

Chapter 1

Main conclusions

1.1 Introduction

The objective of the Courts Commission is to enable the courts to fulfill their key role in the constitutional state also going forward. First of all, it is important to ensure the independence of the courts also under ever changing social conditions. Secondly, the legal framework and the work processes need improvement, to enable the courts to be the key conflict mediator in society.

The courts enjoy a high degree of confidence in the population. In addition, the culture of the rule of law, is strong in Norway. The Courts Commission wishes to build on and reinforce this foundation. In order to fulfill the needs and expectations of society, the Commission recommends adjustments of both how the courts are managed and how they solve their tasks. A recurring characteristic of the Commission's recommendations is that judges and the courts shall be ensured greater influence and a greater shared responsibility for the development of the courts.

On the whole, the Commission is in agreement regarding its recommendations, although some individual items are subject to dissent or special comments.

The report has to be seen in the context of NOU 2019: 17 *Court structure*. Together, the two reports constitute the recommendations of the Courts Commission.

1.2 The function and role of the court

There is a major tendency for the courts of the first and second instance to get fewer, but more complex cases than previously. Furthermore, the cases take more time. This applies both to the time spent in court meetings, and the total time of the proceedings.

With time, there has become fewer regular criminal cases (lay judge cases) brought before the courts, and in total, the District Courts impose fewer criminal sanctions than before. For cases

presided by a single judge, there is growth in relatively routine tasks, such as the appointment of defense lawyers and counsels for the aggrieved parties. There may be several reasons for this development. In addition to the decline in the number of cases reflecting changes in the crime picture, more cases are settled with administrative sanctions.

With respect to civil cases, there has been a decline in the number of regular lawsuits during the past ten years. The analyses may also indicate that the courts are handling fewer disputes between business entities. However, there has been growth in the number of cases involving children. Under half the cases brought before the District Courts, result in judgment/sentencing. In many cases the parties find a solution themselves, either with the aid of court-administered mediation or outside the courts. Of the civil cases resulting in a judgment in the District Courts, about one third is appealed to the Courts of Appeal.

The development gives reason to question whether the conflict resolution is about to move away from the regular courts. The Commission is also observing that the total control of the administration is modest, both in terms of the number of cases, and compared to other countries. The Commission would like to point out that the courts currently are only one of an increasing number of possible mediators in society. The alternative may be arbitration, mediation or private dispute resolution arrangements. Besides, many dispute resolution tasks are assigned to public boards or tribunals. There may be reason to consider whether the courts, to a greater degree, should play a role in ensuring the independence and quality of the alternative forms of dispute resolution.

In a state under the rule of law, it is important to protect the courts as the key conflict resolution body of society, and to ensure that the population has access to the courts. The Commission is of the opinion that the courts' role as a conflict resolution body for civil and criminal cases

should be continued. The Commission does not recommend to remove or add major areas of proceedings from or to the courts. In order to ensure the relevance of the courts, it is, in addition to the reorganization proposed in the structure report, necessary to initiate several measures. In particular, the Commission would like to point to the need for faster digitalization of the courts and improved court proceedings.

1.3 Management of the courts

Overview

Currently, the management of the courts is divided between the Storting (the Norwegian parliament), the Government and specialist bodies. A reform at the start of the 2000's, saw the establishment of the Norwegian Courts Administration, the Judicial Appointment Board (the Appointment Board) and the Supervisory Committee for Judges (the Supervisory Committee).

The Commission recommends to further develop the current arrangement, which has turned out to be good. Similar arrangements have also been chosen in the other Nordic countries. The proposed changes are in part justified on the basis of the experiences from the current arrangement, and in part due to social developments both in our own country and around us in Europe. It is important to find an equilibrium between the branches of government.

The independence of the courts is key in the work of the Commission. §95, second subsection of the Constitution, which was adopted in 2014, confirms that state authorities shall ensure the independence and impartiality of the courts and the judges. Both the passing of §95, and international developments, calls for a renewed assessment of the institutional framework for the courts. The management of the courts has to ensure the independence of the judiciary.

