

The First Climate Judgment before the Norwegian Supreme Court: Aligning Law with Politics

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ABSTRACT

On 22 December 2020, the Norwegian Supreme Court ruled on its first climate case. It dealt with the claim that petroleum licences, issued by the Norwegian government, violate the 'right to a healthy environment' as contained in the Norwegian Constitution. The Court rejected the claim and found that the constitutional protection of the environment applies not as a right but as a substantive limit to governmental action, and only in very limited circumstances. Rather than taking the opportunity to give guidance on this constitutional provision, the Court provided a judgment that aligned law with the current politics in favour of continuous petroleum extraction on Norwegian territory.

KEYWORDS: right to a healthy environment, climate change, Paris Agreement, Supreme Court of Norway, judicial review, oil and gas extraction, exported emissions

1. INTRODUCTION

Climate change litigation is a worldwide phenomenon,¹ and recently it has emerged also on Norwegian shores. On 22 December 2020, the Norwegian Supreme Court ruled on its first climate case, commonly referred to as *People v Arctic Oil*.² The Court rejected the claim put forward by several environmental Non-Governmental Organisations (NGOs) that petroleum licences issued by the Norwegian government violate Article 112(1) of the Norwegian Constitution, which states:

Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained.

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- 1 United Nations Environment Programme, *Global Climate Litigation Report: 2020 Status Review* (2020) 9, 13; Sabin Center for Climate Change Law, 'Climate Change Litigation Databases' (2021) <<http://climatecasechart.com>> accessed 12 June 2021.
- 2 *Greenpeace Nordic Association v Ministry of Petroleum and Energy* (2020) Case no 20-051052SIV-HRET (Norwegian Supreme Court) (*People v Arctic Oil*). Unofficial translation <www.klimasoksmal.no/wp-content/uploads/2021/01/judgement_translated.pdf> accessed 16 February 2021.

Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.

This case provided a unique and timely possibility for the Supreme Court to establish the substantive content of this provision in light of the global challenge of climate change. Yet, the Court decided not to avail itself of this opportunity. It found that the constitutional provision applies, as a substantive limit to governmental action (or inaction), only in very limited circumstances. Foregoing the chance to give guidance and legal meaning to the ‘right to a healthy environment’, the Court pronounced a backward-looking judgment, rightly described as a ‘gust from the past’.³ Delivering its judgment only 40 days following the hearings, the Court appeared hurried to align the relevant law with current politics of continuous petroleum extraction on Norwegian territory. Opponents of *People v Arctic Oil* criticised that the case asked the Supreme Court to rule on the legality of petroleum licences, which they did not consider a matter of law, but of politics.⁴ Yet, by aligning the content of the Constitution with prevailing politics, the Supreme Court has ultimately rendered a highly political decision.

This analysis will first briefly set out the background against which the case took place. It then moves on to the case’s journey through the Norwegian judicial system to finally, list five key observations regarding the judgment. These regard (i) the recognition of the severity of the climate crisis, (ii) the legal importance of the Paris Agreement, (iii) the responsibility for damages resulting from oil and gas exports, and (iv) the circumstances for judicial review in light of Article 112 of the Norwegian Constitution.

2. BACKGROUND

Before we discuss the judgment in *People v Arctic Oil*, it is necessary to briefly consider the importance of the Norwegian petroleum sector, as well as Norway’s climate law and policy. Norway’s greenhouse gas (GHG) emissions, at least from its own territory, are relatively small.⁵ Moreover, in line with the Norwegian Climate Change Act 2017, Norway is legally bound to a 40% GHG emission reduction target by 2030, and to enabling a low-emission economy by 2050.⁶ To achieve this, it has adopted a wide range of measures, including linking the national emissions trading scheme to the EU Emissions Trading Scheme (EU ETS), and carbon taxation.⁷ At the international level, Norway is an active bridge-builder in UN climate negotiations,

3 Ole Petter Pedersen, ‘Klimasøksmålet: En Dom fra og for Fortiden’ *TU Energi* (22 December 2020) <www.tu.no/artikler/klimasoksmålet-en-dom-fra-og-for-fortiden/504722> accessed 12 June 2021; similarly also: Malene Emilie Rustad, ‘Jusprofessor om Klimasøksmålet: Høyesterett Har Stilt seg på Feil Side av Historien’ *E24* (Norway, 22 December 2020) <<https://e24.no/olje-og-energi/i/dljgO1/jusprofessor-om-klimasoksmålet-dom-høyesterett-har-stilt-seg-paa-feil-side-av-historien>> accessed 12 June 2021.

4 Eivind Smidt, ‘Bestemmer Høyesterett Hva Staten Skal Gjøre i Klimapolitikken?’ *Rett24.no* (11 November 2020) <<https://rett24.no/articles/bestemmer-høyesterett-hva-staten-skal-gjøre-i-klimapolitikken>> accessed 12 June 2021.

5 In 2019, overall emissions amounted to 50.3 mtCO_{2e}, which is 2.3% lower than its emissions in 1990. SSB, ‘Utslipp til Luft’ (2020) <www.ssb.no/klimagassn> accessed 16 February 2021.

