

# **REPORT FROM DENMARK**

Presented by

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## 1. INTRODUCTION

The fairly extensive right in earlier times of owners of real property to utilize their real property has - particularly during the last ten years - become limited by legislation concerning inter alia environmental protection, conservation of nature and physical planning.

Environmental law is a very comprehensive system of rules with many different means of regulation and various competent authorities. Also the rights of citizens are regulated in different ways within the different branches of law and are influenced by the changes which occur in the conception of the substance of property.

The concept of interest in administrative litigation is therefore not constant - or uniform within different branches of law. When considering the concept, it is natural to stress the distinction between the interests which are safeguarded when fellow citizens are guaranteed protection and control facilities:

legal protection      control      influence

*The legal protection interest* first and foremost comprises the individuals' needs for the fewest possible legal errors in the administrative practice, i.e. security against violations of rights of individuals. An initiative which is based on a legal protection interest is normally in the form of contradiction, remonstrance, recourse, Ombudsman complaint, or a lawsuit.

Initiatives which further a *controlling interest* normally aim at overseeing the exercise of administration in deed and in intent so as to limit departures from legal requirements or social objectives. The control aspect is part of the State's supervisory interest and is particularly prominent in respect of complaints against decisions made by municipal authorities. The complaints system, however, has limited application as a means of control for the State as the initiative is dependent on the interest in lodging a complaint of the party entitled to do so.

By enlarging the circle of complainants through an acceptance of collective complaints, the State often achieves better substantiated and more fundamental complaints than those which may be expected from individuals. It is a controlling interest rather than a legal protection interest which brings about new rules concerning collective complaints. The public authorities' power of complaint must also be seen as part of this control system.

*Influence* refers to the citizens' possibilities of influencing the decisions. This aspect of citizen initiatives has achieved a certain formal character by way of project publicity rules and right of complaint for organizations or groups which are not affected from a legal protection point of view but which safeguard some common interests. The inclusion of interested representatives in administrative bodies is also a token of the safeguarding of citizen influence on the actual administration.

*The delimitation of the concept of interest is dependent on the reasons for the lawmaker's acceptance of citizen participation in the administration.* In the following it will therefore often be pointed out what the actual reasons have been for a closer delimitation of the concept of interest.

The main theme of the report will be the concept of interest in environmental matters, but also the ordinary administrative law problems and other special administrative law problems will be discussed in the report when it is of importance for the understanding of the special problems within environmental law.

## 2. DEFINITION

### A. What is generally understood by the term 'legal interest'?

The Law of Nature considered the subjective rights, i.e. the rights possessed by an individual as a privilege, to be the origin and purpose of all law. Therefore only such rights could be invoked at the courts of law.

The need for legal protection of other interests as well meant that practice and doctrine gradually abandoned the requirement of a subjective right and instead required a legal interest from a complainant. This concept has primarily been employed as a dissociation from the earlier requirement of a subjective right, and it may be difficult to establish its substance. Poul Andersen, who was one of the first to advocate the use of the criterion, writes the following about the criterion in relation to the right of action in 'Ugeskrift for Retsvæsen' (a weekly law journal) 1925 B, p. 244:

'The decisive viewpoint (must) be, however, that the comparatively complicated and costly judicial machinery should be set in motion only when the matter is of some significant importance to the individual'.

The trial of law has been instituted as a legal protection for the individual, and it is therefore a requirement that there must be a *close connection* between the complainant and the decision complained against.

The recourse, too, is primarily a legal protection remedy for the citizens, and it has therefore been natural, when delimiting the circle of those entitled to lodge complaints, to concentrate on the private individuals who in some way are affected by the decisions which there is a wish to have reconsidered.

However, the concept of party in administrative law differs from the concept of party in procedural law in not presuming that all cases have two parties with conflicting interests. On the contrary, there is normally only one party and the cases are concerned with what he/she can demand of society or what society can demand of him/her. Furthermore many administrative decisions have complicated legal effects in relation to many different persons whose interests must be safeguarded by both the court of first instance and the recourse instance. In several countries it has proved to involve insuperable difficulties to distinguish for example 'parties' from 'interested parties'. Interested parties are persons for whom it is important from some point of view that a decision is made even though the decision is not directed against them or can be said in a proper sense to affect their legal position.

The concept of legal interest is dependent on the development of the rules of substantive law. Thus the new Danish planning legislation has meant both enlarging and limiting the circle of persons who under the former rules were to receive individual notification about the binding detailed plans. The limitation was that under the new rules mortgagees shall receive no special notification - which emphasizes the reduced importance attached to the economic rights. The enlargement was that also tenants and users are to be notified individually, and the local societies or other associations who have once and for all asked the municipality concerned to be informed are also entitled to be notified individually.

The concept of legal interest also depends on the *functions of the control*. It will be elucidated below how the concept varies from systems which solely serve the purpose of legal protection to systems which must also secure democratic citizen participation and supervision.

## **B. What is understood by the concepts of 'collective/common interest' and 'actio popularis'?**

Both the recourse and the trial of law have had the object of providing legal protection in an individual form. But one of the most fundamental features of our modern society is the co-operative idea, and the trend is therefore towards interest groups, rather than individuals, appearing as complainants. This means that there is a development towards a weakening of the demand for a special relation between the complainant and the decision complained against.

In many cases an interest organization looks after the interests of its members in such a way that the decision may be said to affect the organization as such, and the organization therefore has the required legal interest to be considered to have right of complaint and right of action. In other cases it may be doubtful whether there exists any special relation between the decision and the organization.

Within some branches of law it is even presumed that only interest organizations can appear as complainants, as the rules safeguard the interests of the organization. As an example may be cited the monopolies legislation where individuals in cases concerning price level, interest, and the like, can only be expected to be accepted as complainants if no interest organizations exist to safeguard their interests.

The interest to be safeguarded within the monopolies field may appropriately be termed a *collective interest*. The term then covers an amalgamation of interests where all members or the organization are more or less affected by the decision from traditional legal protection considerations.

It is a characteristic of the monopolies field that there is a safeguarding of joint economic interests which are in conflict with the economic interests of others.

In 'Nævn & Råd' 1958 ('Boards & Commissions') Bent Christensen wrote the following about the possibility of organizations appearing as complainants within the monopolies field:

'It probably has to be ruled out that consumer organizations should be able to lodge complaints merely because an exclusive agreement, for example, which the Commission has decided not to prohibit is claimed to put up the price of goods. Consumer organizations are not representatives of tangible economic interests in the same way as trade associations etc., and the fact that Board of Appeal decisions can be brought before the courts of law does not seem to indicate that it has been the intention to depart radically from the general principles of delimitation of the right of action', (p. 240)

The development in respect of the rules of substantive law and in respect of practice has meant that Bent Christensen's starting point regarding the delimitation of the safeguarding of collective interests through organizations can no longer be said to be current law.

It becomes more intangible where it is a question of *ideal interests which are safeguarded by organizations*. What must be required in order that an organization through recognition of its right of complaint or right of action can be said to be a spokesman for a common interest? Must such organizations have a status approximate to that of a party in the case or is it the decisive factor that the expert knowledge of generally accepted is given influence by accepting that such organizations be given the chance to take the initiative?

The interest which is safeguarded *within the environmental field* through organizations like Danmarks Naturfredningsforening (The Danish Society for the Preservation of Natural Amenities) is termed a *common interest*

because here it is a question of safeguarding common interests. This last category is also characterized in that often it is not substantive, economic interests which are invoked by the organization.

*An organization can of course look after both a collective and a common interest.* When Dansk Sportsfiskerforbund (Federation of Danish Anglers) complains against the discharge of waste water, the organization invokes both the anglers' economic interest in the fish released by them and the common interest in preserving the Danish fish stock.

The concept of *actio popularis* means that everybody merely by virtue of citizenship has the right of appeal to administrative authorities or courts of law from a decision.

In Danish law there has never been a general right of complaint against administrative decisions to a higher authority or the courts of law. Such a right has earlier been conferred by the Danish tax legislation, but the provision has now been repealed. There are no other law rules in Denmark in respect of *actio popularis*, and in practice there has been no willingness to accept such a right unless it was prescribed by law.

### **C. How is the concept of 'environment' defined?**

The concept of environment depends on who is using it. It undoubtedly has a meaning in *ordinary parlance* where it primarily has to do with welfare and living conditions, whether in the home, at work, or in the physical surroundings.

