Institutional Aspects of the Nordic Justice Systems: Striving for Consolidation and Settlements

Anna Nylund

Abstract This chapter maps the structure of the Nordic justice systems and explores whether and why one could argue that there is a ‘Nordic’ structure. The aim is also to examine recent changes and to investigate whether these entail a cultural shift in some or all Nordic countries. It examines shifts in the intended functions of the courts; changes in the court structure; and the use of alternative dispute resolution outside courts. It argues that while the private functions of Nordic courts have been accentuated in recent decades in that courts are increasingly expected to facilitate amicable solutions, while alternative dispute resolution outside courts has also been important. It also discusses how the ideal of the generalist judge has been important in consolidating the Nordic court structure. While most of these changes are congruent across the Nordic countries, and have hence strengthened the Nordic court culture, differences among the countries regarding recourse against administrative decisions are growing. New differences among the Nordic countries have emerged and these do not follow the existing divide between the East-Nordic and the West-Nordic countries.

1 Introduction to the Nordic Justice Systems

The basic tenets of the court systems are the same across the Nordic countries: a simple three-tier, uniform court system with limited specialisation.¹ The deeply-rooted ideal is a system where almost all cases follow the same route through the court system and where specialist judges are almost non-existent.² Unified, streamlined courts ensure the coherence of the legal system and congruity across different

¹Finnish administrative courts consist of only two tiers. For an overview of the Nordic court systems, see Nylund and Sunde (2019).

²Letto-Vanamo (2021).

A. Nylund (✉)

Faculty of Law, UiT, The Arctic University of Norway, Hansine Hansens veg 18, 9037 Tromsø, Norway

e-mail: anna.nylund@uit.no

legal fields in the absence of coherent, comprehensive codes. The system minimises jurisdictional conflicts and the risk of incompatible outcomes across court systems. The structure of the court system splits the Nordic countries into two groups: the West-Nordic countries—Denmark, Iceland and Norway—have only general courts, while the East-Nordic countries—Finland and Sweden—have both general and administrative courts.

Another characteristic of Nordic justice systems is the search for pragmatic solutions. The extensive use of out-of-court dispute resolution mechanisms, in both civil and criminal cases, is a manifestation of pragmatism. The Nordic justice systems thus extend far beyond formal courts, and courts are essentially a last resort for resolving disputes. In recent decades, ADR has migrated from the fringes of the justice system into the courts, which strengthens the legal-cultural elements related to finding amicable solutions. The shift towards ADR has also occurred in the domain of criminal justice, where restorative processes and victim-offender mediation have been promoted during the past few decades.

This chapter maps the structure of the Nordic justice systems and explores whether and why one could argue that there is a ‘Nordic’ structure. The aim is also to examine recent changes and to investigate whether these entail a cultural shift in some or all Nordic countries. It examines the functions of the courts, changes in the court structure, and the use of alternative dispute resolution outside courts by studying two very different processes—consumer dispute resolution (CDR) and victim-offender mediation (VOM). These two examples have been selected because they are present in all four countries studied and because they represent two different ideologies of alternative justice: CDR provides justice through a simplified process, and VOM offers an alternative process that generates different outcomes. This chapter also analyses whether and how these have changed during the past decades and whether the basic traits of Nordic court culture have been diluted or perhaps even strengthened.

2 A Transition of the Functions of Courts

2.1 *The Intended Functions of Courts*

The functions of courts and court proceedings has been vividly debated in Nordic legal scholarship. Civil procedure scholarship generally operates with five functions: private, public, norm-clarification/norm-creation, checks and balances, and enforcement of EU/EEA law and the European Convention on Human Rights (ECHR).³

The private function refers to courts serving the interests of citizens, businesses and associations in two distinct, yet partly intertwined ways: first, by enabling them to

³Eldjarn (2016), pp. 53 ff.; Lindblom (2007); Lindblom (2017); Komiteamietintö 2003:3 Tuomioistuinelaitoksen kehittämiskomitean mietintö, Oikeusministeriö, pp. 69 ff.; NOU 1999: 19 Domstolene i samfunnet. Administrativ styring av domstolene. Utnevnelser, sidegjøremål, disiplinærtiltak.

enforce their legal rights (i.e., to have efficient methods to counteract infringements of their rights and assaults by fellow citizens) and second, by providing dispute resolution processes resulting in final and enforceable outcomes.⁴ In this second respect, dispute resolution does not imply outcomes that mirror the law; rather, it implies facilitating constructive dialogue between the parties to engender pragmatic solutions. In criminal and administrative cases, court proceedings protect citizens from ‘arbitrary and inequitable use of state power’.⁵ The public function encompasses the state having an interest in enforcing the law: the rule of law necessitates that the legal rules must be rendered effective by equal and efficient enforcement. Rule by law (i.e., using the law as the predominant tool of governing and moulding society) also requires that laws are effectively implemented and that private individuals are required to obey the law.⁶ Effective enforcement of the law is also likely to result in voluntary compliance and even shape people’s moral beliefs.⁷ In criminal law, the public functions and aspects related to the rule of law are far more important than dispute resolution.⁸

The third function, that of norm clarification and norm creation, is primarily a task for supreme courts. The fourth function is to provide checks and balances to ensure that administrative authorities, and to some extent the legislature, obey the law. Finally, courts ensure effective and equivalent application of EU law and ensure that national law and practice complies with the requirements of the ECHR and other international human rights instruments. Since the three latter functions are discussed in more detailed in other parts of this volume,⁹ this chapter focuses solely on the first two functions—the private and the public.

In addition to the above-mentioned functions that involve adjudication, or are at least connected with adjudication, courts in the Nordic countries (and elsewhere) also have administrative functions, in the form of non-litigious cases (*iurisdictio voluntaria*, *domstolsärende*, *hakemusasia*),¹⁰ such as registrations of wills, guardianship cases, marriage, divorce, and land registers. Often, there is no disagreement between the persons concerned, and adjudication is only needed when a real dispute arises. To a large extent, these tasks have been transferred from courts to other authorities,

Midlertidige dommere. Justis- og politidepartementet. Oslo, pp. 117–119; Robberstad (2018), pp. 1–6; Robberstad (1998); Betænkning nr. 1401 (2001) Reform af den civile retspleje I: Instansordningen, byrettens sammensætning og almindelige regler om sagsbehandlingen i første instans. Retsplejerådet, København, pp. 83 ff.; Bang-Pedersen et al. (2017), pp. 29–30; and Bellander (2017), pp. 87 ff.

⁴Bedner (2010), p. 51.

⁵Bedner (2010), p. 50. For more detailed observations on the Nordic criminal justice systems, see Helenius (2021), Bedner (2010), p. 50. For more detailed observations on the Nordic criminal justice systems, see Helenius (2021).

⁶Møller and Skaaning (2014), pp. 13 ff., Tamanaha (2004), pp. 91 ff.

⁷Tyler (2006).

⁸Landström (2011), pp. 30 ff. See also, e.g., Øyen (2016), pp. 24–25.

⁹Nylund (2021), Sunnqvist (2021) and Thorsteinsdóttir (2021).

