Norges institusjon for menneskerettigheter

Written submission from the Norwegian National Human Rights Institution to shed light on public interests in Case No. 20-051052SIV-HRET

Supreme Court of Norway
P.O. Box 8016 Dep
0030 OSLO

Your reference: 20-051052SIV-HRET
Our reference:
Date: 25/09/2020

Case No: 20-051052SIV-HRET

Appellants: Greenpeace Nordic Association
P.O. Box 33 Torshov, 0412 OSLO
Nature and Youth
Torggata 34, 0183 OSLO

Accessory intervenors: Norwegian Grandparents Climate Campaign
c/o Lund & Co
Akersgata 30, 0158 OSLO
Norwegian Society for the Conservation of Nature
Mariboes gate 8, 0184 OSLO

Counsel: Attorney Cathrine Hambro
Wahl-Larsen Advokatfirma AS
Fr. Nansens pl. 5, 0160 OSLO

Attorney Emanuel Feinberg
Advokatfirmaet Glittertind AS
P.O. Box 1383 Vika, 0114 Oslo

Respondent: Norwegian State, represented by the Ministry of Petroleum and Energy
P.O. Box 8148 Dep
0033 OSLO

Counsel: Attorney General Fredrik Sejersted
P.O. Box 8012 Dep
0030 OSLO

Assisting counsel: Attorneys Anders Wilhelmsen and Ane Sydnes Egeland

Contents

Written submission from the Norwegian National Human Rights Institution to shed light on the public interests in Case No. 20-051052SIV-HRET

1. Introduction

According to section 1 of the NIM act, the Norwegian National Human Rights Institution (NIM) shall "promote and protect human rights". Case No. 20-051052SIV-HRET raises the question of whether the Norwegian State has violated human rights under Articles 112, 93 and 102 of the Constitution of Norway and Articles 2 and 8 of the ECHR by awarding production licences for oil and gas in the 23rd licensing round. The permits may result overall in greenhouse gas emissions of 22 and 370 million tonnes of CO_2 from production and combustion, respectively, at a time when the concentration of CO_2 in the atmosphere may exceed 430 ppm, which corresponds to a global average temperature rise of 1.5 degrees Celsius.[1] The case has been brought before a plenary session of the Supreme Court of Norway under extraordinary circumstances.

The UN High Commissioner for Human Rights considers climate change to be the greatest threat to human rights ever.[2] Greenhouse gas emissions cause, among other things, the melting of the polar ice caps, sea level rises, droughts, landslides and extreme weather, and they may change the climatic conditions for life on Earth.[3] Climate change takes place because carbon is removed from geological reservoars to the atmosphere in the form of CO_2. In Norway, the State owns these carbon deposits beneath the sea, and extraction therefore requires government permits.[4] As in the exercise of other authority, such permits must safeguard human rights norms of a higher rank under the Constitution of Norway and the ECHR. This makes production licences for oil and gas a human rights matter.

The Norwegian National Human Rights Institution hereby submits a written submission pursuant to section 15-8 of the Dispute Act to shed light on public interests. The submission will express points of view that affect human rights obligations and are also of

---

[1] Sections 3.2 and 3.3 of the Borgarting Court of Appeal's judgment of 23 January 2020 (LB-2018-60499) (hereinafter referred to as the Court of Appeal) cite estimates of 22 million tonnes of CO_2 in production emissions and 370 million tonnes of CO_2 in combustion emissions, respectively, with the start of production in 10–15 years. Section 3.1 of the judgment finds that approximately 42 gigatonnes of CO_2 are burned annually, and that as of 2018 there is only room to accommodate about 15 years of the current emissions before the world cannot emit more than nature can absorb.

[2] UN High Commissioner for Human Rights, Michelle Bachelet, address to the 42nd session of the UN Human Rights Council, 9 September 2019, is available here: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24956&LangID=E; see also the UN Secretary General's Special Envoy on Climate Change 2014–2015, Mary Robinson, Report of the Special Rapporteur on the issue of a safe, clean, healthy and sustainable environment, A/HRC/31/52, 2016, p. 7.

[3] IPCC 5th Assessment Report, Summary for Policymakers.

[4] Sections 1-1 and 1-3 of the Petroleum Act.

importance beyond this specific matter. We will not comment on the application of the law to the facts of this specific case or assess disputed evidence, see HR-2018-1887-U (paragraph 18). However, it is not a requirement that submissions made pursuant to section 15-8 of the Dispute Act be neutral, and submissions may outline a position on decisive questions of interpretation relevant to the case, as long they do not go beyond the general level, see HR-2018-1887-U (paragraphs 17 and 18).

This case raises many extensive human rights issues, and seven days have been set aside in court for the proceedings. The submission is therefore voluminous, but it is in accordance with section 15-8, second paragraph of the Dispute Act, because it is "suitable to shed light on public interests in the case", see Proposition No. 51 (2004–2005). We point out that such submissions are meant to be an alternative to intervention pursuant to section 15-7 of the Dispute Act,[5] and we must therefore develop the legal reasoning in writing. In order to ensure both sides are heard, the submission is submitted well in advance of the appeal hearing, see HR-2018-1887-U (paragraph 24), compared to HR-2017-1917-U.

The submission is divided into two parts. The first part (Section 2) deals with general questions of interpretation under Article 112 of the Constitution of Norway. The second part (Section 3) deals with general questions of interpretation under Article 34 of the ECHR, as well as Articles 2 and 8 of the ECHR, which are implemented in Norwegian law by Articles 93 and 102 of the Constitution of Norway.

2. Right to a healthy environment under Article 112 of the Constitution

2.1. Introduction

In Part 2 of the submission, we will first discuss whether Article 112, first paragraph grants enforceable rights (Sections 2.2 and 2.3), what the corresponding duties may be (Section 2.4), and specific questions related to the global nature of the climate problem (Section 2.5). Provided the provision grants rights, we will discuss the content of the rights and the topic of assessment (Section 2.6), and finally we will make some general statements about the intensity of judicial review (Section 2.7). These questions are of importance to public interests under section 15-8 of the Dispute Act.

2.2. Does Article 112, first paragraph, grant enforceable rights?

2.2.1 Issue

The parties disagree on whether Article 112, first paragraph of the Constitution of Norway grants materially enforceable rights. The Court of Appeal concluded that the provision

[5] Proposition No. 51 (2004–2005) to the Odelsting, p. 244, see also HR-2018-1887-U (paragraph 19).

grants rights. The overall source of law picture indicates that the Court of Appeal's conclusion is well founded.

The point of departure for constitutional interpretation is generally the source of law theory, with certain differences depending on the issue in question.[6] As a general rule, the Constitution of Norway is interpreted autonomously, but the interpretation can be inspired by basic international law and comparative constitutional law.[7]

2.2.2 Wording

A natural understanding of the wording of a provision (according to its plain or ordinary meaning) is the most important basis for constitutional interpretation.[8] The importance of this was most recently pointed out in Recommendation No. 258 (2019–2020) to the Norwegian Parliament (the Storting), with the endorsement of a qualified parliamentary majority, which stated that "Whenever possible, everyone shall be able to read the text of the Constitution of Norway in such a way that it gives the best possible expression of the central content of the Constitution".[9] The wording of more recent constitutional provisions will be especially important.

The wording of Article 112, first paragraph, first sentence is formulated as "every person has the right to". In addition, the first paragraph, second sentence states that natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard "this right for future generations as well". The second paragraph then entitles citizens to environmental information so that they can safeguard "the right" given to them in the first paragraph. A natural understanding of the wording in the first and second paragraphs indicates that the first paragraph is a rights provision.

The wording of the third paragraph – that "the authorities of the State shall take measures for the implementation of these principles" – may nevertheless introduce some doubt. Firstly, one can ask whether the term "principles" means that the first and second paragraphs can nevertheless not be taken literally. As an extension of this, one can ask whether the first and second paragraphs are dependent components of the *actual* norm in Article 112, which in this case lies solely in a duty for the authorities to implement environmental measures in accordance with the third paragraph. In this case, it can be

[6] See, inter alia, Smith, *Konstitusjonelt demokrati (Constitutional Democracy)*, 4th ed. (2017), p. 96 and Andenæs and Fliflet, *Statsforfatningen i Norge (Public Administration in Norway)*, 11th ed. (2017), p. 47.

[7] Smith (2017), p. 97.

[8] Andenæs and Fliflet (2017), p. 54 and Smith (2017), p. 113.

[9] Recommendation No. 258 (2019–2020) to the Storting on the amendment of Article 89 of the Constitution of Norway (judicial review of laws etc.).

argued that the duty provision in the third paragraph refers to a general social purpose and does not confer rights to individuals.[10]

An initial premise for this interpretation alternative is that the term "principles" refers to something other than a "right" or "privilege", which requires that the terms are mutually exclusive. Based on a natural linguistic understanding, this is not a given. The word "principle" is defined in the Bokmålsordboka dictionary as a "statement in a deductive system from which one derives or proves other statements, but which is not itself derived or proven in the system", or a "fundamental truth or proposition".[11] In other words, principles can be understood as a reference to the underlying fundamental truths or interests that the rights pursuant to the first and second paragraphs of Article 112 arise from.[12] In the legal system, "principles" are also used to refer to norms that are binding and enforceable.[13] One example of this are the various statutory provisions for compensatory damages which reference "general legal principles", derived from case law on claims for compensatory damages pursuant to Article 105 of the Constitution of Norway.[14] For this reason, it is hardly the case that a principle and a right must be regarded as mutually exclusive concepts.[15]

However, if we assume that a right and a principle are contradictory, the interpretation alternative that Article 112 does not grant rights is based on a further premise that the third paragraph must "nullify" the first and second paragraphs. Logically, it might just as well be the other way around. The plural form in the third paragraph – principle*s* – means that if one resolves a conflict in favour of the last part of the provision, then both the first

[10] As Eivind Smith points out, it is possible on a general basis that a constitutional duty provision does not simultaneously trigger rights for individuals, but that it must be enforced in other ways. See Smith, "Miljøparagrafen – kritisk lest (The Environmental Article – Critically Read)" in Fauchald and Smith (editors), *Mellom jus og politikk – Grunnloven § 112 (Between Law and Politics – Article 112 of the Constitution of Norway)*, (2019), pp. 151–172. Wibye, "Hohfelds rettigheter (Hohfeld's Rights)", *Tidsskrift for Rettsvitenskap (Law Journal)*, (2018), No. 5, pp. 493–533, on p. 501 (footnote 17) is more critical of such a point of view. However, Wibye is also of the opinion that the right under Article 112 *is* that the State fulfils its duty to take action, see the same place on p. 501.

[11] The Norwegian Language Council's Bokmålsordbok dictionary, is available here: https://ordbok.uib.no/GRUNNSETNINGER

[12] Document 16 (2011–2012) Report to the Storting's Presidium from the Human Rights Committee on Human Rights in the Constitution of Norway, pp. 245–246 and Bugge, *Lærebok i miljøforvaltningsrett (Textbook in Environmental Management Law)*, 5th ed. (2019), p. 164.

[13] See, for example, Lilleholt, "Grunnsetningar i formueretten (Basic Principles of Property Law) in Høgberg and Sunde (editors), *Juridisk metode og tenkemåte (Legal Methods and Ways of Thinking)* (2019), pp. 334–342, on pp. 334–336.

[14] See the examples in Lilleholt (2019), pp. 334–335.

[15] This is, for example, in accordance with the distinction made by Dworkin's between "rules" and "principles", which concerns a logical difference in the argumentation patterns and not that their substantive content is essentially different, see Dworkin, *Taking Rights Seriously*, 1997, p. 44. For Alexy, all the constitutional rights are in the form of principles, see Alexy, *A Theory of Constitutional Rights*, 2010.

and second paragraphs will lose the nature of a right. This would be in direct contradiction of explicit guidelines in the legislative history of the second paragraph.[16]

Moreover, it is not natural to read the provision to mean that the *actual* norm lies in the third paragraph. This is clearly evident if the provision is compared with other articles in Chapter E of the Constitution. Provisions such as Articles 93, 95, 100 and 102 have rights provisions in the first paragraph and duty provisions in subsequent paragraphs, without this structure entailing that the paragraphs formulated as a duty void the rights in the first paragraph.

Another objection to taking Article 112, first paragraph literally as a rights provision is that the provision has an absolute formulation and will therefore have too broad a scope. However, this is an objection that can be made against almost all of the absolutely formulated rights in Chapter E of the Constitution of Norway, and is thus not an independent argument against Article 112, first paragraph granting an enforceable right.[17] Nevertheless, it can be argued that the right must be operationalised through a set of criteria for determining whether certain conduct amounts to a violation of the right and whether the right can be lawfully limited or displaced by competing rights considerations. We will discuss this question in more detail under Section 2.6.

A decisive objection against interpreting Article 112, first paragraph as not granting rights is in any case the fact that the first and second paragraphs would lose key parts of their meaning, particularly if the phrase "[e]very person has the right to" was not understood as conferring a right to everyone. On the other hand, an interpretation alternative in which the first and second paragraphs grant individual rights, while the third paragraph clarifies the authorities' positive duty to safeguard the principles from which the entire first and second paragraphs arise, entails that all the paragraphs of the provision retain a meaning that is consistent with the wording.

The wording of the provision, when read in context, therefore indicates that Article 112, first paragraph must be understood as a rights provision.

---

[16] See Recommendation No. 163 (1991–92) to the Storting, p. 6. The second paragraph was maintained without amendment in 2014, see also Doc. 16 (2011–2012), p. 245. This was also pointed out by Thengs, "En sann rett med modifikasjoner? Om Grunnloven § 112 første og tredje ledd (A True Right with Modifications? About Article 112, first and third paragraphs of the Constitution of Norway)" in Fauchald and Smith (editors) (2019), pp. 137–150, on pp. 141–142 and Kierulf and Kjølstad, Norsk Lovkommentar (Norwegian Law Commentary) on Article 112 of the Constitution of Norway, Rettsdata (2019), Note 255.

[17] Recommendation No. 187 (2013–2014) to the Storting, p. 14 states that a "common feature" of the proposed rights provisions is that they are "broadly formulated" and that "the wording is vague". The majority acknowledged that it would be "up to the Supreme Court of Norway to clarify" questions of doubt, and that it "entails legalisation, in the sense of a transfer of power from the Storting to the courts".

2.2.3 Legislative history

The legislative history points in the same direction. In the literature, there are differing views on the relevance of the legislative history in constitutional interpretation,[18] but the Supreme Court's practice shows that the legislative history is of importance, at least for the interpretation of recent constitutional provisions.[19] The legislative history of the constitutional amendments in 2014 is of particular significance.[20]

When the constitutional provision was originally adopted in 1992, the Committee stressed in its recommendation from May 1992 that a "right to a certain environmental quality is a basic human right".[21] The Committee also stated that the third paragraph should entail that "the detailed substantive requirements for environmental measures would be established through the Storting's legislation and the establishment of other rules", and that "when the Storting issues [rules relating to environmental considerations] these rules will form the basis for any matters before the courts". [22] In addition, the Committee emphasised that "rights in this area that can be tried in court should be regulated more closely by law in order to achieve the necessary level of precision".[23] Moreover, the proposal was closely related to a proposal prepared and recommended by Inge Lorange Backer in a study of the constitutionalisation of environmental law principles.[24] Backer had considered several possible alternatives and argued against adopting a provision that could be enforced by individuals before the courts. Regarding the proposal he recommended, he wrote that as long as the Storting had issued rules for implementation of the right to a certain environmental quality, it would be "these rules of law that shall be used as the basis, and not any other interpretation of the principle".[25] In summary, the impression from the legislative history from 1992 is that Article 110 b of the Constitution of Norway was intended as a modified rights provision, which was not normally thought

[18] For a restrictive – but not totally dismissive – attitude, see Smith (2017), pp. 112–114 and Smith (2019), p. 153. For a more open attitude, see Høgberg and Høgberg, "Tolkning av Grunnloven (Interpretation of the Constitution of Norway)", *Jussens* Venner (2013), No. 3, pp. 193–226, on p. 200.

[19] See for example HR-2018-1783-A (*Uskyldpresumsjon (Presumption of Innocence)*, 22–23), HR-2016-2554-P (*Holship*, paragraphs 68–69), Rt. 2015, p. 93 (*Maria*, paragraph 62) and Rt. 2014, p. 1292 (paragraph 21).

[20] Smith (2017), p. 114.

[21] Recommendation No. 163 (1991–92) to the Storting, p. 5. The proposal on which the recommendation was based was submitted by representatives Einar Førde and Liv Aasen from the Labour Party, see Document No. 12 (1987–1988), Proposal No. 15.

[22] In the proposal, which was also adopted, the third paragraph reads as follows: "The authorities of the State will issue detailed provisions to implement these principles." In 2014, the wording of the third paragraph was amended, see below.

[23] Recommendation No. 163 (1991–92) to the Storting, p. 6.

[24] Backer, "Grunnlovfesting av miljørettslige prinsipper (Constitutionalisation of Environmental Law Principles)", Department of Public and International Law Publication Series (1990), No. 6.

[25] Backer (1990), p. 30. Backer also referred to the proposal as a "modified rights provision", see p. 38.

to be enforceable before the courts, except for situations that the Storting had not regulated by law.[26]

The Environmental Article was amended in connection with the constitutional reform in 2014. In addition to new article numbering and an updated language style, the content of the third paragraph was revised. The earlier wording was that State authorities would "issue detailed provisions", but this was amended to the authorities "shall take measures" in order to implement the principles of provision, giving the authorities a more active role. As a source of law, it is the legislative history from the 2014 reform that is key in determining what the prevailing law is today.[27] In environmental law theory, it is also emphasised that older legislative history will be of limited importance as an argument "against an environmentally beneficial solution of a questionable legal issue" in cases where knowledge of the environmental threat has subsequently been strengthened.[28] To the extent that statements in the legislative history from the 1992 amendment and the 2014 amendment diverge, the greatest weight shall be given to the 2014 amendment.[29]

The Lønning Committee, which prepared the reform, started its assessment with a review of the prevailing law. The Committee found that Article 110 b was a rights provision that the Storting was also bound by.[30] Such an understanding was supported by the wording, but the Committee probably went too far in its interpretation of the legislative history

---

[26] This is how the provision was also generally understood in legal theory, see for example Andenæs, *Statsforfatningen i Norge (Public Administration in Norway)*, 8th edition (1998), pp. 438–439 and Boe, *Innføring i juss (Introduction to Law). Volume 2: Statsrett og forvaltningsrett (Constitutional Law and Administrative Law)* (1993), pp. 564–565. See correspondingly Backer, "Domstolene og miljøet (Courts and the Environment)", *Lov og Rett* (1993), No. 8, pp. 451–468, on pp. 455–457, as well as Backer, *Innføring i naturressurs- og* miljørett (Introduction to Natural Resource and Environmental Law), 2nd edition (1995), pp. 54–55. Backer, however, kept the door ajar so that the courts could use the provision to control the administration, and he also made a theoretical reservation that the courts could possibly use Article 110 b as a barrier to the Storting's legislation, if "contrary to expectation it should go in the opposite direction, towards a general reduction in environmental security". Mostly similar views were assumed by Bugge, *Lærebok i miljøforvaltningsrett (Textbook in Environmental Management Law)*, 1st edition (2006), pp. 76–78. Both Backer and Bugge held materially the same views in subsequent editions before the constitutional revision in 2014, albeit the latter went a small step further in the 3rd edition from 2011 on p. 141. Fleischer, *Miljø- og ressursforvaltning (Environmental and Resource Management). Grunnleggende forutsetninger (Basic Prerequisites)* (1999), Chapter 5, particularly pp. 58–61, went further than Backer in believing that Article 110 b could be used to control the administration, and generally had a more critical attitude towards the legislative history, but by and large the views were similar. Fauchald found in 2007 that the courts could only set aside a parliamentary resolution when it "entails a direct and serious weakening or undermining of the environmental standards set out in Article 110 b", see Fauchald, "Forfatning og miljøvern – en analyse av grunnlovens § 110 b (The Constitution and Environmental Protection – an analysis of Article 110 b of the Constitution of Norway)", *Tidsskrift for Rettsvitenskap (Law Journal)*, No. 1–2 (2007), pp. 1–83, on p. 35. Fauchald, however, went slightly further than in previous literature in emphasising that Article 110 b contained certain legally binding minimum norms, where the content had to be assessed on a case-by-case basis, see Section 4.5, pp. 37–40.

[27] Smith (2017), p. 114.

[28] Backer, *Innføring i naturressurs- og miljørett (Introduction to Natural Resource and Environmental Law*, 4th edition (2002), p. 36.

[29] This can be justified both on the basis of *lex posterior* considerations, as well as the relative weight of the constitutional law history based on the thoroughness of the process, see further details in Smith (2017), p. 114

[30] Doc. 16 (2011–2012), Section 40.2 (pp. 243–244) and p. 246.

from 1992. Whether this understanding was correct or not is, however, not of key importance.[31] The point is rather that, based on its understanding of Article 110 b as a rights provision, the Committee decided to sharpen the constitutional protection of the right to a healthy environment by amending the third paragraph.[32] The reason why the Committee saw a need to amend the third paragraph was that it could not be "ruled out" that the original formulation of the paragraph had been a “contributing factor” as to why the rights under Article 110 b had not been perceived and pleaded as rights in practice.[33] The Committee considered the option of “repeal[ing] the third paragraph without replacing it with a new formulation”, but decided in the end to amend the wording.[34] The purpose was to “clarify the duty” of State authorities to “follow up the right to a healthy environment” in accordance with the first paragraph by “taking adequate and necessary measures to safeguard the environment”.[35]

These statements from the legislative history show that the Committee cannot have regarded the first and second paragraphs as independent components that do not have any operational content until the duty is specified in the third paragraph. On the contrary, the Committee considered the *third paragraph* to be a superfluous component, which could have been eliminated without changing the meaning of the first and second paragraphs. The Committee also referred to the identical "practice of the ECtHR".[36] As the ECtHR interprets both Article 2, first paragraph and Article 8, first paragraph of the ECHR, the State has a negative duty to refrain from intervention and a positive duty to ensure implementation of the right.

From consideration of the constitutional reform in the Storting, there are several statements that point in the direction of Article 112 being intended as an enforceable rights provision. The majority of the Standing Committee on Scrutiny and Constitutional Affairs stated that they agreed in general with the Lønning Committee’s proposal for a new Article 112. The majority was of the opinion that “the relationship between the environment and human rights should be linked more closely”.[37] The majority also made reference to a quote from the legislative history from 1992 that “legally, constitutionalisation would entail that a constitutional provision would take precedence over ordinary legislation if they contradicted each other”.[38] In a special note, the

[31] This is also the assessment of the Court of Appeal, see the judgment, p. 16. See also Kierulf and Kjølstad (2019), Note 255, sixth paragraph.

[32] Doc. 16 (2011–2012), p. 245.

[33] Doc. 16 (2011–2012), p. 244, left column, third actual paragraph.

[34] Doc. 16 (2011–2012), p. 246, left column, first actual paragraph.

[35] Doc. 16 (2011–2012), p. 245, right column, last paragraph.

[36] Doc. 16 (2011–2012), p. 246, first column.

[37] Recommendation No. 187 (2013–2014) to the Storting, p. 25, first column.

[38] Recommendation No. 187 (2013–2014) to the Storting, p. 25 ,second column, with further reference to Recommendation No. 163 (1991–92) to the Storting.

committee members from the Conservative Party stated that "the expansion is so marginal that *these members* can agree to the proposal for a new Article 112. The prevailing constitutional provision is meant to be a rights provision, and after the amendment of the third paragraph, this will be clearer in the view of *these members*."[39] There was little focus on Article 112 in the parliamentary debate, but Representative Michael Tetzschner (Conservative Party) stated that the provision "may be pleaded as a concrete rights provision for individuals", and Representative Per Olaf Lundteigen (Centre Party) stated that it "takes precedence over ordinary legislation if they contradict each other."[40]

However, the legislative history is not entirely unambiguous. Firstly, the majority of the Standing Committee on Scrutiny and Constitutional Affairs stated that it would be up to every Storting to adopt whatever measures are to be implemented to safeguard the environment.[41] Even so, this statement does not necessarily contradict the view that Article 112, first paragraph grants rights.[42] The State's ability to choose which specific measures it adopts in order to fulfil a positive duty to *safeguard* rights is typically interpreted as a part of the duty to safeguard and is otherwise consistent with the State having an independent duty to refrain from intervention, see Article 92 of the Constitution of Norway.[43] The second statement that may cause doubt is the Lønning Committee's general statement that none of the Committee's proposals in the report would entail a change to the prevailing substantive law.[44] This reservation has not been made specifically in the chapter on Article 112, as has been the case in the other chapters.[45] It is therefore unclear whether it was aimed at Article 112.[46] Since the Committee, Standing Committee and constitutional majority already assumed that Article 110 b, first paragraph was an

[39] Recommendation No. 187 (2013–2014) to the Storting, pp. 25–26 (emphasised in the original).

[40] See Stortingstidende (Official Report of the Proceedings of the Storting) 2469–2542 (2013–2014), p. 2477 and p. 2494, respectively.

[41] Recommendation No. 187 (2013–2014) to the Storting, p. 25, second column, third paragraph.

