Questionnaire EUFJE conference 2022 - Climate law and litigation

1. How has judicial decision-making on climate change issues evolved in your country over the last decade?

The Supreme Court of Norway has in recent years handed down judgements in two cases concerning climate change issues:

On Article 112 of the Constitution and the validity of a royal decree to grant production licences for petroleum (HR-2020-2472-P)

On 22 December 2020, the plenary of the Supreme Court – fifteen justices – handed down its judgment in the so-called **"climate lawsuit"**.

The case concerned the validity of a royal decree of 2016 to grant ten production licences on the Norwegian continental shelf in the south and southeast parts of the Barents Sea – the 23rd licensing round. The decree was based, among other things, on the Storting's (the Parliament's) consents to the opening of the Barents Sea for petroleum production in 1989 and 2013. The appeal against the Court of Appeal's judgement in favour of the State was dismissed with an 11-4 vote. A minority of four justices found that the production licences awarded in the 23rd licensing round in the southeast Barents Sea were invalid due to procedural errors.

The key issue was whether Article 112 of the Constitution on the right to a healthy environment gives the citizens individual rights that may be invoked directly before the courts, and the extent to which the courts may review resolutions from the Storting in this area. The case did not provide a basis for assessing the extent to which administrative decisions not involving the Storting may be reviewed.

The Supreme Court unanimously found, with emphasis on preceding events and the preparatory works to the constitutional provision, that the clear starting point must be that it is the authorities' task to determine which environmental measures to implement. Article 112 of the Constitution may nonetheless be invoked directly before the courts when it comes to environmental issues that the legislature has not considered.

The Supreme Court found that Article 112 of the Constitution must also be read as a safety valve, even if the Storting has discussed the case. For the courts to have jurisdiction to set aside a legislative enactment, the Storting must have grossly neglected its duties under Article 112 subsection 3. This must also apply for other Storting resolutions and decisions to which the Storting has consented. The threshold is therefore very high.

Due to the strict criterion for review, the Supreme Court unanimously found that the royal decree was clearly not invalid based on Article 112 of the Constitution.

The Supreme Court mentioned that a number of general and specific measures have been taken to reduce the national climate emissions – including carbon tax, investments in renewable energy, grants to technology on carbon capture and storage, grants to green technology and green adjustment in general, and not least the endorsement of the EU's carbon quota system. When it comes to climate emissions from combustion taking place abroad after Norwegian petroleum export, the Supreme Court found that one must accept that the Storting and the Government base Norwegian climate policy on the distribution of responsibility between states

in accordance with international agreements. Here, there is a principle that every state is responsible for combustion on its own territory. Finally, the Supreme Court referred to the strict safety regime on the Norwegian continental shelf implemented to protect against local environmental damage.

A principal issue for the environmental groups – the appellants – was that Norway must take a proportionally larger share of the emissions cuts, both because our petroleum production has caused great emissions, and because we have the economic capacity to do so. The groups held that Norway must therefore reduce climate emissions by at least 60 percent within 2030. The environmental groups also argued that until a detailed legal framework and climate accounts are in place, the authorities cannot commence exploration in new areas.

In the Supreme Court's view, a validity action like the present one could not be used to draw up such specific requirements based on Article 112 of the Constitution. The starting point for the courts' assessment in a validity action is the contested decision. The arguments of the environmental groups implied that central parts of the Norwegian petroleum policy, with production and export, would be put to the test. This was outside the scope of what the Supreme Court could consider.

The Supreme Court also unanimously found that the royal decree does not violate Article 93 of the Constitution and Article 2 of the European Convention on Human Rights (ECHR) on the right to life or Article 102 of the Constitution and Article 8 ECHR on the right to respect for private and family life.

The majority of eleven justices found that no procedural error had been made, and that possible errors under all circumstances had not influenced the royal decree. A minority of four justices found that the climate consequences had been inadequately examined in the environmental impact assessment prior to the opening of the southeast part of the Barents Sea, and that the production licences awarded in the 23rd licensing round in this area therefore were invalid.

