

# Is E-justice Reform of Norwegian Civil Procedure Finally Happening?

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## Abstract

Fifteen years ago, the digitalisation of civil procedure was put on the agenda in Norway by the new Dispute Act. Only now, though, does e-justice appear to be gaining ground. The article sketches out the existing e-justice elements in the Dispute Act and outlines the new test schemes for electronic communication and paperless court hearings. It then tries to explain why so little has happened over the last 15 years. Against this background, the potential of e-justice reform of Norwegian civil procedure is discussed, along with the challenges it faces.

## Keywords:

Civil procedure, e-justice, Norway's civil justice system

## 1. Introduction

About 15 years ago, digitalisation of civil procedure was put on the agenda in Norway by the draft, written by the Expert Committee, for what became the Dispute Act – in force since 2008.<sup>1</sup> In its final report from 2001, the Expert Committee stated it was ‘obvious’ that a new code of civil procedure had to be adapted to modern information and communication technology.<sup>2</sup> The Committee did not suggest a fully digitalized e-justice approach, but the draft was formulated in a ‘technology neutral’ way and the Committee anticipated and encouraged a development towards paperless litigation. Among other things, the Expert Committee suggested that parties represented by an advocate should be obliged to send all pleadings and exhibits electronically and that all other parties should have a right to do so.<sup>3</sup> The Ministry of Justice, whilst endorsing the general view

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<sup>1</sup> Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister [Act of 17 June 2005 no. 90, relating to mediation and procedure in civil disputes] is regularly referred to in English as ‘the Dispute Act’ despite the fact that it is a full-blown Code of Civil Procedure in the Continental tradition. Somewhat reluctantly, we too will refer to it as ‘the Dispute Act’ in this article. An English translation of the Act is available at <<http://app.uio.no/ub/ujur/oversatte-lover/english.shtml>> accessed 14 September 2016 (search for ‘tvisteloven’). Please note that the translation has not been updated, but so far the number of amendments is fairly limited. For an informative introduction to the new Act in the English language, see Inge Lorange Backer, ‘The Norwegian Reform of Civil Procedure’ (2007) 51 *Scandinavian Studies in Law* 41.

<sup>2</sup> NOU [Norwegian Official Reports] 2001 No. 32 606.

<sup>3</sup> Section 16-3 of the draft, entitled ‘Submission to the Court’ in the Committee’s own translation in NOU [Norwegian Official Reports] 2001, No. 32, 1068-1069:

of the Expert Committee on the use of modern technology, stated that it would take 'some time' to facilitate electronic exchange of pleadings and exhibits and that it did not want to put the entire reform on hold in order to wait for the necessary practical preparations.<sup>4</sup> As an unfortunate (but predictable) consequence, the momentum for digitalisation of civil proceedings in Norway was largely lost. It is only in the last couple of years that the Norwegian Courts Administration has been granted the financial and legal means necessary for the introduction of a scheme for electronic communication in civil proceedings.<sup>5</sup>

In this contribution, an attempt is made to sketch out the existing e-justice elements in the Dispute Act (section 2). The new scheme for electronic communication (section 3) and the test scheme for paperless court hearings (section 4) are presented. We then try to explain why e-justice has not been higher on the agenda in Norway (section 5). Looking ahead, we discuss the possibilities of e-justice reform of Norwegian civil procedure and the challenges that such reform faces (section 6).

## 2. Existing e-justice elements in the Dispute Act

### 2.1. Technology neutral elements

Even though Norway has yet to develop a full-scale e-justice scheme, several e-justice elements are to be found in the Dispute Act. As mentioned above, the Expert Committee that drafted the Act proposed to adapt civil proceedings to modern information and communication technology through a 'technology neutral' wording of the Act. As this move only outlined future possibilities, and did not in itself require any funding, the Ministry of Justice endorsed it. One example of such technology neutral formulation is the Act's provisions on court records, which allow for both old-fashioned pen and paper methods and modern technology.<sup>6</sup> Another example, which also serves to illustrate that technology neutral provisions are not always sufficient in themselves, is the provision on the filing of pleadings and exhibits. As mentioned in the introduction, the Ministry of Justice did not follow up on the Expert Committee's suggestion for obligatory electronic filing for parties represented by an advocate, but the provision on filing of pleadings and

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'(1) Written submissions, including exhibits, shall be sent electronically to the court. In case of temporary technical failure, the written submission may be sent by a different method, provided that it is also sent electronically as soon as possible thereafter.

(2) Counsel who is not an advocate may send written submissions in the form of a hardcopy by permission of the court. Parties not represented by counsel may always use hard copies. In such cases the written submission shall be sent in a sufficient number of copies for the court to be able to keep one.

(3) Evidence which, by its nature, will lose a significant part of its value as evidence if submitted electronically may be submitted by a different method. The court may demand that an electronic version of the evidence is submitted in addition.'

<sup>4</sup> Ot.prp. [Government Bill] No. 51 (2004-2005) 228.

<sup>5</sup> See sections 3 and 4.

<sup>6</sup> Sections 13-5 to 13-9 of the Dispute Act.

exhibits was still written in a technology neutral way.<sup>7</sup> However, pleadings have to be signed,<sup>8</sup> a requirement which, in the absence of a reliable e-signature solution, has hindered electronic filing. If urgent, pleadings can be scanned and sent by e-mail, but the original documents have to follow by post.<sup>9</sup>

## 2.2. Electronic recordings of proceedings

The Dispute Act also includes provisions that explicitly allow for, and to some extent demand, the use of new technology. Section 13-7 establishes electronic recording of the testimony of parties and witnesses as the main rule in all civil cases. Parties and witnesses are examined immediately before the court and the examination is recorded on video or tape. The purpose is two-fold. Firstly, recordings limit the need for examination of parties and witnesses before the courts of appeal, thereby saving both time and money. As the Expert Committee explicitly noted, appeal proceedings should not include full repetition of the hearing before the court of first instance, but rather be limited to a concentrated review of the disputed parts of the judgment under appeal.<sup>10</sup> Secondly, in cases where parties or witnesses are still to be examined anew before the court of appeal, the recordings from the court of first instance can counter any inconsistencies or 'adjustments' in their testimonies (or at least allow the other party and/or the judges to point this out and ask follow-up questions).

