Berkeley Center on Comparative Equality & Anti-Discrimination Law

Working Group on Climate Change: Launch Event

Work-In-Progress workshop on Climate Change, Equality and Discrimination Law

Date: Thursday 24 March 2022/Friday 25 March 2022 depending on time zones

Times: PST 12.00, EST 13.00, GMT 19.00, AEDT Friday 25 06.00) 2 hours

via zoom:

https://berkeley.zoom.us/j/92986969773

Program

1. Welcome and launch of the BCCE Climate Change Working Group:
   Beth Goldblatt, Dan Shapiro and Cristy Clark (co-directors of the Group)

2. Panel 1: Equality law and climate justice (Chair: Beth Goldblatt)
   Cathi Albertyn, ‘Rethinking Equality law doctrine to take account of Climate Justice’
   Cristy Clark, ‘Climate Justice as a Necessary Condition for Equitable Transformational Adaptation’

3. Panel 2: Grounds/Attributes of discrimination and Climate Change (Chair: Cristy Clark)
   Sébastien Jodoin, ‘Discrimination against Disabled People in the Climate Crisis’
   Beth Goldblatt, ‘Climate adaptation, race and economic inequality – a role for discrimination law?’
   Elizabeth A. Wilson ‘Children/youth, equal protection and climate litigation’

4. Litigation and advocacy on Climate and Discrimination (Chair: Dan Shapiro)
   Lucy Maxwell, Sara Mead and Michaela Krömer, ‘Urgenda Climate Litigation Network: Equality and non-discrimination arguments in climate cases at the national and international level’
   Matthias Petel and Sam Bookman, ‘Climate Litigation and Climate Justice: The Distributive Dimensions of Rights-based Climate Litigation in Europe’

5. Way Forward for the Group
Abstracts

Cathi Albertyn, ‘Rethinking Equality law doctrine to take account of Climate Justice’

In previous work on reproductive rights in the context of climate justice I called for a radical connectedness of reproductive, social, and climate justice. Here ‘radical’ is used in its routine, rather than political, sense to mean fundamental and comprehensive connectedness. I suggested that an expanded idea of social reproduction, that encompasses care for self, family, community, the environment and the planet, provides an important theoretical lynchpin for this connectedness. I argued that the idea of reproductive rights is best nested in ideas of equality and freedom. Drawing from the connectedness indicated by social reproduction, I called for an understanding of women’s reproductive freedom in the context of a transformative substantive equality that takes account of climate justice. This multi-dimensional and multi-layered idea of equality directs attention to the social and economic conditions and power relations, that operate at all levels (micro, meta and macro), to enable or constrain women’s substantive ability to choose whether, when and how to have and raise children in the context of meaningful family, community, environmental and planetary well-being. In this paper, I hope to develop my thinking on expanded and transformative substantive equality, and its multi-layered context of relational (in)equalities, as a basis for thinking about how equality law doctrine might account for climate justice.

Cristy Clark, ‘Climate Justice as a Necessary Condition for Equitable Transformational Adaptation’

As climate change impacts intensify so too is the research, policy and implementation focus on adaptation. To date, however, the majority of approaches to adaptation policy development and implementation have focused on an incremental adjustments approach, often activated via mainstreaming climate change risks and resilience building into existing social and economic development systems and processes. This incremental approach holds a serious risk of locking in maladaptive development-as-usual pathways, which would undermine the lives and livelihoods of millions of people, particularly the poor and climate vulnerable. This paper argues that in order to achieve climate justice, adaptation must move beyond an ‘incrementalist’ approach to pursue genuine transformational change, and to do this a human rights approach focused on equality rights must guide its development and implementation. This paper will conclude by considering the potential value of discrimination law in pushing climate adaptation towards more equitable approaches in pursuit of climate justice.

Beth Goldblatt ‘Climate adaptation, race and economic inequality – a role for discrimination law?’

Climate change has significant impacts on inequality since existing disadvantages are frequently deepened. Mitigation and adaptation measures to address climate change thus require equality-informed responses. This aligns with the goals of climate justice which emphasise the rights of the most vulnerable, equality and fairness. Climate law and strategic litigation in pursuit of climate justice are rapidly evolving areas with a growing resort to human rights in which equality is often central. This paper argues that discrimination law should be considered, alongside other legal approaches, in shaping creative responses to the challenge of climate-related inequality. While recognising that discrimination law is limited in its capacity to challenge systemic inequality, it nevertheless supports attempts to orient discrimination law towards the unequal impacts of climate change in pursuit of the goal of climate justice. This is motivated by strategic recourse to law as well as the goal of developing relevant discrimination law that is focused on humans within our ecological context and underpinned by an approach to equality that is transformative. The paper brings together concepts of transformative adaptation, substantive equality and climate justice to frame an approach to climate litigation using discrimination law. It draws on the example of unequal race/class access to a public swimming facility in the Australian town of Moree to consider whether discrimination law might support transformative, equitable adaptation in pursuit of climate justice.
Sébastien Jodoin, ‘Discrimination against Disabled People in the Climate Crisis’