6 Act Relating to Norway’s Climate Targets 2017 (Climate Change Act), LOV-2017-06-16-60.

7 The climate cooperation with the European Union and Iceland, Norway is addressed in specific legislation for the period 2021–30 covering all emissions and sectors. For an overview, see Norway’s Climate Action Plan (Meld St 13 2020–21) <www.regjeringen.no/contentassets/202fec60ac844d4ca7d53d65b6b9ac9c/alle-regjeringa-vil-punkt-i-meldinga.pdf> accessed 14 May 2021.

and a leader in reducing deforestation-based emissions in developing countries through its International Climate and Forest Initiative.⁸

While Norway has set itself fairly ambitious national climate goals and has put implementation measures in place, its international GHG emission footprint is significant and remains unaddressed. Almost all oil and gas produced in Norwegian is exported: Norway is the world's third largest gas exporter, and the 15th largest oil exporter globally.⁹ This is significant, especially as it is estimated that GHG emissions resulting from exported petroleum are 95 percent higher than territorial emissions in Norway.¹⁰ At the same time, oil and gas exports have contributed significantly to the exponential economic growth in Norway and the Norwegian welfare state.¹¹

Oil and gas production in Norway is organised by successive licensing rounds, where first exploratory and then production licences are allocated to licensees (companies), who may later sell the oil and gas that they produce. In 2016, the call for exploratory licences opened for exploration in the Southeast Barents Sea. This territory became part of the Norwegian continental shelf following the Treaty on Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, signed by Russia and Norway, and entered force in 2011. In 2013, the Norwegian Parliament opened the Southeast Barents Sea to petroleum activity, and in 2016, the Norwegian Ministry for Petroleum and Energy (Ministry) awarded 10 new licences, based on the decisions by the Parliament to open the respective fields.¹² It was primarily the decision in 2013 by the Parliament, leading to the subsequent issuing of licences by the government, which was addressed in *People v Arctic Oil*.

3. THE JUDICIAL JOURNEY OF *PEOPLE V ARCTIC OIL*

3.1 First Stop: Oslo District Court

On 18 October 2016, a coalition of environmental groups—Greenpeace Nordic Association and Nature and Youth, together with the Grandparents Climate Campaign as the intervener—initiated proceedings against the Government of Norway, and more precisely, the Norwegian Ministry of Petroleum and Energy before the Oslo District Court.¹³ They challenged the validity of 10 petroleum production licences relating to oil and gas production on the Southeast Barents Sea, which, as outlined above, the mentioned Ministry had issued in 2016.

8 Ministry of Climate and Environment, 'Norway's International Climate and Forest Initiative (NICFI) Government.no (28 August 2018) <www.regjeringen.no/en/topics/climate-and-environment/climate-and-forest-initiative/id2000712/> accessed 16 February 2021.

9 Norwegian Petroleum Directorate and Ministry of Petroleum and Energy, 'Exports of Oil and Gas' (*Norwegian Petroleum*, 25 March 2021) <www.norskpetroleum.no/en/production-and-exports/exports-of-oil-and-gas/> accessed 12 June 2021.

10 *People v Arctic Oil* (n 2) [155].

11 Norwegian Petroleum Directorate and Ministry of Petroleum and Energy, 'The Government's Revenues' (*Norwegian Petroleum*, 6 June 2021) <www.norskpetroleum.no/en/economy/governments-revenues/> accessed 12 June 2021.

12 Ministry of Petroleum and Energy, 'Announcement 23rd Licensing Round Awards' (*Government.no* (18 May 2016) <www.regjeringen.no/en/aktuelt/announcement-23rd-licensing-round-awards/id2500936/> accessed 16 February 2021.

13 *Greenpeace Nordic Association v Ministry of Petroleum and Energy* Case (2018) Case no 16-166674TVI-OTIR/06 (Oslo District Court).

In line with the Norwegian Petroleum Act (Act), a production licence grants an exclusive right to survey, exploration drilling and production of petroleum deposits in areas covered by the licence.¹⁴ What is important to note is that the licensee becomes the owner of the petroleum produced,¹⁵ but the Ministry needs to approve any plans for development and operation of the petroleum deposit based on an environmental impact assessment.¹⁶

The environmental groups relevant to this case claimed that the licences issued by the Ministry, granting oil and gas production, violated Article 112 of the Norwegian Constitution and thus were invalid. Article 112 was included in the Constitution only in 2014, and this was the first time that the Court was asked to rule on it. The provision, as listed above, includes the right to a healthy environment, and outlines that 'natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.' It also requires the state authorities to adopt measures to the provision's effect.¹⁷

The licences that were challenged were issued after Norway became a party to the Paris Agreement. The claimants stated that the goals, rules and commitments under the Agreement need to be considered when interpreting Article 112 of the Norwegian Constitution. They argued that the licences would allow access to still undeveloped fossil fuel deposits, and that this is inconsistent with the climate change mitigation required to hold global warming to below 2°C, or and even 1.5°C, above pre-industrial levels.¹⁸ Moreover, the claim was made that the licences were invalid due to a violation of procedural requirements under section 3.3 of the Petroleum Act, which, according to the claimants, needs to be read in light of Article 112(2) of the Constitution,¹⁹ and which, similarly to other national law and EU environmental law,²⁰ demands the right of citizens to information on environmental impacts assessments.

