Choosing a future: the social and legal aspects of climate change

It is increasingly clear that anthropogenic climate change is a real and destructive phenomenon. Glimpses of this reality are everywhere and ever more numerous. Extreme weather events, in particular, resonate strongly through the public psyche, carried by viral media images: devastation in the Philippines in the aftermath of Typhoon Hayan; the haunting white grip of the −50C ice vortex in the United States of America; extreme heat and bushfires in Australia; extensive flooding in the United Kingdom. Such events – just this year alone – and the human stories emerging from the statistics of tragedy speak directly of the human and environmental effects of climate change. Some of the social impacts of such events are obvious – others less so. Not everyone watching the news coverage of the United Kingdom flooding this European winter will be aware, for example, of the fields full of dead badgers and raw sewage or of rats invading homes to escape newly submerged sewers – or of the complex ecosystem implications for crops, planned production patterns, economic futures, legal and regulatory responses and other numerous – and not always predictable – outcomes. Nor will everyone be aware of the complex social impacts of such events: on the one hand, communities uniting to help one another, on the other hand, looting, predation and fear.

What all such events make clear are two things: first, there is no longer any rational room for doubt that climate change is happening or that it now also affects even the thus far relatively comfortable countries of the global North. The real issue is what the global community, and individuals and communities wherever they are, should now be doing in response. Second, the vast majority of individuals and communities, particularly in the Greenhouse Gas emitting nations, have a choice as to what to do – both with respect to mitigation and adaptation. The choice is between business as usual and a radical, eco-responsible change of direction.

The need to act, and to act now, is also made abundantly clear in this collection. The key thinkers and policy experts represented here make a compelling case that the human dimensions of climate change are now pivotal for any meaningful response to the crisis facing the planet. Each author, without exception, albeit in different ways, underlines the centrality of the social and legal aspects of climate change to any choice between planetary futures. Whether presenting climate change as a crisis of human hierarchy; as an issue of climate justice or injustice; as concerning the rights of future generations or the relationship between moral rights and climate duties; as a matter of EU policy or international trade; or in terms of the implications of climate change for the relationship between human rights and the environment – the contributions in this collection unite to capture the dramatic power of focusing on the multiple relationships between law, society and justice in an age of climate breakdown. And each contribution shares the unerring conviction that a change of direction is now urgent, possible and morally imperative.

The format of this volume combines short interviews and papers with longer, more sustained reflections. The collection brings together internationally leading
law and policy experts and their unique blend of expertise and scholarship to address the most compelling question of our age: How should we now respond to climate change?

Connie Hedegaard, European Union Commissioner for Climate Action, speaks passionately of the growing conviction, shared by a number of high-level policy makers, that climate change can no longer be understood as a purely ‘environmental issue’ because the economic and social effects of the problem will define the future – including the future of economic growth in the twenty-first century. Hedegaard is fully aware of the seriousness and intractability of the challenges, but refuses to be bleak. While the problem is immense, and while there is a notable and challenging disjuncture between the short-termism of political and corporate cultures and the need for a long-term climate strategy, Hedegaard ultimately expresses faith in the energies of citizen engagements to bring pressure to bear for a meaningful realignment of climate priorities and action. Her vision is for a productive, multi-level, multi-scalar response, combining the best of citizen, community, corporate and state action expressed within and through the intra-national and international engagements of the EU itself as a key climate policy actor. Drawing attention to the complexities of the contemporary challenges facing European societies, Hedegaard is quick to point out that the growth of a vigorous green sector also promises a socio-economic transformation for the future. The leadership that the EU can provide, for her, key – and the future we will inherit, she insists, is the future we now choose.

For Mary Robinson, President of the Mary Robinson Foundation – Climate Justice, the human and social aspects of climate change are utterly central to addressing the current crisis. For her, the issue has always been framed in these terms: she came to the climate issue as a direct result of seeing the high human cost of irresponsibility and injustice. Robinson insists that it is vital to move beyond the construction of climate change as ‘a scientific or environmental problem’ and to embrace it, in her words, as ‘an issue of development and of rights’. For her, as for Hedegaard, human choice is completely central to the future we choose – and human suffering is fundamental to the motivation for change. For Robinson, the necessary response to the visible injustices of climate change – whereby ‘the negative impacts of a warming climate [are] being felt most acutely by those who have contributed least to the cause of the problem’ – is to embrace ‘climate justice’. Two core aspects of this solution are a turn towards a strong ‘rule of law’ – and towards ‘transformative leadership’. There is a vital need, argues Robinson, for a legally binding climate agreement to sit at the heart of a nexus between strong legal regime approaches to human rights abuses and other forms of climate-related fall-out. The Declaration on Climate Justice, she suggests, captures the call for an integrated, imaginative transformation of international and national legal processes and systems. This should be combined with imaginative, empowering, dispersed leadership ‘at all levels’ – a genuinely inspirational form of leadership unafraid to leap beyond the limitations of business as usual. Human agency – at all levels – is thus key to her vision of a future of climate justice.

