

The Norwegian Reform of Civil Procedure

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1 Introduction

The Norwegian system of civil justice has been overhauled over the last decade. A broad range of reforms have been adopted, covering institutional as well as procedural aspects of civil justice. The objective of this contribution is to provide an overall view of the reforms.

The general aim of the reforms has been much the same as elsewhere in Europe where civil justice is being reformed: to ensure fair justice with greater efficiency, responding to an increasing demand from the public at large. Yet no widespread dissatisfaction with the functioning of the courts underlies the reforms in Norway.¹ The courts, however, find themselves subject to public debate and expectations as well as scrutiny by mass media to a greater degree than they used to be, and they are increasingly called upon to justify their share of public expenditure.

Norway has a unitary court system with three tiers.² The courts have a general jurisdiction; specialization is found to a very small degree. As in Anglo-American jurisdictions, there is no separate jurisdiction for administrative cases. The ordinary courts have a long-standing tradition of judicial review of administrative action, but cannot be said to use this power to interfere manifestly with administrative policies. Constitutional review – of legislation as well as other official acts – on the basis of the revered 1814 Constitution was established in court practice as early as in the 19th century,³ but has rarely served to set aside public policy as clearly expressed by the Parliament. The Norwegian legal system is based on dualism in the sense that international law is not considered as law of the land but requires national transposition. However, national law is presumed to be in line with international law, thus giving courts some leeway to take account of Norway's international legal obligations. Following the incorporation of several human rights conventions in 1999 and 2003 and the EEA Agreement in 1992,⁴ the courts will apply these rules and give them precedence over ordinary Norwegian legislation if a conflict should arise.

For the better part of the 20th century, the Norwegian civil justice system rested upon three general statutes that were all adopted simultaneously in 1915: The Courts of Justice Act, the Civil Procedure Act and the Enforcement of Claims Act.⁵ The latter act was replaced in 1992, the Civil Procedure Act has

1 It would be inaccurate to speak of the Norwegian system of civil justice as a system in crisis. It is worth noting that the comparative study by Adrian A. S. Zuckerman (ed.), *Civil Justice in Crisis* (Oxford 1999) covers none of the Nordic countries.

2 Below the ordinary courts of first instance, the conciliation boards play an important role; see 3.4.3 *infra*.

3 See, e.g., Rune Slagstad, *The Breakthrough of Judicial Review in the Norwegian System*, in: Eivind Smith (ed.), *Constitutional Justice under Old Constitutions* (The Hague etc., 1995) p. 81-111.

4 See Acts of 21 May 1999 no. 30 (the Human Rights Act) and 27 November 1992 no. 109 (the EEA Act).

5 Acts of 13 August 1915 no. 5, 6, and 7 respectively. Due to budgetary constraints they did not enter into force until 1 July 1927.

been subject of the reform leading to the Dispute Act 2005, and the Courts of Justice Act has been modified in various respects over the years, including as a result of the present reforms.

The current reform wave is not carried by any comprehensive concept or objective. In fact, it comprises three separate main reforms which have been carried out on the basis of separate reports. Two of them mainly deal with institutional questions while the third is concerned with the procedural side, replacing the Civil Procedure Act. The objectives of the respective reforms have emphasised judicial independence, efficiency of courts, and fair conflict resolution and adequate lawmaking.

2 Institutional Reforms

2.1 *The Independence and Administration of Courts*

2.1.1 The Judicature, and the Supreme Court in express terms, is regarded as one of the three constitutional powers in the 1814 Constitution.⁶ Admittedly, the Constitution does not set out in plain words that the courts, in their adjudication, are independent of the Legislature and the Executive,⁷ but this has never given rise to doubt.⁸

The administration of courts, however, used to be a matter for the Ministry of Justice, which is also responsible for the police and prison administration. Applications for judgeships were considered by the Ministry before appointments were made by the Government (formally the King in Council), and so was also the division into geographical jurisdictions. Financial allocations (except to the Supreme Court) were decided by the Ministry subsequent to the Parliament's adoption of the general court budget, and disciplinary correction of judges for inappropriate behaviour was a matter for the Ministry. Occasionally, the Ministry was criticised for promoting too many of its civil servants to judgeships, and the independence of the judiciary made it sometimes difficult for the Ministry to exercise any disciplinary powers even where that would have been fully justified. A losing party and his attorney in a lawsuit against the State might sometimes feel that the courts were too ready to accept the values and views of the Government or state bodies, but the actual independence of the

6 See Part D of the Constitution, Articles 86-91.

7 For a general examination of the principle of independence of courts, see Torstein Eckhoff, *Impartiality, separation of powers, and judicial independence*, 9 Sc.St.L. (1965) p. 9-48. Since 2001, the Courts of Justice Act § 55, third subsection, states that judges act independently in the exercise of their judicial function.

8 With the singular exception of the German occupation of Norway during World War II. The Nazi "government" that had been installed under the auspices of the occupant did not accept that the courts were entitled to carry out judicial review of actions taken by the occupant and the Nazi "government", and intended to propose regulations lowering the mandatory retirement age for Supreme Court justices, aiming to replace them by more loyal judges. The Supreme Court responded unanimously by all justices resigning their seats in December 1940. See on this Erling Sandmo, *Siste ord. Høyesterett i norsk historie 1814-1965* [The last Word. The Supreme Court in Norwegian History 1814-1965] vol. II (1905-1965) (Oslo 2005) p. 284-96.

courts in their adjudication was never seriously questioned. Visitors from the young democracies, countries which had been behind the Iron Curtain, were, allegedly, sometimes amazed to realise the lack of formal guarantees of judicial independence that they perceived under the Norwegian system.

A new system for the administration of courts took effect in 2002.⁹ The separate *Courts Administration* was set up and took over most of the tasks that were formerly performed by the Ministry of Justice,¹⁰ in particular budget allocation and control, accounting work and personnel management. The Courts Administration makes proposals for the annual budget for the courts which will subsequently be considered by the Ministry of Justice and included in the Government's general budget bill. The Courts Administration is, however, free to submit its draft to the Parliament. It is for the Courts Administration to decide the number of judges in each court and to provide introductory and continuing education for judges, in collaboration with the judges themselves. It also provides secretariat functions for the Judicial Appointments Board and the Supervisory Committee for Judges. The Courts Administration is led by a Board which now consists of nine members. Seven of them represent professional court competence and user competence in the form of actively practising lawyers, and are all appointed by the King in Council. Two members are representatives of the general public elected by the Parliament who can ensure a view of the courts from outside the legal profession.¹¹

The Courts Administration is an independent body which cannot be instructed by the Ministry of Justice. Annual guidelines for the working of the Courts Administration and for the administration of courts may be laid down as part of the Parliament's handling of the Government's budget bill. The King in Council may give instructions to the Courts Administration, but only after the Administration has been invited to express its views, and the Parliament must be informed of such instructions.¹²

The *appointment of ordinary judges* still lies with the King in Council, who acts on the recommendation of the Minister of Justice. Appointment is by application only, and all vacant judgeships are announced publicly. In order to provide for a broader and more transparent assessment of applicants, a Judicial Appointments Board has been established to interview candidates and make nominations to judgeships.¹³ The nominations, without the reasons given for

9 It was prepared by the Law Courts Commission, appointed by the Government in 1996 and presided by former Supreme Court Chief Justice Carsten Smith. The commission submitted its report in 1999 (published as NOU 1999:19, summary in English at p. 396-418). The Government presented its proposition to Parliament in Ot.prp. no. 44 (2000-2001) on amendments to the Courts of Justice Act, which was adopted as Act of 15 June 2001 no. 62.

10 See the Courts of Justice Act, ch. 1 A.

11 The members appointed by the King in Council, who appoints the chair of the Board as well, shall include three ordinary judges, one land consolidation judge, one representative of the courts' clerical staff and two advocates (who can be lawyers in private practice, or employed with the Attorney General for Civil Affairs or the public prosecuting authority).

12 The Courts of Justice Act § 33, second and third subsection.

13 The Courts of Justice Act § 55 a et seq. The Judicial Appointments Board is appointed by the King in Council and consists of three judges (one from each court tier), one advocate,

them, are made public on their submission to the Ministry of Justice. There is no particular judicial career in Norway; new judges are sought from all parts of the legal profession (practising lawyers, police and public prosecution, public administration, and academia). Early experience as a deputy judge in a district court is probably an essential element in this tradition of recruitment. The appointment of deputy judges – who are young lawyers holding their posts for up to three years – is made by the president of the district court.

The Supervisory Committee for Judges is now responsible for *disciplinary measures* and receives complaints against judges from individuals and professional associations.¹⁴ When handling matters against ordinary judges, the Committee is composed of two judges, one advocate, and two representatives of the general public. Complaints may concern dilatory proceedings or the behaviour of a judge inside or outside the courtroom, but complaints related to the merits of a case or to other matters that are subject to appeal, cannot be considered. The Supervisory Committee is also entitled to institute disciplinary proceedings on its own motion. If it makes a finding of professional misconduct, the Committee may conclude by “criticism” or by issuing a “warning” to the judge.

Different jurisdictions take differing views on *extra-judicial activities* for judges. Norwegian judges have in the past been quite free to take on such activities, even though in a particular case it may disqualify the judge to try a case.¹⁵ An illustrious example is the judge elected as member of Parliament who returned to his jurisdiction to try cases during the parliamentary vacation. Judges have been sitting on boards of governors and control committees in companies, and they have been called upon by the government to chair law reform committees or public inquiries, and to sit on appeal bodies. This has allowed society to make good use of the competence of judges outside the courtroom and the judges have acquired a broader and more varied insight into the workings of society which will benefit them in their judicial functions. Other considerations, however, have come to carry increasing weight in recent years: extra-judicial activities may take up so much time as to hamper the efficiency of justice, and they may create social links that may cause the judge to appear prejudiced. For these reasons, a register has been established for the purpose of recording the extra-judicial activities of judges, including major investments in companies. The register is kept with the Courts Administration and can be consulted electronically by anyone. The consent of the Courts Administration or the president of the court is required for certain extra-judicial activities, such as carrying on a trade or industry, arbitration, membership in private collegiate bodies for resolving disputes and public collegiate bodies charged with taking decisions that are liable to be challenged in the courts, and generally if the extra-

one lawyer employed in public service, and two non-lawyers (with a modified composition with regard to the appointment of land reform judges). Only the appointment of Chief Justice of the Supreme Court is exempt from this procedure.

