Access to a national court by citizens

Norway

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General background: Legal remedies and *locus standi* in Norwegian law

Norway has a single general court system. There is neither a special Administrative Court, nor a Constitutional Court. The ordinary courts treat all types of legal disputes and criminal cases, including issues of constitutionality of new legislation. There are three levels in the court system: the district courts, the appeal courts and the Supreme Court. In addition, civil cases have to be considered by a conciliation board before they are admitted to the district court as the first instance.[1]

Until now, only a limited number of civil cases of environmental law have come before the Norwegian courts. The number of criminal cases is increasing steadily, partly due to an active role of a special state prosecuting unity for economic and environmental crime ("ØKOKRIM").

There may be several reasons for the limited number of civil cases. One reason is probably the costs involved (see below). Another reason may be that the system of *administrative remedies* is quite accessible, and much used. Any decision taken in individual cases by a public authority, may be subject to appeal to a superior authority,[2] unless otherwise explicitly stated. The right to appeal extends to whoever has a "legal interest of appeal", which is interpreted liberally. The authority of the appeal body is usually as wide as that of the authority in the first instance.

In addition, regardless of whether a decision has been appealed or not, a citizen may always present his case to the *Ombudsman*. Anybody who feels that he has been treated incorrectly by a public authority, may file a complaint. The procedure is straightforward, with few formal rules. So far, however, the number of cases related to environmental legislation before the Ombudsman have been rather limited.

The general criterion for *locus standi* in civil court cases in Norway is that the plaintiff must have "legal interest" in the case.[3] The dispute must be a live controversy , and the plaintiff must have a sufficiently close connection to the

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1 The rules on the court system, and the procedural rules, are laid down in four major pieces of legislation: The Court Act of 13 August 1915 no. 5, The Civil Proceedings Act of 13 August 1915 no. 6, and the Criminal Proceedings Act of 22 May 1981 no. 25. For the enforcement of decisions, a special Act - the Execution and Enforcement Act of 26 June 1992 no. 86 - applies.

2 Art. 28 of the Public Administration Act of 1967.

3 Art. 54 of the Civil Proceedings Act.

subject matter so as to justify the court's treatment of the dispute. There is no clear definition or delimitation of the concept. Whether at person has "legal interest" is decided discretionary in each case, and depends on individual circumstances. The core question to ask is whether the person has reasonable grounds for having the issue tried by a court. To have "legal interest" to have a matter tried by the courts, the plaintiff must be affected by the matter to such an extent that it justifies the use of the court system. Interests which are only based on public or common rights, such as the public right of way, may be accepted if they are strong enough.

However, a purely "ideal" interest in the matter is not enough. For example, an ordinary citizen has not *locus standi* in a case concerning the authorities' licencing to kill wolves, based on his general interest in the protection of these predators.

Based on Supreme Court cases, it is usually accepted that non-governmental *environmental associations* have "legal interest" in environmental cases. This was established by the Supreme Court in 1980 (the *Alta case*) The court accepted that the Norwegian Association for Nature Conservation had standing to sue the government in respect of the validity of the decision to build a hydropower dam and station on the Alta river.[4]

In a later case, a nationwide association working to influence life style and reduce consumption, in favour of international solidarity and environmental protection,[5] was entitled to bring an action for compensation for pollution damage on fishing and recreational areas against two chemical factories in the Southern part of Norway bordering Sweden. The local branch of the Swedish Association for Nature Conservation in the affected area, was also found to have standing in the case.[6] (For further details see point 5 below.)

In order to stop a decision which permits an activity or a construction that threatens environmental values, it is necessary to prevent its implementation until the case has been finally decided. The legal mechanism which is at the plaintiff's disposal, is an *action of temporary injunction* before the local court acting as "court of execution and enforcement". By a temporary injunction the court may prohibit the execution of the decision until the matter has been decided in the final instance. This function of the court is defined in the Execution and Enforcement Act.

If the plaintiff claims that a public decision, such as a pollution permit, is invalid and should be changed or revoked, a temporary injunction may be laid down by the court if it finds the claim "probable". The court must carry out a

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4 Norsk retstidende 1980 p. 569.

5 Framtiden i våre hender (literally: "The Future in our Hands").

6 Norsk retstidende 1992 p. 1618.

temporary review of the matter, in order to decide whether the claim has a reasonable basis. In most cases, this actually requires a preliminary assessment of the substance of the case.[7] In a recent case, the environmental association "Våre rovdyr" (literally "Our predators") with the aim of protecting animals of prey, succeeded in stopping the execution of a government decision to kill a family of wolves, by claiming a temporary injunction to this effect. The court found that the law did not authorize such a decision under the circumstances.

A. The present state of the law.

1) A person who has suffered "traditional damage", may always go to court. The burden of proof generally lies with the plaintiff. He has to prove the link of causation, the extent of the damage and loss, and that the defendant is the responsible party. If the pollution is lawful, the general criterion for liability in Norwegian neighbour and pollution law applies: The damage or nuisance must be "unreasonable" or "unnecessary". It is up to the plaintiff to prove that the damage is unreasonable or unnecessary. The interpretation and application of these expressions are rather complicated.

