THREE BINARIES IN *PEOPLE V ARCTIC OIL*

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Abstract

In People v Arctic Oil, courts in Norway considered the question of whether the constitutional right to environment entails a duty of care on the state for curtailing emissions from oil exports. The cause of action was the issue of exploratory oil licenses. The Supreme Court found for the government, but there was a dissenting opinion, and lower courts developed novel jurisprudence. The reaction to the judgment has been polarised. In this Comment, I suggest that it is unhelpful to analyse the judgment using the binaries of international v domestic policy, regulatory v judicial competence, demand v supply responsibility.

1 Introduction

Professor Roggenkamp, Martha, has always been ahead of the curve. She can spot academic trends and potential regulation a mile away. This could be because she knows everyone – if you meet anyone important in the European and Scandinavian energy regulatory space, she will say, 'oh, do you know Martha?'. The researchers she mentors end up writing on the most contemporary things. All this sounds like someone to envy. Now onto the bit I admire.

In the second year of my PhD, I was given the opportunity by one of my supervisors – one of Martha's brilliant colleagues: Edwin Woerdman – to give a lecture on Climate Litigation in the LLM on Energy and Climate Law. I was worried. I had no idea how to teach these subjects without being mind-numbingly boring. And then I attended a lecture by

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Martha on European energy law. Going in, I expected Directive-this implementation-that blah. And the lecture was precisely the opposite. With startling clarity, Martha charted a political history of European energy law. It was also remarkably juicy. This combination – a crystal clear narrative and the most interesting anecdotes – can come only from a lifetime of engaged work. It inspired me. I am also grateful for the fact she took a chance on me to write a book chapter, and that she put me in front of large rooms full of practitioners and regulators to present my bookish thoughts.

One might say there's a research ethic in Martha's work – keep a finger on the pulse of new developments, temper such developments with a dose of realism, interdisciplinarity is cool, and don't forget the law. Let me try to utilise this ethic in sketching a perspective on the recent *People v Arctic Oil* case decided by the Norwegian Supreme Court. I think the case is right up Martha's alley – it involves offshore energy, transition to renewables, conflict between energy and climate law, and political intrigue.

2 The Judgement and its Discontents

People v Arctic Oil is a full-bench judgment delivered by the Norwegian Supreme Court in December 2020.[2] Greenpeace and Nature & Youth (joined by Grandparents' Climate Movement and the Friends of the Earth Norway as interveners) filed an application to quash licenses issued by the Norwegian government for petroleum exploration in the Barents Sea during the 23rd Licensing Round (Licensing Decision). The basis for the challenge was primarily Article 112 of the Norwegian Constitution on the right to a healthy environment. The case was first filed in 2016 before the Oslo District Court amidst a fair bit of publicity – there was an ice sculpture with '112' inscribed on it outside the court.[3] The publicity may be explained by the case being one among an explosion of public interest climate change lawsuits globally,[4] which increasingly utilise rights-claims

2 Greenpeace Nordic Association v Ministry of Petroleum and Energy (2020) Case no 20-051052SIV-HRET (Norwegian Supreme Court) (People v Arctic Oil). Unofficial translation <www.klimasøksma˚l.no/wp-content/uploads/2021/01/judgement_translated.pdf>.

3 https://media.greenpeace.org/archive/People-vs-Arctic-Oil-Court-Case-Ice-Sculpture-in-Oslo-27MZIFJX62PAG.html.

4 For an overview, see UNEP, *Global Climate Litigation Report 2020 Status Review*, available at: https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review; 'Climate change litigation cases spreading around the world', Grantham Research Institute on Climate Change and the Environment, Press Release, July 2021, available at: https://www.lse.ac.uk/granthaminstitute/news/climate-change-litigation-cases-spreading-around-the-world/.

to shape regulatory action.[5] But this one had more going for it for three reasons – it was the first lawsuit that connected the specific practice of oil drilling with climate harm, it raised the question of whether constitutional rights can be mobilised against a specific regulatory decision, and whether a State could be responsible for emissions from oil exports.

