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DEBATE FORUM

‘MIND THE GAP’: ONE DILEMMA CONCERNING THE EXPANSION OF LEGAL SUBJECTIVITY IN THE AGE OF GLOBALISATION

***Anna Grear*¹**

A Prelude: Terra’s Predicament

Once upon a time there was a planet – perfect green and egg-shell blue. It hung, fragile and ancient, in the yawning firmament of space-time. On the planet-surface – a thin crust riding a molten sea – one species outreached all others, reaching for the vaulted heavens with an inventiveness that far outstripped its own moral insight. It took a river of time and thought – but after a slow start the inventiveness of the Terrans built to an accelerating howl driven by a complex current of exchanges and interplays too vast to trace.

Now, the seething world of Terra has reached a crisis point threatening the very materiality of life itself. The planet teeters at the tipping point.

The restless Terra-North need for expansion has emptied out civilisations, constructing in their place vast edifices of thought and speech, action and endless taking – until the rest of planetary life succumbed to the shadow-threat in which the ‘terminus’ now lurks, for Terran chemicals have leached into the very fluids of the planetary body, crushing the great terrestrial lung and engorging its ventricles with the toxins that now seize every rhizomatic finger of Terra’s sprawling vegetation.

Against the gathering gloom of smoke-smeared skies, giants open sonorous, flashing throats to swallow the world whole. These creations of Terra-North, once servants – now masters – and possessing characteristics that no Terran ultimately can – leap across Terra in the flicker of a sleepless eyelid, dismembering time and space, dominating everything that they are not. The ‘great unsleeping eye’, the ocular rulers of multiple spheres, the giants expand, crowned in neon, while in their shadows, the least powerful Terrans dissolve. Terra, her biotic mysteries torn into mathematical shards, her warm inaudible throb buried beneath ceaseless chattering media, lies ravaged, while the giants appear and disappear, assuming and discarding materiality at will. They slip instantaneously across boundaries and borders, exploiting porosity, but they divide Terra with impenetrable walls through which no breathing thing can pass.

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This imaginary scene is offered by the author as a way of trying to paint a linguistic image of some of the key themes invoked by the reflections herein. Key among these themes are certain closures of liberal legal ideology, ones often criticised by scholars suspicious of the ideological foundations of law's traditional commitment to capitalist values, structures and power. The themes of property, capitalism and liberal legal ideology imply powerful links between the broad analysis offered here, and, for example, Norrie's famous analysis of the ideological (and historically instantiated) structure of criminal law (in *Crime, Reason and History* – cited below).

One 'Critical Map' of the Global Present

We live – it seems – in dangerous times. Our planet (and we who inhabit it) face unprecedented threats in the form of climate change, environmental degradation, the eradication of entire species of flora and fauna, looming sets of interlinked eco-system crises and a growing sense that the ravages visited upon the delicate balance of our world could even, at this point, be irreversible. Meanwhile, in social terms, we witness a burgeoning and unprecedented *global rift* between rich and poor accompanied by a rapid and seemingly relentless deepening of human vulnerability on a whole set of measures, and linked by scholars to the dynamics of neo-liberal globalisation.² Indeed, it has been pointed out that globalisation and its patterns of impoverishment and structural injustice³ closely mirrors the differential impacts of climate change⁴ – for it is the poorest societies, groups and individuals who most lack the capacity and/or resilience to respond and adapt.⁵ At the same time, these patterns are linked, through the theme of globalisation again, to the ascendancy of global corporate power⁶ – itself implicated in many a human rights abuse and environmental

² P. Kirby, *Vulnerability and Violence: The Impact of Globalisation* (London, Ann Arbor: Pluto Press, 2006) for an extensive survey of both scholarship and evidence. See also *UNDP Human Development Report 1999* (Oxford University Press, 1999).

³ See, for an excoriating critique, U. Baxi, *The Future of Human Rights* (Oxford University Press, 2006).

⁴ See S. Humphreys (ed.) *Human Rights and Climate Change* (Cambridge University Press, 2009). See also UNEP, *Global Environment Outlook GEO4: Environment for Development* (United Nations Environment Programme, Nairobi 2007):

⁵ See, for example, the range of contributions stressing this point in (2010) 1(2) *Journal of Human Rights and the Environment*.

