Climate Litigation in Norway. A Preliminary Assessment

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Abstract: Il contenzioso climatico in Norvegia. Una valutazione preliminare –

Climate litigation is taking an increasingly important role in attempting to work around the reluctance of States to adopt climate policy commensurate with the enormous challenges posed by climate change and its consequences. In this context, a climate lawsuit was filed in Norway in 2016 as a response to the awarding of 10 oil extraction permits in the Barents Sea by the Norwegian authorities. The lawsuit has been pending since in the Norwegian legal system, drawing huge attention to the question of how the legal system can be used to combat climate change in a meaningful manner. The case will be heard by the Norwegian Supreme Court in plenary session in November 2020. This article offers an outline of the central questions and a concise analysis of the key legal issues at stake.

Keywords: Climate litigation, Right to a healthy environment, Norway, Constitutional Law, Administrative Law.

1. Introduction

In the current context of climate change, and in the face of reluctant policy-making and a softening international legal regime, climate litigation has increasingly taken up an important role in trying to mobilize the legal system towards a meaningful action to combat climate change1. In this broad international context where, especially after the Urgenda case in the Netherlands2, has prompted hopes that climate mitigation may be the most effective way to force States to act on their international obligations, a climate lawsuit was filed in Norway in 2016. The Climate Lawsuit has been pending since in the Norwegian legal system and has received, on a par with similar cases in other jurisdictions, huge attention in both Norway and by the international

[1] See e.g. the Symposium published by the journal Transnational Environmental Law on *Rights-Based Approaches to Climate Change* and therein esp. J. Peel & H. Osofsky, *Rights Turn in Climate Change Litigation?*, 7:1 *Transnational Environmental Law*, 2018, 37, or the recent webinar series on "Human Rights Strategies in Climate Change Litigation: Whati s it All About?", gnhre.org/2020/06/02/webinar-series-human-rights-strategies-in-climate-change-litigation-what-is-it-all-about/. See also E. Johansen, *The Role of the Law of the Sea in Climate Change Litigation*, 11:1 *The Yearbook of Polar Law*, 2019, 141

[2] ECLI:NL:HR:2019:2007, in www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf

community3. The event that prompted the lawsuit was the awarding of 10 petroleum extraction permits in the Barents Sea by the Norwegian authorities in the 23rd licensing round4. The two non-governmental organizations (NGOs) Greenpeace and Nature and Youth filed a lawsuit against the Government of Norway as a response to this decision. The overall aim of the NGOs was to stop the extraction activities in the Barents Sea by means through litigation, a route never previously attempted in the Norwegian legal system. To date, the case has reached the Court of Appeals that has rendered its decision in 2020. The decision finds of the State (like the decision of the district Court), and has been appealed to the Supreme Court by the plaintiffs. The Supreme Court has recently decided that it will accept the appeal. This brief article reviews the case, and offers a concise analysis of the key legal issues under discussion. The article proceeds as follows. Section 2 gives a brief introduction to Norwegian administrative law. Section 3 presents the case, and section 4 outlines the arguments and counterarguments of the parties. Section 5 delves in some details into one of the core issue at stake, and one that may have far reaching implications well beyond the case at hand: the interpretation of Article 112 of the Norwegian Constitution. Section 6 gives a brief account of the use of science as the basis for building the case, and section 7 finally offers some conclusions.

2. A Brief Introduction to Norwegian Administrative Law

In accordance with the Norwegian Act relating to procedure in cases concerning the public administration (Public Administration Act)[5] it is stated that the act is applicable to all activities that are conducted by administrative agencies[6]. The Public Administration Act contains general principles applicable to all administrative proceedings, acts and decisions[7]. However, administrative law is comprised by various special statutes, which provide more detailed rights and obligations for the administrative agencies with regard to their area of competence. One of the special statutes in the Norwegian legal system is the Petroleum Act, which provides the relevant administrative agency (the Ministry of Petroleum and Energy) the power to grant both survey and production licenses

[3] See e.g. publication in the New York Times, *Both Climate leader and Oil Giant? A Norwegian Paradox*, 17 June 2017 in www.nytimes.com/2017/06/17/world/europe/norway-climate-oil.html.

[4] King in Council, Resolution of 10. June 2016 regarding extraction permits for petroleum on the Norwegian continental shelf in the Barents Sea. The full Norwegian title is: Kgl. Res om tildeling av utvinningstillatelser for petroleum på den norske kontinentalsokkelen i Barentshavet sør og Barentshavet sørøst, «23. konsesjonsrunde».

