

Environmental Justice in Courts – a Case Study from Norway

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1. Introduction to environmental law and decision-making . . .	sid 50
2. General introduction to the court system . . .	sid 51
2.1 Courts and administrative appeal . . .	sid 51
2.2 Court procedures . . .	sid 52
2.3 Access to court . . .	sid 52
3. Environmental cases before the courts . . .	sid 54
3.1 Introduction . . .	sid 54
3.2 What cases are brought to the courts? . . .	sid 54
3.2.1 Number of cases . . .	sid 54
3.2.2 Legal themes . . .	sid 55
3.2.3 Environmental themes . . .	sid 57
3.2.4 Activities . . .	sid 57
3.3 Who were parties to the proceedings? . . .	sid 58
3.4 Outcome of the cases . . .	sid 59
4. Some concluding remarks . . .	sid 60
5. Are recent environmental law reforms likely to strengthen the role of courts? . . .	sid 61
Tables 1– 4 . . .	sid 56
Tables 5 – 9 . . .	sid 66 och 67

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1. Introduction to environmental law and decision-making

The term “environmental justice” combines perspectives of human rights and environmental protection. It concerns, *inter alia*, the ability of private parties to enjoy acceptable and equitable environmental conditions.² This article aims at examining the extent to which Norwegian courts can help achieve environmental justice. This is partly an empirical question which will be addressed on the basis of an examination of cases before Norwegian courts between 1996 and 2005.³

Obviously, the ability of private parties to achieve environmental justice through the judiciary depends not only on the procedural and jurisdictional rules of courts. The extent to which courts can fulfil such a function also depends on the existence of legislation that can be invoked by private parties. The extent to which courts have been used to achieve environmental justice may thus also indicate the extent to which Norwegian environmental legislation is conducive to the achievement of environmental justice. A second purpose of the present study is to examine whether recent legislative reforms in Norway, namely the new Planning and Building Act (2008 no. 71) and the new Nature Diversity Act (2009 no. 100), are likely to strengthen the ability of courts to secure environmental justice.⁴ This part of the study will be based on an assessment of the extent to which the revised legislation provides clear legal rights and obligations which may be invoked by private parties where environmen-

tal interests are harmed or threatened.

The Norwegian legislation of relevance to the first part of this study covers a broad range of laws and government regulations, including public law and private law. The core environmental legislation in Norway consists of the Pollution Control Act (1981 no. 6), the Nature Conservation Act (1970 no. 63, replaced by the Nature Diversity Act) and the Environmental Information Act (2003 no. 31). In addition, there are a number of laws that have environmental protection as a main objective along with other objectives, including in particular the Planning and Building Act (1985 no. 77, replaced by the new Planning and Building Act), the Water Resources Act (2000 no. 82), the Outdoor Recreation Act (28 June 1957 no. 16), the Wildlife Act (1981 no. 38), the Neighbouring Properties Act (16 June 1961 no. 15), the Product Control Act (1976 no. 79), and the Act relating to Land (1995 no. 23).

These two groups of environmental legislation are of relevance to the empirical study in three situations. The first is cases where public authorities fail to act to protect the environment in accordance with their powers under the legislation. The decision-making power under these acts are placed with different authorities, including municipalities (under the Planning and Building Act), government appointed or elected authorities at the regional level (e.g. under the Wildlife Act and the Nature Conservation Act), and central government authorities, i.e. directorates, ministries or the Government (e.g. under the Nature Conservation Act). The second situation is cases where claims can be made that private parties have failed to comply with requirements set out in the legislation or in decisions made according to the legislation. The third situation is regulated through the Neighbouring Properties Act which provides a basis for private parties to initiate cases against other private parties or public entities claiming that their acts are in non-compliance with the protective standards of the Act.

A third category of legislation is laws concerning exploitation of natural resources, including the Forestry Act (2005 no. 31), the Aquaculture Act (2005 no. 79), the Act relating to Regulation of Watercourses

² On different approaches to “environmental justice” see David Schlosberg, *Defining Environmental Justice. Theories, Movements, and Nature*, Oxford University Press (2007) at 3-7. This article does not aim at contributing to the discussion of the “environmental justice” concept.

³ This part of the study has been prepared as part of a Nordic comparative study, see H.T. Anker, Fauchald, O.K, Nilsson, A. and Suvantola, L.: *The Role of Courts in Environmental Law – a Nordic Comparative Study*, in *Nordisk Miljörättslig Tidskrift*, 2009 at 9-34. The structure of this part of the study and the categories used to classify cases have thus been harmonised with the other studies for comparative purposes.

⁴ Acts in Norwegian or English versions can be accessed at <www.lovdata.no>.

(14 December 1917 no. 17), the Marine Resources Act (2008 no. 37), and the Act relating to Petroleum Activities (1996 no. 72). A fourth category of legislation is related to the construction, management and use of infrastructure, such as the Act relating to Roads (21 June 1963 no. 23), the Harbour Act (1984 no. 51), the Railways Act (1993 no. 100) and the Aviation Act (1993 no. 101). Decision-making power under these two categories of legislation is in general vested with central government authorities, but has in some cases been vested with regional or local authorities (e.g. the Act relating to Roads). Court cases of relevance under these two groups of legislation concern private parties' claims that decisions or activities are unlawful or generate rights of compensation.

This study starts (section 2) with an overview of the court system in Norway, including remarks on the relationship between courts, on the one hand, and administrative review procedures and alternative approaches to present claims or solve disputes, on the other. Thereafter follows a discussion of rules related to access to courts in Norway, including issues concerning *de facto* access to courts. Section 3 continues with a discussion of the number of environmental cases before Norwegian courts, including some comments on possible problems related to the statistics. This overview is followed by closer analyses of which legal themes (claims) were subject to court proceedings, which environmental issues were addressed in the cases, which activities were subject to the court decisions, who were the parties to the proceedings, and what was the outcome of the cases. Finally, the study concludes by an assessment of the potential future role of courts in light of recent legislative reforms (section 5).

2. General introduction to the court system

2.1 Courts and administrative appeal

Norway has a simple court system with few specialized courts.⁵ There are three levels of courts; the

⁵ For a brief overview of specialized courts in Norway, see

district courts ("tingretten"), the courts of appeal ("lagmannsretten") and the Supreme Court ("Høyesterett"). In addition, there are a limited number of specialized courts, some of which might be of interest in environmental cases, in particular the land consolidation courts ("jordskifteretten"), that address technical issues concerning rights to immovable property.

The right of appeal to the Supreme Court has gradually been restricted. The Dispute Act (2005 no. 90)⁶ states that a case cannot be appealed to the Supreme Court unless the Court accepts to address the case. Such leave to appeal can only be given where the judgement will be of importance beyond the case in question, or where there are other important reasons for asking the Court's opinion, see § 30-4 of the Dispute Act.

The Norwegian administrative review system in environmental matters is in general not independent from the executive, *i.e.* the government or local authorities. Most complaints are decided by superior administrative bodies, which in general are subject to the same instructions from politicians or bureaucrats as the original decision-makers.⁷ Hence, while Sweden and Finland have administrative courts, and Denmark to a significant extent makes use of quasi-judicial complaints mechanisms,⁸ Norway's administrative complaints procedure in the field of environmental law can in general be characterised as non-judicial.

