

BOOK REVIEW

Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources,
by Randall S. Abate

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Randall Abate has provided an innovative and timely contribution to the literature of climate justice. As a stalwart of the climate justice movement, the international scope of his work has been inspirational for other authors working in the field. His latest contribution to the literature, *Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources*, does not disappoint. It highlights recent legal innovations to protect the purported, yet often disregarded, beneficiaries of international law encompassing three groups of subject – future generations (which include today’s children and unborn children), wildlife, and natural resources – which he deems ‘the voiceless’.

While legal principles that apply to these subjects are only just emerging, and unevenly so in some areas, ‘the voiceless’ have not yet been considered collectively in the context of climate change, which makes this book both timely and unique. The overlap between climate change law, natural resources law, and animal law is understudied and often overlooked by scholars and practitioners. The combination of these legal fields within the context of climate change and within one volume is an innovative contribution. Abate provides a unifying theme for these often disparately considered groups: they are uniquely vulnerable to the impacts of climate change and least equipped to protect themselves. The book simultaneously advocates and charts a future for legal developments based on three premises that apply to these subjects: (i) that voiceless populations can be protected by stewardship principles; (ii) their common vulnerability highlights the need for a new rights-based approach; and (iii) recent litigation and legislative developments are pointing in this direction.

Writing about emerging legal protection is challenging and Abate proposes a continuum of common but differentiated rights-based protections, with priority given to future generations. He couches this continuum in terms of positive and negative rights, creating a hierarchy of rights for the various voiceless subjects. Future generations should have a positive right to inherit a stable climate, and wildlife and natural resources should have negative rights-based forms of protection (including freedom from abuse and confinement for wildlife, and freedom from unsustainable use for natural resources). These rights are to be developed within an ecocentric legal personhood approach. Abate’s approach calls on earlier work by writers such as Edith Brown

Weiss,¹ Christopher Stone,² and Peter Singer.³ Yet Abate's arguments are more urgent; indeed, he describes his approach as an 'emergency antidote' to the anthropocentric mindset (p. xvi), which has contributed to the evolving climate and biodiversity crises in which we now live.

The volume is timely as the most recent Intergovernmental Panel on Climate Change (IPCC) Special Report on 1.5°C,⁴ combined with lacklustre action by many countries under the Paris Agreement,⁵ mean that the impacts of climate change will continue to have devastating impacts on the climate-vulnerable.⁶ The recent United Nations Report in May 2019 by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) (released after the book's publication) states that nature is declining at rates that are unprecedented in human history, and transformative change is needed in order to conserve and restore natural resources.⁷

Abate's book also provides an expert summary and survey of the evolving litigation landscape, not just in the United States (US), but around the globe. In that sense, the book is truly a transnational work, focusing on a number of countries in the global South (an often under-researched area in climate litigation)⁸ which have provided us with innovative approaches to legal protection for non-human resources in the context of climate change. In fact, many of the forward-looking legal approaches included by Abate originate from the global South, and this book pays significant and appropriate attention to them.

The book proceeds as follows. Chapters 1 and 2 describe the problems of climate change and the failures of the existing legal system, including litigation strategies which have attempted to provide adequate redress. Chapters 3 to 5 then explore new legal developments focused on the three groups of the voiceless, examining whether new legal paradigms could produce better outcomes. Finally, in Chapter 6 Abate proposes a new stewardship- and rights-based framework for protecting the voiceless.

¹ E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational, 1989).

² C.D. Stone, *Should Trees Have Standing? And Other Essays on Law, Morals and the Environment*, 3rd edn (Oceana Publications, 2010).

³ P. Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* (Harper Collins, 1975).

⁴ IPCC, 'Summary for Policymakers', in *Global Warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (IPCC, 2018).

⁵ Paris (France), 13 Dec. 2015, in force 4 Nov. 2016, available at: http://unfccc.int/paris_agreement/items/9485.php.

⁶ N. Sachs, 'The Paris Agreement in the 2020s: Breakdown or Breakup?' (2019) 46(3) *Ecology Law Quarterly*, pp. 865–910; S. Sengupta, 'U.N. Climate Talks End With Few Commitments and a "Lost" Opportunity', *The New York Times*, 15 Dec. 2019, available at: <https://www.nytimes.com/2019/12/15/climate/cop25-un-climate-talks-madrid.html>.

⁷ S. Diaz et al., *Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policy Makers* (IPBES, 2019), pp. 12–5, available at: <https://ipbes.net/news/ipbes-global-assessment-summary-policymakers-pdf>.

⁸ J. Setzer & L.C. Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10(3) *WIREs Climate Change* online articles, available at: <https://onlinelibrary.wiley.com/doi/abs/10.1002/wcc.580>.

