

The Climate Show – Episode 37

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.

00:00:28 Beatriz Martinez Romera

The European Court of Human Rights is assuming an increasingly important role in European climate governance.

00:00:33 Linnéa Nordlander

The clearest example of the court's contribution is its 2024 judgment in Verein KlimaSeniorinnen and others against Switzerland, in which the court found that Switzerland's inadequate mitigation efforts violated the right to private and family life.

00:00:46 Beatriz Martinez Romera

In today's episode, we talk to Natalia Kobylarz to discuss the significance of the court's climate change judgments, their limitations, and how the judgments are enforced. Enjoy the show.

00:01:04 Linnéa Nordlander

In today's episode, we turn to one of the most transformative developments at the intersection of human rights and climate change, the role of courts, and particularly the European Court of Human Rights in responding to the climate crisis.

00:01:15 Linnéa Nordlander

Today, we're delighted to have Natalia Kobylarz, a senior lawyer at the registry for the European Court of Human Rights with us. Beyond her work at the court, Natalia teaches international and environmental human rights at the University of Strasbourg and other institutions and therefore brings a unique perspective as both a practitioner and a scholar.

00:01:34 Linnéa Nordlander

Natalia is visiting CLIMA on the occasion of the annual conference of the European Union Forum of Judges for the Environment. Natalia, welcome to the Climate Show.

00:01:42 Natalia Kobylarz

Thank you very much. Thank you for having me. Thank you for the space. And I should thank Judge Lavrysen also and the EU Forum of Judges for bringing me here to Copenhagen. My pleasure to talk to you.

00:01:54 Linnéa Nordlander

It's great to have you here. Let's dive right in. Over the past decade, we've seen a remarkable evolution in environmental case law, including climate change cases, of course, at the European Court of Human Rights. Could you tell us a little bit about how the court's understanding of the human rights dimensions of environmental harm has evolved over that time?

00:02:14 Natalia Kobylarz

Yes. This has been a tremendous evolution, especially in the past two decades, I would say, but you may be, and the listeners may be surprised to hear that the very first application that reached us that concerned pollution, nuclear waste, was in the 1960s.

00:02:31 Natalia Kobylarz

So, this is early on, even before the Stockholm Declaration and, you know, before people made these connections between human rights and the environment. But along these lines, recognising really that different forms of environmental harm then impact and restrict the enjoyment of various fundamental rights, human rights guaranteed under the European Convention on Human Rights. The court has been really examining these issues in its case law, simply because people were bringing these cases to the court.

00:03:05 Natalia Kobylarz

We are sort of reacting, we're not inventing things, we're reacting to the claims that people bring and then they in turn react to situations that are harmful to their existence, to their enjoyment of the rights. I can mention the first case in which we found a violation in the context of pollution of air and of water.

00:03:28 Natalia Kobylarz

This is the landmark judgment against Spain, López Ostra, from 1994. So, this is where, not for the first time, but for the first time in a judgment with a violation that the court has elaborated on this principle that severe environmental harm, it started with severe pollution, then we were talking about noise, then we just rounded it up to environmental harm, severe environmental harm that impacts in a particular way on people's enjoyment of their quality of life, of their well-being, health sometimes, but not necessarily affecting health.

00:04:07 Natalia Kobylarz

This may bring the case within the jurisdiction of the Strasbourg Court under Article 8, the right to private life, to respect for private life and family life and for home. And recently, the recent, very recent, this year's development from the case of Cannavacciuolo and Others against Italy, the first pollution case, which was examined on the merits under the right to life, Article 2 of the Convention, and indeed also the court found a violation in this case.

00:04:37 Natalia Kobylarz

So, things are really developing fast as we speak, and I invite everyone who's interested in this area to really watch the space and watch our website, HUDOC website, which is an engine for research engine, search engine, rather, I should say, to look out for these new cases that are coming out from the court.

00:05:00 Linnéa Nordlander

As you say, there's a long history of environmental jurisprudence before the European Court of Human Rights, but the climate change jurisprudence is much more recent, much newer. Let's turn to the court's 2024 climate change judgments, which were really historic, and especially the KlimaSeniorinnen and others against Switzerland in which the court found a violation of the ECHR as a consequence of inadequate climate change mitigation action for the very first time.

00:05:29 Linnéa Nordlander

So, from your perspective, what is the most significant contribution of that judgment, but the sort of climate change jurisprudence overall?