The general conditions for bringing forward an administrative complaint are set out in § 28 of the

Inge Lorange Backer, *The Norwegian Reform of Civil Procedure*, in *Scandinavian Studies in Law* vol. 51, (2007) 41-76, at 48-50.

⁶ Please remark that the Dispute Act was adopted after the end of the empirical part of the study, and that some of the rules of relevance to the cases examined were thus subsequently amended. This will be commented where relevant below.

⁷ Exceptions are cases that are decided by local authorities, such as local land-use plans, which can be reviewed by regional or central administrative bodies, and cases that are decided by independent review bodies (frequently referred to as "nemnder"), such as the Environmental Information Board ("Miljøinformasjonsnemnda").

⁸ See H.T. Anker et al., *supra* note 2.

Public Administration Act, according to which the complainant must demonstrate a legal interest in a review of the decision.⁹ On the one hand, the low cost and the flexibility of the Norwegian administrative complaints procedure make it an attractive alternative to court proceedings. On the other hand, the lack of independence may reduce the likelihood that it will provide an effective review of the decision. In addition, there are alternatives to court proceedings and administrative complaints as a means to review acts and omissions of public authorities.¹⁰ The most relevant from an environmental perspective is the complaints procedure before the Ombudsman for Public Administration.¹¹

2.2 Court procedures

There are separate court procedures for civil and criminal cases, set out in the Dispute Act and the Criminal Procedure Act (1981 no. 25) respectively. According to § 1-1 of the Dispute Act, its main purposes are to:

... provide a basis for dealing with legal disputes in a fair, sound, swift and confidence inspiring manner through public proceedings before independent and impartial courts. The Act shall attend to individual dispute resolution needs as well as the need of society to have its laws respected and clarified.¹²

Reforms adopted under the Act include separate procedures for small claims, *i.e.* claims involving economic values estimated at less than NOK 125,000 (EURO 15,600), and new rules concerning class action, which may be of particular interest in environmental cases.¹³

⁹ Specific legislation may set out other requirements, including requirements that give rights to bring forward complaints to persons that would not enjoy such rights under § 28 of the Public Administration Act, see e.g. the Pollution Control Act.

¹⁰ For an overview, see ot.prp. no. 51 (2004-2005) chapter 7.

¹¹ See the Act concerning the Storting's Ombudsman for Public Administration (22 June 1962 no. 8).

¹² See also Backer (2007), *supra* note 5, at 42.

¹³ See Chapters 10 and 35 of the Dispute Act, respectively.

In general, environmental cases have not been singled out for separate court procedures in Norway.¹⁴ However, two groups of cases, which are of particular interest in an environmental context, enjoy special rules of procedure. These include cases concerning expropriation¹⁵ and cases concerning property rights over agricultural land.¹⁶

2.3 Access to court

The basic conditions for bringing a case to court in Norway are, according to § 1-3 of the Dispute Act, that there must be a "legal claim" and that the claimant must demonstrate a "genuine need for having the claim determined". The changes that were made to these requirements in the new Act of 2005 were aimed at facilitating access to courts.¹⁷ Of particular relevance to the issues to be addressed here is the improved possibility under the new Act to initiate cases concerning abstract legal claims, for example related to the lawfulness of government regulations.¹⁸ There was no focus on the role of courts in environmental cases during the preparation of the Dispute Act, despite obligations concerning access to justice under Article 9 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998 (the Aarhus Convention) and the general principles set out in § 110 b of the Norwegian Constitution.¹⁹

¹⁴ For an overview of court procedures, see Backer (2007), *supra* note 5, at 57-8.

¹⁵ See the Act relating to Procedure in Cases concerning Compensation and Expropriation (1 June 1917 no. 1).

¹⁶ See the Land Consolidation Act (1979 no. 77).

¹⁷ The previous version of the provision set out two conditions: there had to be a legal relationship ("rettsforhold") or rights ("rettighet"), and the claimant had to show legal interest ("rettslig interesse"), see § 54 of the former Dispute Act (13 August 1915).

¹⁸ See ot.prp. no. 51 (2004-2005) at 139-143 and 363-366, and innst. O. no. 110 (2004-2005) at 31.

¹⁹ The relationship to the Aarhus Convention was only mentioned in passing in the preparatory works, see ot.prp. no. 51 (2004-2005) at 143 and NOU 2001:32, section 5.4.10. See also Ole Kristian Fauchald, Forfatning og miljøvern – en analyse av Grunnlovens § 110 b, in *Tidsskrift for Rettsvitenskap*, vol. 120 (2007) no. 1-2, 1-84, at 69-75.

Access to court for non-governmental organisations (NGOs) is regulated in § 1-4 of the Dispute Act, which sets out two cumulative conditions, namely that the claim must be covered by the purpose and ambit of the NGO. Hence, NGOs have access to court as long as the claims fall within the objective as set out in the basic documents of the NGOs, and as long as the NGOs have not been established essentially with a view to generate a right of access to court in the case in question. Neither of these requirements has been interpreted strictly to the disadvantage of NGOs.²⁰ It can also be noted that public authorities may require exhaustion of administrative complaints procedures before a case is brought to court.²¹

While private parties thus have broad *de jure* access to court in Norway, it may be asked to what extent they enjoy *de facto* access to court.²² The basic costs incurred by a claimant bringing a case before a district court in Norway is NOK 4,300 (EURO 540) increasing with NOK 2,580 (EURO 320) per day of court proceedings for each day beyond the first day.²³ After six days, the fee increases to NOK 3,440 (EURO 430) per day for each additional day. Appeals to the courts of appeal costs NOK 20,640 (EURO 2,580), and the costs per day of proceedings are the same as for the court of first instance. The same applies to cases appealed to the Supreme Court. Accordingly, the minimum fee for a civil case that is appealed all the way to the Supreme Court is NOK 45,580 (EURO 5,700), provided that the case only needs one day in court at each level. In addition, the claimant may have to cover costs of hiring a lawyer, costs of paying expert witnesses, the opponent's and possibly also intervening parties'

²⁰ These conditions represent codifications of conditions developed in case law. See, in particular, Rt. 1992 at 1618 concerning the former condition, and Rt. 2003 at 833 concerning the latter.

²¹ See § 27 b of the Public Administration Act (10 February 1967).

²² *De facto* access to court is addressed in Article 9(4) of the Aarhus Convention: "shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive."

²³ See the Act concerning Court Fees (1982 no. 86). The EURO equivalent is based on the exchange rates on March 17, 2010.

expenses, and loss suffered by the opponent as a consequence of the case. Although a main purpose when revising the Dispute Act was to reduce the costs of litigation, the measures taken are mainly aimed at simple disputes that do not involve third parties or public interests.²⁴ One objective was to lower the threshold for making use of courts, in particular with regard to small or insignificant claims, through class action.²⁵ In addition, *de facto* access to courts was improved mainly through increased access to alternative dispute resolution, increased use of formalised mediation, the establishment of a new procedure for insignificant claims, and reform of the rules on costs.²⁶ Only one minor procedural reform was adopted in order to improve the management of complex disputes.²⁷

Problems related to *de facto* access to courts were addressed when Norway ratified the Aarhus Convention. Norwegian authorities chose to focus on the requirement that claimants grant security for potential financial liability for losses that defendants may suffer as a consequence of the case, and rules concerning allocation of costs of the proceedings. The review resulted in a revision of the relevant rules aimed at removing obstacles to effective and reasonable access to court. This reform was limited to claims concerning injunctive relief.²⁸

The issue of injunctive relief has come up in a number of environmental cases.²⁹ Due to the requirement that claimants have to demonstrate that the underlying claims have reasonable chances of success, these cases have had a tendency of becoming resource

²⁴ See Backer (2007), *supra* note 5, at 66-71.