On 4 January 2018, the Oslo District Court ruled in favour of the Ministry.²¹ The Court recognised that Article 112 of the Constitution sets out a right, but it found that the government had not violated this right, and that it had fulfilled the required duties before issuing the licencing. Here, the Court noted that in 2013, the Parliament had agreed to open the Southeast Barents Sea to licencing, and it had subsequently, considered, but rejected, several proposals to halt and review the licencing process in light of the Paris Agreement.²² According to the Court, the involvement of the Parliament was sufficient to indicate that the duty to take action had been fulfilled. The Court further declared that, '[e]missions of CO₂ abroad from

14 Act Relating to Petroleum Activities 2015 (The Petroleum Act), LOV-2015-06-19-65, s 3-3, para 3.

15 *ibid.*

16 *ibid.*, s 4-2.

17 Norwegian Constitution, art 112(3).

18 United Nations Framework Convention on Climate Change 'Adoption of the Paris Agreement' (12 December 2015) FCCC/CP/2015/L.9/Rev.1.

19 The claimants referred, in particular, to the right of citizens to information on the effects of any encroachment on nature that is planned, as contained in art 112(2) of the Constitution.

20 Act Relating to Procedure in Cases Concerning the Public Administration 1967 (Public Administration Act), LOV-1967-02-10, para 17; Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the Assessment of the Effects of Certain Plans and Programmes on the Environment.

21 Cf Oslo District Court (n 13).

22 *ibid.* 27.

oil and gas exported from Norway are irrelevant when assessing whether the Decision entails a violation of Article 112.²³

3.2 Second Stop: Court of Appeal

Greenpeace Nordic and Nature and Youth appealed the decision to the Court of Appeal. They argued that the District Court interpreted Article 112 of the Constitution too restrictively in finding that Norway is only responsible for GHG emissions emitted on Norwegian territory, which, they argued, wrongly limits the territorial scope of the government's constitutional duty to guarantee the right to a healthy environment.

On 23 January 2020, the Court of Appeal upheld the District Court's ruling.²⁴ In doing so, it further explored the legal meaning of Article 112 of the Constitution, offering a different understanding from that of the District Court. It found that Article 112 requires that any environmental damage from emissions of exported petroleum products, and dealing with climate change domestically, need to be considered together.²⁵ Following from this, the Court held that Article 112 imposes a judicially reviewable limit on the state, but only above a high threshold.²⁶ In assessing whether the threshold had been exceeded, the Court explained that a wide range of relevant societal interests needed to be balanced against each other, including economic benefits, as well as the societal costs of the licensing system currently in place.²⁷ Ultimately, the Court denied the appeal, arguing that it is uncertain whether, and to what extent the licences will lead to increased GHG emissions. As mentioned above, the licence alone does not lead to oil or gas extraction, as additional approval for any development of petroleum deposit, based on an impact assessment, is required. Interestingly, it was only in an obiter dictum, that the Court noted Norway's responsibility for 'extraterritorial emissions'; ie GHG emissions that occur because of the export of Norwegian-produced petroleum.²⁸

The plaintiffs appealed the decision on the 24 February 2020 to the Norwegian Supreme Court.²⁹ Here, they added to the previous claim the argument that the awarded licences violate the right to life, and the right to respect for private and family life, as enshrined in Articles 2 and 8 of the European Convention on Human Rights (ECHR), and Articles 93 and 102, respectively, of the Norwegian Constitution. Additionally, they relied on climate change jurisprudence from elsewhere, and foremost the *Urgenda judgment from the Netherlands*.³⁰

23 *ibid* 20.

24 *Greenpeace Nordic Association v Ministry of Petroleum and Energy* (2020), Case no 18-060499ASD-BORG/03 (Borgarting Court of Appeal). Unofficial translation <www.klimasoksmal.no/wp-content/uploads/2019/10/judgement_Peoplevs_ArcticOil_Appeal_Jan2020.pdf> accessed 16 February 2021.

25 *ibid* 17.

26 *ibid* 10, 19, 27.

27 *ibid* 31.

28 *ibid* 21, 31.

29 Wahl-Larsen and Glittertind, 'Notice of Appeal to the Supreme Court of Norway' (24 February 2020). Unofficial translation <<https://drive.google.com/file/d/1Mkjoemyd3XSxpN49YVXz83b9zy87z5Uf/view>> accessed 16 February 2021.

30 *The State of the Netherlands v Urgenda* (2019) ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands).

The Norwegian Supreme Court granted leave to appeal on the 4 April 2020,³¹ and subsequently decided to hear the case in plenary on the 20 April 2020.³²

3.3 Final Stop: The Norwegian Supreme Court

On 22 December 2020, the Supreme Court rejected the appeal, confirming the validity of the licences. More precisely, 11 of the 15 judges panel upheld the District Court's ruling, whereas four judges dissented and deemed the licences invalid. The Court unanimously found that although Article 112 of the Constitution protects citizens from environmental and climate harms, it only allows for judicial review in very limited conditions, which were not met in the present case. In reaching this finding, the Court set out multiple significant observations regarding this constitutional provision.

