The Use of Court- and Party-Appointed Experts in Legal Proceedings in Sweden: Judges’ Experiences and Attitudes

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ABSTRACT
This paper presents the results of a study that is aimed at identifying differences between general and administrative courts in Sweden regarding the use of party- and court-appointed experts and the judges’ attitudes towards them. The subject matter of the study is important as courts grow increasingly dependent on expert knowledge. As part of the study, 144 judges have answered electronic surveys showing clear differences between the two types of courts and also between criminal, civil and administrative cases. Party-appointed experts are usually more frequently used in general courts than in administrative courts and court-appointed experts are more frequently used in administrative courts than in general courts. Administrative judges consider court-appointed experts more useful and impartial than judges do in general courts, but in terms of trustworthiness there are no differences. Judges in general state that expert knowledge is easy or fairly easy to understand, but administrative judges consider expert knowledge more relevant in relation to the courts’ needs and also regard it as being more influential for the judgments. The results point to differences between general and administrative courts regarding the use of, and attitudes toward, experts, which can be explained by separate rules of procedure and traditions. The more frequent use of party-appointed experts in general courts reflects an adversarial process, while the use of court-appointed experts in administrative courts indicates a more inquisitorial process.
I. INTRODUCTION

The rapid developments occurring in technology, medicine and other sciences are also reflected in the courts where evidence is based on increasingly complex theories and methods. This entails that the courts, in cases where judges generally lack specialist expertise beyond their own field, are growing increasingly dependent on experts and on ‘the trustworthiness of their methods and their honesty and integrity’. The issue concerning how to fulfill the courts’ need for trustworthy expert knowledge is largely determined by the procedural model used in the court process. In an inquisitorial procedure, the judge appoints the experts. In an adversarial procedure, it is primarily the parties who appoint experts (party-appointed experts), but in many legal systems they may also be appointed by the court (court-appointed experts). The present article investigates the use of experts in the adversarial model in Swedish courts, where both categories of experts may be appointed. International research has shown that judges have less trust in party-appointed experts whose statements are often considered to have low credibility due to the risk of partiality, while court-appointed experts are generally afforded a greater degree of trustworthiness. The problem of biased experts lies mainly in the relation to the adversarial
system in Anglo-Saxon countries,9 where court-appointed experts – despite their trustworthiness – are rarely used.10 One explanation for this is that the adversarial model assigns the judge the role of ‘neutral and passive decision maker’.11 Thus, the explanation here could be that the judges do not want to risk jeopardising the legitimacy of the legal process by overly actively directing the proceedings. ‘If the fact finder strays too far from passivity adversary theory suggests that neutrality will be jeopardised.’12 Critics of the adversarial system have, for example, pointed out that the passive role of the judge is difficult to reconcile with his or her truth seeking mission.13 Defenders of this system maintain that the parties’ investigative actions and critical review of each other’s arguments and evidence leads to a richer basis for decision than does an investigation led by a judge, which increases the possibility of disclosing the actual conditions of the case.14

The argument for a richer basis for decisions also had a prominent role in the administrative law reform that took place in Sweden in the 1990s in which administrative procedure changed in nature from an inquisitorial to an adversarial procedure.15 This made Swedish legal procedure party-centered in all types of cases: civil and criminal cases (general court) and administrative law cases (administrative court). During the trial, the court plays the role of ‘neutral and passive decision maker’, but is also responsible for ensuring that the basis for its decision maintains high enough standard for the case to be determined in a substantively correct manner.16 This responsibility allows for intervention tools such as the possibility to appoint court-appointed experts. How one defines a satisfactory basis for decisions varies from case to case and depends on the substantive nature of each individual case and its legal relations, but it is also dependent on developments in knowledge in society. Substantive law involves an increasing amount of scientifically based knowledge in its decision processes (for example, within social law) which increases the need for experts.

10. Champagne and others, ‘Are court-appointed experts the solution to the problems of expert testimony?’ (n 7).
12. Ibid 77.
14. See Landsman (n 11) 27: ‘Considering the information-gathering potential of the parties, it is debatable whether the adversary approach is any less effective at uncovering truth than is a judge-centered alternative’. See also Shuman (n 9) 269: ‘The adversarial model assumes we are more likely to uncover the truth about a contested event as the result of the efforts of the parties who have a self-interest in the discovery of proof and exposing the frailties of an opponent’s proof than from the efforts of a judge charged only with an official duty to investigate the case’.
The relationship judges have to party-appointed experts and court-appointed experts, and the degree to which these two categories of experts are actually used in Swedish courts, are issues that have only been partially investigated. The authors of the present article have previously researched the use of experts in cases concerning serious offences against the person, and in administrative law cases concerning compulsory custody of children, based on court verdicts. The present article complements the research by way of a survey-based study of the experiences and attitudes of approximately 140 judges regarding the use of party-appointed and court-appointed experts in criminal cases, civil cases and administrative law cases in five general courts and five administrative courts. The objective is to contribute to an increased understanding by firstly bringing greater clarity to the extent, and on whose behalf, experts are appointed in court proceedings in criminal cases, administrative cases and civil cases, and secondly to explore the attitude of judges in general courts and administrative courts toward experts appointed by parties or the court respectively. Are there any differences between the different types of cases and the two types of courts with regards to what one might expect from the respective rules of procedure compared to the actual outcome in the various courts?