In general, the Ministry of Justice was positive about the electronic recording of party and witness testimony but feared that mandatory rules could delay the entire reform. An exception for courts that do not have the necessary recording equipment was therefore added to the draft.<sup>11</sup> As the Ministry knew very well, this was the situation in many of the courts of first instance. Unfortunately, the situation has not really improved much since.<sup>12</sup> As a result, most testimonies are still today either not documented at all or only their main points are entered into the court record. This is particularly unfortunate because ordinary appeal procedures in Norway are essentially *de novo*, allowing for a full repetition of the proceedings that occur before the court of first instance.

## 2.3. Distance meetings

At present, the lack of necessary technical equipment also limits Norwegian courts in their use of 'distance meetings', as an alternative to ordinary court hearings. A distance

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<sup>7</sup> See section 12-3(1) of the Dispute Act, which simply states that '[p]leadings and exhibits shall be delivered to the court.'

<sup>8</sup> Section 12-2(2) of the Dispute Act.

<sup>9</sup> See Tore Schei and others, *Tvisteloven – kommentarutgave* [The Dispute Act – a commentary] (2nd ed., Universitetsforlaget 2013) 440.

<sup>10</sup> NOU [Norwegian Official Reports] 2001, No. 32, 845.

<sup>11</sup> Section 13-7(2)(b) of the Dispute Act.

<sup>12</sup> As recently acknowledged by the Deputy Director General of the Legislation Department of the Ministry of Justice, Fredrik Bøckman Finstad, 'Tvisteloven – evaluering og endringsbehov' [The Dispute Act – evaluation and need for change] (2016) 55(4) *Lov og Rett* 224, 228. It has to be added, however, that the Norwegian Courts Administration in the autumn of 2016 finally began testing different technical solutions for electronic recordings of proceedings in two courts – Nord-Troms tingrett (District Court for Northern Troms) and Hålogaland lagmannsrett (the Court of Appeals for Northern Norway).

meeting is a meeting at which not all participants are present in person, but participate using remote communication technology.<sup>13</sup> Court hearings may be held, in whole or in part, as distance meetings when specifically provided for in the Dispute Act or with the consent of the parties involved.<sup>14</sup> Such authorisation is given for all meetings at the preparatory stage.<sup>15</sup> Following a rather strict division between preparations and the main hearing, the court cannot make decisions on the merits of the case at the preparatory stage. Rather, it will only check whether the preconditions for a main hearing are met and decide on matters of case management. Authorisation for distance meetings is given for small claims proceedings as well. In the small claims procedure, the court may decide that the oral hearing is to be held in the form of a distance meeting.<sup>16</sup>

Finally, in cases that are heard by more than one judge, deliberations may be held in the form of a distance meeting as long as no lay judges are involved.<sup>17</sup>

#### **2.4. Distance examination**

Under the Dispute Act, parties, witnesses and experts are, as a rule, heard directly before the adjudicating court.<sup>18</sup> Still, the adjudicating court may, under certain conditions, examine parties, witnesses and experts by way of distance examination. The underlying rationale is the proportionality principle, which is one of the guiding principles of the entire Act: the procedure and the costs involved must be reasonably proportionate to the importance of the case.<sup>19</sup> Section 21-10 fleshes this out in a rather general rule on distance examination:

‘Parties, witnesses and experts may be examined before the adjudicating court by way of distance examination if direct examination is not practicable or would be particularly onerous or expensive. Distance examination should not take place if the testimony may be of particular importance or if it may be imprudent for other reasons. Distance examination may always take place if the expense or disadvantages of direct testimony before the adjudicating court is considerable relative to the importance of the dispute to the parties. Experts who have made a written submission to the court may always be examined by way of distance examination unless it may be imprudent due to special circumstances.’

Distance examination may take place both in proceedings before the courts of first instance and in appeal proceedings. Under certain circumstances, it can also take place

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<sup>13</sup> Section 13-1(2) of the Dispute Act.

<sup>14</sup> Section 13-1(3) of the Dispute Act.

<sup>15</sup> Sections 9-4(3) and 9-5(3) of the Dispute Act.

<sup>16</sup> Section 10-3(2) of the Dispute Act.

<sup>17</sup> Section 19-3(1) second sentence of the Dispute Act: ‘If lay judges participate, deliberations ... cannot take place in a distance meeting.’

<sup>18</sup> Section 21-9 of the Dispute Act.

<sup>19</sup> See section 1-1(2) fourth indent of the Dispute Act. As made clear in the Expert Committee’s final report, the main source of inspiration was the Woolf reform in England and Wales.

at the preparatory stage.<sup>20</sup> Distance examination may be decided by the court on its own motion. Obviously, the parties have the right to be heard,<sup>21</sup> but the court can opt for distance examination even if both parties object. A party can appeal such a decision, but the grounds of appeal are very limited: as far as the discretionary assessment is concerned, an interlocutory procedural order can only be appealed on the grounds that it is unsound or clearly unreasonable.<sup>22</sup> Normally, distance examination will be conducted by way of video examination, but audio examination suffices if equipment for video examination is unavailable.<sup>23</sup>

The courts' powers to opt for distance examination are even wider in small claims proceedings. Once again, the justification is to be found in the principle of proportionality. The court can always opt for distance examination in small claim proceedings unless the court itself finds it necessary to receive testimony directly at the court hearing.<sup>24</sup>

The Norwegian reform of civil procedure has thus provided the courts with wide-ranging powers to decide whether and how a distance examination is to be held. Indeed, such examinations are in line with the proportionality principle that informs the entire Act. But, despite these inducements, distance examinations seem to be rarely used in practice.

### 3. The new scheme for electronic communication with the courts

The Courts of Justice Act section 197a gives the King (i.e. the government) the authority to issue regulations to the effect that communication with the courts that takes place in writing, may also take place electronically.<sup>25</sup> These regulations also lay down detailed rules necessary to enable this, including requirements governing signatures, authentication, integrity, and confidentiality. Based on this legal basis and initiated by the Norwegian Courts Administration, a test scheme for electronic communication with the courts entered into force in February 2012.<sup>26</sup> Under the test scheme, several courts of first instance (among them Oslo City Court, which is by far the biggest court in Norway) and two of Norway's five appellate courts (among them Borgarting Court of

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<sup>20</sup> See, on the taking of evidence, section 27-4 of the Dispute Act.

<sup>21</sup> Section 9-6(1) of the Dispute Act.