[42] One possible way of understanding the statement is that it relates to the third paragraph as an independent duty to take action, and not the rights component of the provision, see Kierulf and Kjølstad (2019), Note 256, third paragraph.

[43] This is how the positive duty to safeguard the realisation of rights under the ECHR is understood, which the Committee referred to as the identical practice in Doc. 16 (2011–2012).

[44] Doc. 16 (2011–2012), p. 255 and Recommendation No. 187 (2013–2014) to the Storting, p. 13 (the majority, all but the members from the Conservative Party) and p. 14 (members from the Conservative Party, the Party of Progress and the Centre Party).

[45] With regard to the other rights, it is generally stated in Doc. 16 (2012–2012) that the proposal would not entail any change to the prevailing law. See for example p. 105 (right to life), p. 106 (death penalty), p. 109 (torture), p. 112 (slavery), p. 117 (criminal procedure), pp. 121 and 123 (court proceedings), pp. 123 and 124 (courts), p. 130 (presumption of innocence), p. 132 (double jeopardy), p. 138 (retroaction), p. 144 (equality), p. 149 (discrimination), p. 158 (freedom of thought and conscience), p. 165 (freedom of association and assembly), pp. 175, 178 and 179 (private life), pp. 183 and 185 (family life) , p. 192 (children), p. 197 (property and expropriation), p. 201 (freedom of movement), p. 205 (asylum), p. 208 (culture), p. 217 (Sami), pp. 222, 223 and 225 (education), p. 232 (work), pp. 248 and 249 (principle of legality).

[46] Thengs, "En standardtilnærming til Grunnloven § 112 (A Standard Approach to Article 112 of the Constitution of Norway)" *Tidsskrift for Rettsvitenskap (Law Journal)* (2017), No. 1, pp. 28–67, on p. 37.

individually enforceable right under the prevailing substantive law, a general reservation that the prevailing substantive law would not be amended cannot entail that the adoption of Article 112 would change the nature of a right to something less. In this case, the prevailing substantive law on which the constitutional majority was based would have been amended, contrary to the Storting's presumption.

In summary, the main impression of the legislative history from 2014 is that the Lønning Committee argued for a strengthening of what they already considered to be a rights provision, and that this was something that the constitutional majority endorsed.

2.2.4 Systematic interpretation

This interpretation is strengthened by a contextual comparison with the wording of other provisions in the human rights chapter of the Constitution of Norway. Systematic interpretation is an important element of constitutional interpretation.[47]

In the Constitution of Norway, phrases such as "every person has the right to" are generally used when referring to enforceable rights.[48] Provisions that signal that they concern rights that can be pleaded to a limited degree by individuals are typically formulated so that the authorities have a duty to "facilitate" something.[49] As mentioned, there are also several provisions in the human rights chapter consisting of both a rights component in one paragraph and a duty component in another paragraph, where the first paragraph is regarded as an independent rights provision that entails negative duties to refrain and positive obligations for the authorities, while the duty to safeguard is emphasised in a subsequent paragraph.[50] A contextual interpretation indicates that it is

[47] Andenæs and Fliflet, *Statsforfatningen i Norge (Public Administration in Norway),* 10th edition (2008), p. 49 and Smith (2017), p. 321.

[48] See Article 93, first paragraph, first sentence (right to life), Article 95, first paragraph, first sentence (everyone has the right to have their case tried by an independent and impartial court within reasonable time), Article 96, second paragraph (presumption of innocence), Article 100, fifth paragraph, first sentence (right of access to public documents etc.), Article 101, first paragraph (freedom of association), Article 102, first paragraph, first sentence (right to privacy etc.), Article 104, first paragraph, second sentence (right of children to be heard) and third paragraph, first sentence (children's right to protection of their personal integrity), Article 109, first paragraph, first and second sentence (right to education) and Article 110, first paragraph, second sentence (right to support from the State). It would be going too far to delve into the interpretation of all these rights, but see, for example, HR-2018-1909-A, paragraph 41 ff. on the presumption of innocence and HR-2016-2554-P, paragraph 79 ff. on the freedom of association.

[49] See Article 100, sixth paragraph (open and enlightened public discourse), Article 104, third paragraph, second sentence (children's development), Article 108 (Sami rights) and Article 110, first paragraph, first sentence (freedom of work and enterprise). With regard to Article 108, for example, see HR-2018-456-P, paragraph 91 and further reference to the Lønning Committee, p. 215.

[50] One example is Article 95. It is stated here in the first paragraph, first sentence that everyone has the right to have their case tried by an independent and impartial court within reasonable time. The second paragraph states that the authorities of the State shall ensure the independence and impartiality of the courts and the members of the judiciary. See also Articles 93, 100, 102, 104 and 109.

most natural that Article 112 be understood in the same way as the similarly structured provisions in Chapter E of the Constitution of Norway.

2.2.5 Case law

There is no Supreme Court decision that directly applies to Article 112 after the amendment in 2014.[51] In the Supreme Court decisions concerning the former Article 110 b that are available, the provision is only pleaded as support for an interpretation, and not independently.[52] Case law therefore provides little guidance, but we add that Article 112, first paragraph has been interpreted as a right in the lower court practice that exists to date.[53] Both the District Court and Court of Appeal have also assumed this.

2.2.6 Purpose

Considerations of the objective or purpose of a particular constitutional provision are an "important factor of interpretation" in constitutional law.[54] In addition, considerations of objective carry "great weight" with respect to environmental law, since environmental provisions are a means of ensuring a specific environmental quality.[55] The legislative history of Article 110 b of the Constitution states that the provision was meant to "prevent a development in an environmentally hostile direction".[56] The legislative history of Article 112 states that the provision was "meant to represent a legal barrier for the authorities".[57] Part of the "main purpose" was "to link the legal effects to the fundamental principles of law" formulated by the World Commission for Environment and Development.[58] An interpretation in which Article 112, first paragraph does not grant individuals and organisations enforceable rights before the courts will not safeguard the purpose of the provision to act as a substantive barrier to legislation and the exercise of authority.

2.2.7 Real considerations

Real considerations in constitutional theory are also considered of "key importance" to constitutional interpretation.[59] A fundamental objection to understanding Article 112 as

[51] Article 112 of the Constitution of Norway has recently been mentioned in brief in HR-2020-1353-A (paragraph 53) concerning sentencing for violation of section 32-9 of the Planning and Building Act. See also HR-2017-1978-A (paragraph 23) and HR-2015-791-A (paragraph 52).

[52] Case law pursuant to Article 110 b of the Constitution of Norway has been thoroughly reviewed in Fauchald (2007).

[53] Oslo District Court's judgment of 4 January 2018 (TOSLO-2016-166674), Section 5.2.1, p. 17, Borgarting Court of Appeal's judgment of 23 January 2020 (LB-2018-60499), Section 2.2, p. 17, Jæren District Court's order of 5 June 2020 (20-042262TVI-JARE), p. 19 and Oslo District Court's judgment of 18 May 2018 (TOSLO-2017-196251-2).

[54] Andenæs and Fliflet (2017), p. 59.

[55] Backer (2002), p. 37, with reference to Rt. 1991, p. 385 and Rt. 1991, p. 1137.

[56] Recommendation No. 163 (1991–92) to the Storting, p. 5, second column.

[57] Doc. 16 (2011–2012), p. 245, second column.

[58] Doc. 16 (2011–2012), p. 246, first column, with further reference.

[59] Andenæs and Fliflet (2017), p. 60.

a rights provision is that it would legalise environmental issues that depend on professional assessments and are the result of political priorities. However, this is not specific to the environmental area, and it can hardly be a decisive argument when weighty legal sources indicate that Article 112 is a rights provision. The legislative history of the 2014 amendment also acknowledged that the rights establishment would shift power to the courts in the event of questionable interpretation issues.[60] Democracy considerations, on the other hand, would be an argument for the courts to show restraint in their review.[61]

The doubts against constitutional minority protection that traditionally surface have at the same time a different standing when it comes to long-term and irreversible environmental and climate consequences.[62] It is evident from the legislative history that it was an important acknowledgement behind Article 110 that "the environment around us is completely decisive for our quality of life and for the human race to have satisfactory living conditions in the future".[63] The legislative history of Article 112 raised questions about whether "the right to a healthy environment is at least as important to the existence of individuals and their expression of life as the other human rights" in the Constitution of Norway.[64] If the right to a healthy environment cannot be legally enforced, the interests of today's young people and future generations in a balanced climate system may fall short in relation to other enforceable human rights, such as the right to ownership of petroleum enterprises to protect legitimate expectations of future earnings from the sale of petroleum.[65] Today's children and young people, and future generations, will have to bear the irreversible consequences of climate change without having any political representation when decisions on emissions affecting them are made. Their interests in a liveable climate are not represented *politically* either and can be drowned out by the

[60] Doc. 16 (2011–2012), p. 14.

[61] Compared to Rt 2015, p. 1388 (paragraph 247). See Section 2.7 on climate rights and the distribution of power for more details.

[62] IPCC's 5th Assessment Report, Summary for Policymakers, p. 16: "A large fraction of anthropogenic climate change resulting from CO2 emissions is irreversible on a multi-century to millennial timescale, except in the case of a large net removal of CO2 from the atmosphere over a sustained period. Stabilization of global average surface temperature does not imply stabilization for all aspects of the climate system. Shifting biomes, soil carbon, ice sheets, ocean temperatures and associated sea level rise all have their own intrinsic long timescales which will result in changes lasting hundreds to thousands of years after global surface temperature is stabilized. {2.1, 2.4} There is high confidence that ocean acidification will increase for centuries if CO2 emissions continue, and will strongly affect marine ecosystems. {2.4} It is virtually certain that global mean sea level rise will continue for many centuries beyond 2100, with the amount of rise dependent on future emissions. The threshold for the loss of the Greenland ice sheet over a millennium or more, and an associated sea level rise of up to 7 m, is greater than about 1°C (low confidence) but less than about 4°C (medium confidence) of global warming with respect to pre-industrial temperatures. Abrupt and irreversible ice loss from the Antarctic ice sheet is possible, but current evidence and understanding is insufficient to make a quantitative assessment. {2.4}".

[63] Recommendation No. 163 (1991–92) to the Storting, p. 2.

[64] Doc. 16 (2011–2012), p. 245.

[65] See, for example, HR-2018-1258-A (paragraphs 120–132).

interests represented today.[66] This institutional imbalance is pronounced in the environmental area, and in the climate area in particular.[67] This suggests that there are good reasons for the protection of rights.

2.2.8 Legal literature

In legal literature, the most common view is that Article 112, first paragraph is a rights provision.[68] The opinion in the literature on the former Article 110 b is of limited interest to the scope of Article 112 after the amendment.[69]

2.2.9 Conclusion

An overall assessment of the wording, legislative history, systematic interpretation, purpose and real considerations indicates that it is most natural that Article 112, first paragraph must be understood as granting enforceable rights. In the next section, we will discuss in particular whether this right encompasses future generations.

2.3. Does Article 112, first paragraph grant rights to future generations?

While Article 112, first paragraph, first sentence is formulated as a right, the first paragraph, second sentence is formulated declaratively. It is therefore argued that the second sentence only indicates a mandatory consideration.[70] It is not self-evident that such an interpretation is correct.

Firstly, the wording also provides grounds supporting the opposite view. The second sentence refers to "this right" in accordance with the first sentence. A normal understanding indicates that the reference does not detract from the right in the first sentence. Moreover, the adverb "also" indicates that the content of the future generations' right to the environment is equivalent to the right of the living to the environment in accordance with the first sentence. If we look at Article 95, first paragraph, second sentence of the Constitution of Norway, it states correspondingly that "[c]ourt proceedings shall be fair and public". However, there is no doubt that the provision's second sentence grants rights that individuals may plead.[71]

---

[66] See further details in Bugge (2019), p. 75–76 and p. 171 and Backer (2002).

[67] Bugge (2019), p. 75 and Backer (2002).

[68] See Thengs (2017), p. 44 and Thengs (2019), p. 145, Kierulf and Kjølstad (2019), Note 255, ninth paragraph and Bugge (2019), p. 169. Eivind Smith, however, has arguments for the opposite view in Smith (2019), pp. 151–172. In Andenæs and Fliflet (2017), the point of view is somewhat unclear, see Chapter 65, p. 630 in particular.

[69] See Section 2.2.3 with reference to literature related to Article 110 b.

[70] Smith (2019), pp. 156–157, Thengs (2017), p. 41.

[71] See also Article 104, second paragraph of the Constitution of Norway concerning the best interests of the child as a fundamental right.

Considerations of objective point in the same direction. The authors of the proposal for Article 110 b justified the provision, inter alia, by highlighting the need to ensure "satisfactory living conditions in the future" for mankind.[72] The legislative history of Article 112 states that the aim of the provision is to "protect the quality of life and health for both future generations and individuals" and to ensure "the existence of mankind as such".[73] If the first paragraph, second sentence is reduced to a consideration, the scope of the entire provision will be restricted to that consideration, and although future generations will be emphasised, this may have to give way for other more present considerations. Since, for example, the long-term effects of greenhouse gas emissions over the tolerance limits of the climate system can do irreparable damage to the living conditions of future generations, such an interpretation may therefore entail that satisfactory living conditions in the future are not safeguarded.

The legislative history of Article 110 b supports an interpretation that the first paragraph, second sentence was intended to be a substantive barrier. The Committee's recommendation made reference to the Universal Declaration on Environment and Development, as well as the Stockholm Declaration of 1972.[74] Both of these are based on the fact that current generations have legal obligations to future generations.[75] The authors of the proposal also referred to a report by Inge Lorange Backer, which emphasised solidarity across generations "as a principle of environmental law".[76] And when the Storting chose the wording of the former Article 110 b, first paragraph over other formulations, it was, inter alia, because "the principle of solidarity with future generations was built in".[77]

The legislative history of Article 112 points in the same direction. In a general discussion about the parties that are entitled to plead the provision, the Committee concluded that "the environment as a human right can be pleaded by individuals, affected groups and on behalf of future generations".[78] Admittedly, the Committee stated at the same time that Article 110 b is a "right that applies to 'everyone', but that future generations shall nevertheless be taken into account. This means that it must be possible for individuals to

[72] Recommendation No. 163 (1991–92) to the Storting, p. 2, first column, see also Doc. No. 12 (1987–1988), p. 34, second column.

[73] Doc. 16 (2011–2012), p. 243, second column.

[74] Recommendation No. 163 (1991–92) to the Storting, p. 3.

[75] Stockholm Declaration of 1972, Principle 1: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears the solemn responsibility to protect and improve the environment for present and future generations." The Universal Declaration on Environment and Development states that an "important step towards sustainable development" is that "the State acknowledges its obligations to ensure a satisfactory environment for current and future generations". Also cited in Recommendation No. 163 (1991–92) to the Storting, p. 3, second column.

[76] Recommendation No. 163 (1991–92) to the Storting, p. 5.

[77] Recommendation No. 163 (1991–92) to the Storting, p. 6.

[78] Doc. 16 (2011–2012), p. 47, second column.

plead this right, even though the topic of assessment is first and foremost consideration of multiple generations".[79] These formulations can potentially be cited as support for the argument that the second sentence is meant as a consideration, but such an understanding is less natural when the statement is read in context. It is evident from the chapter that the Committee is only clarifying that even though Article 110 b is formulated as an individual right, the right can also be pleaded by individuals in cases where the topic of assessment concerns collective interests.

In the *legal literature*, there are divided opinions on whether Article 112, first paragraph, second sentence grants a right.[80] Based on the sources of law, Bugge's view appears to be the most established view. He writes that "the rights in the first paragraph shall also apply to future generations", and that this "must entail that the courts can declare pursuant to Article 112 a decision, and possibly a statutory provision as well, as unconstitutional if it clearly neglects or contributes to reinforcing environmental problems that will threaten nature and people in the future".[81]

The *real considerations* we have discussed above strongly apply here. As mentioned, democracy considerations are a fundamental objection to regarding Article 112, first paragraph as a substantive right. And when it comes to an intervention that primarily results in local and reversible inconveniences or damage, and where the decisions can be influenced by the affected individuals or special interest groups that are politically represented, this means that democracy considerations apply more strongly. When, on the other hand, it comes to emissions that make the second sentence relevant in the event of long-term or *irreversible* damage, democracy considerations apply in a different way. The Court of Appeal states to this effect that the principle of solidarity across generations "is related to democracy considerations, as future generations cannot influence the current political processes".[82] One can either take the view that the democracy considerations apply to a lesser extent because future generations are not politically represented today. Or one can alternatively take the view that the democracy considerations potentially call for stronger legal barriers in this area, because future generations may in time and overall constitute a larger majority than the decision-making majority today.

Both of these points of view indicate that Article 112, first paragraph, second sentence of the Constitution of Norway entails a barrier against emissions that jeopardize the rights of future generations under this provision. If the right of future generations to an

[79] Doc. 16 (2011–2012), p. 45, second column.

[80] See Smith (2019), pp. 156–158 and Thengs (2017), p. 41 with further reference to Backer, "Miljøvern og økonomisk utnyttelse – prinsippet om bærekraftig utvikling (Environmental Protection and Economic Exploitation – The Principle of Sustainable Development)", 36th Nordic Law Meeting (2002), pp. 115–141 and Bugge (2019), p. 165 and pp. 171–172.

[81] Bugge (2019), pp. 165 and 171, respectively.

[82] Court of Appeal's judgment, Section 2.2, p. 17.

environment that ensures their health is to have any content under the provision, it should probably entail that it sets out an enforceable barrier against political majority decisions today.

A practical objection to this interpretation is nevertheless that unborn generations are not in a position to assert their rights today. However, this is an objection that relates to *enforcement,* not the existence of the right as such. In the legislative history, it is assumed that this will be resolved by the rights of future generations being pleaded representatively by living individuals, groups or legal persons today.[83] This is not a new interpretation or innovation in Norwegian law. Section 1-4 of the Dispute Act already allows representative legal actions to safeguard broader interests that are not the plaintiff's own interests.

Overall, an interpretation that the rights of future generations are already materially protected today appears to be mostly in accordance with the wording of the provision, read in context with the purpose, legislative history and real considerations. Whenever necessary to ensure an effective and genuine protection in the future, because the effects of the decisions may otherwise do irreparable harm to the living conditions of future generations, their right to a healthy environment will constitute a present-day barrier.[84]

2.4 What duties are prescribed by Article 112 of the Constitution, first and third paragraphs?

2.4.1 Do the rights entail negative or positive obligations?

Provided that Article 112, first paragraph grants a right, another question in dispute in this matter is whether the right only entails a positive duty to take action pursuant to Article 112, third paragraph, or entails a negative duty to respect the right as well. Presumably, the Court of Appeal has assumed that the right only entails a negative duty to refrain from actions which interfere with the right in cases where no measures have been taken to safeguard the right pursuant to the third paragraph.[85]

The wording of the first paragraph formulates the right positively, rather than negatively as a duty to respect the right. However, it follows from Article 92 of the Constitution of Norway that the rights pursuant to Chapter E entail both positive and negative obligations. The provision stipulates that the authorities shall "respect and safeguard" human rights. It was precisely because several individual rights in Chapter E do not themselves "emphasise that the authorities of the State have both a duty to respect the

[83] Doc. 16 (2011–2012), p. 45, see also Doc. No. 12 (1987–1988), p. 35, also cited in Recommendation No. 163 (1991–92) to the Storting, p. 2.

[84] Bugge (2019), pp. 171–172.

[85] Court of Appeal's judgment, Section 2.3, p. 17–19.

rights and a duty to ensure that they are implemented" that the Committee saw a need to stipulate these obligations in general in Article 92.[86] In other words, the relationship between the rules indicates that the obligations of the authorities pursuant to Article 112 include both a *negative duty to respect* and a *positive duty to safeguard* the right.[87]

The legislative history's description of the purpose here points in the same direction. The Lønning Committee does indeed state at one point that the "main reason for the provision" is "the duty of the authorities to comply with the principles in the first paragraph of implementing adequate and necessary measures to safeguard the environment".[88] The statement may initially indicate that the main purpose is the duty to take action, but it is evident from the context that this was not the intention. The Committee's discussion of the "provision" refers to Article 110 b, *third paragraph*, not Article 110 b in its entirety. It is otherwise evident from the wording and legislative history that the overarching purpose behind Article 112, as well as Article 110 b, was to avoid environmental damage and degradation in order to ensure satisfactory living conditions now and in the future.[89] The purpose of the provision therefore contradicts the argument that the authorities only have positive duties to take action under the third paragraph, and not negative obligations to refrain from actions which interfere with the right in cases where no measures have been implemented. The absence of a negative duty will also weaken the real meaning of the provision, because refraining from an environmental intervention may be the most effective – and at times the only – way to prevent environmental degradation and damage.

Such an interpretation is also in accordance with general rights theory.[90] A negative duty to refrain from violating or interfering with a right is regarded as a *fundamental* obligation that can be derived from a right.[91] The negative obligation is often emphasised in the environmental area through the central *no-harm* principle. The original legislative history

[86] Doc. 16 (2011–2012), p. 67, second column.

[87] Kierulf and Kjølstad (2019), Notes 255 and 256, see also Nordby, "Er avståelser tiltak? (Is Refraining a Measure?)" *Lov og Rett (Law Journal)* (2019), No. 6, pp. 379–385, which advocates that Article 112, third paragraph encompasses both negative and positive obligations.

[88] Doc. 16 (2011–2012), p. 245, right column, last paragraph.

[89] The Committee states, inter alia, in Recommendation No. 163 (1991–92) to the Storting, p. 6 that Article 110 b of the Constitution of Norway establishes a constitutional "duty to avoid environmental degradation and damage", as well as a "duty of care".

[90] For a thorough assessment of how all central rights have a negative and positive component, see Shue, *Basic Rights* (1996). Smith (2017), p. 55 also writes that rights and duties mirror each other. See Eng, *Rettsfilosofi (Philosophy of Law)* (2007), pp. 145–148.

[91] See, for example, Caney, Human Rights, Responsibilities and Climate Change, in Beitz and Goodin (editors), *Global Basic Rights* (2009), pp. 227–247, which in its treatment of the relationship between climate change and human rights uses the negative obligations, which are the least controversial, as its point of departure. That rights can be such "linking words" between several different obligations is in line with the theory of Alf Ross, which is well established in the Norwegian interpretation of the law. This is not in contradiction to the fact that rights and duties mirror each other, see Eng (2007), p. 149.

of Article 110 b emphasised this negative obligation, and stated, for example, that a “duty to avoid environmental degradation and damage” as well as a "duty of care" was included in the original Article 110 b.[92] A positive duty to safeguard or protect an interest is generally also regarded as being more demanding for the State than the fundamental negative obligation to refrain from doing damage. Therefore, the fact that the legislative history places particular emphasis on the positive duty to safeguard does not mean that the authorities should not also comply with the more fundamental negative obligation to respect the right by refraining from intervention.

It could be argued that this is different because the positive duty is set out in Article 112, third paragraph, but the legislative history contradicts such an interpretation. As demonstrated above, the third paragraph has been formulated to “clarify” a duty that already follows from the first paragraph.[93] As mentioned, it is also a common practice in Chapter E of the Constitution of Norway to specifically emphasise the positive obligation in a subsequent paragraph, without relieving the State from the fundamental negative obligation to refrain from doing damage by interfering with the right pursuant to the first paragraph.[94]

Such an interpretation is also supported in legal literature.[95]

The sources of law described above indicate that it is most natural that Article 112, first paragraph, read in conjunction with Article 92, also entails a negative duty to refrain from intervention.

2.4.2. Are the negative and positive obligations independent obligations?

The next question is whether the negative obligation to refrain from interfering with the right, and the positive obligation to ensure the realisation of the right, are autonomous and independent duties. The lower courts have relied on the State’s alternative view that the right and the positive duty to safeguard shall be viewed in context, so that a “net assessment” is made of (i) the interference with the right, compared with (ii) any action in the climate area. The Court of Appeal has stated that an overall assessment shall be made of whether “the actions are sufficient relative to the seriousness of the environmental damage”.[96] The State has acknowledged that a net assessment “stretches the sources quite far”.[97]

[92] Recommendation No. 163 (1991–92) to the Storting, p. 6.

[93] Doc. 16 (2011–2012), pp. 245–246.

[94] See, for example, Article 102, second paragraph and Article 93, fourth paragraph.

[95] See, for example, Bugge (2019), p. 168, Thengs (2017), p. 38, Kierulf and Kjølstad (2019), Notes 255 and 256.

[96] Court of Appeal's judgment, Section 2.3, p. 18.

[97] State's outline before the Court of Appeal, Section 2.4.1.

