Civil Procedure in Norway and Covid-19: Some Observations

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The Norwegian government announced a partial lockdown of the country in the evening of 12 March 2020, urging citizens to work from home and restricting access to all public buildings. Compared to many other countries, the number of infected and hospitalised persons has remained low. The government has since taken steps to gradually reduce the restrictions put in place.

Remote Hearings

During the first weeks of the partial lockdown, practically all civil and most criminal hearings were postponed, as physical access to court buildings was restricted. Each court and judge decides on how to proceed with each individual case. Practically all main hearings in civil cases have been postponed, although some courts have hearings with the parties present in parental responsibility, cases on civil restraint issues and interim measures, and in some criminal cases. The Norwegian government, in particular the Norwegian Courts Administration has advocated for maintaining as many court functions as possible to enable the third state power to remain operational.[1]

Courts are slowly returning to a more normal level of activities. Many courts have had some hearings via telephone or video, particularly in parental responsibility cases and small claims. The Supreme Court has held its first video conference hearing. Larger, more complex cases are still largely postponed as judges learn new case management techniques. However, as case management hearings are as a rule conducted via telephone, the current restrictions have had less pronounced impact on them. Still, a case management hearing is futile if the court cannot designate a tentative date for the main hearing.

Norway is currently in a process of installing video-conferencing equipment in courts. Hence, some courts have access to advanced equipment and are used to recording evidence, while other courts must resort to makeshift solutions.[2] In this regard, Norwegian pragmatism is opportune. Differences among the courts is considered a problem: it endangers equal access to justice and judges at some courts could be at significant risk of being infected by the virus.[3] The Courts Administration is in the process of issuing

[1] The Courts Administration has assessed the impacts of the partial lockdown: https://www.domstol.no/nyheter/konsekvenser-av-redusert-drift/

[2] https://www.domstol.no/nyheter/domstolene-behandler-saker-digitalt/

[3] https://rett24.no/articles/-dommere-kan-ikke-vaere-i-en-smittemessig-saerstilling.

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guidelines, albeit only pertaining to sanitization and social distancing. The proposed guidelines do not address procedural issues.[4]

One problem is how to enable the general public to access video conferences. One solution is to stream the hearing online, as the Oslo District Court has decided to do in a few cases.[5] Another solution is to give access to the video conference on request.

The Dispute Act[6] section 13-1 foresees the use of video conferencing with the consent of the parties, and section 21-10 allows distance examination, viz. examination via telephone or using video conferencing, of witnesses, experts and parties. The legislator and the Courts Administration designed the rules and technical solutions to enable one party (and his/her counsel) to attend remotely, while the judge or panel of judges, the other party and the legal counsel of one or both parties would be present in the courtroom. They did not foresee the judge sitting at home, and the parties and their legal counsel being present in their own homes or offices, i.e. perhaps five different locations instead of just two locations.

The temporary decree on measures that enable the justice system to function during the coronavirus outbreak, enacted on 27 March,[7] allows distance hearings when the court considers doing so 'necessary and unobjectable' (*nødvendig og ubetenkelig)*. Hence, courts can opt for video conferences against the wish of a party. The temporary decree hinges on the temporary Corona Act,[8] which is subject to renewal once a month. If it lapses, all decrees based on it will automatically do the same.

Oral and Written Proceedings

The main challenge for enabling the civil justice system to function as normally as possible is the highly oral litigation culture in Norway. Despite efforts to increase the use of written elements, for instance written arguments pertaining to complex, technical legal and factual issues, Norwegian lawyers still present these types of legal and factual arguments orally the main hearing by citing fairly long passages of relevant texts. Consequently, main hearings are time consuming, the median is approximately 10 hours (two days), with 13 % taking maximum 5 hours (one day) and 18 % more than three days.[9] The current situation could propel a much needed cultural shift towards making use of more written elements and

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4 https://juristen.no/sites/default/files/H%C3%B8ringsnotat%20nasjonal%20veileder%20smittevern%20domstoler.pdf

5 https://www.domstol.no/Enkelt-domstol/oslotingrett/nyheter/begjaring-om-midlertidig-forfoyning-om-a-stanse-riving-av-y-blokka/. The case concerns demolition of the Y-building of the government headquarters. The Y-building and the neighbouring buildings were damaged in the terrorist attack on 22 July 2011. There have been many controversies regarding the future of the buildings, particularly the Y-building since it has a few Picasso murals and is also in other ways an important representative of its architectural style.

