Editorial

Crisis, injustice and response

This edition of the *Journal of Human Rights and the Environment* focuses on some of the multiple crises and forms of injustice – most especially the climate crisis – characterizing the present age: The theme of crisis and response is legible in each contribution to this edition – as is a concern with various sources and forms of injustice.

The first contribution to this edition implicates the deeper epistemological crisis of modernity lying beneath the conceptual poverty of ecosystem approaches in environmental law and offers in response a biopolitical analysis laying this poverty bare and indicating future research directions for a critical environmental law (Vito De Lucia). The second contribution addresses the moral hazard presented by the relatively unquestioned priority given to unproven technical fixes for the climate crisis – and offers a response in the form of a critique that suggests the need for a justice-sensitive reorientation of approach (Henry Shue). The third contribution implicates various interwoven crises lying at the heart of the climate crisis and exposes the Eurocentric commitments driving them. In response, new foundations for climate justice are suggested by drawing upon the Declaration on Human Rights and Climate Change (Kirsten Davies et al.). The fourth contribution to this edition addresses energy governance – an issue intimately linked with climate injustice and the climate crisis – offering in response a comparative analysis of human rights and sustainable development law and their potential to provide a just and future-proofed energy governance system (Vincent Bellinkx and Wouter Vandenhoele). The fifth and final contribution addresses a very particular climate justice lacuna in discussions of the Paris Agreement and of climate justice and human rights generally: the failure to address the ‘continual’ extraction of fossil fuels – to which a response is offered in the form of three analytical concepts aiming to bring rights and justice considerations into the centre-frame of climate change discussions (Julia Dehm).

Crisis, injustice and response emerge therefore, as a theme, sometimes implicit, sometimes explicit, yet always insistently present in the contexts (both background and foreground) of the discussions offered in this edition.

In ‘Beyond Anthropocentrism and Ecocentrism: A Biopolitical Reading of Environmental Law’, De Lucia examines the binary, linear assumptions lying behind the general enthusiasm for the ‘rise of ecosystem regimes’ in environmental law. Such regimes are increasingly viewed as pivotal responses to the multiple crises characterizing ‘the Anthropocene’. Yet while many scholars and policy makers see ecosystem regimes as suitable for addressing the shortcomings of environmental law, De Lucia sets out to problematize them. He does so by challenging both the linearity of the ‘progress narrative’ accompanying the development of such regimes and the underlying binary formulation of anthropocentrism *v* ecocentrism used to frame them. Drawing on what he calls ‘an analytics of biopolitics’, De Lucia argues that the familiar binary formulation is too simplistic to capture the

complexities and nuances intrinsic to environmental law. A biopolitical reading, by contrast, exposes environmental law's ambiguities and contradictions and reveals that both poles of the binary draw upon the same inadequate epistemology. A biopolitical reading, De Lucia suggests, enables exposure of the way in which concepts such as biodiversity and the ecosystem approach simultaneously function as '*dispositifs* of protection and control, conservation and subjugation'. Drawing on Esposito, De Lucia notes that 'In the same gesture, biopolitics includes and excludes life, creating a "zone of irreducible indistinction" where the enhancement of life becomes, or always already is, its subjection and subjugation'. In this light, environmental law's ambivalence stands starkly exposed: environmental law both conserves and commodifies 'nature'. In response, De Lucia suggests a future research agenda, stating that there may be a space in which it is possible to re-imagine environmental law – beyond this dilemma – suggesting that such a search is a task for the 'the critical environmental lawyer'.

The ambivalence of environmental law's duel imperatives of conservation and commodification is a theme reflected by critical environmental scholarship more generally and presents a particularly urgent dilemma given the central role of market imperatives in the ongoing plunder of living systems: capital-driven eco-governmentality is increasingly evident in the multiplying regimes of financialization, technification and managerialism so resistant to system-critical modes of justice-based praxis.