The Court of Appeal references two sources of law as the basis for conducting a net assessment. Firstly, the Court found "support for such an understanding in Bugge, Lærebok i miljøforvaltningsrett (Textbook in Environmental Management Law) (5th edition, 2019), p. 169". However, it is evident from page 169 of the textbook that the author has only used the District Court's judgment as the basis for his further consideration of Article 112 in the book. The author clarifies that it is an open question whether the District Court's conclusions will remain standing.[98]

Secondly, the Court of Appeal makes reference to Doc. No. 12 (1987–1988), p. 2, first column, which sets out the legislative history of Article 110 b before the amendment in 2014.[99] However, this source of law does not provide obvious support for a net assessment being made either. In what has been cited from the legislative history, it is firstly evident that 110 b will have "a legal effect in many ways", and will take "precedence over other legislation in the event of any contradiction".[100] It is subsequently stated that the provision "entails a duty for the authorities to issue any detailed rules that are required to implement the principles of the constitutional rules. [...] If rules are issued, it is therefore normally the Storting's interpretation of the constitutional rules that will be decisive for what type of rights the citizens are entitled to".[101] It is difficult to see that a net assessment is instructed here. The fact that the judicial review of rights will normally start at the most detailed and lowest level, and not directly in the Constitution of Norway, is in accordance with traditional principles of judicial review. If the legislation is in violation of the Constitution of Norway, however, the judicial review could be linked directly to the constitutional provision, which would take precedence in the event of any contradiction, and would be consistent with the qualification that the Storting's interpretation will "normally" be decisive as described above. And in the event that the legislation was lacking, the legislative history of Article 110 b indicates that judicial review could be linked directly to the Constitution of Norway.[102]

However, even if the statements in the legislative history of Article 110 b are understood to mean that a net assessment shall be made, there is still a question of whether the older legislative history can justify such a restrictive interpretation of Article 112 after the rights protection was strengthened in 2014. As mentioned, the legislative history of Article 112 will have greater weight as a source of law.

A contextual interpretation, which draws on Article 92 of the Constitution, among other sources, also supports the idea that the negative duty to refrain under Article 112, first

[98] Bugge (2019), p. 169, just below Section 5.4.4.

[99] Correct page number reference to Doc. No. 12 (1987–1988) is believed to be pp. 34–35, see the Court of Appeal's reference to what has been "cited above" from this legislative history.

[100] Doc. No. 12 (1987–1988), p. 34, second column.

[101] Doc. No. 12 (1987–1988), p. 34, second column, and p. 35, first column.

[102] Doc. No. 12 (1987–1988), p. 35, first column.

paragraph and the positive duty to safeguard under Article 112, first and third paragraphs, are independent duties. A violation of the negative obligation is not compensated for then by the fact that the State complies with positive obligations in other areas. For example, the fact that the State has fulfilled positive obligations to protect privacy through the investigation of private surveillance cannot compensate for a violation of the State's negative obligation to refrain from surveillance of its citizens.[103] Correspondingly, it is not taken into consideration in a negative intervention assessment pursuant to Article 93 that the authorities otherwise have a system for following up victims of violence, which fulfils a positive duty to safeguard.[104] The negative and positive obligations in these examples are independent, rather than dependent. It is natural to understand Article 112 in the same way.

Nevertheless, an argument against a contextual interpretation is that environmental law requires an overall perspective, as opposed to other areas of human rights law. Because it will rarely be an individual intervention alone, but the sum of many interventions that cause damage, the consequences of individual interventions must be assessed along with the impact from already existing and planned interventions.[105] This principle of an overall impact is enshrined in section 8 of the Svalbard Environmental Protection Act and section 10 of the Nature Diversity Act, and the latter Act also applies to the continental shelf, see section 2, third paragraph. However, the fact that an overall assessment should be made is unlikely to mean that an isolated source of emissions should be assessed against the sum total of the authorities' emissions-reducing measures within Norway and abroad. It means, rather, that the climate impact of a new source of emissions "cannot be seen in isolation but must be assessed together with the other factors that may have an adverse effect on the environment", see Official Norwegian Report (NOU) 2004: 28, Section 11.11.3. In other words, the climate impact of individual permits for new sources of emissions must be assessed on the basis of already existing greenhouse gas emissions and the prospect of further greenhouse gas emissions.[106] The idea that the overall assessment must also take into account future impacts follows from the precautionary principle, see section 9 of the Nature Diversity Act. The overall perspective in environmental law is thus not that the positive duty to safeguard may compensate for a violation of the negative duty to refrain. It is rather that individual negative interventions must be considered in the context of the sum total of other negative interventions.

[103] Article 102 of the Constitution of Norway.

[104] Article 93 of the Constitution of Norway.

[105] Such an understanding can, for example, be found in Fauchald, "Har § 112 selvstendig betydning for vern av villaksen? (Does Article 112 have independent significance to the protection of wild salmon?)" in Fauchald and Smith (editors) (2019), pp. 227–252 on p. 243 ff.

[106] See more detailed discussion in Official Norwegian Report (NOU) 2004: 28, Section 11.11.3, p. 194.

Based on the sources of law discussed above, it is thus most natural to regard the duty to respect and and the duty to ensure the rights set out in Article 112 as independent duties.

2.5. Specific questions about the application of Article 112 on greenhouse gas emissions

It is clear that Article 112 objectively encompasses greenhouse gas emissions and climate change. The atmosphere and the carbon cycle are part of the "environment", and a well-functioning climate system is a basic prerequisite for the preservation of "nature" and "biodiversity". The climate problem was also part of the backdrop for the original Article 110 b and the new Article 112.[107] The global nature of the climate problem, however, raises the following two questions in particular.

2.5.1 Does the provision encompass exported emissions originating from Norway?

Firstly, the parties disagree on whether the provision encompasses greenhouse gas emissions that occur outside the Norwegian jurisdiction from exported Norwegian oil and gas. Approximately 95 per cent of the greenhouse gas emissions from Norwegian oil and gas are the result of combustion after export, while just 5 per cent come from the production phase within NorwayGreenhouse gas emissions from the combustion of exported oil and gas produced in Norway account for about 10 times the total emissions from the Norwegian territory.[108]

The District Court concluded that Article 112 only applies to greenhouse gas emissions from the production of oil and gas, and not the emissions from combustion after export.[109] The District Court's assessment has been criticised in theory, and the Court of Appeal came to the opposite conclusion.[110] The question is of material importance to the protection of rights under Article 112 and public interests therefore apply under section 15-8 of the Dispute Act.

The wording in Article 112 prescribes "comprehensive" considerations that may indicate that emissions originating in Norway are encompassed. *The legislative history of Article 110 b* stated that the provision should be "marked by the legislation" that exists in this area, and the Petroleum Act is mentioned in the proposal as a special law in the environmental area.[111] Pursuant to section 1-1 of the Petroleum Act, the State has ownership of the undersea petroleum deposits, and extraction is subject to a permit under section 1-3. The State therefore controls whether the greenhouse gas molecules

[107] Storting's Deliberations 1992, No. 253, p. 3737, Doc. No. 16 (2011–2012), p. 245, right column, first actual paragraph.

[108] Court of Appeal's judgment, Sections 3.1 and 3.3.

[109] Oslo District Court's judgment of 4 January 2018 (TOSLO-2016-166674), pp. 19–20.

[110] Bugge (2019), p. 170 and the Court of Appeal's judgment, p. 20.

[111] Recommendation No. 163 (1991–92) to the Storting, p. 6, p. 2.

from Norwegian geological deposits remain in the natural carbon cycle or change the balance in the atmosphere. Even though the environmental damage takes a detour abroad, the exercise of Norwegian authority is a necessary prerequisite before carbon from Norwegian geological deposits can ultimately change the climate. The purpose of the production is to sell the carbon as a source of combustion, and the impact on the climate system is identical, regardless of where the emissions occur. This connection between the exercise of authority and greenhouse gas emissions indicates that exported combustion emissions are encompassed.[112]

As mentioned, the constitutional provision shall be marked by "the legislation and the environmental law principles that exist in this area".[113] Norwegian and international environmental law is based on a principle that environmental impacts shall be counteracted to the same extent, regardless of whether the damage arises within or outside of the country's borders.[114] This is codified in section 2 (6) of the Pollution Control Act , which expressly applies to activities on the continental shelf.[115] This principle is also enshrined in the Espoo Convention, and follows from the Nordic Environmental Protection Convention, which applies as Norwegian law, and also encompasses activities on the continental shelf.[116] Article 2 of the Nordic Environmental Protection Convention States that when deciding whether to permit an environmentally harmful activity, the "nuisance" that such activities entail or may entail in another Contracting State "shall be equated with a nuisance in the State where the permit is granted". National and EU regulations for impact assessments also give equal status to environmental consequences within Norway and abroad.[117] Pursuant to section 21, second paragraph of the Regulations relating to impact assessments, "positive, negative, direct, indirect, temporary, permanent, short-term and long-term consequences" are encompassed".[118] According to Bugge, emissions from the combustion of Norwegian oil and gas are a "direct and long-term consequence of producing oil and gas".[119] If Article 112 was to be limited to greenhouse gases emitted from within the Norwegian territory, and not encompass

[112] Also in the Court of Appeal's judgment, p. 20.

[113] Recommendation No. 163 (1991–92) to the Storting, p. 6.

[114] Bugge (2019), p. 170.

[115] Bugge, Norsk Lovkommentar (Norwegian Law Commentary) on section 2 (6) of the Pollution Control Act of 1981, Note 9, Rettsdata (2018).

[116] Act No. 21 of 9 April 1976 , Nordic Environmental Protection Convention of 1974, Article 13. Denmark, and thereby Greenland, are parties to the Convention.

[117] Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, revised by Directive 2011/92/EU, and 2011/42/EC on the assessment of the effects of certain plans and programmes on the environment, most recently amended by Directive 2014/52/EU, both of which are included in the EEA Agreement. See more detailed discussion in Bugge (2019), p. 170.

[118] Section 21, second paragraph of Regulations no. 854 of 21 June 2017.

[119] Bugge (2019), p. 171.

greenhouse gas emissions originating from here, the provision would deviate from a key principle of environmental law.

However, an objection may be raised that the operationalisation mechanisms under the international climate agreements are based on where the greenhouse gas emissions to the atmosphere occur. This delimitation of territorial emissions depends on global coordination considerations; to avoid emissions and emission reductions being counted twice, and to ensure "environmental integrity".[120] It is not a given that global coordination considerations apply in the same way to a national constitutional provision. One can also ask whether counting emissions twice is as problematic for "environmental integrity" as counting reductions twice.[121] Regardless, international mechanisms for tracking emissions do not consistently count emissions territorially. For transport, including sea transport, the responsibility is determined according to where the fuel is sold, and not where the emissions actually arise from combustion.[122] Other pollution of the atmosphere, ozone-reducing substances or fluorine are also counteracted internationally by export bans, see, for example, EEA Regulation 1005/2009, Article 17 and section 6-2 of the Product Regulations.[123] The principle of territorial emissions in accordance with the climate agreements is thus not an inherent legal restriction on greenhouse gas emissions or atmospheric pollution as such.[124]

While not decisive for constitutional interpretation, it is also worth mentioning that if Article 112 does not encompass greenhouse gases abroad for which the exercise of Norwegian authority is a *necessary* cause, this will deviate from fundamental liability constructions for complicity in the law of damages, criminal law and international law.[125]

From the sources of law described above, it appears to be the most natural interpretation that Article 112 encompasses greenhouse gases originating from the Norwegian territory, even if the combustion occurs abroad.

2.5.2 Should the effects outside of the Norwegian jurisdiction be considered?

The parties also disagree on whether the assessment pursuant to Article 112 only applies to climate effects within the Norwegian jurisdiction, or whether the authorities are also obligated to take into account the impact of Norwegian greenhouse gas emissions abroad.

[120] Article 4 (13) of the Paris Agreement.

[121] Bodansky, Brunnée and Rajamani, *International Climate Change Law* (2017), p. 236.

[122] UNFCCC, Articles 4 and 12, see also Decision 24/CP.19; Article 13 of the Paris Agreement, see also Decision 18/CMA.1, paragraphs 20–21.

[123] Regulations of 1 June 2004 relating to restrictions on the manufacture, import, export, sale and use of chemicals and other products hazardous to health and the environment (Product Regulations), sections 6-2 and 6a-2 on ozone and fluorine products, respectively.

[124] Court of Appeal's judgment, Section 2.4.

[125] See, for example, 1992, p. 64, section 2-4 (1) of the Product Liability Act, Rt. 1989, p. 1004, Articles on State Responsibility (ARS), Article 47. See further details in Section 3.7.3.

The Court of Appeal found that Article 112 only applies to climate change in Norway, but that it may be a relevant factor whether actions originating from Norway also contribute to environmental damage abroad.[126] We clarify that this is not a question of whether persons outside of Norway can plead Article 112, or whether Norway is obligated to make adjustments outside the realm to limit the damage from the climate impact there. The question is whether transboundary effects of greenhouse gas emissions originating from Norway are relevant to the assessment of whether the exercise of authority violates Article 112. Public interests also apply with respect to this question under section 15-8 of the Dispute Act.

The point of departure here is the fact that the Constitution of Norway applies within the Norwegian jurisdiction. However, it is not the case that the jurisdictional limitation in other contexts precludes considering the impact outside the realm. If we look at Article 93, second paragraph of the Constitution of Norway, the provision will, based on its counterpart in Article 3 of the ECHR, probably entail protection against the risk of consequences that may occur extraterritorially.

The "*no-harm principle*" principle of environmental law, which is which is widely recognised as a fundamental principle of customary international law, also entails that states shall prevent transboundary environmental damage. The Court of Appeal found that the "*no-harm principle*" does not follow from Article 112, because it is not explicitly mentioned by the Committee in the legislative history of Article 110 b. This interpretation is probably incorrect. Firstly, the Committee mentions the "duty of care" as a constitutional principle.[127] The duty of care is a key obligation in accordance with the "*no-harm principle*" – that states shall prevent transboundary environmental damage by means of "due diligence".[128] Secondly, the Committee initially points out that "a constitutional provision concerning the environment should be marked by [...] the principles of environmental law that exist in this area".[129] There is no doubt that "no-harm" was and is one of the key principles that exist in the environmental field. Thirdly, the legislative history made reference to the World Commission for Environment and Development, whose report strongly influenced the Rio Declaration and Article 14 concerning "no-harm".[130] In addition, there is the fact that the principle of equal status for environmental damage across borders is codified in Norwegian and international

[126] Court of Appeal's judgment, p. 21.

[127] Recommendation No. 163 (1991–92) to the Storting, p. 6.

[128] Case concerning Pulp Mills on the River Uruguay*(Argentina vs Uruguay)*(Judgment) (2010), ICR Rep (20 April 2010) International Law Commissions Prevention of Transboundary Harm from Hazardous Activities, widely regarded as customary international law, see also Bugge (2019), p. 88, Voigt, "State Responsibility for Climate Change Damages", *Nordic Journal of International Law* 77 (2008), pp. 1–22 on p. 17.

[129] Recommendation No. 163 (1991–92) to the Storting, p. 6.

[130] Bugge (2019), pp. 90–91.

environmental law. This expressly supports that transboundary effects are relevant to the assessment.

Relevant sources of law indicate accordingly that transboundary effects originating from acts by the authorities in Norway are included in the assessments pursuant to Article 112.

2.6. When will Article 112 be deemed to be violated?

2.6.1. Introduction

The right pursuant to Article 112, first paragraph, as other rights in Chapter E of the Constitution of Norway, is formulated absolutely. However, constitutional protection cannot be absolute, see Rt. 2015, p. 93 (paragraph 60). Therefore, the right must be operationalised through a set of criteria for determining whether certain conduct amounts to a violation of the right and whether the right can be lawfully limited or displaced by competing rights or considerations. Since the Constitution of Norway does not contain any general provisions regarding the criteria for limitations on human rights, and the wording of Article 112 is not based on international law provisions that contain such criteria, it is up to the Supreme Court of Norway to determine when limitations on Article 112, first paragraph may be permitted.[131] Neither the District Court nor the Court of Appeal found it necessary to clarify this question.[132]

2.6.2. Limitationcriteria under Article 112, first paragraph

Legal literature has introduced several alternative criteria for determining whether Article 112 can be lawfully limited or displaced by competing rights or considerations, some of which are based on the international interpretation of civil and political rights under the ICCPR and the ECHR, Article 4 of the ICESCR, as well as the jurisprudence of Norwegian courts concerning "legal standards".[133] The two sets of criteria that the Norwegian National Human Rights Institution considers most relevant are those based on the

[131] See the proposal for Article 115 in Doc. 16 (2011–2012), p. 72, which was not adopted. A limitation right has been interpreted as part of Rt. 2015, p. 93 (paragraph 60) and subsequent case law in accordance with the constitutional rights that have a counterpart in the ECHR.

[132] Court of Appeal's judgment, Section 2.3, p. 19, second paragraph.

[133] In Norwegian law, the term "rettslig standard" or "legal standard" refers specifically to legal concepts that change meaning over time, based on the social norms that apply in society at any given time. See Fauchald (2007), pp. 39–40 and Thengs (2017), pp. 28–67, respectively.

ICCPR/ECHR or, in the alternative, on Norwegian jurisprudence concering "legal standards".[134]

However, one does not necessarily have to choose between these two approaches. In Norwegian law, a legal standard is understood as a discretionary directive.. Similarly, the criteria for assessing limitations on rights containd in the ECHR also involve a weighing of the rights in question against the rights of others as well as other important social considerations. The rights enshrined in the ECHR are often interpreted as having an absolute core obligation, whereas the outer edges of the right may be interpreted in light of other rights and considerations. Such rights could perhaps be described as norms which provide a core level of protection, based on an assessment of acceptable tolerance limits. In the case of Article 112 of the Constitution, prevailing environmental law principles were

[134] Methodolically, it appears perhaps most natural to model the assessment criteria for limitations on Article 112, first paragraph based on the ECHR and ICCPR. These instruments set out two different assessment criteria for the negative and positive obligations. For negative rights, an assessment will be made in two stages in accordance with the relevant rights provisions: firstly, whether an intervention exists and, if so, whether the intervention has legal authority, safeguards a legitimate purpose and is proportionate. A two-step assessment is also common for the positive rights: firstly, whether the authorities had or should have had knowledge of a qualified risk of a human rights violation and then whether they have taken reasonable measures to prevent this risk. Such a pattern of assessment is well established and familiar in Norwegian law. It is also in accordance with how the Supreme Court of Norway interprets rights in the Constitution of Norway that have a counterpart in the ECHR, see Rt. 2015, p. 93 (paragraph 60). Presumably, it was also in this direction that Article 112 would have been interpreted, had the Committee's proposal for a general provision on limitations been included in the human rights chapter of the Constitution (Doc. 16 (2011–2012), p. 72). On the other hand, an objection can be made that Article 112, unlike other rights enshrined in the 2014 reform, continued a special Norwegian provision with no counterpart in the ECHR or ICCPR.

Another approach is to assess Article 112 as a legal standard (Thengs (2017), pp. 28–67). In Norwegian law, a the term "rettslig standard" or "legal standard" is traditionally understood as a discretionary assessment (Knoph, *Rettslige standarder (Legal Standards). In particular, Article 97 of the Constitution of Norway* (1939), p. 1). A characteristic of these types of norms is that they allow the assessment to vary over time and with changing social conditions (Rt. 1996, p.1415 on p. 1426; Rt. 2013, p. 1345 (paragraph 101). In constitutional law, the "legal standard" theory is primarily applied in the interpretation of the prohibition of retroactive legislation outside the area of criminal law in Article 97, which typically means cases concerning intervention in legal financial positions. There are no references in the legislative history that Article 112 shall be interpreted as a legal standard. The legislative history refers, however, to a long list of environmental law principles as an important part of the Constitution of Norway. These may be included in a standard norm. Such a structure will also be suitable for safeguarding the underlying tension in Article 112, namely balancing consideration for the protection of rights and majority rule (Thengs (2017) p. 57). In the same manner as the rights enshrined in the ECHR and the ICCPR, legal standards are a well-established and well-known structure in Norwegian law.

The reason we regard the structure based on Article 4 of the ICESCR as the least relevant is because it sets out as a condition for intervention that the intervention is meant to promote "general welfare", based on an underlying idea of gradual improvement of financial, social and cultural conditions. Environmental and climate rights, on the other hand, are about avoiding a future degradation, so that the conditions for human existence are not undermined (Humphrey, *Human rights and climate change* (2010), p. 6). It can be argued that Article 112 should be categorised with the ICESCR rights, because they have a more collective nature and because the Storting voted on Article 112 in the same section as the ICESCR rights (Document 12:31 (2011–2012) and Recommendation 187 (2013–2014) to the Storting). However, it is evident from the legislative history of Article 112 that the Lønning Committee, with the approval of the Storting, wanted to sharpen the constitutional protection of the right to a healthy environment (Document No. 16 (2011–2012), p. 245, see also Recommendation No. 163 (1991–1992), p. 2). The Committee also referred to the practice of the ECtHR concerning protection against environmental damage in accordance with the civil and political rights of the ECHR. It would not be very consistent with these statements if the criteria regarding limitations on Article 112 were to be modelled based on those in the ICESCR.

a strong influence on the norm according to the constitutional history, and would therefore be included in this assessment.

2.6.3. Formulation of a protection norm pursuant to Article 112, first paragraph

(i) Protection norm in the environmental area in general

The point of departure for a protection norm will be the wording of Article 112, first paragraph, concerning the right to an "environment that ensures health" and a "nature in which production capacity and diversity are preserved", a right that is to be safeguarded "also for future generations". The original legislative history refers to a "certain environmental quality" as a basic human right.[135] It points in the direction of a lower tolerance limit, which should also ensure a satisfactory environmental quality in the future as well. Where such tolerance limits apply will have to be based necessarily on science.[136]

The original legislative history states that Article 110 b "should be marked by the legislation and the environmental law principles that exist in this area" in order, inter alia, to achieve the "necessary level of precision".[137] Environmental law legislation may thus provide guidance. The purpose of the Pollution Control Act is to "achieve a satisfactory environmental quality".[138] The management objectives of the Nature Diversity Act are "to maintain the diversity of habitat types within their natural range and the species diversity and ecological processes that are characteristic of each habitat type", and "to maintain species and their genetic diversity for the long term and to ensure that species occur in viable populations in their natural ranges".[139] The purpose of the Svalbard Environmental Protection Act is to "preserve a virtually untouched environment in Svalbard".[140] Key codified national and international principles of due diligence, showing precaution, equal status for transboundary effects and overall impact will also mark the constitutional norm.[141]

Since the tolerance limits may differ according to the type of environmental degradation in question, a general protection norm will likely have to be clarified as underlying standards or guiding factors and elements, possibly with a detailed specification of their

[135] Recommendation No. 163 (1991–92) to the Storting, p. 5.

[136] Thengs (2017), pp. 58–59 uses "environmental status" as his point of departure.

[137] Recommendation No. 163 (1991–92) to the Storting, p. 6. See also Fauchald, "Klimarettssaken og 'amerikanisering' av norske domstoler (Climate Trial and the 'Americanisation' of Norwegian Courts)*", Lov og Rett (Law Journal)* (2018), No. 3, pp. 158–169 on pp. 165–166.

[138] Section 2 (1), last sentence of the Pollution Control Act of 1981.

[139] Sections 4 and 5 of the Nature Diversity Act of 2009.

[140] Section 1 of the Svalbard Environmental Protection Act of 2001.

[141] Sections 4 to 14 of the Nature Diversity Act and sections 5 to 10 of the Svalbard Environmental Protection Act.

relative weight.[142] In the next paragraph, we will discuss a detailed protection norm in the climate area.

(ii) Protection norm in the climate area in particular

Detailed guidance on the establishment of a lower tolerance limit for greenhouse gas emissions must be found in legislation – to the extent that such legislation has been enacted, in environmental law principles and scientific premises.[143] Legislation on climate is found in the Climate Act. The fact that the Climate Act does not itself grant rights hardly prevents the Act from clarifying the interpretation of a constitutional provision as it does.[144] Article 4, first paragraph of the Climate Act defines "harmful effects" of global warming "as described in Article 2 (1) (a) of the Paris Agreement of 12 December 2015".[145] The provision aims to keep

> *the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change*

The Paris Agreement operationalises the implementation of the UN Framework Convention on Climate Change (UNFCCC). Such international agreements may "contribute to clarification of an acceptable tolerance limit" pursuant to Article 112, first paragraph.[146] Article 1 (1) of the UNFCCC defines adverse effects of climate change as

> *changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity systems or on human health and welfare.*[147]

The formulations concerning the production capacity of nature and human health are reminiscent of Article 112, first paragraph. In the parliamentary deliberations, Article 110 b was emphasised as a contribution to the deliberations on the UNFCCC.[148] Under Article

---

[142] See Nygaard, *Rettsgrunnlag og standpunkt (Legal Authority and Point of View)*, 2nd edition (2004), p. 391. See also Thengs (2017), Section 4.2.3.

[143] Article 4, first paragraph of the Climate Act of 2017, see also Article 5, first paragraph (a), referred to as the "best scientific basis".

[144] Recommendation No. 329 (2016–2017) to the Lagting. See Section 2.2.

[145] See also section 13 of the Nature Diversity Act and the climate settlements in the Storting from 2008 and 2012, respectively. Recommendation No. 145 (2007–2008) to the Storting and Recommendation No. 390 (2011–2012) to the Storting.

[146] See Recommendation No. 163 (1991–92) to the Storting, p. 6, second actual paragraph, with reference to the Storting's previous prerequisites, cited on p. 3, where it is evident that the Committee was of the opinion that constitutionalisation "should be based on both the national legislation and international obligations". See also the Court of Appeal's judgment, p. 22.