00:05:39 Natalia Kobylarz

The contribution, I suppose, of the court itself, it is inscribed in the sort of this wave that has been happening, starting with Urgenda and the national courts. So, I think that it has been already researched and confirmed that the developments really of climate law and especially human rights-based or fundamental rights-based claims in the context of climate change, they really came from the national jurisdictions, not from from the top of international courts.

00:06:10 Natalia Kobylarz

Obviously, we already had the different international organizations that were making pronouncements in this area. But when it comes really to the application and the link between the actual claims brought to the courts, this is, I think, we have to recognize the role of national jurisdictions.

00:06:33 Natalia Kobylarz

And then when it comes to our role, it was to really confirm for the first time on an international level, certain findings as to which science the courts should follow and could rely on. So really big recognition for the work and the reports of the IPCC.

00:06:53 Natalia Kobylarz

And then the fundamental knowledge, I suppose, and the consensus, we can call it, in this sense, within the scientific world, that there is climate change, that it is largely anthropogenic, that we need to commit to keep the temperature goals from the Paris Agreement and so on and so forth.

00:07:13 Natalia Kobyla

So, I think that overall, it was very important for an international human rights court to even state, authoritatively, these concepts, the threat to humankind of climate change, the role of judiciary, but also the role of other branches of the government, which the court really stressed in KlimaSeniorinnen judgment, that this is such an important and complex problem that judiciary has a role, international courts included, but that primarily this is to be addressed by legislatures and by the executive branches of the governments.

00:07:57 Natalia Kobylarz

And then finally, obviously, the developments of our case law, which we'll see to which extent they will now allow litigation, climate litigation, to which extent they will inspire biodiversity litigation or other aspects of the triple planetary crisis to come before the Strasbourg Court under under the guides of human rights, really.

00:08:25 Natalia Kobylarz

And I'm referring to the opening of the legal standing to NGOs, to environmental NGOs. For the time being, this is in the particular situation of climate change mitigation, litigation. But we'll see how this develops and. I think this was a huge step for the court, at least, to take, and we indeed have now follow-up climate cases in our docket.

00:08:55 Linnéa Nordlander

Yes, so as you mentioned here, the judgment in KlimaSeniorinnen opened the courtroom door to some types of climate change claims, for example, by facilitating or allowing cases to be brought by environmental NGOs, but it also closed the door in some respects. Can you reflect a little bit about, or a little bit on the limitations that the judgments place on climate change litigation that's based on the European Convention of Human Rights?

00:09:27 Natalia Kobylarz

If we speak only specifically about the Verein KlimaSeniorinnen and others against Switzerland, I think what you're referring to by closing the doors is the fact that we declared inadmissible the same complaint that was brought by 4 individual women who are members of the association.

00:09:51 Natalia Kobylarz

So, the association was granted legal standing, locus standi, as a representative of the members who were affected by the impacts of climate change within this particular jurisdiction where the NGO operated.

00:10:06 Natalia Kobylarz

But the four individual members who are complaining about the individual ailments or the way they were suffering because of heat waves in the canton of Zurich. This is something that at the end of the day was not accepted by the court under the reinvented threshold, reinvented because the court relied on something that already exists.

00:10:32 Natalia Kobylarz

Again, this is what I mentioned at the beginning, the severity threshold. We're not a climate court, we're not an environmental court, so not every form of environmental harm really triggers the protection of the ECHR.

00:10:46 Natalia Kobylarz

And this is understandable, I suppose. But this severity threshold was taken to a higher level in KlimaSeniorinnen by the court, who now requires for individual applicants to prove a high intensity exposure, high intensity, which means of a sort that translates into a pressing need of individual protection.

00:11:08 Natalia Kobylarz

So it's a bit complex test, if you wish, based on this new test, the four Swiss women failed because the court said that the material before the court brought, before the court was not sufficient enough to prove that they were really suffering from a situation or whether health impacts or impacts on their well-being or quality of life, which would really rise to the level of this high intensity threshold, high intensity exposure.

00:11:44 Natalia Kobylarz

And we will see now what the rest of this test means in the cases that have been communicated in the meantime or since KlimaSeniorinnen. Which obviously everyone is awaiting the ruling of the court in the Austrian case of a gentleman who is suffering from a particular type of health disorder. We will see, you see how the court now applies this new test to this new set of circumstances. And in any event, for the court's case law, for the court's principles to become clearer, we need more cases and more jurisprudence because this is this incremental type of development of jurisprudence that is practiced by the court.

