

# 4 Solidarity with future generations

## Protection clauses in constitutions

*Marianne Takle*

### Introduction

Today's generations have the capacity to affect the future ecosystem more than ever before. This means current generations have a major influence on the welfare of future generations. Therefore, obligations to safeguard the natural environment for future generations have been included as protection clauses in national constitutions (Tremmel, 2006; UN Secretary-General, 2013). As national constitutions are meant to endure for many generations, they are the most important intergenerational contracts in modern welfare states (Gosseries, 2008).

By including the protection of future generations' access to a healthy natural environment in constitutions, the current generations have committed themselves to taking future people into account in contemporary welfare state considerations. This commitment might challenge the welfare state particularly in two ways. First, the inclusion of future generations implies welfare states cannot only be understood in economic and social terms but must also include environmental concerns (Schoyen & Hvinden, 2017). Second, the concern for future people's welfare might be at the expense of people living today, leading to tensions between current and future generations.

To understand the consequences of these challenges to the modern welfare state, this chapter develops a fine-mesh concept of solidarity with future generations. More specifically, it elaborates theoretically, and examines empirically, the question: What kind of concrete binding commitments to collective actions – on the part of present-day state institutions – would solidarity with future generations require?

The word "generation" can have at least two different meanings: generations as age groups and generations as ensembles of all people living together at a given point in time. Accordingly, we can distinguish between two types of relations between generations. One is "relations between young, middle aged and old people alive today", i.e. overlapping generations, and the other is relations between the current generations, i.e. all people alive today and future unborn generations (Tremmel, 2009, 2019). Constitutions are intergenerational contracts in terms of both types of relations as future generations include children as well as the unborn.

The concern for future generations has mainly been discussed in scholarly literature in the fields of economics, law, and philosophy. Scholars have developed general principles of justice between generations, also termed “intergenerational justice”. These principles are based on contractual approaches, understandings of stewardship, common heritage of mankind, human rights approaches, and/or theories of needs and capabilities (Lawrence, 2014; Page, 2006; Rawls, 1971; Sen, 2013; Taylor, 2017; Tremmel, 2009). In general, this literature captures the complexities and tensions underlying concerns for future generations, and it provides abstract principles of justice between generations that both extend globally and include future generations. However, general principles of intergenerational justice are not efficient as analytical tools to examine what kind of binding commitments to collective actions solidarity with future generations require. This chapter aims to contribute to filling this gap by combining scholarly literature on future generations with that of solidarity.

Solidarity has commonly included mutual obligations and entitlements within some kind of community such as religious or political groups, classes, local places, and nations (Elias, 1989; Stjernø, 2005, 2015). National welfare states have boundaries, and the distinction between insiders and outsiders is important to maintain internal solidarity (Banting & Kymlicka, 2017, p. 6). While national solidarity is still essential, we increasingly observe calls for solidarity that are transnational and cosmopolitan (Grimmel & Giang, 2017; Habermas, 2015). Appeals for cosmopolitan solidarity are based on a growing awareness that complex policy challenges as environmental degradation can only be solved by crossing national boundaries.

However, solidarity with future generations differs in many respects from solidarity with contemporaries. We can neither expect anything from people who have not yet been born nor know what their preferences will be. The concept of solidarity with future generations developed in this chapter will be useful to understand the consequences of these uncertainties for the current welfare state.

Empirically, the chapter evaluates the relevance of this concept by examining Norway as an example of how around 30 countries have included ecological protection clauses for future generations in their constitution (Tremmel, 2006, 2019). Article 112 in the Norwegian Constitution states the current and future generations have the right to a healthy environment. Greenpeace Norden and the organisation Nature and Youth (Natur og Ungdom) have taken legal actions against the Norwegian Government for violating Article 112. This is one example of 1587 climate lawsuits (not necessarily referring to future generations) registered in the world between 1986 and 2020 (Setzer & Byrnes, 2020). The central issue is the Norwegian Government’s decision from 10 June 2016 on awarding licences for searching for petroleum in the Barents Sea. Due to climate change and the vulnerability of areas in the High North, environmental organisations argue the country should not search for more petroleum in these areas and should also phase out petroleum production. The environmental organisations have not succeeded. The Supreme Court concluded in December 2020 that these decisions must be made by politicians and not in the courtroom. Most of the judges voted in favour

of the Norwegian state. Four judges argued the decision on awarding licences was invalid due to procedural errors, and they believed further processing of the case in relation to future global emissions of greenhouse gases was necessary.

In this Norwegian case, the challenges to the welfare state come to the fore. The country's most important industry, petroleum activities, is set against one of the most important environmental challenges the world is facing: climate change. The Norwegian case also represents an interesting paradox – the country takes leadership in addressing the global climate emergency but is simultaneously one of the world's largest exporters of oil and natural gas (Takle, 2020; UN General Assembly, 2020, p. 8). The combined value of oil and gas represents almost half of the total value of national exports. This production and the infrastructure supporting it are of considerable importance to the welfare state.

Within the context of a welfare state completely dependent on income from its large petroleum industry, the Norwegian climate lawsuit throws light on how long-term concern for protecting the environment – also for those who come after us – is weighed against the challenges it poses to today's welfare state. Accordingly, the Norwegian case is used to analyse the ideas expressed by experts, politicians, and judges, and which political and normative assessments they make regarding solidarity with future generations. The analysis is based on the main documents in the climate lawsuit.