⁶ B. De Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworths, 2002) p.167 describes transnational corporations (TNCs) as 'the key agents of the new world economy'. Gill suggests that social institutions have been redefined worldwide 'to create an emergent market civilization – a monoculture of both social development and mind that is associated with a new political economy of disciplinary neoliberalism': S. Gill, 'Constitutionalizing Inequality and the Clash of Globalizations' (2002) 4 *International Studies Review* 47-65 at 49. Shamir suggests that scholars of the global economy, notwithstanding vigorous disagreements concerning the complexities of globalisation are in complete agreement 'regardless of their disciplinary, analytic or ideological inclinations [on the fact that] corporate global rule is already here': R. Shamir, 'Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony' in B. De Sousa

disaster.⁷ Arguably, we can and should now place the growing vulnerability of human and animal populations, and of the living systems that support them, in direct relationship to the relatively hegemonic ideological closure currently dominating the world order – if not always in straightforwardly causal terms (though there are reasons enough to link deepening vulnerability and globalisation as a causal matter⁸) then as a *deliberate political choice*.

There is an urgent need to challenge the current confluence between global corporate interests and what we can think of as a widespread state capitulation. Global corporate power (or what some have termed in broader terms as the ‘corporate takeover’⁹ of contemporary life) is not convincingly resisted by most states. In fact, many states actively court transnational corporations and their interests, pursuing neo-liberalism as the ideology of choice.¹⁰ For states attempting to resist the strictures of neo-liberalism, the strategic power to refuse investment operates as a crucial mechanism in an oppressive ‘politics of side effect’¹¹ producing forms of domination¹² which, on analysis, suggest that the political meta-power of global capital is an insidious but decisive shift in the nature of power itself.¹³ State compliance/complicity is effectively mandated – especially for the poorest nations on earth:¹⁴ International organisations such as the World Trade Organisation and the World Bank, the ‘midwives’¹⁵ of the globalised neo-liberal order, force conditionality packages upon cash-strapped developing nations, ensuring their conformity, no matter how reluctant, to the imperatives of neo-liberal capitalism.¹⁶

Santos and C.A. Rodrigues-Garavito, *Law and Globalisation from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005) 92-117 at 92.

⁷ See C. Jochnick, ‘Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights’ (1999) 21 *Human Rights Quarterly* 21; D. Kinley and S. Joseph, ‘Multinational Corporations and Human Rights: Questions about their Relationship’ (2002) 27 *Alternative Law Journal* 7-10; Baxi, *The Future of Human Rights*.

⁸ Kirby, *Vulnerability and Violence*.

⁹ G. Monbiot, *Captive State: The Corporate Takeover of Britain* (Macmillan, 2000).

¹⁰ See Gill, ‘Constitutionalizing Inequality and the Clash of Globalizations’; U. Beck, *Power in the Global Age* (Cambridge: Polity Press, 2005/6).

¹¹ Beck, *Power in the Global Age*, p.117.

¹² See R. Went, *Globalization: Neoliberal Challenge, Radical Responses* (Pluto Press: London, 2000).

¹³ Beck argues that contemporary globalisation represents ‘one of the most important changes there has been in the history of power’ (*Power in the Global Age* p.52) – and that TNCs’ function, in effect, as ‘private sector quasi-states,’ *ibid*, p.75.

¹⁴ Beck notes that the few countries in the global South that have attempted to reject neoliberal strictures have been effectively forced to submit under pressure from the World Bank and Western funding bodies; Beck, *ibid*, at p.123. Richardson has argued that the World Bank and the IMF have most pressurised those marginalised societies where poverty is most rife – insisting on structural adjustments such as deregulation, privatisation and the removal of protective policies: J.L. Richardson, ‘Contending Liberalisms: Past and Present’ (1997) 3 *European Journal of International Relations* 5-33.

¹⁵ Richardson, *ibid*; Beck, *Power in the Global Age* p.120.

¹⁶ See L. Wallach and M. Sforza, *The WTO: Five Years of Reasons to Resist Corporate Globalization* (Seven Stories Press: New York, 1999).

The concept of national state sovereignty stands weakened, but in a highly selective way that disadvantages the powerless most of all.¹⁷ Nation states have effectively been re-constituted as profoundly porous to global capital (open-bordered good 'host states')¹⁸ – while, at the very same time, the discursive construction of anti-terror imperatives and the permanent 'state of exception'¹⁹ in which we now live ensures that the 'hard edges' of state power are felt with intensifying force by a state's own human population. The same can be said of all those vulnerable non-citizens whose living, opaque and tangible bodies (in all their vulnerability) press up against the policed and exclusory borders of the modern state. A series of further, related trends seem to converge in a stifling closure: Surveillance, the spreading privatisation and increasingly privatised control of public space²⁰ – the construction, in short, of a virtual Panopticon reflecting a combination of state and (frequently corporate) privatised oversight of civic space; the deepening corporatisation of the state itself; the commodification of the social spheres,²¹ these combine to produce a radical contraction of public space, a contradiction of civil liberties and a concomitant reduction in our ability to resist. Meanwhile, law (as the institutionally dominant mechanism for the regulation of societal life) provides an arterial mechanism through which the ideological flow driving these and related closures find expression in a host of organisational structurations and patterns offering little in the form of either resistance or critique.²²

