

The Climate Show

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

[Episode 5. Andreas Müller: An example of rights based climate litigation: The Mex M. v. Austria case](#)

Content of the podcast

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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.

In previous episodes, Professor Savaresi and Professor Hartmann talked to us about the prospects of rights based climate litigation, with a specific focus on regional courts.

Linnéa Nordlander 00:00:04

And today we're going to be zooming in on the case Mex M. against Austria, which is currently pending before the European Court of Human Rights.

Alessandro Monti 00:00:41

This is the first case focusing on the impacts of climate change on the rights of persons with disabilities before the European Court of Human Rights. We have invited Austrian professor Anders Müller to help us understand the issues that this case raises.

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Alessandro Monti 00:00:41

We're here with Andreas Müller, who is professor of European and international law at the University of Innsbruck, Austria, as well as visiting professor at the Universidad Panamericana in Mexico City and at the Universidad de Alcalà. He holds an LL.M. from Yale University, and he is specialized in international and European human rights law, as well as in international economic law. Beside these academic appointments, he has also served as a law clerk at the International Court of Justice for Judges Abdul G. Koroma and Bruno Simma.

Hi Andreas, thank you for joining us on the show.

Andreas Müller 00:01:31

Hello good morning.

Alessandro Monti 00:01:34

It's great that you could find the time to record this this episode with us during your visit to Copenhagen. We're also very happy to have you on board as a scientific advisor to our project 'Enhancing climate action through international law'.

It is a special pleasure for me, as one of your former PhD supervisees, to have you here today.

Andreas Müller 00:01:51

Thank you, it's a pleasure to be here.

Alessandro Monti 00:01:54

In some of the previous episodes, we have discussed recent trends on human rights based climate change litigation, with a focus on regional courts. Today we're going to zoom in on one particular case, which has been filed against your home country of Austria, namely *Mex M.* against Austria, which is currently pending before the European Court of Human Rights.

Could you give us an overview of the case?

Andreas Müller 00:02:18

Ok, this *Mex* case is particular in a number of reasons. As it focuses on one person who is in a very special personal condition, it is a relatively young male person who has a specific manifestation of multiple sclerosis.

That leads to the situation that his personal condition worsens. The higher the temperatures are. So when they go beyond 30 or 35 degrees, he is more or less forced to remain in his wheelchair, whereas his condition is better when the temperatures are lower.

That makes the case interesting because in all those human rights cases related to climate change, and especially in the European cases, we have this issue of standing and being specifically affected. And as this young person is in a unique position, this might be a case that the European Court of Human Rights will take up, or will treat in different ways from others, so that's maybe the most particular feature of this case.

00:03:42 *Alessandro Monti*

Thank you. So, maybe we can start from the substance of the case and say a bit more about what type of claims is the applicant bringing in this case.

00:03:51 *Andreas Müller*

Yes, so this case started, not surprisingly, in the Austrian domestic courts, and it started very differently. It was a constitutional complaint of several 1000 people, making a tax claim. So they were saying that the fact that flight companies are treated better than the train company in terms of taxes is unconstitutional, that it's a violation of the equality principle of the Austrian Constitution. The Constitutional Court kicked that case out, due to lack of standing.

And then the lawyers behind that case sort of decided, as a matter of strategic litigation, to take one single case out and take that to Strasbourg. And of course, they had to reframe their argument from a constitutional reasoning, to a reasoning under the European Court of Human Rights.

And what is interesting about that case that it has not only a substantive side as cases like that have under Article 8 of the Convention mostly, but it has also, and in particular a procedural side, especially under Article 6 and article 13 of the European Convention, so claiming the lack of an effective remedy.

00:05:28 *Alessandro Monti*

Great. So, we will come back to these more procedural aspects of the case, but first perhaps it's worth saying a few words on the standing issues in this case, and you mentioned that it seems to have some better prospects than other cases that have been raised before the European Court of Human Rights.

So, could you maybe say a few more words about what issues those cases are facing and how the *Mex M.* case could have a better chances of being considered by the court.

00:06:00 *Andreas Müller*

Well, in order to succeed in the Strasbourg Court, one has to show that one is a victim of a human rights violation. And, as we all know, with climate change we have the issue that makes it so important that it affects all of us, we can't avoid it. But the question is, are we now all

victims of a human rights violation, meaning that we can all go to international human rights institutions?

And most will say no, it can't work because there is no such thing as an *actio popularis* in international human rights law.

And so, those people bringing the cases to the Strasbourg court were sort of intelligent and forward looking enough that they tried to single out groups, persons that are specifically affected by climate change, in order to make the argument that they are victims of a human rights violation in a different way than the general population.

And I guess you will have discussed these cases in previous podcasts, the first of these cases was the Portuguese case that focuses on, let's say, the younger generation being particularly affected, in the sense that they will have to bear the consequences of climate change over their whole lifetime, so for decades.

Then we have next in line the *Klimaseniorinnen* case, in Switzerland, which is kind of the opposite way of framing it to say. When you have elderly people, whose health is typically affected or endangered anyway by the fact of getting older and that they experience the consequences of climate change more than a people of a younger age.

And as we have recently heard, this case, the *Klimaseniorinnen* case, managed to be admitted by the Grand Chamber, which is an important sign. At least we know that the European Court of Human Rights takes the issue seriously enough to issue a landmark decision, that we can say for sure. How it will deal with the standing of these Swiss elderly ladies, that remains to be seen.

And then we have now next in line this aforementioned Austrian case, which is again different in that it really doesn't focus so much on a certain age group, but even much more particularly on an individual person who has really a special health situation that affects him really differently and much more than other people.

