), 119(1)(a), 204, 206, 234.

[175] MSPD, preambular para 14.

[176] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy [2008] OJ L 164/19 (MSFD), Annex I.

[177] Catarina Frazão Santos and others, 'How Sustainable is Sustainable Marine Spatial Planning? Part I – Linking the Concepts' (2014) 49 Marine Policy 59.

[178] See, indicatively, Kevin St Martin and Madeleine Hall-Arber, 'The Missing Layer: Geo-technologies, Communities, and Implications for Marine Spatial Planning' (2008) 32 Marine Policy 779; Heather Ritchie and Geraint Ellis, ''A System that Works for the Sea'? Exploring Stakeholder Engagement in Marine

ecological systems, which shows that engaging across knowledges – particularly knowledges that are spatially grounded, contextual, and experiential – is a vital requirement for understanding social-ecological interactivity across multiple spatiotemporal scales. As chapter three will discuss in greater detail, these knowledges tend to be embedded in culturally constructed subjectivities, social networks, and practices of use and stewardship which reflect shared views on sustainability and equity.[179] Persistently grounded in scientific and managerial-technological epistemologies,[180] the implementation of the ecosystem approach often works to relegate such knowledge to the status of anecdotal information, thus giving rise to knowledge hierarchies that detract attention from the manifold social, cultural, and spiritual connections between people and the ocean.[181] In doing so, the ecosystem approach assumes the part of a 'discursive gatekeeping' device, which allows knowledge/power to be wielded in ways that effectively make possible the othering – and, hence, the marginalisation – of non-scientific knowledge systems and their users.[182] The resulting governance strategies allocate, monitor, sanction, enforce, and adjudicate in ways that disempower human subjects and undermine their agency.[183]

Analogous comments can be made in respect of the representational devices and information management technologies employed within MSP processes. For the overwhelming majority of maritime spatial plans, the spatiotemporal distribution of human-ocean interactions is reflected in fine-scale zoning maps indicating where and when specific activities may take place. Among the areas depicted on said maps are those closed to fishing or other human activities; precautionary areas or security zones; marine protected areas; and areas reserved for specific uses or objectives.[184] Accompanying this segmentation and classification of ocean space are technical regulatory measures setting out specifications relating to inputs to human activities (e.g., restrictions on vessel size or number of vessels allowed to fish in a certain area), production processes (e.g., stipulations on what constitutes

Spatial Planning' (2010) 53 Journal of Environmental Planning and Management 701; Ralph V Tafon, 'Taking Power to Sea: Towards a Post-structuralist Discourse Theoretical Critique of Marine Spatial Planning' (2017) 36 Environment and Planning C: Politics and Space 258.

[179] Julia Olson, 'Seeding Nature, Ceding Culture: Redefining the Boundaries of the Marine Commons through Spatial Management and GIS' (2010) 41 Geoforum 293.

[180] Tundi Agardy, Giuseppe Notarbartolo di Sciara and Patrick Christie, 'Mind the Gap: Addressing the Shortcomings of Marine Protected Areas through Large Scale Marine Spatial Planning' (2011) 35 Marine Policy 226; Angel Borja and others, 'Overview of Integrative Assessment of Marine Systems: The Ecosystem Approach in Practice' (2016) 3 Frontiers in Marine Science 20.

[181] Tafon (n178); Wesley Flannery, Noel Healy and Marcos Luna, 'Exclusion and Non-participation in Marine Spatial Planning' (2018) 88 Marine Policy 32.

[182] Tafon (n178), 285.

[183] Arun Agrawal, 'Sustainable Governance of Common-Pool Resources: Context, Methods, and Politics' (2003) 32 Annual Review of Anthropology 243, 258.

[184] Charles Ehler and Fanny Douvere, 'Marine Spatial Planning: A Step-by-step Approach toward Ecosystem-based Management' (IOC-UNESCO 2009), 23.

the 'best available technology' or 'best environmental practice' in a given instance), and outputs (e.g., upper limits on total allowable catch or by-catch).[185]

Maps are also used as a complement to cadastral geographic information systems (GIS), which form an increasingly significant component of MSP's informational infrastructure. As the author has noted elsewhere, cadastral GIS are intended to serve as 'a comprehensive and permanent inventory of the different types of "legally-recognised" rights attached to marine space', including state rights (e.g., rights granted under international law), public rights (e.g., rights of navigation), community rights (e.g., small-scale fishing communities' tenure rights), and private rights (e.g., leases, easements or rights-of-way granted to offshore energy developers).[186] This inventory is held to provide 'an authoritative delimitation of the documented rights' spatial scope, employing maps and other visual aids to situate them in relation to maritime zones and boundaries, area-based management measures, and a wide array of natural and artificial features'.[187]

In all these cases, the normative forces of law and cartography are combined to instil a degree of clarity and predictability into ocean use planning, thus enhancing its transparency and effectiveness.[188] Yet critical commentators are drawing attention to how, in seeking to conceptualise the problems that society is facing – or, to quote Moisio and Luukkonen, '[to render] reality thinkable'[189] – MSP uses law and mapping in such a manner as to transform them into 'powerful [forms] of political control'.[190] For one, the mapping exercises involved in ocean use planning tend to be driven by actors with an interest in the development of sectoral maritime activities, such as seabed mining, marine renewable energy, aquaculture, and tourism. The resulting plans are the product of 'proprietary', capital-intensive mapping practices embedded in more or less well-entrenched power politics,[191] which approach knowledge 'not as a good to be co-produced and shared, but as capital to be channelled towards neoliberal intentionalities'.[192] Contributing to this phenomenon is the tendency of mapping exercises to shy away from the less well-understood aspects of social-ecological relations,

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[185] ibid.

[186] Ntona and Schröder (n1), 248.

[187] ibid.

[188] Evelyn Pinkerton and Jennifer Silver, 'Cadastralizing or Coordinating the Clam Commons: Can Competing Community and Government Visions of Wild and Farmed Fisheries Be Reconciled?' (2011) 35 Marine Policy 63; Séverine Michalak, 'A Multipurpose Marine Cadastre to Manage Conflict Use with Marine Renewable Energy' in Aykut I Ölçer and others (eds), *Trends and Challenges in Maritime Energy Management* (Springer 2018).

[189] Sami Moisio and Juho Luukkonen, 'European Spatial Planning as Governmentality: An Inquiry into Rationalities, Techniques, and Manifestations' (2015) 33 Environment and Planning C: Government and Policy 828, 833.

[190] Glen Smith, 'Creating the Spaces, Filling Them up. Marine Spatial Planning in the Pentland Firth and Orkney Waters' (2015) 116 Ocean & Coastal Management 132, 140.

[191] Olson (n179), 299.

[192] Ntona and Schröder (n1), 248.

among which the multifaceted cultural ties that have developed between human communities and ocean spaces over time.[193] Being difficult to conceptualise, trace, and measure, these ties are often left out of the spatial representations – as well as the information inventories and scoping studies – forming part of ocean use planning.[194] The same is true of the realities and pressures facing particular maritime constituencies.[195] For instance, it is not uncommon for the spatiotemporal scope of fishing regulations to neglect impacts wrought by weather patterns, fluctuating oil prices, and changes in fish populations stemming from non-fishery uses.[196]

The issues above-outlined give the reader an idea of how law feeds into MSP. Specifically, law entails the production and prescription of identity signifiers which prevent the interests, perspectives, and knowledges of vulnerable groups (i.e. oceanic constituencies not seen as belonging to any 'priority' maritime sector) from being given due regard by planners. By the same token, hegemonic actors are empowered to wield legal concepts and discourses in combination with maps, diagrams, and other visual aids to define ocean space and to further consolidate their positioning within it. These findings cast doubt on the legitimacy of the cognitive, physical, and behavioural limits involved in the legal enclosure of the marine commons and the power hierarchies which result therefrom. As Steinberg aptly notes, the regulatory and technoscientific opening and closing of a geographic frontier entails the opening and closing of ethical frontiers regarding 'who gets what, through what mechanisms, and for what ends'.[197] It thus necessarily entails the opening of a conversation which asks new or revisits old questions:

> Who will be served by the incorporation of the frontier? What safeguards are being implemented to protect its environment or inhabitants? How will risks and benefits be distributed? To what degree can the institutions being developed for the frontier serve as a model for other emergent spaces of opportunity and closure?[198]

In the case of the oceanic frontier, these questions – which, at their core, are questions of justice akin to the ones Nedelsky invites us to ask ourselves whenever we seek to determine

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[193] St Martin and Hall-Arber (n178); Noëlle Boucquey and others, 'Ocean Data Portals: Performing a New Infrastructure for Ocean Governance' (2019) 37 Environment and Planning D: Society and Space 484.
[194] Halina T Kobryn and others, 'Cultural Ecosystem Values of the Kimberley Coastline: An Empirical Analysis with Implications for Coastal and Marine Policy' (2018) 162 Ocean & Coastal Management 71.
[195] Jon Anderson and Kimberley Peters, 'Introduction: 'A Perfect and Absolute Blank': Human Geographies of the Ocean' in Kimberley Peters and Jon Anderson (eds), *Water Worlds: Human Geographies of the Ocean* (Routledge 2016)
[196] Glen Smith and Ruth E Brennan, 'Losing Our Way with Mapping: Thinking Critically about Marine Spatial Planning in Scotland' (2012) 69 Ocean & Coastal Management 210.
[197] Steinberg (n73), 239.
[198] ibid, 238.

and assess law's relational implications[199] – are rendered all the more thorny by how uncomfortably enclosure sits with the physical attributes of ocean space. The preceding analysis already alluded to some of the challenges one encounters in attempting to transpose terrestrial socio-materialities to the ocean, an environment which resists being codified into a property right-permeated, grid-like surface comprising mutually exclusive estates.[200] The constantly shifting oceanic frontier must rather be conceived of as 'a zone of declining power […] within which the "inside" gradually becomes an "outside"'.[201] This statement is taken here as a call for an approach to MSP which recognises marine space-being-planned as socio-materially diverse and, by extension, as legally plural. The thesis argues that such an approach is well-placed to account for the ocean's liminality, meaning its quality of being 'betwixt-and-between the normal, day-to-day cultural and social states and processes of getting and spending, preserving law and order, and registering structural status'.[202] The thesis further posits that there is promise in this approach being at least partially founded upon human rights discourse and practice. For the reasons discussed in chapter one and further expanded upon in the following section, such a grounding stands to render MSP a transformative force in ocean governance; one that works to promote socially negotiated, non-economic understandings of human-ocean relations which reflect local reliance upon the integrity of the natural environment.

4. A way forward: De/centring the human

This section seeks to compose a more comprehensive picture of the subjects, spaces, and relations to be accounted for by the normative (including legal) frameworks that regulate MSP processes and steer their outcomes. It does so by delving deeper into what it means to ground human rights within a relational ontology of self and space. In fleshing out the parameters of this ontology, the section draws inspiration from three distinct but synergistic scholarly movements: the blue turn in the humanities and social sciences, and the spatial and relational turns in the same disciplines and in law. These movements are equally preoccupied with the heterogeneous relations that tether human and non-human actants to particular spatial domains. They also exhibit the same determination to cross, reiterate, or even dissolve the

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[199] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2012), 74; chapter one, section 5.2.
[200] Sarah Whatmore, *Hybrid Geographies: Natures Cultures Spaces* (SAGE Publications 2002), 60.
[201] Steinberg (n73), 237-238.
[202] Victor Turner, 'Frame, Flow and Reflection: Ritual and Drama as Public Liminality' (1979) 6 Japanese Journal of Religious Studies 465, 465.

artificial boundaries separating 'nature' from 'culture' and 'subject' from 'object'. Where they differ from each other is in the disciplines they span. This is specifically true of the blue turn. Within the examined currents of humanistic and social-scientific thought, seawater has come to constitute a veritable 'theory machine' – a term used by Helmreich and Galison to refer to 'an object in the world that [stimulates] theoretical formulation'.[203] The same cannot be said about law, where theoretical debates about 'blue' and 'amphibious' legalities are but nascent.[204]

In light of this observation, the thesis posits that interdisciplinary engagement is key to attuning legal thinking to the singular socio-materiality of ocean space. Among other things, this means alerting legal scholars to the ways in which the 'dialectical tension between movement and settlement' manifests itself in the oceanic context.[205] Coming to terms with this tension is a necessary precondition for any attempt to chart the diverse relationships that people have with the ocean – 'both its littoral zones and the open sea spaces through which people have traditionally navigated, migrated, fished, traded, played and sought solace, spiritual enlightenment, adventure, material enrichment, social identity, cultural expression, artistic inspiration or good health'.[206] Grappling with the interplay between movement and settlement is equally key to understanding how the relationships just mentioned are reflected in the formal and informal institutions that regulate maritime activities (e.g., the policies, laws, and social norms that regulate access to marine living and non-living resources). The same can be said about the wider role that the ocean plays in the reproduction of human values (e.g., social and cultural identity, individual and collective well-being, and sense of place and belonging) and human emotions (e.g., curiosity, spirituality, awe, and a sense of adventure).

Armed with these insights, legal scholars can proceed to re-evaluate the protective ambit of human rights as they apply to the marine environment. In performing this re-evaluation, they can draw on kindred currents of legal-theoretical thought; currents which, although not focused on the ocean, are nevertheless dealing with analogous themes and modes of inquiry. This is particularly the case of works that treat the embodied, affective, and relational dimensions of human experience as central to the legal concepts and institutions by which human beings organise their collective lives.

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[203] Stefan Helmreich, 'Nature/Culture/Seawater' (2011) 113 American Anthropologist 132, 132. Helmreich borrows the term 'theory machine' from P Galison, *Einstein's Clocks, Poincare's Maps: Empires of Time* (W W Norton 2003).

[204] Irus Braverman and Elizabeth R Johnson (eds), *Blue Legalities: The Life and Laws of the Sea* (Duke University Press 2020); Irus Braverman (ed), *Laws of the Sea: Interdisciplinary Currents* (Routledge 2022).

[205] Karin Amimoto Ingersholl, *Waves of Knowing: A Seascape Epistemology* (Duke University Press 2016), 17.

[206] Edward H Allison, John Kurien and Yoshitaka Ota, 'The Human Relationship with Our Ocean Planet' (World Resources Institute 2020), 3.

Against this backdrop, the remainder of this section offers an example as to how one can go about building bridges between law and other disciplines with perspectives to offer on the socio-material construction of ocean space. The analysis proceeds in two parts. Section 4.1 explores how relationally-minded humanists and social scientists engage with the material traits of ocean space and the ways in which these shape the ties that bind together human and non-human actants. Section 4.2 explores how relationally-minded legal scholars construe law's capacity to structure human–non-human relationships in ways that foster or impede fundamental values upon which are grounded visions of the just society. Taken as a whole, the section aims to show that a joint reading of different currents of relational thought can facilitate the development of a human rights-based approach to the normativisation of MSP which is simultaneously socialised, ecologised, and spatialised. It is argued that such an approach makes it possible to play to the strengths of human rights while thoughtfully responding to the criticisms that have accrued around them.

4.1. From *aqua nullius* to peopled seascapes

It should be reiterated at the outset that, for scholars of the maritime and spatial turns, the ocean's particular socio-materiality is most decidedly not a new preoccupation. Indeed, humanistic and social-scientific thought has long been captivated by the boundless mutability of seawater and the implications that this property holds for human action.[207] The reader will already be familiar with many of the key tenets of this literature, which has been drawn upon at various points throughout the chapter to shed light on different aspects of the ocean's social and legal normativisation. The present section is a natural continuation of that discussion. As such, it provides additional reflections on the pitfalls of established oceanic and watery tropes while also identifying promising points of departure for the formulation of alternatives.

We may begin by drawing attention to an important leitmotif, namely the use of figurative language around the themes of oscillation and circulation by theorists who, for various reasons, are seeking to devise 'alternative [ontologies] of connection'.[208] This tendency is particularly prominent within globalisation studies, a broad and varied strand of research that approaches globalisation both as an ocean-based phenomenon and as a

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[207] Elizabeth DeLoughrey, 'Submarine Futures of the Anthropocene' (2017) 69 Comparative Literature 32, 32; Gabriel Cooney, 'Introduction: Seeing Land from the Sea' (2004) 35 World Archaeology 323, 324.
[208] Steinberg (n12), 156. See also Gagné and Rasmussen (n12), 137.

phenomenon to be explored through the employment of watery imagery and metaphors.[209] An example of the former approach is Gilroy's 'The Black Atlantic',[210] which uses the rhetorical device of the 'Middle Passage' to trace 'the connections that persist among members of the African diaspora and the ungrounded, unbounded, and multifaceted identities that result'.[211] Indicative of the latter approach is Castells' work on the 'network society', which distinguishes between two overarching, mutually-challenging rationalities of space: the logic of mobility promoted by globalisation, which seeks to maintain and further enhance the global flow of goods, signs, people, and electronic impulses (space of flows), and the logic that underpins the historically rooted spatial organisation of human experience at the local level (space of places).[212] Bauman goes a step further, suggesting that the advent of 'liquid modernity' – of which liquid spatiality is arguably one manifestation – works to unmoor people from grounds of politics.[213] A similar argument is advanced by Sloterdijk, who uses the image of 'foam' to describe the shrinkage and multiplication that spheres of human action are undergoing as a result of globalisation.[214] Foam is assigned this explicative function because of its uncontrollability and unruliness – qualities that lend themselves to the 'morphological anarchy' under which contemporary life transpires.[215]

In all these instances, water is conceived as 'a translocally connecting substance',[216] its materiality being invoked to give expression to the complex spatiality of the modern world; a world which is at once irreversibly interlocked and inescapably fragmented. While this is undoubtedly a worthwhile intellectual pursuit, it merits certain caveats.

First, care must be taken so as not to essentialise seawater and its physical properties. Among other things, this means resisting the urge to regard the ocean's 'globalness' as self-evident or as a matter of 'environmental common sense'.[217] It also means recalling that the ocean's portrayal as a 'site of unimpeded circulation' has a particular, Western lineage, stemming equally from colonial campaigns to keep the high seas outside the reach of sovereign territorialisations and from market-driven, liberal-economic conceptualisations of ocean

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[209] Pamela Ballinger, 'Watery Spaces, Globalizing Places: Ownership and Access in Postsocialist Croatia' in Janet Laible and Henri J Barkey (eds), *European Responses to Globalization: Resistance, Adaptation and Alternatives* (Emerald Group Publishing 2006), 154-155.
[210] Paul Gilroy, *The Black Atlantic: Modernity and Double Consciousness* (Harvard University Press 1993)
[211] Steinberg (n12), 158.
[212] Manuel Castells, *The Rise of the Network Society*, vol 1 (The Information Age: Economy, Society and Culture, Blackwell Publishers 1996), 378.
[213] Zygmunt Bauman, *Liquid Modernity* (Polity 2000), 1.
[214] Peter Sloterdijk, *Foams: Spheres Volume III: Plural Spherology* (Semiotext(e) 2016).
[215] René ten Bos, 'Towards an Amphibious Anthropology: Water and Peter Sloterdijk' (2009) 27 Environment and Planning D: Society and Space 73, 85.
[216] Helmreich (n6), 136-137, drawing on John Kurien, 'People and the Sea: A "Tropical-Majority" World Perspective' (2001) 1 Maritime Studies 9.
[217] ibid, 137.

resources as inherently 'common'.[218] In turn, these normative projects originate in a deep-seated perception of seawater as an element of 'nature' which moves too quickly and too fluidly to be captured by 'culture', 'with culture often imagined in a land-based idiom grounded in the culture concept's origins in European practices and theories of agriculture and cultivation'.[219] The pervasiveness of this perception is easy to substantiate, there being numerous studies that juxtapose the rich sociality of life on land to the sparseness and transience of life at sea.[220] However, as the preceding analysis has repeatedly highlighted, to perceive the relationship between land and sea as one of separation/contrast, as opposed to one of connection/nuance, is to anchor ourselves in a reductive view of the ocean as a space which enables the pursuit of ideologically and politically charged endeavours, but which is not ideologically and politically charged in and of itself.[221]

Cue our second caveat, which concerns the uncritical use of abstract, figurative language relating to the ocean's physical properties. According to Blum, the 'ready availability – and undeniable utility – of fluidity as an oceanic figure' has served to obscure the 'material conditions and praxis of the maritime world',[222] whether that be labour, exertions of power, or the reproduction of institutions.[223] Having been deprived of these constitutive, meaning-giving elements, the ocean has become a spatial entity that 'leaves no traces, and has no place names, towns or dwelling places'; an entity that 'cannot be possessed'.[224]

Alternative accounts are, nevertheless, emerging, which perceive ocean space as 'workplace, home, passage, penitentiary, and promise',[225] and seawater as 'a medium of pleasure, sustenance, travel, poison, and disaster'.[226] Whether placing their focus on embodied and sensory experience, the intersubjective creation of cultural landscapes, or the formulation and pursuit of environmental values, the relevant studies reveal a shared concern with the way in which particular qualities of the marine environment impinge on the construction of individual and collective identities. Some approach the matter from the perspective of social constructivism, looking at how jointly-formulated understandings of the world form the basis of shared assumptions about reality, in the process enabling, reproducing, and diffusing power relations throughout society. Others borrow their methodological tools from phenomenology,

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[218] ibid, 135-137.
[219] ibid, 132.
[220] Cooney (n207), 323.
[221] Peters (n165), 512. See also Cooney (n207), 323.
[222] Hester Blum, 'The Prospect of Oceanic Studies' (2010) 125 Publications of the Modern Language Association of America 670, 670.
[223] Steinberg (n12), 156.
[224] Boelhower (n13), 92.
[225] Blum (n222), 670.
[226] Helmreich (n6), 132.

whose proponents employ critically reflexive analytic approaches to study the essence of human experiences, including the experience of 'being in place'. Particularly influential here is the work of phenomenologist Maurice Merleau-Ponty, who posited that 'our primary relation to the world as experiencing subjects is not a cognitive relationship to a purely objective reality'.[227] Rather, existence is first and foremost actualised through the body, sensory engagement with the material world being what 'makes it present as a familiar setting of our life'.[228] Ocean scholars inspired by phenomenology accordingly look at how encounters with the marine realm become fodder for the imagination, inspiring, *inter alia*, stories and legends, superstitious beliefs and rituals, art and artifacts, and metaphysical and natural philosophical speculation.[229] Additional themes are the development of particular forms of knowledge and skills related to the sea;[230] and seafood as a form of embodied material culture.[231]

The resulting scholarship sheds light on previously overlooked or misunderstood aspects of sea-based identities, making it clear that their formation is just as much a corporeal affair as it is a conceptual one. This composite perspective enables us to conjure a more complete picture of processes of cultural inscription and place-making transpiring at sea, alerting us to the respective roles played by material practices and by 'memories, deep knowledge, and symbolic meaning'.[232] McNiven explores these roles through the notion of the seascape. His work is informed by his interactions with indigenous peoples, whose calls for recognition of their sea rights have resulted in major advances in our understanding of, inter alia, customary marine tenure and the cultural-territorial dimensions of ocean spaces.[233] The insights gleaned from these interactions move McNiven to speak of seascapes as spatial entities which are 'owned by right of inheritance, demarcated territorially, mapped with named places, historicised with social actions, engaged technologically for resources, imbued with spiritual potency and agency, orchestrated ritually, and legitimised cosmologically'.[234] In a

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[227] Eric Matthews, *The Philosophy of Merleau-Ponty* (Routledge 2002), 48.
[228] Maurice Merleau-Ponty, *Phenomenology of Perception* (Routledge 2002), 61.
[229] These categories are borrowed from Pamela Gossin, *Thomas Hardy's Novel Universe: Astronomy, Cosmology, and Gender in the Post-Darwinian World* (Ashgate Publishing 2007), 105. An example would be Stephanie Merchant, 'Deep Ethnography: Witnessing the Ghosts of SS Thistlegorm' in Jon Anderson and Kimberley Peters (eds), *Water Worlds: Human Geographies of the Ocean* (Ashgate Publishing 2014).
[230] An example would be Gísli Pálsson, 'Enskilment at Sea' (1994) 29 Man 901.
[231] Veronica Strang, 'Introduction. Fluidscapes: Water, Identity and the Senses' (2006) 10 Worldviews 147, 148. An example would be Ståle Knudsen, 'Between Life Giver and Leisure: Identity Negotiation through Seafood in Turkey' (2006) 38 International Journal of Middle East Studies 395.
[232] Ian J McNiven, 'Sentient Sea: Seascapes as Spiritscapes' in Bruno David and Julian Thomas (eds), *Handbook of Landscape Archaeology* (Routledge 2016), 149.
[233] ibid, 150.
[234] ibid, 151. See also Cooney (n207), 323; John Cordell, 'Introduction: Sea Tenure' in John Cordell (ed), *A Sea of Small Boats* (Cultural Survival 1989), 1; John Cordell and Margaret A McKean, 'Sea Tenure in

similar, but more abstract vein, Strang speaks of 'cultural "fluidscapes" of social connection and difference'.[235] In proposing this term, she cautions that fluidity is not to be used reductively. To the contrary, it is meant to convey the inherently evolutive nature of identity, which exists 'in a critical relation' – a 'dynamic tension' and, ultimately, a 'complementarity' – to the more concrete aspects of the environment which serve to locate social identity 'in place'.[236]

This brings us to our final caveat, which sees us revisit the scholarly treatment of the ocean's 'fluid mobility' and 'tactile materiality'.[237] Engaging with these attributes is necessary if we are not to essentialise the ocean in the opposite direction to the one problematised thus far in this chapter. That is, if we are to explore the ocean as a social space without reducing it to a mere social construct. Here we may once again draw on Steinberg, who directs our attention to the distant and partial nature of our contacts with the sea: '[t]he encounter from the shore, from the ship, from the surface, or even from the depths, while laden with affective feelings, captures only a fraction of the sea's complex, four-dimensional materiality'.[238] This results in substantial gaps in our understanding of oceanic processes, 'as the unrepresentable becomes the unacknowledged and the unacknowledged becomes the unthinkable'.[239] Filling these gaps requires coming to grips with the ocean's ceaseless becoming, a consequence of the ever-changing alchemy between 'the non-human and the human, the biological and the geophysical, the historic and the contemporary'.[240] It also entails a recognition of the 'configurative' or 'agentive' power of the ocean's constituent elements, meaning their capacity to structure knowledge, power, and livelihoods in ways which produce synergies and tensions among different segments of society.[241]

How may the above perspectives inform marine planning and management? As already stated, the thesis sees a way forward in relational thinking and the 'open-ended, mobile, networked, and actor-centred' notions of space that it promotes.[242] Regarded through a relational lens, the ocean's spatiality transforms into an open plane of possibility, wherein the values, knowledge systems, and embedded practices of heterogeneous actors are

Bahia, Brazil' in Daniel Bromley and David Feeny (eds), *In Making the Commons Work: Theory, Practice, and Policy* (Institute for Contemporary Studies 1992), 183.

[235] Strang (n231), 149.

[236] ibid.

[237] Steinberg (n12), 157.

[238] ibid, 156.

[239] ibid, 157.

[240] ibid.

[241] Gagné and Rasmussen (n12), 137, drawing on Kirsten Hastrup, 'Water and the Configuration of Social Worlds: An Anthropological Perspective' (2013) 5 Journal of Water Resource and Protection 59.

[242] Martin Jones, 'Phase Space: Geography, Relational Thinking, and Beyond' (2009) 33 Progress in Human Geography 487, 487.

perpetually clashing, melding, and being transfigured, imbuing space with social and political meaning.[243] It also becomes evident that space holds an inseparable temporal aspect: it is 'always under construction […] never finished, never closed' – in other words, part of a continuum of activity.[244] This is precisely the quality that Massey sought to convey by referring to space as the realm of 'radical contemporaneity' and to places as 'spatio-temporal [events]'; that is, as temporary crystallisations of the interaction between different place-making narratives and practices and, by extension, as snapshots of the underlying power dynamics.[245]

Critical MSP scholars are already using relational thinking as a conceptual and methodological tool for analysing the discourses and practices involved in the production of marine space.[246] In this context, relational thinking highlights how the ocean's 'energetic materiality'[247] and 'non-linear temporality'[248] appear to defy the confines of traditional modernist modes of planning, which are based on a view of 'objects' (e.g. built structures, landscapes, communities) as 'bounded entities, fitting together in mosaic-type patterns'.[249] This dissonance compels us to take a view of 'marine space-being-planned' not as a 'static and momentary image', but as a moving and continually changing entity – in other words, as a 'lively space'.[250] This calls for a greater understanding of 'geographies of connectivity'[251] and a 'new spatial imagination'; one that is underpinned by 'an ethos of acceptance of ambiguous boundaries and transformative linkages with others – of a sort of oceanic ungroundedness offered by ecological thinking'.[252]

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[243] Henri Lefebvre, *The Production of Space* (Blackwell Publishers 1991).

[244] Doreen Massey, *For Space* (SAGE Publications 2005), 9; Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory* (Law Book Company 2002), 441-442.

[245] Massey (n244), 195, 130-131.

[246] Stephen Jay, 'Marine Space: Manoeuvring Towards a Relational Understanding' (2012) 14 Journal of Environmental Policy & Planning 81; Sue Kidd and Dave Shaw, 'Reconceptualising Territoriality and Spatial Planning: Insights from the Sea' (2013) 14 Planning Theory & Practice 180; Noëlle Boucquey and others, 'The Ontological Politics of Marine Spatial Planning: Assembling the Ocean and Shaping the Capacities of 'Community' and 'Environment'' (2016) 75 Geoforum 1; Luke Fairbanks and others, 'Assembling Enclosure: Reading Marine Spatial Planning for Alternatives' (2018) 108 Annals of the American Association of Geographers 144; Stephen Jay, 'The Shifting Sea: From Soft Space to Lively Space' (2018) 20 Journal of Environmental Policy & Planning 450.

[247] Christopher Bear, 'Assembling the Sea: Materiality, Movement and Regulatory Practices in the Cardigan Bay Scallop Fishery' (2012) 20 Cultural Geographies 21, 22.

[248] Philip Steinberg and Kimberley Peters, 'Wet Ontologies, Fluid Spaces: Giving Depth to Volume through Oceanic Thinking' (2015) 33 Environment and Planning D: Society and Space 247, 260.

[249] Jay (n246, 'Marine Space: Manoeuvring Towards a Relational Understanding'), 83.

[250] Jay (n246, 'The Shifting Sea: From Soft Space to Lively Space'), 450-451, 462.

[251] Jay (n246, 'Marine Space: Manoeuvring Towards a Relational Understanding'), 85, drawing on Patsy Healey, *Urban Complexity and Spatial Strategies: Towards a Relational Planning for our Times* (Routledge 2007).

[252] Jerome Whitington, 'Alien Ocean: Anthropological Voyages in Microbial Seas by Stefan Helmreich' (2010) 25 Cultural Anthropology 165, 166. See also Jay (n246, 'Marine Space: Manoeuvring Towards a Relational Understanding'), 85, drawing on Jonathan Murdoch, *Post-structuralist Geography: A Guide to Relational Space* (SAGE Publications 2006), 156.

The thesis finds its way towards this imagination by bringing together four distinct strands of relational inquiry. The first strand, which will be explored in greater detail in chapter three, approaches ocean spaces as commons and as social-ecological systems. The two conceptualisations are inherently relational. Indeed, each commons can be said to encompass an intricate constellation of relationships between resources, their physical-material domain, and their users.[253] These relationships are mutually constitutive: on the one hand, the institutions that govern resource use unequivocally shape spatial structures and dynamics; on the other hand, the socio-economic and environmental features of an area have a direct bearing on the opportunities available for collective action.[254] As for social-ecological systems, these are understood to be complex adaptive systems in which the 'social' and the 'ecological' are entwined in intricate patterns of reciprocal feedback.[255] The two subsystems operate as 'a coupled, interdependent and co-evolutionary' whole,[256] and any attempt to delineate between them is perceived as artificial and arbitrary.[257] A key point to make here is that, by highlighting the inextricable link between the human and the natural worlds, both the discourse on the commons and that on social-ecological systems point to a composite understanding of well-being, cognisant of the reciprocity between social cohesion and security and ecological integrity.

This finding will serve as a lens through which to appraise the second strand of relational inquiry, which concerns the making of the common European territory. Here, relational thinking is employed as a conceptual and methodological tool for unpicking questions of spatiality, placeness, territoriality, and borderness. As chapter four will demonstrate, relationalists depart from the 'territorial orthodoxy' of European political-geographic studies, which have tended to explicate place-making processes almost exclusively on the basis of natural endowments and other locational properties. This tendency leads geography to be perceived as static, unalterable, and logically structured; the sum total of nested territorial hierarchies with unyielding boundaries.[258] By shifting the focus towards spatio-temporal exposure and connectivity, relationalists reveal space to be the ever-mutating

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[253] Mark Giordano, 'The Geography of the Commons: The Role of Scale and Space' (2003) 93 Annals of the Association of American Geographers 365.

[254] Timothy Moss, 'Spatiality of the Commons' (2014) 8 International Journal of the Commons 457, 458.

[255] Fikret Berkes, 'Implementing Ecosystem-based Management: Evolution or Revolution?' (2012) 13 Fish and Fisheries 465, 468.

[256] ibid.

[257] Fikret Berkes, Johan Colding and Carl Folke, 'Introduction' in Fikret Berkes, Johan Colding and Carl Folke (eds), *Navigating Social-Ecological Systems: Building Resilience for Complexity and Change* (CUP 2002).

[258] Joerg Knieling and Frank Othengrafen, 'Spatial Planning and Culture – Symbiosis for a Better Understanding of Cultural Differences in Planning Systems, Traditions and Practices' in Joerg Knieling and Frank Othengrafen (eds), *Planning Cultures in Europe: Decoding Cultural Phenomena in Urban and Regional Planning* (Ashgate Publishing 2009), xxiii.

product of 'transnational, nonstate phenomena'[259] or, as Jones aptly puts it, of 'imbroglios of flows and networks'.[260] This is not, however, to say that the territorial dimension has lost its relevance or that it should be construed as a mutually exclusive opposite of the relational dimension.[261] Rather, Morgan argues, modern spaces are 'bounded *and* porous, territorial *and* relational'.[262] This view is echoed by Amin, who speaks of space as 'a site of intersection between network topologies and territorial legacies'[263] – a concession that is worthy of note for having been articulated by a seminal proponent of a relational ontology of space.

Crucially for present purposes, the need to dissolve binaries is also recognised by spatial planning scholars. As Allmendinger et al. astutely argue, the planning process must be open enough to acknowledge and take account of 'multiple influences, networks, and flows', and closed enough to distil this diversity into a territorially-based spatial strategy or plan based upon an allocation of legal rights and responsibilities.[264] This requires planners to 'think and act in different realms of space, engaging with […] bespoke, functional spaces, yet working through other, often more stable and accountable spaces'.[265] The thesis takes the view that this amalgamated perspective is well-suited to the ocean's spatiality, accounting for both networked relations of connectivity (material or immaterial; ecological, economic, technological or otherwise) and the physical territoriality of socio-political institutions.[266] Moreover, if informed by the insights gleaned from the discourse on social-ecological systems, this perspective enables us to weave a more inclusive and equitable narrative of well-being in which to ground the MSP processes taking place in Europe's regional seas; a narrative that reflects the needs, interests, beliefs, and values not of the usual suspects, but of all those who make up Europe's maritime *demos*.

Law must both reflect and cultivate this imagination. To determine how, the thesis relies upon two additional strands of relational inquiry. The first comprises legal-geographic

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[259] Gabriel Popescu, *Bordering and Ordering the Twenty-first Century: Understanding Borders* (Rowman & Littlefield Publishers 2012), 47.

[260] Jones (n242), 488. Cormac Walsh, 'Rethinking the Spatiality of Spatial Planning: Methodological Territorialism and Metageographies' (2014) 22 European Planning Studies 306, 309. See also Castells (n212), 1; Ash Amin, 'Regions Unbound: Towards a New Politics of Place' (2004) 86 Geografiska Annaler: Series B, Human Geography 33, 33; Doreen Massey, 'Geographies of Responsibility' (2004) 86 Geografiska Annaler: Series B, Human Geography 5, 9.

[261] Jones (n242), 495, drawing on John Agnew, 'The Territorial Trap: The Geographical Assumptions of International Relations Theory' (1994) 1 Review of International Political Economy 53.

[262] Kevin Morgan, 'The Polycentric State: New Spaces of Empowerment and Engagement?' (2007) 41 Regional Studies 1237, 1247; emphasis in the original.

[263] Ash Amin, 'Re-thinking the Urban Social' (2007) 11 City 100, 103.

[264] Phil Allmendinger, Tobias Chilla and Franziska Sielker, 'Europeanizing Territoriality - Towards Soft Spaces?' (2014) 46 Environment and Planning A: Economy and Space 2703, 2705-2706.

[265] ibid, 2704.

[266] Walsh (n260), 309.

works which construe law as 'situated, embodied, and socially and politically implicated'[267] – in other words, as 'always and already spatial'.[268] Espousing this view means acknowledging law's materiality, sociality, and plurality – qualities which are relational by nature. Indeed, to regard law as a material phenomenon is to assign normative significance to the physical world in all its interconnected manifestations, from human and non-human life to inorganic matter. To regard it as social and plural, on the other hand, is to affirm the existence of diverse epistemological and ontological traditions, diverse knowledge holders within such traditions, and 'endlessly dynamic connections of "matter and meaning"'.[269] These conceptual exercises serve to animate and anchor law in lived realities, hence preventing it from devolving into an alienating abstraction.[270] In so doing, they promote an approach to legal theory and practice which is 'horizontal, networked, ecological, and connective' as opposed to vertical, hierarchical and conducive to inequitable forms of enclosure.[271] Such an approach is premised on – and cultivates – an awareness of law's embeddedness within societal power structures, and its role in their hegemonic preservation or counter-hegemonic subversion.[272]

A similar view of law is promoted by the fourth and final strand of relational inquiry that the thesis draws upon: relational theories of legal and political subjectivity. As already discussed in chapter one, these works are premised on the idea that 'all bodies are kin in the sense of inextricably enmeshed in a dense network of relations'.[273] Accordingly, the role they foresee for law is that of a '[responsive guardian] of emergent spaces of interdependent, communicative normativities' – a role that law can fulfil in many and diverse ways, including, most radically, by enshrining 'a right to commons-based human–non-human co-

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[267] Andreas Philippopoulos-Mihalopoulos and Victoria Brooks, 'Introduction' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law* (Edward Elgar 2017), xii.

[268] Bartel (n139), 159. Legal geographers are developing new analytical tools to study the fusion of legality and spatiality. See, indicatively, 'spatio-legal splice' in Nicholas K Blomley, *Law, Space, and the Geographies of Power* (Guilford Press 1994); 'nomosphere' in David Delaney, *The Spatial, the Legal and the Pragmatics of Place-making: Nomospheric Investigations* (Routledge 2010); 'lawscape' in Nicole Graham, *Lawscape: Property, Environment, Law* (Routledge 2010) and in Andreas Philippopoulos-Mihalopoulos, 'Introduction: In the Lawscape' in Andreas Philippopoulos-Mihalopoulos (ed), *Law and the City* (Routledge-Cavendish 2007).

[269] Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017), ix.

[270] At the same time, it is important to provide space for nuance. In certain cases it may be 'aspatial formalism' rather than locational specificity that will lead to greater justice, signifying that certain rules are so fundamental as to be applicable irrespective of any contextual factors. Accordingly, in setting out a research agenda for legal geographers, Bennett and Layard note that the law's selective approach to spatiality should not be dismissed as inherently flawed. Rather, the focus should be placed on 'whether, and if so how and for what purpose (and what period of time), spatiality is being invoked or ignored, for an apparent absence of space is also doing spatial and legal work'. See Bennett and Layard (n138), 418.

[271] Davies (n269), 129.

[272] This point is explored further in Ntona and Schröder (n1).

[273] Anna Grear, 'Legal Imaginaries and the Anthropocene: 'Of' and 'For'' (2020) 31 Law Critique 351, 359.

governance'.[274] In putting forward these arguments, relationally-minded theorists of legal and political subjectivity create an intellectual space in which to reflect on the ways in which law, including human rights, could support context-sensitive, collaborative, and stewardly modes of marine planning and management. The chapter's concluding section ventures into this space, recruiting Anna Grear (and, to a lesser extent, Jennifer Nedelsky) as its guides.

4.2. From peopled seascapes to vulnerable more-than-human assemblages

To reiterate, relational theories of legal and political subjectivity seek to 'advance a shift in presumptions about the self and its core values so that a relational perspective becomes a routine part of theorizing about justice' in its many guises.[275] Chapter one introduced the reader to this current of thought by way of Jennifer Nedelsky's relational theory of the self, which casts the subjects of law and rights as products of the intimate, social, institutional, and natural-environmental relations in which they partake. This last element – that is, the constitutive effect of human-environment relations – is rather underdeveloped in Nedelsky's work (by the author's own admission). To flesh it out, the present section draws on Anna Grear.

When Grear's writings are read alongside Nedelsky's, it becomes evident that the two authors are motivated by similar concerns and employ similar concepts to similar ends. Yet Grear's writings stand to make a unique contribution to our thinking by virtue of their being explicitly and predominantly ecological in their focus. It bears noting in this regard that Grear offers valuable reflections on embodiment and affectability – two additional dimensions of the self that Nedelsky recognises as significant but decides not to delve into so as not to spread her analysis too thin. What is more, Grear exhibits (and seeks to instil in the rest of us) a stronger awareness of the spatial and temporal dimensions of human-environment relations.

It follows that Grear's theory of legal subjectivity is consistent with, but also expansive of, Nedelsky's. In being so, it has its own wisdom to impart as to how we may go about developing a human rights-based approach to the normativisation of MSP. For one, it clarifies what it means to incorporate within law the linkages between 'the most global and the most micro-situated' of environmental concerns.[276] In addition, it provides a sense of how law could support 'human–non-human working groups in a wide range of situated endeavours in commons-based, grassroots initiatives, expanded to embrace "commoners" who are more-

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[274] ibid, 363.
[275] Nedelsky (n199), 9.
[276] Anna Grear, 'Towards a New Horizon: In Search of a Renewing Socio-Juridical Imaginary' (2013) 3 Oñati Socio-Legal Series 966, 978.

than-simply-human'.[277] Finally, though not exhaustively, it demonstrates how law could carve out '[spaces] for co-negotiation' in which to grapple with shared contingencies and struggles, as well as deliberate on 'what counts and for whom (human and non-human), in what ways, and why'.[278] The remainder of this section corroborates these claims by drawing specifically on Grear's writings on vulnerability – a relational trope that can be used to weave connecting threads between the diverse bodies of scholarship explored in this and subsequent chapters.

As already noted, at the heart of Grear's theoretical framework lies a preoccupation with human embodiment and with the philosophical and legal implications of its assertion. Grear's thinking on this point is heavily informed by the work of Merleau-Ponty, who, as briefly discussed in the previous section, sought to deconstruct the long-held dichotomy between mind and body. For Merleau-Ponty, the corporeal and the conceptual are inextricably intertwined, even co-productive: '[t]he perceiving subject is not this absolute thinker; rather it functions according to a natal pact between our body and the world, between ourselves and our body'.[279] To construe perception along these lines – namely, as 'an embodied continuity with the world'[280] – is to attune ourselves to its profoundly perspectival nature.[281] It is also to open ourselves up to the important notion of intercorporeality, or the idea that 'all being is interbeing, interwining – and such interrelating is intrinsic to the very structure of subjectivity and lived reality'.[282] Abram remarks in this regard that, for Merleau-Ponty, perception is 'inherently participatory' in that it 'always involves, at its most intimate level, the experience of an active interplay, or coupling, between the perceiving body and that which it perceives'.[283] It is this conviction that leads Merleau-Ponty to afford ontological primacy to interrelating and to conceptualise the embodied, perceiving subject as a 'field of experience'.[284]

Similarly to Nedelsky and her influences, Grear is drawn to Merleau-Ponty as a critical legal theorist in search of a conceptual framework that will enable her to effectively problematise the archetypal legal subject; that is, 'the quasi-disembodied Eurocentric rational human-subject, which is as property-centred and exclusory as its broader ideological

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[277] Grear (n273), 361.

[278] ibid.

[279] Maurice Merleau-Ponty, 'An Unpublished Text by Maurice Merleau-Ponty: A Prospectus of His Work' in Maurice Merleau-Ponty (ed), *The Primacy of Perception* (Northwestern University Press 1964), 6.

[280] Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan 2010), 117.

[281] ibid.

[282] Will Adams, 'The Primacy of Interrelating: Practicing Ecological Psychology with Buber, Levinas, and Merleau-Ponty' (2007) 38 Journal of Phenomenological Psychology 24, 40.

[283] David Abram, *The Spell of the Sensuous: Perception and Language in a More-than-Human World* (Pantheon 1996), 57.

[284] Maurice Merleau-Ponty, *The Visible and the Invisible* (Alphonso Lingis tr, Northwestern University Press 1968), 110.

foundation in the liberal legal and political order as a whole'.[285] This archetype finds expression in a series of partial and partisan legal constructions of the body, which, taken together, weave a narrative of boundedness, autonomy, and commodification. Merleau-Ponty's interrelational ontology suggests a sharp departure from this paradigm, its rendering of the body as porous and receptive to external stimuli working to bring into relief the human subject's 'complex incarnate materiality in its context-mediated location in material and social space'.[286] Grear explores the juridical corollaries of this refocusing by bringing Merleau-Ponty into conversation with scholars seeking to trace the underpinnings of justice and law to embodied biological mechanisms shared between human and non-human species.[287] The pertinent studies build on findings from cognitive neuroscience, behavioural ecology, and evolutionary psychology which demonstrate that the comportment of human and non-human animals is shaped by analogous considerations, and that the human species has evolved and operates in a complex relationship with 'particular, identifiable processing mechanisms and physiological systems'.[288] These findings make clear how untenable it is to distinguish between human and other natural species, and, by extension, to abstract rationality, justice, and law from human embodied nature – or indeed from nature itself.[289] In response, Grear advocates an understanding of justice and law as essentially interrelational phenomena stemming from co-constitutive interactions between embodied entities:

> Law and justice emerge from these reflections as being mechanisms intimately related to the socio-biological evolution of human beings as embodied beings living in shared socio-material space and formed – intercorporeally in Merleau-Ponty's radical sense – by an engagement with each other and the world that is so intimate that behaviour patterns are internalised as part of our very encoding, and passed down through bodies and societal structures to undergird the unfolding of law and justice as aspects, in turn, of an inescapably embodied interrelationality.[290]

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[285] Anna Grear, 'Embracing Vulnerability: Notes towards Human Rights for a More-than-human World' in Daniel Bedford and Jonathan Herring (eds), *Embracing Vulnerability: The Challenges and Implications for Law* (Routledge 2020), 164, drawing on Jennifer Nedelsky, 'Law, Boundaries, and the Bounded Self' (1990) 30 Representations 162; and Peter Halewood, 'Law's Bodies: Disembodiment and the Structure of Liberal Property Rights' (1995) 81 Iowa Law Review 1331.
[286] Grear (n280), 123.
[287] ibid.
[288] Roger D Masters, 'The Problem of Justice in Contemporary Legal Thought' in Roger D Masters and Margaret Gruter (eds), *The Sense of Justice: Biological Foundations of Law* (SAGE Publications 1992), 8.
[289] Grear (n280), 124.
[290] ibid, 126.