[147] Article 1, first paragraph of the UNFCCC.

[148] Storting's Deliberations 1992, No. 253, p. 3737. Article 110 b of the Constitution of Norway was adopted 14 days prior to the Rio Conference, which negotiated the UNFCCC.

2 of the UNFCCC, the objective is to stabilise the concentration of greenhouse gases in the atmosphere at a level that prevents "dangerous anthropogenic interference with the climate system", in other words dangerous man-made changes to the climate system.

A tolerance limit of 1.5 degrees Celsius is based on science. Climate science and international climate cooperation have, over many years, established what level of greenhouse gases in the atmosphere will be regarded as dangerous to humans and nature.[149] It was long considered to occur at an average global warming of 2 degrees, compared with pre-industrial times. However, the scientific consensus has changed, and the level considered dangerous will be reached already with warming of 1.5 degrees.[150] The precautionary principle entails that the constitutional protection norm is 1,5 degrees. In any event, the tolerance limit cannot exceed the threshold "well below 2 degrees".[151]

At the *cause level*, it can be objected with respect to a tolerance limit of 1.5 degrees Celsius, that warming to or above these limits is caused by greenhouse gas emissions from all the countries of the world, and not just from Norway. For example, the Court of Appeal writes that Norwegian emissions, including exported emissions, "make up a small proportion, approximately 1%, of the total annual global emissions", and that the importance of potential emissions from extraction and combustion by the disputed permits is "marginal when viewed against the total global emissions".[152] Even if this may be correct, the Court of Appeal's isolation of individual contributions cannot be maintained in principle. This would lead to all the actors being able to point at each other without having any obligations themselves. In environmental law, such tragedies of the commons are resolved through the principle of the overall impact, see section 10 of the Nature Diversity Act, which is one of the "environmental law principles that exist in this area" and will mark the provision according to the constitutional history.[153] According to this principle, one cannot isolate individual contributions to environmental degradation, one must see them in the context of the overall historical and future impact.[154]

---

[149] The IPCC's reports have formed an important scientific basis for several international policy initiatives. The first report formed the knowledge base for the Climate Convention in 1992, and the second report was key to the negotiation of the Kyoto Protocol in 1997. The fifth report was published in 2014, the year before the Paris Agreement was adopted, and it concluded that the average temperature in 2100 will rise by 3.7 to 4.8 degrees, compared with pre-industrial times, without any change in the political direction.

[150] The IPCC's special report from 2018 shows the importance of a tolerance limit of 1.5 degrees, compared with 2 degrees Celsius.

[151] This paragraph is added in the English translation to better clarify NHRI's primary and subsidiary view on acceptable tolerance limits under Article 112, as compared to the Norwegian version.

[152] Court of Appeal's judgment, p. 28, first paragraph.

[153] Recommendation No. 163 (1991–92) to the Storting, p. 6, left column, first actual paragraph, see also p. 1, right column, penultimate paragraph.

[154] Official Norwegian Report (NOU) 2004: 28, Section 11.11.3, p. 194.

Under international law, states have partial responsibility for contributory causes, see Article 47 of the codified common law rules on state responsibility (ASR). In specialised international law on climate, this is expressed by "common but differentiated responsibilities", whereby Norway as a resourceful country shoulders a special responsibility.[155] The fact that there can be no exemption from partial responsibility due to a country having low greenhouse gas emissions compared with the global emissions, or that other countries can become freeloaders, has also been assumed in European case law.[156] In Norwegian case law concerning the Berne Convention, it is similarly assumed that Norway cannot expect that other countries will overfulfil their obligations for viable populations when they cross national borders but have an independent duty to fulfil the objectives of the Convention within their own country.[157] The fact that greenhouse gas emissions originating from Norway will *in isolation* not exhaust the entire carbon budget to limit warming to 1.5 to well below 2 degrees is therefore not a decisive argument against this measure representing a lower tolerance limit pursuant to Article 112.

At the *impact level*, however, an objection can nevertheless be made that a tolerance limit of 1.5 degrees Celsius is related to what is dangerous for the world in general.[158] For example, the Court of Appeal appears to believe that the assessment pursuant to Article 112 should be based on which greenhouse gas concentrations would be dangerous for Norway,[159] and, for its part, assumes global warming of 4.3 degrees Celsius.[160] However, such a point of view compromises the environmental law principle of non-discrimination of transboundary effects, see section 2 (6) of the Pollution Control Act and obligations under international law.[161] It is difficult to reconcile this point of view with the reference in the legislative history of Article 110 b concerning "transboundary solidarity" as a principle of environmental law.[162] And it creates tension with customary international law that no states must exploit their natural resources, including oil and gas, in a way that harms other countries.[163]

Finally, the actual premise that an increase of 1.5 2 degrees Celsius will not have harmful effects within the *Norwegian* jurisdiction is probably incorrect. As an initial point, it is

[155] Article 3, No. 1 and Article 4, No. 1 of the UNFCCC and Article 2, No. 2 of the Paris Agreement.

[156] The Supreme Court of the Netherlands in *Urgenda vs* Netherlands, case number ECLI:NL:HR:2019:2007, paragraph 7.5.1 and further reference to 7.3.2, Supreme Court of Ireland in *Friends of the Irish Environment vs* Ireland (2020), case number 2017 No. 793 JR, British Court of Appeal in the *Heathrow*case, *Plan B vs Ministry of Transport* (2019), case,number [2019] EWHC 1070,

[157] Borgarting Court of Appeal's order of 22 March 2006 (RG-2006-1197 / LB-2006-23415), paragraph 34.

[158] Court of Appeal's judgment, Sections 3.1 and 3.3.

[159] Court of Appeal's judgment, pp. 21–22 and p. 29, second paragraph.

[160] Court of Appeal's judgment, p. 22.

[161] See above.

[162] Recommendation No. 163 (1991–92) to the Storting, p. 5.

[163] See more detailed discussion in Bugge (2019), Section 3.2.3, pp. 92–93.

worth highlighting that the Norwegian jurisdiction encompasses areas that are already experiencing sudden climatic upheavals, including Svalbard and the dependencies of Norway in Antarctica: Bouvet Island, Peter I's Island and Queen Maud Land.[164] In Svalbard, the temperature has increased up to 10 degrees in winter, and around 250 homes need to be demolished due to climate change.[165] It is assumed to fit in with the expected development trends that lives have already been lost due to houses taken by landslides.[166] In the dependencies in Antarctica, climate change is significant, and the consequences for vulnerable ecosystems are great.[167] But even on the Norwegian mainland, a temperature increase of 1.5–2 degrees will entail a serious risk to the production capacity of nature, biological diversity and human health, as these interests are specified and protected by environmental legislation.[168]

Southern parts of Norway will likely experience dramatic changes, initially from higher average temperatures, but areas such as Finnmark and the aforementioned Svalbard have already been exposed.[169] A temperature increase in excess of 1.5–2 degrees Celsius globally will in addition have supply, migration and security implications for Norway.[170] In many cases, warming of 2 degrees is also enough to trigger the risk of irreversible consequences, such as tipping points in the climate system, including changes to the North Atlantic current, where science cannot predict the consequences for Norway.[171] It is assumed that the tipping point for the Greenland ice sheet may have already been reached, and the ice in the ice sheet corresponds to a 7 metre sea level rise.[172] It is also assumed that the tipping point for the ice in the Amundsen Sea in West Antarctica may have been reached.[173] The precautionary principle and duty of care indicate that a

[164] Act No. 3 of 27 February 1930 on Bouvet Island, Peter I's Island and Queen Maud Land, etc.

[165] Norwegian Climate Service Centre (NCCS), Report No. 2/2016, pp. 5, 7, available here: https://cms.met.no/site/2/klimaservicesenteret/rapporter-og-publikasjoner/_attachment/9559?_ts=1559b5c5534, Teknisk ukeblad, 17 September 2018, available here: https://www.tu.no/artikler/folk-ma-trolig-flytte-fra-rundt-250-boliger-pa-grunn-av-klimaendringer-pa-svalbard/446242

[166] Ibid, p. 11.

[167] Norwegian Polar Institute, "Klimaendringer i Antarktisk (Climate Change in Antarctica)" and "Klimaendringer og effekter på polare økosystemer (Climate Change and Effects on Polar Ecosystems)", which is available here: https://www.npolar.no/tema/klimaendringer-antarktis/#toggle-id-3, and here: https://www.npolar.no/tema/klimaendringer-effekter-polare-okosystemer/.

[168] See further details in the Norwegian National Human Rights Institution's report on climate and human rights (2020), Chapter 2, by Cicero.

[169] See projections of climate risk at the county level, which are available here: https://klimaservicesenter.no/faces/desktop/article.xhtml?uri=klimaservicesenteret%2Fklimaprofiler .

[170] See the climate settlements from 2008 and 2012, Recommendation No. 145 (2007–2008) to the Storting and Recommendation No. 390 (2011–2012) to the Storting.

[171] See further details in the Norwegian National Human Rights Institution's report on climate and human rights (2020), Chapter 2, by Cicero.

[172] COM/2020/562 final, 17 September 2020, IPCC, 5th Assessment Report, Summary for Policymakers, p. 16.

[173] COM/2020/562 final, 17 September 2020. Also mentioned in *Friends of the Irish Environment*, Section 3.7. The ice masses in Antarctica correspond overall to a 58 metre rise in sea level.

tolerance limit pursuant to Article 112 does not speculate on uncertainty about this type of risk.

Several European judges in the climate area show how a tolerance limit of 1.5 degrees Celsius can be practised. Such comparative sources are, of course, not of any direct importance to constitutional interpretation but can serve as inspiration.[174] None of the courts reviewed the political exercise of discretion in detail but considered whether the authorities had overlooked or adhered to the 1.5 to well below 2 degree target.[175]

- In *Family Farmers*, a German court found that the State would not have fulfilled its duty to safeguard future generations under Article 20 a of the Constitution of Germany if the environmental and climate policy is "completely unsuitable or totally inadequate" to achieve the goal under the Paris Agreement.[176]
- In *Urgenda,* the Supreme Court of the Netherlands found that the authorities could not establish targets for their climate policy that would not meet the 2 degree target, much less the 1.5 degree target. Even though the Dutch emissions themselves were marginal, the exercise of authority meant that the scientific knowledge of the necessity to limit warming to 1.5 to 2 degrees was not taken seriously and that the authorities did not accommodate the actual realisation of the targets.[177]

While the decisions from Germany and the Netherlands interpret the tolerance limit into openly formulated norms, recent decisions from Ireland and the United Kingdom show that the 1.5 to 2 degree target can also be enforced in relation to individual countries by interpretation of the legislation that refers to the global goal.

- In *the Friends of the Irish Environment*, the Supreme Court of Ireland found the authorities' climate plan to be too unspecified to achieve the statutory climate targets. The Court did not consider the choice of policy instruments or reviewed emission calculations in the plan. But it found that it was clear that a plan that does not provide concrete guidelines for how 1.5 to "well below" 2 degrees Celsius actually can be achieved is not consistent with the right of individuals to

[174] Smith (2017), p. 97.

[175] The 1.5 degree target was included in the protection standard pursuant to Article 20 a of the Constitution of Germany in *Family Farmers vs Germany*, Articles 2 and 8 of the ECHR in *Urgenda*, as part of the court's review of legality with the administration in *Friends of the Irish Environment* and as part of the impact assessments in the UK planning and building legislation at *Heathrow.*

[176] *Family Farmers vs Germany*, p. 23: "Der mit einer solchen Schutzpflicht verbundene grundrechtliche Anspruch ist im Blick auf diese Gestaltungsfreiheit nur darauf gerichtet, dass die öffentliche Gewalt Vorkehrungen zum Schutze des Grundrechts trifft, die nicht gänzlich ungeeignet oder völlig unzulänglich sind (BVerfG, Beschluss vom 29. October 1987 – 2 BvR 624/83 –, BVerfGE 77, 170-240, Juris Rn. 101)."

[177] *Urgenda,* Section 8.3.4: "This case involves an exceptional situation. After all, there is the threat of dangerous climate change and it is clear that measures are urgently needed, as the District Court and Court of Appeal have established and the State acknowledges as well. The State is obliged to do 'its part' in this context."

assess whether the authorities' plan to avoid a harmful concentration of greenhouse gases is realistic.[178]

- In the *Heathrow* case from the United Kingdom, an appeals court ruled that if the authorities allow new greenhouse gas emissions of a significant volume, they must first make an assessment of how such emissions are consistent with their own policy for achieving the 1.5–2 degree target in the Paris Agreement.[179]

Accordingly, based on the wording of the provision as specified in section 4 of the Climate Act, see Article 2 (1) (a) of the Paris Agreement, the precautionary principle and scientific premises, the most obvious protection norm under Article 112 is to loyally prevent a temperature increase exceeding 1.5 degrees, and in any event, well below 2 degrees Celsius.[180]

2.6.4 Negative duty to refrain

In order to *respect* the right to a healthy environment, it is natural to assume that the Norwegian authorities will have to refrain from acts that cause emissions of a magnitude that is inconsistent with Norway's partial responsibility for achieving the 1.5 degree target. A threshold must probably be defined, since the duty to refrain cannot apply to all expected greenhouse gas emissions. This threshold would likely change the closer the concentration of greenhouse gases approaches the critical tolerance limit in the atmosphere, which is specified as 430-450 ppm for CO_2. The overall impact principle will be of "particular significance if the environmental impact is at a critical limit, where even a slight increase in the impact will have major consequences for the ecosystem".[181] In order to realise the right pursuant to Article 112, first paragraph, it is natural to assume that Article 112, second paragraph entails a duty to investigate and inform about how permits for large sources of emissions relate to the remaining carbon budget and loyal adherence to the required reduction rate to prevent warming over the tolerance limit of 1.5 degrees Celsius. As concluded above, the assessments must include greenhouse gas emissions for which the exercise of Norwegian authority is a necessary cause, even if combustion occurs after export.[182]

---

[178] *Friends of the Irish Environment,* Section 9.2.

[179] *Heathrow*, paragraphs 283–284: "The Paris Agreement ought to have been taken into account by the Secretary of State in the preparation of the ANPS, but was not. What this means, in effect, is that the Government when it published the ANPS had not taken into account its own firm policy commitments on climate change under the Paris Agreement. That, in our view, is legally fatal to the ANPS in its present form."

[180] Dupuy and Vinulales, *International Environmental Law*, 2nd edition (2018), p. 399, argues in this direction that the climate system must be in "ecological balance" or "adequate".

[181] Aulie, Norsk Lovkommentar (Norwegian Law Commentary) on section 10 of the Nature Diversity Act, Rettsdata (2017), Note 46. See also Backer, *Naturmangfoldloven (Nature Diversity Act). Commentary Edition* (2010), pp. 101–102.

[182] See Section 2.5.1.

2.6.5 Positive duty to safeguard

To *ensure* the right to a healthy environment, the State must take measures that implement the obligation to reduce greenhouse gas emissions at a scale and pace necessary to prevent warming in excess of 1.5 degrees.[183] This will largely depend on scientific assessments. Pursuant to sections 4 and 5 of the Climate Act concerning the "best scientific basis", good reasons will probably be required in order for the authorities to adopt a minimum approach other than the scientifically updated, international reduction paths.[184] In accordance with the precautionary principle and duty of care, this should not be based on vague assumptions about the future development of technology and projections that are uncertain, or assumptions about international carbon leakage that are derived and uncertain.[185] To the extent that uncertainty is inevitable in the assessments, the uncertainty must be in favour of the environment.[186]

The positive duty to safeguard has, as mentioned, been clarified in Article 112, third paragraph. It is stated here that "the authorities of the State shall take measures for the implementation of these principles". It is assumed in the legislative history that the State will have the freedom to exercise discretion over which measures will be prioritised.[187] However, freedom of action implies that the measures are in accordance with the wording of the provision. The wording points toward the fact that the authorities of the State have control over whether the measures taken actually "fulfil" the obligations. Based on the wording, it may be questioned whether the State can rely on international quota trading that require other countries to verify that real emission reductions take place, rather than implementing emission reductions within its own jurisdiction.[188] The present uncertainty about the real effect of quota trading in relation to the actual emission reductions creates possible tension with the precautionary principle and duty of care.[189] These principles may imply that a loyal adherence to the duty to safeguard entails that the measures are

[183] Section 4 of the Climate Act.

[184] The Supreme Court of the Netherlands ruled that the State must be able to prove a reason for why the Netherlands shall follow an emission reduction path that is lower than the global path, *Urgenda vs Netherlands* (2019), paragraph 7.5.1. In the *Heathrow* case from the United Kingdom, there was an underlying observation in the Court of Appeal that the State must make assessments of whether there is room for large new emission points in the remaining climate budget, *Plan B vs Ministry of Transport* (2019).

[185] See in this direction, *Friends of the Irish Environment vs Ireland* (2020), Section 6.46, see also 6.43 and 6.44. The IPCC 5th Assessment Report, Summary for Policymakers, p. 24, warns against postponing necessary emission reductions with reliance on technology that does not yet exist.

[186] Section 9, second paragraph of the Nature Diversity Act, Article 3 (3) of the UNFCCC, Article 14 of the Rio Declaration.

[187] Doc. 16 (2011–2012), p. 245 and Recommendation No. 187 (2013–2014) to the Storting, p. 25.

[188] Such a model forms the basis for the green development mechanism (CDM) in the Kyoto Protocol and the various emission collaborations that are negotiated under Article 6 of the Paris Agreement. Negotiating the rules for such emission collaborations has proved to be difficult and the mechanisms are not operational.

[189] Recommendation No. 163 (1991–92) to the Storing, p. 4, second column, see also Official Norwegian Report (NOU) 2004: 28, p. 249 ff.

implemented within the control of the State. The requirements from the legislative history that the measures must be "adequate and necessary" may indicate that the effect of the measures in question must be verifiable.[190]

2.6.6 Provided that the duty to refrain and safeguard shall be viewed in context

Based on the sources of law, and in particular Article 92 of the Constitution of Norway, the duty to refrain and safeguard pursuant to Article 112 are independent quantities.[191] However, the lower courts have relied on a net assessment, where negative interventions can be compensated for by positive measures in other areas. If such a net assessment is, contrary to expectations, correct, the measures must in this case be "adequate and necessary" to remedy the specific violation of the right to a healthy environment.[192] Permits that allow significant greenhouse gas emissions probably mean that the State can point out the implementation of concrete emissions reduction measures that are directly related to the totality of the emissions made possible by the specific permit, including from exported Norwegian petroleum, which adequately compensates for these emissions. It is probably not enough to point to the mere existence of a climate policy and Norway's "lobbyist role" internationally, or reductions that are not connected to the emissions.[193] Already planned emission reductions can probably not compensate for any new start-up of a large source of emission, since it may entail that the same emission reduction will be deducted multiple times.

We add that it is probably incorrect to isolate the emissions side of the individual source of emissions and let the reduction side include the combined measures. If it were to be relevant to make a deduction from the overall reduction measures, one would also have to take into account the total greenhouse gas emissions that originate in Norway. The total annual emissions from the Norwegian territory are around 50 million tonnes of CO_2 equivalents, and the total annual emissions from exported Norwegian oil and gas are around 400–500 million tonnes of CO_2 equivalents.[194] In accordance with the overall impact principle, the impact must be assessed together with historical and expected emissions.[195]

2.7 Climate rights and distribution of power

[190] Doc. 16 (2011–2012), p. 245, second column.

[191] See section 2.4.2.

[192] Doc. 16 (2011–2012), p. 245, second column and Recommendation No. 187 (2013–2014) to the Storting, p. 5.

[193] See the Supreme Court of Ireland in *Friends of the Irish Environment* (2020). See on the other hand, the Court of Appeal's judgment, p. 28, second paragraph.

[194] Court of Appeal's judgment, p. 28.

[195] Aulie (2017), Note 46, Backer (2010), pp. 101–102.

2.7.1 Issue of the intensity of judicial review

Article 112 of the Constitution of Norway must, like other human rights provisions, be applied in light of the Constitution's system for the distribution of power. All the branches of government are bound by Article 112 and have an independent duty to respect and secure the right to a healthy environment, see Article 92. The courts have both a right and duty to verify whether the Storting and the administration have complied with this obligation, see Article 89. The question, however, is *how far* the courts should go in this verification, especially in light of the fact that cases pursuant to Article 112 will in many cases involve discretionary, legal, factual and political assessments. This is a question of the *intensity of judicial review*.[196] Public interests also apply here, see section 15-8 of the Dispute Act.

2.7.2 Traditional doctrine on intensity of judicial review

In Rt. 1976, p. 1 (Kløfta), the Supreme Court set up graduated constitutional protection for the review of the constitutionality of acts, in which the provisions were divided into three categories: provisions on personal freedom or security, provisions governing the working practices or mutual competence of other branches of government, and provisions for the protection of financial rights.[197] The impact of the Constitution should be significant in the first category, while in the second category the courts should largely respect the Storting's own view of the constitutionality. In the third category, the Storting's constitutional understanding should play a significant role, and the courts should show caution in placing their own assessments above those of the legislator.

The doctrine has been an important reference point, and was referenced in the three plenary constitutional review cases that were before the Supreme Court of Norway in 2010, as well as in the legislative history of Article 89 of the Constitution of Norway concerning the right to an effective remedy from 2015.[198] At the same time, based on our research, reference has not been made to this tripartite division in the Supreme Court's

[196] In some contexts "margin of appreciation" is used as a synonym for "intensity of judicial review", see Court of Appeal's judgment, p. 28, Section 2.3. See correspondingly in Indreberg, "Utfordringer for Høyesterett ved grunnlovfesting av flere menneskerettigheter (Challenges for the Supreme Court by the Constitutionalisation of Additional Human Rights)" in Schei, Skoghøy and Øie (editors), *Lov, sannhet, rett – Norges Høyesterett 200 år (Law, Truth, Justice – Supreme Court of Norway 200 Years)* (2015), pp. 393–420, on pp. 404–406. This can result in misunderstandings. In this report, the term "intensity of judicial review" will be preferred, because "margin of appreciation" is a doctrine developed by the ECtHR concerning how far the ECtHR should go in reviewing the assessments of national authorities – including national courts. This is, in principle, somewhat different than the review by national courts of the actions of other national authorities against the Constitution.

[197] Rt. 1976, p. 1 on pp. 5–6.

[198] Rt. 2010, p. 143 (paragraph 138), Rt. 2010, p. 535 (paragraph 146), Rt. 2010, p. 1445 (paragraph 89) and Recommendation No. 263 (2014–2015) to the Storting, p. 11.

practice since 2010.[199] In the legal literature, there are different views on the suitability and status of the doctrine today.[200] The objections are based, inter alia, on the fact that recent case law stipulates requirements for qualified doubt about the constitutional question and high quality requirements for the Storting's assessment of the constitutionality, which are so strict that the tripartite Kløfta division is no longer decisive for *the importance of the Storting's view.* On the other hand, there may be grounds supporting that this tripartite division provides a point of departure for constitutional interpretation and the weighting of the *Storting's need for freedom of action*, so that the intensity of judicial review "will by far depend on the content, purpose and formulation of the individual right, as well as the factual circumstances in each case".[201]

2.7.3 Importance of the doctrine on the intensity of judicial review pursuant to Article 112

Without making a conclusion on the position of the tripartite division in Norwegian law today in general, there are several factors that may indicate that the tripartite division is of limited relevance pursuant to Article 112. Firstly, it is difficult to place Article 112 in the relatively rough Kløfta categories.[202] While intervention against individuals in an environment that ensures their health concerns personal freedom and security, the categories probably do not accommodate intervention against idealistic natural interests

---

[199] The Norwegian National Human Rights Institution conducted a thorough search of the relevant judgments and the different terms used to express the tripartite division for the period from 4 December 2010 (day after Rt. 2010, p. 1445) until 29 July 2020. No other authors have pointed out judgments that mention the tripartite division either. The Kløfta *judgment* is indeed mentioned in Rt. 2013, p. 1464 (paragraph 52, minority), Rt. 2014, p. 560 (paragraph 78) and HR-2017-333-A (paragraphs 28 and 36), but in other contexts then. Examples of decisions where the tripartite Kløfta division Kløfta *could* have naturally been mentioned are Rt. 2011, p. 347, Rt. 2013, p. 1345, HR-2016-304-S, HR-2016-389-A and HR-2018-1906-A.

