Editorial

Where Discourses Meet

Sustained reflection on the relationship between human rights and the environment has arguably never been more urgent, but the signs are that human rights discourse and environmental discourse have, at present, an uneasy and relatively under-theorized relationship.

The *Journal of Human Rights and the Environment* was first initiated in order to provide an academic forum in which a sustained inter-disciplinary conversation can take place concerning the links, reticulations, distinctions and analogies between human and environmental rights, issues, discourses, laws, institutions, policies and strategies. It is particularly exciting to see that vision take its first public step towards realization with the publication of this, the inaugural edition of the journal.

Deeply significant concerns lie behind the need for such an academic conversation. The integrity of the Earth's ecological systems is under relentless and destructive pressure from the adverse impacts of human activity. At the same time, along with the multitudes of defenceless living species adversely affected by the degradation of our shared environment, millions of human beings also suffer the deleterious effects and destructive impacts of human activity, particularly in the context of economic globalization. Millions of human beings live in crushing impoverishment, ill-health, political disempowerment and under conditions of profound social exclusion and growing risk. Moreover, environmental degradation presently has a direct and disproportionate impact on the rights of the most vulnerable human beings and communities, such as indigenous populations, as Westra has long argued. It is hard to see what could be more important than urgent and sustained intellectual and political engagement with such savage realities.

Genuinely complex and challenging questions attend the role of human rights in relation to environmental initiatives. For example, if political and legal control of environmentally abusive practices is made more authoritative and extensive, there is a strong likelihood that environmental policies, rules, rights and responsibilities will conflict, for example, with human rights to development, privacy and private property. The resolution of such conflicts seems by no means straightforward. There is a related perception that the strong individualism in mainstream human rights discourse could form a barrier to the collective action necessary to rescue the environment from human practices that degrade its quality – a perception that may not be entirely fair, but which raises the manifold complex tensions and paradoxes concerning human rights discourse already well-discussed in critical human rights literatures. Minimally, human rights and civil liberties can protect the freedom of expression, information, association and protest necessary to effective collective action when the state does not respond rapidly enough to environmental challenges, but questions remain concerning precisely how human rights law and discourse can evolve to be fully and substantively responsive to growing environmental challenges, physical and regulatory. Difficult questions attend the issue of which rights and whose rights

are to take priority in a conflict of legal paradigms, and these complexities extend of course to the vexed issue of whether the legal paradigms themselves can be reconciled.

Law remains, of course, a dominant domain for the discursive meeting between human rights and environmental concerns. The wholesale 'juridification' of the social spheres, and the virtually suffocating extension of law's regulatory reach into almost every micro-sphere of modern life, necessarily means that any engagement with the relationship between human rights and the environment must engage with the deeply fractured promise of the legal. The legal domain is deeply paradoxical in its relation to both rights discourse and environmental protection and regulation, holding out a complex mixture of potentialities, limitations and closures. Gearty's thoughtful discussion in this inaugural edition draws our attention to the challenging nature of law's individualism, particularly as mediated through the domain of traditional human rights law and philosophy, suggesting its limitations in relation to environmental concerns. He rightly stresses the potency, however, of looking beyond the traditional closures of mainstream human rights discourse towards the sociological emphasis on social struggle and the sociological critique of power, a position emphasizing the socially constructed nature of human rights – and which embraces a wide range of social movements united by their opposition to the limitations of extant power-relations. When we understand human rights as a form of critical energy, as a form of impassioned resistance to injustice, as a discursive and political tool of transformation, we can discern powerful connections with the concerns at the heart of the environmental movement. Here, argues Gearty, we find the 'indicators of a convergence between human rights and environmental protection', a convergence suggesting an intimate bond between human rights and the environment – and in the light of which human rights can be understood as 'a help, rather than a hindrance, to progress in the environmental field'. Gearty's argument, in a sense, invites a heartfelt celebration of the vigour of human rights languages – which can be almost endlessly deployed in defence of important interests without necessarily needing to be translated into law in order for that deployment to count as a success.

The discursive energy of human rights, so cleverly invoked by the environmental movement, however, presents a peril – one that further unites human rights and environmental concerns. Baxi's troubling account (in *The Future of Human Rights*, 2006) of the mutation of the Universal Declaration of Human Rights paradigm into a trade-related market-friendly paradigm, as global corporations seek to harness the discursive power of human rights to their advantage, signals the important need to be ever-mindful of law's intrinsically close relationship with economic power and of the closely related need to refocus on the impact of economic priorities, political policies and legal regulation upon the ontic realm of embodied life and the complex materiality of the natural world. Indeed, one powerful benefit of the growing discursive interface between environmental and human rights concerns is the intensified critical focus it inaugurates upon the ontic: environmental degradation forces us to address, directly and explicitly, what we all share in terms of our profound creatureliness and materiality. Environmental peril signals the need for law, long attacked by critical scholars for the closures of abstractionist legal subjectivity (and law's incomplete but violent forms of disembodiment), to be fully responsive to the pulsating realities of lived, bodily life and to the sensitive materiality of ecosystems. Critical and ongoing engagement with the nature of law, its radical limitations, its world-making power, its ideological closures and its strategic promise is, and remains, decisively important, because it is precisely in the closures of law, as well as in the exploitation of the

discursive openness of human rights, that corporations threaten human and environmental futures alike.

