

The Climate Show – Episode 35

Transcript

00:00:04 Linnéa Nordlander

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.

00:00:16 Beatriz Martinez Romera

Hi, we are Beatriz Martinez,

00:00:18 Linnéa Nordlander

And Linnéa Nordlander.

00:00:19 Beatriz Martinez Romera

And we are your host at the Climate Show.

00:00:26 Beatriz Martinez Romera

Welcome back to the Climate Show. Today we are talking about New Zealand's approach to climate law, including the Zero Carbon Act, how ocean and polar governance are evolving, and what this means for justice and the protection of people and nature.

00:00:38 Linnéa Nordlander

To guide us, we're joined by Professor Daya-Winterbottom from the University of Waikato, the Director of the Centre for Environmental Resources and Energy Law. Stay with us as we explore what the rest of the world can learn from New Zealand's action in climate law.

00:00:58 Beatriz Martinez Romera

Welcome to the Climate Show. We are here today with Professor Trevor Daya-Winterbottom from the University of Waikato. And we're going to be discussing how New Zealand approaches climate change law and what lessons it offers internationally. Welcome to the Climate Show.

00:01:13 Trevor Daya-Winterbottom

Thank you, Beatriz. I'm really pleased to be here.

00:01:15 Beatriz Martinez Romera

New Zealand has been described as a global testing ground for environmental governance. How would you characterize the country's approach to climate change law in terms of ambition, innovation, and implementation?

00:01:26 Trevor Daya-Winterbottom

In terms of approach, I describe New Zealand as being a country of high ambition, but equally a slow follower. It's taken historically, over the past 30 years, a very slow approach to implementing climate change laws and also promulgating them and it's been one of quite a difficult pathway. Our current regime is the third policy iteration of trying to produce laws to deal with the climate crisis.

00:02:06 Beatriz Martinez Romera

Notably the Zero Carbon Act from 2019 sets an important milestone, right? How effective has it been so far in driving real emission reductions and where do you see the biggest legal or political or institutional challenges?

00:02:21 Trevor Daya-Winterbottom

The Zero Carbon Act has been interesting in a number of different ways. In one sense, it's a very progressive act, setting targets in law, establishing the Climate Change Commission. But in reality, the implementation of the act has been very difficult.

00:02:44 Trevor Daya-Winterbottom

It wasn't until 2022 that the emissions trading scheme moved into being a fully cap and trade scheme. Previously, before that, it was just a trading scheme.

00:02:55 Trevor Daya-Winterbottom

And the advice of the Climate Change Commission has been challenged by the current government in terms of the announcements last week on cutting in half the targets on methane emissions.

00:03:08 Trevor Daya-Winterbottom

And equally, some of the ways that the targets have been set by the Climate Change Commission are currently the subject of public interest litigation before the New Zealand courts.

00:03:20 Trevor Daya-Winterbottom

But more importantly, the statute was also, as well as being highly progressive, also regressive in that prior to the enactment of the statute, climate change considerations have been litigated before the New Zealand High Court in the Sarah Thompson litigation.

00:03:42 Trevor Daya-Winterbottom

And there the court found that it was a mandatory consideration for the government to consider whether it should set new targets each time a scientific opinion changed through the assessment reports.

00:03:56 Trevor Daya-Winterbottom

And one of the things that the Zero Carbon Act did was to effectively reverse that decision and state that climate change considerations were only permissive. So decision makers are free to take account of them or to ignore them as they see fit.

00:04:11 Beatriz Martinez Romera

What is the positioning or the role of this climate change commission within the system to ensure that emission reductions are achieved?

00:04:21 Trevor Daya-Winterbottom

It is purely advisory. For example, on the question of cutting in half the methane targets, the government commissioned separate advice from a separate advisory panel rather than following the advice from the Climate Change Commission.

00:04:37 Beatriz Martinez Romera

New Zealand operates within a unique Pacific regional context. How does that influence its climate policy and its climate law?

00:04:45 Trevor Daya-Winterbottom

I think influence comes in two ways. One, through New Zealand's own indigenous perspective, through Māori customary law, which in the system is referred to as Tikanga Māori, Māori customary law and separately because of the large Pacific Island population in New Zealand and also New Zealand's wider relationship in terms of being seen as an influential international player in the Pacific.

00:05:18 Trevor Daya-Winterbottom

So, there's a real tension there in terms of that ambition and perhaps also an area of risk, one potential area of risk given the decision on halving the methane targets would possibly be interstate litigation.

00:05:37 Trevor Daya-Winterbottom

This wouldn't be out of the realm of possibility that the state of Vanuatu might actually bring a case before the New Zealand High Court against the New Zealand government for a declaration of inconsistency between New Zealand national law, or how it's implemented, and its international obligations under Paris Agreement.

00:05:57 Beatriz Martinez Romera

You have written on the protection of people at sea. How does this issue connect to the broader challenge of climate-induced displacement and migration in the Pacific?

00:06:08 Trevor Daya-Winterbottom

Very directly, given New Zealand's relationship with the Pacific, perhaps the most interesting case was that of Ioane Teitiota, who's labelled in the press in the sort of mid 20 teens as being the world's first climate change refugee.

00:06:34 Trevor Daya-Winterbottom

Interestingly, he was deported from New Zealand as about the time when the Ardern government was coming into power in 2017. That government announced that it was going to have a specific regime for displaced persons, a climate change displaced persons visa. 100 of those visas were going to be granted. My understanding is that none has been granted so far.