[200] See further details in Tverberg, "Det graderte grunnlovsvernet ved tolking av Grunnloven og prøving av lovers grunnlovsmessighet (Graduated Constitutional Protection for Interpretation of the Constitution and Judicial Review of the Constitutionality of Laws)", in Holmøyvik (editor), *Tolkingar av Grunnlova (Interpretations of the Constitution of Norway)* (2013), pp. 256–303, Indreberg (2015), pp. 393–420, Solheim, "Domstolskontroll med lover på det økonomiske området – Lovgivers vurdering av lovens grunnlovsmessighet (Judicial Review of Laws in the Financial Area – Legislator's Assessment of the Constitutionality of the Law)", *Tidsskrift for Rettsvitenskap (Law Journal),* No. 1 (2014), pp. 1-48 and Schei, "Har Høyesterett en politisk funksjon? (Does the Supreme Court have a Political Function?)", *Lov og Rett (Law Journal)* No. 6 (2011), pp. 319–335 with further references. Of the authors who believe that the tripartite division has been abandoned, or should be abandoned, reference is made to Holmøyvik, "Prøvingsrett og tilbakeverknadsforbod. Borthen-dommen i Rt. 1996, p. 1415 og rettsutviklinga (Right to an Effective Remedy and Ban on Retroaction. Borthen judgment in Rt. 1996, p. 1415 and development of the law)" in Matningsdal, Skoghøy and Øie (editors), *Rettsavklaring og rettsutvikling (Legal Clarification and Development of the Law). Memorial volume for Tore Schei on his 70th birthday on 19 February 2016* (2016), pp. 210–242 and Skjerdal, "Relativisering av domstolenes grunnlovskontroll – på tide å forlate tredelingslæren? (Relativisation of the Constitutional Control of the Courts – Time to Abandon the Tripartite Division Doctrine?", in Graver, Kraby and Stub (editors), *Forsker og formidler (Researcher and Communicator). Memorial volume for Erik Boe's 70th birthday* (2013), pp. 275–296, with further references.

[201] Recommendation No. 263 (2014–2015) to the Storting, p. 11. See further details in Tverberg (2013), pp. 291–292, Schei (2011), p. 328 and Indreberg (2015), p. 406 and Solheim (2014), p. 11.

[202] Rt-2010-143 (paragraph 138), see Rt-1996-1415 on p. 1429.

or the rights of future generations. Secondly, there are the special characteristics of climate matters – related in particular to the long-term and irreversible effects of climate change – which are not taken into account in the traditional doctrine. That is because the tripartite division is designed for one-dimensional rights constellations, while climate rights over time are multidimensional; interventions are of importance today but will mostly affect younger and future generations. As younger and future generations are left without political representation when the emission decisions are made, and the changes are irreversible, consideration of democratic anchoring and governance considerations are placed in a different context.

We will discuss in greater detail some considerations that are likely to be of importance to the intensity of judicial review under Article 112, which may safeguard the need for a reasonable balance between governance considerations and rights protection.

2.7.4 Considerations for determination of the intensity of judicial review under Article 112

(i) Nature of the intervention

Firstly, the intensity of judicial review will probably depend on the *nature of the intervention* in question, i.e. what values the decision intervenes in and the severity of the intervention. This is the reasoning that the tripartite Kløfta division is based on, and it is well known in human rights practice.[203] As a point of departure, it is most natural that Article 112 concerns personal freedom and security. It can be argued at the same time that environmental rights also have financial consequences, but this is at the societal level and it is not particular for Article 112. The threshold for return protection pursuant to Article 93 or family reunification pursuant to Article 102 also has financial consequences for society, but neither the protection against being returned and the right to family life are regarded as financial rights for this reason. The fact that environmental rights have socio-economic consequences cannot indicate either that this concerns a financial provision.

At the same time, the types of cases pursuant to Article 112 may of course vary. For example, pollution cases can be envisioned that are potentially and irreversibly life-threatening in the short or long term, and noise pollution cases that are reversible, local and limited.[204] Here, the judicial review should be more intense in the former case, since

[203] See, for example, Aall, *Rettsstat og menneskerettigheter (State Based on the Rule of Law and Human Rights)*, 5th edition (2018), pp. 109–112 and p. 156, and for the ECHR, see Kjølbro, *Den Europæiske Menneskerettighedskonvention: for praktikere (European Human Rights Convention: for practitioners),* 5th edition (2020), pp. 25–26.

[204] Compared to Jæren District Court's order of 5 June 2020 (20-042262TVI-JARE) in the preliminary injunction case filed by the special interest organisation Motvind Norway to stop the construction of windmills pursuant to Article 112. The preliminary injunction claim was not allowed, but the case has been appealed.

the intervention is of a more serious nature.[205] In cases where the long-term effects of the intervention both relate to the rights of living individuals and future generations, the nature of the intervention will have to be determined based on the interests that are affected the most. This means that if an intervention today concerns financial rights, but in the long term threatens personal freedom and security, the intensity of judicial review is likely to be based on the latter category, see Article 112, first paragraph, second sentence.

(ii) Democracy considerations and rule of law considerations

Another consideration that may affect the intensity of judicial review is the *degree of democratic anchoring*. From the older legislative history of Article 110 b, it is evident that the provision was meant as an intermediary solution between a right and programme obligation. This could imply caution for a review. The legislative history of Article 112 also contains some principles for the assessment of the courts' intensity of judicial review pursuant to the *third paragraph*.[206] Here it is stated that the choice of measures pursuant to Article 112, third paragraph lies with the Storting.[207] This may also imply caution for reviews.

The fact that the authorities have freedom of choice for the fulfilment of positive obligations does, however, not prevent the courts from reviewing whether the measures lie within the barriers of the provision. Moreover, there is the fact that Article 110 b was already meant to "be able to prevent a development in an environmentally hostile direction".[208] The constitutional majority's intention with the amendment of Article 112 was to sharpen the protection of rights,[209] and it was acknowledged that the broadly formulated and vague rights would entail "legalisation, in the sense of the transfer of power from the Storting to the courts".[210] The courts, and ultimately the Supreme Court of Norway, therefore have a right and duty pursuant to Articles 88 and 89 to enforce the limits pursuant to Article 112, in order to protect the minority protection provision by virtue of the what the amendment barrier in Article 121 expresses. This must apply in particular in cases where the Storting has not considered the relationship to the Constitution of Norway.

---

[205] Compared to *Fägerskiöld vs Sweden* and *Vecbastika et al. vs Latvia* where the ECtHR rejects appeals concerning noise from windmills, because such noise that is within the legal limits is not serious enough to make protection pursuant to Article 8 of the ECHR relevant.

[206] Inter alia, Recommendation No. 187 (2013–2014) to Storting, p. 25, Doc. 16 (2011–2012), pp. 242–246 and Recommendation No. 163 (1991–92), pp. 1–7.

[207] Recommendation No. 187 (2013–2014) to the Storting, p. 25.

[208] Recommendation No. 163 (1991–92) to the Storting, p. 5.

[209] Inter alia, Doc. 16 (2011–2012), p. 245, second column.

[210] Recommendation No. 187 (2013–2014) to the Storting, p. 14.

These *rule of law considerations* are particularly in the forefront of climate issues. It follows from Article 112, first paragraph, second sentence that the right pursuant to the first sentence shall be safeguard "for the future generations as well". We have previously concluded that the overall source of law picture points toward the provision granting rights to future generations.[211] Actions that allow significant greenhouse gas emissions today, and failures to reduce emissions in accordance with the reduction rate to prevent warming in excess of 1.5 to well below 2 degrees Celsius, will have serious and irreversible consequences for the living conditions for younger and future generations.[212] They are not in a position to exert political influence over the decisions that will affect them.

At the same time, younger and future generations, over time, can make up a larger majority than the decision-making majority today. The provision is thus not just an expression of minority protection, but a kind of *unborn majority protection.* The objections that traditionally apply to minority protection do thus not apply to climate rights in quite the same way. Since future generations cannot assert their rights now, it is assumed that their rights are enforced by living individuals and legal persons pleading on their behalf before the courts.[213] In order for this safeguarding to be real, the courts must be able to conduct a thorough review of their rights. There is an argument that this review should be stronger in climate matters than in more classic environmental matters. This does not necessarily mean that a court would be better suited than the legislative or executive branches to assess the rights of future generations, but the courts should at least verify that their interests are duly safeguarded.[214]

We accordingly conclude that judicial review of the right to a healthy climate pursuant to Article 112 should be relatively intensive.

3. Right to life and protection of private and family life pursuant to Articles 2 and 8 of the ECHR

3.1 Introduction

The appellants argue that the production licences violate Articles 2 and 8 of the ECHR, see Articles 93, first paragraph and 102 of the Constitution of Norway. The respondent argues that the provisions have not been violated. The Court of Appeal clearly found that the rights had not been violated.

---

[211] See Section 2.2.

[212] IPCC's 5th Assessment Report, Summary for Policymakers, p. 16. See the IPCC's special report (2018) on the 1.5 degree target.

[213] Doc. 16 (2011–2012), p. 245.

[214] See further details in Bugge (2019), p. 171–172 and Backer (2002).

Articles 93, first paragraph and 102 of the Constitution of Norway are interpreted on the basis of the corresponding provisions of the ECHR, compared to HR-2016-2554-P and Rt. 2015, p. 155.[215] In the application of the ECHR, Norwegian courts shall "make an independent interpretation of the Convention", and "use the same method as the ECtHR", see inter alia, Rt. 2005, p. 833.[216] Here, case law from the ECtHR plays a very important role.[217] Since the Supreme Court of Norway has been invited to decide a question on greenhouse gas emissions that the ECtHR has not yet taken a position on, we will first review the ECtHR's method and its importance to Norwegian courts for deciding questions where directly clarifying ECtHR practice is lacking (Section 3.2). We will then discuss the procedural right to submit arguments on greenhouse gas emissions based on the ECHR, both before national courts and the ECtHR (Section 3.3) before we deal with the substantive protection under Articles 2 and 8 of the ECHR (Sections 3.4–3.8).

3.2 ECtHR's interpretation method

3.2.1 Legal point of departure

The ECHR is interpreted on the basis of the common law principles expressed in the Vienna Convention on Treaty Interpretation, Articles 31–33. The point of departure for the interpretation is therefore a normal understanding of the wording of the provision, read in context and in light of the purpose. However, the ECtHR has developed special interpretation principles that reflect and supplement the international law principles for the interpretation of treaties. We will discuss five such principles of interpretation here.

3.2.2 Purpose-oriented interpretation

Firstly, the ECtHR's interpretation method is *purpose-oriented*, in accordance with the Vienna Convention. The Court has repeatedly emphasised that the purpose of the Convention is to safeguard rights that are not theoretical and illusory, but practical and effective.[218] This applies to both substantive and procedural provisions. The primary purpose of the Convention's enforcement system is to provide individual restitution. Nevertheless, the ECHR shall also ensure a collective implementation of the provisions of the Convention. A key purpose of the Convention is to decide general questions in the interests of society in order to raise the level of the general protection standards.[219] It follows from the Convention's preamble, sixth paragraph, in which the Convention States commit to the "collective enforcement" of human rights, and which has been assumed by

[215] HR-2016-2554-P (paragraph 81), Rt. 2015, p. 93, (paragraphs 57 and 60) and Rt. 2015, p. 155, (paragraphs 40 and 44).

[216] Rt. 2000, p. 996, Rt. 2002, p. 557, Rt. 2003, p. 359, Rt. 2005, p. 833. From more recent times, see HR-2019-1206-A (paragraph 104).

[217] Kjølbro (2020), p. 15.

[218] *Demir and Baykara vs Turkey* [GC] (34503/97), Section 53; *Klass et al. vs Germany* (5029/71), Section 34.

[219] Kjølbro (2020), p. 15.

the ECtHR since *Ireland vs United Kingdom* in 1978.[220] The ECtHR has emphasised that the interpretation must consider "the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms".[221] This collective protection objective is also evident from the references to peace, the principles of states based on the rule of law and democracy in the preamble.

The fact that the collective protection purpose of the Convention cannot be understood as being limited to present and short-term interests but also as providing protection for future generations, is supported by the preamble of the Statutes of the Council of Europe, which are included as a relevant instrument for the contextual interpretation of the ECHR, see Article 31 (3) (c) of the Vienna Convention. The preamble of the statutes, second paragraph, states that the overarching purpose of the establishment of the Council of Europe and the Convention System, which includes the ECHR was to ensure peace, justice and "the preservation of human society and civilisation".[222] These aspects of the ECHR's purpose and scope will have an impact on the interpretation of the various convention provisions.

3.2.3 Dynamic interpretation

Secondly, the ECtHR's interpretation method is *dynamic*. The Convention constitutes a "living instrument" that is to be interpreted in light of "present-day conditions".[223] This means that the ECtHR's present case law is a necessary, but not completely sufficient, prerequisite for predicting how the court will assess a particular question.[224] This has two implications. Firstly, this means that even though the ECtHR has at present only considered appeal cases concerning local environmental pollution and not appeals concerning greenhouse gas emissions, it does not rule out that the ECtHR will consider alleged violations as a result of greenhouse gas emissions to be protected by Articles 2 and 8 of the ECHR. Secondly, this means that the principles developed by the court in relation to appeals concerning local environmental damage will not necessarily govern new appeals about greenhouse gas emissions, because it must be taken into account that social developments in the meantime may have necessitated further development of the interpretation.[225] The ECtHR's approach to various rights issues will, therefore, have to depend on the social challenges that exist at any given time.

[220] *Ireland vs United Kingdom* (5310/71), 18/01/1978, Section 239.

[221] *Loizidou vs* Turkey [GC] (15318/89), Section 70.

[222] Statute of the Council of Europe, 1949.

[223] *Demir and Baykara vs Turkey*, Section 68.

[224] Kjølbro (2020), p. 25.

[225] Kjølbro (2020), p. 25, a corresponding principle appears to be assumed by the Supreme Court of Norway in HR-2020-972-U (paragraph 26) in another area of the law.

3.2.4 Principle of subsidiarity

Thirdly, the ECtHR interprets the Convention in light of the principle of *subsidiarity*.[226] The principle of subsidiarity implies that it is primarily the Convention States, including national courts, that shall ensure observance of the rights and positive obligations of the Convention, and that the ECtHR's review function is subsidiary, see Article 19 of the ECHR. The principle of subsidiarity indicates that national courts are unlikely to limit themselves to awaiting the ECtHR's interpretation, for example, in climate matters. The principle of subsidiarity appears rather to assume that the national courts shoulder, as part of the national authorities, the primary responsibility for ensuring the observance of rights and obligations under the Convention, so that the ECtHR's review can be secondary. This has been emphasised more in recent times. In accordance with Protocol No. 15, Article 1, the ECtHR's preamble shall state that the Convention States "have the primary responsiveness to secure the rights and freedoms defined in this Convention and the Protocols thereto".[227]

This primary responsibility for national authorities creates a certain degree of tension with the interpretation reservation in Rt. 2005, p. 833, see also Rt. 2000, p. 996, that it is "nevertheless first and foremost the ECtHR that is to develop the Convention".[228] At the same time, this interpretation reservation is not practised by the Supreme Court of Norway as an obstacle to interpreting and applying the Convention to types of cases where there is no clarifying practice from the ECtHR. For illustration, reference can be made to Rt. 2011, p. 800, in which the Supreme Court of Norway interpreted self-incrimination protection for legal persons as part of Article 6 of the ECHR concerning a "fair trial", even though the ECtHR had not granted a protected application for any parties other than natural persons. Purpose considerations pointed in somewhat different directions, and the question is disputed in comparative law. The Supreme Court of Norway stated that it concerned "interpreting the text of the Convention in light of the purpose and the practice of the ECtHR", and that the interpretation result was "reasonably clear in consideration of the overall source of law picture".[229] Most recently in HR-2020-972-U, where the question was whether exceptions could be made to the appearance requirement pursuant to Article 5 of the ECHR due to COVID-19, it is stated that in the "lack of clarification from the ECtHR, the question must be resolved based on an

[226] *Budayeva et al. vs Russia.*

[227] Protocol No. 15 will enter into force three months after the ratification of all Member States of the Council of Europe, see Article 7 of the Protocol. At present, the protocol has been ratified by 45 out of 47 states. The status of the ratifications is available here: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=5tABARHI

[228] Rt. 2005, p. 833 (paragraph 45), Rt. 2000, p. 996, Rt. 2002, p. 557, Rt. 2003, p. 359.

[229] Rt. 2011, s. 800 (paragraph 53).

independent interpretation of the Convention in light of the purpose and present case law".[230]

Such an independent interpretation in light of the purpose and *present* case law reconciles well with the distribution of roles that has been emphasised by the Convention States in recent times.[231] This is also in accordance with international literature. The standard work on the ECHR from O'Boyle et al. states that when an interpretation question has not been decided by the ECtHR, the national courts will "have no choice but to adopt their own interpretation".[232]

When it comes to the rights that were incorporated into the Constitution of Norway in 2014, it will in any case be the Supreme Court of Norway that bears the "responsibility for interpreting, clarifying and developing" the provisions.[233] The question of whether the Supreme Court of Norway can interpret the ECHR expansively in the absence of clarifying ECtHR practice, therefore, does not have to come to the forefront. In 2014, both Articles 2 and 8 of the ECHR were given counterparts in the Constitution of Norway, Articles 93, first paragraph and 102. In Rt. 2015, p. 93 it is emphasised that the "future practice"of the ECtHR after 2014 does not have "the same precedent effect on constitutional interpretation as on the interpretation of the parallel convention provisions".[234]

3.2.5 Principle of margin of appreciation

Fourthly, the ECtHR interprets the Convention in light of the *principle of margin of appreciation*. The margin of appreciation is related to subsidiarity and implies that the ECtHR may allow the Convention States a certain discretionary latitude when assessing whether it is necessary to intervene in the rights, or what measures are necessary to ensure them.[235] The rationale is that the national authorities will most often be better placed than the ECtHR to make these assessments, because they have greater insight into special circumstances that may apply in each individual country.[236] The extent of the margin of appreciation will, inter alia, depend on whether there is a European consensus, as well as the nature of the right and the activities that are appealed.[237]

[230] Paragraph 26.

[231] The Brighton Declaration (2012), Section 3 and the Copenhagen Declaration (2018), Section 10.

[232] O'Boyle, Harris, Bates and Buckley, *Law of the European Convention on Human Rights*, 4th edition (2018), p. 31.

[233] Rt. 2015, p. 93 (paragraph 57).

[234] Rt. 2015, p. 93 (paragraph 57), referred to in HR-2016-2554-P (paragraph 81).

[235] Kjølbro (2020), p. 25.

[236] HR-2013-2200-P (paragraph 257).

[237] Kjølbro (2020), p. 26.

In Norwegian law, it has been disputed whether Norwegian courts shall grant a margin of appreciation similar to the ECtHR.[238] The ECtHR's Grand Chamber has in *A et al. vs United Kingdom* itself emphasised the following:

> *"The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level."*[239]

In the plenary judgment, Rt. 2013, p. 1345, a minority of three judges argued along these lines that the margin of appreciation pursuant to the ECHR "cannot be transferred to the relationship between national bodies".[240] In HR-2016-389-A, the question was pleaded, without the Supreme Court taking a final position. In several concrete assessments, the Supreme Court has allowed a margin of appreciation, but the question remains undecided in principle.[241]

In the view of the Norwegian National Human Rights Institution, it is probably the most compatible with the ECtHR's own practice and the justification and function of the margin of appreciation, to regard the margin of appreciation as an instrument for a *supranational* court. The ECtHR's doctrine on the margin of appreciation is probably not directly transferable to the relationship between national courts and national authorities. However, the rationale that decisions should be made at the level best placed to make actual and legal assessments, can of course also apply at the national level. Restraint in reviews by the national courts should then probably be justified by and anchored to

---

[238] It its generally accepted in legal literature that the margin of appreciation cannot be applied directly by Norwegian courts, see Skoghøy, "Nasjonal skjønnsmargin etter EMK (National Margin of Appreciation pursuant to the ECHR)" in *Lov og Rett (Law Journal)* No. 4 (2011), pp. 189–190, "Rettsanvendelsesprosessen på EMK-rettens område (Application of Law Process in the Area of ECHR Law)" in Høgberg and Sunde (editors), *Juridisk metode og tenkemåte (Legal Methods and Ways of Thinking)* (2019), pp. 360–385, Section 13.3.3.3 on pp. 382–384, Nyhus, "Høyesterett og EMD – Samme skjønnsmargin? (Supreme Court of the ECtHR – Same Margin of Appreciation?)", *Lov og Rett (Law Journal)* No. 6 (2016), pp. 364–390, particularly pp. 383–390 and Sørensen, "Læren om statens skjønnsmargin etter EMK og betydningen for norsk domstolskontroll med forvaltningen (Doctrine on the State's Margin of Appreciation and Importance to Norwegian Judicial Review of the Administration)", *Tidsskrift for Rettsvitenskap (Law Journal)* No. 1–2 (2004), pp. 134–196 on pp. 172–173. See nevertheless Borvik, "Nasjonal skjønnsmargin etter EMK – replikk til Jens Edvin A. Skoghøy (National Margin of Appreciation pursuant to the ECHR) – reply to Jens Edvin A. Skoghøy)", *Lov og Rett (Law Journal)* No. 10 (2011), pp. 575–595. For an analysis of the ECtHR's margin of appreciation and Danish law, see Christoffersen and Madsen (editors), *Menneskerettighedsdomstolen – 50 års samspil med dansk ret og politik (Court of Human Rights – 50 Years of Cooperation with Danish Law and Policies)* (2009), p. 173. For an international overview, see Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012).

[239] *A et al. vs United Kingdom* (3455/05), paragraph 184, see also *Fabris vs France,* 16574/08, Section 72.

[240] HR-2016-389 (paragraph 125), HR-2013-2200-P (paragraphs 257 and 258). After 2013, it appears as if there is a tendency for the Supreme Court to conduct more in-depth proportionality assessments, without citing a margin of appreciation, than was common earlier, see further details in Nyhus (2016), p. 386.

[241] See, for example, HR-2018-1958-A (paragraphs 82 and 86). In HR-2020-661-S (paragraphs 96 and 100), the first-voting justice references the margin of appreciation of the ECtHR, but then to establish ECHR law in the area, and not in the specific assessments.

internal law doctrines, and not merely as an application of the ECtHR's margin of appreciation.[242] We emphasise that there will in any case be a limit for how restrained the national courts can be if the subsidiarity review is to function as intended.[243] In *Fabris vs France,* the Grand Chamber emphasises that national courts are "required to examine" arguments of convention violations with "particular rigour and care", as a "corollary of the principle of subsidiarity".[244]

3.2.6 Importance of international and national law

The fifth and final interpretation principle that we will emphasise here concerns the importance of other international and national law.

The ECtHR interprets the Convention *in accordance with the rules and principles of international law*, see Article 31 (3) (c) of the Vienna Convention, which states that treaties shall be interpreted in light of relevant "rules of international law applicable in the relations between the parties". The ECtHR has emphasised that the ECHR cannot be interpreted and applied "in a vacuum", but it must take into account "any relevant rules of international law" and interpreted "as far as possible in harmony with other principles of international law of which it forms part".[245] The Vienna Convention refers to binding international law treaties or established custom, but in accordance with the practice of the ECtHR there is no prerequisite here that the treaties are binding or the rules have been ratified by the Convention State, as long as "the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is a common ground in modern societies".[246] Moreover, it is not a prerequisite that the conventions here concern individual human rights.[247] The ECtHR assesses whether there is a "consensus emerging from specialised international instruments and from the practice of Contracting States".[248] If such a consensus is under

[242] See in this direction O'Boyle et al. (2018), p. 17, which discusses national doctrines of restraint as counterparts to the ECtHR's doctrine on the margin of appreciation.

[243] See correspondingly concerning Danish law, Christoffersen and Madsen (editors) (2009), p. 173.

[244] *Fabris vs* France, Section 72.

[245] *Bankovic et al. vs Belgium et al.* (52207/99), Section 57.

[246] *Demir and Baykara vs Turkey*, Section 86.

[247] *Stubbings et al. vs United Kingdom* (22083/93, 22095/93), Section 53; *Al-Adsani vs United Kingdom* (35763/97)*; Fogarty vs United Kingdom* (37112/97), *McElhinney vs Ireland* (31253/96); *Sabeh El Leil vs France* (34869/05), Sections 55-68, see further details in Kjølbro, 2020, p. 30.

[248] *Demir and Baykara vs Turkey* Section 85 (our emphasis by italics).

development, it may constitute a “relevant consideration” for the court for interpretation of the Convention.[249]

The Paris Agreement has been ratified by 46 out of the Council of Europe’s 47 member states, as well as by the EU.[250] This is a binding international law agreement. The Paris Agreement’s goal is to limit global warmingto 1.5 degrees Celsius, and "well below" 2 degrees Celsius, and the IPCC reports the agreement is based on, can be regarded as constituting “common ground” from specialised international law instruments and state practice, which may be of importance to the interpretation of the obligations under the ECHR.[251] The environmental law precautionary principle enshrined in the Rio Declaration and the UNFCCC, and the “no-harm principle” as customary international law, may also be of importance to the interpretation.[252] Furthermore, the UN Human Rights Committee’s general comments and decisions in individual appeal cases concerning the ICCPR and greenhouse gas emissions may contribute to the interpretation.[253]

Finally, the ECtHR will be able to look to the practice of the upper courts of the Convention States as a source of law for the interpretation.[254] There are recent European Supreme Court decisions on climate and environmental rights from France and the Netherlands.[255] The French Conseil constitutionnel (Constitutional Council) has recently elevated the protection of the environment to a constitutional rank.[256] The Supreme Court of the Netherlands concluded last year that Articles 2 and 8 of the ECHR bound the Netherlands to reduce its greenhouse gas emissions by a minimum of 25 per cent compared with the 1990 level by the end of 2020. The ECtHR's former President Sicilianos at that time has in two speeches this year emphasised these decisions. Even though such speeches are of no significance as a source of law, it is worth noting that Sicilianos referred to *the Urgenda* judgment as historic, and stated that it shows that the ECHR can provide genuine answers to the problems of our time:

---

[249] *Demir and Baykara vs Turkey* Section 85 (our emphasis by italics).

