

Preliminary draft

Climate Justice and Disaster Law, by Rosemary Lyster
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I. Introduction

Climate Justice and Disaster Law attempts to do three things. First, it claims to demonstrate ‘the need for the establishment and implementation of a comprehensive body of Climate Disaster Law’.² Second, it seeks to apply Amartya Sen and Martha Nussbaum’s Capability Approach to develop a new theory of justice applicable to responses to the impacts of climate change. Third, it aims to develop at least one concrete proposal on a possible way to address the impacts of climate change. While highlighting important contemporary issues, the book does not really fulfil these (ambitious) objectives. Despite interesting insights, *Climate Justice and Disaster Law* reads as a whole as a rather confusing overview of some of the relations between climate change, justice, disasters and the law, among other things.

The book appears divided in two sets of chapters: a first half presents the climate regime; the second half discusses ‘climate disasters’. More specifically, the first two chapters provide a general background on climate science and the climate negotiations; much of this is of little relevance to the objectives of the book. Lengthy discussions of the interaction between climate research and politics in Australia and the United States constitute the main thread of Chapter 1. Fifteen pages discussing developments beyond the climate regime (e.g., the Sendai Framework for Disaster Risk Reduction) are awkwardly pasted in the middle of a theoretical chapter on climate justice.³ The definition of ‘adaptation’ comes as a surprise in a footnote, following dozens of pages after most discussions of this concept.⁴ The prominent judgment of a court in the Netherlands in the case of *Urgenda* is mischaracterized as a case that ‘incorporate[s] tort principles in determining governmental responsibility and even liability in the face of climate change’.⁵ Entire chapters read as little more than a desultory collage of reports’ or articles’ summaries, resembling the preliminary literature review of a doctoral dissertation whose topic is yet to be defined.

This adds to a somewhat simplistic, almost Manichean positioning of the author which hinders an analytical endeavour. ‘[T]he fossil fuel lobby and other vested interests including those of politicians themselves’ are presented as the evil, waging a ‘vociferous campaign’⁶ against any climate policies, with the passive complicity of ‘platitudes and half-truths at the UNFCCC negotiations’.⁷ Salvation is fortunately coming in the form of the ‘impartial and practical reasoning’⁸ outlined by the author. She insists that ‘[t]he local preconceptions and prejudices ... in fossil fuel jurisdictions ... surely cannot survive reasoned confrontation with

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² Rosemary Lyster, *Climate Justice and Disaster Law* (CUP 2015), at 155.

³ *ibid* 110-125.

⁴ *ibid* 193.

⁵ *ibid* 324. The case determines the primary obligations of the State, not its responsibility. On a more pedantic aspect, there is no concept of ‘tort’ in civil legal systems.

⁶ *ibid* 153.

⁷ *ibid* 347.

⁸ *ibid* 153.

information not restricted by the same parochialism'.⁹ To speed up this process of enlightenment, the author contends, '[t]he voices of vested interests and "unreason" need to be quietened'.¹⁰ It is not sure what this rhetoric seeks to achieve. Most of Lyster's readers would agree that fossil fuel interest groups have vested interests in hindering climate policies.

Despite these claims, the book makes little contribution to the effort of developing an articulated alternative argument. It relies excessively on sources of weak academic credibility, such as policy briefs developed for advocacy purposes – even when they go against a growing consensus in peer-reviewed publications. For instance, the author relies on advocacy documents to establish that 'climate change will displace as many as 200 million people'¹¹ by 2050 and that '[b]y 2020, an estimated 60 million people could be on the move from the desertified areas of sub-Saharan Africa towards North Africa and Europe'.¹² This is contrary to what most recent peer-reviewed publications have assessed in recent years as a diffuse and indirect impact of climate change on human mobility – one which cannot be reduced to such simple figures.¹³

Most detrimental to the academic value of the book, however, is the author's repeated attempt to engage with multiple concepts that remain undefined, obscure, unhelpful, and not really conducive to a better understanding of anything. With regard to disaster risk reduction, climate change adaptation and development strategies, for instance, 'the author proposes, consistently with a Capability Approach to Climate Justice, that in fact all three should be effectively integrated within the framework of disaster risk management for a post-2015 world'.¹⁴ What this means is for the reader to guess. There ought to be a distinction between 'disaster risk reduction' and 'disaster risk management', but this distinction is not explained. The claim that this statement is 'consistent' with a Capability Approach is less significant than if it was at least 'guided' by this approach. 'A post-2015 world' is a rather clear example of an excessively convoluted reference to, basically, now.

