

The Climate Show

This podcast features leading experts insights on current climate change research.

[#09 David Boyd: The right to a healthy environment](#)

Transcript

00:00:03 Linnea Nordland, Beatriz Martinez, Alessandro Monti

Hi and welcome to the Climate Show, a podcast that explores the law and politics of climate change. This podcast is brought to you by the University of Copenhagen. Hi, we are Beatriz Martinez And Linnea Nordlander and Alessandro Monti

00:00:20 Beatriz Martinez

And we are your host at the climate show. In earlier episodes we. Have explored the important role that human rights law plays in advancing action on climate change mitigation. Today we focus on two recent landmark developments with respect to the relationship between human rights and climate change law.

00:00:40 Alessandro Monti

The first is the recognition of a free standing right to a clean, healthy and sustainable environment by the UN General Assembly in July this year. The second is even more recent, namely the Torres Strait Islanders decision. This is the first ever finding in of a climate change related human rights violation by a UN Human rights Treaty body.

00:01:01 Linnea Nordlander

The resolution and decision are both critical to our research project. EnAct which in part studies how human rights law can contribute to climate, ambition and implementation, and so in order to unpack what these developments mean for mitigation action, we spoke to a very special guest, Professor David Boyd, who has comprehensive insight into their background and their implications. As the sitting special rapporteur.

00:01:22 Linnea Nordlander

On human rights in the environment. In addition to his UN work, David Boyd is an associate professor at the University of British Columbia. He's an internationally renowned expert on the relationship between human rights and the environment and through his work as special rapporteur, he has been a driving force in clarifying what obligations human rights law imposes on states with respect to environmental harms, including climate change. Enjoy the show.

00:01:59 Linnea Nordlander

David, welcome to the show. It's such a pleasure to have you here with us today.

00:02:03 David Boyd

Great to be with you today Linnea.

00:02:05 Linnea Nordlander

So today we're going to be talking about some important recent developments in the relationship between human rights and the environment. But before we get to that, I'm wondering if you could reflect a little bit on or on what? From your perspective, human rights law adds to the project of addressing climate change

00:02:24 David Boyd

Yeah, great question. I think that as we all know, one of the fundamental flaws with climate change law. If you look at the United Nations Framework Convention on Climate Change or the Paris Agreement, is one of the distinguishing features of these international environmental agreements is a complete lack of enforcement or accountability mechanisms. And so that's really the big value added that comes from the human rights context. Is that human rights law provides a whole range of not only mechanisms and processes, but. But legal tools and principles that can be applied in the context of climate change, which can actually be very effective in holding states accountable and catalyzing more ambitious climate action.

00:03:11 Linnea Nordlander

Yes, and one of the tools that has sort of been under development is the recognition of a right to a healthy environment and which the summer was recognized in a UN General Assembly resolution, which you of course have been part of the advocacy of for a long time. But of course it's become well accepted that environmental harm, including from climate change. Is a matter of existing human rights law. So what is it? It that the recognition of a free standing right to environment contributes?

00:03:42 David Boyd

Well, free standing right to a clean, healthy and sustainable environment I believe can make a number of contributions. I mean, it's a it's a broad human right. It includes not just a safe and livable climate, but also clean air safe and sufficient water, healthy and sustainably produced food, non-toxic environments where people can live, work, study and play. And healthy ecosystems and biodiversity. So it's really broad, ranging in its scope. But you know, definitely we have seen courts in recent years recognizing that a safe, livable climate is a fundamental element of the right to a healthy environment. And so, again, that provides not only scope for more ambitious legislative and policy action to address the climate emergency, but it also empowers people to hold governments accountable when they're not living up to their obligations.

00:04:35 Linnea Nordlander

And something that I noticed about the wording of the General Assembly resolution is that it refers to a clean, healthy and sustainable environment, but omits the term safe which you not only use just now. In your description of the right, but that you've also used pretty actively in your reports as special rapporteur in describing. A right to a some form of environment, so do you think that omission of the word safe has any implications?

00:05:03 David Boyd

No, no, I don't. Actually, I think that you know there's a lot of there were a lot of adjectives and you know in the work that I've done looking at the right to a healthy environment around the world. There are all kinds of different adjectives applied to it. Safe, clean, healthy, favorable, ecologically, balanced, etcetc. But it all boils down to the same thing. A healthy environment and and we have decades of experience with more than 150 countries. Applying and interpreting this right, and so we have a pretty good sense of what it means, and from my perspective the specific adjectives are not something that we should really get hung up on. We should look more at what is the intent and the purpose of this fundamental human right.

00:05:50 Linnea Nordlander

And in your work you have delineated what human rights obligations states have with respect to safeguarding a safe climate. Could you touch a little bit on what that looks like in terms of especially mitigation obligations on states.