1.1 The Swedish procedural model

In practice, procedural systems are seldom purely inquisitorial or adversarial but rather a mix, a fact that also applies to the Swedish model. The court is party-governed in accordance with the principle that both parties must be heard (audiatur et altera pars), which corresponds to the adversarial system. This is defined by the three interacting key elements: 'party presentation of evidence', 'highly structured forensic procedure', and 'neutral and passive decision maker', which also constitute a foundation of the Swedish model; the parties have the main responsibility for the investigation and evidence in the case and should therefore receive the same opportunity to both present and partake of...
each other’s proceedings as well as respond to each other’s presentations.24 The various components of the process are strictly regulated by law,25 with some exceptions, such as the principle of free production and assessment of evidence.26 Another example is the fact that the courts’ substantive direction of proceedings has not been legally regulated and is expected to be solved in the course of legal practice.27

The court’s direction of proceedings is one of the inquisitorial components of this model and is based on rules that state that the court shall ensure that the case is investigated in accordance with its specific nature and requirements.28 This entails that the court is responsible for ensuring that the enquiry is sufficient for the case to be determined satisfactorily. Due to the court’s responsibility of enquiry, it may decide of its own accord to retrieve evidence in nondispositive law (civil cases that do not permit settlements, public criminal cases and administrative law cases)29 and can, as a step in this process, appoint experts.30 This can be accomplished ex officio by the court or by a party. Court-appointed experts must maintain an impartial relationship to the parties and the matter at hand, a requirement that does not apply to party-appointed experts, who (with a few exceptions) must comply with the rules of evidence.31

The question concerning the extent of the court’s enquiry responsibility should be, in individual, non-dispositive cases, determined partly by the weight of the interest invoked in the substantive legislation at hand, and partly by the legal relations.32 In custody cases (civil law) and cases concerning compulsory custody of children (administrative law), the court is deemed to have a greater enquiry responsibility since the child’s welfare constitutes the determining factor for the decision.33 In criminal cases and administrative law cases concerning an individual party versus a public party, which generally bears the enquiry responsibility in the case (burden of proof),34 the court has a greater enquiry responsibility to the individual party than to the public party.35 This applies particularly in cases that involve any lapses in the enquiry that could cause harm to the individual party.36

However, the court cannot pursue the substantive direction of proceedings too far, as shown by the statements in the law’s legislative history. These statements emphasise that the court shall first and foremost ensure that the parties are made aware of any need for

24. Ekelöf and others (n 21) 31-32.
26. Ekelöf and others (n 21) 34-37.
27. Ekelöf and others (n 25) 200.
29. RB Ch. 35, § 6, FPL § 8 , see the discussion in Wennergren and others (n 21) FPL § 8.
30. RB Ch. 40, § 1 , FPL § 24.
31. Edelstam (n 2) 259-269.
32. Wennergren and others (n 21) FPL § 8.
33. Ekelöf and others (n 21) 55-56; Wennergren and others (n 21) FPL § 8.
34. Christian Diesen, Bevisprövning i brottmål [Evaluation of evidence in criminal cases] (Juristförlaget 1994) 64-65; Diesen and others (n 16) 81.
35. Wennergren and others (n 21) FPL § 8 , cf. Ekelöf and others (n 25) 201.
36. Wennergren and others (n 21) FPL § 8.
additional proceedings material\(^{37}\) and shall avoid acting independently\(^{38}\) in order to avoid any suspicions of partiality.\(^{39}\) These statements clarify that the court should be extremely restrictive with regards to initiating investigative measures,\(^{40}\) while also being a reminder of the court’s role as a ‘neutral and passive decision maker’.

1.2 Details of the empirical evidence and method

The empirical evidence of the present article is based, as mentioned, on a survey of Swedish judges’ experiences of, and attitudes toward, the use of experts in court.

The survey was sent out electronically to 242 legally qualified judges serving at five district general courts and five district administrative courts (December 2015). Responses (wholly or partially) were received from 144 judges (approximately 60 \%) and were relatively evenly distributed between general courts and administrative courts (48 \% and 52 \%). The survey included three groups of questions that concerned (1) the judge’s background, (2) their experiences of the use of experts in court, and (3) their opinion on the role of experts in court. The questions have been formulated mainly using closed-ended questions, divided, where relevant, between criminal cases (public prosecution), administrative law and civil law cases. The survey inquired into the judges’ experiences of the use of experts in cases in which they had personally served in the last three years (2013 – 2015).