²⁵ See ot.prp. no. 51 (2004-2005) chapter 25.

²⁶ See in particular § 20-2 no. 3 of the Dispute Act.

²⁷ See § 9-15(8) of the Dispute Act and ot.prp. no. 51 (2004-2005) at 48 and 50.

²⁸ See §§ 32-11(1) and 34-2(3) of the Dispute Act and ot.prp. no. 116 (2001-2002) chapter 18.

²⁹ For a general introduction to the Norwegian rules on injunctive relief from an environmental perspective, see Inge Lorange Backer, *Domstolsbeskyttelse mot naturinngrep – midlertidige forføyninger etter norsk rett*, in Andersson and Lindell, *Festskrift til Per Henrik Lindblom*, Iustus förlag, Uppsala, 2004 at 27-46.

and time demanding. In a much discussed case concerning the lawfulness of permits to hunt wolves, all five wolves were shot before the case was heard by the court.³⁰ Such concerns were not highlighted during the revision of the Dispute Act; to the contrary, the reform of the relevant rules seems to increase the likelihood that environmental damage may occur before courts are able to make decisions concerning injunctive relief.³¹

3. Environmental cases before the courts

3.1 Introduction

This study is limited to cases that were initiated with a view to, explicitly or implicitly, protect or promote environmental interests. It has been fairly straightforward to distinguish such cases from other cases concerning environmental issues. However, in some cases it was difficult to distinguish cases concerning rights or benefits of individuals from cases concerning protection of the environment, in particular where respect for the rights or benefits of individuals would result in environmental protection. Cases concerning individual rights or benefits, such as compensation for noise or pollution related to public roads, have been classified as environmental cases for the purpose of this study provided that they contain significant environmental elements.

The term “environmental” does not have a clear definition. For the purpose of this study, cases concerning animal welfare and public supply of water, heat and other necessities have been left out, while cases concerning protection of cultural heritage have been included.

3.2 What cases are brought to the courts?

3.2.1 Number of cases

This study is based on the cases that are available

³⁰ Three environmental NGOs brought the case to court in the winter of 2005, after three of the five wolves were killed. For an overview of press coverage of the case, see <www.fvr.no/index.php?option=com_content&task=view&id=54&Itemid=30>.

³¹ See ot.prp. no. 51 (2004-2005) at 246-7.

through “Lovdata”, which publishes a selection of Norwegian court decisions.³² While Lovdata contains almost all Supreme Court decisions and a substantial number of appeal court decisions, it contains very few decisions from district courts.³³ Hence, our focus should be on the percentage of environmental cases rather than on the actual number of such cases.³⁴

During the 10-year period from 1996 to 2005, the percentage of environmental cases found in the cases registered in Lovdata was 0,4 % for civil cases and 0,7 % for penal cases.³⁵ Hence, while approximately one in every 250 civil cases was brought to court to protect environmental interests, the corresponding number for penal cases was one in every 140 cases. Cases promoting environmental interests were thus far more likely to appear as penal cases than as civil cases.

The numbers also indicate that environmental cases may be less likely than other cases to be appealed from district courts to appeal courts. However, such cases were more likely than other cases to be appealed to the Supreme Court. This may indicate that the parties to

³² See <www.lovdata.no>. This is a commercial database which is used as a basis for the printed publication of court decisions in *Retstidende* (Rt) for Supreme Court decisions, and *Rettings Gang* (RG) for a selection of district courts and appeal courts decisions. Some court decisions are available on the web-pages of the respective courts, see <www.domstol.no>.

³³ For the 10-year period 1996-2005, the numbers were: Supreme Court – 2697 civil cases and 2643 penal cases, appeal courts – 17015 civil cases and 9629 penal cases, and district courts – 1456 civil cases and 1475 penal cases.

³⁴ Statistics concerning cases before Norwegian courts are available in the annual reports from the National Courts Administration, see <www.domstol.no>. The statistics contain hardly any information concerning the nature of the cases before the courts and cannot be used as a basis for research into the role of courts in relation to environmental issues.

³⁵ These percentages are based on an estimated 84 civil cases and 97 penal cases. These numbers are estimates, since cases that were subsequently appealed were counted as only one case. The numbers registered were 51 civil cases and 57 penal cases. The estimate is needed since the database is likely to contain the same case several times, and since we do not know the extent to which the database contain the same case several times. The estimate is based on the average between a minimum where only one case is counted and a maximum where each Supreme Court case is counted as three, and each court of appeal case is counted as two (i.e., 116 for civil cases and 137 for penal cases).

these cases found the potential costs of appealing environmental cases higher than the potential benefits, and it may indicate that where a case had been appealed from the district court to an appeal court, a higher number of the environmental cases were regarded as sufficiently important to be brought before the Supreme Court. However, the overall number of cases is so low that there are significant uncertainties related to these observations.

The environmental cases were distributed as follows (see next page, table 1) during the years studied (the year of the final decision in the case):

These numbers indicate that there has not been any significant change in the use of courts for environmental purposes during the period examined. In order to further clarify whether there have been significant changes in the use of courts for environmental purposes in Norway, we may refer to a study of environmental cases brought before Norwegian courts during a 26 year period from 1 July 1979 to 30 June 2005.³⁶ A provision on environmental protection was introduced in § 110 b of the Norwegian Constitution in 1992, and the period examined covers an equal period of time before and after the constitutional amendment. Hence, the study could indicate whether the adoption of § 110 b led to significant changes in the attitude towards environmental issues in the Norwegian legal system. Even if § 110 b does not include any specific clause relating to judicial review, its emphasis on the rights of individuals in relation to the environment indicates that courts could be expected to play an increasingly important role.³⁷

A total of 171 environmental cases were identified during the 26 year period.³⁸ There were 72 cases decided before 1 June 1992 and 99 cases decided

subsequently. If we break down the numbers into five years intervals, we get the following distribution, (see next page, table 2)

These numbers thus indicate that there was a significant increase in the use of courts for environmental purposes during the period when § 110 b was adopted (1990-94), which also coincided with the Rio Conference on Environment and Development. However, as the numbers of environmental cases declined in the following two periods, the study indicates that there has not been any long-term significant change in the use of courts for environmental purposes during the period.

3.2.2 *Legal themes*

Here, we shall focus on the claims brought forward in civil cases. It has been difficult to get access to information concerning the claims in penal cases, and the analysis of penal cases has thus focused on the outcome of the cases rather than on the claims brought forward by prosecutors, see section 3.4 below.

