

The Climate Show

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

[Episode 4. Jacques Hartmann: Rights-based climate change litigation in Europe](#)

Content of the podcast

--- intro music ---

Linnéa Nordlander 00:00:04

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.

Beatriz Martinez Romera 00:00:16

Hi, we are Beatriz Martinez, Linnéa Nordlander and Alessandro Monti, and we are your hosts at The Climate Show.

Alessandro Monti 00:00:26

Welcome! In our last episode, we talked about trends in human rights and climate change litigation, which is connected to our research project EnAct. Professor Savaresi explained to us that rights based litigation for mitigation goals is gaining traction and is beginning to expand to not only states but also corporate actors.

Beatriz Martinez Romera 00:00:45

Picking up from there, today we are exploring how these trends play out at the European level where we find a number of cases that draw on rights-based arguments.

Linnéa Nordlander 00:00:53

And for that, we have the privilege of being joined by Professor Jacques Hartmann, who we talked to about his research on the potential and limitations of litigation before the Court of Justice of the European Union and the European Court of Human Rights, in holding states accountable for their climate inaction.

And as the Danes say, 'god fornøjelse'!

--- music ---

Linnéa Nordlander 00:01:18

We're here with Jacques Hartmann, who is professor at the University of Dundee and visiting professor at the University of La Sabana, Colombia. He is an expert on public international law and human rights law and has worked in this area both in academia, through his earlier work at the Universities of Cambridge Durham, Glasgow and Edinburgh, and in Danish diplomacy. So hi Jacques, thank you for joining us on the show. It's great to have you here, and also to have you on board as a scientific advisor to our project, Enhancing Climate Action through International Law. And of course it's a special pleasure for me to have you here as one of your former students. So welcome to the show!

Jacques Hartmann 00:02:00

Thanks for having me.

Linnéa Nordlander 00:02:01

Thank you! We're going to be talking about your research on climate change today, and in particular on climate litigation in the regional European courts. But before we get to that, could you maybe tell us a little bit about why climate change litigation is so important?

Jacques Hartmann 00:02:18

Well, in short, we've had some 30 years of climate negotiations and the scientific consensus is that there's been insufficient progress. And if our politicians do not want to protect our fundamental rights, somebody else has to do, and that now seems to be the courts.

Linnéa Nordlander 00:02:34

We have touched on climate change litigation here on the show before, but what do you think the role of human rights law specifically is in achieving the Paris Agreement's temperature goals?

Jacques Hartmann 00:02:44

Yeah, I see human rights as a gap filler, so until we get specific international rights or, more likely, domestic rights that address climate change, we have to use the tools that we have, and that's human rights.

Linnéa Nordlander 00:02:58

And specifically, we're looking at climate change litigation in Europe today. Can you give us a quick overview of what the rights-based climate change litigation looks like in Europe today?

Jacques Hartmann 00:03:09

Yeah, a quick overview, maybe not.

Linnéa Nordlander 00:03:13

[laughs] A long one will do.

Jacques Hartmann 00:03:14

[laughs] Yeah, so there's so far been two cases before the Court of Justice of the European Union, and there are currently 5 cases pending before the European Court of Human Rights. So, the two cases before the Court of the European Union were rejected because the applicant failed to establish standing. And that is to say they failed to show a right for them to appear before the Court. It's quite a technical issue, but essentially the Court applied what is called the Plaumann test, which means that if a private person wants to bring a case before the Court, they have to show that they possess some kind of characteristic that makes them uniquely different from all other members of society. And of course, when we're talking about climate change, that's very difficult to do, and it's very difficult to do in environmental cases in general. And then in addition to that we have cases before the European Court of Human Rights. Five cases pending, as I said, and they're still to be decided, and they probably have a greater chance of success. I should add, more cases are coming through the European Court as well.

Linnéa Nordlander 00:04:16

OK, we're going to Unpack those a little bit a little later. But could you maybe touch on why you think that we see more rights-based litigation in Europe than elsewhere in the world.