The following section discusses how solidarity and constitution are intertwined. The third section suggests a novel concept of solidarity with future generations, which is applied to the Norwegian case in the fourth section. The final section summarises and concludes.

## **Solidarity and constitutions**

While solidarity is a key concept in European political thinking, there is no single definition of the concept (Lynch, Kalaitzake, & Crean, 2018; Takle, 2018). One way of defining solidarity is by delineating the concept from other related concepts, and in this respect, Jürgen Habermas' (2015, pp. 3-28) approach is useful. Habermas distinguishes solidarity from justice. His argument is that moral and legal norms are perceived as "just" when they regulate practices that are in the equal interest of all affected. While moral commands should be obeyed out of respect for the underlying norm itself, a citizen's obedience to the law is conditioned by the sanctioning power of the state ensuring general compliance. In contrast, Habermas (Habermas, 2015, p. 23) states solidarity depends on the expectations of reciprocal favours, and the confidence in this reciprocity over time. In this respect, he argues solidarity is more related to what he calls ethical obligations, i.e. *Sittlichkeit*. However, Habermas (2015) also delineates solidarity from such ethical obligations the way these are rooted in pre-political communities. Solidarity presupposes political contexts of life that are legally organised.

According to Habermas (2015, p. 24), solidarity is a political concept based on confidence in a form of reciprocity guaranteed by legally organised relations. He has labelled this constitutional patriotism, which combines patriotic attachments

with the specific way these are codified in specific constitutions. Members of a political community are co-authors of the laws and the political order is an expression of their collective will. The praxis of citizens who exercise their civil rights forms a legally constructed solidarity (Habermas, 2001, p. 76).

This way of defining solidarity implies that solidarity is distinguished from those ethnic-cultural connotations that have accompanied the expression of national political communities in modern Europe and have been emphasised in the literature on nationalism. By applying such a political-legal understanding of solidarity, it is fruitful to build on how Ulrich Preuss (1999, p. 283) explains why solidarity has become a principle of social ordering in the modern state. In common with Habermas, he argues that solidarity is a modern concept not based on pre-political communities. Preuss (1999) contends the concept of solidarity unites two seemingly contradictory elements. On the one hand, it includes duties of care nurtured in *Gemeinschaft*-like types of communities. On the other hand, these duties are directed towards aliens and implemented in *Gesellschaft*-like types of communities. Solidarity can thus be understood as institutionalised reciprocity, which combines feelings of sympathy with modern institutions.

This paradoxical combination is enshrined in the institutions of contemporary welfare states. Rights and duties within a national solidaristic community are mediated through state institutions and are inherently linked to the basic principles of constitutionalism (Preuss, 1999, p. 284). The most important is the principle of legal rights and the connected concept of an independent judiciary, the separation of powers, and the principle of equality before the law. These principles are based on the idea that all forms of governmental power, also a majority in parliament, are subject to important substantive limitations.

While the idea of constitutionalism expresses limitations on democratic decisions, these limitations are enshrined in the constitution. The constitution places restrictions on the powers of the legislative to preserve the fundamental freedoms of individuals. Constitutions are meant to place certain questions beyond the reach of a simple majority. Most written constitutions are difficult to change as they often require legislative supermajorities, concurrent majorities of different legislative houses, and/or legislative majorities in two consecutive parliaments. Constitutions are thereby self-imposed political and legal bindings for current and future generations (Gosseries, 2008; Häberle, 2006). Such bindings are decisive for solidarity as a guarantee for confidence in a form of reciprocity over time.

More specifically, protection clauses in national constitutions intend to set limits for democratic decisions to secure the wellbeing of future generations. Jörg Tremmel (2006) distinguishes between three types of protection clauses: (a) general clauses, which refer to general considerations of future conditions of prosperity, but not specifically to future generations, (b) financial clauses, which mean that one should not transfer the debt to future generations, and (c) ecological clauses, which point directly to the need to ensure ecological conditions for those who come after us. According to Tremmel (2006), around 30 countries have included ecological protection clauses for future generations in their constitutions. A report by the UN Secretary-General (2013) also emphasised the importance of

such clauses for future generations and highlights six examples: Bolivia, Ecuador, Germany, Kenya, Norway, and South Africa. A study from Dirth (2018) shows that 120 countries have clauses referring to the environment and sustainability, and 37 of them explicitly point to future generations.

## **Solidarity with future generations**

The point of departure for the development of a concept of solidarity with future generations is the concept of solidarity as outlined above. Particular attention is paid to the relationship between political and legal aspects in modern welfare states. To elaborate further on the main question raised in the introduction, this chapter distinguishes between four dimensions of solidarity developed from how solidarity has been used historically in European thinking (Stjernø, 2005): What is the foundation of solidarity? How is the objective of solidarity defined? How can the boundaries of a community be defined? What are the requirements for the degree of collective orientation? By dividing the concept of solidarity into these four dimensions, we can analyse how each dimension separately differs from solidarity with contemporaries.