The first chapter focuses on the anthropogenic problem of climate change, and the failure of international environmental law (including the Paris Agreement) to provide adequate and effective solutions. Citing gridlock in international and US climate law, this chapter charts the various forms of the principle of common but differentiated obligations, and its ultimate failure to adequately reflect the moral and political responsibilities of developed countries. The chapter also frames the transition to an ecocentric paradigm, with appropriate references to the evolving fusion of environmental and human rights cases, including the most recent advisory opinion of the Inter-American Court of Human Rights regarding transboundary environmental harm.⁹

With this context in mind, the second chapter covers landmark cases in climate litigation which could augur a new era of climate regulation founded on rights-based stewardship and climate justice legal theories. The chapter focuses on the US, which had some of the earliest climate litigation cases, but also looks at cases in the Netherlands,¹⁰ Pakistan,¹¹ Switzerland,¹² and Norway,¹³ as well as a number of Human Rights Commission case studies, including the Carbon Majors Petitions brought before the Commission on Human Rights of the Philippines.¹⁴ The chapter provides a detailed and eloquent exposition of the investigation launched by the Commission on Human Rights of the Philippines in response to the Carbon Majors Petition, and its implications for the climate-vulnerable. The chapter thus offers a global survey of recent innovative and landmark climate litigation, even though some of the cases had been dismissed or appealed against by the time of the book's publication (an inevitable result with a book that focuses on new and ongoing legal developments). However, the chapter omits an analysis of climate litigation cases brought against corporate legal actors. While these cases are still ongoing, Abate missed the opportunity to examine how, if these cases were successful, potential climate liability for non-human actors could contribute to theories of climate justice. An exploration of the rights

⁹ Inter-American Court of Human Rights, *Advisory Opinion OC-23/17 on the Environment and Human Rights*, 15 Nov. 2017.

¹⁰ *Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment)*, Rechtbank Den Haag, 24 June 2015, ECLI:NL:RBDHA:2015:7196, para. 4.36, English translation available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196>. See also J. van Zeven, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?' (2015) 4(2) *Transnational Environmental Law*, pp. 339–57; and B. Mayer, 'The State of the Netherlands v. *Urgenda* Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)' (2019) 8(1) *Transnational Environmental Law*, pp. 167–92.

¹¹ *Ashgar Leghari v. Federation of Pakistan*, Case No. 25501/2015, Lahore High Court, Order of 4 Sept. 2015, available at: <http://www.lse.ac.uk/GranthamInstitute/litigation/ashgar-leghari-v-federation-of-pakistan-lahore-high-court-green-bench-2015>. See also J. Peel & H.M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law*, pp. 37–67.

¹² *Swiss Senior Women for Climate Protection v. Swiss Federal Council et al.*, filed 25 Oct. 2016, English translation available at: http://klimasenioren.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf.

¹³ *People v. Arctic Oil*, Case No. 16-166674TVI-OTIR/06, Oslo Dist. Ct., 4 Jan. 2018.

¹⁴ Commission on Human Rights of the Philippines, Petition Requesting an Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change, Case No. CHR-NI-2016-0001, Submission in Support of Petitioners, 16 Dec. 2016, available at: <https://climate.law.columbia.edu/sites/default/files/content/Wentz-and-Burger-2016-12-Submission-Case-No.-CHR-NI-2016-0001.pdf>.

afforded to corporations and the historic lack of accountability by these entities for environmental degradation would bolster Abate's thesis.

Building on the use of courts in the climate justice movement in Chapter 2, the third chapter focuses on types of common law protection afforded to the first category of the voiceless: future generations. The chapter illustrates how the principle of intergenerational equity – which has already been developed in international human rights law, international environmental law, and international climate change law – can better protect future generations. It describes some unsuccessful attempts to enshrine the principle of intergenerational equity under customary international law and recognizes some of the legal hurdles that remain. The chapter also provides linkages between different international environmental law mechanisms by documenting where and how the principle has been incorporated in a number of treaties and documents over several decades.

The fourth chapter looks at judicial attempts to establish legal personhood for the second category of the voiceless: wildlife. The chapter attempts to illustrate how creative use of existing legal doctrines, such as habeas corpus, should spur innovative legislative and constitutional changes to provide for negative rights for wildlife, particularly rights not to be confined or harmed. Although interesting, the chapter feels out of place with the rest of the book, as Abate draws very few linkages between the cases covered and international environmental law or international climate change law. The cases in Chapter 4 focus on releasing animals from captivity and/or preventing harm to them, and do not involve environmental and climate change law. While the chapter mentions the limitations of the property-based model and its inability to protect wildlife populations from climate impacts, the chapter's focus on the largely unsuccessful attempts to confer legal personhood on these subjects detracts from, rather than helps to reinforce, the book's purportedly unifying themes. The chapter would have benefited from clearer linkages between negative legal rights and climate vulnerability.