The legal issues raised in the cases concerned the validity of administrative decisions, the validity of and amount of compensation under expropriation decisions, compensation for environmental harm, both based on contracts and non-contractual, and cases initiated to stop environmentally harmful acts. The cases identified were distributed as on next page. A clear majority of the claims brought forward in civil cases concerned compensation for loss suffered as a consequence of environmentally harmful activity. Most of these cases, 49 % of the 51 cases,³⁹ raised issues concerning compensation based on legislation. Moreover, 14 % of the cases concerned compensation on the basis of contractual obligations and 22 % of the cases concerned issues related to compensation in the context of expropriation. Taken together this means that four out of five civil environmental cases brought before Norwegian courts concerned, at least in part,

³⁶ See Fauchald (2007), *supra* note 19, at 71-4.

³⁷ Inge Lorange Backer, who was one of the main proponents of the constitutional amendment, contributed with information concerning the provision aimed in particular at courts, see Inge Lorange Backer, *Domstolene og miljøet, i Lov og rett*, 1993 at 451-68. See also Inge Lorange Backer, *Grunnloven og miljøet*, in *Jussens venner*, 1991 at 219-34.

³⁸ These numbers include all cases registered in "lovdata" during the period. Some cases that were subsequently appealed are thus counted two or more times.

³⁹ *Ibid.*

Table 1 – Number of cases

Civil cases										
1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Total
5	7	5	7	3	1	9	6	4	4	51
Criminal cases										
4	5	3	5	8	5	4	5	8	10	57

Table 2 – Environmental cases 1980-2004 in five-year intervals

1980-84	1985-89	1990-94	1995-99	2000-04
26	20	48	38	33

Table 3 – Cases by legal theme⁴⁰

Legal theme	Civil cases										
	1996	97	98	99	2000	01	02	03	04	2005	Total
Review of adm. decisions	0	0	0	1	0	1	1	1	0	1	5
Review of expropriation decision	2	3	1	1	0	0	1	1	1	1	11
Compensation outside contract	2	4	3	5	3	0	4	1	2	1	25
Compensation under contract	1	0	0	0	1	0	2	1	0	2	7
Stop env'ly harmful activity	0	0	3	0	0	1	1	2	1	0	8
Total	5	7	7	7	4	2	9	6	4	5	56

Table 4 – Cases by environmental interest, civil cases before the “/” and penal cases after the “/”⁴¹

Environmental interest	Civil cases / criminal cases										
	1996	97	98	99	2000	01	02	03	04	2005	Total
Pollution (air, water, soil)	1/1	0/1	0/1	0/2	2/1	0/0	4/2	1/1	1/3	2/2	11/14
Nature protection / conservation	0/3	0/4	0/2	1/2	0/5	1/4	0/2	2/4	0/5	0/8	4/39
Neighbour issues	3/0	5/0	4/0	5/0	1/0	0/0	3/0	2/0	2/0	2/0	27/0
Private rights to resources	1/0	2/0	1/0	1/0	0/0	0/0	2/0	1/0	1/0	0/0	9/0
Cultural heritage	0/0	0/0	0/0	0/1	0/2	0/1	0/0	0/0	0/1	0/1	0/6
Total	5/4	7/5	5/3	7/5	3/8	1/5	9/4	6/5	4/9	4/11	51/59

⁴⁰ Five cases were placed in two categories. This is the reason why the percentage of cases belonging to the various categories adds up to more than 100 % (see next page).

⁴¹ Two criminal cases were placed in two categories.

monetary compensation to a private party. Only 16 % of the cases brought forward claims that harmful activities should stop, including cases concerning injunctive relief, and 10 % concerned judicial review of administrative decisions.

It can thus be observed that the Norwegian courts only to a very limited extent were an option for efforts to prevent environmental harm. Moreover, the courts were only in exceptional cases used by private parties either seeking to overturn administrative decisions permitting environmentally harmful activities, or seeking to force public authorities to take action to protect environmental interests.

3.2.3 *Environmental themes*

The cases addressed a broad variety of environmental issues. When looking at both the civil and criminal cases, we got the results set out in table 4 (see the previous page).

Among the civil cases, 53 % were related to neighbour issues. These cases concerned competing interests where the parties bringing the cases to court were those suffering from environmental degradation. Another 18 % of the cases concerned private rights to natural resources, and were initiated by parties whose access to such resources would suffer due to acts leading to environmental degradation. Only in 29 % of the cases were the issues brought before the courts related to more general environmental concerns, such as issues concerning pollution (21 %) or nature protection and conservation (8 %). Hence, it can be observed that anthropocentric interests were dominant in the civil cases. These findings indicate that private parties had few incentives or opportunities to bring cases promoting environmental interests before courts in Norway. This was in particular the case for issues concerning nature protection and conservation. It is also remarkable that there were no civil cases concerning recreation and public access to nature, or concerning cultural heritage.⁴²

⁴² It might be worth recalling, in this context, that only few cases from the courts of first instance were available in the database. Hence, cases concerning recreation and cultural heritage might have occurred before courts of first instance

In contrast to the civil cases, the criminal cases concerned almost exclusively general environmental issues. The main focus was on nature protection and conservation (68 %), followed by cases concerning pollution (25 %). Some few cases concerned protection of cultural heritage (11 %).

In sum, the analysis shows that general issues related to nature protection are almost exclusively taken care of by public authorities, either through criminal cases or as responsible for administering relevant legislation. The picture is somewhat more nuanced in relation to general pollution issues, where private parties seem to take some initiatives to promote environmental interests before courts. However, initiatives by public authorities through use of criminal law seem to be at least equally important. This indicates that the court system and Norwegian environmental legislation are not designed in a way that promotes private initiatives to secure environmental interests through the judiciary. Rather, criminal law is promoted as a main instrument to secure environmental interests.

3.2.4 *Activities*

It is also of interest to analyse which environmentally harmful activities were addressed by the courts (see table 5 on page 87).

In civil cases, 39 % of the cases concerned pollution-related activities, including efforts to clean up existing pollution, prevent future pollution and noise, and one case concerning the introduction of alien species. Cases concerning construction of public infrastructure, including in particular roads, railways and airports, were a significant part of the cases, 35 %. Taking into account the importance of natural resources in the Norwegian economy, it is remarkable that only 16 % of the cases concerned extraction of such resources, including two cases concerning hunting of wolves. None of the cases concerned extraction of marine resources, and only one concerned forestry. It is also remarkable that only 10 % of the cases concerned building and construction. Hence, an insignificant part without being included in the database.

of the numerous cases brought before Norwegian courts related to the planning and building legislation were initiated for environmental purposes.

Among the criminal cases, a significant number concerned pollution-related activities, 42 % of the cases. The most significant group of cases under this category were cases concerning use of motor vehicles in the wilderness, which constituted almost half of the cases. Cases concerning extraction of natural resources amounted to 40 % of the cases, including eight cases concerning hunting of carnivores and one case concerning aquaculture. Only 11 % of the criminal cases concerned building and construction. The remaining 9 % of cases concerned a variety of activities having environmental implications, such as agriculture, import of endangered species, and arson.

Against this background, it may be observed that a significant portion of the environmental cases brought before Norwegian courts concerned polluting activities. Moreover, almost all cases concerning construction of infrastructure were civil cases, while the clear majority of cases concerning exploitation of natural resources were criminal cases. Even if activities related to land-use are regarded as the main threat to biodiversity in Norway,⁴³ few environmental cases involving construction of houses, offices, infrastructure, etc. were brought to Norwegian courts.

