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Enacting Climate Change in Court

Issues at Work in the Norwegian Climate Lawsuit

Eli Sandmo Brenna

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MA Thesis, TIK Centre for Technology, Innovation and Culture

Faculty of Social Sciences, University of Oslo

http://www.duo.uio.no

Abstract

In 2016, the Norwegian Ministry of Petroleum and Energy was summoned to Oslo District Court by the environmental organisations Nature and Youth and Greenpeace Nordic. The legal proceedings that followed have since been known as the Climate Lawsuit (*Klimasøksmålet*) and lasted for four years. The organisations' legal action initiated discussions on the potentially problematic role of the courts in policymaking, on the weighing of climate policies and national petroleum production, and on the urgent and disruptive nature of the climate crisis.

This thesis is a practice-oriented analysis of a selection of the lawsuit's court documents, and of the arguments made by its two parties: the environmental organisations on the one side and the government on the other. Specifically, I examine how the parties' claims in the courtroom enact different versions of the climate change issue and its consequences for the Norwegian petroleum industry, and how they express different understandings of the possible challenges the lawsuit poses to the established separation of powers. Inspired by several strands of theoretical literature, such as actor-network theory, issue formation studies, and existing works on legal practices and the temporal and geographical aspects of climate change within the field of Science and Technology Studies (STS), this thesis seeks to answer the following research question: *How are different issues established and put to work in the court documents of the Norwegian Climate Lawsuit?*

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Any errors or deficiencies in the following are, of course, entirely my own.

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1. INTRODUCTION

On October 18th 2016, the environmental organisations Nature and Youth (*Natur og Ungdom*) and Greenpeace Nordic brought the Norwegian Ministry of Petroleum and Energy before the Oslo District Court in what came to be known as the Climate Lawsuit (*Klimasøksmålet*). The Ministry had just granted ten oil production licenses to 13 companies on Norway's continental shelf in the Barents Sea, in the so-called 23rd licensing round. The organisations argued that, by awarding these licenses, the government violated Article 112 of the Norwegian Constitution, which reads:

> Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.
>
> In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.
>
> The authorities of the state shall take measures for the implementation of these principles.[1]

The organisations declared that the decision to open previously unexploited and vulnerable areas for fossil fuel exploration and production was incompatible with Norway's emission reduction targets and obligations under national and international law. The licensing decision thus endangered current and future generations' rights to a healthy environment.

To this, the government responded that the issues raised by Nature and Youth and Greenpeace Nordic were not suitable to be solved within a legal court. The production licenses were granted by the authorities in accordance with established guidelines and based on a decision in the Norwegian Parliament. Following the established separation of powers between the legislative and judicial branches of government, the government argued that the question of whether to look for new petroleum reserves should be left to the policymakers.

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[1] The Norwegian Constitution Art. 112. https://lovdata.no/NLE/lov/1814-05-17 (Last accessed in November 2022)

The two parties disagreed on how petroleum production should be governed in the face of an uncertain environmental future. This thesis explores how their statements and contentions were entangled with different understandings of climate change and of how it disrupted established bureaucratic and political practices. But during the Supreme Court hearings, Attorney General and representative of the government, Fredrik Sejersted stated:

> What kind of case is this really? It is called a 'climate case', a catchy word that has stuck. Of course, it is [a climate case] for the appealing parties. But for the state, this is primarily a case about the separation of powers. Who should decide the content of Norwegian climate politics and weigh climate and petroleum politics against each other? Is it the Parliament and the government or should the courts?[2]

Sejersted explicitly draws our attention to how the case constitutes a different issue for the different parties. *Klimasøksmålet* does not primarily raise questions on climate and scientific facts, he says. For the state, Sejersted argues, *Klimasøksmålet* is a question of separation of powers. For the organisations, however, the licensing decision illustrated how the government was lagging behind in the attainment of its emission reduction targets. How could the licensing decision be understood so differently by the two parties? The fact that the lawsuit constituted a climatic issue for the organisations can be read from the name they gave it: *Klimasøksmålet.* This name became the lawsuit's proper name in the Norwegian public. Therefore, I will also refer to it as such.

In 2020, the Norwegian government communicated increased goals to the UN to reduce emissions by 50-55% from 1990 levels by 2030.[3] These targets are solidified through the Paris Agreement, which was adopted at the UN's Conference of the Parties (COP21) and ratified by Norway in 2015. The Paris Agreement is the first legally binding, international climate agreement, aiming to limit global warming to 1.5°C. Norway's emission reduction targets under the Paris Agreement pose fundamental questions to the governance of the country's oil and gas resources. Should petroleum production be expanded despite global struggles to move beyond fossil fuels? How can the government secure state income, ensure

[2] My transcription and translation of Fredrik Sejersted in the documentary "*Norsk Hodepine*", 44:54. https://tv.nrk.no/program/KOID75006420. (Last accessed in November 2022).

[3] HR-2020-2472-P.

continued extensive welfare services to its citizens, and unite this with a political goal to act as a "pioneer in environmental issues"?[4]

Klimasøksmålet raises questions on the future of the Norwegian economy and oil industry, the concern for future generations in policymaking, and the environmental impacts of fossil fuels, at a time when energy demands in Norway and Europe are at a critical high. The aim of this thesis is to investigate how climate change is enacted politically through legal practices, and how temporal and geographical scales are central to perceptions of how climate change can be governed.

The case of *Klimasøksmålet* thus actualises several ongoing discussions within Science and Technology Studies (STS). STS scholars have long investigated the issue of climate change, and how it is co-produced as a scientific and political concept. Other studies within the field have analysed how the courtroom is a place in which matters of concern are negotiated in different ways. What happens in court is thus not only a matter of applying the law to climate change but a social and material practice which changes what climate change is. In this thesis, I have been inspired by how STS approaches to scientific knowledge production in laboratories have been extended to study the construction of legal statements in the courtroom. I will also draw on actor-network theory, studies of how political issues emerge and change in the bureaucracy, and studies of the scientific and social co-production of climate change as a political concern. I will use these theoretical resources to approach the courtroom as a place where grievances are enacted and worked upon, and where the parties' documents render visible how *Klimasøksmålet* constitutes different issues for the government and the environmental organisations. My research question thus reads:

How are different issues established and put to work in the court documents of the Norwegian Climate Lawsuit?

To specify this overarching question, I will also answer the following sub-questions: 1) How do the two parties use their court documents to enact different understandings of what is at stake in the courtroom*?* And 2) how are their versions of the issue *Klimasøksmålet* represents characterised by invocations of different temporal and spatial scales? In other words, how do they call upon opposing notions of local and global, present and future, to substantiate their

[4] Nissen, 2021, 408.

arguments? The theoretical and methodological assumptions these questions are based on will be elaborated further in the next chapter.

Chapter 2 provides an overview of the theoretical and methodological resources I draw on in my approach to *Klimasøksmålet*. It introduces laboratory studies, actor-network theory (ANT), studies of political issues in their becoming, the notion of co-production, and how these can be, and have been, used to study law, legal practices, and climate change. I will combine these theoretical resources to analyse the courtroom as a place where matters of concern are established, modified, and enacted in ways that make them governable and ready to be decided upon. From here, I will move on to introduce the method of practice-oriented document analysis, which has been developed in conversation with several strands of STS literature, particularly ANT and the study of public issues. I will also account for my selection of materials to analyse, which consists of three of *Klimasøksmålet's* court documents.

Chapters 3, 4, and 5 will each take a practice-oriented approach to one of these three documents. Here, I will analyse the actions performed by the court documents, the words and concepts used by the parties, and how these come together in different narratives of the process leading up to the 23rd licensing round, the general management of Norway's petroleum resources, and the government's attainment of its climate targets. I will also show how the two parties call upon different temporal and geographical scales and reference various scientific and legal sources to substantiate their arguments. Finally, in chapter 6, I will reflect on my findings and relate them to my chosen theoretical and methodological resources and to the research questions presented above.

2. THEORETICAL AND METHODOLOGICAL APPROACH

This chapter will present my theoretical and methodological approach to *Klimasøksmålet.* I am one of many to express interest in this case. The lawsuit was widely covered in Norwegian media in the periods surrounding the rulings of the District Court, the Court of Appeal, and the Supreme Court and has also received scholarly attention. The most discussed questions have been concerned with what was perceived as a potentially problematic role of the courts in policymaking. Should the courts be involved in climate change politics? And if so, how? Does the involvement of the courts in climate policy represent a breach of the established separation of powers?[5]

Of course, my study of *Klimasøkmsålet* will evolve around climate politics and law, but I will engage in discussions other than those initiated by the questions above. I will explore the arguments made by the two parties in the lawsuit and how they express differing views on how petroleum resources should be governed in a future where the effects of climate change are looming but uncertain. This means that I study the courtroom as a place where a specific version of the climate change issue is enacted. To do this, I will draw on several perspectives from Science and Technology Studies (STS). This chapter will first review how *Klimasøksmålet* has been studied thus far before moving on to the theoretical and methodological framework particular to my thesis.

In 2021, legal expert and author Marius Gulbranson Nordby published a book called *The Big Climate Lawsuit (Det store Klimasøksmålet).* He cites editorials written by three prominent Norwegian political commentators and newspaper editors published in 2016 and 2017 to show how heated the discussions of the questions above became. "The courts should not govern climate politics", Trine Eilertsen argued in *Aftenposten*. Hanne Skartveit in *VG* stated that "If the courts are granted too much power, the politicians are rendered powerless. And democracy will wither." And lastly, Bjørgulv Braanen wrote in *Klassekampen* that *Klimasøksmålet* could "lead to a fundamental change of the functioning of the Norwegian political system."[6]

[5] Jørn Øyrehagen Sunde 2017, "Klimasøksmål og demokrati", *Nytt Norsk Tidsskrift 34*(4); Ole Kristian Fauchald and Eivind Smith 2019, *Mellom juss og politikk. Grunnloven § 112*.

[6] My translation of Bjørgulv Braanen, Trine Eilertsen, and Hanne Skartveit quoted in Marius Gulbranson Nordby 2021, *Det store klimasøksmålet*, 14.

Nordby's book accounts for the history of the Norwegian oil industry, the Constitution, and the separation of powers between the executive, judicial, and legislative branches. And he details how the lawsuit challenged these institutions in different ways. In short, he concludes that *Klimasøksmålet* illustrates how the government and the Supreme Court neither take the Constitution nor the climate crisis seriously. The book is, in other words, an argumentative contribution to the debate surrounding the relationship between politics and law, and whether the ruling given in the Supreme Court can be considered 'right' or 'wrong'. As such, it does not touch directly on the aspects of *Klimasøksmålet* that I study but has been helpful through its thorough account of the lawsuit and the reactions it generated. And it shows how the very action made by the environmental organisations to bring this issue to court was perceived and presented as highly controversial in the public debate that followed.[7]

This can also be seen in the hour-long TV documentary "Norwegian Headache" (*Norsk hodepine*), which first aired on the Norwegian Broadcasting Corporation NRK in 2021.[8] The filmmakers interviewed different actors involved in *Klimasøkmsålet*, such as the NGOs, the lawyers, the Attorney General, and the Minister of Petroleum and Energy, and asked them what they believed to be at stake. They also followed these actors and recorded them in the courtroom, and the movie can be recommended as a visualisation of the legal proceedings that this thesis will access through the court documents.

Klimasøksmålet has also attracted scholarly interest. In 2019, the edited volume *Between Law and Politics (Mellom juss og politikk)* was published on occasion of the lawsuit. Legal scholars Ole Kristian Fauchald and Eivind Smith argued that the case raised important questions "about the Constitution, the relationship between politics and law, the relationship between Parliament, government, and the courts, as well as Article 112 in a broader picture." Furthermore, Fauchald and Smith wanted to contribute with more "long-term and systemic" arguments to the public debate that followed the lawsuit, which had thus far included "controversial and exaggerated statements".[9] The volume has been useful for my work with this thesis by situating *Klimasøksmålet* within a historical context, and against an international backdrop of environmental constitutionalism and climate litigation.

[7] Nordby 2021.

[8] "*Norsk hodepine*": https://tv.nrk.no/program/KOID75006420.

[9] Fauchald and Smith 2019, 9.

Legal practices have been explored in several studies within STS and I will account for the paradigmatic ones in the next section. But even though STS scholars have approached the law in different ways, climate litigation cases have received relatively little attention, with a few notable exceptions.[10] Among these, the most important study for this thesis is Phillip Paiement's exploration of the courtroom as a "site for co-production" of scientific understandings of the climate change problem and the question of to govern it.[11] His article even features *Klimasøksmålet* and compares it to two other climate litigation cases in Ireland and the Netherlands.[12]

Paiement's aim is to explore the construction of transnational narratives in these three lawsuits.[13] And internationally, the case of the Norwegian lawsuit falls under the field of climate litigation, which has been growing in scope over the last three decades.[14] In several countries, NGOs have sued their governments with arguments of human rights violations related to environmental harm and demanded more ambitious climate change mitigation policies. An example of this is the 'Urgenda Case' from 2019, where the Dutch Supreme Court ruled in favour of 886 citizens compelling their government to reduce emissions to reach the 2°C target set under the UNFCCC. *Klimasøksmålet* is thus part of an international trend of activists using litigation as part of climate protests.[15]

The main argument in Paiement's article is closely related to mine: that climate activists use climate litigation as a tool to "develop narratives of responsibility, science, right, and wrong." And he argues that narratives about time and the future play an important part in their activism, as they frame an urgency with which societies and governments should respond to global warming. The article has served as inspiration for my theoretical approach. But while

[10] Phillip Paiement 2020, "Urgent agenda: how climate litigation builds transnational narratives", *Transnational Legal Theory 11*(1-2); Elizabeth Fisher 2013, "Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachussets v. EPA", *Law & Policy 35*(3); Lisa Vanhala 2020, "Coproducing the Endangered Polar Bear: Science, Climate Change, and Legal Mobilization", *Law & Policy 42*(2).

[11] Fisher 2013, 250; Paiement 2020.

[12] Paiement 2020.

[13] Paiement 2020.

[14] Joana Setzer and Lisa C. Vanhala 2019, "Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance", *WIREs Climate Change 10*(3).

[15] Paiement 2020, 121-122.

his study is comparative and seeks to identify transnational trends, I will do an in-depth analysis of a single case and its documents and explore how the construction of these narratives takes place in practice. With this intention, I have identified several theoretical perspectives from STS and intellectual history that explore the knowledge construction taking place in courtrooms, the role of documents in legal processes and in modifying political issues, and the characteristics of climate change as a framework for thinking about the environmental crisis and how to solve it.

2.1. Doing Legal Knowledge

In the following section, I will lay out the theoretical framework of the thesis and argue for the value of STS perspectives on the law, climate change, and the future, all related to the case of *Klimasøksmålet*. I will draw on and account for strands of literature within STS that have approached the law in different ways: laboratory studies and actor-network theory, the notion of co-production, and the study of political issues. After this, I will account for a selection of studies on climate change science and how it challenges traditional, political understandings of time and space.

In her article "A New Agenda for the Cultural Study of Law: Taking on the Technicalities", anthropologist and legal scholar Annelise Riles divides the body of humanistic legal scholarship in two; the 'Culturalists' and the 'Instrumentalists', the former constituted by, for example, legal historians, philosophers, literary theorists, anthropologists, feminists, and the latter made up by scholars such as economists, political scientists, corporate lawyers, and cognitive scientists. She argues that culturalists have treated the law as "the embodiment of norms, the outcome of political compromise, and the repository of social meanings". In contrast, instrumentalists have viewed law "in primarily pragmatic instrumental terms, as a tool to be judged by its successes or failures in achieving stated ends." Of course, neither of these categories is absolute. But Riles argues that both "have quite impoverished understanding of the very thing that defines our field, of what makes law as opposed to literature, economics or cognitive science: the technicalities of legal thought".[16]

Her essay is a "manifesto for the Culturalists in all of us" and a call for humanistic and social studies of law to "take on the technicalities". Riles elaborates on what types of technicalities

[16] Annelise Riles 2005, "A new agenda for the cultural study of law: Taking on the technicalities", *Buffalo Law Review 53*(3), 973-74.

exist and should be studied. From of her list, those important for my study are the law practitioners, their documents, and their argumentation techniques.[17] What the technicalities of law add up to is a "way of doing legal knowledge", which deserves to be addressed as a subject of humanistic legal studies in its own right. Riles' invitation to study ways of doing knowledge can be read along the lines of an approach known as laboratory studies within STS, which I will account for in the following paragraphs. It shares with Riles an interest in the production of knowledge and how this process happens through an interplay of both social and material factors. Riles also refers to STS scholars such as Michael Lynch, Bruno Latour, and Steve Woolgar and their laboratory studies as inspiration for her approach to legal practices and knowledge production.[18]

STS scholarship grew out of an interest in the interplay between science, technology, and society – particularly how scientific knowledge is socially constructed, both shaping and shaped by factors traditionally understood to be non-scientific, such as the norms, values, and practices of those who produce it. Drawing on this assumption, STS scholars began analysing the production of scientific knowledge through ethnographic studies of technical workplaces, such as laboratories, from the 1970s and onwards.[19]

Bruno Latour and Steve Woolgar conducted a two-year fieldwork in a laboratory to follow scientists in their daily routine activities, resulting in the landmark book *Laboratory Life*. They approached the case anthropologically, bracketing their familiarity with their object of study and "making the laboratory appear ethnographically strange".[20] By being "largely ignorant" to and describing the scientific activities conducted, they wrote, "it is unlikely that our discussion will tell working scientists anything they do not already know." However, "the description of the way in which such activities become transformed into 'statements about science' might constitute a new perspective."[21] Their main finding was that facts are constructed through the daily activities of scientists in the laboratory. This entailed a turn

[17] Riles 2005, 976.

[18] Riles 2005, 986.

[19] Bruno Latour and Steve Woolgar 1986, *Laboratory life: The Construction of Scientific Facts*; Karin D. Knorr-Cetina 1981, *The Manufacture of Knowledge*; Michael Lynch 1985, *Art and artifact in laboratory science: a study of shop work and shop talk in a research laboratory*.

[20] Mike Michael 2017, *Actor network theory: trials, trails and translations*, 29.