14 The Courts of Justice Act, ch. 12 (§§ 235-238).

15 Disqualification in order to avoid suspicion of bias is covered by the Courts of Justice Act § 108.

judicial activity may hamper the judge's judicial work or cause disqualification more often than just occasionally.¹⁶

2.1.2 It is too early for a proper assessment of this reform. As a whole and in its individual features, it serves to increase and to underline the independence of the judiciary from society at large and from the Executive in particular. This is well in keeping with the international trend and relevant instruments¹⁷ and serves to bring the Norwegian system more in line with other European states, even though there are considerable variations. The system for recruitment of judges as well as the broad membership on the relevant bodies and the lack of a total ban on extra-judicial activities can all help to avoid the risk of constructing an "ivory tower" for the judiciary. The creation of a Courts Administration outside the Ministry of Justice may give greater room for offering service to the courts than a ministerial department is able to in the light of its principal function as a professional secretariat for the minister. As an independent body, the Courts Administration has a greater opportunity to speak freely on behalf of the courts than an ordinary government agency would have, but the effect of this position remains to be seen. It is also possible that the increased distance between the administration of courts and the politicians, in particular in the Government, will reduce their interest in the working conditions of the courts.

However, it is still for the Government and the Parliament to determine the terms and functions of the court system and the standard it should be required to attain. This cannot be decided by considering the interests of the courts alone. For example, in the criminal justice system the allocation of resources to the courts and their performance must be regarded in the light of the situation within the police and prosecuting authorities as well as the prison administration. In this perspective, the contributions that the separate and independent courts administration is capable of making to overall considerations that extend beyond the courts themselves will be important.

2.2 *The Functions and Organisation of the Courts of First Instance*

2.2.1 In 1999, Norway was divided into 87 territorial jurisdictions of first instance with 92 courts,¹⁸ 307 ordinary judges and 151 deputy judges. Several ordinary courts of first instance (district courts, *tingretten*) in rural areas were staffed with only one ordinary judge and one to three deputy judges. The functions of the district courts extend beyond the adjudication of civil claims and criminal cases and included in 2000 in particular land registration, the administration of certain estates (of a deceased person, divorced couples, and

16 The rules on extra-judicial activities are to be found in the Courts Act ch. 6 A, §§ 121 a – 121 k.

17 *See*, in particular, the European Convention on Human Rights Article 6 (1), Council of Europe Recommendation (94) 12 on the independence, efficiency and role of judges, and UN Basic Principles on the independence of the judiciary (adopted by the General Assembly 13 December 1985).

18 The number of courts does not correspond with the number of jurisdictions since in the largest cities certain functions were attributed to specialised courts; *see* 2.3.1 *infra*.

bankruptcies), registration of deaths, enforcement of claims, and the functions of public notary including the performance of marriages.

Each year the district courts used to handle some 13 000 civil cases and about 15 000 criminal cases requiring a main hearing, in addition to some 36 000 criminal cases tried by a single judge without a main hearing. There are two main reasons why the number is not higher: numerous civil claims are dealt with by the conciliation boards (see 3.4.3 *infra*), thus providing the necessary legal basis for the enforcement of the claim against an unwilling debtor; and many petty crimes result in a ticket fine issued by the police and accepted by the defendant.

2.2.2 For many years, the district courts outside the major cities were organised in accordance with the principle “small is beautiful”. Whenever the workload became too great for a particular district court, a new jurisdiction would be established if the demand could not be met by employing another deputy judge. Easy geographical access to courts was thus assured, which was perhaps particularly important with regard to land registration. There is some evidence that the small courts could be quite efficient, but they were also vulnerable if the ordinary judge should prove to be less competent or prone to illness. The Ministry of Justice sought to bring about greater entities, but such attempts were at times stopped in the Parliament, often at the instance of local politicians who feared the loss of “their” district court. In the late 1990s, an examination of the existing jurisdictions of first instance was carried out and the functions of the district courts reconsidered against the background of changes in the infrastructure of society, improved communications and modified dwelling patterns.¹⁹ It is a fair proposition that major underlying concerns were in fact of a financial nature and founded in a belief that larger courts would operate more efficiently and provide better service to citizens. It was also assumed that as the law grows more complex, larger courts would better assure the necessary knowledge of the law. On the basis of a subsequent Government White Paper,²⁰ the Parliament decided that the number of district courts should be reduced from 92 to 66,²¹ with at least 3-5 ordinary judges in each district court. A number of smaller courts were retained, however, in the more sparsely populated areas in order to allow for easy geographical access to the court. The courts should concentrate more on their judicial functions; land registration will no longer take place in the district court but in a national electronic register.²² These decisions are now in the process of implementation.

19 See the committee report NOU 1999:22 *Domstolene i første instans* [Courts of first instance]. A similar examination had been made earlier, see NOU 1980:13 *Distriktsrettene – herreds- og byrettene i fremtiden* [The district courts in the future] and the subsequent Government White Paper St.meld. no. 90 (1981-82).

20 St.meld. no. 23 (2000-2001) *Førsteinstansdomstolene i fremtiden* [Courts of first instance in the future].

21 A similar, but more farreaching reorganisation of the police has been carried out by reducing the number of police districts from 55 to 27.

22 See, in particular, St.meld. no. 23 (2000-2001) p. 28-38.

2.2.3 The present reorganisation of the district courts may be seen to strike a balance as regards geographical access to courts. The increased distance to the district court in certain regions may be outweighed by better communications and sometimes greater concentration of the population, and as court meetings and hearing of witnesses and experts may increasingly be carried out using information technology (see 3.7.7 *infra*), physical appearance in a courtroom becomes less necessary. The transfer of land registration to a national body also reduces the citizen's need for easy access to the district court but deprives the court of a valuable source of knowledge of its jurisdictional area that may have been fruitful for its other functions. The more the district court loses its role as a provider of services to the local population, the greater becomes the risk that the general view of the district court will be tinted by what can be seen as its repressive function in the criminal justice system.

2.2.4 A restructuring of the civil justice at the *level below the district courts* has been carried out separately.²³ This level includes the conciliation boards (see 3.4.3 *infra*), the bailiffs and the local police who have certain civil justice functions of long standing. By this reform, the state took over the administrative and financial responsibility for the conciliation boards from the municipalities. Diverse functions – such as secretariat functions for the conciliation board, the issuing of summonses and the enforcement of civil claims – were jointly placed with the local police, in urban areas with a separate civil division.

2.3 The Question of Courts with Specialised Jurisdiction

2.3.1 Norway has a fairly strong tradition for courts of first instance with full and unlimited jurisdiction. Some few exceptions to this are enumerated in the Courts of Justice Act. The most important special courts are the land consolidation courts and the Labour Court.²⁴ The list is not exhaustive, however, and the question of instituting new special courts is raised at irregular intervals. The latest example of a new special court is the Court for outlying land areas in Finnmark, which will be established in order to decide disputes concerning Sami and other local rights to land in the northernmost county of Finnmark.²⁵

Some specialisation also occurs within the range of ordinary district courts. There are a few examples where the legislator has assigned cases of a certain kind to particular courts or to a limited number of courts. This is so for certain

23 Act of 18 June 2004 no. 53, amending numerous provisions and adopted on the basis of Ot.prp. no. 43 (2003-2004).

24 The 46 land consolidation courts, of which 5 superior courts, operate under a specific Land Consolidation Act (Act of 21 December 1979 no. 77, under revision). The administrative responsibility for the land consolidation courts was transferred from the Ministry of Agriculture to the Courts Administration in 2005. The Labour Court has the task of adjudicating wage agreement disputes under a separate Act of 5 May 1927 no. 1. The Ministry of Labour and Inclusion is currently administratively responsible for this court. In pursuance of the respective statutes, both of the special courts apply many of the provisions of the general code of civil procedure.

25 See Act of 17 June 2005 no. 85 concerning the legal status and administration of land and natural resources in Finnmark county § 5, third subsection, and §§ 36-43.

intellectual property cases which are assigned to the Oslo District Court. Under the former Working Environment Act individual labour disputes were allocated to a limited number of courts (at least one in each county), but this rule was not retained in the new 2005 Act. In major towns, certain functions – such as land registration, enforcement of claims and estate management – may have been placed in separate courts. Where large district courts have been divided into departments, however, it will seldom be reflected in the assignment of types of cases to the individual judges, or the judges will serve in the various departments on a rotating basis.

2.3.2 Outside the courts of law, a number of bodies have been set up over the years to deal with certain disputes, particularly different types of consumer complaints. The reasons for this have mostly been to provide a more rapid and cheap resolution of disputes, sometimes also a need for expertise that may have been found lacking in the ordinary courts and certainly in the conciliation boards. The emergence of such bodies may present a challenge to the ordinary courts and may seem to indicate that they do not wholly meet the demands of the public. Some of the bodies are wholly private, usually set up by an agreement between business and consumer organisations, while others have been established by or by virtue of a statute. Their decisions are not enforceable and do not constitute *res judicata* unless authorised by statute and only statute can exempt from submitting a complaint to the conciliation board if that is a prerequisite for taking the matter to court by a party dissatisfied with the decision of the body. Even where such statutory provisions exist, the body is not regarded as a court of law although some may come close to it. This is so for the Public Pensions Appeals Tribunal (*Trygderetten*) which is legally an administrative body (extra-judicial tribunal) whose decisions may be challenged in the court of appeal, bypassing the district court.

2.3.3 The question of specialised courts was considered in the context of both of the institutional reforms dealt with above, and with the same result.²⁶ The prevailing view is founded in the idea of unity of law and legal reasoning which can be taken to imply that there is a common core of legal reasoning applicable to all fields of law, and that the law in any particular field may, in principle, be influenced by legal arguments developed in other fields. Admittedly, specialisation may give greater expertise and experience in the particular field, but it is feared that it may lead to overestimation of values and considerations peculiar to that field. Moreover, disputes may have different aspects some of which may fall outside the competence of a specialised court, and the existence of a specialised jurisdiction will give rise to questions of interpretation as to the limits of that jurisdiction.

It should not come as a surprise that the view in favour of courts of general jurisdiction is held more strongly by the Ministry of Justice, the ordinary courts themselves and the legal profession in general, than by specialists and other ministries. It has not prevented the creation of numerous bodies for out-of-court

26 See NOU 1999:19 p. 369-71, 372-73 and 414, NOU 1999:22 p. 25 and 35-36.

dispute resolution, but it has had the effect of hindering new specialised courts.²⁷ The splitting of functions at district court level in major towns is also about to be superseded.

3 The Reform of Civil Procedure – the Dispute Act 2005

3.1 The Background

It is generally held that the codification of civil procedure in the 1915 Act was beneficial to Norwegian civil justice. It substituted oral proceedings for written procedure in order to speed up the delivery of justice and emphasised that all evidence should, if possible, be presented to the deciding judge. Its plain wording made the rules more easily accessible for the users. Subsequent amendments to the Act were mostly of a limited nature and their success varied. The introduction in 1969 of separate rules on judicial control of administrative coercive measures in child care, psychiatric ward and related fields was an important step to promote the rule of law. The simplified small claims procedure enacted in 1986, however, failed to become widely used. A rising number of civil disputes in the 1980s was met with extended jurisdiction for the conciliation boards and with the creation of new bodies for extra-judicial dispute resolution.