It should be pointed out that the enquiry is based on the judges’ assessments based on their experiences and attitudes, meaning that the results should be interpreted with some caution. There is also some uncertainty surrounding some questions concerning the use of party-appointed and court-appointed experts due to the fact that a number of judges chose the response option ‘do not have an opinion of/experience with this type of case’. This mainly concerns questions that have been divided according to the three above-mentioned types of cases but also emerges in some questions that have not been categorised in this manner. A partial explanation for this response pattern is that judges serving in public courts have varying experiences of the different types of cases processed there due to the fact that they often specialise either in criminal or civil law cases. A more general, overall explanation is that judges have varying levels of work experience. In the survey, the judges were asked about the length of their work experience, and the results show large variations in length of duty served.

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39. Prop. 1986/87:89 (n 36) 108; prop. 1995/96:22 (n 14) 78, see also Ekelöf and others (n 25) 56; Wennergren and others (n 21) FPL § 8.
40. Wennergren and others (n 21) FPL § 8.
Table 1. The judges’ length of service divided by percent.

<table>
<thead>
<tr>
<th>Number of years served as a judge</th>
<th>Share of judges (N=143)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-2 years</td>
<td>26 %</td>
</tr>
<tr>
<td>3-8 years</td>
<td>27 %</td>
</tr>
<tr>
<td>9-17 years</td>
<td>26 %</td>
</tr>
<tr>
<td>18-40 years</td>
<td>21 %</td>
</tr>
</tbody>
</table>

As Table 1 shows, roughly a quarter of the participants had only served for one or two years, and it is possible that they had not served in that many cases involving experts. The majority of the judges, however, had several years of experience and may have served in a large number of cases of varying content and complexity. Expert evidence is, after all, just one of many means of evidence used in a trial,41 and it can be difficult to reconstruct from memory exactly how or to what extent this evidence has been used.

2. THE USE OF EXPERTS

This section of the survey results is based on the judges’ experiences and assessments concerning, in part, the number of cases that the judges have served on in which party-appointed and court-appointed experts have been used, and in part, which party has most often taken the initiative to use party-appointed experts and court-appointed experts respectively in these cases.

2.1 Results

The results indicate that experts (both categories) are not particularly often used in Swedish courts. According to estimates from a very large majority of judges, experts (both categories) were appointed in less than 5 % of the cases they had served on. However, there are some variations in the results depending on category of experts and type of courts, indicating a more frequent use. This entails that court-appointed experts were reported to be used more frequently in cases in administrative courts, where they were appointed in up to 30 % of cases, according to estimates from a relatively large segment of judges (overall, two fifths of the judges selected between 5-30 % on the scale). This can be compared to general courts, where the use of court-appointed experts occurred in less than 5 % of the cases. Party-appointed experts were more common in cases in general court where they were appointed in up to 10 % of cases, according to estimates by a relatively large share of judges (overall, a third of the judges selected between 5-10 % on the scale). In administrative courts, party-appointed experts were appointed in less than 5 % of cases.

Table 2. Number of cases with court-appointed experts vs. party-appointed experts, distributed according to type of court.

<table>
<thead>
<tr>
<th>Share of cases using experts</th>
<th>Court-appointed experts in general court (N=65)</th>
<th>Court-appointed experts in administrative court (N=68)</th>
<th>Party-appointed expert in general court (N=62)</th>
<th>Party-appointed expert in administrative court (N=65)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 5 % of cases</td>
<td>99 %</td>
<td>57 %</td>
<td>64 %</td>
<td>100 %</td>
</tr>
<tr>
<td>5-10 % of cases</td>
<td>1 %</td>
<td>28 %</td>
<td>34 %</td>
<td>0 %</td>
</tr>
<tr>
<td>11-30 % of cases</td>
<td>0 %</td>
<td>14 %</td>
<td>2 %</td>
<td>0 %</td>
</tr>
<tr>
<td>More than 30 % of cases</td>
<td>0 %</td>
<td>1 %</td>
<td>0 %</td>
<td>0 %</td>
</tr>
</tbody>
</table>

With regards to the question concerning which party commonly takes the initiative to appoint an expert, the results for court-appointed experts are summarised as follows: in administrative law cases, usually the court took the initiative to appoint court experts (a little over nine tenths of the responses), while in criminal cases and civil cases respectively, the initiative was taken by both parties in most cases (a little over two fifths and three fifth of responses, respectively). With regards to both types of cases, a relatively large share of the judges (a little over a third) stated that the initiative to appoint experts had been taken approximately equally often by the court and party.

Table 3. Initiative for use of court-appointed experts in different types of cases.