The Pollution Control Act has a special chapter on liability for pollution damage, based on strict, joint and several liability. Its Section 59 contains one rule that easens, and even may seem to switch, the burden of proof in cases of several possible causes:

> "A person that causes pollution that alone or in combination with other causes of damage *may* have caused the pollution damage, is regarded as having caused such damage unless it is established that another cause is more likely."

It is however doubtful whether this rule really deviates from the general rules on the burden of proof in Norwegian tort law.

2) Action against a polluting activity may be based on penal law or civil law.

In *civil cases* the possibility of a court action against, for example, a polluting activity or a landfill, depends on its legal base. Anybody may file a complaint with the pollution control authorities related to cases pursuant to the Pollution Control Act. If no action is taken, this inaction may in certain types of cases be

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[7] One famous example is an attempt by the association Natur og Ungdom ("Nature and Youth") to stop the tearing down of an old farm hous in connection with the construction of a new Central State Hospital in Norway. The basis for the claim was tha the EIA for the hospital was insufficient. The court found that the EIA had important weaknesses, but nevertheless refused the claim on the reason that the EIA rules at the time were unclear.

appealed, and in the end brought before the courts by whoever has "legal interest" (see below).

Another possible legal base is the Neighbour Act. The concept of "neighbour" is considerably wider than only those bordering the actual property, but some direct nuisance or damage is nevertheless required.

3) In *penal cases*, any person, regardless of connection to the case, may report or file a complaint to the police if he is of the opinion that another person carries out an illegal activity. It is then up to the police and prosecuting authorities to investigate the matter and decide indictment. In the case of insignificant damage only, public prosecution will only take place if the pollution control authorities so demand.[8]

If the case is dropped by the prosecuting authorities, it can nevertheless be brought before the court as a private penal case, by the "offended person". This is a rather narrow concept, corresponding to "the victim".

4) As mentioned above, an environmental organisation may bring an action before the courts on "ideal" environmental grounds. It is not necessary that any individual member of the organisation is directly affected by the decision in question. Neither is it necessary that the organisation is the one which may be regarded as the most natural to represent the interests in question.[9]

This right is not confined to certain associations specified in the legislation or to truly national associations. It applies to any association, national and local, whose aim covers the matter at stake. It is generally required, however, that the association is "serious", in the sense that it has formally adopted bylaws and an organisational structure. It must not necessarily have general membership; a foundation may also have locus standi. However, it is usually maintained that an association established for the only purpose of bringing a court action, will not be accepted as plaintiff.

5) As the main rule, only the validity of a formal - that is an *active* - decision made by a public authority may be appealed or brought before the courts. Inaction is not the same as a decision, and usually not subject to appeal or other type of enforcement mechanism. Rules to the opposite effect must be explicitly laid down in legislation.

One (the only?) example of such a rule is found in Art. 37 para. 3 of the Pollution Control Act, concerning orders to clear up waste etc. If a person asks

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[8] Pollution Control Act, Sections 78 and 79, for pollution and waste respectively.

[9] In the cited tort case, neither the local fishermen nor any local association for out-door recreational activities brought actions against the factories.

the municipality to issue an order to clear up illegal waste, the municipality must come to a decision as soon as possible. If no such order is issued, the inaction of the municipality is formally regarded as a decision which is subject to administrative appeal, and may subsequently be brought before the courts. The court may order the matter to be corrected, and - if it is claimed by the plaintiff - may also order damages to be paid.

B. The future under the Aarhus Convention.

6) and 7) It seems to be a need to consider more closely the situations described under items 6) and 7), with a view to clarifying the legal status and possibilities of NGOs in this respect, and - if possible - simplifying the procedures. There are definitely problems connected to the costs involved in these cases (see point 8).

8) The cost element is decisive when it comes to environmental court cases.

The main rule in Norway is that the winning party shall have all his costs covered by the losing party, including the fees of his attorney. The principle of "no cure no pay" for legal services is not applied in Norway. Thus, the losing party must pay both his own costs and that of the winning party. With the present level of attorney fees in Norway, the amount may be considerable, even for a case in a local court.

It is quite likely that the possible costs are a main reason for the limited number of environmental disputes before Norwegian courts. It discourages both individuals and organisations from bringing such cases before the courts. It is likely that conflicts are settled outside the court system. We are oviously faced with the economic problem of "rational apathy". One should also bear in mind, that the defendant in these cases most often is either a public authority or a company, with much resources and first rate attorneys at their disposal.

Some years ago, the idea was put forward[10] to establish a public fund in order to finance such cases. This deserves to be considered seriously.

9) The present legal situation in Norway is generally regarded as being in compliance with the Aarhus Convention as far as access to courts is concerned. The issue of *locus standi* does not imply an important limitation. On the other hand, the problem of procedural costs is probably crucial, and should be looked into.

C. The EC level

[10] By my colleague professor Inge Lorange Bacer in an article in the Norwegian legal journal Lov og Rett 1993.

10-13) It seems to be a need for certain common EC rules concerning national legislation this field, at least as regards locus standi, in order to strengthen the implementation and enforcement of EU legislation, .

However, it seems quite evident that such rules cannot be limited to the enforcement of EC rules only. Since EC rules and national legislation is so much, and increasingly, interconnected, such a distinction would be artificial and easily the source of procedural confusion and controversies.

In the situation mentioned under 13), national action seems to be clearly inadequate. The solution could be to give certain international NGOs a formal legal status to bring cases before the EC court. If no suitable NGOs exist, they must be established.