At the time when the 1915 Act was prepared, Norway was a relatively poor society, where small-scale agriculture and fisheries were still dominant trades. Throughout the 20th century technological and economic development, exploitation of new natural resources, social mobility and more complex social organisations, active state intervention and increasing europeanisation and globalisation gave rise to a wider range of disputes, many of them of a complex nature. It was open to question whether the 1915 Act offered the best of tools to deal with such disputes; in business life, many parties resorted to arbitration whilst litigation with lawyers in court often became too expensive for the ordinary man in the street. The 1915 Act appeared to be best suited to handle disputes consisting of a single claim between single parties on each side who were prepared to provide the judge with the necessary materials for resolving the dispute.

In 1999, the Government set up a committee to prepare a thorough revision of the 1915 Act with a view to adopting an entirely new act. Its terms of reference included the rules on arbitration, which were to be found in a separate chapter of the 1915 Act and appeared rather incomplete in the light of the UNCITRAL model law on international commercial arbitration.²⁸ The committee, presided by Supreme Court Justice, later Chief Justice, Tore Schei, held extensive consultations with various interest groups and completed its work

²⁷ The creation of a specialised court for Sami and other rights to land and natural resources in Finnmark may be explained partly by international law obligations under the ILO Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries, partly by the temporary nature of the task of clarifying those rights, and partly by the earlier use of a similar model for clarifying land rights in outlying areas.

²⁸ Adopted by the United Nations Commission on International Trade Law on 21 June 1985.

in about 2½ years.²⁹ The Government Bill, prepared after general consultations, was adopted with minor adjustments by the Parliament in 2005,³⁰ and the Dispute Act 2005 is now expected to enter into force on 1 January 2008.³¹

3.2 The Objectives of the Dispute Act

Civil procedure has a double main objective in our societies. First, it shall provide redress for individual parties. Secondly, it shall ensure that the substantive law prevails and reserve for the enforcement authorities the use of coercion for enforcing civil claims.

The overall aim of the Dispute Act is to provide a more efficient civil justice that will give the parties correct, rapid, and cheap resolution of disputes as well as contribute to the clarification of existing law. It aims at providing better opportunities for resolving disputes out of court (see 3.4 *infra*) as well as facilitating access to courts (see 3.6 *infra*).

To achieve this, the Act purports to give a basis for a cultural shift among the actors in the civil justice system, in particular judges, advocates and parties to the case. The notion of the passive and reticent judge in order to maintain impartiality and neutrality is replaced by a call for active case management which should, of course, be conducted in an efficient and impartial manner. It shall no longer be accepted that the progress of the proceedings should be governed by the parties and their advocates since the use of court resources will have an impact upon the resources of the society as a whole as well as other citizens' access to courts.

The Dispute Act also affects the role of judges in another way. It encourages the judge to take on the role as a mediator in court sittings (§ 8-2) or as a judicial mediator (§ 8-4). Showing that the role of decision-maker rendering judgments is not the only role for a judge, the Act also underlines its desire to obtain dispute resolution without full litigation. Even though the Dispute Act shall improve citizens' access to courts, it is nevertheless hoped that more disputes will be resolved out of court. It is not the aim of the Act to produce a more litigious society in Norway.

3.3 The Basis for Litigation and for the Judgment

The Dispute Act upholds the principle that it is for the individual party to a dispute to decide whether he or she wants it to be settled by a court judgment. In certain cases, however, the desired result may only be brought about by court litigation. Only in specific types of cases, such as paternity cases, proceedings may be instituted regardless of the will of the parties.

29 See the main report NOU 2001:31 Rett på sak (on the Dispute Act, with a summary in English and a translation of the draft statute in volume B, p. 1035-1120) and the particular report NOU 2001:32 Voldgift (on arbitration, with a summary in English on p. 121-35). The Arbitration Act has been passed as Act of 14 May 2004 no. 25.

30 Act of 17 June 2005 no. 90 on mediation and court proceedings in civil disputes (the Dispute Act) [om mekling og rettergang i sivile tvister (tvisteloven)], adopted on the basis of the Government Bill Ot.prp. no. 51 (2004-2005) and the Parliamentary Committee Report Innst. O. no. 110 (2004-2005).

31 See Ot. prp. no. 74 (2005-2006) p. 58.

The general rule, inherited from the 1915 Act and shared by different jurisdictions, is that a court may only rule on the claims made by the parties and only within the scope of the prayers for relief submitted by them (§ 11-2). The ruling shall only be based on operative facts that have been invoked by a party as a ground for his or her prayer for relief, but the court is not bound by the parties' arguments regarding the evidence. At the outset, it is for the parties to present evidence, but there are certain provisions empowering the court on its own motion to obtain evidence on which the parties must then be invited to comment. More generally, where the right of disposition of the parties is limited, the court is bound by the procedural steps of the parties only to the extent that it is compatible with public policy (§ 11-4). In such cases, the court may make a ruling that goes beyond the parties' prayers for relief and on grounds not submitted by them, but limited to the claims that they have made, and it may obtain and take account of other evidence than presented by the parties. Examples of cases where these extended powers apply, include cases of personal status and legal capacity, disputes on parental authority, and judicial control of administrative coercive measures in child care and psychiatric powers. The legal authority for the extended judicial powers is of a general nature, however, and applies beyond the specific types of cases mentioned in the Act and may give rise to doubt as to their scope of application.

The adversarial principle – a cornerstone of fair trial – must always be respected.³² Advocates are encouraged by the Dispute Act to send their written submissions to their opposite colleague and to the court at the same time. The principle limits the contacts which a judge is justified in having with the parties individually and places restraints on oral communication outside court meetings, but modern information technology facilitates meetings with the parties simultaneously outside the courtroom. The adversarial principle may also prevent the judge from basing his ruling on considerations that were not discussed in the main hearing, thus requiring continued proceedings.

The court is free to base its ruling on a point of law that has not been argued by the parties, provided (except in cases where their right of disposition is limited) that it is applied to operative facts invoked by them (§ 11-3). One could say that the knowledge of the law is the main service to be provided by the court to the parties, and the judge is in a special position to do so. A proposal by the committee to impose a duty on the court to allow the parties to comment on an understanding of the law which was not put forward during the main hearing, was not taken up in the Government Bill and did not become law. As more in-depth studies of the legal material often take place in the judge's chambers when drafting the judgment after the main hearing, such a duty would easily create a need for continued proceedings and subsequent delays in justice – presumably

32 An absolute adherence to the adversarial principle – which the ECHR judgment 3 June 2003 in *Walston (no. 1) v. Norway* may be understood to require – will imply that a party should be allowed to comment on any submission from his opponent, even if the court thinks it of no relevance for the ruling that it is going to make. Should this be the actual state of law, delays in civil proceedings will result; see Backer, *Om Høyesteretts forhold til den europeiske menneskerettskonvensjon* [On the attitude of the Supreme Court to the European Convention on Human Rights], 23 *Nordic Journal for Human Rights* (2005) p. 425 at p. 432.

often, and especially with regard to appellate courts, without adding anything of value to the judges' own understanding of the law.

3.4 The Functions of the Court Tiers: Out of Court Resolution of Disputes

3.4.1 The Dispute Act retains the existing three court tiers,³³ but rests on a clearer distinction between the functions of each of them than the current practice indicates.

The prime function of the *district courts* in the delivery of justice is underlined; the overwhelming majority of disputes taken to court – complex as well as simple cases – should find their final solution in the district court. It is well known that at present, litigation in the district court is sometimes seen by the parties or their advocates as a preparation for the proceedings in the court of appeal, and this is a practice which the Dispute Act intends to abolish.

The function of the *courts of appeal* (*lagmannsretten*) shall be to ensure the quality of the administration of justice by correcting erroneous rulings delivered by the district courts.³⁴ It should be added that the courts of appeal may also use their decisions in appeal cases to draw up guidelines for future practice in the district courts, within the bounds laid by the Supreme Court. In keeping with this, legal action against decisions on coercive measures in child care, psychiatric ward etc. by the County Board for Social Cases will still be brought to the district courts;³⁵ however, judicial control of decisions by the Public Pensions Tribunal will start in the court of appeal as in current law.

Civil cases are in practice tried by professional judges without the assistance of lay judges. In the district court the case is tried by a single judge, in the court of appeal by three judges. However, the district court may sit with three judges at the discretion of the president of the court, if the case is particularly complex, or the parties have made a request for it while waiving their right to appeal (§ 9-12). The latter option is intended to make litigation before the district court more attractive (or competitive) compared to arbitration. The same goes for the rule

33 According to the enumeration in the Courts of Justice Act § 2, formally there are five distinct courts of law until the Dispute Act 2005 takes effect, as the conciliation boards and the Interlocutory Appeals Committee of the Supreme Court (*Høyesteretts kjøremålsutvalg*) are also included. The latter will under the Dispute Act 2005 be regarded as a division of the Supreme Court and designated as its Appeals Committee. As regards the conciliation boards, see 3.4.3 *infra*.

34 The ordinary right of appeal from the district court to the court of appeal applies with respect to asset claims only where the value of the subject matter of appeal exceeds NOK 125 000. If not, leave to appeal is required from the court of appeal. In any case, leave will not be granted if the court of appeal finds that clearly the appeal will not succeed (§ 29-13).

35 At the instigation of, in particular, the Ministry of Children and Family Affairs the Government Bill proposed that cases concerning child care should start in the court of appeal, but this was changed by the Parliamentary Committee for Justice Affairs after representatives from the judiciary had made their point in a committee hearing. The reason for the Government proposal was to reduce the number of reiterated appeal proceedings that may take place to the disadvantage of the child. In the Act as finally adopted, this is to be achieved by taking a restrictive attitude to allowing appeal proceedings, particularly in the Supreme Court.

permitting legally qualified lay judges to be appointed to sit on the case provided that the parties agree to the appointment.

The question of lay judges was not a major issue under the preparation of the Dispute Act. Lay judges are mandatory in certain types of cases only, such as labour law cases or judicial control of decisions on coercive measures made by the County Board for Social Cases. If lay judges take part in the district court or the court of appeal, they are usually two and are drawn by lot from a panel of citizens elected by the municipal council, but there may be expert lay judges if requested by the parties or the court itself or authorised by statute. The general rules on nomination and appointment of lay judges, which are to be found in the Courts of Justice Act, are under review.³⁶

The main function of the *Supreme Court* shall be to contribute to the clarification and the unity of existing law and to a certain extent also to the development of law.³⁷ The implication is that individual justice should be dispensed in the court of appeal.³⁸ Leave must be granted by the Appeals Committee (*ankeutvalget*) to appeal against a judgment to the Supreme Court, and leave shall only be granted if the appeal, in the opinion of at least one member of the Committee, raises questions that have a significance beyond the current case or there are otherwise strong reasons which merit consideration by the Supreme Court (§ 30-4). Even stronger restrictions apply if there is an appeal against an interlocutory order emanating from the district court, usually in a procedural matter (§ 30-6). On the other hand, the Supreme Court has ordinary appellate functions with respect to interlocutory orders made by a court of appeal during its proceedings.

