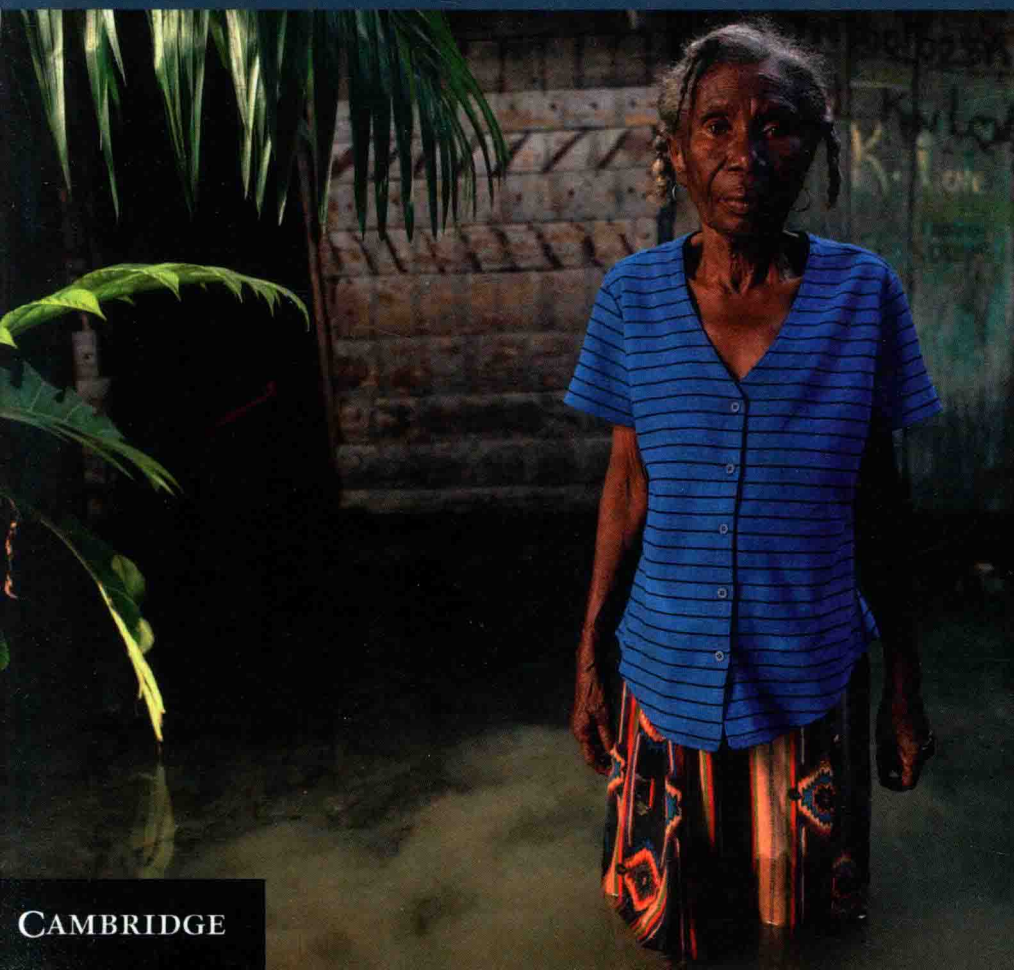


Climate Justice and Disaster Law

Rosemary Lyster



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CLIMATE JUSTICE AND DISASTER LAW

Climate disasters demand an integration of multilateral negotiations on climate change, disaster risk reduction, sustainable development, human rights and human security for a post-2015 world. Via detailed examination of recent law and policy initiatives from around the world, and making use of a Capability Approach, Rosemary Lyster develops a unique approach to human and non-human Climate Justice and its application to all stages of a disaster. These include: prevention; response, recovery and rebuilding; and compensation and risk transfer. She comprehensively analyses the complexities of climate science and their interface with the law- and policy-making processes, and also provides an in-depth analysis of multilateral climate change negotiations dating from the establishment of the 1992 United Nations Framework Convention on Climate Change (UNFCCC) to the Twentieth Conference of the Parties in Lima (COP 20) in December 2014.

ROSEMARY LYSTER is Professor of Climate and Environmental Law at Sydney Law School, The University of Sydney. She is also the Director of the Law School's Australian Centre for Climate and Environmental Law.