At the same time, the courts exercise considerable community power, and have to act responsibly in its execution of power. On the background of the Norwegian democracy and rule of law tradition, all three branches of government still have to be involved in the management of the courts.

Currently, the Storting is responsible for the overall governance of the courts through legislation and budgets. The Commission sees no reason to propose changes in this area. However, it does propose some adjustments in the budget process between the Norwegian Courts Administration, the Government and the Storting.

In law, the Government is assigned a relatively extensive power over and influence on court administrative matters. There is a question whether the executive branch's governance of the central Norwegian Courts Administration indirectly may lead to a weakening of the independence of the judiciary.

The Commission proposes that decision authority shall be transferred from the executive branch to the Norwegian Courts Administration.

Overall, however, it is a matter of a relatively modest shift in responsibilities.

One of the major proposals is that the Norwegian Courts Administration should be given greater influence related to the appointment of the members of the Appointment Board and the Supervisory Committee. Furthermore, the Commission proposes that the Government should no longer have instruction and reversal authority with respect to the Board of the Norwegian Courts Administration, or the authority to issue regulations regarding the operations of the Norwegian Courts Administration, as well as anchoring the process for appointment of members of the Board of the Norwegian Courts Administration with all three branches of government.

The Commission proposes to preserve the opportunity for the Government to dismiss the Board of the Norwegian Courts Administration in situations where the Board has not complied with provisions stipulated by law, or has not followed up criticism from the Office of the Auditor General of Norway. This will root a parliamentary responsibility with the Government. In total, the Commission is of the opinion that the proposals will contribute to a better balance between the three branches of government.

The Supreme Court

The Supreme Court has a special position among the Norwegian courts. The Court has a separate chapter in the government budget, the wages of Supreme Court justices are decided by the Storting, and the constitution of justices is decided by the Ministry of Justice and Public Security. In its cooperation with the Norwegian Courts Administration, the Supreme Court has a number special solutions that are meant to ensure the special position of the court. The organization of the Supreme Court is outside the mandate of the Norwegian Courts Administration, and the Commission has not examined in greater detail how the Norwegian Courts Administration best could support the Supreme Court.

The central administration of the courts

The Norwegian Courts Administration should, broadly speaking, maintain its current role, authority and responsibilities. The Board is responsible for the activities of the Norwegian Courts Administration, and shall, inter alia, work to ensure that the courts have sufficient resources

in general to fulfill its responsibilities, to comply with the guidelines of the Storting for the courts, and secure the rule of law. The Board has also the role as a buffer against the other branches of government.

The Commission recommends that the Board of the Norwegian Courts Administration should continue to have a mixed composition of members with different competencies and experience. We recommend increasing the number of directors. The Commission is divided in the question of whether judges ought to constitute the majority of directors. The majority of the Courts Commission recommends that the current arrangement, where judges and other employees of the courts, together constitute a majority, should be continued. With respect to the appointment of judge directors, the majority recommends furthermore, that the government only may select among candidates nominated by the judges themselves.

Determination of the court structure

The Commission recommends that the authority to divide the country into court districts and locating the main office of the courts, should continue to be the responsibility of the Government and the Storting. That these basic decisions are made by the political authorities is, in the Commission's opinion, important for ensuring the courts' democratic anchoring in society. However, the courts should be given greater influence with respect to adjusting court districts and determine other court premises than the main office.

Appointment of judges

The Appointment Board should continue to be a broadly composed collegial body. Due to its considerable workload, the Council ought to be somewhat enlarged.

On account of the independence of the courts, the Government ought not be able to freely select a majority of the members of the Appointment Board. The Commission recommends that the Norwegian Courts Administration appoints the judge members, and that at least one of the lawyers shall be appointed on the recommendation of the Norwegian Bar Association.

The Commission is divided in the question of whether judges ought to constitute the majority of the members of the Appointment Board. The majority of the Commission recommends that, on account of democratic legitimacy, judges should constitute a minority in the Appointment Board.

Furthermore, the Commission recommends to continue the current arrangement whereby the Appointment Board nominates three applicants ranked in order, but recommends a stricter framework around the authority of the Government to depart from or go outside the nominees.