[21] Latour and Woolgar 1986, 30.

from viewing science as a philosophical abstraction to understanding science and technology as inherently social activities involving everything from human passions, interests, and behaviours to their material resources.[22]

Laboratory Life is a key text in the emergence of the approach actor-network-theory (ANT) within STS.[23] A distinct characteristic of this approach is how scientific knowledge is constructed through practices and networks, including human and non-human elements, among the latter documents and text. Thus, ANT differs from purely social constructivist perspectives on knowledge production because it focuses on materiality.

In *The Making of Law*, Latour entered the courtroom much as he did in the laboratory in the 1980s. Here, he provided an "ANT's view of law" and explicitly directed our attention to the materiality of court documents.[24] He begins the book by stating that in *Laboratory Life*, he untangled what it means to "speak scientifically". In *The Making of Law*, on the other hand, he attempts to identify what it means to "speak legally".[25] To do this, he traces files compiled by case documents. The file is what organises all the activities of the court and "forms the object of all types of care, of all conversations."[26] This does not only include the documents produced by the court, such as rulings written by the judges, but also the documents gathered by lawyers and presented as evidence in the courtroom. These documents of evidence are often produced elsewhere, carrying "the mark of other institutions", he states, but are essential to building a final judgement.[27]

Latour identifies an essential difference between conducting ethnographic studies of the law and ethnographic studies of science: no one has ever asserted a "judicial universality" across borders and cultures, as opposed to scientific universality and objectivity. Or as Latour formulates it, "legal pluralism is part of law whereas until recently there was no such thing as

[22] Sheila Jasanoff 2015, "Serviceable Truths: Science for Action in Law and Policy", *Texas Law Review 93*(7), 1727.

[23] Michael 2017, 29.

[24] Bruno Latour 2010, *The Making of Law: An Ethnography of the Conseil d'Etat*, trans. Marina Brilman and Alain Pottage, x.

[25] Latour 2010, ix.

[26] Latour 2010, 70.

[27] Latour 2010, 75.

scientific pluralism". Therefore, he argues that studying the construction of legal arguments and statements is not as controversial as studying the construction of scientific facts. However, his study of the French Council revealed to him how much the practice of law rests on other institutions and thus how firmly structured the rest of the world must be for the law to do its work, "for a petition to be able to be compiled, for a counsellor to extract the arguments." The law does not simply consist of rules that are applied to human action, but instead of "documents and legal texts, archives, citations, authorizations and invocations." This means that "wanting to define law by means of rules is like reducing science to concepts."[28]

Latour spent four years, although not continuously, in the French institution Council d'Etat, following the different practitioners working there and the movement of documents through the building and the legal process. I have not been able to partake as an observer in the court proceedings of *Klimasøksmålet* and the documents I analyse are accessed digitally, which means that my study cannot be as materially oriented as Latour's. I am, however, inspired by it. The focus on materiality has laid the grounds for the methodology of practice-oriented document analysis, which I will utilise and elaborate further in the thesis' chapter on methodology.

Much more can be, and has been, said about ANT as both a theoretical and methodological framework. It emerged as an approach used to study the production of scientific knowledge in different settings. It has been critiqued, revisited, and further developed to encompass a range of ideas, themes, and vocabularies.[29] But the underlying assumptions from ANT that this thesis will rely on are the ethnographic approach, as explained above, and the attention to practices and materiality – of court documents in particular. I approach this lawsuit without an academic background in law and am thus "largely ignorant" of legal practices.[30] I wish to examine the practice of argumentation performed by the different parties in *Klimasøksmålet* and how their arguments come together to shape different statements or 'truths' about the

[28] Latour 2010, 269.

[29] Emilie Cloatre 2018, « Law and ANT (and its Kin): Possibilities, Challenges, and Ways Forward", *Journal of Law and Society 45*(4), 646.

[30] Latour and Woolgar 1986, 30.

future of Norwegian oil production. This will also show that what is regarded as the facts or the issue of the case differs between the two parties.

2.2. Modifying the Issues

An STS perspective that explicitly draws our attention to how different understandings of contested issues emerge, stabilise, and change is the so-called issue approach. It is based on the American philosopher John Dewey's pragmatist studies of 'things in their becoming' and has been reworked further into a distinct approach by STS scholars Noortje Marres and Kristin Asdal.[31] In their studies, an issue is understood as a contested and politicised question with the "capacity to gather a public of interested actors around itself".[32] The underpinning argument here is that it is not enough, when approaching a political question, simply to state that it *is* an issue. We must unpack how the question emerged as an issue in the first place, what kind of issue it has become and what effect it has on the objects at hand.[33] The attention to issues also represents an increased STS engagement with democratic theory, particularly by scholars within ANT. They have studied how issues centre around shared "matters of concern" that mediate public participation and engagement. The aim is to open political issues and study "what kind of expertise counts, and what kind of questions the political process should seek to answer."[34]

Marres has mainly been concerned with how publics gather around issues *outside* of political and societal institutions, while Asdal has sought to explore how issues are transformed through practices *within* established institutions in the bureaucracy, such as governmental agencies and ministries.[35] Her perspective is thus particularly relevant to my study of *Klimasøksmålet* as an issue moving through the legal system. How do the licenses awarded in

[31] Noortje Marres 2007, "The Issues Deserve More Credit: Pragmatist Contributions to the Study of Public Involvement in Controversy", *Social Studies of Science 37*(5); and 2015, *Material Participation. Technology, the Environment and Everyday Publics*; Kristin Asdal 2014, "From Climate Issue to Oil Issue: Offices of Public Administration, Versions of Economics, and the Ordinary Technologies of Politics", *Environment and Planning A 46*(9); and 2015, "What is the issue? The transformative capacity of documents", *Distinktion: Journal of Social Theory 16*(1).

[32] Asdal 2015, 75.

[33] Ibid.

[34] Bård Lahn 2021, "Changing climae change: The carbon budget and the modifying-work of the IPCC", *Social Studies of Science 51*(1), 6.

[35] Asdal and Hilde Reinertsen 2022, *Doing Document Analysis: A Practice-Oriented Method*, 220.

the 23rd licensing round constitute different issues for the two parties? Asdal argues that documents are particularly important in the making of issues, through what she terms "modifying work". By being worked upon and circulating in the "ordinary sites of politics and administration, bureaucracy and business", documents modify their relevant issues and the notion of what is at stake through "their rhetorical strategies, their conceptual work, and the relations that the text enacts".[36] Her approach thus also draws on ANT and Latour's attention to practices and to the materiality and movements of documents. She further argues that studying bureaucratic and political documents is an effective way for scholars in the social sciences to "take the environment into account" in their studies.[37] The materiality of natural objects and the issues that emerge around them are often rendered governable through documents such as white papers, newspapers, and scientific reports. Therefore, she states, we must recognise how nature is made accessible to us by way of documents – "that is, in a material-*semiotic* version." This means that when studying issues in environmental politics, "words and materialities, the material and the semiotic, must be handled together."[38] This is an argument for my approach to *Klimasøksmålet*. I argue that the court documents grant us access to the parties' differing enactments of the climate change issue and that these determine how they think it should be governed.

In his dissertation, Bård Lahn studied how climate change gets worked into an issue for politics and government and how it is "translated from a process of the physical Earth system and into something that can be governed and acted on politically".[39] He remarks that political struggles over questions related to climate change are often defined and bound up with disagreements over how the concept should be defined. I will discuss the concept of climate change and its characteristics further in a section below, but what the issue approach contributes here is attention to how practices and documents take part in enacting issues in a way that again defines how these issues can be acted upon politically.

[36] Asdal 2015, 77.

[37] Asdal 2015, 75.

[38] Ibid.

[39] Lahn 2022, "Carbon connections. On the work of making climate change an issue for politics and government", Phd. diss., University of Oslo, 7.

This way of studying the practices of environmental politics has been adopted and developed by STS scholars such as Michel Callon, Lahn, Asdal, and Bård Hobæk.[40] But their approach to contested issues has not yet been extended to the formation of issues within law and through legal practices. This is an extension I will do in my thesis, arguing that the courtroom is a place where matters of concern to the public are treated and modified in ways that render them governable, both for the courts themselves and for later political and bureaucratic proceedings.

For my purpose, the issue approach is useful to disentangle the parties' contentions surrounding the production licenses: how did they end up in the courtroom? What do the two parties believe and frame to be at stake in the courtroom? How can this be read from the court documents they have produced? And have their understandings of the issues at hand changed, or been modified, through the legal process? These questions have also guided my method and my selection of court documents. From her theoretical perspective on issues, Kristin Asdal has developed a particular methodological approach called practice-oriented document analysis, together with Hilde Reinertsen.[41] Their way of analysing documents forms the methodological framework of this thesis, and I will return to its characteristics and functions a bit further down.

2.3. The Co-Production of Law, Science, and Climate Change

As mentioned above, the field of climate litigation has served as an object of study for a few scholars within STS. These studies have mainly invoked the theoretical notion of co-production, which was developed by Sheila Jasanoff.[42] Co-production is "shorthand for the proposition that the ways in which we know and represent the world (both nature and society) are inseparable from the ways in which we choose to live in it".[43] In a co-productionist idiom, the natural and social orders are mutually constitutive and continuously co-produced. And the

[40] Michel Callon 2009, "Civilizing markets: Carbon trading between in vitro and in vivo experiments", *Accounting, Oranizations and Society* 34(3-4); Lahn 2022; Asdal and Bård Hobæk 2020, "The modified issue: Turning around parliaments, politics as usual and how to extend issue-politics with a little help from Max-Weber", *Social Studies of Science 50*(2).

[41] Asdal and Reinertsen 2022.

[42] Paiement 2020; Fisher 2013; Vanhala 2020.

[43] Jasanoff 2004, *States of Knowledge: The Co-Production of Science and Social Order*, 2.

courtroom is an essential forum for the co-production of physical and social understandings of matters of concern, such as climate change.[44]

In several works, Jasanoff has approached the law with an STS and co-productionist perspective. Latour conducted an ethnographic study of the courtroom, examining how "the essence of law" was expressed through practices. He studied the construction of legal knowledge and compared it to the construction of science. On the other hand, Jasanoff is more interested in the *interactions* between science and the courts.[45] In her article on the environmental lawsuit *Massachusetts v. EPA*, she writes:

> The courtroom is a space of reenactment. Something happened in the world to awaken society's demand for moral reckoning: someone must be blamed, someone punished, someone rewarded for exceptional enterprise, someone, if possible, made whole. […] the legal process offers an opportunity to replay the sequence of events before an authority capable of making binding judgments that satisfy our collective sense of order, compassion, or moral indignation."[46]

This task demands that the courts fully commit to basing their decisions on factual truth, "for without a baseline of agreed-upon facts, no judgment could satisfy the world's demands for justice."[47] Jasanoff's studies of the law have thus mainly been occupied with the use of scientific evidence, such as expert witnesses and publications, in the courtroom. Judges and juries are tasked with identifying and evaluating what constitutes 'good science' and 'legitimate expertise' in a process where both are presumed to exist independently in the world.[48] This prescription of injecting good science into the legal process is based on the assumption that science and technology operate independently of law and policy.[49] Jasanoff argues, however, that the scientific claims presented in the courtroom "are colored not only by

[44] Fisher 2013.

[45] Jasanoff 1997, *Science at the Bar: Law, Science, and Technology in America*, 1; Latour 2010, x.

[46] Jasanoff 2018, "Science, Common Sense & Judicial Power in U.S. Courts", *Daedalus 147*(4), 15.

[47] Ibid.

[48] Jasanoff 1997, xiii.

[49] Jasanoff 1997, 7-8.

the interest of the offering parties but also by the social, cultural, and political commitments of other actors in society".[50] Thus, then judges' choice between which scientific accounts to believe in and what evidence to base judgments on is always normative and political because it expresses confidence in the practices that produced it.[51] Furthermore, the courts are instrumental in building and stabilising the public's understanding and expectations of science and technology by treating matters involving them. Seen in this way, legal disputes "appear as sites where society is busily constructing its ideas about what constitutes legitimate knowledge".[52]

Jasanoff has also extended the notion of co-production to climate science in several of her studies.[53] In her article "A New Climate for Society", she narrates how climate change has been established as a global phenomenon through scientific assessments conducted by actors such as the IPCC. And she discusses the tensions that arise between universal, apolitical, scientific representations of climate change and the local, lived experiences of weather and climate. Jasanoff argues that the scientific phenomenon of climate change "cuts against the grain of common sense" and human experience by creating new representations of politics, communities, space, and time. It thus undermines our established social institutions and ethical instincts.[54]

Jasanoff directs our attention to how climate change science creates a shift in representations of time and space, which is a central argument underpinning my analysis of *Klimasøksmålet*. The scope of moral thinking and normative decisions within economics, law, politics etc., has usually been confined to the immediate past or near future. But with new modes of analysis and data representation, the effects of climate change can be visualised with models spanning decades to millennia. This temporal shift raises questions such as "When is it time to care; which times should we care about; whom should we care about in times to come?"[55] And it creates challenges for present-day decision-makers, both within politics and law: what is the

[50] Jasanoff 1997, 207.

[51] Jasanoff 1997, 209.

[52] Jasanoff 1997, xv-xvi.

[53] Jasanoff 2004; 2018.

[54] Jasanoff 2010, "A New Climate for Society", *Theory, Culture & Society 27*(2-3), 233.

[55] Jasanoff 2010, 241-43.

significance of our current actions? How do we best evaluate the risks they entail? Whose interests should we take into consideration? And what future worlds are realistic and desirable?[56]

Spatially, climate change poses a challenge as an object of governance as it is both "everywhere and nowhere, hence not accessible to imaginations rooted in specific places." During the 1970s, environmental movements worldwide struggled to protect different bounded spaces they valued: a river, a lake, a national park, or a stretch of coast. Jasanoff argues that climate change is also linked to a place, but that that place is the whole planet. This does not necessarily mean a loss in meaning or that people care less. However, the spatial scale of global warming raises more disputed questions of who is responsible for the problem, both for its causes and its present and future consequences.[57]

These arguments are in line with the idiom of co-production by highlighting how the ways in which we represent and scientifically construct climate change are inextricably linked with our understanding of how it should be governed.[58] In his study of the Dutch, Irish, and Norwegian climate lawsuits, Paiement found that the climate activists presented narratives emphasising the necessity of *urgent* action to avoid an uncertain future with more than 2°C of global warming. And in response, the governments narrated futures that were full of possibilities, including technological developments that could remove emissions from the atmosphere and market-driven energy transitions that could render fossil fuels obsolete. These narratives entail different understandings of the nature of climate change and demand different governance responses. In his conclusion, Paiement states that he has yet to engage with an important temporal dimension of climate governance: the interests and rights of future generations. He urges potential further expansions of his analysis to "engage more comprehensively with the dual temporal considerations of immediate urgency and long-term intergenerational justice that often structure climate litigation". This is what I will turn to in the following section.[59]

[56] Paiement 2020, 128.

[57] Jasanoff 2010, 141.

[58] Jasanoff 2010, 236

[59] Paiement 2020, 143.

2.4. Time, Space, and Future Generations

In this study, I am interested in the government's and the environmental organisations' understandings of the climate change issue and how these are entangled with different visions of the future. To identify the ways in which the concept of climate change can be enacted, I will in the following section present its temporal and spatial characteristics. I will first discuss the tensions it creates between the following two distinctions: global and local, and present and future. And then I will examine the relationship between present and future generations in climate policies.

In an article from 2010, scholar of climate and culture Mike Hulme uses the notion of co-production to explore climate change not just as a scientific description of physical and climatic changes but as "a resourceful idea and a versatile explanation which can be moulded and mobilised to fulfil a bewildering array of political, social and psychological functions."[60] He argues that the concept of climate change is "doing work" and that it challenges and dissolves several traditional dualisms or boundaries of modernity: those between nature and culture, global and local, and between present and future.[61] Hulme's arguments draw on co-production by highlighting how our scientific knowledge about climate change is interwoven with our cultural understanding of it. When it comes to the nature-culture divide, he argues that humans have altered the planet's atmosphere so substantially it has become "a hybrid system yielding hybrid weather." The climate cannot be understood as genuinely human-induced or purely natural.[62] The second divide the concept of climate change disrupts is between global climate and local weather, and thus also global and local political responses. It creates a "causal and moral narrative" that all countries and citizens are partly responsible for changing the weather, no matter where these changes occur. This means that climate change can be invoked to connect local environmental issues and damages to a global problem.[63] Thus, the narrative of climate change and global warming dissolves the spatial distinction between global and local.

[60] Mike Hulme 2010, "Cosmopolitan Climates", *Theory, Culture & Society* 27(2-3), 267.

[61] Hulme 2010, 268.

[62] Hulme 2010, 270.

[63] Hulme 2010, 268.

Hulme's third dualism relates to the temporality of climate change: "Sitting at the heart of most debates about climate change is a problematic tension between the assumed predictability of the climatic future and the necessary openness and malleability of the social future."[64] He argues that mathematical simulations of the future climate presented by actors such as the IPCC are often accepted as scientific predictions in public debates and discourses on climate change. However, climate predictions are full of uncertainties that arise from limited knowledge, randomness, and what he calls human intentionality. But when attempts are made to combine natural science predictions with social science imaginations, the resulting narratives are often termed speculative. Thus, tensions arise between the claimed knowability of the physical state of our climate on the one hand and the asserted uncertainty of the political and social future on the other. Hulme thus proposes "a new humility" when predicting the future using climate models. Instead, participants in these discourses should recognise "that our future foresight – and hence our future – is as conditioned by the hopes and fears emerging from the present as it is revealed inside the electronics of a computer model."[65] In my analysis of *Klimasøksmålet*, it is not my intention to criticise the parties' uses of IPCC predictions or emission pathways but to be aware of the temporal assumptions they produce and when and how they are used.

In the article "On the Difference Between Anthropocene and Climate Change Temporalities", intellectual historian Julia Nordblad discusses climate change and time. She argues that climate change frames the public's understanding of the environmental crisis and functions as a framework for exploring and thinking about how to solve it. Time is a central part of this, and of politics in general, she states: "It is crucial to how phenomena are conceptualised as public issues and to how narratives are used to raise public awareness."[66] Thus, how the future is conceptualised is essential for constructing a sense of political possibility and agency. Nordblad argues that climate change as a temporal framework for politics is characterised by

[64] Hulme 2010, 270.

[65] Hulme 2010, 272.