So, in terms of standing, this could become – it's too early to say it because it's this case is an earlier stage than the others, in terms of treatment, by the European Court of Human Rights – but it has at least the potential of becoming an interesting case in terms of the doctrine of standing, the doctrine relating to what it means to be a victim of a human rights violation under the European Convention.

00:09:35 *Alessandro Monti*

That was very insightful. And now we can also address something else you mentioned previously, which is the sort of lack of available remedies domestically in the Austrian legal system to adequately respond to human rights violations due to climate change. So, maybe starting from the Austrian point of view to then a bit more generally say a few words on how can domestic legal systems provides remedies to these type of violations. And what do you think could be the impact of court decisions to respond to such challenges?

00:10:17 *Andreas Müller*

Well, when we look at human rights driven climate change litigation, mostly people are arguing in the domestic courts that there is a problem with the legislator. So, either they are claiming that the legislature doesn't do anything, or they are claiming, well, the legislator has acted, but it is not acting quickly enough, or is not doing enough. And having these types of claims to be decided by a domestic court or a constitutional court is always challenging. It raises major division of competence, a division of powers concerns, separation of power concerns.

And so, it's not surprising that domestic courts are reluctant to some extent to take such cases up, and in most countries, and especially in Austria and in Switzerland very similarly, there are relatively strict limitations when you want to claim that the law is unconstitutional because the domestic legislator hasn't done enough or is not doing the balancing properly. Because domestic courts take division of power concerns seriously, and this also applies to international human rights courts, so this will be one of the major major challenges for the Strasbourg Court, to look to what extent it will be prepared to interfere with the domestic margin of appreciation.

And now, taking up your question: it might be easier, or more attractive, for an international court to address these issues through the lens of procedural rights than substantive rights. Because when you answer the question directly, you are in the area of *obligations positives*, so positive obligations of states.

And when you answer the question directly, you will have to say: well, you Austrian Parliament, you Swiss parliament, you should have done the material or substantive balancing differently. You should have put more burden on the living generation. You would have to be doing more for the next generation.

It's less intrusive, it's less interfering with the domestic sphere, If you say: well, at this stage, we don't answer the substantive question, but we have an individual case here. This person has a plausible human rights claim. This person is at least the potential victim of a substantive human rights violation.

And why are Article 13 of the Convention? You are under an international obligation to give such a person an effective domestic remedy. And by the way you address this claim by basically not taking it up, by saying for this type of claims there is no constitutional protection. By that, you have violated the Convention. So, it has the advantage that you don't have yet to address the substantial violation, and it might be much easier to digest for the domestic systems and in the end it might lead to the same result.

Because as soon as you give access to persons in domestic fora, then the constitutional courts will have to address the substantive question and we have seen that already in Germany, that the German Constitutional Court last year has opened the doors to substantive claims under German constitutional law. And I think it's a plausible assumption that the European Court of Human Rights will try to motivate, and induce, and invite domestic courts to go in the same direction. And Article 13 might be the trigger for it

00:14:58 *Alessandro Monti*

And of course, climate litigation is a very important way to make progress on mitigation ambition, but definitely not the only one. So, closing now the discussion on climate litigation, I

would like to also briefly address with you how international cooperation can advance on climate change.

And, in this regard, we have the pleasure today to host your talk at our [Climate Breakfast Seminar Series](#), in which you discuss the two principles of common heritage and common concern of humankind as they relate to climate change.

So, could you please just sketch out their respective potential and the way forward?

00:15:33 *Andreas Müller*

Of course. So, now the focus is very much on climate change and human rights, and that means the focus is on individuals as the relevant actors. And, of course, the organized civil society taking up individual cases. And this is very important and there is a lot of potential in that, no doubt.

But, and that's the way I understand your question, and I would completely agree that this can't be the only way. We shouldn't forget that we also have an organized international community, with States being still – I mean, it's the structure of international law as we know it – with states being the main the dominant actors, but also a lot of other and additional actors.

And, with the Paris Agreement, we have had a major step already some years ago, but most will agree that huge challenges lie ahead on this level, and I think there has to be sort of strong claims that the amount and the intensity of international cooperation that is to be expected is very very very high. And there the question is whether concepts like common concern of humankind, that is underlying international climate law as we know it today, or it was the topic of this morning, sort of introduction of common heritage of humankind as an additional or corrective concept would help to intensify the efforts on that level.

But anyway, I would very much emphasize that much has to be done and quickly, because as we hear and see the challenges are huge and won't allow that we that we just wait and drink coffee and think problems will sort out themselves.

00:17:58 *Alessandro Monti*

Thank you so much. And we are getting to the end of this interview, but before we wrap up, is there anything else that we haven't talked about today that you think is important to raise or highlight in this connection?

00:18:11 *Andreas Müller*

Well, an issue I was raising in the morning is that I think there is a particular role of legal academia in accompanying or framing the discourse and this shouldn't be forgotten. I think very in human rights driven litigation, the focus is often very much on, let's say practicing lawyers and NGO's and the agency.

And sometimes I think legal academia is underestimating the role it has in in framing and accompanying these processes.

And maybe, as you were asking, I want just to highlight, uh, this aspect.

00:18:59 *Alessandro Monti*

Well, this is very encouraging as legal academics, that we also have a role to play in these big challenges.

00:19:02 *Andreas Müller*

It's been self serving.

00:19:06 *Alessandro Monti*

And on this note, I thank you so much for coming to the Climate Show and for sharing your expertise with us today. And, also, we look forward to continuing our collaboration with you on our EnAct project.

00:19:18 *Andreas Müller*

My pleasure, thank you.

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00:19:21 *Alessandro Monti*

Thank you for listening to this episode. If you want to learn more about Professor Müller's work, check out the link in the show notes. You can also find the link to our research project EnAct there.

Stay tuned for the next episode!