II. The Possible Relevance of a Capability Approach to Climate Justice

The attempt of the book to develop a Capability Approach to climate justice is rather unconvincing. The author only briefly notes the existence of multiple theories of climate justice (e.g., corrective, distributive and hybrid approaches and alternatives based on the beneficiary-pays principle and greenhouse development rights).¹⁵ She claims however that these theories either fail totally to address adaptation, or else focus 'on an equitable distribution of the costs of adaptation rather than the specific vulnerabilities and needs experienced by those at risk'.¹⁶ Therefore, she contends, 'a fresh approach to Climate Justice is ... warranted'.¹⁷ The author suggests that this approach should be the Capability Approach developed by Amartya Sen and Martha Nussbaum.

Why this approach would be particularly relevant, and how, is not clear. The author makes the rather obvious point that 'climate disasters have an overwhelming ability to *destroy*

⁹ *ibid* 347

¹⁰ *ibid* 154. See also *ibid* 347-348.

¹¹ *ibid* 140

¹² *ibid* 148

¹³ See, for instance, Foresight, *Migration and Global Environmental Change: Final Project Report* (The Government Office for Science, London, 2011); François Gemenne, 'Why the Numbers Don't Add Up: A Review of Estimates and Predictions of People Displaced by Environmental Changes' (2011) 21 *Global Environl Change* S41; and also Benoit Mayer, *The Concept of Climate Migration: Advocacy and its Prospects* (Edward Elgar 2016).

¹⁴ Lyster (n 2) 194.

¹⁵ *ibid* 126-131

¹⁶ *ibid* 131.

¹⁷ *ibid* 132.

Capabilities'.¹⁸ She describes the impacts of Hurricane Katrina as 'a salutary reminder of the many ways in which climate disasters interfere with the Capabilities of the poor and the vulnerable'.¹⁹ In a *non sequitur* scattered throughout the book, the author 'suggests that a Capability Approach of Climate Justice and Disaster Law is sound, as it establishes the need to protect the freedoms and functioning of humans and non-humans all over the world in the face of climate disasters'.²⁰ An ethical reasoning cannot be considered as 'sound' just because one likes its conclusion. If this conclusion appears to be right, it is because it could be achieved more directly by simpler, even intuitive ethical reasoning without speaking about 'capabilities'. This, to the contrary, suggests that a Capability Approach might not be particularly useful to the author's conclusion.

It is already well established that climate change impedes development and affects the enjoyment of human rights.²¹ Speaking about 'capabilities' rather than human rights or development could conceivably lead to new insights, but this book provides no evidence of that. It does not engage with the theoretical underpinning of this approach, nor does it lead to any new conclusions or insights *guided by* the Capability Approach (as opposed to *consistent with* it). Rather, as noted, the author attempts to prove the relevance of her approach by showing that it leads to the exact same conclusions as could be reached without it.²²

III. A Climate Disaster Law?

Through the book, Lyster also attempts to justify the need of establishing 'climate disaster law' as a field of law. Yet, the book does not contain what would have been expected to support such an argument, for instance a systematic, articulated presentation of sources and/or principles forming the skeleton of what would be an emerging legal field. Arguing that climate disaster law is emerging as a legal field requires the demonstration of at least two elements. One would first need to establish that some disasters can be attributed to climate change ('climate disasters'), forming a defined material scope. One would also need to show that the distinction between 'climate disasters' and other disasters is normatively relevant – either that it is already being made in existing law, or that it would be useful to make such a distinction through new legal developments. There is little effort in the book to engage with either of these questions. I would suggest that these assumptions are misleading.