The legislative history illustrates different models as regards the jurisdiction of the Supreme Court.³⁹ Under the 1915 Act as originally adopted, the Supreme Court should work as a cassation court based on German and Austrian models, to which appeal against a judgment could only be made on points of law or procedure. Before it entered into force in 1927, however, temporary amendments were adopted in order to institute direct appeal from the district court to the Supreme Court on questions of fact, law or procedure if the value of the subject matter of the appeal exceeded a certain amount (NOK 5000). In other cases, appeal lay to the court of appeal with further appeal subject to leave from the Interlocutory Appeals Committee. An evaluation of this system led to amendments in 1935 by which the Supreme Court, as a rule, was to hear appeals against judgments of the court of appeal only. The appeal might be grounded on errors of fact, law, or procedure, but would be screened by the Interlocutory

36 See NOU 2002:11 "Dømmes av likemenn". Lekdommere i norske domstoler ["To be judged by equals". Lay judges in Norwegian courts]. These rules are much more important in criminal cases, where the use of lay judges is mandatory at the main hearing.

37 For a comparative analysis of the role of the Nordic supreme courts, see Per Henrik Lindblom, *The Role of the Supreme Courts in Scandinavia*, 39 Sc.St.L. (2000) p. 325-66, also in: *Progressiv process* (Uppsala 2000) p. 87-145.

38 This is a major reason why direct appeal to the Supreme Court from a district court is allowed only exceptionally with leave of the Appeals Committee, and only where a prompt decision on a question of principle, usually on a point of law, is needed (§ 30-2).

39 A condensed version of the history until 1935 is to be found in Ot.prp. no. 23 (1935).

Appeals Committee which could by a unanimous decision refuse leave to appeal if the appeal was based on the assessment of evidence and the adducing of primary evidence was deemed necessary for the proper consideration of the appeal. In order to avoid the hearing of an appeal under the pretext of an error of law, the Committee could also refuse leave to appeal if it found it clear that the appeal would not succeed on that basis. By subsequent amendments, the Committee was authorised to refuse leave to appeal if the outcome could not be seen to have any impact beyond the actual case. Under all these different models the procedural rules for the Supreme Court remained basically unchanged: normally, an oral main hearing would be held, but the Supreme Court would never itself hear parties or witnesses, only expert witnesses if appointed by the court. These rules are continued under the Dispute Act (§§ 30-10 and 30-11).

Under the Dispute Act, the Supreme Court – which currently consists of 19 justices altogether – will sit in four different forms.⁴⁰ Appeals against a judgment are, as a general rule, tried by five justices. Particularly important cases, for instance cases involving the compatibility of statutory legislation with constitutional provisions or international conventions made binding in municipal law, can under present legislation as well as under the Dispute Act be tried by the Supreme Court sitting in plenary. As plenary sessions may hamper the court's work in trying other cases, there is a need for a new intermediate form which will lend greater authority to the final decision without being as cumbersome as a plenary hearing. Using this form, the Supreme Court will sit as a grand chamber (*storkammer*) with 11 justices. Lastly, the Appeals Committee of the Supreme Court is made up of three justices who sit on a rotation basis with the main task of deciding appeals against interlocutory orders and examining appeals against judgments with a view to granting or refusing leave for the appeal to proceed.

3.4.2 It is usually preferable for both parties if a just *settlement* of the dispute can be reached without court proceedings. Out-of-court settlement is usually the cheapest way of resolving the dispute, and parties who have a continuing personal or business relationship will then avoid the risk that court proceedings exacerbate the conflict between them. If all disputes were to be brought before a court of law, the courts would be overburdened and the delivery of justice seriously delayed and impeded, in contravention of human rights obligations. Moreover, an amicable settlement tends to facilitate implementation, making it unnecessary to resort to enforcement measures. The Dispute Act therefore takes the view that both the parties and society at large have an interest in extrajudicial settlements. In addition, experience has shown that proceedings are sometimes commenced before the subject of the dispute is sufficiently clarified or even before the claimant has verified whether the claim is disputed at all.

For these reasons, the Dispute Act – unlike the 1915 Act – emphasises the duty of the parties to clarify the dispute by giving the opposite party the opportunity to explain his case or to meet the claim (§ 5-2). The claimant cannot

40 The Courts of Justice Act, § 5 (as amended by the Dispute Act). The same rules will apply to criminal cases.

bring an ordinary civil claim before the conciliation board or the district court without first notifying the opposite party in writing. Both parties are obliged to explore the possibility of a friendly settlement. Mediation may take place as non-judicial mediation administered by a mediator of the parties' own choice or appointed by the district court from its list of judicial mediators, or the parties may seek mediation before the conciliation board.

3.4.3 The *conciliation boards* (*forliksrådene*) were established in the realm of Denmark-Norway in 1795 and have been maintained in Norway ever since. There is a conciliation board in every municipality, in 2006 431 in all. It is the only truly lay tribunal, consisting of three lay members elected by the municipal council for a four-year period.⁴¹ The conciliation board has a double function. Firstly, as its name indicates, the conciliation board shall mediate between parties with a view to achieving a friendly settlement, and secondly, it is empowered by statute to adjudicate civil claims if mediation was unsuccessful. The power of the conciliation board to deliver default judgments is particularly important in practice as it provides the creditor of an uncontested claim with the necessary legal basis for execution. The board's powers to pass judgments have been extended step by step and since 1993 have covered any asset claim (whether contested or not, and regardless of amount) if both parties met before the board and one of them requested judgment. By caseload, the conciliation boards play an important part in Norwegian civil justice; in 2004, they handled more than 218 000 disputes.⁴²

The conciliation boards have been criticised in recent years by lawyers for their performance in adjudication. It has been argued that the law has been misunderstood and incorrectly applied, and that procedural rules or even basic principles of the rule of law have not been followed. The committee proposed that mediation in conciliation boards should be on a voluntary basis and that the conciliation board should only have power to pass judgment on contested claims with the consent of both parties. However, while the conciliation boards were distrusted by many lawyers, they were held in high esteem by politicians. The Dispute Act upholds the general duty to bring the case before the conciliation board before proceedings in asset claims are instituted in the district court, albeit with a number of exceptions. To the list of exceptions have been added cases where extrajudicial mediation has taken place, or the merits have been decided by a tribunal, or the disputed claim exceeds NOK 125 000 and both parties are assisted by a lawyer (§ 6-2). The authority to pass judgments is also maintained but limited to cases where the parties consent, and if requested by a party, to asset claims meeting no serious objection or, if contested, not exceeding NOK 125 000, or by default (§ 6-10). The value limit of NOK 125 000 (roughly the equivalent of €15 000) ensures, together with other rules, that any claim may, in principle, be tried in two instances.

41 The Courts of Justice Act, §§ 27 and 55.

42 Statistics Norway ("www.ssb.no", Forliksrådene).

3.5 The Court's Handling of the Case: The Preparatory Stage and the Main Hearing

3.5.1 The clear distinction between the preparatory stage and the main hearing that characterises the 1915 Act has been retained in the Dispute Act. It facilitated the introduction of the principle of oral proceedings and is a prerequisite for the main rule that the judgment can only be based on evidence that has been presented at the main hearing and subject to contradiction there.

The 1915 Act left it to the judge to decide whether proceedings at the preparatory stage should be oral in a court sitting, or written by an exchange of submissions in writing. It tried to encourage the use of oral proceedings at the preparatory stage, but often in vain in practice. The original rather sharp distinction between oral and written proceedings at this stage became somewhat blurred by subsequent amendments of the Act and this distinction is altogether abandoned in the Dispute Act.

In practice, the activity of the judge at the preparatory stage has varied considerably. Indeed, it has sometimes been left entirely to the advocates to manage the preparations by exchanging submissions until they asked the judge to set the date for the main hearing. The 1915 Act does not prevent a judge who feels inclined to a more active leadership from taking the preparations in his hands but it cannot be said to provide any clear steering in that direction. The Dispute Act, by contrast, assigns the primary responsibility to the judge: "The court shall actively and systematically manage the preparation of the case to ensure that it is dealt with in a swift, cost effective and sound manner" (§ 9-4, first subsection). For this purpose, the Dispute Act places several tools at the judge's disposal, see 3.7 *infra*.

3.5.2 The Dispute Act places greater emphasis than its predecessor on the preparatory stage while preserving the basic rule that all relevant materials pertaining to the substantive dispute should be presented at the main hearing (§ 11-1, first subsection). The underlying view is that active preparation can reduce the time needed for the main hearing with the ultimate result that time is gained for the courts and the parties and that the total costs incurred are reduced.

In order to achieve this aim, some modifications in the main hearing are also foreseen. It should proceed according to a schedule which has been prepared by the judge after suggestions by the advocates (§ 9-11, second subsection). By clarifying in advance what is actually at dispute between the parties, the need for lengthy opening statements from the advocates will be diminished and it becomes easier to concentrate the deliberations on what is relevant for the contested issues. There will no longer be a need to read aloud documentary evidence at length if the crucial aspects can be pointed out (§ 29-2). The prohibition against submitting written statements as evidence where it is possible to call the author as a witness is also relaxed (§ 21-12). With the consent of the parties the oral main hearing may be dispensed with and replaced partly or wholly by written proceedings if this will be more cost-effective (§ 9-9, second subsection).

3.5.3 These amendments entail a certain change of roles for the various participants in the case. The judge must take on a more active role to seek

clarification of a case of which he knows nothing before it starts, and that role must be carried out without impairing his impartiality. The advocates can no longer leave it to last minute preparations before the main hearing to consider the case in depth and they are expected to provide a final written submission as a summing up of their contentions at least two weeks prior to the main hearing (§ 9-10).

It is questionable whether the desired result will actually be attained. Two different concerns can be raised in particular. One relates to the use of deputy judges, who – at the age of little more than 30 years with few years of experience after graduation – may not have the necessary authority and qualifications to take an active lead at the preparatory stage. The other concern has to do with the advocates; it has been argued that the Dispute Act will encourage advocates to prepare verbose submissions at the expense of their clients. Should this happen to any great extent, the courts may need additional instruments to impose the ideals of brevity and lucidity on advocates.