The case was dismissed in favour of the government at the District Court, Appeals Court and Supreme Court, but not without significant jurisprudential changes introduced by each court.[6] The District Court found that Article 112 enables citizens and organisations to hold the State accountable for lapses in its duty of care, but is applicable only to environmental harms within Norway.[7] The Appeals Court expanded the territorial scope of Article 112 by recognising – a first for any court globally – the possibility of the State's duty of care for extraterritorial emissions.[8] Notwithstanding, the Appeals Court did not interfere with the government's decision, as the separation of powers requires a high threshold for non-compliance with Article 112. The Supreme Court observed that combustion emissions would be relevant if harm to its citizens could be established because of such emissions, which has not been shown. Further, the Supreme Court was divided – a four-judge minority dissenting opinion found that the decision to issue licenses should be quashed due to the procedural deficiency of not accounting for extraterritorial emissions during impact assessments. It may be noted that the minority opinion of the Supreme Court, the District Court and Appeals Court judgments are of interest due to the diagonal[9] and diffusible[10] nature of transnational climate litigation, where both overturned and lower court judgments find their way in the reasoning of courts in other jurisdictions.

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5 J Peel and H Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law* 37.

6 Alongwith Alexandru Gociu, I chart the trajectory of the judgement in 'People v Arctic Oil: Context, Trajectory and Takeaways', Paper presented at IUCN IUCN-AEL Annual Conference on Environmental Law, University of Groningen, July 2021.

7 Greenpeace Nordic Association v Ministry of Petroleum and Energy Case (2018) Case no 16-166674TVIOTIR/06 (Oslo District Court).

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

9 H Osofsky, 'Is Climate Change International – Litigation's Diagonal Regulatory Role' (2008) 49 *Virginia Journal of International Law* 585.

10 S Roy and E Woerdman, Situating *Urgenda v the* Netherlands in Comparative Climate Litigation (2016) 34 *Journal of Energy and Natural Resources Law* 165

Scholarship on the judgment has been polarised. Most commentators have critiqued the outcome – the court did not order a ban on oil exploration and exploitation,[11] which goes against an emerging international trend.[12] With respect to Norway specifically, commentators point to supply-side responsibility – Norway is the seventh largest exporter of emissions in the world.[13] In terms of the reasoning advanced by the Court, commentators find that the way the right to a healthy environment was interpreted is too narrow,[14] and the deferential review adopted by the courts for policy decisions is somewhat backward[15] in the life of transnational climate law. On the other hand, scholars argue that responsibility for emissions from oil should be borne by importers on the demand-side,[16] international economic diplomacy in the wake of climate change cannot be litigated using constitutional rights[17] – this would amount to judicial overreach. Rather, it is up to states to negotiate climate concerns on the international stage based on domestic energy demand. Further, energy policy is intimately connected to the domestic priorities of the welfare state; caution should be exercised in prioritising climate issues that dilute this objective.[18]

What we get from the judgement and the abovementioned scholarship is that on the one hand we have energy policy which is shaped by domestic economic concerns. On the other hand, we have climate policy, which is negotiated at the international and EU level, and which is implemented at the domestic level. Seen in this way, climate and energy policy are antagonistic, and one needs to win out over the other. This polarity

11 D Shapovalova, 'Arctic Petroleum and the 2°C Goal: A Case for Accountability for Fossil-Fuel Supply' (2020) 10 *Climate Law* 282.

12 R Frost, 'The End of Fossil Fuels: Which countries have banned exploration and extraction?', *Euronews*, 12 August 2021. Available at: https://www.euronews.com/green/2021/08/12/the-end-of-fossil-fuels-which-countries-have-banned-exploration-and-extraction.

13 H McKinnon, G Muttitt, and K Trout, 'The Sky's Limit Norway: Why Norway should lead the way in a managed decline of oil and gas extraction' Oil Change International Report, August 2017, http:// priceofoil.org/2017/08/09/the-skys-limit-norway-why-norway-shouldlead-the-way-in-a-managed-decline-of-oil-and-gas-extraction/

14 C Voigt, 'The First Climate judgment before the Norwegian Supreme Court: Aligning law with politics' (2021) *Journal of Environmental Law,* available at: https://doi.org/10.1093/jel/eqab019.

15 P Minnerop & I Røstgaard, 'In Search of a Fair Share: Article 112 Norwegian Constitution, International Law, and an Emerging Inter-Jurisdictional Judicial Discourse in Climate Litigation' (2021) 44 *Fordham International Law Journal* 847.

16 A Zahar, 'A Leakage Case Litigated as a Human Rights Case', Paper presented at the 'Climate Litigation as Governance Tool' Conference, held at Duke Kunshan University, Suzhou, China, 24-25 October 2020, Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3714290.