00:12:31 Natalia Kobylarz

So really it is from one case to the other that we will know more what the court meant in KlimaSeniorinnen by setting up this threshold.

00:12:40 Natalia Kobylarz

I know that the president of the court, for example, Judge Guyomar, he referred to what occurred in KlimaSeniorinnen as on the one hand, closing the door to exceptional, possibly exceptional, because it's not completely closing the door. There is a test that was created, and according to the test, if this test is met by an applicant, then the doors of the court will be open for an individual applicant. But Judge Guyomar was saying that this is more restrictive, but on the other hand, compensated by the fact that we have

created this new test for NGOs, which is more easily attainable by NGOs than engaged in strategic litigation. So, he views it in terms of compensation, if you wish.

00:13:32 Linnéa Nordlander

Yeah, it'll be very interesting to see sort of the next steps in the application of that test in the forthcoming case law. But if we sort of stay on KlimaSeniorinnen, climate change litigation is, of course, sometimes criticized as offering very limited solutions, especially if judgments aren't implemented. And we've seen a lot of discussion around Switzerland's implementation of the KlimaSeniorinnen judgment. Could you say a little bit about how judgments, how the court's judgments are enforced?

00:14:05 Natalia Kobylarz

Yes, sure. The system of implementation of the judgments and the way that this mechanism of human rights protection operates, I often refer to it as a judicial political tandem.

00:14:17 Natalia Kobylarz

We have a judicial body, the court, the Strasbourg Court, which examines a case and renders a judgment. Finding a violation, this judgment then goes for the execution to a political body, which is a committee of ministers of the Council of Europe. The committee of ministers then requires the state to present an action plan according to which they would implement a judgment. This usually consists of individual measures and general measures. It all depends on the type of case. It all depends on really what the court ordered in its judgment.

00:14:55 Natalia Kobylarz

Usually this would be compensation for individual applicants and then either the court already would indicate, usually less prescriptively, that general measures are also necessary.

00:15:07 Natalia Kobylarz

But even if the court does not explicitly do it in the judgment, the Committee of Ministers still looks at the broader picture of a case and usually will look into what kind of general measures are necessary not to repeat the violation. So, this is an obligation

of non-repetition on the states. Basically, we're trying to avoid new similar cases recurring and coming before the court.

00:15:33 Natalia Kobylarz

When it comes to the enforcement of KlimaSeniorinnen and judgment, we already had two meetings before the Committee of Ministers. The second one was quite recently, and Switzerland then must and indeed prepared before indicating what has changed already before the KlimaSeniorinnen judgment in terms of the climate laws and what they were planning to do in the future. And this is all of this, you must keep in mind that this mechanism of protection of human rights, both at the judicial level and at the political level, operates really with the fundamental principle in mind, which is that of subsidiarity. So, and indeed, in KlimaSeniorinnen in itself, the court stated that the subsidiarity principle was very important, and one way of translating this is through the discretion or the margin of appreciation that the state has in choosing the way how to hear in KlimaSeniorinnen and combat climate change.

00:16:44 Natalia Kobylarz

So, famously, another development from the KlimaSeniorinnen judgement was that the court set out a narrow margin of appreciation for commitment to combating climate change and a still wide margin of appreciation to the choice of measures.

00:17:01 Natalia Kobylarz

I'm saying still because usually in environmental cases, in typical environmental cases, we always were repeating that set of measures, taking measures of combating pollution. This was within our urban planning. Nature restoration even was within the wide margin of appreciation of the state. For the context of climate change, the state still retains a wide margin, wider discretion for the choice of measures. In other words, how they want to implement, how they want to realize this commitment to fighting, to mitigating climate change and adapting to it.

00:17:43 Linnéa Nordlander

So, leaving the KlimaSeniorinnen judgment to one side for a bit and taking a bit of a broader perspective, you were seconded to the Inter-American Court of Human Rights in 2016. And of course, that court recently released its advisory opinion on climate

change. How do you compare the European and inter-American approaches to the link between human rights and climate change?

00:18:08 Natalia Kobylarz

This was a very interesting experience being there in San Jose in 2016 because this was the moment where they were examining and they were drafting their first advisory opinion on environment and human rights, the famous advisory opinion number 23.