To start with, the Supreme Court recognised the severity of the climate challenge and found that the term 'environment' in Article 112 also covers climate change—a view opposed by the Attorney General.³³ The Court based its finding on the *travaux préparatoires* concerning Article 112, as well as its predecessor, Article 110b. Further, it found that Article 112 establishes a legal duty on the government to adopt adequate and necessary environmental measures, but that judicial review is permitted only when this duty is *grossly neglected*. Thus, the Court established a *very* high threshold for setting aside legislative and other decisions that the Parliament has taken or consented to.³⁴ It, however, failed to provide guidance on the precise formulation of the threshold beyond the fact that it is high when measures are adopted by the Parliament. In this particular case, it concluded that the threshold had not been passed because the Parliament had adopted several measures to reduce *national* emissions, including a carbon tax, and an emissions trading scheme linked to the EU ETS.³⁵ It did not matter to the Court's reasoning that neither the Parliament nor the government had adopted any measures to address extraterritorial emissions following petroleum exports, nor whether they had they observed the precautionary principle, or the rights of future generations, as stipulated in the Constitution.

Interestingly, the Court remarked on the ambiguity of Article 112. In interpreting its legal meaning, it relied exclusively on the relevant *travaux préparatoires*.³⁶ Relying on this 'back-ward' interpretative method, the Court did not take into account other objectives ('reelle hensyn'), including the legal developments *since* 2014, ie after

31 Decision by Appeal Committee of the Norwegian Supreme Court (2020), HR-2020-841-U.

32 Decision by the Supreme Court Chief Justice (2020) HR-2020-846-J.

33 *People v Arctic Oil* (n 2) [147]–[148].

34 The threshold is lower if the parliament was not involved in the decision-making, and for the judicial review of art 112(2).

35 *People v Arctic Oil* (n 2) [157], [158], [163].

36 *ibid* [93 ff]; art 110b reads: 'Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well. In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to be informed of the state of the natural environment and of the effects of any encroachments on nature that are planned or commenced. The State authorities shall issue further provisions for the implementation of these principles.'

Article 112 was adopted.³⁷ In particular, it failed to consider the legal relevance of the Paris Agreement, and Norway's ratification thereof, or whether the changes in public opinion, especially of children and the younger generations, the seriousness of climate change, advances in climate science and the need for a rapid and irreversible global phase-out of GHG emissions had any bearing on the interpretation of Article 112. According to the Court, the relevance of Article 112 is limited to (i) providing guidance to the Parliament when acting as law-maker, (ii) providing guidance for the exercise of discretion in administrative decision-making, (iii) being an interpretation principle and (iv) being a standard for judicial review only in cases where the legislator was involved but had not taken a position on the environmental problem at stake.³⁸

With regard to the impact on human rights, the Supreme Court concluded that the licences did not violate the mentioned rights. It argued that the link between the decision to grant oil production licences and an increase of GHG emissions is too uncertain to constitute a 'real and immediate' threat to the right to life, and the right to respect for private and family life. Moreover, the Court found that the *Urgenda* case, in which the Dutch Supreme Court ruled that the Netherlands must reduce its GHG emissions by 25 percentage compared with 1990 by 2020, had limited transferable value to the case at hand.

The dissenting opinion by Judge Webster, supported by three other judges, is concerned with procedural errors found in granting the licences.³⁹ Following the Petroleum Act, and related national and EU laws, both production and combustion of GHG emissions must be covered by an environmental impact assessment, which here was omitted for possible future GHG combustion emissions. This procedural error, as identified by the dissenting judges, would not in itself render the licences invalid, but the Act, they argued, needs to be read in light of Article 112, which secures the right to information on 'the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out'. In light hereof, and of Norway's obligations under EU law, those four judges found the decision to grant petroleum production licences invalid.

4. REFLECTIONS

Despite the outcome, the Supreme Court's judgment in *People v Arctic Oil* is important on at least four points: recognising the severity of the climate crisis; the legal importance of the Paris Agreement; the legal significance of extraterritorial emissions; and the use of Article 112 of the Constitution as a ground of judicial review. While critical, these reflections attempt to highlight the 'climate positive' aspects of the case, and carve out possible environmental value—even if ever so small—of the Court's finding.

37 See also Hans Petter Graver, 'Kommentar til Høyesteretts Dom i Klimasøksmålet - En Nærlystet Dom' (*Juridika*, 24 December 2020) <<https://juridika.no/innsikt/en-naerlystet-dom>> accessed 9 May 2021.

38 *People v Arctic Oil* (n 2) [138]–[145].

39 *ibid* [254 ff].