Jacques Hartmann 00:04:27

Well, there's a simple geographical reason that is that we have a lot more countries than we have in many other continents, so we have more countries than we have, for instance, in South and North America. But more importantly, we have very developed international institutions in Europe, and when I say Europe, I mean the wider Europe, not just the European Union. So we have the European Union, which of course most people know, has 27 Member States and then we have the Council of Europe, for instance, which has 46 Member States and they both provide some rather unique possibilities of getting access to justice, either via the European Court of Justice or via the European Court of Human Rights.

Linnéa Nordlander 00:05:07

And why is it that litigation before those two regional courts, or perhaps litigation at the regional level in general, is so important? What is it that that can achieve that domestic litigation can't?

Jacques Hartmann 00:05:18

Well, if you look first at the European Court of Justice, that's rather unique in the sense that it could strike down laws. So, Europe is also unique because we have the European Union, which is an independent climate actor. So, it makes a lot of the legislation that we have. And it's unique in the sense that it can strike down international law. So, that gives you a very potentially very powerful tool, if you can access that Court, which of course, so far we haven't been able to do. The European Court of Human Rights is slightly different, it has different powers, but it's easier to get access to, it covers more countries and that's why that is a potential useful avenue.

Linnéa Nordlander 00:05:56

So let's turn to those two courts specifically and first looking at the CJEU. In your recent article entitled 'Protecting Rights through Climate Change Litigation before European Courts', which you co-authored with Marc Willers, Queen's Counsel, and which was published in the Journal of Human Rights in the Environment, you discussed two climate and human rights cases that have been brought before the CJEU in particular. They are known as the Peoples' Climate Case and the EU Biomass Case. And as you've already mentioned as well, both of these were found inadmissible by the Court. Can you explain what the procedural problems were in those cases?

Jacques Hartmann 00:06:33

Well, the procedural problem is essentially that it is impossible for private organizations or NGOs to get before the Court of Justice of the European Union,

because you have to show that you are uniquely affected by a piece of EU legislation. Now when you're complaining about climate change, you're not uniquely affected. You are affected like everybody else in society by the impacts of climate change and it means you can't bring currently these cases. Now the rules are slightly changed, which means that non-governmental organizations can ask for the European Commission to review legislative acts and, if that review is not satisfactory, it gives you another kind of potential avenue of reaching the court. That said, it is a difficult court to access in environmental matters.

Linnéa Nordlander 00:07:17

And you've also touched on already that there is litigation happening before another important regional court, namely the European Court of Human Rights. And some of these cases target climate change mitigation policy broadly, with applicants arguing that the adverse impacts of climate change will violate their human rights. So what types of arguments are the applicants putting forward to the Court in those cases?

Jacques Hartmann 00:07:41

So there are five cases currently and they have some similarities and also, of course, some differences. One of the first cases being brought was *Carême v France* brought by a French mayor, and he's essentially relying on Article 6, which gives you a right of access to justice. And that's quite unique in that the other cases focus on other human rights, such as the right to life, for instance, or the right to private life and home under Article 8 of the Convention.

Linnéa Nordlander 00:08:12

And you've mentioned, of course, that before the CJEU there are significant hurdles in accessing the court. Would you say that it's easier to access the European Court of Human Rights for these cases? Are there any hurdles that the applicants face there?

Jacques Hartmann 00:08:26

There are other hurdles, you will know because I think it took one of my classes on access to the European Court of Human Rights [laughs]. And there are what we call normally several hurdles. But what we need to focus on is you need to show that you've been victim of a violation, you need to have exhausted domestic remedies, which means that you need to complain to domestic authorities before you try to go to the European Court of Human Rights. In one of the cases being brought, *Duarte Agostinho* and others, which was unique in that it was brought against Portugal and 30 other Member States of the Council of Europe, they did not exhaust domestic remedies, so they didn't go to domestic courts first. And that might be one of the

reasons that this case will be thrown out. In some of the other cases that we've seen, there is a very important case, which is called KlimaSeniorinnen, which is brought by a group of, I'm not sure what political correct term to use, elderly women from Switzerland, they're all over the age of 64. And they have gone to all the way to the Swiss Supreme Court, so they have exhausted domestic remedies, and that case has actually just been elevated to the Grand Chamber of the European Court of Human Rights, which means that this is a potentially important case where the European Court of Human Rights might change its previous case law.