<sup>22</sup> Section 29-3(2) of the Dispute Act.

<sup>23</sup> Section 21-10(2) of the Dispute Act.

<sup>24</sup> Section 10-3 (6) of the Dispute Act.

<sup>25</sup> Lov 13. august nr. 5 om domstolene [Act 13 August 1915 No. 5 relating to the Courts of Justice] (hereinafter 'the Courts of Justice Act'). An English translation of the Act based on the Norwegian official version as of 1 October 2013 is provided by the Norwegian Courts Administration and available at <<http://app.uio.no/ub/ujur/oversatte-lover/english.shtml>>, accessed 14 September 2016 (search for 'domstolloven').

<sup>26</sup> Forskrift 12. februar 2012 nr. 140 om prøveordning med elektronisk kommunikasjon med domstolene [Regulation 12 February 2012 No. 140 on a Test Scheme for Electronic Communication with the Courts], now repealed.

Appeal, which has jurisdiction over Oslo and the surrounding area) facilitated electronic exchange of documents.<sup>27</sup>

In 2016, the test scheme was made permanent and extended, in principle, to all Norwegian courts.<sup>28</sup> However, the entry into force for each and every court is to be decided upon by the Norwegian Courts Administration, so that it may still take its time before it applies to all of the courts.<sup>29</sup>

Participation in the scheme is open, on a permanent basis, to advocates, court-appointed experts, lay judges and translators, and on an *ad hoc* basis, to self-representing parties to a specific case.<sup>30</sup> Electronic exchange of documents is not compulsory, but upon registration on the web portal of the Norwegian Courts Administration, all users undertake to communicate electronically 'as far as possible' and, for advocates, as far as the authority to represent their clients goes.<sup>31</sup> A user can submit electronically to the portal any document which is to be submitted to court in a civil case, including written pleadings, writs of summons, replies, applications, notices of appeal, written closing submissions, expert declarations, related reports and attachments, as well as fee claims from lawyers involved in cases where their fees are to be paid from the public purse.<sup>32</sup> However, the court may still, in each individual case, order the user to forward hard copies of documents that are submitted electronically.<sup>33</sup> No criteria for such orders are set out in the regulations, so the courts have to fall back on the general 'fair trial' – principles found in Section 1-1 of the Dispute Act. Still, the very purpose of the scheme suggests that the threshold must be high. A possible guideline may be found in the Expert Committee's draft for the provision on submission to the court:<sup>34</sup> Only evidence that, by its nature, will lose a significant part of its evidential value if submitted electronically, should be ordered to be forwarded in hard copy.

Importantly, all users of the web portal must agree that the courts may send all documents electronically.<sup>35</sup> Even though formulated as a mere possibility, the purpose of the scheme suggests that all documents from the courts will indeed be sent electronically. To facilitate this, the regulations contain a provision on 'notice of new documents' – the user shall receive notice to the electronic address they have given whenever a document is received and whenever a document with a time limit is made

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<sup>27</sup> Section 2(2) of the 2012-regulation (ibid).

<sup>28</sup> Forskrift 28. oktober 2016 nr. 1258 om elektronisk kommunikasjon med domstolene [Regulation 28 October 2016 No. 1258 on Electronic Communication with the Courts] (hereinafter 'the 2016 regulation'), which replaced the 2012-regulation (n 26).

<sup>29</sup> By decision of 28 October 2016, the Norwegian Courts Administration added seven new courts to the scheme, among them two more of the Norway's five appellate courts and five of the biggest of the courts of first instance. The plan is to add the last of the appellate courts and a number of first instance courts to the scheme in the first and second quarter of 2017.

<sup>30</sup> Sections 2(1) and 3(1) of the 2016-regulation.

<sup>31</sup> Section 3(2) of the 2016-regulation.

<sup>32</sup> Section 6(1) of the 2016-regulation.

<sup>33</sup> Section 6(3) of the 2016-regulation.

<sup>34</sup> See Section 16-3(3) of the Expert Committee's draft (cited in n 3).

<sup>35</sup> Section 9(1) of the 2016-regulation.

available in the web portal.<sup>36</sup> Furthermore, the web portal shall provide users with ‘a good overview of incoming documents and running time limits in pending cases’.<sup>37</sup>

The regulations also contain an important provision on the authority of deputy advocates and other assistants of an advocate to submit and receive documents on his or her behalf (so-called ‘portal assistants’). A portal assistant who has a licence to practice law, or who is an authorised trainee lawyer for a registered user of the web portal, may take procedural steps on behalf of the registered user to the extent permitted by administration of justice legislation for non-electronic communication with the courts.<sup>38</sup> Other portal assistants may, on behalf of the registered user, undertake practical computing activities in the web portal. Nevertheless, the registered user remains liable for all transactions performed by the portal assistants.<sup>39</sup> To adjust to the contrasting preferences of users (big law firm vs. the local advocate etc.), a registered user may limit the portal assistant’s rights in the web portal (essentially a type of parental control).

The regulations also contain provisions on confidentiality, authenticity (electronic signature), notoriety and accessibility,<sup>40</sup> as well as on filing.<sup>41</sup> They do not, however, contain any rules on unforeseen technological errors or delays, which might occur if the web portal is out of order, for instance, or if there are general network problems. These issues were explicitly dealt with in section 16-3 of the Expert Committee’s draft for the Dispute Act, which made clear that, in case of temporary technological failure, a document that should be sent electronically could be sent by a different method if the said document was sent electronically as soon as possible thereafter. The absence of such a provision in the e-justice regulation may cause difficulties, but the solution can probably be found in the general rules on documents. If an original document is required, a party is still allowed to send a fax, for instance, on the last day before the time limit elapses provided a signed original paper is sent as soon as possible thereafter.<sup>42</sup> Within an e-justice scheme, the same line of reasoning implies that an email is acceptable if the document is submitted electronically as soon as possible afterwards. If, due to technological difficulties, a document is not sent at all before the expiration of a time limit, the difficulties are handled under the general rules concerning reinstatement.<sup>43</sup>

Based on the suggested reforms in other countries (e.g. the Netherlands<sup>44</sup>), it may be noted that no special provisions have been enacted to prevent the parties from submitting a large number of documents or very large documents. As far as written

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<sup>36</sup> Section 10 of the 2016-regulation.

<sup>37</sup> Section 10 of the 2016-regulation.

