

The Role of Courts in Environmental Law – a Nordic Comparative Study

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1 Introduction²

The legal situation in any given country cannot be determined solely on the basis of the provisions of enacted legislation (law in books). Instead, it is a joint product of the initiatives of the legislator, the interpretation and application of the law by courts and the practice of administrative authorities or other relevant actors (law in action). Hence, provisions which appear similar if examined word by word can be and are often practiced in very different ways. Courts make the final determination of what law is in individual cases. The courts may, however, have different roles when carrying out this task. On the one hand, differences may arise from the legal system, for example how the functions of the court or the scope of review is defined. On the other hand, differences may be caused by the legal culture, i.e. how the role of the court is perceived both by the legal society and the court itself. For illustrative purposes, we can imagine a continuum from a common law type of court that “enacts” law to a court that only interferes when it is confronted with apparent injustice.

The role of courts in environmental law may also differ significantly from one country to another depending upon the structure of environmental legislation, i.e. whether specialized (environmental) courts or quasi-judicial bodies have been established as an integral element of environmental legislation or whether environmental matters are handled by general courts or administrative courts. In order to

provide a meaningful analysis of the role of courts in environmental law it is thus necessary to explain the functions of different types of courts as part of the environmental law system of each country addressed in this study.

Environmental law does not merely concern disputes between individual parties. Recent environmental law has for the most part been enacted and re-enacted in the interest of the society as a whole, because activities regulated by environmental legislation have far reaching impact both in space and time. Many activities that may lead to environmental harm require some kind of permit granted by an administrative authority. Courts are generally the final resort for the affected members of the public to challenge such permits. Therefore, it is important whether there is effective access to court and how the courts decide environmental disputes.

The general aim of this article is to compare the role of courts in environmental law in four Nordic countries (Denmark, Finland, Norway and Sweden). The Nordic countries are frequently considered to be in the same legal family and regarded fairly similar due to their historical and sociopolitical similarities.³ However, when we look more closely at environmental law in these countries, they turn out to be a heterogeneous group. Two of the most significant differences concern the court systems and the relationship between administrative decision-making, administrative appeal and court review. These differences are the result of

² This comparative study was initiated in 2006 as part of the activities of the Nordic Environmental Law Network (www.neln.life.ku.dk) funded by NordForsk. Helle Tegner Anker is professor at the Institute of Food and Resource Economics, Faculty of Life Sciences, University of Copenhagen (hta@life.ku.dk). Ole Kristian Fauchald is professor at the Department for Public and International Law, University of Oslo (o.k.fauchald@jus.uio.no). Annika Nilsson is associate professor at the Faculty of Law, Lund University (annika.nilsson@jur.lu.se). Leila Suvantola is researcher at the University of Joensuu (leila.suvantola@joensuu.fi). Her part of this study was carried out as a part of her co-ordination activities of the Environment and Law Research Programme financed by the Academy of Finland.

³ Some authors refer to a Scandinavian law or legal tradition, e.g. Lester Bernhard Orfield: *The Growth of Scandinavian law*, University of Pennsylvania Press, 1953. See also Jacob W.F. Sundberg: *Civil Law, Common Law and the Scandinavians*, in *Scandinavian Studies in Law*, Vol. 13, 1969 pp. 179-205. It has been stated that Scandinavian law of today is generally characterised by its pragmatic, practical and realistic conception of law, see Ellen Margrethe Basse & Jørgen Dalberg-Larsen: *The Danish Legal System*, in H.T. Anker, B.E. Olsen & A. Rønne: *Legal systems and wind energy*, DJØF Publishing and Kluwer Law International, 2008 pp. 61-75 at p. 66. The Scandinavian legal tradition extends to Finland which was part of and thus shared the legislation of Sweden until 1815. In the 20th century Sweden has been closely followed by the Finnish legislator.

differences in the historical development of administrative law, but also of differences in environmental law in the examined countries.

This study consists of six parts. First, we paint a general picture of the framework within which the courts in each country do their task of interpreting law in individual cases (section 2). This section sheds light on the formal differences and similarities between the countries as to the court system, the courts' scope of review and access to courts. Secondly, we explain the methodology used in our study, the material we used and the challenges we faced (section 3). Thereafter, we move to the outcome of the study. We compare the countries as to what kind of cases are brought to the court (section 4), who brings the cases to the court (section 5), and what is the outcome of the case (section 6). Finally, we suggest some conclusions concerning the role of courts in the four Nordic countries (section 7).

2 The framework

2.1 The concept of courts

Examination of the court systems relevant to environmental law indicates that courts have different functions in each country – in fact the role of courts may differ between different sectors of environmental law within one country. These differences may be explained by historical traditions in environmental legislation, e.g. the role of courts in water law, or by different circumstances and changes in the legal system as a whole.

As our focus is on courts, it should be clarified what we refer to by a court. A court is generally defined as a body 'with the authority to adjudicate legal disputes and dispense civil, criminal, or administrative justice in accordance with rules of law.'⁴ The composition of courts may vary significantly. Apart from the judges educated in law, courts may include other members

such as laymen, technical or scientific experts etc. Courts should be independent bodies according to the general principle of distribution of powers, i.e. they should be independent from the legislative and the executive powers. Courts are thus distinguished from quasi-judicial appeal bodies that organisationally are part of the executive. In reality, however, the functions of more specialised – and perhaps expert based – courts may resemble those of administrative appeal bodies. Thus, the court concept in itself is problematic when the role of courts in environmental law is compared in different countries. For example, until the end of the 1990's Finland and Sweden had water courts which had both administrative and court functions. In 1999, the Swedish environmental courts replaced the water courts *and* the Licencing Board (Koncessionsnämnden för miljöskydd). The Licencing Board was categorised as an authority while the environmental courts are part of the Swedish general court system.⁵ The composition and functions of the environmental courts have a certain resemblance with the previous Licencing Board. The Swedish environmental courts operate as first instance authorities in some cases and as appellate bodies in other cases.⁶

⁵ One overall aim of the Environmental Code was to amalgamate the Swedish environmental legislation into one code. The Government considered it important to coordinate the trial system and the procedure as far as possible. The chosen system, regional environmental courts replacing the former water courts and linked to the general court system, was considered to best correspond to the demands on such an integrated trial body. A strong argument for this solution seems to be that it was considered more efficient to use an existing structure, with some existing competence in the field, rather than to establish a new body. However, there were many differing opinions and suggestions concerning what would be the optimal structure of and procedure for the trial system. See e.g. Governmental Bill 1997/98:45 chapter 4.22.

⁶ A governmental investigation (SOU 2009:10) proposes amendments that once again will radically change the environmental procedural structure in Sweden. It proposes that the environmental courts shall be complemented by five licencing boards (Koncessionsnämnder för miljöfarlig verksamhet och vattenverksamhet, i.e. licencing boards for environmentally hazardous activity and water activity). The licencing boards are proposed to take over the first instance trial from both the county administrative boards and the environmental courts. The environmental courts will,

⁴ David Walker: *Oxford Companion to Law*, Oxford University Press, 1980, p. 301.

While Sweden opted for an environment court construction, Denmark on the other hand has developed quasi-judicial appeal boards that organisationally are part of the Ministry for the Environment, but operate on an independent basis.⁷ The appeal boards

exclusively of general courts, namely of district courts, courts of appeal and the Supreme Court. There are no courts or independent administrative appeal bodies specialised in environmental law.⁹ In Norway any decision made by an authority can be appealed to a

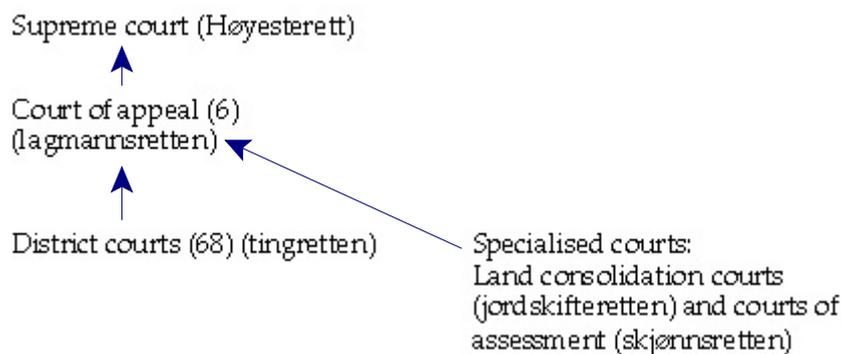


Figure 1. Court system in Norway.

are not categorised as courts for the purpose of this study although there appears to be some resemblance between The Environmental Protection Board of Appeal and the Swedish environmental courts.

Another important element regarding court systems in general is the different traditions as regards civil courts and administrative courts.⁸ Norway and Denmark have not established administrative courts. In general, they rely on the ordinary courts to deal with all types of disputes. Sweden and Finland, on the other hand, have long traditions for distinguishing between general courts and administrative courts.

2.2 The court system in context in the examined countries

Norway has a “simple” court system consisting almost

according to the proposal, function as appeal bodies. They are still to be categorised as general courts even though the appeals will concern decisions of administrative bodies.

⁷ On the background and history of the Nature Protection Appeal Board (dating back to the Nature Conservation Board established in 1917) and the Environmental Protection Board of Appeal (established by the 1973 Environmental Protection Act), see Ellen Margrethe Basse: Ankenævn på miljø- og naturområdet, in L. Ramhøj (ed.): Festskrift til Orla Friis Jensen. Fast ejendoms ret – synsvinkler og synspunkter, Jurist- og Økonomforbundets Forlag, 2007, pp. 209-229.