### *The foundation of solidarity*

The foundation of solidarity can be common interests or sameness (Stjernø, 2005). For these commonalities to lead to national solidarity, there must be some confidence in a form of reciprocity over time (Habermas, 2015). A concept of solidarity with future generations differs from solidarity with contemporaries as the foundation implies expectations of reciprocity with people who have not yet been born. In this regard it is useful to build further on how political philosophy scholars have developed ideas of intergenerational justice for future generations (Connelly, Smith, Benson, & Saunders, 2012); Tremmel (2009). Three principles are frequently used: “justice as impartiality” based on Rawls’ (1971, pp. 284–310) original position theory, “justice as equality”, and “justice as reciprocity”. All principles are for various reasons problematic to apply to intergenerational relations (Tremmel, 2009).

Nevertheless, regarding the foundation of solidarity, it is useful to elaborate further on “justice as reciprocity”. Reciprocity could be interpreted as justice as a mutual advantage, and those who cannot return anything are not taken into consideration. Justice as reciprocity fails to provide adequate justifications for our obligations towards future generations, as we cannot expect anything from people who are not yet born. This should not be confused with compassion or generosity as these are asymmetrical relations and belong to the realm of moral behaviour (Habermas, 2015; Stjernø, 2005).

One solution could be to emphasise “indirect reciprocity”, in which each generation receives from its predecessors and contributes to later generations (Lawrence, 2014; Page, 2006). This is also a kind of stewardship (Connelly et al., 2012). Consequently, appeals to solidarity with future generations make

it worthwhile to accentuate indirect reciprocity as a central tenet of the concept. Accordingly, a concept of solidarity with future generations requires that current generations both open for an identification with future people and impose legally binding obligations on themselves. By giving future generations legal rights, they thereby gain access to a political community in a modern welfare state based on long-term expectations.

### ***The objective of solidarity***

The objective of solidarity can be to unite interests, unite people, or surmount conflicts (Stjernø, 2005). Accordingly, the national concept is based on the objective to unite all individuals belonging to a nation in a good society, and the general ideal is that all individuals should be equal within the nation (Elias, 1989). Accordingly, solidarity with future generations would be to create a good society for people living today and those who come after us. This would require future people to be included as a part of contemporary understandings of political community and be represented in democratic welfare state decisions.

In this regard, political science literature on future generations contributes with crucial analyses of how the interests of future generations often fall short, when the interests of current and future generations are balanced (Caney, 2018; Jones, O'Brien, & Ryan, 2018). This question is often discussed as a problem of “presentism”, i.e. short-term thinking in both the mindset and structure of democratic systems (Tremmel, 2019). One suggestion on how current generations could proceed to take future welfare into account in contemporary policies is by proxy representations by, e.g. giving extra votes to persons representing future generations (Kates, 2015). This could bring out the long-term implications of actions and present alternatives which are important for the welfare of future generations. This could also bring in the time horizon to the resolutions of issues traditionally confined to the here and now. Future generations could thereby be given a voice in democratic decisions. Yet, the inclusion of protection clauses in national constitutions is the most important intergenerational contract in modern society (Gosseries, 2008). This would not only allow for long-term considerations which go above and beyond short-term decisions, but it would also include the legal bindings of solidarity.

### ***The boundaries of solidarity***

The boundaries of solidarity can be drawn in relation to the nation, the continents, or the whole world (Stjernø, 2005). The concept of solidarity with future generations differs from solidarity with contemporaries because the boundaries are not only drawn in relation to territorial space and administrative units, but also require an extension into time. We constantly develop our relationships between past, present, and future and combine them with territorial spaces and administrative units (Elias, 1987; Koselleck, 1989). Within the framework of the nation-state, the past is crucial. National solidarity is based on a sense of timeless continuity with

past generations, which is transmitted to future generations who are understood as future citizens of the nation-state (Elias, 1989).

While national welfare states are based on bounded solidarity, such exclusive boundaries are more problematic in relation to solidarity with future generations. One reason is the increasing knowledge about how actions in one part of the world directly affect the lives of people in other parts. This implies that the ability of the state to function as an adequate shelter for its citizens is reduced, and principled reflections on justice are not only confined to domestic political settings but also require a global approach (Sjursen, 2020, p. 125).

A global concept of solidarity emphasises how contemporary challenges cross national borders and require global solutions. The contemporary solution is that international solidarity is based on mutual rights and duties sovereign states owe each other according to the rules of international law. This is based on the state system and individuals are subject to the states. Can we conceive of a cosmopolitan solidarity for future generations grounded in the universalism of human rights? This would imply that states have the same responsibility for the welfare of all future people and not exclusively their own future citizens, and thereby erode the national boundaries of solidarity. Although national boundaries are important, there are signs of mutual responsibility for future generations, which clearly point to solidarity at the global level (Taylor, 2017).

In emphasising solidarity with future generations, one would accentuate the future, rather than the past and historical traditions, to define the boundaries of solidarity. This concept is forward-looking. It emphasises that today's actions have an important future dimension as people who will be born in the future will have become increasingly dependent on current decisions due to ecological limits (Kverndokk, 2020). The cosmopolitan way of connecting past, present, and future would be equipped to approach the concern for future generations, but its foundation is weak as it lacks the constitutionally defined national welfare state boundaries that determine with whom one should act in solidarity.

### ***The collective orientation of solidarity***

Solidarity can be identified in relation to the strength of the collective orientation. Stjernø (2005) defines this as a question of the extent to which solidarity implies that the actors (e.g. individuals, states, or non-state actors) should relinquish autonomy and freedom in order to achieve collective interests or values. Moreover, he distinguishes between strong and weak collective orientation (Stjernø, 2005). The national concept has a strong collective orientation based on national community, democratic polity, and redistribution based on conditional reciprocity institutionalised through the welfare state (Banting & Kymlicka, 2017). In contrast, the concept of solidarity with future generations has a weak collective orientation because it is based on the recognition of future generations' welfare, and the uncertainty is high.