4.1 Recognition of the Climate Change Crisis

To start with, the Supreme Court acknowledged the seriousness of the challenges that climate change presents, both in terms of mitigation and adaptation:

There is broad national and international agreement that the climate is changing as a result of anthropogenic greenhouse gas emissions and that these climate changes may have serious consequences for life on Earth . . . The effects of global warming will be irreversible for all practical purposes given the current societal perspective . . . Global risks of a temperature increase of 2°C includes extreme heat, drought, sea level rise, ocean acidification, floods and extreme weather. The climate changes will alter living conditions for many species and ecosystems. Many hundreds of millions of people will be exposed to serious effects . . . With warming greater than 2°C, there is a real risk that several critical tipping points will be passed.⁴⁰

This shows the Court acknowledging that climate change has an anthropogenic cause, which, if unmitigated, will have disastrous implications. The Court directly draws on the findings by the Intergovernmental Panel on Climate Change (IPCC) as best-available science.⁴¹

What is curious, nevertheless, is that when the Court interprets Article 112, it does not return to climate science. As such, the Court seems to deny that climate science—and its advances since 2014—have any bearings on the interpretation of Article 112. Moreover, the Court ignores that the IPCC not only gives evidence on the magnitude climate challenge, but that it also models possible pathways to prevent dangerous climate change.⁴² In an inconsistent manner, the Court thus recognises the science behind climate change, while ignoring the bearings this has, or ought to have on its adjudicative powers. This type of inconsistency, further explored below, is disconcerting for a Supreme Court decision. It may be the result of the hastiness of the decision; or the Court's resolution to interpret the constitutional provision in line with the prevailing politics of permitting seemingly unlimited petroleum exploration and extraction—or both.

4.2. The Legal Importance of the Paris Agreement

Importantly, the Court clearly recognised the Paris Agreement as a legally binding international treaty:

The purpose of the [Paris] Agreement is to hold the increase in the global average temperature to well below 2°C compared with the pre-industrial level and to strive to limit the temperature increase to 1.5°C above the same level . . . The burden sharing principle in . . . the Paris Agreement means that

40 *ibid* [49]–[53].

41 *ibid* [49], [51]–[53].

42 IPCC, '2018: Summary for Policymakers' in Valerie Masson-Delmotte and others (eds), *Global Warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (IPCC 2019) 12, 15.

countries rich in resources, such as Norway, have a greater responsibility. Under Article 3 and Article 4, each state is to report nationally-determined contributions, which are to be “ambitious efforts” which together will “represent a progression over time”. In other words, this is not a matter of an equal distribution. All countries shall do their best.⁴³

Given this description, one would have expected the Agreement to have relevance in the interpretation of Article 112 but the Supreme Court did not draw such connections. This is problematic for two reasons.

First, it is inconsistent with standard statutory interpretation, and the praxis of the Supreme Court, where in addition to *travaux préparatoires*, any other relevant objectives, including those expressed in binding international agreements to which Norway is a party, are taken into account.⁴⁴ Secondly, by recognising that ‘all countries shall do their best’, the Court seems to nod towards Article 4(3) of the Agreement, which stipulates that ‘each Party’s [national determined contribution] will reflect its highest possible ambition’ and that Norway, as a resource-rich country, has a higher responsibility, than other countries, in this regard. In fact, Article 4(3) is seen to establish due diligence, obliging the Parties to the Agreement to exercise their best efforts in determining and effectively implementing their climate policies.⁴⁵ The Court, however, ignored this legal commitment of conduct when it failed to consider it in applying Article 112. Ultimately, this means that the Paris Agreement remained without any legal weight in this case, even if its legal impact is recognised for future climate litigation.

4.3 Article 112 of the Constitution Includes Extraterritorial Emissions

One of the most contentious issues in this case was whether extraterritorial emissions from the combustion or other use of petroleum exported from Norway are relevant in the context of applying Article 112. As mentioned above, the Court of Appeal found that it was. The Supreme Court, however, disagreed. Rather than recognising the long-term effects of extra-territorial GHG emissions on future generations, the Supreme Court used the general delimitation for extraterritoriality: ie emissions are the responsibility of each state within their jurisdictional scope.⁴⁶ It found that Article 112 does not *generally* provide protection outside of Norway, but is relevant when the impacts affect Norwegian territory. In that case, may acts outside of

43 *People v Arctic Oil* (n 2) [56]–[58].

44 For example, Alf Petter Høgberg and Benedikte Moltumyr Høgberg, ‘Grunnloven som Rettskildefaktor’ in Alf Petter Høgberg and Jørn Øyrehagen Sunde (eds), *Juridisk Metode og Tenkemåte* (Universitetsforlaget 2019) 239–258; Benedikte Moltumyr Høgberg, ‘Betydningen av Internasjonale Rettskilder i Norsk Statsforfatningsrett’ in Andreas Føllesdal, Morten Ruud and Geir Ulfstein (eds), *Menneskerettighetene og Norge: Rettsutvikling, Rettsliggjøring og Demokrati* (Universitetsforlaget 2017) 215–228.

45 Christina Voigt and Felipe Ferreira, ‘Dynamic Differentiation: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement’ (2016) 5 *Transnational Environmental Law*, 285–303.

46 A requirement, however, is that the state in question has some control over the conduct—either directly or indirectly. See Bruno Simma and Andreas Th. Müller, ‘Exercise and Limits of Jurisdiction’ in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 134–157.