<sup>38</sup> Section 4(2) of the 2016-regulation.

<sup>39</sup> Section 4(3) of the 2016-regulation.

<sup>40</sup> Sections 11 and 12 of the 2016-regulation.

<sup>41</sup> Section 13 of the 2016-regulation

<sup>42</sup> Schei and others (n 9) 440.

<sup>43</sup> Sections 16-12 to 16-14 of the Dispute Act.

<sup>44</sup> See C.H. van Rhee, ‘E-justice: New developments and best practices in the Netherlands’ (the 20th Ius commune conference, Leuven, 26 November 2015), <[www.iuscommune.eu/html/activities/2015/2015-11-26/workshop\\_7\\_Van\\_Rhee.pdf](http://www.iuscommune.eu/html/activities/2015/2015-11-26/workshop_7_Van_Rhee.pdf)> accessed 14 September 2016.

evidence is concerned, the general provisions of the Dispute Act are deemed to suffice. Under the Act's section 21-7(1)(b), the court may disallow presentation of evidence that is not 'apt to appreciably improve the basis for the ruling', whereas section 21-8 empowers the court in a very general manner to limit the presentation of evidence on account of its proportionality. With this comes the most powerful tool of all: the possibility to cut the recoverable costs of the winning party.<sup>45</sup>

#### 4. Test scheme for paperless court hearings

In a number of particularly complex criminal cases, a test scheme has been put in place to allow for all of the documents of the case to be available in a digital format, with computer screens and tablets replacing piles of written documents. According to the Norwegian Courts Administration, the project has increased the efficiency of the main hearing considerably and has now been followed up by a similar test scheme for civil cases, involving the same courts that participated in the abovementioned test scheme for electronic communication.<sup>46</sup> Provided that the necessary funding is made available, digital display of documents can be expected to be the general rule in future for both criminal and civil cases. The ambition of the Norwegian Courts Administration is to have the courts 'fully digitalised' by 2020.<sup>47</sup>

### 5. Explaining the inertia: the rather 'old-fashioned' mode of Norwegian court proceedings

#### 5.1. The need for an explanation

Foreign observers may be excused for wondering why e-justice has not been higher on the agenda in Norway. In other parts of society, Norwegian authorities have been eager to facilitate the use of modern information technology. Despite the country's size and population distribution, 78% of households across Norway had access to high-speed broadband services in 2014, well above the European Union (EU) average of 68%.<sup>48</sup> The difference is even bigger when it comes to fiber optic cables coverage, which reached 40% of households in 2014 (compared to an 18.7% EU average). In rural areas, access to fiber

<sup>45</sup> Section 20-2(3) of the Dispute Act.

<sup>46</sup> See Tage Borøchstein, 'I det digitale førersetet' [In the digital driver's seat] (2015) 12(3) *Rett på sak* 6; Frank Kjetil Olsen, 'Først i Nord-Norge med digital iretteføring' [First in Northern Norway with Digital Proceedings] (2015) 12(3) *Rett på sak* 9; and the Deputy Director General of the Legislation Department of the Ministry of Justice, Fredrik Bøckman Finstad (n 12) 228 ff.

<sup>47</sup> See the contribution by the director general of the Norwegian Courts Administration, Sven Marius Urke, 'Domstolene skal bli heldigitale' [The Courts shall be fully digitalised] *Aftenposten* (Oslo, 23 November 2015) <[www.aftenposten.no/meninger/Domstolene-skal-bli-heldigitale-19998b.html](http://www.aftenposten.no/meninger/Domstolene-skal-bli-heldigitale-19998b.html)>, accessed 14 September 2016.

<sup>48</sup> See the European Commission's report, *Broadband coverage in Europe 2014 – Mapping progress towards the coverage objectives of the Digital Agenda* (Luxembourg: Publications Office 2015).

optic cables exceeded 22% in 2014, almost four times the EU average, and the government's goal is for all Norwegian citizens to have access to 100 Mbps connections by 2018. The government itself has embraced the possibilities offered by modern information technology and launched an ambitious E-government programme – web-based services are to be the general rule for the public sector's communication with citizens and businesses.<sup>49</sup>

If one adds that Norway finds itself in a very privileged financial situation due to the revenues from oil and gas extraction (so that funding of the necessary recording equipment should not really be a problem), and considers the fact that the country's size and population distribution makes it particularly well-suited for e-justice, the lack of real progress over the last 15 years begs for an explanation.

## 5.2. The overall performance of the civil justice system in Norway

One possible explanation for the lack of e-justice reform in Norway is that the existing civil justice system works quite well as it is. The global World Justice Project's *Rule of Law Index* ranks Norway second only to Denmark in the overall assessment, and second only to the Netherlands when it comes to civil justice in particular.<sup>50</sup> In a comparative perspective, the Norwegian civil justice system is regarded as accessible and affordable, free of discrimination, corruption, and improper influence by public officials, with court proceedings conducted without unreasonable delays and with effective enforcement of decisions.<sup>51</sup> Unsurprisingly, both the Lawyers' Association and the Norwegian Courts Administration are of the opinion that more resources are needed, but there is general agreement that the Norwegian civil justice system works quite well. Cases are dealt with in an efficient manner; the average length of civil proceedings in the courts of first instance is only about 5-6 months and the courts of appeal will, on average, deal with an appeal in a civil case within another 6-7 months.<sup>52</sup> Furthermore, public trust in the civil justice system is high. A judgeship is regarded as prestigious and judges are well paid, thus enabling the recruitment of highly competent personnel.

## 5.3. The popularity of the complaints boards

In the Norwegian civil justice system, some of the most pressing reasons for e-justice reforms apparent in other European countries, are taken care of by out-of-court mechanisms. Most importantly, many civil cases are dealt with by different *complaints*

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<sup>49</sup> See Ministry of Government Administration, Reform and Church Affairs *Digitalizing Public Sector Services – Norwegian eGovernment Program* (2012).

<sup>50</sup> World Justice Project, *Rule of Law Index 2015* (the World Justice Project 2015) 6, 30.

<sup>51</sup> Ibid 45-46, 125. See also the comprehensive report by the European Commission for the Efficiency of Justice (CEPEJ), *European judicial systems (2012 data): Efficiency and Quality of Justice (2014 Edition)* (Council of Europe 2014).