00:18:25 Natalia Kobylarz

This was already something that had those first seeds of this year's opinion on climate and human rights obligations. So already this was an eye-opener to me and it allowed me really to discover their case law stemming from situations harmful to indigenous groups which is something that surprisingly has not really arrived before the Strasbourg Court in the environmental context. Of course, we have had the Sámi people bringing their cases to the court, but these were mainly property disputes, not in the strictly speaking environmental context like those cases against the Ecuador, Nicaragua, Suriname from the Inter-American Court.

00:19:22 Natalia Kobylarz

The approaches of the two courts in this area of environmental human rights are strikingly different, but I think this comes mainly from the difference between the foundational documents, so the American Convention on Human Rights and the European Convention on Human Rights.

00:19:39 Natalia Kobylarz

The American Convention contains famously the right to progressive development and economic, social and cultural rights already in its text, not to mention the San Jose Protocol, which also contains the right to healthy environment as such, although with limited implementation possibility back in the day.

00:20:01 Natalia Kobylarz

We don't have that in Europe. We don't have an additional protocol that would have brought the right to healthy environment into the purview of the Strasbourg Court. This is in the making, by the way, maybe, because the political process is underway or has

been triggered, at least, within the Council of Europe. But for the timing, this is something that we don't have. And we also are protecting strictly civil and political rights, perhaps with one exception of right to education. So, that is already the context that is legal context, a normative context, rather, that is different for the two courts.

00:20:42 Natalia Kobylarz

And then obviously the context of the indigenous people who seemingly were more active and perhaps more affected by violations related to environmental harm that triggered then cases and that allowed the court, the San Jose Court, to develop its jurisprudence and the notions that are universally recognized within the UN committees, human rights committees within our system, the African system, but they developed it in a bit different way.

00:21:13 Natalia Kobylarz

And what I'm referring to is, for example, interpreting the right to life as meaning the right to dignified life or right to life and dignity, which encompasses the conditions of living that can be affected in a negative way by certain environmental harms and activities of a state against those indigenous groups. They also interpreted the right to private life in a way to really encompass the traditional way of life, the connection to territories. So, this is something that is quite absent from our case law in this particular environmental context.

00:21:59 Linnéa Nordlander

As you also brought up yourself, there is this sort of ongoing process before the Council of Europe or within the Council of Europe context to have the right to a healthy environment recognized in some format. And the Council of Europe system is, of course, the only regional human rights system that doesn't have a explicit protection for the right to a healthy environment. And as you say, the negotiations around this or the political process around this has been ongoing for a few years.

00:22:29 Linnéa Nordlander

Could you tell us a little bit about what the options are for recognizing that right that are being explored? And also, what you think recognising the right to a healthy environment would or would not add to the existing scope of environmental protection under the ECHR?

00:22:47 Natalia Kobylarz

Right. This is a very complex question, an important one, because the political process has been triggered and somehow is still ongoing. It is important to really understand the implementation, what the implementation of any future document containing the right to a healthy environment would really mean for the Council of Europe and possibly for the court. It is important to not only repeat the slogans around the right to a healthy environment but really understand the intricacies of legal work and legal repercussions.

00:23:26 Natalia Kobylarz

The process was started some years ago already by the Parliamentary Assembly of the Council of Europe. There are resolutions calling for anchoring the right to a healthy environment within the system.

00:23:40 Natalia Kobylarz

And then through the work then of the representatives of member states, it was decided through the report which addressed the feasibility and possibilities of the right to a healthy environment within that system to either adopt an additional protocol to the ECHR, so that would be a new right, to a healthy environment, brought directly within the jurisdiction of the court. This has happened in the past. We have had additional rights being proclaimed, but never this right. This is actually the 4th or the 5th attempt, and previously this has failed, so it has never happened before.

00:24:26 Natalia Kobylarz

The second option on the table is to have an additional protocol to the Social Charter, the European Social Charter, which contains economic, social and cultural rights, and has an implementation mechanism in the form of the Committee of Social Rights, which is not a court. It can examine applications and issue recommendations, but it is not a binding jurisdiction in the same way that the court is.

00:24:56 Natalia Kobylarz

And then the third option that has been put on the table is really drafting a new convention, a standalone convention on the right to a healthy environment and perhaps convention that would describe further the framework of the operation of such a write.

00:25:13 Natalia Kobylarz

So, these are the three basic options because there are additional options which are the combination of all three that I mentioned. So, everything, some of it, one of this, these are the ideas that were presented in the report. And it is now up to the Committee of Ministers to decide on whether to go through with it, in which form, in which time frame. The decision has not been taken. So, we have to wait and see.