The first assumption is that some disasters can be attributed to climate change. Since the notion of 'climate disasters' is rather new, the reader would have expected some efforts to define it and even to justify its usefulness. Yet, when the author claims to cite the definition of 'climate disaster' by the Intergovernmental Panel on Climate Change (IPCC), what she actually cites is the definition of 'disaster'.²³ Elsewhere, Lyster writes: 'Marginalized people are especially vulnerable to climate change which is rarely caused by a single factor.'²⁴ It seems that the author meant 'climate disasters' instead of 'climate change' – the word 'rarely' would

¹⁸ *ibid* 139.

¹⁹ *ibid* 238.

²⁰ *ibid* 384.

²¹ See e.g. UN General Assembly Resolution 70/1, Transforming Our World: the 2030 Agenda for Sustainable Development (UN Doc A/RES/70/1, 21 October 2015) para 14; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), preamble.

²² For instance Lyster (n 2) 159, noting that 'there are clear links between a transformational form of adaptation and the author's adoption of a Capability and procedural justice approach to Climate Justice and Disaster Law'. See also *ibid* 281.

²³ *Ibid* 132, citing the Special Report of the First and Second Working Group of the Intergovernmental Panel on Climate Change (IPCC), *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (CUP 2012) 33 (the definition is actually to be found at 31).

²⁴ Lyster (n 2) 161.

make little sense otherwise. Yet, if ‘climate disasters’ are not caused by one single factor (such as climate change), one could wonder how a ‘climate disaster’ could be identified. Eluding this question, the author simply notes at one place that attribution of physical events to climate change is ‘complicated’.²⁵ Regarding the growth in ‘losses from natural disasters’,²⁶ the author points to²⁷ but mischaracterizes the findings of the IPCC according to which ‘[i]ncreasing exposure of people and economic assets has been the major cause’²⁸ of this growth. Rather, the author implies that this increase is caused by climate change.²⁹

Even if one could somehow attribute particular disasters to climate change, the author would need to justify that the distinction is normatively relevant if she was to justify establishing something called ‘climate disaster law’. The book brings little evidence that this distinction is usually made in existing laws and policies. To the contrary, almost all laws and policies documents mentioned in the book relate *either* to climate change (e.g., climate change adaptation) *or* to disasters (e.g., disaster risk reduction).³⁰ The author finds excessive comfort in that the European Union disaster risk management framework mentions the need to ‘tak[e] into account the future impacts of climate change’³¹ and that the Philippines’s Disaster Risk Reduction and Management Act of 2010 ‘includes several climate change references’³² (which she does not find useful to detail).

The idea of a ‘climate disaster law’, the author notes in the book’s preface, ‘builds on the efforts of other legal academics who, following Hurricane Katrina and the events of 9/11 in the United States, established a new area of legal academic endeavor – Disaster Law’.³³ She adds that, by ‘climate disaster law’, she ‘means a portfolio of legal rules which deal with: prevention; emergency response, recovery and rebuilding; and compensating the victims of climate disasters’.³⁴ Thus, ‘climate disaster law’ seems to be little more than ‘disaster law’ applied to ‘climate disasters’ (whatever these may be). Despite a few references to climate change in disaster policy documents and disasters in climate change policy documents, there appear to be no sources or principles of disaster law specific to ‘climate disasters’ which would justify describing ‘climate disaster law’ as a particular legal field.

Even though climate disaster law does not appear currently as a distinct field of law, one might argue that it should. This could be Lyster’s contention when she writes that ‘the impacts of climate change, among other factors, have created a widespread sense of precariousness’,³⁵ and when she emphasizes the harms suffered as a result of ‘climate disasters’. That disasters somehow associated to climate change cause harm, however, is only one isolated part of the truth: in fact, all disasters cause harms that ought to be addressed. Climate change is certainly relevant in assessing physical hazards and better preparing societies to them.³⁶ Legal and ethical claims for compensation could also arise when climate change exacerbates the harms suffered by particular societies, as blame could arguably be put mostly on a few States or, perhaps, companies. Beyond long-term planning and issues of international responsibility, however, there appears to be no ground for a distinction to be made in the actual

²⁵ *ibid* 133.