<sup>52</sup> Annual report of the Norwegian Courts Administration for 2015, available (in Norwegian only) at <<http://aarsmelding.domstol.no/>> accessed 14 September 2016. In the case of a further appeal to the Supreme Court, it will take the Supreme Court's Appeal Selection Committee an average of about one month to decide whether or not to give leave to appeal and then, if answered in the affirmative, the Supreme Court another 6-7 months to render its final judgment.

*boards*.<sup>53</sup> Some of these boards have a statutory basis, while others are based on a contract between consumer protection organisations and one or more professional bodies (sometimes with governmental approval of the set-up<sup>54</sup>). None of these complaints boards are defined as courts under Norwegian law, but from a functional perspective quite a few of the statutory-based ones are essentially specialised courts of first instance. From an EU law perspective, they would qualify as ‘courts’ (or at least ‘tribunals’) entitled to refer preliminary questions to the Court of Justice of the EU (CJEU) in accordance with Article 267 of the Treaty on the Functioning of the European Union.<sup>55</sup>

Two particularly important examples in the field of consumer protection are *Forbrukertvistutvalget* [the Consumer Disputes Commission] and *Husleietvistutvalget* [the Rent Disputes Tribunal].<sup>56</sup> Both decide about 1,500 disputes each year, of which only very few continue on to the ordinary courts.<sup>57</sup> Other examples of statutory-based complaints boards in consumer cases include *Transportklagenemnda* [the Air Passenger Complaints Handling Body], *Pakkereisenemnda* [the Complaints Board for Package Holidays], *Brukerklagenemnda for elektronisk kommunikasjon* [the Complaints Board for Electronic Communication], and *Elklagenemnda* [the Electricity Appeal Board].<sup>58</sup> These are only a few examples, however; the list could easily be much longer. As to contract-based complaints boards, one of the most important is *Finansklagenemnda* [the Norwegian Financial Services Complaints Board], which handles about 600 cases every year. Its decisions are not formally binding, but they are usually accepted by the parties involved. Similar contract-based complaints boards exist for many other services (such

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<sup>53</sup> For an overview (in the Norwegian language) of the complaints boards in the field of consumer protection, see NOU [Norwegian Official Reports] 2010, No. 11.

<sup>54</sup> Such official approval will typically have as a consequence that neither party may bring the dispute before the ordinary courts as long as it is pending before the complaints board, and that a case whose substance has been considered by the board may thereafter be brought directly before the ordinary courts, without first having to be submitted to a conciliation board. See, as an example, section 4 of lov 25. juni 1999 nr. 46 om finansavtaler og finansoppdrag [Act 25 June 1999 No. 46 on financial contracts and financial assignments].

<sup>55</sup> Obviously, the fact that Norway is not a member of the EU effectively hinders such referrals, but the point advanced here is that quite a few of the Norwegian complaints boards would be regarded as ‘courts’ from an EU law perspective. It may be added that Norway, and the other members of the European Free Trade Association (EFTA) that are integrated into the EU internal market through the Agreement on the European Economic Area, have established a similar preliminary reference procedure to the EFTA Court. Under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, any ‘court or tribunal’ in an EFTA State may request the EFTA Court to give advisory opinions on the interpretation of the EEA Agreement. Unsurprisingly, the EFTA Court has adopted the CJEU’s functional approach and accepted referrals from a number of Norwegian complaints boards, see, e.g. Case E-4/04 *Pedicel* (referral from the Norwegian Market Council) and Case E-1/11 *Dr. A* (referral from the Appeal Board for Health Personnel) and the pending Case E-5/06 *Municipality of Oslo* (referral from the Board of Appeal for Industrial Property Rights).

<sup>56</sup> The Rent Disputes Tribunal resolves disputes between landlords and tenants regardless of whether the landlord is a professional or not, so its jurisdiction is not limited to consumer/business disputes.

<sup>57</sup> The competence of the Rent Disputes Tribunal has been limited to disputes between landlords and tenants in a dwelling in five out of Norway’s 19 counties (including the three biggest cities; Oslo, Bergen and Trondheim). However, as of July 2016, it has been extended to complaints throughout Norway from a tenant who is a consumer against a landlord, who leases the property as a business. In 2015, the tribunal handled about 1,600 cases.

<sup>58</sup> The latter deals with complaints originating from contracts between energy companies and consumers.

as real estate agencies, undertakers, car-dealers, car-rental, parking, artisan services etc.).

Outside the field of consumer protection law, important civil law examples include *Likestillings- og diskrimineringsnemnda* [the Equality and Anti-discrimination Tribunal], *Tvisteløsningsnemnda* [the Dispute Resolution Board under the Working Environment Act] and *Pasientskadenemnda* [the Patients' Injury Compensation Board]. As the Norwegian judicial system admits no distinction between civil and administrative cases,<sup>59</sup> it is important to add the many complaints boards dealing with administrative law cases. *Trygderetten* [the Social Security Tribunal], *KOFA* [the Complaint Board for Public Procurement], *Skatteklagenemnda* [the Complaint Board for Tax Matters], *Statens helsepersonellnemnd* [the Appeal Board for Health Personnel] and *Klagenemnda for behandling i utlandet* [the Appeal Board regarding Medical Treatment Abroad] are just a few examples.

The main purpose behind all of the complaints boards is to offer affordable, efficient and professionally competent means of dispute resolution. With a few exceptions, proceedings are in writing only and the time spent on each case is, on average, much shorter than for ordinary court proceedings. Use of complaints boards is either free or subject to a fairly modest fee (typically about €50-100). The statutory-based complaints boards are all financed by the state, but the costs are probably outweighed by the fact that the boards function as an alternative to proceedings in the ordinary courts. Even though the parties are free to bring their dispute before the ordinary courts, experience shows this very rarely happens.<sup>60</sup> In practice, therefore, the complaints boards operate as a very popular alternative to the ordinary courts. The often rather low value of the dispute and the costs involved with further proceedings before the courts may, of course, help to explain this, but it is also significant that the complaints boards are staffed with jurists with special expertise in the relevant field of the law. This is very different in the ordinary courts, where Norway strongly adheres to the generalist tradition by which any judge is supposed to be qualified to hear any kind of case. Free from any such tradition-based constraints, some of the complaints boards have opted for quite extensive specialisation. *Finansklagenemnda* [the Norwegian Financial Services

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<sup>59</sup> Along with Denmark, Iceland, Ireland and the UK, Norway is one of the few European countries where administrative law cases are dealt with by the ordinary courts, based on the general rules of the Dispute Act (with some adaptations in certain types of administrative law cases). Thus, to a Norwegian lawyer, all court cases that are not criminal cases, are civil cases. Needless to say, this can cause quite a bit of confusion when Norwegian lawyers discuss civil procedure with colleagues from Continental Europe.