Armed with this understanding of law and justice, Grear sets her sights on developing an 'ethically satisfying' theory of human rights.[291] To attain this aim, she must first address an apparent oversight in Merleau-Ponty's work: '[focusing] on the intentional and expressive body' while '[neglecting] the other side of sensibility, that is, sensibility as a condition of affectability', which is to say, 'a condition of non-intentional, heteronomous and more or less vulnerable openness to the surrounding world'.[292] In seeking to address this oversight in a manner that lends itself to human rights theory-building, Grear turns to Fineman's vulnerability thesis, a critical normative project which seeks to expose the failings of the liberal order and conjure an alternative foundation for the ethics underlying political and legal subjectivity.[293] Fineman's core claim is that the vulnerable subject must be placed 'at the center of our political and theoretical endeavours', being 'far more representative of actual lived experience and the human condition' than the autonomous liberal subject of the classical tradition, with its presumed self-reliance, capacity to make independent choices, and valorisation of contractual freedom.[294] It is hardly surprising that Grear would heed this call, Fineman's foregrounding of the vulnerable subject being in profound continuity with her own foregrounding of the embodied subject and its fleshly existence.[295] It is equally natural that the two theorists would, at least in the first instance, direct their reflection towards our commonly shared and enduring susceptibility to bodily harm. The disturbance of the lived body can take different forms, from hunger, thirst, and sleep deprivation to physical injury and illness. It can also have different causes, from the unleashing of natural forces and the passage of time to the simple fact of our presence in a world characterised by material unpredictability.[296] Thus conceptualised, embodied vulnerability is a universal predicament stemming from our 'common ontic condition of being human'.[297]

Similarly to Fineman, Grear regards this latter proposition as 'a suitable, conceptually compelling and direct foundation' for human rights.[298] She expands on this point through a critical engagement with the work of sociologist Bryan S Turner, who uses the notion of

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[291] ibid, 116.
[292] Veronica Vasterling, 'Body and Language: Butler, Merleau-Ponty and Lyotard on the Speaking Embodied Subject' (2003) 11 International Journal of Philosophical Studies 205, 214.
[293] Anna Grear, 'Vulnerability, Advanced Global Capitalism and Co-symptomatic Injustice: Locating the Vulnerable Subject' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate Publishing 2013), 42-43.
[294] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1, 2.
[295] Grear (n280), 128.
[296] Martha Albertson Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate Publishing 2013), 20.
[297] Grear (n280), 128.
[298] ibid, 129.

corporeal, ontological vulnerability as a tool for debunking the doctrine of cultural relativism and asserting the universality of human rights. Turner grounds his argument in the pan-human nature of two critical facets of vulnerability: pain and suffering. To experience the risks and perturbations associated with these harmful states is to partake in a 'community of sentiment' which stretches across generations and cultures.[299] It is also to need and desire, 'above all else, institutions that will give us some degree of security'.[300] This compels Turner to argue that our common embodied vulnerability – rather than our dignity and agency – must be recognised as the true underpinning of human rights.[301]

Grear shares Turner's preoccupation with pain and suffering, which is very much aligned with the *foci* of Fineman's vulnerability thesis. At the same time, she finds that it gives rise to a limited and limiting vision of vulnerability; one that portrays society as 'a pact of the insecure and suffering-prone, huddling together in the face of a dark, frightening world of risk and conflict'.[302] Markedly defensive, this construal fails to account for vulnerability's capacity to serve as 'the source of multiple forms of wellbeing and joy' as well as 'the basis of empathy and intimacy'.[303] In shedding light on these latter functions of vulnerability, Grear's work transcends vulnerability theory's narrowly-conceived quest for security and moves towards a wider, richer set of possibilities with radical implications for those toiling at the intersection of environmental and human rights law. By embracing, rather than resisting, vulnerability, we become alert and attentive to 'context, interaction, and interplay in the constitution of subjectivities – including legal subjectivities – thus opening law to a range of considerations hitherto systematically suppressed'.[304] This expansive awareness of the contextual-relational factors that shape the makeup of different entities provides us with a unifying point of departure and a recurrent guide for unpacking the pluralism of experience. On the one hand, it awakens us to the cross-cultural implications of our human commonality. On the other hand, it reminds us that this commonality is variably lived through, 'the vulnerabilities of different entities [having] differing nuances, interplay, orders of seriousness and complexity'.[305] Two sides of the same coin, these perspectives can help foster 'an ethic of true respect', whereby unevenly and dissimilarly vulnerable subjects can imaginatively empathise with each other's

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[299] Bryan S Turner, *Vulnerability and Human Rights* (Pennsylvania State University Press 2006), 35.
[300] Grear (n280), 127.
[301] A similar point is made by Baxi, who posits that 'human rights languages find their fulcrum point "at the surface of lived, and embodied, human anguish"': Upendra Baxi, *The Future of Human Rights* (OUP 2002), 198.
[302] Grear (n280), 129-130.
[303] ibid.
[304] ibid, 133.
[305] ibid, 128.

positions.[306] After all, 'radical particularity' is just as universal a human truth as corporeal vulnerability.[307]

But this is not where the possibilities generated by an ontic construal of vulnerability end. More directly linked to the central argument of this thesis, such a construal draws attention to the ties that bind human beings with other carbon-based life-forms and the ecosystems they form part of. This implies a conceptual and normative decentring of the human, not in neglect of its vulnerability, but in emphasis of the extent to which it is contingent upon the interchange between human and non-human bodies. Regarded through this relational lens, vulnerability emerges as an aspect of our 'natal eco-sociality'[308] and our 'mundane corporeal entanglements' with our non-human kin.[309] As such, it is a form of affectability intrinsic to all that which is material.[310]

In interpreting vulnerability in this way, Grear brings into relief 'multiple ethological and corporeal dynamics of connection', in the process steering vulnerability theory far beyond what Fineman and Turner had envisaged.[311] She navigates this new terrain with the help of New Materialist thought, which combines theoretical insights from Spinoza, Merleau-Ponty, and Deleuze and Guattari with trailblazing scientific developments to challenge 'received concepts of agency, action, and freedom',[312] and, with them, the orthodoxies of 'human exceptionalism and bounded individualism'.[313] Ethically speaking, the aim of this endeavour is to sensitise us to the vivacity of matter and to hone our ability to discern it.[314] A parallel is drawn to this end between the notions of 'agency' and 'affect', and the argument is made that, regardless of its form, matter is not the inert and submissive target of human deeds, but an agentic entity with the capacity to act, engender effects, and modify circumstances, as well as the tendency to coalesce into heterogeneous groupings.[315] Espousing this view leads us to concede that the distinction between an active, typically human subject and a passive, typically non-human object is utterly relative, 'the sort of world we live in [making] it constantly possible for these two sets of kinds to exchange properties'.[316]

This is not, however, to say that the subject/object distinction should be altogether abandoned. Rather, it should be 'flattened' and read 'horizontally as a juxtaposition' as

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[306] ibid, 134.
[307] ibid.
[308] Grear (n285), 160.
[309] ibid, 162.
[310] ibid, 168.
[311] ibid.
[312] Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Duke University Press 2010), 108-109.
[313] Grear (n285), 166.
[314] Bennett (n312), vii and 553-554.
[315] Grear (n285), 166.
[316] Bennett (n312), 451-453.

opposed to 'vertically as a hierarchy of being'.[317] For Bennett, who is a seminal proponent of New Materialism and one of Grear's key influences, this shift requires taking up a more ecological sensibility which meaningfully accounts for the close kinship between people and things. This means moving beyond well-trodden analytical formulas such as 'bounded individuals plus contexts' and 'organisms plus environments',[318] and towards a monistic ontological imaginary based on the principle that 'all things are interconnected'.[319] Like many other New Materialist thinkers, Bennett explores this prospect through the concept of assemblage, which goes beyond embodied intersubjectivity and towards the broader notion of intermateriality. The term is used to denote 'a material cluster of charged parts that have […] affiliated, remaining in sufficient proximity and coordination to function as a (flowing) system'.[320] Alive and lively, this system has an emergent coherence which endures alongside endogenous schisms and exogenous antagonisms.[321] And, while each of the system's constituent elements exercises its own agentic capacity, there is also an agency which is proper to the system itself. This Bennett refers to as 'the agency of assemblages: the distinctive efficacy of a working whole made up, variously, of somatic, technological, cultural, and atmospheric elements'.[322]

Grear's interest is piqued: if, as Bennett suggests, the *locus* of an assemblage's agency is always and necessarily 'a human-nonhuman working group',[323] then the same must be true of the locus of its vulnerability.[324] This realisation motivates anew Grear's thinking on human rights, which, in her most recent writings, gravitates towards a materialist politics. The crux of her argument is that, whilst '[h]uman exceptionalism [is] unsustainable, […] human distinguishability as particular but contingently understood and positioned diffractions of relationality remains meaningful and ethically important'.[325] By the same token, although it is perfectly legitimate, even imperative, for human rights analysis to maintain its special sensitivity to the affectability of human beings in any given situation, it is also essential that it become more responsive to the implications of their worldly embeddedness. For Grear, this requires resituating human rights as 'a form of juridical attentiveness to human "critters" in a

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[317] ibid, 9-10.
[318] Donna J Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Duke University Press 2016), 30-31.
[319] Jane Bennett, 'The Agency of Assemblages and the North American Blackout' (2005) 17 Public Culture 445, 463.
[320] ibid, 446.
[321] ibid.
[322] ibid, 447.
[323] Bennett (n312), 236-237.
[324] Grear (n285), 166.
[325] ibid, 167.

more-than-human world'[326] and as a specific way of asking 'the onto-political question of "who we are bound up with and in what ways"'.[327] Expanding the protective ambit of human rights in this direction carves out a clear space for law in the cultivation of human–non-human relationalities, multi-species partnerships and alliances, and mutually enabling practices of 'imagination, resistance, revolt, repair and mourning, and of living and dying well'.[328] It also creates a basis for calling upon bodies – whether human, institutional, or otherwise – 'to account for the ways in which they affect other bodies of *all kinds*'.[329] In turn, such an expansive notion and *praxis* of accountability makes possible '"wiser interventions" into the ecology of embodied entanglements at stake in any given question of injustice'.[330]

By 'wiser' Grear means interventions that reflect the idiosyncratic ways in which humans collectivise. The fact of these being shaped by the 'burdens and blessings of place' means that, whether one intends to merely accommodate them or to actively preserve or subvert them, one must engage meaningfully and responsibly with '"location" – with the "suchness" of the […] spaces in (and through) which we *are* in the world'.[331] This is where an awareness and understanding of the linkages between human activity and non-human actancy can prove especially useful: biotic and abiotic 'resources', weather patterns, natural events, diseases, and the relative availability of energy sources, modes of transport, and information and communication technologies all play a critical role in bringing humans together in particular ways, in the process producing differences of various hues[332] – differences that manifest themselves in spatial terms.

Recognising the potency of non-human actancy makes it possible to link Grear's work with that of critical ocean scholars, many of whom are employing concepts and approaches kindred to hers in an effort to unpick 'the affective and multisensory meanings and subjectivities produced by dwelling with the sea'.[333] The thesis argues that making this link renders it possible to conjure an understanding of maritime constituents not as separate from each other and from nature, but as part of a web of relationships of care, attachment, and interdependence. As the next two chapters will demonstrate, translating this relational understanding of the maritime *demos* into a human rights-based approach to the

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[326] ibid, 154 and 165.

[327] ibid, 154 and 167, citing Haraway (n318), 31.

[328] Haraway (n318), 42.

[329] Grear (n285), 170, citing Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press 2007), 1891; emphasis added.

[330] Grear (n285), 167, citing Bennett (n312), 353-355, 508-511.

[331] Grear (n276), 976; emphasis in the original.

[332] Levi R Bryant, *The Democracy of Objects* (Open Humanities Press 2011), 24-23,

[333] Rapti Siriwardane-de Zoysa and Anna-Katharina Hornidge, 'Putting Lifeworlds at Sea: Studying Meaning-Making in Marine Research' (2016) 3 Frontiers in Marine Science 197, 3.

normativisation of MSP calls for interventions to remediate vulnerability which do not stop at minimising harm and meeting fundamental needs, but rather seek to foster individual and collective autonomy and promote the development of individual and collective capabilities.

5. Conclusions

This chapter set out to uncover and challenge the cultural biases that have prevented Western societies from acknowledging the environmental, social, and political dimensions of ocean space in their full breadth. It did so on the assumption that these biases – and the cognitive, normative, and institutional path-dependencies they produce – are what lies behind exclusionary approaches to ocean governance. It is precisely this phenomenon and the implications that it holds for social-ecological well-being that the thesis seeks to counteract by advocating for a human rights-based approach to the normativisation of MSP.

The chapter began by recounting how the ungraspability of the marine element, and the translation of this quality into tropes of the sublime, gave rise to a frontierist ethos of optimism and expansion. Stemming from this ethos were econocentric and technocratic oceanic imaginaries, which dematerialised, homogenised, and hierarchised marine space with a view to adapting it to the exigencies of market capitalism. Still hegemonic, these imaginaries are clearly mirrored in the legal framework that underlies contemporary ocean governance. In fact, the very driver behind the elaboration of said framework was the need to strike a widely accepted balance between two equally economistic spatial narratives: the traditional, Grotian view of the ocean as 'an unclaimable, boundary-free surface for unimpeded movement'[334] and its more recent construal as a boundable space with the capacity to become a dynamic, growth-generating component of national territory.

The outcome of this balancing act is the intricate nexus of subjective, spatial, and relational categories embedded in the provisions of the LOSC. In examining the justice implications of this nexus we must not lose sight of the fact that it reflects delicate compromises worked out over decades of political dialogue and state practice. We must also bear in mind that, when the Convention was being elaborated, the ocean economy carried within itself the promise of a more equitable global order, which would enable developing countries to emancipate themselves from colonial dependency by harnessing the natural wealth of their territories and channelling it towards the well-being and prosperity of their peoples. However, if one sets aside these aspects of the negotiating history of the Convention

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[334] Steinberg (n73), 238.

and focuses on how its provisions are to be implemented within the geopolitical context of the present-day EU – a group of more or less industrialised, more or less affluent countries exhibiting a high level of political and socioeconomic integration – the pride of place afforded to sovereign preoccupations relating to economic growth assumes a more problematic hue.

Regarded through this latter prism, the LOSC's zonally-differentiated jurisdictional gradient appears to fall short of the mark of justice. This is because it fails to recognise the marine element for what it is: not merely a space of human 'crossings' and 'uses', but a disorderly, 'more-than-human' assemblage, reproduced by 'scientists, sailors, fishers, surfers, divers, passengers, and even pirate broadcasters as they interact with and are co-constituted by the universe of mobile non-human elements that also inhabit its depths, including ships, fish, and water molecules'.[335] In turn, this blindness towards the full range of subjectivities involved in the making of ocean space and the factors that mediate their exchanges acts to obscure embodied, emplaced connections to the sea. In light of the neuralgic position that the Convention occupies within the landscape of ocean governance, the thesis takes the view that this high-level erasure of individuals, communities, and groups from ocean spaces bears some of the responsibility for the patterns of exclusion and disenfranchisement being observed in MSP.

In response, the thesis proposes that we move towards a legal construction of ocean space which is alive to its rich sociality. This means going beyond the instrumentalist, utilitarian view of the ocean as an untapped treasure trove of solutions to rapidly escalating global challenges,[336] such as climate change, food and energy insecurity, natural-resource scarcity, and the need for improved medical care.[337] Though it goes a long way towards highlighting human societies' dependence upon the marine realm, this view falls short of transforming ocean spaces into bona fide peopled seascapes. Doing so would require a reframing of human-ocean interactions in novel terms of intersubjective – rather than inter-state – solidarity and shared stewardship. Human rights are well-suited to this task, but they come with their own complicated legacy which cannot be disregarded. Accordingly, the thesis advocates for a specific human rights narrative; one that recognises the ocean as both a host of, and an active participant in, morally and legally significant relationships. Chapter three will delve deeper into these relationships with the help of the academic discourse on social-ecological systems and the ecosystem approach.

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[335] Steinberg (n12), 157.

[336] John Hannigan, *The Geopolitics of Deep Oceans* (Polity Press 2016), 23.

[337] See, indicatively, OECD, *The Ocean Economy in 2030* (OECD 2016).

Chapter Three – The ecosystem approach in marine planning and management: From 'productively ambiguous'[1] to normatively productive

Justice is an integral feature of ecosystem governance because governance almost always has moral implications, be it changes in the distribution of rights and responsibilities, people's participation in decision making or the recognition of their particular identities and histories. As a consequence, ecosystem governance typically incorporates elements designed to serve justice, such as voluntary interactions between users and providers of ecosystem services or compensation mechanisms. Yet, the justice-relevant elements go beyond those explicitly dedicated to bringing about justice or avoiding injustice. They extend to ostensibly technical design features since those may cause effects on distribution, participation, or recognition.[2]

1. Introduction

The previous chapter sought to explain why the legal norms and institutions that form the backbone of contemporary oceans governance afford such limited attention to human rights and their relationship with the environment. The chapter also sought to determine the extent to which this indifference towards the human rights-environment nexus can be said to be conducive to the planning practices and outcomes problematised by critical MSP scholars. In pursuing these aims, the chapter followed a legal-geographic and relational line of inquiry.[3] This involved investigating the kinds of socio-spatial relations that produce and are produced

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[1] Vito De Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (2015) 27 Journal of Environmental Law 91, ch 10.
[2] Thomas Sikor and others, 'Toward an Empirical Analysis of Justice in Ecosystem Governance' (2014) 7 Conservation Letters 524, 529.
[3] The chapter took its cue from Nedelsky, who has devised a set of questions to facilitate the conduct of debates about the meaning and effects of law in relational terms. See, to this effect, chapter one, section 5.2.

by the law of the sea. It also meant considering what these relations convey about the values that the law of the sea is promoting. Having found the examined framework lacking, the chapter proceeded to make the case for an at least partial regrounding of oceans governance in human rights law, this having the potential to cultivate alternative values (and corresponding intra-human and human–non-human relations). The chapter went on to reiterate and corroborate one of the thesis' core claims: if human rights are to help bring about the envisaged change, our understanding of them must be centred around a relational ontology of self and space which highlights social-ecological vulnerability; that is to say, the affectability of human beings' manifold entanglements with each other and with their surrounding world. The chapter concluded by noting that the proposed reconstruction of our relationship with the ocean has the capacity not only to account for our dependence upon the marine environment, but also to uphold and nurture our attachment to it, as well as to strengthen our stewardship of it.

The present chapter explores how this project can be taken forward within and through the paradigm that underpins marine planning and management in the EU, namely, the ecosystem approach. The rationale behind this focus can be explained by reference to one of the defining features of the ecosystem approach: its irreducible multiplicity. As will soon become clear, how different constituencies understand the ecosystem approach is inescapably informed by their interests, their values, and the knowledge they draw from their personal experiences, the cultures they identify with, and the disciplines and sectors of socioeconomic activity they represent.[4] This pluralism has prevented the emergence of a single, universally agreed formulation of the aims, tenets, and means of implementation of the ecosystem approach[5] – a predicament that holds just as true in the legal realm, where the approach remains relatively new, as it does in the realm of environmental policy and management, where the approach has a much longer tradition.[6]

Focusing on the legal realm, what we are seeing at the international level is the parallel elaboration of the ecosystem approach in a number of 'subject- or theme-specific clusters of legal norms, principles and institutions'.[7] Oceans and fisheries form one such cluster, biodiversity another. Crucially, although there is increasing cross-pollination between the

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[4] De Lucia (n1), 100. See also R Edward Grumbine, 'Reflections on "What is Ecosystem Management?"' (1997) 11 Conservation Biology 41; Steven L Yaffee, 'Three Faces of Ecosystem Management' (1999) 13 Conservation Biology 713.
[5] UNGA, 'Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at Its Seventh Meeting' (17 July 2016) UN Doc A/61/156, para 6.
[6] David Langlet and Rosemary Rayfuse, 'The Ecosystem Approach in Ocean Planning and Governance: An Introduction' in David Langlet and Rosemary Rayfuse (eds), *The Ecosystem Approach in Ocean Planning and Governance: Perspectives from Europe and Beyond* (Brill Nijhoff 2019), 5.
[7] Vito De Lucia, *The 'Ecosystem Approach' in International Environmental Law: Genealogy and Biopolitics* (Routledge 2019), 63.

different clusters, there remain enough divergences for us to speak of regime-specific iterations of the ecosystem approach, each with its own lineage, emphases, terminology, and actor constellations. The thesis acknowledges that this is a complicating factor which casts doubt upon the normative potential of the ecosystem approach. At the same time, it argues that elasticity could prove to be a winning quality, enabling the ecosystem approach to serve as a platform for the deliberative production, contestation, and transformation of ideas about marine planning and management (including ideas about the values to be promoted, the relations to be fostered, and the legal discourses and practices that best lend themselves to the realisation of desired ends).

These preliminary observations form the basis of the chapter's structure and line of argument. These revolve around a juxtaposition between the conceptualisation of the ecosystem approach under EU marine environmental law (which is 'very much consistent with' its conceptualisation within the respective legal-institutional cluster at the international level)[8] and under international biodiversity law (which represents a markedly different paradigm of planning and management). The analysis is, accordingly, organised in two parts.

Section 2 picks up where the previous chapter left off,[9] assessing the extent to which the legal instruments and institutional arrangements that govern ecosystem-based marine planning and management in the EU can be said to be conducive to the planning practices and outcomes problematised by critical MSP scholars. The focus here is on the treatment that the relevant instruments and arrangements make of what we regard as significant (but habitually overlooked or misunderstood) relationships between human beings and the ocean. These include sensory, symbolic, and cognitive relationships that inform how human beings valorise the ocean, and socio-institutional relationships that inform how human beings manage ocean uses across space and time. The insights gleaned from this assessment will serve to further clarify and contextualise the pathogenies that the thesis proposes to address through a human rights-based approach to the normativisation of MSP.

Section 3 turns to the lessons that can be learned from international biodiversity law and in particular from the UN Convention on Biological Diversity (CBD).[10] It posits that, in recognising human beings and their cultural diversity as an integral component of many ecosystems, the guidance adopted under the CBD in relation to the ecosystem approach brings considerations pertaining to justice to the forefront of marine planning and management. It

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[8] Ronán Long, 'Legal Aspects of Ecosystem-Based Marine Management in Europe' (2012) 26 Ocean Yearbook 417, 476.
[9] See also chapter one, sections 3 and 4 and chapter two, section 3.2.2.
[10] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 69 (CBD).

further argues that, although this guidance is not written in the language of human rights, its allusions to notions of fairness, equity, vulnerability, empowerment, stewardship, and tenure resonate with the spatially-sensitive and relational understanding of human rights advanced in chapters one and two. In drawing this parallel, the section aims to show that law already provides tentative entry points for a normativisation of MSP along the lines envisaged in this study.

2. Ecosystem-based marine planning and management under EU law

Ecosystems are often described as our life-support systems, the benefits they provide being essential for humanity's survival.[11] Yet, as the twin processes of urbanisation and industrialisation continue to unfold, long-distance flows of people, goods, and information continue to increase, and dependence on trade in natural resources continues to grow, humanity's ecological footprint becomes ever more palpable.[12] Indeed, humanity's capacity to ineradicably transform the natural world of which it forms part is at the core of the much-discussed notion of the Anthropocene.[13] In turn, human-induced changes in the structure and functions of ecosystems reverberate back to society, with far-reaching implications for human well-being and development. This reciprocity is the defining characteristic of social-ecological systems, understood as 'complex adaptive [systems] that [include] social (human) and ecological (biophysical) subsystems in a two-way feedback relationship'.[14] The ecological and social subsystems function as 'a coupled, interdependent and co-evolutionary system'[15] and any attempt to delineate between them is perceived as artificial and arbitrary.[16]

Once we regard the ecosystem approach through a social-ecological lens, it becomes clear just how challenging its operationalisation is. Owing to their multidimensionality, dynamism, and interconnectedness, ecological systems tend to elude attempts at spatial and

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[11] Frank B Golley, *A History of the Ecosystem Concept in Ecology: More than the Sum of the Parts* (Yale University Press 1996).
[12] Eduardo S Brondizio, Elinor Ostrom and Oran R Young, 'Connectivity and the Governance of Multilevel Social-Ecological Systems: The Role of Social Capital' (2009) 34 Annual Review of Environment and Resources 253; Unai Pascual and others, 'Off-stage Ecosystem Service Burdens: A Blind Spot for Global Sustainability' (2017) 12 Environmental Research Letters 075001.
[13] Paul J Crutzen, 'The "Anthropocene"' in Eckart Ehlers and Thomas Krafft (eds), *Earth System Science in the Anthropocene* (Springer 2006).
[14] Fikret Berkes, 'Implementing Ecosystem-based Management: Evolution or Revolution?' (2012) 13 Fish and Fisheries 465, 468.
[15] ibid.
[16] Fikret Berkes, Johan Colding and Carl Folke, 'Introduction' in Fikret Berkes, Johan Colding and Carl Folke (eds), *Navigating Social-Ecological Systems: Building Resilience for Complexity and Change* (CUP 2002).

functional delineation. Comprehensive understandings of social structures and processes are equally difficult to arrive at, given human relations' intricacy and volatility. As Langlet and Rayfuse note, '[w]hen the complexities of the two systems – natural and social – are combined, the result is almost utterly incomprehensible'.[17] The authors go on to posit that, 'to effectively implement an ecosystem approach in any meaningful manner, both systems must be defined in such a way as to render them *manageable*'.[18] This observation compels us to view ecosystems

> as social constructs, and as the result of social processes – scientific, administrative, political – through which geographic areas are defined, desired ecosystem functions are articulated, and decisions are made regarding what to conserve, manage and monitor, in what manner, to what end, and for how long.[19]

It is precisely this process of social construction that the present section is preoccupied with. Its reflection focuses on how EU law transforms the complex social-ecological systems that are Europe's regional seas into ecosystems to be managed and spaces to be planned. Consistent with the previous chapter's line of analysis, legal construction is not regarded as a process operating in a vacuum. Rather, the focus is placed on how law interacts with other normative systems rooted in economic and technoscientific rationality to consolidate patterns of human-ocean interaction, rendering some types of interaction hegemonic and others subaltern. This cross-cutting perspective makes it possible to assemble a fuller, more rigorous account of law's contribution to two of the foremost relational shortcomings of the MSP processes taking place in Europe's regional seas: the failure to integrate different knowledge systems (section 2.1); and the failure to meaningfully involve stakeholders and the public (section 2.2). In the former instance, it will be shown that EU law is implicated by virtue of its kinship with scientific and technological-managerial rationality; in the latter, by virtue of having reconfigured the structures of decision-making without having addressed the implications this reshuffling may have for different actors on the ground.

Before proceeding any further, a note is warranted on the range of instruments discussed. To answer the question it has set for itself, the section need not duplicate existing

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[17] David Langlet and Rosemary Rayfuse, 'Challenges in Implementing the Ecosystem Approach: Lessons Learned' in David Langlet and Rosemary Rayfuse (eds), *The Ecosystem Approach in Ocean Planning and Governance: Perspectives from Europe and Beyond* (Brill Nijhoff 2019), 448.
[18] ibid; emphasis added.
[19] ibid.

efforts at identifying general[20] and sector-specific[21] challenges associated with the implementation of the ecosystem approach in the context of ocean governance. The section also need not provide an exhaustive appraisal of the legal framework that regulates marine management *lato sensu* in the EU – a framework so intricate that Boyes and Elliott have described its visual representation as 'the ultimate "horrendogram"'.[22] Rather, it suffices to concentrate on the two instruments that hold the greatest relevance to the planning processes taking place in Europe's regional seas: the Maritime Spatial Planning Directive (MSPD)[23] and the Marine Strategy Framework Directive (MSFD).[24] References will also be made to the regional cooperation structures through which Member States and third countries have been coordinating their efforts towards the sustainable management of their shared marine environment: the Regional Seas Conventions.[25]

2.1. The ecosystem approach as an exercise in scientific and technological-managerial rationality

The application of an ecosystem approach to marine planning and management is widely regarded as a knowledge- and information-intensive endeavour requiring understanding of the complex interactions between social and ecological systems, awareness of related limits and uncertainties, and attentiveness to change, whether that be past, ongoing or anticipated, incremental or abrupt.

As widely accepted as the need for a composite, social-ecological focus is, however, the scholarship and praxis of ecosystem-based marine planning and management remains closely attuned to the aims, premises, methods, and results of applied natural-scientific

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[20] See indicatively David Langlet and Rosemary Rayfuse (eds), *The Ecosystem Approach in Ocean Planning and Governance: Perspectives from Europe and Beyond* (Brill Nijhoff 2019).
[21] See indicatively Daniela Diz Pereira Pinto, *Fisheries Management in Areas beyond National Jurisdiction: The Impact of Ecosystem Based Law-making* (Martinus Nijhoff Publishers 2012).
[22] Suzanne J Boyes and Michael Elliott, 'Marine Legislation - The Ultimate 'Horrendogram': International Law, European Directives & National Implementation' (2014) 86 Marine Pollution Bulletin 39.
[23] Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning [2014] OJ L 257/135 (MSPD).
[24] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy [2008] OJ L 164/19 (MSFD).
[25] Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (adopted 16 February 1976, amended 10 June 1995, entered into force 9 July 2004) 1102 UNTS 27; Convention on the Protection of the Marine Environment of the Baltic Sea Area (adopted 9 April 1992, entered into force 17 January 2000) 1507 UNTS 167 (Helsinki Convention); Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted 22 September 1992, entered into force 25 March 1998) 2354 UNTS 67 (OSPAR Convention); Convention on the Protection of the Black Sea against Pollution (adopted 26 November 1992, entered into force 15 January 1994) 1764 UNTS 3 (Bucharest Convention).

inquiry.[26] Spanning several different branches of life and physical science research, the disciplines relied upon are seen as possessing a set of idealised properties which render them uniquely able to identify and unpick patterns in environmental conditions, explicate any shifts that these patterns may be undergoing, and appraise the resulting implications at different ecologically meaningful scales. Among these properties is a commitment to a systematic and reproducible mode of knowledge acquisition at whose centre lies the careful observation of environmental phenomena and the application of rigorous scepticism about what is observed, given that cognitive assumptions can distort how one interprets what one perceives. This initial scrutiny is followed by the formulation of hypotheses, the experimental and measurement-based testing of deductions drawn from the hypotheses, and the refinement (or elimination) of the hypotheses based on experimental findings. The results arrived at through this process are eventually opened to validation by peer review, which adds credence to the natural-scientific community's claims to transparency and to professional independence, objectivity, and accountability.[27]

Research conducted and corroborated along these lines has been essential to the deployment of conservation-oriented area-based management tools, such as marine protected areas. However, as ecosystem-based marine planning and management become increasingly concerned with cross-sectoral coordination, it is possible to observe an emerging interest in the insights offered by economists, who 'can estimate the value of ecosystem services and provide cost-benefit analyses', and by engineers and technologists, 'who are able to come up with new development concepts for harnessing the potential of the ocean economy'.[28] This last occurrence has been attributed to the propagation of 'blue growth' and 'blue economy' discourses, which are working to reframe human-ocean interactions in terms of 'entrepreneurship, technological innovation, multi-use offshore platforms, and new harvesting and cultivation strategies'.[29] The natural sciences remain relevant in this new context, but, rather than the conservation of species and habitats or the long-term maintenance of ecosystem stability, their findings are used to support the sustainable exploitation of finite natural resources.

For their part, though not entirely absent from conservation and exploitation-oriented approaches to ecosystem-based marine planning and management, the social sciences 'tend to

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[26] Robin Gregory and others, 'Some Pitfalls of an Overemphasis on Science in Environmental Risk Management Decisions' (2006) 9 Journal of Risk Research 717, 719.
[27] Andrew Stirling, 'On Science and Precaution in the Management of Technological Risk: Volume I - A Synthesis Report of Case Studies' (Institute for Prospective Technological Studies 1999), 5.
[28] Peter Arbo and others, 'The Transformation of the Oceans and the Future of Marine Social Science' (2018) 17 Maritime Studies 295, 296.
[29] ibid.

be reduced to an uncritical science of indicator development and social impact analysis'.[30] As for non-scientific knowledges and the insights they have to offer into the social and cultural connections between people and the sea, these are customarily relegated to the status of anecdotal information, fated to fade into obscurity unless corroborated by 'hard' data.

These broad trends – namely the enduring prevalence of the natural sciences, the growing currency of economic and technological disciplines, and the marginalisation of social-scientific perspectives and non-scientific knowledges – are a central research topic within critical MSP studies. Commentators are noting that, on paper, MSP is depicted as a *public* process through which to analyse and regulate the spatial and temporal distribution of human activities with a view to advancing *politically determined* ecological, economic, and social objectives.[31] It is equally, and somewhat contradictorily, championed as 'a *practical* way to create and establish a more *rational* organization of the use of marine space'.[32] It is this functionalist construal of MSP that appears to predominate on the ground, acting to subject planning initiatives to the logic of scientific and managerial expertise and to 'other' and side-line 'alternative claims to representing reality and […] ways of knowing'.[33]

This tendency can be traced to the modernist lineage of the paradigms of environmental management and economic development within which MSP is grounded, and of planning theory and practice more generally.[34] As a project rooted in Enlightenment ideals, modernism subscribes to a view of the natural as distinct and separate from the human and as amenable to its control.[35] It also propagates a narrow, instrumental understanding of reason, geared towards practical utility;[36] that is, towards the pursuit of 'the most efficient means for reaching a given end'.[37] These predilections lead to the valorisation of those '[forms] of knowledge which [cope] most proficiently with the facts and [support] the individual most effectively in the mastery of nature'.[38] This, in turn, gives rise to a presumption of knowledge-

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[30] ibid. See also Joanna Endter-Wada and others, 'A Framework for Understanding Social Science Contributions to Ecosystem Management' (1998) 8 Ecological Applications 891.

[31] Charles Ehler and Fanny Douvere, 'Marine Spatial Planning: A Step-by-step Approach toward Ecosystem-based Management' (IOC-UNESCO 2009), 18.

[32] ibid; emphasis added.

[33] Yvonne Rydin, 'Re-examining the Role of Knowledge within Planning Theory' (2007) 6 Planning Theory 52, 53. See also Ralph V Tafon, 'Taking Power to Sea: Towards a Post-structuralist Discourse Theoretical Critique of Marine Spatial Planning' (2017) 36 Environment and Planning C: Politics and Space 258.

[34] Greg Young, *Reshaping Planning with Culture* (Ashgate Publishing 2008), 44.

[35] Mary G Wallace and others, 'Moving toward Ecosystem Management: Examining a Change in Philosophy for Resource Management' (1996) 3 Journal of Political Ecology 1.

[36] Max Horkheimer and Theodor W Adorno, *Dialectic of Enlightenment* (Continuum 1993), 6.

[37] Wallace and others (n35), paraphrasing Laurence H Tribe, 'Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality' (1973) 46 Southern California Law Review 617, 618.

[38] Horkheimer and Adorno (n36), 82-83.

enabled and knowledge-sustained progress which has consistently served to validate the process of planning and its outcomes. In the words of Rydin,

> [t]he notion of progress is inherent to modernism so that as knowledge accretes over time, societal improvement follows from the use of more and better knowledge through planning. Planning practice has, therefore, seen itself as a user of knowledge in the pursuit of progress. The status of planners as experts resides in their command of specialist knowledge.[39]

Planning is, thus, one of the many fields of professional practice governed by 'technical rationality', understood as 'a model of instrumental problem-solving made rigorous by the application of scientific theory and technique'.[40]

Yet it cannot be denied that the shift in philosophical thought from modernism to post-modernism over the latter decades of the twentieth century 'brought with it fundamental questioning of the very notion of impartial rationality in planning processes'.[41] It was posited that knowledge was not universal and singular, but context-specific and particular, its (re)production a continuous, pluralistic, and profoundly power-laden venture. This discourse gave rise to a new understanding of the planning process, which cast 'the planner as a communicator and mediator between different interests, and planning as a transactive process aimed at fostering communicative or collaborative action'.[42]

Parallel to this, the neighbouring realm of environmental management underwent its own post-modern reckoning. Scientific and expert knowledge became regarded as only one of several elements feeding into environmental policy, which ultimately constitutes an expression of a public choice between multiple alternative options with varying implications for social-ecological well-being.[43] The role of science thus changed from 'provider of truth' to '[provider of] transparency about trade-off choices', while public participation emerged as the legitimating anchor of environmental decision-making.[44] This implied a reconsideration of the traditional, linear configuration of the science-policy interface, whereby scientific knowledge

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[39] Rydin (n33), 53.

[40] Leonie Sandercock, *Cosmopolis II: Mongrel Cities of the 21st Century* (Continuum 2003), 66, drawing on Donald A Schön *Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions* (Jossey Bass 1987).

[41] Sue Kidd and Geraint Ellis, 'From the Land to Sea and Back Again? Using Terrestrial Planning to Understand the Process of Marine Spatial Planning' (2014) 14 Journal of Environmental Policy & Planning 49, 55.

[42] ibid.

[43] R Edward Grumbine, 'What Is Ecosystem Management?' (1994) 8 Conservation Biology 27; Oran R Young and others, 'Solving the Crisis in Ocean Governance: Place-Based Management of Marine Ecosystems' (2007) 49 Environment: Science and Policy for Sustainable Development 20.

[44] Paulina Ramírez-Monsalve and others, 'Ecosystem Approach to Fisheries Management (EAFM) in the EU – Current Science–Policy–Society Interfaces and Emerging Requirements' (2016) 66 Marine Policy 83, 88.

production precedes and is independent from policy-making, while the public is limited to exercising political pressure through lobbying.[45] In its place was proposed a broadly inclusive model of deliberation, which would allow scientific and expert knowledge to interact and become integrated with 'experiential, place-specific and user-based knowledges'.[46] Such are the knowledges held by long-time community residents, indigenous populations with special interests in cultural uses of environmental resources, and resource users with specialised knowledge, such as farmers or hunters.[47]

However, as already noted, the practice of ecosystem-based MSP remains far removed from these environmental and spatial management paradigms, embracing instead 'a positivist and rationalist evidence-based epistemology'.[48] Tafon and Flannery et al. characteristically speak of MSP as 'a form of post-political planning', which seeks '[to produce] managerial-technological fixes for complex socio-environmental conflicts'.[49] The authors add that, although public participation is widely considered to be a key stage in the planning process, the actors engaged are actually 'expected to divest themselves of their power resources to collaboratively develop, at least on the surface, "win-win" outcomes'.[50] Kidd and Ellis explicate this distortion of participatory engagement by reference to the paradoxical origins of MSP: having been 'born in an era where neo-liberalism […] is the dominant organizing principle, [MSP] has been justified within a discourse of ecological modernization, that facilitates reform of environmental governance while leaving many of the dominant unsustainable practices to continue'.[51] In other words, MSP's dual focus on preventing, mitigating, and resolving resource conflicts and preserving the ecological health of marine areas functions as a distraction from the fundamental irreconcilability of economic growth and ecological sustainability, which remains unacknowledged and unaddressed. This being the political end that dictates the epistemological means, MSP puts scientific and expert knowledge to the task of weaving optimistic – and, hence, legitimating – narratives of

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[45] Marta A Ballesteros, Jose L Santiago and Rose Chapela, 'New Dance, Old Steps? Co-creation for the Ecosystem Approach to Management' (ICES 2014); Ramírez-Monsalve and others (n44).

[46] Tafon (n33), 265. See also Terence P Hughes and others, 'New Paradigms for Supporting the Resilience of Marine Ecosystems' (2005) 20 Trends in Ecology & Evolution 380; Jake Rice and others, *Guidance on the Application of the Ecosystem Approach to Management of Human Activities in the European Marine Environment* (ICES 2005); Judith A Layzer, *Natural Experiments: Ecosystem-based Management and the Environment* (MIT Press 2008); Derek R Armitage and others, 'Adaptive Co-management for Social-Ecological Complexity' (2009) 7 Frontiers in Ecology and the Environment 95; Rydin (n33).

[47] D Scott Slocombe, 'Lessons from Experience with Ecosystem-based Management' (1998) 40 Landscape and Urban Planning 31; Gregory and others (n26).

[48] Tafon (n33), 261.

[49] Wesley Flannery, Noel Healy and Marcos Luna, 'Exclusion and Non-participation in Marine Spatial Planning' (2018) 88 Marine Policy 32, 32; Tafon (n33), 259.

[50] Flannery, Healy and Luna (n49), 33.

[51] Kidd and Ellis (n41), 52.

synergies and virtuous cycles, while the knowledges that can expose and help address injustices are peripheralised or, worse, erased.

For its part, law does not passively reflect these patterns of knowledge production and utilisation; it actively nurtures and promulgates them. More specifically, law works to shape and consolidate perceptions of what constitutes valid – and, hence, policy- and management-relevant – knowledge. This it does by enshrining environmental quality objectives, targets, and indicators, which, being technocratically formulated, leave important aspects of social-ecological well-being unaccounted for. Furthermore, law establishes obligations relating to the use of 'best available data' and 'recognised scientific methods' which underplay the complexity of related political-scientific debates and negate the inherent multiplicity of knowledge. Equally problematic is the fact that law relies for its implementation on geospatial tools and applications which, though seemingly neutral, are actually profoundly value- and power-laden. Finally, though not exhaustively, law portrays the participating public as a collective of 'concerned' or 'affected' parties rather than as holders of 'experiential, grounded, contextual, intuitive knowledges' to be integrated into the evidence base of environmental and spatial decision-making.[52]

Chapter two already foreshadowed the centrality of the above-outlined tendencies and tropes to the politico-legal framework that underpins ecosystem-based MSP in the EU. Before delving more deeply into the pertinent instruments, it is worth considering the wider normative, discursive, and institutional context that has shaped their content and implementation. A natural point of departure are the Lisbon and Gothenburg strategies, which set out the broad priorities and parameters of Union action for the period 2000-2010 – a formative time in the evolution of EU marine and maritime policy. The former instrument famously sought to make Europe 'the most competitive and dynamic knowledge-based economy in the world';[53] the latter to assert and clarify the environmental dimension of this long-term development vision.[54] The two strategies accorded pride of place to knowledge-based innovation, entrusting it with an integrative, conciliatory function. The goods and services accruing from it would work to simultaneously create new employment opportunities, streamline production processes, increase resource efficiency, strengthen the Union's competitiveness within global markets, and improve European citizens' quality of life.

This rhetoric of innovation-based synergies was echoed by the Lisbon Strategy's successor, namely the 'Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth'

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[52] Leonie Sandercock, *Towards Cosmopolis: Planning for Multicultural Cities* (John Wiley 1998), 30.
[53] European Council, Presidency Conclusions, Lisbon European Council, 23-24 March 2000, para 5.
[54] European Council, Presidency Conclusions, Gothenburg European Council, 15-16 June 2001.

(2011-2020).[55] One of the flagship initiatives deployed to deliver the objectives of this last instrument was the 'Innovation Union'. In addition to stimulating and buttressing economic development,[56] this scheme was expected to help address pressing societal and environmental challenges, including 'climate change, energy and resource efficiency, health and demographic change'.[57] Its implementation was to involve, among other things, the launch of multi-level innovation partnerships, the improvement of regulatory and financial framework conditions, the promotion of science-, math-, and engineering-related fields of study, the enhancement of digital literacy and accessibility, and the completion of the 'European Research Area',[58] an initiative launched under the Lisbon Strategy to facilitate the transition to a 'knowledge-based economy and society'.[59]

It was against this background that the constellation of instruments making up the EU marine and maritime policy had its 'big-bang' moment. Its early nucleus, the 2007 Integrated Maritime Policy, included 'excellence in marine research, technology and innovation' among its founding aspirations and identified the establishment of a robust 'knowledge and innovation base' as an area of priority action.[60] It justified the significance attached to this latter task in terms consistent with the core premises of the Lisbon and Gothenburg strategies: '[b]y helping us to develop a more sophisticated understanding of the impact of human activities on marine systems, scientific research and technology provide the key to decoupling the development of sea based activities from environmental degradation'.[61] This technoscientific framing of sustainability became a *locus communis* of EU marine and maritime policy discourse, appearing in, inter alia, the European Strategy for Marine and Maritime Research,[62] a Communication setting out actions to be taken by the Commission to promote innovation in

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[55] Commission, 'EUROPE 2020: A Strategy for Smart, Sustainable and Inclusive Growth' COM (2010) 2020.

[56] ibid, 5.

[57] ibid, 12.

[58] ibid, 12-13.

[59] Commission, 'Towards a European Research Area' COM (2000) 6 final.

[60] Commission, 'An Integrated Maritime Policy for the European Union' COM (2007) 575 final, 11.

[61] ibid.

[62] Commission, 'A European Strategy for Marine and Maritime Research: A Coherent European Research Area Framework in Support of a Sustainable Use of Oceans and Seas' COM (2008) 534 final, 5.

the blue economy,[63] the Communication that launched the preliminary phase of the Marine Knowledge 2020 initiative,[64] and the one that initiated the debate on its follow-up.[65]

In all these instances, knowledge and innovation were cast as catalysts of virtuous cycles and as vehicles of inclusion, mediation, and integration. Research agendas were to be cross-sectoral and inter-thematic in their focus, while efforts would be undertaken to foster collaboration between the marine and maritime research communities, interdisciplinarity being a *conditio sine qua non* for '[addressing] system complexity, [developing] a better understanding of the interactions between maritime activities as well as [predicting and mitigating] the effects of climate change'.[66] An analogous emphasis was placed on bridging the divide between science, innovation, and policy-making, and on bringing about new, consensus-seeking and partnership-based forms of research governance. The envisaged arrangements would 'establish a continuous dialogue between scientists, policymakers, industrialists and representatives from society', thus helping to 'achieve shared understanding and informed decision-making based on sound scientific knowledge'.[67] This dialogue would, in turn, be facilitated and undergirded by a robust, transparent, and user-empowering informational infrastructure, wherein data would be 'easily accessible, interoperable and free of restrictions on its use'.[68]

It follows that EU marine and maritime policy have, from the outset, been broadly aligned with the modernist ideal of knowledge-enabled and knowledge-sustained progress. Yet, as noble as this ideal may be, it can be problematised on a number of different grounds. The first concerns its narrow construal of the aims – and, hence, the epistemological underpinnings and exigencies – of ecosystem-based marine planning and management, and how this construal becomes reflected in law. This point can be explored against the background of the MSFD. The Directive requires Member States to set up national strategies to achieve (and, where it already exists, to maintain) good environmental status in their marine waters. As a first step to this end, Member States sharing a marine region or subregion must undertake an assessment of the essential features of their waters, identify the predominant pressures and

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[63] Commission, 'Innovation in the Blue Economy: Realising the Potential of Our Seas and Oceans for Jobs and Growth' COM (2014) 254 final/2.

[64] Commission, 'Marine Knowledge 2020: Marine Data and Observation for Smart and Sustainable Growth' COM (2010) 461 final. It bears noting that the Communication cast knowledge-based innovation as a key element for achieving 'good environmental status of marine waters, in accordance with the [MSFD]' and 'smart growth […] in line with the "Europe 2020" strategy', which had by then succeeded the Lisbon Strategy: COM (2010) 2020 (n55).

[65] Commission, 'Marine Knowledge 2020: From Seabed Mapping to Ocean Forecasting' COM (2012) 473 final.

[66] COM (2008) 534 final (n62), 7.

[67] ibid, 4 and 11.

[68] Commission, 'Marine Knowledge 2020: Roadmap' SWD (2014) 149 final, 4.

impacts on those waters, and carry out a socio-economic analysis of their use and of the cost of environmental degradation.[69] They are further to determine a set of characteristics for good environmental status and establish a comprehensive set of environmental targets and associated indicators to guide progress towards their attainment.[70] Following this, Member States must establish and implement coordinated monitoring programmes for the ongoing assessment of the status of their marine waters, as well as draw up programmes of measures setting out the actions to be taken in order to achieve or maintain good environmental status.[71]

What constitutes good environmental status is to be determined on the basis of the qualitative descriptors laid down in Annex I of the Directive, the indicative lists of ecosystem features and of anthropogenic pressures and impacts laid down in Annex III, and the criteria and methodological standards laid down in subsequent guidance issued by the European Commission.[72] A review of the pertinent provisions reveals that they all revolve around elements believed to be essential to marine ecosystems' capacity 'to function fully and to maintain their resilience to human-induced environmental change'; that is, around marine ecosystems' structure, function and processes, associated physiographic, geographic, geological and climatic factors, and related hydro-morphological, physical and chemical properties, including those that result from human activities.[73] This finding adds credence to the point made earlier with respect to law's propensity to cast natural-scientific knowledge as the principal basis for the identification of environmental management needs and goals. It also attests to the epistemological implications of narrow legislative framings of the human element. Indeed, although the achievement and maintenance of good environmental status is recognised as a precondition for the enjoyment of marine ecosystem goods and services by present and future generations,[74] the notion itself is a purely ecological one. In pinning down its precise parameters, Member States are to approach human societies first and foremost as culprits of environmental harm. This serves to obscure significant dimensions of the interplay between social and ecological systems, as well as the humanistic, social-scientific, and non-scientific knowledges required for their unpicking.