⁸ This issue is further explored immediately below.

superior administrative body, which may or may not be specialised in environmental law.

Denmark has a rather similar simple system of general courts – the district courts, the two High Courts (Court of Appeal) and the Supreme Court.¹⁰

The general courts in both Norway and Denmark review all types of cases: administrative, civil and criminal cases that are brought to the courts. There are no specialised courts within environmental law in Denmark. Thus, the courts have not been assigned more specific functions in environmental law than in other areas of law. However, Denmark has established specialised quasi-judicial administrative appeal boards in environmental matters ensuring a form of independent review of administrative decisions. Cases can be brought to the courts as well and there is no general obligation to exhaust administrative appeal before bringing a case to court. The administrative appeal

⁹ Two specialised courts, “jordskifteretten”, which deals with ownership to and delimitation of immovable property, and “skjønnretten”, which deals with valuation of property, make decisions that frequently have significant environmental implications.

¹⁰ With effect from 1 January 2007 a court reform has significantly reduced the number of district courts from 82 to 24 and has extended the role of the district courts as first instance to all cases with a few exceptions.

boards – Naturklagenævnet and Miljøklagenævnet¹¹ – operate independently from the Ministry for the

In both countries environmental law has a close relationship with administrative law, as environmental

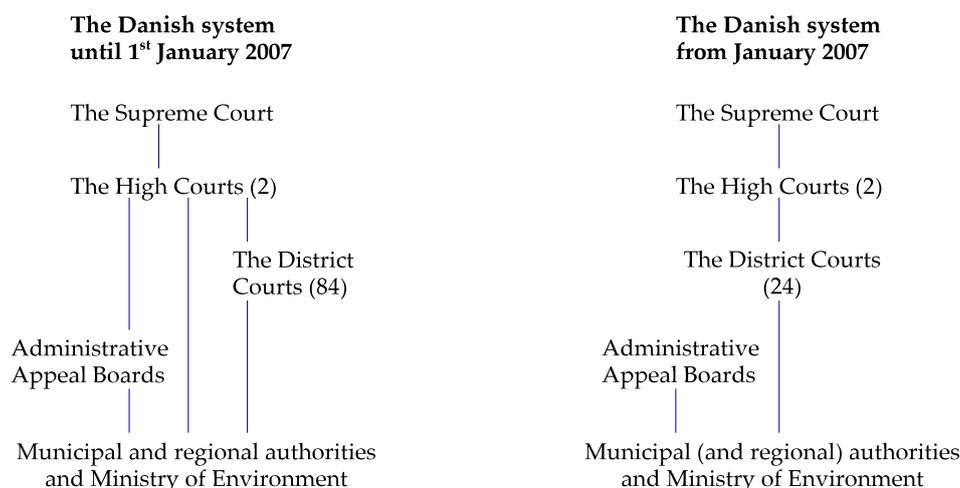


Figure 2. Court system in Denmark.

Environment, of which they are organisationally a part.

Finland and Sweden share a history of a dual court system which dates back to 17th century, consisting of general courts and administrative courts. The first administrative court was the chamber court in Sweden (which Finland was part of). Since the middle of the 17th century, the county administrative boards (länsstyrelse) acted as general administrative bodies. Their duties began to cover administrative adjudication, and deciding appeals began to be regarded as separate from their administrative duties.¹²

¹¹ The composition of the appeal boards differs. While the Nature Protection Appeal Board in addition to the chairman has two Supreme Court judges and seven politicians as members, the Environmental Protection Appeal Board in addition to the chairman has two or four members with scientific or technical expertise appointed by the Ministry for the Environment and business organisations respectively. A political agreement has been made to merge the two appeal boards in 2010.

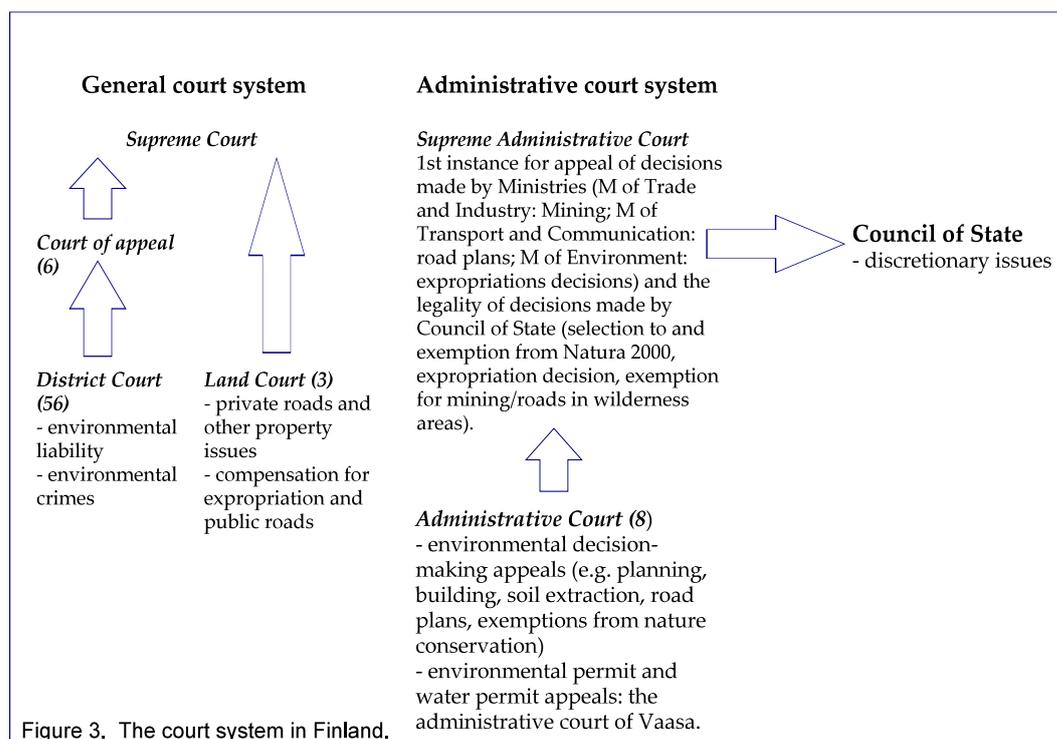
¹² The Swedish (and thus, Finnish) chamber court was established 1799, as the previous administrative body ("kammarrevisionen") was transformed to an administrative court. The Supreme Administrative Court was not, however, established until 1909. See e.g. Rune Lavin: *Domstol och administrativ myndighet*, Norstedts förlag 1972, pp. 24 and 26, and Finlands Regerings Proposition 114/1998 Lagförslag till Riksdagen med förslag till lag om förvaltningsdomstolarna <http://www.eduskunta.fi/tripho->

law is, to a large extent, applied in administrative decision-making. Both countries have had a water court system dealing with permits involving use of public authority and with compensation as a private law issue. In Finland water courts were amalgamated to the administrative courts at the end of the 1990's when the administrative court system was totally revised.¹³ In Sweden they were amalgamated to the environmental courts in 1999. While in Finland all administrative decisions are appealed to administrative courts, in Sweden the system is slightly more diverse (see below).

In Finland, any planning or building decision, resource use permit, environmental permit, decision to establish a conservation area or to give an exemption from conservation provisions is made in an administrative decision-making process and any appeal is lodged in an administrative court. One of the administrative courts – the Administrative Court of Vaasa (the former Water Court of Appeal) – specialises in environmental permit appeals. Decisions of the administrative courts can be appealed to the Supreme Administrative Court. Decisions concerning the

<http://www.eduskunta.fi/tripho-me/bin/akxkaanna.sh?{KEY}=HE+114/1998+Yleisperus+telut+vp&{KIELI}=R>.

¹³ The Finnish Administrative Courts Act (430/1999).



environment made by Ministries – e.g. mining permits or road plans – are appealed directly to the Supreme Administrative Court.

In Sweden, planning, building and some infrastructure issues are decided in the first instance by administrative authorities. Many of those cases are appealed to administrative courts. Detailed plans and some other decisions are appealed to the Government. Most decisions concerning environmental permits, decisions concerning nature conservation and environmental supervision are decided by administrative authorities in first instance. Such decisions are appealed to the environmental courts for review. The environmental courts further grant environmental permits as the first instance bodies in some permit trials (large or otherwise complicated operations), and judge cases of a civil law character.¹⁴ The specialised environmental

¹⁴ The Government decides on the permissibility of some large infrastructure projects and industrial operations, where after the case is returned to the authority or environmental court for issuing the detailed permit. The Government's decisions may not be subject for an ordinary appeal,

courts and the Environmental Court of Appeal are established as part of the general court system. The courts are provided with environmental and technical expertise. As indicated above, recent proposals suggest to alter the Swedish court structure in environmental cases.¹⁵

Against this background, it can be observed that there is a degree of judicial or quasi-judicial specialisation in the review of administrative decisions concerning environmental issues in Denmark, Finland and Sweden. The main differences between these countries concern whether this specialisation is part of the administrative system (Denmark), the administrative

but private parties concerned – and, today, NGOs - may apply for legal review on formal grounds.

¹⁵ See footnote 5 above. Further, it has been proposed that building issues and local plans etc., that currently are appealed to administrative courts, are appealed to Environmental Courts in the future. See the Governments Bill 2006/07:98 and SOU 2007:111, SOU 2008:31 and SOU 2009:10.