The particular dangers presented by corporations and in particular by corrupt corporate operational practices emerge forcefully in Baxi's thought-provoking contribution to this inaugural edition, as do the intimate linkages between human and environmental violation – an intimacy rendered especially transparent in the context of mass industrial disaster. The Bhopal catastrophe presents an enduring challenge to any contemporary self-congratulatory assumptions concerning the likely fruitfulness of corporate social and environmental responsibility discourses – often critically named as the blue- and green-washing of corporate practice and policies respectively. Bhopal presses at the very margins of our ability to comprehend the moral implications of the interlinked ways in which the 'Bhopal-violated' (to use Baxi's term) were systemically failed and betrayed. Baxi reconfigures our understanding of the Bhopal event into a series of intimately interlinked catastrophes, in which culpable corporate failure is compounded by a series of juridical (and arguably political and discursive) betrayals. Bhopal, as the largest peacetime industrial disaster, reveals something of the contours of what Baxi names as 'geographies of injustice' – as well as the deeply flawed and fractured nature of law's emancipatory promise. The 'Bhopal-violated' experienced the disaster, not as 'accident', but as injustice – injustice compounded by a startling series of juridical failures. What is very clear, and directly implied by Baxi's account, is the sense in which the entire ontic 'community of life' itself is threatened by such dangerous corporate malpractice, uniting humanity, all living beings and the living environment and its eco-systems in the radical potential solidarity of vulnerability – or affectability. And, consonant with Gearty's suggestion of the emergent unity between human rights and environmental concerns emerging from social movement activism, Baxi points to the 'larger narrative message' emerging from the 'movement of the suffering peoples', a message that re-crafts the 'discourse of environment and human rights, lifting us beyond the languages of victimage/victimhood and towards a "political situation, one that calls for a political thought-practice, one that is peopled by its own authentic actors"' and productive of a dynamic jurisprudence of human solidarity in the face of the global (and globalized) degradation of human beings and the environment alike – pointing us, indeed, to possible futures beyond 'the new paradigm of trade-related, market-friendly and environmentally hostile human rights'.

The intimacy of the ontic unity between humanity and the living environment is sensitively reflected by Gray's article, as is the enduring challenge presented by the centrality of the private property construct in modern liberal legal systems. Gray makes a compelling and carefully written case for the 'democratisation of property', stressing the fundamental importance of renewed political and civic awareness of the critical role of access rights to wild, natural space. Access to wild space, argues Gray, has a pivotal and symbolic place in the task of transforming our civic worldview along richer, more environmentally responsible and responsive lines, opening us to the inescapable importance of an almost visceral, evolutionary connection between our fundamental human sense of self and the natural environment. It is impossible to escape the rich resonance of the ontic in Gray's beautifully written exploration – and it is exciting to reflect on the ethical and political possibilities opened up by a more holistic understanding of democracy, ecological consciousness and ecological ethical responsibility. In short, Gray suggests that an expanding sense of public responsibility for the care of land sits in a mutually dynamic and reinforcing relationship with the notion of a carefully calibrated public right to participation in the environmental

goods of life. This is an interrelationship fundamental to a 'geography of hope' lying at the morally significant interface between human rights, property and the environment. Gray's geography of hope arguably forms a component of a nascent political and legal reconfiguration of relationships, to be set, alongside other values and arguments, against the exclusions, exploitations, separations and reductions lying beneath the 'geographies of injustice' invoked by Baxi's discussion of Bhopal. This sense of hope can also take strength from the growing evidence of judicial interpretive openness to the use of human rights standards to protect environmental claims.

Rights discourse, naturally enough, forms a central part of the conversation, ethical and legal, concerning the relationship between human rights and the environment. The discursive unity hinted at in the term 'a human right to a healthy environment', however, stands in a fractious relationship with underlying conceptual tensions surrounding its nature. One school of thought suggests that there are no human rights without such an environmental right. However, for many other commentators, the human environmental right in all its qualitative forms is difficult to conceptualize. Although approximately 60 national constitutions include a right to a healthy environment in their guarantees, the issue of what constitutes a clean or healthy environment remains thoroughly contested. Though it is safe to say that the concept of the human right to a healthy environment remains vexed by haunting ambiguities, Morrow and Shelton argue in their contributions to this edition that national and international courts are increasingly using the interpretive power at their disposal to invoke environmental concerns when adjudicating human rights matters. This, too, we can perhaps add to a nascent sense of hope.