For John Knox, the United Nations Independent Expert on Human Rights and the Environment, the core issue is also an ethical one. While clearly embracing climate change as an issue of science, economics and politics, Knox argues that the most fundamental question we face is: ‘What should we try to do?’ For Knox, the morass of disagreements concerning ethical foundations, reflected in multiple justice-based, religious and philosophical starting points, is best addressed by international human rights – the one language capable of cutting through the ‘ethical Babel’ confronting
climate change strategies. Additionally, human rights discourse places the most climate-affected human beings and communities squarely at the centre of its analysis. It also has the advantage of reticulating well with existing legal frameworks and regimes. Directly addressing certain critiques of human-rights-based approaches to climate change, Knox points to the fact that human rights discourse and law show special concern for the human individual – not just for humanity in the aggregate – and that such a focus allows an almost visceral form of human empathy which in turn serves to generate ethical responsiveness. The legal forms of human rights, and their level of detailed attentiveness to human need and vulnerability, have placed important argumentative tools at the disposal of climate-affected communities. Knox argues that despite existing weaknesses in implementation, ‘the speed with which States have accepted the relevance of human rights to climate change is impressive, and their acceptance of this necessary first step provides a basis for future recognition of responsibilities’. For Knox, the ‘greening’ and flexibility of human rights holds out immense promise, notwithstanding the complexities surrounding their applicability to extra-territorial harms. It is imperative that the evolutionary development of human rights must now bring them to bear ‘on the greatest environmental challenge of our time’.

This task, however, faces hurdles – sometimes hurdles of a theoretically troubling kind. Marcus Hedahl, Dahrendorf Postdoctoral Fellow, addresses a core theoretical quandary faced by advocates of human rights – especially as moral rights – in the context of climate change arguments. Hedahl points out that a prominent theoretical analysis of moral rights claims (and we can include human rights broadly within this characterization for the purposes of his argument) holds that a right only exists if a corresponding ‘directed’ obligation to fulfil it exists. However, this theoretical framework is obstructive for a large number of rights – including those rights related to climate change. It is not surprising, in the light of this, that some theorists choose to reject the traditional theoretical analysis of moral rights entirely. Hedahl, however, argues that ‘eliminating the link between rights and directed obligations risks losing the essential, directional aspect of such rights’. His response to this quandary is to argue that the link between moral rights and directed obligations is not descriptive, but normative. He argues – in short – that ‘a moral claim right ought to engender directed obligations, but it need not actually do so in order to be properly analysed as a right’. This, for Hedahl, implies several practical consequences for an ethical understanding of climate change. Specifically, it yields the insight that in the absence of a directed obligation to prevent the harms of anthropogenic climate change, those wronged by climate violations can be further wronged precisely by the failure to create such directed obligations. Furthermore, argues Hedahl, we can still ‘further wrong’ others if there is no way for them to engage in meaningful second-personal exchanges about what is rightfully their due. For now, those unjustly injured by climate change cannot complain to anyone in particular; they cannot demand as their due any specific action; they can merely howl at the moon’. This conclusion implies an ethical obligation to create responsive institutional structures and to accept the idea that to fail to do so is not merely to enact an instrumental harm, but to undermine the ‘very humanity [of the wronged] as rights-holders’. Hedahl’s argument, therefore, directly implies the importance of allowing rights-holders ‘the ability to engage in normatively significant exchanges’ concerning their rights and futures – a concern animating other contributions to the collection, especially those of Robinson and Grear, who both share an explicit concern with the expansion of human agency through fora of participation.
The central call for inclusory concern and respect concerning the discursive agency of rights-holders lying at the heart of Hedahl’s argument is, of course, more problematic in relation to those putative future rights-bearers who cannot possibly yet speak for themselves. Quite apart from arguments concerning the potential rights-based interests of non-human animals and living ecosystems and the challenges concerning their inclusion within an anthropocentric human juridical order, there are urgent ethical considerations concerning other silent beneficiaries of the future: the generations as yet unborn. Notwithstanding the ‘absence’ of the non-speaking and future victims of climate damage, it is possible that there is a clear ethical duty to anticipate the needs and rights of ‘other’ and future climate-victims and to extrapolate from this a series of normative duties placed upon actors in the present. This, in essence, is the central implication of the contribution of Henry Shue, Senior Research Fellow, Merton College, and Professor of Politics and International Relations at the University of Oxford.