At the outset, the appointment of Supreme Court justices should follow the same process as for other judges. For the Chief Justice of the Supreme Court, we recommend to establish by law a process whereby the Chief Justice is appointed by the Government after nomination by an independent council appointed for the purpose. The council ought to consist of a representative appointed by the Ministry of Justice and Public Security, one representative appointed by the Judicial Appointment Board, and one representative appointed by the executive council of the Bar Association.

The disciplinary system for judges

The assessment of the Courts Commission is that the current system for disciplinary proceedings against judges is appropriate. We propose that the system should be continued. According to the present system, the competency of the courts is limited to a review when the decisions of the Supervisory Committee is brought before the courts.

The Commission proposes to change it so the courts may examine all sides of the case. The Commission has also considered whether access to an administrative complaint process should be given for disciplinary decisions by the Supervisory Committee and decisions regarding requests for access.

Currently the authority to appoint members of the Supervisory Committee rests with the Government. It is detrimental, in principle, that a disciplinary body for judges is appointed by the executive branch, without requiring involvement by the courts or other judicial bodies. The Commission is of the opinion that the authority should be transferred to the Board of the Norwegian Courts Administration.

The Commission is divided on the issue of whether judges ought to constitute the minority of the members of the Supervisory Committee. A majority of the Commission thinks judges should constitute a minority, in order to avoid the perception of self-judgment.

Temporary judges

The Commission is of the opinion that it is necessary to limit the current use of temporary judges. Defending the need for temporary judge positions should require weighty reasons. Furthermore, there ought to be clear statutory authorities for when such positions may be used, and there ought to be openness around temporary appointments. Thus, we recommend significant limitations of the authority to appoint temporary judges. A unanimous Commission is also of the opinion that the deputy judge arrangement should not be continued in its present form. The majority of the members of the Commission proposes to continue the deputy judge arrangement with significant tightening, whereas a minority proposes to wind up the arrangement.

Central and local management of courts

The formal and real responsibility for the management and administration of the courts is currently divided between the Norwegian Courts Administration and the chief judicial officer of each court. The Courts Commission points out that there is a need for better coordination of the activities of the courts, at the same time as autonomous judges and independent courts are of fundamental importance. It is necessary to clarify the management functions both in the Norwegian Courts Administration and in the courts, as well as to ensure an appropriate division of labor and good cooperation between the chief judicial officers and the Norwegian Courts Administration. The Commission recommends to establish the responsibilities of the Norwegian Courts Administration in law vis a vis the courts of the first and second instance, as they are today.

Furthermore, the Commission recommends that the Norwegian Courts Administration strengthens its supervisory and compliance function, and the facilitation of a tighter and more formalized cooperation between the chief judicial officers of the courts and the Norwegian Courts Administration.

Case allocation

The Commission recommends strengthening the framework around the internal independence of Norwegian judges by regulating the criteria for case allocation in law. Cases shall be allocated according to fair and objective criteria in order to prevent extraneous considerations being taken into account. The Commission proposes that the reallocation of a case against the wishes of a judge, shall require due cause.

Financing of the courts

The Commission recommends some improvements in the budgeting process for the courts. The purpose is to reflect the special status of the courts in our constitutional system and raise the bar for using the appropriation authority to undermine the independent role of the courts. The executive and judicial branch ought to have formal meetings in which the economic frameworks are discussed. The Commission recommends to establish in law an obligation for the government to attach the proposed courts budget to the budget proposition if the government's proposal, after debate, deviate from the proposal of the Norwegian Courts Administration, regardless of whether the deviation is in the chapter for the Supreme Court or in the chapter for the other courts and the Norwegian Courts Administration.

Determination of wages for judges

Due to independence considerations, the Courts Commission is of the opinion that it is necessary to establish a new procedure for wage determination for judges of the Courts of Appeal, the District Courts and the Land Courts. Professor emeritus, Mr. Stein Evju, has given an account of alternatives for wage determination and the Commission recommends to follow up his report. Furthermore, the Commission recommends that the wage system for the Supreme Court should be reviewed at the same time.