¹⁰The concept of non-litigious matters does not exist in Danish and Norwegian law.

since the cases seldom require a judge to be involved. Courts are specialists in adjudicating disputes (and resolving disputes through other processes), whereas other authorities are better equipped to operate registers, administer guardianships and grant divorces.¹¹ In Sweden, and to some extent in Norway, undisputed pecuniary claims and eviction cases are subject to direct enforcement (i.e., the parties do not have to go through courts to obtain a judgment). If the debtor (i.e., the defendant) contests the claim, the creditor must request that the case is transferred to regular civil proceedings, or else the debt collection proceedings come to an end. Uncontested claims have increasingly been transferred away from courts to administrative organs despite the fact that establishing the existence of the claim is *de facto* adjudication, and that administrative organs—enforcement officers—thus adjudicate claims.¹²

As a result of the ideal of courts as purely adjudicative organs, many of these cases have been transferred to administrative authorities.¹³ The formal (independence) and procedural (impartiality, equality of arms, etc.) fair trial rights only apply to adjudication; courts should only have tasks directly related to these; and retaining non-litigious cases is primarily a manifestation of tradition, rather than the outcome of a deliberate selection of the most appropriate and efficient organisation. Administrative authorities can provide services of equal or even better quality than courts do, while letting courts specialise in rendering justice.¹⁴

2.2 *Accentuating the ‘Private’ Functions of Courts*

In parallel with emphasising courts as adjudicative organs, Nordic courts increasingly serve private functions by delivering non-adjudicative dispute resolution methods, particularly in civil cases, and by supporting out-of-court dispute resolution.¹⁵ A broader spectrum of dispute resolution processes has been implemented in two distinct ways: by emphasising the role of judges in facilitating settlement while acting in their role as judges during the course of regular court proceedings, and by introducing court-connected mediation, which is a parallel track to litigation with a separate process.

Judges in the Nordic countries have long had a right to promote settlement. In his rule for judges, Olaus Petri stressed in the sixteenth century the virtues of settlement

¹¹E.g., Työryhmämietintö 2007:6, pp. 23–24; NOU 1999: 22 (1999) Domstolene i første instans. Førsteinstansdomstolenes arbeidsoppgaver og struktur. Oslo, Justis- og politidepartementet, Sects. 3.4 and 4; and Ds 2019:31 Konkursförfarandet, Departementsserien, pp. 131 ff.

¹²For a more detailed discussion, see Nylund (2019a). For a discussion of the problematic aspects of this arrangement, see also Wallerman Ghavanini (2020).

¹³Komiteamietintö 2003:3, pp. 114 ff. and pp. 134 ff.; NOU 1999: 22, pp. 26–27 and 46 ff.; Betænkning nr. 1398 (2001) Domstolenes strukturkommission. København; Regeringens skrivelse 1999/2000:106 (2000) Reformeringen av domstolsväsendet – en handlingsplan. Stockholm, pp. 8–10 and 15–16.

¹⁴Komiteamietintö 2003:3, pp. 339–341, and Regeringens skrivelse 1999/2000:106, pp. 15 ff.

¹⁵Petersen (2021).

in *inter alia* rule ten: ‘All law is to be wielded with wisdom because the greatest right is the greatest wrong; and there must be mercy in justice as well.’¹⁶ Conciliation Boards (*forliksråd*) were introduced in Denmark and Norway in 1795 to establish a forum where a panel of lay judges would resolve disputes.¹⁷ In recent decades, the right to promote settlement has been fortified and turned into a duty to assess whether promoting settlement is appropriate at every stage of civil proceedings. Danish, Finnish and Swedish law requires the court to facilitate settlement in all civil cases, unless the court finds that settlement is unlikely due to the character of the case, the position of the parties or other similar circumstances.¹⁸ Norwegian law only imposes a duty to consider whether settlement is suitable and to act accordingly.¹⁹ The differences in the wording of the duty to promote settlement do not necessarily translate into differences in practices. Hence, one can argue that pragmatic solutions are a quintessential element of Nordic court culture.

Civil procedure rules in the Nordic countries do not regulate how a judge should proceed when assessing whether promoting settlement is appropriate and how to assess the timing of these efforts, nor are the efforts themselves regulated in more detail.²⁰ However, judges must refrain from any action that could render them partial, or at least raise concerns with regard to their impartiality, such as meeting privately with one party. Finnish judges are explicitly allowed to suggest a specific outcome;²¹ Danish judges can do so when appropriate, although the matter is not regulated in detail;²² and Norwegian judges are explicitly prohibited from doing so.²³ In Sweden, judges are allowed to meet privately with each party (*caucus*), without the other party being present;²⁴ in the other Nordic countries, private meetings are considered inappropriate, as they jeopardise the impartiality of the judge.²⁵ According to a Danish study, judges lack a shared understanding of what promoting settlement entails and how judges should proceed when promoting settlement. Some judges believe encouraging the parties to negotiate suffices, others discuss the advantages of amicable solutions and the disadvantages of continuing litigation, and still others point out common ground.²⁶ Considering the limited regulation, the divergence among judges is not surprising.

¹⁶Tontti (2000).

¹⁷Vindeløv (2007), pp. 2–5.

¹⁸Danish Administration of Justice Act Sect. 268, Finnish Code of Judicial Procedure Chap. 5 Sect. 26 and Swedish Code of Judicial Procedure chapter 42 Sect. 17.

¹⁹Norwegian Dispute Act Sects. 8–1 and 8–2.

²⁰Bengt Lindell (2019), pp. 248 ff., and Camilla Bernt (2011) discuss these in detail.

²¹Finnish Code of Judicial Procedure Chap. 5 Sect. 26.

²²Bang-Pedersen et al. (2017), pp. 109–110.

²³Norwegian Dispute Act Sect. 8–2.

²⁴Lindell (2019), pp. 262–265, and SOU 2007:26 Alternativ tvistlösning. Betänkande av Utredningen om alternativa former för tvistlösning vid tingsrätt. p. 76.

²⁵HE 114/2004 vp (2004) Hallituksen esitys Eduskunnalle riita-asioiden sovittelua ja sovinnon vahvistamista yleisissä tuomioistuimissa koskevaksi lainsäädännöksi. Helsinki, p. 6; Bernt (2011), pp. 286–288; Bernt (2015); and Adrian (2012), p. 96.

²⁶Adrian et al. (2015).

The Nordic countries have relatively high settlement rates. In 2019, the proceedings in first courts in Denmark resulted in settlement in 18% of general civil cases.²⁷ In Finland, the ratio of settlements was 33% of rulings in civil cases in 2019.²⁸ In Norway, 24% of general civil cases were resolved by the means of an out-of-court settlement and 14% by an in-court settlement.²⁹ Sweden has no official statistics available, but a 2005 study found that a third of civil cases resulted in settlement.³⁰ Additionally, some cases end in withdrawal as a result of settlement.³¹ At least in Finland, a cultural shift has taken place, as a result of which the preparatory stage of civil proceedings is essentially a dialogue in which the parties and the judge cooperate to identify the key disputed issues and to find a pragmatic solution, rather than each party attempting to persuade the judge using legal argumentation.³² As a result, many judges perceive themselves as settlement judges.³³ This trend is also reflected in increasingly benign attitudes towards plea bargaining.³⁴

Court-connected mediation, in which courts run, administer and monitor mediation programs and oversee mediators, has been introduced in Denmark, Finland and Norway. In Denmark and Norway, a judge or other suitable person can act as a mediator, and courts are obliged to maintain a list of approved mediators. In Finland, only judges can mediate. Court-connected mediation is regulated in some detail in law.³⁵ Sweden is different in this regard, as courts do not manage and run mediation programs themselves; the Swedish Courts Administration has a list of mediators.³⁶ Furthermore, the Swedish Code of Judicial Procedure Chap. 42 Sect. 17 subsection 2 only states that the court has the power to decide that the case be transferred to ‘special mediation’ (*särskild medling*) if the parties consent and that it must stay

²⁷ Afgørelsestyper inden for forældreansvarssager og ægteskabssager <https://www.domstol.dk/om/talogfakta/statistik/Pages/civilesager.aspx> (accessed 15 June 2020).