¹⁷ Santos argues that TNCs are at the 'core of the loss in economic national sovereignty [and that as a result] their actions, no matter how offensive to [for example,] human rights, are unlikely to collide with considerations of national interest or security that might otherwise prompt the corrective or punitive intervention of the state': Santos, *Toward a New Legal Common Sense*, p.268. For Baxi the 'end of the nation state' thematic emerging from the selective diminution of sovereignty relates merely to the end of the 're-distributive state', marking 'in some important ways ... the end of the processes and regimes of *human rights-oriented, redistributionist governance practices* in ways that convert the mandate of "progressive realization" of social, economic, and cultural rights of the people into an ongoing cruel hoax': Baxi, *The Future of Human Rights* p.248.

¹⁸ Baxi, pp.248-9.

¹⁹ See G. Agamben, *State of Exception* (University of Chicago Press, 2005).

²⁰ 'It is increasingly the case that spaces to which the public have physical access are becoming the objects of heightened and more overt forms of private control. For example, the proliferation of closed circuit television cameras and other forms of private security in shopping malls, town centres and even residential areas': B. Fitzpatrick and N. Taylor, 'Trespassers *Might* Be Prosecuted: The European Convention and Restrictions on the Right to Assemble' (1998) 3 *European Human Rights Law Review* 298-300, footnote 1. See also C.D. Shearing and P.C. Stenning, 'Private Security: Implications for Social Control' (1982-1983) 30 *Social Problems*, 493; K. Gray and S. Gray, 'Private Property and Public Propriety' in J. McLean (ed.) *Property and the Constitution* (Hart Publishing: Oxford, 1999) pp.11-39; K. Gray and S. Gray 'Civil Rights, Civil Wrongs and Quasi-Public Space' [1999] *European Human Rights Law Review* 46-102A; A. Gear, 'A Tale of the Land, The Insider, The Outsider and Human Rights' (2003) 23 *Legal Studies* 33-65

²¹ A. Gear, 'Human Rights – Human Bodies? Some Reflections on Corporate Human Rights Distortion, The Legal Subject, Embodiment and Human Rights Theory' (2006) 17 *Law and Critique* 171-199 at 189-192.

²² Law has long been co-imbricated with the structure of liberal capitalism: See, for stimulating accounts and examples, M. Horwitz, 'Santa Clara Revisited: The Development of Corporate Theory' (1985) 88 *West Virginia Law Review* 173-224; M. Neocleous, 'Staging Power: Marx, Hobbes and the Personification of Capital' (2003) 14 *Law and Critique* 147-165; C. Federman, 'Constructing Kinds of

At the same time, however, the global ascendancy of legal-rights-discourse means that many voices speaking *as* and *for* the excluded and subaltern now turn to law, legal rights and the legal process as part of an attempt to address injustice and exclusion. One particularly relevant example of this, for the purpose of the present reflection, is the growing contemporary concern for the expansion of legal subjectivity. We witness, for example, increasing calls for the recognition of the potential legal subjectivity of animals,²³ the environment and elements within it,²⁴ while at the same time we encounter growing interest in the legal subjectivity of post-human entities such as artificial intelligences or agents, robots and the like.²⁵ This debate is, of course, vitally important. However, if it is to lead to any form of justice worthy of the name, reflection needs to be placed against the contextual backdrop of hegemonic globalisation – for it is when we place the extension of legal subjectivity against this that we can identify one particular future challenge of central importance. There is a need to face up to the challenge of ‘minding the gap’ (likely to deepen) between laws ‘outsiders’ (those currently excluded from the interiority of neo-liberal privilege) and law’s ‘insiders’ (those whose interests and even whose legal subjectivity emerges from) their virtually seamless fit with the deep commitments that currently constitute the interior of neo-liberal capitalistic techno-culture.

Identifying/Constructing ‘the gap’

It can be argued, of course, that all categories and ‘gaps’ are, in the final analysis, a choice of closure – a way of demarcating, more or less – choices about the perception/construction of ‘monads’ within an otherwise undifferentiated field.²⁶ It is important, however, while acknowledging this and other valuable insights of post-modernism and post-humanism,²⁷ to stress the urgency of developing a political consciousness responsive to the vulnerability of embodied life, bio-vitality and materiality – allowing this to form the basis of a material ‘excess’ as a means of delivering critique to the current closures of law and capitalism. We

Persons in 1886: Corporate and Criminal’ (2003) 14 *Law and Critique* 167-189; A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Butterworths: London, 2001).