[66] Julia Nordblad 2021b, "On the Difference Between Anthropocene and Climate Change Temporalities", *Critical Inquiry 47*(2), 330.

the fact "that it is presented in the form of alternative scenarios for the future" and that the most prominent actor in creating and stabilising this framework is the IPCC.[67]

The IPCC collects and synthesises international climate science in its scientific Assessment Reports (ARs), which include a significant number of narratives, scenarios, and simulations of the future. The results are gathered and presented as "alternative pathways for the future" that integrate "physical science, climate risks and adaptation, and the mitigation of climate change" and span from the years 2030 to 2100.[68] The pathways show different possible climates and societies depending on the mitigation measures implemented by the world's countries: "different scenarios are imagined, modelled, projected, and those can be debated, compared, and deliberated."[69] In other words, the pathways open various futures and show how they depend on policy choices made in the present. Nordblad argues that they constitute a productive way of imagining the future and thinking about climate change politically. However, she also points out how they can be criticised for combining mathematical models of the climate with normative, social, political, and economic views on the future. They can thus "be understood as a depoliticization of political and economic assumptions and values" and certainly not as apolitical or neutral facts.[70]

Nordblad has also discussed the relationship between present and future generations in environmental discourse. She argues that climate change has introduced a new and long timescale into politics because decisions made in the present decide the conditions of the planet for "innumerable generations to come".[71] But the concept of future generations has many meanings. And references to it in discussions about climate change "are in fact tied up with differing views on long-standing questions in political modernity, such as the openness of the future and the political relationship between present and future generations."[72] She thus argues that different invocations of future generations often represent different views on how

[67] Nordblad 2021b, 336.

[68] IPCC 2022, "Summary for Policy Makers" in *Climate Change 2022: Impacts Adaptation and Vulnerability*, 9.

[69] Nordblad 2021b, 337.

[70] Nordblad 2021b, 339.

[71] Nordblad 2021a, "Concepts of Future Generations: Four Contemporary Examples", in *Futures,* ed. Jenny Andersson and Sandra Kemp, 364.

[72] Nordblad 2021a, 364.

much can be known about the future. Furthermore, the concept actualises questions of how to ascribe agency between generations and how much claim future generations can have over present people and their interests.[73]

Economists have been particularly engaged in discussions of how to take future generations into account in present-day decision-making. Nordblad narrates a debate that played out between climate economists in the 1990s and 2000s, on how climate change should be mitigated. She argues that most of these economists used the concept of future generations in a way that presupposed a quantitative knowability of the future. They argued that the general path of history is one of growth. And because future generations exist further down this path and will be richer than today's, all climate mitigation measures should be discounted accordingly.[74] It is not given how substantial this discount should be, but mitigation measures will, either way, be less costly for future people than for present people. This narrative, Nordblad points out, implies a uniformity between the past and the future and does not consider possible disruptive developments. It also commonly relies on the belief that future technological developments, such as CO_2 removal from the atmosphere, will make mitigation measures less costly. But as part of this debate, former Chief Economist at the World Bank, Sir Nicholas Stern, published *The Stern Review on the Economics of Climate Change* in 2006, which proposed a principle of equity between generations instead. He argued that mitigation policies should be implemented as quickly as possible because future generations will be seriously affected by climate change but are neither politically represented nor able to participate in discussions on the matter. He also stressed "the uncertainty and possibility of tipping points, irreversibility, and other non-linearities within the climate system [as] factors that distort the knowability implied in most economic models."[75] Nordblad thus shows how the Stern review proposes a different view of and approach to future generations, based on a principle of precaution.

Article 112 of the Norwegian Constitution imposes a duty on the government to ensure a healthy environment for its citizens and "for future generations as well."[76] The point of

[73] Nordblad 2021a, 366-367.

[74] Nordblad 2021a, 369.

[75] Nordblad 2021a, 370.

[76] The Constitution Art. 112.

narrating the above discussion on future generations is to show that this concept can entail different understandings of the future, depending on who uses it and how.[77] Statements made on behalf of or invoking future generations' interests are thus often contested and politicised. Nordblad's analysis is concerned mainly with climate change politics, but her argument is also relevant to how future generations are called upon in courtrooms. I will draw on her discussion to explore how the two parties in *Klimasøksmålet* relate their arguments to this concept and what that might reveal about how openly they imagine the future. Both Hulme and Nordblad examine, drawing on insights from both STS and intellectual history, how science and society are co-producing the concept of climate change, what is believed to be adequate responses to it, and our imaginaries of future climates. And they invite us to look for and analyse temporal tensions in climate change discourse. I will take inspiration from their reflections to explore such tensions in the use of the concept of future generations in *Klimasøksmålet* and in the ways scientific knowledge, such as the IPCC reports, is used in the argumentation for certain policy choices.

2.5. Practice-Oriented Document Analysis

The previous sections have elaborated on the theoretical perspectives on law, public issues, and climate change that are relevant to answer my investigation of how the parties in *Klimasøksmålet* understand the issue that has arisen between climate change and Norway's petroleum production, and how they believe that these policy areas are best governed together. I have also explored how notions of time and space have been discussed in relation to the concept of climate change within STS and other neighbouring fields of literature. But how are the ways in which the parties invoke different temporal and geographical scales best examined in practice? The answer proposed in this thesis is to examine them through court documents.

In the three analytical chapters of the thesis, I will conduct a document analysis of three of the court documents from the lawsuit's legal proceedings.[78] I have chosen to read the summons sent by the NGOs to the Oslo District Court in October 2016, the government's response issued two months later, and lastly the Supreme Court ruling from December 2020. I will

[77] Nordblad 2021a, 364

[78] In May 2022, I submitted a thesis outline to UiO in the course TIK4040. Both this methodological section and the next section on Research Ethics have been largely retrieved from that outline. The same might go for formulations of research questions and intentions used in the Introduction and other parts of the thesis.

expand on why I have chosen these three documents in a separate section below, but here I will first account for my approach to analysing them.

Practice-oriented document analysis is a method developed in close conversation with several approaches within STS, such as ANT and the study of issues, as presented above. These theoretical strands of literature do not only propose how to understand different social and scientific phenomena but also how to study them.[79] In other words, they bring with them certain methodological guidelines that the practice-oriented method is built on. These include the attention to practices, materiality, and the modifying work performed by documents.

My reading of the different court documents is rooted in Kristin Asdal and Hilde Reinertsen's book *Doing Document Analysis. A Practice-Oriented Method*.[80] Their methodological approach entails a broadened understanding of what documents are and what they do. It is a drawing together of readings of discursive analyses associated with Michel Foucault with theoretical foundations from STS, to create a methodology that enables us to explore "how the written, the concepts we develop and employ, the words we use, how we formulate words and sentences, are taking part in forming and formatting things".[81]

The issue approach within STS has been an important source of inspiration for practice-oriented document analysis. But Asdal and Reinertsen argue that the issue approach has been mainly concerned with how issues and new publics emerge around material objects. They aim to extend the issue approach to the study of semiotics, or the textual, as well.[82] Words and texts do things and actively shape the objects and issues in question. In my readings of *Klimasøksmålet*, I will examine how the court documents establish and modify the issue and the parties' differing understanding of what is at stake. I will do chronological readings and analyses of the documents, meaning that I will relate the parties' arguments in the order they were structured by their authors. The reason for this is that the structure of the documents takes part in forming the arguments they present, and it also reveals what the parties are most intent on communicating.

[79] Latour 2005, Reassembling the Social: An Introduction to Actor-Network-Theory, 142.

[80] Asdal and Reinertsen 2022.

[81] Asdal and Reinertsen 2022, 212-213.

[82] Asdal and Reinertsen 2022, 221.

The practice-oriented method will draw my attention to how the words, concepts, and narratives carefully chosen and used by the two parties shape what is contested in the courtroom, whether that is the environment, the production licenses, and the political issue that has formed around them, or the possible challenges the lawsuit poses to the established separation of powers.

2.6. Research Ethics

All the documents I have handled in my study are publicly available. I have retrieved them from the website klimasøksmål.no, where the environmental organisations have gathered and posted all the court documents: those presented and produced by the plaintiffs, the defendant, and the judges.[83] Both parties to the case and the Supreme Court have also provided unofficial translations of their documents from Norwegian to English, for information purposes. I have read them in both languages, but all citations and references in this thesis are made to the English translations.

I have not conducted any interviews and thus not handled any personal information on interviewees, recordings, or private documents, so when it comes to research ethics, there are no formal criteria I need to adhere to or applications to fill out. But research ethics is also about norms and values underpinning good scientific practice. In their guidelines, the Norwegian National Committee for Research Ethics on the Social Sciences and the Humanities writes that science's most fundamental objective and obligation is the pursuit of truth while acknowledging that "research can never fully achieve this goal". Involvement with and interpretation of materials are integral parts of the scientific practice and different approaches might lead to different interpretations of the same material. [84]

In her book *Simians, Cyborgs, and Women*, prominent STS scholar Donna Haraway criticises the traditional ideal of universal objectivity in science.[85] However, the alternative to what she calls the ideology of 'firm objectivity' is not complete relativism. Both relativism and claims of objectivity are totalizing visions because their proponents deny responsibility and critical

[83] https://www.klimasøksmål.no/en/2019/10/31/legal-documents-in-english/ (Documents last accessed in November 2022)

[84] https://www.forskningsetikk.no/en/guidelines/social-sciences-humanities-law-and-theology/guidelines-for-research-ethics-in-the-social-sciences-humanities-law-and-theology/

[85] Haraway 1991, *Simians, Cyborgs, and Women: The Reinvention of Nature*, 8.

inquiry by "promising vision from everywhere and nowhere equally and fully".[86] Haraway presents the notions of positioned rationality, or situated knowledge, as an alternative, grounding value in scientific practice. Positioning, she writes, "implies responsibility for our enabling practices".[87] In this thesis, my practices of selecting court documents, retrieving quotes, and choosing theoretical frameworks and approaches enable a certain understanding of *Klimasøksmålet*. In the spirit of positioning, assembling documents is also best understood as *generating* empirical material and not as the more traditional phrase of *collecting* data. These materials are not simply collected as raw data; they are generated in a certain context and enable a particular story.

This means that other studies of *Klimasøksmålet* would activate the material in different ways and initiate other discussions than those I engage with here. As an example, I have chosen to read the ruling provided by the Supreme Court with attention to how the parties have modified their arguments throughout the lawsuit and thus how their perception of the issue might have changed through the legal process. Another interesting approach to the document would be to examine what impact the Court's decision has had, and will have, on Norwegian decision-making. This could also be a way to explore the role of the Supreme Court justices in shaping future perceptions of climate and oil. However, the point is that the case can be studied in ways that would raise other questions and direct the reader to other strands of theoretical literature and different selections of court documents than mine. And as I read Haraway, acknowledging this positioning and its effect on how we engage with and activate our materials is part of an ethical and responsible scientific practice.

2.7. Choice of Documents

An advantage of and motivation for studying the case of *Klimasøksmålet* is that it is incredibly well documented, with a large number of publicly available documents, either presented or written by the different parties, and with extensive rulings from all three courts: Oslo District Court, the Borgarting Court of Appeal, and the Supreme Court. As an illustration of the sheer volume of documents produced and gathered on the occasion of this

[86] Haraway 1991, 191.

[87] Haraway 1991, 193.

lawsuit; the written evidence presented to the Supreme Court amounts to six thousand pages. I have, in other words, had to be very selective about which documents to analyse.

I have chosen to do a careful reading of three documents, and the three following chapters each take a practice-oriented approach to one of them. The first is the organisations' notice of proceedings or summons (*stevning*), which introduces the content of the case for the first time. And the second is the government's notice of defence (*tilsvar*), which states what grounds the Ministry will base its defence on. These are the two first documents of the case. They are part of the category of court documents called 'the statements of case' or 'pleadings' (*prosesskriv*). These include the introductory and the closing arguments in all three court rounds and are written by the representatives of the NGOs on one side and the Attorney General on the other. They are the documents in which the parties both present the factual basis on which they argue their case and summarise their legal arguments. They are thus central to understanding how the parties frame the issue of the production licenses awarded in the 23rd licensing round in 2016.

The third document I will analyse is the judgement delivered by the Supreme Court and written by Justice Borgar Høgetveit Berg. My intention when reading the judgement is to examine the justice's perception of the parties' arguments and to see if it can tell us something about whether the parties have changed their arguments during the legal process, which spans over a period of four years. Or in other words, whether the issue has been modified through its treatment in the courtroom. Most important for my analysis is therefore what he perceives to be the essence of the conflict and his summary of the arguments made on both sides in the three court rounds. The Supreme Court ruling is also the final treatment the case will be subject to in the Norwegian legal system. Therefore, the document's summary of the arguments made in this court round is important because it shapes how the issue will be understood by future decision-makers, legislators, and judges faced with similar questions. In short, it establishes precedent.

The reason I have chosen to look at the two first documents in the case and the last one follows from my practice-oriented approach to them. I have directed my attention both to what the documents say and what they *do.* And the actions these three documents perform are particularly interesting. The two statements of case bring the 23rd licensing round to court for the very first time and are central to transforming the issue from a political to a legal one. The ruling from the Supreme Court marks the end of its journey through the Norwegian legal

system and can be understood to settle the discussion of what this case has been about. My analysis will untangle and discuss the concepts the two parties use, how they formulate their arguments, and what evidence and legal sources they put forward.

3. EXPANDING THE ISSUE: THE PLAINTIFFS' ARGUMENTS

During *Klimasøksmålet's* three court rounds, the NGOs and the government made various arguments concerning the 2016 decision to award oil production licenses in the Barents Sea. They contested each other's interpretation of the constitutional provision Article 112, their view of the licenses' possible environmental repercussions, and consequently, how future generations are best taken care of. In the following three chapters, I will dive deeper into the arguments made by the environmental organisations and the state. And I begin with those put forward by the plaintiffs.

The notice of proceedings, or summons, from Oslo District Court, is dated October 18th 2016. It is prepared and written by Greenpeace Nordic and Nature and Youth's legal representatives Cathrine Hambro and Emanuel Feinberg at the law firm Wahl-Larsen to let the defendant, the Ministry of Petroleum and Energy, know they are required to meet in court and why.[88] It is a 49-page document and begins with five pages briefly introducing the case, the plaintiffs, and their primary arguments. It then moves on to three longer sections laying out the scientific evidence the organisations present to support their claims. These are titled "Facts of the case – Particulars regarding the licenses and the geographical areas they involve", "The harmful effects of the licensing decision", "Socio-economic considerations", and "Particulars regarding the proceedings before the decision was taken". These are followed by the section "Legal arguments", where they apply their chosen provisions and legal sources to the case of the licenses and their environmental effects.[89] The document ends with their final claim: "The decision of the Government of Norway through the Ministry of Petroleum and Energy on awarding production licenses in the twenty-third concession round, laid down in the Royal Decree of June 2016, is invalid."[90]

The summons is thus the first document to collect and express the plaintiff's view of the production licenses and the issue at hand. But this document also brings the issue to court and the field of law in practice. It was carefully crafted by the organisations and their legal representatives at Wahl-Larsen and sent electronically to the Oslo District Court and the

[88] Notice of Proceedings [Stevning til Oslo Tingrett], October 18th 2016; Notice of Defence [Tilsvar til Oslo Tingrett], December 14th 2016.

[89] Notice of Proceedings, October 18th 2016, 3-4.

[90] Notice of Proceedings, October 18th 2016, 49.

government through the Ministry of Petroleum and Energy.[91] As such, it physically ties these actors together by establishing a legal issue around which an enormous number of documents are digitally assembled and written. It also requires all representatives, lawyers, judges, and witnesses to meet in the courtroom physically.

But why do the plaintiffs initiate this gathering of documents and people? What reasons do they give for bringing the issue to court? To search for answers to these questions, I will explore the different statements made by the NGOs in the summons. They first introduce their legal interpretation of Article 112 before making two arguments concerning the environmental damages the licenses might lead to and two additional claims concerning inadequate assessments of socio-economic proportionality and procedural errors leading up to the licensing decision.

3.1. Interpretation of Article 112

The first claim that the environmental organisations make in their summons is that the decision to award licenses "contravenes the state's duty to take account of environmental considerations, including climate considerations".[92] It rests upon their interpretation of the newly revised Article 112, the so-called environmental article. The organisations argue that Article 112 provides the court with jurisdiction to determine whether the decision to award the production licenses is acceptable "on the basis of environmental considerations".[93] In other words, this argument concerns whether *Klimasøksmålet* 'qualifies' to be decided upon in a courtroom at all and is thus fundamental for the rest of their argumentation and the consideration of their case. In the summons, the plaintiffs' arguments for this interpretation are presented matter-of-factly. However, we will see from the notice of defence that this reading of the constitutional article is controversial. It was both rejected by the government and was widely discussed in the Norwegian public sphere from the beginning of the trial.[94]

The organisations present some historical context to Article 112. The environmental article was first adopted as Article 110b in 1992 and led to extensive judicial theoretical debate: Did

[91] Notice of Proceedings, October 18th 2016, 49.

[92] Notice of Proceedings, October 18th 2016, 8.

[93] Notice of Proceedings, October 18th 2016, 40.

[94] Nordby 2021, 14.

it grant individuals enforceable, material rights, or should it be considered a declaration of policy?[95] In other words, what jurisdiction did it give the courts? In the summons, the organisations state that the discussions among legal scholars in 1992 were intricate but that they bear witness to a consensus on the fact that Article 110b provided courts with jurisdiction to review administrative decisions – such as the decision to award production licenses – and on the fact that the actors involved in the process of implementing the article were aware of this function.[96] They substantiate this by referencing textbooks within environmental law, written by Norwegian legal scholars Hans Christian Bugge, Inge Lorange Backer, and Ole Kristian Fauchald.

But this is the extent of the prelude and context of Article 110b presented in the summons. It is interesting to note here that the plaintiffs limit their references to the historical situation surrounding the implementation of the environmental article. We will see that they focus on arguing for their interpretation by providing empirical evidence of the current state of the environment and Norwegian oil production, and not on the article's legal history and preliminary works. This can be read as an indication to the fact that their reading of the Article challenges legal precedent. It will not benefit their case to state explicitly that their interpretation is controversial. Instead, they can be seen to discreetly avoid historical legal references and emphasise an empirically rooted narrative.