²⁸ Oikeusministeriö (2020), Tuomioistuinten työtilastoja 2019, Oikeusministeriön julkaisuita. Tominta ja hallinto 2020: 4, p. 34.

²⁹ NOU 2020: 11 Den tredje statsmakt. Domstolene i endring. Oslo, Justis- og beredskapsdepartementet, p. 52. Moreover, 5% were dismissed, 2% withdrawn and 1% through other types of rulings or no ruling was recorded, and 41% of all incoming cases were resolved by a judgment on the merits. Additionally, 13% were resolved by an in-court settlement in court-connected mediation. An in-court settlement is binding and enforceable in the same manner as a judgment on the merits, whereas an out-of-court settlement has the same status as any contractual agreement. The number of settlements is significantly higher in labour disputes.

³⁰ SOU 2007:26, p. 107.

³¹ Riksrevisjonens undersøkelse av saksbehandlingstid og effektivitet i tingrettene og lagmannsrettene Dokument 3:3 (2019–2020), pp. 81 and 90.

³² Haavisto (2002).

³³ Ervo (2016). Mark Galanter (1985) made a similar observation on American judges in the mid-1980s.

³⁴ See Ervo (2021).

³⁵ Danish Administration of Justice Act Sects. 271–279; Finnish Act on mediation in civil matters and confirmation of settlements in general courts 394/2011; and Norwegian Dispute Act Sects. 8–3–8–7.

³⁶ For a more detailed discussion on court-connected mediation, see Linnanmäki (2021) and, e.g., Adrian (2016). See also Adrian (2014).

the proceedings during mediation, but it does not regulate the mediation process in more detail.³⁷ One could argue that since court involvement and oversight of the mediation process is almost non-existent in Sweden, the scheme cannot be labelled court-connected mediation.³⁸

The use of court-connected mediation varies significantly among the Nordic countries. In Denmark, only 1.7% of general civil cases were directed to court-connected mediation in 2017. Judges mediated 53% of the cases, and the parties settled the case in half of mediated cases.³⁹ In 2019, 23% of the incoming civil cases in Norwegian courts were directed to court-connected mediation, and the parties entered into settlement in 65% of the cases.⁴⁰ In Finland, 25% of civil cases were directed to court-connected mediation in 2018, with a settlement rate of 71%.⁴¹ There appears to be no obvious explanation for the variation in the setup and use of mediation in Nordic courts.⁴²

As increased focus on settlement demonstrates, Nordic courts have a bifocal approach to justice and dispute resolution: they facilitate amicable settlements, which enables the parties to design the outcome according to their wishes and needs (private justice), and they provide ‘justice through the law’ and promote the rule of law through formal, adjudicative processes.⁴³ This development is more pronounced in Finland and Norway, where court-connected mediation has become an integral part of civil procedure,⁴⁴ whereas Danish and Swedish courts are more hesitant to embrace mediation.

Perhaps part of the hesitance towards court-connected mediation arises from attractive alternatives. In Denmark, courts resolve many disputes by a judge’s announcement—a process wherein the judge announces his or her view on the outcome of the case when the main hearing is concluded, unless a party requests that the court make a formal ruling.⁴⁵ The court can base the outcome either on legal rules or on what it considers to be a fair and equitable solution. In the latter case, it must inform the parties that a ruling based on legal arguments might differ from the outcome the court recommends. In Sweden, judges can meet privately with the parties when promoting settlement and, thus, do not need to resort to court-connected mediation to avail themselves of private meetings.

³⁷ Lindell (2019), pp. 266–270.

³⁸ Adrian (2016).

³⁹ Domstolsstyrelsen (2018) Statistik for civile sager – retsmægling 2017. <https://www.domstol.dk/om/talogfakta/statistik/Pages/civilesager.aspx> (accessed 26 June 2020).

⁴⁰ Riksrevisjonen (2019) Riksrevisjonens undersøkelse av saksbehandlingstid og effektivitet i tingrettene og lgamannsrettene. Dokument 3:3 (2019–2020) <https://www.riksrevisjonen.no/globalassets/rapporter/no-2019-2020/Domstolene.pdf> (accessed 15 June 2020), p. 83.

⁴¹ Data obtained from the Finnish Court Administration. On file with the author.

⁴² Adrian (2014).

⁴³ For theoretical discussions on these concepts, see, e.g., Nolan-Haley (1996), Nolan-Haley (1998), Nolan-Haley (2011), Riskin and Welsh (2007), Welsh (2001), Welsh (2001), Welsh (2002) and Welsh (2004).

⁴⁴ See, e.g., Kjelland-Mørdrø et al. (2020), pp. 142 ff; Bernt (2015); and Bernt et al. (2014).

⁴⁵ Bang-Pedersen et al. 2017, pp. 110–111.

3 Court Structure and the Role of Courts

3.1 Consolidation of Courts

Courts with general jurisdiction with generalist judges epitomise the institutional elements of Nordic procedural culture. While increased legal complexity with a ‘denser’ regulation, and an emphasis on productivity and minimising the cost of operating courts puts these basic tenets under pressure, they still remain a beacon for developing the structure of the court system.

Until the turn of the millennium, the Nordic countries had a large number of district courts—general courts of first instance. Many of the courts were very small, with only one or two professional judges aided by one or two deputy judges.⁴⁶ Courts heard many simple criminal cases, although a ‘decriminalisation’ had already taken place by changing the formal status of the sanction from criminal to administrative and thus alleviating the workload of (general) courts.⁴⁷

Since the 1990s, general courts in Nordic countries have undergone reorganisation, with a dramatic reduction in the number of courts. The number of courts has been reduced from 82 to 24 in Denmark and from 70 to 20 in Finland.⁴⁸ In Sweden, the number has been reduced from 96 to 48,⁴⁹ and in Norway from 92 to 23.⁵⁰

Norwegian Conciliation Boards (*forliksråd*) are interesting in this respect. Although not formally courts, they have mandatory jurisdiction on most pecuniary, non-family civil cases unless the value of the claim is above NOK 200,000 (approximately € 20,000). The majority of cases are uncontested and the Board can pronounce a judgement only if the case is sufficiently simple.⁵¹

Small courts have several disadvantages; for example, the illness of a judge brings most proceedings to a halt, recruiting judges is challenging and judges hear fewer cases than in larger courts. Judges often have no experience hearing complex cases; hence, parties in commercial cases opt for larger courts or arbitration.⁵² A study commissioned by the Norwegian Courts Commissions indicates that the criminal sanctions imposed by small courts more often deviate from the sanctions courts issue on average.⁵³ Larger courts offer higher quality proceedings and outcomes and are more efficient.

⁴⁶E.g., Betænkning nr. 1401 (2001), Komiteamietintö 2003:3 and NOU 1999:22.

⁴⁷Halila et al. (2018).

⁴⁸Betænkning nr. 1401 (2001) and HE 270/2016 vp Hallituksen esitys eduskunnalle laeiksi tuomioistuinin ja eräiden muiden lakien muuttamisesta.

⁴⁹Regeringens skrivelse 1999/2000:106, pp. 13–14 and 44 ff.

⁵⁰Prop. 11 L (2020–2021) Endringer i domstoloven (domstolstruktur)

⁵¹See Nylund (2020), p. 50–51 and Jensen (2021), part 2.3.

⁵²NOU 2019: 17, pp. 40 and 46–48, SOU 2003:5 (2003) Förändringar i tingsrättsorganisationen – en utvärdering av sammanläggningar av tingsrätter 1999–2001. Justitiedepartementet, Betænkning nr. 1401 (2001), Chap. 9, and NOU 1999:22, pp. 22 ff and 89 ff.