17 Ibid.

18 A Gociu, 'The Norwegian Petroleum Regulatory Framework and the Transition to Green Energy' (2021) 1 *Queen Mary Law Journal* 33.

may be subdivided into three binaries: 1) energy policy is domestic whereas climate policy is international; 2) climate policy is a matter of legislative and executive competence while domestic social concerns may be a matter of judicial interest; and 3) responsibility for emissions should be on consumers (demand-side) as against the position that responsibility for emissions should be on producers (supply side). In this comment, I seek to unsettle these three binaries.

3 The Domestic and External Binary

Norway's treatment of energy is unique, and difficult to replicate given a mix of political and policy choices. When oil was discovered in the Norwegian Continental Shelf, Norway moved to simultaneously build up experience in the industry, and use the proceeds to strengthen the economy; specifically, to lay the foundations of a strong welfare state.[19] At the core of such regulatory choices was a particular idea of sustainable development – where human capital and natural resources were simultaneously developed.[20] This process paid off – Equinor (of which the Norwegian state owns 67%) is one of the most formidable oil companies in the world today, the Norwegian Pension Fund Global (financed by oil money) is the third largest sovereign wealth fund. Equinor heavily invests in carbon capture & storage, R&D in renewables;[21] Pension Fund Global invests heavily in renewable energy infrastructure worldwide.[22] From this account, it appears that Norwegian energy policy is very much a creation of domestic regulatory culture, and the internationalisation is an aspect of the network effects of Pension Fund Global. In contrast, climate prerogatives – in keeping with the global nature of climate change – appear to be an 'external' concern that Norway would have to respond to. The external concern idea points to a *lex specialis* argument – climate policy is internationally negotiated at the UN and EU levels, and then left to countries to implement and enforce.[23]

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19 CB Øvald, BSTranøy, and K Raknes, 'The Norwegian Petroleum Fund as Institutionalized Self-Restraint' in P't Hart and M Compton, *Great Policy Successes* (OUP 2019).

20 M Takle, 'The Norwegian Petroleum Fund: Savings for future generations' (2020) 30 *Environmental Values* 147.

21 See https://www.equinor.com/en/what-we-do/renewables.html,

22 See https://www.nbim.no/en/publications/submissions-to-ministry/2019/mandate-for-the-government-pension-fund-global--investments-in-renewable-energy-infrastructure/.

23 A position that Zahar takes in many of his works. See for instance, A Zahar, 'Climate Law, Environmental Law, and the Schism Ahead' in E Techera, J Lindley, K Scott, and A Telesetsky (eds) Routledge Handbook of International Environmental Law (2nd ed, Routledge 2020) 488 – 500.

We will assess the justiciability of 'climate policy as foreign policy' idea shortly. For now, it needs to be pointed out that Norwegian energy policy is, and has always been, a part of foreign policy and international negotiations. The Norwegian Continental Shelf has historically been a hotly negotiated territory, shaped by bilateral and multilateral treaties, international conciliation commissions and even an International Court of Justice ruling.[24] In *People v Arctic Oil* what is of concern is the Licensing Decision. The Licensing Decision pertains to the 23rd licensing round when there was a sudden spike in licenses issued. This spike could be explained by either a fear that international pressure would result in untapped crude oil becoming 'stranded assets' – something that had been suggested by the Norwegian Environment Agency.[25] Less speculative is the fact that the Barents Sea had been under bilateral dispute with Russia for forty-four years; this dispute was resolved by a delimitation treaty in 2010,[26] leaving Norway free to look for oil deposits. This bilateral agreement provides for joint development and discoveries if reservoirs spill into the Russian zone, including consultation on environmental matters for exploration on transboundary hydrocarbon deposits.[27] While the utilisation of proceeds subsequent to the issue of development and operation licenses could be characterised as a matter of domestic welfare policy, the exploration of the Norwegian Continental Shelf via exploration licenses is intimately connected to both international law and bilateral relations.

On the other hand is the characterisation of climate policy as *lex specialis* outside the ambit of domestic law and policy, and combustion emissions as a matter of 'foreign policy'. This argument had been countered in both *Massachusetts v EPA*[28] and the *Urgenda* district court judgement[29] – courts can require regulation on climate change when the State contributes to environmental harm, with *Urgenda* developing a jurisprudence of pro-rata responsibility. Both these cases used particular domestic law and jurisprudence to make these findings, and there may not be equivalent doctrine in Norwegian law especially for the issue of oil licenses. Notwithstanding, the State's duty of care

24 For an overview, see T Pedersen, 'The Svalbard Continental Shelf Controversy: Legal Disputes and Political Rivalries' (2006) 37 *Ocean Development and International Law* 1.