[250] Turkey signed the Paris Agreement on 22 April 2016, but has not ratified the agreement.

[251] Weweinke-Singh, *State responsibility, climate change and human rights under international law* (2019).

[252] See *Tătar vs Romania* (67021/01), Section 120, where the ECtHR refers to the precautionary principle in the Rio Declaration as an important principle. See otherwise, *Demir and Baykara vs Turkey*, Section 86.

[253] Compared to *Opuz vs Turkey* (33401/02), Section 187. The decisions of the UN Human Rights Committee are discussed in greater detail in the Norwegian National Human Rights Institution's report on climate and human rights (2020), Chapter 6.

[254] *S. V. and A vs Denmark* [GC] (35553/12, 36678/12 and 36711/12), Sections 122 and 125.

[255] For the record, it is noted that ECHR appeals concerning greenhouse gas emissions have been argued, but the substance of the case has not been considered, by the Supreme Courts of Ireland and Switzerland, see further details in the Norwegian National Human Rights Institution's report on climate and human rights (2020), Chapter 9.

[256] Décision n 2019-823 QPC: “Il en découle que la protection de l'environnement, patrimoine commun des êtres humains, constitue un objectif de valeur constitutionnelle”, available in an English translation here: https://www.conseil-constitutionnel.fr/en/decision/2020/2019823QPC.htm.

> "By relying directly on the Convention, the Dutch judges highlighted the fact that the European Convention on Human Rights really has become our shared language and that this instrument can provide genuine responses to the problems of our time."[257]

3.2.7 Summary

The ECtHR's method is therefore based on the wording, but because the ECHR consists largely of standards with little detail, the wording must be interpreted. The Court's interpretation is distinctively purpose-oriented, to ensure effective rights, and dynamic, in order to respond to contemporary challenges. In establishing the obligations, the ECtHR takes international law into account, and may, under the circumstances, give weight to national supreme court practice. Since the judicial review of national courts is primary, while the ECtHR's review is subsidiary, the principles of subsidiarity and the margin of appreciation do not mean the same to the national courts as the ECtHR. In the absence of clarifying case law from the ECtHR in the area of climate, national courts will have to make independent interpretations of the Convention, based on the purpose and the ECtHR's present case law.

3.3 Procedural conditions – in particular the victim requirement in Article 34 of the ECHR

3.3.1 Placement of the problem at hand

An *ex officio* question in this matter is whether the environmental organisations are in a position, procedurally, to argue violations of Articles 93 and 102 of the Constitution of Norway, see Articles 2 and 8 of the ECHR. The State has argued dismissal of the case with regard to a basis of claim concerning Articles 2 and 8 of the ECHR, because in the view of the State, the environmental organisations cannot be a "victim" in accordance with Article 34 of the ECHR. The Court of Appeal did not take a position on the question, because it nevertheless found that it was clear that Articles 2 and 8 of the ECHR had not been violated.

3.3.2 Importance of procedural conditions pursuant to the ECHR in national reviews

For the national review of rights under the ECHR, the procedural conditions for appealing to the ECtHR are in principle unimportant. It follows from Article 34 of the ECHR, read in conjunction with Article 19 of the ECHR, that the provision only regulates the right to file

[257] Siciliano's speech at the opening of the ECtHR for the court year 2020 on 21 January 2020, which is available here: https://www.echr.coe.int/Documents/Speech_20200131_Sicilianos_JY_ENG.pdf See also published speech of 27 February 2020, which is available here: https://www.echr.coe.int/Documents/Speech_20200227_Sicilianos_Environment_FRA.pdf

appeals before "[t]he Court", defined as the ECtHR. Article 34 of the ECHR does thus not govern the right to file legal actions before national courts. This applies, of course, more when it concerns rights enshrined in the Constitution of Norway. The right for environmental organisations to file legal actions before Norwegian courts is also governed by section 1-4 of the Dispute Act, see also section 1-3. It has not been contested that the procedural prerequisites under the Dispute Act have been met.

However, in Rt-2005-543, the Appeal Committee has stated with reference to the "victim" requirement in Article 34 of the ECHR, that "similar requirements must be set out in order for a case claiming violation of the constitution to be brought before Norwegian courts".[258] To the extent that it is correct, even for subsequently enacted rights under the Constitution of Norway, the statement must be understood on the background of the fact that the problem was whether the plaintiff could use the ECHR to *expand* the right of legal action nationally. As long as section 1-4 of the Dispute Act enables representative legal actions, the problem here is the opposite; whether Article 34 of the ECHR can be used to *restrict* the right of legal action nationally. In such cases, it follows from Article 53 of the ECHR that the ECHR's procedural conditions cannot restrict this right.[259] Article 53 of the ECHR states that nothing in the Convention shall be interpreted in such a way that it restricts or deviates from national rights.

The procedural conditions pursuant to Article 34 of the ECHR are in principle not of importance when Norwegian courts are to take a stand on the substantive content of Articles 2 and 8.[260] It will depend on a reality assessment of the substantive rights claimed to be violated. In this context, it is sufficient to acknowledge that the parties entitled to appeal pursuant to Article 34 of the ECHR are in principle different than the entitled parties under the Convention. Children, for example, are entitled parties under Article 1 of the ECHR, even if they are not automatically entitled to appeal under Article 34 of the ECHR, regardless of the party or parties who are exercising parental authority.[261] Consequently, it cannot be determined whether plaintiffs are entitled parties pursuant to Article 2 or 8 of the ECHR, based on whether they would fulfil the conditions for being entitled to appeal in the event of a subsequent appeal to the ECtHR.

---

[258] Rt. 2005, p. 534 (paragraph 28).

[259] The right to legal action is related to Article 6 of the ECHR concerning "access to court", see also Article 9 of the Århus Convention.

[260] The ECtHR's practice may nevertheless build on pragmatic approaches, where the Court can decide a case on the least questionable basis, based on codiscussions of procedural and substantive topics of assessment. This does not in itself provide guidance for the scope of the rights protection, unless the premises provide clear grounds supporting something else.

[261] *A.K. and L. vs Croatia* (37956/11), paragraph 47, and repeated in *Strand Lobben et al. vs Norway* (37283/13), paragraph 156. See also Kjølbro (2020), p. 48.

3.3.3 Points of departure for the right of appeal pursuant to Article 34 of the ECHR

Provided that Article 34 of the ECHR is nevertheless of importance in the case, and brought about by the parties' arguments, we will review the principles of interpretation pursuant to the provision in more detail here.

Article 34 of the ECHR grants the right of appeal to natural and legal persons, non-governmental organisations and groups of individuals, provided they can claim to be a victim of an alleged violation of the Convention. A "victim" is understood to mean the person or persons directly or indirectly affected by an alleged violation.[262] Associations can appeal on behalf of directly affected individual members under a power of attorney, or appeal in their own name over alleged violations, in which the association, at least in principle, is itself "directly affected".[263] Since associations as natural persons do not have a right to life under Article 2 of the ECHR and can in principle not claim a separate right to health under Article 8 of the ECHR, one can ask whether associations can be in a position procedurally to claim a violation of these provisions in their own name.[264]

However, this issue must be further clarified. The question is not whether organisations can claim their own *right* to life or health, but whether they can file an appeal in their own name for violations that will jointly affect several members of the association. Kjølbro expresses that this question is encumbered by "some doubt".[265] He concludes that associations "presumably" can also be entitled to appeal if a sufficient number of the association's members are directly affected.[266] We will discuss this question in more detail in the following.

3.3.4. Can organisations appeal in their own name against violations that will affect their members?

In accordance with the ECtHR's case law, the point of departure is that the association itself must be "directly affected" in order to appeal, but this applies only "normally" according to the Court.[267] This requirement is typically used as justification for dismissing appeals from associations in cases where there are specific individuals who have allegedly been subjected to a violation and who have either appealed or will be able to appeal on their own behalf.[268] This differs from appeals from associations concerning greenhouse gas emissions with effect in the future, which are precisely characterised by the fact that

[262] *Vallianatos et al. vs Greece* [GC] (29381/09 and 32684/09), Section 47.

[263] Kjølbro (2020), p. 121.

[264] *Identoba vs Georgia* (73235/12), Section 45; *Greenpeace E.V. et al. vs Germany* (18215/06).

[265] Kjølbro (2020), p. 121.

[266] Kjølbro (2020), p. 121.

[267] *British Gurkha Welfare Society et al. vs United Kingdom* (44818/11), Section 50.

[268] See, for example, *Identoba vs Georgia*, Section 45; *Vallianatos et al. vs Greece*, Section 47.

individuals who have already been affected by the consequences of the emissions cannot just be pointed out, individuals who are the most obvious parties to appeal the alleged violations.[269]

The term "victim" is interpreted autonomously and dynamically. On the one hand, it means that the group of parties entitled to appeal to the ECtHR is disconnected from national delimitation of parties entitled to take legal action. The ECtHR practices the victim requirement further than national jurisdictions, and it has allowed appellants to file appeals to enforce the right to the environment.[270] On the other hand, dynamic interpretation implies that the view of the parties entitled to appeal will have to develop to keep pace with changing social conditions.[271] The rationale is that a too formalistic interpretation of the term "victim" will otherwise prevent an effective and genuine enforcement of rights.[272]

We add that the ECtHR will consider whether an environmental organisation has been a party to a national legal action. This has occasionally been decisive for the victim status[273] and has in other cases been given weight as a factor indicating that the party meets the "victim" requirement.[274]

In accordance with the practice of the ECtHR, the "victim" requirement entails delimitation against reviews *in abstracto* and against *actio popularis*, where anyone can file an appeal against violations committed against others.[275] However, this is only a point of departure. For example, the ECtHR accepts appeals from individuals concerning the pollution of larger areas, which affect all the residents in the areas in general and not individuals in particular.[276] In *Cordella,* Italy's argument was not accepted that the appeal had to be dismissed as *actio popularis.* The ECtHR pointed out that it was presumed that the pollution of the areas was potentially hazardous to the health and well-being of everyone exposed to it, even though the risk could not be proven and specified at the individual level. The ECtHR also has long-standing case law for the acceptance of appeals

[269] The Swiss Supreme Court's decision of 5 May 2020 illustrates how difficult it will be for individuals to prove that they are at present individually and particularly affected by climate change.

[270] *Balmer-Schafroth et al. vs Switzerland* [GC] (22110/93), Sections 24–26); *Athanassoglou et al. vs Switzerland* (27644/95), Section 39. See also Sicilianos's speech published on 27 February 2020, which is available here: https://www.echr.coe.int/Documents/Speech_20200227_Sicilianos_Environment_FRA.pdf

[271] *Monnat vs Switzerland* (73604/01), Sections 30–33; *Gorraiz Lizarraga et al. vs Spain* (62543/00), Section 38.

[272] *Monnat vs Switzerland,* Sections 30–33.

[273] *Balmer-Schafroth et al. vs Switzerland*, Sections 24–26.

[274] *Aksu vs Turkey*, Section 52, *Micallef vs Malta* [GC] (17056/06), Section 48.

[275] *Centre for Legal Resources on behalf of Valentin Câmpeanu vs Romania* [GC] (47848/08), Section 101; *Aksu vs Turkey* [GC] (4149/94 and 41029/04), Section 50.

[276] *Cordella et al. vs Italy* (54414/13 and 54264/15), Sections 97 and 104. Section 104 states: "Il s'agit en tout cas d'une présomption, qui peut ne pas se vérifies dans un cas déterminé."

concerning potential concrete[277] or abstract[278] violations, provided they are necessary to ensure effective rights.

In cases where it would be impossible for appellants to demonstrate that they are directly or indirectly affected by an alleged violation, the ECtHR has allowed the abstract review of laws that have a structural effect. One type of case is secret surveillance.[279] In *Klass et al. vs Germany*, the*Commission justified the exception as follows:*

> "The question arises in the presented proceedings whether an individual is to be deprived of the opportunity of lodging an application with the Commission because, owing to the secrecy of the measures objected to, he cannot point to any concrete measure specifically affecting him. In the Court's view, the effectiveness (l'effet utile) of the Convention implies in such circumstances some possibility of having access to the Commission. If this was not so, the efficiency of the Convention's enforcement machinery would be materially weakened. The procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious."[280]

In these types of cases, a formalistic interpretation of the "victim" requirement would thus exclude appeals concerning secret surveillance precisely because the surveillance is secret. These types of violations will thus be cut off from review.

A corresponding impossibility characterises appeals concerning greenhouse gas emissions that may violate the right to life and integrity of the person. It is a scientific fact that at the current emission rate (42 Gt CO_2 per year) we have less than 15 years left before the remaining carbon budget to achieve the 1.5 degree target with a 50 per cent probability will be exceeded.[281] This will lock in irreversible and dangerous climate change, and then it will no longer be possible to prevent such climate change. At the same time, it may be difficult today to specify which individuals bear a real and individualised risk of losing their lives in landslides, avalanches, floods, heatwaves, pandemics and hurricanes that greenhouse gas emissions today cause with a latent and delayed effect in the future.[282]

A formalistic interpretation of the "victim" requirement will therefore, in practice, entail, as in *Klass vs Germany*, that individuals are deprived of their opportunity to appeal to the

[277] *Soering vs United Kingdom* (14038/88).

[278] *Klass et al. vs Germany*.

[279] *Roman Zakharov vs Russia* [GC] (47143/06) Sections 173–178.

[280] *Klass et al. vs Germany*, Section 34.

[281] IPCC's carbon budget, cited in the Court of Appeal's judgment, Section 3.1. See www.globalcarbonproject.org/carbonbudget.

[282] See the Norwegian National Human Rights Institution's report on climate and human rights, Chapter 2 (written by Cicero) concerning the effective duration.

ECtHR because of the actual violation he or she is appealing against. When the secrecy constitutes at the same time the violation and the procedural obstacle in *Klass*, it is the temperature response to the greenhouse gas emissions with its inherent inertia that constitutes at the same time the violation and the procedural obstacle in appeals concerning greenhouse gas emissions.

Another type of case is mass surveillance (bulk), where potential violations may affect everyone and anyone, and where it will not be possible to demonstrate specified individual violations. The ECtHR has recently considered the substance of appeals *in abstracto* from associations here.[283] They are related to the rights the associations themselves have as legal persons, but generally apply to *the* existence of legislation that allows mass surveillance in bulk and potentially allows secret surveillance of anyone. In *Centrum för rättvisa vs Sweden*, for example, the ECtHR gave the association "victim" status, despite the fact that the appeal concerned the existence *in abstracto* of legislation, and despite the fact that the association could not demonstrate any specified individual violation, because it concerned a "system of signal intelligence that potentially affects all users of, example, mobile telephone services and the internet".

Since climate change, as opposed to secret surveillance and bulk surveillance, may in its ultimate consequence entail irreversible changes to the possibility of life in the foreseeable future, a formalistic understanding of the "victim" requirement will also lead to the following paradox:

Today, when it is still possible to guard against emissions that will lead to dangerous climate change, appeals concerning the right to life and integrity of the person can conceivably be cut off procedurally because they cannot be adequately individualised. When climate change becomes so dramatic over time that a requirement for the individualisation of the loss of life and health without difficulty can be met by a large numbers of appeals, individuals will no longer have an opportunity to guard against the causes of climate change, because CO_2 in excess of the 1.5 degree target (430 ppm CO_2), even the 2 degree target (450 ppm CO_2), has already been extracted and combusted.[284]

Representative appeals from collective entities, such as environmental protection associations, may therefore perhaps be the only way individuals can effectively and genuinely enforce rights in this area today. Consideration for effective rights protection may thus imply that the ECtHR will be inclined to grant "victim" status to environmental protection associations, precisely because collective entities will be able to represent a community of affected interests, even if the interests of individual members alone are

[283] *Centrum för rättvisa vs Sweden* (35253/08), Section 92 and *Big Brother Watch et al. vs United Kingdom* (58170/13, 62322/14 and 24960/15). Both cases are being heard by the ECtHR's grand chamber and no final decision has yet been made. Two additional appeals filed by associations have been communicated, see *Privacy International et al. vs United Kingdom* (46259/16) and *Bureau of Investigative Journalism and Alice Ross vs United Kingdom* (62322/14).

[284] See further details at www.globalcarbonproject.org.

probably not adequately assessed in isolation. In addition, the complexity of the administrative decisions such appeals may conceivably challenge will involve genuine obstacles that a collective entity can practically and in terms of resources have better prerequisites for overcoming than private individuals.

The ECtHR reasoned along these lines in a fundamentally justified environmental case concerning the location of a dam that would flood a village, *Gorraiz Lizarraga et al. vs Spain*. Here, the Court justified an expansive interpretation of the term "victim" by the fact that collective entities such as associations are becoming increasingly important in modern societies in order for individuals to have remedies available to ensure effectiveness.[285] The ECtHR therefore allowed both the environmental protection association and individual members, who had not been a party to the national legal action, the right of appeal to the ECtHR. The Court pointed out that the term "victim" must be interpreted dynamically, and then stated the following:

> "And indeed, in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. Moreover, the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries. That is precisely the situation that obtained in the present case. The Court cannot disregard that fact when interpreting the concept of 'victim'. Any other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory."[286]

The ECtHR has also in other contexts emphasised the importance of environmental protection associations to prevent and appeal violations of environmental rights.[287] Sicilianos has even pointed out that the right to establish associations can prove to be very important in filing appeals concerning environmental law violations to the ECtHR.[288]

An exception for environmental protection associations may draw on the justification for representative legal actions, as this institution has emerged in European legal systems. The ECtHR may attach weight to whether an interpretation result is in accordance with what follows from the legal systems of several Convention States.[289] In *Gorraiz Lizarraga et al.*, the ECtHR justified dynamic interpretation of Articles 34 and 35 of the ECHR, inter

[285] *Gorraiz Lizarraga et al. vs Spain*, Section 38.

[286] *Gorraiz Lizarraga et al. vs Spain*, Section 38.

[287] See, for example, *Costel Popa vs Romania* (47558/10).

[288] Sicilianos, published speech of 27 February 2020, mentioned above.

[289] See *Agrotexim et al. vs Greece,* Section 66; *Goodwin vs United Kingdom*, Section 39.

alia, with the right for associations to bring legal action to defend the interests of their members "is recognised by the legislation of most European countries".[290]

In accordance with Rt. 2005, p. 844 (paragraph 45), Norwegian courts will when there is doubt about the understanding of the ECHR also draw on "value priorities on which the Norwegian legislation and conception of law is based". The institution of representative legal actions was originally justified in Norwegian law by the fact that environmental protection associations represent broader idealistic and public interests that otherwise cannot or will not be pleaded before the courts.[291] In cases where individuals will not be affected to such an extent that they themselves can take legal action, organisations under Norwegian law are also regarded as being entitled to take legal action because they represent the sum total of affected interests, see Rt. 1914, p. 419, Rt. 1952, p. 554, Rt. 1980, p. 569, and Rt. 1987, p. 538. Schei et al. writes that an organisation has an interest as a party to a legal action in such cases "precisely because it represents a community – the affected parties – and where individual members are unlikely to be affected to such an extent that they could take legal action".[292]

Such considerations are particularly relevant to questions concerning greenhouse gas emissions. This is because the consequences of emissions most strongly threaten those who lack procedural capacity pursuant to section 2-2 (2) of the Dispute Act, and the independent right of appeal pursuant to Article 34 of the ECHR today. There are children and young people who will live until and past 2100, and who in their lifetime, and in the lifetime of their children, will be exposed to dramatic and irreversible climate change unless greenhouse gas emissions are significantly reduced within a few years from now.

Accordingly, we believe there are several grounds supporting the assumption that the ECtHR will treat environmental protection associations that appeal potential violations resulting from greenhouse gas emissions as a type of case *outside* of the cases in which the association itself is "normally" required to be directly affected.[293]

3.3.5 Can individuals appeal to the ECtHR when the legal action has been filed by an organisation?

In conclusion, there may be reason to point out that the question of whether environmental organisations are entitled to appeal under Article 34 of the ECHR does not have to be decisive as to whether the ECtHR will consider the substance of the appeal. The practice of the ECtHR shows that it is possible to differentiate between the

[290] See *Gorraiz Lizarraga et al. vs Spain,* Section 38.

[291] See Rt. 1980, p. 569, Rt. 1992, p.1618, Rt. 2003, p. 833. The legislative history of the Dispute Act points out that associations and foundations in particular "emerge as important bearers of public and idealistic interests in civil society", see Proposition No. 52 (2004–2005) to the Odelsting, p. 356.

[292] Schei et al., Tvisteloven kommentarutgave (Dispute Act Commentary Edition), 2nd edition, Volume I, p. 60.

[293] Compared to *British Gurkha Association et al. vs United Kingdom*.

composition of the appellants to the ECtHR, so that individual members of the association stand as co-appellants, without having taken part in the national legal action in their own name. *In Gorraiz Lizarraga et al. vs Spain*, the ECtHR accepted appeals from individual members of an environmental protection association that had not been part of the association's legal action.[294] The decision is understood to mean that individual members of an environmental protection association will be entitled to appeal without regard to whether they themselves have exhausted the national remedies, provided the legal action is deemed to have been filed through an association ("par l'intermédiaire d'une association", *Bursa Barosu Baskanligi et al. vs Turkey*).[295] On the other hand, non-members who have not in any way participated in the association's legal action ("sans aucunement participé") will have to exhaust the national remedies before they can appeal to the ECtHR in their own name (*Bursa Barosu Baskanligi et al.*).[296]

3.3.6 Summary

Even though the ECtHR's procedural conditions may constitute a practical obstacle with regard to appeals concerning greenhouse gas emissions to the ECtHR today, there are several supporting grounds in the sources of law suggesting that the ECtHR may adapt the procedural conditions to ensure an effective review of the rights pleaded.[297]

3.4 Articles 2 and 8 of the ECHR in general

3.4.1 Issue

Appellants have argued that the exploration licences entail greenhouse gas emissions in an order of magnitude that will contribute to dangerous climate change that violates the right to life and integrity of the person pursuant to Articles 2 and 8 of the ECHR. The State argues that the decision does not violate these provisions, because, according to the State, they do not include the risk of dangerous climate change as a result of future greenhouse gas emissions. The Court of Appeal endorsed that the decision did not affect the right to life in a way that is protected by Article 2 of the ECHR, because the decision does not entail "real and immediate" risk of loss of life for the residents of Norway in general, even though the Court would not rule out that climate change may take life in Norway.[298] The Court of Appeal also found that there was no "direct and immediate link" in contravention of Article 8 of the ECHR between the emissions that could result from

[294] *Gorraiz Lizarraga et al. vs Spain,* Section 39.

[295] *Bursa Barosu Baskanligi et al. vs Turkey*, No. 25680/05, 19/06/2018, Section 115.

[296] *Bursa Barosu Baskanligi et al. vs Turkey*, Section 115.

[297] See in this direction, Sicilianos's speech, 27 February 2020.

[298] Court of Appeal's judgment, Section 4.2.

the decision and serious consequences for the residents of Norway at the general level.[299] In the view of the Norwegian National Human Rights Institution, this part of the case raises interpretation questions of public interest. We will therefore explain the principles that apply to the interpretation of the provisions.

3.4.2 Legal point of departure

As mentioned, the ECHR does not explicitly contain the right to a "clean and quiet environment", but environmental protection is nevertheless interpreted into Articles 2 and 8 of the ECHR. In the following, we will explain the interpretation principles that can be derived from the practice of the ECtHR, and discuss their application on appeals concerning greenhouse gas emissions. It may be argued that the present case law applies to other types of environmental hazards, but the protection under the ECHR is of a general nature, and the ECtHR regularly subsumes legal principles from previous case law for new factual issues.[300] The analysis is structured so that we first discuss whether the provisions apply (3.5–3.7), and then we discuss the scope of the protection, provided the protection is relevant (3.8). Initially, it is necessary to say something in brief about the connection between the two provisions.

3.4.3 Relationship between Articles 2 and 8 of the ECHR

Article 2 of the ECHR protects the right to life, while Article 8 of the ECHR protects, inter alia, everyone's right to respect for their home and private life, including physical integrity, health and well-being. Even though the provisions differ, the ECtHR has considered the rights to be overlapping in appeals in the environmental ("dangerous activities").[301] In *Cordella et al. vs Italy*, for example, the ECtHR considered the appellants' submissions regarding violations of Articles 2 and 8 of the ECHR, as well as Article 13, solely under Article 8 of the ECHR.[302] The fact that the provisions overlap implies, according to the ECtHR, that principles of law developed in case law on the environment and planning matters concerning Article 8 can also be applied pursuant to Article 2, and vice versa.[303] The ECtHR typically assesses appeals pursuant to Article 2 of the ECHR if the appealed actions entail a relevant and obvious risk to life, and under Article 8 of the ECHR if the actions do not entail such risks, but on the other hand a risk to life and physical integrity in the long term.[304] For the sake of the overview, we will discuss the

[299] Court of Appeal's judgment, section 4.2.

