Immediacy, orality, and appellate proceedings

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Abstract

In line with procedural principles of proportionality and concentration, a Norwegian reform of 2005 was intended to narrow the scope of appeals proceedings and to prepare the ground for more flexible modes of evidence taking. In practice, however, the principles of orality and immediacy have been applied also for appeals proceedings, and appellate proceedings tend to take more time than the first instance proceedings. Therefore, Norwegian civil proceedings have become extremely costly, and one might ask whether state courts currently provide a good dispute-solving alternative for ordinary companies and citizens. This article addresses these challenges and suggests possible paths for a new reform.

Orality, immediacy, appellate proceedings, litigation costs, proportionality, concentration, reform.

1. Introduction

As has been demonstrated in other articles in this volume, although principles of immediacy and orality are key figures in modern civil procedure law, and have been so for quite some time, their meaning and implication for civil procedure law is far from straightforward. In this short article, I will address the role of immediacy and orality in appellate proceedings. Should appellate proceeding take the form of a full main hearing, exchange of written documents, or a combination of these forms? Should evidence, for instance witness' testimonies, be taken immediately before the appellate court? Could the presentation instead take the form of a video of the testimony before first instance court, or would that violate a principle of immediate taking of evidence? I will bring forward some thoughts on these issues inspired by (a lack of) developments in reforms and court practice in Norway. In order to make these Norwegian developments relevant for an international audience, I will leave out most of the technical details and concentrate on broader and more general issues.

In Norway, both the district courts (tingrettene), the appeal courts (lagmannsrettene), and the Supreme Court (Høyesterett) are general courts, which means that they are competent to deal with all cases concerning criminal law, administrative law, family law, insolvency law, and private law.[1] Since leapfrog appeals[2] are extremely rarely accepted by the Supreme Court, litigation is normally commenced before a district court, then potentially brought to the appeal court, before potentially being brought to the Supreme Court.[3] In this paper, I will focus on first appeal and the structure of

[1] See A. Nylund, *CIVIL PROCEDURE IN NORWAY*, (Wolters Kluwer: Amsterdam 2020) p. 31–43.

[2] Norwegian Code of Civil Procedure of 17th June 2005 (CCP) Section 30-2. An unofficial translation under the name of "The Dispute Act" is found here: https://lovdata.no/dokument/NLE/lov/2005-06-17-90/*#%C2%A716-6

[3] Two exceptions to this structure are worth mentioning: Firstly, social security cases formally start in the appeal court after having been decided by the National Insurance Court (Trygderetten), see the Act on appeal

first appeal proceedings. While procedures for the Supreme Court is not a key issue for my article, appeals concerning the style and form of appellate proceedings may be considered by the Supreme Court. What is of interest, then, is not the form or style of Supreme Court proceedings, but the Supreme Court's practice as a legal source on rules concerning oral and written appellate proceedings.

I will only deal with first appeals against judgments and not first appeals against other forms of district courts' decisions. Hence, I will not deal with *interlocutory appeals*, i.e., separate appeals against procedural decisions, such as evidence orders or case management orders taking place while other aspects of the case are still proceeding for the first instance court. In Norwegian law, such procedural decisions may be appealed either as a procedural error against the final verdict,[4] or separately as an interlocutory appeal.[5] Interlocutory appeals are normally handled by written proceedings, but an oral hearing must be considered "required due to the need to ensure sound and fair legal proceedings."[6]

2. Oral versus written style of appellate proceedings

In Norwegian law, appellate proceedings are normally structured similarly to first instance proceedings.[7] Proceedings are split in two stages; a preparatory stage and a main hearing stage.[8] The preparatory stage is, as the word suggests, a preparation for the main hearing. In addition, it is the stage where most procedural decisions are made. Normally, procedural decisions made under the preparatory stage are based on written proceeding, see CCP Section 9-6 (4):

> "Rulings on procedural issues during the preparatory stage shall be made following a written hearing. Oral proceedings shall be held if required to fulfil the purposes of the Act regarding fair and sound proceedings. The oral proceedings may be limited to specific issues."