3.3 Who were parties to the proceedings?

As the parties to the cases differ significantly between civil and penal cases, we will address civil and penal cases separately below. In relation to civil cases, the numbers were as follows (claimants before the “/” and defendants after the “/”), (see table 6 on page 88).

Hence, as many as four out of five civil cases (80 %) were initiated by private parties, including citizen groups, landowner associations and other interest groups that fall outside the concept environmental non-governmental organizations (NGOs).⁴⁴ Cases were

⁴³ See NOU 2004:28, Lov om bevaring av natur, landskap og biologisk mangfold, chapter 7.

⁴⁴ Cases raised by private parties also include a group of cases where public authorities according to the law are regarded *de jure* as claimants, mainly for the purpose of

brought forward by enterprises in 10 % of the cases, and by environmental NGOs in 8 % of the cases. Public authorities did only initiate one civil case. The low number of cases brought by NGOs, even fewer than cases brought by private enterprises, is remarkable in light of the broad *de jure* access to courts enjoyed by such organisations under Norwegian legislation.⁴⁵ It is also of interest that public authorities almost never initiated civil cases to protect environmental interests. Hence, public authorities seem to rely almost exclusively on criminal cases as means to promote environmental protection through courts.

Among the four cases brought by NGOs, two were appealed to the Supreme Court, and two were decided by district courts. Three cases were unsuccessful, including one case concerning logging in forests considered for protection, one case concerning the establishment of a military artillery range, and one case concerning hunting of wolves.⁴⁶ The only successful case was another case concerning hunting of wolves, in which the court of first instance decided that the hunting should stop.⁴⁷ This case was not appealed.

A majority of the cases, 59 %, were brought against public authorities. The remaining cases were brought against private enterprises (25 %) and private individuals (16 %). As shown in section 3.2.2 above, few cases concerned judicial review of administrative decisions. On closer inspection, it can be observed that most of the cases raised against public authorities concerned neighbour issues. This could indicate that public authorities are involved in a higher number of

responsibility for costs associated with the case, but where private parties are the *de facto* claimants (“skjønssaker”).

⁴⁵ See section 2.3 above.

⁴⁶ The first two cases were published in Rt. 2003 at 1630 and Rt. 2003 at 833. The latter case has not been published. It was decided by Oslo namsrett on 16 February 2001. This case is illustrative of the economic risks for NGOs of bringing cases to courts. The NGOs had to cover the costs of the public authorities as well as the costs of third parties allowed to intervene in the case in support of the public authorities. For an overview of press coverage of the case, see <http://www.fvr.no/index.php?option=com_content&task=view&id=54&Itemid=30>.

⁴⁷ This decision has been published in RG 2000 at 1125.

controversial projects that generate environmental problems than are private enterprises. However, the difference is most likely the result of special rules concerning distribution of costs of proceedings in expropriation cases.⁴⁸ Hence, the difference between public authorities and private enterprises can be regarded as illustrative of the importance of the distribution of costs of proceedings when private parties decide whether or not to bring a case to court.

All the criminal cases were initiated by the public prosecutor. Criminal cases were only brought against private individuals and private enterprises, (see table 7 on page 88).

This means that 83 % of the cases were brought against private individuals, including non-profit associations of individuals, and 17 % were brought against enterprises. What is most remarkable is that no penal cases were brought against public authorities. This is in contrast to the significant number of civil cases brought against public authorities. Taken together, these findings may indicate that the public prosecutor is reluctant to bring charges against public authorities. Some of this difference may be explained by public authorities being more likely to accept and pay fines, and thus avoid court proceedings, while private parties may be less likely to do so.

3.4 Outcome of the cases

A detailed assessment of the outcome of the cases is challenging, since the cases differ significantly. Two criteria have been identified as important from an environmental perspective, namely whether the results in the cases were beneficial to the environmental interests involved, and whether the interpretation of key provisions in the case was in favour of environmental interests. A third issue to be addressed is the outcome in cases concerning judicial review of administrative decisions.

In most civil cases it was relatively easy to determine whether the results were beneficial to the environmental interests involved. In general, the answer would depend on an assessment of the extent

to which the claimant was successful. However, in some complex cases and in some cases where the court did not produce a clear final decision, the conclusion was that the case was neutral in relation to the environmental interests (see table 8 on page 88).

Hence, a majority, 53 %, of the cases was concluded in favour of the environmental interests, 39 % were concluded to the disadvantage of the environmental interests, and 8 % of the cases were neutral. Significantly more cases were thus determined in favour of the environmental interests involved than *vice versa*. While it thus could be argued that Norwegian courts are sensitive to environmental issues, another explanation may be that the economic risk of bringing cases to courts in Norway is so high that only cases where the claimant has a high degree of certainty that the case will be successful will be brought to courts. From such a perspective, it might be argued that it is remarkable that as many as two out of five cases were unsuccessful. The numbers can possibly indicate that there is a weak tendency in favour of the environment towards the end of the period, but the tendency is too weak to conclude on this issue.

In the majority of the cases, it could not be determined whether the courts' interpretation of key provisions was or was not in favour of environmental interests. Those cases in which it was possible to make such an assessment were distributed evenly between interpretations in favour of and contrary to environmental interests. Hence, it seems that Norwegian courts do not in general favour environmental interests when interpreting provisions in civil cases.

There were five cases concerning judicial review of administrative decisions. Of these cases, only one was successful in overturning the administrative decision, namely a case concerning hunting of wolves.⁴⁹ The four unsuccessful challenges concerned the validity of a decision to permit the hunting of wolves,⁵⁰ the validity of a land-use plan related to future expansion of Gardermoen Airport,⁵¹ the validity of a decision to

⁴⁹ See RG 2000 at 1125.

⁵⁰ See decision by Oslo namsrett on 16 February 2001.

⁵¹ See Rt. 2002 at 352,

⁴⁸ See section 2.2 above.

locate a lane for snowmobiles close to a cabin,⁵² and the validity of a decision to expropriate to the benefit of a hydropower station.⁵³ These cases are too few to draw conclusions concerning the general attitude of Norwegian courts in cases concerning judicial review of administrative decisions in environmental cases. However, they seem to confirm the general impression that private parties avoid bringing cases concerning the validity of such decisions to courts. It also contrasts with the above findings that a majority of environmental cases brought to courts were decided in favour of environmental interests. These findings can thus be regarded as supporting the thesis that has been put forward by some theorists that Norwegian courts tend to decide in favour of public authorities.⁵⁴

There is a significant difference between civil cases and criminal cases when it comes to assessing whether the results in the cases were beneficial to environmental interests, in the sense that the latter cases can be distinguished according to the sentences imposed by the courts. Whether or not such cases were decided in favour of environmental interests was based on the extent to which the claim of the prosecutor was successful (see table 9 on page 89).

In these cases, 70 % were decided in favour of the environmental interests, 14 % were decided to the disadvantage of environmental interests, and 16 % were neutral. This most likely reflects the policy of the prosecutor not to bring cases to courts unless there is a high degree of likelihood that the accused will be sentenced.⁵⁵ This picture may be supplemented by an overview of the punishments rendered by the tribunals: prison sentences were used in 33 % of the cases, fines in 54 % of the cases, loss of rights, such as the right to hunt, in 21 % of the cases, and confiscation, for

example of snowmobiles used unlawfully, in 25 % of the cases. The result was unknown in 14 % of the cases, and the person charged was acquitted in 14 % of the cases.