According to the organisations, the revision of the Constitution in 2014 also speaks for an interpretation of Article 112 as an article that provides a basis for judicial review of administrative decisions and grants individuals with concrete rights enforceable in the courtroom.[97] With the revision, the article was slightly rephrased and moved to the Constitution's new section for human rights. The revision also entailed a change of its third section from "The authorities of the state *shall issue further provisions* for the implementation of these principles" in Article 110b to "The authorities of the state *shall take measures* for the implementation of these principles."[98] The plaintiffs interpret this amendment as a

[95] Notice of Proceedings, October 18th 2016, 40.

[96] Ibid.

[97] Notice of Proceedings, October 18th 2016, 41.

[98] Notice of Proceedings, October 18th 2016, 8.

clarification of the individual's right to a safe environment and argue that the intention was to strengthen the state's obligations under the provision.[99]

The plaintiffs lastly argue that Article 112 sets an absolute threshold for the environmental damages that can be tolerated as the result of an administrative decision. And they state that the sum of negative environmental impacts following the licensing decision renders it invalid. This will be elaborated on below. They also claim that, regardless of whether the courts decide that Article 112 establishes such a material threshold, the article establishes a requirement of proportionality: "if a decision represents a disproportionate environmental encroachment compared with the decision's benefit, the decision will contravene Article 112 of the Constitution."[100] This means that before deciding to award production licenses, the Ministry should assess its possible negative effects on the environment and its potential socio-economic benefits and weigh these against each other.

The organisations return to the argument concerning proportionality in a later section, presenting evidence for their claim that the licensing decision is invalid due to a disproportionate risk of environmental damages. In this section, however, they first establish proportionality assessments as a requirement that follows their interpretation of the Constitutional provision. In other words, they introduce the concept of proportionality to the court, allowing them to present evidence related to it. This also means that proportionality is a term and an idea that the government must reply to in its defence. Because my narration of these arguments follows the document's structure as closely as possible, I will also return to a more thorough description of the proportionality argument when the organisations do. But the important thing to notice here is that when a new concept is introduced in this document, it also establishes a new point of contention to the case.

3.1.1. International Principles of Environmental Law

The summons also presents legal principles from international environmental law that should influence the application of Article 112. The first of these is the precautionary principle, which has a long tradition in Norwegian and international environmental law. The formulation of the principle used by the organisations is that the authorities are required not to

[99] Notice of Proceedings, October 18th 2016, 8; 41.

[100] Notice of Proceedings, October 18th 2016, 8.

use “a lack of knowledge as a justification for failing to limit or prevent a risk of serious harm.”[101] In other words, if there is a risk of the licensing decision leading to detrimental environmental effects, uncertainty or a lack of knowledge cannot be used as an argument to make it. Furthermore, the plaintiffs argue that this principle places the burden of proof on the authorities. Given that there is a possibility or likelihood of environmental damages from the licensing decision, “it must be assumed that the decision will have this impact if the state cannot prove the opposite is more likely.”[102]

According to the organisations, transboundary environmental harm is the second relevant international principle. Here, the summons references the Norwegian Pollution Control Act, which states that pollution and waste problems that result from activities on Norwegian territory should be treated and counteracted in the same way regardless of whether those problems arise in Norway or abroad. This rule reflects the ‘non-discrimination principle’ and the ‘no harm principle’ in international law, meaning that the Norwegian government must consider and protect the environment regardless of national borders in all its decisions.

The effect the organisations create when drawing on these two principles in their interpretation of Article 112 is that the environmental damages the courts must consider under the article are neither confined to the immediate future nor Norway’s national borders. The precautionary principle implies that when faced with future uncertainty, decision-makers today should either avoid a specific action completely or take protective measures rather than wait for scientific consensus and certainty. It thus relates to the discussion presented in the theoretical section on how openly the future should be understood and encourages policymakers to consider the possibility of tipping points and disruptive events. On the other hand, the principle of transboundary harm turns Article 112 into a provision with international, even global, reach. And, if the courts agree to this interpretation, the provision can thus be invoked to render Norwegian governmental actions resulting in CO_2 emissions invalid because they affect the global climate. In other words, by introducing these two principles, the organisations expand the temporal and spatial scale of environmental damages from the 23rd licensing round.

[101] Notice of Proceedings, October 18th 2016, 44.

[102] Notice of Proceedings, October 18th 2016, 45.

3.2. Environmental Damages from the Licenses

Following the organisations' argumentation concerning the legal nature of Article 112, the article imposes requirements on the public administration, the Ministry of Petroleum and Energy included, and establishes long-term environmental considerations as mandatory when it decides on individual matters. If state authorities make decisions that breach every person's, including future generations, right to a healthy environment, the courts can declare them invalid.[103] The plaintiffs argue that Article 112 sets "an absolute threshold governing the extent of the damage and risk to which the environment can be exposed"[104] and that there is "no doubt" that the environmental damages and risks related to the production licenses exceed this threshold and infringe "on the core of the interests Article 112 of the Constitution protects."[105]

But, at the same time, not every environmental encroachment amounts to a constitutional violation, so the central question thus becomes: when does it? Which potential environmental repercussions are relevant and need to be considered? How should risks be assessed, and should they be weighed against potential benefits? The NGOs lay out two different arguments, 'the climate argument' and 'the vulnerability argument', concerning two different categories of environmental damages from the licensing decision. They argue that the two amount to breaches of Article 112 both separately and combined. In the following, I will lay out the two arguments and the scientific basis the plaintiffs present for them.

3.2.1. The Climate Argument

According to the plaintiffs, the climate effects from the production licenses amount to violations of Article 112 of the Norwegian Constitution as they "represent an infringement of the fundamental constitutional rights of every person, including future generations, to a healthy environment (including a liveable climate)".[106] This is what they call 'the climate

[103] Notice of Proceedings, October 18th 2016, 42.

[104] Notice of Proceedings, October 18th 2016, 8.

[105] Notice of Proceedings, October 18th 2016, 43.

[106] Notice of Proceedings, October 18th 2016, 5.

argument': The licenses will facilitate continued oil production and increased CO^2 emissions from the Norwegian continental shelf and in the places where the petroleum is combusted.

As previously mentioned, their interpretation of Article 112 involves an absolute substantive limit on activities that impair the environment's health, productivity, and diversity. And the determination of this limit must be made on "the best possible scientific basis."[107] Under the subheading "Knowledge basis – starting points", the organisations present the Intergovernmental Panel on Climate Change (IPCC) and its Fourth and Fifth Assessment Reports (AR4 and AR5) as the primary sources of "established, scientifically based knowledge of the earth's current climate."[108] The reports summarise the status of current knowledge on climate change and are several thousand pages long. The cited reports from 2007 and 2014 state that the world must limit global warming to avoid irreversible and detrimental climate changes and are referenced thoroughly in this section of the summons. They also form the basis for the negotiations at the United Nations Framework Convention on Climate Change (UNFCCC) and its Conference of the Parties (COP).[109] What the organisations are doing here is thus drawing on the most authoritative international body in climate science.

In the summons, the organisations first narrate the different climate change and emission reduction pathways, as presented in the two reports. To reach the 2°C target, global emission reductions will have to be done at a pace of 25-40% before 2020 or 80-95% before 2050, based on 1990 levels.[110] And if the international community continues with "business as usual" or sticks to the current emission pathway, this could lead to warming between 2,6-7,8°C, depending on the uncertainty added to the simulation models.[111]

The summons also devotes a subsection called "Cumulative CO_2 emissions, 2012-2100" to the introduction of 'carbon budgets'. These are calculations of the cumulative amount of CO_2 the atmosphere can sustain over a period of time, given a certain temperature threshold, such

[107] Notice of Proceedings, October 18th 2016, 16.

[108] Ibid.

[109] Ibid.

[110] Notice of Proceedings, October 18th 2016, 18.

[111] Notice of Proceedings, October 18th 2016, 19.

as the 2°C target. The petroleum licenses awarded in the 23rd licensing round facilitate future petroleum production, and the question the organisations raise is thus whether there is "room for" the emissions the licenses will lead to within the carbon budget, which again determines the amount of petroleum that can be looked for and produced.[112] Again, they reference models from AR5 and other scientific reports showing how 65% of the total carbon budget required to reach the 2°C goal had already been emitted in 2011. This means that a substantial share of the world's petroleum reserves can never be produced – a fact that the organisations argue has been known for a long time. The plaintiffs conclude this section by alleging that "planning for petroleum production far into the future is not consistent with the reduction in CO_2 emissions required to avoid damaging climate changes."[113]

The scientific knowledge from the IPCC on climate change and the carbon budget constitutes the factual basis for the Paris Agreement, which was negotiated at the twenty-first COP (COP21) in December 2015. Through the legal framework of the Paris Agreement, all countries have committed themselves to limit global warming to well below 2°C, preferably 1,5°C. The Norwegian government ratified the Agreement in 2016 and is thus bound to contribute to reducing the world's CO_2 emissions. [114] This is the global and scientific backdrop against which the organisations begin to discuss Norway's national emission reduction targets and the country's performance by these.

The structure of the summons, where the international scientific and legal institutions on climate change are presented before moving on to the specifics of Norwegian climate and petroleum policies, reveals the importance for the organisations to situate the case of *Klimasøksmålet* within a global context, where possible emissions and environmental damages are not just a national concern. The plaintiffs also limit their references to scientific reports officially 'accepted' or commissioned by the Norwegian government. When stating that significant shares of global petroleum resources must be left in the ground because of the carbon budget, they reference a report prepared by the private energy research company Rystad Energy on behalf of the Ministry of the Environment. And by building their narrative on the IPCC reports that form the scientific basis of the UNFCCC, the organisations also aim

[112] Notice of Proceedings, October 18th 2016, 20.

[113] Notice of Proceedings, October 18th 2016, 22.

[114] Notice of Proceedings, October 18th 2016, 17.

to show how the government, through the ratification of the Paris Agreement, has endorsed the facts they present. This also contributes to placing the licensing decision within a narrative that allocates responsibility among a range of international actors, including the Norwegian government and courts, and establishes a timeframe with carbon budgets and emission reduction pathways that stretches far into the future.

Given this context, the plaintiffs state that "Norwegian authorities quite clearly understand and accept that it is of great importance to significantly reduce the emissions of CO_2".[115] However, from 1990 to 2015, Norway's greenhouse gas emissions increased by 3,9% annually. There has been a consistent gap between the requirements for emission reductions, or 'climate targets', set by Parliament and the actual numbers. In 2016, the climate target in force under the UNFCCC was to reduce Norwegian greenhouse gas emissions by 30% by 2020, compared to 1990 levels. The organisations cite the Norwegian Environment Agency (NEA) and other reports predicting a considerable discrepancy between the target and the actual emission levels in 2020.[116] In other words, they show how Norway has consistently lagged behind in the attainment of the targets that "represent the authorities' own assessment of what has been considered appropriate and necessary at given points in time."[117]

From here, the organisations discuss the emissions from the petroleum production licenses awarded in the Barents Sea South (BS) and Barents Sea South-East (BSE) in particular. They state it is irrelevant to the world's climate, where petroleum is combusted. Therefore, it is not only the emissions from the production on Norwegian territory that needs to be assessed under Article 112 but also the amount of CO_2 the petroleum will generate after it has been exported. Based on numbers from the Norwegian Petroleum Directorate, Nature and Youth has estimated that the CO_2 emitted from the combustion of the oil and gas found in BS and BSE would amount to 4767 million tonnes and thus occupy 0,5% of the total global carbon budget, given the 2°C target. This is a rather explicit way of situating the particular case of production licenses in BS and BSE within the *global* carbon budget, which is defined as the amount of CO_2 the atmosphere can accommodate over a certain *period of time*. The carbon budget is thus an inherently temporal concept because it creates a connection between

[115] Notice of Proceedings, October 18th 2016, 24.

[116] Notice of Proceedings, October 18th 2016, 24-28.

[117] Notice of Proceedings, October 18th 2016, 25.

political decisions made today, the greenhouse gas emissions these decisions will lead to, and the climatic and social future we can expect because of them. The concept also creates a clear sense of global responsibility.

The plaintiffs also seek to debunk a fact that "has been claimed", although they do not specify by whom, that if Norway leaves its petroleum resources in the ground, other countries will increase their production accordingly. In other words, a Norwegian reduction in petroleum production would not affect the global carbon budget. It is worth a comment here that the organisations refrain from saying who has made the claim they are arguing against. But a reader with knowledge of the public debate surrounding Norway's dual role as a leader in international climate negotiations and a significant oil producer will recognise this argument as quite commonly made by supporters of continued exploration and production of petroleum resources. The plaintiffs are thus not only arguing against their government but also parts of the Norwegian public looking favourably at the oil and gas industry.[118] Either way, they claim that the argument is factually incorrect and reference a report by researchers at Statistics Norway, an independent government agency, stating that "for each per cent decline in Norwegian oil production, global CO_2 emissions fall by approximately one million tonnes."[119]

In this section, the organisations also problematise the expected "lifespan" of Norwegian oil and gas fields, meaning the time the fields are expected to be in active production. This varies from 4 to 80 years, with an average lead time of 10 years from the discovery of petroleum resources to the actual production begins. This means that the estimated start dates for production in the awarded areas in BS and BSE would be 2026 and 2029, again underlining how the licensing decision primarily facilitates future petroleum production and emissions.[120] And as time passes, the carbon budget shrinks.

3.2.2. The Vulnerability Argument

In addition to the climate argument, the organisations present the vulnerability argument: the licenses represent unacceptable risks for local environmental effects in previously unexplored

[118] Lahn and Rowe 2015, "How to be a front-runner: Norway and international climate politics", in *Small State Status Seeking. Norway's Quest for Interational Standing,* ed. Benjamin de Carvalho and Iver Neumann.

[119] Fæhn, Rosendahl et al. 2013 quoted in Notice of Proceedings, October 18th 2016, 28.

[120] Notice of Proceedings, October 18th 2016, 20.

and particularly vulnerable areas located around the marginal ice zone (MIZ) in the Barents Sea South and South-East. The vulnerability of areas in BS is defined and asserted in a management plan (*forvaltningsplan*) from 2010-2011, which is the organisations' starting point when presenting the possible local effects of the licenses. The management plan is a scientific report and white paper prepared for Parliament by several Norwegian directorates and scientific institutions to facilitate a profitable industry that still protects the area's environmental value. Half of the relevant regions of BS are described as having "great importance for biodiversity". No management plan exists for the areas in question in BSE, which, according to the plaintiffs, breaks with previous management practices.[121]

When arguing for the vulnerability of the areas in BS and BSE, the organisations reference two consultation statements (*høringsuttalelser*) written to the Ministry of Petroleum and Energy by the Norwegian Polar Institute (NPI) and the NEA. They were written in February and March 2013, respectively, after the Ministry suggested areas to be announced in the 23rd licensing round. The NPI stated that "some of the proposed blocks in northern parts of the Barents Sea South-East overlap with particularly valuable and vulnerable areas"[122] and called for an additional assessment of the possible negative effects petroleum activities can have in the area. The organisations write that, to their knowledge, no such assessment was made. The institute concluded that 14 of the total 40 blocks suggested by the Ministry should not be awarded. The NEA also advised against granting 20 out of the 40 blocks and pointed to an inadequate knowledge basis regarding the possible effects of oil spills and accidents so far north and the need for a clear boundary towards the MIZ.[123]

The main concerns for the two agencies and the plaintiffs are the risks connected with so-called 'black carbon' emissions and possible oil spills. Black carbon (BC) is fine soot particles and is emitted in connection with petroleum production through combustion, drilling, construction, and shipping. Emission of BC, the plaintiffs write, is both an environmental problem, as it negatively affects the ecology and wildlife close to the ice edge, and a severe climate problem. It has a greater negative climate effect than CO_2 because it leads to quicker ice and snow melting. The climate effects of BC are also stronger the further north it occurs

[121] Notice of Proceedings, October 18th 2016, 29-31.

[122] Letter of the Norwegian Polar Institute to the Ministry of Petroleum and Energy of 14 February 2014, quoted in Notice of Proceedings, October 18th 2016, 31.

[123] Notice of Proceedings, October 18th, 29.

and thus speaks against opening blocks closer to the MIZ. When it comes to potential oil spills, these can be "completely destructive" for arctic seabirds, marine mammals and fish that use them as resting, feeding, and breeding ground. Oil spill response will also be complicated in areas as far north as the blocks in question because they are far from land and periodically covered with ice.[124] The plaintiffs lastly allege that Norway, "as one of the world's very few petroleum-producing countries with resources in areas north of 70 degrees north, has a special responsibility for administering the marginal ice zone and the ice in the Arctic."[125]

An interesting aspect of the vulnerability argument is how it differs from the climatic one in terms of temporality and geographical scope. The vulnerability argument centres around environmental impacts that are local and urgent, demanding immediate emergency response. As we have seen, the climate argument is built on a far longer time horizon and geographical reach. Because decision-makers within economics, law, and politics are used to dealing with problems that are closer in time and more local in nature, the climate argument thus challenges the established regime of petroleum governance more fundamentally than the arguments of local vulnerability do. The plaintiffs' arguments about climate emissions attempt to change the issue from one concerning a national industry to one of intergenerational and global responsibility.

The fact that the climate argument poses a more significant challenge to the established bureaucratic procedures than the vulnerability argument also becomes evident through the organisations' use of expertise and scientific evidence to support the two. They reference international reports and institutions when arguing that the greenhouse gas emissions from production in BS and BSE will lead to a breach of Article 112. And when presenting arguments related to the local vulnerability of the areas in question, they reference national agencies, such as the Polar Institute and the NEA. This is because environmental damages such as oil spills and black carbon already fall within the Norwegian authorities' effective jurisdiction and governance practices – and the plaintiff's legal action is an attempt to include national and international emissions in these practices as well.

[124] Notice of Proceedings, October 18th, 34-35.

[125] Notice of Proceedings, October 18th, 34.

3.3. Socio-Economic Proportionality

Thus far in the summons, the plaintiffs have presented their arguments and evidence as to why the decision to award licenses in 2016 amounts to a breach of Article 112 of the Constitution. Given their interpretation of the article, the climate argument and the vulnerability argument presented above constitute violations of the absolute limitation set by Article 112, both separately and combined. But the organisations also interpret the article to establish a proportionality requirement. This would mean that the Ministry must assess whether the decision "*ought* to be taken" based on "whether the benefit from the decision exceeds the harmful effects."[126] They also state that this requirement exists regardless of whether the courts agree on the article's alleged absolute threshold. It can thus function as an independent and alternative ground on which the decision can be rendered invalid.

