

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

**Report on Sweden**

*Answers given by Åsa Marklund Andersson, judge, the Land and Environment Court in Nacka, Sweden and Anna-Lena Rosengården, technical judge, the Land and Environment Court of Appeal in Stockholm, Sweden*

**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?

*Issues related to climate change have been incorporated into legislation in various ways, both explicitly and implicitly. A recent product of legislation directly connected to climate change is the Climate Act (enters into force 1 Jan. 2018). There are also set “climate goals” within the framework of environmental objectives decided by the Swedish Parliament. As part of the objective “Reduced climate impact” Parliament has adopted a vision for Sweden of zero net emissions of greenhouse gases by 2050.*

*Legislation relating to issues connected to climate change can also be found in e.g. the Environmental Code, the Planning and Building Act and in various ordinances.*

*For instance the provision in Chapter 2, section 3 of the Planning and Building Act reads as follows:*

*In accordance with this Act, planning with regard to natural and cultural values, environmental and climate aspects, and intermunicipal and regional conditions must promote:*

- 1. a purposeful structure and an aesthetically pleasing design of the built environment, green spaces, and transportation routes;*
- 2. a from a social perspective viable living environment that is accessible and usable for all social groups;*
- 3. long-lasting and effective management of land and water areas, energy resources and raw materials, as well as good environmental conditions in other respects;*
- 4. good economic growth and efficient competition; and*
- 5. construction of dwellings and the development of the housing stock.*

*The interests indicated in the first paragraph, item 1–5, must also be taken into consideration in other matters.*

### *Chapter 2, section 5 of the Environmental Code reads:*

*Persons who pursue an activity or take a measure shall conserve raw materials and energy and make use of possibilities to*

- 1. Reduce the amount of waste,*
- 2. reduce the amount of hazardous substances in materials and products,*
- 3. reduce the negative effects of waste, and*
- 4. recycle waste.*

*Renewable energy sources shall be used in the first place.*

- Which levels of government have been involved in these legislative processes?

*Parliament takes decisions on legal acts and codes. These decisions have been prepared by the government offices and have also been remitted to various stake holders (authorities, enterprises, associations, NGOs etc.). Ordinances are issued by the Government. There is no particular process exclusively applicable to climate change legislation.*

- What have been the catalysts for these legislative developments (i.e. EU law, international law, political agitation etc.)?

*Probably all of the above. But the recent Climate Act clearly relates to the Paris Agreement under the Convention on climate change (UNFCCC) – it is described as “a key component of Sweden’s efforts to comply with the Paris Agreement”.*

## 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?

*A number of institutions may be confronted with issues that relate to climate change. Action taken in order to achieve the environmental objectives (Reduced climate impact) will be carried out by authorities at national, regional and municipal level. Examples of authorities assigned to act on climate change within their particular areas of responsibility are the Swedish EPA, the Meteorological and Hydrological Institute, the Geotechnical Institute, the Mapping, Cadastral and Land registration Authority, the local municipalities and the County Administrative Boards. Without looking into detail one may presume that there is a certain amount of overlap.*

*Legislation does not only contain general provisions of “policy character” but also a number of provisions which directly or indirectly will affect climate. Those provisions will be applied by the relevant authority or court e.g. when trying a permit application.*

- Is the separation of legislative, executive and judicial powers in initiating and implementing climate policy clear in your jurisdiction?

*There are no special issues on separation of powers that concern matters of climate change. And as far as we know there have been no discussions on this.*

*Matters of implementation of EU law and international law as well as proposing new legislation lie primarily within the initiative of the Government. Sweden does not have a constitutional court.*

- Is climate change legislation affected by the legal powers of different levels of government in your jurisdiction?