²³ See, for example, C.R. Sunstein and M.R. Nussbaum (eds.), *Animal Rights: Current Debates, New Directions* (Oxford University Press, 2005).

²⁴ See C.D. Stone, *Should Trees Have Standing? Law, Morality and the Environment* (Oxford University Press, 2010).

²⁵ See, for a discussion of the implications of post-human insights for human rights, U. Baxi, *Human Rights in a Post-human World: Critical Essays* (Oxford University Press, 2007); see also G. Teubner, ‘Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law’, (2006) 33 *Journal of Law and Society* 497-521.

²⁶ Many contemporary scholars of various disciplines would likely accept this quasi-Deleuzian characterisation.

²⁷ The work of Haraway, for example, raises multiple compelling points: D. Haraway, *When Species Meet (Posthumanities)* (University of Minnesota Press, 2008); See also D. Haraway, *Simians, Cyborgs and Women: The Reinvention of Nature* (Routledge: New York, 1991).

need, it is suggested, to find a way of developing a jurisprudence and politics of compassion fully responsive to the lived realities of immiseration, exclusion and exploitation – and to their ethical demand. One part of this important task could be the placing of debates and philosophical puzzles concerning the extension of legal subjectivity within the overarching socio-material context of hegemonic globalisation and corporate social dominance.

It should be noted, related to this, and perhaps as an element of such an approach, that legal subjectivity, as currently constituted, has a distinctive ideological tilt – one ill-suited to the protection of animals and complex eco-systemic concerns²⁸ but ideally suited to the juridical advantage of the corporate form.²⁹ Given the effective domination of the world order by corporations to the proven detriment of humans, animals and environment alike, it seems most important when theorising legal subjectivity to be alert to any continuities with the (effective) napolitics of law's existing inclusions and exclusions, patterns that could map themselves almost seamlessly into new formulations of legal subjectivity. While it is clear, in relation to this point, that excluded human beings, animals and ecosystems are especially vulnerable and in need of legal protection from the excesses of globalised capitalism and its side-effects,³⁰ it is likely to be the case, also, that post-human entities such as artificial intelligences and robots can and will be conceived of as vulnerable. But while we should note, as a conceptual matter, that vulnerability itself is not a monolithic value and nor are entities monolithic in their 'identity'/'identification' for the purpose of describing them as vulnerable or worthy of an ethical concern responsive to vulnerability, there remains, arguably, a vital political need to construct a critical fault-line attending putative post-human rights-claimants, in particular.

This fault line, in line with the argument already made, is intended to reflect an ethically and politically important distinction between liberal law/capitalism's 'insiders' (those with unhampered access to both the legal process and to a strong degree of 'fit' with the ideological structure of liberal law – a category including – quintessentially – the corporation) and those people and collectivities who are, along with animals and the environment, liberal law/capitalism's 'outsiders' – *and likely to remain so even if and when animals, the environment and post-human entities are granted legal subjectivity.* Historically, and

²⁸ See A. Grear, 'The Vulnerable Living Order: Human Rights and the Environment in a Critical and Philosophical Perspective' (2011) 2 *Journal of Human Rights and the Environment* (forthcoming); A. Grear, "'Sexing the Matrix": Embodiment, Disembodiment and the Law – Towards the Re-Gendering of Legal Rationality' in J. Jones, A. Grear, R.A. Fenton and K. Stevenson (eds.) *Gender, Law and Sexualities* (Glasshouse: London, 2011) pp.39-52; D. Nibert, *Animal Rights, Human Rights: Entanglements of Oppression and Liberation* (Rowman and Littlefield: Oxford, 2002).

²⁹ Grear, *Redirecting Human Rights* chs 3 and 4; Neocleous, 'Staging Power'.

³⁰ Nibert, *Animal Rights, Human Rights*.

contemporaneously, law's outsiders, according to a range of critical accounts, are the (some would doubtless want to say 'predictable') historical (and contemporary) recipients of discursive and physical violence – those who disproportionately bear the costs of a capitalistic techno-rationality: the global poor, women, children, other non-dominant humans – such as racially non-dominant groups and the disabled – along with animals, sensitive eco-system habitats and the environment as a whole.³¹ This group of 'outsider' subjectivities/(and 'objects') have long provided the plundered, exploited 'bodies' in the service of capitalist appropriation – and also often – the 'bodies in the way' of capital. Haunting and instructive examples, such as Bhopal,³² stand as mournful case-studies – highly revealing symbols of the worst of the fallout from 'toxic capitalism'³³ – and equally symbolic of the juridical failure³⁴ that deepens capitalist injustice, rather than alleviating it.