In this report the concept will primarily be *determined by the lawmaker's delimitation of environmental regulations of the physical surroundings.*

There may be reason to protect people from harmful effects of their living and working conditions. The Danish lawmaker has regulated these questions in a Building Inspection Act and a Factory Act, but these acts and the environmental acts have not been co-ordinated regarding the physical surroundings. It may seem an inexpedient distinction, but one which it is necessary to maintain in this report.

Problems concerning food control also lie outside the scope of this report.

### **3. THE CHIEF SUBSTANTIVE LAW RULES CONCERNING ENVIRONMENTAL LEGISLATION AND SIMILAR LEGISLATION**

It is characteristic of the environmental legislation that the rules do not regulate the utilization of the area by precise legal provisions. The rules are *framework and delegation rules* which are filled out with binding and guiding rules and plans by the administrative authorities. Furthermore the acts are not the result of a detailed, interdependent co-ordination of the contents. It is therefore a fairly complex law system with frequent problems of co-ordination in the relationship between the acts at the various administrative levels.

Of relevant branches of law, the following deserve special mention: *The Environmental Protection Act* which shall especially be employed to seek to safeguard the qualities of the surrounding essential to people's hygienic and recreational living conditions and to maintain a diverse animal and plant life. The act aims at preventing and combating pollution of air, water, and soil, and to counter noise nuisances.

Under the Environmental Protection Act the main responsibility for regional and local administration of environmental protection rests with county councils and local councils. The popularly elected bodies shall see to an environmental administration in conformity with local wishes. The State administration shall ensure a central co-ordination, a national superintendence, and a handling of complaints regarding the private interests affected.

Briefly, the work is divided between the authorities as follows:

Heavily polluting enterprises must obtain permission before expanding or changing operations if this leads to increased pollution. The vast majority of cases requiring permission must be dealt with by the *municipal councils*.

The chief responsibility for the supervision of polluting enterprises rests with the local councils. If supervision or control disclose conditions or circumstances which are not in order, the local councils may order the enterprise to cease operations until the pollution can be brought within certain specified limits. Enterprises which have failed to apply for approval or failed to comply with the terms and conditions of the approval may be ordered to close down.

All local councils were required to have worked out by 1 October 1976 a waste water plan to be approved by the county councils. The waste water plan must include information about how it broadly relates to other local, physical planning. It must state the waste water plants which already exist in the municipality and any that are planned, and it must state how the waste water is purified or is intended to be purified.

*The county councils* have the main responsibility for the quality of the water areas. They must therefore consider applications from commercial or industrial enterprises for permission to abstract water, and they must also decide about waste water discharge.

Certain enterprises require the approval of the county council. This is true, inter alia, of enterprises operated by the municipality.

On the basis of a survey of the sources of pollution and the resultant pollution, the county councils in cooperation with the local councils work out plans for the future siting of enterprises which may cause pollution problems. In addition, the plans contain a statement of the desired utilization of the surroundings and the environmental qualities to be secured in that connection. The plans are called environmental qualities, and together with other sector plans form part of regional planning.

There are no binding substantive law rules concerning the quality of the environment. The administrative rules are guiding rules and are worked out by the *National Agency of Environmental Protection*. If one wants to know something about the noise limit acceptable in a residential area and a business or industrial area respectively, one has to look to the guiding rules of the Environmental Agency. The same is true of other forms of pollution limit determination.

The pollution of the watercourses is a great problem, which is regulated by the *Watercourse Act* of 1949. The act has been amended several times, and in 1963 the State took over the bankowners' obligation to maintain public watercourses. In 1973 the waste water regulations of the act were transferred to the Environmental Protection Act. The most important function of the act is now to solve various conflicts between landowners regarding watercourse utilization and maintenance, and to ensure the draining capacity of the watercourses. Agricultural interests in the watercourses for drainage and the coinciding public interest in the watercourses as recipients of waste water from residential properties and business or industrial enterprises etc. have been looked after by the Watercourse Act's substantive main provision in section 2 which says that the use of the natural watercourses referred to in the Watercourse Act for the discharge of water has priority over all other uses of the watercourses. Section 3 of the act further gives any landowner the right to lower the groundwater level on his property to a depth necessary to cultivation, by means of ordinary ditching and draining with an outlet to existing watercourses. And the provision furthermore permits the owners of adjacent lots to drain off from their own sites both surface water and water from ordinary drainage and ditching plants to the watercourses, including stretches of previously open watercourses. Pumping for the purpose of ensuring a better draining of low-lying areas and adjustments of watercourses by laying down pipes shall require the approval of the special *watercourse tribunals*.

The Watercourse Act contains no substantive provisions which ensure a watercourse quality in conformity with the objectives in the recipient quality plans to the benefit of freshwater fishing. In the case of changes of watercourses whereby their natural state is affected, the conservation authorities must be called as the matter in question will often be something which requires permission under the Conservation of Nature Act.

*The Water Supply Act* makes it possible to secure the volume of water in the watercourses. The *county council's* permission is required to abstract water (groundwater as well as surface water). When an application is being considered, it must be taken into account that the water abstraction if possible does not prevent a reasonable watercourse quality, and for that reason applications for a licence to abstract water must in certain cases be refused.

*The Raw Materials Act* governing the exploitation of stone, gravel and other natural deposits in the soil, as a general rule, makes it a precondition that any commercial exploitation of raw materials shall require a permit. Permits for exploitation on land are granted by the *county council* after weighing any public interests involved, while permits for exploitation in the territorial waters are granted by the *Minister for the Environment*.

Together with the Continental Shelf Act, the act has meant that the public planning authorities have obtained a certain superintendence of the raw material exploitation on land and on the sea bed and thereby of the utilization of Denmark's total raw material resources.

Section 2 of the act states the chief purposes which the act is to ensure, viz. that the raw material exploitation takes place on the basis of concerted planning following an overall assessment of the social considerations involved, that a resource-economical utilization of the deposits is ensured, and that there is a co-ordination of the authorities' handling of questions regarding raw material exploitation.

The mapping which is undertaken will form the basis of the regional and local plans which, in connection with a consideration of the ways in which the country's area can be used, must contain guidelines also for the use of the area to extract stone, gravel and other natural deposits from the soil.

Of other relevant branches of law should be mentioned the Act on National and Regional Planning and the Municipal Planning Act. They are acts which have the purpose of ensuring a concerted planning which inter alia sees to it that the utilization of land and natural resources is based on an overall assessment of the community's interests - a planning which also takes into account the environmental problems so that a basis is created for using, inter alia, the Environmental Protection Act. The plans that are worked out as national plans are binding on the local authorities. The citizens, on the other hand, are under no obligation to implement the plans. The legal effect only manifests itself as a restriction of ownership rights, the landowners being bound to comply with the plans which have been worked out at the local level.

It is a central feature of the planning acts that provisions have been included requiring proposals for plans to be presented at an early stage, that the authorities have an obligation to ensure that the plans are debated, and that it must be possible for the citizens to make objections regarding the plans. The citizens' objections, however, are not binding on the administrative authorities.

The regional plans are worked out by the *county councils*, municipal and local plans by the *municipal councils*.

Another act to be mentioned is the *Urban and Rural Zones Act* which was introduced in 1970 as the first stage of a planning act reform. In view of the restricted area resources and the public investments required to secure for the population a reasonable access to public and private services, the administrative authorities interfere in major development and building where planning for this exists.

The transfer of areas to urban or holiday cottage area is effected through a local plan under the Municipal Planning Act. The zonal boundaries, however, shall be ruled by the overall planning. The regional plan lays down the guidelines for the utilization of rural zones and for the distribution of building on urban and rural zone building respectively. The municipal plan, which must not be contrary to the region plan, contains guidelines for the individual municipality. As the local plan, too, must not be contrary to the municipal plan, co-ordinated planning is ensured.

The Zones Act is no ordinary planning act which confers powers to make out plans, but it works on the basis of plans and the planning system. In conformity with this, the principal purpose of the act is 'to ensure a planned and expedient development in terms of the national economy, in accordance with the national, regional and municipal planning' cf. section 1 (1). A further purpose is contained in section 1 (2) according to which the act is to 'contribute to the safeguarding of the population's recreative interests and the maintenance of rural amenities'. Finally the act is to 'help to secure the interest in an expedient utilization of raw material resources and the agricultural area resources', cf. section 1 (3).

