

EU Forum for Judges for the Environment 2017
Climate Change and Adjudication Questionnaire
Merton College, Oxford, 22 and 23 September 2017

Report on Norway

Climate Change in Legislation

1. How (if at all) has climate change and issues related to it been incorporated into legislation in your jurisdiction?

- Do they feature in the constitution; legislation; delegated acts?
- Which levels of government have been involved in these legislative processes?
- What have been the catalysts for these legislative developments (i.e. EU law, international law, political agitation etc.)?

Answer:

In 1992 the Norwegian Parliament adopted a new provision in the Norwegian Constitution regarding protection of the environment. This provision was later amended in connection with a considerable modernization and expansion of the Norwegian Constitution as to the protection of fundamental rights, carried out as part of the Constitution's bicentennial anniversary in May 2014. Article 112 now has the following wording:

"Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.

In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

The authorities of the state shall take measures for the implementation of these principles."

The purpose of this article is first and foremost to function as a guideline for drafting legislation and as a principle of interpretation of legislation. It is an ongoing discussion whether, or to what extent, the article's first paragraph provides citizens with specific rights

that can serve as basis for remedy against the government. In that case, the Constitution sets out safeguards relevant to climate change claims. Please see below.

At the ordinary legislative level Norway has not had any acts regulating climate change directly. Two key instruments in Norwegian climate policy are carbon dioxide taxes (introduced in 1991) and quota. The latter is regulated by the Greenhouse Gas Emission Trading Act which incorporates the EU Directive 2003/87/EC – scheme for greenhouse gas emission allowance trading within the Community. The policy is that these two instruments incentivize reduction of emissions. Other measures are regulation, standards, agreements and subsidies for emission-reducing measures. For example are there subsidies on electric cars whereas users of regular cars must inter alia pay fuel tax.

Connected to the subject of this questionnaire are public law acts under which sources of emission are regulated. The Pollution Control Act is an act with the objective to restrict pollution, and requires inter alia permission to carry out pollutive activities. This act can under certain circumstances serve as basis for private law claims (typically for damages), for example against the polluter. There are also other environmental law acts, and under sector-specific public law legislation the authorities are normally required to take environmental interests into consideration in their decision-making processes.

Earlier this year the Ministry of Climate and Environment presented a bill named the Climate Act.¹ The Parliament resolved to adopt the act and the effective date is 1 January 2018. Norway has an objective to adjust the country to a low-emission society in 2050, and the act sets out certain means that will contribute to the development towards 2050. An objective of the act is to promote transparency and public debate about the status, direction and progress of this work.

The act applies to the Nationally Determined Contribution ("NDC") as registered in the NDC register under the Paris Agreement in accordance with article 4.12. Under the act the Government is empowered to broaden the scope of the act to encompass emissions beyond the NDC.

¹ Prop. 77 L.

In section 3 the objective to reduce gas emissions by 40% from the year of reference (1990) is set out. Further, section 4 sets out the target to become a low-emission society in 2050. The wording of these two provisions is non-binding, meaning that the provisions at the outset cannot serve as basis for claims against the government.

The Government shall in accordance with section 5 present an updated climate target to the Parliament every fifth year. Under section 6 the Government has an obligation to address climate change issues to the Parliament in connection with the presentation of the yearly government budget. The statement must inter alia include a report on how Norway can reach its climate targets, the budget's effect on climate and development of emissions.

The legislative process was initiated with a white paper from the Government in 2012, in which the Government raised the question of whether a climate act would be appropriate. The majority of the Parliament's Standing Committee on Energy and the Environment agreed and asked the Government to assess the appropriateness of such an act. The Minister of Climate and Environment thereafter issued a consultation paper, to which over 200 responses were made.

On this basis the Parliament's Standing Committee on Energy and the Environment resolved to ask the Government to make a draft bill, which later on was submitted for consultation process. The ministry received statements from all levels and many branches of the government, which was assessed in preparation for the final draft.

The catalysts for this legislative development were the sum of Norway's obligations under the Kyoto Protocol and the Paris Agreement, in addition to the intention to enter into an agreement with the EU regarding reduction of emissions.