When we start to reflect upon legal subjectivity and the case for its expansion, keeping a vivid focus upon the background of globalisation and the tragedies littering the history of the relationship between law and capital, is essential – for it is highly likely that many post-human and/or techno-entities will *share* the advantages of the corporate domination and marketisation of the social spheres as 'insiders' to the capitalistic techno-economy. This point, however, should not be monolithically read, for it is feasible to anticipate that some post-human beings will, as the 'products' of capitalist investment, be placed in a highly double-edged position, one requiring a critical ethical attentiveness.³⁵ Notwithstanding this possibility and its implications, it is a *virtual certainty* that the inconvenient and traditionally excluded subjectivities (objectified people, animals and natural systems) linked to traditional and contemporaneous injustices of the capitalist juridical order *will retain*, no matter how complexly, a quintessentially 'outsider' status (that is, unless the entire world-order moves from its existing ideological foundations). This virtual guarantee of continuing and perhaps even deepening outsider status is a matter that ought to be placed front and centre of reflection upon the extension of legal subjectivity to post-human entities – not in order to render extending legal subjectivity inherently problematic, but in order to render problematic the current reality of capitalistic law's dark fallout in that context.

³¹ Ibid.

³² See U. Baxi, 'Writing about impunity and environment: the "Silver Jubilee" of the Bhopal catastrophe' (2010) 1 *Journal of Human Rights and the Environment* 23-44.

³³ F. Pearce and S. Tombs, *Toxic Capitalism: Corporate Crime and the Chemical Industry* (Dartmouth: Aldershot, 1998).

³⁴ Baxi, 'Writing about impunity and environment'. pp 33-44.

³⁵ Consider the case of, say, a future 'cyborg' whose legs, arms and lungs, say, are corporately owned as 'a breakthrough' in science – and whose life is controlled by a mesh of contractual limitations and the rights reserved by the inventing company, including, perhaps, the right to 'remove' the corporately-owned 'body parts' should it be 'required' for reasons beyond the individual's later control or agreement.

Complexities, of course, abound. The rapidity and complexity of technological change necessitates a corresponding fluidity or responsiveness in theorisation, for a start. Additionally, there will always be contradictory realities in play: there will, for example, always be individuals (even groups) who break free of existing patterns of structural injustice, which while it is a welcome development, can present problems for the general observations about injustice and the related languages of identification ('women', 'blacks', 'the poor') – languages and generalisations remaining decisively important to those still locked in structural disadvantage. Furthermore, the implications of future developments in technology are likely to be extremely complex. Yet, notwithstanding these present and future complexities, and a host of other imaginable (and unimaginable) subtleties, it seems vital, as a political matter, to point out that there are, historically, now, and in the likely or foreseeable future, human beings (and animals and natural systems) that *remain and are likely to remain* constituted as profoundly '*outsider*' in real terms.

Final Thoughts: a Politics of Compassion?

Returning, then, to the concern haunting this reflection, it seems highly likely that present and future dominant groups ('insiders' – including future 'insider subjectivities' emerging from the heart of the capitalist techno-economy) will (continue to) possess privileges intimately related to the rising power of the corporate entities and priorities currently shaping the worst excesses of globalisation and its fallout. Meanwhile, it is likely that the yawning gap between the powerful and powerless will continue to grow in its significance and intractability. In this light, placing legal debates concerning rights-subjectivity against the larger backdrop of contemporary globalisation and the related excesses (historical and contemporaneous) of the intimacy between law and capital is an important political task. A politics of compassion – even as it is conducive to the extension of law's circle of concern beyond the human – must necessarily *reach beyond* the closures of law to respond to the tortured realities of the differential material and discursive subject-positions (including human subject-positions) generated by a burgeoning capitalistic techno-economy. A politics of compassion has arguably never been more urgent. As we open our minds to the important idea of the subjectivity of a range of putative new rights-claimants – it is essential that we never lose sight of those 'earthlings' (of whatever form) who remain trapped outside and beneath the power structures of our age. A burning question, of course, concerns precisely how we now construct a juridical order that is responsive, inclusive and possesses the plasticity to account for new and complex kinds of rights-holders while simultaneously ensuring full juridical responsiveness to the visceral realities facing currently (and traditionally) excluded subjectivities.