To decide whether the licensing decision is proportionate, the organisations identify the benefits the Ministry expects from the licenses as "1) the revenue received by the Government of Norway from the production and 2) employment effects in a broad sense".[127] The government covers most of the costs in the initial exploration phase of a field, which means that for the decision to be profitable, revenues from production must cover these expenditures. In the summons, the NGOs claim that there is a risk that the economic effects could be negative for the authorities in total. The main reason for this, they state, is that "a number of factual circumstances [presented above] indicate that the world's need for emission reductions means that there is 'no room' for these petroleum resources throughout the lifespan of the fields."[128] In other words, they question the government's prediction of future revenues from the potential oil fields in BS and BSE. But in the summons, they leave this argument here and "reserve the right" to elaborate on it later.[129]

[126] Notice of Proceedings, October 18th, 36.

[127] Notice of Proceedings, October 18th, 36.

[128] Notice of Proceedings, October 18th, 36-37.

[129] Notice of Proceedings, October 18th 2016, 37.

3.4. Procedural Errors

The organisations also state that the licensing decision should be ruled invalid due to several procedural errors.[130] This is presented as a separate argument to those concerning Article 112. If the courts decide that the licensing decision is constitutional, it should nonetheless be ruled invalid due to inadequate assessments under the Norwegian Petroleum Act.

According to the Norwegian Petroleum Act, an evaluation "of the various interests in the relevant area" should be carried out before any licenses are awarded. This evaluation should include and weigh the petroleum activity's possible economic and social effects and its impacts on the industry, trade, and environment. [131] In the case of the 23rd licensing round, the organisations argue that the Ministry has failed to adhere to these demands as its impact assessment inadequately addresses questions of 1) the licenses' relations to Norway's climate obligations, 2) economic proportionality, and 3) of the potential environmental damages to particularly vulnerable and valuable areas. An evaluation of these points could have raised several questions in Parliament and the bureaucracy that might have affected the decision to open the areas in question for exploration.[132]

Even though the alleged procedural errors are presented as an alternative or separate argument, they are closely related to and based on the evidence presented above. First, it is argued that the only evaluation of whether the opening of the areas in BS and BSE is consistent with Norway's national emission reduction targets and its international obligations was conducted in April 2012, in the White Paper on Climate Change (*Klimameldingen*, St. 12 (2011-2012)). The organisations call it "astounding" that a White Paper from 2012 is the only assessment of whether production licenses issued in 2016 "are consistent with the available knowledge about the planet's climate and the need for large emission reductions." They also argue that the paper from 2012 is outdated because the IPCC's AR5 from 2014 and the Paris Agreement from 2015 represent significant developments in climate change knowledge since

[130] Notice of Proceedings, October 18th 2016, 8.

[131] The Norwegian Petroleum Act § 3-1 quoted in Notice of Proceedings, October 18th 2016, 37.

[132] Notice of Proceedings, October 18th 2016, 3; 37-39.

then and thus "critical grounds" for assessing whether the production licenses can be issued and Norway's obligation to combat global warming be realised at the same time.[133]

The organisations' second reason for alleging procedural errors is that the Ministry has not assessed the licensing decision's economic proportionality. This argument is the same as the one presented in the previous subsection: the authorities have failed to adequately assess whether the potential benefits and revenues from the licenses outweigh their negative environmental effects. Here, the organisations add that the failure to do this assessment not only breaches Article 112 but also the assessment requirements under the Petroleum Act. The third and last claim of procedural error relates to the vulnerability argument, as the government has also failed to assess the local environmental effects of the licenses, as presented in section 3.2.2. Both the NPI and the NEA requested further studies of the risks associated with petroleum production near the MIZ. Still, no such studies were conducted, and the relationship between these vulnerable areas and licenses was not discussed in the Impact Assessment from 2013. Because this is a question of "great environmental importance", it should have been evaluated as required by the Petroleum Act.[134]

What the organisations are doing in these last two sections on socio-economic proportionality and procedural errors is to form a narrative of the Norwegian petroleum governance as lagging behind on the incorporation of climate science in its practices and assessments. They argue that the government's inactions on mitigation measures, its active pursuit of continued fossil fuel production, and its failure to assess the effects of recent climate science on economic profit amount to violations of the laws implemented to regulate and guide its activities, such as the Petroleum Act. To the organisations, the fact that the latest IPCC report has not been part of the scientific basis of the authorities' weighing of climate and petroleum policies illustrates that the Ministry is not keeping pace with the development of scientific knowledge on climate change or with the physical, climatic changes themselves. In short, the plaintiffs create a narrative of urgency on which the government fails to act.

[133] Notice of Proceedings, October 18th 2016, 37-38.

[134] Notice of Proceedings, October 18th 2016, 38-39.

3.5. Summary: Widening the Scope of Article 112

Together, the main arguments made by the organisations show how they believe Norwegian petroleum policies fail to take the environmental crisis into account. Their arguments concerning socio-economic proportionality and procedural arguments are secondary, meaning that they represent the plaintiffs' alternative arguments should the courts rule against their suggested interpretation of Article 112 or their claim that the licensing decision violates it. The climate argument is the one the organisations devote the most space to presenting and substantiating in the summons and thus comes across as the most crucial to their case. The fact that the organisations termed and referenced the case 'the Climate Lawsuit' from its initiation also illustrates how they direct attention to their arguments related to climate change.

The climate argument is both more important and difficult for them to substantiate than the vulnerability argument as it poses a more fundamental challenge to how the authorities currently govern petroleum resources. In the narrative that is constructed in this document, the government is claimed to disregard the long-term, international effects of climate change and, consequently, their impacts on future generations. The authorities are thus presented as fixed on what we can understand as a more traditional way of doing politics, with the range of decision-making confined within national borders and to the immediate future. Through their legal arguments, the organisations seek to widen the scope of Article 112 to encompass climate emissions from the 23rd licensing round. And with their empirical evidence, they expand the geographical and temporal impact of the production licenses by showing how the government's way of managing petroleum resources fails to understand the global nature of greenhouse gas emissions and the international and intergenerational responsibility required by Norwegian authorities to stabilise the global temperature rise at 2°C by the second half of this century.

What the organisations are doing is thus enacting a climate change issue that is global and future-oriented, through their focus on the long-term and transboundary environmental impacts of greenhouse gas emissions. An interesting temporal tension here is their claim that immediate action is needed to take care of future generations. In other words, the facts of climate change represent an environmental urgency that must be responded to, in order to secure a healthy planet for generations to come. This also implies that their issue with the awarded production licenses is wider in scope, both temporally and spatially, than the

government recognises through its practices. And their narrative is created with the use of particular concepts and scientific evidence in the notice of proceedings. The document invokes the concepts of precaution, transboundary environmental harm, and international scientific reports from the IPCC to enact the licensing decision as part of a global issue demanding immediate response.

4. DEFENDING THE ESTABLISHED: THE DEFENDANT'S ARGUMENTS

In *The Making of Law*, Latour remarks how the first document of a trial translates a subject matter "which has given rise to an anger or sadness somewhere" into a legal claim "through a rather mysterious mutation".[135] With the notice of proceedings, the plaintiffs' legal representatives have translated their feeling of injustice into a scientifically based legal opinion on the government's licensing decision and its consequences. The next step in the process is then for the defendant to respond to their claims. The following chapter analyses the defendant's answer and the second document of the lawsuit – the government's notice of defence. It is written by Attorney General Frederik Sejersted, who begins by declaring himself Counsel for the Government of Norway, represented by the Ministry of Petroleum and Energy.[136]

The document is 44 pages long and was signed by Sejersted on December 14th 2016. One copy was sent to Court, and two were sent to advocates Hambro and Feinberg at Wahl-Larsen.[137] It begins with a general summary and structuring of the defendant's arguments. Following this, there is a section with "General Remarks on the Nature of the Action", where it is argued that the issue of the Licensing Decision of June 10th 2016 is ill-suited as a court case and represents an attempt at "juridification" (*rettsliggjøring*) of Norwegian climate policy. I will elaborate on this below. The defence continues with two general and lengthy sections laying out the government's evidence for its claims. These are titled "Petroleum activities on the Norwegian shelf" and "Norwegian climate policy and climate regulations". After this, the section "Article 112 of the Norwegian Constitution" lays out the defendant's interpretation of the article and other legal sources and their conclusion. The document's last section contains "Other comments on the Plaintiff's legal arguments". Here, the government repeats the essence of arguments already put forward in the document but contrasts them more explicitly with the plaintiffs' arguments. For the sake of clarity and to avoid repetition, I have thus chosen to present these comments together with related arguments in different

[135] Latour 2010, 72.

[136] Notice of Defence, December 14th 2016, 2.

[137] Notice of Defence, December 14th 2016, 44.

sections. The defence ends with the government's counterclaim: "The Government of Norway through the Ministry of Petroleum and Energy is to be found not liable."[138]

In the following, I will closely examine the state's arguments in a similar way to the organisations' above. The notice of defence is the starting point of this narration and discussion. It answers the summons presented above, rebutting the plaintiffs' claims and referencing them along the way. The environmental organisations' claims thus become contextualised. It is not necessarily evident when reading the notice of proceedings above what the plaintiffs argue *against* or why their arguments are controversial. However, the notice of defence establishes the lawsuit as a dispute in which two parties have something at stake. Thus, *Klimasøksmålet* emerges as an issue and a controversy between several actors, and it becomes evident where their disagreements lie.

4.1. The Nature of the Action

The first argument presented in the document is the defendant's opinion of what *kind* of issue the plaintiffs have raised. What is the nature of this legal action? The government agrees that the case concerns the specific awarding of licenses in the 23rd licensing round adopted on June 10th 2016, and its validity. However, "it is also important to be aware that the case has obviously been presented in principle as a test case – both to test the reach of Article 112 of the Norwegian Constitution, and to generally test the relationship between Norwegian petroleum policy, and environmental and climate policy."[139]

Thus, the government calls *Klimasøksmålet* a "general climate action": the organisations' intentions are not just to challenge the validity of the licensing decision but also the government's general weighing of climate and petroleum.[140] According to the government, this becomes evident when examining the pleas and arguments in the notice of proceedings closely, and it determines whether the case is suitable for treatment in the courts. The defendant states that some of the plaintiffs' arguments specifically relate to the 23rd licensing round, but others relate more generally to petroleum production in the Barents Sea. And others are even more general and could not only affect any decision to award production

[138] Notice of Defence, December 14th 2016, 44.

[139] Notice of Defence, December 14th 2016, 6.

[140] Ibid.

licenses, grant approvals and developments for the petroleum industry but could potentially have consequences for all decisions within trade, transport, or agriculture policy. In short, "any measure or decision issued by the authorities that could potentially result in new greenhouse gas emissions". [141] The courtroom is an appropriate arena to assess and discuss the validity of a specific administrative licensing decision, the defendant states, "but not for a wide-ranging debate on the challenges of national and global climate policy, as the Notice of Proceedings and numerous exhibits invite us to believe."[142]

The government continues to argue that the organisations' interpretation of Article 112 extends the article's reach much further than any judicial basis provided by other legal sources and much further than its drafters and the Parliament intended. The defendant characterises this as a "judicial leap" with the intention of juridifying climate and environmental policy. Or in other words, to shift the established distribution of power between the Government, Parliament, and the courts. The defendant presents an exhibit of excerpts from Norwegian newspapers such as Klassekampen, VG, and Aftenposten to show how the public debate also identified the risk of the lawsuit moving the issue from democratic decision-making processes into the legal system. The government argues that the public debate at the time captured the essence of the case. The content of the national climate and environmental policy is a "political and technical issue, not a legal one". The opening of new areas for petroleum involves weighing a range of conflicting interests and considerations and is, as such, best handled through administrative, technical, and political processes and should ultimately be decided upon in Parliament. The court is "by its very nature" ill-suited for this task. It should not make a decision in *Klimasøksmålet* "based on a brief and general wording of a constitutional provision, which was formulated without this in mind".[143]

The first argument presented in the District Court by the defendant is in other words that the case should not be there. Furthermore, no legal basis is found in the preparatory works or the wording of Article 112 to support the plaintiffs' expansive interpretation. And their interpretation would, according to the government, entail a transfer "of power to determine the main features of Norwegian petroleum policy and climate policy – and their

[141] Ibid.

[142] Ibid.

[143] Notice of Defence, December 14th 2016, 6-7.

interrelationship – from the politically responsible authorities (Government and the Storting) to the courts" and thus constitute a challenge to democratic processes.[144]

Here, we can already see how the parties' understanding and framing of the issue at hand diverges. In this case, the government states that its main concern is not related to climate and scientific facts but rather to the challenges it poses to the constitutional separation of powers. The fact that the Attorney General has written this as the first section of the document enables him to first protest his presence in court before moving on to his rebuttal of the claims and materials presented by the organisations. The rest of the arguments he will present related to petroleum governance and climate policies will thus be presented against the backdrop of what the defendant perceives as the *real* issue: the juridification of a political process.

4.2. Managing Petroleum Activities

After establishing its concerns about the separation of powers, the government presents how it generally manages and regulates petroleum activities. It states that knowledge of these general regulations is required to understand the organisations' claims regarding inadequate assessments and considerations of the environment and subsequently to rebut them. The document describes the phases leading up to production and the assessments and processes initiated and conducted along the way. This section, titled "Petroleum Activities on the Norwegian Shelf", takes up 21 of the document's 44 pages. It starts with a general history of national petroleum production, dating back to the first licensing round in April 1965. Illustrated both with a map and a timeline, the formal opening of the Barents Sea South in 1979 and the Barents Sea South-East in 2013 is placed within Norway's 50-year-long history of production. Thus, the government shows how petroleum activities have been the country's most important industry for half a century and how there is a broad political consensus that they will continue to play an essential role in the economy.[145]

The petroleum industry is subject to well-functioning and stringent regulations, both when it comes to safety and the environment. The authorities illustrate this by explaining the allocation of roles and responsibilities between the different state entities when it comes to activities on the continental shelf: First, the Parliament establishes the legislative framework,

[144] Notice of Defence, December 14th 2016, 7.

[145] Notice of Defence, December 14th 2016, 7-10.

and there is a requirement for its approval for all major petroleum developments. Then, the different governmental institutions carry out various tasks related to taxation, emergency response and safety, environmental protection, monitoring, and exploration. These include the Ministry of Petroleum and Energy, the Ministry of Climate and Environment, the Ministry of Labour and Social Affairs, the Ministry of Finance, the Ministry of Transport and Communications, the Ministry of Trade, Industry and Fisheries, and several of their various underlying agencies, such as the Norwegian Environment Agency we encountered in the summons. And last, commercial decisions related to profitability are made by the companies that perform the actual production activities under the terms and frameworks provided by the issued licenses.[146]

The government also gives a detailed description of the opening of sea areas and the process from "untouched shelf to actual production". A central part of this process is the impact assessment the Ministry performs, which includes risk assessments of potential environmental effects. The Petroleum Act sets the requirements. The finished impact assessment is sent to affected authorities, stakeholder organisations, and public consultation, after which the Ministry assesses whether there is a need for further investigations before it is presented to Parliament. Once it has been decided to open the area in question, production licenses can be awarded. This is usually done through licensing rounds, where different geographic areas, or blocks, are announced by the Ministry and companies are invited to apply.[147] From 1965 to 2016, 1129 petroleum production licenses were issued – covering 2394 geographical blocks. The government writes that "for purposes of comparison, this action relates to the validity of the 23rd round, thus ten licenses covering a total of 40 blocks or parts of blocks." [148]

After a detailed description of the process of licensing rounds, the defence also explains the process of drilling exploration wells, an activity conducted by the license rights holders. If they discover resources and commercial finds, they must carry out a plan for development and operation (PDO), also regulated by the Petroleum Act. The PDO includes further environmental impact assessments of the concrete development plans in the area. The point for the government here is to show that an impact assessment has already been conducted for

[146] Notice of Defence, December 14th 2016, 10.

[147] Notice of Defence, December 14th 2016, 11-13.

[148] Notice of Defence, December 14th 2016, 13.

the blocks in the 23rd licensing round and that further investigations will be made through PDOs if any commercial findings are made. Additionally, these assessments are part of transparent processes where they are continuously "subject to extensive public consultation procedures".[149]

After this, the defence narrates the history of petroleum activities in the geographical area of the Barents Sea in particular, which includes major oil fields such as the operative Snøhvit and Goliat, and the planned Johan Castberg field, for which the right holders had submitted its impact assessment to public consultation in September 2016. The government uses these fields as evidence to illustrate how petroleum activities have been safely conducted in the Barents Sea for years. And it also seeks to demonstrate how Parliament is thoroughly involved in the different stages of opening, licensing, and planning. These processes are thus not only subject to technical and administrative management but also popularly elected control.[150]

And importantly, the same will be true for the newly opened areas in the Barents Sea South-East. The process of opening BSE is the theme of the next section in the defence. The government underlines that 24 studies were done to gather knowledge and map possible environmental effects of petroleum production in the areas. The studies concluded that "petroleum activities in the [BSE] can create considerable wealth for society and could contribute to wealth creation and increased employment nationally, regionally and locally."[151] And regarding the environment, they concluded that a major oil spill would have severe consequences for the maritime area but that "the probability of such a spill is deemed low."[152] The government particularly cites the report "New opportunities for Northern Norway – opening of the Barents Sea South-East to petroleum activities (2012-2013)", presented to Parliament in the spring of 2013, stating that greenhouse gas emissions from production in the

[149] Notice of Defence, December 14th 2016, 15-16.

[150] Notice of Defence, December14th 2016, 16-19.

[151] Notice of Defence, December 14th 2016, 20.

[152] Ibid.

BSE "will only result in marginal contributions to the total load and generally will not result in negative environmental effects."[153]

In this section on its management of the petroleum industry, the government has aimed to establish a narrative of a stable and safe industry. As we have seen, it places the 23rd licensing round within a longer history of oil production. I will argue that this is part of a larger temporal turn made by the government, where it points to the past to show how its governance has been effective, rather than predicting how it will function in the future. In this section, the government also shows how the responsibility for the awarded licenses and their environmental effects is distributed among a range of state entities. And it illustrates how the industry is subject to regulations and management practices that *work*. These practices are also what is at stake for the government in this trial. Can petroleum activities be managed in the same way as they have been? Is the established infrastructure resilient and adaptable enough to meet a challenge such as the climate crisis? In the next part of the notice of defence, the authorities show how their practices are subject to extensive democratic control by Parliament.