Although we have limited knowledge of future generations' preferences and technological abilities, we know what they will need in some basic terms.

Sustainable development was defined by the UN World Commission on Environment and Development (WCED, 1987, p. 41) as: “development that meets the need of the present without compromising the ability of future generations to meet their own needs”. While the Commission defined this as an interaction between environmental, economic, and social dimensions of sustainability, these dimensions have often been applied separately. Welfare state sustainability is often seen as problems of economic and social sustainability, while debates about climate change are defined in terms of environmental sustainability (Büchs & Koch, 2017). The inclusion of the concern for future generations in welfare state consideration requires an integrated analysis in which avoidance of environmental harm is seen as essential for the welfare state (Schoyen & Hvinden, 2017).

Amartya Sen (2013, pp. 6–20) criticises this emphasis on the needs to achieve sustainable development. Rather than emphasising the ability of each generation to meet its respective needs, he proposes each generation should be given the freedom and possibility to evaluate and identify its own wants. Sen (2013) focuses on human capability and his central concern is that we see human beings as agents who can think and act. In contrast, Ian Gough’s (2017) essential premise is that all individuals around the world have certain basic common needs. He argues that needs should be given priority over preferences as needs imply ethical obligations on individuals and claims of justice on social institutions (Gough, 2017). Accordingly, a concept of solidarity with future generations would require a collective orientation that is legally organised, in which current generations relinquish autonomy and freedom to safeguard sustainable development for future generations in terms of needs and/or capabilities.

### **The Norwegian tensions over implications for the welfare state**

The Norwegian Constitution of 1814 is one of the world’s oldest constitutions which is still in force. An amendment to the Constitution requires a two-thirds majority in the Storting (Norwegian Parliament) and changes can only be adopted after a new election. Many of the provisions of the Norwegian Constitution are relatively short and aim to specify general rules (Fauchald & Smith, 2019). This also applies to the environmental protection clause, Article 112 of the Norwegian Constitution:

Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.

In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.



The authorities of the state shall take measures for the implementation of these principles.

(Stortinget, 2018)

Greenpeace Norden Association and Nature and Youth Norway have taken legal actions against the Norwegian Government represented in court by the Office of the Attorney General for violating the Constitution's Article 112. The issue is awarding of licences for searching for petroleum in the Barents Sea. The environmental organisations succeeded neither in the first trial in the Oslo District Court in November 2018 nor in the second trial in Borgarting Appeal Court in November 2020. Also, the Supreme Court concluded in December 2020 that such decisions must be made by politicians at Stortinget.

The Norwegian "climate lawsuit" highlights tensions and solidarity between the welfare of current and future generations. The following analysis of the lawsuit includes the main documents from the environmental organisations (Greenpeace Norden Association, 2016, 2018, 2019, 2020), and from the Government representation in court by the Office of the Attorney General of Norway (Attorney General of Norway, 2016, 2018). Moreover, it includes the judgements made by the District Court (2018), the Appeal Court (2020), and the Supreme Court (2020). The analysis is an idea analysis (Bratberg, 2017). The focus is on future generations and the analysis does not include assessments of all aspects of the lawsuits and court decisions. The main tensions and solidarity between generations are analysed by means of the four dimensions of solidarity with future generations.

### ***The foundation of solidarity***

Today's generations have to impose some kind of binding obligations on themselves in order to act in solidarity with future generations. In Norway, this is achieved with Article 112 in the Constitution. However, a contested issue is how binding this protection clause is; should it be interpreted as a rights provision?

Environmental organisations perceive the article as a rights provision. In terms of rights, they also argue the decision on awarding production licences is contrary to the European Convention on Human Rights. In contrast, the Government argues this article does not provide substantive rights for individuals, which can be reviewed before the courts. Both the District Court and the Appeal Court concluded that Article 112 grants rights that can be reviewed before the courts. According to the Appeal Court, neither the wording in the article, its placement in the chapter on human rights since 2014, nor the preparatory work provides any clear answer, but altogether they point in the direction of providing a substantive right.

Within the discussion of the protection clause as a rights provision or not, a question is raised whether the courts are suitable to make decisions in matters affecting the environment. Such issues often involve political considerations and priorities. Therefore, the Government argues that decisions on awarding production licences involve political decisions that should be made by elected

representatives in the Storting and not by the courts. This means the protection clause has weak bindings on current generations.

In contrast, the Appeal Court argues that courts must be able to set a limit, also for a political majority, when it comes to protecting constitutionally established values. It argues that the environment is fundamental in the broadest sense to human living conditions. Moreover, the Appeal Court points out Article 112 provides that natural resources shall be disposed of in a manner “which will safeguard this right for future generations as well” and continues:

The fact that the right is to be safeguarded across generations has an aspect of the concern for democracy, in that future generations cannot influence today’s political processes.

(Appeal Court, 2020, p. 18)

These ideas of setting a limit for democratic decisions in the Storting are in line with how the foundation of solidarity with future generations builds on indirect reciprocity, i.e. each generation receives from its predecessors and contributes to later generations as a form of stewardship. The inclusion of the protection clause, Article 112, in the human rights chapter of the Constitution would thereby impose constitutionally binding obligations on current generations to act in solidarity with future generations.