*This question is not very clear to us, but there is nothing special about “climate change legislation” in this regard. The legal powers entrusted to different levels of government are the same as regards any kind of legislation. One could argue that the strength of various government offices (e.g. the Ministry of Environment might not be as influential or powerful as the Ministry of Enterprise) or the personal power of a particular minister generally affects the legislative matters to some extent.*

### **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?

*No, there is no such explicit climate change legislation which could serve as basis for judicial action. Within the scope of e.g. a permit process matters related to climate change may be raised and dealt with if relevant.*

#### **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?

*Climate change can appear as a question in cases according to the environmental legislation in mainly two ways. First, measures can be prescribed that – at least partly – aim at reducing the effects of climate change. Second, in many kinds of cases the consequences of climate change are the basis for the case, or at least have to be taken into account in the trial of the case.*

*Examples of the first type of cases – preventing climate change - are permits combined with conditions concerning energy saving. Energy saving is of course of interest from different aspects, of which one may be reducing the effect on climate change. One case, for instance, concerned a permit for a paper industry, where there was a condition stating that the amount of electricity and heat used must not exceed certain values (MWh per ton product and GJ per ton product respectively). This kind of conditions is not common. Instead permits concerning different kinds of industries rather often contain a condition that calls for the industry to have a plan for improving the energy efficiency, and that the plan and actions taken according to the plan must be reported to the supervisory authority each year. In some cases there will be conditions*

*concerning the discharge of different kind of greenhouse gases, such as dinitrogen oxide. It is not possible however to prescribe conditions concerning the discharge of carbon dioxide for activities that are covered by the emission trading system, since that is not allowed due to the exclusiveness of that system.*

*There have been a much larger number of cases that somehow concern the consequences of climate change. In Sweden there are for instance a large number of hydropower plants. Many of these have lately applied for a permit according to the environmental legislation to increase the possibilities to discharge water by installing larger outlets. This is needed in case of large water flows caused by heavier rain due to the climate change ,which can be foreseen. As regards mines, and more specifically tailing dams, the water balance is often crucial for the remediation, and the future water balance depends on the climate and its changes. So in permits that concerns mines, climate change is an important factor when considering the conditions for the remediation of the tailings. Climate change must also be taken into account in cases where the amount of stormwater runoff is of importance, for instance waste deposits, cases concerning land planning or cases about draining of agricultural areas. The risk of flooding must also be considered in cases concerning, for instance, land planning. There are also a number of cases concerning measures that aim at preventing the overflow of land. In those cases climate change also have to be considered. Questions related to the possible impact of climate change have also occurred in cases concerning permits for extraction of ground water. Such permits have been limited in time partly due to the uncertainty that is associated with the consequences of climate change.*

*All the examples given above concern cases that are tried by the Land and environment courts. Claims for damages or for some kind of action to prevent climate change in a broader sense do not feature in these cases.*

*Three major cases where the consequences of climate change have been of importance might serve as examples.*

### ***The hydro regulation of the lake Mälaren***

*The lake Mälaren has its discharge to the Baltic sea in the cities of Stockholm and Södertälje. It is the third largest lake in Sweden. The discharge situated in Stockholm is narrow, and lies in the very middle of the city. The old sluice in Stockholm city needed to be replaced for technical reasons. At the same time the old permit regulating the water regime of the lake had to be replaced. The question of the climate change was of great importance in the case, since it is essential that the process where the future precipitation which will eventually be discharged by the lake Mälaren can function without adversely affecting the city and infrastructure of Stockholm.*

### ***A final deposit of mercury in rock***

*A company applied for a permit to build a final deposit for mercury and other kinds of wastes in the north of Sweden. The deposit should not affect health or environment, and since it is final it should be able to work without any further control measures. Thus many difficult questions arouse considering the future. What will happen in the environment until at least the next ice age? Will a change of temperature and/or precipitation affect the deposit? What about the land elevation that is considerable in this part of the country?*

### ***A copper mine with tailings***

*There is a large open-cast mine (3 square km wide and 450 m deep) in the north of Sweden. At the site there are also tailings from the mine, e.g. a large tailing dam (around 13 square km wide). The question of remediation of the site is part of the permit. The ore is sulphidic, and it is crucial that the tailings doesn't*

*decompose and emit metals to the environment once the mine is closed. The water balance for the site, especially for the tailings dam, is therefore very important. Climate change will affect the precipitation, and different scenarios can be foreseen depending on how the climate will change. Different measures will be needed depending on the future climate situation.*

## **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?

*The legal questions raised in cases like the ones described under question 4 above doesn't differ from the questions that are raised in other cases in accordance to the environmental legislation. So the conventional legal concepts apply. As we haven't seen any "climate action cases" we haven't applied any new legal doctrines, nor have we had any reason (yet) to consider concepts of causation or matters of preliminary rulings related to such cases.*