00:06:05 David Boyd

Sure, well, so in terms of state obligations, I would say that there's 3 broad categories. One is procedural obligations, so that's ensuring people have information about the climate emergency that people have an opportunity to participate, and that people have access to justice with effective remedies when their rights are being threatened or violated. Then you have the kind of substantive elements of. Climate related obligations and then you have special obligation. The third category would be special obligations towards. I'm particularly vulnerable and marginalized groups of people. In terms of you know the substantive obligations related to mitigation. I think you know again, those the parameters of those obligations are really drawn from both human rights law and international environmental law. And so a bunch of different principles apply, but broadly speaking, states have an obligation to take ambitious action to address the climate emergency, and because of the principle of common but differentiated responsibilities and respective capacities, those obligations are look quite different for states in different. Position so the obligations facing low income countries or small island developing states are quite different from the obligations that are facing wealthy nations that are, you know large greenhouse gas emitters, both currently and historically, and so. I think you know you can look at the fact that 80%

of greenhouse gas emissions come from 20% of nations both currently and historically, and say OK, well those are the countries we need to focus on. Those are the countries that have an obligation to reduce their emissions as quickly as possible.

00:07:53 Linnea Nordlander

And I think that links quite nicely to, uh, another question that I have for you, which is what you think the next steps are. With respect to environmental rights at the international level. And if there's more progress to be made in the sort of in filling out the standards that are developing.

00:08:14 David Boyd

Yeah, I'm not surprisingly, I get this question a lot and you know, it's these two recent resolutions, one from the General Assembly in July that you mentioned and one last year from the UN Human Rights Council. They are really not legally binding resolutions, right? So you know, they're what. We in the legal profession referred to as soft law. Although there's a beautiful decision from the Constitutional Court of Costa Rica, just a couple of weeks ago that referred to the General Assembly resolution, and said because it's a General Assembly resolution with, you know the mandate from that. Leading international body. Then it should be really regarded as the highest and strongest form of soft law. So it's kind of a ongoing debate amongst lawyers about where the boundary is between soft law and hard law. But I think of course you know if we look back at 1948 and the Universal Declaration of Human Rights, which was also a non binding political type of document. It took 18 years for the Universal Declaration to be transformed into the two international covenants on civil and political rights. One on economic, social and cultural right to give those rights legal force at the international level, I feel like we don't really have that much time because of the global environmental crisis in which we find ourselves and so I'm hopeful that states will recognize the urgency of crafting some form of international instrument, which makes the right to a clean, healthy and sustainable environment legally binding at the global level, but at the same time I also think there's progress needs to be made at the regional level, and so for example there are ongoing conversations at the Council of Europe about adding the an additional protocol to the European Convention on Human Rights. On the right to a healthy environment, which I think is long overdue for a region that considers itself a leader both in Environmental Protection and human rights, there are discussions now happening in Africa and Asia about environmental democracy agreements that would be similar to the Aarhus Convention and the Escazu agreement. So there's a lot of momentum at the international level, and there are also all kinds of international negotiations taking place where this right to a clean, healthy and sustainable environment should have influence so. A couple examples of that would be the negotiations for a new global treaty on plastic pollution, the ongoing negotiations about a post 2020 global biodiversity framework, and the long long standing negotiations about an international treaty to regulate business and human rights.

00:10:53 Linnea Nordlander

So of course, as you mentioned there, this is something where there isn't a lot of time left, and so a lot of people are starting to turn to courts and quasi-judicial. These, as you've also already touched on, and so I wanted to turn to a second even more recent milestone, which is the decision by the Human Rights Committee in the Torres Strait Islanders case. And this is of course the first ever decision by a treaty body finding a human rights violation as a consequence of climate change. So could you briefly describe what that case was about and why the decision is so important?

00:11:30 David Boyd

Of course, so the Torres Strait Islanders are a group of indigenous people who inhabit an archipelago of islands off the coast of Australia. And as is the case for many islands around the globe, they are being really impacted in a severe fashion by rising sea levels, saltwater intrusion, which makes it difficult to grow crops or have fresh fresh drinking water, and so the Torres Strait Islanders brought a case against the state of Australia before the Human Rights Committee, arguing that several of their rights under the International Covenant on Civil and Political Rights have been violated by Australia. It is failure to take adequate mitigation action and failure to take adequate adaptation action to protect human rights from the climate crisis. Great and as you touch on UM, the complaint is somewhat unique in that it combines arguments both about Australia and adequate mitigation and adaptation action. Do you think that that had an important role to play in the outcome of the complaints, and are there lessons to be learned here about the interconnectedness between mitigation and adaptation?