However, the Supreme Court concludes the wording in the article reflects an intermediate solution between a substantive right and a declaration of principle. This means individuals or groups can take a case to court on the basis of Article 112 in cases when the Storting has not taken a position on an environmental problem. In this lawsuit, the Supreme Court argues that there is no evidence in the legal sources that the courts should exercise control over decisions made by the Storting. The Supreme Court refers to the balance between the rule of law and democracy and concludes that environmental issues include broad assessments, and such decisions should be made by elected bodies and not by the courts.

### ***The objective of solidarity***

Protection clauses in constitutions are means to guarantee that future generations are included as a part of contemporary understandings of what it means to create a good society (Gosseries, 2008; Preuss, 1999). In this regard, the Norwegian trial reveals different ideas of which binding commitments to collective actions the protection clause implies. This can be found in the discussion of how to determine the substance of the rights under Article 112. There are various ideas of where to define the threshold for when the courts should review a decision made by the Storting. The threshold is measured in terms of the seriousness of the environmental damage.

According to environmental organisations the threshold should be low for when the courts are to set limits for democratic decisions, and it is already exceeded. They argue that an overall assessment of environmental harm must include risks

involved in an environmentally valuable area connected to the polar front and the ice edge, and the emission of greenhouse gases in connection with production and combustion. They refer to the established knowledge of how serious the climate crisis already is, and future generations' access to a healthy environment is decisive for defining a low threshold.

The Government's argument is that Article 112 should not be interpreted as granting rights, but if it should, the Government questions whether the protection clause contains a threshold at all. Moreover, it argues politically that the protection clause is neither suited to, nor intended for, any regulation of greenhouse gas emissions and it cannot be understood to set limits for Norwegian petroleum export. According to the Government, there will not be any net increase in greenhouse gas emissions, as such emissions are included in the EU's emissions trading system. Moreover, it contends the emissions are uncertain and will be marginal from a global perspective.

Both the District Court and the Appeal Court argue the threshold must be high for when the courts are to review decisions made by elected bodies, and in this case, they conclude the threshold has not been exceeded. However, the Appeal Court discusses the challenge to decide in which situations the court should review a decision made in parliament. The court claims to give the Storting broad margin for discretion. The Appeal Court will not determine a specific limit for how serious the environmental damage must be before the court is to set limits for decisions made in the Storting. It sees grounds to be restrained by reviewing decisions that have been the subject of political processes in the Government or Stortinget, as is the case here.

As a response to the Appeal Court, the environmental organisations contend the Storting's discretion is strictly limited due to both legal and factual circumstances, and the concern for future generations is crucial:

Because future generations lack the opportunity to safeguard their own need for a liveable environment, Article 112 of the Norwegian Constitution protects precisely these "future generations". This is essential when determining the discretion, which must be narrowed if the concern for "future generations" requires it. The Court of Appeal does not discuss the concern for "future generations" when determining the discretion.

(Greenpeace Norden Association, 2020, p. 6)

The objective to create a good society which includes future people is crucial for environmental organisations, and they thus argue in terms of solidarity with future generations. However, the Supreme Court concludes the threshold must be high when the court is to set limits for democratic decisions. According to the Supreme Court, the article is a safety valve for cases where the Storting has neither considered environmental problems nor implemented measures. This means the protection clause does not imply concrete, binding commitments for the current generation to create a good society in solidarity with future people.

***The boundaries of solidarity***

The boundaries of the concept of solidarity with future generations require an extension of time. As one would accentuate the future solutions to global problems, a cosmopolitan concept of solidarity would be better equipped than national solidarity to approach the global ecological commons (Takle, 2018). However, it lacks the constitutionally defined boundaries of welfare states. The climate lawsuit reveals contestations over whether, on the basis of Article 112, one should only make an assessment of the environmental damage associated with the production of oil and gas in Norway. Or, if the assessments should also include greenhouse gas emissions associated with combustion outside Norway.

According to environmental organisations, an overall assessment is required which includes the future risk of traditional environmental damage in the Barents Sea, and greenhouse gas emissions associated with both the production in Norway and combustion outside Norway. One central argument is that in a situation of catastrophic global warming, Norway has a global responsibility that must be assessed on the basis that the country is a major oil exporter.

In contrast, the Government draws national boundaries and argues that emissions from the combustion of Norwegian petroleum, which takes place outside Norwegian jurisdiction, are not covered by Article 112. The Government states the Constitution does not provide global rights, and it has a limited scope of application and jurisdiction, both in terms of persons and territory. It refers to the fact that both international and national climate policies are based on each state being responsible for its national emissions, and Norway has committed itself to reducing its own emissions through international agreements. According to the Government, it is therefore only relevant to assess the consequences for the climate in Norway.

The District Court concludes in line with the Government, while the Appeal Court argues emissions from the combustion of fossil fuels after export should also be included. However, the arguments are vague:

This involves, in the same way as the principle regarding solidarity across generations, a moral principle that can have major significance in the work on reducing climate changes. However, in contrast to the principle on solidarity with future generations, the principle has not been expressed in the wording of Article 112, nor have any clear references been made to the principle in the preparatory works. The key will therefore have to be the effects arising in Norway.