The second ground of our critical appraisal relates to the assumptions that policy and legal instruments make about the rationality and value-neutrality of natural-scientific knowledge, and its amenability to conceptual and methodological standardisation. The MSFD

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[69] MSFD, art 8.
[70] MSFD, arts 9 and 10.
[71] MSFD, art 13.
[72] Commission Decision (EU) 2017/848 of 17 May 2017 laying down criteria and methodological standards on good environmental status of marine waters and specifications and standardised methods for monitoring and assessment, and repealing Decision 2010/477/EU [2017] OJ L 125/43 (GES Decision).
[73] MSFD, art 3(5).
[74] MSFD, arts 1(3) and 3(5).

can, once again, be taken as a case in point. Its Preamble sets a clear tone, underscoring that Member States' programmes of measures will be effective only if 'they are devised on the basis of a *sound knowledge* of the state of the marine environment in a particular area and are tailored as closely as possible to the needs of the waters concerned' – needs which, it bears reiterating, must be analysed through an ecoregionally-conscious lens.[75] Action should accordingly be taken towards 'the preparation at national level of an appropriate framework, including marine research and monitoring operations, for *informed* policy-making'.[76] In translating these broad stipulations into concrete and practicable obligations, the Directive's operative provisions rely on a number of evocative leitmotifs: *consistency* (of environmental targets, assessment methodologies and monitoring methods at the ecoregional level);[77] *compatibility* (between the environmental targets adopted under the MSFD and those adopted under other instruments of international and EU law; among monitoring programmes at the ecoregional level);[78] *coherence* (of marine strategies and programmes of measures at the ecoregional level; of protected area networks);[79] *comparability* (of assessment approaches and methods within and between marine regions and/or subregions);[80] and *coordination* (of various actions among Member States and, to the extent possible, between Member States and third countries having sovereignty or jurisdiction over waters in the same marine region or subregion).[81] An equally important leitmotif – though one enshrined in the Commission's guidance rather than the MSFD itself – is that of *best available science*, which alludes to the standards of excellence that must underpin the establishment of threshold values through Union, regional or subregional cooperation.[82]

Notwithstanding this strive for harmonisation and systematisation, a number of important challenges remain to be addressed. These were brought into stark relief by the Commission's appraisal of the progress achieved during the first implementation cycle of the MSFD (2012-2018).[83] Of the definitions of good environmental status reported by the Member States, only 8% were evaluated as adequate. This was largely due to the definitions' predominantly qualitative nature, which was deemed inconducive to the setting of clear and measurable environmental targets. Another issue was the apparent conflation between, on the

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[75] MSFD, recital 23; emphasis added.
[76] ibid; emphasis added.
[77] MSFD, arts 8(3)(a), 9(3) and 11(2)(a); annexes IV and V.
[78] MSFD, arts 10(1) and 11(1); annexes IV and V.
[79] MSFD, arts 5(2), 11(2)(a), 12, 13(4) and 16.
[80] MSFD, arts 9(3) and 11(2)(a) and (4); annex V.
[81] MSFD, arts 5(2), 6, 8(3), 11(1)-(2) and 17(2); annexes II and VI.
[82] GES Decision, art 4(1)(g).
[83] Commission, 'Report from the Commission to the European Parliament and the Council on the Implementation of the Marine Strategy Framework Directive (Directive 2008/56/EC)' COM (2020) 259 final.

one hand, the substantive characteristics on the basis of which good environmental status is to be conceptualised and, on the other, the operational targets on the basis of which its attainment is to be assessed. These trends were among the primary factors responsible for the variability observed across the Member States' initial definitions of good environmental status, which was considerable despite the steps taken towards the elaboration of region-wide indicators and threshold values. They also contributed to inconsistencies in the Member States' monitoring and reporting practices. Working to further exacerbate these were the ambiguities surrounding the notion of 'measure', as well as the inherent difficulty of evaluating a measure's success, both individually and in its interaction with other measures. Furthermore, and crucially for present purposes, the issues of measurability and consistency were found to be inextricably linked with that of ambition, which is political rather than scientific in nature. The Commission noted in this regard that the proximity of the 2020 deadline and the prospect of infringement proceedings being brought against them had made Member States reluctant to set bold threshold values for the determination and assessment of good environmental status.[84]

The issues just outlined could be dismissed as growing pains, a natural corollary of the 'broad ambition and holistic view of the MSFD'.[85] The thesis resists this temptation. Instead, it attributes the challenges that afflict the implementation of the MSFD to a more fundamental problem, namely the absence of a universally held and readily deployable natural-scientific orthodoxy. It is submitted that, as this ideal dissolves, what comes into view is an irreducible doctrinal and methodological pluralism which must be accommodated and grappled with. This is not to discount the usefulness of the guidance issued by the Commission with respect to the determination of good environmental status.[86] Nor is it to diminish the importance of the MSFD Common Implementation Strategy, under whose rubric technical expert groups are working towards the standardisation of target-setting, monitoring, and assessment methodologies. Rather, it is to underscore that the development of a shared code of communication for ecosystem-based marine management in the EU will necessarily be a gradual, iterative process. It is also to advocate for this process being more cognisant of, and more receptive to, alternative ways of knowing.

The third ground of our critique pertains to the aims that motivate the Union's marine and maritime policy and how these work to shape the expectations placed upon marine knowledge and upon the informational and technological apparatuses involved in its production, dissemination, and utilisation. Starting with the first piece of this puzzle, the politics, we may note that, over the past two decades, the Commission has endeavoured to

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[84] ibid, 25.
[85] ibid, 24.
[86] As encapsulated in the GES Decision.

transform the relationship between ocean-based economic growth and marine ecological integrity from one of tension/conflicts to one of balance/synergies. The means of this transformation have been predominantly discursive in nature, with the Commission employing a rich repertoire of mediating tropes to cultivate faith in the possibility of these two competing sets of priorities being reconciled. One such trope are the positive qualifiers that have routinely been attached to marine data ('easily accessible', 'interoperable', 'free from restrictions on its use'), information ('timely', 'accurate') and knowledge ('sound'), which have worked to instil a sense of optimism about the prospect of advancing economic development in tandem with environmental protection.

However, upon closer scrutiny, this assuaging narrative appears to be rather disingenuous, more rhetoric than reality. Underlying the pertinent policy documents is a deep preoccupation with realising the economic potential of Europe's seas. To the extent that environmental concerns enter the picture, it is to indicate the outer limits of the Union's developmental aspirations and, hence, to legitimise them. This uneven dynamic holds important implications for the instrumentalisation of ocean observation systems and marine data infrastructures. To be sure, these geospatial tools are consistently linked to the implementation of ecosystem-based marine management. At the same time, the Commission harbours a deep fascination with their economic promise, crediting them with the capacity to reduce investment risk by improving understanding of the feedbacks between human activities and marine ecosystems; improve the productivity of their users by preventing the duplication of efforts and lowering data processing costs; streamline the licensing, design, construction, and operation of offshore installations; and stimulate innovation by allowing new market entrants to engage in value-adding activities and enabling the development of products and services built on multiple data sources.[87] In performing these functions, geospatial tools can help pull uneconomic sectors into the zone of profitability and create high value jobs in the blue economy, with the latter outcome being identified as 'the main social impact' of Union initiatives in the area of marine science and research.[88] Moreover, and importantly, these economic and employment gains, together with the greater and wider availability of information on the marine environment and its uses, can, in the long run, foster 'public support and acceptance of the blue economy'.[89]

While positive on their surface, these statements on the power of marine data, information, and knowledge to both catalyse and legitimise the blue economy convey the impression of a *fait accompli*. That is, they make it seem as though the desirability of an ocean-

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[87] COM (2012) 473 final (n65).
[88] SWD (2014) 149 final (n68), 27.
[89] ibid, 27-28.

based economic growth model has already been deliberated upon and accepted. As already discussed, however, the critical turn in MSP studies tells a very different story.[90] This brings us to the fourth issue that the thesis seeks to draw attention to, which relates to the relationship that the European public is believed to have with marine data, information, and knowledge. It bears noting in this respect that the Commission refers to access to information as 'a public good'[91] and highlights its role in '[enhancing] public engagement with marine issues'.[92] Three particular manifestations of this role are emphasised: enabling citizens to engage public authorities in an 'informed debate' on ocean conservation and use; allowing them to challenge 'expert pronouncements' on the state of marine resources and the environmental impact of maritime activities;[93] and making it possible for them to '[hold] their elected representatives to account on issues that affect their neighbourhood, their livelihoods, their health, or [the environment]'.[94]

The thesis seeks neither to challenge the validity of these contentions nor discount the critical contributions that informed individuals, communities, and groups can and do make to environmental and spatial decision-making. What the thesis does take issue with is the portrayal of citizens only as consumers and users – rather than also as holders and providers – of information. Granted, the Commission noted that assembling the technical background of different management issue areas is not a task to be entrusted exclusively to public authorities.[95] What it proposed in response is, however, far from a radical overhaul of existing arrangements. Rather, the Commission outlined the benefits of gaining access to the data that private companies were already collecting for the purposes of marine licensing processes (e.g., when carrying out environmental impact assessments).[96] It also considered the prospect of introducing stronger reporting obligations for licensees and of instrumenting offshore platforms to provide continuous information on the state of the marine environment.[97] Absent from the Commission's suggestions was any reflection on the types of data that members of the public are uniquely, perhaps even exclusively, capable of contributing.

The practical ramifications of this technocratic mentality can be illustrated through the example of the European Observation and Data Network (EMODnet). Launched under the rubric of the Commission's Marine Knowledge 2020 initiative, EMODnet is a consortium of organisations working together to make available 'quality-assured, standardised and

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[90] See chapter one, section 4 and chapter two, section 3.2.2.
[91] COM (2010) 461 final (n64), 3.
[92] SWD (2014) 149 final (n68), 27-28.
[93] ibid.
[94] COM (2012) 473 final (n65), 8.
[95] ibid.
[96] ibid, 18.
[97] ibid, 18-19.

harmonised marine data which are interoperable and free of restrictions on use'.[98] Upon its establishment, the consortium was tasked with developing and providing access to a multi-resolution digital map of the European seabed covering topography, geology, habitats, and ecosystems. This was to be accompanied by timely observations and information on the physical, chemical, and biological state of the overlying water column, as well as by oceanographic forecasts and data relating to human activities and their impacts on the marine environment.[99] The result of this endeavour is a budding data management infrastructure, currently organised around seven discipline-based themes: bathymetry, geology, seabed habitats, chemistry, biology, physics, and human activities.[100] For each of these themes, EMODnet has created an online gateway to a range of data archives managed by local, national, regional, and international organisations. Through these gateways, users have unrestricted access to standardised observations, data quality indicators, and processed data products, such as basin-scale maps. Moreover, a number of 'Sea-basin Checkpoints' have been charged with periodically assessing the extent to which monitoring systems and data collection frameworks meet the needs of users in industry, public authorities, and the research community.

The establishment of EMODnet has undoubtedly fostered coordination between EU laws and policies of relevance to the sea, as well as between large-scale observation and data collection framework programmes.[101] Equally importantly – though more arguably – EMODnet has served to democratise the evidence and knowledge base of ecosystem-based marine management in Europe's seas. Buck et al. speak in this respect of a 'new paradigm for how data is converted into information, and ultimately knowledge': rather than 'the custodian of data [pre-defining] the use and constraints of the data and in so doing [defining] the knowledge that can be extracted', EMODnet empowers users to 'create knowledge relevant to their own needs'.[102] This proposition finds support in the policy discourse that has developed around EMODnet, which routinely links it to EU environmental democracy laws. Among these are the Access to Environmental Information Directive, which seeks to ensure that the

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[98] 'About EMODnet' (*EMODnet*, date of publication unknown) <https://www.emodnet-humanactivities.eu/about.php> accessed 21 April 2022.
[99] COM (2012) 473 final (n65), 3.
[100] For more information on EMODnet see Belén Martín Míguez and others, 'The European Marine Observation and Data Network (EMODnet): Visions and Roles of the Gateway to Marine Data in Europe' (2019) Frontiers in Marine Science.
[101] These include the Copernicus Marine Environment Monitoring Service (CMEMS), which provides regular and systematic reference information on the physical and biogeochemical state, variability, and dynamics of marine ecosystems; and the Global Earth Observation System of Systems (GEOSS), a set of coordinated, independent Earth observation, information, and processing systems that interact and provide access to diverse information for a broad range of users in both public and private sectors.
[102] Justin J H Buck and others, 'Ocean Data Product Integration through Innovation: The Next Level of Data Interoperability' (2019) 6 Frontiers in Marine Science 1, 3.

public has access to environmental information held by, or for, public authorities, both upon request and through active dissemination;[103] the INSPIRE Directive, which seeks to bring into being an EU-wide infrastructure for the sharing of spatial information to support the implementation of Union policies of relevance to the environment;[104] and the Open Data Directive, which seeks to facilitate the re-use of public sector and publicly funded data.[105]

While it concedes the transformative potential of EMODnet's data management model, the thesis wishes to draw attention to an important constraint; namely, the fact that the model does little to move public engagement with marine data 'upstream'. What such a move would entail is discussed by Tlili and Dawson, who posit that '[p]ublic-science mediation […] should be concerned with the *inputs* (including normative conceptions of purpose, aspirations, needs and priorities of different social and cultural voices and groups) that ought to steer scientific research and policy *in the first place*'.[106] It is submitted here that the exclusion of these elements from upstream processes of data collection, processing, and dissemination can lead to their exclusion from downstream processes of allegedly 'democratised' knowledge production and, in the second instance, from processes of environmental and spatial policy- and decision-making.

This claim is corroborated by the operation to date of the EMODnet human activities gateway.[107] The pertinent map displays data on the geographical position, spatial extent, and key attributes of a wide array of ocean uses, from aquaculture and marine renewable energy to shipping and a range of extractive industries. Of particular interest for our purposes are the data categories 'environment', 'fisheries', and 'cultural heritage'. The former brings together various types of nationally designated areas: Natura 2000 sites, strict nature reserves, wilderness areas, national parks, natural monuments or features, habitat/species management areas, protected seascapes, and protected areas with sustainable use of natural resources. The map further shows the state of bathing water, as determined in accordance with the minimum quality standards set out in EU law.[108] As for the fisheries map, this depicts the boundaries of

[103] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L 41/26 (Access to Environmental Information Directive).

[104] Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) [2007] OJ L 108/1 (INSPIRE Directive).

[105] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information [2019] OJ L 172/56 (Open Data Directive).

[106] Anwar Tlili and Emily Dawson, 'Mediating Science and Society in the EU and UK: From Information-Transmission to Deliberative Democracy?' (2010) 48 Minerva 429, 438; emphasis added.

[107] 'EMODnet Human Activities Portal' (*EMODnet*, date of publication unknown) <https://www.emodnet-humanactivities.eu/> accessed 22 April 2022.

[108] Directive 2006/7/EC of the European Parliament and of the Council of 15 February 2006 concerning the management of bathing water quality and repealing Directive 76/160/EEC [2006] OJ L 64/37 (Bathing Water Directive).

internationally established statistical fishing areas, using these as a basis for the cartographic representation of fish catches and fishing effort. Also featured on the map are fishing intensity (the average (sub)surface area covered during one hour of fishing) and fish sales (based on data made available by the European Market for Fisheries and Aquaculture products (EUMOFA)). The detail of the environmental and fisheries datasets is in stark contrast with the minimalism of the one dedicated to cultural heritage, which contends itself with providing information on shipwrecks, lighthouses, and submerged prehistoric archaeology and landscapes. No attempt appears to have been made to record the intangible aspects of marine cultural heritage, i.e. sea-based 'practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage'.[109]

Such unevenly populated maps are, admittedly, a common occurrence, mapping necessarily involving 'the simplification of features and processes, ultimately granting only a static, partial and distorted depiction of complex seascapes'.[110] Yet these particular maps merit special attention due to what they can tell us about the challenges involved in conceptualising, measuring, and charting socio-cultural ties to the ocean: in the absence of an upstream democratisation of data management infrastructures, the dimensions of humanity's relationship to the ocean which are the hardest to 'datafy' through conventional means risk being left out of digital imaginaries consisting of cartographic representations and informational overlays.[111]

Extrapolating from this observation, the thesis argues that tools such as EMODnet are inherently and profoundly power-laden and wielded in ways that 'other' and make invisible a range of human-ocean interactions, the non-scientific knowledge systems that underpin them, and the humanistic, social-scientific, and non-scientific perspectives that can help elucidate

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[109] Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3, art 2(1).

[110] Mara Ntona and Mika Schröder, 'Regulating Oceanic Imaginaries: The Legal Construction of Space, Identities, Relations and Epistemological Hierarchies within Marine Spatial Planning' (2020) 19 Maritime Studies 241, 247, drawing on Paul Robbins, 'Fixed Cartographies in a Portable Landscape - The Causes and Consequences of Land Cover Categorization' in Karl S Zimmerer and Thomas J Bassett (eds), *Political Ecology: An Integrative Approach to Geography and Environment-Development Studies* (Guilford Press 2003).

[111] Kevin St Martin and Madeleine Hall-Arber, 'The Missing Layer: Geo-technologies, Communities, and Implications for Marine Spatial Planning' (2008) 32 Marine Policy 779; Halina T Kobryn and others, 'Cultural Ecosystem Values of the Kimberley Coastline: An Empirical Analysis with Implications for Coastal and Marine Policy' (2018) 162 Ocean & Coastal Management 71; Noëlle Boucquey and others, 'Ocean Data Portals: Performing a New Infrastructure for Ocean Governance' (2019) 37 Environment and Planning D: Society and Space 484.

and uphold them.[112] As for the consequences of this cognitive enclosure, these go beyond the erasure of vulnerable constituencies from virtual and material ocean worlds to affect social-ecological well-being at large. As the author has previously argued, the contraction of the 'coupling space' between marine social and ecological systems 'undermines the prospects for individual and collective learning and adaptation, thus contributing to reduced social memory, social capital and organisational and institutional flexibility'.[113]

The four critiques discussed in this sub-section are readily extendable to MSP. The MSPD appears to espouse the natural science-oriented epistemology of the MSFD, asserting that planning initiatives should apply an 'ecosystem-based approach [...] with the aim of ensuring that the collective pressure of all activities is kept within levels compatible with the achievement of good environmental status'.[114] It further echoes the assumptions that the MSFD makes vis-à-vis the rationality, objectivity, and uniformity of scientific research, its Preamble stressing that planning processes should have 'due regard' for the 'best available knowledge' and be based on the 'best available data and information'.[115] The Directive's operative provisions proceed to set out an obligation for Member States to organise the use of best available data and the sharing of information,[116] framing this as a minimum procedural requirement for the establishment and implementation of maritime spatial plans.[117] The data alluded to comprise, without being limited to, 'marine physical data about marine waters' and 'environmental, social and economic data' collected in accordance with Union legislation pertaining to a non-exhaustive list of ocean uses.[118] In making the necessary arrangements, and in order to avoid additional administrative burdens, Member States are expected to make use of existing conduits of data exchange and management, including those available under the IMP and other relevant Union policies.[119] Indicative reference is made to the Commission's

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[112] Julia Olson, 'Seeding Nature, Ceding Culture: Redefining the Boundaries of the Marine Commons through Spatial Management and GIS' (2010) 41 Geoforum 293, 294; Boucquey and others (n111), 10.

[113] Ntona and Schröder (n110), 245, drawing on Grant Murray and others, 'Cumulative Effects, Creeping Enclosure, and the Marine Commons of New Jersey' (2010) 4 International Journal of the Commons 367; Alex Jeffrey, Colin McFarlane and Alex Vasudevan, 'Rethinking Enclosure: Space, Subjectivity and the Commons' (2012) 44 Antipode 1247; Nathan James Bennett, Hugh Govan and Terre Satterfield, 'Ocean Grabbing' (2015) 57 Marine Policy 61; and Noëlle Boucquey and others, 'The Ontological Politics of Marine Spatial Planning: Assembling the Ocean and Shaping the Capacities of 'Community' and 'Environment'' (2016) 75 Geoforum 1.

[114] MSPD, recital 14.

[115] MSPD, recitals 18 and 24.

[116] MSPD, art 10(1).

[117] MSPD, art 6(2)(e).

[118] MSPD, art 10(2). The activities, listed in art 8(2), include: aquaculture and fishing areas; installations and infrastructures for the exploration, exploitation and extraction of oil, gas, and other energy resources, of minerals and aggregates, and for the production of energy from renewable sources; maritime transport routes and traffic flows; military training areas; nature and species conservation sites and protected areas; raw material extraction areas; scientific research; submarine cable and pipeline routes; tourism; and underwater cultural heritage.

[119] MSPD, recital 24 and art 10(3).

Marine Knowledge 2020 initiative, which has served as a unifying framework for ocean observing activities transpiring in the EU and, through EMODnet, as a means of fostering a more coordinated approach to the collection, curation, and dissemination of marine data. Member States are further directed to take into account data gathered and synthesised at the sea-basin level, this being a necessary precondition for tailoring MSP to the specificities of different ecoregions and for facilitating the pursuit of a phased, adaptive approach to marine spatial management; one that 'ensures refinement and further development as experience and knowledge increase'.[120] The relevance of the Regional Seas Conventions is highlighted in this regard, as is that of the MSFD.

These provisions have a lot to recommend them and it is difficult to conjure a version of the Directive which does not include some iteration of them. Of particular note is the contribution they stand to make to the development of a comprehensive and integrated evidence and knowledge base for ocean use planning, particularly at the ecoregional level. At the same time, these provisions are reflective of the epistemological hierarchies – and, hence, the cognitive blind spots – that characterise the wider field of EU marine and maritime policy. The embedding of these hierarchies into MSP law produces an atmosphere of exclusivity, in which dominant groups do not only see themselves as justified in contributing to the planning process, but indeed justified in their rejection of other groups as legitimate knowledge- and stake-holders.[121]

Yet, as our understanding of the complex and tightly-coupled workings of marine social and ecological systems expands, so does our awareness of the multiplicity of ways of being with, knowing, and being separated from the ocean. It follows that, if our faith in the dependability of natural-scientific and expert knowledge is not to be misplaced, it must be accompanied by a greater engagement with the insights gleaned from the 'blue turn' in humanistic and social-scientific research, including (without being limited to) research regarding the links between the integrity of marine and coastal ecosystems and human well-being; traditional and emerging uses of ocean space and associated tenure and use rights; the possibilities and prospects offered by marine environmental citizenship and/or stewardship; questions of social justice and equity; maritime culture and heritage; and 'blue' livelihoods.[122] Moreover, the epistemic communities involved in MSP must become both more receptive to crowd-sourced marine data and more willing to work with societal actors in order to co-

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[120] MSPD, recital 14.
[121] Ntona and Schröder (n110), 248.
[122] On the *foci* of marine social-scientific research see Nathan James Bennett, 'Marine Social Science for the Peopled Seas' (2019) 47 Coastal Management 244; Emma McKinley, Tim Acott and Katherine L Yates, 'Marine Social Sciences: Looking towards a Sustainable Future' (2020) 108 Environmental Science & Policy 85.

produce the knowledge needed to navigate scientific uncertainty and environmental change, whether that knowledge be quantifiable, not readily quantifiable, or not quantifiable at all.[123]

2.2. The ecosystem approach as a *locus* of scalar politics and struggles

The concept of scale is central to the epistemological, normative, and performative aspects of ecosystem-based marine management. While seemingly uncontroversial, this statement will be interpreted in vastly different ways by different scholarly constituencies. The reason for this is not difficult to discern: scale is what we might call a methodologically 'thick' concept, which is to say a concept that is amenable to a range of theoretical and disciplinary perspectives. This is not a purely academic issue. To the contrary, scale's thickness has implications that exceed the realms of research design and execution and enter that of practice, 'conceptual puzzlement' opening the way to multiple, potentially contradictory instrumentalisations.[124]

A comprehensive account of the different approaches taken to theorising scale and to studying scaled phenomena would far exceed the scope of the present inquiry. Instead, and in line with the overall methodological framework of the thesis, this sub-section concentrates on the treatment of scale within ecology, human geography, and law. In this particular instance, a disciplinary 'detour' by way of ecology and human geography was deemed necessary in order to bring into focus the scalar tug-of-war that lies at the heart of the legal concept of the ecosystem approach. What this entails can be gleaned from a juxtaposition of two of the principles adopted under the CBD to guide implementation: the principle that 'management should be decentralised to the lowest appropriate level'; and the principle that 'the ecosystem approach should be undertaken at the appropriate spatial and temporal scales'.[125] These stipulations are indicative of law's fundamental oscillation between a notion of scale which is ecologically-minded and one which is sensitive to patterns of socio-political organisation (or, in regulatory contexts where the social dimension of the ecosystem approach is less fleshed out than it is in the milieu of the CBD, a notion of scale which is jurisdictionally conscious). The two notions are, of course, not mutually exclusive and may well give rise to concuring spatial and temporal delineations. At the same time, the complexity and interconnectedness of

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[123] Ramírez-Monsalve and others (n44).

[124] Nathan F Sayre, 'Ecological and Geographical Scale: Parallels and Potential for Integration' (2005) 29 Progress in Human Geography 276, 276.

[125] CBD Decision VII/11, 'Ecosystem approach' (13 April 2004) UN Doc UNEP/CBD/COP/DEC/VII/11, annex I, principles 2 and 7 respectively.

marine ecological processes, the breadth and variability of land-sea interactions, the essential arbitrariness of jurisdictional and administrative boundaries, and the persisting gaps in our understanding of human-ocean relations are all factors that increase the likelihood of divergence.[126] Where divergences do indeed occur, we are faced with a 'social-ecological scale mismatch' – a term introduced by Cumming et al. to describe situations where

> the scale of environmental variation and the scale of the social organization responsible for management are aligned in such a way that one or more functions of the social-ecological system are disrupted, inefficiencies occur, and/or important components of the system are lost.[127]

In view of this prospect, the thesis makes the case for a more integrated understanding of scale across the disciplines of ecology, human geography, and law. One important caveat is in order at the outset. When dealing with a concept as pluralistic as scale, integration could be interpreted as a matter of simplification, standardisation, and ritualisation of epistemic and managerial practices. Though it does not altogether reject this interpretation, the thesis is conscious of its conduciveness to reductionism and determinism. It thus aligns itself with those advocating for a non-positivist, dialectical, and hence necessarily chimerical notion of scale. In this notion it sees a powerful tool for grasping the spatial and temporal dimensions of social-ecological vulnerability, and for using these dimensions to (re)calibrate the legal/regulatory and political/institutional components of ecosystem-based marine planning and management in the European context.

2.2.1. Connecting the dots between ecological and geographic conceptions of scale

We begin our reflection by noting an important parallel between ecological and human-geographic conceptions of scale: each in its own way, the two disciplines grapple with the question whether scale is 'real' (i.e. an 'objective [pattern] or [structure] generated by material processes') or socially constructed (i.e. an 'artefact' of more or less conscious epistemological choices).[128] The work of Sayre and Smith is instructive in this respect. Sayre's analysis shows that ecologists and human geographers perceive scale as 'both a methodological issue inherent

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[126] Aron Westholm, 'Delimiting Marine Areas: Ecosystem Approach(es?) in EU Marine Management' in David Langlet and Rosemary Rayfuse (eds), *The Ecosystem Approach in Ocean Planning and Governance: Perspectives from Europe and Beyond* (Brill Nijhoff 2019), 118.
[127] Graeme S Cumming, David HM Cumming and Charles L Redman, 'Scale Mismatches in Social-Ecological Systems: Causes, Consequences, and Solutions' (2006) 11 Ecology and Society 14.
[128] Sayre (n124), 283.

to observation ([scale's] epistemological moment) and an objective characteristic of complex interactions within and among social and natural processes ([scale's] ontological moment)'.[129] This finding is echoed by Smith, who notes that the treatment of scale within the natural and social sciences – and, by extension, within the bridging discipline of geography – has tended to follow one or both of two approaches: a voluntarist epistemological approach which casts scale as a methodological choice; and a naturalist ontological approach which construes scale as naturally given.[130] In the former instance, scale is determined by the exigencies and constraints of the analytical project at hand; in the latter, a pre-existing and inherent stratification is presumed. This last distinction is not, however, absolute, nor does it render the two approaches mutually exclusive. In fact, it is not uncommon for studies grounded in the voluntarist approach to make 'gestures in the direction of an ontology of scale'.[131] Consequently, and to the extent that they leave the actual object of research unmodified, the pertinent studies serve to further consolidate scalar categories rather than subvert them.[132]

These introductory observations may give the impression that the scholarly discourse on scale is an esoteric turf war of sorts. Yet how one chooses to answer the – admittedly philosophical – question 'what is scale?' has some very real consequences. As discussed in greater detail below, the varied ways in which voluntarist and naturalist approaches to scale are applied in practice give rise to different, and at times contradictory, appraisals of the phenomena being investigated. For Sayre, this conundrum 'seems sufficient to indicate that scale matters in some objective sense, even as it underscores the observer's methodological lens'.[133] Adopting this mediating position is a productive first step towards the development of more coherent intra-, inter-, and transdisciplinary paradigms to the study of multi-scalar social-ecological processes; paradigms which are cognisant of the limitations of, and the tensions between, naturalism and voluntarism.

Upon taking this step, however, we are immediately brought face to face with an important challenge: although both ecologists and human geographers vacillate between voluntarist and naturalist approaches to scale, they appear to gravitate towards opposite ends of the spectrum. What is more, and despite any points of intradisciplinary divergence, the two academic communities as wholes are variably willing to acknowledge and reflect upon scale's two 'moments', their functions and ramifications. As Sayre has so aptly put it, '[e]cologists tend to keep scale's two moments separate from each other, denying their dialectical relation;

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[129] ibid, 276.
[130] Neil Smith, 'Scale Bending and the Fate of the National' in Eric Sheppard and Robert B McMaster (eds), *Scale and Geographic Inquiry: Nature, Society, and Method* (Blackwell Publishing 2004), 194.
[131] ibid, 195.
[132] ibid.
[133] Sayre (n124), 280.

critical human geographers more often confound the two, collapsing the dialectic'.[134] It is to these matters that we now turn, our analysis focusing on how hierarchy theory (as a form of idealistic naturalism) and social constructivism (as a form of idealistic voluntarism) inform ecological and human-geographic thought. This exploration will result in a more integrated conception of scale, which will serve as the basis for our critical review of the regulatory and institutional scalings underlying ecosystem-based marine planning and management in the EU.

Hierarchy theory constitutes the prevailing approach to the study of complex ecological systems.[135] In this context, complexity is understood as a corollary of the large number of components making up each individual ecological system, the breadth of behaviours these components exhibit, and the variation of these behaviours in space and time – all factors that work to render the description and comprehension of ecological processes a formidable empirical and analytical task.[136] Enter hierarchy theory, which here serves as a means of transforming the apparent anarchy of the natural world into intelligible and coherent patterns. Providing a set of tools with which to trace flows of energy, matter, and information across space and time, it helps determine how ordered structures emerge in open natural systems, and how said structures persist and form building blocks for higher levels of ecological organisation.[137] The underlying assumption is that ecological processes have characteristic spatial and temporal scales at which they operate and to which they can be canonically attached, thus facilitating cross-scale analysis.[138]

Here, it is useful to introduce the basic organisational parameters of ecological systems when viewed from the perspective of hierarchy theory: levels of ecological organisation (the vertical dimension) and the holons that populate them (the horizontal dimension).[139] Each level represents a cluster of similar rates of spatial and temporal interaction, with higher levels being 'characterized by slower and larger entities (or low-frequency events) whereas lower levels by faster and smaller entities (or high-frequency events)'.[140] The subsystems that comprise each level, holons, are designated as such by virtue of the intensity (*viz.* the strength and frequency) of the interactions between their constituent

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[134] ibid, 278.

[135] ibid, 286.

[136] Brian A Maurer, 'Ecological Complexity' in Robert A Meyers (ed), *Encyclopedia of Complexity and Systems Science* (Springer 2009), 2708.

[137] Jianguo Wu and Orie L Loucks, 'From Balance of Nature to Hierarchical Patch Dynamics: A Paradigm Shift in Ecology' (1995) 70 The Quarterly Review of Biology 439, 449.

[138] Jianguo Wu, 'Hierarchy and Scaling: Extrapolating Information along a Scaling Ladder' (1999) 25 Canadian Journal of Remote Sensing 367, 373.

[139] The concept of the holon was originally introduced by Koestler: Arthur Koestler, *The Ghost in the Machine* (Macmillan 1967).

[140] Wu (n138), 370.

elements. Within each holon interactions are rapid and/or frequent; between holons they are slower and/or more infrequent. As for the nature of the interactions between holons situated at different levels of an ecological hierarchy, it is held that higher-order holons provide the environment in which lower-order holons operate.[141] At its most basic, this means that higher-order holons are contextual to, and place top-down constrains upon, lower-order ones. In some cases, however, higher-order holons will actually contain and consist of lower-order ones. An indicative example of this type of holonic arrangement – the nested hierarchy – can be drawn from biology: cells are embedded within tissues, tissues within organs, organs within organisms, organisms within populations, etc.[142] Ecological systems can be perceived along similar lines. To quote MacArthur,

> [a] real environment […] is like a checkerboard of habitats, each square of which has, on closer examination, its own checkerboard structure of component subhabitats. And even the tiny squares of these component checkerboards are revealed as themselves checkerboards, and so on. All environments have this kind of complexity, but not all have equal amounts of it.[143]

Other checkerboards are, of course, conceivable. What a holon's constituent elements are will depend on both the nature of the system being investigated and the analytical task at hand. As Allen and Starr have aptly noted in this regard, '[t]he holon is an integration of its parts; but the definition says nothing about how many parts there should be or indeed what criteria should be applied in order to determine what is and is not a part'.[144] This means that, 'while the holon model may relate to something ontogenetically real, nevertheless the holon in its composition and its boundary is essentially arbitrary'.[145]

These remarks direct our attention to a key tenet of hierarchy theory: holons are perceived as being 'loosely' coupled along vertical and horizontal directions, and this looseness is what makes it possible to decompose a complex system into levels and holons without significant loss of information. As Wu succinctly puts it, 'the "loose vertical coupling" enables and maintains the separation between levels, whereas the "loose horizontal coupling" allows for each holon to operate dynamically in independence of the details of the other

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[141] TFH Allen and Thomas B Starr, *Hierarchy: Perspectives for Ecological Complexity* (2nd edn, University of Chicago Press 2017), 61.
[142] ibid, 44.
[143] Robert H MacArthur, *Geographical Ecology: Patterns in the Distribution of Species* (Princeton University Press 1972), 186.
[144] Allen and Starr (n141), 45.
[145] ibid.

holons'.[146] But here lies the crux. The twin presumptions of loose coupling and decomposability are, admittedly, what makes it possible to simplify the description of ecological systems and, in so doing, to render them more amenable to empirical observation (and, by extension, to management). At the same time, it is acknowledged that this legitimate quest for simplification can, on occasion, lead to reductionism and determinism. It is further underscored that, in nested hierarchies, higher-order holons do not constitute mere aggregations of lower-order ones. Rather, 'as components, or subsets, are combined to produce larger functional wholes, new properties emerge that were not present at the level below'[147] – a reality that finds expression in the old adage, beloved of ecologists, 'the whole is greater than the sum of its parts'.[148] This holds implications for research design: it is posited that, to unpick the consequences and evaluate the significance of a process operating at one level of ecological organisation, one must also look at the level directly above; to identify the mechanisms that govern the process' operation, on the other hand, they must look at the level directly below (or perhaps carry out an even finer-grained analysis).[149]

This last proposition is indicative of attempts to make space within ecological hierarchy theory for relational, dialectical thinking. Together with the cited remarks by Allen and Starr, it also suggests that ecologists are becoming more conscious of the control they can and do exert upon their object of study. This consciousness brings with it a willingness to reflect on the subjective dimension of scientific observation; that is, on the role played in the process by the 'purposeful, biological human observer', for whom an understanding of ecological systems as vertically continuous hierarchies consisting of clearly delineated levels and holons is, more than anything else, a convenient conceptual, communicative, and calculative tool, with all the contingencies that this instrumentality entails.[150]

This moment of self-critique suggests that ecological complexity is in the process of crystallising as 'a special sort of scaling issue'; one that is normative in nature as opposed to a matter of material distinction.[151] This serves to immediately put into perspective the

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[146] Jianguo Wu, 'Hierarchy Theory: An Overview' in Ricardo Rozzi and others (eds), *Linking Ecology and Ethics for a Changing World: Values, Philosophy, and Action* (Springer 2013), 293, drawing on Herbert A Simon, 'The Organization of Complex Systems' in Howard Hunt Pattee (ed), *Hierarchy Theory: The Challenge of Complex Systems* (George Braziller 1973).

[147] Eugene P Odum and Gary W Barrett, *Fundamentals of Ecology* (5th edn, Thomson Brooks/Cole 2005), 7.

[148] Frances Westley and others, 'Why Systems of People and Nature Are Not Just Social and Ecological Systems' in Lance H Gunderson and CS Holling (eds), *Panarchy: Understanding Transformations in Human and Natural Systems* (Island Press 2002).

[149] Wu and Loucks (n137), 451.

[150] Allen and Starr (n141), 51 and 65. See also David W Cash and Susanne C Moser, 'Linking Global and Local Scales: Designing Dynamic Assessment and Management Processes' (2000) 10 Global Environmental Change 109, 110; Cumming, Cumming and Redman (n127), 14.

[151] Allen and Starr (n141), 37.

ecological concept of the ecosystem, which, to revisit MacArthur's apt metaphor, constitutes the foundational 'checkerboard' of ecosystem-based regulation, management, and governance. To the extent that these operationalisations of the ecosystem approach direct their interventions towards bounded physical spaces, they can be said to promote a perception of ecosystems 'as real entities in nature', to be demarcated in accordance with structural and functional ecological criteria.[152] The classical paradigm of ecology would have left the provisional nature of this demarcation unacknowledged and underproblematised, grounded as it was in a concept of 'closed, self-regulating, ontologically robust ecosystems'.[153] Conversely, contemporary ecological thought appears to eschew the idea that there is an inherent structural and functional completeness – and, hence, a definitive spatial form – to ecosystems. Admittedly, some structural boundaries 'do map easily into human experiential space'.[154] This is not, however, presumed to make the pertinent structures 'especially real in an observer-independent sense'; it only makes them 'more direct in human experiential terms', hence facilitating their investigation.[155]

Two interim conclusions can be drawn at this point, both of which lend themselves to the development of a more coherent conception of scale across the disciplines of ecology and human geography. First, the scientific designation of a portion of physical space as an ecosystem should not be taken to signify that we are dealing with a hermetically sealed container of ecological processes. To the contrary, ecosystems are dynamic spatial entities with 'fuzzy' boundaries,[156] which remain 'porously open to all sorts of comings and goings, from invasive organisms to minerals from afar blown in on the wind and washed down by the rain'.[157] Second, if it is true that the observation of complex ecological phenomena is a normative matter as opposed to a matter of material distinction, then there is arguably scope for a wide range of scholarly and non-scholarly constituencies to engage critically with the

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[152] Ole Arve Misund and Hein Rune Skjoldal, 'Implementing the Ecosystem Approach: Experiences from the North Sea, ICES, and the Institute of Marine Research, Norway' (2005) 300 Marine Ecology Progress Series 260, 262.

[153] J Baird Callicott, 'Ecological Sustainability' in Sahotra Sarkar and Ben A Minteer (eds), *A Sustainable Philosophy: The Work of Bryan Norton* (Springer 2018), 34, drawing on Steward TA Pickett, V Thomas Parker and Peggy L Fiedler, 'The New Paradigm in Ecology: Implications for Conservation Biology Above the Species Level' in Peggy L Fiedler and Subodh K Jain (eds), *Conservation Biology: The Theory and Practice of Nature Conservation, Preservation and Management* (Chapman and Hall 1992).

[154] Allen and Starr (n141), 168. See also Jean-Yves Pirot, Peter-John Meynell and Danny Elder, *Ecosystem Management: Lessons from around the World. A Guide for Development and Conservation Practitioners* (IUCN 2000).

[155] Allen and Starr (n141), 168.

[156] Misund and Skjoldal (n152), 262.

[157] Callicott (n153), 34.

decisions made by ecologists, and this with a view to '[revealing] the assumptions, methodological lapses and social content of ecological assessment'.[158]

This would be an apposite point to turn our focus to human geography. Hierarchy theory is equally influential in this context, scholars having long relied upon a nested, Russian doll-like conception of geographic scale. Having its origins in a 'Euclidean, Cartesian and Westphalian' rationality of space, this model presents social systems as being '["vertically ordered"] within a hierarchical scaffolding of intertwined territorial units stretching from the global/worldwide, the supranational/triadic and the national downwards to the regional, the metropolitan, the urban, the local and the body'.[159] Although it remains pervasive, this view of geographic scale as a system of relatively fixed and self-enclosed spatial containers has, over the past three decades, undergone a process of extensive qualification.[160] In step with the wider constructivist turn in the social sciences, critical human geographers have sought to challenge traditional assumptions about the boundedness and permanence of scalar configurations; assumptions which they regard as ill-equipped to account for the 'profound and perplexing' restructuring processes that the contemporary world is undergoing, including, and in particular, as a result of capitalist globalisation.[161] What they propose in response is a processual, relational, and contextual notion of geographic scale, which incorporates, but ultimately transcends, the basic tenets of hierarchical thinking.[162]

As re-imagined through the critical human-geographic looking glass, scale is Janus-faced: it is, at one and the same time, a constitutive dimension and a product of socio-spatial processes, 'from capital accumulation and state regulation to social reproduction, gender relations, oppositional mobilization […] and subjective identity'.[163] In its constitutive role, scale provides a 'partitioned geography' within which pertinent forms of social action can become hierarchically embedded.[164] In its constituted nature, it is a corollary of processes of

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[158] Matthew D Turner, 'Ecology: Natural and Political' in Noel Castree and others (eds), *A Companion to Environmental Geography* (Wiley - Blackwell 2009), 195.

[159] Neil Brenner, 'The Limits to Scale? Methodological Reflections on Scalar Structuration' (2001) 25 Progress in Human Geography 591, 592 and 597, drawing on Chris Collinge, 'Self-Organisation of Society by Scale: A Spatial Reworking of Regulation Theory' (1999) 17 Environment and Planning D: Society and Space 557.

[160] ibid, 592. The critique of the non-relational, container view of space was first advanced by Harvey: David Harvey, *Explanation in Geography* (Edward Arnold 1969), 208.

[161] David Delaney and Helga Leitner, 'The Political Construction of Scale' (1997) 16 Political Geography 93, 94.

[162] ibid, 93; Erik Swyngedouw, 'Scaled Geographies: Nature, Place, and the Politics of Scale' in Eric Sheppard and Robert B McMaster (eds), *Scale and Geographic Inquiry: Nature, Society, and Method* (Blackwell Publishing 2004), 133.

[163] Delaney and Leitner (n161), 93; Brenner (n159), 599 and 604.

[164] Neil Smith, 'Homeless/Global: Scaling Places' in John Bird and others (eds), *Mapping the Futures: Local Cultures, Global Change* (Routledge 1993), 101.

socio-spatial structuration, whereby social relations become differentiated into 'distinctive, if closely intertwined, spatial units'.[165]

Crucially, whether we are speaking of the boundary-drawing exercises that forge the macro- and meso-scale of capitalist sovereignty or the 'everyday habits, routines, practices, negotiations, experiments, conflicts and struggles' that shape the micro-scale of the quotidian, the processes in question do not transpire in a vacuum.[166] To the contrary, they are dialectically entangled and, as such, intrinsically open-ended. What is more, entanglements of significance do not occur solely along a vertical axis. Equally decisive are horizontal forms of spatial connectivity bringing together actors, coalitions of actors, and organisations situated within geographically dispersed *loci*.[167] Some examples of direct relevance to the thesis can be drawn from Leitner, who speaks in this respect of 'transnational issue networks and social movements', such as those that have developed around human rights and the environment, and 'formalized transnational cooperative networks', such as the strategic inter-regional and inter-urban alliances that have spread across the EU in recent decades (more on which in chapter four).[168] These being the anarchic origins and articulations of geographic scale, critical human geographers propose that we conceptualise the resulting configurations as '[mosaics] of unevenly superimposed and densely interlayered scalar geometries', rather than as 'absolute [pyramids] of neatly interlocking scales'.[169]

It follows from these contentions that, although scholars looking at scale through a constructivist lens speak of it as a product, they resist the connotations of concreteness, completeness, and finality that that word carries within it. Much like the processes from which it stems and which it helps catalyse and advance, scale is viewed as contingent, its contours constantly shifting as a result of socio-spatial power struggles. That being said, and to return to scale's constitutive dimension, it is entirely possible for processes of scalar structuration to 'crystallize into scalar fixes', within which aspects of social, cultural, economic, and political activity become solidified, even if only temporarily.[170] To affirm this possibility is not to suggest that scale ceases to be an arena and an object of contestation. It is, rather, to recognise the limits of scale's malleability. Indeed, were we to position extant scalar configurations and

[165] Brenner (n159), 603.
[166] ibid, 604-605.
[167] Neil Brenner, *New Urban Spaces: Urban Theory and the Scale Question* (OUP 2019), 104.
[168] Helga Leitner, 'The Politics of Scale and Networks of Spatial Connectivity: Transnational Interurban Networks and the Rescaling of Political Governance in Europe' in Eric Sheppard and Robert B McMaster (eds), *Scale and Geographic Inquiry: Nature, Society, and Method* (Blackwell Publishing 2004), 237.
[169] Brenner (n159), 610.
[170] ibid, 606-607. See also Neil Brenner, 'Between Fixity and Motion: Accumulation, Territorial Organization and the Historical Geography of Spatial Scales' (1998) 16 Environment and Planning D: Society and Space 459.

inter-scalar relations along a historical continuum, we would readily discern the path-dependencies that underlie their emergence and evolution. As Brenner has insightfully noted in this connection, even in periods of 'intensified, accelerated restructuring […] entrenched social arrangements' find ways 'to reinforce themselves and induce the development of complementary organizational forms'.[171] Applied to scale, this means that the scalar configurations of one historical period – one could think here of the configurations brought about by such socio-spatial phenomena as state formation, industrial restructuring, and the retreat of the welfare state – 'impose a relatively inflexible, self-reinforcing geographical scaffolding' within which future scaling processes are to unfold.[172]

This naturally brings us back to the question of power. However ephemeral, scalar fixes determine the arenas where socio-spatial conflicts are to be negotiated and where the compromises reached are to be translated into institutional forms and practices.[173] In performing this function, they set the scene for 'choreographies of inclusion/exclusion and domination/subordination which empower some actors, alliances, and organizations at the expense of others'.[174] These choreographies comprise the central focus of the literature on the 'politics of scale'. The preoccupation here is with scale's capacity for instrumentalisation; that is, with how actors representing 'contending ideologies of social life and human relatedness' use scale as a strategic means of effectuating and resisting socio-spatial change.[175] Among the contested transformations are those being pursued by proponents of neoliberalism as part of their quest to fashion geoeconomic and geopolitical architectures that stimulate commodification, facilitate cross-border capital mobility, and ease access to global markets.[176] The pertinent debates revolve around two distinct rescaling projects, one that targets economic activities and relations *per se* and another that is geared towards associated strands of regulation and governance. The two projects are, of course, intimately linked. Experience to date shows that the networked expansion of systems of production, trade, and consumption is routinely accompanied by moves towards the privatisation of public services and assets, the supranationalisation and/or decentralisation of labour and environmental regulation, and the

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[171] Brenner (n159), 607.
[172] ibid.
[173] Erik Swyngedouw, 'Globalisation or 'Glocalisation'? Networks, Territories and Rescaling' (2004) 17 Cambridge Review of International Affairs 25, 42; Erik Swyngedouw, 'Excluding the Other: The Production of Scale and Scaled Politics' in Roger Lee and Jane Wills (eds), *Geographies of Economies* (Arnold 1997).
[174] Brenner (n159), 607-608; Swyngedouw (n162), 147.
[175] Delaney and Leitner (n161), 94; Neil Smith, *Uneven Development: Nature, Capital, and the Production of Space* (3rd edn, University of Georgia Press 2008), 229.
[176] Brenner (n159), 594. Examples of studies that examine the role of non-economic structures, relations, and discourses in theorising the politics of scale can be found in Leitner (n168), 240-241.

curtailment of opportunities for public dialogue, lest oppositional movements impede the continued circulation and accumulation of capital.[177]

Space constraints preclude a detailed examination of how these recalibrations act to transfigure each individual tier of the territorial hierarchy. For present purposes it suffices to note that the consequent shifts in the *loci* of power – and, hence, in the opportunities for participation and interest representation available to different territorial actors – hold particular import for the local and regional tiers, where the disruption and reconstitution of socio-spatial relations is arguably at its most palpable. For the spatial units that comprise these two tiers, being remade in the image of global capital means assuming a new, cosmopolitan identity that seeks belonging to locally and regionally integrated, transnationally networked, and globally competitive production complexes. In turn, the normalisation of these aspirations serves as a springboard for the elite-driven overhaul of the rules that have traditionally governed the appropriation and control of space in different localities, and for the establishment in their place of regimes that work to '[suppress] possibilities of resistance and the formulation of alternative trajectories'.[178] Where successful, these reforms cause new 'geometries of power' to emerge, take root, and become dominant, thereby completing the envisaged transformation of socio-spatial relations.[179] It is then left to the voices of dissent to find new and creative ways to mobilise scale towards 'emancipatory' ends, 'whether by "jumping scales" to circumvent hegemonic institutional practices, by attempting to socialize capital at particular scales or by envisioning radically different scalar arrangements based upon principles of radical democracy and social justice'.[180]

Thus far in our overview of the critical human-geographic discourse on scale, and in line with the cited works, we have used the term 'socio-spatial' to convey the idea that sociality and spatiality are indissolubly linked. At this juncture, and as a further step towards developing an integrated conception of scale across the disciplines of ecology and human geography, it is important to acknowledge that socio-spatial relationality is understood to encompass social-ecological relationality. There is much that could be said by way of unpacking this statement. In keeping with the critical turn that our reflection has taken, we will proceed by engaging

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[177] Swyngedouw (n173, 'Globalisation or 'Glocalisation'? Networks, Territories and Rescaling'), 38; Caroline Thomas, *Global Governance, Development and Human Security: The Challenge of Poverty and Inequality* (Pluto Press 2000), 56.
[178] Swyngedouw (n173, 'Globalisation or 'Glocalisation'? Networks, Territories and Rescaling'), 28-29 and 38.
[179] The term 'geometry of power' is borrowed from Massey: Doreen Massey, 'Power-geometry and a Progressive Sense of Place' in John Bird and others (eds), *Mapping the Futures: Local Cultures, Global Change* (Routledge 1993).
[180] Brenner (n159), 594 and the references therein.

with Swyngedouw's historical materialism-inspired writings on the mutual constitution of social and ecological scales.