[5] Act of 2 October 1967 relating to procedure in cases concerning the public administration. The Authentic Norwegian title is "Lov om behandlingsmåten i forvaltningssaker».

[6] It is also stated that any central or local government body shall be considered as an administrative agency. See Section 1 of the Norwegian Public Administration Act for more detailed information.

[7] Exceptions do however exist. These are included in Section 3 and 4 of the Public Administration Act.

for oil extraction to private corporations[8]. Norwegian authorities applied this special statute in 2016 when the 10 extraction permits in the relevant areas of the Southern and South-east Barents Sea was granted to the 13 oil companies[9].

As a starting point, all administrative decisions can be appealed to the administrative agency that is hierarchically superior of the administrative agency that made the original decision[10]. However, production licenses are awarded by the King in Council in accordance with Section 3-3 of the Petroleum Act. Thus, the decision about the extraction permits have already been made by the superior administrative agency in Norway. In such circumstances, the appellate body will be the district court that has substantive and territorial jurisdiction to address the legal claim[11].

The district court can examine whether the administrative agency has interpreted the legal rules at stake correctly, if the agency has acted within the scope of its powers, if the facts of the case has been correctly and sufficiently emphasized in the administrative decision, and that the administrative proceedings have been undertaken in accordance with the general provisions set out in the Public Administration Act and the special statue if such laws are applicable to the particular case. However, the court will not examine how the administrative agency has applied its discretionary powers[12].

In accordance with Section 1-3 of the Act relating to mediation and procedure in civil disputes (The Dispute Act)[13], legal claims can be brought before the court if the claimant is able to "demonstrate a genuine need to have the claim decided against the defendant". The assessment of the criterion "genuine need" shall be determined on the basis of "an overall assessment of the relevance of the claim, and the parties' connection to the claim" [14].

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[8] Act of 29 November 1996 No. 72 relating to Petroleum Activities. The authentic Norwegian title is "Lov om petroleumsvirksomhet." See chapters 2 and 3 for a detailed review of the regulations concerning both the awarding of survey and production licenses. For more information on the Norwegian licensing process, see E. Johansen, *Norway's Integrated Ocean Management: A Need for Stronger Protection of the Environment?* 52:1 *Ocean Yearbook*, 2018, 239

[9] See the press release by the Norwegian Government with regard to the extraction permits awarded in the 23rd round of licensing for more information and also the map and working program for the awarded permits. The press release of the Norwegian Government, Nr. 026/2016, "Tildeling av leteareal i 23. Konsesjonsrunde,» 18 May 2016, in www.regjeringen.no/no/aktuelt/23.-konsesjonsrunde-tildeling/id2500924/ (in Norwegian only).

[10] See section 28 (1) of the Public Administration Act.

[11] District courts are normally the first instance for cases brought before the courts in Norway in accordance with Section 4-1 of The Dispute Act. The ordinary venue for cases where the Norwegian government is the defendant is the district court located in Oslo in accordance with Section 4-4 of the Act.

[12] A cursor for discretionary powers in the Norwegian legislation with regard to administrative decisions is the usage of the word "can". On the contrary, if the wording "shall" is used, this indicates that the administrative powers is bound by regulatory conditions. It should also be noted that the court can always examine whether there has been an "abuse of power" by the administrative agency in the decision-making process.

[13] Act of 17 June 1990 no. 90 relating to mediation and procedure in civil disputes. The Authentic Norwegian title is "Lov om mekling og rettergang I sivile tvister».

[14] See the Dispute Act, Section 1-3 (2). The assessment of whether the criterion "genuine need" is fulfilled for organizations or foundations must also include a review of whether the action

Furthermore, organizations or foundations may bring action before Norwegian courts in accordance with Section 1-4 of The Dispute Act when the abovementioned conditions in Article 1-3 are fulfilled. However, this only applies when the action falls within the purpose of the normal scope of the organization[15].

It is beyond doubt that the conditions in Section 1-3 and 1-4 are fulfilled in the so-called "climate litigation." As the decision is made by the King in Council, there is thus no other administrative agency that is superior. This means that there is a "genuine need" for the plaintiffs to bring a legal case before the courts to assess the validity of the administrative decision. Furthermore, the purpose of both Environmental Organizations is to protect the environment, and the fact that the nature can not represent itself in proceedings before the court indicates that the appeal by the plaintiffs in such situations should be widely accepted.