<table>
<thead>
<tr>
<th>Initiative for use of court-appointed experts</th>
<th>Criminal law cases (General court) (N=33)</th>
<th>Civil cases (General court) (N=34)</th>
<th>Administrative law cases (N=69)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Usually the court</td>
<td>18 %</td>
<td>3 %</td>
<td>93 %</td>
</tr>
<tr>
<td>Usually the party</td>
<td>46 %</td>
<td>62 %</td>
<td>1 %</td>
</tr>
<tr>
<td>Both court and party to approximately the same extent</td>
<td>36 %</td>
<td>35 %</td>
<td>6 %</td>
</tr>
</tbody>
</table>

Results for party-appointed experts can be summarised as follows: in criminal law cases, the initiative to appoint an expert was usually taken by the public party (approximately two thirds of the responses), while in civil cases, almost all the judges estimated that the initiative was taken by both parties (plaintiff and defendant) to approximately the same extent. With regards to administrative law cases, the responses were divided into two equal groups. One group estimated that the initiative was most often taken by the public party (two fifths), while the other group estimated that the initiative generally was taken by the individual party (two fifths).
Table 4. Initiative for use of party-appointed experts in different types of cases.

<table>
<thead>
<tr>
<th>Initiative for use of party-appointed experts</th>
<th>Criminal law cases (General court) (N=44)</th>
<th>Civil law cases (General court) (N=49)</th>
<th>Administrative law cases (N=44)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Usually the public party</td>
<td>66 %</td>
<td>39 %</td>
<td></td>
</tr>
<tr>
<td>Usually the individual party</td>
<td>14 %</td>
<td>39 %</td>
<td></td>
</tr>
<tr>
<td>Usually the plaintiff</td>
<td>4 %</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Usually the defendant</td>
<td>0 %</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Both parties to approximately the same extent</td>
<td>20 %</td>
<td>96 %</td>
<td>22 %</td>
</tr>
</tbody>
</table>

2.2 Concluding discussion

Firstly, the results indicate that expert witnesses are not appointed in particularly many cases, with reservation for some variations with regards to category of expert and type of court. Court-appointed experts are used in up to 30 % of the cases in administrative courts but in less than 5 % of cases in general courts. Party-appointed experts are used in up to 10 % of the cases in general courts, but in less than 5 % of cases in administrative courts.

One explanation for why experts are not used more often than the results show could be that most court cases are of a relatively simple nature and can be solved without expert participation. In comparison, our previous research on criminal cases concerning serious offences against the person and administrative law cases concerning compulsory custody of children often involved cases with a relatively high degree of complexity. In criminal cases, party-appointed experts were used to varying degrees depending on type of crime, ranging between 45 % of cases and approximately 90 % of cases. In compulsory custody cases, party-appointed experts were used in almost 70 % of cases. It is worth noting that in these two studies there were no court-appointed experts, only party-appointed experts.

Additionally, the results of the study indicate that it is nearly always the court that takes the initiative to appoint experts in administrative courts, but this is also relatively common in criminal cases in general courts. However, it is more common in general courts for the parties to take the initiative of appointing court-appointed experts, this being most common in civil law cases.

Expert witnesses appointed ex officio by the court comprise an extensive form of substantive direction of proceedings that the court can be expected to use when the material nature of the case requires that the enquiry meets high standards and the party’s enquiry has not succeeded in fulfilling this requirement. Court initiatives are most common in the area of administrative law which can be related to the fact that substantive law increasingly requires (whether explicitly or implicitly) expert participation in the authorities’ and

42. Friis and others (n 17).
43. Friis (n 18).
courts’ decision-making processes, for example, in medical and social law areas.44 Additionally, decisions in many administrative law cases are based on a predictive risk assessment of the individual’s future living conditions (where traditional evidential methods are not sufficient), which often requires expert participation.45

Apart from the substantive nature of the case, the legal relations are also a deciding component in the court’s substantive direction of proceedings. The fact that there were no court-appointed experts to be found in our studies of criminal cases and compulsory custody cases may be due to these types of cases being of a nature that entitled the individuals to public counsel, paid for by public funds. The fact that the individual is represented by a lawyer in court means that they are viewed as more equal to the public party than would otherwise have been the case had they not received legal counselling.46 This position of equality (from a legal perspective) among the parties may therefore be a factor that leads to a reluctance on the court’s part to intervene in the parties’ processes when appointing their own experts. The situation is different in administrative law cases which are not of a nature that entitles the individual to either public counsel or public legal aid, and where courts are more able to intervene ex officio.47

Additionally, the results of the study indicate that the initiative for appointing party experts was often taken by the public party in criminal cases and approximately equally often by both parties in civil cases. In administrative law cases, the results are more varied, but they indicate that the initiative to use party-appointed experts is taken by the public and individual party at an approximately equal level.

A comparison of these results concerning the initiative to use party-appointed experts with results from previous studies shows a relatively strong correlation with the criminal law cases but deviates from the compulsory custody cases of administrative law. This is due to the fact that in criminal cases, party-appointed experts were regularly used by the authorities, while it was unusual for the individual to use their own expert. Based on this starting point, we had not expected to find these results concerning the use of party-appointed experts in administrative law. One explanation could be that administrative law cases vary greatly,48 and in some cases, the individual party bears a greater burden of proof and/or investigative responsibility in, for example, tax, work injury or asylum

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45. Diesen and others (n 16) 96-98, 124.