4.2.1. Political Considerations of the 23rd Licensing Round

There is a particular subsection I would like to highlight under the governmental framework surrounding petroleum production. It is titled "Particulars of the political consideration of the 23rd licensing round". Here, the defendant argues that the decision to award production licenses through the licensing round has been thoroughly deliberated, both in government and Parliament, which makes legal treatment of the case problematic.

The section references several parliamentary debates where the 23rd licensing round was up for discussion. After the opening of BSE in 2013, three attempts were made at stopping the entire or part of the licensing round in Parliament. In 2014, a proposal was made by the Green Party and the Socialist Left Party to stop the allocation of all blocks in the round because of the potential emissions from petroleum production and their consequences for the global climate, or alternatively to exclude the blocks advised against by the NEA and NPI. The second proposal was made in 2015 by a coalition of the Christian Democratic Party, the Liberal Party, the Socialist Left Party, and the Green Party, arguing that the government

[153] Report No. 36 (2012-2013) "New opportunities for Northern Norway – opening of the Barents Sea South-East to petroleum activities" quoted in Notice of Defence, December 14th 2016, 21.

should refrain from initiating petroleum activities along the MIZ and the polar front, or alternatively limit the number of blocks in line with the input from NPI and NEA. A final suggestion was made in the spring of 2016 by three members of the Socialist Left Party. They argued that an independent study should be done of whether the extraction of Norwegian oil was in accordance with the Paris Agreement and that the 23rd licensing round should be halted until such a review was delivered to Parliament.[154]

All these proposals were lost in parliamentary votes. The one that came closest to a majority was downvoted by 82 to 16. Thus, the government argues, there have been discussions of the potential environmental effects from the 23rd licensing round in Parliament several times, "based on arguments which in the main are identical with the Plaintiff's arguments in the Notice of Proceedings."[155] The proposals made by these politicians have been rejected, which "illustrates how the lawsuit is an attempt at a judicial replay of a matter which has already been thoroughly considered on a technical and democratic basis and which has a support among a broad, popularly-elected majority."[156] The section substantiates the argument that this discussion does not belong in a courtroom. The question of whether the licensing round is in accordance with Norwegian climate policies is being treated in the wrong place. The government seeks to illustrate that the most crucial issue at hand is how the organisations' action to bring the awarding of production licenses to court undermines democratic practices.

4.3. Climate Policy and Regulations

The next section of the notice of defence presents Norway's existing policies and obligations when it comes to climate change, to which "any production resulting from the production licenses awarded in the 23rd licensing round will be subject".[157] Emission of greenhouse gases from Norwegian petroleum production was on the agenda long before the environmental article was added to the Constitution, the government states. It begins by establishing its perceived "starting point for cooperation in international law" on solving issues related to climate change, which is that each country is responsible for its own emissions. This principle

[154] Notice of Defence, December 14th 2016, 26-28.

[155] Notice of Defence, December 14th 2016, 28.

[156] Ibid.

[157] Ibid.

– that the polluter pays – is underlying in the agreements of the Kyoto Protocol and the Paris Agreement, where a country's obligations are tied to *national* emission targets.[158]

The defendant introduces its obligations under international environmental law through the UNFCCC, the Kyoto Protocol, and the Paris Agreement. And it has objections to the plaintiffs' interpretation of the latter. The plaintiffs seem to assume that the Paris Agreement sets substantial, individual obligations for emission reductions for all parties. However, it primarily contains procedural commitments, meaning that the Norwegian government is legally committed to following a given procedure by submitting its targets in a certain way, with certain time intervals. Furthermore, the political recommendations and expectations expressed in the agreement are collective for the international community and, as such not individually binding for each country.[159] The government's description illustrates an interesting contrast within the Paris Agreement, where the overall targets are collective, but the actual implementation should be strictly national, not subject to any binding international legislation.

In the chapter on the organisations' arguments, we saw that they continuously invoked a notion of globality, and they argued, in short, for an international responsibility that the government failed to take. The government's argument presented in the paragraph above is interesting because it calls on international agreements and targets to support its *opposing* claim – that Norway is only responsible for its own emissions. This can be seen as another way of invoking the global: international politics and law is contrasted to national policymaking as arenas where certain expectations and motivations are agreed upon, but not as sources of binding commitments. This illustrates that even though international targets function as guidelines, their actual execution still falls under national jurisdiction. Thus, the government argues that even though greenhouse gases and their effects are transboundary, climate politics are national.

The authorities continue to account for the various measures they have implemented to reach their national targets and those under the different international agreements. The defendant argues that the most important of these are financial instruments, such as the CO2 tax and the duty to surrender emission allowances, which contribute to changing consumption and

[158] Notice of Defence, December 14th 2016, 29.

[159] Notice of Defence, December 14th 2016, 30.

production patterns over time and incentivise emission reductions at the lowest possible cost. Other examples of measures include subsidies, standards, and regulations, such as a prohibition for companies from burning excess gas, investments in competence and technology development, and the introduction of shore-based power to oil fields.[160] These measures are introduced with individual paragraphs in the notice of defence, and I will not go into their details here. Important is only to note that they are mentioned to illustrate how the government continuously works to consolidate "its respective roles as energy producer and custodian of the climate and the environment."[161]

The relationship between Norway's petroleum policy and climate policy is a highly complex subject where "work is being done continuously at the technical, administrative and political level to achieve the objectives the Storting has set."[162] Petroleum activities are responsible for "a considerable part" of the greenhouse gases emitted on Norwegian territory. But "based on many assessments, deliberations and debates" and heavy involvement from Parliament, Norwegian authorities have established a regulatory regime to limit the industry's emissions, including the abovementioned taxes and allowances. In sum, the climate measures on the Norwegian continental shelf are "the strongest in the world." [163] The government also cites a recommendation to the Parliament by the Standing Committee on Energy and the Environment from 2011, which states that despite the petroleum sector's significant contribution to national emissions, "the emissions per unit produced of oil and gas from the Norwegian continental shelf are considerably lower than most other petroleum provinces in the world." Furthermore, Norwegian gas functions as a replacement for coal-fired power plants in continental Europe, thus making an important contribution to the reduction of European greenhouse gas emissions.[164]

The government presents another rebuttal to one of the plaintiffs' arguments regarding emissions from the petroleum sector. There is a "fundamental distinction" between the

[160] Notice of Defence, December 14th 2016, 29; 33; 34-35.

[161] Notice of Defence, December 14th 2016, 28.

[162] Notice of Defence, December 14th 2016, 31.

[163] Notice of Defence, December 14th 2016, 31-32.

[164] Recommendation to the Storting no. 390 (2011-2012), 15, quoted in Notice of Defence, December 14th 2016, 32.

emissions from petroleum production on the Norwegian continental shelf on the one hand and global emissions from oil and gas exported from Norway and combusted abroad on the other. As opposed to the plaintiffs, the government argues that national climate policies and Norway's obligations under international law only encompass the first category. And "the individual state where the petroleum products are used is responsible for the second".[165]

These last two arguments are interesting seen together. An essential part of the government's argumentation is to show how petroleum production in BS and BSE is compatible with national climate obligations because the industry can buy allowances through the trading system and because the emissions from exported Norwegian oil are irrelevant when assessing the possible environmental impacts of the licensing decision. Both these arguments contribute to making the licensing decision a matter of *national* concern. However, the recommendation referenced above states that Norwegian petroleum production actually contributes positively to the reduction of international emissions because the emissions related to the production of Norwegian gas are lower than those from gas production in other European countries. From stating that the emissions from exported oil and gas should be excluded from the considerations of the licensing decision, the government introduces these emissions as evidence in their favour.

To summarise, what the defendant has done in these two sections on the governance of petroleum resources and environmental problems is to create a picture of a functioning system or machinery. The section began by historicising petroleum activities and detailing how safety responsibilities are delegated between several governmental agencies with different expertise. The arguments are rooted in and invoke the past and the present, rather than the future. And they create a historical legitimacy for the way it governs petroleum. The government continued by showing how these regulation practices are designed and conducted in accordance with international obligations and targets. As previously mentioned, this intricate system of governance is what the organisations challenge and, consequently, what is at stake for the authorities. It is thus important for them to show how the weighing of oil, gas, and environmental policies is a matter of national concern to be decided upon by popularly elected bodies and how this allocation of authority follows both from national legislation,

[165] Notice of Defence, December 14th 2016, 31.

international environmental agreements and from *experience,* as a country with a long history of petroleum production.

4.4. Interpretation of Article 112

The sections thus far in the Notice of Defence have presented the history and state of Norwegian petroleum production in general, then all relevant international climate agreements and the measures taken by the government to comply with them. The sections have underlined how the established bureaucracy secures all relevant interests and considerations, how the obligations set under the UNFCCC and the Paris Agreement do not set any legally binding material demands on each country, and how they are flexible in terms of whether the emission cuts are made in Norway or elsewhere through the emission trading system. In the coming section, the authorities present their arguments regarding the actual interpretation of Article 112. These are closely related to the evidence and arguments presented above: to the nature of the government's obligations and to the measures it has implemented.

The defendant argues that the lawsuit and the summons rest "on an incorrect interpretation of Article 112."[166] The article's three paragraphs openly formulate the general "right" of all citizens to a healthy natural environment and how Norway's natural resources shall be managed and governed to safeguard this right for future generations. Article 112 also establishes the citizens' right to information on the state of the environment and the potential encroachments governmental decisions may lead to. Lastly, the government must "take measures" in accordance with these rights.[167] In the notice of proceedings, however, the plaintiffs claim that the article establishes a material and absolute limit for environmental impacts from an administrative decision, which renders the decision to award production licenses in the 23rd licensing round invalid. And they argue that it sets a criterion for proportionality assessments of all individual administrative decisions. The government takes issue with this. It states that these interpretations do not have roots in any legal sources and that they are expansive and instrumentalist, made because they serve what they perceive to be

[166] Notice of Defence, December 14th 2016, 35.

[167] Notice of Defence, December 14th 2016, 37.

the interests of the environmental organisations – namely to test the general relationship between the government's petroleum and climate politics.[168]

The authorities argue that the plaintiffs' interpretation of Article 112 goes against the intentions of those who drafted the article. The notice of defence cites the proposal to Parliament that resulted in the adoption of the environmental article as Article 110b in 1992, written by Einar Førde and Liv Aasen in 1988. It also references a recommendation from the Standing Committee on Foreign Affairs and Constitutional Affairs prior to the adoption from 1991-92. Both these documents express the drafters' intention regarding the legal effect of the environmental article, the defendant states. It was implemented to take precedence over other legislation in case of conflict, to establish environmental protection as normative for administrative and governmental practice, and to function as a guideline for Parliament in its legislative activities. The government further references the Storting Members who proposed the amendment of Article 110b to Article 112 in 2011-2012 to show how the amendment of the third paragraph was done to render visible this legal essence but "*not* to change the nature of the rule or alter the substantive content of the first and second paragraphs."[169]

Thus, the government argues that the environmental article is legally binding but does not grant individuals the "right to a particular environmental condition, or protection against measures and decisions which the responsible authorities have arrived at after a reasonable process." The article can only be invoked by individuals directly in the courts "if the legislature has not taken a position on an environmental question". Furthermore, the intention was not to grant the courts jurisdiction to go into decisions such as the 23rd licensing round and "overrule the substantive assessments which have been made, or the balancing and prioritising which have been done between environmental considerations and other societal considerations." The authority to weigh these considerations lies with the Parliament and moving it to the legal system would entail a juridification of highly complicated matters.[170]

The government also points out that Article 112 does not prohibit the extraction and utilisation of natural resources but rather assumes such activities will be carried out in the future and requires this to be done in a long-term perspective. If the intention had been

[168] Notice of Proceedings, October 18th 2016, 44; Notice of Defence, December 14th 2016, 35; 42.

[169] Notice of Defence, December 14th 2016, 37-38.

[170] Notice of Defence, December 14th 2016, 38.

expressed, either in connection with the adoption of Article 110b or the amendment of the environmental article, of using it to halt all decisions to issue new production licenses or open new fields, "it is unlikely that it would have obtained a majority in the Storting." The article was instead adopted to set a direction and establish overarching goals for Norwegian environmental policy and ensure that the authorities take measures to reach these.[171] This is the first time the government draws on the future to make an argument. And its function is to show how the environmental article, in both versions, was drafted by a Parliament with the *expectation* that petroleum activities would continue. And the underlying assumption here is thus that the elected majority expected and wished for past practices to be carried on into the future.

The government makes two last remarks on the environmental organisations' interpretation of Article 112. First, it states that "even though the reference to 'the environment' and 'the natural environment' in Article 112 clearly can include climate issues, climate changes are by their nature different and far more complex than traditional environmental problems" because they are transboundary and transsector. The government understand oil spills and black carbon emissions (the damages mentioned in the organisations' vulnerability argument) as examples of traditional environmental problems. What they term "traditional" damages are thus local and urgent environmental encroachments. Second, the government argues that climate mitigation measures can be implemented "in other areas of society or in other geographical areas, nationally or internationally" than the place or industry where the emissions come from. This is a fundamental principle of climate policy and means that mitigation measures cannot be evaluated isolated from other policy areas. Thus, Article 112 is "especially poorly suited in the climate area" because the duty to take measures under the article can be met even if those measures are taken in completely different areas than the petroleum sector.[172]

In other words, the government argues that climate change is too complex to be evaluated in court and under a single constitutional article. Whereas the legal system is suitable for handling short-term environmental damages confined to restricted geographical areas, it is ill-suited to treat a general action concerning climate change, because the issue transcends

[171] Notice of Defence, December 14th 2016, 39.

[172] Ibid.

traditional sectors, timelines, and geographical regions, and thus also the conventional reach of the courts. Consequently, the plaintiffs' interpretation is both temporally and geographically too expansive. And the arguments presented here can be read as protests to the organisations' attempt at widening the issue of production licenses to include the environmental damages they might lead to internationally and in the future. The government's defence is thus that these discussions are too big and complicated to be decided upon in a courtroom.

The defendant then argues that if the courts will in fact evaluate its climate mitigation policies, the authorities *have* implemented measures that satisfy the requirements under the third paragraph of Article 112. In the government's view, the plaintiffs assert that the licensing decision could lead to three categories of environmental impacts: 1) traditional, local impacts, such as an oil spill, from exploration and development near the ice edge and other vulnerable areas, 2) national CO_2 emissions from future operation of possible oil fields licenses in the 23rd licensing round that will affect the climate, and 3) global emissions from oil and gas produced at these fields and combusted somewhere, sometime in the future.[173] The government argues that sufficient measures have been taken and legislation has been implemented to prevent and attend to all three categories. For the first two, the impact assessments conducted at various stages and the regulations applied to the petroleum industry, both described above, secure the decision's compliance with Article 112.

When it comes to the requirements for impact assessments under the Petroleum Act 3-1, which the organisations claim have not been met, the government points to the fact that the environmental article, then Article 110b, was used as a guideline by the Parliament when drafting and adopting § 3-1 of the Petroleum Act in 1995-96. In other words, "if the authorities have fulfilled the duties resulting from section 3-1 of the Norwegian Petroleum Act, there is a strong legal presumption that they have fulfilled their duty under Article 112 of the Constitution."[174] The authorities argue that they have fulfilled them and that even more assessments and consultations would be done as part of PDOs related to possible commercial petroleum finds.[175] Furthermore, possible petroleum production in BS and BSE will be

[173] Notice of Defence, December 14th 2016, 40.

[174] Ibid.

[175] Notice of Defence, December 14th 2016, 41.

subject to all the financial instruments and climate regulations imposed on the Norwegian continental shelf, as described above. In sum, the different governmental measures "clearly fulfil the duties which may be inferred from Article 112."

This argument stands regardless of whether the court decides that Article 112 establishes a material limit for emissions allowed under Article 112. If the courts agree with the plaintiffs' interpretation, the threshold for reaching this limit should be much higher than what the plaintiffs suggest. They point to the uncertainty regarding future emissions from licenses awarded in the 23rd round and underline the number of measures implemented to prevent environmental encroachments.

The government also addresses the third category of environmental impacts and returns to their argument that the emissions from Norwegian oil burned in other places of the world are not relevant for assessing whether Norwegian authorities fulfil their duties under Article 112 or any other climate obligations. The courts' potential evaluation of these emissions is problematic in several ways. "First, it raises questions about the territorial extent of the Article. Second, it raises the complicated question of what the net climate effects of the Norwegian exports actually are." And third, it breaks with the principle underlying all international environmental law and cooperation that the responsibility for emission reductions lies with the state where the petroleum is combusted. Thus, if Article 112 is to be interpreted in light of the Paris Agreement, this speaks against "any duty for Norwegian authorities to take measures in order to compensate for the effect of oil and gas exports to other countries." In other words, the plaintiffs' interpretation that the Norwegian government is obligated "to find the answer to the impact of other countries' greenhouse gas emissions" is "not natural".[176]

Even though emissions from production on the Norwegian continental shelf are the only ones considered relevant when assessing whether the licensing decision violates Article 112, the government also argues that it takes various measures to contribute to *global* emission reductions. It states it is a "driving force internationally in climate policy." Thus, if the Article is thought to place responsibility on Norwegian authorities for emissions from future combustion abroad, the defendant will argue that "this has clearly been met in a legal sense."

[176] Notice of Defence, December 14th 2016, 41.