General constitutional protection

The Courts Commission is of the opinion that it is necessary to provide a more constitutional regulation of the courts, including the strengthening of the constitutional protection of independent courts and judges. A modernization and updating of the provisions of the Constitution regarding the courts is necessary in order to ensure that the foundation for the third estate will be sufficiently robust also in the future.

On that basis, the Commission proposes to include rules in the Constitution regarding the court hierarchy, an upper limit on the number of justices of the Supreme Court, the appointment process for judges, employment protection for judges and an independent administration of the courts.

Special note from the member Hagen

The member Hagen has prepared a special note regarding the management of the courts. In order to clarify further the role of the courts as an independent branch of government, the member Hagen proposes to establish a new constitutional and independent body, the National Courts, to take over all authorities currently held by the Storting, the Government and the Ministry of Justice and Public Security, with respect to the courts.

1.4 Improved work processes in the courts

Introduction

In order to ensure that the courts remain a central and good resolver of conflicts, it is necessary to improve the work processes of the courts. The Commission points to challenges regarding case completion in the courts, primarily long case processing time, technological lag, limited use of specialization and a significant increase in awarded legal costs. For the Courts of Appeal it is, in addition, a special challenge that they generally do a complete re-evaluation of the case that was heard in the District Court. The case is also often expanded in the appellate court.

The workday of judges no longer consists of primarily administrating main proceedings. The former ideal of the "unprepared judge" who practices his/her work in a courtroom, must be considered a thing of the past. The fact that the working hours of judges are spent accomplishing

tasks before and after the main proceedings, has importance for the assessment of which means that should be used to improve and increase the efficiency of the work processes.

In its first partial report, the Commission pointed out that the establishment of larger court districts was an important measure to ensure the quality, efficiency and flexibility of the courts. In this report, the Commission is concentrating on further measures such as increased digitalization, improved court proceedings in the courts of first instance, moderate specialization of judges and sharpening of the appellate courts' function and role. In addition there is an analysis of legal costs.

Digital transformation of the courts

The courts have to implement a significant digitalization lift. There are expectations of the courts to offer more digital and more user friendly services. Digitalization will change the work processes of the courts, and may contribute to both qualitatively better and more efficient services.

Technology in the courts has not been a priority for the appropriating authorities, which is an important cause of the technological lag experienced by the courts. Better digital infrastructure is a precondition for implementing other changes in the courts, primarily a reform of the appellate courts. However, more efficient proceedings is difficult to implement without digital tools. Shorter and more concentrated proceedings may be ensured, inter alia, by the aid of structured data and digital decision support.

In particular, the Commission refers to technology that enables virtual court meetings, automatic translations and better and more user friendly platform solutions; and to developments in machine learning that may contribute to providing judges with good tools for decision support. With increased digitalization of the courts, coordination with other participants in the justice sector is important.

Improved court proceedings

Changes to the courts' case completion and work processes may contribute to improving the quality and increase the efficiency of the court proceedings. The Commission points to challenges in the proceedings in civil cases. It is a particular goal to reduce the total use of time, both before and during main hearings. More concentrated proceedings may both strengthen the quality and reduce costs.

The Commission is primarily reviewing the courts of first instance, but the recommendations also apply to a great extent to the Courts of Appeal and the Land Courts.

One main objective of the measures recommended by the Commission, is to strengthen case preparation, to facilitate increased use of written materials in the process and to reduce the time used for hearing of oral evidence during the main hearing. This is in line with the general trend in European process legislation. By improving and strengthening case preparation, it will be easier to focus the case on the issues in dispute.

Inter alia, the Commission recommends that the court shall be obligated to prepare a written

summary of the disputes of the case during its preparation, and that case preparation is recognized as a separate part of the work process of judges, in line with the main hearing and writing of judgements. Furthermore, the Commission recommends an arrangement whereby documents are no longer read out loud during the main hearing, but are briefly referred to.