46. Pernilla Leviner, *Rättsliga dilemma i socialtjänstens barnskyddarbete* [The legal dilemmas inherent in the child protection work of social services] (Jure Förlag AB 2011) 177.

47. Cf. Stendahl (n 44) 65-73.

48. Wennnergren and others (n 21).
cases, as well as in cases concerning compensation for loss of income due to a traffic accident. This implies a more active process on behalf of the individual, as well as, depending on the case, a more active use of expert evidence, as is apparent in, for example, traffic injury cases.

### 3. ATTITUDES TOWARD EXPERTS

The starting point for this study of judges' attitudes toward experts is based on the assumption that such attitudes build on each judge's consideration of at least three variables: 1) the robustness of the experts’ knowledge base; 2) the experts’ conflict of impartiality; 3) the experts’ ability to make themselves understood by the courts.

The survey measured these variables in several different ways, as shown by the results below.

3.1 Results

One of the questions concerned the kind of expert participation the judges felt was most needed in court. The results of this question show that among judges in administrative courts, a majority (four fifths) believe that court-appointed experts are the most needed experts, but there is also a relatively large group (one sixth) that believes that both categories of experts are needed. Among judges in general courts, roughly two equal shares (both comprising two fifths) were of the opinion that party-appointed experts are needed the most, followed by the opinion that both expert categories are equally needed.

**Table 5. Type of expert participation needed the most in different kinds of courts.**

<table>
<thead>
<tr>
<th>Type of expert participation needed the most in court</th>
<th>Share of judges in general courts (N=41)</th>
<th>Share of judges in administrative courts (N=57)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court-appointed expert</td>
<td>22 %</td>
<td>81 %</td>
</tr>
<tr>
<td>Party-appointed expert</td>
<td>39 %</td>
<td>3 %</td>
</tr>
<tr>
<td>Both needed to the same extent</td>
<td>39 %</td>
<td>16 %</td>
</tr>
</tbody>
</table>

The question concerning which kind of expert participation is needed the most was followed by a question that asked the judges to select the statements that best matched their responses to the previous question. The response alternatives revolved around the three above-mentioned variables. Each variable had three response options in accordance with the model ‘court-appointed experts are better than party-appointed experts’, ‘party-appointed experts are better than court-appointed experts’ and ‘court-appointed and party-appointed experts are equal’.

49. Diesen and others (n 16) 84, 87, 102, 108-109.
50. Stendahl (n 44)13.
51. Ibid.
The main tendency in the judges’ motives for their responses can be summarised as follows:

1) Both court and party-appointed experts generally have a *substantial knowledge base* (approximately half of the judges in general courts and a third of the judges in administrative courts). 2) Court-appointed experts generally provide a greater guarantee of *impartiality* (four fifths of judges in administrative courts and a little over two fifths of judges in general courts). 3) Both court- and party-appointed experts generally are good at *making themselves understood by the court* (half of the judges in general courts and a third of the judges in administrative courts). The group of judges that placed the most importance on the impartiality of court-appointed experts consisted of judges serving in administrative courts. Judges serving in general courts believed to a greater extent than judges in administrative courts that both court-appointed and party-appointed experts generally have a solid knowledge base and a good ability to make themselves understood.

**Table 6. Evaluation of the court and party-appointed experts’ characteristics and skills, summarised as three main tendencies**

<table>
<thead>
<tr>
<th>Comparative evaluation of three types of characteristics and skills in court and party-appointed experts</th>
<th>Share of judges in general courts that agree (N=41)</th>
<th>Share of judges in administrative courts that agree (N=56)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Both court-appointed and party-appointed experts generally have a solid knowledge base</td>
<td>54 %</td>
<td>34 %</td>
</tr>
<tr>
<td>Better guarantee that court-appointed experts are impartial in comparison to party-appointed experts</td>
<td>46 %</td>
<td>82 %</td>
</tr>
<tr>
<td>Both court and party-appointed experts are generally good at making themselves understood to the court</td>
<td>51 %</td>
<td>34 %</td>
</tr>
</tbody>
</table>

The three variables (knowledge base, impartiality and communication ability) were also studied in various constellations as separate questions. One of the questions referred to the experts’ trustworthiness which can be assumed to be based on a presumed *impartiality*, but may also include the robustness of the *knowledge base*. The results show that a large majority of judges in general courts and administrative courts view court-appointed experts as generally more trustworthy than party-appointed experts (approximately three fourths). None believed that the opposite was true, but a relatively large share (approximately a fourth) felt that court-appointed and party-appointed experts were equally trustworthy.
Table 7. Evaluation of the trustworthiness of party-appointed experts and court-appointed experts.