4. Some concluding remarks

This study, which has been limited to cases brought to court with a view to promote environmental interests, finds few cases of relevance during the ten-year period examined. In all, the study identifies 51 civil cases and 57 criminal cases, which represented approximately 0,4 % and 0,7 % respectively of the total number of cases. There was no significant increase or decrease in such cases during the period.

As to the legal claims brought forward in the cases, the main focus of civil cases was on achieving monetary compensation. Few cases aimed at stopping environmentally harmful activities or at challenging the validity of administrative decisions. Moreover, most of the civil cases concerned neighbour issues and pollution. Few concerned protection of nature. Almost all civil cases concerned activities related to emission of pollutants and the construction of infrastructure. Few cases concerned extraction of natural resources. Only in one case did the claimant argue that public authorities had failed to comply with a duty to take measures to protect the environment. Hence, courts did in general not serve to prevent environmental damage in civil cases. In criminal cases, the issues brought to courts were mainly related to nature protection, and the activities addressed were mainly polluting activities and extraction of natural resources.

These findings, when taken together, indicate that the Norwegian environmental legislation and court system in the period studied did not favour the use of courts to achieve environmental justice in civil cases related to administrative decision-making. The significant reform of the Dispute Act in 2005 is unlikely to have changed this situation, at least in the short or medium term.⁵⁶ On the other hand, courts

⁵² Unpublished decision by an appellate court on 12 August 2003.

⁵³ See RG 2006 at 401.

⁵⁴ See Asbjørn Kjønsstad, *Er Høyesterett statsvennlig*, in *Lov og Rett*, 1999, at 97-122 with further references.

⁵⁵ Økokrim, the Norwegian special prosecutor for economic and environmental cases, aims at limiting the number of acquittals in the cases they bring to court to 10 %, see Økokrim, *Årsrapport 2005*, at 9 and 11.

⁵⁶ This may possibly change in the longer term due to long term effects of procedural reforms, such as the possibility to

were used more actively to contribute to environmental protection through criminal cases. In sum, courts seem generally to serve to reinforce rather than to act as a correction to the approach of public authorities to environmental protection. This conclusion is confirmed by the findings that environmental NGOs initiated very few civil cases and by the fact that the outcome in cases concerning judicial review of administrative decisions was in favour of public authorities in four of five cases.

The assessment of the outcome of the civil cases is inconclusive as to whether courts were likely to conclude in favour of environmental interests. Where cases were brought by environmental NGOs and where they concerned judicial review of administrative decisions, courts generally concluded contrary to the environmental interests. These findings, although based on a low number of cases, lend some support to the hypothesis that Norwegian courts tend to conclude in favour of public authorities.

Formally, Norway offers broad access to courts in relevant legislation, and courts have so far interpreted the requirements for initiating environmental cases in a manner beneficial to NGOs and others wanting to bring such cases to courts.⁵⁷ The above findings indicate that significant obstacles to bringing environmental cases to courts remain. We may distinguish between three main reasons why courts do not play any important role in securing environmental justice: 1) the potential costs of bringing cases to courts in Norway, 2) the tendency of courts to conclude in favour of public authorities and 3) that environmental legislation in general provides public authorities with broad discretionary power and few legal duties. The above study indicates that all three factors are significant, but it does not permit us to draw any clear conclusion regarding which of these factors are most significant. The factor that is subject to the highest degree of uncertainty is the one concerning the tendency of courts to conclude in favour of public

initiate “class action” and abstract claims.

⁵⁷ Two landmark cases are the Supreme Court decisions in Rt. 1992 at 1618 and Rt. 2003 at 833.

authorities. In particular, courts have been reluctant to provide private parties with a means to force public authorities to take action.⁵⁸ In a recent case before the Supreme Court concerning the right of access to environmental information from a logging company on the basis of Section 16 of the Environmental Information Act (2003 no. 31), the Supreme Court concluded that the NGO bringing the case had a right of access to the information sought in the form of maps detailing the occurrence of old forests.⁵⁹ While this case signals a willingness to protect the rights of private parties, it concerns the relationship between private parties and not the relationship between private parties and public authorities.

Against this background, it can be argued that a main reason why Norwegian courts have been unwilling to conclude that public authorities are under an obligation to take acts to promote environmental interests is the lack of legislation setting out sufficiently clear duties. Hence, under the assumption that the lack of such legislation is a main factor, we shall in the next section briefly assess whether the approach of the legislator in recent environmental legislation is likely to improve the possibility of using courts to achieve environmental justice.

5. Are recent environmental law reforms likely to strengthen the role of courts?

Recently, there have been two main reforms of Norwegian environmental legislation: a revised Planning and Building Act was adopted in 2008 (no.

⁵⁸ See Rt. 2003 at 1630, in particular paras. 37, 42, 43 and 45. The case, which is one among a handful of environmental cases brought by environmental NGOs, concerned the duty of public authorities to prevent a person from logging in forests that were considered for protection. See also the discussion of the case in *ot.prp. no. 51 (2004-2005)* at 143. Another case of interest is Rt. 2009 at 661, where the Supreme Court upheld the decision concerning location of the U.S. embassy despite failure to carry out the prescribed environmental impact assessment. For a critical comment to the latter case, see Inge Lorange Backer and Hans Chr. Bugge, *Forsømt konsekvensutredning av alternativer - Høyesteretts dom i Rt. 2009 s. 661 om den amerikanske ambassade i Husebyskogen*, in *Lov og Rett* 2010 no. 3 at 115-27.

⁵⁹ Judgment 6 April 2010, reference no. HR-2010-00562-A.

71) and 2009 (no. 27), and a Nature Diversity Act was adopted in 2009 (no. 100). The preparatory works of these acts do in general not address the need to improve environmental justice through courts.⁶⁰ In the following, we shall examine whether these acts nevertheless are likely to strengthen the use of courts to secure environmental interests. Whether the new legislation strengthens the role of courts in this respect depends on the extent to which it introduces, or supports existing provisions implying, rights and obligations that can be invoked before courts.

The new Planning and Building Act contains at least five elements that could improve the prospects of bringing cases to courts in order to promote environmental interests. First, the Act contains clearer rules on the environmental aspects of objectives to be achieved and it uses “mandatory” language in this context. Section 1-1 states that the Act “shall promote sustainable development to the benefit of each individual, the society and future generations”.⁶¹ When taken together with provisions setting out the tasks and discretionary power of public authorities under the Act, this provision can strengthen the legal basis for claims that public authorities have failed to protect environmental interests as provided for in the Act.

Secondly, there are new rules setting out a legal framework for the content of land use plans, see Chapter 3, in particular Section 3-1. Moreover, according to Section 6-1, the government shall every four years adopt a document setting out “national expectations” to local planning in order to promote sustainable development. It is unlikely that Norwegian courts would agree to use Section 3-1 or decisions under Section 6-1 as independent legal bases for reviewing the validity of planning decisions.⁶² Nevertheless, these provisions may serve to strengthen potential claims that public authorities have failed to protect environ-

mental interests as provided for in the Act.