Central to these seminal works are the notions of 'circulation' and 'metabolism', which Swyngedouw uses as metaphors to describe how the social interacts and fuses with the ecological to produce space and generate repertoires of socio-spatial relations. The foundational axioms of Swyngedouw's thesis are simple enough: all living organisms, humans included, depend for their survival upon the circulation and metabolism of physical, chemical, and biological components; in turn, these circulatory and metabolic processes have a transformative effect on both social and natural environments.[181] One corollary of this twofold premise is that the spaces emerging from the metabolic interactions between humanity and nature are social-ecological hybrids, insofar as they '[embody], simultaneously and inseparably, biochemical and physical properties, socioeconomic and political characteristics, and cultural and symbolic meanings'.[182] But to be multifaceted and polysemous is, rather inescapably, to be laden with ambiguities, contradictions, and tensions. A second corollary of Swyngedouw's premise is, hence, that the social metabolism of nature is an inherently uneven process of social and ecological differentiation, 'particular trajectories of socio-environmental change' acting to either enhance or undermine the stability and coherence of different 'social groups, places or ecologies'.[183] Consistent with his Marxian roots, Swyngedouw argues that the orientation of these trajectories is historically contingent. He argues, in particular, that it is each era's prevailing economic system and social institutions that will determine the winners and losers of socio-environmental change – which is to say, those who will gain and those who will be deprived of access to, or control over, components of the environment.[184]

In view of the foregoing discussion, it is not difficult to discern how scale is implicated in social-ecological struggles. Swyngedouw posits that, as a product of socio-spatial relations *lato sensu*, scale is also a product of the metabolic interactions between humanity and nature.[185] As these interactions evolve over time, they lead to the emergence of new social and ecological scales, as well as to the transformation and dissolution of existing ones.[186] An indicative example are the scalar shifts brought about by processes of agricultural modernisation and

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[181] Swyngedouw (n162), 130; Nik Heynen, Maria Kaika and Erik Swyngedouw, 'Urban Political Ecology: Politicizing the Production of Urban Natures' in Nik Heynen, Maria Kaika and Erik Swyngedouw (eds), *In the Nature of Cities: Urban Political Ecology and the Politics of Urban Metabolism* (Routledge 2006), 12.
[182] Swyngedouw (n162), 134; Erik Swyngedouw, 'Metabolic Urbanization: The Making of Cyborg Cities' in Nik Heynen, Maria Kaika and Erik Swyngedouw (eds), *In the Nature of Cities: Urban Political Ecology and the Politics of Urban Metabolism* (Routledge 2006), 26.
[183] Heynen, Kaika and Swyngedouw (n182), 12.
[184] Swyngedouw (n162), 130-132; Heynen, Kaika and Swyngedouw (n182), 12-13.
[185] Swyngedouw (n182), 24.
[186] Swyngedouw (n162), 132-133.

commercialisation, with the case in point being the transition from the intimate social-ecological scalings of peasant subsistence farming to the diffused ones of monocultural cash-cropping. It bears noting, however, that, although Swyngedouw's perspective is decidedly constructionist, it does not seek 'to foreground a notion of "*social* construction"'.[187] Quite the opposite: non-human actants are seen as having a 'pivotal and foundational role' to play in shaping the scalar dimensions of socio-natural metabolic relationships, serving as 'circulatory conduits that link often distant places and ecosystems together and permit relating local processes with wider socio-metabolic flows, networks, configurations and dynamics'.[188]

Shifting the focus to scale's constitutive dimension and recalling the debate on the politics of scale, Swyngedouw proceeds to argue that scalar (re)configurations '[shape] in important ways who [has] access to what kind of nature, and the particular trajectories of environmental change'.[189] This, it bears reiterating, is a consequence of power's fundamental embeddedness within scaled socio-spatial relations. It is this embeddedness that leads scale to assume the function of a mediator 'between cooperation and competition, between homogenization and differentiation, between empowerment and disempowerment'.[190] Equally, and by the same token, it is this embeddedness that renders scale a determining factor in the success of environmental mobilisation. To the extent that social movements pertaining to the environment seek to resist the locally-manifested implications of supraregionally or even globally hegemonic projects (e.g., free trade), their proponents are forced to become savvy about scale. This is a task fraught with challenges and pitfalls. Institutions operating at higher levels of the political hierarchy can be impervious to outsiders and, thus, inhospitable to the establishment of transformative new alliances, especially by those who are already disempowered. What is more, it is not at all certain that the actors that one would regard as the natural leaders of cross-scalar environmental movements are actually willing and able to contend with the practical exigencies of 'scale-jumping'.[191] For the individuals, communities, and groups who experience first-hand the erosion and breakdown of social-ecological systems, it is 'loyalty to and an insertion into a local social and physical ecology' that is of the utmost priority, not engagement in cosmopolitan networking and advocacy, however necessary this may be.[192] Swyngedouw does, however, concede that the capacity to strategically navigate scale can serve as a catalyst for intersectional coalition-building, in which case the deployment

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[187] Swyngedouw (n182), 27; emphasis added.
[188] Heynen, Kaika and Swyngedouw (n182), 12.
[189] Swyngedouw (n162), 132.
[190] ibid, 134.
[191] The term 'jumping scales' was coined by Smith: Neil Smith, 'Geography, Difference and the Politics of Scale' in Joe Doherty, Elspeth Graham and Mo Malek (eds), *Postmodernism and the Social Sciences* (Palgrave Macmillan 1992).
[192] Swyngedouw (n162), 148.

of 'scalar narratives, scalar politics, and scalar practices' enables subaltern constituencies to explore the parallels and crossings between ecological struggles and spatiotemporally situated class struggles, gender struggles, and race and ethnic struggles, among others.[193]

This concludes our overview of the treatment of scale in ecology and human geography. The analysis appears to confirm Sayre's contention that ecologists are rather reluctant, and critical human geographers rather eager, to affirm the dialectical relation between scale's epistemological and ontological moments. These inclinations are, of course, not absolute, and it is possible to discern a certain willingness to develop nuanced conceptions of scale which straddle disciplinary lines. The next step is, thus, to identify areas of convergence and synergy between ecological and critical human-geographic thought. Particular emphasis is placed on parallels that can be harnessed to interpret and operationalise the legal concept of the ecosystem approach in a manner consistent with the relational, vulnerability-centric understanding of human rights advanced in chapters one and two.

Here we may point to ecology's ongoing transition from a positivist-reductionist metaphysics of scale, which leads researchers to idealise simplification, linearity, and quantitative precision, to a relational-dialectical metaphysics of scale, which enables them to discern where such 'standards of truth' may be inappropriate due to 'practical, ethical, or historical reasons'.[194] In light of the foregoing discussion, we are compelled to agree with those who, like Sayre and Turner, believe that critical human geographers can help ecologists navigate this transition, shedding light on the (often unconscious) assumptions that their work is predicated upon, the blind spots in their methodologies, and the social implications of different ecological scalings becoming normalised.[195]

Although this proposition has broad transformative potential, it holds particular and urgent relevance for ecosystem-based marine planning and management. As already discussed in some detail in chapters one and two, owing to its 'multi-dimensionality'[196] and 'energetic materiality',[197] the ocean is a context where the standards underlying the positivist-reductionist view of scale are, if not inappropriate, then certainly limited in their application.[198] This is not to say that these standards ought to be altogether abandoned. Rather, 'attempts at finding stable metrics that can fix and organize spaces and the activities that transpire within' should be

[193] ibid, 134.
[194] Sayre (n124), 287.
[195] ibid; Turner (n158).
[196] Christopher Bear, 'Assembling the Sea: Materiality, Movement and Regulatory Practices in the Cardigan Bay Scallop Fishery' (2012) 20 Cultural Geographies 21, 21.
[197] David Lambert, Luciana Martins and Miles Ogborn, 'Currents, Visions and Voyages: Historical Geographies of the Sea' (2006) 32 Journal of Historical Geography 479, 482.
[198] See chapter one, section 2 and chapter two, section 4.

combined with a new (or renewed) focus on 'the processes that are continually constructing spatial patterns, social institutions, and socio-natural hybrids'.[199]

This is precisely the shift in perspective that a relational-dialectical view of scale can offer. Regarded through its lens, marine ecosystems shed the skin of hierarchically organised 'checkerboards' and assume the form of fluid and pluralistic 'hydroelemental assemblages',[200] comprised of 'mobile biota (both human and non-human) as well as technologies and objects'.[201] Already widely employed among human geographers working on the ocean,[202] this conception of marine ecosystems can render the ecologists dedicated to their study more discerning of instances of 'socio-biological-geophysical convergence',[203] however fleeting these may be. As the next section will demonstrate, it can do the same for legal scholars and practitioners.

2.2.2. The legal scaling of ecosystem-based marine planning and management in the EU

We now turn to the second part of our analysis, which centres around the scalings involved in the legal framework that underpins ecosystem-based marine management in the EU. Before specifying the focus of our reflection and delving into the pertinent provisions, some broad considerations on law and scale are in order. First, and most fundamentally, law is a scalar project. Yet law's scalarity did not become the subject of concerted critical reflection until a number of scholarly movements emanating from different intellectual traditions and harbouring diverse preoccupations coalesced around a shared interest in the interactions between multiple, overlapping legal orders. The debate that followed, which remains lively and ongoing, has revealed the limitations of a 'state-sovereigntist' view of law, premised on 'the (co)existence of territorially differentiated state legal orders, each of them claiming exclusive jurisdiction within its respective territorially defined social space, and international law, confined to regulating external relations among sovereign states'.[204] There is now little

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[199] Philip E Steinberg, 'Of Other Seas: Metaphors and Materialities in Maritime Regions' (2013) 10 Atlantic Studies 156, 161-162.

[200] Philip Steinberg and Kimberley Peters, 'Wet Ontologies, Fluid Spaces: Giving Depth to Volume through Oceanic Thinking' (2015) 33 Environment and Planning D: Society and Space 247, 250.

[201] Steinberg (n199), 164-165.

[202] See indicatively Kimberley Peters, 'Manipulating Material Hydro-Worlds: Rethinking Human and More-Than-Human Relationality through Offshore Radio Piracy' (2012) 44 Environment and Planning A: Economy and Space 1241.

[203] Steinberg (n199), 164-165.

[204] Kaarlo Tuori, 'Transnational Law: On Legal Hybrids and Legal Perspectivism' in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (CUP 2014), 12-13.

doubt left that this two-level model is ill-suited to account for the transformations that law has been undergoing as a result of various facets of social life – not least social-economic and social-ecological – becoming denationalised and transnationalised. More specifically, the model is difficult to reconcile with the emergence of specialised, 'self-contained' transnational regimes, which are coupled to – and reflective of the 'independent rationality of' – 'functionally differentiated [sectors] of the world society'.[205] The proliferation of such regimes impacts both national law and international law: no longer exhausting between them the possible and appropriate ways of conceiving, enacting, and performing legality, the two realms become increasingly fragmented and qualified in the substantive scope and spatial remit of their mandates.[206] And this not only in giving way to specialised transnational regimes, but also in recognition of the 'informal, unofficial, more or less customary' infra-state laws which govern social relations 'in rural areas, in marginalised urban sectors, in churches, in sports, in the professions'.[207]

In a pattern that will by now be familiar to the reader, this debate suggests a shift away from a positivist-reductionist view of law's scalarity towards a relational-dialectical one. In this particular disciplinary setting, this shift means letting go of the idea that law is 'an exclusive, systematic and unified hierarchical ordering of normative propositions', and recognising the 'normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping "semi-autonomous social fields"'.[208] The point to underscore for the purposes of the present analysis is that the legal orders attached to these fields have their own 'interpretive standpoints' or '"root images" of law'.[209] Even where they seek to regulate the same social object, they use different standards to flesh out its details and identify its consequential features, hence foregrounding and validating different social and legal struggles. These struggles they proceed to address using regulatory techniques that befit the level of legality at which they operate. This is artfully conveyed by de Souza Santos in his schematic juxtaposition of local law and transnational law. Whereas the former 'is rich in details and features; describes behaviour and attitudes vividly; [and] contextualises them in their immediate surroundings', the latter 'is poor in details and features, [and] skeletonises behaviour and attitudes, reducing them to general types of action'.[210] However, while local

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[205] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012), 171.
[206] Tuori (n204), 18.
[207] Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14 Journal of Law and Society 279, 287.
[208] John Griffiths, 'What is Legal Pluralism?' (1986) 18 The Journal of Legal Pluralism and Unofficial Law 1, 3 and 39.
[209] de Sousa Santos (n207), 288.
[210] ibid, 289-290.

law has the vital advantage of being 'sensitive to distinctions (and complex relations) between inside and outside, high and low, just and unjust', transnational law

> determines with accuracy the relativity of positions (the angles between people and between people and things), provides sense of direction and schemes for shortcuts and, finally, it is sensitive to distinctions (and complex relations) between part and whole, past and present, functional and non-functional.[211]

This comparison of local and transnational law takes us a step closer to the final piece of the scalar puzzle this section has been assembling. Reading the two profiles, one would be justified in thinking that they describe complementary approaches; a kind of ideal division of regulatory labour between local law and transnational law, with national law serving as a decreasingly neuralgic median point. And indeed, legal orders operating at these different levels of legality can coexist productively and fairly harmoniously, each one constructing, problematising, and acting upon the same object in ways that capitalise on its own strengths while also harnessing (or, at the very least, not undermining) the strengths of others. What often prevents this multi-level utopia from materialising is, as de Sousa Santos notes, the fact that each legal order departs from its own interpretive standpoint. This is not merely a note on legal hermeneutics. To the contrary, a legal order's interpretive standpoint is informed by the balance of powers characterising the level of legality to which it is canonically attached. In de Sousa Santos' own words, '[p]ower represents social and physical reality on a scale chosen for its capacity to create those phenomena that maximise the conditions for [its] reproduction'.[212] It is so that law becomes instrumentalised in projects wherein agents of various persuasions attempt to produce, sustain, relativise or dissolve the scalar fixes around which socio-spatial relations are organised at a given moment. Which brings us to the missing puzzle piece: alongside ecology (and environmental management) and human geography (and socio-political governance), law (and political-legal regulation) is another field wherein choices concerning scale are charged with symbolic and material meaning and, by virtue of being so charged, give rise to issues of a normative rather than technical nature. This realisation forces us to go beyond the mere mapping of the legal orders acting upon the object that interests us, and to examine their 'interlegality', meaning 'the superimposition, interpenetration and mixture of different legal spaces in both mind and action'.[213]

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[211] ibid.

[212] ibid, 284.

[213] Karen Knop, 'Statehood: Territory, People, Government' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012), 111, drawing on Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edn, CUP 2002), 437.

The need for this is especially palpable in the field of environmental law, which has all the makings of legal pluralism: polycentricity in terms of legal sources, multiplicity in terms of legal orders and systems, and fuzziness in terms of the boundary between formal and other social norms.[214] As for the subfield of marine environmental law, this is subject to a particularly high level of normative heterogeneity due to the material nature of the object of its regulation, seawater acting to weave together a network of ecological and social-ecological relationships which are at once deeply localised and boundary-transcending.[215]

Europe is a characteristic example. The continent's physical and political geography, whereby a number of relatively small sovereign states share coastlines and river systems, and border enclosed or semi-enclosed seas, creates the need for a multilateral and multi-level approach to regulation and management.[216] Consequently, we are seeing a number of horizontally and vertically differentiated legal orders use the ecological-geographic concept of the *ecosystem* as a device by which to both legitimate their mandates and demarcate their substantive and spatial scope. Consistent with the legal pluralist thesis, these legal orders differ in how they frame the precise *foci* and *loci* of regulation, governance, and management. Yet, consistent with the interlegality thesis, they perform their functions in interaction with, rather than in isolation from, each other, in the process transmuting each other. The remainder of this analysis will, accordingly, inquire into the dynamics between different levels of marine environmental law-making, showing how the EU legal order came to be the one that dictates the rules of the game of ecosystem-based marine planning and management. Moving beyond this descriptive exercise, it will examine the counter-intuitive possibility that this EU-driven confluence of norms and approaches to governance may be '[producing] destabilizing consequences that undermine other orders or disrupt the institutions that allow plural coexistence'.[217]

Our first contention is that the heterogeneous patchwork of legal instruments and governance arrangements that underpin ecosystem-based marine management in Europe's regional seas find their nucleus in EU law and, in particular, the MSFD. We further posit that this dynamic is not the product of chance, but a consequence of the distinguishing characteristics of the EU legal order, including, not least, its combination of elements of supranationalism and intergovernmentalism, its openness to a regionally-tailored approach to

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[214] Tuori (n204), 16.
[215] Swyngedouw (n162), 147.
[216] Lawrence Juda, 'The European Union and Ocean Use Management: The Marine Strategy and the Maritime Policy' (2007) 38 Ocean Development & International Law 259; David Symes, 'Regionalising the Common Fisheries Policy: Context, Content and Controversy' (2012) 11 Maritime Studies 1.
[217] Víctor M Muñiz-Fraticelli, 'Theorizing Justice under Conditions of Global Legal Pluralism' in Paul Schiff Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (OUP 2020).

legal integration, and its command of a rich institutional infrastructure dedicated to facilitating the implementation and ensuring the enforcement of the Union *acquis*. Owing to these characteristics, the EU legal order is often the one that gets to dictate the balance between different levels of environmental regulation and management across the common European territory. Predictably, this balancing act is likely to involve institutional rescalings of a profoundly transformative nature.

The MSFD is a case in point. From the outset, the Union legislator justified its intervention by invoking the nestedness of marine ecological systems, which is to say, the idea that smaller ecosystems are functionally comprised within larger ones and that changes occurring at one level of an ecological hierarchy will translate into altered patterns and processes at higher levels.[218] This ecological reality was seen as giving rise to two legal desiderata: promoting consistency (i.e. the non-contradiction of the norms, rules, and measures that underpin marine management within a given ecosystemic context) and allowing for flexibility (i.e. the accommodation of regional circumstances within agenda- and standard-setting processes, as well as within processes culminating in the adoption of operational measures).[219]

In terms of scalar arrangements, the two desiderata appeared to be pointing in different directions: consistency towards supranational integration and flexibility towards infranational and transnational devolution. This conundrum ultimately worked in the Union legislator's favour, allowing it to build a case for the added value of EU-level action. To wit, the explanatory memorandum accompanying the Commission's legislative proposal used the desideratum of consistency as an argument for a new supranational legislative initiative in the field of marine environmental protection. Although it was recognised that several Member States were already adopting measures in this respect, these were deemed to be of limited efficacy due to their narrow spatial scope. As for international cooperation within the framework of the Regional Seas Conventions, this was subject to its own shortcomings, particularly as a result of these organisations' 'lack of enforcement and control'.[220] A supranational initiative was thus considered necessary in order to minimise the risk of Member

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[218] Commission, 'Proposal for a Directive of the European Parliament and of the Council Establishing a Framework for Community Action in the Field of Marine Environmental Policy (Marine Strategy Directive)' COM (2005) 505 final, 6.

[219] The interpretation of the notions of consistency is based on Froujke Maria Platjouw, *Environmental Law and the Ecosystem Approach: Maintaining Ecological Integrity through Consistency in Law* (Routledge 2016), 189. The interpretation of the notion of flexibility is based on Saskia van Holten and Marleen van Rijswick, 'The Governance Approach in European Union Environmental Directives and its Consequences for Flexibility, Effectiveness and Legitimacy' in Marjan Peeters and Rosa Uylenburg (eds), *EU Environmental Legislation: Legal Perspectives on Regulatory Strategies* (Edward Elgar 2014), 45.

[220] COM (2005) 505 final (n218), 6.

States bordering the same marine ecoregion arriving at different conclusions vis-à-vis the issues that management ought to address, the approaches it ought to be predicated upon, and the particular measures it ought to entail.[221] The desideratum of flexibility was, in turn, used as an argument for the adoption of a framework directive, this legislative format being well-placed to 'address shared challenges and […] establish common principles and approaches to the protection of the environment across Europe' while leaving '[a]mple scope […] for national decision and regional concertation'.[222]

The instrument that was ultimately adopted brought about a more radical change than the Commission's explanatory memorandum would suggest. As Hey has astutely observed, both in their formulation and in their implementation to date, the MSFD's operative provisions suggest a fundamental redefinition of the relationship between the EU, its Member States, and the governing bodies of the Regional Seas Conventions: whereas the latter bodies retain their status as actors of international law and continue to adopt acts which are binding upon the EU and its Member States, they are also – and increasingly – taking on the role of implementing EU policy and law.[223]

The Directive performs this redefinition through two strategic scaling choices. The first, which is spatial in nature, pertains to the ecoregional units that the Directive elevates into the primary *foci* of regulation, governance, and management. As already discussed in section 2.1, the Directive divides the marine waters falling under the sovereignty and jurisdiction of the Member States into four marine regions and eight marine subregions.[224] It is at the level of these ecoregional units that the environmental quality objective to be attained by Member States – i.e. the good environmental status of their marine waters – must be determined.[225] Each Member State must accordingly develop a marine strategy which, while being specific to its own environment, reflects the overall perspective of the marine region or subregion concerned.[226] These provisions are regarded by Hey as assigning marine regions and subregions the role of 'territorially based public governance units based on European law'.[227]

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[221] ibid.

[222] ibid, 6-7.

[223] Ellen Hey, 'Multi-Dimensional Public Governance Arrangements for the Protection of the Transboundary Aquatic Environment in the European Union: The Changing Interplay between European and Public International Law' (2009) 6 International Organizations Law Review 191, 191-192. See also Luc van Hoof, Judith van Leeuwen and Jan van Tatenhove, 'All at Sea; Regionalisation and Integration of Marine Policy in Europe' (2012) 11 Maritime Studies 1.

[224] MSFD, art 4. The four regions are: the Baltic Sea, the North-east Atlantic Ocean, the Mediterranean Sea, and the Black Sea. The eight subregions are: in the North-east Atlantic Ocean, the Greater North Sea, the Celtic Sea, the Bay of Biscay and the Iberian Coast, and the Macaronesian biogeographic region; and in the Mediterranean Sea, the Western Mediterranean Sea, the Adriatic Sea, the Ionian Sea and the Central Mediterranean Sea, and the Aegean-Levantine Sea.

[225] MSFD, art 3(5).

[226] MSFD, recital 11 and art 4(1).

[227] Hey (n223), 200.

The significance of this becomes apparent when one considers that the spaces being transformed in this way fall within the spatial scope of application of the Regional Seas Conventions. This leads us to the Directive's second strategic scaling choice, which is institutional in nature. The Directive stipulates that, 'where practical and appropriate', coordination among Member States and between Member States and third countries must take place within existing institutional structures, including those established under the Regional Seas Conventions.[228] Hey posits that, under this provision, the international organisations established under the Regional Seas Conventions are assigned the role of coordinating bodies that Member States may rely upon for the purposes of discharging their obligations under the MSFD. In assuming this role, the pertinent organisations become endowed with 'public governance tasks within the framework of European law'.[229]

One could argue that Member States retain the power to shape the institutional objectives and normative outputs of the Regional Seas Conventions through intergovernmental negotiations, thus setting the tone for how the MSFD is to be implemented in practice. Although this claim holds some credence, it is important to recall that the EU is itself a party to the relevant conventions and is represented in their governing bodies by the European Commission. Granted, the Commission's comportment within these fora remains 'internally constrained' by the principle of conferral, whereby the EU 'shall only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein'.[230] At the same time, the fact that international cooperation within the framework of the Regional Seas Conventions is becoming increasingly oriented towards the implementation of EU law, together with the fact that the Commission is tasked with supervising said implementation,[231] makes it difficult to imagine a scenario where decisions will be made at the international level which do not have the Union's approval. This is not to mention the role of the CJEU is assessing Member State compliance with EU law. The Court's scrutiny extends to measures agreed at the international level, even if the bodies under which they have been adopted do not possess legal personality under EU law and, as such, are not in a position to adopt decisions which formally have the status of EU law.[232]

All this serves to corroborate the claim that it is the EU legal order that, more so than any other, is shaping the interactions between the legal instruments and governance

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[228] MSFD, art 6.
[229] Hey (n223), 199.
[230] Consolidated version of the Treaty on European Union [2012] OJ C 326/13 (TEU), art 5(2). See generally Gracia Marín Durán and Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing 2012), 5-9.
[231] MSFD, arts 9(2), 10(2) and 11(3).
[232] Hey (n223), 222.

arrangements that underpin ecosystem-based marine management in Europe's regional seas. Here, interlegality does not take the form of a hierarchical trickling down of legal dictates from the international level down to the EU and national levels, and from the EU level down to the national level. Rather, EU law, by way of the MSFD, 'provides the legal framework, while international and national law, together with European law, provide the flesh on the bones of that framework'.[233]

The thesis maintains that, overall, this shift in the dynamic between the national, supranational, and international legal orders bodes well for the operationalisation of the ecosystem approach to marine management, especially to the extent that it subjects it to the scrutiny of a powerful supervisory body and a court. Concerns, however, emerge when the shift is regarded through the combined lens of the critique of the MSFD advanced in the previous section, the human-geographic debate on the politics of scale, and de Sousa Santos' profiles of local and transnational law. Our second contention is, thus, that the institutional rescalings involved in the implementation of the MSFD, together with the Directive's technocratic brand of environmental management, are creating new 'choreographies of inclusion/exclusion and domination/subordination' which merit critical attention.[234]

To be sure, the MSFD includes a number of provisions that promote public participation. For one, it explicitly includes among the measures that Member States can take in order to achieve or maintain good environmental status those relating to 'communication, stakeholder involvement and raising public awareness'.[235] Moreover, it requires Member States to ensure that all interested parties are given 'early and effective' opportunities to participate in its implementation.[236] To facilitate this participation, the Directive provides that Member States publish, and make available to the public for comment, summaries of the different elements of their marine strategies and of any updates thereof.[237] Finally, the Directive stipulates that access to information is to be governed by the Access to Environmental Information Directive, which enshrines within EU law the right of public access to environmental information held by or for public authorities.[238]

In its appraisal of the progress achieved during the first implementation cycle of the MSFD (2012-2018), the European Commission appears satisfied with how these provisions have been applied to date and confident of their future contributions to public engagement, ocean literacy, and, crucially from a legal perspective, the discharge of the international

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[233] ibid.
[234] Brenner (n159), 607-608; Swyngedouw (n162), 147.
[235] MSFD, art 13(1) and annex VI, para 8.
[236] MSFD, art 19(1).
[237] MSFD, art 19(2).
[238] MSFD, art 19(3).

obligations that the EU and its Member States have assumed vis-à-vis procedural environmental rights.[239] A somewhat different story is told by scholars conducting theoretical and empirical research on the institutional arrangements involved in the Directive's implementation. Of particular concern is the fact that the Directive does not set out precise criteria and modalities for stakeholder participation.[240] It is argued that, in the absence of such guideposts, decision-makers have few tools with which to identify and address the factors that may be preventing different stakeholders from becoming directly and actively involved in the Directive's implementation; factors such as institutional capacity, economic strength, and political authority.[241] Still more elusive is the understanding of how the hindrances stakeholders are grappling with are affected by the growing polycentricity and non-linearity of ecosystem-based marine management. Attention is drawn to the fact that institutional ambiguity generates uncertainty and confusion with respect to the rules that govern decision-making and participation.[242] It further casts doubt on the extent to which management processes adhere to good governance principles, such as accountability, legitimacy, responsibility, representation, and transparency.[243] Crucially, with stakeholders operating on unequal footing and institutions – especially higher-order institutions such as the Regional Seas Conventions – doing little to level the playing field, any mismatches between the institutional settings within which decisions are made and the territorial locations to which these decisions relate are perpetuated and exacerbated.

As Kern and Söderström argue, and as will be discussed in greater detail in chapter four, bridging these mismatches and reconstituting legitimacy requires that the deterritorialisations implicated in the upwards rescaling of marine management are followed up with reterritorialisations of both agency (i.e. of governance architectures) and substance

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[239] COM (2020) 259 final (n83), 6; Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention).

[240] Jan van Tatenhove and others, 'Regional Cooperation for European Seas: Governance Models in Support of the Implementation of the MSFD' (2014) 50 Marine Policy 364.

[241] Astrid Hendriksen and others, 'Fishing for Opinions: Stakeholder Views on MSFD Implementation in European Seas' (2014) 50 Marine Policy 353, 361-362; Kristen Ounanian and others, 'On Unequal Footing: Stakeholder Perspectives on the Marine Strategy Framework Directive as a Mechanism of the Ecosystem-based Approach to Marine Management' (2012) 36 Marine Policy 658, 660.

[242] Judith van Leeuwen, Luc van Hoof and Jan van Tatenhove, 'Institutional Ambiguity in Implementing the European Union Marine Strategy Framework Directive' (2012) 36 Marine Policy 636, 637. See also Judith van Leeuwen and others, 'Implementing the Marine Strategy Framework Directive: A Policy Perspective on Regulatory, Institutional and Stakeholder Impediments to Effective Implementation' (2014) 50 Marine Policy 325.

[243] Jan PM van Tatenhove, 'How to Turn the Tide: Developing Legitimate Marine Governance Arrangements at the Level of the Regional Seas' (2013) 71 Ocean and Coastal Management 296; Katrine Soma, Jan van Tatenhove and Judith van Leeuwen, 'Marine Governance in a European Context: Regionalization, Integration and Cooperation for Ecosystem-based Management' (2015) 117 Ocean and Coastal Management 4.

(i.e. of laws and policies, whether single-issue or integrated).[244] It also requires the elaboration and execution of place-making strategies aimed at cultivating shared regional identities based on common values.[245] Key to realising both requirements is a conception of marine regions as being comprised of places, understood both as physical entities and as socially constructed systems of meaning.[246] This is consistent with the thesis' recasting of ocean spaces as peopled seascapes and more-than-human assemblages. It is equally consistent with the thesis' spatialised understanding of social-ecological vulnerability, which highlights the relevance of two core dimensions of place attachment: place dependence (i.e. dependence on a spatially defined resource that is necessary for the development of desired activities) and place identity (i.e. a psychological investment in a setting that has developed over time).[247] Although this appears to be a conceptual link rather than a normative one, the remainder of this chapter will relate it to elements of the normative guidance elaborated under international biodiversity law with regard to the ecosystem approach – guidance which, although not written in the language of human rights, is nevertheless amenable to a human rights reading.

3. Ecosystem-based marine planning and management under international biodiversity law

The preceding analysis has shown how the legal framework that governs ecosystem-based marine planning and management in the EU contributes to two of the foremost shortcomings of MSP practice: the failure to integrate different knowledge systems and to genuinely and meaningfully involve legitimate stakeholders and the public. In the former instance, law is implicated by virtue of its kinship with scientific and technological-managerial rationality; in the latter, by virtue of having reshuffled the *loci* of decision-making without having fully addressed the implications that this reshuffling may have for different actors. Against this background, the present section suggests aligning the normative framework that governs ecosystem-based marine planning and management in the EU with the iteration of the ecosystem approach found in international biodiversity law.[248]

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[244] Kristine Kern and Sara Söderström, 'The Ecosystem Approach to Management in the Baltic Sea Region: Analyzing Regional Environmental Governance from a Spatial Perspective' (2018) 98 Marine Policy 271, 273.
[245] ibid, 276.
[246] Jerry J Vaske and Katherine C Kobrin, 'Place Attachment and Environmentally Responsible Behavior' (2001) 32 Journal of Environmental Education 16, 17.
[247] ibid.
[248] On the wider significance of the CBD, see Mara Ntona and Elisa Morgera, 'Connecting SDG 14 with the other Sustainable Development Goals through Marine Spatial Planning' (2018) 93 Marine Policy 214.

There are several reasons why we turn to this particular regime. First, it is widely acknowledged that the regime's cornerstone, the CBD, is the multilateral environmental agreement that has made the greatest contribution to the advancement of the ecosystem approach at the international level,[249] both building upon the *acquis* of international environmental law and pushing its boundaries forward.[250] Albeit imperfect, the balance that this particular iteration of the ecosystem approach strikes between accommodating the human subject and displacing it from its position of primacy is arguably the closest that international environmental law gets to a socialised notion of ecological integrity, i.e. 'one that focuses on enhancing the resilience of the biosphere *as a social-ecological system*'.[251]

Second, and relatedly, although the pertinent principles and guidelines are not written in the language of human rights, they offer multiple entry points for a mutually supportive interpretation of international environmental law and international human rights law.[252] Attempts at such an interpretation can be grounded in a black-letter analysis of instruments adopted within and beyond the context of the CBD. For instance, one can employ the CBD guidance on the ecosystem approach as a tool with which to refine the interpretation and application of human rights standards of relevance to environmentally vulnerable constituencies, such as local communities that depend heavily upon natural resources for their subsistence and livelihood. At the same time, one can use the CBD guidance on the ecosystem approach as a springboard for developing a more critical understanding of the human rights-environment nexus. That is, a more-than-human understanding which lends proportion and assigns consequence to human rights' social, ecological, and spatial dimensions. It is submitted that, combined, these two distinct ways of engaging with the CBD offer a useful basis upon which to begin to re-normativise marine planning and management in the EU and beyond.

Finally, and on a decidedly doctrinal note, it bears mentioning that the pertinent principles and guidelines are a product of the consensus-based normative activity of the CBD Conference of the Parties (COP). As Morgera has observed, this mode of decision-making suggests a more than minor law-making effect, consensus serving to '[secure] widespread

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[249] Platjouw (n219), 32.

[250] Elisa Morgera, 'The Ecosystem Approach and the Precautionary Principle' in Elisa Morgera and Jona Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar 2017), 71.

[251] Peter Bridgewater, Rakhyun E Kim, and Klaus Bosselmann, 'Ecological Integrity: A Relevant Concept for International Environmental Law in the Anthropocene?' (2015) 25 Yearbook of international Environmental Law 61, 75; emphasis added.

[252] Elisa Morgera, 'Against All Odds: The Contribution of the Convention on Biological Diversity to International Human Rights Law' in Denis Alland and others (eds), *Unité et Diversité du Droit International/Unity and Diversity of International Law* (Martinus Nijhoff Publishers 2014); Elisa Morgera, 'The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law' (2018) BENELEX Working Paper No 17.

support for a text that legitimizes and promotes consistent State practice'.[253] This leads her to contend that, although the strive for consensus has admittedly come at the price of 'qualified and often convoluted' stipulations, and although this can be taken as 'an expression of disagreement among CBD Parties as to whether certain interpretations reflect existing or emerging international law', it will ultimately be 'difficult for a State to defend an approach that goes against an internationally recognized best practice, particularly when it has agreed upon it after intensely participating in intergovernmental negotiations'.[254]

Crucially for present purposes, Morgera's claim finds support in the annual UN General Assembly resolutions on 'Oceans and the Law of the Sea' and on 'Sustainable Fisheries'. These provide that, in applying 'ecosystem approaches to ocean management', states are to be guided by 'the commitments contained in' the CBD.[255] The implications of this stipulation become evident when one considers the role that these recurring resolutions play in '[facilitating] the progressive development' of the UN Convention on the Law of the Sea[256] – 'a treaty that was always intended to mature organically to adapt to changing circumstances'.[257] It follows that, depending on the reading we make of it, and by virtue of its recognised authoritativeness, the CBD guidance on the ecosystem approach can have a transformative effect on ocean law and governance (the caveat, of course, being that, for all the formal affirmations of its importance, the systemic interpretation of international law remains an exercise fraught with challenges).

3.1. The ecosystem approach as a vehicle for community-based management

It should be noted at the outset that the ecosystem approach is not explicitly mentioned in the text of the CBD. The Convention nevertheless introduces the legal concept of the *ecosystem*, defined as 'a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit'.[258] In addition, the Convention calls

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[253] Morgera (n252, 'The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law'), 14, citing Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007), 112.
[254] ibid, 2 and 13-15.
[255] 'Oceans and the Law of the Sea' UNGA Res 76/72 (20 December 2021) UN Doc A/RES/76/72, para 202(c).
[256] 1982 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 21 ILM 1261 (LOSC).
[257] Richard Caddell, 'International Fisheries Law and Interactions with Global Regimes and Processes' in Richard Caddell and Erik J Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2019), 136.
[258] CBD, art 2.

upon Parties to '[p]romote the protection of ecosystems' and to '[r]ehabilitate and restore degraded ecosystems […], *inter alia*, through the development and implementation of plans or other management strategies'.[259] Ecosystems are thus elevated into an object of international regulation, in a normative move that affirms 'the dynamic interconnectedness of the variability of life on earth and the need to actively manage, not just preserve, natural system functions for the long term'.[260]

These provisions have served as the treaty basis for the elaboration of the ecosystem approach by CBD Parties. Already at its second meeting, the CBD COP recognised the ecosystem approach as 'the primary framework of action to be taken under the Convention'.[261] At its fifth meeting, it proceeded to define the ecosystem approach as 'a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way'.[262] It further expressed its expectation that, thus conceptualised, the ecosystem approach would contribute to the balanced achievement of the three objectives of the Convention, namely, the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising from the utilisation of genetic resources.[263] Finally, the CBD COP laid down a set of principles to guide the further development and operationalisation of the ecosystem approach by Parties, other governments, and international organisations.[264] Subsequent decisions added flesh to the bones of the ecosystem approach, expanding both on its cross-cutting aspects and on its particular significance for various thematic initiatives established under the Convention. Worth noting for present purposes is that the ecosystem approach has featured in the CBD programmes of work on marine and coastal biodiversity[265] and island biodiversity,[266] as well

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[259] CBD, art 8(d) and (f).

[260] Morgera (n250), 71.

[261] CBD Decision II/8, 'Preliminary consideration of components of biological diversity particularly under threat and action which could be taken under the Convention' (1995) UN Doc UNEP/CBD/COP/2/19, para 1.

[262] CBD Decision V/6, 'Ecosystem approach' (2000) UN Doc UNEP/CBD/COP/5/23, section A, paras 1 and 2.

[263] CBD, art 1.

[264] CBD Decision V/6 (n262), section B. See also CBD Decision VI/12, 'Ecosystem approach', (2002) UN Doc UNEP/CBD/COP/6/20; CBD Decision VII/11 (n125); CBD Decision IX/7, 'Ecosystem approach' (9 October 2008) UN Doc UNEP/CBD/COP/DEC/IX/7.

[265] CBD Decision IV/5, 'Conservation and sustainable use of marine and coastal biological diversity, including a programme of work' (1998) Un Doc UNEP/CBD/COP/4/27. See also CBD, 'The Jakarta Mandate – From Global Consensus to Global Work: Conservation and Sustainable Use of Marine and Coastal Biological Diversity' (CBD Secretariat 2000); CBD Decision VII/5, 'Marine and coastal biological diversity' (13 April 2004) UN Doc UNEP/CBD/COP/DEC/VII/5, para 19; annex I, para 4 and operational objectives 1.1(d) and 2.1(c).

[266] CBD Decision VIII/1, 'Island biodiversity' (15 June 2006) UN Doc UNEP/CBD/COP/DEC/VIII/1, annex, paras 15 and 22.

as in COP decisions on marine debris and anthropogenic underwater noise,[267] cold-water areas,[268] sustainable fisheries,[269] ecologically and biologically significant areas,[270] coral bleaching,[271] and MSP.[272]

Focusing on the principles that lie at the heart of this normative activity, the so-called Malawi Principles, it is readily evident that their underlying philosophy is aligned with the tenets of social-ecological systems theory. The pertinent guidance explicitly states that 'humans, with their cultural diversity, are an integral component of many ecosystems'.[273] Accordingly, whereas it is asserted that the conservation of ecosystem structure and functioning should be a priority target for the ecosystem approach,[274] it is also acknowledged that different sectors of society view ecosystems in terms of their own economic, social, and cultural needs. From this it follows that the objectives of ecosystem management are a matter of societal choice, to be determined through negotiations and trade-offs among actors having different perceptions, interests, and intentions.[275] Decision-making processes should therefore be inclusive, transparent, and appropriately paced. They should also manage conflicts, broker compromises, ensure accountability, encourage cross-sectoral integration, build stakeholders' capacity for participation, and prevent stakeholder fatigue. Finally, but no less importantly, decision-making processes should account for any power asymmetries between stakeholders, ensuring that those who are routinely marginalised 'are not excluded or stifled in their participation'.[276]

The inextricable link between social and ecological systems is further reflected in how the CBD guidance on the ecosystem approach deals with the question of scale. As already mentioned in section 2.2, scale serves as the focus of two distinct principles: first, that the ecosystem approach should be undertaken at the appropriate spatial and temporal scales; and,

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[267] CBD Decision XIII/10, 'Addressing impacts of marine debris and anthropogenic underwater noise on marine and coastal biodiversity' (10 December 2016) UN Doc CBD/COP/DEC/XIII/10, para 11(e).
[268] CBD Decision XIII/11, 'Voluntary specific workplan on biodiversity in cold-water areas within the jurisdictional scope of the Convention' (10 December 2016) UN Doc CBD/COP/DEC/XIII/11, annex I, para 24; annex II 5(2)(a) and 5(3); CBD Decision X/29, 'Marine and coastal biodiversity' (29 October 2010) UN Doc UNEP/CBD/COP/DEC/X/29, para 13(g).
[269] CBD Decision XI/18, 'Marine and coastal biodiversity: Sustainable fisheries and addressing adverse impacts of human activities, voluntary guidelines for environmental assessment, and marine spatial planning' (5 December 2012) UN Doc UNEP/CBD/COP/DEC/XI/18, section A, para 2.
[270] CBD Decision X/29 (n268), para 25.
[271] CBD Decision V/3, 'Progress report on the implementation of the programme of work on marine and coastal biological diversity (implementation of decision IV/5)' (2000) UN Doc UNEP/CBD/COP/5/23, annex, section B.
[272] CBD Decision XIII/9, 'Marine spatial planning and training initiatives' (9 December 2016) UN Doc CBD/COP/DEC/XIII/9, paras 2 and 3(e).
[273] CBD Decision V/6 (n262), section A, para 2.
[274] CBD Decision VII/11 (n125), annex I, principle 5.
[275] CBD Decision VII/11 (n125), annex I, principle 1.
[276] CBD Decision VII/11 (n125), annex I, principle 1, para 1.5.

second, that management should be decentralised to the lowest appropriate level.[277] Upon initial reflection, the two principles appear to be pulling law- and decision-makers in different directions. To their credit, the CBD Parties do not shy away from this contradiction. To the contrary, they take some decisive steps towards addressing the challenges that arise from the push-pull between an ecologically-minded notion of scale and one which adheres to patterns of socio-political organisation. They specifically recognise that, whilst the ecosystem approach is based upon 'the hierarchical nature of biological diversity', boundaries for management are to be defined operationally by 'users, managers, scientists, and indigenous and local peoples'.[278] Conceding the prospect of social-ecological scale mismatches, they proceed to highlight the need for more decentralised models of natural resource management. These are believed to enhance efficiency, effectiveness, and equity, and to contribute to the balance between local interests and the wider public interest. It is posited that, '[t]he closer management is to the ecosystem, the greater the responsibility, ownership, accountability, participation, and use of local knowledge'.[279] This is not, of course, to say that higher-order institutions, such as central governments and international organisations, do not have a role to play within management. It is rather to suggest that decisions about particular aspects of management must be assigned to the body that represents 'the most appropriate community of interest'.[280] Strategic decision-making can, therefore, still be assigned to higher-order institutions, while decisions about the distribution of the benefits accruing from management are best entrusted to lower-order ones. Crucially, where fragmentation of decision-making and management responsibilities persists, its adverse effects should be compensated for through the cultivation of cross-scalar linkages, including through the establishment of cross-scalar channels of communication, information exchange, and accountability.

How the CBD guidance on the ecosystem approach deals with the question of scale sets the tone for how it deals with the question of knowledge. In this last regard, it is noted that '[m]ost problems of biological-diversity management are complex, with many interactions, side-effects and implications, and therefore should involve the necessary expertise and stakeholders at the local, national, regional and international level, as appropriate'.[281] It follows that, to be effective, ecosystem-based management should be grounded in a combination of professional knowledge, knowledge accruing from natural-, economic-, and social-scientific research, and indigenous and local knowledge, innovations, and practices.[282] On the one hand,

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[277] CBD Decision VII/11 (n125), annex I, principles 2 and 7.
[278] CBD Decision VII/11 (n125), annex I, principle 7.
[279] CBD Decision VII/11 (n125), annex I, principle 2, para 2.1.
[280] CBD Decision VII/11 (n125), annex I, principle 2.
[281] CBD Decision VII/11 (n125), annex I, principle 12.
[282] CBD Decision VII/11 (n125), annex I, principles 11 and 12.

this calls for the establishment of procedures and mechanisms aimed at ensuring effective stakeholder and public participation throughout the different stages of implementing an ecosystem approach to environmental management. On the other hand, it calls for the establishment of mechanisms for documenting and making more widely available information from all relevant knowledge systems, including those based on local and traditional practices. In the latter case, however, it is imperative that indigenous and local knowledge be treated in a manner consistent with the requirements set out in the CBD in relation to benefit-sharing.[283]

This general guidance is not where the CBD's contribution to the conceptual and normative development of the ecosystem approach ends. Equally relevant is the elaboration by CBD Parties of different aspects of the treaty obligation to protect and promote the wider application of the knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. Most notable in this connection are the Akwé: Kon Guidelines for the conduct of socio-cultural and environmental impact assessments regarding developments proposed to take place in, or likely to impact on, sacred sites, and lands and waters traditionally occupied or used by indigenous and local communities.[284] The Guidelines seek to provide 'a collaborative framework' within which governments, decision-making authorities, development proponents, and indigenous and local communities can support the latter's 'full and effective' participation across the different stages of the assessment process,[285] from screening and scoping to impact analysis and evaluation, and from there to decision-making and monitoring.[286] The overarching aim is to ensure that proposed developments strike a balance between economic, social, cultural, and environmental concerns, as well as maximise opportunities for the conservation and sustainable use of biological diversity, the equitable sharing of benefits, and the recognition of traditional knowledge, innovations, and practices.[287]

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[283] CBD, art 8(j).

[284] Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, CBD Decision VII/16, 'Article 8(j) and related provisions' (13 April 2004) UN Doc UNEP/CBD/COP/DEC/VII/16, section F (the Akwé: Kon Guidelines). The Guidelines build upon previous guidance for incorporating biodiversity related issues into environmental assessment legislation and/or processes and in strategic environmental assessment: CBD Decision VI/7, 'Identification, monitoring, indicators and assessments' (2002) UN Doc UNEP/CBD/COP/6/20, annex.

[285] Akwé: Kon Guidelines, para 3.

[286] Akwé: Kon Guidelines, para 7.

[287] Akwé: Kon Guidelines, para 56. See also the Mo'otz Kuxtal Voluntary Guidelines for the Development of Mechanisms, Legislation or Other Appropriate Initiatives to Ensure the "Prior and Informed Consent", "Free, Prior and Informed Consent" or "Approval and Involvement", Depending on National Circumstances, of Indigenous Peoples and Local Communities for Accessing their Knowledge, Innovations and Practices, for Fair and Equitable Sharing of Benefits Arising from the Use of Their Knowledge, Innovations and Practices Relevant for the Conservation and Sustainable Use of Biological Diversity, and for Reporting and Preventing Unlawful Appropriation of Traditional Knowledge, CBD Decision XIII/18,

From a substantive perspective, the Akwé: Kon Guidelines call for the integration of cultural, environmental, and social impact assessments into a single process.[288] The cultural strand of the assessment process should focus on the effects that the proposed development is likely to have on the affected community's 'way of life', meaning, *inter alia*, its members' customary use of biological resources, their traditional knowledge, innovations, and practices, their sacred sites and associated ritual or ceremonial activities, their cultural privacy, and the exercise of their customary laws, including laws pertaining to tenure and the distribution of resources and benefits.[289] The environmental strand of the assessment process should, in turn, consider potential effects on local biodiversity, placing particular emphasis on those of its components that the members of the affected community rely upon for their livelihood, well-being, and other needs.[290] Lastly, the social strand of the assessment process should account for potential effects on the community's economic, social, cultural, civic, and political rights, as well as its well-being, vitality, and viability.[291] This appraisal should be based on social development indicators which are consistent with the affected community's views and which centre around health, safety, food and livelihood security aspects, gender roles and dynamics, social cohesion, and trans-generational relations.[292]

From a procedural perspective, the Akwé: Kon Guidelines require that the indigenous and local communities who traditionally occupy or use the lands and waters likely to be adversely impacted by the proposed development be invited to participate in, and be accorded full respect at all stages of, the assessment and development process.[293] Community representatives should be invited to participate in bodies appointed to advise at the screening and scoping stages, while communities should be consulted on the assessment process and involved in the establishment of the terms of reference for its conduct.[294] In addition, participatory models of community engagement should be used both during the conduct of the impact assessment and during subsequent decision-making, while the proponent of the proposed development should provide 'regular feedback to affected communities throughout the impact assessment and development processes'.[295] To support the envisaged involvement of affected communities, 'local experts should be identified and their expertise recognized and

'Article 8(j) and related provisions' (17 December 2016) UN Doc CBD/COP/DEC/XIII/18 (the Mo'otz Kuxtal Voluntary Guidelines).