In practice, the preparatory stage takes a written form even though video-conference meetings between judge and parties may be arranged.

An important decision to be made under the preparatory stage of appellate proceeding, is whether the case shall be referred to a main hearing or be rejected based on written proceedings. As applies to other procedural decisions under the preparatory stage, this decision will be based on written proceeding.[9] Since a main hearing is normally a full-scale *de novo* proceeding based on principles of

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to the National Insurance Law (Act of 16th dec 1966) Section 26 (1). Formally, the National Insurance Court is an administrative body although it is entirely independent and in practice functions like a regular court. Secondly, complaints to the competition authority's decision is handled by the Complaints Board concerning Competition Cases (Konkurranseklagenemnda) and then brought directly to the appeal court, see the Norwegian Competition Act of May 3rd 2004 Section 39 (4).

[4] Norwegian CCP Section 29-3.

[5] Norwegian CCP Section 29-2 (1)

[6] Norwegian CCP Section 29-15 (2).

[7] Nylund *supra* note 1, p. 123–129.

[8] A. Nylund, "PREPARATORY PROCEEDINGS IN NORWAY: EFFICIENCY BY FLEXIBILITY AND CASE MANAGEMENT", in L. Ervo and A. Nylund, Current Trends in Preparatory Proceedings. A Comparative Study of Nordic and Former Communist Countries, (Springer: Dordrecht 2016) p. 57–80.

[9] CCP Section 29-12 (5) first sentence.

orality and immediacy, the appeal court's decision whether to refer the case to a main hearing holds tremendous significance for the style of proceedings.

The rules regarding the referral of appeals to a main hearing distinguishes between *low value cases* and other cases. In Norwegian law, a case is of low value if the claim's value is below 250.000 NOK (approximately 25.000 EURO), which corresponds to the threshold for handling a case under the small claim's track in first instance proceedings.[10] When the CCP entered into force in 2008, the threshold was 125.000 NOK, and the threshold was raised in an amendment of April 2020.[11] As a main rule, low value cases should not be referred to a main hearing. Appeals against judgments on cases with value lower than 250.000 NOK should be referred to a main hearing only when leave of appeal is granted by the appeal court, see CCP Section 29-13 (1):

> "An appeal against a judgment in an asset claim shall not be referred for hearing without leave of the court of appeal if the value of the subject matter of the appeal is less than NOK 250,000. In determining whether to grant leave, the court shall, among other things, take into consideration the nature of the case, the parties' needs for review and whether there appear to be flaws in the appealed ruling or the hearing of the case."

In practice, cases under the threshold of 250.000 NOK are rarely referred to a main hearing. The main rule of not referring such cases to a main hearing is based on considerations of proportionality and avoiding the parties' costs to exceed the value of the claims in question.[12]

For *high value cases and cases concerning non-economic values*, the court should refer the case to a hearing unless Section 29-13 (2) is met:

> "The court of appeal may refuse leave to appeal against a judgment if it finds it clear that the appeal will not succeed. Refusal may be limited to certain claims or grounds of appeal."

This criterion appears to grant the appeal court extensive competence to refuse leave to appeal. The appeal court's competence to deny the referral of a case to a main hearing has, however, not been applied frequently in civil cases. Traditionally, in accordance with the main rule, a majority of cases are referred to a main hearing. However, in recent years, the competence seems to have been applied slightly more frequently in civil cases and a similar criterion established for criminal cases has been even more frequently applied.[13] However, the use of these criteria has been disputed, particularly for criminal cases, and the appeal courts' practice has been subject to numerous appeals to the Supreme Court. Although the Supreme Court has accepted most of the refusals, refusals have been reversed on some occasions. The Supreme Court has established a common set of requirements for accepting the appeal court's refusal of a main hearing:

Firstly, as made clear by the wording of CCP Section 29-13 (2) and the corresponding Section 321 (2) of the Code of Criminal Procedure, it must be "clear that the appeal will not succeed." The Supreme Court emphasizes that the threshold is high, that it does not vary according to the essence of the