⁵³NOU 2019: 17, p. 45.

The increasing density and complexity of legal regulations as well as the increasing factual complexity of cases poses a challenge to the Nordic ideal of generalist judges. To address this problem, ‘moderate specialisation’ of judges has been implemented in mid-size and larger courts. Large courts are divided into sections specialising in criminal or civil cases, or even certain subgroups of these, such as white-collar crime, labour law or family law. Alternatively, some judges specialise in, for example, cases involving children or court-connected mediation. To maintain coherence, some types of cases are distributed among all judges in a section or even across sections, and judges rotate among the sections at regular intervals (e.g., 3–5 years).⁵⁴

The disinclination toward special courts is persistent across the Nordic countries. Government reports from the Nordic countries articulate the same reasons for and against special courts.⁵⁵ The advantages of special courts are specialist knowledge, tailoring proceedings to the needs of the specific types of cases and potentially more efficient proceedings. The disadvantages are associated with difficulty to recruit judges, insufficient caseload to maintain efficient proceedings, inconsistent and incoherent case law emanating from different courts and weakening the coherence of law. The reports also list measures that enable general courts to gain the same advantages as special courts would: partial specialisation, using expert judges or experts, and flexible procedural rules. When necessary, the general procedural rules can be combined with a few special rules that are applicable only for selected types of cases.

As a result, functional consolidation has taken place by merging special courts with general and administrative courts.⁵⁶ This functional consolidation is a token of the strong inclination towards general courts and generalist judges. Finnish land courts (i.e., courts hearing land cadastral matters) have been merged with district

⁵⁴NOU 2017: 8 Særdomstoler på nye områder? Vurdering av nye domstolsordninger for foreldretvister, barnevernsaker og utlendingssaker Justis- og beredskapsdepartementet, Familie -og likestillingsdepartementet. Oslo, pp. 36–39; NOU 2019: 17, pp. 79–80. See e.g. description of how the work is organised at the Aarhus District Court <https://www.domstol.dk/aarhus/om-retten-i-aarhus/organisation/> (accessed 15 June 2020); order for procedure at Helsinki District Court https://oikeus.fi/karajaoikeudet/helsinginkarajaoikeus/material/attachments/oikeus_karajaoikeudet_helsinginkarajaoikeus/liitteet_oikeus_karajaoikeudet_helsinginkarajaoikeus/plWhzYFOL/Helsinginkarajaoikeuden_tyojarjestys_2019.pdf (accessed 15 June 2020); the order of procedure at Helsinki Administrative Court https://oikeus.fi/hallintooikeudet/helsinginhallintooikeus/material/attachments/oikeus_hallintooikeudet_helsinginhallintooikeus/liitteet_oikeus_hallintooikeudet_helsinginhallintooikeus/9RsdNS6VV/Helsinginhallintooikeuden_tyojarjestys.pdf (accessed 15 June 2020); information on moderate specialisation at the Oslo District Court <https://www.domstol.no/Enkelt-domstol/oslotingrett/om-domstolen/virksomheten/moderat-spesialisering/>; information on how cases are distributed in Stockholm District Court <https://www.domstol.se/stockholms-tingsratt/om-tingsratten/organisation/var-verksamhet/> (accessed 15 June 2020).

⁵⁵Betænkning nr. 1401 (2001), pp. 252 and 305; Komiteamietintö 2003:3, pp. 334–339; NOU 2017: 8, p. 50; and Regeringens skrivelse 1999/2000:106, pp. 58–59.

⁵⁶Komiteamietintö 2003:3, pp. 383–385.

courts, and Norwegian land appellate courts with general appellate courts.⁵⁷ The Swedish environmental (water) courts have been merged with selected district courts, whereas the administrative parts of Finnish water courts have been incorporated into administrative bodies and the adjudicative functions with the Vaasa administrative court.⁵⁸ Practically no special courts remain in Sweden as separate units, although some of them form a section of another court, such as the Market Court that has become a section of the Stockholm district court.⁵⁹ The Nordic Labour Courts and the Danish Maritime and Commercial High Court remains the exception to the rule of general courts.⁶⁰

Functional consolidation has also been achieved by concentrating some cases to a single or a few selected courts (e.g., the district courts in Oslo and Stockholm have exclusive jurisdiction in patent matters).⁶¹

Geographic and functional consolidation combined with ‘moderate specialisation’ enable the Nordic countries to uphold the pragmatic, ‘non-specialist’ (‘lay’) elements in Nordic legal culture: even if lawyers and attorneys are increasingly specialised, the judges hearing the cases are not specialists. Hence, the legal counsels of the parties cannot resort to highly specialised, legal-technical arguments as easily as they could if the judges were specialists as well. Moderate specialisation also secures the position of courts as guardians of the coherence of the legal system.

Finally, the increased independence of courts is reflected in the establishment of separate administrative bodies for the administration of courts in all Nordic countries. Detaching courts from ministries of justice and other political organs is an important step in ensuring the independence of the judiciary.⁶²

4 Persistent Differences in Attitudes Toward Administrative Courts

There are palpable differences among the Nordic countries in the adjudication of administrative cases. In 2019, the number of incoming administrative cases was

⁵⁷HE 86/1999 vp (1999) Hallituksen esitys Eduskunnalle maa- ja metsätalouden lakkeutamisesta erityis- tuomioistuimina ja siihen liittyväksi lainsäädännöksi. Helsinki; <https://www.domstol.no/jordskift/rettene/om-jordskifterettene/jordskiftevirksomheten-i-et-historisk-perspektiv/> (accessed 15 June 2020) and Regeringens proposition 2009/20:215.

⁵⁸HE 114/1998 vp (1998) Hallituksen esitys Eduskunnalle hallinto-oikeuslaiksi ja siihen liittyväksi lainsäädännöksi. Helsinki and Regeringens proposition 2009/20:215 Mark- och miljödomstolar Miljödepartementet.

⁵⁹A closer look at the courts of Denmark <https://www.domstol.se/patent--och-marknadsdomstolen/om-patent--och-marknadsdomstolen/> (accessed 15 June 2020).

⁶⁰https://domstol.dk/media/lacbg0w5/profilbrochure_uk.pdf (accessed 15 June 2020), p. 10.

⁶¹Norwegian Patent Act Sect. 3, and Swedish Patent Act Sects. 65 and 66.

⁶²Sunnqvist (2021) and Nylund (2019c).

19,961 in Finland⁶³ and 176,760 in Sweden⁶⁴ but only approximately 800–1,000 in Denmark and Norway.⁶⁵ Considering that Denmark, Finland and Norway have almost the same number of inhabitants, around 5.4 million, one would expect these numbers to be much more similar. The Finnish Social Security Appeal Board (SSAB, *Sosiaaliturva-asioiden muutoksenhakulautakunta*) explains part of the gap between the Finnish and Swedish numbers. With 41,165 incoming cases in 2019,⁶⁶ the SSAB almost closes the gap between the two countries. The Norwegian Insurance Court (*trygderetten*) is a de facto appellate court in social security matters and contributes to closing part of the gap, but it can only account for a fraction of the difference.⁶⁷ The main explanatory factor seems to be that recourse against administrative decisions is organised within administrative bodies in Denmark and Norway, and that courts, therefore, seldom review administrative decisions, except in cases concerning a narrow range of issues, such as child protection.⁶⁸ For instance, Norwegian courts have only a handful of incoming cases related to environmental law, whereas Finnish and Swedish courts have several thousand environmental cases.⁶⁹

Review of administrative decisions is recognised as part of the rule of law, since it enables citizens to react to abuses of power by challenging unlawful decisions and since review of decisions by courts is one of the main mechanisms constituting checks and balances. These principles are recognised in all Nordic countries. Hence, the following question arises: why are the differences in the incoming cases so pronounced?