(Appeal Court, 2020, p. 22)

The Appeal Court concludes that global environmental harm must be taken into account in line with environmental organisations' cosmopolitan ideas for future generations, but its main concern corresponds with the Government's drawing of national boundaries. Moreover, the Supreme Court concludes in line with the Government's argument that Norwegian climate policy is based on the division of responsibility between states which comply with international agreements. While

this is the decision so far, the climate lawsuit reveals how global environmental challenges to the welfare state lead to contestations over national boundaries and cosmopolitan ideas for future generations.

### ***Collective orientation of solidarity***

The concept of solidarity with future generations has a weak collective orientation, mainly because it is based on uncertainty about future generations' needs and wants. While Article 112 states that natural resources are managed on the basis of comprehensive long-term considerations for future generations, there is a tension about to what extent and how today's generations must relinquish autonomy and freedom to achieve this. There are various understandings of which efforts are necessary to achieve sustainable development, and how to achieve a healthy environment for future people.

Environmental organisations focus on environmental sustainability, and economic and social sustainability are subordinated to this. They emphasise global warming will have catastrophic future consequences if drastic measures are not taken. Moreover, these organisations argue the decision to search for petroleum will have a serious environmental impact, which cannot be justified on the basis of economic considerations. Their central concern is that there is no room for more fossil fuel resources if future generations should have access to a healthy environment to be able to enhance their capabilities.

The Government's point of departure is, as we have seen, that these questions are not suitable for decisions made by the courts. It asserts that the majority in the Storting has upheld the decision to search for petroleum in the Barents Sea, also after considering all themes discussed by the environmental organisations. In line with the decisions made by the Storting, the Government defines welfare in terms of a combination of environmental, economic, and social sustainability.

At the same time, the majority emphasises the importance of a continuous focus on the environment and safety to ensure good and sustainable resource management. Cancelling the allocation of new blocks in the 23rd licensing round is therefore considered not to be in line with the Storting's objectives for Norwegian petroleum policy.

(Attorney General of Norway, 2016, p. 27)

The concept of solidarity with future generations requires a collective orientation that is legally organised, in which current generations relinquish autonomy and freedom to achieve sustainable development. However, none of the main documents from the Government, which form the basis for this analysis, has references to the concern for future generations. This lack of discussion about future generations' needs for a healthy environment indicates that environmental sustainability has a lower priority than economic and social welfare state sustainability. This could also be understood as a tension between the concern for current and future generations.

This tension is also evident in the Supreme Court's argument that the environmental organisations' position would imply that central parts of Norwegian petroleum policy, including extraction and export, were put to the test. Moreover, it argues that these views will affect later licensing rounds and thereby involve a controlled phasing out of Norwegian petroleum activities. According to the Supreme Court, this is outside the scope of what it could rule on. This means it is up to the elected politicians in the Storting to decide what today's generations should do with petroleum production, and thereby ensure how future generations have their needs and capabilities covered (Takle, 2020).

### **Conclusion – tensions over solidarity with future generations?**

This chapter develops a theoretical concept of solidarity with future generations and evaluates its empirical relevance by applying it to Norway. The theoretical concept consists of four dimensions of solidarity with future generations: foundation, objective, boundaries, and collective orientation. The main question raised is what kind of concrete binding commitments to collective actions – on the part of present-day state institutions – solidarity with future generations would require.

The inclusion of Article 112 in the Norwegian Constitution is an excellent example of a global issue as it reveals conflicting ideas about whether to impose political and legal bindings on current generations and thereby act in solidarity with future generations. Moreover, the Norwegian climate lawsuit reveals the tensions these binding might lead to.

Firstly, one central tension is over whether to perceive this as a rights provision. The Supreme Court's final conclusion is that the article is an intermediate solution between a substantive right and a declaration of principle. This means individuals or groups can take a case to the court on the basis of Article 112 only in cases when the Storting has not taken a position on an environmental problem. Accordingly, the *foundation* of solidarity with future generations is only weakly fulfilled as strong fulfilment requires current generations to identify with future people and impose legally binding obligations on themselves by giving future generations constitutional rights.

Secondly, in the climate lawsuit, there are different ideas about where to define the threshold, in terms of environmental harm, for when future generations' welfare is guaranteed by the protection clause. The Supreme Court concludes the threshold must be high when the court is to set limits for democratic decisions. It calls the article a "safety valve" for circumstances where the Storting has neither considered environmental problems nor implemented measures. This means the protection clause will only involve binding commitments for current generations if legislative bodies have not considered the environmental harm. The *objective* of solidarity with future generations can thereby hardly be achieved as this implies future people are included as a part of contemporary understandings of what it means to create a good society.

Thirdly, the climate lawsuit reveals how global environmental challenges might lead to tensions over national boundaries and cosmopolitan ideas for future

generations. There are contestations over whether one should only assess the environmental damage in Norway or if the assessments should also include greenhouse gas emissions associated with combustion outside the country. The Supreme Court draws national boundaries. It argues the Constitution does not provide global rights, and Norwegian climate policy is based on the division of responsibility between states which comply with international agreements. However, by defining the *boundaries* of solidarity with future generations, the cosmopolitan human rights ideas would be better equipped to approach the concern for future generations than national boundaries emphasised by the Supreme Court. However, cosmopolitanism lacks the constitutionally defined national welfare state boundaries, which are also defining contemporary international relations.