*The Conservation of Nature Act* was amended in 1978 as the result of a wish to incorporate the conservation planning in the overall physical planning. Under the act an elaborated planning system is provided by means of a prior mapping, analysis, and assessment of the conservational interests, which are then made the basis of the thorough planning of the safeguarding of the conservational interest within each separate region. The regional conservational planning results in the preparation of a provisional plan proposal which, after a public phase, is considered afresh with a view to working out a final plan proposal to be approved by the Minister for the Environment. The conservational plans will, among other things, select the most important nature areas in the region, and guidelines for the protection of these areas, their care, and recreational utilization will be laid down. The plans will subsequently form part of the regional plans so that guidelines are fixed for the safeguarding of nature conservational interests.

It is also possible under the Conservation of Nature Act to make concrete proposals for conservation following an initiative from the National Agency for the Protection of Nature, Monuments and Sites etc., the county council, the municipal council, or the Danish Society for the Preservation of Natural Amenities. The Danish Society for the Preservation of Natural Amenities is an organization with the ideal purpose of safeguarding nature preservation interests. Conservation orders are made by the *Conservation Boards*. After the amendment of the Conservation of Nature Act in 1978 there have only been very few conservation cases. In the event of conservation measures, compensation is paid according to the principles of expropriation. In this the interventions differ from the general regulations via the planning acts. In practice the conservation authorities have therefore primarily chosen to regulate through plans in order to avoid citizens being treated differently dependent on which act reference is made to. It may be said that, as a result of the development of the planning acts, the conservation orders have changed character. Thus there has been reason to restrict the institution of conservation to the cases where an addition is desired to the compensation-free regulation which can be carried out by virtue of the legislation governing the utilization of areas.

There are also legal regulations of agricultural planning in the *Agricultural Properties Act*, but this planning is still in its initial phase.

It should also be mentioned that the *Forestry Act* has provisions regarding forest preservation obligations.

The content of the substantive rules is naturally of consequence to the delimitation of the concept of interest within the mentioned branches of law, and in the following administrative practice in respect of some of the branches will form part of the report.

#### **4. WHAT POSSIBILITIES EXIST IN YOUR COUNTRY OF APPEAL FROM ADMINISTRATIVE RULINGS?**

Unless otherwise provided by law or in pursuance of law, there exists in Denmark a right of appeal from a decision by a lower State authority to a higher State authority, and with final recourse to the Minister. Such a regulating possibility is a requisite of our constitutional system. It is also no doubt the case that decisions made by an authority in compliance with delegated powers can be brought before the authority which has the original jurisdiction.

It is more difficult to establish the state of law in those cases where the competent authority is a municipal body or a special administrative body. The case for accepting a right not prescribed by law to bring decisions made by such authorities before the appropriate Ministry is that the Ministry will obtain a better insight into the administrative and legal attitude in the sphere in question. The generally accepted view is that where jurisdiction by law is vested in a body which is not subject to a relationship of superiority and subordination, there must be a legal provision in order that this jurisdiction can be limited by another authority's right to reconsider and perhaps overrule the decision.

Practically all recourse systems are mentioned in the legislation. Special complaints provisions are introduced in some cases to debar an otherwise existing right to lodge complaints. This is the case where the law prescribes that decisions made by central authorities may not be submitted to the Minister. The final administrative decision shall be made at a lower level of the hierarchy or by a board of appeal. In the first-mentioned case the recourse still forms part of a superiority/subordination relationship, while in the last-mentioned case it is a question of a special statutory recourse facility where the legal provision institutes the right of recourse to the board.

The term 'administrative recourse' is used to describe the fact that an administrative decision can be brought before another administrative authority which - when some procedural prerequisites have been satisfied - is under an obligation to reconsider the decision.

The recourse is partly a legal protection remedy for the citizens and partly a means of control ensuring that the judicial opinion of a central or regional authority is brought to bear influence on the practice of the first instance. In both respects the recourse is a means to ensure a lawful and expedient administration on the part of the local authorities. The re-examination may have the result that the decision is upheld, amended completely or partly, or overruled without a new decision being made in its place.

#### **A. How are the administrative bodies which deal with complaints organized?**

Where the right of complaint rests on a *superior/subordinate relationship* the superior authority, in addition to its powers as a recourse authority, has the other normal powers of superiority in relation to the body whose decision is being considered. This means the right to give official orders, to amend on its own initiative decisions made by the subordinate authority, and the right to superintend the subordinate authority. These other powers have the effect that the complaints system in the case mentioned is characterized in that the usual procedural prerequisites - including the right of complaint - do not have to be satisfied in order that the recourse body can consider a complaint as to the points of fact.

*When establishing recourse systems*, it must be considered what type of bodies are *best suited* to handle the task at hand. If the lawmaker wishes to infuse confidence into the administrative authorities, it is natural to copy the courts of law, which are thought to command greater confidence than the administration. This means that the members of the recourse body must first and foremost be guaranteed a functional independence, but also that some of the basic principles of judicature must predominate the body's procedure. However, there are also other possibilities. By allowing representatives of the general public to be members of the body, the lawmaker may be able to ensure that the body commands a confidence equal to or greater than that of the courts of law. If the principal objective is an acceptance on the part of those directly affected by the decision, the lawmaker may set up recourse bodies with interest representatives.

Basically, however, the recourse bodies are administrative authorities, and therefore officials will be natural members, and the ordinary rules of procedure will still be predominant.

Legislatively the application of the recourse as a means of control must also be borne in mind. By letting a central body make the final administrative decision, the aim is a uniform, national practice, as the ruling of the recourse body establishes a precedent for the subordinate authorities. The central authority may be a Minister. This arrangement would ensure a parliamentary control of the decisions made. However, the tendency is towards relieving the Minister by the legislation placing the administrative decision-making in the hands of a directorate or a central board of appeal.

The lawmaker has in some cases left the final administrative decision to local bodies. The reason for this is that there is no need for central control in these spheres, and that the local authorities have the best knowledge of local conditions of importance to the decision of cases. Here, typically, municipal or county councils are the competent local authority.

*In environmental law* the first instance is normally the municipal or county councils. Under the *Environmental Protection Act* the municipal decisions may be brought before the central directorate, The National Agency of Environmental Protection, which has discretionary powers to reconsider the decisions fully. This recourse arrangement shall ensure both a legal protection and a control.

The National Agency of Environmental Protection has a staff of both administratively and technically trained people, i.e. law graduates, economists, engineers specialized in different branches, chemists, doctors, biologists etc. The Agency advises the Minister and other authorities on questions of environmental protection, and with a view to that it must familiarize itself with the state of pollution in the various parts of the country. The Agency must also keep

