

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

Introduction

Throughout the world, legislation addressing climate change is increasing in volume and scope. The United Nations Framework Convention on Climate Change 1992 (UNFCCC) and the agreements made under it have been a significant catalyst for legal developments in many jurisdictions. The EU is firmly committed ‘to deal with regional and worldwide environmental problems, and *in particular* combating climate change’¹, as a key EU environmental objective set out in the Lisbon Treaty. It is also part of its ten-year growth strategy –‘Europe 2020’– in which the EU pledges to ‘outreach to other parts of the world in pursuit of a worldwide solution to the problems of climate change’.²

Climate change is not a discrete problem. It is caused by many different activities and impacts on many others. EU and national climate change law covers a vast array of subject areas, including energy, trade, transportation, innovation, land-use planning and agriculture. In each of these areas there are challenges in developing law and policy due to the dynamic nature of climate change, the need to assess its future impacts, and the way it gives rise to socio-political controversy.

The growth of climate change legislation has been accompanied by an increase in the number of cases in which climate change has been relevant to the legal adjudication of disputes. Academic studies of these cases in common law courts

¹ Article 191(1) TFEU, Consolidated Versions of the Treaty on the Functioning of the European Union (TFEU), [2008] OJ C115/49. Emphasis added.

² Commission of the European Communities, Communication from the Commission, 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth' COM (2010) 2020 final.

highlight the many ways in which climate change is relevant. For example, some cases relate to the application and enforcement of climate change legislation but others do not. Some cases raise questions about the justiciability of the questions raised by climate change, others about access to justice, and others about the application of remedies.

The purpose of this questionnaire is to gain a more accurate picture of the ways in which climate change is figuring in adjudication in national jurisdictions within the EU including: the legal nature of national climate change measures; the type of issues being litigated in respect of climate change; how these issues are being adjudicated upon by courts; the issues they raise for access to justice; and the range and application of remedies in climate change cases. The specific questions under each general question are included to prompt thinking but are not intended to limit responses. The answers to these questions are likely to cover a range of different types of case, and there will of course be no single answer to any of them. Practical examples should be included wherever possible.

Questionnaire

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.)?

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?

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?

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 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?

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?

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?

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?

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?

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?