People with disabilities are adversely and disproportionately harmed by the impacts of climate change and the unintended consequences of measures that have been adopted in response. Both forms of harm result from a general neglect of the rights and perspectives of disabled people in the design of climate mitigation and adaptation policies and programmes. These direct and indirect consequences of the climate crisis are more pronounced for disabled individuals that experience multiple and intersecting forms of oppression due to their gender, age or ethnicity. In our paper, we demonstrate the role that different forms of discrimination and inequality have played in generating and exacerbating the climate harms suffered by disabled people. Drawing on key cases in Europe, the United States, and Canada that relate to the intersections of disability and climate change, we examine the potential and limitations of equality rights and anti-discrimination arguments for preventing and addressing the climate injustices experienced by the disability community. We conclude by reflecting on what our analysis reveals about the opportunities and challenges of broader efforts aiming to eliminate discrimination and address the physical, economic, institutional, and social barriers that hinder the full enjoyment of rights by disabled persons.

Lucy Maxwell, Sara Mead and Michaela Krömer ‘Urgenda Climate Litigation Network: Equality and non-discrimination arguments in climate cases at the national and international level’

Children, older persons, women, persons with disabilities, and indigenous peoples, among others, experience disproportionate impacts of climate change, in particular on their lives, health and cultural rights. A State’s failure to take reasonable and appropriate measures to protect persons within its jurisdiction from the harm posed by climate change may constitute (in addition to other human rights violations) indirect discrimination against certain groups on one or more ‘protected’ characteristic (such as age, sex, race, disability etc). We will provide a ‘lay of the land’ regarding the use of equality and discrimination arguments in ‘systemic’ mitigation cases in Europe – both at the national and regional level before the European Court of Human Rights. Systemic mitigation cases challenge a State’s overall mitigation efforts, and are usually premised on the State’s duty under tort law or human rights law to take reasonable measures to protect persons within its jurisdiction from harm posed by climate change. We will focus, in particular, on the pending case before the European Court of Human Rights that was filed by a person suffering from multiple sclerosis (MS) against the Austrian government. Like the majority of MS patients, the applicant suffers from the Uhthoff’s syndrome which causes him to lose more muscular control as temperatures go up. At about 25°C he starts to get dependent on a wheelchair, which he can’t push by himself when temperatures reach about 30°C. The petitioner alleges that through inaction on the climate crisis, the Austrian government has violated his constitutional right to family and private life under Article 8 of the European Convention on Human Rights (ECHR). As the Austrian legal system does not provide for an effective remedy to be filed in case of climate inaction, he also alleges that his rights under Article 13 of the ECHR have been infringed (details here and here).

Matthias Petel and Sam Bookman, ‘Climate Litigation and Climate Justice: The Distributive Dimensions of Rights-based Climate Litigation in Europe’

Human rights arguments have been successful before several domestic courts across Europe in imposing more ambitious action in cutting greenhouse gas emissions upon governments. Yet, the integration of climate justice concerns in those judicial decisions have been insufficiently studied. This paper seeks to contribute to such endeavor by analyzing the cases of Urgenda v. The Netherlands, Klimaatzaak v. Belgium and Neuebauer v. Germany against the climate justice framework. In Part One we set out our analytical framework. A climate justice approach acknowledges that climate mitigation, like the effects of climate change itself, is distributional in nature. In particular, climate justice
highlights the unequal distribution of burdens and benefits across three dimensions: international (justice between states); intergenerational (justice between generations); and intragenerational (justice between social groups along socio-economic, racial and gender determinants). In Part Two, we offer a close reading of three key rights-based mitigation decisions to evaluate how judges have accounted for the various dimensions of climate justice. Detailing the contrasted approaches of climate justice in those decisions, we also point to a common reluctance to engage in intragenerational justice reflected in the failure to fashion rights-based obligations which take into account the inequalities across communities and social groups.

Elizabeth A. Wilson ‘Children/youth, equal protection and climate litigation’

Our Children’s Trust (OCT) is a non-profit law firm dedicated to climate litigation on behalf of youth and child plaintiffs. In its ambitious lawsuit against the United States, Juliana v. United States, the Complaint includes an Equal Protection claim under the Fifth Amendment; other cases based on state constitutions include similar claims. Young people are defined as a suspect class in need of “extraordinary protection from the political process” who are being “denied the same protection of fundamental rights afforded to prior and present generations of adult citizens.” After a stunning early victory, the Juliana litigation has been stymied by the unwillingness of courts to provide a key component of the relief requested: namely, a national remedial plan addressing climate change. This paper considers the Equal Protection claims from a legal and moral perspective. I argue that the strategy of using youth and child plaintiffs that OCT has brilliantly deployed permeates the Juliana litigation as well as other state litigation as moral if not yet legal suasion. Even the U.S. government, in asking for the case to be dismissed, stated that children are “clearly not differently situated from any other person of any age when it comes to respect to current impacts of climate change” (italics added), making an implicit admission. Aiming to bring about a shift in constitutional meaning, OCT is counting, not wins at this point, but dissents.1 From a legal perspective, the paper will look at how OCT’s youth-related strategy relates to precedent on equal protection, especially to cases involving children. From a moral perspective, the paper will look at how the youth climate movement resonates with youth-centered climate litigation in ways that parallel prior moments of constitutional change.