Endorsements

"All who care about environmental and climate issues should feel deeply indebted to Rosemary Lyster. It is indeed fortunate that a distinguished lawyer and ethicist has immersed herself in the technicalities of this field, and written an authoritative book that is not only hugely informative but which also sets out pathways towards a just and effective response to the threats of climatic disasters."

*Lord Martin Rees, Astronomer Royal, Fellow of Trinity College
and Emeritus Professor of Cosmology and Astrophysics at the
University of Cambridge*

"This book makes a compelling case for Climate Justice, not just as a matter of law and collective action, but rather as a moral imperative. That imperative, as outlined through theory and practice, is watertight in its ethical foundations and in its evidence. This book demonstrates clearly how dealing with disasters is intimately related to these fundamental questions of justice."

*Professor Neil Adger, University of Exeter
Lead author, Chapter 12, IPCC Working Group II, Fifth Assessment Report*

"Rosemary Lyster has made an important contribution to the climate change debate by highlighting the risks that future disasters pose to the planet today. She persuasively argues that we need to consider the concept of justice in using the law coupled with other policy tools to undertake disaster risk reduction measures now. Her book fills an important gap in addressing the many challenges in managing the risks of climate disasters ranging from the economic development of hazard-prone areas to food insecurity and water shortages."

*Howard Kunreuther, James G. Dinan Professor of Decision Science and
Public Policy and Co-director of the Wharton Risk Management and
Decision Processes Center, Wharton School University of Pennsylvania.
Lead author, Chapter 2, IPCC Working Group III, Fifth Assessment Report*

"This highly interesting volume is the first thorough exploration of the relationship between Climate Justice and disaster law. The book covers disaster risk reduction, response, recovery and rebuilding. In addition to analyzing the relationship between Climate Justice and disaster law from an academic and policy perspective practical insights are provided as well inter alia through various case studies. This book will undoubtedly be of high importance and interest to both academics and policy-makers interested in the way forward as far as Climate Justice and disaster law is concerned."

*Daniel A Farber, Sho Sato Professor of Law, Berkeley Law and
Michael G. Faure, Professor of Comparative and International
Environmental Law, Maastricht University*

"This new book by Professor Rosemary Lyster, one of the world's leading authorities on climate change law, significantly advances our understanding of how the law can address this most complex problem. She deftly brings together climate change law and disaster law – two fields with different conceptual foundations and time frames – and shows how they can and must operate together. She does so using an explicit philosophical framework that gives a structure to her argument that goes well beyond merely tactical considerations. The balance of this century – and, many of us fear, far beyond – will be dominated by disasters that are created or worsened by climate change, and a thorough understanding of the current legal tools to prepare, respond and cope, and a set of proposals for how to do all of this far better, as presented by Professor Lyster, could not be more important and timely."

*Michael B. Gerrard, Andrew Sabin Professor of Professional Practice and
Director, Sabin Center for Climate Change Law, Columbia Law School*

‘The focus on actual lives in the assessment of justice has many far reaching implications for the nature and reach of the idea of justice’
Amartya Sen *The Idea of Justice*

(Penguin Books 2009, p.xi) Copyright © Amartya Sen, 2009.
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PREFACE

Why Climate Justice and Disaster Law? I began my intellectual foray into the world of Climate Law in 1997 in the lead up to the multilateral negotiations under the 1992 United Nations Framework Convention on Climate Change (UNFCCC), which resulted in the establishment of the Kyoto Protocol. This was long before Climate Law was identified as a specialised area of Environmental Law. For the next twelve years, I devoted almost all of my academic writing to international and domestic legal instruments designed to mitigate greenhouse gas (GHG) emissions, especially in the Energy sector. This included interdisciplinary approaches to emissions trading schemes, renewable energy, energy efficiency and Smart Grids, while keeping a forensic eye on the annual Conferences of the Parties (COPs) to the UNFCCC, and devouring the documentation arising out of those meetings. In 2008, I added Reducing Emissions from Deforestation and Degradation (REDD+) to my range of mitigation research projects. It seemed to me, at least in the early stages, that the COPs would deliver the level of emissions reduction commitments for which the Intergovernmental Panel on Climate Change (IPCC) called in the short-, medium-, and long-term, to avoid the worst impacts of climate change. I understood of course that moving forward beyond the Kyoto Protocol developing countries, especially the high emitters, would also have to submit to the international legal arrangements for reducing greenhouse gas emissions.