3.6 Access to Justice

3.6.1 “Access to justice” has served as a programme for reform of civil justice for about three decades.⁴³ As a notion, it has several meanings. Formal access to justice implies that a case will not be thrown out of court for lack of jurisdiction or failure to comply with procedural requirements that are perhaps excessive. Social access to justice implies that there is actual access to courts irrespective of social class and economic conditions. Many and various measures can be used to increase citizens’ access to justice. Some of them, legal aid for example, fall outside the scope of the Norwegian reforms presented here, but a number of new rules in the Dispute Act can be regarded as a contribution to better access to the courts and to justice generally.

Improved access to the courts may very well be of benefit to one party who is regularly the petitioner. At the same time, it can be a disadvantage to the opposite party who is forced, as defendant, to spend time and resources on defending his or her legal position against a claim that may be unfounded and frivolous or vexatious. The process of delivering justice will have its costs. Unlimited access to the courts is, therefore, not to be desired.

3.6.2 A fundamental question is what *kind of conflicts* should be admitted to the courts for resolution in civil proceedings. The Dispute Act follows the tradition from the 1915 Act in stating that only legal claims can be brought before a court of law (§ 1-3). The courts cannot be seized to solve political conflicts as such,⁴⁴

43 The notion of access to justice is inextricably linked to the late Italian professor Mauro Cappelletti, see, e.g., the work by Cappelletti and Bryant Garth, *Access to Justice* vol. I-III (1978-79). For a Scandinavian introduction, see Per Henrik Lindblom, *Grupptalan* [Class action] (Uppsala 1989) p. 3-19 (reproduced with modifications in *Progressiv process* (Uppsala 2000) p. 305-21).

44 A conflict on the counting of votes at elections (as in *Bush v. Gore*, 531 US 98 (2000), 12 December 2000) cannot be brought before a Norwegian court of law, but will be decided by the Parliament itself or the National Elections Board, depending on the issue in parliamentary elections, and by the Ministry of Local Government in municipal elections

or conflicts between interests that have no legal foundation. Moreover, the Norwegian courts can only be called upon to decide individual cases. A dispute concerning the constitutionality of new legislation or its compatibility with human rights conventions must be linked to a concrete factual situation if it is to be brought before a court. Even if the courts will exercise judicial review of legislation where relevant, their conclusion is legally binding only in the context of the particular case and does not serve to abolish a statute as such. The general rule on the subject matter and character of legal action has been reworded in the Dispute Act (§ 1-3), and the preparatory works to the Act indicate that the courts should in certain situations adopt a less restrictive attitude than they have occasionally shown in the past.⁴⁵

By and large, Norwegian courts have taken a fairly liberal view on the requirements of standing to sue, particularly where judicial review of administrative action is involved. A case in point is *Rt. 1980 p. 569*, where the Supreme Court held that the Norwegian Association for the Conservation of Nature could sue the Government on the validity of the permission granted for the Alta hydropower project.⁴⁶ Since then it has been settled law that, as a rule, associations established to promote a certain public or general interest will have standing to sue with respect to administrative action affecting interests that are defended by them.

3.6.3 The rules on the *territorial jurisdiction* of the district courts have over the years led to many cases being summarily dismissed. It will often be an advantage to the claimant if legal action can be brought in his own ordinary venue (usually determined by his or her habitual residence) instead of in the ordinary venue of the defendant, as the main rule would require. The Dispute Act grants this favour to consumers in many consumer cases, to insured persons in claims for payment under the policy against the insurance company, and in cases directed at the State or the county administration of his county of residence (§ 4-5). Moreover, should the claimant be mistaken in his choice of venue, the case shall no longer be dismissed, but referred to a court having local jurisdiction (§ 4-7).

3.6.4 It is unfortunate if a case is dismissed because of *procedural errors* by the party or because his pleadings are misunderstood. The Dispute Act extends the duty of the court to give guidance in procedural matters and to seek necessary clarification of the parties' submissions on substantive issues (§ 11-5). The Act goes further in this respect than was generally considered acceptable under the 1915 Act and does so in order to obtain substantive justice and out of consideration for parties who are not represented by counsel. It is also stated,

(see Act of 28 June 2002 no. 57 relating to elections of Parliament, county councils and municipal councils ch. 12).

45 See Ot.prp. no. 51 (2004-2005) p. 142-43.

46 See, e.g., Backer, *Legal standing in environmental cases – Norwegian practice*, in: Tuula Tervashonka (ed.), *The legal status of the individual in Nordic environmental law* (Juridica Lapponica 10, University of Lapland, Rovaniemi 1994) p. 132-38.

however, that guidance must be provided in a manner which is not liable to diminish confidence in the court's impartiality. If procedural inadequacies occur, the court should as a rule set a time limit for rectification by the party (§ 16-5).

3.6.5 Small claims require special consideration if access to justice shall be secured, and the handling of them must not entail disproportionate costs. Many small claims cases will have been handled by the conciliation board or by tribunals (see 2.3.2 and 3.4.3, *supra*). A special *small claims procedure* in district courts has been introduced to this end (§§ 10-1 et seq.). Small claims are generally defined as claims of an economic nature where less than NOK 125 000 is in dispute.⁴⁷ The small claims procedure is usually mandatory for such cases. The Act puts special emphasis on the judge's duty to manage the case and to provide guidance with respect to small claims. The small claims procedure should be completed in not more than three months and the court sitting which serves the function of a main hearing can be arranged as a distance meeting or even dispensed with at the request of both parties, and it should only in exceptional cases last for more than one day. The judgment itself is simplified compared to the ordinary procedure and need not contain detailed reasons for the conclusion. The right to compensation for costs is also limited (see 3.8.2 *infra*).

If the case is deemed to be of material importance for a party beyond the specific dispute, or if it is too complex to be dealt with in a satisfactory manner under the small claims procedure, the ordinary procedure will apply. The claimant is then entitled to abandon the case without relinquishing the claim.

3.6.6 *Class actions* have been introduced in the Dispute Act in order to promote access to justice in small claims in particular and to render more efficient and effective justice. Mass production of goods and services gives rise to mass conflicts in the sense that numerous customers are affected by similar deficiencies in individual performances, and class actions may be regarded as the law's response to such mass conflicts. The American and in particular the Swedish rules have served as inspiration and models for the chapter in the Dispute Act devoted to class actions (§§ 35-1 et seq.).⁴⁸ Although the new rules met some opposition in business circles, they were adopted unanimously by the Parliament.

A class action may only be brought if several individuals (natural or legal persons) make up a class in the sense that they have claims or are subject to obligations on a materially similar factual or legal basis. Another prerequisite is that class action procedure is the most appropriate way of dealing with the issues (§ 35-2, first subsection). The action may be instituted by anyone who belongs to the actual class, or by associations, trusts, or public bodies if the action falls within the scope of their purpose and field of activity. This will, for example,

47 In a comparative view this is quite a high upper limit for small claims; compare, for example, £ 5000 (about €8000) for the small claims track in England and Wales.

48 See for an account of the Swedish proposal (before its adoption) Per Henrik Lindblom, *Individual litigation and mass justice: A Swedish perspective and proposal on group actions in civil procedure*, Am. J. Comp. L. vol. XLV (1997) p. 805-31.

allow the Consumer Ombudsman or the Consumers' Council to bring class actions on behalf of consumers.

The court must approve a class action for hearing (§ 35-4). When granting approval, the court shall define the scope of claims to be covered by the class actions and thereby also the range of class membership. If the class action is disallowed, interested parties may bring individual actions which may be brought as a joint action if the conditions for joinder are fulfilled.⁴⁹ The court's approval may later be amended or – exceptionally – reversed; class members who are then no longer included in the class action pursuant to the new decision, will have the right to continue pursuing their claim as an individual action before the court.

Rulings in a class action are binding on those who are class members at the time of the ruling (§ 35-11, first subsection). The main rule is that membership is by “opt in” (§ 35-6); anyone who falls within the class as defined by the court in its approval is entitled to be registered as a member within a set time limit and also has the right to withdraw his membership prior to a judgment that is binding on him (§ 35-8). Once a class action has been approved for hearing, the court shall ensure that those who may qualify for class membership are informed of the action by notification, public announcement or otherwise. If the action concerns claims or obligations which are of such a minor value individually that they would not justify a separate legal action, the court may approve the action as an “opt out” class action, provided that the individual claims are not likely to give rise to particular questions (§ 35-7). Anyone who falls within the class will then be a class member and bound by the judgment unless he uses his right to withdraw from the action.

The class shall be represented in court by a class representative nominated by the court when giving approval to hear the action and by counsel. The class representative must be chosen among those entitled to bring the class action but need not be the person who actually brought it. The representative shall keep the class members informed of the handling of the action. The representative is liable for costs awarded to the opposite party but can claim reimbursement from the class members individually if this was made a condition for registration as a class member.

The rules on class action have been formed with class claimants in mind. They also apply to class defendants, except that class membership without registration (“opt out”) is excluded. It is questionable whether such class actions will be of any practical use since defendant members are entirely free not to register as members and will then not be bound by a judgment (§ 35-14).

3.7 *Expediting Proceedings*

3.7.1 It is a common view, irrespective of jurisdiction, that justice is too slow. Slow civil justice may be one of several reasons why commercial parties resort to arbitration or submit their disputes to a different jurisdiction. Slow justice may deprive the rightholder from enjoying his right for as long as the court

⁴⁹ It is submitted that they will then benefit from the class action as a defence against prescription in the same way as would apply if an individual claim was summarily dismissed (see § 18-3).

proceedings last and may cause liquidity problems for creditors (and temporary relief for debtors); at worst, the rightholder may go bankrupt while waiting for judgment in his favour. The basic requirement is laid down in ECHR Article 6 (1): everyone is entitled to justice “within a reasonable time”.

The demand for speedy justice may be connected with the rhythm of society at large, and this may explain the increased emphasis on swift justice. In a world where change may prevail over stability, rapid enforcement of legal positions is required because changed conditions may result in a certain legal position becoming useless. In times when the general rate of interest is high, financial problems brought about by slow justice become more serious in economic life.

Yet rapidity is not all, as also allowed by the ECHR test of “reasonable time”. There are conflicts which need to mature if both parties are to accept any outcome whatever. The parties may have lived with the dispute for a long time before bringing it to court; they can hardly expect as a matter of course to receive as rapid justice as parties to a dispute where there is an acute conflict. The complexity of some disputes alone may require time for court processing, and even vital evidence may not be readily at hand. Most importantly, court litigation is the most thorough way of resolving legal conflicts in our societies, and the rule of law requires not only rapid, but also *correct* delivery of justice. The quest for rapid justice is therefore as much a search for *efficient* justice. It is essential to avoid unnecessary delays.