At the ordinary legislative level climate change and environmental issues have been dealt with through public law regulation, i.e. through restrictions and obligations for the citizens and the industry. The above-mentioned legislation provides to a very limited degree basis for claims against the government on the basis of climate change per se. One possible exemption is the Act on Compensation for Damages due to Natural Disasters, under which the governmental compensation scheme for natural disasters is regulated. This act is however not

directly linked to climate change, but to damages related to natural disasters, i.e. occasionally consequences of climate change.

As a consequence we have so far not had any cases regarding climate change per se brought before the Supreme Court, whereas other environmental law issues have been litigated. There is however an ongoing case in which climate change may be an issue, please see below. Consequently there are no clear-cut answers to most of the questions in this questionnaire, and some are even impossible to answer.

2. How do the structures of government affect legislation related to climate change?

- Is one or several institutions assigned to act on climate change within your legal system? To what extent do these overlap and diverge?
- Is the separation of legislative, executive and judicial powers in initiating and implementing climate policy clear in your jurisdiction?
- Is climate change legislation affected by the legal powers of different levels of government in your jurisdiction?

Answer:

Within the Ministry of Climate and Environment there is a separate department for climate change. Further, the Norwegian Environment Agency is a subordinate agency to the ministry. The agency is responsible for nature management and issues related to climate and pollution. The agency's principal functions include collating and communicating environmental information, exercising regulatory authority, supervising and guiding regional and local government level, giving professional and technical advice, and participating in international environmental activities. Being a subordinate agency, the agency's and ministry's responsibilities overlap in many areas.

Climate change litigation must be brought before the ordinary courts and there are no special tribunals or the likes. From an environmental crime perspective, the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime is responsible for investigation and prosecution.

Within the legislative branch the mentioned Standing Committee on Energy and the Environment in Parliament is responsible for inter alia climate change issues.

Generally speaking, there is a clear separation of legislative, executive and judicial powers in Norway, also with respect to initiating and implementing climate change policy. We have no reason to assume that the legal powers of different levels of government affect climate change legislation in Norway.

Climate Change Litigation

3. Can climate change laws in your jurisdiction serve as basis for judicial action?

- Is this basis, or the lack of such basis, seen as legally novel or not?
- What role does European Union law play in this regard?

Answer:

As previously mentioned, the current legislation does not provide any basis for climate change claims of significance. Given the wording of the new Climate Change Act it is hard to see that it can serve as basis for judicial action. Action may also be based on the Pollution Control Act, but as mentioned above this is not climate change legislation per se; claims must be based on specific pollutive activities. It is our understanding that general environmental law falls outside the scope of this questionnaire, and therefore we will not address judicial actions regarding such issues in depth below.

It has been an ongoing discussion whether the first paragraph of the Constitution Article 112 can serve as basis for judicial action. The question is whether the article, in addition to being a guideline for drafting legislation and interpretation of it, is a provision on which remedies can be based and in such case to what extent the provision represents an absolute limitation on the government's policies, decisions and legislation.

In 2012 a government-appointed human rights committee assessed inter alia Article 100b, the predecessor of Article 112.² The committee referred to the preparatory works for the article, in which it was assumed that citizens and organizations can file a suit on the basis of their rights set out in the provision. It was however noted that the circumstances under which such claims could be made were uncertain, which may have undermined the importance of the provision. Article 112, and its predecessor, has been referred to by the Supreme Court in their decisions, but it has primarily been employed as an interpretation principle in application of ordinary legislation.

The question will probably be a key issue in a recently initiated suit filed by Nature & Youth and Greenpeace Nordic against the Norwegian Government. The factual background for the suit was that the Government of Norway on 18 May 2016 decided to offer 13 companies ten production licenses for oil and gas in the 23rd licensing round. The production licenses were awarded 10 June 2016. For the first time in more than 20 years, Norway opened new acreage to the oil and gas industry in the Arctic Barents Sea. The organizations argue that by issuing new production licenses in previously untouched areas, Norway will continue to contribute major greenhouse gas emissions and thus exacerbate global warming.