Thirdly, there are new rules concerning procedural requirements that aim to ensure environmental interests, in particular in Chapter 4 concerning environmental assessments, Chapter 5 concerning public involvement in planning processes and Chapter 25 concerning supervision. In some respects, these rules represent changes in the approach to procedural issues under the previous Planning and Building Act (1985 no. 77). One example is the duty to ensure “risk and vulnerability assessments” in the context of planning decisions in Section 4-3. Another example is the duty to ensure that persons and interests that are likely to be unrepresented, are able to participate effectively in the procedures leading up to planning decisions, see Section 5-1. On the other hand, it is stated in the preparatory works that failure to carry out supervision according to Chapter 25 cannot justify claims of economic compensation for damages.⁶³ The Supreme Court’s decision in a recent case concerning environmental impact assessment shows that Norwegian courts so far have practiced a high threshold for finding against the validity of an administrative decision on the basis of failure to follow procedural requirements.⁶⁴ In sum, some of the procedural reforms, in particular in Section 5-1, improve the possibility of achieving environmental justice through courts.

Fourthly, the duty to adopt zoning plans is strengthened according to Section 12-1. Even if the revised rules do not exclude the possibility of exempting from the duty,⁶⁵ they provide an improved legal basis for bringing to courts claims that projects cannot be undertaken before a zoning plan has been adopted. This improves the opportunities for those potentially affected by projects to ensure thorough assessments of the projects’ environmental effects.

Finally, the provision authorising public authorities to issue general exemptions under the law has been

⁶⁰ For the Planning and Building Act, see ot.prp. 32 and 45 (2007-2008) and NOU 2001:7, 2003:14, 2003:24, 2003:29 and 2005:12. For the Nature Diversity Act, see ot.prp. 52 (2008-2009) and NOU 2004:28.

⁶¹ As there is no official translation of the Act at the time of writing, the translation provided is the translation of the author of this article.

⁶² See ot.prp. 32 (2007-2008) at 178.

⁶³ See ot.prp. 32 (2007-2008) at 334.

⁶⁴ See *supra* note 59.

⁶⁵ See ot.prp. 32 (2007-2008) at 228-9 and the discussion of Section 19-2 below.

reformulated so that it allows extensive court review of such decisions. This was a controversial issue under the former Act,⁶⁶ and the Supreme Court finally decided that courts had limited opportunity to review decisions under Section 7 of the Act.⁶⁷ This judgment was controversial, and the revised Act makes clear in Section 19-2 and related preparatory works that there is a threshold for making exemptions and that decisions authorising exemptions can be subject to review by courts.⁶⁸

Against this background, it can be observed that the revised Planning and Building Act contains some elements that might promote the use of courts to ensure environmental justice. However, when assessed in light of experiences under the former Act, where few cases have been initiated before courts to achieve environmental justice, we may conclude that the reforms provide a relatively weak basis for increased use of courts for such purposes. Significant parts of the Act continue the trend of delegating measures to ensure environmental protection to the executive rather than introducing rights and obligations. One example is Section 29-10 under which public authorities have full freedom to adopt or refrain from adopting rules addressing environmental impacts of projects that are subject to permits under the Act. Another example is Section 32-1 which sets out a duty for the municipality to follow up projects that have been carried out unlawfully. Despite the mandatory language used in the Section 32-1, the preparatory works state that private parties cannot invoke it as a basis for legal claims.⁶⁹

The new Nature Diversity Act (2009 no. 100) contains a number of rules that did not exist under the former Nature Conservation Act (1970 no. 63), in particular rules on sustainable use in Chapter II, on species management in Chapter III, on alien species in

Chapter IV, on “selected habitat types” in Chapter VI and on genetic material in Chapter VII. For the purpose of this study, I have gone through the provisions of the Act with a view to identify those that are likely to provide a significant legal basis for bringing cases to courts. Since we have little experience on the implementation of the Act and since most of the provisions of the Act lack parallel provisions in previous legislation, the analysis below is based on the wording of the Act and statements in the preparatory works. Against this background, I have identified five elements of the Act that are likely to provide a significant potential for increased use of courts to achieve environmental justice.

First, Section 6 of the Act contains a general duty of care. This duty is related to provisions concerning management objectives for flora and fauna in Sections 4 and 5. Moreover, Section 28 contains a more specific duty of care related to introduction of alien species. Failure to fulfil the duty of care is not subject to penal sanctions, but may according to Section 74 lead to an order to pay environmental compensation. Public authorities are under no obligation to order such compensation, and a failure to make such an order cannot be brought to court.⁷⁰ Another consequence from failing to carry out the duty of care may be the possibility of raising claims to compensation on the basis of torts law.⁷¹ A third consequence may be a duty to carry out remedial acts according to Sections 69 or 70. Such remedial acts may be ordered by public authorities, but a failure to make such orders is not subject to subsequent review by courts. The issue of interest is whether there is a duty to take remedial acts independent of orders by public authorities, see para. 2 of Section 69 and para. 1 of Section 70. The duty to take remedial acts under Section 69, which concerns activities that are unlawful, can arguably be enforced through court proceedings.⁷² It is less clear whether it

⁶⁶ See Johan Greger Aulstad, *Domstolsprøvingen av dispensasjonsvedtak etter plan- og bygningsloven § 7, in Areal og eiendomsrett* 2007 at 63-87.

⁶⁷ See Rt. 2007 at 257.

⁶⁸ See ot.prp. 32 (2007-2008) at 138-40 and 242.

⁶⁹ See ot.prp. 45 (2007-2008) at 352.

⁷⁰ This is confirmed in ot.prp. 52 (2008-2009) at 454-5 which uses hortatory language.

⁷¹ See Inge Lorange Backer, *Naturmangfoldloven*, in *Tidsskrift for eiendomsrett*, vol. 5 (2009) no. 3 at 190, who emphasises this aspect of Section 6.

⁷² While the wording of the provision seems to indicate that

is possible to enforce a duty to take remedial acts through court proceedings under Section 70, i.e. where the environmentally harmful activities are lawful. While certain statements in the preparatory works may be read in favour of concluding that there is a duty to take remedial acts independent of orders from public authorities,⁷³ courts may come to the opposite conclusion, for example by arguing that it should be left to public authorities to determine the remedial acts to be taken. A failure to fulfil the duty of care can be regarded as unlawful under the Act, and the related activities would thus normally fall under Section 69.⁷⁴

Secondly, the provisions concerning species management in Chapter III contain mandatory language that possibly set a legally binding framework for decisions concerning permits to harvest, hunt or otherwise eliminate organisms. It is not possible within the framework of the present study to address the extent to which the various provisions, when read together with relevant provisions in related legislation, provide for rights or duties that are enforceable before courts.⁷⁵ Nevertheless, it is clear that a main purpose of including Chapter III was to establish a legal framework for decisions concerning species management.⁷⁶ This framework must be implemented in light of its function to secure the management objectives for species set out in Section 5. Such a legal framework may be of limited value unless it can be invoked in cases before courts. We may thus assume that the rules contained in Chapter III set a legally binding framework for decisions authorising elimination of organisms, and that they have legally binding implications for the process of preparing such decisions. Non-compliance with this framework may be brought to courts. However, the willingness of courts to effec-

there is an independent duty to take remedial acts, this is not followed up in the preparatory works, which focus on the power of public authorities to issue orders, see ot.prp. 52 (2008-2009) at 339-40 and 451-2.