<table>
<thead>
<tr>
<th>Trustworthiness of the experts</th>
<th>Share of judges in general courts (N=40)</th>
<th>Share of judges in administrative courts (N=43)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court-appointed experts are (generally) more trustworthy than party-appointed experts</td>
<td>73 %</td>
<td>77 %</td>
</tr>
<tr>
<td>Party-appointed experts are (generally) more trustworthy than court-appointed experts</td>
<td>0 %</td>
<td>0 %</td>
</tr>
<tr>
<td>Both are (generally) equally trustworthy</td>
<td>27 %</td>
<td>23 %</td>
</tr>
</tbody>
</table>

Another question addresses the judges’ perception of the court-appointed experts’ communication ability, expressed in terms of ‘the degree to which the specialised information provided by the experts is difficult to understand’. Results indicate that the judges generally do not have any issues comprehending experts. In the experience of almost all judges in both general and administrative courts, it was usually easy or quite easy to understand the information presented by the experts.

Table 8. Evaluation of the comprehensibility of expert information

<table>
<thead>
<tr>
<th>Comprehensibility of the experts’ specialised information</th>
<th>Share of judges in general courts (N=61)</th>
<th>Share of judges in administrative courts (N=69)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Generally easy to comprehend</td>
<td>51%</td>
<td>75 %</td>
</tr>
<tr>
<td>Generally fairly easy to comprehend</td>
<td>49 %</td>
<td>23 %</td>
</tr>
<tr>
<td>Generally hard to comprehend</td>
<td>0 %</td>
<td>2 %</td>
</tr>
</tbody>
</table>

One of the questions was intended to measure the judges’ perceived advantages of the expert knowledge contributed by experts, which can be presumed to be related to the robustness of the experts’ knowledge base. The results indicate that the judges found that the knowledge provided by experts was satisfactory. Almost all judges in administrative courts, and most judges in general courts (just over four fifths) felt that the need for expert knowledge had been fulfilled by the experts to a significant or very significant extent.
Table 9. Evaluation of the degree to which experts fulfil the court’s need for expert knowledge

<table>
<thead>
<tr>
<th>The degree to which experts fulfil the court’s need for expert knowledge</th>
<th>Share of judges in general courts (N=61)</th>
<th>Share of judges in administrative courts (N=69)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Insignificant</td>
<td>17 %</td>
<td>1 %</td>
</tr>
<tr>
<td>Significant</td>
<td>60 %</td>
<td>22 %</td>
</tr>
<tr>
<td>Very significant</td>
<td>23 %</td>
<td>77 %</td>
</tr>
</tbody>
</table>

Finally, the survey included a question intended to measure the extent to which the information provided by the experts in the case had influenced the courts in their position regarding the facts of the matter at hand, according to the judges’ assessments. The results can be summarised as follows:

Court-appointed experts wielded the greatest influence in administrative courts, and a large majority of the judges (in a little over two thirds of the responses) felt that their position had often been influenced by this category of experts. In general courts, court-appointed experts sometimes influenced the court’s position, according to the assessments of a relative majority of judges (half). Party-appointed experts had the greatest influence in general courts, and a relatively large group of judges (two fifths) felt that they had often been influenced in their position by this category of experts. In administrative courts, there were cases of party-appointed experts sometimes influencing the court’s position, according to the assessments of a relative majority of the judges (a little more than half).

Table 10. Evaluation of the extent to which expert information influenced the court’s position.

<table>
<thead>
<tr>
<th>The extent to which expert information influenced the court’s position</th>
<th>Court-appointed experts in general courts (N=63)</th>
<th>Court-appointed experts in administrative courts (N=71)</th>
<th>Party-appointed experts in general courts (N=51)</th>
<th>Party-appointed experts in administrative courts (N=32)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Occurs rarely</td>
<td>25 %</td>
<td>9 %</td>
<td>14 %</td>
<td>34 %</td>
</tr>
<tr>
<td>Occurs sometimes</td>
<td>49 %</td>
<td>21 %</td>
<td>45 %</td>
<td>56 %</td>
</tr>
<tr>
<td>Occurs often</td>
<td>16 %</td>
<td>70 %</td>
<td>41 %</td>
<td>10 %</td>
</tr>
</tbody>
</table>

3.2 Concluding discussion

The present study investigates partly the judges’ attitude toward the two categories of court-appointed experts and party-appointed experts, and partly toward the two types of experts as a single category. When court-appointed experts and party-appointed experts are compared to each other, the results show, with one exception, a variation in the judges’ attitudes depending on whether they served in general court or in administrative court. More specifically, this entails the following:
Firstly, with regards to the question concerning which group is considered the most trustworthy, court-appointed experts or party-appointed experts, there was broad consensus among judges in general court and administrative court. A majority of judges believe that court-appointed experts generally are more trustworthy than party-appointed experts, but a relatively large group (approximately a fourth) assessed them to be equally trustworthy. These results correspond partly with the results of international research as discussed in the article’s introduction, and show that judges generally have greater trust in court-appointed experts than party-appointed experts. However, there is also a discrepancy in the fact that a relatively large group of judges deemed the two groups of experts to be equally trustworthy. One explanation could be that assessments of the trustworthiness of experts relate to the area of evaluation of evidence. According to the principle of free assessment of evidence, the court shall freely assess the evidence presented in the case, which should prevent the judge from having any pre-determined assumptions concerning the evidential value of certain kinds of evidence. It is possible that the judges in the minority group may have felt the urge to support this principle via the response option ‘both court-appointed experts and party-appointed experts are (generally) equally trustworthy’.