Perhaps the warning bells about the post-2012 UNFCCC regime began to ring at the 2007 Thirteenth Conference of the Parties (COP 13) in Bali. This COP was to focus specifically on the post-2012 arrangements and to give the Parties five years within which to reach agreement on the way forward. At Bali, no agreement was reached on whether the Kyoto Protocol would continue beyond 2012 and whether developing countries would take on legally binding emissions reduction targets under the Protocol, or indeed whether an altogether new agreement was needed. Consequently, two working groups were established to delay a decision

on whether future legally binding GHG reduction commitments would be made under the Kyoto Protocol. They were the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) and the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP). These groups were crucial to keeping multilateral negotiations alive in the lead up to the annual COPs. They met quarterly until their gradual disbandment at subsequent COPs. Although the outcomes of COP 13 will not be discussed in any detail here, the text of the AWG-LCA provided the essential underpinning of the 2009 Copenhagen Accord, from which all subsequent negotiations for an inclusive agreement have followed.

As is now rather well-known, the Copenhagen negotiations failed to deliver a legally binding agreement for the post-Kyoto era, although they did deliver a definitive step change with developing countries agreeing to take on voluntary emissions reduction targets for the first time. It was at the Seventeenth Conference of the Parties (COP 17) that a second commitment period of the Kyoto Protocol was established. This second commitment period, like the first, does not include the United States, the second highest emitter of GHGs after China. Japan, New Zealand, Canada and Russia also withdrew leaving only approximately 13 per cent of global greenhouse gases covered by a legally binding agreement. COP 17 also established the Ad Hoc Working Group on the Durban Platform for Enhanced Action to put before the 2015 Twenty First Conference of the Parties (COP 21) in Paris 'a Protocol, or other legal instrument or an agreed outcome with legal force under the UNFCCC' for their agreement. The COP has to decide in Paris precisely what this agreement will entail for developed and developing countries, and when this new agreement will come into force, but it is likely to be either 1 January 2020 or 1 January 2021.

The Twentieth Conference of the Parties (COP 20) concluded in Lima in December 2014. The negotiating text for COP 21 is one of the outcomes of this COP. It, and the outcomes of all other COPs, is analysed in detail in Chapter 2. Suffice it to say, most aspects of a future agreement remain unresolved including whether or not this new agreement will include any compliance mechanism at all. So, eighteen years after the establishment of the UNFCCC in 1992, there is still considerable uncertainty about whether or not developed and developing countries will agree to take the decisions needed to reduce greenhouse gas emissions in line with the IPCC's recommendations in its Fifth Assessment Report (AR5).

Perhaps unsurprisingly, over the years attention has begun to focus more closely on the need for countries to adapt to the impacts of climate change, given the evidence about current and likely future changes to the Earth's climate. Indeed, evidence that climate change is human-induced has led some scientists to claim that the Earth is entering a new geological age – the Anthropocene – which, unlike any other preceding age, is caused by humans. It is now also accepted by the Parties to the UNFCCC that adaptation will only go some way towards staving off the worst impacts of climate change. It has therefore become necessary, in the past three years, to establish the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts to protect developing countries most vulnerable to the impacts of climate change. In other words, the negotiations are now putting in place mechanisms to deal with climate disasters – whether they arise as a result of extreme weather or slow onset events.

It is important to note that the Parties to the UNFCCC state consistently at the various COPs that they accept the evidence put to them by the IPCC, with the IPCC's First Assessment Report being released in 1990 and the most recent in 2013 and 2014. However, as discussed in Chapter 1, the authority of climate science has been deliberately destabilised by those seeking to undermine the case for international and domestic regulation of greenhouse gases. The most notorious of these efforts was the 'Climategate' scandal which erupted immediately before the 2009 Copenhagen negotiations, as well as the questions raised about the reliability of the IPCC's 2007 Fourth Assessment Report in early 2010. These disruptions to a consensus on climate science, which was emerging in most countries by 2007, have not been entirely resolved, despite the efforts of many governments to fund national science academies to report on climate change at a national and regional level.