²⁶ *ibid* 134.

²⁷ *ibid* 134, footnote 128

²⁸ IPCC (n 23) 269.

²⁹ Lyster (n 2) 134.

³⁰ *ibid* 184ff.

³¹ *ibid* 186.

³² *ibid* 196.

³³ *ibid* xvii.

³⁴ *ibid* xvii.

³⁵ *ibid* 135.

³⁶ This is so even though, at present, demographic and economic factors seem to have a greater impact on the evolution of disaster risks than climate change. See IPCC (n 28).

responses to disasters based on their causal association to climate change. Every disaster, whether related to climate change or not, affect people's rights and 'capabilities', and every disaster ought to be avoided or otherwise addressed through assistance and protection laws and policies. There is no justifiable need for a *distinct* body of laws on climate disasters, although there certainly is a need for reinforcing approaches to reduce disaster risks on the one hand and to address compensation claims related to the responsibility of excessive greenhouse gas emitters on the other hand.

The concept of 'climate disaster' that Lyster proposes would just add to a list, already too long, of 'climate things', which scholars have been trying to distinguish from other 'things'. Over the last decade or so, academic publications have become replete with discussions on 'climate refugees', 'climate migration' or 'climate displaced persons', and new concepts such as 'climate victims', 'climate emergency', 'climate conflicts' or 'climate wars' may also have a growing publication potential. If this trend continues, nothing will stop scholars from inundating academic debates with publications on 'climate floods', 'climate clouds', 'climate hunger', 'climate malaria', 'climate deaths', or 'climate economic crises', and so on. That climate change impacts a lot of 'things' does not mean that it creates distinct 'climate things', which ought to be treated differently. Whether this is migration or disasters, conflicts or malaria, climate change often just reveals to our attention the long forgotten shortcomings of existing institutions – our inability to protect all migrants, address all disasters, solve all conflicts or fight malaria everywhere, for instance. The solution does not lie in new concepts and categories or specialized laws and institutions. Rather, the solution lies in reviewing existing laws and institutions to address these shortcomings.³⁷ It is after all a fundamental principle of justice that all like 'things' should be treated alike. Only 'climate things' that are different in a relevant way require a distinct treatment.

IV. Ways Forward: Capabilities or Compensation?

A third aspect of the book under review is its attempt to develop a proposal on a possible way to better address the impacts of climate change. The author calls for the creation of a 'Climate Disaster Response Fund'. This fund, she suggests, could be placed under the Warsaw International Mechanism on Loss and Damage, and it could draw on a levy on the 200 largest fossil fuel companies.³⁸

The book contains little justification for even the most basic modalities of the proposal (e.g., why companies rather than States? Why only fossil fuel companies? Why the top 200?). It fails even to mention some obvious issues (what about differentiation between developed and developing States?). Nor is the proposal really original.³⁹ The author provides three examples of funds established to address specific environmental issues: i) a fund created in the United States in 1980 to tackle contamination of land and water by certain hazardous substances; ii) a fund (confusedly presented alternatively as a US fund or an international fund) to address oil pollution from accidents at seas; and iii) a fund for compensation of nuclear accidents in Japan.⁴⁰ Yet, she omits to mention the additional difficulties that would appear

³⁷ I developed this argument with regard to a particular 'thing' in Mayer (n 13). See also Calum Nicholson, "'Climate-induced Migration': Ways Forward in the Face of an Intrinsically Equivocal Concept' in Benoit Mayer and François Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law* (Edward Elgar forthcoming).

³⁸ Lyster (n 2) Chapter 6.

³⁹ The author published the content of Chapter 6 as Rosemary Lyster, 'A Fossil Fuel-Funded Climate Disaster Response Fund under the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts' (2015) 4(1) *Transnational Env'tl L* 125. Others published similar reflections, for instance in Peter Frumhoff et al, 'The Climate Responsibilities of Industrial Carbon Producers' (2015) 132(2) *Clim Change* 157.