Licences for wind power development on Fosen ruled invalid as the construction violates Sami reindeer herders' right to enjoy their own culture (HR-2021-1975-S)

On 11 October 2201, a grand chamber of the Supreme Court – eleven justices – handed down its judgment on licenses for wind power development on **Fosen**.

The case concerned whether the construction of Storheia and Roan windfarms on Fosen peninsula amounts to a violation of the reindeer herders' right to enjoy their own culture under Article 27 of the International Covenant on Civil and Political Rights (ICCPR). The Supreme Court unanimously found a violation, and ruled the licence and expropriation decisions invalid.

In 2010, the Norwegian Water Resources and Energy Directorate issued licences for Roan and Storheia windfarms, among others. These windfarms are located within Fosen grazing district, where Sør-Fosen sijte and Nord-Fosen siida practice reindeer husbandry. The herders claimed that the construction interfered with their right to enjoy their own culture, but this was rejected by the Ministry of Petroleum and Energy in 2013. The issue was brought before the courts. Fosen Vind DA was nonetheless permitted to start the construction, and the windfarms were finalised in 2019 and 2020, respectively. They are part of the largest onshore wind power project in Europe.

The main issue before the Supreme Court was whether the development violates the reindeer herders' rights under Article 27 ICCPR. The provision sets out that persons belonging to an ethnic, religious or linguistic minority shall not be denied the right, in community with the other members of their group, to enjoy their own culture. It is undisputed that reindeer husbandry is a protected cultural practice. Because the Court of Appeal had a better basis for its factual assessments than the Supreme Court, the Supreme Court relied on the Court of Appeal's findings with regard to the consequences for reindeer husbandry. The Supreme Court thus took as its starting point the Court of Appeal's conclusion that the winter pastures near Storheia and Roan are in practice lost, and that the wind power development will threaten reindeer husbandry's existence on Fosen unless remedy measures are implemented.

Pointing in particular to statements from the UN Human Rights Committee, the Supreme Court found that it will amount to a violation of Article 27 ICCPR if the interference has significant adverse effects on the possibility of cultural enjoyment. Although the interference in itself may have so serious consequences that it amounts to a violation, it must also be considered in context with other projects, both previous and planned. The total effect of the development determines whether a violation has taken place. As a starting point, there is no room for a proportionality assessment balancing the minority's interests against other interests of society. However, a balance must be struck if the rights conferred by Article 27 conflict with other basic rights. The Supreme Court established that the right to a good and healthy environment might constitute such a conflicting right.

Based on the Court of Appeal's findings of fact, the Supreme Court found that the wind power development would have a significant adverse effect on the reindeer herders' possibility to practice their culture on Fosen. Against that background, the Supreme Court found that the herders' rights would be violated if satisfactory remedy measures were not implemented. The Supreme Court agreed with Fosen Vind DA that a "green shift" and increased renewable energy production are important factors. However, because there were other – and for the reindeer herders less intrusive – development alternatives that could take these factors into account, this case did not involve a collision between environmental interests and the reindeer herders' right to cultural enjoyment.

In its ruling, the Court of Appeal stipulated a large compensation for the winter feeding of fenced-in reindeer, thus finding no violation of the right to cultural enjoyment. In the Supreme Court's view, such a solution is burdened with so much uncertainty that, at present, it cannot be significant in determining whether Article 27 ICCPR has been violated. The Supreme Court also found that the courts in any case cannot rely on such a measure as a part of the reindeer herders' duty to adapt.

2. Before which type of courts is this type of litigation brought and by which type of plaintiffs?

Climate litigation is brought before the ordinary courts, and is heard and decided on pursuant to the same procedural rules as all other civil cases.

Climate litigation may in principle be brought by any type of plaintiff. The “climate lawsuit” referred to above, was brought before the courts by the non-governmental organisations Nature and Youth Norway and Greenpeace Nordic, whilst the parties in the “Fosen” case were, on the one hand, Fosen Vind DA – the holder of licences to construct windfarms – and Statnett SF –

the holder of licences build power lines, and on the other, Sør-Fosen sijte and Nord-Fosen siida – two siidas practicing reindeer husbandry in the area.