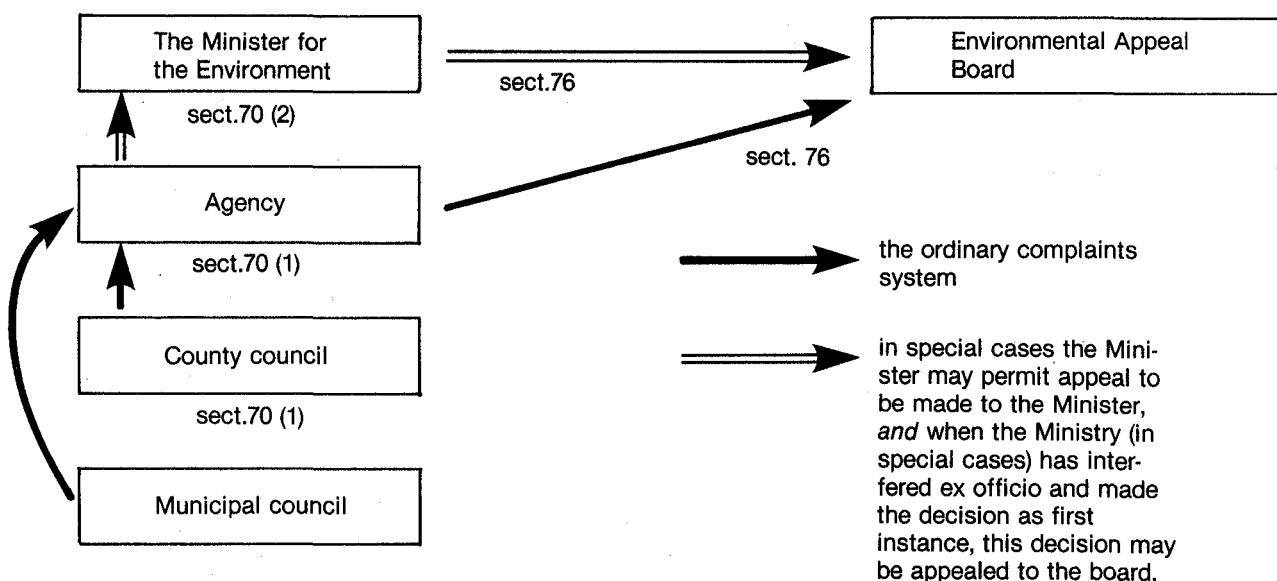
up to date with the state of knowledge in the field of environmental protection - including developments abroad. The Environmental Agency's principal decisions, i.e. primarily decisions concerning the approval of polluting enterprises and permission to discharge waste water from commercial or industrial enterprises, may be brought before a special board of appeal, the Environmental Appeal Board. The Environmental Appeal Board is the final instance of appeal within the following branches of law: environmental protection, the Sea Protection Act, the Recycling Act, the Act on Chemical Substances and Products, the Water Supply Act, and the Urban and Rural Zones Act. Only cases involving fundamental principles may be appealed to the Board, which has authority to make a complete re-examination. The composition of the Environmental Appeal Board depends on which act the appealed decision is made in pursuance of, and on the Chairman's designation of appointed members in the individual case. The authorities and industrial and trade associations with the right of nomination vary from one branch of law to another, dependent on the interests to be safeguarded through the administration of the act.

Within most branches of law the appointed members may be divided into two groups. One group has been nominated by the Agency and entered on a special list. (Within most branches of law it is the National Agency of Environmental Protection which has the right of nomination, but in respect of the Raw Materials Act, for example, it is the National Agency for the Protection of Nature, Monuments and Sites, and in respect of the Urban and Rural Zones Act it is the National Planning Agency jointly with the National Agency for the Protection of Nature, Monuments and Sites which have the authority). The other group has been nominated by the industrial and trade organizations and entered on another list. In respect of the Environmental Protection Act it is the Federation of Danish Industries and the agricultural organizations who jointly have the right of nomination.

When considering the individual case, the board is composed of a chairman, who shall be a graduate in law, and two or four appointed (expert) members. The expert members are designated for each individual case by the chairman. The chairman shall designate the members with equal representation of the two lists (i.e. one or two from each list dependent on the significance of the case). The lists state who possess special expertise within the existing subject spheres.

In the cases where the Environmental Appeal Board is not an instance of appeal (because of the Act's restriction of its authority to what is normally major environmental matters) the Minister for the Environment may permit appeals to him from Agency decisions. Such a permission will be exceptional and based on the reason that the decision turns on a point of principle, or that it is of major importance to environmental protection.

The appeal system of the Environmental Protection Act may be characterized as a model, which is used in other branches of law where the Environmental Appeal Board is the instance of appeal. The model may be illustrated by the following figure, the sections referred to being sections of the Environmental Protection Act.



*NB* In respect of the Urban and Rural Zones Act there are only two instances, viz. the municipal and the appeal board. In these cases the National Planning Agency is the board's secretariat.

In respect of the *planning acts* no appeal board has been instituted. Here the final administrative decision in appeal cases is made by the National Planning Agency which, like the National Agency of Environmental Protection, is a specially expert directorate. The Planning Agency does not have powers to fully re-examine plans or decisions, as it has been laid down by the Municipal Planning Act that only *legal questions* may be considered (cf. section 48). The reason for this limitation is the interest in ensuring local autonomy, central control, and a relief of the Ministry.

As regards *conservation*, the bodies are composed in a different manner. Here a local conservation board is the authority of the first instance, and a chief conservation board (an appeal board) the final administrative instance of appeal concerning actual conservation.

The conservation boards, whose jurisdiction is limited geographically to a county, are composed of a chairman, who shall be a judge and who is appointed by the Minister, and two other members who are appointed by the local municipal authorities.

The Chief Conservation Board is not composed of interest representatives like the Environmental Appeal Board. The Chief Conservation Board is composed of a chairman and a number of other members. The chairman shall be a graduate in law. Of the other members, each of the parties represented in the Finance Committee of the Folketing (Parliament) shall appoint one member while two members are appointed by the Supreme Court among the members of the court.

The Chief Conservation Board has powers to make a full re-examination of the decision.

Changes in public and private waterways and in the state of natural lakes, as well as the establishment of fish farms, shall be subject to the permission of the county council pursuant to section 43 of the Conservation of Nature Act. The decision may be appealed to the National Agency for the Protection of Nature, Monuments and Sites.

## **B. Who has right of complaint?**

As the recourse is first and foremost a legal protection remedy for the citizens, interest must be concentrated on the private persons who in some way or other are affected by the decision which is desired to be re-examined. The law has stated who has the right of complaint in some appeal systems. These rules are often imprecise on purpose as it has not been the intention to preclude interests which deserve protection by inviting 'e contrario' conclusions, arising out of too narrow a definition of who has the right of complaint. The predominant opinion must probably be said to be that it is not the lawmaker's task to delimitate the circle of those who have the right of complaint unless there are very special reasons for doing so, and that therefore the delimitation should be the result of a free development of practice.

Where there is no legislative basis for a delimitation, it is the presumption that *everybody who has an individual and material interest in the decision made has a right of complaint*. Guidance may be obtained from the judicature delimitation of who shall have right of action, which also uses the criterion 'individual and material interest in the decision'.

The party to whom the decision is directed clearly belongs to the category which has a right of complaint. A petitioner who is not himself affected by the decision, on the other hand, has no right of complaint.

Between these two extremes there are persons to whom it will be of importance from some point of view that a certain decision is made, even when the decision is not directed against them or can be said properly to concern their right. Their right to appear as complainants depends partly on whether the act may be understood to protect the group of persons they belong to, and partly on whether their interest in contesting a decision equals private and public interest in the decision having immediate legal force.

It is particularly difficult, applying the traditional criterion (and thereby from a legal protection interest), to decide whether an association of citizens can be said to have a right of complaint.

In the environmental field there is particular reason to look into the preparatory works of the acts, as the wording of the acts typically does not commit itself on the question but instead chooses the imprecise criterion 'individual, material interest' (or 'material, individual interest').

In the *preparatory works of the Environmental Protection Act* the decisive criterion of whether associations etc. should be considered to have a right of complaint is whether the association in question 'may be said to represent a group of persons whose individual, material interests are directly affected by the decision. Thus a homeowners' association e.g. must be able to complain against a permission to establish a dumping site near the association's area if the site can conceivably cause inconvenience to the members, and an anglers' association must be able to complain against a decision regarding the pollution of a watercourse which the members of the association have an interest in. If the association does not represent such a group, or if the group of persons represented by the association has no direct connection with the said matter, perhaps because the association is rather looking after an initiative-taking and an opinion-creating interest, it will hardly be true that such an association has a right of complaint, and the competent authority does not on its own initiative have to inform the association about decisions made, ...

A person with a right of complaint may of course decide to let somebody else lodge a complaint on his behalf, e.g. a lawyer or an association (trade association, agricultural society, nature conservation society or NOAH). It must be clearly established that an authorization exists and that the proper complainant is the one covered by section 74 (1)...