Finally, the climate lawsuit reveals tensions over the importance of a controlled phasing out of Norwegian petroleum activities for the sake of future generations' welfare. According to the Supreme Court, this is outside the scope of what it could rule based on Article 112. This means it is the responsibility of elected politicians in the Storting to decide what today's generations should do with petroleum production, and so far, there is an agreement about increased production. This implies priority is given to economic and social welfare state sustainability. One might question whether this would be in line with a concept of solidarity with future generations. This would require a *collective orientation* that is legally organised, in which current generations relinquish autonomy and freedom to safeguard sustainable development for future generations.

By applying the theoretical concept of solidarity with future generations, we can conclude protection clauses in constitutions might have weak binding commitments to collective actions on the part of present-day state institutions. It is, however, important to note that the climate lawsuit studied in this chapter involves much more than just the case itself. We may assume that in most cases such climate lawsuits not only create public discussions but also show the ideas that form the basis for the various actors' arguments about how to create a political system that is designed to safeguard the welfare of current and future generations. This reveals tensions over whether to include future generations in the contemporary welfare state considerations. These are tensions over solidarity with future generations, which we will probably see more of – due to our capacity to affect the future ecosystem.

## References

- Appeal Court. (2020). *Borgarting Appeal Court judgement. Pronounced 23 January 2020. Case no.: LB-2018-60499. Unofficial translation*. Retrieved 09.02.2021 from [https://www.klimasøksmål.no/wp-content/uploads/2019/10/judgement\\_Peoplevs\\_ArcticOil\\_Appeal\\_Jan2020.pdf](https://www.klimasøksmål.no/wp-content/uploads/2019/10/judgement_Peoplevs_ArcticOil_Appeal_Jan2020.pdf)
- Attorney General of Norway. (2016). *Notice of defence to Oslo District Court. Date: 14 December. Unofficial translation*. Retrieved 27.01.2021 from [https://www.klimasøksmål.no/wp-content/uploads/2019/10/Government-Response\\_unofficial-translation\\_ENG.pdf](https://www.klimasøksmål.no/wp-content/uploads/2019/10/Government-Response_unofficial-translation_ENG.pdf)

- Attorney General of Norway. (2018). *Reply to notice of appeal to Supreme Court of Norway. Date 9 March. Unofficial translation.* <https://www.klimasøksmål.no/wp-content/uploads/2019/10/2.-APPEAL-RESPONSE.pdf>
- Banting, K., & Kymlicka, W. (2017). *The strains of commitment: The political sources of solidarity in diverse societies.* Oxford University Press.
- Bratberg, Ø. (2017). *Tekstanalyse for samfunnsvitere* (2. utg. ed.). Cappelen Damm akademisk.
- Büchs, M., & Koch, M. (2017). *Postgrowth and wellbeing: Challenges to sustainable welfare.* Palgrave Macmillan.
- Caney, S. (2018). Justice and future generations. *Annual Review of Political Science*, 21, 475–493.
- Connelly, J., Smith, G., Benson, D., & Saunders, C. (2012). *Politics and the environment: from theory to practice.* Routledge.
- Dirth, E. P. (2018). *Governance for Future Generations: A Global Review of the Implementation of Intergenerational Equity.* Utrecht University Repository. <https://dspace.library.uu.nl/handle/1874/361333> (Accessed 21.06.2021)
- District Court. (2018). *Oslo District Court judgement. Pronounced 04.01.2018. Case no.: 16-166674tvi-otir/06. Unofficial translation.* Retrieved 09.02.2021 from <https://www.klimasøksmål.no/wp-content/uploads/2019/10/Judgement-4.-jan-2017-Oslo-District-Court-stamped-version.pdf>
- Elias, N. (1987). *Arbeiten zur Wissenssoziologie : 2 : Über die Zeit* (3. Aufl. ed., Vol. 2). Suhrkamp.
- Elias, N. (1989). *Studien über die Deutschen: Machtkämpfe und Habitusentwicklung im 19. und 20. Jahrhundert.* Suhrkamp.
- Fauchald, O. K., & Smith, E. (2019). *Mellom jus og politikk: Grunnloven § 112.* Fagbokforlaget.
- Gosseries, A. P. (2008). Constitutions and future generations. *The Good Society*, 17(2), 32–37.
- Gough, I. (2017). *Heat, greed and human need : climate change, capitalism and sustainable wellbeing.* Edward Elgar.
- Greenpeace Norden Association, N. a. Y. N. (2016). *Notice of proceeding in Oslo District Court. 18 October 2016. Unofficial translation.* Retrieved 28.09.2020 from <https://www.klimasøksmål.no/wp-content/uploads/2019/10/Notice-of-Proceedings-Final-Translation.pdf>
- Greenpeace Norden Association, N. a. Y. N. (2018). *Direct appeal to the Supreme Court of Norway. Date 5 February 2018. Unofficial translation.* Retrieved Accessed 28.09.2020 from <https://www.klimasøksmål.no/wp-content/uploads/2019/10/1.-APPEAL.pdf>
- Greenpeace Norden Association, N. a. Y. N. (2019). *Statement of case to Borgarting Court of Appeal. 12 August 2019. Case no: 18-060499ASD-BORG/03. Unofficial translation.* Retrieved 28.09.2020 from <https://www.klimasøksmål.no/wp-content/uploads/2019/10/Writ-on-international-law-and-procedural-issues-Aug-2019.pdf>
- Greenpeace Norden Association, N. a. Y. N. (2020). *Notice of appeal to the Supreme Court of Norway. Date 24 February 2020. Unofficial translation.* Retrieved 28.09.2020 from <https://drive.google.com/file/d/1Mkjoemyd3XSxpN49YVXz83h9zy87z5Uf/view>
- Grimmel, A., & Giang, S. M. (2017). *Solidarity in the European Union : a fundamental value in crisis.* Springer International Publishing.
- Häberle, P. (2006). A constitutional law for future generations – the ‘other’ form of the social contract: the generation contract. In J. C. Tremmel (Ed.), *Handbook of intergenerational justice* (pp. 215–229). Edward Elgar.



