

# THE ROLE OF COURTS IN ENVIRONMENTAL LAW — NORDIC PERSPECTIVES

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## Introduction

This article presents results of a comparative study of the role of courts in environmental law in Denmark, Finland, Norway and Sweden – focusing on the Swedish and Danish experiences.<sup>1</sup> The purpose of the comparative study was to examine the extent to which differences in court systems may affect the application and enforcement of environmental law, focusing on general courts versus more specialized courts or administrative tribunals. Environmental law in Nordic countries is dominated by a public law perspective and the study focuses on judicial review of administrative decisions of environmental issues.

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1. The article is based on Helle T. Anker, Ole K. Fauchald, Annika Nilsson & Leila Suvantola, *The role of courts in environmental law – a Nordic comparative study*, NORDIC ENVTL. L.J. 9-33 (June 2009), available at [www.nordiskmiljoratt.se](http://www.nordiskmiljoratt.se). Iceland is also a Nordic country, but was not included in the comparative study. The study was carried out as a primarily quantitative study of environmental court cases during a ten year period (1996-2005) in Norway and Denmark and a five-year period (2001-2005) in Finland and Sweden.

Environmental protection is mainly the responsibility of public authorities in accordance with public law. Civil law and civil law disputes play a minor role in this field. In addition, environmental law is defined broadly to include not only pollution control, but also water management, nature conservation, land use and planning.<sup>2</sup> Thus, environmental legislation in the Nordic countries vests public authorities with wide responsibilities and broad discretionary powers in environmental matters.

Despite similarities in environmental law there are major differences in the Nordic court systems and their role in environmental law. The most significant differences concern the structure of the court systems, and the relationship between administrative decision-making, administrative appeal and court review. Denmark, Finland, and Sweden all have judicial or quasi-judicial specialization in review of administrative decisions concerning environmental issues. The main differences lie in whether the specialization is part of the administrative system (Denmark), the administrative court system (Finland) or both the general and administrative court systems (Sweden).<sup>3</sup> In Norway, which has no specialized judicial or quasi-judicial review of environmental issues, environmental cases may be appealed to either the general administrative authorities or to the general courts.<sup>4</sup>

Systematic comparison of the different court systems is difficult because of differences in the ways in which these systems are organized. Nevertheless, the study findings enhance understanding of the design and interaction of court and administrative systems and how they are affected by the nature of environmental legislation.

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2. For a general introduction to the Scandinavian legal tradition, see LESTER BERNHARD ORFIELD, *THE GROWTH OF SCANDINAVIAN LAW* (The Lawbook Exchange 2002) (1953) and Jacob W.F. Sundberg, *Civil law, Common Law and the Scandinavians*, 13 *SCANDINAVIAN STUD. L.* 179 (1969). In a Danish context see Ellen Margrethe Basse & Jørgen Dalberg-Larsen, *The Danish Legal System*, in *LEGAL SYSTEMS AND WIND ENERGY: A COMPARATIVE PERSPECTIVE* 61 (Helle Tegner Anker et al. eds., Kluwer Law International 2008). In a Swedish context see Stig Strömholm, *General Features of Swedish Law*, in *THE SWEDISH LEGAL SYSTEM 1* (Nordstedts Juridik 2010) and Annika Nilsson, *Environmental Law*, in *THE SWEDISH LEGAL SYSTEM* 467 (Nordstedts Juridik 2010).

3. See Anker et al., *supra* note 1, at 15.

4. For further details on the Norwegian system, see Ole Kristian Fauchald, *Environmental Justice in Courts – a Case Study from Norway*, *NORDIC ENVTL. L.J.* 49-68 (2010:1).

## The Nordic Court Systems

Looking at the Nordic court systems two key distinctions appear. The first relates to the distinction between general courts and administrative courts. The second relates to the distinction between general courts and specialized courts or tribunals.

Norway and Denmark have general courts only, while Finland and Sweden have dual court systems, consisting of general courts and administrative courts. The general courts in Denmark and Norway review all types of cases – administrative, civil and criminal – while the general courts in Finland and Sweden normally review civil and criminal cases. The explanation for this difference is largely to be found in each nation's legal history.

Sweden first established an administrative court (Chamber Court) in 1799 when Finland was still a part of Sweden.<sup>5</sup> Denmark and Norway, which was part of the Danish Kingdom from 1523 to 1814, never established administrative courts although the 1849 Danish Constitution explicitly provides a legal basis for doing so.