00:25:44 Linnéa Nordlander

Absolutely. So, looking ahead, as climate change litigation continues, and there are, of course, several cases that are pending before the European Court of Human Rights. What sort of path forward do you see? What challenges can you foresee for international human rights courts and specifically the European Court of Human Rights in this sort of new landscape of climate litigation?

00:26:10 Natalia Kobylarz

I would say that the challenge is what you mentioned earlier, is there really the implementation of the judgments? Because the court has already shown through its steady development of environmental case law and also the recent addition within the context of climate change is that it is capable of really keeping the convention in life, really treating it as a living instrument as it was meant to be, to adapt to new scientific situation, really, to have a dialogue, not only with other national courts, but also with the scientists, and to respond to those new human rights-based claims brought in more and more creative way every time by the applicants, individual applicants, large groups of people who are affected, or indeed NGOs.

00:27:09 Natalia Kobylarz

So, the court can do it and has been doing this in terms of really stretching either Article 8, now applying Article 2, and really paying attention to procedural rights. We haven't mentioned it before, but hugely important tools to environmental defenders or to those who may be affected by different forms of environmental harm is really the right to have access to information, to participate in a decision-making process, and then to have a judicial review of a decision.

00:27:41 Natalia Kobylarz

This is also another very important development through cases against France, cases against Turkey that have been brought recently but haven't been in the spotlight so much because they concern more localized one source of pollution or indeed complex judicial proceedings. So not everyone really understands it so well, but important developments in this area as well.

00:28:07 Natalia Kobylarz

Having said that, being capable of doing all these normative inventions, I think that the real challenge is within the implementation. And not only of climate cases, not only the case of Verein KlimaSeniorinnen, which is still then pending, it is still open in the execution. We still haven't closed that case, so more is expected of Switzerland now in this particular case.

00:28:34 Natalia Kobylarz

But another very recent, hugely important judgment against Italy, Cannavacciuolo and others, this is a case concerning failure of waste management and then the pollution, massive pollution, long-standing pollution, long-lasting pollution coming from illicitly abandoned or buried waste, polluting air, water, soil, and really affecting already generations of people living in Campania region.

00:29:07 Natalia Kobylarz

So, you have this mass, long-lasting pollution, which will be extremely costly to remove. Some of these elements were highlighted in the separate opinions of two judges joined to this judgment in the case Cannavacciuolo. You can now imagine how difficult of a task it is for the Italian government to implement this judgment. This is also another area which is worth watching to see how now a state, the committee of ministers, but also the court, which has more cases waiting for the examination, will handle this situation of large scale, very large-scale pollution, which is very costly to remove.

00:30:02 Linnéa Nordlander

Definitely a space to watch. So, before we wrap up, is there anything else that you would like to raise or add?

00:30:11 Natalia Kobylarz

No, thank you very much for this space. Really, this was a pleasure talking to you and I hope this podcast will trigger curiosity among the listeners, and they will want to read more and about our work. I can invite those of the listeners who are professionals who really work with these types of cases to look up our guide on environmental case law of the court. This is a rather technical document.

00:30:45 Natalia Kobylarz

That's why I'm addressing this to those who really practice that kind of law and to everyone else to really watch the announcements that are coming out from the court about those cases that are coming in and coming out in the form of judgments or inadmissibility decisions sometimes because I think we need to remember that while the court has opened its jurisdiction to climate cases, it has continued to deal with those more traditional environmental cases.

00:31:19 Natalia Kobylarz

It is still perhaps not the ideal mechanism and the court itself stresses that other instruments are better for the goals that we seek, especially when it comes to nature protection and really for perhaps the instruments for the environmental defenders.

00:31:40 Natalia Kobylarz

So human rights law has now proven to be helpful in some situations where this connection with a human being can be made, and the severity of impact can be proven. But perhaps it's not a remedy, it's not a silver bullet that will, you know, solve all the issues.

00:32:03 Linnéa Nordlander

Thank you so much for joining us on the Climate Show today, Natalia. It's been a fascinating and inspiring conversation, and I'm sure many of the listeners will be turning to all those fantastic resources that the court has. I can only second your recommendation to consult them. So, thank you so much for today.

00:32:22 Natalia Kobylarz

Thank you very much. Thank you. My pleasure.

00:32:28 Beatriz Martinez Romera

Thank you for listening to this episode of the Climate Show. If you would like to read more about the European Court of Human Rights, Climate Change Jurisprudence, check out the link in the show notes. Stay tuned for our next episode.