Focusing predominantly upon developments in the law of England and Wales, Morrow focuses not only upon the evolution of human rights law, but also upon the development of environmental rights regimes to suggest that human rights-based approaches to environmental protection provide creative opportunities for the pursuit of litigation concerning environmental claims. The dynamic effect of these developments upon areas of the common law and the concept of fairness in judicial review suggest that law holds promise as an avenue for strategies of environmental protection and consciousness-raising, though as yet in a deeply qualified fashion. However, she also notes the limitations of human rights law, concluding that while such approaches have opened a vital discursive space, they 'have not for the most part greatly extended the protection on offer to environmental interests' as yet. In sum, it seems that her analysis suggests that litigation thus far has produced a series of incremental and muted gains, when in fact, what is required is a wholesale transformation of legal culture, itself impossible without a worldview transformation in relation to our social perception of the environment. What Morrow calls for, in terms of a reconfigured relationship between our view of the environment and our place in it, the UK courts seem to be tentatively approaching in somewhat limited terms. The contributions of Morrow and Gray, taken together, suggest that the UK courts and legislature alike seem to be responding, albeit in an attenuated way as yet, to the centrally important connection, as Gray puts it 'between environment, humanity, morality and civic entitlement'.

Shelton, like Morrow, focuses on the role of adjudication in the development of environmental protection, drawing out the fact that courts generally have wider scope than is often acknowledged for the interpretive development of the environmental dimension of human rights. This scope, arguably, forms part of the fractured promise of the legal – for judicial interpretation, as we know, can cut more than one way – but again, there is room for some hope. In particular, Shelton identifies compelling

evidence that a range of courts already invoke international documents, national constitutions and national laws to give substantive content to a human right to a specified environmental quality. She adverts to the general precedence given to procedural human rights linked to environmental protection, but points out the inherent limitations of an emphasis on the procedural – an emphasis driven, in part, by political caution. In the light of such decisive limitations, it becomes vital to examine the potential for the law to develop a substantive content to human environmental rights. Shelton explores the way in which law's responsiveness, driven by litigation, develops novel approaches as a result of judicial interpretive openness to international standards and to the dynamism of evolving values in contemporary ethical life, providing a careful argument that casts doubt on the assertion that it is impossible to provide substantive content to environmental human rights. And against those who argue that courts are institutionally ill-suited to elucidate or specify the content of an environmental right in the light of the open-textured nature of the values involved and the complex technical questions surrounding environmental cases and issues of environmental causation, Shelton points out that the adjudication of complex, value-based and technical subjects are scarcely novel territory for the judiciary. Again, in Shelton's argument, it is possible to discern the important link between environment, humanity, morality and civic entitlement. In her analysis, moreover, it is clear that the substantive content of human rights can operate as constraints against majoritarian political excess – something procedural rights alone could never achieve. At the same time, the courts, by allowing public interest litigants to speak on behalf of environmental concerns, perform an important role as adjudicative conduits of representation. Institutional factors, however, constrain the role of the courts. In common with Morrow, Shelton draws our attention to the fact that issues such as a deferential standard of review can limit the impact of the courts in relation to the protection of environmental human rights. However, Shelton's analysis gives further cause for hope regarding the unfolding search for the correct institutional balance between adjudication and legislation in the increasingly important attempt to balance environmental, democratic and civic concerns through the vehicle of human rights law.

It is clear from the contributions to this first edition of the *Journal of Human Rights and the Environment* that despite manifold divergences and the potential for profound conceptual conflict, human rights and environmental discourses increasingly share a set of common concerns and challenges. These concerns and challenges sit at the important interface between human social and political organization and the natural ecology of which we are but a part. Moreover, as we have seen, the multiple social movements related to these two important discursive domains have some shared agendas and concerns and a common passion for justice, whether conceived of as social justice, environmental justice or both. Both the human rights and environmental movements, arguably, are attempting to respond to globalization and the potentially destructive effects of current economic paradigms on human beings and the environment. Both movements seem forced to grapple with the deleterious, sometimes vicious, impacts of corporate excess and the pursuit of the profit motive to the exclusion of other values and imperatives. And, despite some evidence of conceptual conflicts, it can also be argued that both human rights law and discourse and environmental law and discourse, on at least one reading, share common philosophical roots – roots that it is perhaps time to address, embrace and reflect upon more explicitly.

The establishment of this journal constitutes a recognition of the important responsibility of the academy and of the 'public intellectual' to address the common

concerns and pressing issues that now to a large extent frame not only environmental and human rights discourses but our entire future as human beings and actors within a larger natural matrix of which we are a part. The time is now ripe for an important intellectual task to be directly addressed by an ongoing and sustained academic conversation concerning the nature of the relationship between human rights and the environment. The political urgency of this conversation could hardly be more pressing as we approach the end of the first decade of the twenty-first century. This journal is intended to contribute to that urgent task.

Anna Grear (Founder and Co-Editor in Chief)
International Law and Human Rights Research Unit,
Bristol Law School, UWE, UK