More differences among the Nordic countries emerge when the uses of general or specialized courts or tribunals in environmental law are examined.<sup>6</sup> Norway and Denmark do not have specialized environmental courts. However, Denmark has two specialized administrative environmental appeals tribunals – the Nature Protection Board of Appeal and the Environmental Protection Board of Appeal,<sup>7</sup> which will be merged into one Nature and Environmental Protection Board of Appeal in January 2011.<sup>8</sup> The merged appeal tribunal will, however, have two separate configurations: one composed of a legally-trained chair, two Supreme Court judges and political appointees; the other including one legally-trained chair and two to four appointed experts. Decisions of Denmark's administrative environmental appeals tribunals can be appealed to the general courts. Norway's administrative environmental decisions are appealed to a superior administrative authority or to the general

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5. Rune Lavin, *Domstol och administrativ myndighet* [Courts and Administrative Authorities] 24, 26 (Norstedts förlag 1972).

6. For further details, see Anker et al., *supra* note 1.

7. On the background and history of the appeal boards, see Ellen Margrethe Basse, *Ankenævn på miljø- og naturområdet*, in: *FAST EJENDOMS RET – SYNVSINKLER OG SYNSPUNKTER 209* (Lars Ramhøj ed., Økonomforbundets Forlag 2007).

8. See Act No. 483 of May 11, 2010 (Den.) concerning the Nature Protection and Environmental Protection Appeal Board.

court.

Finland has one administrative court – the Administrative Court of Vaasa – which specializes in environmental and water permit appeals. Sweden has chosen greater specialization within its general court system. Sweden has five environmental courts and one Environmental Court of Appeal dealing with a wide range of environmental cases.<sup>9</sup> The Swedish environmental courts hear appeals from administrative decisions and also serve as a first instance body in some environmental permit trials.<sup>10</sup>

## Scope of Review and Composition of Courts

Environmental protection and environmental law in the four Nordic countries studied are to a large extent based on administrative authorities being in charge of the primary application of law, with relatively broad discretionary powers. The role of the court or tribunal in such a system depends on whether the power of the court or tribunal to review administrative decisions is expansive or limited.

Although the general courts in Norway and Denmark have the power to conduct a full review of administrative environmental decisions, they focus on evaluating legality, leaving substantial discretion to the administrative authorities.<sup>11</sup> On the other hand, the administrative courts in Finland and Sweden generally review cases in full, examining both legality and merits. Similarly, Denmark's

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9. The present system, on which the Swedish part of the comparative study is based, was introduced in 1999 together with the Environmental Code. The Environmental Courts replaced the Environmental Licensing Board (Koncessionsnämnden för miljöskydd), an administrative tribunal with, largely, the same construction as the Environmental Courts and, partly, with corresponding tasks. In spring 2010, the Swedish Government proposed an amended court system which will combine environmental and planning and building appeals. See Proposition [Prop.] 2009/10:215 Mark- och miljödomstolar [government bill] (Swed.). The amendments would not significantly affect the matters covered by the comparative study.

10. The Swedish Environmental Courts are also discussed and analyzed in Jan Darpö, *Environmental Justice through Environmental Courts? Lessons Learned from the Swedish Experiment*, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 176 (Jonas Ebbesson & Phoebe Okowa eds., Cambridge University Press 2009).

11. The Danish Constitution in Sec. 63 ascribes the courts a right to decide any question relating to the scope of the administrations authority. For further information on the review of administrative decisions in a Danish context, see Ellen Margrethe Basse & Helle T. Anker, *Denmark*, in ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN THE EU 149, 156 (Jonas Ebbesson ed., Kluwer Law International 2002) and Basse & Dalberg-Larsen, *supra* note 2, at 71.

administrative appeals tribunals generally perform a full review including discretionary matters.

We believe that differences in the scope of review between general courts on the one hand and the administrative or specialized courts or tribunals on the other can be explained by the greater expertise and experience on specific elements of administrative law and environmental law in the specialized courts and tribunals. Members of the specialized courts and tribunals in Sweden and Denmark bring scientific, political or governmental expertise to the process.

For example, the Swedish Environmental Court includes a legally-qualified district court judge, an environmental adviser and two expert members. The environmental adviser shall have technical or scientific training and experience of environmental issues. One expert member must have expertise regarding the responsibility of the Swedish Environmental Protection Agency. The other expert member has a specialty in industry or local government.<sup>12</sup>

The new Danish Nature and Environmental Protection Appeal Board will have two distinctly different boards: one drawing on the judicial-political "lay" composition of the Nature Protection Appeal Board and the other fashioned after the judicial-expert composition of the Environmental Protection Appeal Board. The "lay" board will be composed of one legally-trained chairman, two Supreme Court judges and seven members appointed by the Parliament. The "expert" board will be composed of one legally-trained chairman and two or four expert members appointed by the Minister for the Environment based on proposals from a number of business and environmental organizations. Though formally and organizationally established under the Ministry for the Environment, the tribunal operates independently from the Ministry.