[288] Akwé: Kon Guidelines, para 23.
[289] Akwé: Kon Guidelines, paras 6(a), 24-25, 28-29 and 32-34.
[290] Akwé: Kon Guidelines, paras 35-36.
[291] Akwé: Kon Guidelines, para 6(f).
[292] Akwé: Kon Guidelines, paras 42-43.
[293] Akwé: Kon Guidelines, para 12.
[294] Akwé: Kon Guidelines, para 14.
[295] Akwé: Kon Guidelines, para 15.

engaged at the earliest opportunity'.[296] What is more, governments are expected to support indigenous and local communities' expertise and participation through the provision of human, financial, technical, and legal resources,[297] which should be '[proportionate] to the scale of the proposed development'.[298]

The Guidelines go on to recommend the development of a series of written materials, to act as safeguards throughout the impact assessment and development processes. First, communities should receive encouragement and support to develop their own development plans.[299] These should include mechanisms for strategic environmental assessment which are 'commensurate with' the communities' goals for development and poverty eradication.[300] Second, proponents of the proposed development should elaborate environmental management and monitoring plans, which should include contingency plans regarding possible adverse socio-cultural impacts.[301] These plans, which are to serve as a framework within which the proposed development can take place, should be formulated in accordance with the affected communities' development plans and any measures these may have put in place for the conduct of strategic environmental assessments. Third, and critically from a legal standpoint, proponents of the proposed development should conclude agreements or action plans on mutually agreed terms with the affected community in order to protect the latter's interests.[302] The terms of such agreements are to cover the procedural aspects of impact assessments, including the option of a no-action alternative; set out the rights, duties, and responsibilities of parties; and address measures to prevent or mitigate any negative impacts of the proposed development.[303]

Against this background, it is clear that the intention behind the substantive and procedural directives enshrined in the Akwé: Kon Guidelines is to enable indigenous and local communities to fully and effectively participate in development planning. Importantly, in calling for socio-cultural considerations, traditional knowledge, and benefit-sharing to be taken into account at an early stage, the Guidelines expand the scope and methodologies of impact assessment and consultation processes. Performed along the lines they set out, environmental impact assessment ceases to be a techno-scientific exercise which '[privileges] mainstream views of development', becoming instead a 'culturally appropriate and open space

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[296] Akwé: Kon Guidelines, paras 13 and 16.
[297] Akwé: Kon Guidelines, para 18.
[298] Elisa Morgera, *Corporate Environmental Accountability in International Law* (2nd edn, OUP 2020), 190.
[299] Akwé: Kon Guidelines, para 55.
[300] ibid.
[301] Akwé: Kon Guidelines, para 19.
[302] Akwé: Kon Guidelines, para 21.
[303] For an analysis of the challenges involved on reconciling the communities' customary law with hegemonic legal systems, see Morgera (n298), 208-209.

for understanding the worldviews' of indigenous and local communities.[304] No longer constrained by a fatalistic logic of '*damage control*', assessment processes can, accordingly, move towards the identification, in an integrated and collaborative manner, of environmental, economic, and socio-cultural benefits, including those aimed at '*[improving] and [consolidating]* the conditions under which indigenous peoples' and local communities' ecosystem stewards and traditional knowledge holders develop and maintain their practices'.[305]

This last remark indicates how international biodiversity law may be relied upon for the purposes of developing an approach to the normativisation of MSP which is consistent with the socialised, ecologised, and spatialised understanding of human rights advocated by this study. Indeed, the remark in question resonates with our previously discussed understanding of law and justice as fundamentally relational phenomena stemming from co-constitutive interactions between embodied and emplaced entities.[306] This way of thinking brings us to the realisation that, in more-than-human assemblages such as ecosystems, the *locus* of both agency and vulnerability is always and necessarily 'a human-nonhuman working group'.[307] It also focuses our attention on the fact that, to be deemed *just*, planning, management, and assessment frameworks and processes must be sensitive to (and, where appropriate and necessary, actively protective of) idiosyncratic patterns of intra-human and human–non-human entanglement;[308] patterns which, as already noted, are shaped by the 'burdens and blessings of place'.[309]

This relational consciousness is very much there in the Malawi Principles and the Akwé: Kon Guidelines. The two instruments promulgate a view of indigenous peoples and local communities as *ecosystem stewards*, with this function being justified by 'the intrinsic connection' between these groups' knowledge and their lands, territories, and resources.[310] This connection renders traditional knowledge a critical component of the knowledge base upon which environmental management and development planning are anchored; one that

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[304] ibid, 191.
[305] ibid, 190 and 205-206; emphasis in the original.
[306] See chapter two, section 4.2.
[307] Anna Grear, 'Embracing Vulnerability: Notes towards Human Rights for a More-than-human World' in Daniel Bedford and Jonathan Herring (eds), *Embracing Vulnerability: The Challenges and Implications for Law* (Routledge 2020), 166, drawing on Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Duke University Press 2010), 236-237.
[308] ibid, 167.
[309] Anna Grear, 'Towards a New Horizon: In Search of a Renewing Socio-Juridical Imaginary' (2013) 3 Oñati Socio-Legal Series 966, 976.
[310] Morgera (n298), 187 and the references therein.

supplements and validates relevant scientific and technical expertise.[311] Yet the Malawi Principles and the Akwé: Kon Guidelines compel us to go beyond valuing traditional knowledge for its instrumental contribution to environmental management and development planning, and towards recognising it as a key dimension of indigenous peoples and local communities' vulnerability. Traditional knowledge is here depicted as being 'embodied in *traditional lifestyles* that are inextricably linked to natural resources, shared cultural identity and customary rules'.[312] As such, its preservation and continued development can be hampered by interferences with communities' customary relations with the lands and waters they have historically occupied and on which they depend for their material needs and cultural life.[313] It is precisely for this reason that the CBD places an obligation upon states to '[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements'.[314] It is for the same reason that the UN Framework Principles on Human Rights and the Environment set out an analogous requirement for states to '[respect] and [protect] [indigenous peoples and traditional communities'] traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources'.[315]

In these ways and more, the CBD points to an approach to the normativisation of MSP which values a plurality of knowledge and management systems. The thesis posits that this broad requirement can be broken down into a number of concrete standards to be incorporated into the legal frameworks that govern MSP, including in the EU. First, these frameworks must actively promote the integration, on an equal footing, of traditional, scientific, and expert knowledge, including by clarifying that the notion of best available scientific information comprises traditional knowledge. Second, these frameworks must explicitly recognise local communities as custodians and owners of their knowledge and of the traditional cultural expressions in which this knowledge is embodied. This should not be a passive recognition, but one accompanied by procedural and substantive obligations for traditional knowledge users, including the obligation to seek the prior informed consent of traditional knowledge

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[311] Report of the Expert Workshop to Provide Consolidated Practical Guidance and a Toolkit for Marine Spatial Planning (9 February 2015) UN Doc UNEP/CBD/MCB/EM/2014/4/2 (Report of the Expert Workshop), annex IV, paras 37 and 38.
[312] Morgera (n298), 187; emphasis in the original.
[313] John H Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (24 January 2018) UN Doc A/HRC/37/59, para 48. See also John H Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (19 January 2017) UN Doc A/HRC/34/49, paras 52-58.
[314] CBD, art 10(c).
[315] Knox (n313, UN Doc A/HRC/37/59), Framework Principle 15 and para 52. See also chapter one, section 5.

holders and to fairly and equitably share the benefits arising from the application of their knowledge within marine planning and management. Third, the legal frameworks that govern MSP must account for the link between traditional knowledge and ecosystem stewardship, hence supporting local communities' full and effective participation in marine planning and management, including through capacity-building. In doing so, law can empower traditional knowledge, including knowledge on customary ocean use planning, to be incorporated into regulated MSP processes, thus contributing to the preservation of local resource use arrangements and associated tenure rights, even if – *especially* if – these are not formally recognised.

Encouragingly, the technical guidance that has begun to emerge under the CBD with respect to MSP is already moving in this direction. The guidance clearly calls for recognising indigenous peoples and local communities' traditional knowledge,[316] and for addressing any challenges that could prevent the two groups from participating in the planning process, from lack of resources to difficulties in accessing scientific information and planning tools.[317] The guidance further suggests that planning processes build upon – rather than attempt to replace – traditional management capacities and governance regimes. In practice, this means 'scaling up' arrangements operating at the micro-level so that their focus and scope become aligned with the boundaries of the ecosystem to be managed.[318] This last stipulation is intended to support co-management and community-based management, these participatory paradigms having a proven track record for promoting the sustainable use of marine resources.[319]

In lieu of a conclusion, let us acknowledge that the emphasis this section has placed on indigenous peoples and local communities may appear overly restrictive for a study that or of limited relevance to the EU. Yet focusing on these subjective categories is justified by the fact that they provide the most obvious points of departure for a mutually supportive interpretation of international environmental law and international human rights law.

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[316] Report of the Expert Workshop, annex IV, paras 3(f) and 37-29.

[317] Report of the Expert Workshop, annex III, para 6.

[318] Report of the Expert Workshop, annex III, para 44(d).

[319] Secretariat of the CBD and the Scientific and Technical Advisory Panel, 'Marine Spatial Planning in the Context of the Convention on Biological Diversity: A Study Carried out in Response to CBD COP 10 Decision X/29' (2012) CBD Technical Series No 68, 24 and 27; Report of the Expert Workshop, annex IV, para 44(d). Being so motivated, the CBD guidance points to the relevance of two instruments adopted under the UN Food and Agriculture Organization (FAO): the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (adopted at the 31st Session of the FAO Committee on Fisheries, 9-13 June 2014); and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security (adopted at the 38th (Special) Session of the FAO Committee on World Food Security, 22 May 2012). See also Elisa Morgera and Julia Nakamura, Shedding a Light on the Human Rights of Small-scale Fishers: Complementarities and Contrasts between the UNDROP and the Small-Scale Fisheries Guidelines' in Mariagrazia Alabrese and others (eds), *The United Nations' Declaration on Peasants' Rights* (Routledge 2022).

Moreover, the common European territory is home to both indigenous peoples and local communities, including local communities embodying traditional lifestyles (e.g., small scale-fishing communities). The foregoing recommendations can, thus, help elucidate the relational dimensions of the rights held by each of the two groups, as well as promote their formal recognition within the normative frameworks that govern marine planning and management in the EU. Future studies can consider how said frameworks can integrate the broader cognitive category of 'citizen science', which is at one and the same time an essential dimension of environmental citizenship and the procedural rights associated therewith, an enabler for the creation, sharing, and dissemination of knowledge about substantive rights of relevance to the environment, and a human right in and of itself.[320] Future studies can also explore the possibility of said frameworks prescribing a collective right to co-management of resources and environmental systems the subjects of which extend beyond indigenous peoples and local communities embodying traditional lifestyles. This is a more proactive instrumentalisation of collective rights, for which Olivier De Schutter – former UN Special Rapporteur on the Right to Food and current UN Special Rapporteur on Extreme Poverty and Human Rights – makes the following case:

> There is no reason not to extend the recognition of communal rights beyond indigenous or traditional communities […]. Indeed, there is mounting evidence that the management of common pool resources may be most effective when done at the local level, by the communities directly concerned, rather than through top-down prescriptions from the centre or through privatization of the commons.[321]

3.2. The ecosystem approach as a vehicle for upholding and cultivating relational values

We may now turn to another, increasingly central element of the ecosystem approach as elaborated under the CBD: ecosystem services. The Malawi Principles state in no uncertain terms that the ecosystem approach must prioritise the conservation of ecological structures and functions in order to ensure the continued provision of the ecosystem services that underpin human well-being and environmental sustainability.[322] Noting that many of the said goods and

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[320] See, indicatively, Effy Vayena and John Tasioulas, '"We the Scientists": a Human Right to Citizen Science' (2015) 28 Philosophy and Technology 479.
[321] Olivier De Schutter, 'The Emerging Human Right to Land' (2010) 12 International Community Law Review 303, 324-325 and 319.
[322] CBD Decision VII/11 (n125), annex I, principle 5.

services are 'economically valuable', the Principles proceed to make the case for understanding and managing ecosystems 'in an economic context'.[323] Management programmes should thus endeavour to curtail the market distortions that are adversely impacting biodiversity; provide socio-economic incentives to promote biodiversity conservation and sustainable use; and foster the internalisation of environmental externalities. Where possible, the pursuit of these aims should be based on the application of 'appropriate' methodologies for the economic valuation of ecosystem goods and services and of environmental impacts.

The complicated lineage of these stipulations has been discussed at great length in the literature, including by the author.[324] What bears noting for present purposes is that, in formulating its guidance on the operationalisation of the ecosystem approach, the CBD COP took its cue from the conceptual framework put forward by the Millennium Ecosystem Assessment.[325] Launched in 2001 by the then UN Secretary-General Kofi Annan, the Assessment was a four-year international work programme designed to meet the needs of decision-makers for scientific information on the links between ecosystem change and human well-being. Espousing a utilitarian (anthropocentric) conception of value, the Assessment defined ecosystem services as the 'benefits that humans obtain from ecosystems' and proceeded to classify them into four categories: provisioning services (e.g., food and water); regulating services (e.g., regulation of floods, drought, land degradation, and disease); supporting services (e.g., soil formation and nutrient cycling); and cultural services (e.g., recreational, spiritual, religious, and other non-material benefits).[326] The Assessment further advocated the use of economic valuation methodologies as a means of '[making] the disparate services provided by ecosystems comparable to each other', thus '[enhancing] the ability of decision-makers to evaluate trade-offs between alternative ecosystem management regimes and courses of social actions that alter the use of ecosystems and the multiple services they provide'.[327]

Within the normative context of the CBD, the Millennium Ecosystem Assessment worked to reinvigorate discussions on the contribution of biodiversity to human well-being

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[323] CBD Decision VII/11 (n125), annex I, principle 4.
[324] Elisa Morgera and Elsa Tsioumani, 'Yesterday, Today, and Tomorrow: Looking Afresh at the Convention on Biological Diversity' (2010) 21 Yearbook of International Environmental Law 3; Morgera (n250); Ntona and Morgera (n248); De Lucia (n7), 198-200.
[325] CBD Decision VII/11 (n125), para 6 and annex I, para 5.
[326] Joseph Alcamo and Elena M Bennett, *Ecosystems and Human Well-being: A Framework for Assessment* (Island Press 2003), 34ff.
[327] ibid, 128 and 132.

and development.[328] In particular, the Assessment led to further reflection on how economic valuation may serve as a tool for tackling different drivers of biodiversity loss and for ensuring that biodiversity, and the benefits it provides, is appropriately and adequately factored into policies and practices that rely and have an impact on it. At the same time, the concept of ecosystem services served as a vehicle for CBD Parties to explore rights-based dimensions of biodiversity policy-making. Their efforts in this connection concentrated on clarifying and preventing the consequences of biodiversity loss upon vulnerable constituencies, such as local communities who depend heavily upon natural resources for their subsistence and livelihoods.

For their part, the Malawi Principles stand at the intersection of these two *foci*, casting the ecosystem approach as a process that entails 'a balancing of economic and non-economic understandings of the relationship between humans and the environment'.[329] This is equally true of the CBD guidance on MSP. On the one hand, the guidance suggests that innovative financing mechanisms and ecosystem services valuation could support the achievement of environmental and socio-economic goals through MSP.[330] On the other hand, it underscores the need to better understand stakeholders' dependence on ecosystem services, such understanding being an essential precondition for their involvement in the formulation and enactment of marine spatial plans.[331] The guidance concludes by stating that the mapping, quantification, and valuation of ecosystem services can facilitate the integration of biodiversity considerations into MSP processes, as well as help build a sense of ownership among stakeholders over the resulting plans.[332]

These guidelines should be read through the lens of the debate that surrounds 'the moral and cultural acceptability and the effectiveness of the pricing and marketing of ecosystem services, […] inherent pressures towards their privatisation, and more generally […] the appropriate balance between ecosystem stewardship and ownership'.[333] The thesis is particularly sensitive to the critiques levied against ecosystem services by human geographers and political ecologists, who explore these questions against a socio-spatial background. As discussed in section 3.2.2 of chapter two, ecosystem services and other tropes of neoliberal conservation can give rise to 'new spaces and territories for capitalist governance and accumulation through processes of demarcation, enclosure, privatization, marketization,

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[328] Morgera and Tsioumani (n324), 11 and 22; Morgera (n250), 74-75. For an example of an early normative development under the CBD which recognised that economic valuation of ecosystem services can render biodiversity conservation more effective see CBD Decision III/18, 'Incentive measures' (1996) UN Doc UNEP/CBD/COP/3/38.
[329] Morgera (n250), 75.
[330] Report of the Expert Workshop, annex III, para 8(j) and annex IV, para 16.
[331] Report of the Expert Workshop, annex IV, paras 13 and 14.
[332] Report of the Expert Workshop, annex IV, para 44(j).
[333] Morgera (n250), 75. See also Ntona and Morgera (n248), 216.

securitization and land grabbing for green and un-green purposes'.[334] And as pointed out in section 2.2 of the present chapter, these spaces and territories are the product of rescaling processes which work to deconstruct 'historically and geographically specific scalar assemblages of institutional organization'.[335] Whether shifting environmental governance upwards (to the level of supranational and international institutions), downwards (to the level of cities, regions, and localities), or sideways (to horizontal networks of private capital), these processes result in an expanded role for the private sector, while also pushing ecosystem stewards to become 'more corporate in style, structure, and partnerships'.[336] Phenomenically benign, these shifts entail 'a systematic reformulation of socionatures so that these become more aligned with capitalist forms of governance and accumulation regimes'.[337]

Yet, although it concedes the risks that this reformulation presents, the thesis nevertheless posits that the academic and policy discourse on ecosystem services is slowly, but surely, building the conceptual and methodological tools needed to deal with the pathogenies of neoliberal conservation. The thesis draws particular attention to the way in which relational thinking is being used as a basis for the articulation of a more nuanced account of the multifaceted ways in which humans forge bonds with the natural world. Here we may point to the conceptual framework developed under the auspices of the Intergovernmental Panel on Biodiversity and Ecosystem Services (IPBES), with a view to '[providing] a shared language and a common set of relationships and definitions' through which to convey the complex interactions between the natural world and human societies.[338] The framework acknowledges that nature has its own intrinsic value, which is independent of any human considerations of its worth or importance. At the same time, nature contributes to human societies through the provision of benefits that can be perceived in terms of instrumental and relational values.[339] The former represent the direct and indirect contributions of nature's benefits to the achievement of a good quality of life. These contributions can take the form of spiritual enlightenment, aesthetic pleasure, and the production or consumption of commodities. In turn, relational values are embedded in 'desirable (sought after) relationships, including those between people and nature'.[340] They are also closely connected to 'held values,

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[334] Elia Apostolopoulou and others, 'Reviewing 15 Years of Research on Neoliberal Conservation: Towards a Decolonial, Interdisciplinary, Intersectional and Community-engaged Research Agenda' (2021) 124 Geoforum 236, 237.
[335] Brenner (n167), 137.
[336] Elia Apostolopoulou, *Nature Swapped and Nature Lost: Biodiversity Offsetting, Urbanization and Social Justice* (Palgrave Macmillan 2020), 34.
[337] Apostolopoulou and others (n334), 1.
[338] Sandra Díaz and others, 'The IPBES Conceptual Framework - Connecting Nature and People' (2015) 14 Current Opinion in Environmental Sustainability 1, 3.
[339] ibid, 4-5.
[340] ibid, 11.

principles or moral duties', which 'determine how individuals relate with nature and with other individuals'.[341] Examples of relational values include security and livelihoods (e.g., food and water security), governance and justice (e.g., intra- and inter-generational equity), identity and autonomy (e.g., sense of place, sense of community, agency, self-determination), resilience (including social-ecological resilience), and diversity and options (e.g., biocultural diversity, diversity of current and future options).[342]

According to the IPBES conceptual framework, any given aspect of nature (e.g. a species, an ecosystem, or a network of ecological interactions) provides people with multiple benefits, to which different instrumental and relational values can be assigned. Where conflicts arise, each type of value provides unique tools to facilitate resolution. Instrumental values are amenable to, inter alia, economic valuation, which can be used to identify and communicate the trade-offs involved in a decision-making process, and to ensure that ecosystem goods and services are efficiently and equitably distributed across stakeholders. Relational values, on the other hand, do not readily lend themselves to being quantified and monetised, since they refer to relationships that maintain their significance regardless of whether they imply trade-offs in the provision of specific ecosystem goods and services. In this case, the measure by which an individual preference or societal choice is judged is its 'consistency with core values, such as justice, care, virtue, and reciprocity'.[343]

For all the practical challenges that the intangibility of these criteria may raise, it also means that relational values are much better-positioned than instrumental or intrinsic values to account for and respond to previously overlooked aspects of the link between marine environmental health and human well-being.[344] This observation leads to three additional conclusions as to how the wider international biodiversity regime – of which IPBES forms a part – may be relied upon for the purposes of developing an approach to the normativisation of MSP which is consistent with a relational, vulnerability-centric understanding of human rights.

First, to the extent that relational values represent 'culturally and psychologically mediated relationships' between humans and the ocean,[345] they can provide a tool with which to flesh out the different ways in which components of marine ecosystems serve as 'the

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[341] ibid.

[342] IPBES, 'Preliminary Guide Regarding Diverse Conceptualization of Multiple Values of Nature and its Benefits, Including Biodiversity and Ecosystem Functions and Services' (7 December 2015) IPBES Doc IPBES/4/INF/13, 14ff.

[343] Kai MA Chan and others, 'Opinion: Why Protect Nature? Rethinking Values and the Environment' (2016) 113 Proceedings of the National Academy of Sciences 1462, 1462-1463.

[344] Díaz and others (n338), 2.

[345] Sarah C Klain and others, 'Relational Values Resonate Broadly and Differently than Intrinsic or Instrumental Values, or the New Ecological Paradigm' (2017) 12 PLOS ONE e0183962, 2.

material basis for cultural rights' – a critical but poorly understood category of marine environmental rights.[346] In turn, the conceptual crystallisation of these rights and their enshrinement within the normative frameworks that govern MSP processes and steer their outcomes can support the elaboration of spatial visions and plans which are 'sensitive to the material considerations at play', and which makes environmental stewardship and advocacy possible even in 'the absence of well-developed property rights'.[347]

Second, and relatedly, the incorporation of relational values into the normative frameworks that govern MSP can serve to involve a more diverse range of groups in the stewardship of marine ecosystems.[348] It can do so by sensitising planning practitioners to local ways of knowing and being with the sea; by promoting the solidification and adaptation of existing, 'home-grown' management initiatives; and by encouraging local communities to forge new 'collective [visions] for a self-determined and sustainable life'.[349] Those who have 'lived in, worked on and stewarded coastal and continental waters for centuries or millennia', such as small-scale fisherfolk, will have a key role to play in this respect, as will 'community elders and next-generation social and environmental activists, Indigenous Peoples, and women who work in the maritime economy'.[350]

Finally, the incorporation of relational values into the normative frameworks that govern MSP can work to expand the ocean constituency. This expectation is derived from preliminary empirical evidence of relational values' intersectional resonance. The diverse populations that make up local communities appear to find in these values an evocation of things they care about and with which they identify, such as 'connectedness, belonging to a community (both human and non-human), [and] sense of place'.[351] Yet the legal enshrinement of relational values will not by itself be enough to ensure that planning processes uphold these desiderata. As the foregoing analysis has made clear, the legal frameworks that govern MSP must also include safeguards aimed at ensuring that participatory processes geared towards the elicitation of values, views, and aspirations pertaining to the marine environment take into account matters of equity, power asymmetries, and dynamics between systems of knowledge and social organisation. Human rights discourse and practice stand to make a significant contribution to this end.

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[346] Richard Barnes, 'Environmental Rights in Marine Spaces' in Sanja Bogojevic and Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018), 61.
[347] ibid, 76.
[348] Chan and others (n343), 1465.
[349] ibid, 1463-1465.
[350] Edward H Allison, John Kurien and Yoshitaka Ota, 'The Human Relationship with Our Ocean Planet' (World Resources Institute 2020), 2.
[351] Klain and others (n345), 2 and 16.

4. Conclusions

This chapter set out to explore how a human rights-based approach to the normativisation of MSP can be taken forward within and through the paradigm that underpins marine planning and management in the EU, namely the ecosystem approach. Ironically, the very thing that makes this intellectual endeavour possible, *viz.* the paradigm's malleability, is the same thing that makes it so challenging. As De Lucia has aptly remarked, the ecosystem approach is 'located in a discursive field of competing narratives and is the result of complex genealogies, situated within a "play of forces"'.[352] As such, it is a pluralistic notion, its various iterations grounded in the same conceptual framework – that is, ecosystem ecology – but 'traversing different ideological affiliations and responding differently to the different institutional and regulatory contexts into which they are inserted'.[353]

For all the challenges that these characteristics of the ecosystem approach may raise for those seeking to define its aims, tenets, and means of implementation in readily practicable and widely acceptable ways, they also offer scope for normative and performative experimentation. It is on this basis that the chapter has argued for aligning the conceptualisation of the ecosystem approach enshrined in EU marine environmental law with that elaborated under the auspices of the CBD – an instrument which, it bears noting, both the EU and its Member States are parties to. This is not to suggest that the maintenance and restoration of the integrity, structure, and functioning of marine ecosystems should cease to be the overarching objective of planning and management. Rather, it is to push EU law to recognise that humans, with their cultural diversity, are an integral component of many marine ecosystems, and that planning and management should account for the manifold ways in which the social and ecological spheres are interlinked.

A first implication of this recognition is the need for a legal expansion of the knowledge base upon which marine planning and management are grounded. This would serve to ensure that, although the pertinent frameworks and processes continue to valorise natural-scientific and technological-managerial rationality, they do not 'discount, mischaracterize, or ignore place-based values, worldviews, and knowledge systems'.[354] The latter are central to local communities' shared identity, their attachment to the coastal lands and marine waters they have historically occupied, and the culturally-specific forms of stewardship they have collectively developed over time. Their incorporation into the cognitive underpinnings of

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[352] De Lucia (n7), 57.

[353] ibid.

[354] Eleanor J Sterling and others, 'Biocultural Approaches to Well-being and Sustainability Indicators across Scales' (2017) 1 Nature Ecology & Evolution 1798, 1798.

marine planning and management would not only contribute to the preservation of traditional practices, knowledges, and beliefs, but would also serve to bring about forms of community involvement which are more substantive than 'stakeholder engagement' and 'public participation'; forms such as co-management and community-based management.

A second implication of recognising humans as an integral component of marine ecosystems is the need for law to strengthen the local and (sub-)regional levels' position within multi-level structures of marine planning and management. While EU law is justified in requiring that the spatial entities to be managed be delineated on the basis of ecological criteria rather than criteria pertaining to socio-political organisation, there is more it can do to promote the establishment, scaling up, and linking up of community-based management arrangements (rather than solely the networking of Member States' competent authorities, which the MSPD already provides for).[355] Whereas the exclusion of 'town and country planning' from the Union's legislative competence in the area of the environment would prevent the instruments in question from taking a bold stance on matters such as tenure rights,[356] there remains scope for sensitising, empowering, and building the human and institutional capacities of the Union's localities and regions so as to promote decentralisation and devolution in line with the principle of subsidiarity.[357]

The next chapter will explore how EU cohesion policy – the Union's strategy to promote and support the 'overall harmonious development' of its Member States and regions[358] – could contribute to these ends, as well as help counter socio-spatial inequality at the ecoregional and inter-ecoregional levels.

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[355] MSPD, art 11(2)(b).
[356] See chapter one, section 3.
[357] On how the Union's legislative competence shaped the MSPD see chapter one, section 3.
[358] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/1 (TFEU), art 174.

Chapter Four – EU territorial action and spatial justice: Reclaiming Europe's seas as sites of utopic spatial play

> The construction of Europe consists of directly modifying […] the relative disposition of its places: it is a geographic event.[1]

1. Introduction

The previous chapter sought to determine the extent to which the legal instruments and institutional arrangements that govern ecosystem-based marine planning and management in the EU can be said to be conducive to the planning practices and outcomes problematised by critical MSP scholars. The analysis noted two key shortcomings: first, the pertinent instruments and arrangements ground the ecosystem approach within a natural-scientific and technological-managerial rationality which hinders the integration of different knowledges; and, second, they rescale governance structures without fully accounting for how this may affect the power dynamics between different actors. The result is an approach to marine planning and management which is rather indifferent to the sensory, symbolic, and cognitive relationships that shape how people valorise the ocean, as well as the socio-institutional relationships that shape how people manage ocean uses across space and time.

The chapter proceeded to search for an alternative conceptualisation of the ecosystem approach in international biodiversity law. It looked to this regime because the normative guidance produced by the States Parties to the UN Convention on Biological Diversity (CBD),[2] together with the scientific and policy work carried out under the auspices of the

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[1] Jacques Lévy, *L'Europe: Une Géographie* (Hachette 1997). The translation is taken from Jean Peyrony, 'Territorial Cohesion and the European Model of Society' in Andreas Faludi (ed), *Territorial Cohesion and the European Model of Society* (Lincoln Institute of Land and Policy 2007), 63.
[2] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 69 (CBD).

Intergovernmental Panel on Biodiversity and Ecosystem Services (IPBES), has played a critical role in deepening the legal understanding of the human and social dimensions of ecological integrity. In so doing, it has created a number of entry points for a mutually supportive interpretation of environmental and human rights law.

Crucially for present purposes, these entry points lend themselves to both legal-doctrinal and critical-geographic treatises of the human rights-environment nexus, including treatises that use relational theories of space and self to advance a socialised, ecologised, and spatialised notion of human rights. The potential that international biodiversity law holds in this regard lies in the values it embodies and the types of relations these values stand to foster. Of particular note are the opportunities that international biodiversity law creates for the development of approaches to planning and management which are cognisant of different manifestations of social-ecological vulnerability. Such approaches treat local communities and their members not merely as stakeholders to be consulted, but as participants in legally meaningful intra-human and human–non-human relationships, and, by virtue of this, as forgers of their own pathways to development and conservation.

From a legal-doctrinal perspective, this treatment of local communities and their members can find expression in a formal recognition of collective rights to lands, territories, and resources, as well as to the tangible and intangible cultural heritage associated therewith. Such rights assume increased importance in the marine context due to the ocean's unique socio-materiality, which calls for thinking of related interests and entitlements in communal and intersubjective (rather than individual and fragmentary) terms.

From a critical-geographic perspective, on the other hand, the values and corresponding relationships promoted by international biodiversity law can find expression in what the thesis called for in chapter one: an instrumentalisation of human rights as a rhetorical-performative scaffolding upon which to base the dialectical production of ocean space. It is this last prospect that forms the focus of the present chapter.

The chapter takes its point of departure in the following proposition: to determine the extent to which the politico-legal order of the EU is amenable to the envisaged instrumentalisation of human rights, one must look beyond the minutiae of the laws and institutions that govern marine planning and management and towards EU territorial action *lato sensu*.[3] The rationale behind this proposition is that, as a key source of the Union's spatial

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[3] Tedesco uses the term 'territorial action' to refer to 'policy initiatives (and the practices developed within them), explicitly assuming a territorial impact either as the main or as one of the objectives. These include, on the one hand, actions developed within planning policy, on the other hand actions developed within other policy sectors (regional, environmental, agricultural, etc.)': Carla Tedesco, 'Territorial Action and EU Regional Policy in the Italian Mezzogiorno: Hybridizing 'European' Frames in Local Contexts' in Luigi

vernacular and an enduring *locus* of transnational visioning exercises, EU territorial action constitutes a major force in the construction of the common European territory. As such, it can facilitate or undermine efforts to use human rights as a vehicle for 'disruptive, […] provocative dreaming' about Europe's blue futures.[4]

It is thus worthwhile to explore the parallels and points of tension between what we regard as the overarching objective of the ecosystem approach under international biodiversity law (namely, social-ecological well-being) and the stated objective of EU territorial action (namely, balanced territorial development). Such an exploration can serve at least two purposes: first, to establish whether EU territorial action provides analogous entry points for a mutually supportive interpretation of environmental and human rights law; and, second, to find out whether EU territorial action has any insights of its own to impart to those intent on employing human rights as tools of socio-spatial visioning.

The analysis is, accordingly, organised in three parts. Section 2 recounts the emergence of, and charts the interactions between, two distinct fields of EU territorial action: EU cohesion policy, which is the Union's strategy to promote and support the 'overall harmonious development' of its Member States and regions;[5] and European spatial planning, which encompasses the 'various initiatives, strategies, programmes and instruments for the spatial planning and territorial development of the EU territory as a whole, or of large transnational areas within it'.[6] The analysis shows that European spatial planning is both a corollary of and a vehicle for the progressive spatialisation of EU cohesion policy – a process that reached an important climax when territorial cohesion was formally recognised as an area of shared competence between the Union and its Member States. This serves to correlate the idea and practice of 'planning *for* Europe'[7] with an area of EU policy-making which is just as much a tool for socio-economic development as it is a means of promoting commonly shared values and identities among European citizens. In turn, this correlation is working to clarify the spatial dimensions of said values and identities, thus creating new claims to be articulated and asserted through human rights.

Doria, Valeria Fedeli and Carla Tedesco (eds), *Rethinking European Spatial Policy as a Hologram: Actions, Institutions, Discourses* (Ashgate Publishing 2006), 89.

[4] David Pinder, 'Necessary Dreaming: Uses of Utopia in Urban Planning' in Jean Hillier and Patsy Healey (eds), *The Ashgate Research Companion to Planning Theory: Conceptual Challenges for Spatial Planning* (Routledge 2010), 360.

[5] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/1 (TFEU), art 174.

[6] Stefanie Dühr, Claire Colomb and Vincent Nadin, *European Spatial Planning and Territorial Cooperation* (Routledge 2010), 360.

[7] Kai Böhme and Bas Waterhout, 'The Europeanisation of Planning' in Andreas Faludi (ed), *European Spatial Research and Planning* (Lincoln Institute of Land Policy 2008); emphasis in the original.

This introductory discussion is a necessary prelude to Section 3, which undertakes to determine how the examined fields of EU territorial action construe vulnerability and whether this construal resonates with the thesis' own understanding of the same notion. The criterion on the basis of which this determination is made is the extent to which vulnerability is framed in terms which are conducive to spatial justice. Although new to the reader, this last concept will quickly reveal itself to be an amalgamation of the different considerations that we have argued should inform the development of a human rights-based approach to the normativisation of MSP. This, together with the fact that it is a concept commonly associated with EU territorial action, makes spatial justice a helpful frame for thinking about the kinds of relationships that competing rights (or competing interpretations of the same right) stand to generate or entrench, the values that these relationships have the capacity to foster, and the extent to which the appropriate reaction is support or subversion.

It bears noting that sections 2.4 and 3.4 offer some exploratory remarks regarding the possibility of using the European Social Model as an additional framework within which to hold debates over the connections between spatial planning, spatial justice, and human rights. It is posited that the time is ripe for efforts to distance understandings and deployments of the European Social Model from the idea that the '[simultaneous promotion] of sustainable economic growth and social cohesion' is feasible, desirable, and intrinsic to the political project of forging a supranational identity.[8] Rather, invocations of the European Social Model should denote the European polity's awareness of the fact that our historic moment is one of 'paradigmatic transition', as well as its appetite for a politics of rights that addresses human and more-than-human vulnerabilities of different kinds and at different levels.[9] In assuming this new meaning, the European Social Model can buttress rights-based visions of transformative blue futures, the spatiality of which is more responsive to the ethical and material exigencies of our era.

2. The rise and maturation of EU territorial action

This section traces the chronological evolution of EU territorial action. It begins by discussing how the launch of a policy aimed at promoting economic and social cohesion among the Member States in the late 1980s created favourable conditions for the emergence and

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[8] Maria Jepsen and Amparo Serrano Pascual, 'The European Social Model: An Exercise in Deconstruction' (2005) 15 Journal of European Social Policy 231, 231.
[9] The term is borrowed from Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (3rd edn, CUP 2020), 17 and 268.

flourishing of strategic, EU-wide spatial visions and scenarios during the 1990s. It proceeds to recount how the discourses and cooperative arrangements that materialised in the latter context in turn served to endow cohesion policy with a more explicit spatial dimension. This analysis provides a background against which to investigate how the notion of vulnerability is understood in the context of EU territorial action as this pertains to the Union's maritime territories.

Before proceeding, one caveat is in order. It will soon become apparent that the evolution of EU territorial action reflects significant episodes in European integration, such as the launch of the single market and the various rounds of enlargement. Although the precise changes triggered by each of these milestones hold great relevance for the present discussion, space limitations prevent us from discussing them at length. What follows instead is a broad-based overview of the ways in which the underlying philosophy and practical toolkit of EU territorial action developed through time to reflect the preoccupations and ambitions attached to the European project's spatial dimension.[10]

2.1.   The birth of cohesion policy (1957 – 1989)

The EU has harboured a concern over spatial inequities since its inception. In the Preamble to the Treaty of Rome, the six signatory States expressed their resolve 'to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions'.[11] This was reiterated in the main text of the Treaty, which enjoined the then European Community to establish a common market and to progressively approximate the economic policies of its Member States with a view to promoting 'a harmonious development of economic activities' throughout its territory.[12]

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[10] A general overview of the evolution of EU cohesion policy is provided in Marco Brunazzo, 'The History and Evolution of Cohesion Policy' in Simona Piattoni and Laura Polverari (eds), *Handbook on Cohesion Policy in the EU* (Edward Elgar 2016). A general overview of the early history of European spatial planning is provided in Richard H Williams, *European Union Spatial Policy and Planning* (Paul Chapman Publishing 1996).

[11] Treaty Establishing the European Economic Community (adopted 15 March 1957, entered into force 1 January 1958) 294 UNTS 17 (Treaty of Rome), preambular para 5.

[12] Treaty of Rome, art 2. See also arts 39 (which drew attention to the 'natural disparities' between agricultural regions); 75 (which called upon the Member States to take action if a common measure 'seriously [affected] the standard of living and the level of employment in certain regions'); 80 (which called upon the Commission to consider 'the needs of underdeveloped areas and the problems of areas seriously affected by political circumstances' when examining the rates and conditions imposed on transport operations by the Member States); and 92 (which provided some leeway in the granting of 'aids intended to promote the economic development of regions where the standard of living [was] abnormally low or where there [existed] serious unemployment').

Yet, despite this apparent preoccupation with reducing territorial disparities, a coherent and ambitious regional policy was slow to emerge. This can be attributed to a number of reasons: the absence of a strong legal basis on which to ground Community action in the field of regional development; the liberal market philosophy that characterised the early stages of the integration process; the lack of understanding surrounding the regional effects of European economic integration; and the Member States' reluctance to accept supranational interference with what they perceived to be a sensitive domestic issue, touching upon matters relating to their internal organisation.[13] Taken together, these factors served to confine Community regional policy to the role of a modest 'inter-State transfer mechanism', aimed at compensating national governments for actions undertaken vis-à-vis regional development.[14] Funds were distributed on the basis of fixed national quotas, determined through a high-level bargaining process lacking any meaningful involvement on the part of sub-national authorities and regional socio-economic actors. The identification of eligible regions was a matter of discretion for the government concerned, as was the implementation of Community-funded projects on the ground, the European Commission having no oversight mandate. Thus configured, Community regional policy had the effect of further solidifying the role of the state in matters of regional socio-economic development and welfare.

The limitations of this government-centric approach would become increasingly apparent over the course of the 1970s and 1980s. For European states, this was a period of growing territorial divides, prompted by the fade-out of the post-war growth boom, the internationalisation of corporate networks, the fragmentation of labour markets, and the elevation of knowledge, information, and innovation into the primary determinants of regional competitiveness.[15] These developments placed a substantial burden on regions and localities, shifting the focus from '[their] incorporation [...] into a national division of labour on the basis of comparative advantage, towards competitive regionalism, in which territories vie for position within national, European, and global markets, based upon the changing requirements of high-technology production'.[16] Critically, it was Europe's metropolitan core that stood to gain the most from this transition, owing to its established and rapidly consolidating

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[13] John Bachtler, Carlos Mendez and Fiona Wishlade, *EU Cohesion Policy and European Integration: The Dynamics of EU Budget and Regional Policy Reform* (Routledge 2013), 13ff.

[14] Liesbet Hooghe and Michael Keating, 'The Politics of European Union Regional Policy' (1994) 1 Journal of European Public Policy 367, 370-372. See also Robert Leonardi, *Cohesion Policy in the European Union: The Building of Europe* (Palgrave Macmillan 2005), 6 and 37-38.

[15] Ash Amin and John Tomaney, 'The Challenge of Cohesion' in Ash Amin and John Tomaney (eds), *Behind the Myth of European Union: Prospects for Cohesion* (Routledge 2003), 10. See also Michael Keating, *Rescaling the European State: The Making of Territory and the Rise of the Meso* (OUP 2013), 56.

[16] Keating (n15), 7.

'monopoly over the ideas, expertise, know-how and information circuits' pervading the global industrial networks it formed part of.[17]

For their part, governments failed to prevent – and, in some cases, actively contributed to – the resulting territorial imbalances. In their efforts to meet the challenges of global economic competition, they begun to channel resources towards their most dynamic sectors and locations, often to the detriment of their weakest.[18] Their dwindling commitment to regional incentives coincided with the progressive deregulation of their internal economic structures and the privatisation of long-standing public monopolies, all of which wore away at the protective framework surrounding the less favoured regions.[19] These developments were indicative of broader changes in the nature of the nation-state, triggered by the twin pressures of globalisation and neoliberalism. Commentators have spoken of an 'erosion' of the domestic welfare apparatus from three distinct directions: from above by internationalisation, of which European integration was one manifestation; from below by sub-state nationalisms and the readiness of central governments to offload some of their welfare responsibilities to lower-tier authorities; and from within, as civil society and the market assumed a more active role in matters of economic management, social solidarity, culture, and identity formation.[20]

The role of European integration is of particular interest for present purposes. Several components of economic unification – including the introduction of the principle of mutual recognition, regulatory harmonisation, and the gradual elaboration of state aid and competition policy – served to constrict the state's redistributive capacity,[21] preventing it from implementing macroeconomic and industrial policies in support of the less favoured regions.[22] But European integration was not only an impediment to the alleviation of territorial imbalances; it was also one of their root causes.[23] Asymmetries stemmed both from inter-regional competition within the single market and from the territorially differentiated impacts of various sectoral policies, including those relating to agriculture, fisheries, steel and coal, and the environment.[24] This became more obvious with every new round of enlargement: as

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[17] Ash Amin and Nigel Thrift, 'Institutional Issues for the European Regions: From Markets and Plans to Socioeconomics and Powers of Association' (1995) 24 Economy and Society 41, 44-45.

[18] Michael Keating, 'The Political Economy of Regionalism' in Michael Keating and John Loughlin (eds), *The Political Economy of Regionalism* (Frank Cass 1997), 21.

[19] Amin and Tomaney (n15), 33.

[20] Michael Keating, *The New Regionalism in Western Europe: Territorial Restructuring and Political Change* (Edward Elgar 2000), 72-73; Simona Piattoni, *The Theory of Multi-level Governance: Conceptual, Empirical, and Normative Challenges* (OUP 2010), 17.

[21] Simon Hix, 'The Study of the European Union II: The 'New Governance' Agenda and Its Rival' (1998) 5 Journal of European Public Policy 38, 42.

[22] Amin and Tomaney (n15), 33.

[23] Iain Begg and others, *A New Strategy for Social and Economic Cohesion After 1992* (European Parliament 1991), 13-14.

[24] Michael Keating, 'Regions and Regionalism in the European Community' (1995) 18 International Journal of Public Administration 1491, 1496.

the territory of the Community expanded and became more diverse, concern grew over the particular plight of different categories of regions, such as declining industrial regions (after the entry of the UK) and underdeveloped rural areas (after the entry of Spain, Portugal, and Greece).[25] And although it had always been clear that regional disparities held far-reaching implications for the competitiveness of the Community as a whole, the chorus of voices that saw this as part of the economic rationale for a more robust regional policy grew steadily louder.

Parallel to this, the Community was approaching a level of political maturity that required it to engage with regional disparities and consider how the benefits of economic unification could be widely and equitably distributed across its territory.[26] Arriving at a mutual understanding between those who were perceived to gain and those who ran the risk of losing from the single market was central to the very survival of the European project: in its absence, the solidarity necessary to sustain the momentum of integration would be threatened. But intergovernmental bargaining alone could not provide the desired solution. As Hooghe and Keating have noted, a mechanism that channelled resources from the core to the peripheral Member States in return for the latter's assent to the single market programme would simply 'not [have been] *communautaire*'.[27] What was needed was a genuine instrument of Community policy aimed at enhancing the endogenous resources and institutional capacity of different territorial levels, this being the only way to ensure that financial support led to a long-term improvement of economic performance conditions.[28] The envisaged instrument would also provide opportunities to actively involve subnational actors in supranational decision-making processes,[29] hence dispelling the popular notion that the latter were dominated by a distant, bureaucratic élite.[30] Thus conceptualised, regional policy had the potential to

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[25] ibid.

[26] Paul C Cheshire, 'European Integration and Regional Responses' in Martin Rhodes (ed), *The Regions and the New Europe: Patterns in Core and Periphery Development* (Manchester University Press 1995), 32.

[27] Hooghe and Keating (n14), 371.

[28] Keating (n24), 1507; Enrico Gualini, ''Territorial Cohesion' as a Category of Agency: The Missing Dimension in the EU Spatial Policy Debate' (2008) 28 European Journal of Spatial Development 1, 13.

[29] Leonardi notes that, by the end of the 1980s, 'the regions as political institutions were in a position, i.e. they existed in a number of Member States and had been granted constitutional powers in areas such as regional planning, development, vocational education and transport, to be involved in the implementation of the EU's Cohesion policy': Robert Leonardi, 'Cohesion in the European Union' (2006) 40 Regional Studies 155, 159-160. Hepburn further draws attention to the progressive proliferation of European-wide regional interest organisations, 'including pro-regional lobbies, interregional associations and cross-border associations': Eve Hepburn, 'Cohesion Policy and Regional Mobilisation' in Simona Piattoni and Laura Polverari (eds), *Handbook on Cohesion Policy in the EU* (Edward Elgar 2016), 207.

[30] Raffaella Y Nanetti, 'EU Cohesion and Territorial Restructuring in the Member States' in Liesbet Hooghe (ed), *Cohesion Policy and European Integration: Building Multi-Level Governance* (OUP 1996), 89.

legitimise the new economic and political order in the eyes not only of central governments, but also of the regions that were the most vulnerable to its effects.[31]

Conscious of these socioeconomic and political dynamics, the Commission began to take some tentative steps towards developing and financing regional projects on an autonomous basis.[32] Starting with the establishment of a non-quota section under the European Regional Development Fund (ERDF) in 1979 and culminating in the implementation of the Integrated Mediterranean Programmes in 1985,[33] these early experiments served to loosen the intergovernmental straightjacket that Community regional policy had been operating in.[34] The true turning point, however, came with the adoption of the Single European Act (SEA) in 1986. The Act represents a milestone in European integration, having set the date (31 December 1992) and institutional means for attaining the objective of a unified internal market. Crucially for present purposes, the Act also signalled the birth of cohesion policy. It inserted a new Title on 'Economic and Social Cohesion' into the Treaty of Rome, which called upon the Community to act towards reducing disparities between the various regions and the backwardness of the least-favoured regions, with a view to promoting the 'overall harmonious development' of its territory.[35] Emboldened by this new mandate, the Commission assumed an active leadership role in shaping the priorities of cohesion policy, imbuing the latter with 'a stronger pan-European orientation'.[36]

The adoption of the SEA was accompanied by a radical reform of the Structural Funds – that is, the financial instruments through which Community funding was deployed.[37] An important development concerned the principles guiding the Funds' administration, which were refined in an attempt to strengthen the position of regional actors.[38] The newly-introduced partnership principle was particularly significant in this regard. It distanced regional policy from the traditional dichotomy between national and supranational powers, and brought it into the arena of multi-level governance, where decision-making was a collective process involving European, regional, and local authorities, social partners, and civil society organisations.[39] An

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[31] Hooghe and Keating (n14), 370.

[32] Leonardi (n14), 6.

[33] The latter sought to assist the southern regions of the Community – at the time including Greece, parts of southern France, and most of southern Italy – in responding to the competitive challenge presented by the 1986 enlargement (accession of Spain and Portugal).

[34] Georgia Giannakourou, 'Towards a European Spatial Planning Policy: Theoretical Dilemmas and Institutional Implications' (1996) 4 European Planning Studies 595, 599.

[35] Single European Act [1987] OJ L 169/1 (SEA), art 23.

[36] Hepburn (n29), 205.

[37] At the time, the Structural Funds included the European Regional Development Fund (ERDF), the European Social Fund (ESF), and the guidance section of the European Agriculture and Guidance and Guarantee Fund (EAGGF).

[38] Gualini (n28), 13; Hooghe and Keating (n14), 378.

[39] Liesbet Hooghe, 'Reconciling EU-Wide Policy and National Diversity' in Liesbet Hooghe (ed), *Cohesion Policy and European Integration: Building Multi-Level Governance* (OUP 1996), 7.

equally important development related to the rules governing eligibility, which were reformulated in order to enable a more targeted, needs-based allocation of financial resources between territories.[40] The new scheme rested on two pillars: a set of detailed criteria for determining backwardness; and a Community-wide classification of territorial units, from sections of a country to villages and towns. Combined, these two innovations allowed the *loci* of intervention to be identified in a manner that was more sensitive to territorial considerations, thus setting in motion what is often referred to as the 'spatial turn' in EU cohesion policy.