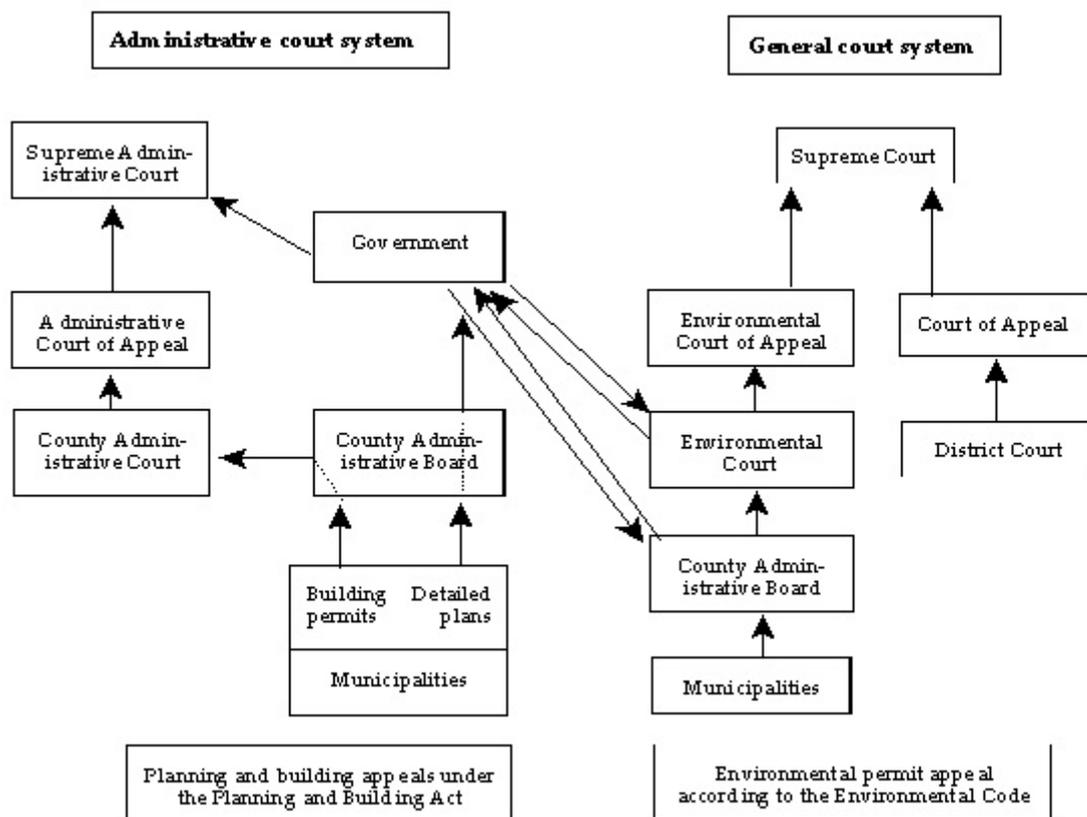


Figure 4. Court system in Sweden.

court system (Finland) or the general *and* administrative court system (Sweden). Here, however, the focus is on the role of courts – administrative courts or general courts – in environmental law. Hence, the Danish administrative appeal system is not examined even though it does resemble the specialised courts in Finland and Sweden. Looking strictly at the courts, the examined countries are divided into two groups: in Finland and Sweden there is some degree of specialisation in administrative and environmental cases, while in Denmark and Norway this is not the case.

All of the four countries share a fairly similar ombudsman institution. Its significance in environmental law varies. In Norway it provides a significant avenue to justice supplementing the courts.¹⁶ In Denmark relatively few environmental

cases are decided by the Ombudsman – one explanation being good access to the administrative appeal boards.¹⁷ In Finland and Sweden its role remains minor, e.g. due to good access to administrative court procedures.¹⁸

Jurist- og Økonomforbundets Forlag, 2008, pp. 199-219. The Act concerning the Storting's Ombudsman for Public Administration (June 27, 1962) requires, however, that cases only be raised by persons who have been subject to injustice by the public administration, see § 6.

¹⁷ See further Ellen Margrethe Basse: Ombudsmandens rolle inden for miljøområdet, in Peter Garde, Steen Rønsholdt, Jens Olsen, Arne Fliflet og Jens Møller (eds.), "Festskrift til Hans Gammeltoft-Hansen", Jurist- og Økonomforbundets Forlag, 2004, pp. 17-26.

¹⁸ The Swedish Justitieombudsman, JO, receives a rather large number of complaints on environmental issues but often refrains from acting, for different reasons. The functioning of the Swedish JO with regard to environmental issues is discussed in A. Nilsson: *Rättssäkerhet och miljöhänsyn*, Santérus förlag 2002.

¹⁶ For a discussion of the need for an environmental ombud, see Ole Kristian Fauchald: Er det behov for et miljøombud? In Helle Tegner Anker and Birgitte Egelund Olsen (eds.) "Miljørettslige emner. Festskrift til Ellen Margrethe Basse",

2.3 Court procedures and scope of review

The differences in the court systems referred to above are also reflected in the court procedures applicable in environmental cases in the examined countries. Generally, the civil courts apply the so-called adversarial procedure addressing the claims brought forward by the parties to the case only. In Norway, the Dispute Act gives courts responsibility for conducting independent assessment of the law to be applied and for ensuring relevant clarification of facts.¹⁹ In Denmark the courts apply the adversarial procedure addressing the claims brought forward by the parties.²⁰ In the administrative court in Sweden and Finland the court procedure is more inquisitorial. The administrative courts examine the cases on basis of the grounds of the appeal. Where an appeal merely states that the decision is illegal, the courts will examine relevant bases for determining its legality. Both in Finland and Sweden, the administrative and environmental courts have the duty to ensure that the claims presented by the parties in the case are properly investigated, and, if necessary, the appellant is requested to supplement the appeal. The court can also ask for statements from governmental authorities, scientific institutions or other relevant institutions to clarify the facts as well as carry out inspections on site.²¹ This principle is applied also in the environmental courts in Sweden although they are organisationally part of the general court system.²²

The adversarial procedure of courts may cause difficulties for private parties in particular and some-

times also for NGOs. Environmental court cases are often characterised by a relatively high degree of complexity. The claimant must be familiar with relevant law to be able to formulate the claim successfully and sufficiently precisely from the start. Moreover, if the defendant is a company or an authority, the resources to litigate may be significantly in its favour. On the other hand, the more inquisitorial procedure of administrative courts may facilitate appeals by private parties and NGOs, since the courts have a stronger duty to ensure that the case is properly investigated.

There may also be differences between the countries regarding the scope of review by the courts of administrative decisions. The courts either have a duty to carry out a full review of the case or there are *de jure* or *de facto* limitations of their scope of review. In principle, the courts in Norway and Denmark perform a full review of the case, including discretionary issues.²³ For Norway this does not apply to issues that, according to the law, are to be decided on the basis of the discretion of the authorities. In practice the Norwegian and Danish courts frequently exercise self-restraint on discretionary issues in environmental cases, often limiting the review to procedural errors or abuse of power. In Norway, this seems in particular to be the case for courts of first instance and appeals courts. In a few Danish court cases it appears that the courts do examine more discretionary matters, however with certain limitations.²⁴

In Finland, decisions made within the municipal autonomy can be appealed – and thus be examined by the courts – only on the basis of procedural errors, abuse of power and the legality of the decision.²⁵ In the field of environmental law such decisions are building permits and approval of detailed plans.²⁶ In other

¹⁹ See in particular Chapter 11 of the Norwegian Dispute Act (2005 no. 90).

²⁰ Consolidated Act no. 1069/2008 on Court Procedures (Retsplejeloven) Chapter 32 (§ 338).

²¹ The Finnish Administrative Judicial Procedure Act (586/1996) 33 §, the Swedish Administrative Procedure Act (1971:291) 8 § and 23-25 §§,

²² The procedure in the environmental court is regulated in the Code of Procedure and, with regard to specific issues in the environmental courts, the Environmental Code chapter 22. The court's competence and obligations with regard to sufficient investigation is prescribed for in 2 §, 11-13 §§ and 18 §.

²³ The Danish Constitution in § 63 provides for a full review of administrative decisions.

²⁴ See *infra* section 6.

²⁵ The Finnish Municipal Act (365/1995) § 90.

²⁶ The Finnish Planning and Building Act (1132/1999) § 88.

administrative law cases, the Finnish Supreme Administrative Court has to transfer the appeal to the Council of State – the highest administrative body – to the extent it concerns discretion. This restriction has, however, become in practice almost outdated since the Supreme Administrative Court's interpretation of legality is broad and it has not transferred any appeal cases since 1999. In Sweden the courts perform a full review, except in a few types of cases where restrictions are established by law. The environmental courts review discretionary issues as well as issues of legality. The Supreme Administrative Court's legal review of Governmental decisions is limited; the court may annul the decision if it apparently is not in accordance with the law. As in Finland, the Court's interpretation of what is in accordance with the law may be rather broad.

The court's attitude towards a restricted or a full review may be partly dependent on their knowledge of the substantive issues. It is fair to assume that the court's composition in this respect is based on which types of cases they are expected to decide and which type of review they are expected to perform. The expertise reflected in the composition of the courts as well as the experience gathered by the courts may thus be important factors for their scope of review in practice.

2.4 Access to courts

The importance of access to courts has been emphasised in Article 9 of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998), to which all four countries are parties. Article 9(3) does not limit the possibility of states to define the criteria for access to justice, but Article 9(4) and (5) emphasise the aspect of effective access to courts.

Access to courts is a key issue in environmental law because of the impact of environmental activities on third persons and the society as a whole.²⁷ In this

²⁷ Jonas Ebbesson (ed.): *Access to Justice in Environmental Matters in the EU*, Kluwer Law International, 2002. A recent

regard the general concept of *locus standi* is insufficient to ensure effective access to courts as it focuses on a legal or economic link between an individual and the claim in question. The *de jure* access to courts in Denmark, Finland and Norway is generally not limited to those being individually and significantly affected, although there is no unlimited *actio popularis* in any of the countries. However, on closer examination some variation can be identified among the courts.