Norway fall under the scope of Article 112. This applies to activities abroad which lead to harm in Norway, where Norwegian authorities have direct influence over such activities or where they could take measures against them. ‘One example is combustion abroad of oil or gas produced in Norway, when it leads to harm in Norway as well.’⁴⁷

This may open the door to establishing responsibility for extraterritorial emissions.⁴⁸ After all, climate change is such a problem that GHG emitted elsewhere from gas and oil exploited in Norway, accumulate in the atmosphere and can lead to harm in Norway ‘as well’.⁴⁹

It is worth noting that Norway cannot unilaterally regulate extraterritorial emissions, but it could adopt measures to indirectly address emissions from combustion or production from Norwegian petroleum exports. Some of the emissions are covered by mitigation measures in importing states, such as the EU ETS, but not all. This is both because Norway also exports oil and gas to countries outside the EU, and because petroleum is also used in installations not covered by the EU ETS. For countries where no effective climate legislation exists, several options to take measures spring to mind. Norway could, eg regulate exports by setting a condition on production and export licences that down-stream emissions are mitigated (eg by using carbon capture and storage technologies) or that emissions are offset by removals, or a combination of both. Also, other measures, such as an additional CO₂ tax or a fee or certain due diligence requirements for the licensees, are conceivable. By failing to adopt any such measures, Norway could, following the Court’s reasoning in *People v Arctic Oil*, become liable for climate damages in Norway that result from exported GHG emissions.

In addition, and similar to the recommendations by the Ethics Guidelines for the Government Pension Fund Global,⁵⁰ Norwegian authorities could adopt guidelines on export criteria, including the existence or adoption of effective climate mitigation measures by importing countries, and the exclusion from Norwegian oil exports of countries without such measures.

4.4 Article 112 of the Constitution as a Ground of Review

Perhaps the most central and controversial aspect of the judgment is the delimitation of the threshold for judicial review based on Article 112.⁵¹ Here, the Supreme Court shows extreme deference to the Parliament, undermining its own competence to

47 *People v Arctic Oil* (n 2) [149].

48 Alexandru Gociu and Suryapratim Roy, ‘Extraterritoriality of Oil Constitutionalism in *People v Arctic Oil*’ *EJIL: Talk!*, (16 February 2021) <www.ejiltalk.org/extraterritoriality-of-oil-constitutionalism-in-people-v-arctic-oil> accessed 13 June 2021.

49 *ibid.*

50 Ministry of Finance, ‘Guidelines for observation and exclusion from the Government Pension Fund Global’ (last updated 2019). Unofficial translation <<https://nettsteder.regjeringen.no/etikkradet3/files/2019/12/guidelines-for-observation-and-exclusion-from-the-gpfg-01.09.2019.pdf>> accessed 16 February 2021.

51 Graver (n 37); Tora Lind Berg “«Høyesterett Finner opp Ting»: Fire Juss-eksperter om Klimadommen” *Filter Nyheter* (15 February 2020) <<https://filternyheter.no/hoyesterett-finner-opp-ting-fire-juss-eksperter-om-klimadommen>> accessed 13 June 2021; Eirik Holmøyvik, ‘Grunnlovrealistane i Høyesterett’ *Rett24.no* (23 December 2020) <<https://rett24.no/articles/grunnlovrealistane-i-hogsterett>> accessed 13 June 2021.

hold the state accountable, and protect citizens against constitutional rights violations. Obviously, the rule of law requires the separation of power but in this judgment the Supreme Court significantly curtails its own competences. It ruled that Article 112 may act as the basis for review of acts of Parliament only where the Parliament has failed to address an environmental problem, or where it has grossly neglected its duty under Article 112(3). What is curious is that the Court failed to explain how it reached this finding, or what, more precisely, would count as ‘gross neglect’.

It appears that as long as the government has done *something*, the Court will consider the threshold met. This implies that Article 112 constitutes only a procedural duty to adopt environmental measures, which, however, neglects the substantive duty to adopt and implement measures that are *adequate and necessary* to effectively address the environmental problem at issue, as per Article 112(3).⁵² In other words, the Court has effectively lowered the environmental duty to taking *any* measure expressed in Article 112(3), without any regard to the effectiveness or adequacy of that measure. In doing so, the Court not only ignores its own constitutional control function under the Constitution, it also shows disconcerting indifference to the meaning and content of Article 112(3). While a threshold is certainly necessary, the Court could have relied on other criteria, such as proportionality, necessity or adequateness. Following from this, it is also astonishing that the Court failed to even once consider the inter-generational aspect of the climate challenge in the context of rights of future generations, as explicitly laid down in Article 112 of the Constitution.

Still, it can be inferred from the judgment that Article 112(1) of the Constitution contains a material right, which can be invoked before courts. Although the Supreme Court did not explicitly state that such right exists, the Court implicitly recognised its existence by establishing a threshold for review of legislative and/or governmental action. While the duty and the right do not entirely overlap, as the Court stated, there is—at the very minimum—a correlating right under Article 112(1), where the duty under Article 112(3) has not been executed. This applies, first, in circumstances of inaction by the legislature or the government, ie where an environmental issue was not addressed. The court stated itself, that it might be difficult to establish where such a ‘lawless space’ exists. However, it is proposed here that such legislative inaction exists with respect to the issue of ‘exported emissions’. So far, no legislation exists that aims to address emissions that result from exported Norwegian oil or gas. According to the Supreme Court’s own criteria, this situation could, arguably, have justified using Article 112 to determine the validity of exploration and subsequent production licences that contribute to emissions outside Norwegian territory.