[300] See, for example, the application of the Osman Test in the environmental area, which is discussed in Section 3.5.2 below.

[301] *Budayeva et al. vs Russia*, Section 133; *Öneryıldız vs Turkey* [GC] (48939/99), Sections 90 and 160.

[302] *Cordella et al. vs Italy*, Section 94.

[303] *Budayeva et al. vs Russia*, Section 133.

[304] *Vilnes et al. vs Norway* (52806/09 and 22703/10), Section 234; Kjølbro (2020), p. 238

interpretation principles in accordance with the two provisions separately, but such that the case law under the two provisions may be relevant in both respects.

3.6.4 Precautionary assessment of risk

It may be argued that human rights obligations do not fit in well with potential greenhouse gas emissions and the general consequences of climate change, because it is difficult to establish the actual causal relationship between emissions, climate change and events that cause harm.[305] However, there is another issue, which concerns responsibility for events that have *occurred*. The issue here is whether Articles 2 and 8 of the ECHR positively bind the states to *prevent the risk* of dangerous climate change as a result of greenhouse gas emissions. The difference is illustrated by *Tătar vs Romania*. Here, the ECtHR found that it had not been demonstrated as probable that the pollution was the cause of the proven deterioration in the appellant's asthma, but that the pollution nevertheless represented a real risk of injury to the health of the general population.[306] When the ECtHR accepts greater uncertainty for the future risk assessment, this is anchored to the fundamental environmental law precautionary principle, see the Rio Declaration.[307]

3.5 Does Article 2 of the ECHR apply?

3.5.1 Introduction

Article 2 of the ECHR on the right to life is the most fundamental right in the Convention.[308] It cannot be derogated from.[309] The provision binds the State not only to refrain from negative interventions in the right to life, but also to take "appropriate steps to safeguard the lives of those within its jurisdiction".[310] The positive obligation or the duty to safeguard applies "in the context of any activity, whether public or not, in which the right to life may

[305] The State's main submission to the Court of Appeal, Section 3.4 on p. 28, references Dupuy and Viñuales, *International Environmental Law*, 2nd edition (2018), pp. 396–397. The authors point to factors that may indicate that it may be difficult at present to establish a causal connection between the damage occurred and greenhouse gas emissions. They do not discuss the ECHR, but an appeals case before the Inter-American Commission on Human Rights based on other rules of law. The theme of this chapter is the challenges related to establishing a direct causal connection in retrospect between the occurrence of a specific natural phenomenon that has caused harm, climate change and greenhouse gas emissions, not the prevention of risk. The reference to the literature can therefore probably not be cited as support for the argument that Articles 2 and 8 of the ECHR do not stipulate a positive obligation that may include the risk of loss of life and well being in the event of dangerous greenhouse gas emissions.

[306] *Tătar vs Romania*, Sections 106–107.

[307] *Tătar vs Romania*, Section 120.

[308] O'Boyle et al. (2018), p. 205. Kjølbro (2020), p. 237 and the ECtHR's *Guide on* Section 2 of the Convention – Right to Life (updated 30 April 2020), p. 6 categorises Article 2 as one of the most fundamental rights. See also *Giuliani and Gaggio vs Italy* [GC] (23458/02), Section 174).

[309] Article 15 of the ECHR. The ban on derogation does not apply to the State's lawful acts of war.

[310] *Centre for Legal Resources on behalf of Valentin Câmpeanu vs Romania*, Section 130.

be at stake".[311] The ECtHR has stated that the obligation must be interpreted and applied "so as to make its safeguards practical and effective".[312]

Even though Article 2 of the ECHR does not regulate environmental hazards based on its wording, the ECtHR has made the provision applicable in environmental matters to protect against real and imminent danger to life in the event of pollution, industrial risk, environmentally hazardous activities and natural disasters.[313] The provision is not limited to situations where lives have been lost, but also applies where there is clearly a risk of loss of life.[314] The ECtHR's practice with regard to Article 2 of the ECHR has primarily been brought about by individual appeals filed *after* lives have been lost or put at risk. However, it cannot be concluded from there that the duty to safeguard assumes that the risk has materialised. The duty to safeguard is preventative and general by nature, and arises when the authorities should be aware of a sufficiently serious and close risk of loss of life.

3.5.2 Requirements for individualisation or protection against the general risk to society?

Since the risk of climate change may have a general impact, an initial issue is whether Article 2 of the ECHR can provide protection against this type of general risk to society, or whether the provision's protection is only individual. This will depend on the criteria developed in practice to determine whether a situation gives rise to a duty to safeguard. The ECtHR applies a modified version of the so-called "Osman Test" in environmental cases.[315] This test was originally developed in cases of serious violence by third parties, and sets out a positive obligation to prevent threats against the right to life in cases where

> "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals […] and failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk".[316]

The "Osman test" requires in principle risk against an identified individual or individuals, but the ECtHR has in subsequent cases assumed that the states have an obligation "to afford general protection to society", for example, in case of potentially violent acts by

[311] *Öneryildiz vs Turkey*, Section 71.

[312] *McCann et al. vs United Kingdom* [GC] (18985/91), Section 146; *Öneryildiz vs Turkey*, Section 69.

[313] *Guerra et al. vs Italy* [GC] (116/1996/735/932), Sections 60–62; *Öneryildiz vs Turkey*, Sections 69–74*; Budayeva et al. vs Russia*, Section 146; *M. Ôzel et al. vs Turkey* (14350/05), Sections 170–172; *Kolyadenko et al. vs Russia* (17423/05, 20534/05, 20678/05, 23263/05 and 35673/05); *Brincat et al. vs Malta* (60908/11, 62110/11, 62129/11, 62312/11 and 62338/11).

[314] *Kolyadenko et al. vs Russia, Section 151, Budayeva et al. vs Russia,* Section 146.

[315] *Öneryildiz vs Turkey*; *Budayeva et al. vs Russia*; *Kolyadenko et al. vs Russia*.

[316] *Osman vs United Kingdom* (87/1997/871/1083), Section 116

the mentally ill, suspected terrorist attacks or landmines.[317] This is also a common view in international literature. O'Boyle et al. writes, for example, that the "Osman obligation" "has been extended beyond the protection of "identified individuals" at risk to that of the public at large in a life-threatening situation".[318] In the ECtHR's own commentary guide for Article 2 of the ECHR, it is further stated that the Court has stipulated "an obligation to afford general protection to society" in various contexts.[319] The environment is such a context.

With regard to environmental threats that expose an entire region to risk, Articles 2 and 8 of the ECHR protect the residents of the region. In *Cordella et al. vs Italy* and *Tãtar vs Romania,* Article 8 of the ECHR was violated because the authorities allowed pollution that exposed not only the appellants, but the entire population of the affected areas in general to a health hazard.[320] The duty to safeguard is limited based on who is exposed to the risk, regardless of whether it is individuals or all the residents of a region. In the event of very local pollution, only neighbours will be protected, whereas in the case of pollution or environmental hazards with larger impact areas, the residents of the exposed regions may be protected. The ECtHR's decision will materially only apply to the groups of individuals who have exercised their right to appeal, but the Court's premises for the duty to safeguard encompass the population in the relevant area in general.[321] The geographical delimitations are simultaneously casuistic, not general. To the extent that the practice provides a basis for the abstraction of principles, it is probable that the delimitation of the protected population depends on the geographical extent of the pollution or environmental hazard.[322] It may suggest that the protection may encompass larger populations in the event of hazardous pollution that is not limited to a local impact area, but which will have a greater impact in general. One type of case may be greenhouse gas emissions.[323]

---

[317] See respectively *Bljakaj et al. vs Croatia* (74448/12), Section 77; *Tagayeva et al. vs Russia* (26562/07), Section 482 and *Ercan Bozkurt vs Turkey* (20620/10), Section 54.

[318] O'Boyle et al. (2018), p. 213.

[319] Case law guide for Article 2, Section 21, refers, inter alia, to *Mastromatteo vs Italy* (37703/97), Section 69 and *Gorovenky and Bugara vs Ukraine* (36146/05 and 42418/05), Section 32.

[320] *Cordella et al. vs Italy,* Section 172: "plus généralement, celle de l'ensemble de la population résidant dans les zones à risque". *Tătar vs Romania,* Section 122: "la Cour estime que la population de la ville de Baia Mare, y inclus les requérants, a dû vivre dans un état d'angoisse et d'incertitude accentuées par la passivité des autorités nationales [...]"; Section 124: "les autorités nationales ont manqué à leur devoir d'information de la population de la ville de Baia Mare, et plus particulièrement des requérants".

[321] *Cordella et al. vs Italy,* Section 172; *Tãtar vs Romania,* Section 122.

[322] See, for example, *Tãtar vs Romania; Cordella et al. vs Italy*.

[323] As in *Urgenda vs Netherlands*.

In the ECtHR's practice concerning the risk of loss of life due to acts of violence, the ECtHR has distinguished between individualised and general risk. However, a corresponding distinction is not found in subsequent practice concerning pollution risk.[324]

The ECtHR's expansion of the duty to safeguard to encompass general social protection harmonises with the considerations of objective. For even though the primary purpose of the convention system is to provide individual restitution, the purpose is also to decide on general questions in the interests of society to raise the general protection standards.[325] The ECHR's preamble, sixth paragraph, binds the states to the "collective enforcement" of human rights, and the ECtHR has emphasised that the Convention also has a distinctive collective protection objective.[326]

In light of the present case law and considerations of objective, it emerges in the view of the Norwegian National Human Rights Institution to be somewhat counter-intuitive to assume that human rights violations resulting from dangerous climate change do not make Articles 2 and 8 of the ECHR relevant, because they will have such a large impact that the risk can be designated as collective, while each and every countless violation on a smaller scale will be encompassed by the rights protection.[327] The principle of effectiveness may point in the same direction. One can ask whether an interpretation result that in its ultimate consequence entails that the right to life does not encompass the right to an atmosphere that supports conditions for life, can be combined with the principle that the rights shall be interpreted so that they are effective.

3.5.3 What does the requirement of a "real and immediate" risk mean?

A next question is whether the risk of dangerous climate change is sufficiently "real and immediate" to make the duty to safeguard relevant. It sets requirements for how serious and how imminent the risk is. A very serious risk may affect the requirement of how imminent the risk is, and vice versa.[328] The size of and how imminent the risk one is facing is will also affect the requirements for the authorities' measures.[329]

---

[324] *Mastramatteo vs Italy,* Section 69; *Giuliani and Gaggio vs Italy* [GC] (23458/02), Section 247, compared to *Tãtar vs Romania, Cordella et al. vs Italy.*

[325] Kjølbro (2020), p. 15.

[326] *Loizidou vs Turkey,* Section 70. See also Section 3.2.2 of the submission.

[327] See in the same direction, Section 3.15.

[328] See, for example, *Nicolae Virgiliu Tănase vs Romania* (41720/13), Section 144. A corresponding point of view follows from the general law of damages, whereby the duty of care is assessed based, inter alia, on an overall assessment of the probability of the realisation of risk compared with the potential extent of damage if the risk was to be realised. As Lødrup writes in *Lærebok i erstatningsrett (Textbook in the Law of Damages)* (5th edition, 2005): "The safety devices in a nuclear power plant must of course be more extensive than in a pin factory" (page 108).

[329] *Budayeva,* paragraph 135.

As for the phrase “real risk”, it is understood in other contexts as a delimitation against “mere possibilities”, but the ECtHR has otherwise made modest demands on the likelihood that the risk will materialise.[330] The Supreme Court of the Netherlands has interpreted the phrase as a risk that is “genuine”.[331] The Norwegian National Human Rights Institution assumes that the international knowledge base through the IPCC reports on the risk of dangerous climate change as a result of warming in excess of 1.5 to 2 degrees will in general be able to satisfy the requirement that the risk associated with significant greenhouse gas emissions is real.[332]

Whether the risk can also be characterised as “immediate” may result in more doubt. The phrase appears at first glance to entail that the risk must be immediately imminent. This is nevertheless only apparently. The ECtHR's case law shows that when the “Osman Test” is applied analogically in the environmental area, “immediate” is interpreted so that the risk may also materialise in the longer term.

In *Öneryildiz vs Turkey,* the risk of a gas explosion had been known to the authorities for several years, while in *Budayeva et al. vs Russia,* the authorities had for a period prior to the landslide been aware of the danger of landslides and the possibility that such landslides could occur at some point in time.[333] In *Kolyadenko vs Russia,* the authorities had been aware of the risk of flooding for years, without taking the “necessary steps” to protect “those individuals who, on the date of the entry into force of the Convention in respect of Russia, were living in the area downstream of the Pionerskoye reservoir”.[334] The ECtHR linked thus the duty to safeguard to persons who lived downstream at the time of ratification *in 1998*, even though the risk did not materialise until 2001, and then not necessarily to the same individuals. In *Brincat et al. vs Malta,* the authorities should have been aware from the early 1970s of the risk of asbestos exposure at a shipyard, to protect employees who subsequently died, developed life-threatening illnesses or serious health problems.[335] And in *Tãtar,* the risk of the pollution hazard had been known to the authorities since an impact assessment in 1993. The factory in question was nevertheless commissioned in 1999, a factory accident occurred in the following year, and the activities continued. The ECtHR emphasised that the positive obligation to protect against serious and substantial risk to health and well-being was equally valid *before* the establishment of the factory as *after* the accident, and was even more valid in the years thereafter, while the factory continued to operate.[336] Based on the present case law, the Supreme Court of

[330] Compared to *T.K. and S.R. vs Russia* (28492/15), Section 9.

[331] See the Supreme Court of the Netherlands in *Urgenda vs Netherlands,* Section 5.2.2.

[332] *Demir and Baykara vs Turkey*.

[333] See Sections 98–101 and 147–158, respectively.

[334] *Kolyadenko et al. vs Russia*, Section 171.

[335] *Brincat et al. vs Malta,* Sections 103–117.

[336] *Tãtar vs Romania,* Section 107.

the Netherlands has interpreted "immediate" as not referring to a short period of time, but that the risk is “directly threatening the persons involved”.[337]

A longer time perspective makes, in the view of the Norwegian National Human Rights Institution, good sense when the “Osman Test”, read in context, is applied accordingly to environmental hazards. The topic of assessment for the positive duty to safeguard is whether the authorities “failed to take measures within the scope of their powers which, reasonably, might have been expected to avoid that risk”. This means that the assessment of what constitutes “imminent” must relate to a point in time when the authorities can still prevent the risk. With regard to dangerous persons who are released on parole, it may perhaps be a matter of days or hours before a possible incident of violence, but with regard to dangerous climate change, the positive obligation to prevent change must be prior to the emissions, and not at a later point in time when the change occurs.

That is because the temperature response to greenhouse gas emissions has an inherent inertia. Because even though all the greenhouse gas emissions affect the climate from the moment they are released, some greenhouse gases – especially CO_2 – will also have an effect in the longer term.[338] The latest research shows that if the amount of CO_2 in the atmosphere abruptly doubled, it would result in the long term in additional warming of approximately 3 degrees Celsius. Around half of this warming would have occurred during the first decade, much of the remaining warming over the next hundred years, and then a small remnant on a millennial scale.[339] This can be compared with changing the temperature settings for a furnace. The warming starts immediately from when the thermostat is turned up, even though it will take some time before all parts of the room reach the set temperature. However, the duty to prevent cannot be linked to the point in time when the room, or the climate here, is warmed throughout. Unlike a thermostat, you cannot turn down the setting (or reduce the emissions) to reduce the heat. In order to prevent the warming, you must prevent the emissions. In other words, climate change is locked in from when the emissions occur. This means that the assessment of whether the risk of dangerous climate change is “imminent” must be linked to a point in time *before* the emissions, when the change can still be prevented, and not close to when the change takes effect, when climate change as a result of emissions is unavoidable and irreversible.

However, an objection may be entered that the State's obligation to protect life and health will have to be close to or after natural disasters that occur as a foreseeable

[337] Supreme Court of the Netherlands, *Urgenda vs Netherlands*, Section 5.2.2. See *Öneryildiz vs Turkey*; *Budayeva et al. vs Russia* and *Kolyadenko et al. vs Russia*.

[338] See the Norwegian National Human Rights Institution's report on climate and human rights (2020), Chapter 2, by Cicero.

[339] Sherwood et al., 2020, is mentioned in the Norwegian National Human Rights Institution's report on climate and human rights (2020), Chapter 2, by Cicero.

consequence of climate change. However, there is *another* obligation, which concerns handling the *consequences* of climate change. The question here is whether the State has a positive obligation to prevent the occurrence of further climate change that puts life at risk.

3.5.4 Authorities' knowledge of the risk

In accordance with the Osman Test, it is further required that the authorities "knew or ought to have known at the time" about the existence of the risk. The authorities' due care is assessed specifically, and the requirement is relative to the strength and proximity of the risk.[340] If the authorities can be criticised for not knowing better about the risk or for not having investigated and assessed the risk, then this may imply responsibility.[341] The risk of dangerous climate change as a result of greenhouse gas emissions is well established, and has been so for many years. It is not disputed.

3.5.5 Duty to take action

Firstly, the State may have a positive duty of a procedural nature to introduce the necessary regulation to counteract risk from environmentally hazardous activities and environmental disasters, including a duty to inform the public of the risk.[342] Furthermore, the State may have a positive duty of a substantive nature to ensure that persons are not exposed to unnecessary risk.[343] The ECtHR's requirements for the authorities are characterised as an obligation to take action (duty to take action), and not an obligation with respect to the results.[344] The duty of take action is discussed in greater detail in connection with Article 8 of the ECHR below.

3.5.6 Summary

Risk of dangerous climate change due to greenhouse gas emissions is real. The risk cannot be characterised as anything less than "immediate", as the ECtHR has applied the criterion in case law concerning environmental hazards. Greenhouse gas emissions affect the climate immediately.[345] In addition, some greenhouse gases, such as $CO_{2,}$, will have an effect for a long time. This inertia of the temperature response is latent and cannot be prevented.[346] The risk emerges thus as imminent.

---

[340] *Öneryildiz,* paragraph 101.

[341] *Tatar vs Romania*, Section 97.

[342] See, for example, *Öneryildiz*, Section 108, see also Section 90; Brincat, Sections 113–114.

[343] *L.C.B. vs United Kingdom,* Sections 37–38; *Pasa and Erkan Erol vs Turkey*, Sections 30–38.

[344] *Georgel and Georgeta Stoicesu vs Romania* (9718/03).

[345] See the Norwegian National Human Rights Institution's report on climate and human rights (2020), Chapter 2, by Cicero.

[346] The assessment will have to be based on scalable technology that is available.

As pointed out in Section 3.4.3, the Supreme Court of Norway does not have to take a final position on the scope of Article 2 of the ECHR. This is because, in cases where the risk is far in the future, the ECtHR can in any case choose to allow the assessment pursuant to Article 2 of the ECHR to be consumed by Article 8 of the ECHR.[347] In the following, we discuss the conditions for when Article 8 of the ECHR applies.

3.6 Does Article 8 of the ECHR apply?

3.6.1 Point of departure

Article 8 of the ECHR protects the right to private life, family life and home. The wording of this provision does not grant the right to the environment either, but the ECtHR has interpreted this right as encompassing environmental pollution that "may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely".[348] The impact must therefore exceed a certain threshold, but it is not a requirement that the pollution constitutes a serious health hazard.[349] Article 8 of the ECHR will also apply where a "sufficiently close link" has been established between the dangerous effects of an activity that individuals *may be* exposed and private and family life.[350] It is this protection against potential risk that is discussed in greater detail here.

3.6.2 Negative and positive obligations in general

In the same manner as the right to life in Article 2 of the ECHR, Article 8 of the ECHR may be violated as a result of the influence/intervention of the State itself (negative duty of the State) or by the State not adequately safeguarding the right from the influence/intervention of third parties (positive duty of the State). The positive duty is derived from Article 8 (1) of the ECHR, while the negative duty depends on an overall assessment of whether the intervention is lawful pursuant to Article 8 (2) of the ECHR. The ECtHR has formulated it as the State must take "reasonable and appropriate measures".[351] The distinction between negative and positive obligations may be fluid. The relevant principles are nevertheless "broadly similar".[352] The ECtHR has stated that:

---

[347] *Vilnes et al.*, *Cordella et al.*

[348] *Taşkın et al. vs Turkey* (46117/99), Section 113. In other contexts, the ECtHR has formulated it as a requirement that the environmental degradation must "directly and seriously affect" private and family life, or affect "adversely, to a sufficient extent", see *Hatton vs United Kingdom,* Section 96.

[349] *López Ostra vs Spain*, Section 51; *Taşkın et al. vs Turkey*, Section 113.

[350] *Taşkın et al. vs Turkey,* Section 113.

[351] See, for example, *Lopez Ostra vs Spain* and *Hatton vs United Kingdom*.

[352] *Jugheli et al. vs Georgia*, Section 73.

"In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention."[353]

3.6.3 Does Article 8 of the ECHR encompass latent and future risk of climate change?

As for Article 2 of the ECHR, a key question is whether Article 8 of the ECHR encompasses future risk of dangerous climate change. The question is unresolved, but the present case law nevertheless provides some supporting grounds.

An older dismissal decision, *Asselbourg et al. vs Luxembourg*, does indeed state that it will only be in "wholly exceptional circumstances" that the risk of future violations may constitute a *prima facie* Convention violation.[354] The Court did not consider Article 8 of the ECHR, but Article 34. Here "the mere mention of the pollution risks" was not enough. The appellants had to prove a detailed probability of risk of injury. Subsequent development of the law suggests that protection under Article 8 of the ECHR against potential and hypothetical risk goes somewhat further.[355]

In *Taşkın et al. vs Turkey* from 2004, Turkey was held responsible for the risk of possible health damage caused by pollution from a gold mine, where the risk would not materialise among the residents of the area until after 20-50 years.[356] Turkey argued that the risk was too "hypothetical" to be deemed "serious and imminent", and therefore outside the scope of application of Article 8 of the ECHR. The ECtHR dismissed the argument, and concluded that Article 8 of the ECHR had been violated. The most important element according to the Court was that a "sufficiently close link" had been established between the risk of hazardous health effects and private and family life. If such a risk was not encompassed, the positive obligation to safeguard the rights of appellants under Article 8 of the ECHR would "be set at naught".[357]

In *Tãtar vs Romania* from 2009, Romania was held responsible for the risk to health and the environment at a mineral extraction plant. Unlike *Taskin,* there was no impact assessment that established a "sufficiently close link" between the pollution risk and

[353] *Jugheli et al. vs Georgia*, Section 73.

[354] *Asselbourg vs Luxembourg* (29121/95), 29/06/1999.

[355] See *Hardy and Maile vs United Kingdom,* Section 185, see also Section 189. *Asselbourg* is only mentioned a few times in subsequent cases.

[356] *Taşkın et al. vs Turkey,* Section 107, compared to Section 113.

[357] *Taşkın et al. vs Turkey,* Section 113. Since the Supreme Court of Turkey had already rendered an adverse decision on the authorities' substantial duty to safeguard the right to life and a healthy environment, the ECtHR only made an assessment of the procedural side of the duty to safeguard (Section 117). The Court found that Turkey violated the procedural side of its duty to safeguard by allowing the mining operations to continue, despite the fact that the operating permit was ruled invalid in an enforceable judgment.

protected interests, but this was, under the circumstances, and in light of a prior accident, not of decisive importance.[358]

In *Hardy and Maile vs United Kingdom* from 2012, the State argued, citing *Asselbourg,* that the appellants had not demonstrated a sufficiently detailed probability of injury risk in a hypothetical scenario of a collision in a port area with LNG terminals, potentially posing a risk of explosion.[359] Despite the fact that *Asselbourg* was argued by the State, the ECtHR did not mention the decision. Instead, the Court relied on legal principles established in the subsequent decisions, *Taskin et al.* and *Tãtar*. The Court concluded that the potential risk of a hypothetical collision incident near the LNG terminals was sufficient to establish a "sufficiently close link" with the appellants' private life and home.[360]

In *Cordella et al. vs Italy* from 2019, Italy was held responsible for allowing the *continuation* of a pollution situation "(la prologation d'une situation de pollution"), despite reports of the health hazards associated with the activities having been submitted since the 1970s.[361]

As mentioned, the ECtHR has not yet assessed appeals concerning greenhouse gas emissions. However, there is one European Supreme Court decision (*Urgenda*) that assesses whether Articles 2 and 8 of the ECHR entail obligations to reduce greenhouse gas emissions. As a national Supreme Court decision, it may be a relevant source of law for the interpretation of the ECHR.[362] There are also two decisions from the Supreme Courts of Switzerland and Ireland, but none of them are a substantive review of Articles 2 and 8 of the ECHR, because the arguments had to be dismissed on the grounds of internal procedural law.[363] They will therefore not be discussed further here.

The Supreme Court of the Netherlands found that the threat of dangerous climate change constitutes a sufficiently qualified risk under Articles 2 and 8 of the ECHR, which the authorities are obligated to protect the residents from. In accordance with a review of the present ECtHR practice, the Court stated that

> "no other conclusion can be drawn but that the State is required pursuant to Articles 2 and 8 ECHR to take measures to counter the genuine threat of dangerous climate change if this were merely a national problem. Given the findings above in

[358] *Tãtar vs Romania*, Sections 93–97.