2.2.   The emergence of European spatial planning (1989 – 1999)

It is at this point that the paths of cohesion policy and European spatial planning became inextricably entwined. The latter rose to prominence in the late 1980s, when a number of factors came together to expose the untenability of insular, inward-looking approaches to territorial management. Among these was the recognition that spatial development within a Member State could have implications for neighbouring countries as well as for the Community as a whole; the need to maximise the economic potential of the single market by ensuring that infrastructure gaps and inconsistencies in spatial development are tackled; the need to coordinate funding streams with a view to enhancing their contribution to the alleviation of regional disparities; and the desire to capitalise on opportunities for Member States to collaboratively address spatial issues of common concern.[41] Another important factor was the recognition of the role that spatial planning could play in promoting the sustainable development of the European territory, particularly in terms of 'ensuring that economic growth is balanced against the need to protect the environment and heritage'.[42]

Importantly, the advent of European spatial planning came at a time when the Commission was able to lend meaningful material and political support to pertinent initiatives. The regulatory framework that had come to govern the functioning of the Structural Funds following the adoption of the SEA specifically empowered the Commission to use ERDF resources to finance pilot projects on spatial development, as well as studies aiming to identify 'the elements necessary to establish *a prospective outline* of the utilization of Community

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[40] Leonardi (n14), 7.
[41] Commission, *The EU Compendium of Spatial Planning Systems and Policies* (European Commission 1997) (Compendium), 21. See also Louis Albrechts, 'Genesis of a Western European Spatial Policy?' (1997) 17 Journal of Planning Education and Research 158, 160.
[42] Compendium, 21.

territory.[43] The Commission was quick to heed this call. Released in 1991 and 1994 respectively, the studies 'Europe 2000' and 'Europe 2000+' set out the trends and pressures that were expected to shape land use and physical planning within the Community at the beginning of the twenty-first century.[44] The goal was not to prescribe any one approach or set of objectives for planning, but to provide a frame of reference for public and private sector organisations to assist them in their long-term planning and decision-making.[45]

In addition to these two studies, the Commission coordinated the preparation of an 'EU Compendium of Spatial Planning Systems and Policies'.[46] Completed in 1997, the Compendium outlined the institutions and mechanisms for plan-making and regulation in each of the Member States, and offered a summary of spatial planning and related policies at EU, national, regional, and local levels. In a further step, the study used a number of interrelated criteria to develop ideal types or traditions of spatial planning.[47] Among these criteria were the nature of the applicable legal framework; the *locus* of power, i.e. the relative balance between central control and local discretion; and the relative roles of the public and private sectors. While admittedly obscuring some of the subtle differences between Member States identified as belonging to the same planning 'family', the employment of the 'ideal type' methodology made it possible to have a concerted discussion about the (dis)similarities between national (and, where relevant, regional) arrangements for spatial planning, and to determine whether adjustment to internal and external pressures was leading to convergence – in other words, whether a Europeanisation of spatial planning systems was occurring.[48]

This was an exceptionally timely endeavour. The responsiveness of domestic planning systems to Community-derived regulatory stimuli had been apparent for some time, but never more so than in the late 1980s and early to mid-1990s. This period saw the EU pursue an

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[43] Council Regulation (EEC) 4254/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Regional Development Fund [1988] OJ L374/15; emphasis added.

[44] Commission, *Europe 2000: Outlook for the Development of the Community's Territory* (European Commission 1991); Commission, *Europe 2000+: Cooperation for European Territorial Development* (European Commission 1994).

[45] Erik Gløersen, Kaisa Lähteenmäki-Smith and Alexandre Dubois, 'Polycentricity in Transnational Planning Initiatives: ESDP Applied or ESDP Reinvented?' (2007) 22 Planning Practice & Research 417, 417.

[46] Note that, between 2016-2018, the European Territorial Observatory Network (ESPON) coordinated a project aimed at providing an authoritative comparative report on recent changes in territorial governance and spatial planning systems in Europe: ESPON, *COMPASS – Comparative Analysis of Territorial Governance and Spatial Planning Systems in Europe* (ESPON 2018).

[47] Namely, the regional economic planning approach (mainly France and Portugal); the comprehensive integrated approach (mainly Germany, Austria, the Netherlands and the Nordic countries); the land use management tradition (mainly the UK, Ireland, and Belgium); and the urbanism tradition (mainly the Mediterranean Member States).

[48] See, indicatively, Stefanie Dühr, Dominic Stead and Wil Zonneveld, 'The Europeanization of Spatial Planning Through Territorial Cooperation' (2007) 22 Planning Practice & Research 291.

ambitious agenda of legislative reform, spanning areas as diverse – and as intimately linked with spatial planning – as environmental protection and public procurement. The intention was to remove physical, technical, and fiscal divisions between the Member States, this being an essential precondition for the smooth functioning of the single market.[49] The Compendium noted that the relevant legal instruments had a direct impact on the Member States' planning cultures, as did a number of Community policies pertaining to matters with a spatial dimension (e.g., agriculture and trans-European networks).[50]

A more indirect impact stemmed from the realisation that market liberalisation held both positive and negative implications for spatial development in the Member States. On the one hand, it was giving rise to 'a more open pattern of spatial development', which offered unprecedented possibilities for cultivating and harnessing transnational synergies.[51] On the other hand, if left uncontrolled, market liberalisation could end up exacerbating spatial polarisation. In turn, the intensification of spatial disparities could trigger a retreat towards protectionism, thus thwarting integration.[52] Becoming increasingly preoccupied with this prospect, national governments strove to imbue their planning systems with a more cosmopolitan orientation,[53] placing an ever-greater focus on their positioning within the European territory and the need to deal with European-wide issues through enhanced cross-border cooperation and strategic planning.[54] In making these observations, the Compendium demonstrated that the Europeanisation of national planning systems was already afoot, which suggested a certain receptivity on the part of the Member States towards the EU's continued involvement in strategic planning initiatives.

Together with the Europe 2000 studies, the Compendium laid the groundwork for what remains one of the most seminal texts in the history of European spatial planning, namely the 'European Spatial Development Perspective' (ESDP).[55] The decision that kick-started the ESDP process was taken at an informal meeting of the Member States' ministers responsible for spatial planning held in Liège in 1993. The intention was to develop a document that would

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[49] Peter John, 'The Europeanisation of Sub-national Governance' (2000) 37 Urban Studies 877, 879.
[50] Compendium, 47-49.
[51] HWE Davies, 'Towards a European Planning System?' (1994) 9 Planning Practice and Research 63, 66-67.
[52] Giannakourou (n34), 599-600.
[53] Jan Fit and Rob Kragt, 'The Long Road to European Spatial Planning: A Matter of Patience and Mission' (1994) 85 Tijdrchnjl voor Econornische en Sociale Geografie 461, 463.
[54] ibid.
[55] Commission, *European Spatial Development Perspective: Towards Balanced and Sustainable Development of the Territory of the European Union* (European Commission 1999) (ESDP). A detailed account of the process leading up to the adoption of the ESDP can be found in Andreas Faludi and Bas Waterhout, *The Making of the European Spatial Development Perspective: No Masterplan* (Routledge 2002).

constitute the 'political extension' of the Europe 2000 studies,[56] setting out clear, 'spatially transcendent' guidelines for the development of the European territory.[57] The task was taken forward by the newly-instituted Committee on Spatial Development, which consisted of national representatives and was chaired by the country holding the EU Presidency.

This novel, markedly intergovernmental arrangement was meant to act as a safeguard against a creeping expansion of Union powers in the field of spatial planning. Being a tool for exercising control over territory, the latter had long been recognised as an element of the Member States' sovereign prerogative.[58] Yet the newly adopted Treaty of Maastricht[59] contained a number of provisions that could plausibly be used as a legal basis for the development of a European spatial planning policy.[60] It recognised economic and social cohesion as a fundamental objective of the European Community;[61] called for the establishment of a new financial instrument to support projects in the fields of environment protection and transport infrastructure;[62] encouraged the establishment and development of trans-European networks in the areas of transport, telecommunications, and energy with a view to '[enabling] citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting up of an area without internal frontiers';[63] and conferred upon the Commission the power to propose legislation relating to 'town and country planning' and 'land use' – although, as already discussed in chapters one and three,[64] such acts could only be adopted by a unanimous decision from the Council.[65]

In an effort to assuage any concerns that these provisions may have raised among the Member States, the Commission opted to play a more passive, facilitative role throughout the ESDP process.[66] The tension between the Member States and the Commission is, nevertheless, palpable across the resulting text. The very title of the document can be read as a proclamation of its informal, non-binding nature. The word 'perspective' suggests 'a view (or an opinion)

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[56] Giannakourou (n32), 601-602.
[57] ESDP, 7.
[58] Andreas Faludi, 'Unfinished Business: European Spatial Planning in the 2000s' (2003) 74 Town Planning Review 121, 121.
[59] Treaty on European Union (Treaty of Maastricht) [1992] OJ C 191/1.
[60] Giannakourou (n34), 595-596.
[61] Consolidated version of the Treaty on European Union [2012] OJ C 326/13 (TEU), art 2.
[62] TEU, art 130d.
[63] TEU, art 129b.
[64] See chapter one, section 3; chapter three, section 4.
[65] TEU, art 130s(2).
[66] Andreas Faludi, 'European Territorial Cooperation and Learning' (2008) 44 disP - The Planning Review 3, 3. It has, however, been noted that the Commission contributed ideas and ensured the continuity of the process: Faludi (n58), 133; Henriette Bastrup-Birk and Philippe Doucet, 'European Spatial Planning from the Heart' (1997) 23 Built Environment 307, 311.

rather than a definitive statement'.[67] The term 'spatial development', on the other hand, connotes a broad understanding of spatial planning; one that places the emphasis on cross-sectoral policy coordination and the balanced distribution of socio-economic potentials across European cities and regions. The message was clear: spatial planning, construed narrowly as regulatory land-use planning, was to remain within the competence of the Member States, while the Commission was to assume a steering role, focusing on coordination and the facilitation of cooperation.[68] To dispel any doubts, the ESDP stated that 'each country [would] take it forward according to the extent it [wished] to take account of European spatial development aspects in its national policies'.[69] And, although it acknowledged its capacity to affect the implementation of territorially impactful Community policies, it asserted that it did not in any way seek to constrain the competent institutions in exercising their responsibilities. Accordingly, the document's operative part consisted of a number of 'policy options', the application – rather than the implementation – of which had to abide by the principle of subsidiarity.[70]

But these characteristics need not be interpreted as evidence of a lack of spine. Andreas Faludi, one of the foremost scholars of European spatial planning, has posited that they are better understood as manifestations of the inherently strategic nature of a document such as the ESDP.[71] Its goal had always been to identify parameters to be taken into consideration rather than specific outcomes to be attained, and to push the Member States towards incorporating European dimensions and connections into their spatial policies from the outset – in other words, to promote further 'Europeanisation of state, regional, and urban planning'.[72] Crucially, rather than positive or negative integration measures,[73] the envisaged

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[67] Rob Atkinson, 'The Emerging 'Urban Agenda' and the European Spatial Development Perspective: Towards an EU Urban Policy?' (2001) 9 European Planning Studies 385, 388.

[68] Thiemo W Eser and Dimitrios Konstadakopulos, 'Power Shifts in the European Union? The Case of Spatial Planning' (2000) 8 European Planning Studies 783, 790; Stefan Krätke, 'Strengthening the Polycentric Urban System in Europe: Conclusions from the ESDP' (2001) 9 European Planning Studies 105, 105.

[69] ESDP, 11.

[70] ESDP, 35.

[71] Andreas Faludi, 'The Application of the European Spatial Development Perspective: Evidence from the North-West Metropolitan Area' (2001) 9 European Planning Studies 663, 664.

[72] ESDP, 45.

[73] Positive and negative integration measures adopted in areas falling within the competence of the EU do, however, contribute to the Europeanisation of domestic planning cultures and practices. EU laws on environmental impact assessment and the regulatory framework underpinning the European Structural and Investment Funds are characteristic examples: Stefanie Dühr and Vincent Nadin, 'Europeanization through Transnational Territorial Cooperation? The Case of INTERREG IIIB North-West Europe' (2007) 22 Planning Practice & Research 373, 379.

transformation was to be achieved through the reproduction of the discourses embedded in the ESDP and their institutionalisation in new spatial practices and forms of governance.[74]

Despite its lack of a statutory planning role and the particularities of its involvement in the ESDP process, the EU had an important function to perform in this regard. It would provide 'the context, the cognitive and normative "frame", the terms of reference, or the opportunities for socialisation'[75] that would enable domestic actors 'to internalise new norms, ideas and practices and to redefine their interests and identities accordingly'.[76] The ESDP appeared to both anticipate and invite this. It made several references to the objectives set out in the Treaties, including social and economic cohesion and sustainable development. It also took account of key Treaty concepts – such as 'harmonious, balanced and sustainable development', 'high degree of competitiveness', 'improvement of the quality of the environment' and 'raising of the quality of life' – bringing them into conversation with the spatial notions that formed its own discursive core – among which 'polycentric spatial development', 'urban-rural partnerships', 'equivalent access to infrastructure and knowledge' and 'careful management of natural and cultural heritage'. This gave the impression that the ESDP was 'an informal and specialised extension of the Treaty', fleshing out its provisions in such a way as to suggest that the territorialisation of EU policies – that is, their territorial contextualisation – was a *conditio sine qua non* for achieving equity and coherence.[77]

The EU embraced this conception of the ESDP, eager to harness and channel its discursive currency to further its own ends. Accordingly, the Second Report on Economic and Social Cohesion recognised the ESDP as 'the first coherent effort to clarify the nature of the major territorial imbalances across the Union as a whole'.[78] Along similar lines, the EU Strategy on Sustainable Development noted that the ESDP's recommendations could help reduce disparities in economic activity and maintain the viability of rural and urban communities, thus promoting more balanced regional development.[79] For its part, the

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[74] Peter Schön, 'Territorial Cohesion in Europe?' (2005) 6 Planning Theory & Practice 389, 389-390; Dühr, Stead and Zonneveld (n48), 298; Dominic Stead and Bas Waterhout, 'Learning from the Application of the ESDP: Influences on European Territorial Governance' (2008) 44 disP - The Planning Review 21, 22-23.

[75] Claudio M Radaelli, 'Europeanisation: Solution or Problem?' (2004) European Integration online Papers (EIoP) No 8/16, 5.

[76] Georgia Giannakourou, 'Transforming Spatial Planning Policy in Mediterranean Countries: Europeanization and Domestic Change' (2005) 13 European Planning Studies 319, 327.

[77] J Robert and others, *Spatial Impacts of Community Policies and Costs of Non-cordination* (European Commission 2001), 6. This is reflected in the White Paper on EU Governance, which placed the ESDP at the centre of efforts to promote coherence across territorially impactful EU policies: Commission, 'European Governance: A White Paper' COM (2001) 428 final, 13. On how the ESDP influenced the working practices of the European Commission, including those relating to impact assessment, see Stead and Waterhout (n74).

[78] Commission, 'Second Report on Economic and Social Cohesion' COM (2001) 24 final, viii.

[79] Commission, 'A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development' COM (2001) 264 final, 12.

Commission's strategy on integrated coastal zone management invited the Member States to take due account of the specific needs of coastal areas when applying the ESDP guidelines.[80]

The invocation of the ESDP in these and many other policy documents published in the early aughts sparked a lively discussion over the objectives and principles of European spatial development, and the potential of European integration to both exacerbate and alleviate territorial imbalances. But this was not the sole context in which the ESDP's messages were contested, refined, and reproduced. Additional fora for debate were provided by INTERREG and the European Spatial Planning Observatory Network (now the European Observation Network for Territorial Development, ESPON).[81] The former promoted transnational cooperation in the field of spatial planning by co-financing initiatives involving partners in different countries. The latter sought to enhance the production of territorial evidence through applied research, and to catalyse knowledge transfer and policy learning among public authorities and other policy actors at different levels. The two initiatives served as critical links between EU and domestic planning policy and action, facilitating the exchange of ideas and know-how, fostering the elaboration and diffusion of innovative approaches to territorial governance, and triggering broad patterns of institutional adaptation.[82]

2.3. Territorial cohesion (1999 – present)

As these new modes of cooperation took hold, the Committee on Spatial Development ceased to be a privileged venue for the intergovernmental exchange of views on European spatial development. The Commission stopped financing its activities and proceeded to establish a working group on spatial and urban development under the comitology committee responsible for managing the Structural Funds. This move created new pathways for the Europeanisation of spatial planning, to be explored by the Commission while it bid its time, waiting for the

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[80] Commission, 'Communication from the Commission to the Council and the European Parliament on Integrated Coastal Zone Management: A Strategy for Europe' COM (2000) 547 final.

[81] See, indicatively, Faludi (n66).

[82] Vincent Nadin and David Shaw, 'Transactional Spatial Planning in Europe: The Role of INTERREG IIc in the UK' (1998) 32 Regional Studies 281, 284; Dühr and Nadin (n73), 377. Commentators have, however, noted that it is difficult to trace the domestic influence of the ESDP: Tim Richardson and Ole B Jensen, 'Discourses of Mobility and Polycentric Development: A Contested View of European Spatial Planning' (2000) 8 European Planning Studies 503; Dominic Stead and Vincent Nadin, 'Shifts in Territorial Governance and the Europeanization of Spatial Planning in Central and Eastern Europe' in Neil Adams, Giancarlo Cotella and Richard Nunes (eds), *Territorial Development, Cohesion and Spatial Planning: Knowledge and Policy Development in an Enlarged EU* (Routledge 2011).

constitutional recognition of a territorial dimension to cohesion policy to clarify and strengthen its competences.[83]

Granted, the Treaty establishing the European Community (EC Treaty) had contained a reference to territorial cohesion since its amendment by the Treaty of Amsterdam in 1997.[84] The relevant provision highlighted the role of services of general economic interest (SGEIs) in promoting social and territorial cohesion, and called upon the Community and the Member States to ensure that such services operated on the basis of principles and conditions which enabled them to fulfil their mission.[85]

The draft Treaty establishing a Constitution for Europe reaffirmed the link between territorial cohesion and SGEIs, but went considerably further. It recognised territorial cohesion as a distinct pillar of cohesion policy and, by extension, as an overarching objective of the Union and an area of shared competence between the EU and the Member States.[86] It also drew attention to the particular challenges facing different types of European regions, among which rural areas, areas affected by industrial transition, and areas suffering from severe and permanent natural or demographic handicaps, such as the northernmost regions with very low population density, and island, cross-border, and mountain areas.[87] These provisions – which would eventually find their way into primary EU law via the Treaty of Lisbon[88] – suggested a more far-reaching conceptualisation of cohesion; one that went beyond socio-economic considerations to encompass any factor having a bearing on regional development. In turn, and crucially from the perspective of this study, this implied a departure from the traditional demarcation of regions on the basis of administrative and statistical criteria, and a shift towards more meaningful ways of reflecting functional interactions between territories, resources, and people.[89]

The need for such an approach became all the more apparent as the expansion of the EU into Central and Eastern Europe drew nearer. The majority of the countries that would be acceding to the Union in the 2004 and 2007 rounds of enlargement displayed employment rates and per capita incomes that were significantly lower than the EU-15 average. Their

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[83] Andreas Faludi, 'Territorial Cohesion: Old (French) Wine in New Bottles?' (2004) 41 Urban Studies 1349, 1350.
[84] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/1 (Treaty of Amsterdam).
[85] EC Treaty, art 16.
[86] Draft Treaty establishing a Constitution for Europe [2003] OJ C 169/1 (Draft Constitutional Treaty), arts I-3(3) and I-14(2)(c).
[87] Draft Constitutional Treaty, art III-220.
[88] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ 2007 C 306/1 (Treaty of Lisbon).
[89] John Bachtler and Fiona Wishlade, *Searching for Consensus: The Debate on Reforming EU Cohesion Policy* (European Policies Research Centre 2004), 48.

absorption was expected to markedly increase the Union's population and territorial coverage while contributing very little to its aggregate GDP, thus reinforcing uneven patterns of socio-economic growth. Critically, unless the rules determining eligibility for development support were revised, the regions that had traditionally benefitted from cohesion policy would see their access to funding curtailed. In its Third Report on Economic and Social Cohesion, the Commission identified these potentialities as key threats to the harmonious development of the EU economy; threats that territorial cohesion as a concept that was distinct from, but complementary to, economic and social cohesion could help tackle.[90] It further set out its intention to restructure cohesion policy around three cross-cutting, widely-encompassing themes: convergence, regional competitiveness, and territorial cooperation. These themes were said to reflect the mutual supportiveness between growth – which, as already discussed in chapter three and as further discussed below, was the key objective of Union action under the Lisbon Strategy[91] – and cohesion, with the latter serving to ensure that '*all regions and social groups* can contribute to, and benefit from, the overall economic development of the Union'.[92]

Faced with these developments, the Member States sought to put their mark on the conceptualisation and operationalisation of territorial cohesion. At an informal meeting held in Rotterdam in 2004, the Ministers responsible for spatial planning and development agreed to work together towards establishing a common framework for addressing territorial matters within the EU. Thus begun a process of intergovernmental cooperation and broad public consultation that culminated in the adoption of the 'Territorial Agenda of the European Union' (TAEU) in the spring of 2007.[93] Scholars of European spatial planning have tended to regard this initiative as a continuation of the deliberations that, some years prior, had given shape to the ESDP.[94] The latter was credited with having raised awareness of the factors affecting territorial cohesion (e.g., discrepancies in policy cycles, strategic objectives, competences, and processes of negotiation and consensus-building), as well as making recommendations that quickly became part of the regional development zeitgeist (e.g., recommendations pertaining to the mobilisation of endogenous forces and the generation of social capital through transnational cooperation). Lending credence to the parallels between the two documents was the TAEU's restatement of the ESDP's aims and its assertion of their lasting relevance as a

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[90] Commission, 'Third Progress Report on Economic and Social Cohesion' COM (2004) 107 final, 27.
[91] See chapter three, section 2.1.
[92] COM (2004) 107 final (n90); emphasis added.
[93] 'Territorial Agenda of the European Union: Towards a More Competitive and Sustainable Europe of Diverse Regions', agreed on the occasion of the Informal Ministerial Meeting on Urban Development and Territorial Cohesion in Leipzig on 24-25 May 2007 (TAEU).
[94] See, indicatively, Andreas Faludi, 'From European Spatial Development to Territorial Cohesion Policy' (2006) 40 Regional Studies 667; Schön (n74).

basis for formulating territorial development priorities.[95] The conviction that the ESDP had '[foreshadowed] territorial cohesion thinking' and that the TAEU would give European spatial planning 'a new lease of life' thus became a *locus communis* among commentators.[96]

This appraisal was predicated on an understanding of territorial governance as a 'functional equivalent' of strategic spatial planning, with many suggesting that the two served a common purpose: promoting horizontal and vertical policy integration with a view to ensuring that measures 'made sense' within a given spatial context.[97] This preoccupation with coherence is perhaps unsurprising considering how exceedingly pluri-central and multi-scalar socio-spatial relations were becoming under the twin forces of globalisation and European integration. What is more, policy incongruences had been shown to exacerbate inter- and intra-regional inequalities, thwarting opportunities for pursuing synergies and positive multiplier effects.

This was one of the key findings to emerge from Robert et al.'s seminal study on the 'Spatial Impacts of Community Policies and Costs of Non-coordination', which was published by the European Commission in 2001. The authors saw territorial cohesion as a gateway to 'a new transnational practice of spatial planning' which took into account '*individual and collective aspirations* of regions and territorial communities'.[98] The core tenet of the TAEU – namely, that territorial cohesion could only be achieved through a cooperative process involving the various actors and stakeholders of territorial development at different political, administrative, and technical levels – was subsequently taken to mean that a certain degree of spatial analysis and programming had to be carried out on a continental or macro-regional scale in order to deal with issues such as congestion, remoteness, interregional connectivity,

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[95] TAEU, 3.

[96] Faludi (n94), 669. See also Andreas Faludi, 'Making Sense of the 'Territorial Agenda of the European Union'' (2007) 25 The European Journal of Spatial Development 1; Roberto Camagni, 'Territorial Development Policies in the European Model of Society' in Andreas Faludi (ed), *Territorial Cohesion and the European Model of Society* (Lincoln Institute of Land and Policy 2007); Umberto Janin Rivolin, 'EU Territorial Governance: Learning from Institutional Progress' (2010) 38 European Journal of Spatial Development; Bas Waterhout, 'European Spatial Planning: Current State and Future Challenges' in Neil Adams, Giancarlo Cotella and Richard Nunes (eds), *Territorial Development, Cohesion and Spatial Planning: Knowledge and Policy Development in an Enlarged EU* (Routledge 2011).

[97] Andreas Faludi, 'The European Spatial Development Perspective (ESDP)' in Andreas Faludi (ed), *European Spatial Planning* (Lincoln Institute of Land Policy 2002), 15; Wil Zonneveld, 'Expansive Spatial Planning: The New European Transnational Spatial Visions' (2005) 13 European Planning Studies 137, 137-138; Andreas Faludi, 'Territorial Cohesion and Subsidiarity under the European Union Treaties: A Critique of the 'Territorialism' Underlying' (2013) 47 Regional Studies 1594, 1596. Integration and coherence were prominent themes in the Commission's 'Green Paper on Territorial Cohesion': Commission, 'Green Paper on Territorial Cohesion: Turning Territorial Diversity into Strength' COM (2008) 616 final. This was in line with the work of the European Commission on good governance, which attributed to policy coherence an intrinsic territorial dimension: Janin Rivolin (n96), 20; COM (2001) 428 final (n77), 13.

[98] Robert and others (n77), 162; emphasis added.

and the advantages and drawbacks of urbanisation.[99] More importantly for present purposes, territorial cohesion as a *normative goal* was seen as going beyond cooperation and sectoral integration. At its essence, it was about the development of place-based, territorially sensitive frameworks of action, aimed at achieving a more even geographical distribution of economic, social, and environmental well-being across the European territory.[100]

All this served to further solidify the distinction between regulatory land use planning, which remained firmly rooted within the Member States' sphere of control, and the transnational 'visioning' exercises that mushroomed in the wake of the ESDP.[101] Louis Albrechts, a key figure within European spatial planning scholarship, has characterised visioning as an 'integrative' and 'transformative' process.[102] Integrative because its primary task is to synthesise and reconcile the diverse claims, objectives, goals, and aspirations attached to an area; and transformative because it holds the power to profoundly alter the area's spatial, economic, and socio-cultural 'fabric'. He has further spoken of visioning as a creative socio-spatial exercise that frames what a place *is* and what it *might become*.[103] This is very much in line with the spatial rhetoric that the Commission has been honing since the early aughts, which portrays strategic plans as a 'type of "contract" binding and directing the social agents of a particular entity to a joint vision for their area', as well as 'a democratic expression of what the territory should be and a frame of reference for collective action'.[104]

This points us towards an area of EU cohesion policy and European spatial planning research which is central to the conceptualisation of 'just' marine geographies: spatial discourses. Here, visioning is regarded through the critical lens of communicative planning theory, which draws attention to the ways in which specific storylines and discursive practices shape perceptions of spatial interests within a given context. What the communicative turn has made clear is that, for a vision to become a point of reference for future action, it must put forward a compelling narrative of spatial organisation. To this end, the vision must employ

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[99] Iain Begg, 'Cohesion or Confusion: A Policy Searching for Objectives' (2010) 32 Journal of European Integration 77, 78.

[100] ESDP, 19. See also Wil Zonneveld and Bas Waterhout, 'Visions on Territorial Cohesion' (2005) 76 Town Planning Review 15, 18; Simin Davoudi, 'Understanding Territorial Cohesion' (2005) 20 Planning Practice & Research 433, 435.

[101] Veronika Tiefenthaler, 'Spatial Planning in Europe - The Impact of European Union Law on National Planning Systems and Territorial Transnational Cooperation' (2011) 8 Journal for European Environmental & Planning Law 115, 120-121. See also Stefanie Dühr, Claire Colomb and Vincent Nadin, *European Spatial Planning and Territorial Cooperation* (Routledge 2010), 15. A distinction between territorial cohesion policy and spatial planning is also made in COM (2008) 616 final (n95), 10.

[102] Louis Albrechts, 'Bridge the Gap: From Spatial Planning to Strategic Projects' (2006) 14 European Planning Studies 1487, 1491.

[103] ibid.

[104] Commission, 'TERRA: An Experimental Laboratory in Spatial Planning' (European Commission 2000), 9.

communicative devices endowed with 'generative capacity';[105] that is, concepts, images, and metaphors amenable 'to [being] (re)created in different ways to work within existing and emerging policy frameworks'.[106] This is conducive to the formation of strong discourse coalitions capable of carrying a spatial strategy through time and across power structures as diffuse as those encountered in the field of European spatial planning.[107] On the other hand, it has been widely emphasised that spatial discourses are not rational, value-neutral or apolitical, but, rather, normative and ideological.[108] Hence, and as we have repeatedly noted throughout this study, one needs to be alert and sensitive to the power structures, uncertainties, and competing ideals that underpin socio-spatial relations, both existing and envisaged.[109]

For its part, the EU provides a multi-level and multi-sectoral environment within which spatial concepts and visions can be articulated, interpreted, and debated, thus profoundly shaping the rationality that underpins the organisation of European space.[110] Territorial cohesion is a case in point, being a 'catalytic concept around which several (spatial and non-spatial) values and policy practices have generated discursive chains' that have gone on to shape the theoretical and methodological frameworks underlying planning initiatives and development strategies at different levels.[111] These discursive chains can be traced across EU environmental laws and policies, the regulations governing the operation of the EU Structural and Investment Funds, the Commission's periodic Cohesion Reports, the Union's long-term development strategies, and normative documents such as the ESDP and the TAEU. They also inform the design and implementation of instruments aimed at facilitating novel forms of territorial cooperation (e.g., macro-regional strategies), as well as the identification and dissemination of good practices (e.g., by ESPON).

Accordingly, the following section explores how the notion of vulnerability – and, more specifically, the notion of maritime territorial vulnerability – has been framed in these different contexts. What it seeks to gain from this exploration is an understanding of how to 'fill out' the normative content of spatial justice in a manner which is attuned to the unique

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[105] Faludi (n71), 665-666.

[106] Louis Albrechts, 'Some Ingredients for Revisiting Strategic Spatial Planning' in Louis Albrechts, Alessandro Balducci and Jean Hillier (eds), *Situated Practices of Strategic Planning: An International Perspective* (Routledge 2017).

[107] Louis Albrechts, Patsy Healey and Klaus R Kunzmann, 'Strategic Spatial Planning and Regional Governance in Europe' (2003) 69 Journal of the American Planning Association 113, 127. See also Richardson and Jensen (n82), 504 and the references therein to Hajer.

[108] See, indicatively, Gordon Dabinett and Tim Richardson, 'The European Spatial Approach: The Role of Power and Knowledge in Strategic Planning and Policy Evaluation' (1999) 5 Evaluation 220.

[109] Albrechts (n102), 1493.

[110] Kai Böhme and others, 'Values in a Vacuum? Towards an Integrated Multi-level Analysis of the Governance of European Space' (2004) 12 European Planning Studies 1175, 1176.

[111] Loris Servillo, 'Territorial Cohesion Discourses: Hegemonic Strategic Concepts in European Spatial Planning' (2010) 11 Planning Theory & Practice 397, 398.

'socio-spatial dialectics' present within the common European territory and thus better able to challenge them from within.[112] But before delving into this discussion, the chapter introduces the concept of the European Social Model. This concept, which will be revisited in section 3.4, is resorted to for two reasons. First, invocations of it have strong human rights connotations. Second, and relatedly, it is regarded by scholars of EU cohesion policy and European spatial planning as a potential vehicle for the normative consolidation of the slippery ideal that lies at the heart of territorial cohesion; that is, the spatially-conscious mediation between economic competitiveness, social cohesion, and environmental sustainability.

2.4. EU territorial action coming of age? The European Social Model and its spatial and ecological dimensions

A recurring theme throughout this chapter is that EU territorial action is perpetually vacillating between competitiveness- and equity-oriented narratives. This equivocality is indicative of the nature of European politics, which Hooghe and Marks describe as an interplay among a limited number of overarching, ideologically-informed projects, each making fundamental claims about how the EU polity operates and how it ought to be organised.[113] For proponents of the 'neoliberal project', European integration should be limited to 'an economic enterprise dominated by insulated government elites'.[114] Neoliberals systematically oppose the democratic institutionalisation of the Union, regarding it as a pathway to positive market regulation. A rival project seeks to strengthen the Union's capacity to enact 'market-enhancing and market-supporting legislation' that will progressively align European economic governance with social-democratic and Christian-democratic traditions.[115] The so-called 'project for regulated capitalism' is guided by a redistributive ethic, aiming to allocate resources in such a way as to enable structurally weak regions to compete more effectively in an increasingly liberalised market. This logic can be discerned in policies promoting, *inter alia*, regional development, environmental protection, and the development of EU-wide infrastructure networks. Crucially for present purposes, the project for regulated capitalism is also preoccupied with democracy and rights. It endeavours to extend basic principles of liberal democracy to the EU with a view to empowering European citizens to push for social welfare

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[112] The term 'socio-spatial dialectics' is borrowed from Edward W Soja, *Seeking Spatial Justice* (University of Minnesota Press 2010).
[113] Liesbet Hooghe and Gary Marks, *The Making of a Polity: The Struggle Over European Integration* (1997) European Integration Online Papers (EIoP) No 1/4, 3.
[114] ibid, 6.
[115] ibid, 3.

provision and market regulation through political parties, interest groups, and social movements.

Although it has been more than two decades since Hooghe and Marks' paper, their observations have lost none of their salience. After all, the clash between the neoliberal project and the project for regulated capitalism is just one manifestation of perennial debates about the relationship between 'economic efficiency and social equity, and between the state as provider and interventionist and the state as facilitator and enabler'.[116] Each society has struck its own idiosyncratic balance between these imperatives, consistent with its particular socio-economic, political, and cultural traditions. It is precisely this balance that the term 'social model' seeks to encapsulate. Social models are ideal-types in the Weberian sense; that is, 'conceptual abstractions' that facilitate analysis by helping to clarify the similarities and differences underlying complex social phenomena.[117] Thus understood, social models can be used as a kind of shorthand to refer to the ways in which constellations of institutional arrangements and social practices shape market-state-society relations within particular settings.[118] At the same time, social models perform a normative function: in making recourse to a specific social model, one invokes a relatively stable equilibrium between economic growth/competitiveness and social welfare/equity, while also highlighting specific concerns regarding sustainability and governance.[119]

By the same token, to speak of a 'European Social Model' is to draw attention to the 'high degree of interest organisation and comprehensive negotiation between governments and social partners over conflicts of interest' that is discernible across the different layers of the European architecture.[120] It is also to evoke a certain balance between the neoliberal project and the project for regulated capitalism, as these find expression within the context of European politics. To understand what this balance entails, one must revisit the circumstances surrounding the historical emergence of the European Social Model, proceeding to trace how market-state-society relations have been recalibrated over time in response to internal and external stimuli.

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[116] Simin Davoudi, 'Territorial Cohesion, The European Social Model, and Spatial Policy Research' in Andreas Faludi (ed), *Territorial Cohesion and the European Model of Society* (Lincoln Institute of Land and Policy 2007), 83.
[117] Andrew Martin and George Ross, 'Introduction: EMU and the European Social Model' in Andrew Martin and George Ross (eds), *Euros and Europeans: Monetary Integration and the European Model of Society* (CUP 2004), 11.
[118] Bernhard Ebbinghaus, 'Does a European Social Model Exist and Can It Survive?' in Gerhard Huemer, Franz Traxler and Michael Mesch (eds), *The Role of Employer Associations and Labour Unions in the EMU: Institutional Requirements for European Economic Policies* (Routledge 1999), 3.
[119] Andreas Faludi, 'The European Model of Society' in Andreas Faludi (ed), *Territorial Cohesion and the European Model of Society* (Lincoln Institute of Land and Policy 2007), 1.
[120] ibid, 2.

One of the first to refer to the European Social Model was Jacques Delors, who served as President of the Commission between 1985-1995. Delors was heavily preoccupied with the question of reconciling competitiveness with equity – or, as the Commission's landmark 1994 White Paper on European Social Policy put it, of cultivating 'a new synergy between the welfare and wealth-creating functions of society'.[121] Integral to this was the affirmation and progressive elaboration of a distinctly 'European' model of society, predicated upon the values held in common by the Member States.[122] Importantly, Delors saw this model as having the potential to perform a moralising function, instilling upon individuals a communitarian ethos and committing governments to providing a wide range of public goods, 'not only because of market failures and "externalities", but in response to *demands for solidarity*'.[123] It was in this spirit that Delors launched cohesion policy, envisaging it as a welfarist 'counterpart' to the free market.[124]

In the years that followed, the existence, normative content, and analytical utility of the European Social Model became the subject of fervent debate. Commentators have been particularly sceptical of the concept's homogenising connotations, which run the risk of obfuscating the enduring differences between the Member States' social, economic, and political systems.[125] For their part, the European institutions have repeatedly highlighted that each of the Member States has its own distinct social model, which reflects its history and the collective choices of its citizens. At the same time, the Member States' social models are regarded as having a number of 'distinctly European characteristics' that common approaches can be built upon.[126] These characteristics are traced to the shared 'European' values reflected in primary and secondary EU legislation, the EU Charter of Fundamental Rights,[127] and the European Convention on Human Rights (ECHR).[128] Key among them are human dignity,

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[121] Commission, 'European Social Policy: A Way Forward for the Union' COM (1994) 333 final, 35.

[122] ibid.

[123] George Ross, *Jacques Delors and European Integration* (OUP 1995), 46; emphasis added.

[124] Nanetti (n30), 89. See also Hooghe and Keating (n14), 374; Hooghe and Marks (n113), 6. The Delors Presidency also saw the adoption of a Community Charter of Fundamental Social Rights of Workers, which promoted the creation of a minimum set of social rights for EU citizens.

[125] Gøsta Esping-Andersen, 'Towards the Good Society, Once Again?' in Gøsta Esping-Andersen (ed), *Why We Need a New Welfare State* (OUP 2004), 25.

[126] Commission, 'European Values in the Globalised World: Contribution of the Commission to the October Meeting of Heads of State and Government' COM (2005) 525 final, 4.

[127] Charter of Fundamental Rights of the European Union [2010] OJ C 83/389.

[128] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, 213 UNTS 222. The Council has adopted a similar position. See, for instance, European Council, Presidency Conclusions, Nice European Council, 7-10 December 2000, annex I ('European Social Agenda'), para 11. This value-based conception of European Social Model is also prevalent in scholarship. See, indicatively, Delanty and Rumford, who describe the Model as 'the EU's projection of its values, norms and core social policy concerns': Gerard Delanty and Chris Rumford, *Rethinking Europe: Social Theory and the Implications of Europeanization* (Routledge 2005), 106.

freedom, democracy, equality, the rule of law, respect for human rights, solidarity, cohesion, non-discrimination, adequate health and safety in the workplace, universal access to education and healthcare, quality of life and quality in work, sustainable development, and the involvement of civil society.[129] Taken together, these values are said to represent a clear 'European choice in favour of a social market economy'.[130]

Taking this proposition as their point of departure, scholars of EU cohesion policy and European spatial planning have posited that the introduction of territorial cohesion as a new strategic aim alongside social and economic cohesion signalled the European Social Model's spatial turn. Early work along this line of inquiry focused on the parallels between territorial cohesion and the French planning tradition of *aménagement du territoire*.[131] Owing to its rootedness within French egalitarianism, *aménagement du territoire* aspires to a socially and ecologically balanced pattern of territorial development, which contributes to citizens' sense of solidarity and the maintenance of national unity.[132] Crucially, although it does not resolve the tension between equity and efficiency, it nevertheless provides some clarity as to how these desiderata should be balanced in the context of spatial planning. Being grounded in a principle of equal opportunity, it calls for a territorially equitable production of collective goods (e.g., health and education) and the mutualisation of the asymmetrical risks faced by regions. In practical terms, this justifies the incurrence of costs for the purposes of mitigating the adverse effects of territorial mobility (e.g., costs associated with the maintenance of public service provision in depopulated areas) or promoting wider social objectives (e.g., costs associated with the provision of localised services and amenities so as to preserve links within and between families or neighbourhoods).[133]

The relevance of these considerations for territorial cohesion has been most aptly conveyed by Davoudi, who argues that

> [the territorial cohesion debate] calls for an extension of the underlying
> principles of the European model from individuals to places and territories.
> It calls for solidarity not only amongst European citizens but also amongst

[129] COM (2005) 525 final (n123), 4.
[130] ibid. Scholars have been thinking along similar lines. de la Porte and Pochet, for instance, argue that the European Social Model 'is rooted in a set of constitutional policy principles, works with a floor of social guarantees, operates a regime that forces national systems to communicate with each other and pursues a set of wider aspirations': Caroline de la Porte and Philippe Pochet, 'Conclusion' in Caroline de la Porte and Philippe Pochet (eds), *Building Social Europe through the Open Method of Co-ordination* (Peter Lang 2002), 290.
[131] The EU Compendium of Spatial Planning Systems and Policies referred to this tradition as the 'regional economic planning approach': Compendium, 36.
[132] Davoudi (n100).
[133] Peyrony (n1), 68.

European territories. It extends the call for work-based social-protection to place-based territorial-protection.[134]

Consequently, the discourse on territorial cohesion adds a spatial justice dimension to the European Social Model, allowing us to use its normative content as a benchmark against which to evaluate policies related to – or indirectly affecting – spatial development.[135] From an analytical perspective, a combined reading of the two concepts sheds light on the complex ways in which societal interests form, become manifest, and interact at different spatial scales, giving rise to intricate patterns of conflict/competition and alignment/cooperation between actors.[136] It also throws into question the planning community's tendency to favour narrowly technocratic and managerial solutions, pushing planners to engage with a broad set of territorially-embedded socio-cultural values, including place attachment, social networks, a sense of community and identity.

This is not to say that the normative content of the European Social Model – and hence of territorial cohesion – has not evolved over time, especially as concerns over the 'greying' of the European population and the slow-down of economic development have taken hold. Indeed, in the early aughts, the Model's very viability seemed to depend entirely on the acceleration of growth and the enhancement of labour market 'flexibility'.[137] This was reflected in the political priorities set out in the Lisbon Strategy, which, as already discussed in chapter three, sought to make Europe 'the most competitive and dynamic knowledge-based economy in the world'.[138] The Strategy was grounded in a somewhat contradictory narrative, which presented economic growth as an essential precondition not just for achieving higher *per capita* incomes, but, more critically, for financing a certain degree of social cohesion in a durable manner. This win-win rhetoric, which had the effect of glossing over the inherent tension between economic growth and social cohesion, was echoed by the successor to the Lisbon Strategy, namely the 'Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth'.[139] Critical commentators have drawn attention to the neoliberal undertones of the two strategies, which are said to have contributed to a 'retrenchment of traditional models of welfare'.[140] The documents have also been reproached for their unambitious approach to

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[134] Davoudi (n116), 83.
[135] Davoudi (n100), 437.
[136] Faludi (n119), 19. See also chapter three, section 2.2.
[137] André Sapir and others, 'An Agenda for a Growing Europe: Making the EU Economic System Deliver' (2003) Report of an Independent High-Level Study Group established on the initiative of the President of the European Commission, 2.
[138] European Council, Presidency Conclusions, Lisbon European Council, 23-24 March 2000, para 5.
[139] Commission, 'EUROPE 2020: A Strategy for Smart, Sustainable and Inclusive Growth' COM (2010) 2020.
[140] Ian Bache and others, *Politics in the European Union* (4th edn, OUP 2015), 71.

environmental issues. The Europe 2020 Strategy, for instance, portrayed efficient resource use and clean energy as prerequisites for 'sustainable' growth. In so doing, it cast the environment in a supporting, enabling role, thus failing to engage with the intrinsic unsustainability of the Union's economic aspirations and the implications that this holds for social-ecological well-being. As will be further discussed in the following section, this rhetoric resulted in the European Social Model becoming a lever of not only social, but also territorial stratification.

Currently, Europe finds itself at a turning point. This is evident in the reflection paper 'Towards a Sustainable Europe by 2030', which was published by the Commission in early 2019 in an attempt to pave the way for a comprehensive implementation strategy of the UN Sustainable Development Goals (SDGs).[141] The paper refers to climate change as a key challenge for the Union's social welfare model and, by extension, for the European project itself.[142] Responding to this challenge calls for 'sustainability *change*' and a 'sustainability *transition*' – terms that imply a radical departure from the path of 'business as usual'. The paper goes on to underscore that the sustainability transition must be for the benefit of all, leaving no group, community, sector, or region behind.[143] In other words, it must be 'socially inclusive, just and fair', with all members of society receiving equal opportunities to contribute to – and to enjoy the benefits arising from – Europe's sustainable future.[144] This is reiterated in the Commission's seminal communication on the European Green Deal, which was published in December 2019.[145]

The language in which the two communications are written resonates with an equity-oriented reading of territorial cohesion. This is most clearly seen in the assertion that the sustainability transition can have 'positive spill-over effects', helping to '[promote] social rights and well-being for all and in turn contributing to social cohesion in the Member States and across the EU'.[146] Equally supportive of this proposition is the Commission's call for a 'territorial approach' to the delivery of the SDGs, based on a 'two-way dialogue where European and national strategies associate regional and local authorities as well as civil society and professional organisations in a multi-level and multi-stakeholder governance approach'.[147] The Commission has further committed to working with the Member States and regions – particularly fossil fuel-dependent regions transitioning to low-carbon, climate-resilient activities – to assist them in putting in place 'territorial transition plans'.[148] One could argue

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[141] Commission, 'Towards a Sustainable Europe by 2030' COM (2019) 22 final.
[142] ibid, 10.
[143] ibid, 24.
[144] ibid.
[145] Commission, 'The European Green Deal' COM (2019) 640 final, 2.
[146] COM (2019) 22 final (n138), 24.
[147] ibid, 67.
[148] COM (2019) 640 final (n145), 16.

that, in setting such a tone for the next phase of the academic and policy debate on EU territorial action, the two communications have provided a solid point of departure for a forward-looking exploration of the spatial and territorial dimensions of social-ecological well-being as this relates to Europe's maritime regions.

This is a promising research direction considering how sensitive MSP is to the shifting equilibrium between social cohesion, economic competitiveness, and environmental sustainability embodied by the European Social Model. This sensitivity may be attributed to the significant direct and indirect influence that the EU exerts upon visioning exercises and statutory planning processes taking place at different scales. As already discussed in chapter three, the Union plays a key role in promoting cooperation in the field of transnational MSP, its rich institutional infrastructure providing ample opportunities for knowledge-sharing and consensus-building among policy-makers, practitioners, and stakeholders.[149] In turn, the socialisation, mutual learning, and coalition-building that occur in this context contribute to the consolidation and institutionalisation of new consultation patterns, decision-making procedures, administrative roles, and behavioural expectations. Moreover, the EU Blue Growth Strategy has opened up new areas of regional competition and synergy. Resources under the European Structural and Investment Funds are being channelled towards 'promising maritime economic activities and their supporting infrastructures',[150] with sea-basin and macro-regional strategies serving as 'bottom-up vehicles' for triggering direct funding towards the blue economy.[151] Finally, it bears reiterating that, for certain Member States, the transposition of the MSPD was the first major legislative development in the area of ocean-use planning.[152] For these countries, planning culture was shaped by the EU from the outset, rather that progressively Europeanised.

At the same time, as discussed previously,[153] the Union's maritime policy has garnered criticism for allowing economic development to be prioritised at the expense of ecosystem integrity, not to mention socio-cultural well-being tied to the ocean.[154] Yet, somewhat surprisingly, few critical MSP scholars have used cohesion policy and its links to the European Social Model as a source of normative insight into what constitutes a just spatial pattern of

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[149] See chapter three, section 2.

[150] Commission, 'Blue Growth Opportunities for Marine and Maritime Sustainable Growth' (2012) COM (2012) 494 final, 6.

[151] Commission, 'Report on the Blue Growth Strategy: Towards More Sustainable Growth and Jobs in the Blue Economy' SWD (2017) 128 final, 5.

[152] See also chapter one, section 3.

[153] See also chapter one, section 4; chapter two, section 3.2.2; and chapter three, section 2.

[154] Gordon M Winder and Richard Le Heron, 'Assembling a Blue Economy Moment? Geographic Engagement with Globalizing Biological-Economic Relations in Multi-use Marine Environments' (2017) 7 Dialogues in Human Geography 3; Maria Hadjimichael, 'A Call for a Blue Degrowth: Unravelling the European Union's Fisheries and Maritime Policies' (2018) 94 Marine Policy 158.

human-ocean relations.[155] The present study identifies this as an important lacuna that requires filling, not least because the notion of territorial cohesion can help us to better understand the cultural-territorial dimensions of spatial justice, this being one of the most elusive aspects of the relationship between humanity and the ocean. Accordingly, the following section discusses how territorial vulnerability, equity, and solidarity have been discursively construed within the context of EU territorial action, concluding with a reflection on how a spatially- (but also ecologically-) conscious conception of the European Social Model can help us clarify and evoke the balance that Europe and its peoples must strike in their social-material relations with the ocean as they enter a new and in many ways critical decade.