- Habermas, J. (2001). *The postnational constellation : political essays*. Polity.
- Habermas, J. (2015). *The lure of technocracy*. John Wiley & Sons.
- Jones, N., O'Brien, M., & Ryan, T. (2018). Representation of future generations in United Kingdom policy-making. *Futures: The Journal of Policy, Planning and Futures Studies*, 102, 153–163. <https://doi.org/10.1016/j.futures.2018.01.007>
- Kates, M. (2015). Justice, democracy, and future generations. *Critical Review of International Social and Political Philosophy*, 18(5), 508–528.
- Koselleck, R. (1989). *Vergangene Zukunft: zur Semantik geschichtlicher Zeiten*. Suhrkamp.
- Kverndokk, K. (2020). Talking about your generation: “our children” as a trope in climate change discourse. *Ethnologia Europaea*, 50(1), 145–158.
- Lawrence, P. (2014). *Justice for future generations : climate change and international law*. Edward Elgar.
- Lynch, K., Kalaitzake, M., & Crean, M. (2018, 09.02.2021). *Research Report on conceptualizing European solidarity. SOLIDUS project funded by the EU's Horizon 2020 research and innovation programme*. <https://solidush2020.eu/wp-content/uploads/2018/03/D1.2-Research-report.pdf>
- Page, E. A. (2006). *Climate change, justice and future generations*. Edward Elgar.
- Preuss, U. K. (1999). National, supranational, and international solidarity. In K. Bayertz (Ed.), *Solidarity* (pp. 281–292). Kluwer Academic Publishers.
- Rawls, J. (1971). *A theory of justice*. The Belknap Press of Harvard University Press.
- Schoyen, M. A., & Hvinden, B. (2017). Climate change as a challenge for European welfare states. In P. Kennet & N. Lendvai-Bainton (Eds.), *Handbook of European Social Policy* (pp. 371–386). Edward Elgar Publishing.
- Sen, A. (2013). The ends and means of sustainability. *Journal of Human Development and Capabilities*, 14(1), 6–20.
- Setzer, J., & Byrnes, R. (2020). *Global trends in climate change litigation: 2020 snapshot*. Retrieved 09.02.2021 from [http://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation\\_2020-snapshot.pdf](http://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf)
- Sjursen, H. (2020). The European Union and global political justice. In D. Bigo, T. Diez, E. Fanoulis, B. Rosamond, & Y. A. Stivachtis (Eds.), *The Routledge Handbook of Critical European Studies* (pp. 125–138). Routledge.
- Stjernø, S. (2005). *Solidarity in Europe: the history of an idea*. Cambridge University Press.
- Stjernø, S. (2015). Solidarity Beyond Europe? . In J. Salamon (Ed.), *Solidarity beyond borders: ethics in a globalising world* (pp. 1–27). Bloomsbury Publishing.
- Stortinget. (2018). *The Constitution, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and subsequently amended, most recently in May 2018. Translation from the Storting*. Retrieved 27.01.2021 from <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>
- Supreme Court. (2020). *Supreme Court judgement. Pronounced 22 December 2020. Case no.: HR-2020-2472-P (sak nr. 20-051052SIV-HRET)*. Retrieved 09.02.2021 from <https://www.domstol.no/globalassets/upload/hret/avgjorelser/2020/desember-2020/hr-2020-2472-p.pdf>
- Takle, M. (2018). Is the migration crisis a solidarity crisis? In A. Grimmel (Ed.), *The crisis of the European Union: challenges, analyses and solutions*. (pp. 116–128). Routledge.
- Takle, M. (2020). The Norwegian Petroleum Fund: savings for future generations? *Environmental Values*. <https://doi.org/> <https://doi.org/10.3197/096327120X15868540131305>

- Taylor, P. (2017). Governing the global commons: an ethical-legal framework. *Policy Quarterly*, 13(1).
- Tremmel, J. C. (2006). *Handbook of intergenerational justice*. Edward Elgar.
- Tremmel, J. C. (2009). *A theory of intergenerational justice*. Routledge.
- Tremmel, J. C. (2019). Whose constitution? Constitutional self-determination and generational change. *Ratio Juris*, 32(1), 49–75.
- UN Secretary-General (2013). *Intergenerational solidarity and the needs of future generations*. Report of the Secretary-General. A/68/322. United Nations General Assembly. Sixty-eight session. 5. August.
- UN General Assembly. (2020). *UN general assembly. Human rights council, forty-third session 24 February–20 March 2020 Agenda item 3. Visit to Norway*. Retrieved 09.02.2021 from <https://undocs.org/A/HRC/43/53/Add.2>
- WCED. (1987). *Report of the world commission on environment and development: our common future* Retrieved 02.09.2021 from <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>