In Norway, access to courts is provided to persons that present a legal claim and that demonstrate a genuine need for having the claim determined against the defendant. The rules concerning access to courts are similar to those applicable to access to administrative complaints.²⁸ In addition, there is a requirement concerning the importance of the claim that has to be met to gain access to appeal courts and to the Supreme Court.²⁹ In Denmark, access to courts is not stipulated by law, contrary to what is the case for access to administrative appeal. Danish courts, however, generally grant *locus standi* to the same group of persons or organisations that have access to administrative appeal.³⁰ In Finland, the environmental cases are almost exclusively decided in the administrative courts and the *locus standi* in general courts requiring a legal interest is significant only in environmental damage cases. Almost all environmental legislation since 1990's contains appeal right provisions which vary but in general grant right of appeal to those who may be affected and to local or regional environmental

study of access to justice in EU Member States can be found in Milieu Ltd.: *Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters*, 2007. There are separate country studies for Denmark, Finland and Sweden. These studies are available at <http://ec.europa.eu/environment/aarhus/pdf/studies.zip>.

²⁸ Compare § 1-3 of the Norwegian Dispute Act (2005 no. 90) and § 28 of the Public Administration Act (February 10, 1967).

²⁹ See in particular §§ 29-13 and 30-4 of the Norwegian Dispute Act (2005 no. 90).

³⁰ E.M. Basse & H.T. Anker: Denmark, in J. Ebbesson (ed): *Access to Justice in Environmental Matters in the EU*, Kluwer Law International, 2002, p. 157f.

NGO's.³¹ Where the applicable legislation does not contain specific appeal right provisions, the Administrative Judicial Procedure Act provisions are applied. In these cases the right of appeal is significantly narrower and extends only to the addressees of decision and to persons whose rights, interests or duties are *directly* affected by the decision.³² This concerns private roads, mining, expropriation, wilderness areas, off-road traffic, water traffic, forestry and resource use in the sea areas.³³ In Sweden, access to courts is generally limited to parties that are concerned by the decision.³⁴ However, the interpretation of the concept "concerned" is left to the courts and varies depending on the applicable legislation. Parties concerned may raise an administrative case and appeal; to an administrative body or to a court, whichever is the right instance of appeal in that type of case. Permission to appeal is required to higher instances. (Private parties also have access to the environmental courts for a civil law suit for injunction or compensation.) To some extent contrary to Denmark and Norway, administrative authorities may appeal an administrative decision to a court in both Finland and Sweden, provided that the authority is considered "concerned" or the relevant legislation provides for a right of appeal. In Denmark an authority must demonstrate a significant interest in order to challenge an administrative decision by e.g. the administrative appeal boards.

The right of NGOs access to courts varies significantly between the countries. In Norway, the only requirements are that the issue at stake falls within the scope of the general objective of the NGO and that the NGO has not solely been established in order to gain

access to court.³⁵ In Denmark the right of NGO access to courts is not stipulated by law as opposed to access to administrative appeal.³⁶ Standing of NGOs has in general been accepted by the courts.³⁷ In Finland, the local or regional NGOs have right of appeal in the majority of environmental administrative decisions, excluding the majority of exemptions granted by the Nature Conservation Act. National NGOs only have the right to appeal decisions of national scope such as nature conservation plans. In Sweden, NGOs' right to appeal is restricted. They may appeal decisions concerning permits, municipal plans that are considered to have significant impact on the environment and supervisory decisions concerning contaminated land. The right to appeal is, furthermore, restricted with regard to the NGO's purpose (environmental protection or nature conservation), its size (2000 members) and its duration (shall have existed for 3 years).³⁸ The latter serves the same purpose as the Norwegian restriction on *ad hoc* NGOs.

As a conclusion, *de jure* access to courts is fairly broad in the four countries.³⁹ Yet, *de facto* barriers may significantly limit effective access to courts. Here we concentrate on costs of litigation. The potential

³¹ See e.g. Environmental Protection Act (86/2000) § 97 and Nature Conservation Act (1096/1996) § 61.

³² The Finnish Administrative Judicial Procedure Act § 6.

³³ See footnote 62 for interpretation of this provision in relation to access to justice in Finland.

³⁴ The Administrative Act (1986:223) 22 §, The Administrative Procedure Act (1971:291) 33 §, the Environmental Code (1998:808) chapter 16, 12 §.

³⁵ One landmark case concerns the establishment of a military practice field, raised by an NGO established with the purpose of working against the establishment of the field, see Rt. 2003 p. 833. Another famous case concerns the access to courts of a Swedish NGO, see Rt. 1992 p. 1618.

³⁶ In general local and national NGOs that safeguard nature, environment or recreational interests have access to appeal to the administrative appeal boards as specified in e.g. the Planning Act (consolidated act 1027/2008), the Nature Protection Act (consolidated act 1042/2008) and the Environmental Protection Act (consolidated act 1757/2006). Certain variations may appear though.

³⁷ See e.g. U1994.780Ø regarding the standing of Greenpeace in a case concerning the construction of the Oresund Bridge.

³⁸ However, the environmental process in Sweden is rather open; everyone, including organisations that do not fulfil the criteria, have access to the files of the case and may add any information they find relevant, also if they do not have the right to appeal.

³⁹ However, the Swedish criteria for NGOs' access to justice have been criticized, see Milieu Ltd.: Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters, 2007, at 10-11.

litigation costs appear to be significantly higher in Norway than in the other countries. The basic costs incurred by a claimant bringing a case before a district court in Norway is NOK 4,300 (480 €)⁴⁰ increasing with NOK 2,580 (290 €) per day of court proceedings for each day beyond the first day.⁴¹ Appeals to the courts of appeal cost NOK 20,640 (2,300 €), 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 (5,400 €), provided that the case does not need more than one day in court at each level. In addition, the losing party will normally have to pay the costs of the opponent.⁴² In Denmark court fees are fairly low starting from 500 DKK (67 €) and with a maximum fee at 75,000 DKK (10,000 €). Private appellants may be ordered to pay the litigation costs of an authority if they lose the case. In Finland the appeal fee in administrative courts is 82 € and in the Supreme Administrative Court 204 €. Costs of litigation are covered by each party. The state is ordered to pay the litigation costs of the other party if there is a clear legal mistake in the appealed decision. The costs ordered are significantly lower than those accepted in general courts. The private appellant may have to pay the litigation costs of an authority only if the appeal is manifestly groundless. In Sweden, the cost for an application to the environmental court is, at present, 450 SKR (41 €). Appeals are free of charge. Litigation costs, except in civil suits, are predictable also if they may be considerable, as each party pay their own costs.⁴³ The option of civil suit for preventive measures

is seldom used, probably since the losing party pays the opponent's costs.

3 Methodology of the comparative study

The original intention of this study was to make a comparison of case law from the four countries. Yet, a comparison was complicated by the differences in the court systems and structure of environmental legislation introduced above. Moreover, the nature and availability of the research material differed significantly from country to country. Thus the results are not fully comparable. Regardless of this, we believe that the findings of the study are significant for our understanding of how the design of court systems interact with the functions courts have in environmental cases.

The study is performed as a quantitative analysis on the basis of the character of the environmental cases brought before courts, and a more detailed qualitative analysis in relation to all or a sample of cases to answer the following key questions:

- 1) what kind of environmental cases are brought to courts;
- 2) who bring environmental cases to courts; and
- 3) what is the outcome of the cases.

In Norway the study concentrated on published cases⁴⁴ initiated to protect the environment, whereas a broader range of cases has been included in the Danish, Finnish and Swedish studies. The main purpose of limiting the selection of cases examined in Norway was to examine to what extent courts have served and in the future can be expected to serve to promote environmental interests. Moreover, it was

⁴⁰ In order to ensure comparability, fees in € are calculated at the exchange rates on June 4, 2009.

⁴¹ See the Act concerning Court Fees (1982 no. 86). After six days, the fee increases to NOK 3.440 (€ 380) per day for each additional day.

⁴² See § 20-2 of the Norwegian Dispute Act (2005 no. 90).

⁴³ However, the cost to *have* a permit may be considerable, as supervision partly is paid by operations that have permits. The supervisory fee varies between 0–250,000 SKR (22,900 €) depending on the size of the enterprise.

⁴⁴ However, one unpublished case concerning hunting of wolves was included. It was decided by Oslo namsrett on 16 February 2001 and received significant attention both domestically and internationally. The cases examined include all cases published by "Lovdata", see www.lovdata.no. For the 10-year period 1996-2005, the total numbers of published cases are: Supreme Court – 2,697 civil cases and 2,643 penal cases, appeal courts – 17,015 civil cases and 9,629 penal cases, and district courts – 1,456 civil cases and 1,475 penal cases.

feasible to use this criterion for identifying relevant cases rather than to use the broader criterion “environmental cases”. The cases selected include those in which the individual interests coincided with the public environmental interest. All selected cases were examined in detail. In total there were 51 civil cases and 57 criminal cases during a ten-year-period of 1996–2005. In Denmark the study covered civil cases related to environmental issues presented to the High Courts and the Supreme Court in the period from 1996–2005.⁴⁵ There were in total 260 published environmental cases of which 45 were identified as being initiated to protect the environment. The cases initiated to protect the environment were primarily cases challenging administrative decisions invoked with reference to the interference with environmental interests, e.g. pollution, noise, landscape, nature or recreational interests.