Secondly, there was disagreement concerning the kind of expert participation that the judges felt was most needed in court. Among judges serving in administrative courts, a large majority believed that court-appointed experts were the most needed category. Among judges serving in general courts, there was disagreement between the two equally sized groups of which one group believed that party-appointed experts were the most needed and the other that both categories of experts were equally needed. These results indicate a polarisation between judges in administrative courts and general courts, which entails that the aforementioned prefer court-appointed experts while the latter prefer party-appointed experts, or at least view them as equal to court-appointed experts. One explanation can be traced to the fact that administrative courts generally have a greater responsibility and better prerequisites than general courts have to ensure that the basis for decisions in the case is satisfactory. The explanation, then, might be that the two kinds of courts have different legal traditions: In general court, the contradictory principle governs to a greater degree than in administrative court. In administrative court, the process is largely focused on arriving at substantively correct decisions. Roughly described, one could say that the results reflect, in the adversarial system, an inherent tension between on the one hand the requirement for the court to be a ‘neutral and passive decision-maker’, and on the other hand the requirement for the court to produce substantively correct decisions.

Thirdly, the judges evaluated party and court-appointed experts’ characteristics differently. These characteristics were limited, in this study, to three aspects: (1) robustness of the experts’ knowledge base; (2) the experts’ impartiality; and (3) the experts’ capacity to make

53. See for instance Ekelöf and others (n 21) 26, 34.
54. Stendahl (n 44) 65-73.
55. Wennergren and others (n 21).
themselves understood by the courts. Judges in administrative courts agreed to a greater extent with the statement that there is a greater guarantee of impartiality with regards to court-appointed experts than party-appointed experts. Judges in general courts agreed to a greater extent with the statement that both categories of experts have a robust knowledge base and a good ability to make themselves understood to the court.

These results indicate that judges in administrative courts place greater importance on the experts’ impartiality, while judges in general courts emphasise their knowledge and communication ability. The fact that judges in administrative courts place greater importance on impartiality can be related to the aforementioned, different legal traditions. Research has shown that there are cases in which judges in administrative courts, in cases of great complexity and disagreement between party-appointed experts, allow court-appointed experts to determine whether the party-appointed expert statements fulfil the evidentiary requirements of the case. This indicates that court-appointed experts in administrative courts can be used in a manner that, in practice, makes them into co-judges. This is possible in a process where it is more important for the outcome to be substantively correct than to fulfil the formal requirements of the party-governed process. The room for manoeuvre for judges in general courts is limited by the fact that the process is regulated and formalised to a greater degree, and judges therefore need to rely on the parties’ evidence to a greater extent. Their task, as judges, is mainly confined to evaluating the evidence presented in the case, which process is intended to ensure objectivity. Impartiality is an aspect that the judges consider in their evidential evaluation of an expert statement. Another aspect concerns the strength and sustainability of the scientific arguments and conclusions used in the expert statement. The court’s evaluation of evidence is probably made easier if the expert is able to explain the underlying scientific basis to the members of the courts in a comprehensible fashion. There may be a similar reasoning underlying the results for judges in general court.

Fourthly, the degree to which party and court-appointed experts have influenced the courts’ positions on the matter of fact at hand also varied between judges. The majority of judges in administrative courts estimated that court-appointed experts often influenced their position, while this applied to a significantly less degree to party-appointed experts. Conversely, a large group of judges serving in general court believed that their position was often influenced by party-appointed, while this was significantly less true for court-appointed experts.

These results are based on the judges’ experiences, but correspond relatively well with their attitudes. Judges in administrative courts prefer court-appointed experts, and it follows that they are often influenced by their statements. Judges in general courts prefer party-appointed experts or at least view them as equal to court-appointed experts, which appears to be consistent with, or at least not in conflict with, the fact that they are often influenced by party-appointed expert statements.

56. Stendahl (n 44) 72.
57. Ibid.
58. Ekelöf and others (n 21) 55-56, 287.
59. Ibid 56.
60. Cf. Edelstam (n 2) 380. See also Schelin (n 52) 240-242.
Finally, experts counted as a single category were studied here by way of two questions concerning respectively the comprehensibility of the expert information, and the degree to which experts fulfil the court’s need of expert opinion. With regards to the matter of comprehensibility, there was mutual agreement between judges in both types of court, which entails that in their experience, the expert information was often easy or fairly easy to comprehend. There was also mutual agreement on the second point, entailing that the judges assessed that the need for expert opinion was usually fulfilled to a significant or very great extent.

These two results indicate that when party-appointed and court-appointed experts are studied as a single category, the judges are generally satisfied with their efforts in court.