## Access to the Nordic Courts

Access to courts is a key issue in environmental law.<sup>13</sup> However,

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12. The judge and the environmental adviser are employees of the court. The two experts are appointed from case to case, depending on which type of expertise is requested. (The Environmental Court has listed experts in various areas, who have accepted to take such tasks.)

13. Convention on Access to Information, Public Participation in Decision-

formal access might not be the only prerequisite to ensure proper access to courts. Accordingly, it is important to distinguish between *de jure* access as stipulated by law or precedent and *de facto* access as limited by high court fees or other obstacles.

Norway and Denmark provide relatively broad *de jure* access to the general courts, including access by individuals and by non-governmental organizations (NGOs). Access to courts is stipulated by law in Norway. In Denmark, access to the administrative appeal tribunals is stipulated by law and the courts generally grant access to the same group of persons or organizations that have access to administrative appeal.<sup>14</sup> In Finland, access to administrative courts is stipulated by law for individuals and for NGOs, whereas the general courts apply a narrower requirement of having an individual and significant legal interest. In Swedish environmental law the standing requirements vary depending on the type of interest. Regulation of environmentally hazardous activity is regarded as protecting human health and the environment, and so people affected by the potentially hazardous activity have standing. Nature conservation is seen as a task for authorities, and so, standing is limited to directly affected individuals (but including NGO's to a certain extent). The European Court of Justice has ruled that the previous Swedish regulation, stipulating that NGOs must have 2,000 members to have legal standing, was too narrow compared to Article 10a of the Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.<sup>15</sup> Consequently, the Swedish regulation has been amended so that starting September 1, 2010, NGOs with 100 members have standing.

Court fees and cost-shifting requirements can be *de facto* obstacles to access. Fees are relatively low in Denmark, Finland and Sweden, and quite high in Norway.<sup>16</sup> In addition, in Norway and in

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Making and Access to Justice in Environmental Matters, June 28, 1998, 2161 U.N.T.S. 447, 38 I.L.M. 517. See also JONAS EBBESSON ED., ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN THE EU (Jonas Ebbesson ed., Kluwer Law International 2002).

14. Basse & Anker, *supra* note 11, at 157.

15. Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun*, 1 C.M.L.R. 36 (2009). Council Directive 85/337/EEC, art. 10a, 1985 O.J. (L 175). Note that Council Directive 2003/35/EC, art. 3(7), 2003 O.J. (L 156) amended Council Directive 85/337/EEC by inserting article 10a with the purpose of implementing the obligations arising under the Aarhus Convention.

16. Anker et al., *supra* note 1, at 18-19. Examples of low court fees are 41 EUR (Swedish environment court), 82 EUR (Finnish administrative court), 67 EUR

Denmark the losing side may be required to pay litigation costs of the opponent. These *de facto* limitations seem to impact the number of environmental cases presented to the courts. In Norway, the number of environmental court cases is quite low (108 cases from 1996-2005 – a majority were criminal cases). Denmark also has a fairly low number of environmental court cases (260 cases from 1996-2005 – excluding criminal cases).<sup>17</sup>

## NGO Cases

NGOs bring relatively few environmental cases to the Nordic courts. The share of NGO cases in the superior courts ranges from 1.5% in Denmark between 1996 and 2005<sup>18</sup>, to 2% in Sweden between 2001 and 2005, 7.4% in Norway between 1996 and 2005 and 8% in Finland from 2000 to 2005. It is difficult to explain this relatively low share of NGO cases in environmental matters. Perhaps the NGOs, at least in Denmark, Sweden and Finland, rely on the relatively easy and cheap access to lower level administrative/environmental courts and administrative tribunals. Notably, the share of NGO cases brought to Denmark's administrative tribunals is estimated to be significantly higher than NGO cases brought to the courts. In Sweden, NGOs did not have standing before the Environmental Code 1999 and thereafter only a rather limited access. So, there is not yet a fully established tradition of NGOs appealing cases. Another explanation might be that NGOs have other means than the right to appeal to act in an environmental case. According to the Swedish constitution, documents received by an authority including, for example, permit applications are accessible to anybody asking for them. Moreover, the court/authority is responsible for conducting a sufficient investigation in environmental cases. As a result, NGOs have often been able to present their arguments to the court/authority without being a formal party.