In the study of Finland and Sweden another approach was adopted. First and foremost the number of cases inhibited the detailed study of all environmental cases. In these countries it was not feasible to choose only the cases which were invoked for the purpose of environmental protection.

In Finland the Statistics Finland collects and publishes statistics on the numbers of court cases and their outcome, and the Supreme Administrative Court publishes annual reports. The total number of environmental cases identified in these sources during the period 2001–2005 were annually 3000–4000 in administrative courts (in total 13567 cases) of which about 800 cases were annually appealed to the Supreme Administrative Court (in total 4464 cases). Environmental cases formed one fifth of all cases decided by the Supreme Administrative Court annually. In addition there were annually over 300 property law cases decided in the Land Courts, almost 40 environmental crime cases in the district courts, and one or two environmental liability cases in the district courts. As 97 percent of the environmental cases were decided

in administrative courts, the study concentrated on them. The vast number of cases decided by the administrative courts as well as by the Supreme Administrative Court allowed a quantitative examination of the cases but made a more detailed examination of for example claimant and outcome of the cases impracticable. In order to select a sample it was decided to examine in detail only those environmental cases decided by the Supreme Administrative Court that it has classified as precedents, a total of 143 cases. These are decisions which the Court regards to have relevance for the application of law in identical or similar cases or are otherwise of public interest.⁴⁶

In Sweden during the period 2001–2005 the Supreme Court decided 15 precedents in environmental cases.⁴⁷ The Environmental Court of Appeal decided 2184 cases of which 667 were judgements.⁴⁸ The environmental courts decided 8038 cases and the property courts decided 5792 cases during the period. In this study the 15 precedents from the Supreme Court and the 667 judgements from the Environmental Court of Appeal are included. The cases include a broad range of cases such as permit applications, administrative review, nature conservation and claims for compensation. The Supreme Administrative Court decided 20 precedents and 189 other cases,⁴⁹ mainly concerning planning issues, infrastructure and nature conservation, which are all included in the study. It was not possible to extract statistics from the lower courts for this study.

⁴⁵ The survey was based on the cases published in *Miljøretlige Afgørelser og Domme (MAD)*, see www.thomson.dk.

⁴⁶ These cases are available at the website of official legal documents (www.finlex.fi).

⁴⁷ The cases published in the Yearbook of the Supreme Court.

⁴⁸ The other cases were decisions and protocols, and applications for permit to appeal.

⁴⁹ Reports respectively note cases in the Yearbook from the Supreme Administrative Court.

4 What kind of cases are brought to the courts?

4.1 Introduction

The types or categories of environmental cases may differ from country to country. The cases have generally been categorised according to the *legal theme*, the *environmental theme* and the *activity* in question. Legal theme relates to the type of claim, e.g. review of administrative decisions, compensation claims, criminal cases etc. Environmental theme relates to environmental interest at stake in the case, e.g. a clean environment, nature protection, recreation, cultural heritage etc. The activity in question categorises the human activity that was addressed in the case, e.g. emissions, building and construction, planning, infrastructure etc. A certain variation as to themes and activities occur between the four countries due to differences in the national environmental law, in activities leading to environmental problems, and in the environment as such.

4.2 Comparison regarding legal theme

In Norway the 108 cases identified during 1996-2005 initiated with a view to promote environmental interests represented only an estimated 0.4 percent of the civil cases brought to court and 0.7 percent of the criminal cases brought to court. It is thus of interest that environmental issues were far more frequent among criminal cases than among civil cases in Norway. It appears that criminal law plays a surprisingly significant role for environmental protection when compared to civil cases in Norway. In the Norwegian civil cases the main legal claim was monetary compensation. Few cases aimed at injunction (stopping environmentally harmful activities) or at challenging the validity of administrative decisions. In only one case did the claimant argue that public authorities had failed to comply with a duty to act to protect the environment.

In Denmark the number of environmental court cases (260) identified during 1996-2005 appears relatively low, in particular the number of cases (45)

initiated to protect the environment. This may, however, be explained by the fact that Denmark has a quasi-judicial administrative appeal system with independent administrative appeal boards providing a cheap and fairly expedient opportunity for review of administrative decisions. Nevertheless, court review of administrative decisions – primarily decisions by the administrative appeal boards – accounted for 67 percent of the civil court cases. The second largest group of civil court cases (22 percent) related to questions of monetary compensation or liability for pollution costs etc.

Denmark differs significantly from Norway, despite the similarities of their court systems. While most Norwegian cases to promote environmental interests concerned claims for compensation, the clear majority of the corresponding Danish cases challenged administrative decisions giving a permit or adopting a plan for new development. This is a noteworthy difference since there is extensive use of the administrative appeal boards in Denmark. These findings seem to confirm an impression that there exist strong disincentives to bringing environmental administrative decisions to court in Norway.

The legal theme in almost all cases in Finland concerns review of administrative decisions. These cases do in general not concern monetary compensation, since such compensation cannot be awarded in administrative review, except in water law cases (8 percent of all administrative cases).⁵⁰ Monetary compensation was the main issue in only six environmental liability cases initiated during the examination period.⁵¹

The detailed examination of a sample of cases from the Finnish Supreme Administrative Court showed

⁵⁰ Water Act (264/1961) chapter 11 concerns monetary compensation for damage, harm or lost interest caused by decision made on the basis of the act or by an activity which such a decision is required for,

⁵¹ Monetary compensation could also have been raised in relation to the 153 criminal cases decided in first instance because in Finland damages are awarded in criminal procedure if the damage is caused by committing a crime.

that one third of the 143 examined cases concerned decision-making competence, procedure and availability of information (in total 34 percent of the cases). It is particularly interesting that in nine of these cases the Court regarded the information available to the decision maker to have been insufficient and the cases were returned to the original permit authority for renewed and better informed decision-making.⁵² This indicates that the Court stresses the duty of the decision-maker to be well informed of the alternatives and the impacts of their decisions concerning the environment.

In Sweden, as in Denmark, a clear majority of the cases in the Supreme Administrative Court as well as in the Environmental Court of Appeal challenged decisions concerning a permit or a plan for development, either by the applicant or by a counterpart that was not satisfied with the outcome. Another large group of cases in the Environmental Court of Appeal concerned review of administrative supervisory decisions. Claims for monetary compensation represented less than 10 % of the cases in the Environmental Court of Appeal. The few cases in the Supreme Court concerned, *inter alia*, legal standing, environmental crime, and interpretation and application of environmental law. A large number of cases in all the courts concerned fees, administrative fines and formal issues, which were not very interesting from the environmental perspective.

Norway was the only country for which criminal cases were studied. Hence, our study does not provide a basis for comparing the role of courts in such cases. Our most important finding regarding the legal theme in environmental cases was the significant focus on administrative decisions in all countries except

Norway.

4.3 Comparison regarding environmental theme

Among the Norwegian civil cases initiated to benefit the environment, more than half were related to neighbour issues. These cases concerned competing interests between neighbours, and those bringing the cases to court were parties suffering from environmental degradation. Another 18 percent of the cases concerned private rights to natural resources, and were initiated by parties whose access to such resources would suffer due to environmental degradation. Only in 29 percent of the cases were the issues brought before the courts related to more general environmental concerns, such as issues concerning pollution and clean environment (21 percent) or nature protection and conservation (8 percent). Hence, it can be observed that anthropocentric interests were dominant in these cases. These findings indicate that private parties had few incentives or possibilities 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.

A similar tendency can be seen in Denmark where overall neighbour issues accounts for 19 percent of all cases. However, a clean environment (air, water and soil) has nevertheless been registered as the most dominating environmental interest in 32 percent and nature protection in 26 percent of all cases. It must be recalled that the Danish figures are not limited to cases initiated to protect the environment, thus including appeals of administrative decisions restricting emission or pollution.

The environmental interest at stake in the cases in Finland was examined only in the sample of precedents of the Supreme Administrative Court due to the overwhelming number of cases. In the same case there may have been several environmental interests at stake or there may have been several appellants with

⁵² Either the environmental values had not been examined or environmental impacts had not been sufficiently assessed. E.g. in case KHO 2002:78, the nesting sites of a flying squirrel (Habitat Directive Annex IV a species) were not sufficiently examined in the planning process and thus the nature conservation interests could not have been taken properly into account as stipulated by the Planning and Building Act. In decision KHO 2005:88 an alternative site for the proposed pig farm with less adverse environmental impacts had not been assessed.

Table 1. Environmental interest at stake in the studied countries. The figures from Norway and Denmark cover a ten-year period of 1996-2005, whereas the figures from Finland and Sweden cover a five-year period from 2001-2005.

Env. interest	Norway	Denmark	Finland	Sweden
Clean env't (air, water, soil)	11 (21,5 %)	83 (32 %)	14 (7 %)	404 (59 %)
Nature conservation	4 (8 %)	67 (26 %)	27 (14 %)	54 (8 %) ¹ 9 (4 %) ²
Overall neighbour issues	27 (53 %)	50 (19 %)	7 (4 %)	incl. in other themes
Recreation and public access to nature	-	12 (5 %)	15 (8 %)	incl. in nature conservation
Built and cultural heritage	-	10 (4%)	9 (5 %)	183 (87 %) ²
Private rights	9 (17,5 %)	6 (2 %)	53 (28 %)	61 (9 %) ¹
Other	-	32 (12 %)	64 (34 %)	163 (24 %) ¹ 17 (8 %) ²
Total	51	260	191	682¹ 209²

¹ Supreme Court and Environmental Court of Appeal

² Supreme Administrative Court

conflicting interests. In the majority of cases the main interest was private rights (28 percent) understood to cover also the requested right to carry out the proposed activity. Of the environmental interests nature conservation was most often presented (in 14 percent of the cases). Clean environment and recreation interests were both brought up in about one case out of ten. Built and cultural heritage was the concern in 5 percent of the cases. It has to be pointed out that neighbourhood issues were raised in only 4 percent of the cases. This is a significant difference when compared to Norway and Denmark.