Finally, in order to bring action for the Norwegian courts, the organization or foundation needs to have legal capacity to sue and be sued in accordance with Section 2-1 (2) of the Dispute Act. The decision of whether the conditions are met relies on an overall assessment with emphasis on the organizations structure, representation, funds, membership arrangements and purpose[16]. The plaintiffs in the "climate litigation" also meets the conditions in Section 2-1 (2) as the organizations have a permanent organizational structure, solid funds, formalized membership arrangements with a large number of members and also a purpose to protect the environment.

3. The Norwegian Climate Lawsuit

The Climate Lawsuit has been pending in the Norwegian legal system for some years and has received huge attention in Norway and by the international community[17]. The event that prompted the lawsuit was the awarding of 10 petroleum extraction permits in the Barents Sea by the Norwegian authorities in the 23rd licensing round[18]. The two non-governmental organizations (NGOs) Greenpeace and Nature and Youth filed a lawsuit against the Government of Norway as a response to this decision. The overall aim of the NGOs was to stop the extraction activities in the Barents Sea by means through litigation, a route never previously attempted in the Norwegian legal system.

In order to achieve the aim of stopping the oil extraction activities, the plaintiffs chose to invoke Article 112 of the Norwegian Constitution. This

falls within the scope of purpose of the organization, its normal activities and representativeness. See paragraph 30 of the Norwegian supreme court case Rt. 2003 s. 833 (Stopp Regionfelt Østlandet) and H.C.Bugge, *Lærebok i miljøforvaltningsrett*, Oslo, 2015 (Textbook on Environmental Administrative Law) 187.

[15] Dispute Act s. 1-4.

[16] Ibid s. 2-1 (2).

[17] New York Times, *Both Climate leader and Oil Giant? A Norwegian Paradox*, cit.

[18] King in Council, Resolution of 10. June 2016 regarding extraction permits for petroleum on the Norwegian continental shelf in the Barents Sea. The full Norwegian title is: Kgl. Res om tildeling av utvinningstillatelser for petroleum på den norske kontinentalsokkelen i Barentshavet sør og Barentshavet sørøst, «23. konsesjonsrunde».

provision contains three paragraphs. The first sets out the general principle that "every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained".[19] Additionally it sets out that the management of natural resources shall take place "on the basis of comprehensive long-term considerations which will safeguard the rights of future generations as well" [20]. Subsequently, the provisions sets out that citizens have the right to access information pertaining to the status of the environment, as well as related to any "encroachment on nature" being planned. Finally, the third paragraph sets out a general duty for administrative authorities with regards to adopting the measures necessary for the implementation of the "principles" (an important linguistic choice, as we shall see later) contained in Article 112.

The NGOs main argument was that the licensing decision was invalid as it represented a violation of the constitutional right to a healthy environment, as contained in Article 112[21]. The plaintiffs argued that decision by the Norwegian authorities represented an encroachment on this right due to both the potential raise of global CO2 emissions from the expected extraction activities, and the threat posed by the same extraction activities to the vulnerable environment in the marginal ice zone in the Barents Sea[22].

The Oslo District Court rendered its decision on 4 January 2018. The court ruled that Article 112 of the Norwegian Constitution contains rights that can be invoked and enforced by courts. However, the verdict of the Court was that the Norwegian authorities had not violated such rights in this particular case. The plaintiff immediately appealed the ruling on 5 February 2018[23]. The new judgement was rendered by the Court of Appeals on 23 January 2020. The Court of Appeals also ruled that the licensing decision did not violate Article 112 of the Norwegian Constitution. Not surprisingly, the plaintiffs have now chosen to appeal the decision to the Supreme Court. As the time of writing, the case is still pending. However, the Supreme Court has accepted to pronounce itself on the case[24]. The decision of the Supreme Court will be taken *in plenum*[25] and is expected to have important general implications for the interpretation of article 112 of the Constitution, in light of the normative force as precedent of the decisions of the