Given the tenuous nature of the multilateral UNFCCC negotiations, the failure of the United States and Australian governments to pass emissions trading legislation, and the disputation around climate science, I decided in 2010 to devote my research to an area of law which I have labelled Climate Disaster Law. This 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 endeavour – Disaster Law. In this book, Climate Disaster Law means a portfolio of legal rules which deal with: prevention; emergency response, recovery and rebuilding; and compensating the victims of climate disasters. It

acknowledges the IPCC's framing of climate disasters as those where hazards, like natural climate variability and anthropogenic climate change, influence the climate extremes that contribute to disasters when they intersect with the exposure and vulnerability of human society and natural ecosystems to these extremes. Consequently, in this book I acknowledge that Climate Disaster Law intersects with areas outside of the UNFCCC's traditional ambit including disaster risk reduction, sustainable development, human rights, humanitarian actions and human security. Each of these is dealt with under separate international instruments and agencies although the challenges posed by climate change have witnessed some recent convergence between them.

What about Climate Justice? Climate Justice has always been at the heart of the multilateral negotiations under the UNFCCC. It is the basis for embedding within the text of the UNFCCC the International Law 'common but differentiated responsibilities' principle. This has proved to be an enduring UNFCCC principle, despite the attempts of some developed countries to oust it, and requires developed countries to take on a larger share of the burden of reducing greenhouse gases than developing countries. It also requires developed countries to fund the adaptation and disaster risk reduction activities of developing countries. Many scholars have written detailed accounts of what Climate Justice means, especially in the context of reducing greenhouse gas emissions. Fewer have countenanced what Climate Justice means for adaptation and none has investigated in detail what it means in the context of climate disasters. Inspired particularly by the work of Amartya Sen, and others, I have adopted a Capability Approach to understand and illuminate the risks which climate disasters pose to humans and non-humans. I find the Approach inspirational for two reasons. First, it resonates well with the fact that climate disasters fundamentally destroy and undermine Capabilities unless vulnerability and exposure are reduced, and resilience building is actively pursued. Even then, extensive uncompensated economic and non-economic losses are likely to linger well into the future. The capacity of developed countries to respond to the challenge of climate disasters depends primarily on the political will of politicians to embrace climate science and respond accordingly. In developing countries, the capacity to respond depends largely on having the financial resources to engage in adaptation and disaster risk reduction activities, while compensation remains a significant difficulty. In both cases, the disasters are very likely to take governments and even insurers beyond their limits and functions to cope and offer compensation.

A second reason for relying on Amartya Sen's work is his conception of justice enunciated in *The Idea of Justice*. Although Sen espouses a more general theory of global justice, it is his insistence on procedural justice – the idea that justice should extend to, and take account of, the actual lives of those affected by injustice – that resonates in the context of Climate Disaster Law. It goes beyond all the other theories of Climate Justice, discussed in this book, by insisting that a conception of justice be based on impartial and practical public reasoning about how a society should respond to an issue like climate change. That reasoning should embrace the consequences of decisions taken in any nation state on others who are far away. For me, those 'others' are far away on both a spatial and a temporal scale if we take future generations into account. Given the manipulation of climate science by vested interests, and the consequent failures at the international and domestic levels to adequately respond to climate change, Sen's insistence on impartial practical reasoning is intrinsically important to notions of Climate Justice. I propose that an essential aspect of Climate Justice is a 'willingness to pay' on the part of all negotiating parties, and that this can be derived via Sen's notion of a deliberative global justice. Of course Sen's idea of justice is deeply embedded in his Capability Approach, which is itself highly relevant to notions of vulnerability and resilience to climate change, and the attempts of public and private sector agents to adapt to it, and compensate for its effects.

Given my desire to produce a work which comprehensively analyses the interface between Climate Justice and Disaster Law the book considers: in Chapter 1 – the complexities of climate science and its interface with the law- and policy-making process; in Chapter 2 – the multilateral climate change negotiations from the establishment of the 1992 United Nations Framework Convention on Climate Change (UNFCCC) to the Twentieth Conference of the Parties in Lima (COP 20) in December 2014; in Chapter 3 – a vision of Climate Justice where a Capability Approach to climate disasters demands a better integration of multilateral negotiations on climate change, disaster risk reduction, sustainable development and human rights for a post-2015 world, as well as a process of impartial practical reasoning; in Chapter 4 – the imperative of preventing disasters, or at least ameliorating their impacts, through adaptation and disaster risk reduction responses; in Chapter 5 – mechanisms for the response, recovery and rebuilding phases of a disaster; in Chapter 6 – existing avenues for compensating the victims of disaster, as well as my own proposed fossil fuel-funded Climate Disaster

Response Fund for compensating victims in developing countries most vulnerable to the impacts of climate change; and finally in Chapter 7 – an approach towards an impartial practical and public reasoning process to aid the Climate Justice and Disaster Law project.