⁷³ See ot.prp. 52 (2008-2009) at 340-1 and 452.

⁷⁴ In the same direction, see Backer *supra* note 72 at 190.

⁷⁵ For some general comments on these parts of the Act, see Backer *supra* note 72 at 195-9.

⁷⁶ See ot.prp. 52 (2008-2009) at 113-4.

tively enforce the legal framework remains to be seen.

Thirdly, the provisions concerning protected areas in Chapter V of the Act contain clearer rules on activities that are prohibited and activities that are lawful in the various categories of protected areas than under the former Nature Conservation Act (1970 no. 63). Moreover, there are clearer duties for the authorities to define the purposes for which the protected areas are established and to adopt management plans.⁷⁷ Obligations under international law related to protected areas have been incorporated through Section 40.⁷⁸ In view of the practice of the Supreme Court under the former Act,⁷⁹ it can be assumed that courts will accept to address claims of non-compliance with such provisions.

Fourthly, the Act contains two new procedures for protection of species and habitats. Section 23 provides for decisions that species are “priority species”, and Chapter VI provides for decisions on “selected habitat types”. These provisions do not contain duties for public authorities to make such decisions under specific circumstances, for example where species are threatened. However, the provisions contain mandatory procedural elements, *i.e.* a duty to assess whether decisions shall be taken.⁸⁰ Failure to make such assessments can be brought to court. However, the preparatory works state that failure to make assessments cannot be subject to penal proceedings or claims of compensation.⁸¹ It remains to be seen whether courts will address claims that assessments do not sufficiently assess all relevant factors and thus do not fulfil the requirements of the Act.

⁷⁷ For a more detailed discussion of these issues, see Backer *supra* note 72 at 201-5.

⁷⁸ This is relevant for wetlands listed under the Ramsar Convention on Wetlands (1971), see in particular Art. 5, and decisions to list protected areas within the Emerald Network under the Bern Convention on the Conservation of European Wildlife and Natural Habitats (1979).

⁷⁹ See, in particular, Rt. 1986 at 1999 and Rt. 1995 at 1427.

⁸⁰ See para. 3 of Section 23 and para. 3 of Section 52.

⁸¹ See ot.prp. 52 (2008-2009) at 393 and 433. Moreover, the preparatory works state that decisions to start or not to start preparing decisions under the Sections 23 and 52 are not subject to any administrative complaints procedures.

Finally, the new rules concerning genetic material contain a provision in Section 60 seeking to ensure benefit sharing in accordance with Article 15 of the Convention on Biological Diversity (1992). According to Section 60, public authorities are encouraged to bring legal action in order to ensure benefit sharing of use of genetic resources on behalf of interested parties in other countries. While there is no duty on authorities to take such cases to court, the provision clearly indicates an interest in using courts as a vehicle to promote environmental justice.

While the above new elements of the Nature Diversity Act provide a significant potential for the use of courts to promote environmental interests, the Act does not provide any possibility of private parties to use courts to force administrative authorities to take enforcement measures, see Chapters VIII and IX. It can also be observed that the role of courts in relation to the new elements of the Act will to a significant degree depend on the willingness of courts to review decisions that are based on technical and complex assessments of the facts. Hence, while the Nature

Diversity Act provides a number of opportunities for courts to contribute to effective implementation of the Act, it leaves the courts with significant discretion when determining the extent to which they will make use of these opportunities in specific cases.

Against this background, we can conclude that the revised Planning and Building Act is unlikely contribute to significant changes in the role of courts in environmental matters. The potential for increased recourse to courts to promote environmental interests is significant under the Nature Diversity Act. Hence, in light of the above findings that very few civil cases have been brought to courts in Norway to protect biodiversity or ensure sustainable use of biological resources,⁸² despite the economic, social and cultural importance of exploitation of such resources and the current loss of biodiversity,⁸³ we might possibly face a significant increase in the use of courts in such cases in the future.

⁸² See section 3.2.3.

⁸³ See <www.miljostatus.no>.

Table 5 – Cases by activity⁸⁴

Activity in question	Civil cases / criminal cases										
	1996	97	98	99	2000	01	02	03	04	2005	Total
Emission of pollutants	2/2	0/1	3/1	2/2	2/4	0/0	2/2	4/3	2/4	3/5	20/24
Building / construction	0/0	2/0	1/1	0/1	0/2	0/1	2/0	0/0	0/0	0/1	5/6
Infrastructure	3/0	4/0	0/0	3/0	1/0	0/0	4/0	1/0	2/0	0/0	18/0
Extraction of natural resources	0/2	1/4	1/1	2/2	0/2	1/2	1/2	1/1	0/2	1/5	8/23
Other	0/0	0/0	0/0	0/0	0/0	0/2	0/0	0/1	0/2	0/0	0/5
Total	5/4	7/5	5/3	7/5	3/8	1/5	9/4	6/5	4/8	4/11	51/58

Table 6 – Cases listed by claimant / defendant, civil cases

	Claimant / defendant										
	1996	97	98	99	2000	01	02	03	04	2005	Total
Private parties	5/0	7/0	4/1	6/1	2/1	0/0	7/2	3/1	4/0	3/2	41/8
Enterprises	0/1	0/1	1/2	0/1	1/1	0/0	1/3	1/1	0/2	1/1	5/13
Authority	0/4	0/6	0/2	0/5	0/1	0/1	1/4	0/4	0/2	0/1	1/30
Environmental NGO	0/0	0/0	0/0	1/0	0/0	1/0	0/0	2/0	0/0	0/0	4/0
Total	5	7	5	7	3	1	9	6	4	4	51

Table 7 – Cases by defendant, criminal cases

	1996	97	98	99	2000	01	02	03	04	2005	Total
Private individuals	4	4	2	4	5	5	4	3	7	8	46
Enterprises	0	1	1	1	3	0	0	2	1	2	11
Total	4	5	3	5	8	5	4	5	8	10	57

Table 8 – Cases listed according to result, civil cases

	1996	97	98	99	2000	01	02	03	04	2005	Total
Pro environmental interests	2	3	2	4	2	0	5	3	3	3	27
Contra environmental interests	2	4	3	2	0	1	4	2	1	1	20
Neutral	1	0	0	1	1	0	0	1	0	0	4
Total	5	7	5	7	3	1	9	6	4	4	51

⁸⁴ One criminal case was placed in two categories.

Table 9 – Cases listed according to result, criminal cases

	1996	97	98	99	2000	01	02	03	04	2005	Total
Pro env'l interests	4	2	2	4	3	4	2	5	6	8	40
Contra env'l interests	0	3	0	0	3	1	1	0	0	0	8
Neutral	0	0	1	1	2	0	1	0	1	3	9
Total	4	5	3	5	8	5	4	5	7	11	57
Prison	2	0	1	3	1	1	1	1	4	5	19
Fine	3	2	2	2	3	3	1	4	6	5	31
Loss of rights	2	1	0	2	2	0	1	1	1	2	12
Confiscation	2	0	1	1	1	1	1	2	3	2	14
Acquitted	0	3	0	0	3	1	1	0	0	0	8
Unknown	0	0	1	1	2	0	1	0	1	2	8
Total	9	6	5	9	12	6	6	8	15	16	92