Shue’s concern is with the rights of future human generations. He examines the issue of climate change through four lenses – each an image of the normative significance of the climate crisis. The images represent evolutionary phases in approaches to climate change. The first two images, which Shue identifies as ‘making room’ and ‘avoiding encroachment’ respectively, once operated on the shared assumption that the central normative concern in response to climate change was essentially one of distribution: how to distribute permissions to emit carbon dioxide as a result of burning fossil fuels. The closely related assumption was that there were tolerable levels of climate change, and that these were compatible with a distributive form of entitlement to continue to cause climate damage. However, argues Shue, the evolving scientific understanding of the problem has exposed the uncomfortable reality that the ‘remaining cumulative carbon budget compatible with tolerable degrees of climate change is too small, however it is distributed’. At this point, it became clear that the most urgent imperative was to construct an alternative energy system altogether – one leaving behind the existing fossil fuel regime and transitioning to cleaner modes of energy production. Shue’s third image (‘protecting rights’) constructs this necessary transition as an opportunity for institutional innovations protecting rights minimally understood to demand ‘at least the subsistence need for essential energy’. The fourth image (‘forced choice’) directly addresses the future needs of unborn human generations. Shue categorizes this image as being centred upon avoiding a ‘forced choice among rights’ – a formulation driving at the ethical responsibility of present human generations not to leave future generations with nothing but a choice between rights-undermining alternatives. Shue argues that unless the present human system changes enough to avoid it, the humans of the future will be left only with the forced choice between pursuing economic development (and further destabilizing the climate) or depressing their economy to protect the climate (armed only with the fossil fuel alternatives they are left with by a generation that failed to respond in time). In this sense, argues Shue, future human generations will be left only with rights-violating choices – and be forced to carry the moral burden of knowing that and being scarred by the inevitability of rights-violating outcomes.

This dilemma is not purely, however, a future one. The fractious dynamics and pressures accompanying interactions between socio-economic and environmental rights are all too familiar to scholars, policy-makers and others confronting the tendencies of law and rights discourse to separate issues into conceptual and institutional silos, while the powerful tendencies of a globalized juridical and economic order present complex and paradoxical challenges to the search for a climate-friendly structural
direction. Olivier De Schutter, the outgoing UN Special Rapporteur on the Right to Food, addresses the important question of how to overcome the current paradoxical impasse characterizing the contrasts between strong, export-led trade growth and the growing inequalities between rich and poor. He also identifies the complexities of the relationship between the dynamics of poverty reduction and the environmental degradation and uncontrolled increase in greenhouse gas emissions that accompany them. The current form of globalization, De Schutter suggests, needs closer evaluation and engagement – particularly the relationship between trade dynamics and climate mitigation. De Schutter’s concern is to address the disconnection between the trade law regime and the climate regime – which, he suggests, provides a clear illustration of the much-lamented tendency towards ‘fragmentation’ in international law. These two regimes have separate negotiation fora, separate enforcement regimes, separate dispute resolution methods and remain largely autonomous from general international law. Against this problematic background, De Schutter conducts a thoughtful analysis of how the multilateral trade regime enables World Trade Organization (WTO) members to link their own trade policies with environmental imperatives – thus deploying market access conditionalities as levers for climate behaviour modification. This analysis points to some critically important questions. Can trade be reformulated as a tool for conduct-management able to influence trade partners to take action to combat climate change? Can WTO member bilateral negotiations thus fulfill the vision of trade as a means of achieving the non-instrumental values declared during the inaugural negotiations for the WTO agreements – including sustainable use of the world’s resources? De Schutter makes a compelling case for the claim that while the promotion of trade is currently producing climate-unfriendly outcomes, the economic growth of developing countries can be promoted by linking market access to stringent climate-friendly requirements. Together with the diversification of developing economies, increased levels of foreign direct investment, the transfer of clean technologies, regional integration and South–South trade, De Schutter is confident that the international trade system can move away from its current post-colonial pattern of North–South resource exploitation. De Schutter’s hope, clearly, is to channel trade towards sustainable development and towards modes of climate-friendly response to socio-economic disparities between nations through the use of a combination of market policies and the provision of clean technologies.