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[10] Norwegian CCP Section 10-1 (2) litra a).
[11] Prop. 133 L (2018-2019), ENDRINGER AV TVISTELOVEN (VERDIGRENSENE), (Ministry of Justice and Public Security: Oslo), see Prop. 133 L (2018–2019) - regjeringen.no .
[12] NOU 2001: 32 RETT PÅ SAK, p. 778–779, Ot.prp. no 51 (2004-2005), OM LOV OM MEKLING OG RETTERGANG I SIVILE SAKER (TVISTELOVEN), (Ministry of Justice and Public Security: Oslo), p. 296–297.
[13] The Code of Criminal Procedure Section 321 (2).

case, and only “obvious cases” and “hopeless appeals” are covered.[14] Secondly, a basic criterion of *fair* or *proper (“forsvarlig”) proceeding* must be met.[15] Taking the factual and legal issues of the appeal into account, it must be reasonable to conclude that the outcome of the case is “obvious” based on the district court’s judgment and the documents presented to the appeal court. Furthermore, the appeal court must review the proceedings of the first instance court and cannot refuse the appeal if that proceeding was flawed. Thirdly, the appeal court’s rejection of an appeal must be based on explicit *reasons*.[16] The reasons must reflect the criteria for refusing the appeal, which means that the appeal court must demonstrate – based on the district court’s judgment and documents provided by the parties – that the appeal will clearly not succeed.

Since these three criterions imply that the appeal court must deal with the appeal’s merits even when denying a main hearing, a two-step model of appeals has emerged. The model is similar to the Swedish model of first appeals,[17] but two differences seem to be present: Firstly, the Norwegian criteria for denying a main hearing are less developed than the Swedish rules. Secondly, the threshold for denying a main hearing is substantially higher in Norway. Swedish law is explicitly based on a view that the first instance proceeding shall be the main examination of the case and the role of the appeal courts is to control the first instance court.[18] In Norway, on the other hand, a main hearing is held in the majority of cases (except from low-value cases).

In general, the form of a main hearing before the appeal court is very similar to that of the main hearing before the district court. Basically, the principles of orality and immediacy apply similarly to the appeal hearing as they do to the main hearing for the first instance court.[19] Formally, a number of exceptions or modifications to the principle of orality apply to appeal proceedings,[20] but they are rarely applied in practice.

Immediate and oral appellate proceedings – is it worth it?

Compared to other European jurisdictions, Norwegian appellate proceedings are more dominated by orality both concerning presentation of evidence and in legal arguments. The strong position of the principle of orality, and to some degree the principle of immediacy, is due to historical traditions going back to at least the Norwegian civil procedure reform of 1915. In this reform, an ineffective written style of civil proceedings was, and rightly so, replaced by a dominantly oral style of proceedings.[21] While the reform of 2005 entailed certain changes concerning the style of proceedings, the principles of orality and immediacy were maintained both for first and second instance proceedings. Although the new code of 2005 leaves appellate courts some competence to interchange oral and written proceeding within the framework of a main hearing, that competence is

[14] HR-2021-2058.
[15] F ex Rt. 2008/1764 and HR-2021-2058.
[16] F ex Rt. 2008/1764 and HR-2021-2058.
[17] See Swedish CCP (RB) chapter 49 Section 12.
[18] P. O. Ekelöf and H. Edelstam, RÄTTSMEDLEN, 12th ed, (Iustus förlag: Stockholm 2008) p. 32–33.
[19] Norwegian CCP Sections 21-9, 29-16, and 29-18 (1).
[20] Norwegian CCP Section 29-16 (2)-(5).
[21] I. Lorange Backer, “THE REFORM OF NORWEGIAN CIVIL PROCEDURE”, in V. Lipp and H. Haukeland Fredriksen, Reforms of Civil Procedure in Germany and Norway (Mohr Siebeck: Tübingen 2011) p. 43–59 (on p. 47).

rarely used and there is no such competence if the parties disagree on factual issues where immediate evidence is of some importance.[22]