The differences in the conception of the ideal method for reviewing administrative decisions are pronounced. The Finnish and Swedish systems value review by independent and impartial courts, while the Danish and Norwegian systems are based on a belief in the superiority of administrative review. Unlike administrative courts, where judges are generalists, administrative bodies have specialist knowledge and

⁶³Oikeusministeriö (2020), Tuomioistuinten työtilastoja 2019, Oikeusministeriön julkaisuita. Tominta ja hallinto 2020: 4, p. 23.

⁶⁴Domstolsverket 2020, Court Statistics 2019, https://www.domstol.se/globalassets/filer/gemensamt-innehall/styrning-och-riktlinjer/statistik/court_statistics_2019.pdf (accessed 15 June 2020), p. 27.

⁶⁵No official statistics are available. Betænkning nr. 1401 (2001), p. 107 and Difi-rapport 2014:2 (2014) Viltvoksende nemnder? Om organisering og regulering av statlige nemnder. Oslo, Difi - Direktoratet for forvaltning og IKT, p. 48. The Danish Chamber Advocate represented Danish government bodies in 3,638 cases in district courts in 2019, <https://oes.dk/media/36430/statens-for-brug-hos-kammeradvokaten-i-2019.pdf> (accessed 15 June 2020). However, this includes both civil and administrative cases.

⁶⁶<https://www.samu.fi/wp-content/uploads/2020/03/SAMU-Vireasia-Tammi-Joulu-2019.pdf> (accessed 15 June 2020).

⁶⁷The Norwegian Insurance Court had 3 908 incoming cases in 2018, https://www.trygderetten.no/statistikk?p_lang=2 (accessed 15 June 2020). The Norwegian functional equivalent of the Finnish SSAB and Swedish administrative courts in social security matters is NAV *Klageinstans*, which is part of The Norwegian Labour and Welfare Administration, NAV. For more details see Nylund (2019a), p. 433 with further references.

⁶⁸Difi-rapport 2014:2.

⁶⁹Nylund (2019b), pp. 93–94.

easy access to information and documents, which allows them to perform a thorough review of each case, as well as a mandate to review issues related to both legality and expedience of the decision. The review process and the institutional organisation of the review body are tailored to the type of cases handled, since the rules regarding administrative review are general; this results in a timely and efficient process wherein the private party, at least ideally, does not need legal assistance. These advantages are pronounced when the administrative review board finds for the private party: the review board has the power to reverse the decision, and in these situations, the private party does not have to wait for the administrative body to make a new decision. Danish and Norwegian lawyers believe that review performed within the administration fulfils the foundational values of efficiency, the rule of law and the ability of administrative organs to control and rectify their own decisions. In these systems, court proceedings are, and should be, a last resort.⁷⁰

The differences in court structure are undoubtedly of vital importance in this regard, since different procedural rules apply in general courts and administrative courts. Civil litigation is party-driven and adversarial; the parties produce the evidence, and the losing party pays the cost of litigation. Appointing a legal counsel is usually necessary; hence, the government uses specialised counsel in Denmark through an arrangement with a private law firm and in Norway through the Attorney-General's office.⁷¹ Although administrative proceedings are also party-driven and adversarial, the court has a more pronounced role in the proceedings and can *inter alia* order other authorities to provide relevant information. Furthermore, the party constellation differs: unlike in civil litigation, in administrative court proceedings, the government organisation is not formally a party, and thus the government does not have a specialised legal counsel to assist during court proceedings. The parties are only liable for their own costs, and since the government does not use a fairly expensive, specialised legal counsel, and the court sometimes pays for (parts of) the cost of evidence, the total costs, are lower and differences in access to legal advice are not pronounced.⁷² Therefore, the threshold for initiating court proceedings is lower for administrative courts. Nevertheless, administrative recourse can render equal, or even superior, justice to court proceedings, provided that the institutional and procedural rules regarding administrative recourse proceedings support quality outcomes.

The differences in recourse against administrative decisions have long historical roots. The Swedish system can be traced back to *Kammerkollegiet*, a government organ in charge of monetary, fiscal and customs policies, from which *Kammarrevisionen*—later *Kammarrätten* (Chamber Court)—was separated in 1695 to form a separate organ for adjudication and auditing. However, this organ was not fully

⁷⁰NOU 2019: 5 Ny forvaltningsolv. Lov om saksbehandling i offentlig forvaltning. Oslo, Justis- og beredskapsdepartementet, p. 366–367.

⁷¹The Attorney-General is separately funded, and hence litigation entails no direct costs for the government body using the services of the Attorney-General, in spite of the fact that when the government prevails, the private party must reimburse the government.

⁷²See, e.g., Bragdø-Ellenes (2014) and Aer (2003). For environmental cases, see Nylund (2019b).

independent. The Chamber Court gradually morphed into an administrative court. In 1909, the Supreme Administrative Court was founded, and the Chamber Court became a lower court.⁷³ Since Finland was a part of Sweden until 1809, it followed a similar path, except the former Chamber Court itself became the Supreme Administrative Court.⁷⁴

Finnish and Swedish administrative courts have gradually cut their organisational, functional, economic and regulatory ties to the administration and formed a parallel track to general courts. Although their powers are limited to reviewing the legality of administrative decisions, they have been given increased powers to review aspects concerning expedience, both formally and by the increase in the role of general principles of public administration and administrative law.⁷⁵ The recourse system is two-pronged: it separates recourse based on legality from recourse based on expediency, where administrative courts hear the former and the government the latter. The increasing importance of EU law and the growing role of principles of administrative law have challenged the two-pronged approach and shifted the balance towards administrative courts.⁷⁶ The right to seek recourse against administrative decisions as an essential element of the rule of law has been emphasised in Finland since the Finnish civil war in 1918, whereas Swedish commentators have been sceptical towards ‘elitist’ courts and have seen recourse to the government as an equivalent path to review by administrative courts.⁷⁷

Concomitantly with growing powers and organisational independence of administrative courts, administrative appeals boards have been merged with administrative courts, which has contributed further to administrative courts becoming relatively powerful state organs. For instance, migration cases are delegated to some administrative courts in Sweden,⁷⁸ and environmental cases to the Vaasa Administrative Court in Finland.⁷⁹ The main exception to the consolidation of administrative courts is that of cases related to social security benefits in Finnish law, for which a tribunal—the SSAB—hears the appeals. Its rulings are subject to appeal to the Insurance Court. The SSAB is interesting, as it has gradually been transformed from several bodies that were organisationally, institutionally and economically a part of the administration of the Social Insurance Institution of Finland (*Kela*) into an organisationally and financially independent tribunal, a *de facto* court. The predecessors of the board relied on staff employed by the administration to prepare the cases, most (or even all) of the judges had part-time, limited-term positions, and the regular rules of administration applied, whereas the proceedings in the SSAB are essentially governed by

⁷³Wenander (2019), p. 438.

⁷⁴<https://www.kho.fi/fi/index/korkein hallinto-oikeus/historia.html> (accessed 15 June 2020).

⁷⁵Mäenpää (2019), SOU 1994:117 Domstolsprövning av förvaltningsärenden. Slutbetänkande av Fri- och rättighetskommittén.

⁷⁶Wenander (2019).

⁷⁷Wenander (2019).

⁷⁸Gothenburg, Luleå, Malmö and Stockholm (<https://www.domstol.se/hitta-domstol/migrationsdomstolar/>) (accessed 15 June 2020).