No book is possible without the inspiration and assistance of many people. First, I owe a debt of gratitude to Amartya Sen for providing me with the intellectual base from which to prosecute my own approach to this book. Perhaps it was serendipity when, in 2010, I stood outside Heffers Bookshop in Cambridge and saw *The Idea of Justice* in the window. Feeling rather despondent at the time about the shape of climate change law and policy in the world, I felt, as I was reading it, that every word resonated perfectly. I felt certain that it is important to reach a clear understanding of how climate disasters impact on the freedoms and functioning of humans and non-humans, and a less oppositional and more reasoned way of thinking about these impacts. So began a journey where this book marks simply a destination along the way. I hope that this approach shines a light on the way forward for future multilateral climate change negotiations and domestic law and policy.

I am so grateful that, while variously a visiting scholar to Trinity College, Cambridge and a Herbert Smith Freehills Visiting Professor at Cambridge Law School, I have had the distinct privilege of meeting Amartya Sen, discussing some aspects of my work with him, and having him read one of my very early pieces on Climate Justice. All of this has encouraged me to take on the sometimes daunting task of writing this book. I am also most grateful to Kevin Gray, Professor of Law and Dean of Trinity College, for facilitating my appointment as a visiting scholar to the College, and to Herbert Smith Freehills for sponsoring my appointment to Cambridge Law School in 2013. I have done some of the most important research and writing for this book while sitting in the Squire Law and Trinity College Libraries at Cambridge. However, it is my home institution, Sydney Law School, The University of Sydney, which has supported and sustained my research and teaching over the past nineteen years. I am particularly grateful to the current Dean, Professor Joellen Riley, and the Pro Dean, Professor Cameron Stewart, for their enduring interest in, and support for the research into and teaching of, Climate and Environmental Law at the Law School.

To write a book entitled *Climate Justice and Disaster Law*, I have also been inspired by, benefited enormously from the work of and enjoyed my various interactions with many other leading scholars including: Dan Farber, Sho Sato Professor of Law at the University of California,

Berkeley; Michael Faure, Professor of International and Comparative Law at Maastricht University; Michael Gerrard, Professor of Law and Director of the Sabin Centre for Climate Change Law at Columbia Law School; Jonathan Verschuuren, Professor of International and Environmental Law at Tilburg University; David Schlosberg, Professor of Environmental Politics and Co-Director of the Sydney Environment Institute at The University of Sydney; Tim Stephens, Professor of International Law, at Sydney Law School, The University of Sydney; Chris Field, Melvin and Joan Lane Professor for Interdisciplinary Environmental Studies and Director of the Carnegie Institution's Department of Global Ecology at Stanford University, and co-chair of Working Group II of the IPCC; Lisa Alexander, Chief Investigator at the Climate Change Research Centre, University of New South Wales and lead author of the IPCC's Working Group I Fifth Assessment Report; Professor Lesley Hughes, Department of Biological Sciences at Macquarie University, lead author of IPCC Assessment Reports and member of Australia's Climate Council; and countless others.

I am deeply appreciative of the support which my partner, Mark Lyster, has given me throughout the writing of this book and also for his insights, as a sustainability consultant, into many of the concepts and ideas which I raise. My children, Kathryn and Matthew, who are building their own careers and who are deeply committed to social and animal justice, are a constant source of inspiration. My extended family and friends have also been generous with their encouragement and tolerant of my many absences.

No-one has been more instrumental to my research and writing over the past ten years than my researcher, Chris Cain, who has been a diligent and devoted collector, and reader, of the vast array of materials upon which I have relied. Her efforts to assist me in the writing of this book went way beyond the call of duty. Thank you, Chris.

Johanne Brady, the Administrative Assistant of the Australian Centre for Climate and Environmental, of which I am Director, has supported me and the Centre over a long period of time, for which I am very grateful.

Finally, my thanks go to Elizabeth Spicer and Richard Woodham at Cambridge University Press for their patience, assistance and guidance with bringing this book to completion and ultimately to publication.

Rosemary Lyster
July 2015

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