00:12:43 David Boyd

Yeah, that's it's a really interesting question, and to be honest, the Human Rights committee from my perspective did a really good job in addressing the adaptation question and kind of not a strong job to put it diplomatically in addressing the mitigation question so. In terms of adaptation, they did find that Australia had failed to fulfill its obligations to protect the rights of the Torres Strait Islanders and as a result ordered Australia to provide compensation to the Torres Strait Islanders and also to take more ambitious adaptation. In terms of mitigation, the evidence before the committee was that Australia amongst industrialized nations has one of the worst track records in the world in terms of failing to reduce greenhouse gas emissions and instead aggressively pursuing the development of fossil fuel resources. But despite that quite poor track record the committee didn't actually make a finding on the mitigation side, so that that's disappointing and I think it just leaves it to future cases where mitigation and the impacts of failure to take ambitious climate action are going to be dealt with in a future forum.

00:14:02 Linnea Nordlander

And we've seen in sort of on that point. We've seen in some domestic litigation that courts have been able to find violations of human rights as a consequence of inadequate mitigation action, but have been unwilling to or found that it's beyond the scope of the Court's competence to specify what the state in question should actually be required to do with respect to mitigation due to the separation of powers

doctrine. Do you think that, that could also be a challenge at the international level, sort of questions about the legitimacy of these decisions and that type of and those types of concerns on behalf of these bodies.

00:14:47 David Boyd

Yes, I do think that will be a challenge and I do think that in the international context we will see courts and tribunals and committees. I think in the in the in the near future we will see decisions that say that governments need to do more in terms of mitigation to address the climate crisis, whether courts and tribunals will make really specific recommendations I think. I think that's probably that's probably at this point I stepped too far and and you know, the reality is that if if a court such as the Supreme Court in the Netherlands or the Constitutional Court in Germany, if they make it clear order that a government has a has a legal obligation to do more with respect to. Mitigation that is to reduce emissions more quickly in countries where there's a strong rule of law. That is, you know, respect for the judicial system, functioning government institutions. Then I think we can be fairly confident that governments will actually follow the courts orders and take steps to reduce emissions more quickly, and that's that's the most important thing, you know. You also had a recent recent decision of a court in the in the Czech Republic which said the government is not doing enough to reduce emissions, and that is a violation of the right to a right to a healthy environment because a healthy environment includes a livable climate, so courts are increasingly making these types of decisions in the context of mitigation, and I think that the next step will be if governments fail to adequately implement those court orders, we will see courts taking the next step and saying OK, look if if the government can't adequately respond to these orders, then we're going to provide more detailed instructions for the governments to follow.

00:16:44 Speaker 1

So do you think that the Torres Strait Islander decision in particular, but also sort of coming decisions if they come at the international level, it will affect rights based climate change litigation in other judicial foras. So national and regional courts, for example, the European Court. The case is pending before the European Court of Human Rights, and if so, how? Do you think so? I don't think they will impact these judgments.

00:17:13 Speaker 5

Yeah, I think. That we're seeing an incredible degree of cross pollination not only amongst the lawyers that are bringing these types of cases, but amongst the courts and the judges themselves. So whenever there's a new decision on climate change and human rights, it spreads like wildfire around the world, and I think that it's it's kind of a one way St at this point. That decisions are going to build on earlier decisions and decisions are going to become progressively stronger weaknesses in. And decisions will be addressed in future decisions because the the facts are just increasingly compelling. I mean, when climate change and human rights litigation started 15 years or so ago. Climate change in many parts of the world was still seen as kind of a distant phenomenon, and the reality is that in today's world, climate

change is happening much faster than even leading scientists anticipated. 15 years ago, the impacts are increasingly severe. I mean, you can look at the the devastating floods in Pakistan. This year you can look at the incredible wildfires. I'm from Canada. Last year we had 50 degree Celsius heat wave here in Canada. Horrific wildfires. There's atmospheric rivers, and so there's just such compelling scientific evidence of the severity of the climate crisis and its impact on people health and well-being. Courts, tribunals, governments, all, all institutions in society are going to have to start treating this emergency with the requisite degree of urgency that has simply not been present in the past. And that means that includes courts that includes legislatures that includes executive. The the level of action that has been taken is just grossly inadequate to the magnitude of the problem that we're facing.

00:19:11 Linnea Nordlander

There as as we've touched on, there are four pretty significant gaps with respect to mitigation and also with respect to adaptation, which the human rights committee touched on. And but something that has received sort of comparably. Less attention in the human rights space is the issue of loss and damage. Do you think that there is sort of a role for human rights to play with respect. To addressing loss and damage in the absence of that. Stronger rules within the international climate change regime.