Furthermore, the question of whether the measures are sufficient is of technical and political nature and should not be subject to review by the courts.[177]

The government's last legal arguments concern the two international legal principles presented by the plaintiffs as relevant for interpreting Article 112. First, the defendant protests the claim made in the notice of proceedings that the precautionary principle should be applied when assessing the licensing decision. The environmental organisations argue that this principle reverses the burden of proof onto the government and requires it to prove that it is "more likely than not" that the licensing decision will *not* have any negative environmental impact. The government states this is a "purely instrumentalist construction, without any legal support". Instead, it argues that "if the authorities have taken 'measures' under the third paragraph intended to [address] environmental purposes, then there must be a strong presumption that the duty under the Article has been fulfilled".[178]

And second, the plaintiffs present the principle of non-discrimination "as an argument for the proposition that any environmental effects in other countries must have equally great importance as effects in Norway." The government again argues against this and states that the geographical scope of Article 112 has not been established through any legal sources or the article's wording. It is thus an unresolved question "about how far it may be given application to environmental impacts which do not occur on Norwegian territory." The government states that applying the non-discrimination principle to Article 112 is another example of the plaintiffs' "creative" legal interpretation.[179] This is not a favourable characteristic in a courtroom, where persuasive arguments are generally thought to be based on precedent and interpretive continuity.

4.5. Procedural Errors

The organisations alternatively argue that the 23rd licensing round is invalid due to procedural errors because the impact assessments conducted by the authorities inadequately examine 1) the licenses' relations to Norway's climate obligations, 2) economic proportionality, and 3) the potential environmental damages to particularly vulnerable and valuable areas. The notice

[177] Notice of Defence, December 14th 2016, 42.

[178] Notice of Defence, December 14th 2016, 43.

[179] Ibid.

of defence comments only very briefly on these claims. The government argues that "the question in this context is not whether the requirements resulting from Article 112 of the Constitution have been met, but whether the procedural requirements resulting from the Norwegian Petroleum Act have been, as these must be interpreted in light of Article 112." And it concludes that they have met them, based on the overview of its petroleum governance presented in section 4.2, which shows how the process of impact assessments and regulatory activities are accounted for and illustrates the efficiency and thoroughness of the system. The impact assessments are not required to address the impact of the production licenses on global emissions, as the responsibility for emissions from combustion lies with the country where this occurs. And when it comes to economic assessments and assessments of possible local environmental effects, these have been carried out in accordance with the Petroleum Act and, thus also in accordance with Article 112. Again, the government rejects the organisations' expansion of the issue and states that the current system looks after all relevant considerations.

4.6. Summary: Juridification of a Political and Complex Issue

In its defence, the government argues that the courtroom is the wrong place to treat possible conflicts between petroleum and climate policies. And it characterises the plaintiffs' summons as an attempt at a judicial replay of questions that popularly elected representatives have already discussed in the appropriate institutions. But, if the case goes to trial, it argues that the current Norwegian governance of petroleum resources is practised in accordance with national and international obligations. Furthermore, the climate change issue is much more complex than the nature of what the government terms traditional short-term, local environmental problems. Therefore, climate change is ill-suited as a legal issue. It is simply too complicated to be treated by a court. This means that the organisations' argumentation and legal interpretation are too expansive. For example, the argument that Norwegian authorities should implement measures to compensate for emissions from combustion abroad places an international responsibility on them that does not follow any obligations under international law. The plaintiffs and the defendant endorse the same scientific publications as the factual circumstances of the issue at hand. But whereas the organisations argue that these facts enact an issue demanding an unprecedented global response, the government argues that adequate policy responses to the transboundary nature of climate change are still confined to each country's national borders.

The government's defence is thus concentrated on rejecting the organisations' attempted expansion of the issue of the 23rd licensing round and showing that the established bureaucratic machinery is doing its job and effectively takes the environmental effects of its activities into account. This is done through the notice of defence's thorough narration of the history of the Norwegian oil and gas industry, which illustrates how its intricate management of petroleum production has been developed through 50 years of experience. Climate change is here enacted as an issue that is ill-suited for legal treatment, but well-suited to be treated by the established bureaucratic assessment and regulation practices. The issue is thus not as disruptive as the organisations claim. Finally, climate change renders the future uncertain. But instead of fundamentally changing the governance of national resources, this uncertainty is best handled through *national* mitigation measures agreed upon by popularly elected majorities. Or in other words, climate change is best governed through a continuation of past practices that we already know, master, and depend on. The government thus makes a different temporal turn than the organisations, and invokes the past and the importance of experience, instead of expectations or predictions of the future.

5. THE SUPREME COURT RULING

With the plaintiff's summons and the government's defence, the issue of *Klimasøksmålet* has been established. Both parties have presented their understanding of what the problem in this legal action is, whether that is the global, long-term climate effects of the licensing decision from 2016 or the challenge the lawsuit poses to the established separation of powers and governance of petroleum resources and the environment. Following the publication of these two documents, a long legal process ensued where all the parties' contentions were listened to and treated. The proceedings lasted for four years, from October 2016 to December 2020, during which lawyers, witnesses, journalists, and interested parties busily entered and left the courtroom and nervously awaited the rulings in each court. And a great number of documents were assembled and produced. As previously mentioned, the evidence presented in the courtroom amounted to 6000 pages and the statements of case (the documents produced by the parties' legal representatives) to 900 pages. These papers and their matters of concern were decided upon and appealed twice before reaching the Supreme Court.

The last document I want to look at is the ruling from the Supreme Court, referenced by its publication number HR-2020-2472-P.[180] We are thus moving to the very last document of *Klimasøksmålet*. It is 50 pages long and published on December 22nd 2020. It is written by Justice Høgetveit Berg and signed by the 14 other Supreme Court justices who heard and ruled on the case. It is not the legal conclusion and verdict from the Supreme Court that is my primary interest when reading this document, but rather if it can tell us something about how the issue has changed through the court rounds and which arguments presented by the plaintiff and the defendant in our previous documents became the most contested in the trial. This means that I will not analyse the ruling in the same manner as I have done with the statements of case presented above, where I followed the structure of the documents and disentangled each argument. Instead, I will read and recount the sections on the court proceedings and the parties' contentions to see what can be identified as the most significant developments since the case began in the District Court.

The first section of the ruling presents the "subject matter" at hand, the legal basis of the parties' claims, and the core of the issue, as seen by the Justice: "the crux of the matter is the interpretation of Article 112 of the Constitution and to which extent it confers substantive

[180] HR-2020-2472-P.

rights on individuals that may be asserted in court."[181] The case concerns the validity of the licensing decision made in June 2016, he states, but "the overall constitutional issue is which role the courts are to play in the environmental work."[182] In the previous two documents, both parties have presented several, different arguments and points of contention. Here, we can see that they have been treated and distilled and, in the end, it is the privilege of the Supreme Court to declare the *crux* and core of the issue.

However, what the Justice does is not declare that the heart of the matter is either the validity of the production licenses or the role of the court, but rather to establish different layers to the case. The court's first step must be to settle the question of whether Article 112 grants substantive rights to individuals because it determines whether the plaintiffs' case can be treated in court at all. And if it can, the validity of the 23rd licensing round can be discussed, and the parties' evidence and narratives related to petroleum production can be evaluated. But above these questions hover the constitutional separation of power and the issue of whether *Klimasøksmålet* disrupts it. He thus structures the parties' arguments for them, making it clear what they disagree on. It is important to keep in mind when reading these and following statements made in this document, that they are made by the highest court in the Norwegian legal system and thus create precedent for how similar cases will be understood and decided upon in the future.

The Justice continues with a section where the court proceedings in the Oslo District Court and the Borgarting Court of Appeal are summarised. After this, "The parties' contentions" are presented, followed by a section titled "My opinion", meaning the legal opinion of Justice Høgetveit Berg. The section is not exclusively argumentative, as it first contains general informative paragraphs on "The climate challenges", "The Paris Agreement", and "Norwegian climate legislation", followed by "Petroleum activities in Norway" and "Factual circumstances – particularly the 23rd licensing round". After this, the justice moves to provide his answers to the following questions: "Does Article 112 of the Constitution confer rights on individuals that may be asserted in court?", "Is the decision invalid?", "Is the decision incompatible with Article 2 or 8 of the ECHR, or Article 93 or 102 of the Constitution?", and "Is the part of the royal decree concerning the southeast Barents Sea, invalid due to

[181] HR-2020-2472-P, 2.

[182] Ibid.

procedural errors?"[183] In the following two sections, I will read, recount, and comment on the Justice's presentation of the court proceedings and the parties' points of contention. How are the legal proceedings summarised, after four years in court? And what do the Supreme Court justices perceive to be the most significant and contested arguments?

5.1. The Legal Proceedings 2016-2020

The document begins with a summary of the court proceedings since their initiation in the fall of 2016 and the following section is a narration of them as they are presented by the Justice. On January 4th 2017, the Oslo District Court ruled in favour of the Ministry of Petroleum and Energy. The judges found Article 112 to be a rights provision and, as we have seen, this was one of the plaintiffs' legal arguments and a fundamental part of their interpretation of Article 112. It means that individuals may assert their rights if the state fails to take measures in accordance with the article and its subsections. And it means that the case, and future cases of citizens invoking their rights under Article 112, 'qualify' to be treated by the courts.

Despite agreeing to this part of the plaintiffs' legal argumentation, the District Court concluded "that the decision was not a violation of Article 112, since the risk of environmental harm and climate deterioration was limited, and the mitigation measures were adequate."[184] The court further found that the article applies to environmental damages from greenhouse gas emissions in Norway, but not emissions or damages abroad and that no procedural errors were made that could invalidate the 23rd licensing round. During the District Court Proceedings, the NGO the Grandparents' Climate Campaign (*Besteforeldrenes klimaaksjon)* also joined Greenpeace and Nature and Youth in the case as intervener, meaning that it claimed legal interest in the case and uttered its support to the side of the plaintiffs. As a result, two of the interest groups involved in the case explicitly represented different generations: the youth, and the grandparents.

The environmental groups subsequently appealed to the Borgarting Court of Appeal, where the organisation Friends of the Earth Norway (*Naturvernforbundet*) also joined as intervener. Justice Høgetveit Berg further relates how the plaintiffs, in their appeal, added several articles to their legal basis; Article 2 on the right to life and Article 8 on the right to respect for private

[183] HR-2020-2472-P.

[184] HR-2020-2472-P, 3.

and family life under the European Convention on Human Rights, and the corresponding Articles 93 and 102 of the Norwegian Constitution. The Court of Appeal did not find that the decision violated any of these articles, and the case was dismissed by the Court of Appeal on January 23rd 2020. The judges largely agreed with the District Court. These two rulings thus meant that both courts declared their jurisdiction to invalidate a governmental decision on the basis of Article 112, but that the threshold to do so is high, and that it had not been exceeded in the case of the 23rd licensing round. The Court of Appeal did however reach the conclusion "that the provision applies to all environmental harm asserted in the case at hand, local damage as well as greenhouse gas emissions; the latter created by the petroleum extraction itself and the combustion abroad."[185] Greenpeace Nordic and Nature and Youth Norway appealed the judgement again to the Supreme Court, whose summary of the prior court proceedings ends here. I will briefly return to the final ruling given by the Supreme Court at the end of this chapter because it tells us how the parties' arguments were received by the justices. But first, I will recount the arguments made by the parties in the Supreme Court, as presented by Court itself.

5.2. The Supreme Court's Summary of the Arguments

Moving back to the structure of the Supreme Court ruling again, the Justice moves on to relate the contentions of the parties. He begins with a summary of the arguments made by the appealing organisations Greenpeace Nordic and Nature and Youth. The interveners, the Grandparents Climate Campaign and Friends of the Earth Norway support these arguments as grounds for appeal. In the summons, all the plaintiffs' arguments were given a relatively similar amount of space in the text, but in this presentation, their legal arguments and the climate argument are clearly in focus. The summary of the organisations' arguments is a page and a half long and the entire first page is dedicated to the organisations' interpretation of Article 112 and to the climate argument. It thus becomes evident that these two claims are the ones that have been most extensively discussed in the courtroom. And when they are related in this way in Supreme Court ruling, the lawsuit's last document and decision, they are established as the most important for all future readers and interpreters of the case as well.[186]

[185] HR-2020-2472-P, 3.

[186] HR-2020-2472-P, 4-6.

Thus, one of the central actions performed by the Justice in this document is to shape the way the parties' arguments and their contentions will be understood in the future.

In the Supreme Court ruling, we can see how the plaintiffs' arguments are presented quite similarly to how we know them from the Notice of Proceedings. The licensing decision constitutes a breach of the absolute threshold of Article 112 because of the environmental encroachments the production licenses will lead to. In the Justice's summary, we can clearly recognise the organisations' global narrative: "if drastic measures are not taken with urgency", the effects of global warming will be "catastrophic". Emission cuts have not even started in Norway, the country is emitting too much CO_2, and cannot continue with the same level of petroleum production because "the fossil resources that may be exploited globally […] have already been found." Therefore, "no further production licenses can be granted for new fields without existing infrastructures if it may lead to petroleum production in 2030 and onwards."[187]

Additionally, the organisations have argued that the national petroleum production has led to major emissions and supplied Norway with the economic capacity to take a proportionally larger share of emissions cuts than other countries. Therefore, Norway's status "as a large oil exporter with resources to restructure" weighs heavily when assessing the country's international responsibility. And the Parliament's "general position" and involvement in matters related to climate and petroleum policies cannot be a decisive argument against judicial review of the licensing decision. The courts must be able to review the issue at hand if Article 112 is to have any legal significance.[188]

What we came to know as the vulnerability argument in the notice of proceedings is just briefly mentioned in the Justice's relation of the organisations' arguments: The production licences are "awarded for a particularly vulnerable and valuable area connected to the polar front and the ice edge, which must also be given weight."[189] In other words, the particularly vulnerable nature of these areas is in this document presented as something that should be considered as part of a broader picture when assessing the climate effects of the licenses. The vulnerability argument has thus been distilled through the legal proceedings and ended up as a

[187] Ibid.

[188] Ibid.

[189] Ibid.

supporting claim to the climate argument, instead of representing a separate and independent breach of Article 112.

After this, the appellants' other arguments are presented as alternatives to the climate argument. The first alternative is that the licensing decision violates Article 93 and 102 of the Constitution on the right to life and the right to respect for private and family life, or the corresponding Article 2 and 8 of the ECHR. The second alternative is the procedural errors. And the argument concerning procedural errors, concerns "above all" the government's failure to assess the licensing decision's relation to greenhouse gas emissions and reduction targets.[190] Thus, we can see again how the organisations have overall placed more focus on their climate-related arguments, instead of those concerning economic proportionality and ecological vulnerability that played a more prominent role in their argumentation in the very first document of the lawsuit.

In the notice of proceedings, the organisations stated that the licensing decision is invalid due to procedural errors. They identified a risk that the total economic effects from the production licenses would be negative for the government because the global demand for oil might decrease due to factors related to climate change. The procedural error lies in the fact that the government failed to assess this as part of the socio-economic analyses prior to the opening of the Barents Sea South-East. In the summons, the organisations stated they would return to and elaborate further on these grounds for invalidity.

And in the Supreme Court ruling, we can see that they have. Their argument here is that estimated future income from the production licenses should have been "discounted" to present value. Discounting is a calculation practice used by economic actors to determine the future value of investments made today, and thus to help them identify relevant and profitable courses of action.[191] In this case, it means that the Ministry should have considered that petroleum revenues might decrease because of changes in demand and will be worth less in the future. If the correct discounting methods had been applied to the estimated income, "the societal calculation" of costs and benefits associated with the 23rd licensing round would have

[190] HR-2020-2472-P, 6.

[191] Liliana Doganova 2018, "Discounting and the Making of the Future: On Uncertainty in Forest Management and Drug Development", in *Uncertain Futures: Imaginaries, Narratives, and Calculation in the Economy,* ed. Jens Beckert and Richard Bronk.

been negative. Additionally, there were errors in the governmental assessments of employment effects and CO_2 costs resulting from the opening of the BSE.

The very act of discounting is intertwined with problems of how future uncertainty is best accounted for in policymaking, and thus raises interesting questions when introduced by the plaintiffs. How much do we know about the future? How do we know it best, through which calculations and which models? And when faced with incalculable uncertainty, what are our best courses of action? I will return to these questions in my discussion in the next chapter, as it is closely related to Nordblad and Hulme' arguments about how perceived knowability of the future impacts policy choices made today. But in short, by introducing the concept of discounting, the organisations further substantiate their claim that the government fails to acknowledge how uncertain the future has become because of climate change and how urgently its effects must be mitigated.

These are the appellants' claims as summarised by the Supreme Court. When compared to the summons, the arguments here are more clearly centred around the climate argument and the attention to those surrounding 'traditional', local environmental damages have been reduced. The organisations' main issue with the production licenses is presented to be the greenhouse gas emissions they will lead to and how they amount to a violation of Article 112. As previously discussed, the climate argument includes statements that the impacts of Norwegian CO_2 emissions last longer and have a wider geographical reach than the government's assessment practices account for. The effects of greenhouse gas emissions are transboundary and long-term, and national petroleum production needs to be governed accordingly. Local and urgent environmental damages caused by petroleum production are on the other hand more easily handled by established routines and guidelines.

Thus, the climate argument poses a more fundamental challenge to the established governmental management of petroleum production than the vulnerability arguments, as does the claim that the licenses' relationship to international climate obligations should have been more thoroughly considered. This is illustrated by the appellants' introduction of the European Convention on Human Rights as legal basis, which again is a way for them to tie their arguments to international legal sources. The narrative that follows frames Norwegian oil and gas as part of a global problem and demands a political perspective that is wider in scope both geographically and temporally than what the authorities find relevant and

necessary. The reason why these arguments are perceived as more important by the Supreme Court can in other words be that they are more controversial.

After this account of the appellants' arguments follows a section in which the Justice relates the respondent's counterclaims. The government's arguments are mainly presented as protests against the different statements made by the NGOs. The royal decree to award licenses is *not* invalidated by Article 112 or any other mentioned articles in the Constitution or ECHR. And no procedural errors that can invalidate the decision have been made. Article 112 imposes a duty on the state to take positive measures to secure a healthy environment but does not confer any rights that can be asserted by individuals in a courtroom and was never meant to establish "a duty to abstain from making a decision".[192] Furthermore, Article 112 is not suited to evaluate the government's performance on emission reductions. If it were interpreted as such, it could end up functioning as a regulation of national petroleum export. This would be a clear juridification of political questions. It follows from the international legal principle that each country is responsible for its own emissions. Therefore, Norwegian authorities cannot be held responsible for those resulting from combustion abroad.[193]

The Justice further summarises the defendant's alternative arguments if the Supreme Court should agree to the appellants' interpretation of Article 112. The government would then argue that the threshold for invalidating the decision has not been breached. To substantiate this, it emphasises the uncertainty surrounding the actual emissions of greenhouse gas emissions from the awarded licenses and their possible environmental effects. Both the emissions from production and combustion are "uncertain – and will be marginal". They would be included in the EU's emissions trading system and will therefore not result in an increase in net emissions. It also states that "the relevant issue would be the effect on the climate in Norway" and that "the net effect of reducing Norwegian export of oil and gas is unclear and subject to debate".