[19] Article 112, the Constitution of the Kingdom of Norway, 17 May 1814. Authentic Norwegian title: Kongeriket Norges Grunnlov.
[20] Ibid
[21] See page 39 of the plaintiffs notice of proceedings, in www.xn--klimasksml-95a8t.no/wp-content/uploads/2019/10/Notice-of-Proceedings-Final-Translation.pdf. The view of the plaintiffs has been supported in the literature. See e.g. E. Smith and T. Eckhoff, *Forvaltningsrett 11. Utgave*, Oslo, 2018, 464 where it is stated that an administrative decision that contradicts a constitutional right may be rendered invalid by the courts.
[22] See the plaintiffs notice of proceedings, 5-6.
[23] The verdict was appealed by the original plaintiffs and the Norwegian NGO "Besteforeldrenes Klimaaksjon", who chose to intervene and join the plaintiff in the further proceedings for the court.
[24] HR-2020-841-U, (sak nr. 20-051052SIV-HRET) www.domstol.no/globalassets/upload/hret/henviste-saker/hr-2020-841-u.pdf
[25] www.domstol.no/globalassets/upload/hret/henviste-saker/beslutning.pdf

Supreme Court, and of their role as one of the sources of law in the Norwegian legal system[26].

The Norwegian Climate Lawsuit is not only unique in Norway due to the plaintiff's application of Article 112(1) of the Norwegian Constitution. It also represents the first lawsuit in Norway where the provisions of the Paris Agreement have been invoked as a legal basis to stop activities that may harm the environment[27].

4. The Arguments in Brief

After a brief summary of the case, and a review of its current status, it is time to delve more in depth in the analysis of the arguments and counterarguments. The presentation of the arguments and counterarguments, as well as the analysis, draws on both the decision of the district court and on that of the Court of Appeals, as relevant. Of course, neither of these two decisions will likely have a lasting impact, unless and to the extent they will be upheld by the Supreme Court, so the current analysis is inevitably tentative and preliminary. It is however useful to look at the arguments presented by the plaintiffs, and at the rebuttals articulated by the State, as they will be debated again before the Supreme Court[28].

The plaintiffs made three claims. The first, and most important, claim is that the administrative decision to grant the licenses is in breach of article 112 of the Norwegian Constitution, with the consequence that the decision must be declared invalid. Secondly, the decision is also in breach of the Petroleum Act, insofar as it failed to appropriately carry out the balancing of interest that shall underpin the decision to grant an exploration license, especially in light of the general normative guidance provided by article 112 of the Constitution. Finally, the decision is invalid due to procedural fault related to factual errors and insufficient assessments. Given the complexity of the case and the limited space available, we will focus the analysis on the first claim. The reason for this is that the constitutional claim is also the central claim, and the one that may have far reaching consequences, given that it is the first time that the Supreme Court of Norway may pronounce itself on the meaning and scope of article 112. This is important as a judicial interpretation of article 112 of the Constitution may be crucial not only for the case at hand, but also in a more general sense as it might create legal precedent[29], and are one of the recognized sources of law in the

[26] T.Echkoff, *Rettskildelære, 5. Utgave*, Oslo, 2001.

[27] The legal questions presented for the court has even invoked questions regarding the separation of powers under the Norwegian Constitution, and the Courts admission to invoke and enforce administrative decisions made by Norwegian authorities. See I.U. Jakobsen, *Klimasøksmålet. I Store norske leksikon*, 6 januar 2020, in snl.no/Klimas%C3%B8ksm%C3%A5let.

[28] In accordance with Article 88 of the Norwegian Constitution, «the Supreme Court pronounces judgement in the final instance».

[29] This is connected with the role of the Supreme Court in the Norwegian legal system, which is not only to interpret, but also to develop the law. One key condition however is that the case must have significance in general, and not only for the parties to the dispute. The Supreme Court thus usually only accepts cases that raise principled questions and have

Norwegian legal system[30]. This is all the more important as this would be the first time that article 112 will be interpreted by the Supreme Court after its recent introduction in the Constitution[31]. To be sure, article 112 is an evolution of former article 110b, but the formulation has changed in significant respects, as the new section three may establish a positive obligation for the government[32]. The key question, in this sense, is whether article 112 affords substantive rights to Norwegian citizens.

The arguments of the plaintiff, while hinging primarily on the interpretation of article 112 of the Norwegian Constitution, was articulated in a fourfold manner. The plaintiff in fact presented a "climate" argument, a "vulnerability" argument, a "path-dependence" argument and, finally, a "cross-road" argument. Before addressing the core of the case, namely, again, the interpretation of art. 112 of the Constitution, let us review in brief the contents of each argument, as well as the counterargument of the State.