⁴⁰ Lyster (n 2) 334-339.

when trying to establish an international fund to address the damages caused by climate change, for instance because of the temporal disconnection between greenhouse gas emissions and the impacts of climate change or the large sums potentially at stake. Nor does she take the measure of the rejection of such claims in international negotiations in the last quarter of a century as an obvious political non-starter.⁴¹

This proposal is clearly related to the author's assumption that insurance should play the greatest role in addressing 'climate disasters'. A *summa divisio* is suggested, throughout the book, between 'insured and uninsured losses',⁴² as if responding to the impacts of climate change was just about insuring them. In the first pages of the book, she even lends to insurers an authority equal to that of climate scientists in assessing the impacts of climate change.⁴³ This contrasts sharply with her rejection of the 'vested interests' of fossil fuel companies. Insurers, just like oil majors, have vested interests, in particular in extending coverage to developing States and possibly receiving subsidies. This sympathy for insurance as a response to 'climate disasters' is certainly related to an emphasis on the need to protect 'domestic economies'⁴⁴ and the suggestion of a purely economic approach of 'transferring the risks of climate disasters',⁴⁵ Rather than a more human-centred perspective which might have followed from a discussion of the impacts of climate change on 'capabilities.'

By and large, insurance remains the preserve of the world's rich. The author notes that Africa only accounts for 0.6% of global economic losses associated with natural disasters.⁴⁶ Attributing this figure to an issue of underreporting,⁴⁷ Lyster further claims that '[t]he failure of the insurance system to respond effectively to climate change is consistent with a broader societal failure'.⁴⁸ Yet, those countries experiencing what Lyster calls 'societal failure' ought arguably to be the priority of efforts to promote climate change adaptation and to address loss and damage.⁴⁹ Another issue is that insurance tends to focus on economic value rather than human welfare. Populations that have little to insure are unlikely to insure it, even if insurance were accessible at all. This uncritical apology of insurance relates to the fact that, despite the book's contention to cover 'recent law and policy initiatives from around the world',⁵⁰ examples are disproportionately situated in Australia, the United States and the European Union. Approaches to disasters that are relevant in developed States might not be so in developing or least developed States. Such misunderstandings occur inevitably when scholars seek to approach a 'climate thing' in isolation from substantial discussions of the 'thing' (whether disaster, migration, or any other thing), thus trying to reinvent the wheel without understanding why it does not turn well. Academic discussions on 'climate things' only divert much-needed research on the shortcomings of existing institutions addressing global issues.

⁴¹ A similar proposal was made by the Alliance of Small Island States in 1991. See Submission by Vanuatu, Draft Annex Relating to Article 23 (Insurance) for Inclusion in the Revised Single Text on Elements Relating to Mechanisms, in Intergovernmental Negotiating Committee (INC) for a Framework Convention on Climate Change (FCCC), 4th session, Negotiation of a Framework Convention on Climate Change. Elements relating to mechanisms (UN Doc A/AC.237/WG.II/CRP.8, 1991) 2.

⁴² Lyster, *supra* note 2, 99. See also *ibid.* at 347

⁴³ See *ibid.* for instance at 1, where the author relies on "climate scientists and insurers" as authorities establishing that "the costs of climate disasters are escalating beyond anything experienced before."

⁴⁴ *Ibid.* at 347

⁴⁵ *Ibid.* at 349.

⁴⁶ *Ibid.* at 287.

⁴⁷ *Ibid.* at 287. The origin of this figure (and whether it accounts for underreporting) is unverifiable as it is not contained in the reference indicated in footnote 15.

⁴⁸ *Ibid.* at 287.

⁴⁹ See e.g. *UN Framework Convention on Climate Change* (1992), art. 4(4), 4(8) and 4(9).

⁵⁰ Lyster, *supra* note 2, book summary (preliminary pages).

As a whole, this book certainly raises more questions than it solves. It is insufficiently researched, ill-structured and poorly argued. There might be a need for a reflection on how climate law relates to disaster management, but this need remains unfulfilled.