Inspired by the English Woolf-reform,[23] the 2005 reform of Norwegian civil procedure law was also based on principles of proportionality, concentration, and active case management in order to reduce the time and money spent.[24] As the expert committee noted in the preparatory report for the new code, bringing cases to court had become too costly, which probably was the most important reason why very few civil litigations were commenced in the pre-millennium decades.[25] Proportionality and concentration were not only general features of relevance for the new code on a general level, particular emphasis was placed on the principles for appellate proceedings.[26] Even though appellate proceedings normally should take the form of a main hearing conducing immediate and oral presentation of evidence and legal arguments, appellate proceedings should be more focused and limited to those issues of the district court's judgment that the parties disagreed on. Appellate proceedings should no longer take the form of a *de novo* testing of the entire case, it should take the form of an appellate review in the place of a retrial.[27] Within a system based on a new main hearing, appeal proceedings should be more limited by judges' active case management combined with more detailed description by the parties, especially by requiring more precise descriptions of the reasons for appeals and what aspect of the judgment the appeals was related to.

When the new code was adopted, a number of concrete goals for saving of time and money was announced – for instance, the parties' legal costs should on average be reduced by 30 % and the proceedings should be 30 % shorter.[28] On the initiative of the Parliament, it was decided that the reform's effect should be evaluated within three years from the time it had entered into force.[29] The evaluation, which was concluded in 2013, showed that many of the goals of the reform had been accomplished (to some extent).[30] Average time spent decreased by 12 % in first instance proceedings and by 17 % in second instance proceedings; the number of hours spent in open court was considerably reduced; the main hearings had become better prepared; and the number of judgments declared per year of work load was increased both in first and second instance. Although the goals were not completely realized, the code of 2005 did reduce time and cost expenditure. A higher number of civil cases were also commenced during these years.

However, later evaluations are less positive. A report delivered by The Office of the Auditor General of Norway in 2019, found that the court's efficiency was not in accordance with the requirements set by Parliament. Only three of six appeal courts managed to deliver judgments within the time limit of six months, and the appeals seem to have spent a higher number of hours in open court than what

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[22] Norwegian CCP Section 29-16 (5).
[23] NOU 2001: 32 *Rett på sak* p. 183–184.
[24] NOU 2001: 32 *Rett på sak* p. 131–133 and CCP Section 1-1. See also I. Lorange Backer, "GOALS OF CIVIL JUSTICE IN NORWAY: READINESS FOR A PRAGMATIC REFORM", in A. Uzelac, Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems (Springer: Dordrecht 2014) p.
[25] NOU 2001: 32 *Rett på sak* p. 111–114.
[26] NOU 2001: 32 *Rett på sak* p. 357 and 776–780.
[27] NOU 2001: 32 *Rett på sak* p. 355 and 357.
[28] Ot.prp. nr. 74 (2005-2006) p. 47.
[29] Innstilling Odelstinget no 110 (2004-2005), INNSTILLING FRA JUSTISKOMITEEN OM LOV OM MEKLING OG RETTERGANG I SIVILE TVISTER (TVISTELOVEN), (Stortinget: Oslo 2005), p. 8.
[30] Justis- og beredskapsdepartementet, *Evaluering av tvisteloven*, 2013, see https://www.regjeringen.no/no/dokumenter/evaluering-av-tvisteloven/id732374/

was the case for the first instance courts. Even more interesting, the Court Commission (Domstolskommisjonen), in its thorough study of cost shifting, observed the same trend for all instances: the costs increased substantially over the period and especially from 2014 forwards.[31] The costs did increase in absolute numbers, but also relative to the value of the claims. Furthermore, the Court Commission found that the number of so-called "regular civil cases", where for instance family cases and child protection cases are excluded, saw a steady decrease from 2014 to 2019. While approximately 7100 regular civil cases were initiated in the first instance courts in 2009, approximately 6300 were initiated in 2018.[32]

While the 2005 code in the years immediately following its entering into force moderately decreased the expenditure of time and money in civil proceedings, the costs increased significantly from 2013 onwards. Hence, the current state of Norwegian civil procedure law is quite similar to the description given prior to the 2005 reform: going to court is not a realistic option for most private parties, and one may seriously question whether a *de facto* access to court exists in Norway today.

