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**TOWARDS 'CLIMATE JUSTICE'?
CRITICAL CHALLENGES AT THE
NEXUS BETWEEN HUMAN RIGHTS,
CLIMATE INJUSTICE AND
CAPITALISM: SOME LESSONS FROM
LIBERAL LEGAL SUBJECTIVITY.**

Dahrendorf Symposium Paper Series
Summary

About the author

Prof. Anna Grear is the Founder and Director of the Global Network for the Study of Human Rights and the Environment, Founder and Co-Editor in Chief of the well-respected *Journal of Human Rights and the Environment*, and a legal theorist whose work focuses largely upon questions of the law's construction of the human being and of the human relationship with the world, broadly conceived. Anna Grear is interested in interrogating ontological and epistemological suppositions informing the construction of legal subjectivity (including corporate legal subjectivity) and relating that analysis to potential legal responses to questions of climate justice.

This paper was developed for the 2013 Dahrendorf Symposium, a joint initiative of the Hertie School of Governance, London School of Economics and Political Science (LSE) and Stiftung Mercator.

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Abstract

TOWARDS 'CLIMATE JUSTICE'? CRITICAL CHALLENGES AT THE NEXUS BETWEEN HUMAN RIGHTS, CLIMATE INJUSTICE AND CAPITALISM: SOME LESSONS FROM LIBERAL LEGAL SUBJECTIVITY.

On 23rd September 2013, the global High Level Advisory Committee to the Climate Justice Dialogue, an initiative including former presidents and other leaders from a range of relevant fields (politics, science, business, civil society and academia) issued a Declaration on Climate Justice. The Declaration sets out five priorities for securing 'a just and sustainable future': empowering those most affected by climate change; reducing emissions; establishing a new investment model; enforcing accountability; building strong legal frameworks.

The emergence of the concept and language of 'climate justice' into national and international policy agendas and debates concerning climate change is undoubtedly a most valuable and timely contribution to reflections on the social and legal aspects of climate change. Without raining on the justice-facing parade, however, there are significant reasons to be aware of future dangers facing the language and concept of 'climate justice', for critical legal scholarship reveals a genuine possibility that the concept (just as 'human rights' and 'sustainable development' before it) will fall prey to corporate co-option in the service of 'business as usual'. Such a possibility does not mean, however, that climate justice should be abandoned – far from it. It does suggest, however, that its meaning must be forged in an ongoing critical reflexivity, and be contended for in the light of discursive mutations highly likely to emerge from corporation-friendly juridical, economic and political ontologies and practices of power.

This paper will explore the idea that 'climate justice' is best illuminated and achieved, not by a reflection upon climate justice and its characteristics (important as those are) but by a sustained genealogical reflection – informed by critical legal scholarship – upon the contours and characteristics of climate *injustice*.

When climate *injustice* is examined in the light of critical legal scholarship, what emerges is a highly patterned set of signals with deep relevance for 'climate justice' as a concept: First, that liberal law – in particular liberal law's *constitution of juridical subjectivity* – is (despite law's important aspirations to the contrary) thoroughly *tilted* and deeply implicated both in the genesis of the climate crisis itself and in continuing patterns of climate injustice. Secondly, that law's tilted ideological field and its related constitution of *homo juridicus/economicus* has profound implications for policy-making that invokes (as 'climate justice' policy does) human rights-based approaches and/or strong rule of law frameworks as modes of addressing the vexed question of climate accountability. Thirdly, that the construct of paradigmatic legal subject (and its core instantiation in the corporate form) reveals the vital importance for climate justice pursuits to make *immanent* the need for reflexive critical engagements with its own core assumptions if it is to succeed in its aims.

Critical legal scholarship suggests a need for vigilance, for progressive concepts are all too easily co-opted and made into tools in the service of 'business as usual'. Indeed, it is painfully obvious that neither human rights law nor environmental regulation and governance regimes have to date delivered the paradigm shift required by the climate crisis. In his extensive 2013 review of environmental governance, Turner argues that 'the global legal architecture' is itself thoroughly implicated in the root causes of environmental degradation (Turner, 2013, at 31) – that 'the very design of the law itself is fundamentally predisposed to environmental degradation and forms part of a dysfunctional global legal architecture which *cannot* achieve environmental sustainability' (Turner, 2013 at 32, emphasis added). The vexed question of whether the concept of 'climate justice' can break with this impasse can by no means be lightly dismissed.

In the course of its reflections, the paper will explore the highly patterned (and predictable from a critical perspective) nature of climate injustice, linking it with critical sociological accounts of the trajectories of capitalism and of the global corporate subversion of international human rights law, in particular. The paper will also explore related critical accounts of the construction of liberal legal subjectivity as a mechanism of human exclusion and its relationship with epistemologies of mastery and environmental destruction. Links will be explored between genealogical accounts of the intimacy between capitalism and colonialism; their imposed hierarchies of being and the privileged constitution of law's archetypal subject: *homo juridicus/homo economicus*. Finally, the corporation, as the ultimate instantiation of colonizing, appropriating *homo juridicus/homo economicus* will be framed as being the inevitable beneficiary of the ideological tilt of liberal law and its technical juridical constructions.

Central, then, to the paper's concerns is the insight that climate crisis is and always was a *crisis of human hierarchy*, and that this can be directly related to law's constitution of its subject and to the *juridical privileging of the corporate form*.

The search for a substantive and genuinely inclusive climate justice, therefore, should be informed by at least the following policy concerns and priorities:

1. The need to 're-engineer' the corporation's juridical constitution.
2. The need to expand legal subjectivity – through transformations in juridical standing; the development of new advocacy and process practices; and re-theorisation of legal personhood.
3. The need to break down the actor/acted-upon binary so fundamental to environmental law and governance regimes and to their policy languages.
4. The need to diversify agency and to embrace adaptive, complex self-governance responses emerging in non-state and commons-based initiatives.

5. The need to embrace complexity- and systems-based ontologies rendering fluidity, epistemic uncertainty and humility central to law's regulatory responses and procedural processes.
6. The need for ceaseless, reflexive epistemic vigilance to form a core priority of climate justice practices.

The analysis will have direct implications for at least three priorities of the Declaration on Climate Justice: empowering those most affected by climate change; enforcing accountability; building strong legal frameworks. It will also have highly relevant justice-related implications for the other two priorities: reducing emissions and establishing a new investment model. The concept of 'climate justice' will have been brought into direct interface with a vital tradition of world-facing critical legal scholarship highly sensitive to forces of co-optation/capture *intrinsic* to the structure of modern law and its formations of subjectivity. In the light of a sustained critical reflection on climate *injustice*, 'climate justice' is rendered more semantically *alert*, reflexive, adaptive, and thus better able to achieve resistance to corporate capture. This will (in the light of critical legal scholarship) be *fundamental* to the future prospects of 'climate justice' escaping the trajectories of law-as-usual in order to deconstruct the *juridical* components of climate *injustice* and to construct the law and policy foundations of a 'justice' worthy of the name.