25 G Bang and B Lahn, 'From oil as welfare to oil as risk? Norwegian petroleum resource governance and climate policy' (2020) 20 *Climate Policy* 997, 1003-1006.

26 Treaty between Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, 2010. An English translation of the treaty is available at: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/NOR-RUS2010.PDF.

27 Article 1.10 of Annex II on Transboundary Hydrocarbon Deposits.

28 549 U.S. 497 (2007).

29 [2015] HAZA C/09/00456689.

for transnational climate harm could very well be construed as a matter of domestic law – the fact that the Supreme Court did not explore this line of reasoning, choosing to characterise combustion emissions in general as 'foreign policy' is rather selective. More generally, the idea that the international regime of climate law is *lex specialis* is certainly discredited by the fact that duty of care is very much a creation of domestic law,[30] as *Urgenda* has demonstrated.

4 Policy and Rights Binary

What we see above is that the distinction between energy policy being domestic and climate policy characterised as 'foreign policy' is illusory, and that courts may have more of a role to play. Speaking of courts, the most prevalent binary in climate law is the policy v rights binary – it is the government that is called on to make climate policy, and courts should respect the separation of powers and apply a hands-off approach. Following this logic, rights would have limited potential to inform judicial review of energy and climate policy. In the Supreme Court decision, the Court observed that it cannot open a regulatory decision that is already made (in this case the Licensing Decision) unless it satisfies a high threshold of 'gross disregard of rights.'[31] The fact that an impact assessment was conducted was enough to acquit the government of its duty under Article 112. The minority opinion suggested otherwise.

Being premised on a procedural deficiency (in that impact assessments did not account for combustion emissions), it may appear that the minority opinion focuses on improper application of regulation, and has nothing to do with rights. This was domestic regulation, and the way the Strategic Environmental Assessment Directive was implemented – four out of sixteen judges were of the opinion that combustion of exported oil needs to be accounted for at the earliest stage possible, and measures for counteracting the adverse impacts of combustion emissions would need to be devised and made transparent. These two properties are derived from jurisprudence developed by the Court of Justice of the European Union, which is not binding law in Norway, but was utilised by the Supreme Court. More importantly, dissenting judge Webster J observed: 'The procedural rules in the petroleum legislation *must* be assessed in the light of Article 112 of the Constitution.' [emphasis added][32] Given Article 112 requires that Norwegian citizens

30 I have dealt with this argument in more detail in S Roy, '*Urgenda II* and its Discontents' (2019) 13 *Carbon and Climate Law Review* 130.

31 People v Arctic Oil (n 1) para 182.

32 People v Arctic Oil (n 1) para 255.

know 'the effects of any encroachment on nature that is planned or carried out;' there is an 'ongoing obligation' on the government to carry out impact assessments and make available such information for the entirety of the exploration and exploitation process ('from opening of a new maritime area for petroleum activities until any production in concluded and the maritime area is restored').[33] This view is taken notwithstanding the minority concurring with the majority that direct challenge to government action based on Article 112 could not be maintained. Thus, the role of enforceable constitutional rights is not only to challenge policy, but also to ensure policies have certain properties.

Though the case gained traction because of the larger issues of combustion emissions and whether oil exploration should be banned, one issue that that commentators missed is that the Licensing Decision challenged was one which saw a spike in licenses issued. The spike could be explained by a fear of oil becoming a stranded asset or the delimitation treaty as discussed earlier; in any event, a spike goes against the spirit of Norwegian energy policy – that is to 'go slow' and pursue an economic model that achieves a high standard of environmental protection.[34] Here there was a missed opportunity for the court to step in and steer Norway back to its development path, which it could have done by invoking the principle of non-regression.[35] This could have been another example of how courts can shape policy.

5 Producer and Consumer Binary

The need to take climate action was not in debate in *People v Arctic Oil*, nor was compliance with the Paris Agreement. By virtue of the European Economic Agreement (EEA), Norway has substantively adopted EU environmental law, including climate measures such as participating in the European Union Emissions Trading Scheme (EU ETS). Internally, Norway has taken several steps on climate change and use of renewables. Norway's energy sources are completely renewable, with *National Geographic* dubbing it the world's greenest nation.[36] On oil specifically, exploration is conducted using renewable sources, there are carbon taxes and a statutory framework including impact assessment. The issue as alluded to earlier is the emissions from oil exports. The debate on

33 People v Arctic Oil (n 1) para 273.

34 H Ryggvik, 'A Short History of the Norwegian Oil Industry: From Protected National Champions to Internationally Competitive Multinationals' (2015) *Business History Review* 89.