It is clear that the high and disproportionate costs of civil proceedings are due to numerous causes. One of those causes is the lawyer's fees, which regularly amounts to 200 or 300 EUR per hour even for private (personal) litigants outside the sphere of business litigation. Arguably, another important factor relates to the number of hours spent in open court, or the number of hours spent in court meetings. Even though judges are supposed to actively manage cases and proceedings in order to concentrate first and second instance proceedings,[33] this does not seem to be the actual effect of current Norwegian civil procedure law. However, the strong preference for principles of immediacy and orality, and the way in which those principles are applied, seem to be one of the most important factors. Firstly, far too much time is spent on reading out documents. This practice is due to the requirement of "documenting" written evidence by reading out during trial the parts of the document that a party bases his case on.[34] The Court Commission has, for very good reasons, suggested such readings to be replaced by other requirements for presentation of written evidence.[35] Secondly, there is a lack of technology applied during trial especially for the cross-examination of witnesses. Thirdly, far too much time is spent on oral arguments on matters of law even though most lawyers will present to court both an overview of relevant legal sources and the related legal argumentation.

Another important factor which obviously increases cost, is the content of appellate proceedings. Although the ambition of the 2005 reform was to get rid of the *de novo* principle, it has survived in practice simply because the CCP opens up for it. While the 2005 code require parties to specify their grounds for appeal and the part of the judgment which are appealed, parties may appeal against any part of the judgment and may appeal on all legal grounds, factual grounds, and procedural errors of that judgment.[36] The parties must specify the grounds for appeal but can easily, by combining several grounds for appeal, appeal on all legal and factual aspects of the first instance judgment. And since the Norwegian CCP only hinders parties from presenting new claims or widen their prayer for relief in

[31] NOU 2020: 11, *Domstolene i endring – den tredje statsmakt*, p. 303.
[32] NOU 2020: 11, *Domstolene i endring – den tredje statsmakt*, p. 50–51.
[33] Norwegian CCP Section 9-4 and Section 11-6.
[34] Norwegian CCP Section 26-2.
[35] NOU 2011, *Domstolene i endring – den tredje statsmakt*, p. 363–364.
[36] Norwegian CCP Section 29-2.

appellate proceedings,[37] parties are free to allege new factual allegations and new evidence before the appeal court.

To sum up, once again, the massive costs are causing serious problems for the Norwegian civil justice system. While the extremely high costs are due to many causes, one of them is the still prevailing *de novo* style of appellate proceedings which doubles the waste of time and resources related to for instance reading out documents. Applying principles of orality and immediacy twice is simply too costly. The existence of many and nearly free of charge out-of-court services such as complaints boards and ombudsmen do salvage the system from being in a very serious crisis, but those services are not of very much help for complex cases and for those cases where an out-of-court service do not exist.

Possible paths for a reform

In order to reduce the costs for litigation and thereby reestablishing Norwegian courts as a viable option for solving private disputes, a new reform is necessary to follow up on the more general reform of 2005.[38] While the goals and purposes of the 2005 reform are still applicable, the instruments for realizing these goals need adjustments and rethinking. Such a follow-up reform may, of course, take many different paths. In my opinion, however, there is a need to reform the rules for first appeals (in consequence, perhaps also for appeals to the Supreme Court) and especially the role of orality and immediate presentation of evidence and legal arguments. The current set of criteria for rejecting appeal or referring the appeal to a main hearing has become too vague and therefore challenging for appeal courts to apply. In practice, the criteria work similarly to the Swedish system of appeals. However, while the Swedish rules are compiled in an entire system of relatively well-defined criteria noting both when appeal courts should leave appeal and how the court should proceed in order to make that decision, Norwegian rules consist of rudimentary provisions governed by somewhat abstract principles developed by the Supreme Court. Therefore, whether one is in favor of the current Norwegian rules on appeal or not, the need for clarifying the system should be acknowledged.