The most dominating environmental interest in the Swedish Supreme Court and the Environmental Court of Appeal was a clean environment, as this was at focus in the cases concerning permits and review of administrative supervision.⁵³ Nature conservation was the main theme in only 8 percent of the cases, but nature protection in general is an interest included in the "clean environment" interest, as this is understood by Swedish law. The main part of the cases concerning

⁵³ However, the Supreme Court grants leave to appeal on grounds of legal issues rather than on environmental themes.

private rights does not have a genuine environmental theme as they concern compensation for flooded sewer systems, duty to pay for garbage collection etc. Decisions on environmental sanction fees and judgments concerning administrative fines (one third of the cases in the “other” group below) are aiming at different environmental interests depending on which type of issue they address. The overall dominating environmental theme in the Swedish Supreme Administrative Court is the built environment, in a broad sense, as this is the main issue related to environment for which the court has jurisdiction. Most kinds of environmental themes may occur in relation

to this overall theme, such as air quality, noise, protection of threatened species or neighbour issues. The Supreme Administrative Court also has decided some cases concerning nature conservation during the studied period. Such cases were transferred to the environmental courts in 1999, by the Environmental Code.

Against this background, it can be asked whether the differences in focus on environmental theme in the countries can be attributed to differences in the natural environment, differences in legislation, differences in the role of courts, or simply to differences in the categorisation in the country studies. The fact that

Table 2. Environmental cases in the studied countries listed according to activity in question. The figures from Norway and Denmark cover a ten-year period of 1996-2005, whereas the figures from Finland and Sweden cover a five-year period from 2001-2005.

Activity	Norway	Denmark	Finland Administrative Courts	Sweden
Planning	n.a.	8% (20)	45% (6079)	51% (106) ²
Building	10% (5)	32% (82)	17% (2373)	28% (60) ²
Emissions and pollution permits	39% (20)	32% (84)	11% (1446)	45% (305) ¹
Water	n.a.	n.a.	10% (1320)	17% (116) ¹ (also included in permits above)
Waste	n.a.	n.a.	6% (836)	-
Use or resources (soil, mining, forestry)	16% (8)	2% (6)	4% (610)	2% (17) ¹ (also included in permits above)
Supervision (env. protection and water)	n.a.	n.a.	2% (227)	15% (105) ¹
Nature conservation management	n.a.	n.a.	1% (181)	8% (52) ¹ 5% (10) ²
Infrastructure	35% (18)	6% (15)	<1% (31)	8% (16) ²
Other	n.a.	20% (53)	3% (464)	32% (220) ¹ 8% (17) ²
Total	51	260	13567	682¹ 209²

¹ Supreme Court and Environmental Court of Appeal

Denmark has the highest share of cases on nature conservation may be explained by the fact that Denmark is most densely populated and agriculturally developed of the four examined countries and accordingly has a more dispersed system of protected

one concerned forestry. It is also remarkable that few of the numerous planning and building cases brought before Norwegian courts were initiated for environmental purposes.

In Denmark emissions and pollution are also the

Table 3. The appellant or claimant in court.

Claimant / Appellant	Norway all courts only cases initiated to protect the environment	Denmark first instance only cases initiated to protect the environment	Denmark first instance - all cases	Finland Supreme Admin Court precedents in first instance	Sweden Environmental Court of Appeal
Private addressees (excl. companies)	82 % (41)	16 % (7)	44 % (115)	27 % (38)	14 % (82)
Other private parties		53 % (24)	17 % (44)	24 % (60)	27 % (160)
Company	10 % (5)	2% (1)	17 % (44)	14 % (20)	35 % (210)
Authority	2 % (1)	2 % (1)	7 % (18)	15 % (21)	22 % (133)
Environmental NGO	8 % (4)	16 % (7)	3 % (7)	15 % (22)	2 % (14)
Municipality	n.a.	n.a.	n.a.	8 % (12)	-
Other	-	11 % (5)	12 % (31)	4 % (6)	-

areas that are likely to be affected by many different activities. In addition, it can be assumed that activities which will be harmful to the fairly small nature areas will be more controversial in Denmark than in the other countries.

4.4 Comparison regarding activity

The two activities that were brought before Norwegian courts most frequently were pollution-related activities, including efforts to clean up existing pollution, prevent pollution and prevent noise, and construction of infrastructure. Taking into account the importance of natural resources in the Norwegian economy, it is remarkable that few cases concerned extraction of such resources. None of the cases concerned extraction of marine resources, and only

dominating activities in environmental court cases. However, building and construction activities are almost just as frequent in court cases. This may reflect the fact that Denmark is fairly densely populated and that building activities are subject to several restrictions and often raise controversies.

The activity was examined only in relation to the review of administrative decisions in the Finnish cases. The cases were classified into 11 groups according to the activity affecting the environment: planning, building, pollution permits, water, waste, use of natural resources, supervision, nature conservation management, infrastructure and other activities. In administrative courts almost half of the cases concerned planning (45 percent). The second largest group was building cases (17 percent), environmental

permits (11 percent) and water issues (10 percent). The number of cases in the “other activity” group, which included cases concerning waste, use of resources, nature conservation management and infrastructure, was fairly small.

In comparison with courts in Norway and Denmark, the Swedish Environmental Court of Appeal has a rather different function. As the court is the appeal instance for environmental permits of different types; industry, water operations, gravel pits etc, it is natural that a large part of the activities in the court cases is about permit issues. For the same reason, supervisory issues are rather frequent. Most of the cases related to the environment in the Swedish Supreme Administrative Court concern municipal planning, infrastructure, actions for building and constructing and, in a few cases, nature conservation management.

In all countries, there was little focus in courts on activities related to use of resources or activities concerning nature conservation or management. One significant difference between the countries is the focus on planning and building in the courts of Denmark, Finland and Sweden as compared to the courts of Norway. The high costs of bringing cases to courts in Norway may be a barrier to bringing cases as the potential benefits of bringing planning and building decisions to courts in environmental interest would not outweigh these costs.

5 Who brings environmental cases to the courts?

A relatively high percentage of cases in all examined countries are brought to courts by private parties to whom the original decision is addressed (hereinafter “private addressees”), including companies, typically challenging administrative or court decisions that refuse or restrict a permit to conduct environmentally harmful activities. The latter types of cases were not included in the Norwegian study, however, which focused only on court cases initiated to protect the environment.

In Norway, 51 civil cases were initiated to protect the environment during the period 1996–2005. Private parties accounted for the great majority of cases, namely 82 percent, while companies accounted for 10 percent, public authorities for two percent and NGOs for eight percent of these cases.

In Denmark there were 260 civil cases related to environmental issues in the High Courts and the Supreme Court during the period 1996–2005. Private addressees, including companies, accounted for 61 percent of all environmental cases in first instance, whereas other private parties accounted for 17 percent, authorities for seven percent and NGOs for three percent. When court cases initiated to protect the environment are examined the picture is somewhat different. Of the 45 cases initiated to protect the environment private addressees and companies accounted for 18 percent, other private parties for 53 percent and NGOs for 16 percent of the court cases in first instance. The claims by private addressees were primarily related to compensation claims regarding noise or other interference with private property. The authorities only accounted for one percent of the cases initiated to protect the environment.

In Finland the analysis of a limited number of Supreme Administrative Court cases (143) showed that private addressees brought forward 27 percent of the cases in the first instance, other private parties 24 percent, companies 14 percent, authorities and NGOs 15 percent and municipalities eight percent. In the first instance there were two or more appellants in one fifth of the cases.

The Swedish study is focusing on who *appeals* the case to one of the three examined courts. The rates differ between the courts as they handle different types of issues. In the Environmental Court of Appeal, companies accounted for 35 percent of the appeals, neighbours for 27 percent, other private parties for 14 percent, NGOs for only 2 percent, and authorities for 22 percent. In the Supreme Administrative Court, private parties accounted for 27 percent of the appeals and neighbours for 63 percent. The cases before the

Supreme Court are too few to discuss in terms of percentage.

The samples differ: for Denmark all cases are included, while for Finland the sample is the appellant in the first instance of 143 cases of the Supreme Administrative Court and for Sweden it is the appellant in the Environmental Court of Appeal.⁵⁴ In the Finnish figures the sum of percentages is higher than 100 as in the same case there may have been two or more appellants.⁵⁵

Even though the Finnish and Swedish studies did not extract cases initiated *to protect* the environment, such information can, however, be extrapolated from the numbers of appellants. It can be assumed that most cases initiated by authorities, NGOs and neighbours aim to protect the environment (or the neighbourhood). Private claimants may indirectly act to protect the environment although through monetary compensation. On the other hand, private addressees of public decisions, including companies, typically initiate the appeal in an exploitative interest i.e. to challenge a permit refusal or permit conditions. For example, in Finland companies brought forward only five out of 20 relevant cases in another role than addressee.

Even though the *de jure* access to courts in the examined countries is broad, the number of cases actually brought to the courts by NGOs is low. Moreover, Norway seems to stand out from the rest of the countries due to the low number of environmental cases brought by private parties in general and NGOs in particular. A rather obvious conclusion is that in countries where the court trial is part of the

ordinary administrative appeals procedure (Finland and Sweden) there are many environmental cases, while in countries where the application to court can be regarded as an additional procedure the cases are fewer.