Before moving any further, it is necessary to note that, like so many other concepts explored in this chapter, the European Social Model remains fervently contested. Unfortunately, providing a detailed account of its discursive evolution, its political potency and normative force, and the diverse analytical purposes it has been called upon to serve would far exceed the scope of the present study. It suffices to say that we have heeded the warnings of critical commentators, who draw attention to the Model's proneness to being ideologically and politically manipulated. Gualini, for instance, notes that efforts to correlate European spatial planning with 'an allegedly persistent' European model of society have tended to intensify whenever institutionalisation hit a plateau.[156] In this context, Gualini suggests, the invocation of the European Social Model has served a strategic purpose, allowing scholars of European spatial planning to paint their subject of inquiry in a positive light, making it appear firmly rooted within the Union *acquis*. Being mindful of this critique, the subsequent analysis is careful to draw attention to the Model's contradictory aspirations, as well as the tentative legitimacy of the processes through which these aspirations are balanced against each other and become translated into socio-material realities.

3. European imaginaries of maritime territorial vulnerability, equity, and solidarity

The preceding analysis sought to illustrate the growing consciousness around the European project's spatiality. As discussed above and further elaborated in this section, this consciousness extends to the marine realm, which, over the course of the last two decades, has

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[155] Kidd and Shaw are two of the few commentators that have noted the relevance of EU cohesion policy, although they do not focus on its equity dimension: Sue Kidd and Dave Shaw, 'Reconceptualising Territoriality and Spatial Planning: Insights from the Sea' (2013) 14 Planning Theory & Practice 180.
[156] Gualini (n28), 4.

emerged as a distinct component of the common European territory and, by extension, as the subject of supranational policies aimed at stimulating economic growth, promoting environmental protection, fostering social cohesion, and enhancing territorial cooperation.[157]

Importantly, to affirm the spatiality of the European project is to open ourselves to more complex questions 'concerning how ideas about European space could create particular and far reaching challenges for people, environments and places'.[158] There are, of course, different pathways to unpicking these questions. For our part, we take our cue from the critical research agenda developed by Böhme et al. The authors identify three major areas of inquiry: the ways in which ideas about space and spatial relations are shaped, contested, and reproduced within the Union's 'multi-level, multi-nodal and multi-national' governance system; the capacity of these ideas to produce or perpetuate inequalities and injustices; and the connection between these ideas and 'potential, imaginary [or] realised notions of territorial belonging and identification (identity)'.[159] The authors further stress that, regardless of the area one decides to focus on, their analysis '[needs] to be fundamentally underpinned by *a value driven perspective of spatial justice*', values being a key normative criterion for appraising existing or proposed socio-spatial realities.[160] The rationale behind this proposition is that regarding spatial policies through such a lens can reveal the variegated ways in which they make (in)visible core concerns relating to environmental degradation, uneven development, and social exclusion.[161] It can also facilitate the identification of, on the one hand, the social groups and territories that stand to benefit or be harmed by spatial change and, on the other hand, the counter-movements that have the capacity to generate and institutionalise alternative spatial ideas.

Böhme et al.'s research agenda gives us a sense of the contribution that a notion like spatial justice can make to a study such as ours. From the outset, we have grounded our advocacy of a human rights-based approach to the normativisation of MSP in the assumption that human rights language and practice have the capacity to render spatial planning an arena *par excellence* for the dialectical formulation of transformative blue futures.[162] Our understanding of what transformation means in this context has been informed by Albrechts, who speaks of a normative exercise concerned 'with values and meanings, with "what ought

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[157] Juan L Suárez de Vivero, Juan C Rodríguez Mateos and David Florido Del Corral, 'Geopolitical Factors of Maritime Policies and Marine Spatial Planning: State, Regions, and Geographical Planning Scope' (2009) 33 Marine Policy 624, 624.
[158] Böhme and others (n110), 1176.
[159] ibid, 1179.
[160] ibid; emphasis added.
[161] ibid. Here, Böhme et al. are drawing on David Harvey, *Justice, Nature and the Geography of Difference* (Blackwell Publishers 1996).
[162] See chapter one, section 5.1.

to be" and "what could be"'.[163] The success of this exercise, Albrechts stresses, depends on the existence of an ideational compass that will steer spatial change away from 'a pernicious relativism where anything goes' and towards ends which are beneficial and desirable, and the determination of which has been legitimately arrived at.[164] From where we are standing, these statements read like a call for a framework within which responsible socio-spatial visioning can take place; that is, a framework which facilitates the articulation and assertion of interests, aspirations, and entitlements at the same time as it commands the assumption of responsibilities and obligations towards others, both human and non-human. It is in response to this very call that we have made the case for a human rights-based approach to the normativisation of MSP which is grounded in a relational ontology of self and space. And it is in response to similar considerations that Böhme et al. have proposed that spatial justice be used to fill the 'vacuum of values' in which EU spatial policy seems to be unfolding.

In light of the foregoing, it appears feasible and permissible to use spatial justice as a shorthand for the kinds of values (and corresponding relationships) that a human rights-based approach to the normativisation of MSP – in the way we understand it – ought to foster. These include values that serve to strengthen relational and collective autonomies, capabilities, and solidarities – elements which are key to the enactment of participatory and collaborative forms of marine planning and management. They also include values that steer marine planning and management processes towards a more equitable distribution of ocean uses (and, hence, of environmental benefits and impacts) across space and time. It is posited that, such a value base can enable Europe's maritime *demoi* to pursue social-ecological well-being '*in situ*', creating more just patterns of human-ocean interaction from the ground up.[165]

Against this background, the main body of this section provides more detail on the theoretical underpinnings of spatial justice and their points of intersection with the critical legal-theoretical movements that have informed the design and execution of the present study. It then returns to EU cohesion policy and European spatial planning to examine how they construe maritime territorial vulnerability, which is the essential socio-spatial condition that a human rights-based approach to the normativisation of MSP must recognise, address, and accommodate.

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[163] Louis Albrechts, 'Enhancing Creativity and Action Orientation in Planning' in Jean Hillier and Patsy Healey (eds), *The Ashgate Research Companion to Planning Theory: Conceptual Challenges for Spatial Planning* (Routledge 2016), 218
[164] ibid.
[165] Antonia Layard and Jane Holder, 'Seeking Spatial and Environmental Justice for People and Places within the European Union' in Andreas Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (Routledge 2011), 185.

3.1. Locating spatial justice

It is neither practicable nor necessary to provide a synopsis of the rich field of scholarship that explores the links between justice and space. For present purposes, it is sufficient to engage with the work of Edward Soja. Soja's 2010 monograph *Seeking Spatial Justice* is a notable effort to locate spatial justice as a theoretical concept, a mode of empirical analysis, and a strategy for social and political action. It is also a synthesis, a crystallisation, and an advancement of a decades-long academic debate that straddles disciplinary and perspectival boundaries. Further yet, it is a work that is lauded for its 'grounded theorisation' and 'excellent strategisation' of spatial justice at the same time as it is reproached for having failed to reveal the full breadth of the concept's radical potential.[166] It bears noting in this regard that among those who harbour this critically appreciative view of Soja's take on spatial justice are seminal proponents of the more-than-human turn in legal and justice studies. Soja's monograph is therefore both a useful introduction to spatial justice and an apposite framework within which to bring this concept into a productive dialogue with the theoretical perspectives we have engaged with thus far in this study.

A core claim of Soja's is that 'justice, however it might be defined, has a *consequential geography*, a spatial expression that is more than just a background reflection or set of physical attributes to be descriptively mapped'.[167] To the contrary, the spatiality of justice 'is an integral and formative component of justice itself, a vital part of how justice and injustice are socially constructed and evolve over time'.[168] Spatial justice is, accordingly, 'not a substitute or alternative to other forms of justice but rather represents a particular *emphasis* and *interpretive perspective*'.[169] As Soja simply – yet potently – puts it, spatial justice is a 'conception of social justice in which geography matters in significant ways'.[170]

One element of Soja's thesis that is particularly worth highlighting is that he views space in relational terms (i.e. as 'a shifting set of relations among bodies') rather than abstract ones (i.e. as 'an infinite, pre-social grid in which material processes occur').[171] This is evident in how he understands what he refers to as a 'socio-spatial dialectic'; that is, the notion that 'there exists a mutually influential and formative relation between the social and the spatial

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[166] Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Routledge 2015), 180ff.
[167] Soja (n112), 1; emphasis in the original.
[168] ibid.
[169] ibid, 13; emphasis added.
[170] ibid, 75.
[171] Justin Williams, 'Theorizing the Non-human through Spatial and Environmental Thought' in Teena Gabrielson and others (eds), *The Oxford Handbook of Environmental Political Theory* (OUP 2016), 162.

dimensions of human life, each shaping the other in similar ways'.[172] When you regard the world through this lens, Soja argues, 'the spatiality of whatever subject you are looking at is viewed as shaping social relations and societal development just as much as social processes configure and give meaning to the human geographies or spatialities in which we live'.[173] It follows that to espouse and internalise this worldview is to adopt a new 'spatial consciousness, a way of thinking that recognises that space is filled with politics and privileges, ideologies and cultural collisions, utopian ideals and dystopian oppression, justice and injustice, oppressive power and the possibility for emancipation'.[174]

Crucially in this regard, the way in which Soja frames the tugs-of-war that punctuate the production of space represents a departure from his scholarly antecedents, many of whom were of a Marxist lineage and thus primarily or even exclusively preoccupied with issues of class struggle. While he shares their concern with neoliberal capital accumulation and its discontents, Soja casts a wider net, especially when he discusses the kinds of mobilisation needed to advance spatial justice. He accordingly makes the case for the creation of 'diverse coalitions and networked social movements that extend beyond the narrow and often essentialist channels of the past'; movements 'for labor, against racism, patriarchy, or cultural domination, or to achieve peace or respond to global warming or to promote local community development'.[175]

All this Soja distils in three principles. The first principle postulates that human spatiality in all its forms and expressions is socially produced. This distances us from the much-critiqued 'container view' of space, which casts the physical environment as 'a naturalised or neutral stage for life's seemingly time-driven social drama'.[176] The second principle recognises that geographies are consequential. Depending on how they are constructed, they can 'provide advantage and opportunity, stimulate, emancipate, entertain, enchant, enable' or 'constrain opportunity, oppress, imprison, subjugate, disempower, close off possibilities'.[177] The third and final principle suggests that human spatialities are changeable and, as such, the target of political and social movements advancing demands for transformative action.

So how do these principles fit with the theoretical framework that underpins the present study? As a first step towards answering this question, lets us briefly reflect on the relationship between spatial justice and environmental justice.

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[172] Soja (n112), 4.
[173] ibid.
[174] ibid, 103.
[175] ibid, 109.
[176] ibid, 103-104.
[177] ibid.

The modern environmental movement emerged from the interaction and cross-fertilisation between different strands of social justice activism in the 1960s and 1970s. Initially, the movement was preoccupied with the existence of inequities in the distribution of environmental hazards. Specifically, the concept of environmental injustice was used to convey that ethnic minorities and other marginalised groups endured disproportionately high levels of environmental risk. As time went on, the movement became more proactive and aspirational, advancing demands for equal environmental protection under the law and for a fair and equitable distribution of not only environmental bads, but also environmental goods (e.g., access to green space, public transit, clean water, and fresh food).

But even in its early iterations, environmental justice discourse was not limited to issues of maldistribution. It raised questions about the very definition of what constitutes the environment or environmental quality, shifting attention away from the mirage of pristine wilderness and towards the spaces 'where we live, work and play'.[178] Also of concern were the factors that contribute to the emergence, exacerbation, and perpetuation of environmental injustice, among which class, income, race, and gender. In addition, theorists sought to develop a pluralist conception of the notion of justice based on principles of equity, recognition, and participation, and on an inclusive understanding of the basic needs and functioning of individuals and communities.[179]

More recently, the environmental justice discourse has widened its lens further still to consider 'new issues and constituencies and new places and sites of analysis'.[180] Schlosberg intriguingly speaks of this development in terms of a 'spatial' expansion that is both vertically and horizontally oriented, with the former orientation referring to scale and the latter to scope.[181] Vertical expansion is working to strengthen the analytical and activist potential of environmental justice, and this particularly in areas such as development planning and ecosystem-based management, where the progressive adoption of a polycentric and multi-level perspective is key. Vertical expansion is also working to clarify the relationship between environmental justice and spatial justice, lending credence to Soja's argument that seeking the latter is not a substitute or an alternative to searching for the former, but, rather, 'a means of amplifying and extending [the concept of environmental justice] into new areas of understanding and political practice'.[182] Those who subscribe to this claim – and we do –

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[178] Patrick Novotny, *Where We Live, Work, and Play: The Environmental Justice Movement and the Struggle for a New Environmentalism* (Praeger 2000)

[179] David Schlosberg, 'Theorising Environmental Justice: The Expanding Sphere of A Discourse' (2013) 22 Environmental Politics 37, 38.

[180] Julie Sze and Jonathan K London, 'Environmental Justice at the Crossroads' (2008) 2 Sociology Compass 1331, 1331.

[181] Schlosberg (n179), 37.

[182] Soja (n112), 5.

maintain that environmental justice discourse and practice can benefit from 'a greater awareness of the interactive and multiscalar geographies of place-based discrimination' that give rise to environmental inequities and open up opportunities for intervention at different levels between the global (the planet) and the local (the body).[183]

From a horizontal perspective, the diffusion of critical spatial thinking across a broad spectrum of subject areas provides fertile ground for a reflection on the tensions and synergies between environmentalism and other social movements with a newly evident spatial dimension, including those dealing with issues of labour, gender, and civil rights. However, this opportunity for complementarity between environmental and spatial thought is thwarted by an important point of divergence between the two camps, namely their understanding of the influence that non-human actors exert upon social life.[184] Specifically, the growing emphasis placed on humanity's embeddedness within ecological systems has allowed environmental justice theorists to develop nuanced, non-deterministic accounts of 'the actancy' of non-human actors, from air and water to chemicals, soil erosion, fields of grain, and migratory species. Conversely, in considering how the spatiality of different components of the natural and built environment shapes social relations and societal developments, spatial thinkers tend to over-emphasise human agency, which leads them to inadvertently portray non-human actors 'as passive receptacles of social action'.[185] It is therefore argued that, if spatial justice is to realise its intersectional potential, it must embrace a relational-materialist conception of the environment, which clearly acknowledges the co-constitutive relationship between ecological processes, economic activity, political contestation, and land use policies. The need for, and examples of, such a conception has already been discussed at different points in the thesis.[186]

It follows that spatial justice thought can itself benefit from a greater understanding of the formative dynamics observed within social-ecological systems, particularly the reciprocity that characterises social-ecological feedback loops. This can help the discourse move away from such false dichotomies and stifling hierarchies as eco/anthropocentricity, animal/human, human/environmental, and natural/artificial.[187] Soja's composite notion of a socio-spatial dialectic can be seen as a step in this direction, but it arguably does not go far enough. Thus, in taking Böhme et al.'s research agenda forward, the following sections will use Soja's spatial justice framework, but will enrich it with insights from critical legal theory. Particular

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[183] ibid, 53.
[184] Williams (n171), 169-170.
[185] ibid, 171.
[186] Chapter two, section 4; chapter three, section 2.2.
[187] Andreas Philippopoulos-Mihalopoulos, 'Actors or Spectators? Vulnerability and Critical Environmental Law' (2013) 3 Oñati Socio-Legal Series 854, 854.

emphasis will be placed on vulnerability, which, as the reader will anticipate, will be conceptualised in more-than-human terms.

A source of inspiration on this point is the work of Andreas Philippopoulos-Mihalopoulos, which paints vulnerability as a tool to help us come to terms with our 'incontestable exposure to the world' and to find our place in the middle, i.e. the 'space in which one's body affects and is affected by other bodies'.[188] An additional source of inspiration is the work of Anna Grear, which casts vulnerability 'as a kind of corporeal predicament', 'an inescapably creaturely continuity in the *vulnerability of the living order itself*'.[189] In directing our attention towards that which is material – and, by extension, porous and affectable – and in declaring this as the 'vulnerable subject' of law (including rights), Grear sheds new light on the 'relativities of resilience' that exist within our 'community of universally vulnerable – but unevenly situated – subjects', and in the ways in which these relativities are mediated by equally vulnerable institutions.[190] She also pushes us to become more attentive to 'dynamics of encounter, relativities of position and the co-symptomatic production of privilege and oppression', as well as macro- and micro-politics.[191] As the previous chapters have shown, this receptive, expansive frame of mind seems particularly apposite to the topic at hand, considering that new technologies, new activities, and new management tools and practices pertaining to the marine realm are leading to human-ocean interactions of unprecedented scope and intensity. At the same time, the blue turn in the humanities and social sciences, together with the deepening of the dialogue between pertinent disciplines and the natural sciences, is generating a wealth of knowledge about the complex dynamics of marine social-ecological systems; knowledge that can help elucidate the meaning of non-human actancy as it pertains to the marine realm.

Armed with this more-than-human and vulnerability-centric understanding of spatial justice, the following sections proceed to examine how social-ecological well-being fits into the normative core of EU territorial action; namely, the idea that a balanced pattern of territorial development is one that prevents 'people [from being] disadvantaged by wherever they happen to live or work in the Union'.[192] This requires investigating how the notion of territorial vulnerability and the kindred notion of territorial equity have been framed within EU cohesion policy and European spatial planning, with framing being understood as the

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[188] ibid, 859-860.
[189] Anna Grear, 'Foregrounding Vulnerability: Materiality's Porous Affectability as a Methodological Platform' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law* (Edward Elgar 2016), 13-14; emphasis added. See also chapter two, section 4.2.
[190] ibid, 11. Grear is drawing on Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1.
[191] Grear (n189), 26.
[192] COM (2004) 107 final (n90), 27.

articulation of 'normative-prescriptive [stories]' that identify policy problems and chart a course of action to address them.[193] The analysis shows that territorial vulnerability has been conceptualised in a twofold manner: as a result of spatial peripherality and its corollary of functional marginality; and as a consequence of ecological and cultural sensitivity. The ideal of territorial equity, on the other hand, has been construed through recourse to polycentricity and balanced territorial development. Once we have set out the key parameters of these interpretations and highlighted potential areas of tension, we will proceed to discuss the possibility of human rights being employed to give expression and assign consequence to territorial vulnerability, and to promote not only territorial equity, but also, and crucially, territorial solidarity.

3.2. Territorial vulnerability as spatial peripherality and functional marginality

Peripherality is one of the earliest terms used to refer to territorial vulnerability within the context of the EU, having been part of the vocabulary of EU territorial action since the late 1980s. In 1988, the European Council tasked an expert committee – chaired by the newly re-appointed President of the Commission, Jacques Delors – with studying and proposing concrete stages towards the realisation of the economic and monetary union. Released the following year, the 'Delors report' both reflected and actively shaped popular understandings of vulnerability as it pertained to the common European territory. A key concern related to the impact that economic and monetary integration would have on regions located in the Community's periphery.[194] Here, peripherality was framed in predominantly spatial terms, i.e. as physical distance from a central core. Thus construed, it carried within it a preoccupation with accessibility; that is, 'the relative opportunity of interaction and contact between households, firms or industries across geographic space afforded by location in a particular town or region'.[195] Accessibility constraints had been found to place peripheral regions at a competitive disadvantage, with transport costs and economies of scale tending to favour a shift

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[193] Martin Rein and David Laws, 'Controversy, Reframing and Reflection' in WGM Salet and Andreas Faludi (eds), *The Revival of Strategic Spatial Planning* (Royal Netherlands Academy of Arts and Sciences 2000), 93. See also Maarten Hajer, 'Transnational Networks as Transnational Policy Discourse: Some Observations on the Politics of Spatial Development in Europe' in Willem Salet and Andreas Faludi (eds), *The Revival of Strategic Spatial Planning* (Royal Netherlands Academy of Arts and Sciences 2000).
[194] Committee for the Study of Economic and Monetary Union, *Report on Economic and Monetary Union in the European Community* (European Commission 1989) (Delors Report), 18.
[195] David Keeble, John Offord and Sheila Walker, *Peripheral Regions in a Community of Twelve Member States* (Office for Official Publications of the EC 1988), 1-2.

in economic activity towards the highly developed areas at the centre of the Community.[196] Accordingly, along with the single market, competition policy, and macroeconomic policy, the Delors report suggested that the economic and monetary union include a regional structural policy, which, rather than subsidising incomes and offsetting inequalities in standards of living, would aim to 'equalize production conditions' across the Member States through investment programmes in areas such as physical infrastructure, communications, and transport.[197]

The spatial ideas promulgated by the Delors report played a decisive role in the discursive construction of 'the periphery' as the lowest echelon in the stratified pyramid of Europe's territorial hierarchy. The summit was occupied by large city-regions forming part of dynamic clusters of economic activity, the emergence and consolidation of which was nurtured by spatial relationships of proximity and continuity.[198] For its part, cohesion policy was expected to serve as a catalyst for the development of peripheral regions. It would do so not through a passive redistribution of income, but by promoting regional entrepreneurship and cultivating so-called 'indigenous potentials'.[199] This was regarded as a key precondition for achieving convergence, i.e. the gradual approximation of economic performance and standards of living across the Member States.[200] It is, nevertheless, worth noting that convergence was understood primarily as the narrowing and eventual disappearance of disparities in per capita GDP – an interpretation that had the effect of diverting attention away from broader social considerations.

Taken together, the economistic construal of convergence and the depiction of regional disparities in core-periphery terms were important contributing factors to competitive regionalism becoming a pervasive paradigm of economic development and political organisation. Speaking of this phenomenon, Rumford notes that the type of regionalism we find in the EU is unique: 'it is not the regionalism of secessionism or cultural autonomy […] but a regionalism that approaches the region as an economic actor within the framework of

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[196] Indeed, peripheral regions appeared to share a number of troubling economic, demographic and labour market attributes, including a low GDP *per capita*, overdependence upon agricultural activities, unfavourable manufacturing and service industry infrastructures, and high levels of youth and female unemployment: ibid, 114.

[197] Delors Report, 19.

[198] It is worth noting that, during this time, the dominant spatial metaphor was the so-called 'Blue Banana' – a term used to refer to the prosperous and largely homogenous zone running from London through northern France, the Benelux countries, Milan in Northern Italy, and the Rhine Valley in Switzerland. Europe's prosperous core zone has also been referred to as the 'European Megalopolis', the 'Golden Triangle' and the 'Pentagon'. See references in Simin Davoudi, 'Polycentricity in European Spatial Planning: From an Analytical Tool to a Normative Agenda' (2003) 11 European Planning Studies 979, 989.

[199] Hooghe and Keating (n14), 374.

[200] Delors Report, 11 and 13. Note that the SEA had elevated convergence into the overarching objective of Member State cooperation in the field of economic and monetary policy: SEA, art 20(1).

neoliberal opportunities and EU economic governance'.[201] Now part of the canon of EU regional development studies, in the late 1980s this was still a relatively novel proposition. It highlighted that, in an ever-globalising world, a region's development prospects would depend on its capacity 'to produce, with a comparative advantage, goods and services demanded by the national and international markets to which [it belonged]', thus assuming 'an appropriately specific role within the interregional and international division of labour'.[202] As this idea took hold, territorial actors became exceedingly conscious of their positionality within the global economy and anxious to reconstitute themselves at new spatial scales.[203] In some cases, this triggered new alignments, alliances, and political movements. For the most part, however, it created a zero-sum competition dynamic that undermined inter-territorial equity and State- as well as Union-wide solidarity.[204] From a socio-spatial perspective, the casting of geographic location and resource endowments as critical determinants of regional competitiveness obscured the significance of embodied and emotional connections to local settings, thus paving the way for the further subjection of space to capitalist reification and instrumentalisation.[205]

The limitations of the core-periphery metaphor extended to its explicative capacity. Certainly, the juxtaposition between Europe's dynamic core zone and its under-developed, geographically remote periphery made for a useful and compelling spatial narrative, helping policy-makers and stakeholders to visualise the uneven development of the European territory and garner support for regional development strategies.[206] For more critical commentators, however, the core-periphery metaphor was grounded in a 'static and binary' territorial typology which failed to reflect the complexity and evolving nature of the Union's territorial makeup.[207] In addition, the dichotomous depiction of the common European space glossed over the fact that there were pockets of deprivation in the core (arising from the existence of marginalised groups and places) and pockets of development in the periphery (including as a result of rural gentrification processes). As Hooghe and Keating aptly noted at the time, '[t]here [was] not simply a pattern of core and peripheral regions, or of haves and have-nots',

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[201] Chris Rumford, 'European Cohesion? Globalization, Autonomization, and the Dynamics of EU Integration' (2000) 13 Innovation: The European Journal of Social Science Research 183, 189.
[202] Tomaso Pompili, 'Structure and Performance of Less Developed Regions in the EC' (1994) 28 Regional Studies 679, 680.
[203] Mike Goldsmith, 'Variable Geometry, Multilevel Governance: European Integration and Subnational Government in the New Millennium' in Kevin Featherstone and Claudio M Radaelli (eds), *The Politics of Europeanization* (OUP 2003), 128. See also chapter three, section 2.2.
[204] Keating (n20), 73; Keating (n15), 61.
[205] Keating (n24), 1496.
[206] The core zone is variously referred to as the 'European Megalopolis', the 'Blue Banana', the 'Golden Triangle' and the 'Pentagon'. See the references in Davoudi (n198), 989.
[207] ibid; Costis Hadjimichalis, '"New" Questions of Peripherality in Europe or How Neoliberal Austerity Contradicts Socio-Spatial Cohesion' in Thilo Lang and Franziska Görmar (eds), *Regional and Local Development in Times of Polarisation: Re-thinking Spatial Policies in Europe* (Palgrave Macmillan 2019), 62.

but, rather, 'a complex pattern of disparities in output, productive capacity and resources'.[208] For them, the 'mosaic' suggested itself as a far more apposite analogy for Europe's multifarious economic and demographic reality.[209]

This brings us to the ESDP, a watershed moment in the effort to subvert reductive, polarised representations of the European territory. Although competitiveness remained a core concern, greater attention was directed towards the economic potential and performance of the EU as a whole, which was likely to be compromised if economic activity remained concentrated in a few selected locations.[210] Previously under-emphasised, the collective dimension of competitiveness pointed to a need for a more spatially balanced, socially inclusive, and environmentally sustainable pattern of development, as well as a greater degree of intra- and inter-regional cooperation. These aspirations were translated into three concrete and actionable aims for spatial development policies at different levels: securing parity of access to infrastructure and knowledge for all regions; developing a balanced urban system and a new urban-rural relationship; and, as will be discussed further in the following section, prudently managing and protecting the Union's nature and cultural heritage.[211]

Importantly for present purposes, these aims had a clear maritime dimension, making the ESDP one of the first major policy instruments to meaningfully engage with the role that the sea could and did play in the spatial development of the EU. It was noted that the Union's 'maritime character' – a consequence of the peninsular shape of the European territory on the western fringes of the Eurasian continent – offered favourable conditions for the integration of regions, cities, Member States, and, ultimately, the EU as a distinct and self-contained entity within the global economy.[212] This was to be achieved through the creation of several dynamic zones of global economic integration, well distributed throughout the European territory so as to facilitate the establishment of a network of internationally accessible metropolitan regions and their linked hinterland (towns, cities, and rural areas of varying sizes).[213]

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[208] Hooghe and Keating (n14), 369.

[209] Similar considerations led Kunzmann and Wegener to propose the 'European bunch of grapes' as a more pluralistic – and, thus, more equitable – representation of the common European space: Klaus R Kunzmann and Michael Wegener, 'The Pattern of Urbanisation in Western Europe' (1991) 58 Ekistics 282. See also Klaus R Kunzmann, 'Planning for spatial equity in Europe' (1998) 3 International Planning Studies 101, 101; Deike Peters, 'Cohesion, Polycentricity, Missing Links and Bottlenecks: Conflicting Spatial Storylines for Pan-European Transport Investments' (2003) 11 European Planning Studies 317, 326.

[210] The ESDP also cautioned that the anticipated enlargement of the Union raised the possibility of spatial development becoming further concentrated within a 'single globally outstanding, dynamic integration zone' (the so-called 'Pentagon', which consisted of the metropolises of London, Paris, Milan, Munich and Hamburg), thus exacerbating disparities between the prosperous core and an increasingly large periphery: ESDP, 20.

[211] ESDP, 11.

[212] ESDP, 20 and 55.

[213] ESDP.

'Gateway cities', i.e. cities providing access to the European territory, had an important role to play in the realisation of this new growth model, with large sea ports being a case in point. The ESDP noted that 90% of the Union's external trade relied on maritime transport and that the functional hinterlands of the major sea ports of Northwest Europe covered practically the whole of the European territory.[214] Moreover, although unlikely to become intercontinental transport nodes, the smaller ports populating the Atlantic and Mediterranean coasts made an important contribution to regional economies and held significant potential as European short sea shipping ports or as gateways to the EU for North African and Asian countries. Hence, the establishment of a network of large sea ports, including regional sub-systems of ports, was expected to fulfil a twofold purpose: easing the strain that the nodal points in the core area of the EU were experiencing; and allowing peripheral areas to harness their full economic potential.[215]

This emphasis on mobility and accessibility would go on to become an integral element of territorial cohesion discourse. The perceived centrality of international maritime transport for global trade and the gradual advent of short sea shipping within Europe was reflected in the new spatial concept of 'motorways of the sea', which cast maritime corridors as a sustainable and viable alternative to their congested overland counterparts. Also carried over from the ESDP was the idea that connectedness to commercial ports was a precondition for Europe's global competitiveness and the integrated development of its coastal and island regions.[216] Most crucially, territorial cohesion discourse embraced the notion of peripherality. Encountered at both the European and the national level, core-periphery dynamics were said to contribute to the desertification of coastal and island regions.[217] The answer was to be provided by (trans-)national clusters of competition and innovation, which were expected to shift the paradigm underlying EU territorial action from 'subsidising the poor' and 'securing fair play within the system', to investing in the potential of different territories and helping functional inter-regional networks become more competitive at the global level.[218] Accordingly, cities that functioned as 'regional centres' were invited to participate in

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[214] ESDP, 71.

[215] ESDP, 27. It is worth noting that, since the Treaty of Maastricht, trans-European transport networks had been regarded as a key spatial dimension of European integration, with commentators referring to them as 'the first spatial concept in European policies': Willem Buunk, 'Trans-European Networks (TENs). The First Spatial Concept in European Policies: Establishing a Policy Arena Around One European Spatial Development Issue' (1999) AESOP Congress, Bergen, Norway, 1. Similarly, Peters has spoken of the EU's 'first and primary de facto spatial development intervention' and its 'first large-scale infrastructure policy': Peters (n209), 321.

[216] ESPON, 'The Territorial State and Perspectives of the European Union: Towards a Stronger European Territorial Cohesion in the Light of the Lisbon and Gothenburg Ambitions' (2005) (Territorial State and Perspectives 2005), 22, 30-31 and 66; TAEU, 4.

[217] Territorial State and Perspectives 2005, 66.

[218] Territorial State and Perspectives 2005, 65.

associational structures aimed at generating positive spillover effects for rural and peripheral areas as well as areas with specific geographic challenges and needs (e.g., structurally weak parts of islands and coastal zones).[219] This entailed, inter alia, the development of second tier transport networks which would link peripheral areas to urban centres and, by extension, to transport infrastructure 'of a higher order'.[220]

These discursive trends suggest a framing of European maritime and coastal space as a 'space of flows',[221] 'of frictionless mobility within a polycentric spatial form'.[222] The cited policy documents speak with some urgency of 'missing links' that need to be filled in and 'bottlenecks' that need to be unblocked in order to create a European maritime space without barriers which allows the unhindered circulation of goods, both within the European territory and between the Union and the outside world.[223] This preoccupation with accessibility and connectivity is certainly aligned with spatial justice theory, with Soja himself identifying distance and related physical properties as a key source of spatial friction. He observes that '[h]uman action and the collective social contexts that frame human activities […] tend for the most part to cluster, to seek proximity and propinquity to reduce the time and energy costs of traversing distance'.[224] However, natural though it may be, this 'distance-minimizing behavior' has been criticised for encouraging the formation of centres and agglomerations, leading to an uneven distribution of (dis)advantages across space.[225] Moreover, discourses that represent European spatiality in the vocabulary of flows are said to detract attention from

[219] TAEU, 3. See also Mark Tewdwr-Jones and João Morais Mourato, 'Territorial Cohesion, Economic Growth and the Desire for European 'Balanced Competitiveness'' (2005) 76 Town Planning Review 69, 71; Davoudi (n198), 992.

[220] Territorial State and Perspectives 2005, 29-30; TAEU, 4.

[221] This term is borrowed from Manuel Castells' seminal work on the 'network society', which sought to unpack the complex dynamics of globalisation by distinguishing between two overarching rationalities of space: the *space of places* and the *space of flows*. Castells argued that there is a tension between the logic of mobility promoted by globalisation, which seeks to maintain and further enhance the global flow of goods, signs, people, and electronic impulses (space of flows), and the logic that underpins the historically rooted spatial organisation of human experience at the local level (space of places). This tension, which Castells regards as the defining feature of our times, can be used as a lens through which to regard the spatial discourses at play within a given context, and the balance that these strike between the contra-directional forces of globalisation and localisation, as well as between the three pillars of sustainable development – a balancing act that both assumes and actively promotes a certain understanding of vulnerability. See Manuel Castells, *The Rise of the Network Society*, vol 1 of *The Information Age: Economy, Society and Culture* (Blackwell Publishers 1996), 378 and 428.

[222] Tim Richardson, 'Discourses of Rurality in EU Spatial Policy: The European Spatial Development Perspective' (2000) 40 Sociologia Ruralis 53, 58.

[223] Peters (n209), 331. The discursive legacy of the ESDP can be found, *inter alia*, in the following documents: Commission, 'An Integrated Maritime Policy for the European Union' COM (2007) 575 final; Commission, 'Communication and Action Plan with a View to Establishing a European Maritime Transport Space without Barriers' COM (2009) 10 final; Commission, 'Strategic Goals and Recommendations for the EU's Maritime Transport Policy until 2018' COM (2009) 8 final.

[224] Soja (n112), 72.

[225] ibid. See also Albrechts (n41), 164-165; Peters (n209), 327; Richardson (n222), 58.

alternative understandings of accessibility relating to social exclusion and access to work, services, and leisure.[226]

It is these considerations that led commentators to critique the spatial concept of polycentricity. Traditionally used within the discipline of geography to describe and analyse networked spatial patterns that have developed spontaneously over time,[227] within EU territorial action polycentricity assumed the role of a prescriptive and normative agenda which professed to promote the reconciliation of socio-spatial cohesion and economic competitiveness.[228] The concept's Janus-facedness is hardly surprising, especially when one considers the diverse backgrounds, values, and objectives of the actors involved in EU territorial action, the different planning cultures, languages, and epistemic bases they are attached to, and the lack of a formal EU competence in the area of spatial planning, which for a long time prevented the Commission from assuming a stronger leadership role in the formulation of spatial policy.[229] However, although this ambiguity has allowed polycentricity to be used as a tool for cultivating buy-in across diverse stakeholders, it has also triggered concerns over transparency, consistency, and coherence.[230] Critics speak of polycentricity as a 'contested and potentially paradoxical' spatial narrative,[231] geared towards objectives which are neither value-neutral nor readily reconcilable.[232] Polycentricity's promise of win-win outcomes is ultimately dismissed as disingenuous, an attempt to make growth-oriented aspirations more palatable to those who would otherwise be inclined to reject them.[233] But before reflecting further on the validity of these claims, we must first turn to the other dimension of territorial vulnerability, namely ecological and cultural sensitivity.

3.3. Territorial vulnerability as ecological and cultural sensitivity

Ecological and cultural sensitivity has been perceived as a dimension of territorial vulnerability since the outset of European spatial policy. The ESDP identified damaging

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[226] Richardson and Jensen (n82), 513.
[227] Francesca Governa and Carlo Salone, 'Italy and European Spatial Policies: Polycentrism, Urban Networks and Local Innovation Practices' (2005) 13 European Planning Studies 265, 266.
[228] See, indicatively, Davoudi (n198).
[229] Gløersen, Lähteenmäki-Smith and Dubois (n45), 418; Davoudi, (n198), 988; David Shaw and Olivier Sykes, 'The Concept of Polycentricity in European Spatial Planning: Reflections on its Interpretation and Application in the Practice of Spatial Planning' (2004) 9 International Planning Studies 283, 286.
[230] Krätke (n68), 113; Wil Zonneveld, 'Unraveling Europe's Spatial Structure Through Spatial Visioning' in Andreas Faludi (ed), *Territorial Cohesion and the European Model of Society* (Lincoln Institute of Land and Policy 2007), 205.
[231] Shaw and Sykes (n229), 286.
[232] Gløersen, Lähteenmäki-Smith and Dubois (n45), 418.
[233] See, indicatively, Richardson and Jensen (n82), 515.

infrastructure projects, urban expansion, and unrestrained tourism as factors contributing to the destruction, modification, and fragmentation of natural ecosystems, noting that intact habitats were becoming an increasingly rare occurrence.[234] This was particularly true of coastal regions, which featured a great diversity of sensitive biotopes,[235] but suffered from intense conflicts between competing land uses.[236] The response necessitated by these pressures was twofold: on the one hand, the ecologically valuable core of intact habitats had to be placed under strict protection while their outer parts could be subjected to economic uses that were in keeping with their ecological function (e.g., small-scale, environmentally friendly tourism). As a next step, these areas had to be incorporated into a pan-European ecological network, an endeavour that required a spatially coordinated approach between different supranational policies and corresponding national measures, taking into account the elements of the network that different species use throughout their life cycle, among which wetlands, mudflats, islands, coastal areas, and national parks.[237] In turn, this called for integrated spatial development strategies which balanced environmental protection and economic development on the basis of territorial and environmental impact assessments; involved all relevant stakeholders; and, where necessary and appropriate, were the product of transnational and interregional cooperation.[238]

From a cultural perspective, the ESDP assigned great significance to landscapes, recognising them as a core element of Europe's natural and cultural heritage. Attention was drawn to their variability, which is an outcome of the unique ways in which local and regional communities have interacted with their surroundings throughout history.[239] Emphasis was also placed on the contributions that landscapes make to peoples' quality of life (e.g., their aesthetic and recreational value, their centrality to regional identities, and their distinctiveness), which could serve as a point of departure for promoting the singular qualities of an area and attracting new industries (e.g., tourism).[240] Worth noting for present purposes is that these observations extended to the marine realm, with the ESDP underscoring the particular attractiveness of coastal landscapes and European peoples' 'closeness and affinity to the sea'.[241] At the same time, it was recognised that processes of economic and social modernisation could adversely

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[234] ESDP, 24 and 62.
[235] ESDP, 31.
[236] ESDP, 16. For a broader analysis of the environmental dimension of the ESDP, see Bas Waterhout, 'Territorial Cohesion: The Underlying Discourses' in Andreas Faludi (ed), *Territorial Cohesion and the European Model of Society* (Lincoln Institute of Land and Policy 2007).
[237] ESDP, 36.
[238] ESDP, 32-33.
[239] ESDP, 74.
[240] ESDP, 30-31, 62, 66-67, 74.
[241] ESDP, 55.

impact landscape quality by, inter alia, encouraging rationalised and standardised spatial orderings which undermine natural diversity.[242] Preventing this erosion was challenging for a number of reasons, not least the fact that landscapes are complex entities that draw their value from their overall composition rather than individual elements. The ESDP thus called for creative, adaptive, and integrated management approaches,[243] geared towards the further development and active restoration of landscapes rather than the mere preservation of the *status quo*.[244]

These messages went on to inform territorial cohesion discourse. Among the major challenges that the TAEU sought to respond to is the overexploitation of ecological and cultural resources and the loss of biodiversity. With regard to the latter, it has been noted that the spatial fragmentation resulting from urban sprawl, infrastructure development, and land- and sea-use change poses a threat to Europe's natural environment, jeopardising the continued provision of valuable ecosystem services.[245] At the same time, natural and cultural heritage have been hailed as key constituents of territorial capital and identity, which suggests a recognition of the role that ecological values, environmental quality, and cultural assets play in promoting both social well-being and economic development. This role becomes particularly important in the case of marginal and historically neglected regions, where integration barriers at local and regional level are likely to result in the underutilisation of cultural and natural resources, thus exacerbating economic and social exclusion.[246] The TAEU characteristically stated that:

> The irreplaceable values of European ecological structures and cultural and natural heritage […] should constitute, against the background of the respective regional circumstances and potentials, the foundation for environmentally and culturally-oriented development which offers development perspectives, whilst safeguarding diverse cultural identities, particularly in regions that are lagging behind or undergoing structural changes.[247]

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[242] ESDP, 62 and 74.
[243] ESDP, 75-75.
[244] ESDP, 33.
[245] Ole Damsgaard and others, 'The Territorial State and Perspectives of the European Union 2011 Update: Background Document for the Territorial Agenda of the European Union 2020' (2011) (Territorial State and Perspectives 2011), 44; 'Territorial Agenda of the European Union 2020: Towards an Inclusive, Smart and Sustainable Europe of Diverse Regions', agreed at the Informal Ministerial Meeting of Ministers responsible for Spatial Planning and Territorial Development in Gödöllő, Hungary on 19 May 2011 (TAEU 2020), 5-6.
[246] TAEU 2020, 5.
[247] TAEU, 5.

Among other things, this called for multi-level, multilateral, and transnational interventions aimed at developing integrated networks of natural areas and cultural landscapes of European and national importance.[248] From an ecological perspective, this entailed not only the further consolidation of the Natura 2000 network, but also the establishment of a supportive green infrastructure network for the rest of the European territory to counterbalance intensive land- and sea-use changes.[249] The latter objective was interpreted by the Commission as an incitement to create 'a strategically planned network of natural and semi-natural areas with other environmental features designed and managed to deliver a wide range of ecosystem services'.[250] This network would extent to both rural and urban settings and incorporate both terrestrial and aquatic ecosystems. It would serve as a means of reconnecting fragmented natural areas and improving their functional linkages, as well as encouraging a better use of nature-based approaches to tackling climate change and improving resource efficiency.[251] Crucially, green infrastructure was presented as an alternative or a complement to standard (grey) solutions and, by extension, as a pathway to a more ecologically principled approach to territorial development. Specifically, the Commission posited that the mainstreaming of green infrastructure perspectives into integrated landscape management, integrated coastal zone management, and MSP would facilitate the development of multifunctional zones capable of delivering benefits to biodiversity, land and sea users, and society at large.[252]

Analogous initiatives have emerged with respect to cultural connectivity. For instance, the background document to the TAEU 2020 spoke of the establishment and enhancement of transnational 'cultural routes' that will protect the 'distinct character' of local communities while underlining the existence of common values and contributing to the mutual valuing and conservation of heritage.[253] This can be taken as an indirect reference to the Council of Europe's flagship 'Cultural Routes' programme, which was launched in 1987 with the aim of raising public awareness on European cultural identity. The Council defines a Cultural Route as

> [a] cultural, educational heritage and tourism cooperation project, aiming
> at the development and promotion of an itinerary or a series of itineraries
> based on a historic route, a cultural concept, figure or phenomenon with a

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[248] TAEU, 5; TAEU 2020, 8.
[249] Territorial State and Perspectives 2011, 47; TAEU 2020, 8.
[250] Commission, 'Green Infrastructure (GI) - Enhancing Europe's Natural Capital' COM (2013) 249 final, 3.
[251] Commission, 'The EU Biodiversity Strategy to 2020' (European Commission 2011), 14.
[252] COM (2013) 249 final (n250).
[253] Territorial State and Perspectives 2011, 48.

transnational importance and significance for the understanding and respect of common European values.[254]

Thus defined, Cultural Routes are not necessarily linear pathways or trails. They can also be archipelagic networks that link places and people from geographically disconnected areas under a common and shared heritage element.[255] In either case, these transversal itineraries are lauded as tangible illustrations of the pluralism and diversity of the shared European heritage, as well as conduits for intercultural dialogue and understanding. What is more, they are said to strengthen the democratic dimension of cultural exchange by stimulating interactions between urban and rural societies, between developed and disadvantaged regions, and between majorities and minorities.[256] Finally, in triggering the elaboration of cross-cutting policy and governance frameworks for sustainable tourism, Cultural Routes arguably contribute to the socio-economic development of local communities, generating resources for the conservation of natural and cultural heritage.

Importantly, the Council of Europe considers Cultural Routes as platforms to implement the numerous instruments adopted under its auspices with regard to cultural heritage, landscape management, and spatial planning.[257] In light of this, it is hardly surprising that the Council and the European Commission have launched a joint initiative which aims to strengthen regional development through the establishment of Cultural Routes in the four EU macro-regions, which, as noted earlier, are the Union's foremost vehicles for cooperative transnational planning. Among the outputs of the project are roadmaps providing data and information on the implementation and management of existing Cultural Routes in each macro-region, and setting out recommendations and future steps to be taken. It bears noting that the roadmaps produced for the Adriatic-Ionian Region and the Baltic Sea Region identify maritime heritage (including underwater heritage such as historic wrecks and archaeological structures) as an important but underrepresented theme. This clear recognition of the symbolic and material significance that maritime life holds for the peoples surrounding the two basins[258] is aligned with the priorities set out in the respective spatial visions, both of which highlight

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[254] Resolution CM/Res(2013)66 confirming the establishment of the Enlarged Partial Agreement on Cultural Routes (EPA), adopted by the Committee of Ministers on 18 December 2013 at the 1187bis meeting of the Ministers' Deputies, art 1.

[255] Council of Europe (ed), *Cultural Routes Management: From Theory to Practice* (Council of Europe 2015), 42-53.

[256] Declaration by the Committee of Ministers on the 30th anniversary of the Cultural Routes of the Council of Europe (1987-2017), adopted by the Committee of Ministers on 27 September 2017 at the 1295th meeting of the Ministers' Deputies, Decl(27/09/2017), 2.

[257] ibid.

[258] Council of Europe (ed), *Roadmap for the Adriatic-Ionian Region: Heritage Protection, Cultural Tourism and Transnational Cooperation through the Cultural Routes* (Council of Europe 2018), 28; Council of Europe (ed), *Roadmap for the Baltic Sea Region: Heritage Protection, Cultural Tourism and Transnational Co-operation through the Cultural Routes* (Council of Europe 2019), 21 and 29.

the need to protect key cultural assets, including immaterial values (e.g., the beauty of the seascape and traditional fishing practices).[259]

Taken together, Natura 2000, green infrastructure, and Cultural Routes help us conceptualise transnational ecological and cultural networks as structural elements of the European territory and as levers for trans-European territorial integration.[260] Such a conceptualisation is conducive to ecosystem-based MSP insofar as it pushes planners to account for the spatial dimensions of social-ecological well-being. At the same time, environmental and cultural spatialisation is a project rife with ambiguities and contestations. In particular, one could argue that to perceive of ecological and cultural diversity and connectivity as spatial-territorial notions is to acquiesce to their economic instrumentalisation, i.e. their subjugation to the growth-oriented objectives assigned hegemonic status within cohesion policy.