4. SUMMARISED CONCLUSIONS
Concerning the use of experts, the results show that court-appointed experts are used to a significantly greater extent in administrative court cases (up to 30%) than in general court (less than 5%). Party-appointed experts are used to a greater extent in cases judged in general courts (up to approximately 10%) than in administrative courts (less than 5%).

It is almost always the court that takes the initiative to use court-appointed experts in administrative courts, while in general courts the initiative is generally taken by the party, and less often by the court. The initiative to use party-appointed experts in the various kinds of cases is generally taken, in criminal cases (under public prosecution) by the public party (the prosecutor) and in civil cases by both parties (plaintiff and defendant) to roughly the same extent. In administrative law cases, the initiative is usually taken equally often by the public party (representing an authority) as the individual party.

To summarise, the results indicate thus far that the process in administrative courts is to a greater degree governed by the judge than in general courts. Conversely, the process in general courts is to a greater degree governed by the parties than in administrative courts. This can be related to different legal traditions, meaning that administrative courts generally have a greater responsibility for the investigation due to the objective of the administrative procedure to reach materially correct decisions. More precisely, this relates to the fact that many administrative and legal cases are of a complex nature and often include a predictive risk assessment, as well as the fact that the individual party may often lack legal representation and therefore be at a procedural disadvantage vis-à-vis the public party.

With regards to the judges’ attitudes towards party- and court-appointed experts, the results show two tendencies. One tendency becomes apparent when party- and court-appointed experts are treated as a single category. The results here indicate that judges have a positive attitude toward both party-appointed and court-appointed experts with regards to their ability to make themselves understood by the court and fulfil the judges’ need for expert information.

The other tendency emerges when the experts are divided into party-appointed and court-appointed experts. The results show, with one exception, a polarisation between judges in administrative courts and general courts. This exception concerns the trustworthiness of court-appointed experts in comparison to party-appointed experts. The
results indicate that most judges in both administrative and general courts view court-appointed experts as generally more trustworthy than party-appointed experts, but there are also ‘dissidents’ that feel that party-appointed and court-appointed experts are equally trustworthy.

This polarisation between judges in administrative and general courts has to do with their preferences for one or the other of the two categories of experts. The results indicate that judges in administrative courts prefer court-appointed experts, while judges in general courts prefer party-appointed experts or feel that they are needed to the same extent as court-appointed experts. Additionally, the results indicate that the judges’ positions in administrative courts are to a greater degree influenced by court-appointed experts than by party-appointed experts. Conversely, judges in general courts are influenced to a greater degree by party-appointed experts than court-appointed.

One clue in the explanation for this polarisation was the judges’ evaluation of the experts’ characteristics. In the present study, these were limited to the three aspects of knowledge base, impartiality and communication skills. The results indicate that administrative judges place greater importance on the impartiality of court-appointed experts, while judges in general courts emphasise the experts’ knowledge base and communication skills. This difference can also be related to different legal traditions, meaning that judges in administrative courts are focused on finding a substantively correct solution to the issue in dispute, while judges in general courts are bound by the formal regulations of the party-governed process which limits the judge’s role to the evaluation of evidence.

To be more precise, this means that experts can fulfil different functions in administrative courts and general courts. This infers that judges serving in administrative courts have a greater need of court-appointed experts (who must fulfil impartiality requirements) and who can function as informal co-judges. Judges serving in general courts must depend to a greater extent on party-appointed experts, and these must, from a legitimacy perspective, be treated as means of proof to be evaluated by the court. The evidential value of an expert statement does not solely depend on the expert’s impartiality; indeed, the scientific basis of the statement is a significant aspect. Based on this perspective, it is also important that the expert is able to explain the underlying scientific basis in a comprehensible manner to the court.

To summarise, the study shows differences between general and administrative courts both with regards to the use of, and attitudes towards, party- and court-appointed experts, which can largely be explained by the fact that these two types of courts are governed by different rules of procedure and traditions. The present study shows the inquisitorial nature of the administrative procedure by way of a relatively extensive use of court-appointed experts in administrative court cases, and the fact that these are routinely appointed ex officio by the court. This indicates that the changes in administrative procedure in the 1990s, from an inquisitorial to an adversarial procedure, have not been fully reflected in practice. This may be due to the fact that the administrative procedure reform did not lead to any changes to the objective of the procedure, which is to achieve substantively correct decisions, and requires judges to pursue a more substantive direction of proceedings.

The present study also clarifies the adversarial nature of the process in general court as shown by a relatively extensive use of party-appointed experts, as well as the fact that these
are generally appointed by the parties. The process in general court is, therefore, to a high
degree party governed, which indicates that judges do not intervene more than necessary
to ensure that the parties are afforded a fair trial and equal opportunities to bring action
and present evidence. 61 This entails that the Swedish process model accommodates two
procedural objectives, which may be difficult to reconcile, not least due to the fact that
achieving them requires very different judicial behaviours.

61. Cf. Shuman (n 9) 271.