The ruling also presents the government's comment on the claim that the estimated income to the state from areas in the BSE should have been discounted. And its answer is that discounting of estimated incomes is not required at the licensing stage because future income is highly uncertain in any case. The use of estimates in present value is as such intentional and

[192] HR-2020-2472-P, 7.

[193] Ibid.

not a procedural error, as they would be discounted at a later stage of development. The last argument presented in this section is that objections to the 23rd licensing round "that by far coincide" with those made by the organisations have been presented and rejected in Parliament prior to *Klimasøksmålet.* Thus, "considerations of separation of powers and democracy" speak against the handling of this case in the legal system.

As the government's arguments have been related by the Justice here, they are even more clearly focused on emphasising how the established management of petroleum activities *works* and takes relevant issues into account, than they were in the Notice of Defence. The Justice presents them primarily as protests or rejections of the organisations' claims, rebutting them point by point. In this way, the government's arguments come across as a counter-narrative to that presented by the appellants. Instead of telling an independent story of how petroleum resources should be governed in the future and how it plans to face the uncertainties posed by climate change, the statements above point to past experiences and established practices to show how these are resilient and dependable.

Additionally, the arguments presented above point to the uncertainty underpinning the organisations' claims. The actual emissions from the licenses are uncertain and therefore, their effects on global emissions cannot be assessed. The revenues from possible production cannot be discounted either, "since it is uncertain whether profitable discoveries will be made."[194] This means that the organisations' arguments are rejected as uncertain statements that challenge and endanger a solid and transparent bureaucratic system that already ensures thorough assessments and considerations of potential environmental encroachments. And to substantiate these arguments and rejections, the government invokes the past and the country's experience as an oil producer to create a narrative and feeling of stability and continuity.

Finally, what the Supreme Court justices have done with these arguments is to establish them as the most important contentions to the case, and to create a basis on which they can make a decision. I will thus briefly relate the Supreme Court ruling below because it, as the final document action performed in this lawsuit, shapes and solidifies how the parties' arguments will be understood in the future.

[194] HR-2020-2472-P, 8.

The Supreme Court concluded that the royal decree does not violate Article 112, or any other legal articles of the ECHR or the Constitution. It underlined that it is the authorities' task to decide which mitigation and protection measures to implement, but that individuals may assert their constitutional rights under Article 112 if the Parliament or the government fails to consider environmental considerations or "grossly neglects its duties".[195] However, the threshold for the courts to invalidate decisions to which the Parliament has consented should be "very high" and had not been reached.[196] The Supreme Court justices further agreed with the Court of Appeal that emissions from exported oil were relevant when assessing the constitutionality of environmental encroachments caused by Norwegian petroleum production.

Thus, arguments made both by the government and the organisations were agreed to by the Supreme Court justices in different ways in the end. The decision to award licenses in the 23rd licensing round was declared valid, and the government's narrative that it carefully governs petroleum resources in accordance with its constitutional and international obligations was thus granted legitimacy. However, the Supreme Court rejected the Ministry's claim that the licensing round did not belong in the legal system in the first place. And the organisations' attempt at expanding the reach of Article 112 to include emissions from the combustion of petroleum abroad was successful, although the Court stated that these emissions must be considered together with the government's implemented mitigation measures.

[195] HR-2020-2472-P, 25.

[196] Ibid.

6. THE IMPORTANCE OF SCALE: DISCUSSION

The parties in *Klimasøksmålet* contested each other's view of the issue constituted by the 23rd licensing round. They have argued against the other's interpretation of Article 112, of which environmental encroachments are relevant and possible for the government to assess, and of whether petroleum production will benefit the Norwegian economy in the future. During my readings of the court documents above, I have highlighted and commented on how the two parties call upon temporal and geographical scales and reference different scientific and legal sources to substantiate their arguments and direct the court's attention to their preferred version of the issue at hand. In the following chapter, I will visit their assumptions and invocations one last time and discuss them in relation to the literature presented in the theoretical chapter.

In the introduction, I posed the following research question: How are different issues established and put to work in the court documents of the Norwegian Climate Lawsuit? Following this, I have chosen to discuss my findings in two sections: 1) the establishment and transformations of the issues performed in the courtroom, hereunder the modifying work done by court documents and the parties' use of scientific evidence, and 2) the co-production of notions of temporality and globality through invocations of climate science. And at the end of this chapter, I will conclude the thesis by making some final remarks on the concept of future generations.

6.1. Legal Documents and their Modifying Work

In this section, I will discuss the work done by court documents in establishing and modifying the 23rd licensing round as a public issue and the construction of facts taking place in *Klimasøksmålet*. As we have seen, the government and the organisations disagree on what is at stake in the courtroom, whether it is the validity of the production licenses, the state of the future climate and environment, or the separation of powers between the legislative and judicial branches of government. And through their documents, they introduce and utilise different concepts to construct their narratives.

In her studies of political issues, Asdal argues that the paperwork circulating within bureaucratic institutions shapes their relevant issues. The documents modify them by their use

of concepts, the relations and causations they present, and their narrative structures.[197] Through the three document analyses in this thesis, we have seen how the documents establish different versions of what is at stake in *Klimasøksmålet*, or of what the issue in the courtroom is. In the notice of proceedings, the organisations first introduce the 23rd licensing round as a matter of legal concern. They argue that the licensing decision violates Article 112 because of the environmental damages petroleum production in the Barents Sea will lead to. Thus, their main issue is with what they perceive as a wrongly conducted weighing of petroleum production and climate policies. This resulted from the fact that the government had not assessed the latest scientific knowledge on climate change, represented by the Fifth IPCC report from 2014 and the Paris Agreement from 2015, when awarding the licenses in June 2016. For the defendant, however, *Klimasøksmålet* is first and foremost an issue for the constitutional separation of powers. The first argument the government presents in its defence is that the case should not have been treated in a courtroom at all. To the authorities, the legal action is thus perceived as an attempted juridification of political matters that belong in Parliament.

However, the organisations' introduction of the licensing decision to the legal system is granted when the courts decide to evaluate whether the decision can be considered compatible with Article 112 and with the government's climate policies and international obligations. This means that the government is forced to partake in the plaintiffs' enactment of climate change as an issue in the courtroom. And even though the government continues to argue that the case is a juridification of politics through all three court rounds, it is required to engage with and argue against the organisations' statements regarding climate change and petroleum production.

In the subsequent discussions of the government's petroleum management that the defendant is now required to participate in, we can identify how the parties enact two competing versions of the climate change issue. As presented in the theoretical chapter, Lahn argues that the issue of climate change is made governable through political practices and documents.[198] I have extended this perspective to the study of legal practices and documents as well. My argument by making this extension is that the parties in *Klimasøksmålet* enact the issue of

[197] Asdal 2015; Asdal and Reinertsen 2022.

[198] Lahn 2022.

climate change in their own particular ways, and that these versions of the issue demand different political responses.

The organisations enact climate change as an urgent, disruptive, and global problem that requires immediate and drastic measures. They avoid references to past practices and legislative history because the issue they present demands an unprecedented response. The government also bases its understanding of the scientific nature of climate change on the IPCC and its reports. It recognises the need for mitigation and has therefore implemented a range of national measures. It has also ratified the Paris Agreement and participates in international cooperation on climate change mitigation. These measures enable the government to consolidate "its respective roles as energy producer and custodian of the climate and the environment".[199] The underlying argument here is that climate change is best addressed through the well-functioning practices of government and that these secure long-term, dependable treatment of the issue by being rooted in the popularly elected Parliament. Climate change is thus enacted as an issue that can and should be treated together with other political considerations, such as the benefits of continued petroleum production. In other words, the government understands the issue as less disruptive than the organisations do. I will come back to the specific temporal and spatial characteristics of these understandings of climate change in the next section. But what we can see here is how the parties enact their grievances in different ways and transform them into issues for the judges to decide upon.

For the parties to direct the judges' attention to their preferred version of the issue, they must substantiate their arguments with facts. This is the reason why I have also approached *Klimasøksmålet's* court documents in a manner inspired by Latour's way of studying knowledge production in the laboratory and in the French Council d'Etat. I have utilised his perspective to study the practices performed by the parties' legal representatives in the courtroom, particularly their argumentation and document production, and how they constitute a certain way of doing knowledge.[200] In *Klimasøksmålet,* both parties are constructing and presenting their notion of what is at stake, and thus also of what they believe to be the facts of the issue. By assembling relevant evidence and legal sources and putting

[199] Notice of Defence, December 14th 2016, 28.

[200] Latour 2010; Riles 2005.

them together in a certain narrative, they are thus engaged in the construction of different 'truths' or predictions of the future of Norwegian production of oil and gas.

For the government, the factual circumstance of this issue is based on the same international, scientific publications presented by the organisations, such as the IPCC reports. However, the reality of climate change as presented by the IPCC does not disrupt previous practices or render them outdated. Instead, climate change is perceived as yet another issue the bureaucratic establishment is well-equipped to handle, in addition to concerns of traditional environmental damages and safety. Additionally, we saw that the government referenced a report from 2013, stating that the emissions from petroleum production in BSE will only contribute marginally to the total amount of greenhouse gases emitted from Norwegian territory.[201] This renders the 23rd licensing round as less of a contribution to the problems of climate change than the organisations perceive it to be. And either way, the role distribution and qualified expertise within the bureaucracy have been built through 50 years of experience, which makes it resilient and adaptable to handle the climate change issue as well. And the authorities take environmental concerns into account through the government's engagement in international climate policies and its mitigation measures taken in other policy areas. Therefore, continued exploration and production of petroleum is responsible and compatible with all relevant obligations. With this as a factual basis, the government perceives the organisations' attempt to radically change Norwegian petroleum production as rash and irresponsible because it creates even more uncertainty in the face of an uncertain future.

For the organisations, on the other hand, the IPCC's scientific reports communicate an environmental reality that demands immediate and drastic political action. Norwegian authorities have consistently been lagging behind in the attainment of the climate targets they have set for themselves and solidified under the Paris Agreement. It is therefore not enough to address the issue of climate change with mitigation measures taken in other sectors, or through participation in international agreements and the carbon emission trading system. The science presented in these reports is of a much more disruptive nature than the government recognises. The scientific facts require the authorities to leave their petroleum resources in the ground, or at least to stop looking for new reserves. The same scientific publications thus constitute very different facts for the two parties.

[201] Notice of Defence, December 14th 2016, 21.

The parties' different invocations of the same scientific materials can also be related to Latour's argument that the law cannot be reduced to rules and legislation. Instead, it must also be understood as practices of citation and invocation of materials produced outside the legal system.[202] In the document readings above, we have seen how much of the parties' argumentation rests on documents produced in other places, such as white papers, parliamentary debates, newspaper articles, letters from the Polar Institute and the Norwegian Environment Agency, and scientific publications from the IPCC and other institutions. And as Latour states, "we should note that these documents are not all legal in nature, even though they allow for a judgement to be rendered." [203] In other words, the practices of legal argumentation and the assemblage of written materials in a courtroom are directed at turning the parties' grievances into an issue that judges can decide upon. And of course, the representatives of each party will try to convince the Court of their issue and their version of the facts and truth about the case.

6.2. Co-Producing Temporal and Spatial Scales

By drawing on studies of political issues and Latour's perspective on the law, I have explored how the parties' document practices in the courtroom, their invocations, citations, and accumulation of evidence, construct different factual bases on which they argue for their version of the issue to be debated and decided upon. But in my readings of *Klimasøksmålet*, I have also been inspired by the notion of co-production proposed by Jasanoff. In her studies of the law, she explores the interactions between science and the courts. She argues that the legal system is an important forum for the co-production of physical and social understandings of different issues.[204] In the coming section, I will first discuss the co-production of the parties' understandings of the issue of climate change taking place in *Klimasøksmålet*, and how these invoke opposing temporal and geographical scales. Then, I will discuss whether the issue of *Klimasøskmålet* was settled in the end. Did the Courts decide whether the issue was about how to understand and govern climate change, the potentially problematic role of the courts in policymaking, an occasion on which to determine the correct interpretation of Article 112, or all of the above?

[202] Latour 2010, 269.

[203] Latour 2010, 76.

[204] Jasanoff 1997; 2004; 2018.

As discussed in the theoretical chapter, Jasanoff has been occupied with the social and scientific co-production of the issue of climate change in ways relevant to understanding the argumentative actions performed in our court documents. She argues that climate science has created a shift in the traditional representations of time and space that have guided political and economic decision-making. The temporal and geographical scope of politics has usually been confined to the immediate future and to each country's national borders. But because both climate change models and the environmental damages they predict span from decades to millennia, the significance of current decisions must be assessed with a new and longer temporal horizon. When it comes to spatial scales, the climate change issue poses a challenge to traditional governance practices because greenhouse gas emissions cannot be understood as confined to national borders.[205] Hulme and Nordblad's arguments about the temporal and spatial characteristics of climate change have also guided my attention to the tensions of scale in the parties' arguments.[206]

In my document analyses, I have commented on how the parties' understandings of climate change are constructed through different invocations of temporal and spatial scales. I have argued that the organisations' enactment of climate change fundamentally challenges the Norwegian governance of petroleum resources because it expands the geographical and temporal impact of the production licenses. By referencing the latest scientific reports on climate change, the organisations have argued that the current management of petroleum resources fails to understand the global nature of greenhouse gas emissions, and the urgent action demanded to take responsibility for them and their long-term effects. To the plaintiffs, it is irrelevant where greenhouse gases are emitted because they contribute to a global problem. Therefore, Article 112 should be interpreted to encompass emissions from the combustion of Norwegian petroleum abroad. The organisations also argue that the government's intention of continuing established governance practices into the future is disrupted by irreversibility and tipping points that can result from global warming. Thus, they call upon the uncertainty of our climatic future to create a narrative of urgency on which the government is failing to act.

[205] Jasanoff 2004; 2010; Hulme 2010.

[206] Hulme 2010; Nordblad 2021a and 2021b.

The government, on the other hand, enacts the climate change issue as less disruptive than the organisations do. It also considers the uncertainty of the climatic future a scientific fact but argues that this uncertainty is best handled through the established practices of national mitigation measures. It states that widening the reach of Article 112 to encompass emissions from the combustion of petroleum places an international responsibility on the authorities that does not follow any obligations under international law. The government rejects the geographical scale called upon by the organisations and argues that even though greenhouse gases and their effects are global, climate politics are national. I have also argued that the government can be seen to take a different temporal turn in its arguments than the plaintiffs do. Instead of focusing on the IPCC's predictions and expectations of the future, it calls upon past practices and experiences to emphasise the importance of continuity and stability. In the Supreme Court's summary of the government's arguments, we saw that the defendant stated the future revenues from petroleum production and the future effects of climate change were too uncertain to be discounted and assessed. This means that the government only invokes the future to emphasise how the future is *too* uncertain to form the foundation of any drastic decisions. The safest course of action is thus to draw on the practices that already work.

Finally, Jasanoff's insights into the co-production taking place in courtrooms are also central to understanding the importance of the Supreme Court ruling in *Klimasøksmålet*. Judges identify what constitutes the 'good' or 'correct' scientific basis of the case they are treating. The parties present different narratives of the incident that initiated the legal action, and the judges must choose which of these factual narratives to believe in. Their final judgement thus expresses confidence in the scientific and legal knowledge construction of the party they agree with. Jasanoff also argues that legal decisions are essential in constructing and stabilising the public's understanding and expectations of future technological and societal developments. In *Klimasøksmålet,* the Supreme Court' ruling was in support with selected arguments made both by the government and the organisations. If we look beyond the ruling, the very decision to consider climate change within the legal system is seminal. The ambiguity inherent to the Supreme Court, I suggest, left several questions on climate change open to future negotiations.

6.3. Concluding Remarks: The Absence of Future Generations

I would like to conclude this thesis by visiting again the concept of future generations. Since its introduction in the theoretical chapter, it has figured somewhere in the background of the document analyses I have conducted, even though it is the mention of future generations in Article 112 of the Constitution that enabled the organisations' legal action in 2016. Their main argument was that the Ministry's licensing decision violated Article 112 because the long-term climate effects of the production licenses would endanger the state of the environment for generations to come. Therefore, when I first approached the case of *Klimasøksmålet,* I thought that these generations would play a much more prominent role in the parties' arguments. My hypothesis was that the environmental organisations and the government would have explicit opinions on what future generations need, how they should be cared for, and on what their legal protections are when it comes to the environment. However, they are exclusively mentioned when the parties quote Article 112.[207]

I believe the government and the organisations have different reasons for avoiding invocations of future generations. However, their reasons might be related to the same ontological problem of how much we can know about the future.[208] In their narratives, both parties rely on the scientific reports of the IPCC and its mathematically simulated emission pathways. As we have seen in the theoretical chapter, these mathematical simulations are accepted as scientific predictions of the environmental future, whereas more qualitative imaginaries of our social future are often termed speculative. One possible problem with the concept of future generations is that questions of what they need and are entitled to initiate discussions of a range of other societal challenges than climate change, and that are these not easily quantifiable. And because courts, as Jasanoff states, must commit to basing their decisions on 'factual truth', general discussions on how to take care of future people would probably be dismissed by law practitioners as too complex and politicised for legal treatment.[209]

However, if this is the case, it would render the concept of future generations with little power and agency in climate litigation cases. As we have seen, the Supreme Court decided that

[207] The Constitution Art. 112.

[208] Nordblad 2021a.

[209] Jasanoff 2018.

Article 112 confers rights that individuals may assert in court. But if future generations are this difficult to invoke, it would mean that the legal significance of their mention in Article 112 is rather limited. By reading the court documents, I can only detect the absence of the concept of future generations and thus only speculate on the reasons the government and climate activists might have for avoiding them in *Klimasøksmålet*. Therefore, I will encourage further investigations into the role of future generations in climate litigation. What is it that makes the government and climate activists refrain from calling upon the interests of future generations? And what can this tell us about the nature of this concept and its role in future climate litigation cases?

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