3.7.2 In Norway, as well as in many other jurisdictions, expeditiousness is measured in relation to a set of *time targets*. The current average time target for handling civil cases in the district courts is 6 months,⁵⁰ while the actual average handling time in recent years has varied between 6,5 and 7 months, with considerable differences between different types of cases and different courts. The corresponding figures for an appeal on the merits to the court of appeal are a target of 6 months and an average performance varying in recent years between 9 and 10 months. In the Supreme Court, the average handling time in 2005 for civil cases was less than 6 months from approval was granted by the Interlocutory Appeals Committee until judgment was rendered.⁵¹ It follows from these figures that an ordinary civil case can in practice very well be tried by the three ordinary court instances in little more than three years, even where mediation by the conciliation board is included.

3.7.3 The figures indicated in 3.7.2 suggest, in a comparative perspective, that Norwegian civil justice is fairly rapid. Being average figures, they may hide a number of cases with unacceptable delays. Under the European Convention on Human Rights, every member state of the Council of Europe is obliged to organise its court system and its civil procedure in a manner so as to make sure

50 The similar target for criminal cases requiring a main hearing is 3 months and for criminal cases tried by a single judge 1 month.

51 See for the target figures St.prp. no. 1 (2005-2006) for Justisdepartementet (regarding the annual budget for 2006 for the Ministry of Justice and the justice affairs) p. 54-57. For the performance figures see Årsstatistikk 2005 [Annual statistics for the courts 2005], accessible at “www.domstol.no”.

that justice is actually delivered in all cases within a “reasonable time”.⁵² Against this background it is part of the purpose of the Dispute Act to provide a basis for swift handling of civil disputes (§ 1-1, first subsection). The Act provides a number of instruments to achieve this end.

3.7.4 The essential overall concept is *case management*, which implies a much more active role for the judge than was expressly envisaged in the 1915 Act. The Dispute Act has a general provision stating that the court shall prepare a plan for dealing with the case and follow up on it in order to bring the case to a conclusion in an efficient and sound manner (§ 11-6). The court’s duty to actively and systematically manage the preparation of the case is underlined and, moreover, elaborated by a duty to set up a plan for further proceedings after discussion with the parties (§ 9-4).⁵³ It is also incumbent on the court to see that everything necessary for the efficient management of the main hearing is in place (§ 9-13).⁵⁴

An integral part of case management is assistance to the parties in *defining the scope of the case*, even though the prime responsibility for this rests with the parties in ordinary civil cases. It is for the court to seek clarification from the parties if their prayers for relief and grounds leave doubt as to the real meaning or whether they correspond with the obvious intention of the party (§ 11-5). This is particularly important in cases where a party is not represented by counsel.

The Dispute Act leaves ample scope for joinder of claims and parties (§§ 15-1 et seq.) but leaves it basically to the initiative of interested parties. Failing this, the court has power to consolidate actions raising similar issues (§ 15-6). On the other hand, the court may split the proceedings and the adjudication in order to promote the efficient delivery of justice (see 3.9.3 *infra*).

The determination of the scope of appeal cases is especially important if the particular tasks of the appellate courts are to be fulfilled and the obstruction of justice prevented. The court of appeal may, without further hearing, refuse leave to appeal entirely or as regards certain claims or grounds in so far as the court is satisfied that the appeal will not succeed (§ 29-13, second subsection). When granting leave to appeal to the Supreme Court, the Appeals Committee may by unanimity limit its consent to specific claims or grounds of appeal, or even to specific points of law, procedure or fact that a party alleges have been erroneously decided by the inferior court (§ 30-4, second subsection). In so

52 This is not the place for a discussion of what constitutes a “reasonable time” and, in particular, whether delays in a particular case can be justified by an (unexpectedly) large caseload. See, e.g., van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed., The Hague 1998) p. 442-50, Jacobs and White, *The European Convention on Human Rights* (3rd ed., Oxford 2002) p. 166-68, and Erik Møse, *Menneskerettigheter* [Human Rights] (Oslo 2002) p. 359-66. See also Opinion no. 6 (2004) of the Consultative Council of European Judges (CCJE), established under the auspices of the Council of Europe.

53 The provision applies similarly to appeals against judgments, see § 29-14, third subsection (court of appeal) and § 30-8, third subsection (Supreme Court).

54 The provision applies by virtue of § 29-18, first subsection, and § 30-11, second subsection, to the court of appeal and to the Supreme Court.

doing, it can be assured that the capacity of the Supreme Court is not unnecessarily used for handling matters that do not serve the purpose of clarifying or developing the law.

3.7.5 The court has a number of instruments at its disposal to expedite the proceedings. Some of them are particularly directed at complex cases (see 3.9.3 *infra*).

The preparatory stage is organised so as to avoid long and protracted main hearings. The use of judicial mediation or mediation in a court sitting must be considered at this stage with a view to obtaining an amicable settlement. Each of the parties will as a rule be required to submit a final written submission at the end of the preparatory stage stating their prayers for relief and the grounds upon which the prayer is based, the main evidence that the party will present and the legal rules that are invoked (§ 9-10, second subsection). This summing up – which is new under the Dispute Act – will serve as a basis for the judge's final preparation and opening of the main hearing.

To avoid the preparatory stage dragging on, the court shall on receiving the defendant's first written reply set the date for the main hearing. This date shall only in special circumstances be more than six months after the submission of the writ of summons. The main rule is that no amendments to or additional claims, prayers for relief, grounds or evidence may be submitted once the preparatory stage is completed, usually two weeks prior to the main hearing (§ 9-16). This rule also prevents the opposite party from being taken by surprise.

Certain cases can be decided at the preparatory stage without a main hearing. This includes dismissal for procedural reasons (§ 9-6, third subsection), judgment pursuant to an oral sitting at the preparatory stage if the court finds that it has a sufficient basis and the parties give their consent (§ 9-5, fourth subsection), and by simplified proceedings upon application where it is evident that a claim cannot be upheld or the objections against it are entirely unfounded (§ 9-8). The latter provision gives a simple remedy for dealing with frivolous or vexatious claims.

Under the Dispute Act, the court has been given clear powers to fix time constraints for the main hearing and its basic elements (§ 9-11).⁵⁵ It is unfortunate, however, if a party for good cause thinks that he or she has not been granted the time needed to explain his or her case. Adequate case management at the preparatory stage should prevent this from occurring during the main hearing. The powers of the court to restrict the presentation of evidence, in particular the new rule on proportionality (§ 21-8), can also serve to shorten the main hearing. A court sitting – including the main hearing – shall not be rescheduled unless a party has a valid excuse for non attending or there are otherwise weighty reasons having regard to cost-effectiveness (§§ 16-2 and 16-3). If it is considering to order a stay in the proceedings, the court shall give weight to the need for swift, sound and cost-effective proceedings (§ 16-18).⁵⁶

55 The provision also applies to the Court of Appeal by virtue of § 29-14, third subsection; similarly for the Supreme Court § 30-8, third subsection, with regard to the advocates' oral submissions.

56 There are, of course, also provisions for judgment by default, see § 16-10 in particular.

3.7.6 The Dispute Act does not provide for *summary proceedings* as such, but a number of rules serve this purpose, including the small claims procedure, and the rules that allow the court to render judgment at the preparatory stage, including simplified judgment.

The need for a swift judgment as the basis for enforcement of a claim which is undisputed or met with clearly untenable objections is to a large extent covered by the power of the conciliation boards to render judgment (see 3.4.3, *supra*). Moreover, since 1 January 2006 a creditor can request enforcement on the basis of a document in writing – an invoice, for example – which he has sent to the debtor, specifying the basis for the claim and the amount due. The debtor can avoid immediate enforcement by requesting negotiations for settlement or by raising objections to the claim; in the latter case, the case will be transferred to the conciliation board if requested by the creditor.⁵⁷

Proceedings for interim relief are sometimes used as a remedy to obtain a ruling by summary proceedings. These rules were to be found in the Enforcement Act but have now been transferred to the Dispute Act (chapters 32-34). Although interim relief can only be granted if there is a specific reason for so doing, there is in practice considerable scope for obtaining a ruling on the merits in these proceedings.

3.7.7 The use of modern *information and communication technologies* will be of considerable help in providing swift justice. Under the Dispute Act, court sittings may be held as distance meetings by telephone or televised communication if the parties consent or if authorised by the Act (§ 13-1). For example, the initial court sitting at the preparatory stage to draw up a plan for the handling of the case, may be held as a distance meeting. Parties, witnesses and experts may be examined before the adjudicating court by way of long-distance examination if direct examination is not feasible, or would be particularly onerous or expensive (§ 21-10). Tape recording of the statements of parties or witnesses during the main hearing may prove particularly useful in an appeal against the judgment or in a request for reopening. However, it is only mandatory where the court has the necessary equipment at its disposal (§ 13-7) and that is – for budgetary reasons – frequently not yet the case.⁵⁸ A technologically neutral wording of the provision on dispatch of submissions ensures that submissions to the court may be sent electronically as well as on paper (§ 13-3).⁵⁹ A proposal by the committee that advocates should be obliged to send their written submissions electronically was not enacted, but a pilot project on electronic communication between courts and between courts and advocates is foreseen.

57 See the Enforcement Act (of 26 June 1992 no. 86) § 7-2 litra f, § 7-6, second subsection, § 7-7, second subsection and § 7-11, fourth subsection. This instrument was introduced as part of the reform mentioned under 2.2.4 *supra*.

58 Mandatory tape recording will not apply to the small claims procedure.

59 Electronic communication with the courts is authorised in so far as laid down in regulations issued under the Courts of Justice Act, § 197 a.

3.7.8 In some cases continued proceedings must take place in another court. In order to prevent unnecessary delays, the Dispute Act introduces rules that require the original court to refer the case to the appropriate court. This is so where the case has not been brought at the correct venue (§ 4-7, see 3.6.3 *supra*), and where a ruling by an inferior court is set aside by a superior court (§§ 29-24 and 30-15). The appropriate court shall then continue the proceedings on its own motion.

3.7.9 Despite the efforts made by the Dispute Act, it is likely that a case will occasionally be poorly managed and unduly delayed. According to the practice of the European Court, the European Convention on Human Rights requires an effective remedy against this.⁶⁰ Under the Dispute Act, the president of the court shall give the necessary instructions to rectify such deficiencies and a party to the case may demand his intervention (§ 11-7). If necessary, he may transfer the case to another judge or take over the case himself. If the president is disqualified – in particular where he is administering the case himself – the powers to intervene lie with the superior court which can also intervene if the court president has not taken action within one month after receiving a demand from a party.

3.8 *Reduction of Costs*

3.8.1 It is a common trait in jurisdictions worldwide that court proceedings are expensive. The expected costs may, for small claims in particular, actually prevent access to the courts and result in a denial of justice. Even though most parties will probably find it worth while to engage an advocate when going to court, the complexity of the law and procedure may prevent those who want to do so, from conducting their own case. New technology has been of little help in bringing down litigation costs.

The major cost is usually lawyers' fees, but fees to expert witnesses and even court fees cannot be ignored.⁶¹ The parties' own use of time or personal expertise must be added to this. Generally, the longer the proceedings take, the higher the costs will be.