3. What are the opportunities to this type of litigation in your country?

The "climate lawsuit" and the "Fosen case" concerned the *validity* of a royal decree to grant production licences for petroleum and licences for wind power development, respectively. In both cases, one of the sides sought to have prior administrative decisions ruled invalid by the courts.

In principle, also other type of claims may be brought before the courts, such as e.g. claims for monetary damages.

4. What are the challenges to this type of litigation in your country?

Decisions in cases on fundamental environmental issues will often require a political balancing of interests and broader priorities. As was pointed out by the Supreme Court in the "climate lawsuit", democracy considerations may suggest that decisions on such topics should be made by popularly elected bodies, and not by the courts. On this background, the Supreme Court stated in section 142 of the judgement (office translation for information purposes):

> "… Article 112 of the Constitution must, when the Storting has considered a case, be interpreted as a safety valve. In order for the courts to set aside a legislative decision of the Storting, the Storting must have grossly neglected its duties under Article 112 subsection 3. The same must apply for other Storting decisions and decisions to which the Storting has consented. Consequently, the threshold is very high."

Another challenge is the costs generally associated with court proceedings. The plaintiffs in climate litigation may typically be non-governmental organisations, as in the "climate lawsuit".

5. What is the average length of proceedings (including on appeal and cassation)?

The length of proceedings will vary from case to case depending on, among other things, the scope of the case.

The "climate lawsuit" was initiated by the plaintiffs' filing of a writ of summons to the District Court on 18 October 2016. The main hearing at the District Court took place from 14 to 22 November 2017, and the District Court handed down its judgement on 4 January 2018. The appeal hearing took place from 5 to 14 November 2019, and the Court of Appeal's judgement was handed down on 23 January 2020. The Supreme Court's judgment – concluding the case – was handed down on 22 December 2020.

6. Which type of remedies are being ordered by the courts? What are the arguments for not ordering such remedies?

Pursuant to the Dispute Act, the courts may only rule on the claims brought before the court by the parties, and the courts' ruling must fall within the scope requested by the parties.

In civil cases, the parties may request the court to determine the legal status between the parties, e.g. rights and obligations or whether an administrative decision is invalid, or to order a party to perform, refrain from or accept an act. The parties may also request a preliminary injunction.

7. Do the courts have powers to ensure and follow-up the enforcement of judgements in climate cases? Are there specific difficulties in this regard?

The courts do not hold particular powers in climate cases compared to other civil cases. Judgements that order a party to perform, refrain from or accept an act can be enforced pursuant to the rules on enforcement. Enforcement must be requested by a party by submission of a motion on enforcement to the enforcement authorities.

8. What are the most useful norms, legal principles or practices available to judges to ensure effective climate action by governments and businesses?

The courts rule on the individual cases brought before the them by the parties.

Pursuant to Article 112 of the Constitution, every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. It is also stipulated in the article that natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.

In 2017, the Climate Change Act was adopted. Pursuant to section 1 subsection 1, the purpose of the Act is to promote the implementation of Norway's climate targets as part of its process of transformation to a low-emission society by 2050. The Climate Change Act is, however, aimed at the highest decision-making bodies in society; that is, the Storting and the Government. The Act does not establish rights or obligations for citizens that may be enforced through legal action.

The Greenhouse Gas Emission Trading Act was adopted in 2004. The purpose of this Act is to limit the greenhouse gas emissions in a cost-efficient manner by means of a duty to surrender greenhouse gas emission allowances and freely transferable emission allowances, cf. section 1 subsection 1.

Norway has several other climate-related acts, including the Environmental Information Act, the Nature Diversity Act, the Pollution Control Act, the Petroleum Act and the CO2 Tax Act. In addition, Norway has a large number of regulations for protecting the environment and ensuring petroleum production safety.