⁷⁹See above Sect. 3.1.

the Administrative Judicial Process Act⁸⁰ and the Courts Act.⁸¹ To make the SSAB more robust and to secure a sufficient caseload and number of judges and other staff, it was formed as a merger of two boards. As with general courts, very small units face difficulties in recruiting qualified judges compared with larger organisations. Having a broader variety of cases is also likely to attract potential judges, while simultaneously contributing to ensuring a coherent approach to social security benefits. The latter is not attainable, since many health-related benefits follow another track. The Finnish government estimated that the costs each case generates for the Board and the parties would remain roughly the same, while the quality of rulings is likely to increase (i.e., the rule of law will be improved).⁸² The SSAB is in essence a special administrative court that—in combination with the Finnish Insurance Court, where appeal is sought against SSAB rulings—forms a branch of social courts.

The development of recourse against administrative decisions in Denmark and Norway has been very different. Since courts have reviewed administrative decisions in Denmark and Norway since the eighteenth century, there has been no perceived need for administrative courts. Due to the high costs and duration of civil litigation, a multitude of administrative appeals boards have been instituted to rule on appeals against administrative decision. Many of these have a limited caseload. A Danish report from 2001 identified 61 appeals boards: of these, about one third (21) had more than 100 cases per year, one third (24) had less than 50 cases and nine had no cases at all.⁸³ A Norwegian report found 53 appeals boards.⁸⁴

In this regard, it is interesting to note the persistent resistance against administrative courts in Denmark and Norway. In fact, practically nobody advocates for establishing general administrative courts in these countries—at most, introducing administrative courts for a specific type of law, such as child protection and compulsory measures, is sometimes discussed.⁸⁵ The main arguments in support of specialised appeals boards or a superior administrative organs as the main bodies hearing recourse proceedings are that the proceedings can be tailored to each case, the judges are experts and the proceedings are less costly than in civil (and probably also administrative) litigation.⁸⁶ Recourse against decisions of local administrative bodies should stay within municipal or county organs to guarantee local self-governance.⁸⁷ By giving general courts competence to hear further appeals, the court system is streamlined, and a single branch of courts upholds the coherence of the legal system. Administrative courts, which in the Danish and Norwegian context refer to special

⁸⁰Laki oikeudenkäynnistä hallintoasioissa 2019/808.

⁸¹Social Security Appeals Boards Act (Laki sosiaaliturva-asioiden muutoksenhakulautakunnasta) 2006/1299.

⁸²Government Bill HE 167/2006, pp. 6–13 and Government Bill HE 74/2017, part 4.

⁸³Betænkning nr. 1401 (2001), pp. 127–128.

⁸⁴Difi-rapport 2014:2.

⁸⁵NOU 2017: 8.

⁸⁶NOU 2019: 5, pp. 371–374.

⁸⁷NOU 2019: 5, p. 391 ff.

courts with jurisdiction limited to a specific area of law, arguably reduce the coherence of the legal system.⁸⁸ General courts are problematic, too: adversarial, party-driven proceedings are not appropriate, at least not in the first instance of recourse proceedings, and more ‘inquisitorial’ proceedings would require more specialisation of judges, which is unattainable.⁸⁹

The disadvantage of the current Danish and Norwegian systems are that many appeals boards are organisationally dependent on the administration. Many boards are not detached from administrative organs, and sometimes it is the administrative organ that the appeals board is supposed to control that appoints the members of the board, that is the employer of the board members and administrative staff, and that even has the power to instruct the appeals board. Even independent bodies are relatively weak institutions with part-time, limited-term judges, who must rely on administrative staff (who do not have the independent position of a judge) to prepare the cases.⁹⁰ The irresolution regarding which powers should be assigned to the Norwegian Public Procurement Complaints Board (KOFA, *Klagenemnden for offentlige anskaffelser*) illustrates how the legislator is in doubt with regard to whether the Board is sufficiently competent: KOFA was assigned new powers, which later were withdrawn only to be returned again.⁹¹

The proceedings in complaint boards are often weakly regulated, which can result in the board not having a sound basis for its decision and in parties not having equal and appropriate opportunities to present their case (*audiatur et altera pars*).⁹² Furthermore, highly specialised boards might reduce coherence of the legal system, since the scope of cases of each appeals board is limited. Additionally, recruitment of judges and administrative staff has often proved to be challenging.⁹³

Some of the weaknesses with regard to administrative appeals boards can be easily remedied. The Norwegian Complaint Boards Secretariat (*Klagenemndssekretariatet*), established in 2017 to provide high-quality secretariat services to seven complaint boards, is an example of how the organisation of these bodies can be strengthened to enable them to render justice.⁹⁴ Consolidation of appeals organs is likely to advantageous because a larger case load is an incentive to establish an independent and specialised secretariat, and more detailed and tailored procedural rules, all of which improve the independence of the body. Thus, appeals boards do not necessarily render less justice than courts do, and when they are properly organised

⁸⁸E.g., NOU 1999: 19, pp. 499–521; Betænkning nr. 1398 (2001); and Betænkning nr. 1401 (2001), pp. 135–142.

⁸⁹Waage (2017), pp. 198 ff.

⁹⁰Difi-rapport 2014:2, pp. 50 ff.; Difi-notat 2013:3 Forvaltningsdomstoler i Norge? Kort gjennomgang av begreper og synspunkter. Difi - Direktoratet for forvaltning og IKT, and Bragdø-Ellenes (2014, 2020), pp. 136–140.

⁹¹In 2012, the power to levy penalty charges was removed, only to be reintroduced in 2017. See Hagland and Bruserud (2016).

⁹²Difi-rapport 2014:2, pp. 50 ff.; Difi-notat 2013:3; and Bragdø-Ellenes (2014).

⁹³NOU 1999: 19, pp. 499–521; Betænkning nr. 1398 (2001); Betænkning nr. 1401 (2001), pp. 135–142; and Komitesamietintö 2003:3, pp. 392–394 and 415–416.

⁹⁴www.klagenemndssekretariatet.no (accessed 15 June 2020).

and regulated, they can render better justice, since the procedure can be cheaper, faster and tailored to the specific type of cases instead of being based on general rules of procedure of administrative courts. The broader competence to review issues regarding expedience of complaint boards can also be an advantage for the rule of law,⁹⁵ as long as courts are able to exercise sufficient control.⁹⁶ The Finnish SSAB is a key example of how the difference between courts and appeals boards can be formal rather than substantive, and how relatively small organisational changes can result in a significant improvement of the independence of the body.

The practical implications of the absence of administrative courts is that administrative decisions are seldom subject to judicial review. Recourse against decisions that allow emission of environmentally harmful substances or other activities with adverse environmental effects serve as an example: Danish courts hear some and Norwegian courts hear only a handful of such cases each year, whereas Finnish and Swedish courts hear thousands of these cases.⁹⁷ Courts hearing few cases is likely to reduce the demand for in-depth knowledge in environmental law and other branches of administrative law. The de facto limited access to courts might also impact the interpretation and enforcement of *inter alia* rules protecting the environment: big companies who have been denied permission to make emissions can bear the costs associated with litigation and therefore challenge decisions to deny permission, whereas individual citizens and NGOs often cannot afford to challenge such permission. The Norwegian Government uses as a rule the Attorney General (*Regjeringsadvokaten*) as its legal counsel, which is funded over the state budget, not by billing each individual case.⁹⁸ In Denmark, since 2015 the Chamber Advocate (*Kammeradvokaten*) has been privately organised as a law firm, where government bodies pay for each individual case.⁹⁹ The power differences are thus often striking between the government and citizens. Additionally, the Danish Chamber Advocate and the Norwegian Attorney General are zealous advocates when representing government bodies in courts, and sometimes have an interest in resisting clarification, perhaps even obscuring, of the certain issues when the government has a weak case. This is in sharp contrast to the duty of the government to be objective and to provide for sufficient clarification on its own motion.¹⁰⁰ Consequently, to some extent, public authorities can *inter alia* bypass rules and proceedings concerning environmental law without facing sanctions.¹⁰¹

The so called NAV (Norwegian Labour and Welfare administration) scandal, which unfolded in November 2019, exemplifies the potential adverse consequences of the combination of the lack of independence of complaint boards and sufficient legal aid. NAV required the beneficiaries of certain welfare benefits to stay in Norway; even short-term trips abroad to visit family or have a short holiday were disallowed

⁹⁵See also NOU 2019: 5, pp. 387–389.