The low number of environmental cases initiated by private parties in Norway is an indicator that the potential costs of bringing cases to courts in Norway has been a significant disincentive to environmental litigation. In the Danish court system the number of cases raised by NGOs is fairly limited – only seven cases from 1996–2005 have been identified – whereas 24 cases appears to have been initiated by other private parties concerned in order to protect the environment. Even though court fees are fairly low, the risk of having to pay the costs of the opponent(s) may be an obstacle to bringing cases to the courts also in Denmark. Moreover, the possibility of bringing the case before an independent complaint mechanism may be regarded by many as a sufficient option for review in Denmark. However, the similarities between Norway and Denmark despite the differences in costs of initiating cases may indicate that the nature of environmental legislation in these countries, in particular the extent to which environmental legislation establishes clear rights and duties that can be invoked by private parties, may be a significant factor for the low number of cases.

The considerable number of environmental cases in Finland is a clear indication that access to justice in environmental law matters: low costs, limited risk of liability for opponents' costs and relatively broad right of appeal. Also in Sweden low costs, the inquisitorial procedure which may provide the weaker part with guidance on what would be needed for a successful judgement, and a relatively broad right of appeal, at least in many types of cases, lower the threshold to bring environmental cases to courts.

6 What is the outcome of court cases?

In the Danish and Finnish studies a particular focus

⁵⁴ It should thus be noted that the Swedish cases do not indicate who initiated the case before the courts.

⁵⁵ In Finland the municipalities have a dual role in environmental issues. They act as an authority in pollution permit and soil extraction issues. Here, however, the municipality is not the decision-maker, but represents the interest of the municipal self-government and the interest of the municipality as a whole. Also the Swedish municipality has a similar dual role where the Municipal Council is the "government" of the municipality and one or several municipal boards act as executing authorities

has been directed towards the review of administrative decisions and the extent to which the cases lead to changes in administrative decisions. The Swedish study includes review of administrative decisions but also, in accordance with the court structure, review of cases decided in the environmental courts as a permit authority (see section 2.2). Due to a high number of court cases it has not been possible to make a more in-depth qualitative analysis of the Swedish cases. In Norway judicial review of administrative decisions in cases initiated to protect environmental interests is limited to only 5 cases during the ten year period examined.

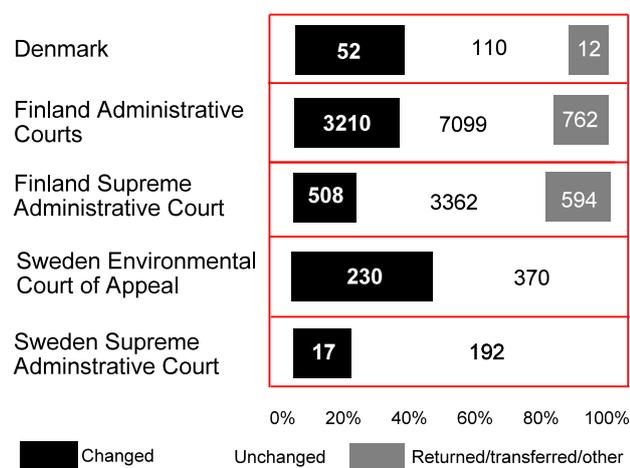


Figure 5, Outcome of court cases.

It should be emphasised that “change” of the administrative decision by the court is a continuum from totally altered to minor changes with little significance. For Norway, only one out of a totality of five cases was successful in overturning the administrative decision, namely a case concerning a permit to hunt wolves.⁵⁶ It appears that the rate of change in administrative decisions by the courts in Denmark, Finland and Sweden in essence depends upon the type of court and the nature of cases addressed in the respective courts. There is a relatively high rate of change of administrative decisions in all three countries; 30-40 percent in the lower courts. For Finland and Sweden, the rates of successful appeals in the

supreme courts are in general low. In Denmark where the general courts review administrative decisions the rate of change is 30 percent. In Finland the rate of change was rather high (35 percent) in administrative courts, but fairly low (12 percent) in the Supreme Administrative Court. In Finland, the lower change rate in the final court instance could be interpreted to indicate good quality of the lower court decisions.⁵⁷ The relatively high rate of change in the lower court may be due to the fact that the period examined in this study coincided with major revisions in the environmental protection and planning and building legislation both of which came into effect during the first months of 2000. The decision makers appear to have had difficulties in adopting correct interpretation of the new pieces of law, in particular that of the Environmental Protection Act.⁵⁸ In Sweden the rate of change in the Environmental Court of Appeal (to the benefit of the appellant) was about 38 percent (judgements except fines and fees). The Swedish Supreme Court changed 8 out of 15 cases – but the number of cases is too small to be the basis for any conclusion. The Swedish Supreme Administrative Court changed only about 8 percent of the cases. The low rate of change in the Supreme Administrative Court is to a large extent depending on the court’s self-restraint to alter municipal decisions and the restricted legal review of Governmental decisions.

The rate of change of the administrative decisions does not, however, indicate the extent to which the courts act in favour of the environment or contrary to it. Despite the difficulty of assessing this, an attempt has been made to indicate whether the courts in reviewing administrative decisions favour environmental interests. In Norway the courts were unlikely to conclude in favour of environmental interests in the few cases regarding review of administrative deci-

⁵⁶ See RG 2000 at 1125.

⁵⁷ Conclusion made in relation to Finland by Leila Suvantola in Tuomioistuinnratkaisut ympäristöasioissa 2001–2005, Ympäristöoikeuden ja -politiikan vuosikirja 2007, University of Joensuu, Joensuu 2007, 363–376, 369.

⁵⁸ See *ibid.*, 368.

sions. These cases are too few to draw conclusions concerning the general attitude of Norwegian courts in such 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 findings that a clear majority of environmental cases brought to courts were decided in favour of environmental interests (53 percent in favour and 39 percent to the disadvantage of environmental interests). Taken together, these findings can thus be regarded as supporting the thesis that has been presented by some theorists that Norwegian courts tend to decide in favour of public authorities.⁵⁹

In Denmark the courts do not appear to act in favour of the environment to any great extent as only 25% were categorised as in favour of the environment. In addition, most of the rulings categorised as in favour of the environment reflects the acceptance of compensation claims related to noise from roads etc. Thus, the rulings may express a safeguarding of individual economic interests rather than broader environmental interests as such. In some of the cases categorised as negative to the environment the courts have applied a very narrow interpretation regarding the legal basis for clean-up orders for (incidental) pollution in order to safeguard the legal certainty of the polluter.⁶⁰

In Finland the Supreme Administrative Court can be described as environmentally friendly. Only seven percent of the cases appeared to be contrary to environmental interests, while 65 percent could be considered to further environmental objectives.

In the Swedish study of the Environmental Court of Appeal, the result with regard to environmental protection has been analysed based on the outcome for different appellants. Companies aiming at performing some kind of operation or action, probably negative for the environment, were successful in 50

percent of their appeals. Authorities, acting to protect the environment, were successful in 55 percent of their cases. However, neighbours and NGOs protecting the environment were successful in only 19 and 7 percent of their appeals, respectively. In the study of the Supreme Administrative Court, authorities' decisions may promote environmental *or* exploitation interests. Nevertheless, the outcome of these cases supports the above hypothesis, as authorities were successful in 67 percent of their appeals, companies in 25 percent, but private parties and neighbours were successful only in 4 percent of their cases. Municipal plans, aiming at exploitation, were changed in 2 percent of the cases, infrastructure decisions aiming at exploitation were never changed. The low rate of changes of municipal plans is not surprising considering the strong principle of municipal planning monopoly that is applied in Sweden.

The success rate of NGOs has been analysed in all four countries. Generally, there were a limited number of NGO cases in all four countries. In Norway, four cases initiated by NGOs were identified during 1996-2005. Of these cases, only one case was successful.⁶¹ In Denmark seven cases raised by NGOs have been identified in the period from 1996-2005. Three of the seven cases dealt with the question of right of access to court (which was granted) and injunctive relief (which was not granted). Of the four cases dealing with more substantive issues two cases can be regarded as partly successful.⁶² In Finland, NGOs brought 17 cases of the 143 cases to the administrative court. They appealed to the Supreme Administrative Court in 12 of those cases. It appears that having been successful in the first instance they did not need to appeal to the second instance. In Supreme Administra-

⁶¹ See Rt. 2003 p. 833, Rt. 2003 p. 1630 and RG 2000 p. 1125. One of the cases has not been published. It was decided by Oslo namsrett on 16 February 2001. RG 2000 p. 1125, which concerned hunting of wolves, was the only successful case.

⁶² MAD2001.539V (lacking assessment according to the Habitats Directive art. 6(3) re. the release of beavers close to a Natura 2000 site) and MAD2000.83H (lacking EIA of a road project).

⁵⁹ See Asbjørn Kjønstad, *Er Høyesterett statsvennlig*, in *Lov og Rett*, 1999, at 97-122 with further references.

⁶⁰ E.g. MAD2001.1377Ø and MAD1990.130V.

tive Court NGOs were successful in 7 cases. Three of the cases concerned access to justice⁶³ and four concerned substantive interpretation.⁶⁴

In Sweden, NGOs appealed two cases to the Supreme Court and 15 cases to the Environmental Court of Appeal during the period. NGOs had no access to the Supreme Administrative Court. The NGOs were successful only in one case in the Supreme Court and in one case in the Environmental Court of Appeal.