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(Danish adm.. appeal boards/general courts), whereas the higher costs in Norway starts at 480 EUR with a rapid increase.

17. The Norwegian and Danish figures are not entirely comparable. Neither are the Danish figures comparable to the Swedish and Finnish figures as cases brought to the Danish administrative appeal tribunals were not included in the study.

18. This figure represents four cases between 1996 and 2005. In addition, three court cases dealing with the question of access only were recorded in the period.

Our study also analyzed the NGO success rate.<sup>19</sup> These data should be approached with caution due to the low number of cases and the differences in court structure in the four countries. We found the highest NGO success rate at 58% in Finland, followed by 50% in Denmark, 25% in Norway and only 7% in Sweden. It appears that successful cases mainly relate to procedural issues, e.g., environmental impact assessment requirements, but also to some extent to strong substantive rules as reflected, for example, in the EU Habitats Directive.<sup>20</sup>

## Outcome of Environmental Court Cases

Evaluating effectiveness of environmental court cases is difficult and requires some subjective judgement.<sup>21</sup> Moreover, it is difficult to make meaningful comparisons across countries and legal systems.

Nevertheless, we did attempt to assess whether Nordic courts' review of administrative decisions favors the environment. The main criteria for determining whether a ruling would favor the environment was to assess whether a court ruling that changed an administrative decision could to some extent be seen to further environmental interests, e.g., limiting pollution or safeguarding nature protection or landscape interests. We concluded that the general courts in Norway and Denmark did not favor the environment to any great extent. In Denmark, 25% of the rulings that change administrative decisions could be labelled favoring the environment. However, most of these "positive" rulings addressed traditional compensation claims relating to such issues as noise from roads, thus reflecting traditional safeguarding of economic interests rather than protection of broader environmental interests. In Finland,

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19. For further analysis and reference to the relevant cases see Anker et al., *supra* note 1, at 29-30.

20. Council Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora, OJ L 206 (1992). The Habitats Directive in Art. 6 establishes not only a procedural requirement to perform an impact assessment, but also a strong substantive requirement that activities which may negatively affect protected species and habitats cannot be allowed.

21. See GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009), available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).



the rulings of the Supreme Administrative Court can be described as environmentally friendly since 65% of the court's rulings seem to further environmental interests. The complex jurisdiction of Sweden's environmental courts made it impossible, within the framework of this study, to draw conclusions concerning the "environmental friendliness" of the Environmental Court of Appeal.<sup>22</sup>

## Conclusions

Although the Nordic countries share a number of similarities in environmental legislation, there are some major differences in the role of courts in applying environmental law. In Norway and Denmark the courts have not been assigned an important role in the environmental law systems. In Denmark, a specialized administrative appeal system deals with environmental matters. In Finland, the existence of administrative courts has encouraged some degree of specialization in environmental matters, while Sweden's specialized environmental courts deal specifically with environmental cases and have a broad competence.<sup>23</sup>

There is reluctance by the general courts in Norway and Denmark to fully review administrative decisions, whereas, administrative courts in the course of ordinary appeals in Finland pave the way for more in-depth review in environmental matters. In Sweden, this has expanded to the establishment of dedicated environmental courts within the general court system.

Our study revealed that the distinction between general courts and specialized courts or tribunals was more important than the distinction between general and administrative courts. However, the function of specialized courts or tribunals depends upon several things. First, it is dependent upon the system within which they are placed, e.g., within the general court systems as in Sweden or within the administrative system as in Denmark. Second, it is dependent upon the expertise of the members sitting on the courts or tribunals. Third, a relatively easy, cheap and expedient access to review is important. Although broad *de jure* access to courts may be established by law, *de facto* access may be limited, with Norway as a clear example

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22. Anker et al., *supra* note 1, at 29.

23. The proposed amendment in Proposition [Prop.] 2009/10:215 Mark- och miljödomstolar [government bill] (Swed.) aims, inter alia, at further extension of the courts competence to other areas related to the environment.

of limited *de facto* access due to high litigation fees.

The environmental outcome of court rulings may depend not only on the specific expertise of the courts, but also on the nature of environmental legislation

When designing environmental law systems it is important to consider both the nature of environmental legislation and the role that courts or tribunals should play as part of the environmental law system. Consequently, attention must be paid to what court structure would be most appropriate to meet those demands. The structure and functions of courts and quasi-judicial appeal bodies or tribunals is an important component of any legal system. In addition, effective access to courts is a key element that should be addressed in any system aimed at safeguarding environmental interests.