35 M Prieur, 'The Principle of Non-regression' *in Elgar Encyclopaedia of Environmental Law VI: Principles of Environmental Law* (Edward Elgar 2018) 251 – 259.

36 Matt Carroll, 'Norway's Leading the Charge on a Sustainable Electric Future', *National Geographic*, June 27, 2019.

whether it is consumers or producers who should be responsible for emissions goes back a long way, and it appears to be ethically irresolvable. Should a passenger or the airline pay for mitigation? Farms or meat-eaters? Should it be Chinese factories or Apple who pays for the emissions from iPhone production? This same debate may be applied to the emissions that are released when Norwegian oil is burnt by countries and companies that buy such oil. Zahar argues that the attack on supply has a 'populist scapegoatish appeal to it', rather, the focus should be on importing countries as 'the problem of climate change arises from the cumulative demand.'[37]

Framed as consumer v producer, or demand v supply, this debate seems irresolvable as it comes down to the philosophical question of causal responsibility. There have been creative regulatory and scholarly solutions to deal with this problem. The EU ETS, for instance, provides for direct liability of producers (due to penalties enforced by applying strict liability) and indirect financial burdens on consumers due to pass-through of costs (provided competition does not prevent a pass-through).[38] To attribute liability to the producer may be justified by an efficiency perspective – costs of identifying and monitoring producers for the purpose of liability may be lower than diffuse non-point sources.[39] The tables might be turned if there are a fewer number of large consumers than multiple small producers of a particular commodity. An ethical perspective would bring in comparative historical advantage to shape rules and reap benefits from fossil fuels.[40] Political scientists have argued that key decisive moments have put us on a fossil fuel trajectory, such as investment in coal rather than hydropower to provide mobility and avoid trade unions in Britain,[41] or post-war oil subsidies in the US.[42] Economists have attempted to develop nuanced supply-chain perspectives for distribution of responsibility for mitigating emissions;[43] including a suggestion to dissolve the producer-consumer binary and move to an income-based responsibility model.[44] Thus, arguments such as Zahar's endorses the uncritical perspective that consumers are to blame for global warm-

37 Zahar (n 16) 6.

38 Discussed in S Roy, 'Distributive Choices in *Urgenda* and EU Climate Law' in M Roggenkamp and C Banet (eds.) *European Energy Law Report XI* (Intersentia, 2017).

39 S Roy, *Situating the Individual within Climate Law: A behavioural law and economics approach to end-user emissions trading*, University of Groningen Dissertation, 2017.

40 S Caney, 'Climate Change and the Duties of the Advantaged' (2010) 13 *Critical Review of International Social and Political Philosophy* 203.

41 A Malm, *Fossil Capital: The rise of steam power and the roots of global warming* (Verso 2016).

42 T Mitchell, Carbon Democracy (2009) 38 *Economy and Society* 399.

43 J Feng, 'Allocating the Responsibility for CO2 over Emissions from the Perspectives of Benefit Principle and Ecological Deficit' (2003) 46 *Ecological Economics* 121.

44 A Marques, J Rodrigues, M Lenzen, T Domingos, 'Income-based Environmental Responsibility' (2012) 84 *Ecological Economics* 57.

ing. The Appeals Court recognized that combustion emissions from oil exports may well be taken into account in the State exercising its duty of care, the scope of which was reduced by the Supreme Court in its ruling that extraterritorial emissions may be accounted for only when they directly affect people on Norwegian territory. In a way, the Supreme Court avoided the producer and consumer binary by concentrating on harms within Norwegian territory. Having said that, the focus on direct harm to citizens within Norwegian territory goes against the *Massachusetts* and *Urgenda* idea of duty of care of states for contributory emissions.

6 Conclusion

In the above whirlwind treatment of *People v Arctic Oil*, we see that the case deals with a concern that is central to the interface of climate and energy law: can responsibility for extraterritorial emissions shape energy policy? In Norway, this is crucial as energy policy is central to its economic policy and welfare policy. It has been suggested in this brief comment that thinking of this issue through binaries is not helpful. As anyone influenced by Martha would surely agree, some nuance would always be of assistance.