An important objective of the Dispute Act is to reduce litigation costs, in particular for the parties involved, but also for society at large. Moreover, it is important to ensure a fair and just distribution of the necessary costs. Several devices have been introduced to this end. An underlying overall concept is the principle of *proportionality* which implies that costs – and accordingly the procedural steps taken – must be proportionate to the size and importance of the claim made. The principle of proportionality as laid down in the Dispute Act

60 See ECHR Art. 13 as applied in *Kudla v. Poland* (26 October 2000) and subsequent practice, for the present culminating with *Sürmeli v. Germany* (8 June 2006).

61 Court fees are in Norway regulated by a separate Act of 17 December 1982 no. 86. The fee to be paid for particular procedural steps is calculated on the basis of a standard fee, the amount of which has often been increased for general budget income purposes. It can be asked whether the actual fees to be paid may exceed the cost of court services provided, but presumably this is still very rare.

will also promote swift justice, but has its principal importance with respect to the costs.

3.8.2 Swift resolution of a dispute usually means small costs incurred. This is an important reason why the Dispute Act places strong emphasis on early mediation and encourages the parties to engage in it. A party who fails to clarify his claim initially as prescribed by the Act, or to accept a reasonable offer of friendly settlement, may find that his rights with respect to an award of costs are impaired.

The procedural rules promoting efficient justice (see 3.7 *supra*) will also tend to reduce the costs incurred by the parties. Judges should practise active case management with a view to avoiding unnecessary costs. Greater emphasis on the preparatory stage may lead to earlier settlements in some cases, and in other cases to shorter main hearings, which are presumed to be the most costly part of the process. The rules of the small claims procedure are meant to encourage the parties to conduct their own case and thereby reduce their costs, since the court has a more extensive duty to provide guidance to the parties and costs awarded to the winning party for legal counsel cannot, as a rule, exceed 20 % of the amount in dispute (§ 10-5, second subsection). The class action procedure provides a special procedure by which the procedural costs for each individual claim is expected to be considerably lower compared to separate litigation.

3.8.3 There is a contractual relationship between a party and his or her lawyer, and the *lawyer's fee* will, in principle, depend on the terms of the contract. Norwegian lawyers usually charge by the hour; the hourly rate may vary. As the price for a service commodity is generally not regulated, the Dispute Act does not include substantive rules on lawyers' fees even though their level has been criticised.⁶² Contingency fees, however, are prohibited in the ethical rules adopted by the Norwegian Association of Lawyers, which by the Government's confirmation have become legally binding in pursuance of the Courts of Justice Act.⁶³ Conditional fees are likely to be accepted as long as they do not violate the rule against unfair terms of contract. The party has a right to request the court within one month after the judgment to determine the fee to be paid. In doing so, the court shall take due account of the legal assistance contract as well as other circumstances (§ 3-8). There are no fixed tariffs for lawyers' fees except the tariffs for legal aid and legal advice granted out of the public purse.⁶⁴

3.8.4 The rules of the 1915 Act on the *distribution of costs between the disputing parties* have proved to be the object of considerable litigation. They sometimes appear to encourage an advocate to produce surprisingly extensive submissions

62 These questions are further discussed in another official report concerned with the competition between advocates in the interest of their clients, NOU 2002:18.

63 The Courts of Justice Act, § 224 second subsection cf. Regulation on Advocates of 20 December 1996 no. 1161 ch. 12, 3.3.2.

64 These tariffs are fixed in pursuance of the Act of 13 June 1980 no. 35 on legal aid.

in a dispute on costs, the favourable result of which will be an immediate advantage to himself. The criticism has been voiced that some lawyers are charging excessive fees, particularly if they can be imposed on the opposite party, and that their fees at times do not correspond reasonably to the amount or interest at stake in the dispute. For all these reasons, the Dispute Act seeks to establish a clearer and stricter regime on compensation for costs than its predecessor, while retaining flexibility.

The general rule that a winning party is entitled to full compensation for his costs from his opponent, is upheld, with certain exceptions in the interests of justice (§ 20-2). The losing party may be exempted from liability for costs if there was justifiable cause for having the case tried, if the successful party can be reproached for bringing the action or rejecting a reasonable offer to settlement, or if the case was important to the welfare of the losing party and he was in an inferior position (for example, an unemployed person against a major company or the state). If neither party can be said to have won the case, the main rule is that each party shall bear his or her own costs. A party who has been successful to a significant degree without winning the case, may be awarded costs if there are weighty grounds for it (§ 20-3). In certain situations, a party may be awarded costs irrespective of the outcome of the case, particularly if the opposite party can be fully reproached (§ 20-4).

Full compensation for costs shall cover all necessary costs incurred by the party. When assessing whether costs have been necessary, regard must be had to the amount and interest at stake in the dispute. Thus, the proportionality principle applies even here. The amount which the advocate will charge from his client, does not in itself determine the amount for which the losing party will be liable. Costs after oral proceedings are only awarded on the basis of a statement of costs submitted by the advocate at the end of the court sitting.⁶⁵ The number of hours used by the advocate at various stages must be specified as required by the Act. The specified claim is not binding on the court, not even when accepted by the opposite party, but subject to control by the court on its own motion with a view to avoiding excessive and ever increasing costs.

3.8.5 The parties to a case may resent having to bear costs incurred due to an *erroneous judgment* which could only be corrected by appeal to a superior court. No court system, however, can reasonably bear the costs of the parties whenever a judgment is modified by a superior court. If the judge of the inferior court is seriously reproachable, the interest of justice may be seen to require a different balance. Under the 1915 Act, the private party had no real remedy to that effect, but the Dispute Act introduces state liability in the case of grave procedural errors or clearly unsound conduct on the part of the court (§ 20-12).

3.9 *Managing Complex Disputes*

3.9.1 The complexity of a dispute is due to one or more of several factors: the number of claims made in a single action, the number of grounds asserted to

⁶⁵ An award of costs in a case with no oral hearing may be granted without specification up to NOK 15 000 (€2000).

substantiate a particular claim, the complexity of the evidence and the complexity of the relevant law. A lawsuit may be complex in its own right, but sometimes the complexity is caused by one party for tactical reasons. The complexity may be of a subsidiary nature if it is due to claims or grounds put forward with a view to the situation where the principal claim or ground is not sustained by the court.

Civil procedure has a double task in complex disputes. It must allow the complexity to be adequately presented to the court. It must also provide the necessary tools for handling complex disputes.

It is fair to say that the 1915 Act was adopted mainly with conflicts of a simple nature in mind. A typical dispute might be between two individual parties over, for example, the alleged ownership to a plot of land or the alleged failure of performance of a sales contract regarding a horse or a shipment of coal. It is equally fair to say that advanced technology and complex organisations nowadays give rise to conflicts that are much more complex,⁶⁶ and the importance of EEA law and human rights, in particular, tend to make the relevant law more complex than it would have been if governed by municipal law only.

Unlike the Woolf Reform in England and Wales, the Dispute Act provides no particular track for complex disputes. They are to be managed by using the ordinary rules of procedure and the flexibility inherent in them. The special procedure for class actions (see 3.6.6 *supra*) will, however, cover certain complex disputes. A small claim which is subject to the small claims procedure (see 3.6.5 *supra*), may be transferred to the ordinary procedure if it gives rise to complex issues.⁶⁷

The flexibility of the ordinary rules was to a large part inherent in the 1915 Act as well. In the Dispute Act, certain modifications have been adopted and some new tools added, and rules have been simplified and clarified, particularly as regards the role of third parties.

3.9.2 The rules on *joinder* are important for an adequate presentation of a complex dispute, and the conditions for joinder have been somewhat relaxed in the Dispute Act. The different claims do not need to have the same venue provided that all of them fall under Norwegian jurisdiction and there is no condition that exactly the same procedural rules apply to the different claims (§ 15-1, and § 15-2 as regards joinder of several parties). The court also has powers to consolidate two or several actions which raise similar issues for joint hearing (§ 15-6).

66 Two well-known examples of extremely complex disputes before Norwegian courts are the Alta case (*Rt. 1982 p. 241*), concerning the validity of the Government's permission for the Alta hydropower project in Sami land areas, and the Balder case, concerning the performance of the contract to construct the floating oil production, storage and offloading ship of Balder. In the Alta case, the appeal proceedings before the Supreme Court took six and a half weeks; in the Balder case, the main hearing before Stavanger District Court took about one and a half year.

67 See the Dispute Act § 10-1, third subsection, *litra d*.

Third party intervention is allowed to the same extent as under the 1915 Act. Court practice has become more liberal in recent years towards intervention and this practice is to be continued under the Dispute Act. The rules cover two different situations; one where the legal position of the intervener will be affected by the outcome of the case, the other for associations, foundations, and public bodies which operate for the purpose of promoting particular interests that may be affected by the case (§ 15-7). A novelty is provided by the right for relevant associations, foundations, and public bodies to make written submissions in order to throw light on public interests at stake in the dispute (§ 15-8). This rule introduces the concept of “*amicus curiae*” in Norwegian civil procedure and may facilitate the court’s consideration of, for example, legally relevant requirements of sustainable development in a dispute between private individuals as the submissions become part of the basis for the decision. Such written submissions may also be made by the Government on constitutional matters or obligations in international law that are relevant when deciding the case, for example if the outcome depends upon the constitutionality of legislative provisions. When such cases are heard by the Supreme Court, the government also has a specific right to intervene in the oral hearing (see 3.11.3 *infra*).

3.9.3 The procedural rules must also give tools to manage complex disputes and to avoid undue complexity. Judicial mediation is one instrument to facilitate a friendly settlement without necessitating time-consuming and expensive hearings. The district court may disallow joinder of parties if it will interfere with or complicate the proceedings and the main rule is that joinder is disallowed in the appellate courts unless already made in the inferior court. Procedures that require leave of the court may also reduce complexity in appellate courts when used to restrain the issues allowed for hearing.

The management plan to be set up by the court in collaboration with the parties is particularly important for the proper conduct of a complex case. The court has powers to split the proceedings and the adjudication of different claims. Moreover, in compensation cases, for example, the court may split the basis for the claim from the amount to be awarded. Proceedings may be held separately for different grounds but a separate ruling – on prescription or the choice of law, for example – may only be given if the court is unanimous or with the consent of the parties (§ 16-1).

If there is a complex factual history behind the dispute, the claimant may be requested by the court to provide a short chronological or systematic account of the facts. Such a written submission is to be presented to the defendant for comments (§ 9-9, fourth subsection). Under a new rule, either party may be required to make submissions in writing on complex issues of fact or law raised by the dispute, if needed for a sound basis for the ruling and if justified in the interests of cost-efficiency (§ 9-9, third subsection). The powers of the court to restrict duplication or disproportionate presentation of evidence come into play in particular where abundant or complex evidence is offered by a party. The use of information and communication technologies can greatly facilitate the overview of the abundant material in very complex cases and might need to be considered in the management plan.