00:07:00 Trevor Daya-Winterbottom

And the Teitiota case was litigated quite aggressively by the New Zealand government before the UN Human Rights Committee. So, it's a very strange, again, positive, negative relationship there in terms of thinking about people who are going to be displaced through climate change and very significantly so.

00:07:29 Beatriz Martinez Romera

You've been also looking into ocean governance and Antarctic law, 2 critical and sometimes siloed domains. Do you see these areas converging under the pressure of climate change?

00:07:42 Trevor Daya-Winterbottom

Potentially, yes. One of the sorts of traditions that is there in New Zealand's sort of relationship with Antarctica has really been one of the sorts of environmental or public trusteeship.

00:07:56 Trevor Daya-Winterbottom

When the original claim to Antarctica was transferred from the United Kingdom to New Zealand in the 1920s, the New Zealand government at that stage accepted the claim on behalf of the then British Empire and Commonwealth.

00:08:11 Trevor Daya-Winterbottom

And that similar kind of wider trusteeship also came to the fore in the 1959 Washington Conference where the Antarctic Treaty was negotiated.

00:08:23 Trevor Daya-Winterbottom

And the then New Zealand Prime Minister Walter Nash put forward the idea that there should be a global trusteeship for Antarctica rather than what transpired into Article 4 of the Treaty, which is basically just a freezing of the claimant rights.

00:08:44 Beatriz Martinez Romera

New Zealand is internationally known for the Whanganui River case, recognizing the river as a legal person. Do you see these rights of nature approach evolving in New Zealand, and how can this approach help the climate fight?

00:09:01 Trevor Daya-Winterbottom

The Whanganui River case was very interesting in terms of a milestone change. Before that, there had been an approach to dealing with rivers and harbors from a guardianship perspective. So still treating those natural phenomena as objects of law rather than being subjects of law.

00:09:27 Trevor Daya-Winterbottom

And we got a change firstly with the Taranaki Maunga Mountain ranges, which were given legal personality in 2014. And that mechanism was repeated with the Whanganui River in 2017. But the critical difference with the Whanganui River was that two guardians were specifically appointed to speak for the river, so providing a real voice.

00:09:52 Trevor Daya-Winterbottom

Where I think that goes in relation to broader developments is potentially looking at how it relates, say, to protected areas at sea. For example, we had a long-running debate in New Zealand around having a marine protected area around the Kermadec Islands.

00:10:15 Trevor Daya-Winterbottom

That would have been a 620 square kilometer reserve. That faltered for various reasons, primarily because of the lack of consultation between the government and Māori who had fishing rights there.

00:10:30 Trevor Daya-Winterbottom

But there's been a lot of commentary to suggest that a legal personality approach could actually have brokered a settlement on that because that would have been attractive to certainly the Māori fishing interests who have a very strong sense of relationship to the environment, both through Tikanga Māori in terms of environmental considerations and also through more relationships and ancestral connections.

00:11:00 Trevor Daya-Winterbottom

And where you can see that going is, again, thinking about climate change and the global commons and that trusteeship relationship with Antarctica. Turning that forward and looking at that and possibly New Zealand amending its own Antarctica Act of 1960 to give legal personality, if not to the whole continent, but at least to that part of Antarctica that New Zealand exercises some interest in.

00:11:33 Trevor Daya-Winterbottom

And that I think would put a very different perspective in terms of how the climate change obligations are viewed by states.

00:11:42 Beatriz Martinez Romera

If you could recommend one key reform or idea for the next decade on climate change, what would it be?

00:11:49 Trevor Daya-Winterbottom

I think the one key area would be when you have institutions that you have put in place, such as the Climate Change Commission actually, giving binding force to those recommendations, because otherwise it is too easy for the government of the day to choose to do things differently.

00:12:14 Trevor Daya-Winterbottom

And if I was allowed a second thing that one could put forward, then that would be really interrogating and expanding this idea of legal personality that New Zealand has been pushing the boundary on and seeing where that could take us, particularly with the global commons.

00:12:38 Beatriz Martinez Romera

Thank you very much. Before we wrap up, is there anything else that you would like to raise on the theme of today?

00:12:44 Trevor Daya-Winterbottom

I think the only final thing that's worth putting out there is that where we're currently sitting with climate policies around the world, some of the policy sets are highly unambitious.

00:13:04 Trevor Daya-Winterbottom

And if we were to adopt those positions, it would be firmly putting us on track for four degrees of global warming. So having things that can challenge that would be very useful. And I think one area where there's a risk is New Zealand's recent decision in the last two weeks to reduce the methane targets by half.

00:13:33 Trevor Daya-Winterbottom

It's not out of the realms of possibility that states such as Vanuatu might actually start an interstate action litigating in the New Zealand courts, seeking from the High Court a declaration of inconsistency between how New Zealand's current domestic law is being implemented and its Paris Agreement commitments.

00:13:53 Beatriz Martinez Romera

Thank you very much, Trevor. This has been a fascinating and very inspiring conversation. To our listeners, thank you for joining us on the Climate Show.

00:14:02 Beatriz Martinez Romera

We hope you visit us soon again. And yeah, thank you very much.

00:14:08 Trevor Daya-Winterbottom

Thank you. It's been a real pleasure to be here in Copenhagen today. And I'd sincerely love to come back.

00:14:17 Beatriz Martinez Romera

Anytime.

00:14:23 Linnéa Nordlander

Thank you for listening to this episode. If you would like to learn more about Professor Daya-Winterbottom's work, check out the information in the show notes. Stay tuned for our next episode.