Secondly, this applies, as discussed above, to situations where the parliament has grossly neglected its duty under Article 112(3). Although the threshold is restrictively high, it is not set in stone. The threshold is subject to interpretation, and such interpretation might change over time; taking into account the severity of the climate challenge, the clear science on the urgency and magnitude of measures needed to prevent climate change from crossing the Paris Agreement’s temperature targets, public opinion and the interests and rights of children and young adults who will

52 *People v Arctic Oil* (n 2) [137].

increasingly be impacted by the effects of climate change as they grow up.⁵³ Disregarding those objectives and voices by allowing unrestricted petroleum exploration and production, could sooner than later amount to a 'gross neglect'. For example, it is evident today that it would be a gross neglect not to regulate the sale of tobacco, or the export of hazardous substances, but at some point, the courts and legislation were silent on the matter. Ultimately, here, the Supreme Court appeared to be motivated by the goal of 'constitutionalising' acts of parliament relevant to this case, rather than providing the independent legal check that citizens might rightfully expect and deserve.

5. CONCLUSION

In *People v Arctic Oil*, we saw a Supreme Court deferential to the Parliament to the point of abdicating its role in upholding the Constitution, marked by the motivation to align the law with the prevailing political preferences for unlimited petroleum exploration, extraction and export. While recognising the severity of the climate challenge, the Court failed to uphold its role, mandate and social, as well as legal mission in relation to this challenge.

The motivation for the Court's reasoning could be linked to the Norwegian legal culture, which is generally restrictive towards judicial review, especially of parliamentary measures.⁵⁴ The fact that the judges on the Supreme Court were educated at a time when climate law did not yet feature on the curriculum may also have played a role. It has also been suggested that using the law as a tool to address climate change, and in this way pursuing climate change litigation, has had limited feature before the Norwegian Supreme Court.⁵⁵ Taken together, this may explain why the Court decided to thread the narrow lines of its tradition, rather than to adjust its adjudication to contemporary legal demands, showing foresight and concern for the inter-generational aspects relevant to this case. But if not the Supreme Court, who then will control whether the Parliament has not simply 'legislated away' its duty under Article 112? This seems particularly pressing where political decisions, often based on majority votes, are the result of a compromise between, on one hand, the strong interests in a continued fossil fuel-based economy and public concerns about the global and long-term environmental impacts of such economy, on the other hand.

In numerous countries across the globe, citizens, non-governmental organisations, youth groups and even sub-state entities are seen taking governments and/or companies to court with the aim of enhancing their effort to address climate change, or to claim compensation for associated losses.⁵⁶ A recent example in stark contrast to the

53 United Nations Special Rapporteur on Human Rights and the Environment and the United Nations Special Rapporteur on Toxics and Human Rights, *Amicus Curiae Brief before the Supreme Court of Norway in the Case Greenpeace Nordic Association v Ministry of Petroleum and Energy* (2020) <www.ohchr.org/Documents/Issues/Environment/SREnvironment/Norwegian_climate_change_case.pdf> accessed 9 May 2021; Norwegian National Human Rights Institution, *Klima og Menneskerettigheter* (2020).

54 For example, Anine Kierulf, *Judicial Review in Norway: A Bicentennial Debate* (CUP 2018).

55 Malcolm Langford and Beate Kathrine Berge 'Norway's Constitution in a Comparative Perspective' (2019) 3 Oslo Law Review 198.

56 Asian Development Bank, *Climate Change, Coming Soon to a Court Near You: Climate Litigation in Asia and the Pacific and Beyond* (2020); Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*" *Cambridge Studies in International and Comparative Law* (CUP

Norwegian Supreme Court's judgment is the decision by the Federal Constitutional Court of Germany,⁵⁷ which found that the German Climate Act was partly unconstitutional in that it did not contain specific targets and measures beyond 2030 to achieve carbon neutrality by 2050. The German court found that this, in turn, violates liberty rights of partly young claimants to enjoy access to GHG emitting activities in the future. The Court ordered the German Government to revise its Climate Act by December 2022, and as a result, several German parliamentary parties have introduced a new legislative proposal to strengthen the target for 2030 to 65% (previously 55%) and achieve carbon neutrality already by 2045.⁵⁸

While the science is clear, national climate politics are not.⁵⁹ Climate policies and laws are simply too slow, or unambitious when all states' targets are combined—to deal with the threat of climate change.⁶⁰ In the absence of urgent, effective and ambitious climate action and in the face of slow and cumbersome political decision-making processes, recourse to the Courts—the third pillar of power—is as legitimate as it is necessary.⁶¹ While their role is not to make politics (or to align the law with politics), they certainly are well-placed to ensure accountability. While courts should not act as law-makers, they have the power and the mandate to hold governments accountable to their constitutional responsibilities. The example of the German Federal Constitutional Court is a telling example.