On this basis the plaintiffs argue that the effects of the licensing decision are sufficiently serious to render their content incompatible with the safeguards against environmental encroachments mandated by Article 112. The claim is that the licensing decision must be rendered invalid.

The Ministry of Petroleum and Energy has denied that the decision is unconstitutional, and stated in its response inter alia that Article 112 does not represent an absolute limitation on legislation and the government's decisions and policies.

The oral hearings will commence 14 November 2017 in Oslo City Court and the proceedings are to be held over two weeks. Time will show whether the case will be brought before the Supreme Court for an authoritative clarification on the scope of the environmental protection laid down in Article 112. If it is deemed that the provision sets an absolute limitation for the government, we may see several other legal actions regarding climate change in the future.

² Document 16 2011/2012 page 243.

European Law has not played a part of this suit, as far as we can see.

4. Has climate change, and related issues, given rise to court cases in your jurisdictions?

- If so, what type of cases (i.e. are they related to specific pieces of legislation or to something else)?
- How frequently do climate change claims come to court by comparison with other environmental law cases in your court?
- What types of legal issues are raised in these cases (i.e. matters of private law, constitutional law, administrative law, international law etc.)?
- Does the type of legal issue affect, if at all, which court hears the case?
- Do rights-based claims feature in these cases?
- How central is the issue of climate change when it is raised in these cases?

Answer:

As presented above Norwegian legislation is today not directly linked to climate change, and the new Climate Act is not a rights-based act. The outcome of the above-mentioned suit may clarify whether and to what extent Article 112 of the Constitution can serve as basis for climate change claims. Further, domestic rules on standing represent in any case obstacles for climate change actions, please see below.

Consequently, we have not seen other cases directly linked to climate change. It is illustrative that the Norwegian word for climate change (Norw.: "*klimaendring*") only appears in four decisions from the Supreme Court. The latest decision is from 2002 and it is a criminal case against Greenpeace regarding confiscation of objects the organisation used in a

demonstration against a Norwegian drilling rig.³ We believe that the absence of rights-based climate change legislation is the reason why we have so few cases directly linked to the issue.

We have on the other hand had other environmental law cases argued before the Supreme Court. However, these fall outside the scope of the questionnaire and the question.

It is consequently not possible to answer the specific questions asked above.

Climate Change Adjudication

5. How easily resolvable are the legal questions raised in these different cases?

- Do these cases involve the application of conventional legal concepts? If so, how straightforward is the application of these concepts to climate change?
- Do these cases involve the application of new legal doctrines? If so, from where have these doctrines been derived?
- How do concepts of causation affect climate change actions in your jurisdiction?
- Has your court issued any preliminary ruling concerning climate change laws, or to relates issues to the EU court? If not, why not?

Answer:

Please see answers above.

The mentioned suit addresses an uncertain constitutional question that may lead to the application of new legal doctrines. The question of causation is not part of this suit. If the result of the case opens up for further climate change suits, for example claims for damages, the concept of causation may affect certain types of climate change actions.

³ Rt-2002-1271.

We have seen questions about causation for example arise in cases regarding the Act on Compensation for Damages due to Natural Disasters. The act sets out a strict causation requirement for claims. In *Trygve Skui vs. the Norwegian State Fund for Compensation for Damages Due to Natural Disasters* the Supreme Court held that, after a natural disaster that ruined parts of a property, the scheme only compensated for the loss of utility value and not for the loss of protective arrangements against flood, partly because of the causation requirement.⁴ This case raised primarily question about the *legal* understanding of the causation requirement under the scheme. Given the complexity of climate change, both factual and legal aspects of the causation requirement may cause particular problems for the plaintiff in establishing merits of the alleged claim.

With respect to the last question regarding preliminary rulings, the Supreme Court has not issued such rulings. The reason is probably the absence of climate change legislation, as mentioned above.