[359] *Hardy and Maile vs United Kingdom,* Section 185.

[360] *Hardy and Maile vs United Kingdom,* Section 189 ff.

[361] *Cordella et al. vs Italy,* Sections 163 and 172. See also *Vilnes et al. vs Norway,* in which Norway was held responsible for the "long-term effects on human health" due to inadequate information in connection with diving in the 1970s. Presumably, Norway has been responsible for this violation from a point in time *before* the diving took place, when information about the diving tables should have been provided.

[362] *S., V. and A. vs Denmark,* Sections 122 and 125. See Section 3.2.6.

[363] The Swiss decision does indeed contain some summary statements on Articles 2 and 8 of the ECHR, but they are difficult to reconcile with scientific facts about the long-term impact of CO_2 emissions, and the IPCC's scenarios.

> paragraphs 4.2–4.7, after all, this constitutes a 'real and immediate risk' as referred to above in paragraph 5.2.2 and it entails the risk that the lives and welfare of Dutch residents could be seriously jeopardized. The same applies to, inter alia, the possible sharp rise in the sea level, which could render part of the Netherlands uninhabitable. The fact that this risk will only be able to materialise a few decades from now and that it will not impact specific persons or a specific group of persons but large parts of the population does not mean – contrary to the State's assertions – that Articles 2 and 8 of the ECHR offer no protection from this threat (see above in paragraph 5.3.1 and the conclusion of paragraphs 5.2.2 and 5.2.3). This is consistent with the precautionary principle (see paragraph 5.3.2, above). The mere existence of a sufficiently genuine possibility that this risk will materialise means that suitable measures must be taken."

The analysis of the Supreme Court of the Netherlands is based on established legal principles pursuant to Articles 2 and 8 of the ECHR, and in particular the principle of effective rights protection and the precautionary principle. The analysis is not limited to the risk a rising sea level represents for a low-lying country.

Potential and hypothetical risk that may not materialise for a period of up to 50 years, i.e. the year 2070 calculated from today, may in principle be encompassed by Article 8 of the ECHR.[364] Climate change, by comparison, is not a hypothetical and potential risk, but a latent and existing risk that has already materialised.[365] If demonstrating that climate change as a result of emissions today will not occur until decades in the future was to relieve states of responsibility, the inertia of the temperature response will exclude the protection of the right to life and well-being against one of the most serious threats to the right to life and well-being, or "the ability of present and future generations to enjoy the right to life", as the UN Human Rights Committee has formulated it.[366] As in *Taşkın et al. vs Turkey,* it can set the positive obligation to protect life and well-being "at naught".[367]

3.6.4 Summary

The risk of dangerous climate change is latent and existing, and is substantiated in national and international risk assessments. The risk has a "sufficiently close link" with the private life and well-being of vulnerable groups, if not today, then at least within a period of time accepted by the ECtHR. Article 8 of the ECHR applies in principle.

[364] See *Taşkın et al. vs Turkey,* Section 113.

[365] IPCC 5th Assessment Report, Summary for Policymakers.

[366] See CCPR/C/GC/36, paragraph 62.

[367] Compared to *Taşkın et al. vs Turkey,* Section 113.

3.7 Particular questions when applying Articles 2 and 8 of the ECHR to greenhouse gas emissions

3.7.1 Issue

A real objection to asserting a positive obligation for the State to prevent dangerous climate change is that climate change is not the result of emissions brought about by a single Convention State, but emissions from all the countries of the world. In the view of the Norwegian National Human Rights Institution, however, it is not given that this can exempt the State from a positive *duty to take action* to safeguard its citizens against dangerous climate change under Articles 2 and 8 of the ECHR. There are several reasons for this.

3.7.2. ECtHR's practice

Firstly, based on well-established ECtHR practice, it does not exempt a state from responsibility that a potential violation is partly or primarily based on the actions of other countries. Since *Soering vs United Kingdom* in 1989, the ECtHR has not deemed an imminent expulsion or return from a Convention State to a third country to violate the obligations of the Convention State under Article 3 of the ECHR, even though it will be the other state that exposes the person in question to a real risk of torture, degrading or inhumane treatment or punishment. A Convention State is also responsible in accordance with the ECHR when returning a person to a country, where the person in question is at a real risk of being sent to a third country, where the person in question will be at risk of degrading treatment.[368] The Convention State may in addition be deemed responsible if an individual is sent to a country where there is a real risk of treatment by private parties that is in violation of the Convention.[369] The ECtHR's rationale is general and applies in principle not only to Article 3 of the ECHR but any Convention right.[370] The Convention States are therefore obligated to do what they can within their jurisdictions, by refraining from contributions to potential harm, to protect individuals from real risk of the hypothetical actions or omissions by other countries.

3.7.3. Customary international law

Secondly, it is also recognised in accordance with customary international law that a state can be held individually responsible for actions that only partially contribute to the harm, and where the actions of other states are necessary and independent contributions. Customary international law is relevant in accordance with the ECtHR's method to the

[368] *M.S.S. vs Belgium and Greece* [GC] (30696/09), *Hirsi Jamaa et al. vs Italy* [GC] (27765/09).

[369] *N vs* Sweden (23505/09).

[370] O'Boyle et al. (2018), p. 248; O'Boyle, "Rights: reflections on the Soering case" in James O'Reilly (editor), *Human Rights and Constitutional Law Essays in Honour of Brian Walsh* (1992), p. 97.

interpretation of the ECHR, see Article 31 (3) *(c)* of the Vienna Convention.[371] The general rules of international law on state responsibility are stated in the Articles on State Responsibility for International Wrongful Acts, which has been prepared by the UN Commission on International Law and adopted by the UN General Assembly.[372] It is assumed that the articles largely express customary international law. Article 47 (1) reads:

> "Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be pleaded in relation to that act."

The explanatory report on the provision states:[373]

> "Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act. (...)
>
> Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. […] In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations."

The provisions here are aimed only at acts that constitute *violations* of international rules of law (compare "internationally *wrongful* acts"). They have a transfer value, since the appellants argue violations of international law (ECHR). The essence of the rules on state responsibility is that states are responsible under international law for their contributions to damage.

This responsibility is not limited to or precluded by the fact that other states have contributed to the same damage.[374] In the Corfu Canal case from 1949, for example, the ICJ found that Albania was fully responsible for the loss of life and material damage to British vessels as a result of mine explosions in Albanian waters, even though the mines were deployed there by a third country.[375] The ICJ found that Albania was obligated to try to "prevent the disaster".[376] When Albania failed to take "all necessary steps" to prevent the potential disaster that mines in their waters represented to people and vessels, they

---

[371] *Bankovic et al. vs Belgium et al.*, Section 57. See Section 3.2.6.

[372] Draft Articles on State Responsibility for International Wrongful Acts, Chapter IV, p. 64.

[373] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, p. 124, Section 1.

[374] Articles on Responsibility of States at Internationally Wrongful Acts, with commentaries, 2001, p. 124, Section 2.

[375] The ICJ concluded that the mines were of a German type, and probably deployed by Yugoslavia.

[376] Corfu Channel (United Kingdom and Northern Ireland vs Albania), 9 April 1949, p. 23.

were responsible and obligated to provide the United Kingdom with compensation for the damage directly inflicted by the actions of third countries.[377]

The UN Commission on International Law's draft principles on international liability for damages for transboundary harmful acts that do not constitute a violation of international law assume that each State is responsible for its actions.[378]

3.7.4 Specialised rules of international law on greenhouse gas emissions

Thirdly, the *lex specialis* rules of international law on greenhouse gas emissions are based on the fact that every country has "common but differentiated responsibilities" to reduce greenhouse gas emissions to prevent dangerous climate change, see the preamble, sixth paragraph, Article 3 (1), Article 4 (1) of the UN Framework Convention on Climate Change (UNFCCC), as well as the preamble, third paragraph and Article 4 (3) of the Paris Agreement. Pursuant to Article 2 of the UNFCCC, the purpose of the Convention is to stabilise the concentration of greenhouse gases in the atmosphere at a level "that would prevent dangerous anthropogenic interference with the climate system", defined in Article 1 (1), inter alia, as "changes in the physical environment or biota resulting from climate change which would have significant deleterious effects on [...] human health and welfare". In order to prevent such dangerous changes, the parties shall "protect the climate system for the benefit of present and future generations of humankind", in accordance with "common but differentiated responsibilities", which are understood such that developed countries, given their historical responsibilities and resources, "should take the lead", see Article 3 (1). These rules are also relevant in accordance with the ECtHR's method for the interpretation of the ECHR.[379]

3.7.5 National responsibility rules

Finally, it can be added that basic rules of responsibility in the law of damages prevalent in the national legal systems of the Convention States and in the EU operate with partial responsibility. Under the circumstances, it may also be a relevant source of law for the ECtHR's interpretation of the ECHR.[380]

3.7.6 Objections

Against such an interpretation result, it may be argued that if a single state is held responsible, other states may become freeriders, and that emissions from a single state

[377] Ibid.

[378] Principles of the allocation of loss in the case of transboundary harm arising out of hazardous activities, 2006, inter alia, Articles 2 and 4.

[379] *Demir*. See also Section 3.2.6 of the submission.

[380] *Agrotexim et al. vs Greece* (15/1994/462/543), Section 66; *Goodwin vs United Kingdom* (17488/90), Section 39. See further details in Kjølbro (2020), p. 33.

may be marginal compared to global emissions. However, the consequence of these objections is the fact that any country can evade partial responsibility for greenhouse gas emissions by pointing to other countries or the size of its own relative contribution, so that no country can be held responsible if greenhouse gas emissions exceed an existentially dangerous level. This argument is unlikely to stand in to international law, see the rules on state responsibility for international law violations and international liability for damages for transboundary harmful acts.[381] In addition, in accordance with Article 31 of the Vienna Convention, the ECHR shall be interpreted based on the wording of the text, as well as the object and purpose of the treaty. The overall purpose of the ECHR regarding the protection of individuals and the purpose of the Statutes of the Council of Europe regarding the protection of human society and civilization indicates an interpretation that promotes these purposes.

The Supreme Court of the Netherlands stated this as follows:

> "Indeed, acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share. If, on the other hand, this defence is ruled out, each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest, in accordance with the principles laid down in the preamble to the UNFCCC cited above in 5.7.2.
>
> Also important in this context is that, as has been considered in 4.6 above about the carbon budget, each reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change, as every reduction means that more room remains in the carbon budget. The defence that a duty to reduce greenhouse gas emissions on the part of the individual states does not help because other countries will continue their emissions cannot be accepted for this reason either: no reduction is negligible."[382]

The Supreme Court of the Netherlands concluded that Articles 2 and 8 of the ECHR implies positive obligations for the Convention States "to do 'their part'" to prevent dangerous climate change. The Court considered this interpretation to be "sufficiently clear" based on the case law of the ECtHR and other principles of interpretation, so that it was not necessary to request an advisory statement from the ECtHR, see Protocol No. 16, Article 1.[383]

---

[381] Articles on State Responsibility, Article 47, see also Principles of the allocation of loss in the case of transboundary harm arising out of hazardous activities, 2006, inter alia, Articles 2 and 4.

[382] Supreme Court of the Netherlands in *Urgenda vs Netherlands*, Sections 5.7.7 and 5.7.8.

[383] The Supreme Court of the Netherlands in *Urgenda vs Netherlands*, Section 5.6.4. Protocol No. 16 has been ratified by the Netherlands. The protocol has been signed, but not ratified, by Norway. An overview of the ratification status is available here: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=JxEGRcU8

3.7.7 Summary

Based on the present ECtHR practice, supported by international law, the law of damages and EU legal sources, it is obvious that several legal entities being guilty of the same damage does not exempt from responsibility.

3.8 Provided that Articles 2 or 8 of the ECHR apply

3.8.1 Overview

Provided Articles 2 or 8 of the ECHR apply to the risk of climate change, the ECtHR will make an assessment of whether the State has complied with its positive obligation to protect its citizens from the risk. In accordance with the ECtHR's practice, this positive obligation has a substantive and procedural side.[384]

3.8.2 Substantive side of the positive obligation

The substantive side entails that the ECtHR will consider "the substantive merits of the national authorities' decision" to ensure that it is compatible with the requirements pursuant to Articles 2 or 8 of the ECHR.[385] The ECtHR is assessing whether the State has taken "appropriate steps" to prevent the risk. This is also consistent with the precautionary principle.[386] The authorities will not have the freedom of discretion to assess *whether* they shall take adequate and necessary measures, but the ECtHR will be able to grant a wide margin of discretion in the *choice of* instruments to prevent the risk.[387]

The positive obligation pursuant to Articles 2 and 8 of the ECHR in the environmental area is, as mentioned*, preventative,* in order to safeguard against *potential* risk*.* The ECtHR has accepted a greater degree of uncertainty here, with reference to the precautionary principle.[388] The precautionary principle means that scientific uncertainty about the likelihood of potential environmental damage does not exempt states from a positive obligation to prevent risk.[389]

In the absence of clarifying ECtHR practice, in accordance with the ECtHR's method, *national Supreme Court decisions can, as mentioned, be considered.* The Supreme Court

---

[384] *Taşkın et al. vs Turkey,* Sections 115 ff.

[385] *Hatton et al. vs United Kingdom* Section 99; *Taşkın et al. vs Turkey,* Section 115.

[386] *Tătar vs Romania,* Section 120.

[387] *Hatton et al. vs United Kingdom,* Section 100; *Buckley vs United Kingdom* (20348/92), Sections 74–77.

[388] Tătar vs Romania, Section 120, which states: "En ce sens, la Cour rappelle l'importance du principe de précaution (consacré pour la première fois par la Déclaration de Rio), qui «a vocation à s'appliquer en vue d'assurer un niveau de protection élevée de la santé, de la sécurité des consommateurs et de l'environnement, dans l'ensemble des activités de la Communauté."

[389] See, for example, Article 3 (3) of the UNFCCC. It is stated here in case of "threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing [precautionary] measures".

of the Netherlands made an assessment of the substantive side of the duty to safeguard, so that the State was obligated to take "appropriate measures" against the threat of dangerous climate change.[390] Even though the Court maintained that this was "in principle" a political question, it found that it was competent to consider whether the State's measures to reduce greenhouse gas emissions entailed too little a reduction in light of what was *clearly the lower limit* for the State's partial responsibility to prevent dangerous climate change.[391]

In determining this lower limit, the Supreme Court of the Netherlands used the ECtHR's "common ground" doctrine. The Court pointed out that there is a "high degree of international consensus on the urgent need" for Annex 1 countries to reduce greenhouse gas emissions by at least 25-40 percent by 2020, compared with the 1990 level, based on IPCC scenario AR4 from 2007.[392] It was based on the "widely supported view of states and international organisations, which view is also based on the insights form of climate science".[393] The reduction rate is anchored to Articles 3 and 4 of the UNFCCC and has been included in the resolution of the Bali Climate Change Conference in 2007 (COP-13), the preambles of the resolutions of the Cancùn Climate Change Conference in 2010 (COP-16), Durban in 2011 (COP-17) and Doha in 2012 (COP-18), as well as the resolutions adopted at the climate change conference in Warsaw in 2013 (COP 19), Lima in 2014 (COP-20) and Paris in 2015 (COP-21). This has also been assumed by the EU.[394] Based on the "common ground" doctrine, the Court considered the Netherlands to be obligated to reduce greenhouse gas emissions by at least 25 per cent by the end of 2020.

It may be argued against this interpretation that even though the UNFCCC and the Paris Agreement are binding agreements under international law, national contributions (NDC) to cut emissions are determined by the state. In this regard, it could be argued that Article 31 (3) (c) of the Vienna Convention is unlikely to "establish" a legal content that is not evident from the wording of the climate agreements. The argument overlooks the fact that Article 4.3 of the Paris Agreement stipulates that NDCs shall reflect "highest possible amibitions" and imply "progression". In any event, it is of no consequence to ECtHR's "common ground" method whether emissions cuts under the UNFCCC and the Paris Agreement themselves are legally binding, as long as the tolerance limits and emission scenarios that these instruments are based on indicate overall that there is a sufficient consensus between the Convention States that can inform about the interpretation of the

[390] Supreme Court of the Netherlands in *Urgenda vs Netherlands*, Sections 5.8–5.9.1.

[391] Sections 6.3–6.6

[392] *Urgenda vs Netherlands,* Section 7.2.11.

[393] Section 6.3. See also Section 3.2 of the submission.

[394] See most recently COM/2020/562 final, 17 September 2020, *Stepping up Europe's 2050 climate ambition*, with the European Commission setting an emissions reduction target of 55% by 2030. The Commission points out that the IPCC's most recent special reports conclude a greater risk of tipping points in the Earth's climate system with less warming than the 5th IPCC report.

ECHR.[395] The Dutch Court did therefore not interpret legal obligations as part of the climate agreements, but referenced the international climate agreements and established science to establish a "common ground" for the interpretation of the ECHR. The application of the doctrine is in accordance with the practice of the ECtHR.[396] The ECtHR takes, as mentioned, into account specialised rules of international law and principles, even if they are not binding, provided they express a "common ground in modern societies".[397] Since emission cuts of minimum 25 percent are not in themselveslegally binding, the Supreme Court of the Netherlands nevertheless exercised restraint with respect to reviews outside of "clear-cut cases".[398]

3.8.3 Procedural side of the positive obligation

The procedural side of the positive obligation entails that the ECtHR will review the decision-making process to ensure that sufficient emphasis has been placed on the interests of individuals.[399] The requirements that are set out for the decision-making process are preventive by their nature and have three components:

(i) The State must prepare the necessary reports and studies "in order to *allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights"*.[400]

(ii) Information from such reports and studies must be publicly available so that the citizens are able to assess in advance "the danger to which they are exposed".[401]

(iii) The citizens must be able to attack the validity of any decision, action or omission at any stage of the process.[402]

While the substantive requirements derived by the Supreme Court of the Netherlands concern the minimum targets for the *total* emission reductions, the procedural requirements the ECtHR has set out will also apply to *specific* decision-making processes that may entail significant emissions. The procedural components will probably entail that Articles 2 and 8 of the ECHR set out requirements that the authorities at an early stage assess and make information available on what consequences, for example, permits to extract carbon from geological deposits with the goal of combustion to the atmosphere,

[395] *Demir*. See also Section 3.2.6 of the submission.

[396] *Demir and Baykara vs Turkey,* Sections 85–86.

[397] *Demir and Baykara vs Turkey,* Section 86.

[398] Section 6.6.

[399] *Taşkın et al. vs Turkey,* Section 115, see also *Hatton et al. vs United Kingdom,* Section 99.

[400] *Taşkın et al. vs Turkey,* Section 119; *Hatton et al. vs United Kingdom,* Section 128; *Tătar vs Romania,* Section 88.

[401] *Taşkın et al. vs Turkey,* Section 119; *Guerra et al. vs Italy,* Section 60; *McGinley and Egan vs United Kingdom* (10/1997/794/995-996), Section 97; *Tătar vs Romania,* Section 88.

[402] *Hatton et al. vs United Kingdom,* Section 127; *Taşkın et al. vs Turkey,* Section 119; *Tătar vs Romania,* Section 88.

may potentially have on climate change and human rights. Such information will probably have to shed light on potential and total greenhouse gas emissions compared with the remaining carbon budget and Norway's partial responsibility under the UNFCCC and the Paris Agreement with the goal of keeping CO_2 concentrations in the atmosphere below a hazardous level (430 ppm, 1.5 degrees Celsius, and well below 450 ppm, 2 degrees Celsius).[403] A positive obligation to assess risk and make assessments available in advance is not just of importance so that the citizens are able to assess the risk that they and their descendants will be exposed to by permits that will allow significant sources of emissions in the long term, but also so that voters can make informed decisions and hold politicians accountable in elections.[404]

Based on the ECtHR's practice, the authorities will have to make predictions about the risk of pollution based on the knowledge base the State possesses, even if it is uncertain.[405] However, the precautionary principle indicates that uncertainty must be credited in favour of, and not in disfavour of, the environment. In the case of greenhouse gas emissions, the authorities can therefore probably not rely on vague assumptions about technological developments in the future that are currently unavailable or scalable, or uncertain assumptions about carbon leakage internationally.[406]

Consideration of a harmonious interpretation of the rights catalogue point toward the fact that such assessments are made and can be verified at an early stage.[407] Companies can obtain protected property benefits through permits pursuant to the Petroleum Act, and legitimate expectations of future earnings from petroleum activities may conceivably be protected from subsequent amendments under ECHR P1-1.[408] Therefore, consideration of an harmonious interpretation also indicates that assessments of whether permits for these type of activities violate more fundamental rights under Articles 2 and 8 of the ECHR exist at such an early stage that one avoids an unnecessary, costly and litigation-promoting rights collision.[409]

---

[403] *Plan B vs United Kingdom,* EXCA Civ 214, 27 February 2020; *Friends of the Irish Environment vs Ireland*, IESC 49, 31 July 2020.

[404] Supreme Court of Ireland in *Friends of the Irish Environment vs Ireland*.

[405] *Guerra et al. vs Italy,* Section 60. Here, the residents were given information about what type of pollution hazard they had been exposed to when the factory finished this part of its production in 1994. The ECtHR concluded that Article 8 of the ECHR had been violated. If the residents were to have been able to assess the risk associated with living in the city, they would have had to be given predictions for the risk of pollution in advance, and not certain information about the exact risk after the fact.

[406] Supreme Court of Ireland in *Friends of the Irish Environment vs Ireland*.

[407] *Demir and Baykara vs Turkey,* Section 66, *Merabishvili vs Georgia* [GC] (72508/13), Section 293. See Kjølbro (2020), p. 20.

[408] HR-2018-1258-A, paragraphs 120–132.

[409] See Smith (2017), p. 325.

3.8.4 Delimitation against an impossible or disproportionate burden

The positive obligation to prevent risk under Article 2 of the ECHR has been interpreted with the limitation that an "impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources".[410] It may be argued that it would be disproportionate, if not impossible, for a Convention State to prevent dangerous climate change alone. However, the positive obligation is not a performance obligation. It is a content obligation.[411]

The ECtHR has defined delimitation against impossible or disproportionate burdens in the context of states benefiting from a "wide margin of appreciation" within "difficult social and technical spheres".[412] It can also be seen as a result of the fact that the State's positive duty to safeguard human rights is of a different nature than the fundamental negative duty to refrain from intervention.[413] As mentioned, it is not obvious that the ECtHR's margin of appreciation has the same application in the relationship between national courts and national authorities as it has in the relationship between the ECtHR and the Convention States.[414] Applied to climate, there are in any case no grounds supporting that the margin of appreciation may be anything less. The ECtHR has stated in *Budayeva* that the scope of positive obligations is necessarily dependent on "the origin of the threat and the extent to which one or the other risk is susceptible to mitigation", and that rescue efforts after natural disasters that are "beyond human control" requires a wider margin of appreciation than "the sphere of dangerous activities of a man-made nature".[415] It is well established today that climate change is of a "man-made nature". Distinctions made in *Budayeva* may therefore indicate that any margin of appreciation on the part of the ECtHR will possibly be somewhat less.

3.9 Summary

This section of the submission has analysed the extent to which Articles 2 and 8 of the ECHR set out a positive obligation for the authorities to do their part to prevent dangerous climate change. We have pointed out that the question must be answered based on an independent assessment in accordance with the ECtHR's method, even though there is currently no directly clarifying ECtHR practice. As climate risk can raise particular procedural difficulties for individuals today, we have discussed the right of environmental protection associations to file rights appeals nationally and before the ECtHR. As regards

[410] *Budayeva et al. vs Russia,* Section 134.

[411] *Georgel and Georgeta Stoicesu vs Romania* (9718/03).

[412] *Budayeva et al. vs Russia,* Section 135.

[413] See further details in Section 2.4.

[414] *Fabris vs France* [GC] (16574/08).

[415] *Budayeva et al. vs Russia,* Sections 134–135 and 137.

the substantive rights, we have assessed that the present sources point in the direction that Articles 2 and 8 of the ECHR apply to the risk of dangerous climate change due to greenhouse gas emissions, even if the question has not been clarified by the ECtHR itself. We have concluded that there are probably not any grounds in the sources of law supporting the exemption of states from responsibility because of the global nature of greenhouse gas emissions and outlined the various procedural and substantive obligations that states probably have in accordance with the present practice of the ECtHR to protect their citizens from the dangerous impact of the climate system.

We want to emphasise that these questions remain unresolved. It is also debatable how far the Supreme Court should go in interpreting the Convention in the place of the ECtHR. At the same time, one can ask whether this is really a matter of reinterpreting Articles 2 and 8 of the ECHR. As the review of the principles of interpretation and case law has shown, it is perhaps more natural to characterise it as the application of established legal principles from the ECtHR's case law in light of the purpose on a new fact.

4. Closing remarks

It lies outside the framework of section 15-8 of the Dispute Act to subsume the evidence in the case under the rules of law that the submission has sought to clarify.

Yours sincerely
for the Norwegian National Human Rights Institution

Adele Matheson Mestad	Jenny Sandvig
Director	Policy Director

This document has been electronically approved and does thus not have any signature.