In sum, it seems that NGOs in general do not make much use of the courts in order to promote environmental interests in the Nordic countries. Given that they only bring cases to court in a limited number of cases, it must be assumed that those cases that are brought to courts represent important cases from the perspective of NGOs. Against this background, it is particularly noteworthy that NGOs in general are unsuccessful, perhaps with the exception of Finland, when bringing cases to the courts.

7 Conclusions

Although the Nordic countries share a number of similarities in environmental legislation, there appear

⁶³ In KHO 2003:2 a building permit had been granted without the required exemption decision by another authority. The right to appeal was granted according to the standing provisions concerning the exemption decision. In KHO 2004:76 a right of appeal exemptions from hunting restrictions of non-protected species was granted to local bird conservation organizations. In KHO 2005:49 the appellant was a sports fishing organisation and it was decided to have right to appeal a decision establishing a conservation area

⁶⁴ In KHO 2003:38 and KHO 2003:99 the Supreme Administrative Court gave interpretation of the conservation provisions of the Habitat Directive Annex IV concerning flying squirrel (*Pteromys volans*) threatened by forestry activities and motorway construction. In KHO 2005:42 the Court interpreted the duty to assess impacts of proposed mining operations in the vicinity of a Natura 2000 site and came to the conclusion that the Ministry did not have sufficient information to form an opinion on whether an assessment should or should not be carried out. Finally in KHO 2005:57 the Supreme Administrative Court made restrictions to a permit for taking of ground water which could impact a Natura 2000 site.

to be some major differences as regards the role of courts in environmental law.⁶⁵ These differences stem primarily from differences in the court systems and in the functions of the courts. In particular, the existence of administrative courts in Finland and Sweden as opposed to the general court systems in Norway and Denmark stands out as a clear difference. In addition, the establishment of more specialised environmental courts in Sweden is a significant difference. Thus, a comparison of court cases has turned out to be quite complex. Nevertheless, the findings in the study are significant for the understanding of how the role of the courts interacts with the design of court systems and the nature of environmental legislation.

Norway has a "simple" system of general courts. The findings of the Norwegian study indicate that the Norwegian environmental legislation and court system do not favour the use of courts to promote environmental interests in civil cases. Courts were used more actively to contribute to environmental protection through criminal cases. In general, the Norwegian courts seem to serve to reinforce, rather than act as a correction to, the approach of public authorities to cases concerning environmental protection. This conclusion is supported by the fact that environmental NGOs bring few cases to courts and lose most of the cases brought forward. It also seems to be confirmed by the fact that the outcome in cases concerning judicial review of administrative decisions was in favour of the public authorities in four of five cases.

The Danish court system is very similar to the Norwegian system of general courts. However, in Denmark the existence of specialised quasi-judicial appeal bodies within environmental law may also affect the role of the courts in environmental law. Despite the fairly expedient and specialised administrative appeal system, a relatively large share of the environmental cases brought to the courts is reviews of administrative (appeal) decisions. Thus, the Danish courts to some extent function as a correction to public

⁶⁵ Iceland has not been included in this study.

authorities, although the courts in the majority of cases appear to act in favour of public authorities. This confirms the general reluctance or self-restraint that limits the scope of review by the courts primarily to legal issues. Furthermore, it appears that the Danish courts in general tend to favour legal certainty and more traditional individual legal interests. Yet, there are examples of successful environmental court cases and the Danish courts in general accept a broad right of access to courts, including that of NGOs. These examples primarily relate to procedural guarantees.

In Finland it appears that courts play a very significant role in environmental law. Courts are relied on to achieve environmental justice in relation to environmental decision-making. Yet, the courts play a minor role in monetary compensation for environmental damage. This is largely due to the control and permit mechanisms which are central to environmental law in Finland. The need to rely on courts for monetary compensations is therefore limited to environmental damages caused by accidents or illegal activities. The significance of the courts in delivering environmental justice is confirmed by the finding that the Supreme Administrative Court appears environmentally friendly in its decision-making.

In Sweden, courts play an important role for environmental law. This would largely be due to the procedural structure, with courts as ordinary and rather easily accessible instances in the process, but probably also to the cheap and inquisitorial process (except in civil law suits) which makes it possible for “ordinary people” to go to court. The environmental courts’ specialization and composition vouch for a high degree of competence with regard to environmental issues. But it is not possible from this study to draw any clear conclusions concerning the significance of the courts in delivering environmental justice. For such conclusions, there would be need for a more in depth study regarding how courts interpret environmental law than has been undertaken here. A finding worth mentioning even if it is outside the scope of this study and thus has not been presented above is that

who is appealing seems to be of significance for the outcome of the case; appeals from authorities and from companies applying for a permit seem to be considerably more successful than appeals from private parties and NGOs.

Common to the Nordic countries is that the environmental law is dominated by a public law perspective. Moreover, the environmental legislation in these countries vests public authorities with a broad margin of appreciation. However, the extent of margin of appreciation seems to vary somewhat between the countries, and this may be one reason for differences between the countries regarding the role of courts. Moreover, general differences between the administrative law systems of the countries mean that independent review of decisions by administrative authorities vary significantly between the countries. Norway can be placed at one extreme, with almost no independent review of administrative decisions by courts, while the Swedish and Finnish systems provide for a review by different types of courts. In Sweden the environmental courts and in Finland the administrative courts handle a large amount of environmental cases and generally perform a full review, whereas Norwegian and Danish courts decide rather few environmental cases and generally exercise self-restraint in their review of administrative decisions.

Another explanation of the differences in the nature and number of court cases in Norway/Denmark on the one hand and Finland/Sweden on the other may be the differences between the adversarial and inquisitorial systems of proceedings used in the respective courts. But even though Norway and Denmark have similar courts, there seems to be more court cases in Denmark than in Norway – in particular court cases that challenge administrative decisions. It could be argued that the relatively easy access to the quasi-judicial appeal system in Denmark may in fact lead to more court cases challenging administrative decisions as the first step has already been taken in the administrative appeal process.

Norway stands out as the country in which the

economic risk of bringing environmental cases to courts is the most significant. At the same time, Norway seems to be the country that has the lowest formal threshold for bringing cases to courts. Against this background, it is of interest to observe that few cases are brought to court in Norway compared to the other Nordic countries, a fact that indicates that the economic risk is very significant when private parties consider whether to bring cases to court. The considerable number of environmental cases in Finland is a clear indication that effective access to justice in environmental law matters: low costs, limited risk of liability for opponents' costs and relatively broad right of appeal. Also in Sweden, low costs, the inquisitorial procedure which may provide the weaker part with guidance on what would be needed for a successful judgement, and a relatively broad right of appeal, at least in many types of cases, lower the threshold for bringing environmental cases to courts. An added cause for the rather considerable number of environmental cases in court in Sweden may be the integrated procedural structure; a part who is dissatisfied with an administrative decision – whether it is a decision on a permit application or a supervisory decision – does not have to take a separate initiative to take the case to court.

In general it appears that courts have not been assigned any important role as part of the environmental law systems in Norway and Denmark. This coincides with the traditions to rely on general courts without establishing administrative courts or more specialized courts. Finland and Sweden have a tradition of administrative courts dating back two hundred years – and to some extent also a tradition of specialized courts within specific areas, e.g. the environmental courts of Sweden. Courts may, thus, have been afforded a more important role as part of the environmental law systems in Finland and Sweden. Administrative courts play a significant role in both countries characterized by a rather extensive review of administrative decisions. In addition, Sweden has established specialized environmental courts dealing with in particular environmental permit cases. Denmark has chosen another approach establishing more specialized administrative appeal boards. Although having a quasi-judicial element, the boards cannot be characterized as courts. Yet, the function of e.g. the Danish Environmental Protection Board of Appeal may to a certain extent resemble the function of a Swedish environmental court, i.e. to ensure a qualified, expedient and accessible review of administrative decisions. Norway, on the contrary, has relied

Table 4. Qualitative analysis of the outcome of the environmental court cases in the studied countries in their examined period.

	Norway	Denmark	Finland	Sweden
	Civil cases	Cases that change administrative decisions	Supreme Administrative Court precedents	Environmental Court of Appeal
Pro environmental interests	53% (27)	25 % (13)	60 % (86)	34 %
Neutral/Uncertain	8 % (4)	35 % (18)	29 % (41)	-
Contra environmental interests	39 % (20)	40 % (21)	11 % (16)	43 %

¹ The numbers show an approximation of the percentage of success by appellants that act pro or contra the environment.

on appeals to superior administrative authorities with the general courts as a last resort.

Yet, it has to be noted, that environmental law is by nature flexible. Environmental legislation – at least in the Nordic countries – offers broad discretion to public authorities and few rights to private parties or clearly defined duties for public authorities – perhaps with the exception of an increasing number of procedural guarantees, e.g. in the form of impact assessment requirements etc. Hence, it may be difficult for private parties to identify a satisfactory legal basis for bringing an environmental claim in countries where the courts have not been assigned an important role in the environmental law system. Specialized courts and administrative courts as well as quasi-judicial appeal boards may, however, provide better options than the general courts, in particular for review of administra

tive decisions. A system that relies on the general courts may expect a certain focus on individual legal interests, including legal certainty, as well as a reluctance or self-restraint in dealing with more discretionary matters.

Thus, when drawing up environmental law systems it is important to consider and discuss what role courts should play – or what functions they should have – as part of the environmental law system and consequently which court structure that would be most appropriate to meet those demands. The functions of courts and quasi-judicial appeal bodies should be an important component of any legal system. In addition, effective access to courts, not only focusing on formal access, appears to be a key element that should be addressed in any system that intends to safeguard environmental interests alongside other interests.