A future reform should take on a more general examination of whether, and to which extent, oral hearing and immediate re-presentation of evidence should be a part of appellate proceedings. As a first step of its examination, the reform should decide whether appeal courts should have a broad competence more or less equal to first instance courts, or whether the appeal courts competence should be highly limited. In the current situation, the important role of orality and immediacy in appellate proceedings is to some extent justified, maybe even necessitated, by the very broad competence of appeal courts in cases where parties have cumulated factual and legal grounds for appeal. When the appeal courts have such a broad competence, elements of orality may under the circumstances be required by ECHR article 6 even though the allowed exceptions from the right to an oral hearing are rather far-reaching, particularly for appellate proceedings.[39] However, even if future

[37] Norwegian CCP Section 29-4.

[38] See also M. Strandberg, TILGANG TIL ANDRE INSTANS SOM HINDER FOR TILGANG TIL FØRSTE INSTANS, in. A. Ghavanini and S. Wejedal, Access to justice i Skandinavien (Santérus Academic Press Sweden: Stockholm 2022), p.

[39] O. J. Settem, APPLICATIONS OF THE FAIR HEARING NORM IN ECHR ARTICLE 6(1) TO CIVIL PROCEEDINGS. WITH SPECIAL EMPHASIS ON THE BALANCE BETWEEN PROCEDURAL SAFEGUARDS AND EFFICIENCY, (Springer: Dordrecht 2016), p. 297–307.

Norwegian appeal courts maintain a broad competence to deal with matters of fact, a very strict application of the principles of orality and immediacy does not seem to be justified. As has been demonstrated in Sweden, it is perfectly possible to present evidence for the appeal court as videos of evidence taken before the first instance court. Even though such presentation of evidence is more indirect than having the witness present in the courtroom, it does not necessarily mean that appeal court judges are put in a less favorable epistemic situation. Furthermore, such a practice would also imply that, especially in larger cases, the first instance proceeding no longer takes the form of a mere "warming up." Parties will no longer have the opportunity to re-think, evaluate, and adapt their testimonies and perhaps the preparation of witnesses. By attorneys, this might be fronted as a positive aspect of rehearing evidence, but as a matter of truth-seeking mechanism it is probably not a better alternative.

However, a future reform should also consider whether the appeal courts' competence should be seriously limited. Multiple alternatives for such limitations are available in other jurisdictions, and reforms in for instance Germany and Spain have been introduced to the Norwegian debate as possible models for reform.[40] Inspirations from other European jurisdictions and ELI-UNIDROIT Model Rules on Civil Procedure were also found in the last report from the Court Commission,[41] who posed the general recommendation of rephrasing the appeal courts' role and competence in order to reduce costs, resolving most conflicts at the lowest possible level of the court system, and for further enhancing the quality of decision-making.[42] Unfortunately, the Commission did not have time and resources to develop an entire rephrasing of the rules concerning appeals proceedings and merely fronted a few rather limited suggestions for amendments of the code. Inspired by Rule 168 of the ELI-UNIDROIT Model Rules, the commission suggested that parties, unless certain exceptions were fulfilled, should not be able to allege new facts or present new evidence which had not been a part of the first instance proceeding.[43] However, the consultation process following the suggestion was not a massive success for those who argue in favor of reform. Even the, in a comparative context, very moderate suggestion from the Court Commission was by the Supreme Court described as too strict.

[40] M. Strandberg and A. Nylund, "UTSIKT TIL INNSIKT: EN KOMPARATIV TILNÆRMING TIL REFORM AV REGLENE OM ANKE TIL LAGMANNSRETTEN OVER DOMMER I SIVILE SAKER», Lov og Rett (Universitetsforlaget: Oslo 2020) p. 84–102. The suggests provided by Nylund and me resulted from a seminar held in Bergen in June 2019 where the German rules were presented by professor Christoph Kern, the French rules by professor Frédérique Ferrand, and the Spanish rules by professor Fernando Gascón Inchausti. Together with these three colleagues, I was a member of the working group who prepared the rules on appeal in ELI-UNIDROIT Model Rules on European Civil Procedure.

[41] NOU 2020: 11, *Domstolene i endring – den tredje statsmakt*, p. 323–324.

[42] NOU 2020: 11, *Domstolene i endring – den tredje statsmakt*, p. 324–325.

[43] NOU 2020: 11, *Domstolene i endring – den tredje statsmakt*, p. 364.