Such tensions emerge, albeit in a different register, in Shue's article, 'Climate Dreaming: Negative Emissions, Risk Transfer, and Irreversibility'. Shue takes on the problematic degree to which current responses to climate warming rely upon unproven technical fixes in the form of Negative Emissions Technologies (NETs), arguing that 'the feasibility and moral acceptability of heavy reliance on NETs are clearly major, but relatively little-discussed, issues'. Shue's particular focus is on BECCS, a technique that combines bio-energy with carbon capture and storage. All NETs approaches rely upon the removal of large amounts of carbon from the atmosphere to reverse the effects of the carbon being emitted – and NETs are extensively assumed to be an effective future response to the climate crisis. These, however, are essentially technical fixes – unproven – and Shue argues that such reliance amounts to an unjustified transfer of risk from the present to the future: given that 'Most NETs are hypothetical solutions, not confirmed solutions', reliance upon them is 'a moral hazard'. Reliance on BECCS is morally hazardous because, first, it has not been established that BECCS is feasible at 'a scale sufficient to matter', and even if it were, it has not been established that the operation of BECCS would be compatible with the international commitment to sustainable development or with food security. Secondly, the prospect of BECCS 'later' is insufficiently certain to justify the transfer of risk from the present to the future. Thirdly, Shue argues that 'no NET can "buy time" for unambitious mitigation because the later reduction of "overshoots" in emissions cannot reverse the passing of tipping points in the interim'. No NET, in other words, can turn back the tide on exceeding ecological limits and planetary tipping points – and delaying action now in favour of future-facing fantasies is to indulge in profoundly unethical dreaming: 'The substitution of the dream of later negative emissions for immediate mitigations is ... completely unjustified'.

How then might climate justice and ethical responsibility become more central to addressing the climate crisis and other crises of the Anthropocene? How can the epistemic centrality of Eurocentric binary assumptions and the unmediated priority of the imperatives of capital and *techné* be challenged in the name of a more expansive, all-embracing justice-sensitive response? One response, implicit in the contribution of

Davies et al., is to foreground the creaturely status of human beings and to place human rights – as a meta-ethical language of claim – upon new ontological and epistemological grounds.

Focusing on a range of background tensions informing responses to the human and environmental costs of climate change, in 'The Declaration on Human Rights and Climate Change: A New Legal Tool for Global Policy Change', Davies et al. reflect on the Declaration as a potential policy tool, expressing the necessity for new, imaginative human-rights-based thinking to be central to climate change strategies and future negotiations. Underlying the analysis offered by Davies et al. is an explicit awareness of the 'crisis of human hierarchies now characterizing the climate crisis' in response to which the Declaration 'creates space for non-Western ways of seeing and being as well as responding to insights emerging from new scientific understandings of the world'. The authors note a 'turning juridical tide' – arguing that it is 'vital that respect for human rights should now be understood as an indispensable element of any adequate approach to climate change'. 'Human rights', the authors argue, 'offer a powerful meta-ethical language of critique and the seeds of alternative future histories, but only ... where those rights are understood to refer to a re-imagined humanity'. These are not then, human-rights-as-usual: human rights are re-imagined in a situation in which multiple living beings and systems are co-situated in the dilemmas of climate injustice. The Declaration declares that 'Human rights and a profound commitment to climate justice are interdependent and indivisible' and that 'All human beings, animals and living systems have the right to a secure, healthy and ecologically sound Earth system'. The Declaration also addresses the deep tension between technological approaches and questions of justice lying at the heart of Shue's contribution – but in doing so, offers a non-anthropocentric conception of climate justice: in Article 7, the Declaration states that 'All human beings, animals and living systems have the right to fairness, equity and justice in respect of responses to the threat of climate change. This includes protection from deleterious impacts caused by adaptation and mitigation efforts to develop climate resilience, and by the potential deployment of climate geoengineering technologies'.

Davies et al., drawing upon the Declaration, offer a vision of human rights as multi-faceted semiotic tools for forging new, inclusive conversations about how responses to the multiple crises of the Anthropocene could be re-thought.