<sup>60</sup> The popularity of the complaints boards may help to explain the very low number of new civil cases before the courts in Norway; of the 41 countries covered by the CEPEJ-report (n 51), Norway was second only to Finland when it came to the number of incoming civil litigious cases per 100,000 inhabitants (see Figure 9.4 at p. 202). The Norwegian number, 359, is very far from the European average of 2,492. The score for the other Nordic countries covered, Denmark and Sweden, is also below average, but much higher than Norway (825 and 685, respectively). Even though the highest number of new cases are to be found in eastern and southern Europe, the numbers for countries such as France and Germany are close to the average (2,575 and 1,961, respectively). The authors of the report clearly struggle to explain these 'serious discrepancies': 'This report is not the place for a sociological analysis of these trends' they write, 'but it might be useful to use this information for in-depth research' (p. 203).

Complaints Board], for example, now consists of no less than five specialised complaints boards, each one dealing with a different kind of financial service.

Our reason for highlighting the complaints boards in an article on e-justice in Norway is two-fold. Firstly, the popularity of the complaints boards limits the push for e-justice reform in the ordinary courts by taking care of exactly those cases where the costs and length of court proceedings would be a problem. Without all of the complaints boards (and their popularity in practice), consumer protection organisations, in particular, could be expected to push harder for reforms of civil proceedings, and e-justice would surely be a part of any such push.

Secondly, and perhaps even more importantly, many of the complaints boards themselves have developed proceedings which deserve to be regarded as e-justice schemes. Complaints usually have to be submitted electronically through the home page of the relevant complaints board, as does the rejoinder and all other documents of the case. Some complaints boards, such as the abovementioned *Brukerklagenemnda for elektronisk kommunikasjon* [the Complaints Board for Electronic Communication], have introduced a 'my case solution' where the parties can submit all documents and follow the development of their case.<sup>61</sup> Thus, if one acknowledges that, from a functional perspective, quite a few of the complaints boards are 'courts', there is indeed ongoing e-justice reform in Norway.

#### 5.4. The conciliation boards

In addition to the complaints boards, the existence and functioning of the conciliation boards are important in understanding why the push for e-justice reform in the ordinary courts has not been stronger. Previously, the conciliation boards were themselves recognised as 'courts', but through the enactment of the new Dispute Act, their status was reduced to that of 'mediation institutions with limited jurisdiction'.<sup>62</sup> Staffed with laypeople and located in almost every municipality of Norway, the task of the conciliation boards is to help parties to achieve a simple, swift and cheap resolution of their case through conciliation or judgment.<sup>63</sup> In cases of a pecuniary character where the amount in dispute is less than NOK 125,000 (about €14,000), the conciliation board is an obligatory step on the way to the court of first instance, unless out-of-court mediation has been attempted or the case has been heard by an approved complaint board.<sup>64</sup> The conciliation board may only pass judgment (i) with the consent of both parties; (ii) at the request of one of the parties if the amount in dispute is less than NOK 125,000; (iii) if the conditions for passing judgment in default are fulfilled or (iv) if the only defence raised by the defendant is inability to pay or another defence deemed

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<sup>61</sup> See <[www.brukerklagenemnda.no](http://www.brukerklagenemnda.no)> accessed 14 September 2016 (in Norwegian only).

<sup>62</sup> See section 1(2) of the Courts of Justice Act. By way of consolation, the members of the conciliation boards are still regarded as 'judges' according to section 52 of the Courts of Justice Act.

<sup>63</sup> Section 6-1(1) of the Dispute Act.

<sup>64</sup> Section 6-2(2) of the Dispute Act.

obviously irrelevant.<sup>65</sup> However, the latter two alternatives, in particular, are of considerable practical importance in cases of uncontested claims, so that such claims never have to be brought before the ordinary courts. This is part of the reason why there is no practical need in Norway for a simplified order for payment procedure to enable the ordinary courts to deal with uncontested claims (such as the Austrian and German *Mahnverfahren*).<sup>66</sup> In any event, it is not the limited jurisdiction to pass judgment in certain types of cases that is the main merit of the conciliation boards – it is their ability to settle a large number of ‘everyday’ disputes through mediation.

### 5.5. Less flattering causes: High legal costs and a lot of arbitration

However, the efficiency of Norwegian civil proceedings may also have some less flattering explanations: high legal costs and a lot of arbitration.

The legal costs involved with civil court proceedings in Norway are high, especially the fees charged by the lawyers. This has long been acknowledged as a problem in Norway. The Expert Committee that drafted the new Dispute Act stated that the legal costs involved with civil proceedings had reached levels where ‘many people have to refrain from enforcing their rights in the courts’.<sup>67</sup> The same concern was echoed by both government (the Ministry of Justice) and parliament.<sup>68</sup>

In cases of a pecuniary character where the amount in dispute is less than NOK 125,000 (about €14,000), the new Act brought about real improvement by way of a separate small claims procedure in cases where the compensation for costs for legal assistance was limited to 20% of the amount in dispute, and never more than NOK 25,000 (about €2,800).<sup>69</sup> For other cases, however, the legislation limited itself to emphasise that the courts were obliged to review the necessity of the costs incurred by the successful party,<sup>70</sup> hoping that stricter scrutiny of the statement of costs could reduce their level by around 30%.<sup>71</sup> The Ministry of Justice’s 2013 evaluation of the Act suggests that this has

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<sup>65</sup> Section 6-10 of the Dispute Act.

<sup>66</sup> Actually, most uncontested claims are not dealt with by the conciliation boards either. Section 7-2(f) of lov 26. juni 1992 nr. 86 om tvangsfullbyrdelse [Act 26 June 1992 No. 86 on the enforcement of claims] recognises that a claim can be brought directly to enforcement without any involvement of a court or a conciliation board, if the creditor himself has sent a written notification to the debtor which sets out the basis for the claim and the amount due. Invoices, most commonly used in simple commercial transactions, fall into this category. Thus, Norway is one of the relatively few countries in Europe where enforcement of most undisputed claims takes place without any involvement of the courts.