⁹⁶NOU 2020: 11, pp. 71–72.

⁹⁷Nylund (2019b) and Anker et al. (2009).

⁹⁸Bragdø-Ellenes (2010).

⁹⁹Waage (2016).

¹⁰⁰Waage (2017), pp. 272 ff., and Zimmer (2013).

¹⁰¹Fauchald (2018), see also Sunde (2017).

and sanctioned, although this was clearly against the requirements of EU/EEA law. Additionally, NAV persistently disregarded rulings from the Norwegian Insurance Court that found the practice unlawful. It could do so partly because first recourse takes place in a complaint board that is part of the NAV organisation and, hence, would follow internal guidelines despite the Insurance Court finding these unlawful. The very limited, practically non-existent access to general courts exacerbated the problem.¹⁰²

From a legal cultural perspective, the enduring—and growing—difference in attitudes between Denmark and Norway on the one hand and Finland and Sweden on the other hand is very interesting. The latter systems seem to believe that a clear demarcation between executive and adjudicative powers is the best way of ensuring the rule of law and that administrative courts ensure that the tenets of administrative law are applied equally in different types of cases, whereas the former countries recognise some of the advantages of administrative courts but still believe that a decentralised structure of first appeals against administrative decisions is superior.

The differences in the attitudes towards administrative courts in Denmark and Norway on the one hand and Finland and Sweden on the other hand are profound, and there are few, if any, signs of convergence between the two blocks. On the contrary, the consolidation of administrative courts in Finland and Sweden has widened the gap. Finnish and Swedish courts have in practice a far more prominent position in fulfilling the private and public functions of courts in administrative cases than Danish and Norwegian courts do.

5 Alternative Dispute Resolution Outside Courts

Alternative dispute resolution has a long history in the Nordic countries, and formalised dispute resolution processes outside courts have been present for centuries. Today, the use of dispute resolution boards outside the formal court system to resolve disputes and render justice could be regarded as a manifestation of Nordic pragmatism. Many of these bodies, such as organisations that offer VOM, labour courts and bodies offering CDR, are designed to find practicable solutions and common ground rather than to provide a highly adversarial process. Consequently, courts are a final resort: a case should be filed only once other methods of dispute resolution have been exhausted.

Out-of-court dispute resolution is pivotal in many areas of law.¹⁰³ The availability of family mediation¹⁰⁴ free of charge is likely to contribute to the relatively low ratio of child custody cases in court compared with the number of separating families.

¹⁰²Boe (2020), Nylund (2019a).

¹⁰³See also Petersen (2021).

¹⁰⁴See, e.g., Haavisto (2018), Nylund (2018), Ryrstedt (2012) and <https://familieretshuset.dk/> (accessed 15 June 2020).

However, this section focuses on two areas in which the Nordic countries have been at the forefront, namely CDR and VOM (or restorative justice).

5.1 Consumer Dispute Resolution

The Nordic consumer dispute resolution systems were developed in the 1970s and 1980s, with each country opting for a slightly different design. The two-pronged design, consisting of dispute resolution boards as the ‘private’ prong that resolves individual disputes and the consumer ombudsman as the public prong, forms the tenets of the systems. The ‘private’ prong consists of two sub-divisions: a publicly funded consumer dispute resolution body with broad subject-matter competence and privately funded bodies competent to hear disputes related to specific types of goods or services, such as banking and insurance, or laundry and dry cleaning. Despite the fact that the fragmented structure of CDR makes establishing the exact number of cases processed arduous, the considerable number of cases resolved annually by these boards is one factor explaining the comparably low number of civil cases in Nordic courts.¹⁰⁵ The public prong—consumer ombudsmen and authorities—have an important role in monitoring trading and marketing practices and in enforcing consumer law.¹⁰⁶ The Nordic consumer dispute resolution (CDR) systems have served as an inspiration for EU law.¹⁰⁷

Sweden has a National Board for Consumer Disputes (*Allmänna reklamationsnämnden*), which is competent to hear practically all consumer disputes regardless of the type of purchase object or service concerned. In contrast, the Danish and Norwegian systems consist of a number of consumer dispute resolution (CDR) boards, most of which are highly specialised.¹⁰⁸ The Finnish system is located somewhere between the two, being neither highly centralised nor decentralised.¹⁰⁹

In Finland and Sweden, the decisions of consumer dispute resolution boards are not binding and enforceable as a judgement.¹¹⁰ In Denmark and Norway, decisions of public CDR bodies are binding. In Denmark, the decision is only binding on the trader, and the trader can avoid being bound by the decision by declaring that he or she does not wish to be bound by the decision within 30 days of the date

¹⁰⁵See, e.g., Hodges (2014). For a discussion on the advantages and disadvantages of dispute resolution boards, see Betænkning nr. 1398 (2001) and Betænkning nr. 1401 (2001), pp. 148–153.

¹⁰⁶E.g., Viitanen (2007).

¹⁰⁷E.g., Hodges (2014) and Hodges et al. (2012).

¹⁰⁸See Kristoffersen (2019) for details about the Danish system and NOU 2010:11 Nemndsbehandling av forbrukertvister, Barne-, likestillings- og inkluderingsdepartementet, Chapters 3.2 and 8.

¹⁰⁹Viitanen (2007).

¹¹⁰Laki kuluttajariitalautakunnasta (Consumer Disputes Board Act) 2007/8 p. 20 and Förordning (2015:739) med instruktion för Allmänna reklamationsnämnden (Decree containing instructions for the National Board for Consumer Disputes).

the decision.¹¹¹ In Norway, the decision is binding on both parties, unless one party initiates court proceedings.¹¹² The Norwegian CDR system is different from those of the other Nordic countries, in that traders can initiate CDR processes in the Norwegian Consumer Authority (*Forbrukertilsynet*), whereas normally this is a privilege of consumers. The Norwegian Consumer Authority also hears disputes arising from sales of goods between two individuals, neither of whom is a trader.¹¹³

Despite these formal differences, the systems function similarly. The EU Consumer ADR Directive¹¹⁴ introduced mediation as the first step of CDR processes in all Nordic countries. While mediation has some advantages, the parties to consumer disputes often have disparate power both economically and in terms of knowledge of their legal rights and obligations, making mediation problematic. The consumer risks entering into disadvantageous agreements if they do not know their rights. The availability of bodies offering consumers information and advice mitigates this problem.¹¹⁵ If the consumer and trader do not settle their case in mediation, the consumer can initiate ‘adjudicative’ proceedings at a CDR board. Proceedings are written, free of charge or low-cost, and designed for self-represented parties and are thus very popular. The decisions of CDR bodies have evolved into a set of ‘case law’, which is important for ensuring equal application of the law and predictability and for preventing disputes from arising. The majority of traders voluntarily comply with the decisions. Consumer organisations often ‘blacklist’ traders who do not comply, thus creating an incentive to comply regardless of whether or not the outcome is formally binding.¹¹⁶

5.2 *Victim-Offender Mediation*

The famous article ‘Conflicts as Property’¹¹⁷ by the Norwegian criminologist Nils Christie marked the genesis of restorative justice processes in Norway, which later spread to the other Nordic countries. Christie reprehended lawyers for being professional thieves, who by solving the conflict in lieu of the parties efficiently bar the

¹¹¹Lov om alternativ tvistløsning i forbindelse med forbrukerklager (Act on alternative dispute resolution regarding consumer complaints) 30 April 2015, Sect. 32.