6 Lov om mekling og rettergang i sivile tvister (tvisteloven) 17 June 2005 no. 90. (Act relating to mediation and procedure in civil disputes). Unofficial English translation is available at https://lovdata.no/dokument/NLE/lov/2005-06-17-90.

7 Midlertidig forskrift om forenklinger og tiltak innenfor justissektoren for å avhjelpe konsekvenser av utbrudd av Covid-19 FOR-2020-03-27-459, https://lovdata.no/dokument/LTI/forskrift/2020-03-27-459.

8 Midlertidig lov om forskriftshjemmel for å avhjelpe konsekvenser av utbrudd av Covid-19 mv. (koronaloven) 27 March 2020 no. 17.

9 Unpublished study by the Norwegian Courts Commission.

concentrating the main hearing to central, disputed facts and law, and in reducing the number and scope of witness statements.

Current procedural rules already provide for flexibility. By the mutual request of the parties, the court can allow the proceedings to be fully or partially written (Dispute Act section 9-9 subsection 2). Additionally, the court can request that the parties deliver written submissions on selected legal or factual issues, and limit the scope and duration of examination of experts and witnesses. However, judges have been reluctant to make use of these powers, and the requirement of mutual consent enables one party to delay the proceedings by refusing to consent to written proceedings. Despite the fact that (partially) written proceedings are possible within the scope of current rules, temporary amendments could be instrumental in bringing about change. The Ministry of Justice did not seize the opportunity for facilitating this process, however, by limiting extended access to written proceedings to certain criminal cases.

The question is whether the current situation, at least if social distancing must be practiced for months, forces courts and lawyers to adapt their practices. Video conferences are often more tiresome to attend, which could impel the parties and the judge to narrow the scope of the main hearing both by narrowing the scope of the presentation of evidence and delivering legal arguments and complex evidence at least partly in writing.

Appellate Proceedings

A shift in the role and function of appellate courts is also needed to cope with the backlog of cases that the pandemic will inevitably result in. The 2005 Dispute Act (in force since January 2008) was intended to produce a shift from appellate proceedings being a *de novo* hearing of the case, to appellate courts reviewing the case with respect to the application of the law, the legality of the proceedings, and the evaluation of the evidence and limiting hearings only to selected issues.[10] However, the intended transformation of the functions of appellate courts and proceedings has not taken place. In this regard, the pandemic could be instrumental in inducing a shift in legal practices and the underlying conceptions, since change does not necessitate amendments of the Dispute Act. There are, in fact, some signs of a burgeoning shift in the attitudes to the nature of appellate proceedings.

The challenge is therefore not primarily the lack of technology, or the need for temporary amendments to legal rules; the main problem is to bring forth a shift of the litigation culture.

Court-Connected Mediation

Some court-connected mediation sessions were conducted using telephone before March 2020 and thus some judges have proceeded with mediation sessions as planned, and some other judges have conducted their first remote mediation sessions. Mediation has a significant advantage over litigation in that the sessions are closed to the public and that no witness or expert evidence is provided. Hence, the judge who mediates the case only needs to establish a connection between the parties and their lawyers. The fact that scheduling remote mediation sessions is relatively easy, mediation renders justice more efficiently than

[10] NOU 2001: 32 Rett på sak – lov om tvisteløsning (tvisteloven), p. 355 ff. https://www.regjeringen.no/no/dokumenter/nou-2001-32/id378579/.

litigation does in the current situation, and consequently, mediation could become more popular.

Problems Arising from Travel Restrictions

A final anecdotal observation is that local restrictions on the freedom of movement have had detrimental effect on the operation of courts. Most municipalities in northern Norway have ordered anyone who has been in the southern parts of the country to self-isolate for two weeks. Since many large law firms are situated in Oslo, often at least one of the parties has a legal counsel based in Oslo. The Hålogaland Court of Appeals, which is competent for Northern Norway, has been unable to conduct hearings: lawyers from Oslo refuse to attend the hearing as they would have to self-isolate for two weeks before attending the hearing. The legality of the municipal rules has been debated, and since 14 April, many of the municipal orders have been discontinued.[11]

[11] https://rett24.no/articles/advokatforeningene-ber-regjeringen-gripe-inn-mot-lokale-karantener.