It was therefore a well-aligned and important step with the climate litigation move worldwide when Greenpeace Nordic Association and Nature and Youth initiated the first Norwegian climate case and fought it through the Norwegian court system. Although the claimants did not win the case, they did not lose either. The case contributed to increased public, academic and political awareness of climate change in and beyond Norway. It also forged the way for legal clarifications by the Court, even if ambiguities remain, as explained in this article. The Supreme Court had the chance to render a forward-looking judgment, respecting the rights of children and youth in

2015); Joana Setzer and Lisa Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9 *Transnational Environmental Law* 77; John H Knox and Christina Voigt, 'Introduction to the Symposium on Jacqueline Peel & Jolene Lin, "Transnational Climate Litigation: The Contribution of the Global South"' (2020) 114 *American Journal of International Law* Unbound 35; Wolfgang Kahl and Marc-Phillippe Weller, *Climate Change Litigation: A Handbook* (Beck 2021).

57 BVerfG, *Beschluss des Ersten Senats vom 24. März 2021* (2021) ECLI:DE:BVerfG:2021:rs20210324.1bwr265618 (Constitutional Court of Germany).

58 Isabelle Gerretsen, 'Germany Raises Ambition to Net Zero by 2045 after Landmark Court Ruling' *Climate Home News* (5 May 2021) <www.climatechangenews.com/2021/05/05/germany-raises-ambition-net-zero-2045-landmark-court-ruling> accessed 9 May 2021.

59 United Nations Environment Programme, *Emissions Gap Report 2020* (2020).

60 *ibid.* The report states that 'current NDCs remain seriously inadequate to achieve the climate goals of the Paris Agreement and would lead to a temperature increase of at least 3°C by the end of the century', p XI. However, a preliminary, unofficial version of the IPCCs 6th Assessment report indicates that in business-as-usual scenarios without any new climate policies, temperature rises are expected to be around 5°C by the end of this century.

61 Christina Voigt, 'Climate Change as a Challenge for Global Governance, Courts and Human Rights' in Wolfgang Kahl and Marc Weller (eds), *Climate Change Litigation-Liability and Damages from a Comparative Perspective* (CH Beck/Hart 2020); Christina Voigt, 'The Climate Dimension of Human Rights Obligations' *Human Rights for the Planet* (Strasbourg, 5 October 2020) <www.jus.uio.no/ior/english/people/aca/chrisvo/voigt_final-talk_the-climate-dimension-of-human-rights-obligations.pdf> accessed 13 June 2021 (forthcoming in *Journal of Human Rights and the Environment* (2021)).

the face of the climate crisis, which, unfortunately, it missed. Still, it did not foreclose the possibility of using Article 112 of the Constitution as a standard of material review of legislative or governmental action, or omission.

Still, for the young claimants in this case, the issue of whether the expansion of Norwegian oil and gas extraction is violating their human rights to life and private life remains unresolved. To address it, on 15 June 2021, the claimants Nature and Youth and Greenpeace Norway, joined by six young adults, brought this case to the European Court on Human Rights (ECtHR).⁶² They argue that by failing to adopt reasonable and appropriate measures to avert or to minimise climate harms to the claimants, Norway has failed to protect their human rights under Articles 2, 8 and 13 of the Convention. According to the Strasbourg Court's praxis, a State must have in place a 'legislative and administrative framework designed to provide effective deterrence against threats to the right to life'.⁶³ Norway, the claimants argue, has no laws or regulations regarding exported emissions nor any law that requires the development of a plan to transition away from the production of fossil fuels in line with the IPCC 1.5°C compliant emission trajectories.⁶⁴

This case is one of a line of so-called 'climate cases' recently brought against Member States of the ECHR before the Strasbourg Court. While none of cases is yet decided, the pressure and the expectations on the ECtHR are rising. If the Court were to decide on the merits of the Norwegian case, it would not need to be prescriptive as to which exact measures Norway would have to adopt. Rather, it could determine whether the national authorities approached the question of avoiding climate harm with *due diligence*.⁶⁵ The ECtHR, therefore, could ask whether the climate measures adopted by Norway are at the level of the highest possible ambition and effective for achieving rapid, deep reductions of GHG emissions so as to achieve a *global* net zero CO₂ emissions around 2050, in line with the Paris Agreement.⁶⁶ If the answer is negative, Norwegian law-makers will have to revisit the relevant national legislation, or adopt new laws. In that scenario, the business-as-usual trajectory of continued and expanded oil extraction and export, as supported by the Norwegian Supreme Court, might not be an option anymore.

62 The claim is available here: <https://www.greenpeace.org/static/planet4-norway-stateless/2021/06/0392a3c0-people-vs.-arctic-oil---application-to-the-ecthr---for-distribution_skjult-innhold.pdf> accessed 16 June 2021.

63 *Öneryıldız v Turkey*, App No 48933/99, 30 November 2004 [55].

64 See (n 62) [60 and 61].

65 *Cordella and others v Italy*, App Nos 54414/13 and 54264/ 15, 24 January 2019 [161].

66 See Voigt (n 61, 2021).