*In the explanatory notes concerning section 12 of the Raw Materials Act a similar delimitation has been made of the right of associations to appear as complainants. (The Environmental Protection Act is also in this respect a model for the other acts).*

*The preparatory works of the Urban and Rural Zones Act also presume a broad delimitation of the criterion 'material, individual interest' stating:*

*'Like a similar provision of the Raw Materials Act, the provision opens up the possibility that a local association whose object includes e.g. the safeguard of nature conservation or recreational interests may lodge a complaint. The association's interest in a matter where it wishes to lodge a complaint must be founded on material regard for the object of the association, and the association must be able to justify the complaint on the ground of regard for the safeguarding of the association's interests in the said matter'.*

*The explanatory notes concerning section 45 of the Conservation of Nature Act make a broader delimitation by stating;*

*'The rule that complaints may be lodged by anybody who has a material, individual interest in the decision, offers an expedient delimitation of who has the right of complaint. In particular it seems reasonable that the local association whose members go in for special leisure activities connected with our freshwater and other wetland areas, e.g. anglers, sportsmen, bird-lovers, yachtsmen and rowers etc., has the possibility of complaining against a decision which materially affects the leisure activities, ...'*

*It seems natural to assume as a general rule that associations should be considered to have a right of complaint in cases where their members as a group are appreciably affected by a decision even though individual members do not have the required individual interest to lodge complaints themselves. If so, the association's right of complaint should be based on the sum of the members' interests.*

*In the above, the delimitation of who has right of complaint has been based on the recourse as a legal protection remedy, but the recourse can furthermore *In the public interest* ensure that nothing unlawful occurs in the administration, that the common interests of the local community are safeguarded, and that a certain control is obtained by the central authorities of the practice of those in a subordinate position. This aspect of the recourse should be borne in mind when dealing with the circle of complainants.*

*It may be stated that the safeguarding of public interests through a right of complaint, as an almost indispensable rule, can only take place if there is *authority* for it. Such a right of complaint may have been conferred on the authority which has had its decision overruled, other authorities than the competent authority, a minority within the competent authority, and private persons with no direct involvement in the case or associations of such people. A few exceptions to this restrictive starting-point do, however, exist. Before the new Environmental Protection Act, it was presumed in practice that the Medical Health Officer had a right of complaint, which was not founded on a specific provision, both as a member of the health committee and when appointed ad interim. Paragraph (2) of subsection (1) of section 74 of the Environmental Protection Act expressly authorizes this right of complaint.*

*When it is established that the safeguarding of public interests through a right of complaint can only be accepted where an express authority exists, the reason is the regard for the party to whom the decision is directed. Any complaint leads to insecurity and can interfere in the legal position of the party to whom a decision is directed. Where the complaint has a suspensory effect, the party affected must await the decision of the recourse instance. The recourse instance has the competence to safeguard the complainant's interests and may therefore overrule the decision complained against to the detriment of the party to whom the decision is directed.*

*Is special authority required in order that an environmental association or a grassroots organization can be accepted as being entitled to lodge complaints, on the grounds that they are to ensure, in the public interest, that there is no unlawfulness in the administration, that the local community's interests are safeguarded, and to obtain a certain control by the central authorities of the practice of those in a subordinate position?*

*The regard for the party to whom the decision is directed is of course the same, but it must nevertheless be considered doubtful whether the same authority must be required in respect of such organizations as that required in respect of public authorities wishing to lodge complaints.*

*It follows from the principle of legality that every act done by a public authority must be founded on law. Such a requirement of authority does not apply to the acts of an environmental association or a grassroots organization. Furthermore the public authorities have other means than the recourse when they wish to intervene - grassroots organizations or environmental associations seldom have other possibilities when disregarding the use of mass media.*

*In Swedish judicial practice it has been presumed that the fact that the lawmaker has expressly directed a public authority to safeguard the public interest through superintendence and complaints, precludes that also interest organizations, grassroots organizations, or other organizations can have a right of complaint in the public interest unless this is expressly laid down in law. As there are very often public superintendence functions or right of*

complaint for public authorities within the spheres where grassroots organizations wish to make their influence felt, it requires express legal provision if this conception of law is also the one prevailing in Denmark. That this way of thinking is not alien to Danish law may be seen from the Environmental Appeal Board's decision pursuant to the Raw Materials Act which is mentioned on page 27 and from the question raised by Claus Haagen Jensen in 'Dansk Miljøret' (Danish Environmental Law) vol. 3, p. 147, as to whether when considering, inter alia, borderline cases concerning the right of complaint of associations, importance should be attached to the extent to which there will be others entitled to lodge complaints based on roughly the same interests. Haagen Jensen says the following about this:

'What decides the weight of the view is obviously the aim of the recourse system. The more the system is to serve ordinary control purposes, the more important the viewpoint. As regards the Environmental Protection Act, the leading idea underlying the complaints rules is probably that materially affected individuals must be given legal protection, but it appears from the preparatory works in respect of section 74 that also broader considerations of a central control through recourse have played a part,...

*As long as the criterion 'legal interest' or 'individual, material interest' is to be the basis according to the act or because of a lack of an express definition in the act, it becomes difficult for grassroots organizations or environmental associations to acquire a right of complaint or right of action. The criterion focuses on the need to offer legal protection to the individual and is not intended to create a basis for permitting spokesmen for public interests to appear as complainants.*

Legislation and practice within the Environmental Protection Act, and the delimitation in analogous acts on environmental matters of the right of complaint of associations differing widely in character seems rather incalculable and not entirely consistent.

Of relevant distinctions, the following should first and foremost be emphasized:

- approved national environmental associations  
local committees of approved national associations
- other national environmental associations  
local committees of other national environmental associations
- grassroots organizations which are nation-wide  
grassroots organizations with local affiliation.

An approved association means an association which by virtue of an act or a ministerial order has acquired a special status in regard to the administration of the act. The concept of approved associations is primarily known within the Conservation of Nature Act, where the Danish Society for the Preservation of Natural Amenities has acquired inter alia the right to make proposals for conservation and a right of complaint.

National environmental associations like the Danish Society for the Preservation of Natural Amenities and the Association of Danish Anglers have local committees which in the preparatory works of certain acts are presumed to be given a right of complaint in cases where it has not been accepted that the entire national organization should have a right of complaint. Administrative practice also outside such branches of law has accepted that the local committee rather than the national organization be given a right of complaint.

Grassroots organizations are characterized by not having a structure similar to regular associations. There is no actual board, the decisions being made at joint sittings - it is a so-called flat structure. There is no membership fee and the resources of the organization are typically only the personal efforts of members. Of national grassroots organizations in Denmark NOAH should be singled out for special mention. Of local ones may be mentioned the Cheminova group.

It must be maintained that the more a complaints system is founded on *legal protection interests* the more reluctant the lawmaker and the practitioner will be to accept associations or grassroots organizations as complainants. If complaints by the organizations are allowed within such systems, emphasis will be on a local affiliation. For that reason local committees and local associations will be given right of complaints in preference to national associations. It will, however, be difficult for local grassroots organizations to be accepted as there can hardly be said to exist an actual agency between the inhabitants and an organization with such a loose structure.

If, on the other hand, the focus is on superintendence (control), the interest in national organizations is greater, as such organizations may be said to look after some public functions in a manner which ensures that cases involving principles will be submitted to central authorities.

If, finally, the focus is on *democracy* (influence) in the administration, the authorities will not so much be interested in the actual structure of the organization as in the local affiliation and objects. This is manifested by the National Planning Agency's decisions pursuant to the Municipal Planning Act. Mention should also be made of section 26 of the Conservation of Nature Act, according to which complaints against decisions may be lodged with the Chief

Conservation Board by 'anyone who is to be given special notice pursuant to section 20', i.e. 'anyone who has appeared before the board during the consideration of the matter or who has made a request to be informed about the decision' cf. section 20. In the two acts publication is compulsory, and its purpose is to ensure that the inhabitants of the area get information as potential complainants. The rules of publication are therefore included when considering the delimitation of complainants. (It is different in the case of section 65 of the Environmental Protection Act and section 11 of the Raw Materials Act which do not impose publication, and where publication is rather to serve as an aid to the municipal council. Here rules of publication cannot in themselves be decisive for the establishment of the legal interest when delimitating the circle of complainants).

This may be briefly illustrated by some examples from practice:

Within the *complaints system of the Environmental Protection Act* the system has primarily been seen as a legal protection provided in the interests of the nearest inhabitants and the industrial or commercial enterprises.

Therefore the environmental authorities have turned down complaints from environmental associations such as for example the Danish Society for the Preservation of Natural Amenities and the Association of Danish Anglers. The latter organization has, however, acquired a right of complaint in cases involving pollution of freshwater where the association has actual fishing rights. On the other hand, the release of fish in watercourses, whether freshwater or salt water (normally freshwater) is not sufficient for the association to base a legal interest on. The emphasis has been on a traditional delimitation of individual, material interest, and it has not been felt that the Anglers' Association had any rights in respect of the released fish if the association did not at the same time have a fishing right.