The climate argument rests on the fact that as a warming world is experiencing the dangerous impacts of climate change, what is needed is drastic emissions reduction measures, while the decision to grant the licenses goes in the opposite direction, by setting the stage for "gigantic" emissions of CO2. Additionally, and this is the vulnerability argument, the geographical scope of the decision corresponds with extremely vulnerable marine areas, as the licenses have been granted in the vicinity or in part within the ice edge and the polar front. The consequences of an oil spill in these areas would be catastrophic. The plaintiff also points out how this is the first time that an exploitation license has been given so near the ice edge[33].

general relevance, as also set out in Article 30.4 of the Act relating to mediation and procedure in civil disputes (The Dispute Act), which at paragraph 1 sets out that an appeal can be granted only «if the appeal concerns issues that are of significance beyond the scope of the current case or if it is important for other reasons that the case is decided by the Supreme Court». The force of precedent is however limited insofar as, while it binds lower courts, it only offers strong guidance, rather than being fully binding, to the Supreme Court itself. For more details, see e.g. T.Echkoff, *Rettskildelære, 5. Utgave*, cit. and A. Høgberg and J. Sunde (eds), *Juridisk Metode og Tenkemåte*, Oslo, 2019, 89ff.

[30] T. Echkoff**,** *Rettskildelære, 5. Utgave*, cit.

[31] The current Article 112 was introduced with the Constitutional reform of 2018

[32] It should be noted that Article 110 b has not been tested in the way it is done in the "climate litigation", but the Supreme Court has made reference to the provision in its decision given in the Rt-1993-528 "Lunne Pukkverk-case". The case was about a company and its right to get an emission permit, whereas the State refused to grant the permit due to environmental considerations. In the decision it is stated that considerations regarding the environment shall be incorporated in decision making processes by Norwegian authorities as a way to give effect to the principle of integration, in accordance with the relevant Constitutional provisions (i.e. Article.110b)

[33] The ice margin, and the ice edge, are central sites for Norwegian "petropolitics" and for Norway as a "petrostate", and are continuously subjected to contestaitons given their inherent uncertainty and mobility, see for illuminating details on this P. Steinberg and B. Kristoffersen, *Edges and Flows. Exploring Legal Materialities and Byophysicial politics of Sea Ice*, in I. Braverman and E. Johnson (eds) *Blue Legalities. Life and Laws of the Sea*, Durham, 2020.

The other two arguments are linked. One refers to the problem of path-dependence (a well-known problem in the economics literature)[34] this decision may engender – determined by the massive technological and financial investments – in relation to future CO2 emissions. The other utilizes the metaphor of standing at a crossroad to signal the crucial implications of the decision with respect to the future. The key point in this argument is that there is no more room in the global carbon budget to extract and burn the remaining deposits of fossil resources. This in turn will reduce demand, and thus the economic viability of the investments.

In light of these arguments, the plaintiff claims that the decision is in breach of article 112, to the extent that it jeopardizes the right to a healthy environment. The alleged violation of the constitutional right is based on the scientific evidence showing how the permits awarded by the administrative agency will affect both the climate and the fragile environment in the areas of the Barents Sea at stake[35].

The counterargument presented by the State focused in turn on two main points. The first is simply that Article 112 does not grant substantive rights. The second, and subsidiary, counterargument has to do with policy choices, and with the obligations to adopt measures for the implementation of Article 112. In this latter respect, the government observed how the most important manner in which Article 112 is implemented is through legislation. The main argument of the defendant was however that it is not possible for the government to be in breach of the provision contained in the first paragraph of Article 112 as long as the obligation to take measures in accordance with the third paragraph is fulfilled[36]. The choices of the Parliament are however beyond the competence of review by the Courts.Additionally, and relatedly, the specific regulatory measures or administrative acts adopted on the basis of such legislation cannot be reviewed, insofar as such review would unduly compress the executive branch's ability to balance competing interests, a balancing that is especially important in relation to environmental and climate policy decisions, which may have important economic and social effects on society. The key argument made by the defendant was ultimately that the Courts can only examine whether the government has included environmental considerations in its decision-making process, but not how it decides to weigh these interests against other relevant interest.[37] Here the notion of sustainable development, articulated for the first time in a comprehensive manner in the 1982 Report of the UN Commission on Environment and Development, headed by Norwegian Gro Harlem Brundtland, comes sharply into focus, as a balancing principle between the three pillars that underpin a sustainable development: the environment, the economy, and social welfare[38].

[34] See e.g. S. Liebowitz and S. Margolis, *Path Dependence, Lock-in, and Histor*, 11:1 *Journal of Law, Economics, & Organization* 1995, 205.
[35] How science influenced the proceedings before the court will be presented in a later section of this paper.
[36] See Johansen, *The Role of the Law of the Sea in Climate Change Litigation*, cit., 159
[37] Ibid
[38] See e.g. P. Sands and J. Peel, *Principles of International Environmental Law*, Oxford, 2018.