The fifth chapter examines rights of nature, the third category of the voiceless. The chapter charts constitutional and other legal developments that, over the past decade, have granted protected status to natural resources. Here the book makes a closer connection with climate change, illustrating how these legal developments, although not always successful, could provide a tool to combat the impacts of climate change. The chapter covers a wide variety of legal developments, including the Bolivian Constitutional concept of *Pachamama* (Mother Earth),¹⁵ the Ponca Nation of Oklahoma's statute recognizing the rights of nature,¹⁶ and the campaign by the Environmental Defenders Office of Northern Queensland to confer legal personality on the Great Barrier Reef.¹⁷ The chapter also does an admirable job of highlighting

¹⁵ Law of the Rights of Mother Earth, Law No. 071, 7 Dec. 2010, Art. 3 (Bolivia). See also P. Villavicencio Calzadilla & L.J. Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7(3) *Transnational Environmental Law*, pp. 397–424.

¹⁶ Global Alliance for the Rights of Nature, 'Ponca Nation of Oklahoma to recognize the Rights of Nature to Ban Fracking', 29 Jan. 2018, available at: <http://therightsofnature.org/ponca-rights-of-nature>.

¹⁷ Friends of the Earth Australia, 'Legal Personality for Great Barrier Reef', available at: <https://www.foe.org.au/legal-personality-great-barrier-reef>.

some of the tensions and difficulties of granting legal protection to nature, and fleshing out where potential rights, such as the right to restoration, could be prioritized over a right to protection.

In the sixth chapter, Abate provides a framework for enhanced stewardship and rights-based protection for the voiceless. This framework proposes both a substantive standard based on the principle of sustainable development, as well as a procedural mechanism to enhance and enforce the substantive standard. The author offers the US National Environmental Policy Act¹⁸ as a model of an ecocentric procedural mechanism, and also proposes the establishment of specialized tribunals and other regulatory bodies to focus on protection of the voiceless, citing existing commissions for future generations in Switzerland, Germany, and Wales. While the chapter's focus on procedural mechanisms makes sense – as much of the recent jurisprudence looks at incorporating climate change into environmental impact assessments – procedural mechanisms on their own may fail to provide for the substantive protections that the author is advocating. Abate acknowledges that further steps are needed, including the effective incorporation of climate change into the principle of sustainable development, as well as the enhancement of accountability theories in order to implement stewardship responsibilities and rights-based protections. He also acknowledges that one of the major barriers to this proposed framework will be the likely unwillingness of regulatory bodies to adopt the sustainable development paradigm as a substantive standard, particularly in developed countries where economic models dominate. Abate also highlights how jurisprudence in the global South has embraced the principle of sustainable development, but challenges remain here as well, particularly in terms of implementation of the principle in resource-scarce countries. Overall, Chapter 6 provides some initial ideas of what a proposed framework could look like, but more detail would have been useful, particularly around the substantive standard and stewardship models.

The book is punctuated by segments of interviews with lawyers and other representatives who are involved in bringing some of the innovative cases discussed throughout the book. An enlightening interview with a lawyer for Australian Earth Alliance provides both the motivations for and concerns regarding litigation to grant legal rights to non-human resources. She notes that rights-of-nature concepts should be developed without repeating the mistakes of colonization by not assuming nature is '*terra nullius*' and ensuring that First Nations communities and their laws are part of any new legal regime (p. 157). This comment highlights a strain of potential tension between protecting existing vulnerable communities and granting legal rights to non-human constituents. While these rights will often be compatible with each other, at times they may not be and a hierarchy within legal orders and protections could usefully be explored, perhaps in a subsequent work, building upon the positive and negative hierarchy of rights which Abate charts at the beginning of the work.

This book serves as an engaging resource for those working in the climate justice field by offering linkages between climate change, natural resources and animal law,

¹⁸ 42 U.S.C. §§ 4321–4370h.

as well as across human rights. It focuses on subjects of climate impacts which are often overlooked and understudied, and provides an initial roadmap indicating how the law can progress in order to provide protection for the voiceless. It also offers detailed and careful study of very recent litigation in the climate justice arena, focusing on the plaintiffs and their stories, and so should be considered essential reading for those working in the climate litigation and climate justice areas. While the chapter on wildlife feels slightly out of place in the context of climate change, the overlap between these areas of law is likely to become greater over time. As the impacts of climate change worsen, legal orders will continue to be questioned and interrogated, and this book will be seen as one of the first to provide a guiding light for future legal developments to protect the climate-vulnerable.

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