6. How straightforward is the resolution of factual issues in cases on climate change?

- Is there disagreement among the parties over the factual issues? If so, what types of disagreements are there?
- Do the factual issues require reference to specialist evidence? If so, how is that evidence submitted to the court?
- How do the rules evidence affect climate change actions in your jurisdictions?
- How do the factual issues affect the resolution of legal questions in these cases?

Answer:

Please see above answers. We believe that if there will be a development towards more climate change actions, the factual issues will most likely require specialist evidence. In light

⁴ Rt-2011-105.

of the rules on evidence as they are now, we do not assume that these will represent an obstacle against climate change actions.

Climate Change and Access to Justice

7. Who are the parties bringing climate change actions?

- What role do individuals play in bringing actions relating to climate change?
- What role do NGOs play in bringing climate actions?
- What role does industry play in bringing actions relating to climate change laws?
- Does industry make claims under different or the same set of laws as NGOs?

Answer:

Please see above answers. So far only NGOs have brought a climate change action before the courts. Individuals and the industry have played a part in other matters of environmental law, especially for claims under the Pollution Control Act.

To have standing the plaintiff must normally establish that he/she/it is materially affected of the alleged factual basis for the claim. As a consequence the industry is normally not in a position to file a suit regarding climate change. It is easier to establish standing for a claim for damages after a natural disaster that occurred as a consequence of climate change, or damages after pollutive activities (that exacerbate climate change), than to have standing when the claim is that a decision or the likes will impair climate change. It is here irrelevant that the claim is based on the constitutionality of the government's decision.

Because of special rules for organizations' standing under the Civil Procedure Act section 1-4, NGOs can bring such cases before the courts if the interest(s) on which the claim is made lie(s) within the organization's objective and the scope of the organization's normal activities. As a consequence, only NGOs are at the outset in a position to bring cases in which there are

no specific persons or entities materially affected before the courts, as is normally the case in climate change actions.

8. How do legal rules in relation to the bringing of an action affect the ability to bring these cases?

- How do domestic rules on standing affect climate change litigation?
- How do costs rules affect climate change actions?
- Are there any other impediments to parties bringing climate change claims?

Answer:

Please see answer above regarding standing. As a consequence of the domestic rules on standing, NGOs are in a substantially better position to file a suit regarding climate change than the industry and individuals.

Under the Civil Procedure Act the prevailing party/parties can normally claim its litigation costs covered by the other party/parties. In addition to the legal uncertainty for claims based on climate change, the risk of being ordered the counterparty's litigation costs represents a genuine obstacle for climate change litigation. Also, the party must normally pay its own legal fees during the proceedings, which may lead to a liquidity problem in the process. We must note, however, that our impression is that legal costs are generally lower than in other jurisdictions, although there has been a development towards higher legal costs in recent years.

Climate Change and Remedies

9. What is the range of remedies available to national courts in climate change cases?

- What is the breadth of the court's discretion in choosing a suitable remedy?

- What is the availability and level of financial penalties?
- What types of injunctive relief are available?

Answer:

The court's choice of remedy is firstly limited by the plaintiff's claim. If the prevailing party has claimed damages, the courts cannot discretionally choose another remedy. Secondly, as presented above the possible grounds for climate change claims are rather limited which also narrows down possible remedies available for the parties.

As per now regular climate change claims effectively must be based on Article 112 of the Constitution, and the mentioned case may shed light on the scope of the constitutional environmental protection. *Possible* remedies can be that legislation is deemed unconstitutional, that decisions from the government are rendered void, and damages.

Financial penalties are as per now not available for climate change cases. Penalties are however common as a sanction to breaches of the Pollution Control Act. We have seen penalties of millions Norwegian kroner, for example were the companies Norsink and Norcem fined with NOK 4.5 millions (approx. EUR 450,000) and NOK 3.5 millions (approx. EUR 350,000) respectively. The authorities have under the Pollution Control Act in certain situations power to issue a stop order and the likes. The act may also give grounds for injunctive relief.

10. What types of issues are raised about remedies in climate change cases?

- How straightforward is the application of remedies in these cases?
- Does the relationship between private law and public law affect remedies in climate change-related claims?

Answer:

Please see answer above.