5. The Interpretation of Article 112 of the Norwegian *Constitution*

If one starts from the parliamentary debate[39] preceding the adoption of Article 112, three primary ideas emerge that shall guide the interpretation of the provision[40]. First, Article 112 is meant to serve as a guide for the Parliament when legislating in matters relevant to the environment. Secondly, Article 112 is to serve as an important guide for the interpretation of ordinary legislation and regulations. Third, it shall serve as a limit for the powers of governmental agencies[41]. The ambiguity of the provision's formulation, however, render its interpretation less that straightforward. What is the significance of the different terminology ("right" in paragraph 1 and "principle" in paragraph 3) used in different parts of the provision? What are the limitations imposed to governmental agencies by Article 112 (3)? Further, Does Article 112 (1) grant citizens a subjective right to a clean environment or does it only enshrine a principle[42] that is not actionable as such, but only offer remedies insofar as governmental agencies may have breached the only legal obligations contained therein? Further, does Article 112 secure that is, that the government shall adopt measures aimed at ensuring the quality of the environment, and that by converse it shall avoid adopting measures that may have unduly negative consequences? As we have seen, these latter two are the counterarguments of the State.

What is beyond dispute is that Article 112 contains a) a *positive* obligation for State agencies to adopt relevant measures in relation to ensuring a healthy environment and b) a *negative* obligation to refrain from adopting measures that may impair the quality of the environment[43]. The district Court has however also established that Article 112(1) contains a norm granting a substantive, actionable right that is independent of the obligations imposed on the Parliament and on State agencies in Article 112(3), a conclusion which was confirmed by the Court of Appeals. Established Norwegian doctrine largely agrees with this conclusion,

[39] It is here important to note how preparatory works, including parliamentary debates, are considered a source of law in the Norwegian legal system, and are crucially important, insofar as Norwegian legislations is very concise since the legislator also "legislates through the preparatory works", A. Høgberg and J. Sunde (eds), *Juridisk Metode og Tenkemåte*, cit., 85. It is perhaps also useful to mention that the Norwegian theory of the sources of law emerges from a realist theory of law, and as such may seem to blend together what to an Italian lawyer are the formal sources of law on the one hand, and the rules of interpretation on the other. This also means that the theory of the sources, which is largely based on observations of the modus operandi of the Supreme Court, is the result of doctrinal work, rather than being formalized in legislation. See in general on the theory of the sources of law T. Echkoff, *Rettskildelære, 5. Utgave*, cit. and for a more recent take, A. Høgberg and J. Sunde (eds), *Juridisk Metode og Tenkemåte*, cit.

[40] Tidende S. 1991-1992, 3736-3737.

[41] Ibid.; see also H. Bugge, *Lærebok i Miljøforvalntingsrett*, cit.,165.

[42] In Norwegian the term used in paragraph 3 is "grunnsetning", which is somewhat different than principle; a more apt translation was however impossible. The key point though is that a "grunnsetning" indicates something that, located somewhere between a principle and a guideline, does not have directly binding legal implications, and does not grant subjective rights to citizens. This is the position of the State in the Norwegian "climate litigation." For further details, see e.g. H. Bugge, *Lærebok i Miljøforvaltningsrett*, cit.,168.

[43] Ibid, 169.

and additionally suggests that Article 112, insofar as imposes obligations that must be adhered to across the board, also contains an implicit reference to the principle of integration.[44]

Three further points must be mentioned by way of conclusions. Regardless of the content of Article 112, a triggering threshold must be identified, given that there is reasonable expectation that State agencies should avoid activities that may cause harm to the environment. This is a well-established principle of environmental law, whereby environmental harm, to be legally relevant, must exceed a threshold that, while not always easily identified, must be more than what must be considered generally tolerable in the context of current social, economic and industrial circumstances[45].

