

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

Questionnaire

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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.)?

In German constitution there is Art. 20a. Thereafter the state, mindful of its responsibility toward future generations, shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

On level of federal and country administration law there are various rules that deal with climate change, climate protection and climate adaption (for example § 1a, § 5, § 136, § 171a BauGB [Building Code], § 2 ROG [Regional Planning Act], § 4, § 73, § 75 WHG [Water Resources Act], § 1, § 7, § 9 BNatSchG [Federal Act for the Protection of Nature]). These rules are taking place

whenever a local or regional planning authority establishes new guidelines for using ground and buildings.

In 2002 the German government adopted the - so called - “Nationale Nachhaltigkeitsstrategie - Perspektiven für Deutschland” (see Gröhn, *Natur und Recht* 2016, 78 [79]). With regard to the indicator nitrogen the federal government is working towards a goal of reducing nitrogen surpluses to 80 kilograms per hectare and year till 2010 (this goal has been dismissed; in 2010 the nitrogen surplus has been at 96 kg), and with regard to land consumption towards a goal of 30 ha per year till 2020 (in 2010 - 2013 the land consumption could have been reduced from 100 ha/day to 74 ha/day).

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?

There is no legislation that deals exclusively with climate problems or climate change. These issues are incorporated in German specific legislation; they are part of those acts.

In Germany there is also no institution constituted by law that deals especially with climate problems or climate change.

The jurisdiction is bound by law and justice. Thereby it should not affect whether the law is a federal or a country act.

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?

Due to being bound by law and justice the jurisdiction has to examine, whether for example a new freeway is compatible with environmental law. In such a case it is possible, that questions on climate change have to be discussed and decided by the court. As far as I know there was – till now – no judgement that stopped an infrastructure project for climate change reasons.

A large part of Environmental law in Germany is influenced by European environmental acts. Therefore it could be necessary to call the European Court for an interpretation of European environmental acts and to give the court the possibility to rule the case.

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?

As pointed out above German law offers no possibility to bring a case to the court exclusively on climate change matters.

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?

If the case is concerning a legal issue, the court will decide the issue. Possibly it is necessary, to call the European Court first.

If the case is concerning a question of fact, the court isn't able to decide without the needed know-how. Usually the court doesn't have this know-how. But the German Code of Administrative Court Procedure offers several possibilities to

get the required facts and the necessary know-how, for example to hold a hearing with environmental experts or commissioning expert reports.

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?

I have no specific data to answer this question due to the fact, that there are no cases on climate change.

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?

In younger times there were several cases brought to the administrative courts by environmental associations in fact of fine dust pollution. Actually there is an increasing discussion about driving restrictions on diesel cars. Due to this some automobile manufacturers (for example Daimler, Audi, VW) promised that they will upgrade diesel cars for free.

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?

In Germany the “Umweltrechtsbehelfsgesetz” (Environmental Appeals Act) gives environmental associations the possibility to bring a case to the court, if they are convinced that permission or a plan, for example for a new freeway or a very-high voltage line, violates environmental law. Otherwise than civil claimants an environmental association needs no infringement of rights for this claim. Apart from that, there are no special rules for environmental associations.

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?

As pointed out above, there are no special rules relating to climate change. This applies in the same way for remedies. Remedies are regulated in the Code of Administrative Court Procedure. But relating to some special infrastructure projects the federal court of administration is the first and last instance to decide, whether the project is lawful or not. In this case there are no remedies.

The courts have to decide by law and justice. There is no discretion. If the claim is successful the permission or the plan will be cancelled by the court or the court decides that the permission may not be set in use.

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?

As pointed out above, there are no special rules relating to climate change. Therefore there are no special types of issues raised about remedies in climate change cases. Remedies are following the rules regulated in the Code of Administrative Court Procedure.

In Germany private law und public law are strictly separated in the jurisdiction. Therefore there is in general no relationship between these matters, neither for a claim nor for a remedy.