This argument finds support in the consistent framing of nature and culture as heretofore underutilised engines for sustainable economic development. Granted, the debate surrounding the commodification of nature and culture both precedes and exceeds the instruments discussed in this section.[261] The latter are merely reproducing discursive trends that have been long prevalent in the relevant sectoral frameworks, such as the enduring use of the term 'natural resources' and the more recent turn to 'ecosystem services' within EU environmental law and governance. The 7th Environment Action Programme is a case in point, stating that '[t]he Union's economic prosperity and well-being is underpinned by its natural capital, i.e. its biodiversity, including ecosystems that provide essential goods and services, from fertile soil and multi-functional forests to productive land and seas'.[262] Environmental degradation is consequently framed as an issue of valuation: 'because it escapes pricing and is not reflected in society's accounts, biodiversity often falls victim to competing claims on nature and its use'.[263] This charged language accentuates the economic value of nature and normalises its appraisal on the basis of costs and benefits expressed in monetary terms.[264] This, however, leaves unaddressed the 'idiosyncratic question' of what an ecological feature means

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[259] Kira Gee, Andreas Kannen and Bernhard Heinrichs, 'BaltSeaPlan Vision 2030: Towards the Sustainable Planning of Baltic Sea Space' (BaltSeaPlan 2011), 27 and 30; Andrea Barbanti and others (eds), *ADRIPLAN Conclusions and Recommendations: A Short Manual for MSP Implementation in the Adriatic-Ionian Region* (European Commission 2015), 28.
[260] Territorial State and Perspectives 2005, 9.
[261] See also chapter three, section 3.2.
[262] Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' [2013] OJ L 354/171, annex para 17.
[263] Commission, 'Our Life Insurance, Our Natural Capital: An EU Biodiversity Strategy to 2020' COM (2011) 244 final, 2. See also COM (2013) 249 final (n244), 2.
[264] Maria Lee, *EU Environmental Law, Governance and Decision-Making* (2nd edn, Hart Publishing 2014), 75.

to a particular individual or community in a particular place and time – a question that calls for the development of a context-specific valuation framework that meaningfully incorporates qualitative-subjective metrics.[265]

Though not the instigator of these normative discourses, territorial cohesion policy has contributed to their entrenchment. Lending credence to this claim is the unceremonious absorption of natural and cultural heritage within the notion of territorial capital. In a seminal 2001 study on territorial development trends, the Organisation for Economic Co-operation and Development (OECD) defined territorial capital as 'the stock of assets which form the basis for endogenous development in each city and region, as well as to the institutions, modes of decision-making and professional skills to make best use of those assets'.[266] Among the factors that determine an area's territorial capital are its geographic location, size, climate, traditions, natural resources, quality of life, and economies of scale. Other factors may be 'untraded interdependencies' such as understandings, customs, and informal rules that enable economic actors to work together under conditions of uncertainty, or the solidarity, mutual assistance, and co-opting of ideas that often develop in clusters of small and medium-sized enterprises working in the same sector (social capital). Finally, territorial capital is said to comprise an intangible dimension, a certain 'something in the air' that is the outcome of 'a combination of institutions, rules, practices, producers, researchers and policy-makers, that make a certain creativity and innovation possible'.[267] Thus conceptualised, an area's territorial capital endows it with comparative and absolute advantages that determine the rate of return on financial investments.[268] In view of this, and in line with the latest trends in economic geographical thinking, the OECD proposed that territorial capital be taken as a point of departure for the productive specialisation of regions and for fostering the creation of networks within the framework of a spatial-functional division of labour, information, services, and infrastructures.[269]

The notion of territorial capital went on to shape the strategic orientation of cohesion policy, infusing it with a newfound geographic consciousness. Indicatively, in contemplating the policy's contribution to the delivery of the Lisbon aims, the 2006 Community Strategic Guidelines on Cohesion portrayed economic growth as being conditional upon the accommodation and fostering of territorial specificities and the enhancement of trans-

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[265] Eric Sheppard, 'Heterodoxy as Orthodoxy: Prolegomenon for a Geographical Political Economy' in Gordon L Clark and others (eds), *The New Oxford Handbook of Economic Geography* (OUP 2018), 164.
[266] OECD, *OECD Territorial Outlook* (OECD 2001), 13.
[267] ibid, 15.
[268] ibid, 15-16.
[269] ibid, 192.

European structuring elements, including those of an ecological and cultural nature.[270] The positive effect that this has had in terms of raising the profile of the environment within development circles cannot be overstated. Indeed, until the turn of the millennium, cohesion policy had been only moderately receptive to environmental considerations. At the time of its inception, environmental protection had been regarded as a financial burden weighing heavy on lagging economies; a burden that ought to be compensated in a spirit of solidarity.[271] Some modest 'greening' had, nevertheless, taken place during the 1990s and early aughts, first through the programmatic inclusion of environmental aims into the Structural Funds, then through policies implementing the (by then constitutionally recognised) principle of environmental integration, and finally through the growing participation of environmental actors in the governance of the Funds, building on the partnership principle.[272] But territorial capital represented a far more radical shift, helping to cast the environment (and culture) as a key determinant of territorial diversity and, by extension, of indigenous development prospects. In turn, this triggered the reinterpretation of negatively charged spatial notions such as peripherality. For instance, it has been suggested that the Baltic Sea's peripheral location has helped preserve the uniqueness and authenticity of its localities and of the 'Baltic way of life'.[273] This is said to offer unique possibilities for development in remote regions and to constitute a potential basis for the elaboration of a distinctive macro-regional 'brand'. Environmental and cultural sensitivities are thus being recast as 'untapped potentials', to be harnessed and placed at the service of economic growth as a matter of priority.

Here lies the irony: 'as capital is becoming ever more stretched out and mobile, it is the place-specific qualities that are becoming the defining factors in its search for profitable production sites'.[274] One could, therefore, argue that the articulation of the Europe of flows is at least partly dependent upon the survival of the Europe of places and of the social-ecological relations that underpin it. Yet the feedback loop between these two spatial narratives entails processes of de-territorialisation and re-territorialisation that exert pressure upon natural and cultural heritage. The latter is the focus of dynamic citizen movements seeking to safeguard regional and local identities against the eroding forces of European integration and

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[270] Council Decision 2006/702/EC of 6 October 2006 on Community Strategic Guidelines on Cohesion [2006] OJ L 291/11; Territorial State and Perspectives 2005, 51. The Guidelines which were adopted by the European Council as an indicative framework for the Member States for the preparation of national strategic reference frameworks and operational programmes for the period 2007-2013.

[271] Andrea Lenschow and Jörg Baudner, 'Cohesion Policy and the Green Economy' in Simona Piattoni and Laura Polverari (eds), *Handbook on Cohesion Policy in the EU* (Edward Elgar 2016), 371.

[272] ibid, 370.

[273] Council of Europe (n258), 48.

[274] Davoudi (n198), 989.

globalisation.[275] Understanding the drivers of these movements and the demands they are advancing requires a firm grasp on the role that social-ecological well-being plays in human self-realisation and social organisation. In broad strokes, a person's satisfaction with the quality of their surroundings contributes to their sense of spatial belonging, which in turn serves as a basis for the construction of individual and communal identities. Decidedly place-based, this dimension of social-ecological well-being is disrupted by the subsumption of nature and culture within the notion of territorial capital and their subsequent co-optation in support of competitiveness agendas of a regional or global focus. It follows that the different scales at which the environment and culture are considered correspond to distinct and potentially clashing value systems. The environmental critique of market capitalism is illustrative of this point, insofar as it problematises 'the distinction between the exchange value of land as a globally tradable commodity, and its use value, which is local and social'.[276]

In sum, the discussion on territorial vulnerability demonstrates that, within the context of EU territorial action, space is dually perceived: on the one hand, it is an important and distinguishable factor of local production and, hence, of regional competitiveness (space as territorial capital); on the other hand, it is a stabilising, integrating force which helps balance patterns of social, economic, and ecological vulnerability (space as a dimension of spatial justice).[277] It is not, however, clear whether these two interpretations are complementary or contradictory, mutually reinforcing or mutually undermining. After all, capitalist geographies are by definition dynamic and uneven, with conflicts and crises being the norm rather than the exception.[278]

For its part, though it emphasises territorial specialisation and the participation of regions in the international division of labour, the EU distances itself from a notion of 'competition using all available means', envisaging instead a pluralistic space in which medium-sized and smaller regions join forces, work in partnership, and pool resources so as to compensate for their relative lack of metropolitan qualities.[279] Although not entirely inconsequential, this commitment to healthy inter-regional rivalry has proven ill-equipped to curb the counter-solidaristic dynamics of competitive regionalism and to meaningfully advance spatial justice.[280]

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[275] Albrechts (n102), 1489.

[276] Keating (n15), 58.

[277] Joerg Knieling and Frank Othengrafen, 'Planning Cultures in Europe: Decoding Cultural Phenomena in Urban and Regional Planning' in Joerg Knieling and Frank Othengrafen (eds), *Planning Cultures in Europe: Decoding Cultural Phenomena in Urban and Regional Planning* (Routledge 2016), xxiii.

[278] Sheppard (n265), 165.

[279] ESDP, 65.

[280] Richardson and Jensen (n82), 510-511. See also Krätke (n68), 112; Atkinson (n67), 399.

This is appositely captured by the recent discourse on the geography of discontent, which seeks to expose 'distinct geographical [patterns] of unhappiness' with the political, economic and social status quo.[281] The OECD has observed that this sentiment is particularly palpable in economically stagnating regions, where the lasting reverberations of the recent financial crisis and a rejection of the urban, cosmopolitan lifestyle that has become the dominant cultural narrative of our era are giving rise to an insular, defensive outlook.[282] Interestingly, the draft TAEU 2030 makes an explicit reference to the geography of discontent, noting with concern that people and places throughout Europe appear to be drifting apart.[283] Indeed, in a post-Brexit, post-COVID EU that will have to fight hard to uphold its international climate and biodiversity commitments, the spatiality of regional disparities will acquire new meaning and significance. The final sub-section scrutinises the Union's strategic vision for the next decade, assessing the extent to which it confronts issues of spatial justice and creates favourable conditions for an instrumentalisation of human rights as tools of socio-spatial visioning.

3.4. Prospects for the 'insurgent architects'[284] of Europe's blue futures

As a barometer of social change and political transformation, EU cohesion policy can be a useful tool for gauging the normative content of the European Social Model at a particular moment in time. Indeed, the introduction of territorial cohesion as a new strategic aim alongside social and economic cohesion signalled a spatial turn in the process of European integration. In turn, the European Social Model became regarded as a tool for conceptualising the ways in which European societies construct not just socio-economic, but also territorial inter-dependence.[285] This construction is to be appraised against the ideal of balanced territorial development, which, as noted earlier, suggests that people should not be disadvantaged by where they happen to live and work in the Union. Layard and Holder argue that this – admittedly inchoate – ideal imbues the European Social Model with a core of shared values, which, when spatialised, are capable of promoting spatial justice.[286] The authors also

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[281] OECD, *OECD Regional Outlook 2019: Leveraging Megatrends for Cities and Rural Areas* (OECD 2019), 41, and the reference therein to Bart Los and others, 'The Mismatch between Local Voting and the Local Economic Consequences of Brexit' (2017) 51 Regional Studies 786.
[282] Lewis Dijkstra, Hugo Poelman and Andrés Rodríguez-Pose, 'The Geography of EU Discontent' (2018) DG Regio Working Paper No 12/2018, 11.
[283] 'Territorial Agenda 2030: A Future for All Places' (2020, draft) (TAEU 2030), 5.
[284] The term is borrowed from David Harvey, *Spaces of Hope* (Edinburgh University Press 2000).
[285] Davoudi (n100), 436.
[286] Layard and Holder (n165), 176.

see the Model as entailing a visionary element.[287] Specifically, the very process of being involved in deliberations about the future structure of the European territory, its linkages and shape, can help forge a shared territorial identity, which, in time, may lead to a sense of territorial solidarity; that is, solidarity among people and places within the territory of the Union. This argument finds basis in the language and practice of the Model's spatialisation, which revolves around a 'growing and rather explicit territorial project: the creation of the idea of a Single European Territory'.[288]

An interesting aspect of Layard and Holder's work are the parallels it draws between the Model's spatial and environmental justice dimensions. The authors concede that EU environmental law has always comprised a strong place-making element, resulting from the use of spatial units such as river- and sea-basins as foci for public governance. But territorial cohesion transcends this technical-managerial understanding of space. It implies that, if exposure to environmental risks and harms cannot be eliminated entirely, then its distribution across the common European territory should at the very least be proportionate. This inference exposes and reasserts an essential truth: '[w]hile environmental justice has conventionally been conceptualised as a human-centred harm, it is fundamentally a collective concern bound to location'.[289] The espousal of a more explicitly territorial mentality would accommodate this concern and provide environmental policy-makers and advocates with a more diverse arsenal, allowing them to 'use cohesion funding, treaty provisions and legal prescriptions to pursue environmental justice in situ, creating positively "just environments" from the ground up'.[290] This grassroots approach is aligned with the dual emphasis within territorial cohesion discourse on people and places. As 'collective physical entities', the latter arguably provide a basis for formulating a pluralistic and space-sensitive interpretation of environmental justice.[291]

This proposition is in line with the strategic direction of EU cohesion policy and, by extension, the European Social Model, at the dawn of the third decade of the twenty-first century. Specifically, the draft TAEU 2030, appositely subtitled 'A Future for All Places', calls for strengthening solidarity in order to 'promote convergence and reduce inequalities between better-off places and those with less prosperous future perspectives or lagging behind'.[292] Though couched in language which is typical of cohesion policy, this mission

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[287] Here, Layard and Holder are drawing on Andreas Faludi, 'Territorial Cohesion Policy and the European Model of Society' (2007) 15 European Planning Studies 567.
[288] Layard and Holder (n165), 172.
[289] ibid, 174.
[290] ibid, 172.
[291] ibid, 181.
[292] TAEU 2030, 2.

statement acquires transformative potential when read alongside the objectives that underpin the Agenda's operative part: a *Just Europe* that offers positive future perspectives for all people, communities and places in Europe; and a *Green Europe* that protects the European peoples' common livelihoods and shapes societal transition processes.

The former objective is the one explicitly geared towards addressing the European geography of discontent. It seeks to alleviate disparities in quality of life and access to services of general interest; remedy demographic and societal imbalances; and curb the adverse economic and societal impacts of disruptive technologies. It also aims to diffuse the polarisation caused by the widening and deepening of territorial interdependencies, and to even out the asymmetric distribution of the potentials and vulnerabilities arising from the growing global embeddedness of regions, cities, and towns. It is noted that achieving these goals will require synergistic action across a number of overarching policy agendas, including cohesion, just transition, the European Pillar of Social Rights, and a Europe closer to its citizens. The cultivation of territorial networks and the consolidation of functional regions through spatial planning can make a significant contribution in all these regards, helping to unleash the unique potential of territories with specific geographies and address any common constrains they may be facing.

The objective of a Green Europe, on the other hand, is intended to address challenges in the field of sustainable development with particular relevance for local and regional development. Said challenges relate to, inter alia, climate change; loss of biodiversity and land consumption; lack of access to secure, affordable, and sustainable energy; unsustainable consumption and production patterns; and the manifold pressures that threaten natural and cultural heritage, including those stemming from the increased and uncoordinated exploitation of maritime space. Significantly for present purposes, the draft TAEU 2030 recognises the correlation that often exists between health risks caused by environmental degradation and social inequality.[293] This correlation has a prominent spatial dimension, with disparities in access to clean air, soil, and water being observed not only between countries and regions, but also between urban and rural areas, as well as inside towns and cities. In response, spatial planning and territorial policies must endeavour to promote 'better ecological livelihoods' and the establishment of climate-neutral towns, cities, and regions; foster circularity in the management of material and energy flows; and nurture sustainable digital and physical connections between places.[294]

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[293] TAEU 2030, 8.
[294] TAEU 2030, 12-13.

Appraising the draft TAEU 2030 in the light of the critique advanced in previous sections, one cannot but concede that the instrumentalist framing of the environment as a productive component of territory remains conspicuous. The document does, however, include a clear commitment on the part of the Member States, the European Commission and the European Committee of the Regions that they 'will respect the natural limits of [the European peoples'] common livelihoods and increase the resilience of all places to the impact of climate change'.[295] This closely echoes the Union's long-term vision of 'living well, within the planet's ecological limits', as this is enshrined in the 7th Environment Action Programme. Elsewhere in the draft TAEU 2030, a reference is made to the functioning of ecosystems and the provision of ecosystem services as matters of 'shared concern' and 'joint responsibility'[296] – language that affirms, and provides an entry point to further explore, the linkage between territorial solidarity and environmental justice.

But perhaps most promising is the proclamation that the place-based approach should serve as a guiding principle for territorial development.[297] This statement sends a clear signal that, in the national context and without departing from the EU-level approach, 'the main task of national, regional and local authorities is to define the tailored concepts, goals and tools for enhancing territorial development, which will depend on their geographical specificities, political culture, and legal and administrative system'.[298] What this means in practical terms can be gleaned from the steps that policy-makers are invited to take in order to diversify local economies and strengthen regional innovation capacities, among which the elaboration of local and regional energy transition strategies; the adoption of place-appropriate measures in the building, transport, and bioeconomy sectors; and the development of industrial symbiosis processes which bring together global competitiveness and local assets.[299] What is more, the delivery of these arrangements must be based on horizontal coordination, evidence-based policy-making, integrated functional area development, and a range of other instruments designed to cater to the needs of multi-level governance.[300]

Thus interpreted and translated into action, the place-based approach to territorial development can arguably make a valuable contribution to the operationalisation of the subsidiarity principle. Though part of the orthodoxy of EU territorial action, the principle nevertheless holds transgressive potential. This is most apparent in the draft Agenda's reference to awareness-raising and the empowerment of local and regional communities to

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[295] TAEU 2030, 2.
[296] TAEU 2030, 12.
[297] TAEU 2030, 3.
[298] TAEU 2020, 10.
[299] TAEU 2030, 12-13.
[300] TAEU 2020, 4.

protect, rehabilitate, utilise, and reutilise their (built) environments, landscapes, cultures, and other unique values.[301] This reflects one of the key messages of the discourse on the geography of discontent, namely that a place-based approach helps overcome territorial distress by not only promoting economic development, but also, and perhaps more significantly, 'by valorising local cultures and traditions', thus helping to counter feelings in some regions of being 'left behind' or 'not mattering'.[302] It also validates Layard and Holder's claims about the visionary dimension of territorial cohesion and the ways in which participation in spatial visioning exercises helps to cultivate a sense of shared territorial identity and, ultimately, a sense of territorial solidarity.

Specifically, an environmental justice reading of the place-based approach to territorial development endows the latter with a prominent procedural dimension, linking it with broader debates on civic environmentalism and collaborative planning.[303] More radically, it invites planners – and those who study their work – to embrace a relational-material understanding of place, which reveals 'that all places […] are unique, that place and other non-human perspectives and agency must be visibilized, that the human may need to be de-centred and that multiple knowledges and voices may be required to reveal multiple ontologies'.[304] By advocating 'sensitivity and a focal length adjusted to platial and natural phenomena', such an understanding paves the way for an ethics of place that is capable of overcoming the dichotomies identified at the beginning of this section.[305] It also reveals the power dynamics involved in place-making processes and the ways in which planning entrenches or subverts them. Finally, it acts as a safeguard against the uncritical romanticisation of place. The recognition of places as the key *loci* of territorial distress and the subsequent empowerment of local actors to shape their spatial futures point to a certain degree of accountability. Accordingly, the local level must acknowledge and hold itself responsible for its implication in wider processes which are subject to contestation (e.g., unjust consumption and production patterns).[306]

Taken together, these observations help clarify how planning can be used to foster forms of self- and collective identification around place that promote a more socially and

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[301] TAEU 2030, 12.
[302] OECD (n281), 15.
[303] Layard and Holder (n165), 183-184.
[304] Robyn Bartel, 'Place-thinking: The Hidden Geography of Environmental Law' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law* (Edward Elgar 2017), 177.
[305] JAA Swart, 'Towards an Epistemology of Place' in Martin Drenthen, Jozef Keulartz and James Proctor (eds), *New Visions of Nature: Complexity and Authenticity* (Springer 2009), 198.
[306] Doreen Massey and others, 'The Possibilities of a Politics of Place Beyond Place? A Conversation with Doreen Massey' (2009) 125 Scottish Geographical Journal 401, 412.

environmentally just spatial organisation. In exploring this line of reasoning, the present study places its focus on ocean space, which, as already discussed, is undergoing an unprecedented period of territorialisation.[307] Actors at different levels are in the process of reformulating the role of the ocean as a territorial component of the EU and its constituent states, regions, and localities.[308] This reformulation is accompanied by legal and institutional arrangements which serve to enhance the spatial fixity of different actors' spheres of control, whether traditional or newly-acquired. Resulting from this process are intricate spatial patterns of influence and power, underpinned by different types of boundary-making: delineations based on natural hydrological, oceanographic, and bio-geographic features (e.g., the marine regions of the MSFD); demarcations based on the principle of maritime sovereignty (e.g., the maritime zones established under the LOSC); new jurisdictional delimitations triggered by incipient demands for devolution in the elaboration and execution of maritime policies; and, finally, the geographical containment of different uses of marine space through MSP.[309] At the same time, the ocean is the subject of emotional and imagined geographies of place, both 'personal (stemming directly from an individual's unique experience) and shared (involving the mediation of other persons in sustaining an intersubjectively experienced sense of place)'.[310]

The spaces emerging from these processes are contested because scale, whether by design or de facto, enables and contains particular forms of social interaction in a given context.[311] This is due to the role of territories as sites of governance: their institutional structure entails specific opportunities for participation and interest representation, which are unequally accessible to social forces at different levels. This is particularly evident in the oceanic realm, where the interaction between different spatial entities and the corresponding constituencies is characterised by tensions between the strong geopolitical dimension of marine space, which prevents coastal states from acting in isolation; its fluid nature, which leads localised decisions, interventions, and actions to generate far-reaching spillover effects; and its progressive incorporation 'into the domain of domestic action', where 'the principles and procedures of democratic political systems must prevail'.[312] It follows that, depending on the political agenda that drives it and the legal and institutional arrangements that underpin it, the territorialisation of the ocean – and the openings and (en)closures it entails – shapes power relations between different actors in ways which are more or less spatially just.

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[307] See chapter two, section 3.2.
[308] Suárez de Vivero, Rodríguez Mateos and Florido Del Corral (n157), 624.
[309] ibid, 628.
[310] Christine Milligan, Amanda Bingley and Anthony Gatrell, ''Healing and Feeling': The Place of Emotions in Later Life' in Joyce Davidson, Liz Bondi and Mick Smith (eds), *Emotional Geographies* (Routledge 2016), 51.See also chapter two, section 4 and chapter three, section 3.2.
[311] See also chapter three, section 2.2.
[312] Suárez de Vivero, Rodríguez Mateos and Florido Del Corral (n165), 625.

In the EU, the enthusiastic construal of the ocean as 'a new economic and epistemological frontier' has tipped the scales towards a neoliberal 'blue growth' narrative, which takes economic development as a given and seeks merely to limit its negative consequences.[313] Admittedly, despite its many merits, the European Green Deal does little to reverse this trend. Its proclamation that '[a] sustainable "blue economy" will have to play a central role in alleviating the multiple demands on the Union's land resources and tackling climate change' is rooted in an instrumentalist view of the ocean, which highlights the 'services' it offers rather than the material and emotional relations it forms part of.[314] An alternative paradigm may be gleaned from the budding academic discourse on 'blue degrowth', which seeks to expose the social-ecological struggles taking place at different scales with respect to access to, and use of, marine space. A snapshot of this debate can be found in a recent publication by Ertör and Hadjimichael, who posit that the goal of the blue degrowth movement is not a better – that is, a more inclusive or greener – growth, but an alternative, socio-ecologically just blue future 'with minimised and fairly distributed energy and material use from the seas'.[315] Helping them to conjure this future are Kallis' nine principles of degrowth: an end to exploitation, direct democracy, localised production, sharing and reclaiming the commons, a focus on relationships, *dépense*,[316] care, diversity, and, finally, the decommodifcation of land (and seas), labour, and value.[317] Both rhetorically and practically, these principles can contribute to the articulation of 'a common participatory societal vision towards the seas', emphasising a relationship that strives for the rights of coastal communities, small-scale production, local consumption, various kinds of cooperatives, and common management of marine areas.[318]

Ertör and Hadjimichael's proposition allows us to flesh out the normative content of place-based maritime territorial development in a manner that conveys understanding of place as a 'humanised space; an abstract word made real through human inhabitation, through the investment of emotion and the attribution of meaning'.[319] The thesis submits that this agenda – and the analogous agenda advanced in chapter three with respect to ecosystem-based marine

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[313] Irmak Ertör and Maria Hadjimichael, 'Editorial: Blue Degrowth and the Politics of the Sea: Rethinking the Blue Economy' (2020) 15 Sustainability Science 1, 1.

[314] COM (2019) 640 final (n145), 14.

[315] Ertör and Hadjimichael (n313), 5.

[316] *Dépense* has been defined as 'the social and ritual destruction of accumulated surplus' and unproductive (including reproduction) use of energy that should be socialized in a degrowth society: Giacomo D'Alisa, Marco Deriu and Federico Demaria, 'Care' in Giacomo D'Alisa, Federico Demaria and Giorgos Kallis (eds), *Degrowth: A Vocabulary for a New Era* (Routledge 2015), 63-66.

[317] Here, Ertör and Hadjimichael are drawing on Giorgos Kallis, *Degrowth* (Agenda Publishing 2018).

[318] Ertör and Hadjimichael (n313), 5.

[319] Michaela Garland and others, 'The Blue Economy: Identifying Geographic Concepts and Sensitivities' (2019) 13 Geography Compass e12445, 13.

management – can be taken forward through a human rights-based approach to the normativisation of MSP. Already a core element of the European Social Model, human rights provide a promising path forward owing to their capacity to capture the diversity, heterogeneity, and dynamism that characterise the co-becoming of people and place, and to further the construction of place identity in ways that foster positive networks of linkages with other places, based on territorial solidarity and its foundational notions of communality and *demos*.[320] In so doing, human rights offer better chances of transitioning to a brand of place-based globalism that takes locale-specific manifestations of territorial distress seriously without denying the ever-growing linkages between people and places. In its discussion of the contribution that the international biodiversity regime can make to the conceptualisation and operationalisation of an approach to MSP which is both ecosystem- and human rights-based, the thesis has already pointed to some existing standards that can be relied upon to this end. Further reflection is, however, needed in order to determine the relevance of other strands of the academic and policy discourse on human rights and the environment, particularly those seeking to flesh out human rights' collective dimensions. If the legal construct of human rights is to sit comfortably with the socio-materialities of the marine realm, then it must be reconceived as 'a communal, spatial project'.[321]

Before we bring the discussion to a close, let us note that the intellectual quest we are proposing here is not of a strictly legal-doctrinal nature. Granted, research projects designed along such lines can offer valuable insights into the menu of options that law already provides when it comes to affording formal recognition to collective rights to lands, territories, and resources, as well as to the tangible and intangible cultural heritage associated therewith. The same is true of the treatment that extant legal instruments make of rights and obligations pertaining to the exercise of environmental citizenship. Yet, as this study has hopefully demonstrated, critical-geographic thinking can be instructive in its own right, and this regardless of whether one wishes to engage in legal-geographic research or not.

To drive this point home, let us refer back to a work that was briefly discussed in chapter one, David Harvey's *Spaces of Hope*. About halfway through the book, and in an attempt to make his readers mindful of their agency, Harvey invites them to imagine themselves as 'architects of [their] own fates and fortunes'; ones that are 'insurgent' (because they are striving to change the world) and 'crafty' (because they have to think 'strategically and tactically about what to change and where, about how to change what and with what tools').[322] Should they rummage through their toolboxes, one item these architects will come

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[320] Layard and Holder (n165), 172; Bartel (n304), 177.
[321] ibid, 176.
[322] Harvey (n284), 251.

across are human rights. These Harvey refers to as one among the many 'generalized [discourses] about rights and wrongs, about moral imperatives and proper and improper means and ends, through which we try to persuade ourselves as well as others to certain consistent lines of action'.[323] In describing human rights in this manner, he wishes to convey his conviction that even the most cherished of our universals are socially constructed and situated, and, as such, not free-standing, abstracted absolutes that can be brought to bear upon the totality of human affairs irrespective of spatio-temporal specificity. In this view of human rights Harvey finds license to attempt his own subversive re-reading of the Universal Declaration on Human Rights,[324] and this with a view to providing fodder for the insurgent architectural imagination and fuel for the insurgent architectural *lexis* and *praxis*. The new universals he proposes include 'the right to the production of space', which can be understood as the right of 'individuals and collectivities […] to reconstruct spatial relations (territorial forms, communicative capacities, and rules) in ways that turn space from an absolute framework of action into a more malleable relative and relational aspect of social life'.[325] Equally compelling is 'the right to difference, including that of uneven geographical development', which entails 'the right for different group or collective explorations of differences [in the realms of culture, sexuality, religious beliefs, and the like] and, as a consequence, the right to pursue development on some territorial and collective basis that departs from established norms'.[326] Finally, though not exhaustively, we have 'our rights as species beings', at the heart of which Harvey places 'the right freely to explore the relation to nature and the transformative possibilities inherent in our species being in creative ways'.[327] Crucially, the freedom he envisages

> must be tempered by duties, responsibilities, and obligations to others, both human and non-human, and it most certainly must accord strong protections against the potential powers of a non-democratic elite (or a capitalist class) to push us down technological, social, and evolutionary pathways hat represent narrow class interests rather than human interests in general.[328]

Legal scholarship has much to contribute to this search for new universals, as well as to our understanding of what it means for universals to be socially constructed and, thus, subject to contestation and reinvention. We maintain that such a view of universals does not negate their

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[323] ibid, 248.
[324] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR).
[325] Harvey (n284), 200 and 233. This is a re-reading of UDHR, art 14.
[326] ibid, 251. This is a re-reading of UDHR, arts 22 and 27.
[327] ibid, 252.
[328] ibid.

authority nor does it undermine their potency. It rather serves to free us from the notion that the values and patterns of interrelating promoted by our current universals are monolithic and, as such, unamenable to context-specific variation, disputation, and change. Having rid ourselves of the stifling expectations we tend to project upon universals, we can proceed to investigate questions such as the following: how may other legal instruments, including and in particular instruments of human rights law, be re-read so as to respond to the exigencies of this era of paradigmatic transition?; how can novel re-formulations of extant rights or new rights be incorporated into the instruments that govern MSP processes and steer their outcomes?; and how does this incorporation influence the behaviour of institutional players, of individuals, communities, and groups that are socio-culturally attached to, or materially dependent upon, the ocean, of agents of the ocean's industrialisation, and of non-human actants? Whether one opts for the path of subversive imagination, sobering pragmatism, or worldly empiricism, their findings will be of value to a number of scholarly debates, not least critical MSP studies.

4. Conclusions

European spatial policy as a distinct field of EU action seeks to cultivate a shared vision of the Member States' shared territory. Operating in dialogue with EU cohesion policy, it has set in motion a number of strategic planning processes, gradually giving rise to a sizeable normative-ideational and epistemological *acquis*. Naturally, concerns have been raised regarding the particular and potentially far-reaching implications of this *acquis* for people and the environment within the EU, as well as in the wider European geographic area. These questions have become all the more pressing as new modes of governance have taken hold, each creating new possibilities and challenges for the construction, contestation, reproduction, and institutionalisation of spatial ideas.

Initially little more than an afterthought, the ocean has emerged as an important parameter of this debate. Marine space is now regarded as a critical component of the common European territory, a treasure trove of practical solutions for society's most pressing problems, from food and energy security to poverty alleviation and climate change adaptation. This at a time when maritime policies have reached a stage of relative maturity, with actors at different scales being engaged in public processes of problem definition, developing initiatives to generate consensus, and articulating discourses that 'afford both political and axiological

substance' to governance tools such as ecosystem-based MSP.[329] Yet, as the seaward expansion of human activities gains momentum, its very desirability and legitimacy is being called into question on ideological and ethical grounds. The ocean thus becomes a new setting in which to continue the age-old argument regarding the balance that EU territorial action must strike between economic development, social cohesion, and environmental sustainability.

This chapter has approached the issue from the perspective of spatial justice. It has shown that those seeking to articulate a concept of spatial justice which reflects the political and legal culture of the EU in its full contradictory complexity have no choice but to contend with the ambiguities and contestations surrounding the ideas that underpin EU territorial action, such as territorial vulnerability and territorial equity. This means engaging with the implied trade-offs and endeavouring to determine the conditions – if any – under which they may be considered just. This exercise reveals that, although it should not be uncritically discredited as it plays a part in raising standards of living across individuals, groups, and communities, the EU's preoccupation with competitiveness, innovation, and growth can, and indeed *must*, be called into question.

More concretely, the chapter suggested that the quest towards these valid aims finds its limits in the composite notion of social-ecological well-being. In practical terms, this translates into a need to develop 'distributively conscious and environmentally sensitive' spatial visions and to imbue MSP culture with a coherent approach to political, ethical, and ideological issues.[330] On the other hand, the notion of justice does more than convey the qualities of a 'just' plan. The action-oriented variant of '*seeking* justice' serves as a call to arms for a wide array of contemporary social movements. Its rallying power lies in its capacity to work across social cleavages 'to foster a collective political consciousness [and to] create a sense of solidarity based on shared experience',[331] thus cultivating an 'inclusive and combinative' approach to political mobilisation.[332] Our growing understanding of Europe's geography of discontent provides opportunities for these diverse movements to coalesce around spatialised demands. A human rights-based approach to the normativisation of MSP, particularly one which is grounded in a relational ontology of self and space – and, by virtue of being so, is more sensitive to human/more-than-human vulnerability – has a key role to play in this regard.

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[329] Suárez de Vivero, Rodríguez Mateos and Florido Del Corral (n157), 626.
[330] Albrechts (n41), 166.
[331] Soja (n112), 20-21.
[332] ibid, 23.

Chapter Five – Conclusion

This thesis set out to answer two questions. First, to what extent are the issues problematised by critical MSP scholars attributable to the multi-level legal framework that regulates marine planning and management in Europe's regional seas? And, second, how, if at all, can human rights be utilised to meaningfully challenge, as opposed to reinforce, unjust patterns of human-ocean interaction, and so provide a vehicle for the formulation and realisation of transformative blue futures? This concluding chapter will reflect on the timeliness of this inquiry, summarise its key findings, point out its limitations, and identify areas for further research.

As discussed in chapter one, the present moment represents a critical juncture in our relationship with the ocean. Whereas claims over marine resources and space are not new, 'the extent, intensity, and diversity of today's aspirations are unprecedented', leading commentators to speak of 'the blue acceleration – a race among diverse and often competing interests for ocean food, material, and space'.[1] Yet, at the same time that the ocean is settling into a new phase of large-scale industrialisation and intensified spatial competition, high-level assessments of the state of the marine environment are employing the language of 'transition' and 'transformation' to describe the steps needed to slow, halt, and, to the extent possible, reverse the anthropogenic deterioration of marine and coastal ecosystems.[2] These two trends are, in turn, paralleled by a move towards framing the ocean commons as social-ecological systems. Embracing this framing – and the thesis clearly has – leads one to a more integrated consideration of the environmental and socio-cultural dimensions of ocean space, as well as to a critical reflection on the relevance that social identities, values, and power asymmetries hold for marine planning and management. Of particular concern from this standpoint are the

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[1] Jean-Baptiste Jouffray and others, 'The Blue Acceleration: The Trajectory of Human Expansion into the Ocean' (2020) 2 One Earth 43.

[2] Sandra Díaz and others, *Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES 2019); Hans-Otto Pörtner and others (eds), *The Ocean and Cryosphere in a Changing Climate* (IPCC 2019); EEA, *The European Environment - State and Outlook 2020: Knowledge for Transition to a Sustainable Europe* (EEA 2020); UN, *The Second World Ocean Assessment - World Ocean Assessment II*, vol 1 (UN 2021).

effects that the race for economic growth and the strive for environmental protection can have upon the well-being of vulnerable constituencies, the two agendas being equally susceptible to becoming vehicles for the 'dispossession of traditional cultural, recreational and small-scale commercial uses and users'.[3]

MSP stands at the intersection of these three perspectives, its most common definition casting it as a 'public process of analyzing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic, and social objectives that are usually specified through a political process'.[4] Thus understood, MSP is a means of preventing conflicts and promoting synergies between different uses of ocean space, as well as a means of keeping their cumulative impacts upon the marine environment within 'acceptable' levels. Where trade-offs between ocean uses – or between ocean uses and environmental protection – are deemed necessary, MSP is also a means of ensuring that they are arrived at in a cognitively and socio-politically legitimate fashion.

All these are undoubtedly functions that MSP performs. As experience with implementation accumulates, however, the systemic shortcomings of MSP discourse and practice are becoming increasingly apparent. A key concern pertains to how heavily preoccupied the relevant legal and policy instruments are with catalysing economic growth and streamlining environmental management. The EU is a case in point, its key institutional actors having consistently heralded MSP as a 'tool for the sustainable development of Blue Economy initiatives, and for the restoration of Europe's seas to environmental health'.[5] This narrowly defined agenda leads planning frameworks and processes to afford limited attention to the cultural, historical, ethical, spiritual, and aesthetic dimensions of the relationship between people and the sea. The same is true of matters concerning human well-being, livelihoods, and food security. From a procedural perspective, moreover, it has been shown that 'participatory' planning processes are more a means of validating pre-determined or hegemonically imposed divisions of ocean space, rather than a platform for the collaborative formulation of spatial visions. In all these ways and more, MSP processes are acting to obscure important values, cause-and-effect relationships, and uncertainties, hence triggering and reinforcing unjust patterns of human-ocean interaction.

These trends have been well-documented by scholars working in the area of critical MSP studies. The thesis was inspired by the preoccupations of this budding field of inquiry

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[3] Edward H Allison, John Kurien and Yoshitaka Ota, 'The Human Relationship with Our Ocean Planet' (World Resources Institute 2020), 11.
[4] Charles Ehler and Fanny Douvere, 'Marine Spatial Planning: A Step-by-step Approach toward Ecosystem-based Management' (IOC-UNESCO 2009), 18.
[5] Commission, 'The EU Blue Economy Report 2021' (European Commission 2021), 12.

and sought to build upon its methodological advances. Its point of departure was the observation that, though rapidly evolving and expanding, the field of critical MSP studies is still largely lacking in legal perspectives. This gap is a conspicuous one, especially when one considers the twofold role that law plays in the socio-material production of ocean space. On the one hand, law interacts with other normative systems to (de)legitimise categories and instances of human-ocean entanglement, in the process creating injustices of various hues. On the other hand, law is one of the morally charged contexts in which to seek means of preventing or remedying said injustices. This duality is reflected in the questions that the thesis set itself and the lines of argumentation it developed to answer them. It is also reflected in the thesis' findings, which constitute its original contribution to the field of critical MSP studies.

A first cluster of findings concerns law's complicity in bringing about the planning practices and outcomes problematised by critical MSP scholars. The thesis submits that, whereas law constitutes but one *locus* and medium for the social construction of ocean space, it is a crucial one, legal classification having a unique capacity to shape the balance between individual and society, subjective and objective, public and private, nature and culture. This claim is corroborated by the analysis offered in chapter two, which explored the cognitive and normative biases that underpin the legal territorialisation of ocean space. Two sets of processes were considered. The first set, grouped under the banner of 'external territorialisation', was centred around the jurisdictional gradient enshrined in the law of the sea, which serves as a basis for the demarcation of maritime borders and the regulation of states' *inter se* relations. The second set, grouped under the banner of 'internal territorialisation', was centred around the designation of ocean uses through MSP, which entails the exercise of state power for the purposes of allocating resource access rights. Although operating at different levels and to different ends, the two sets of territorialisation processes are grounded in the same logic of enclosing ocean space with a view to subjecting it to spheres of control, all with the intention of ensuring that marine resources are optimally – which is to say, systematically and maximally – exploited. The crux is that, for ocean space to be partitioned and apportioned, it must first be selectively emptied of the social-ecological relationships it is party to. This process of emptying out and refilling ocean space is facilitated by the deeply engrained assumption that, by virtue of its unruly materiality, the marine realm is a sphere of dissociation, wherein traditional ways of relating to one's environment become suspended. Ironically, however, once the process of refilling ocean space begins, its aim is to 'tame' this materiality and to reconstruct it in ways that reflect the differentiated rights of access that characterise the terrestrial realm.

Chapter three shifted the focus to the EU legal order, which can be viewed as an intermediate level of territorialisation between the international and the domestic. In particular, the chapter examined how the legal instruments and institutional arrangements that govern ecosystem-based marine planning and management in the EU are contributing to the injustices observed in the MSP processes taking place in Europe's regional seas. The pertinent framework was critiqued on two grounds. The first was its valorisation of natural-scientific and technological-managerial rationality, which puts little pressure on domestic MSP frameworks and processes to recognise and incorporate different knowledge systems. Of particular concern is the exclusion from the knowledge base of marine planning and management of place-specific, experiential, and user-based knowledges, which have the capacity to orient practice towards an integrated notion of social-ecological well-being. The second ground of critique was that, although its laws and policies and the comportment of its institutions work to rescale aspects of marine planning and management, the EU has all but failed to address the implications that this rescaling has for different actors on the ground – particularly lower-level actors who are not associated with neuralgic sectors of the blue economy. Here, attention was drawn to the factors that could prevent individuals, communities, and groups from becoming directly and actively involved in decision-making processes taking place at different levels; factors such as institutional capacity, economic strength, political authority, and general ease with navigating the increasingly polycentric landscape of marine planning and management. Together, the two critiques demonstrate how even a paradigm such as the ecosystem approach, which purports to be grounded in a holistic perspective, may be blind to the ways in which the ecological specificity of the ocean spaces to be planned is entwined with the socio-cultural specificity of the communities and groups who live their lives in and around them.

The combined conclusion of chapters two and three is that the legal norms and institutions that govern marine planning and management at the international and supranational levels are firmly rooted in the logic of capitalist sovereignty and technocratic, managerial transnationalism. Having found this logic to lead to socially and environmentally unjust patterns of human-ocean interaction, the thesis proceeded to make the case for a human rights-based approach to the normativisation of MSP. It was motived to do so by the following assumption: were the legal norms and institutions that govern marine planning and management at the international and supranational levels more sensitive to the nexus between human rights and the environment, they would steer the socio-material construction of ocean space towards the realisation of such values as 'cultural, social and legal identity; a sense of

place; occupational pride and self-respect; spirituality; mental and bodily health; and human security'.[6]

It is important to note the thesis made the case for a human rights-based approach to the normativisation of MSP whilst being fully aware of the challenges its conceptualisation and operationalisation entails. Already in chapter one, it acknowledged that attempts at cultivating a normative link between human rights and the environment remain contested by critically-disposed scholars, who view human rights as a vehicle for the perpetuation of cognitive dichotomies that foster anthropocentrism (and, hence, human exceptionalism and privilege), of fallacious claims of context-transcending universality, and of liberal-capitalist modes of social organisation. Equally concerning is the tendency of advocates of human rights-based approaches to environmental protection to underplay the fact that they too involve trade-offs and that the road to the progressive realisation of social, economic, and cultural rights is long, winding, and strewn with obstacles.

Rather than turning a blind eye to these criticisms, the thesis placed them at the centre of its argument and methodology. It was, thus, careful to highlight the inherent limitations and potential pitfalls of a human rights-based approach to the normativisation of MSP which faithfully reproduces the tenets of liberal legal and political thought. An alternative construal was favoured, which the thesis arrived at in two steps. The first step was a critical and interdisciplinary reading of the debate on human rights and the environment. By this is meant a legal-geographic reading that recast human rights as an institutional and imaginative framework within which to dialectically construct desired social-ecological futures. The second step was a synthesis of three distinct but synergistic theoretical turns: the blue turn in the humanities and social sciences, the spatial turn in ocean studies, and the relational turn in legal theory. By juxtaposing these scholarly theoretical movements against each other, the thesis showed that there is a common thread tying them together; namely, the belief that law and other normative systems are more likely to advance social and environmental justice if they assign consequence to 'the ways in which entities, thought of as processes rather than existents, become entwined'.[7]

This brings us to the second cluster of insights the thesis has generated, which can be distilled into three points. First, there is merit to be found in an approach to the normativisation of MSP which instrumentalises human rights as tools of socio-spatial visioning and advocacy. As discussed at various points throughout the thesis, but particularly in chapters one and four, such an approach is conducive to the formulation of transformative oceanic imaginaries, by

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[6] Allison, Kurien and Ota (n3), 1.
[7] Christopher Watts, *Relational Archaeologies: Humans, Animals, Things* (Routledge 2014), 1.

which we mean oceanic imaginaries that offer opportunities for collective self-realisation outside of market forces and that bring social structures into a better working relationship with marine ecological conditions.[8] The proposed approach can also support social movements that seek to prevent or disrupt unjust patterns of human-ocean interaction, whether that be by engaging with existing institutions or by forming new discursive hubs that will facilitate further contestation and norm-production.[9]

The second insight to emerge from our exploration is that, if they are to serve the functions we have sought to assign them, human rights must be re-grounded in an ontology of self and space which is relational in its nature and vulnerability-centric in its focus. So ontologised, human rights can be used to transform ocean space from a blank canvas upon which hegemonic actors are free to paint visions of technoscientific innovation and economic growth into richly populated seascapes in which the social and the ecological are engaged in spatially embedded processes of mutual constitution; processes that can and do give rise to relationships of care, attachment, and interdependence.

Promisingly, law was found to already provide entry points for such a ontologisation of human rights. A case in point is the way in which international biodiversity law construes the ecosystem approach to development planning and environmental management, which was discussed in chapter three. Central to this construal is the intimate relationship that indigenous and local communities embodying traditional lifestyles have with their surrounding environment. Human rights can be used to afford formal recognition to this relationship in a number of ways. For instance, legal instruments can assert the existence of collective rights to lands, territories, and resources, as well as to the tangible and intangible cultural heritage associated therewith. Such rights have both substantive and procedural dimensions, with the latter going beyond traditional environmental citizenship rights (e.g., the right to participate in environmental decision-making) and towards the prescription of a right to co-management of resources and environmental systems. Crucially, although these rights have emerged in response to unique patterns of human-environment interaction, there is no reason to deny their relevance in contexts where the management of common pool resources would be more effective for being 'done at the local level, by the communities directly concerned, rather than through top-down prescriptions from the centre or through privatization of the commons'.[10]

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[8] As suggested in David Harvey, *Spaces of Hope* (Edinburgh University Press 2000), 199.
[9] As suggested in Andreas von Arnauld and Jens T Theilen, 'Rhetoric of Rights: A Topical Perspective on the Functions of Claiming a 'Human Right to…'' in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (CUP 2020), 49.
[10] Olivier De Schutter, 'The Emerging Human Right to Land' (2010) 12 International Community Law Review 303, 324-325 and 319.

Should this suggestion be taken forward, it can promote the creation of new institutional spaces in which local communities can come together to conjure blue futures that reflect the needs, traditions, and aspirations of their members. It is in those spaces that further normative innovation can take place, local communities working together with other actors to formulate spatial plans and management arrangements that reflect not only ecological, but also socio-cultural (including socio-legal) specificities.

The third insight concerns the values (and corresponding intra-human and human–non-human relationships) that a human rights-based approach to the normativisation of MSP should seek to foster, which the thesis summarised under the rubric of 'spatial justice'. This concept was selected because of its capacity to bridge the divide between the critical-theoretical works that influenced the design and execution of this research project – among which works that form part of the more-than-human and spatial turns in legal and justice studies – and more mainstream academic debates on spatial planning and territorial development. This bridging exercise was, in turn, necessary to demonstrate how the more abstract elements of the argument advanced by the thesis can be brought to bear in the European context. Accordingly, the thesis used an ecologically-minded understanding of spatial justice as a tool with which to re-interpret the aims of EU territorial action so that they provide additional entry points for a human rights-based approach to the normativisation of MSP. One such entry point is the notion of territorial vulnerability, which the Union construes in a twofold manner: as a result of spatial peripherality and its corollary of functional marginality; and as a consequence of ecological and cultural sensitivity. Although this construal does not fully account for the exigencies of social-ecological well-being, it nevertheless provides an interesting starting point for thinking about the desiderata to be pursued through human rights. For instance, the discussion offered in the concluding section of chapter four can form the basis for the articulation of novel collective rights the subjects of which are territorial communities.

All said, it is our hope that the kind of approach to the normativisation of MSP that the thesis proposes can help clarify how those who are socio-culturally attached to, or materially dependent upon, the ocean – particularly small-scale fisherfolk and island and coastal communities – are to be involved in marine planning and management, and how their values, views, and interests are to be weighed against those of mariculturalists, workers in the renewable energy sector, deep-seabed miners, and other agents of the ocean's industrialisation. If we get the balance right, we stand to produce spatial visions and plans that go beyond the prevention/minimisation of environmental harm and the fulfilment of fundamental human needs, and towards the advancement of individual and collective autonomy, the development

of individual and collective capabilities, and the cultivation of intersubjective and intercollective solidarity, all in the aim of supporting the flourishing of humanity's diverse ties to the ocean and its biotic and abiotic constituents.

In closing, let us reiterate that the critically social, ecological, and spatial notion of human rights that this study advocates is not entirely foreign to contemporary environmental and human rights law. Be that as it may, we maintain that further research is required to determine how extant human rights standards can be interpreted to reflect it (e.g., standards relating to the right to food and the right to health), and whether new human rights standards are needed to bring underrepresented aspects to bear (e.g., a right to the seascape, a right to clean energy from the ocean, or a right to uneven blue development). Equally necessary and worthwhile is to engage with the 'rights of nature' movement, which represents a significant attempt on the part of legal theory and practice to grapple with the reality of entangled, more-than-human subjectivities. Future inquiries on these topics would do well to adopt an inter- and transdisciplinary outlook, intellectual porosity and partnership having the potential to usher in a new era in the ever-evolving debate on human rights and the (marine) environment.

Moreover, empirical research is needed to determine whether a human rights-based approach to the normativisation of MSP can indeed change the value underpinnings, mechanics, and outcomes of planning processes, both in Europe and beyond. Empirical research is also needed to ascertain the role that social movements play in the evolution, implementation, and enforcement of legal frameworks so designed. Should it corroborate the claims advanced by the thesis, 'a painstaking, case-by-case post hoc evaluation'[11] of the actual deployment of human rights frames by different actors will serve as a convincing response to the concerns raised by critics and sceptical proponents of human rights-based approaches to development planning and environmental management.

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[11] This proposition, and the triangular framework of outcome change, process change and value change, are borrowed from Balakrishnan Rajagopal, 'The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India' (2005) 18 Leiden Journal of International Law 345, 385 and 387.

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