Secondly, and there is in this point a broad agreement in the doctrine, Article 112 must be interpreted in light of prevailing general principles of international and domestic environmental law, and especially the principle of precaution and the principle of sustainable development[46]. Finally, a question that must be raised is whether the particular act under scrutiny must be considered in isolation or within the broader context of State policy, in order to ascertain whether and to which extent it may be in breach of Article 112. A reading of the prevailing doctrine suggests that it would be unreasonable to isolate one act, as it would dramatically reduce the operational scope and practical implications of Article 112, given that a single act – an exploration license, a concession etc. – rarely in and of itself present risks that are significant enough to entails a breach of law. It is now well-established that environmental problems must be assessed and considered, also from a legal perspective, in their broader context. Such is the meaning of the principle of cumulative effects, which is well-established in both international environmental law as part of the ecosystem approach, and in Norwegian legislation, namely in the Biodiversity Act[47] and indirectly in the Pollution Act. Indeed, on this point the Court of Appeal made probably its key contribution, as it concluded that potential CO2 emissions from the Licensing Decision must be regarded in context with other emissions. The District Court did not rule on the question relating to the cumulative effect of the relevant emissions, but stated that the geographical scope of Article 112 was the Norwegian territory, hence leaving out emissions from the consumption of petroleum projects, which due to export mostly take place outside the Norwegian Territory. The reasoning underlining the conclusion of the Court of Appeals was that Article 112 would lose its function if the harmful effects of the emissions are only considered separately when they are tested in the legal system, as the threshold of harm would be only seldom met, and would effectively neutralize the provision. Thus, on the basis of the notion of cumulative effects, an administrative decision may violate Article 112 if the *total* emission burden, and not only the emission that may be determined by it, surpass

[44] Ibid
[45] P. Sands and J. Peel, *Principles of International Environmental Law* cit., esp., 197ff.
[46] Thus for example H. Bugge, *Lærebok i Miljøforvalntingsrett*, cit., 170ff.
[47] Biodiversity Act, Article 10. The authentic Norwegian title is: «Lov om Forvaltning av Naturens Mangfold (Maturmangfoldloven)»

the threshold of harm[48]. This is a crucial point that is likely to attract significant attention during the proceedings before the Supreme Court, as it may bootstrap the entire Norwegian legal system towards a new epistemic basis for environmental regulation and for the interpretation of existing legislation. The Court of Appeals has prepared the terrain by articulating in some details its reasoning on why Article 112 contains an implicit reference to the principle of cumulative effects[49], but it will be surely attacked by the State, insofar as this interpretation may have significant economic consequences.

6. The Use of Science as the Basis for the Lawsuit

As shown in the previous sections, the fear of both global warming and the knowledge about the potential threat to the particularly vulnerable area in the marginal ice zone in the Barents Sea, prompted the Norwegian Climate Lawsuit in Norway. One can thus conclude that science lays the foundation for the whole case as a starting point. Furthermore, all of the arguments presented by the plaintiff to support their claim that the licensing decision was invalid were firmly underpinned by scientific evidence. In this section, we will thus briefly illustrate how science influenced, and was used by, the plaintiffs during the proceedings before the court.

The Environmental Organizations that brought the case stated that the assessment of the need for emissions reductions must be based on well-established scientific knowledge of the current climate of the earth[50]. Thus, the "climate argument" was built primarily on knowledge derived from the IPCC's Fourth and Fifth Assessment Reports from 2007 and 2014[51]. The plaintiffs main argument was that the Licensing Decision is hard to reconcile with the necessary reductions in CO2 emissions from Norwegian activities. The necessary reductions have in turn been outlined by the IPPC in their reports, which in turn culminated in the Paris Agreement which also Norway is a party to and thus bound by[52].

With regard to the "vulnerability argument," the plaintiffs heavily built their arguments on scientific knowledge from the Norwegian Environment Agency and the Norwegian Polar Institute, which both advised against several of the awarded blocks from the Licensing Decision[53]. As much as half of the licenses in the 23. Licensing round were awarded within areas considered as a "particularly valuable

[48] See Borgarting lagmannsrett - Dom: LB-2018-60499, Section 2.4, in lovdata.no/dokument/LBSIV/avgjorelse/lb-2018-60499?q=greenpeace (in Norwegian only).
[49] Ibid.
[50] See the plaintiffs notice of proceedings, 16.
[51] Ibid.
[52] The Paris Agreements states that worlds nations must limit the global warming to a maximum of 2°C, and most likely to 1,5°C to avoid irreversible climate damage. See United Nations Framework Convention on Climate Change, *Adoption of the Paris Agreement*, 21st Conference of the Parties, Paris, 2015 in unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf.
[53] See the plaintiffs notice of proceedings, 30 – 32.

and vulnerable area" [54]. These areas consist of the marginal ice zone which science has proven to be areas of great ecological importance. The plaintiffs further argued that the risk posed by the extraction permits was two-sided and consisted of the risk posed by "black carbon" and the risk of oil spills[55].