The complaints system of the *Raw Materials Act* is very similar to that of the Environmental Protection Act. The explanatory notes in respect of the Raw Materials Act resemble those of the Environmental Protection Act very closely, and decisions will often concern actual vicinity nuisance of the same nature as in the Environmental Protection Act. It is therefore to be expected that the complaints delimitation in the Raw Materials Act will be construed along the same lines as the delimitation in the Environmental Protection Act. However, the Raw Materials Act *also resembles* the Zoning Act and the Conservation of Nature Act, where there is no question of vicinity nuisance and where entitlement to complaint has been prescribed or presumed for, at any rate, the local committees of the Danish Society for the Preservation of Natural Amenities and for certain other local associations. It is therefore of interest whether the circle of those entitled to lodge complaints on the criterion 'material, individual interest' is delimited in the same way as the Environmental Protection Act, or whether grassroots organizations and environmental organizations will be given a certain leave to appear as complainants.

The problem has been at issue in practice in a case in Bornholm. The Environmental Appeal Board established that a collation of the wording of the act with the explanatory statement accompanying the Bill led to the conclusion that the principal association (The Danish Society for the Preservation of Natural Amenities) as such cannot be considered to have a right of complaint pursuant to the Raw Materials Act unless there are special circumstances or conditions. According to the Board, the fact that the principal association did not acquire recognition as to entitlement to complaint was first and foremost because the explanatory statement had to lead to non-recognition of such a national association. The explanatory statement was of special importance because of the vagueness of the act.

As regards the position of the local committee, the board was of the opinion that in the case in hand, which according to evidence mainly concerned water abstraction considerations, no such direct member interest seemed to have been established that could have led to a recognition of the local committee's right of complaint. In this connection it was emphasized that regarding the water abstraction questions there are others who undoubtedly are entitled to lodge complaints, and reference is here made to the fact that the county medical officer had lodged a complaint. With this decision it has been intended to leave open the possibility of acceptance of complaints in other cases, as the broad objects clause in the Raw Materials Act, collated with the nature of the explanatory notes, points towards a different delimitation than the one used by the Environmental Protection Act.

Practice within the administrative complaints system of the *Municipal Planning Act*, on the other hand, has proved to be more liberal to grassroots organizations. This was clearly reflected in a decision which was later brought before the courts of law and decided by the Eastern Division of the Danish High Court on 21 October 1977 (unpublished decision, BBL-case).

The National Planning Agency, in a letter of 3 October 1977, maintains that

'the Municipal Planning Act does not delimitate the circle of those who are entitled to lodge complaints, which must be seen in relation to the fact that the discretionary elements of municipal council decisions can no longer, as a principal rule, be appealed to a higher administrative authority. As the right of complaint thus in the main has been restricted to legal questions, and when the Municipal Planning Act altogether attaches extremely great importance to having citizens involved in the planning through the local planning procedure, the consequence in the Agency's opinion must be that a fairly wide circle of complainants are accepted so far as the legal questions are concerned.' The Planning Agency therefore finds that an association of citizens with the object of preventing the demolition of a building pursuant to the local plan complained against had a right of complaint.

The complainants in question brought the matter before the courts of law, asking for an injunction prohibiting the demolition. The court refused to accept their right of complaint, giving the following grounds. The claimant in this matter must be considered to be an organization with such an indeterminate group of members and with such a loose structure that it is not possible to point to specific bodies which can bind it as a whole, and the bailiff's court is also of the opinion that more stringent requirements must be demanded in order to be considered as having procedural capacity to sue and be sued than perhaps to be entitled to exercise a right of complaint under the rules of administrative recourse.

The circle of those having right of complaint and those having a right of action respectively, has not been laid down in the Municipal Planning Act. It is therefore on the basis of the ordinary rules that the National Planning Agency and the Bailiff's Court and the Eastern Division of the Danish High Court respectively decide whether the complainant in question can be accepted as having right of complaint. The Planning Agency's grounds for considering grassroots organizations to have right of complaints is partly that the recourse re-examination is limited to legal questions, and partly that it is presumed by the Municipal Planning Act that citizens shall be involved in the planning. The Planning Agency seems not at all to consider the legal interest of the complainants in the matter as this interest seems immaterial compared with 1) the control interest and 2) securing the guarantee of a local citizen influence.

In this connection it should be remembered that the Municipal Planning Act, which entered into force on 1 February 1977, implied a decisive change in previous town planning legislation. This new act has meant abandoning the previous system, according to which the detailed municipal planning required central approval. Instead one got a centralized system where the municipal council, in compliance with overall planning and by control through citizen participation, can itself provide the binding local plans.

In order to achieve simplification, section 48 of the act limits the recourse examination to legal questions. The Planning Agency's possibility of influencing the municipality's local plans as an instance of recourse is limited. If procedural errors are made during the preparation of a local plan, this constitutes a point of law which can be tried by the Planning Agency, but the Planning Agency will presumably be disinclined to let ascertained errors have any influence on the validity of the local plan. A broad delimitation of the circle of complainants is consequently of no great importance in such matters but may ensure that the Planning Agency gets the opportunity to point out to the municipalities that the procedural rules must be observed and that the provisions of the local plan must be in accordance with the law.

### **C. Does a higher administrative authority have jurisdiction to try a case ex officio?**

In the Danish administrative system where traditional State authorities are concerned (i.e. authorities with a hierarchical organization) there is presumed to exist a usual superiority/subordinate relationship. Such a relationship implies that the superior authorities have the right to interfere ex officio.

If, on the other hand, the superior authority is an appeal board, which has been composed on a collegiate basis and which primarily has the function of settling disputes, there is no right to interfere ex officio. Only when a complaint has been lodged is it possible for the appeal board to consider the substance of the matter dealt with by the subordinate authority.

Similarly, where the superior authority is a municipal authority, a superior State authority or municipal authority will not have competence to interfere ex officio unless expressly empowered to do so by law.

Within the environmental law, the administration's organization is characterized in that competence in the first instance is placed under the municipal authorities. There is therefore no leave to interfere ex officio unless this is expressly provided by law.

The need for a safeguarding of national environmental and planning interests implies that various acts have provided the Minister (which in practice means the board or agency) with authority to interfere in matters involving principle.

Thus there is, inter alia, in section 47 of the Environmental Protection Act a provision empowering the Minister in actual matters of a more far-reaching importance to determine that decisions otherwise to have been made by a municipal authority shall instead be made by him. And in section 70 (3) there is a provision that the Minister may on his own initiative take up a decision made by a municipal authority for further examination and decision, and may determine that a decision otherwise to have been made by the National Agency of Environmental Protection shall be made by him. It is established here that the decision may only be amended to the detriment of the party to whom it is directed if decisive environmental protection considerations call for it. These are provisions which have not been used very extensively in practice, but it appears from a letter of 1 July 1981 from the Agency regarding amendments of the Environmental Protection Act that the Ministry is considering using the leave to interfere ex officio more often in future.

Section 43 (6) of the Conservation of Nature Act stipulates that the Minister may decide to make use of his right to grant permits/refuse applications in respect of measures affecting wetland areas when the matter is deemed to be of more far-reaching importance.

In the Municipal Planning Act there is a provision in section 10 according to which the Minister has authority to issue summons in respect of municipal plans, and a similar provision in section 28 about the Minister's powers to issue summons in respect of local plans. The authority is primarily intended to be used where there is a national interest in the plan in question; this means first and foremost very large building and civil engineering projects which may be of considerable importance to society and have far-reaching environmental consequences (e.g. the location of an airport).

As already mentioned, an appeal board has been instituted within several of the environmental acts to function as a final instance of appeal. There is no authority for such a board to interfere *ex officio* - law rules about this would be contrary to the intentions underlying the election of this form of appeal body. The board of appeal has on purpose been elected as a body which is independent of the ordinary administrative hierarchy. It is composed on the basis of some special legal protection considerations, with - *inter alia* - interest representation, and is assumed to be impartial because it cannot take the initiative on its own.

It should be mentioned, however, that within the Conservation of Nature Act matters involving compensation of more than 100,000 Danish kroner must be brought before the Chief Conservation Board. It is the subordinate authority (the Conservation Board) which must submit the matter, as it does not itself have competence to make the final decision. The Chief Conservation Board does not itself interfere *ex officio*.

*The superior control* within the environmental field is typically effected through general regulations, guidance, and plans - and not so much through interfering *ex officio*. The delimitation of complainants is also of decisive importance because of the function of the recourse as a control measure. It should be mentioned that within the environmental law in several cases *municipal and State authorities have been vested with a right of complaint* in order thereby to ensure a control. But the public authorities are not very inclined to make use of such a right of complaint.