<sup>67</sup> NOU [Norwegian Official Reports] 2001, No. 32, 547.

<sup>68</sup> Ot.prp. [Government bill] No. 51 (2004-2005) 42-43, 51ff; Innst. O. [Parliamentary Committee Report] No. 110 (2004-2005) 15-17.

<sup>69</sup> Section 10-5 of the Dispute Act.

<sup>70</sup> According to section 20-5(1) of the Dispute Act the court shall, in assessing whether costs have been necessary, have regard to whether it was ‘reasonable to incur them in view of the importance of the case’.

<sup>71</sup> In addition, section 20-5(5) of the Dispute Act introduced an obligation on the courts to assess the necessity of the costs incurred by the successful party even if no objection has been raised by the opposite party.

actually been achieved as far as proceedings before the courts of first instance are concerned.<sup>72</sup>

Despite this achievement, however, the legal costs involved with civil proceedings in Norway are still too high. By way of illustration, a rather ordinary contract law dispute related to acquisition of a terrace house (quite common in Norway) can easily see the lawyers on both sides charging in the range of €20,000-30,000 each if a full day in court is required (also quite common in Norway, see the next subsection for an explanation). As the main rule under the Dispute Act is that the successful party is entitled to full compensation for his legal costs from the opposite party,<sup>73</sup> an ordinary citizen with an ordinary financial situation will certainly think twice before going to court with a case where the outcome appears uncertain.<sup>74</sup> Whilst obviously problematic from an access to justice perspective, the deterrent effect of the legal costs is part of the reason why Norwegian courts appear able to handle the inflow of civil cases, which again has probably weakened the push for reforms.

As to arbitration, this appears to be the preferred means of dispute resolution for professional parties in complex commercial cases.<sup>75</sup> The lack of specialised commercial courts (found in many other European countries) may be part of the explanation here, as it is difficult to see why, for example, the desire for discretion or the need for a swift decision should be more important to professional parties in Norway than elsewhere.<sup>76</sup> Of course, the disputes settled through arbitration in Norway are hardly the ones most suited for a full-scale e-justice scheme anyway, but the point advanced here is that the preference for arbitration eases the workload of the ordinary courts considerably. As mentioned above, with a manageable workload, the push for reform will naturally be weaker in Norway than in countries where the courts struggle to handle the constant inflow of cases.

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<sup>72</sup> Ministry of Justice, *Evaluering av tvisteloven* [Evaluation of the Dispute Act] (2013) 123.

<sup>73</sup> Section 20-2(1) of the Dispute Act. According to the second paragraph of this section, an action is successful if the court finds in favour of the party in the whole or in the main, or if the opposite party's action is summarily dismissed or quashed because it is waived or because the courts do not have jurisdiction. It has to be added that paragraph 3 empowers the court to exempt the opposite party from liability for legal costs, in whole or in part, if it finds that 'weighty grounds' justify exemption. But the main rule is full compensation to the successful party.

<sup>74</sup> At least as long as (s)he doesn't have insurance which will cover (some of) the costs involved.

<sup>75</sup> For an interesting discussion (in the Norwegian language) on possible reforms to make the ordinary courts more attractive to professional parties in complex commercial cases, see several of the contributions in the special edition of *Lov og Rett* (2016) 55(4) on 'Tvisteloven i komplekse saker – et alternativ til voldgift' [The Dispute Act and complex cases – an alternative to arbitration?], in particular Ørnulf Øyen, 'Gir tvisteloven gode løsninger i store og komplekse saker?' [Does the Dispute Act offer good solutions in big and complex cases?] 191; Ingvald Falch, 'Domstolene som alternativ til voldgift' [The courts as an alternative to arbitration] 196; Finstad (n 12); Christian Lund, 'Mulige justeringer i tvisteloven for å tiltrekke flere kommersielle tvister' [Possible amendments to the Dispute Act to attract more commercial cases] 230.

<sup>76</sup> See, in addition to the contributions mentioned in the previous footnote, Amund Bjøranger Tørum og Ingvald Falch, 'Bør tvisteloven legge bedre til rette for "storkravprosess"?' [Should the Dispute Act facilitate for 'big claim procedure'?] (2015) 54(5) *Lov og Rett* 315.

## 5.6. Causes related to the way courts proceedings are conducted in Norway

In addition to the external reasons already given, the slow introduction of e-justice in Norway may also be due to certain features of the way civil cases are dealt with by Norwegian courts.

Firstly, the oral hearing remains a cornerstone of civil proceedings in Norway, in rather stark contrast to developments on the Continent. The expert committee drafting the new Act was aware of these developments and advocated a strengthening of the competences and responsibilities of the court both during the preparatory stage of the proceedings and in the administration of the main hearing. Nevertheless, the oral hearing still occupies a far more central role in civil proceedings in Norway than in most other European countries (such as Germany, for example). Due to a strict understanding of the principle of orality, combined with the principle of immediacy, much time in the oral hearing is spent on the presentation of documentary evidence. According to section 11-1 of the Dispute Act, rulings following a main hearing 'shall be made on the basis of the proceedings at the court hearing'.<sup>77</sup> Written submissions shall form part of the basis for the decision 'only to the extent provided by statute'.<sup>78</sup> This does not imply that all the documents have to be read out in court, but section 26-2 of the Act does require documentary evidence to be 'presented by a review where the important aspects are pointed out'. The following sentence of the provision makes clear that, '[t]he review shall not be more detailed than justified by the need for the proper presentation of evidence', but the parties and the court cannot simply agree to dispense with the oral documentation altogether.<sup>79</sup> In practice, in cases with a lot of documents, quite some time in the oral hearing will be spent simply waiting for all of the actors to find the relevant section of the relevant document.

For foreign observers familiar with developments in Germany and other countries from Continental Europe over the last decades, the importance and length of the oral hearing in civil proceedings in Norway often comes as a surprise and may be regarded as either an outdated luxury or simply a waste of time and resources.<sup>80</sup> The Expert Committee

<sup>77</sup> See also section 21-2(2) of the Dispute Act: 'The evaluation of evidence shall be based on facts that come to light in the proceedings that form the basis for the ruling.'