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1 Today (January 28, 2022), the Alaska Supreme Court handed down a decision ruling against the youth plaintiffs in the split decision in Sagoonick v. State of Alaska. A press release issued by Our Children’s Trust states: “...more importantly, the dissents keep growing.”
Participant Bios

Cathi Albertyn is a Professor of Law and the National Research Foundation South African Research Chair in Equality, Law and Social Justice, based at the School of Law University of the Witwatersrand, Johannesburg, South Africa.

Cristy Clark is an academic at the University of Canberra Law School, Australia. She is an expert on the human right to water. Her research focuses on the intersection of human rights, neoliberalism, and the environment, and she is the co-author of The Lawful Forest: A Critical History of Property, Protest and Spatial Justice (2022).

Beth Goldblatt is a Professor in the Faculty of Law at the University of Technology Sydney (UTS), Australia and a Visiting Professor in the School of Law at the University of the Witwatersrand, South Africa. She is an international expert on social and economic rights and equality and non-discrimination law. Her work covers many aspects of equality with a recent focus on climate change, its impact on inequality, and the role of law in contributing to climate justice.

Sébastien Jodoin is an Associate Professor in the Faculty of Law of McGill University, where he holds the Canada Research Chair (tier 2) in Human Rights, Health, and the Environment. He is also a member of the McGill Centre for Human Rights and Legal Pluralism and an Associate Member of the Bieler School of Environment, the McGill Institute of Health and Social Policy, and the Max Bell School of Public Policy. He is the founding director of the Disability-Inclusive Climate Action Research Programme, a pioneering initiative to generate, co-produce, and translate knowledge at the intersections of disability and climate justice.

Michaela Krömer is an Austrian attorney-at-law focusing on human rights and climate crisis litigation. In this capacity she has filed the third climate petition with the ECtHR on behalf of her client, a multiple sclerosis patient whose symptoms of disease worsen with the rise in temperatures. She has successfully represented clients in numerous strategic litigation cases, most recently regained access to the Austrian labour market on behalf of asylum seekers. Prior to becoming an attorney, she worked for numerous national and international NGOs and studied law in Vienna, Nottingham and at Harvard law school.

Lucy Maxwell is a Senior Legal Associate at the Climate Litigation Network, a project of the Urgenda Foundation. In 2015, the Urgenda Foundation won a landmark climate case against the Dutch Government, which forced the government to increase its climate ambition. The Network provides legal and scientific expertise to support litigation around the world to enforce States’ mitigation obligations, including pursuant to national and international human rights law. Lucy specialises in strategic State-based climate litigation and advises on States’ human rights obligations in the context of climate change. In current and previous roles, Lucy has worked with human rights defenders in Europe, South Africa and South Asia on a range of human rights claims arising under national, regional and international frameworks.

Sara Mead is a Senior Legal Associate at the Climate Litigation Network, a project of the Urgenda Foundation. Sarah specialises in international environmental law and human rights law – with a focus on States’ obligations in light of the climate crisis. She is co-editor of the forthcoming collection The Environment through the Lens of International Courts and Tribunals (Asser Press) and co-lead of the World Commission on Environmental Law (WCEL) project: Judicial Handbook on Climate Litigation.

Matthias Petel is an SJD (Doctoral Candidate) at Harvard Law School. His work focuses on the strategic use of human rights in climate litigation and on the legal foundations of green capitalism. He also acts as the President of the Environmental Justice Commission of the Belgian Human Rights League.
Sam Bookman is an SJD (Doctoral) Candidate at Harvard Law School and Staff Attorney at the Cyrus R. Vance Center for International Justice. His work focuses on constitutional responses to the climate crisis as and other legal challenges of the Anthropocene. In his legal practice, he has consulted on comparative environmental law matters for clients including the International Council on Environmental Law, the OECD, and the United Nations Environment Program.

Dan Shapiro has been a practicing trial lawyer and business litigator since 1982. Much of his career has been spent litigating class actions, where he helped to develop and refine the applicable law in the trial and appellate courts. He has been a frequent speaker and author on class actions and class action reform. Dan is a graduate of The University of Chicago Law School and of the University of Illinois where he earned All University Honors and was a member of Phi Beta Kappa.

Elizabeth A. Wilson is a human rights lawyer and academic. She has a JD from Harvard Law School and a PhD from the University of Pennsylvania and was Assistant Professor of Human Rights Law at the School of Diplomacy at Seton Hall University. Her research focusses on civil society, people power movements, and international law. Her monograph book People Power and International Human Rights: Creating a Legal Framework (International Center for Nonviolent Conflict, 2017) puts forward the theory that nonviolent resistance is the fundamental source of human rights.