The Commission is of the opinion that guidelines, guides and templates for various types of cases, should be used to a greater extent in case proceedings. They are good means for the exchange of experiences and contribute to ensure equal treatment of citizens, strengthen quality and make proceedings more efficient. Judges have to lead the work related to developing and maintaining such instruments.

Faster proceedings are also dependent on the case flow and resource situation of each court. It is a basic challenge that the relationship between case load and staffing varies considerably between District Courts. As pointed out in the structure report, larger court districts will provide more flexibility. The provisions of the Courts of Justice Act regarding the transfer of cases or judges between courts, are only suited to solve individual or time-limited challenges. They will not be able to solve the underlying structural differences between the courts, or be used to equalize differences in resource requirements over time.

Specialization

Moderate specialization is a good way to improve both the quality of individual court decisions and the efficiency of the proceedings. Thus, the Commission recommends laying the ground for a greater extent of moderate specialization in the courts.

Which types of cases and tasks that are best suited for a more specialized treatment, may vary. The courts ought to have freedom to decide how moderate specialization should be implemented. The Commission recommends specialization in, inter alia, cases involving children, cases related to Sami interests, big commercial disputes and big economic criminal cases. Furthermore, the Commission recommends that the courts should consider the opportunities for specialization within different forms of proceedings and tasks, including court-administered mediation.

Awarded legal costs in the courts

The Courts Commission has mapped the development of legal costs awarded in civil cases in the District Courts, the Courts of Appeal and the Supreme Court. Over time, legal costs have increased significantly, also when adjusted for price inflation.

The real growth of legal costs has been higher than the real growth of the values in dispute.

The considerable increase in the level of legal costs awarded, is considered serious, and it is particularly worrisome with respect to citizen's access to the courts. The measures recommended by the Commission to improve the proceedings in the courts, may have a certain impact on the legal costs. However, alone they will not be sufficient to bring the legal costs down to a level that is more in line with the intentions of the legislator. The Commission recommends that a committee should be established to give an account of further measures that may check the growth in legal costs.

District Courts. Since there are relatively few and specialized cases that start in the Courts of Appeal, the Commission recommends that these should be allocated to some select District Courts.

The function and proceedings of the appellate courts

The Commission has taken a closer look at the function of the appellate courts, and recommends that the Courts of Appeal to a greater extent review the decisions by the District Courts rather than run full proceedings of the cases all over again.

When considering which means should be employed to get better appellate proceedings, the Commission has taken a look at the development elsewhere in Europe, and has, in particular, looked for inspiration from our neighbor countries. The Commission presents several proposed reforms with the aim of changing the appeal proceedings of the Courts of Appeal. One move is to introduce so-called preclusion between the instances, in order that proceedings in the Courts of Appeal cannot be more extensive than the proceedings in the District Courts.

The Commission also recommends that the Courts of Appeal no longer shall be able to be the court of first instance, meaning that all cases before the ordinary courts, shall start in the

Land consolidation

In the structure report, the Commission gave recommendations regarding a new structure for the Land Courts. In this report, the Commission discusses the overall development of the Land Courts. The Commission recommends that the administrative model for the Land Courts should be as similar as possible to the ordinary courts. The Land Courts should be continued as a low threshold offer, and the user perspective has to be to the fore of all assessments of tasks. The Commission also proposes several measures in order to promote simpler and more user friendly proceedings.

Finally, the Commission has some general recommendations regarding the cooperation between the Land Courts and the District Courts. On the basis of the recommendations of both reports, the Commission recommends a

strengthening of the cooperation between Land Courts and District Courts, and that Land Courts and District Courts consequently should be co-located as far as possible. In addition to the benefits resulting from co-location, it may also be stimulating and culture building with respect to a tighter future cooperation regarding the tasks of the courts. In the view of the Commission, the long term objective should be that the District Courts and the Land Courts become a joint court of first instance that handles all types of cases, with input from specialized competencies on, inter alia, issues of real estate law. Although co-location undoubtedly will be the right thing to do as a first step, in the opinion of the Commission, in a somewhat longer perspective, it should be examined if there also are grounds for an amalgamation of District Courts and Land Courts.