In a sense, De Schutter’s analysis presents, in another mode, a vision for climate justice – in his hands as a vision responsive to historical patterns of inequity and to their continuing impact within the international legal order. De Schutter’s concern with the current form of globalization and his intimations of its links to colonial patterns of North–South predation, resonates strongly in the arguments made by Anna Grear, Reader in Law at Cardiff University and Dahrendorf Visiting Fellow. Grear’s central concern is with the persistence of colonial historical patterns and the dense intimacy of their linkages and dynamics with law’s constitution of both its ‘subject’ (the legal actor) and ‘the environment’. Grear welcomes the high level emergence of climate justice in the normative and policy discourse addressing the social and legal aspects of climate change, but is wary of the dangers of ‘co-option’ facing the concept as it gains institutional traction. Specifically, Grear draws upon a critical theoretical reading of the patterns of ‘climate injustice’ and their relationship with liberal legal subjectivity, linking this with the politics of dis/embodiment, with corporate juridical privilege and forms of (neo)colonialism and with the highly uneven structure of the contemporary globalized legal order to produce a far-reaching critique of the status quo. Grear’s conviction is that climate justice is more likely to retain its
resistive critical energies if it is informed by critical legal reflection on historical and contemporary patterns of climate injustice – particularly as they emerge in relation to the privileged trope of law’s insider status and the closely related juridical privileging of the corporate form.

Drawing careful links between the colonial foundations of international law and the philosophical foundations of the Western juridical imaginary, Grear points to the centrally important power of critique as a mode of transformational awareness and indicates future policy directions specifically aimed at a more radically inclusive vision for climate justice in the future. These policy directions include: re-engineering the corporate juridical form and challenging the contexts of its domination; expanding legal subjectivity to move beyond the human while at the same time expanding the juridical subjectivity of humans in a more radically inclusive way; diversifying agency by rejecting the ‘actor/acted upon’ binary familiar to many policy languages; emphasizing the need to embrace complexity and new modes of human self-governance; and the need for ‘ceaseless, reflexive epistemic vigilance to form a core priority of climate justice practices’. Grear’s argument, while deeply concerned with the human implications of climate justice/injustice is the only argument offered in this collection to move beyond the human to embrace non-human animal and ecosystem structures in order to fold them into the epistemic justice implicit in the climate justice visions of Hedahl, Robinson and Shue. For Grear, climate injustice attacks the human – but is also a mode of violation aimed at the living order itself. She explicitly maintains that there are distinctive patterns uniting non-dominant humans, non-human animals and other living systems that point to a predatory form of ideological hegemony in which the law itself is thoroughly complicit. Thus, while climate justice and human rights present hopeful visions, Grear maintains that such hope must always function in tandem with a world-facing, highly responsive commitment to reflexive critique. Thus law, and its categories and processes, requires radical reformulation if the choices we make now are to augur resilient futures for climate justice.

The collection concludes with Stephen Humphreys, the Dahrendorf Symposium Discussant, and Associate Professor of Law at LSE. Humphreys offers an insightful synthetic appraisal of the papers in this edition. Like Grear, he is explicit concerning the central idea that ‘historical injustice saturates the problem of climate change’ – a point also clearly implicit in the arguments of De Schutter and Robinson. Humphreys is equally direct concerning the fact that those most vulnerable to climate change are predominantly those who already lack resources – those who start, as it were, from an oppressed base-line position. These are the individuals, communities and nations ‘who have been on the wrong end of colonial history’ or are ‘globalization’s losers’ or that have suffered or continue to suffer ‘neglect, exclusion or simple rapacity at the hands of their own governments’. Humphreys traces the insights, narratives and arguments emerging in the various contributions to this collection, balancing his reflection-rich weavings with a very clear intimation of his own position. His examination, in particular, of human rights law and trade law, combined with his well-informed examination of the overarching ideal of the rule of law, lead him to agree with a general sense that all the authors share: law’s current response is inadequate. However, Humphreys, again like Grear, ultimately concludes that ‘the particular form taken by law in international and transnational affairs, having largely followed the historical progress of industrialism, colonialism and globalization, is peculiarly ill-suited to the task’ of facing up to climate injustice and vulnerability. Law, then, is not merely inadequate, but – in a complex sense – counter-productive because of its ideological and historical formation.
This collection, taken as a whole, clearly emphasizes the inescapability of direct engagement with the social and legal aspects of climate change: the complicity of law and society in its production as well as the paradoxes and promises of the role of law and society in seeking solutions. Nothing could be more urgent than a move away from the predominant presentation of climate change as being primarily a matter of science, economy and environment. It is vital to unite these images and concerns with the urgent human implications of climate change – indeed, its implications for the totality of embodied, biotic life on a living planet Earth.

Climate change is far more than a problem of measures of carbon dioxide, methane and the production of pollutants. It signals an urgent crisis of human hierarchy and a crisis of self-understanding. Climate change calls out for new ways of looking, hearing and acting in the world. It calls out for a justice embracing the whole of the vulnerable living order. It calls out for a transformation – in response – of human society and of law itself. This collection offers one unique strand of a far wider search. It points unerringly towards the need, now, to choose between futures.

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