In a complex case, the president of the district court may decide that three professional judges shall sit at the main hearing (§ 9-12). In principle, apart from counsel's submissions, it is still for the court to provide the knowledge of the law. In complex legal matters, however, the court may decide to call evidence, for example on the existence of certain practices underpinning local customary law, or on facts to substantiate legal policy considerations to the extent they are admissible for the determination of current law (§ 11-3).

3.10 *Res judicata and Reopening*

3.10.1 The objective of civil proceedings is to bring the dispute to an end which will be accepted by the parties. Rapid proceedings serve that aim and the doctrine of *res judicata*, as enacted (§ 19-15), prevents the parties from raising the dispute anew before a court of law. Substantive justice may fail to be achieved, however, if a party for good reason believes that a ruling is incorrect to his disadvantage and he cannot have it overturned through ordinary legal remedies. Procedural rules may influence the extent to which this situation is likely to occur.

A complete basis for judicial decision-making will favour a correct ruling, but to achieve completeness requires time and costs. The abundance of information achieved in the search may obscure the essence of the dispute and even lead to an erroneous decision.

The Dispute Act takes the view that the price for obtaining a complete basis can be too high. This view is evident in the small claims procedure as well as the proportionality rule with respect to the presentation of evidence. The reform committee cited with acclaim the Woolf Report's notion of "rough and ready justice" with regard to small claims. The call for substantive justice may persist, however, unless it is accepted that the losing party in a small claims case is expected to abide by the ruling and put the dispute behind him and look ahead to the future whatever the merits of the judgment.

According to generally accepted principles of civil procedure – on which the Dispute Act is based – it is for the parties, as a main rule, to present evidence and argue their case. Once the dispute has been taken to a court of law, the parties will be obliged to present relevant material and to appear before the court within certain time constraints. If these are exceeded, a party may be barred from presenting additional material or invoking new grounds even if it is relevant to the case.⁶⁸ Sometimes it is difficult or expensive to obtain certain evidence and a party may then be tempted to argue the case on the basis of evidence more readily available. If he is unsuccessful, the rules of *res judicata* will hinder him from trying again. This result is motivated by the interest of the opposite party and, to some extent, by the quest for an efficient administration of justice.

This state of affairs may be generally accepted, but there are situations where the call for substantive justice may be felt more strongly. One example is where the claimant is not free to decide when to bring the action because prescriptive

68 See § 9-16 for the district court and the more demanding rule in § 30-7 for the Supreme Court.

time limits apply.⁶⁹ Even if there are no such rules, the claimant may have strong personal reasons to vindicate his claim at an early stage: in cases of personal injury, he may need to obtain some compensation rapidly; and if the insurance company has refused payment after his house was burnt down, suspecting him of insurance fraud, he may naturally want to clear himself of that suspicion as soon as possible. In either case, additional evidence may later be available to substantiate the claim. If the original action failed to succeed, can the losing party then choose to raise it again or to make an additional claim? In legal theory and practice, the distinction between facts already existing at the time of the trial and new facts (*facta supervenientes*) usually determines whether a new action can be brought. If the answer is negative, reopening of the case is the only option, but the conditions for reopening have been very strict.

Over the years, however, the general opinion appears to be more disposed to accept a new trial in the interest of substantive justice. Legally, this can be allowed either by modifying the effect of *res judicata* or by relaxing the conditions for reopening, or, as regards new facts, by adopting substantive rules linked to the particular field that allow for a revision of the original decision.

3.10.2 Certain aspects of these questions were discussed at some length during the preparation of the Dispute Act.

Particular attention was given to the situation where the original ruling rests upon an assumption concerning the future, which in fact proves to be wrong. Welfare considerations speak in favour of additional compensation for personal injury which has proved to be more serious than assumed in the original ruling. The Dispute Act allows a new action in these circumstances, not by modifying the effect of *res judicata* or the rules on reopening, but by adding a substantive provision to the Compensation Act⁷⁰ which will also cover out of court settlements of such claims for compensation.

It also happens that the original ruling assumes that another court or a public body will render a decision of a certain kind, and the subsequent decision turns out to differ fundamentally from that assumption. If this should happen within ten years from the original judgment, the Dispute Act allows a new action by modifying the effect of *res judicata* (§ 19-15, fourth subsection). The underlying reason is that in the interest of the citizen party, all public authorities should be identified with each other.

Even the rules on reopening were modified in order to widen the scope for reconsidering a judgment where new evidence has become available.⁷¹ It is still

69 In Norwegian law, procedural time limits for bringing a case are usually connected with certain decisions or orders that can only be challenged within the time limit set. The general rules on prescription are regarded as rules of substantive law.

70 Act of 13 June 1969 no. 26 (§ 3-8).

71 Greater reforms have been adopted in criminal procedure as a result of the failure of courts of law to allow reopening of criminal cases where a miscarriage of justice has subsequently been proved. Applications for reopening of rulings in criminal cases are now considered by the Criminal Cases Review Commission which was set up pursuant to an amendment in 2001 of Criminal Procedure Act chapter 27 (Act of 22 May 1981 no. 25), based on similar commissions in England and Scotland.

a condition for reopening that new evidence will most likely lead to a different ruling, but this will no longer need to be obvious (§ 31-4, litra a). The maximum time limit for an application for reopening has been extended from five to ten years from the original judgment was rendered (§ 31-6). In order to strengthen the guarantees for an impartial consideration of the application, the Act provides that it shall be lodged with the court in the neighbouring district instead of the original court (§ 31-1).⁷²

3.11 International Models and Obligations

3.11.1 The original draft to the 1915 Act was made after extensive studies of foreign rules of civil procedure. The preferred models were sought in jurisdictions where law reforms of civil procedure had pursued aims that corresponded to the Norwegian objectives and where the law prior to the reforms had been similar to that of Norway. The Austrian act of 1898 was a major source of inspiration but the German act of 1877 (as revised in 1898) was also taken into account, and English law offered models for certain important provisions. Among the Nordic countries the Danish and Finnish drafts for comprehensive civil procedure legislation were considered to be of particular interest.⁷³

Public international law did not play a prominent part when the 1915 Act was prepared, but treaty obligations in matters such as the recognition of foreign judgment and security for costs were taken into account. A general provision to the effect that the rules of civil procedure shall not be applied in a manner that would violate international law obligations which are binding on Norway, was not introduced until 1987.

3.11.2. The picture is different with respect to the Dispute Act. Comparative studies of foreign laws were still undertaken, although perhaps not on such a broad range as before the 1915 Act. It must be borne in mind, however, that industrialised nations nowadays appear to experience similar challenges to their systems of civil justice. The ongoing work in the Council of Europe, particularly in the European Commission for the Efficiency of Justice (CEPEJ), testifies to this.⁷⁴ It is therefore possible to argue that it no longer matters so much which particular country is taken as a model, though it is hardly insignificant.

During the preparation of the Dispute Act the 1999 reform in England and Wales based on the Woolf Report aroused special interest, in particular because its objectives were perceived to be quite similar to those to be pursued by the Norwegian reform. The Norwegian committee also studied American and German procedural law on specific questions⁷⁵ and the new Swedish rules on

72 An application for reopening of a Supreme Court ruling will be considered by its Appeals Committee (§ 31-1, fourth subsection).

73 *See Udkast til lov om rettergangsmaaden i tvistemaal med motiver* (Kristiania [Oslo] 1908) p. 77-79.

74 *See, e.g., European Judicial Systems*. Edition 2006 (2004 data) (Council of Europe, Strasbourg 2006).

75 Anne Robberstad, *Utenlandske sivilprosessforbilder* [Foreign models in civil procedure], in: *Festskrift till Per Henrik Lindblom* (Uppsala 2004) p. 575-88 discusses the comparative

class actions prompted by professor Per Henrik Lindblom served as a model for the Norwegian class action rules. The emphasis placed by the Dispute Act on mediation and pre-trial settlement is very much in line with general thinking internationally on alternative dispute resolution, and the same goes for the judge's responsibility for proper case management.

The Norwegian reform had as an important aim to ensure that the civil procedure will comply with extensive treaty obligations, especially those emanating from the European Convention on Human Rights. The general provision to avoid the application of the Act in contravention of international law is upheld (§ 1-2). This aim also underlies specific provisions on directions to a judge regarding the inefficient management of a case and state liability for serious errors committed by a judge in adjudication.

Norway is not a member of the European Union and does not take part in the ongoing work on judicial cooperation under the third pillar, but is a party to the 1988 Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Cases.⁷⁶ Civil procedure as such is not covered by the European Economic Area (EEA) Agreement between EU and several EFTA states, including Norway, but its general rules on non-discrimination may have some repercussions on certain rules of civil procedure, such as security for costs and the service of documents. The ongoing work in the EU is nevertheless of considerable interest for the development of Norwegian civil procedure.

There are other obligations in international law which may have an impact upon the rules of civil procedure. An example is to be found in the TRIPs Agreement under WTO, which requires states to maintain certain rules to secure evidence outside a lawsuit concerning intellectual property rights (covered by the general rules in § 28-3).

3.11.3 A civil lawsuit may, in part at least, be argued on the basis of international law obligations, particularly if they have been incorporated into Norwegian legislation, such as the EEA Agreement and the main human rights conventions. If the courts find arguments of that nature convincing, they may prevent the application of parliamentary legislation and thus restrict the power of the democratically elected legislature. It cannot be taken for granted that the public interest in maintaining the freedom of the legislature will always be well argued by the private parties to a civil case. Accordingly, there is a need for a right for the State (Government) to intervene in the case. The courts did not accept such a right under the existing legislation before the Dispute Act,⁷⁷ but under the Dispute Act, the Government is allowed to intervene in cases before the Supreme Court (§ 30-13). This right does not apply before the district courts

studies undertaken prior to the 1915 Act and the Dispute Act and believes that more inspiration could have been taken from German law for the preparation of the Dispute Act.

⁷⁶ The Lugano Convention is a parallel convention to the Brussels Convention 1968 (now chiefly replaced by Council regulation 44/2001/EC) regulating the same questions. There is a close cooperation between all the convention states whether they are members of the EU or not, see in particular Protocol no. 2 to the Lugano Convention on the uniform interpretation of the convention.

⁷⁷ See *Rt.1998 p. 1372* and *2000 p. 1332*.

and the courts of appeal because their rulings will not be regarded as binding precedents,⁷⁸ but the Government may instead put forward its arguments in the form of a written submission (§ 15-8, see 3.9.2 *supra*).

78 See Svein Eng, *The Doctrine of Precedent in English and Norwegian Law*, 39 Sc.St.L. (2000) p. 275 at p. 294.