The two interlinked arguments referring to "path-dependence" and standing at a "crossroad," appeals to the notion that Norway should not invest in activities that might cause environmental degradation for a period up to at least 50 years when we have scientific knowledge about how this will contribute to both the unacceptable risk of climate impact and at the same time alter the fragile environment with its ecosystems located in the Arctic.

It is likely that the debate before the Supreme Court will be further informed by the most recent report of the IPCC, the Ocean and Cryosphere Report, which specifically focuses on marine and polar areas, and on the realm of ice, its vulnerability and its crucial role for the climate system. In this respect, the plaintiffs will have further ammunition to support the necessity of a strict precautionary approach, the consideration of the cumulative effects, and the vulnerability of the local Arctic and subarctic environment. These concerns, however, will be undoubtedly balanced against political considerations.

7. Conclusion

In this article we have offered a brief account of the Norwegian climate lawsuit, that, while still pending, has become a central topic of public debate, scholarly discussion and an important topic in teaching environmental law and constitutional law[56]. The account has focused in particular on what will arguably prove to be the central aspect of the case, as well as its only long lasting and potential far reaching, implication: the interpretation of Article 112 of the Norwegian Constitution. The decision of the Court of Appeals has been further appealed to the Supreme Court, which has accepted to review the case on 20 April 2020, on the basis that it hinges, as it must for it to be admissible, on a question of a principled and general nature whose relevance exceeds the particular case. This case may prove in fact very important for the entire Norwegian legal system, as Article 112 has never been tested before in a court, having been introduced only recently with a Constitutional reform. The questions are several, ranging from

[54] Ibid, 29.

[55] With regard to the threat posed by the production of "black carbon," the plaintiffs relied on information from the Center for International Climate and Environmental Research (CICERO) and their research showing that the further north "black carbon" occurs, the worse for the planet's climate. See page 33 of the plaintiffs notice of proceedings for further information. See also Ø. Hodnebrog et al., *Climate impact of short-lived climate forcers: A case study of emissions from Norway*, Report of the Center for International Climate and Environmental Research (CICERO), 2014, 25. This report is not the original report from 2013 cited by the plaintiff in their notice of proceedings, as this report is not available anymore. The report is however a revised edition published in 2014. The quotes used by the plaintiffs is exactly the same in the two reports.

[56] Both writers teach environmental law, and one of the seminar topic is precisely the climate lawsuit.

whether or not the provision contains a substantive right of citizens to a healthy environment, as well as its contours, elements and limitations, to the role of courts in reviewing decisions of the Parliament and of the government on the basis of such provision. In fact, rights-based climate litigation is on the surge, and for better or for worse is attempting to work around the reluctance of most States to adopt the climate policy frameworks commensurate with the enormous challenges posed by climate change and its consequences. The Paris Agreement has in some ways further complicated matters, as it contains only soft provisions with respect to individual countries mitigation objectives. These mitigation objectives are in fact adopted on a voluntary basis, and only subject to the cumulative goal of reducing emission so as to maintain the global average temperature increase to 2 degrees Celsius[57], and to a mechanism of stock-taking and ratcheting up of the ambition on a 5-year cycle[58]. Climate litigation, then, may be a crucial tool to move forward the climate agenda, not the least by combining the human rights dimension with climate mitigation obligations[59]. With specific regards to the Norwegian climate lawsuit, it remains to be seen how the Supreme Court will decide on the two key questions of how to interpret Article 112, and on what is the scope of a judicial review that the Court can carry out on that very basis of the legislative and executive branches decision with regards to climate policy.

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[57] Paris Agreement, cit. Article. 2 (a).
[58] Ibid., respectively Articles. 14 and 4(3).
[59] The plaintiffs in the case at hand also chose to include a claim relating to the State's obligation to secure the right to life and the right to respect for private and family life in accordance with Articles 2 and 8 of the European Convention on Human Rights (ECHR) in their appeal to the Court of Appeals. The Court of Appeals ruled that there was no violation of the ECHR in this particular case, as there was not possible to establish a direct linkage between the licensing decision and a threat to someone's life or his or hers right to a private life. It should also be noted that the plaintiffs argued that the licensing decision represented a violation of the constitutional rights contained in Articles 93 and 102 (The right to life and right to respect for privacy and family life) of the Norwegian Constitution. Nonetheless, this claim was also rejected by the Court of Appeals. See section 4 of Borgarting lagmannsrett - Dom: LB-2018-60499.