Within the planning acts a new system has been instituted, whereby sector authorities may veto an approval of co-ordinated plans if the plan conflicts with the special interests which the sector authorities are to safeguard. If a veto is cast, the municipal authority cannot itself prepare the plan as the competence passes to the Minister. Thus it is not a question of a complaint or of *ex officio* interference, but of a change of the competence on account of disagreements between the interests of the authorities involved.

## **5. TO WHAT EXTENT CAN AN ACTION BASED ON A RULING MADE BY A HIGHER ADMINISTRATIVE AUTHORITY BE BROUGHT BEFORE A COURT OF LAW?**

Section 63 of the Constitution of the Kingdom of Denmark Act lays down that rulings made by the administration can always be brought before a court of law. Under section 63 (2) of the Constitution Act one or more administrative courts may be set up, but their decisions may always be tried by the highest court of the Kingdom. Such administrative courts have not been set up. This means that in Denmark it is the ordinary courts of law which try the ruling of the administration.

The law court superintendence of the administration comprises in practice both concrete actions, general rules, plans, and concrete rulings, including prior information and administrative agreements. On the other hand the law court superintendence does not include decisions made as part of the preparation of an administrative ruling. An exception to this is the decision of the question of right of access to documents.

In administrative law the concrete administrative ruling occupies a central position, and the essence of law court superintendence is the question of whether the administration has made a valid or invalid ruling. The basis for an estimate of this is whether the administrative ruling suffers from material legal defects or whether the procedure has been so imperfect that the administrative ruling has to be set aside.

In Danish law it is not required that the administrative recourse shall be employed before bringing the matter before the courts of law unless otherwise expressly prescribed by law. By instituting specially expert instances of appeal, particularly boards of appeal like the ones known from the environmental law among others, the interest on the part of the citizens in avoiding employment of the recourse will be reduced. In this connection it should be borne in mind that the re-examination made by the Danish courts of law cannot be or become as intense as that of the appeal boards. The appeal boards are moreover bound by the 'official' maxim (i.e. the principle that the content and form of proceedings depend on the activity of the judge and not the parties) to assist the private persons in the clearing up of the matter, where the law courts are bound by the 'negotiation' maxim (i.e. the principle of the Administration of Justice Act according to which the main burden of procuring material for the proceedings rests on the parties so that the work of the judge is at most supplementary). This fact, too, renders it desirable that the citizens make use of the recourse before going to the courts of law.

It is not many matters which in Danish law are brought before the ordinary courts of law. There is for example no tradition within the environmental protection field to have the substantive questions tried by a court of law - on the other hand, formal questions like right of complaint and excess of time limits for lodging complaints have been submitted.

#### **A. Who are entitled to exercise this right?**

It is presumed that every citizen does not as a general rule have a right of action. An *actio popularis* is not acknowledged by Danish law. The plaintiff may only bring an action before the courts of law if he/she has a material and individual interest in the decision of the action. This means that the person in question must be protected by the rules according to which the matter has been settled, and that the person in question must have been affected by the decision in a manner which must be said to be significant compared with other citizens. The requirement of a legal interest may, however, have been waived by law, but such acts are not very common in Denmark.

It is presumed that the point of departure must be a certain correspondence in respect of the circle having right of complaint and the circle having right of action. If a person or an association of persons has such a connection with or interest in a decision that a right of complaint is presumed to exist, it could not be presumed that there would not also be a right to take the matter further and obtain a definitive, enforceable decision at the courts of law. And conversely it would be impractical if the person who has right of action should not have the possibility, before bringing an action, of trying to be successful in a recourse examination, as this would typically be quicker as well as cheaper for both the individual and for society. Only special circumstances or conditions shall be grounds for a varying determination of the concept of interest in the two relations.

#### **B. Are such rights for example granted to associations, unions, or groups, whose programmes include environmental protection etc.?**

The acts which regulate environment, conservation of nature, and planning are characterized by not making a separate delimitation of the circle having right of action. On the other hand there are often rules governing the circle having right of complaint. Where provision has been made for an action at the courts of law, it is primarily in the form of stipulation of the instance to be used and any time limits to be observed (cf. *inter alia* section 49 (1) of the Municipal Planning Act). The Environmental Protection Act contains no provisions for action before the courts of law.

As mentioned above the basis must be that the delimitation of action is the same as the delimitation of the circle having right of complaint. When for example the Conservation of Nature Act assigns to the Danish Society for the Preservation of Natural Amenities a right to lodge complaints, the society in question therefore also has a right of action. The society attends to some common objectives, which the act has agreed it is well qualified for, and it must also be possible to safeguard these objectives by bringing an action before the courts of law. It must likewise be presumed that when for example the Association of Danish Anglers pursuant to section 20 (3) of the Freshwater Fishing Act are entitled to lodge complaints with the administrative authorities mentioned in section 37, the Association must also have the right to complain to the courts of law in order to safeguard the special, common interest in the fish stock. However, the act says nothing of this.

The position taken in the *preparatory works* of the acts dealt with here in regard to the delimitation of the complainants seems primarily to focus on the administrative complaints system. It is not quite clear whether the same delimitation is to be accepted in regard to the courts of law. As already mentioned, the basis must be that there is a correspondence of the delimitations so that also the preparatory works cited under 4B can be used when delimitating who has right of action.

#### **C. Have such rights been granted ipso facto?**

Not many environmental matters are brought before the Danish courts of law, and particularly not many brought by associations.

The most talked-about matter is the one already mentioned above concerning the delimitation of the Municipal Planning Act (the BBL-case). Here the Planning Agency had established that a *grassroots organization* could be accepted as complainant, as the administrative complaints system was not primarily instituted as a legal protection for the individual but first and foremost to ensure a control facility for the central authorities and an extension of the representative democracy. When the grassroots organization went to the courts of law to obtain an injunction prohibiting the demolition, the court refused to accept that the organization was entitled to lodge complaints. As stated above, the grounds given were as follows:

The claimant in this matter must be considered to be an organization with such an indeterminate group of members and with such a loose structure that it is not possible to point to specific bodies which can bind it as a whole, and the bailiff's court is also of the opinion that more stringent requirements must be demanded in order to be considered as having procedural capacity to sue and be sued than perhaps to be entitled to exercise a right of complaint under the rules of administrative recourse'

In this decision it is maintained that it is difficult for a grassroots organization to acquire right of action whereas environmental associations because of their firm structure are better able to acquire recognition as party to a case.

In Danish legal practice it has never been brought to a head whether a national organization like the Danish Society for the Preservation of Natural Amenities is entitled to exercise a right of action. This was done in Norway, however, in the Alta action which Norges Naturvernforbundet (The Norwegian Society for the Preservation of Nature) brought before the courts of law in 1979 (NRt 1980.569).

A number of the criteria normally emphasized in legislation concerning organizations' right of complaint had been satisfied by the Norwegian nature preservation society (among other things the organization was nation-wide, had a considerable membership, had its own rules and bodies etc.). Nevertheless the right of action was disputed, maybe because other interest groups were more naturally qualified to act as complainants. The organization's right of action is recognized by the Norwegian Supreme Court after the following argumentation:

It has been accepted under the circumstances that a plaintiff may have a legal interest in bringing an action even though the decision has no direct influence on his own legal position. Depending on circumstances, also an interest organization may have the required legal interest even though the decision in the matter is of no direct consequence to the organization's or the members' rights. The need for judicial control of the public administration may be the decisive factor here. But he who brings an action concerning the validity of an administrative ruling must have reasonable grounds in the concrete case for asking to have the question tried by the courts of law. It must be a legal claim that is being pleaded. And the plaintiff must have such a connection with the legal claim that he is the very person to have a natural reason for bringing the matter up', (p. 575).

The grounds in the Alta case for accepting the organization's legal interest were the allegations concerning nature conservation interests (cf. pp 575-576).

In Danish legal practice it has been presumed that the Association of Danish Anglers may act as mandatory for its local committees in civilian actions for damages against polluters. The local committees may be awarded damages for the loss suffered as a result of destruction of the fish stock. The amount is to cover the cost of supplying new fry. On the other hand the courts of law have not been prepared to accept claims for damages arising out of financial loss due to lacking yield in the period of time where pollution has occurred. It is presumed that it is a case of non-economic damage when the association's members have not been able to practise a recreational interest for a period of time. The recognition of the right of action is based on a legal interest on the part of the association in being able to get compensation on the basis of the ordinary rules governing compensation and damages.