00:19:42 David Boyd

Yeah, absolutely. I mean, the reality is again, I'm just building on the comments I made earlier. The devastating impacts of the climate emergency on low income countries, small island in all pink states. Take Dominica for example. A small country in the Caribbean that has been rocked by two category, 5 hurricanes in the past six or seven years, each of which caused damage to over 90% of the buildings in Dominica, so. So for a country like Dominican that has produced less than .000, something of total greenhouse gas emissions since the dawn of the industrial era, they are now being faced with. Impacts on their economy, which twice in the last seven years have been that the cost of these devastating hurricanes has been more than their entire annual GDP. So there has to be a way to get funding to Dominica and countries in similar positions so that they can rebuild from these hurricanes and so that they don't have to. Divert their limited resources away from things like health care and education into rebuilding from the impacts of the climate crisis. And so you know, it's clear that these nations that are experiencing these massive losses, you know losses of life, losses of health, losses of economic and non economic varieties. They they have to be compensated and there's just no question in my mind that that has to happen and that the countries that are. Largely responsible for creating the climate crisis. Have a northernly, a ethical and moral obligation, but I would say a legal obligation. And to provide compensation to those countries that are being harmed and so loss and damage is something that's been debated for three decades at conferences of the parties to the UN Framework Convention on Climate Change. It's really past time to stop talking and start writing checks. And the good news is we're starting to see that, so we've seen the first kind of breakthroughs from Scotland and from Denmark countries are agreeing to put very small but not very small sums of money, but significant in that they represent an acknowledgement that that money does have to be put into loss and damage.

00:22:07 Linnea Nordlander

So before we wrap up, I wanted to sort of look into the future and consider. That, in light of all of the developments that have already taken place and the significant progress that has been made in establishing the link between human rights and the environment, but also human rights and climate change specifically. Are there any other areas where you see particular scope for progress in the role for human rights law.

00:22:37 David Boyd

Well, yes, of course, right across the spectrum. I mean, if we think about the United Nations Sustainable Development Goals, which. There's 17 of the Sustainable Development Goals, 169 targets, and if humanity actually fulfilled those goals, we would be living in a world that would be vastly improved for the great majority of people on this planet. And you were coming up to the halfway mark of the SDG's, which were agreed to in 2015. And we're we're really not on track to meet them. And you know some people will say it's because of the pandemic or the war in the Ukraine. Note we were off track before those cataclysmic events, and I've just completed a report that I'll be presenting to the UN General Assembly later this month, where I make the argument that the reason we're failing on the SDG's is because. We've finally fundamentally misunderstood their very nature. They're they're widely understood to be kind of these political aspirations. But my research indicates that every single one of the SDG's is built on a rock solid foundation of international human rights law, and so there are not aspirations that are actually obligations. And if we treated them as obligations, if governments mobilized the resources to meet the SDG's and the way governments mobilized resources to fight the COVID-19 pandemic. Then we could really harness the power of human rights law to bring about incredible global transformations. Not only in terms of cleaner air access to safe drinking water healthy and sustainably produced food, but in terms of addressing poverty, inequality, gender discrimination. You know the whole range of issues that are targeted by the SDG, so I think that we're at kind of a pivotal moment right now where a brighter future. Is still within our grasp, but we need to really undergo some systemic transformations in order to achieve that.

00:24:41 Linnea Nordlander

Great, I think uh, we'll all be eagerly anticipating that report now and before we wrap up is there anything else that you would like to raise that we haven't talked about yet.

00:24:54 David Boyd

Yeah I would just like to close on a note of optimism, which is, you know, I just got back from doing a country mission to Portugal and Portugal like many other countries is just being blitzed by the climate crisis heat waves. The horrific wildfires drought that's wracking the entire nation, but Portugal has pivoted and Portugal is aggressively pursuing a renewable energy future which will you know, fulfill their obligations in terms of contributing to the global solution so they are putting up wind turbines and solar farms as fast as they can. They've moved from 30% renewable electricity five years ago to 60%. Today

they'll be at 80% in four years, they'll be at 100%. By the end of the decade. And I just think that's the kind of government response we need in the face of the climate emergency is saying, look, we're all in on renewable energy and the beauty of it is that people in Portugal are now experiencing lower energy bills. They're experiencing higher degrees of energy security, so I think that. The solutions to the climate crisis are actually solutions which will kind of create a virtuous circle and. Improve, improve well-being across a whole span of metrics for people all across the world. So I realize that there's a lot of reasons to be pessimistic. But I also think it's fundamentally important to give people reasons for hope.

00:26:21 Linnea Nordlander

A nice optimistic note to end on. So David, I'd like to thank you so much for taking the time to come on the show today. It's been such a pleasure to have you and I hope we get the chance. To speak again soon and maybe even in Copenhagen next time, thanks.

00:26:34 David Boyd

Very much Linnea, and thanks for the great work that you're doing and all the best.

00:26:39 Linnea Nordlander

Thank you bye. Thank you for listening to this episode. If you want to learn more about Professor Boyd's work, check out the link in the show notes. You can also find the link to our research project. And act there, stay tuned for our next episode.