¹¹²Lov om Forbrukerklageutvalget of 17 February 2017 nr. 7 (Act relating to the Consumer Disputes Commission), Sects. 7 and 12.

¹¹³Act relating to the Consumer Disputes Commission Sect. 1 subsection 2 and Lov om godkjenning av klageorganer for forbrukersaker of 17 June 2016, nr. 29 (Act relating to authorisation of alternative dispute resolution entities in consumer matters), Sect. 23.

¹¹⁴Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), O.J. L165/63 (2013).

¹¹⁵Hodges (2014) and Komiteamietintö 2003:3, pp. 280–284.

¹¹⁶Hodges (2014).

¹¹⁷Christie (1977).

parties from renegotiating their relations and social rules and from gaining an understanding of each other's views and experiences related to the incident. Hence, the lay element is pronounced in the Norwegian context, with trained volunteers serving as mediators. The involvement of the employees at the local Mediation Service Offices (*konfliktrådet*) is limited to coordinating and administrative support.¹¹⁸

Mediation can be either linked to criminal proceedings (i.e., considered 'criminal' mediation) or independent of them (i.e., considered 'civil' mediation). In 'criminal' mediation, the process is either an alternative to the criminal investigation and court proceedings or an alternative to or part of the sanction. The accused person must plead guilty to or at least admit the factual basis for the criminal investigation to qualify for victim-offender mediation. Many 'civil' mediations are, in fact, related to a criminal offence: the police encourage the victim of the crime to attempt mediation rather than to file a report, or the police or prosecution has decided to dismiss the case. Since 2016, mediation has been an integral part of youth punishment and youth follow-up, two sanctions aimed at youth offenders ages 15–18. These sanctions replace imprisonment and fines, respectively. In 2019, the total number of cases was 7,386, including 554 youth sanctions and youth follow-ups and 2,207 'civil' mediations.¹¹⁹

Denmark and Finland have enacted similar processes. The Danish process, called *konfliktråd*, entered into force in 2010 and is administered by the police. In 2019, the number of mediations was 564, approximately the same as in 2011.¹²⁰ In Finland, the Finnish institute for health and welfare has overseen local mediation offices since 2006.¹²¹ The process has a criminal and a civil prong, as in Norway. In 2018, the number of 'criminal' mediations was 14,789 and the number of 'civil' mediations was 737.¹²² The Swedish system is decentralised and less regulated compared to mediation in the other Nordic countries. No statistics are available for Sweden.¹²³

Studies on VOM processes show that both victims and offenders are satisfied with the processes.¹²⁴ However, the impact on recidivism is limited or non-existent and that the restorative elements are often limited in practice.¹²⁵

¹¹⁸<https://www.konfliktraadet.no> (accessed 15 June 2020) and Holmboe (2019).

¹¹⁹Konfliktrådet, Årsrapport 2019. <https://www.konfliktraadet.no/getfile.php/4683565.2268.lwlitpzbttjtbt/%C3%85rsrapport+for+2019+fra+Sekretariatet+for+konfliktr%C3%A5dene++korrigert+27.4.2020.pdf> (accessed 15 June 2020), p. 6.

¹²⁰<https://konfliktraad.dk/> (accessed 15 June 2020).

¹²¹Ervasti (2018) and <https://thl.fi/en/web/thlfi-en/statistics/information-on-statistics/quality-descriptions/mediation-in-criminal-and-civil-cases> (accessed 15 June 2020).

¹²²<https://thl.fi/fi/tilastot-ja-data/tilastot-aiheittain/sosiaalipalvelut/rikos-ja-riita-asioiden-sovittelu> (accessed 15 June 2020).

¹²³For a critical account of the organisation and regulation of victim-offender mediation, see Jacobsson et al. (2018).

¹²⁴Gade et al. (2020) and Eide and Gjertsen (2009).

¹²⁵Andrews and Eide (2019), Kyvsgaard (2016), p. 26 and Medling i går, i dag och i morgon. En kort skrift om melding vid brott. Brottsförebyggande rådet 2008. https://www.bra.se/download/18.cba82f7130f475a2f180007582/1371914724337/2008_medling_igar_idag_imorgon.pdf (accessed 15 June 2020), p. 15.

Victim-offender mediation and restorative justice processes follow roughly the same pattern as court-connected mediation: it has become an integral part of the justice system in Finland and Norway, is used to a lesser extent in Denmark and exists only at the fringes of the Swedish justice system.

6 Concluding Remarks

Nordic courts and justice systems have undergone structural, organisational and functional changes, which have amplified many of the legal cultural hallmarks. A strong preference for general courts over special courts is the most central and discernible of these, despite the fact that the adjudication of administrative cases takes place in a myriad of complaints boards in Denmark and Norway. Another key element is the continued unequivocal support for generalist judges. The increased support and use of 'moderate specialisation' dilute the ideal to some extent, while keeping the core of the principle intact.

Nordic courts occupy a less central role in the justice systems than in many other countries, since many other organs provide dispute resolution services, particularly in small cases. The role of courts in the Norwegian justice system is less central than in the other Nordic countries due to the small number of administrative cases, the role of the Conciliation Boards and enforcement agency in resolving undisputed pecuniary claims and the wide powers of CDR bodies and restorative processes. In comparison, the Swedish justice system is by design much more court-centred. Interestingly, some of the Nordic traits are primarily present in the formal court system, such as the idea of judges and courts as generalists, whereas boards at the fringes of the justice system are specialised.

In civil cases, the function of courts is disjointed. On the one hand, the adjudicative role of courts has been accentuated by transferring non-litigious, undisputed cases from courts to other organs. On the other hand, facilitating settlement and conciliation are increasingly a task of courts, whether it is part of the ordinary court proceedings or a separate mediation process or whether victim-offender mediation and restorative justice processes are used as a criminal sanction. The private function of courts has broadened beyond the formal, legal definition of a final judgment, to encompass dispute resolution through dialogue and active search for mutually agreeable solutions. Thus, Nordic courts have taken steps in the direction of the multi-door courthouses, where the disputants can utilise the dispute resolution process of their choice.¹²⁶ This has strengthened the pragmatic element in Nordic court culture.

While many of the developments are common to the Nordic countries, such as consolidation of the court structure, judicial settlement efforts or CDR, other developments uphold pre-existing divides or even create new ones. The differences in the view of the role of courts in administrative law cases and the attitudes towards administrative courts are tangible and unaltered. Court-connected mediation and

¹²⁶Sander (1976).

victim-offender mediation have become intrinsic elements of the Finnish and Norwegian justice systems and court cultures. The reception of mediation has, in comparison, been tepid in Sweden, and partly also in Denmark. Perhaps a new division is emerging in Nordic court culture between the north (Finland and Norway) and the south (Denmark and Sweden)—that is, between countries where mediation is absorbed into court culture becoming an intrinsic part of it and countries that are more sceptical toward to mediation.

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