The theme of human rights as tools for the achievement of climate justice is also central to the contribution by Bellinkx and Wouter, which focuses on the environmental challenges emerging from energy production and consumption and on the questions of rights-based justice that concern energy needs as an aspect of the fulfilment of socio-economic human rights. In 'Normative Guidance for Energy Governance: Sustainable Development and Human Rights', the authors argue that a well-constructed system of energy governance is 'crucial in resolving environmental challenges to preserve adequate natural resources for future generations'. The authors offer an exploration of two key normative frameworks – human rights and sustainable development – that they suggest have 'the potential to guide energy governance towards social change and towards a just and future-proof energy governance system'. The authors examine five energy governance challenges: (1) lack of participation mechanisms; (2) the absence of environmental policy integration; (3) unsatisfactory protection of the interests of future generations; (4) challenges of availability and accessibility of energy for everyone; and (5) lack of adaptivity and reflexivity. Addressing each of these, the authors offer a comparative analysis of sustainable development law and human rights law as responses, arguing that both frameworks

can and should inform energy governance. The authors conclude that human rights law and sustainable development law 'reinforce each other in rejecting the hegemony of economic development interests in governance mechanisms, but they may disagree on which concern should prevail', and that, ultimately, when the two normative regimes conflict, sustainable development law 'offers more compelling guid[ance] towards a more future proofed energy system and liveable planet'.

Energy justice, climate crisis and human rights also key themes in Dehm's contribution, 'Post Paris Reflections: Fossil Fuels, Human Rights and the Need to Excavate New Ideas for Climate Justice'. Dehm presents a reflection one year on from the Paris Agreement, arguing that there is a blind spot in discussions of the Agreement – whether supportive or critical – namely, 'the continual extraction of fossil fuels'. The same blind spot, she suggests, besets considerations of human rights and climate justice. Dehm's reflection is framed by three events that coincided with the post-Paris Marrakech climate meeting: the election of the climate-change-denier Donald Trump as the President of the United States of America; new evidence of rising temperatures (and presumably of their effects) and the violent petro-state suppression of protestors peacefully blockading fossil fuel infrastructure at Standing Rock – pictures of which spread like wildfire across social media in 2017. Resisting the temptation to offer more grist to the mill of critical environmental legal engagement with the Paris Agreement's fragile political consensus and various failings, however, Dehm argues that there is a 'greater obligation to produce reparative scholarship that suggests different visions and pathways for alternative futures and climate justice'. In service of this particular goal, she offers a convergence of three analytical tools: a 'transnational law of carbon', infrastructure and global value chains. The combination of such analytical concepts, Dehm hopes, could 'provide heuristic devices' for constructing fossil fuel extraction as a human rights issue. Tracing and framing the 'complex, diffuse agencies, authorities and modes of legal regulation that authorize the extraction, circulation and combustion of fossil fuels' could enable climate justice considerations to go to the heart of fossil fuel path dependencies. This approach, Dehm hopes, might allow the Paris Agreement to operate as 'a hook on which people can hang their demands' and 'as a new tool to work with' – despite the fact that the Paris Agreement ultimately relies for its realization upon forms of scholarship and activism lying beyond its own parameters.

This edition offers, then, five distinctive future-facing approaches to the relationship between crisis, injustice and response: first, the hope of a more developed critical environmental legal engagement seeking spaces beyond the stifling dilemmas of environmental law; second, a powerful moral critique that challenges the assumed ethical trajectory of techno-hubristic climate 'fixes'; third, a new Declaration and policy tool bearing the seeds of alternative ontologies and epistemologies capable of reformulating the dynamic relationships between human rights, climate change and justice; fourth, new insights concerning the convergence between human rights and sustainable development – and their interactions – in the vital search for energy justice; and fifth, three mutually supportive heuristic devices for the future deployment of the Paris Agreement, and for framing fossil fuel extraction as a human rights issue.

Taken together, therefore, the contributions to this edition of the *Journal of Human Rights and the Environment* trace a cluster of invigorating sightlines towards alternative possible futures.

Anna Grear
Editor in Chief, Professor of Law and Theory, Cardiff Law School