<sup>78</sup> See e.g. section 21-12 of the Dispute Act on written statements as evidence:

'(1) Written declarations made for the purpose of the case by experts pursuant to section 25-5 may be presented as evidence.

(2) Written statements made for the purpose of the case by other persons may be presented as evidence if the parties agree or have the opportunity to examine the person who has made the statement.'

<sup>79</sup> Ot.prp. [Government Bill] No. 51 (2004-2005) 466.

<sup>80</sup> Cf. § 137(3) of the German *Zivilprozessordnung* and the telling assessment of the German approach by Johann Braun in his *Lehrbuch des Zivilprozessrechts* (Mohr Siebeck 2014) 127: 'Im Zivilprozessrecht wird ... kaum je der Akteninhalt in freier Rede reproduziert. Stattdessen konzentriert man sich auf einige wenige streitige Punkt und setzt das übrige als bekannt voraus. *Alles andere wäre Zeitverschwendung.*' [In civil proceedings, the contents of the files are hardly ever reproduced in free speech. Instead, one concentrates on the few controversial points and presupposes the rest as known. *Anything else would be a waste of time*] (italics added).

that drafted the Dispute Act noted that, as far as the principle of orality was concerned, the difference between Norwegian and German law was immense: whereas Norwegian civil procedure has, to a very large extent, held on to orality, German law has removed itself from this common past.<sup>81</sup> Importantly, the Expert Committee did not see this as a reason to downplay the importance of orality in Norway, but rather as a justification to overlook recent reforms of German civil procedure as a possible model (or at least source of inspiration) for the new Dispute Act.<sup>82</sup>

The reasons for the strong position of the principle of orality in Norwegian civil procedure are probably much the same as the ones that explain the slow introduction of e-justice elements – the latter, to a certain extent, being the result of the former. In addition to the causes explained above, it is tempting to add the interests of the advocates; lengthy oral proceedings obviously add considerably to their fees. As far as appeal proceedings are concerned, one may perhaps also add the appellate judges' long-established preference for 'proper' court proceedings that are in touch with 'the real world', as opposed to what they perceive as 'detached' appeal proceedings found in many other European countries.

The new Dispute Act is also characterised by rules that encourage the parties to settle. In-court-mediation, in particular, is regarded as a successful development, and is frequently used in practice.<sup>83</sup> The traditional style of such mediation, though, is direct face-to-face discussions between the parties under the direction of a judge. In-court mediation may also be conducted by way of distance meetings involving telephones, video-conferences or other technological equipment, but the parties' attendance and the possibility of direct discussions is presumably regarded as an advantage by both the judge and the parties.

## **6. The possibilities of full-scale e-justice reform of Norwegian civil procedure and the challenges it faces**

Based on the experiences gathered so far from the test scheme for electronic communication with the courts (section 3 above) and the test scheme for paperless court hearings (section 4 above), it seems safe to assume that both these initiatives will

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<sup>81</sup> NOU [Norwegian official reports] 2001, No. 32, 124-125.

<sup>82</sup> For a critical assessment of the Expert Committee's rather one-sided orientation towards English and American civil procedure as sources of inspiration, see Anne Robberstad, 'Utenlandske sivilprosessforbilder – for Francis Hagerup og Tvistemålsutvalget' [Foreign models of civil procedure – for Francis Hagerup and Tvistemålsutvalget] in Torbjörn Andersson and Bengt Lindell (eds), *Festskrift for Per Henrik Lindblom* (Iustus Förlag 2004) 575-588; and, in the English language, Halvard Haukeland Fredriksen, 'German Influence on the Development of Norwegian Civil Procedural Law' in Volker Lipp and Halvard H. Fredriksen (eds), *Reforms of Civil Procedure in Germany and Norway* (Mohr Siebeck 2011) 19-26.

<sup>83</sup> See Camilla Bernt, 'Mediation of Legal Disputes in Norway. Institutionalized, Pragmatic and Increasingly Popular' in Carlos Esplugues and Louis Marquis (eds), *New Developments in Civil and Commercial Mediation* (Springer 2015) 511-545.

be followed up and eventually become the rule rather than the exception in civil proceedings in Norway.<sup>84</sup> A first step in this direction is the fact that the test scheme for electronic communication with the courts has just been made permanent. The only real obstacle to further such development appears to be of a financial nature, even though it may be added – by way of anecdotal evidence – that some Norwegian lawyers are reported to feel that electronic exchange of pleadings and exhibits is unfortunate as it allows for judges to copy/paste without a thorough and independent assessment of the arguments of both parties. Further, that these developments result in longer and longer judgments, in particular in complex cases. Even if this view was to be substantiated, this objection cannot stand in the way of general digitising of court proceedings – the problem will rather have to be addressed by other means. As far as funding is concerned, one may assume the necessary funds will be made available by the government sooner rather than later.

This conclusion applies also to electronic recordings of proceedings – the only real obstacle to this appears to be of a financial nature as the Dispute Act already establishes electronic recording of the testimony of parties and witnesses as the main rule in all civil cases (section 2(b) above). Again, one may only hope that the necessary funds will be made available for the courts to obtain the necessary recording equipment.

A bigger challenge relates to the enhanced use of other existing e-justice elements, in particular distance meetings and distance examination (section 2(c) and (d) above). Both tools appear well-suited to a country with the geography, size and population distribution of Norway. Their use is hindered, practically, by a lack of the necessary technical equipment. But a more stubborn impediment to reform is the predominant role of the oral hearing in civil proceedings in Norway and the widespread view that the presence of the parties and the witnesses in the courtroom is by far the best way to proceed (section 5 (f) above).

The potential for reform appears particularly ripe in the courts of appeal. However, even though it is widely recognised in academic circles that appeal proceedings in Norwegian courts ought to be more efficient, the electronic recording of testimonies before the courts of first instance is the only change that seems to be in sight. A possible explanation is that key actors (appeal court judges and advocates) appear quite happy with the status quo and the financial situation of Norway has been so privileged that political demands for cost reductions are yet to emerge. Eventually, however, the matter is likely to come up. When it does, reforms to appeal proceedings in other European countries, such as Austria, Belgium, Germany and the Netherlands, will be of considerable interest.

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<sup>84</sup> This is in line with the government's (long-time) ambitions in St.meld. [White paper] No. 23 (2012–2013) *Digital agenda for Norge* [Digital Agenda for Norway] 78–79.