Before the Environmental Protection Act entered into force, the Association of Danish Anglers was incidentally recognized as having right of complaint before the special soil improvement commissions under the Watercourse Act. It is debatable whether soil improvement commissions are courts of law or administrative authorities, but in this report I have chosen to consider them as administrative authorities.

Acceptance by the courts of law of a legal interest on the part of associations with a programme of environmental protection etc. must probably be said to be dependent on:

1. The structure of the association. Only associations with a firm structure are accepted as party to a case (cf. the BBL-case).
2. The association's object and possible recognition by law. Only if the object of the association is protected by law and is relevant to the case in question may the association be a party to the case. If an act expressly recognizes the association as being entitled to look after the interests in question, it is natural in practice to regard the association as entitled to present a claim before the courts of law (cf. the Alta case).
3. The association's concrete interest in the matter. If an association suffers financial losses or if the association's rights are infringed in a way comparable to an infringement of an individual's legal position, it is natural in practice to regard the association as a party, (cf. practice concerning the Association of Danish Anglers).

#### **6. IS IT BEING CONTEMPLATED TO EXTEND THE EXISTING POSSIBILITIES OF LODGING COMPLAINTS/-BRINGING RULINGS CONCERNING ENVIRONMENTAL QUESTIONS BEFORE THE COURTS OF LAW?**

The Danish Environmental Protection Act is to be revised during the 1981/82 session of the Folketing (Parliament) and with a view to that, a draft for the revision of the Act has been issued by the National Agency of Environmental Protection (letter of 1 July 1981). In the draft it is proposed that national environmental organizations may, by executive order, be given a right of complaint in respect of certain environmental matters where the decision has been made by a municipal authority. The organizations may consequently become entitled to lodge complaints with the National Agency of Environmental Protection - but they cannot be given a right to lodge complaints with the Environmental Appeal Board. It has not been considered whether an organization would have a right to bring the matters before the courts of law.

It is natural to interpret the proposal as meaning that the chief intention of the extension of the circle of complainants is an interest in ensuring State control of the field. Therefore the organizations are given a right to lodge complaints against major environmental matters with the central authority making the regulations. If it had

been a question of legal protection of the organizations which motivated the proposed amendment, it would be natural also to ensure a right to lodge complaints with the Environment Appeal Board which has primarily been instituted to secure a legal protection.

This reason for conferring a right of complaint on the associations makes it natural to conclude that it has never been the idea that the associations were to be recognized as having right of action in order to obtain legal protection. The reason why this has not been considered in the preparatory works is probably chiefly that it is very impractical to have environmental matters tried by courts of law. As already mentioned, there is no tradition of actions in respect of environmental protection questions in Denmark.

At the same time as the draft for the Environmental Protection Act, three reports have been prepared by the Ministry of the Environment (May 1981). The reports primarily deal with the question of a simplification of the environmental legislation. It is being considered, *inter alia*, whether it is possible to ensure a co-ordinated procedure. This procedure is primarily to be in the form of joint planning, i.e. the co-ordinating planning must also consider the sector planning. The result will then be that both nature conservation interests and environmental protection interests are to be looked after when working out the overall physical planning. It must be ensured that the citizens acquire influence pursuant to the rules of project publicity known within the Municipal Planning Act, and the sector authorities must be guaranteed an influence through a right of veto.

One of the consequences of such a simplification, according to the reports, is an extension of the circle of those who have right of complaint, so that in particular environmental organizations acquire a right of complaint. But again it is primarily a State control interest which motivates an extension of the circle of complainants. It cannot be expected that the extension will mean that the organizations automatically acquire a right of action at the courts of law. The future plans are in fact to be regulated in the same way as the local plans under the Municipal Planning Act, and in relation to such a local plan, the above-mentioned case (the BBL-case) is of interest as the courts of law there refused to accept that a grassroots organization had a right of action even though the organization had a right of complaint. Judging by the grounds for the decision, it is not certain whether an environmental association would also have been turned down.

#### **7. IS IT DESIRABLE - FROM A JUDGE'S POINT OF VIEW - TO EXTEND THE POSSIBILITIES OF LODGING COMPLAINTS/BRINGING RULINGS BEFORE THE COURTS OF LAW TO A WIDER CIRCLE THAN THE PRESENT?**

The answer to the question must start with a consideration of the rôle of the law-courts. The courts of law have primarily been instituted as a legal protection for the citizens with the purpose of ensuring that the legal limitations are observed by the administration. The natural function of the law-courts has therefore been to construe rules of law.

Within the environmental field the *rules are so vague and imprecise* that it is difficult for the courts of law to re-examine. If the circle of complainants is extended so as to include organizations which, from traditional legal protection points of view do not have right of action, the courts of law must have some precise rules to base their decisions on.

There are considerations within the environmental field which tend towards binding quality norms. But in the present Environmental Protection Act there is no authority for establishing such *binding* quality norms. How, then, are the courts of law to assess an action brought by an environmental organization which claims that the decision made is unjustifiable? If the Environmental Protection Act is revised so that there is authority for binding quality norms, it will not be impossible for the courts of law to foresee the consequences of accepting that national environmental associations which acquire a right of complaint within the Environmental Protection Act also acquires a right of action before the courts of law.

Furthermore the courts of law in *their procedure* are restricted by the 'negotiation' maxim. This means that the decision of the court is fairly dependent on who appears as having right of action.

Also this circumstance means that great caution must be used in accepting representatives at the courts of law. If an association appears as spokesman for a large group of citizens, it is often the case that within the association there are divergent interests which it is difficult to consider on the basis of the association's delimitation of the assertions.

The courts must therefore distinguish between associations with a firm structure, i.e. environmental associations, and grassroots organizations respectively.

If the association wishes to have an *unlawful administrative ruling set aside* and in that connection alleges violation of unambiguous law rules, the structure of the association is not so important as the courts of law must themselves include the relevant law rules in their deliberations.

If, on the other hand, the association wants the courts of law to assess a *discretionary decision in conformity with the object of the law* the courts must look at the structure of the association and the interests claimed by the association.

If a common interest in the environment is invoked, the courts of law must require that the association has a firm structure and an object which is covered by the law. Only by maintaining such a demand on the association can the courts of law preserve their status as an instance of control for the interests protected by law.

If the association invokes the interests of a group of private persons the courts must require that the association can be said to represent the interests of the persons in question. Here a firm structure with a board and membership fees will often be a prerequisite for the association's appearance as party (unless express authorization exists).

If the courts of law are to accept collective complaints from associations whose members in various ways are affected by a decision, the differences in the interests involved may mean that it must be contemplated, at the legislative level, whether the courts' rules of procedure in these cases should be amended in the direction of the 'official' principle. To a judge such an amendment of the rules of procedure will not be unproblematical. It may imply an obligation to participate actively in the elucidation of the matter, guidance of the parties, and delimitation of the matter.

What the courts of law can of course ensure - irrespective of whether the substantive rules are precise or imprecise and irrespective of differences in the legal position of those involved - is the administration's *observance of the procedural rules*. Here particularly the provision in the planning acts involving the public in the decisionmaking process is of interest.

However, the courts of law have no suitable sanctions to be applied for example in the event of non-observance of the project publicity rules. Under the existing arrangement the courts must admit that the traditional sanctions in the form of invalidation or damages are often impractical when the administration disregards the formal rules which apply to citizen participation. Therefore the courts, even if they recognize a right of action on the part of organizations which claim they have a right of influence, will often have no possibility of applying sanctions against a non-observance.

*The position taken by the courts of law with regard to an extension of the circle of complainants must therefore be dependent on:*

the concept of interest in the substantive rules, the applicability of the substantive rules at the court, the courts rôle as a re-examining instance of control in respect of the interests protected by law, and the sanctions available to the courts of law.

The regard for the party to whom the decision is directed, on the other hand, cannot be decisive for the courts' interest in an extension of the circle of those who have right of action. An action before the courts of law has no suspensory effect, and the ordinary principles of administrative law ensure that the substantive decision is based on a special need to protect the party to whom the decision is directed.