Linnéa Nordlander 00:09:41

And of course, these cases are still pending, but if we suppose that some of them or one of them will be successful, what would the impact of a judgment like that be? Are there limits to what such judgments can achieve?

Jacques Hartmann 00:09:56

Yes, when we compare the European Court of Human Rights to the Court of Justice of the European Union, then the powers are much more limited. So the European Court of Human Rights can't strike down domestic legislation, so what they would normally give us what we call 'just satisfaction' under Article 41 of the Convention, and that is essentially that you get money. And we distinguish between pecuniary and non-pecuniary compensation. So that means if you lost something, if your land was flooded, for instance, and you can't use it, you might be compensated. That said, I think it's very unlikely the court will give monetary compensation in these cases, because if one person gets compensation, potentially there's 500 million people in the wider Europe that can go to the Court. So it's probably more likely, I'm not saying this is likely, but I'm saying *more likely* to give some indication of general measures which you can do under Article 46. Where it can say, let's say, a piece of legislation is defective, they could come with suggestions how the national forces can change the domestic legislation. So we saw something like that in the very famous Urgenda case, for instance, where the domestic court in the Netherlands said that the government had to reduce its emissions. I would doubt that the Court would be so specific, but you never know.

Linnéa Nordlander 00:11:12

So of course, the Court typically allows states to have a certain degree of discretion in implementing their human rights obligations, but that discretion is wider or narrower depending on the degree of European consensus. How do you think the court is going to assess the notion of European consensus for these types of mitigation-oriented cases?

Jacques Hartmann 00:11:35

I think it's quite difficult to predict, but the case is quite unique and there's quite a lot of unique features. That said, so you're completely right, let's say something like the chastisement of children, for instance, if a lot of European countries have regulations and rules on that, then we have something we call that narrow margin appreciation because we have common rules all over wider Europe, and that means more scrutiny from the Court and less discretion for the Member States that decide for themselves. If there's no such legislation, then we have a wider margin of appreciation and states can decide themselves. Now, when we look at climate change, I think there's a good argument to be made that this is first of all an international issue, so it's not an issue that lends itself to a lot of margin of appreciation. And secondly, we have a lot of consensus. If we look at the Paris Agreement, you could argue that is consensus [on] what we have to do. And that would again speak in favour of limiting the margin of appreciation of the Council of Europe Member States.

Linnéa Nordlander 00:12:34

So before we wrap up, is there anything that we haven't touched on today that you think is important to raise or to highlight?

Jacques Hartmann 00:12:41

Well, I think one thing that is important is that these cases are kind of like a template for how we can bring cases, and so we have 5 cases pending, but there is nothing preventing the other 500 million people in Europe to initiate a similar litigation either in domestic courts or before the European Court of Human Rights.

Linnéa Nordlander 00:12:59

OK, great, a nice call for action there towards the end. Thank you so much for coming on the show today and for sharing your expertise with us. We look forward to having you back here in Copenhagen sometime soon and of course to continue our collaboration on EnAct.

Jacques Hartmann 00:13:13

My pleasure, I look forward to being back.

--- music ---

Linnéa Nordlander 00:13:17 Speaker 1

Thank you for listening to this episode. If you're interested in learning more about Professor Hartmann's Research, check out the article he co-authored with Marc Willers, QC entitled 'Protecting Rights through Climate Change Litigation before Europe'. You can find the link to that article, and to our research project EnAct, in the show notes. Stay tuned for our next episode!