## **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?

*An interesting question that may be an issue when the consequences of climate change are considered within a case, is which climate change scenario that should be applied. So far, we haven't experienced any significant disagreement between the parties – companies and authorities etc. – when it comes to this question.*

*The issue of climate change is handled in the same way as other environmental issues within the permitting process. The application for a permit contains a technical description and an environmental impact statement that covers questions concerning climate change. The application and the EIS are submitted to expert authorities for an evaluation and a written statement. The Land and Environment Court then holds an official hearing with the company and the authorities present, where all environmental issues – among them climate change - are reviewed and discussed.*

## **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?

*As we have not yet (to our knowledge) had any special cases where climate action have been brought we can't really answer this question. Within e.g. an environmental case such as a permit case an ENGO or private individual concerned, as well as a relevant authority, could appeal a decision and bring forward arguments related to climate change which would then have to be addressed by the court. The same would go for a case related to supervision of an activity not being carried out in accordance with environmental legislation relating to climate change.*

- What role do NGOs play in bringing climate actions?

*See the above.*

- What role does industry play in bringing actions relating to climate change laws?

*See the above.*

- Does industry make claims under different or the same set of laws as NGOs?

*See the above.*

## **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?

*In environmental cases standing will be given to the public concerned by an activity as well as to ENGOs and also a number of environmental authorities.*

- How do costs rules affect climate change actions?

*As regards environmental cases concerning permits and supervision there are no court fees and the loser pays principle does not apply. An individual, ENGO or authority challenging such a decision would thus not risk having to pay the opposite party's costs. Furthermore there are no requirements for legal representation.*

*In civil cases (e.g. cases on damages or prohibition) general rules on costs apply, meaning that if you sue and lose the case you will have to pay your opponent's costs.*

- Are there any other impediments to parties bringing climate change claims?

*As we have not seen any specific cases on climate change claims this question is hard to answer. However if the matter of climate change rises in e.g. a permit case it might be worth mentioning that the Swedish environmental process is based on the ex officio principle. This means that the court carries a burden of investigation and must see to it that the material is sufficient in order to make a decision in the case. In practice this means that there is a need for technical expertise within the court. That expertise is held by the technical judges.*

## 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?

*As we have not seen any specific cases on climate change claims this question is hard to answer. Generally if the provisions of environmental law are not followed, the supervisory authority has to intervene. Under the rules of the Environmental Code, the supervisory authorities have to supervise compliance with the Environmental Code and regulations, judgments and other decisions issued under the Code and have to take the measures needed to ensure that faults are corrected. Their supervision has to ensure compliance with the purpose of the Environmental Code and regulations issued under the Code. The supervisory authorities normally act on their own initiative, but the public is entitled to contact the authorities if they think that something should be checked. Such an initiative must be dealt with by the authority and lead to a decision which then subsequently can be appealed to court. If the supervisory authority discovers deficiencies it may, for example, decide on an environmental sanction charge and issue orders or prohibitions. If a permit holder does not follow the permit decision this could lead to criminal charges and that the permit is revoked.*

- What is the availability and level of financial penalties?

*We do not really recognize the issue of financial penalties related to climate change cases.*

*Generally corporate fines may be issued within an environmental crime case. Levels start at EUR 500 and stop at EUR 1 000 000. Fines over the sum of EUR 50 000 are extremely rare. Cases on some kind of environmental damages are also rare and typically relate to situations where an activity has caused harm in a surrounding area.*

- What types of injunctive relief are available?

*Due to the fact that we do not recognize the concept of climate changes cases as such the question is hard to answer. As regards environmental proceedings in general an appeal has suspensive effect. In cases where an execution order has been granted it is possible to apply for an interim suspensive decision. It may also be mentioned that the environmental legal system is based on a reformatory procedure, which means that the court can replace an appealed decision with a new one. It is not just a legality control.*

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

- How straightforward is the application of remedies in these cases?  
*This concept is not familiar to us and we find it hard to answer the question.*
- Does the relationship between private law and public law affect remedies in climate change-related claims?  
*See above.*