Laura Ervo · Anna Nylund *Editors*

The Future of Civil Litigation

Access to Courts and Court-annexed Mediation in the Nordic Countries

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Preface

The Nordic research project "The outlooks of the Nordic dispute resolution—The future of civil litigation" was funded by the NOS-HS (Joint Committee for Nordic Research Councils for Humanities and the Social Sciences) in 2011–2014. The project was based on the workshops where the topic was studied from different perspectives by the project members and several European guests. This book is the fruit of that project.

The project was planned mainly by the principal applicant Professor Dr. Laura Ervo of the University of Örebro, Sweden, and associate professor (docent) at the Universities of Helsinki, Eastern Finland, and Turku, Finland. Professors Anna Nylund (the University of Tromsø, Norway) and Clement Petersen (the University of Copenhagen, Denmark) were enthusiastic enough to join in the project as coapplicants. All the applicants were interested in the theme, how the traditional court proceedings in civil litigation can respond to the challenges of the modern society and what kind of role the state courts will have in the future in comparison to alternative dispute resolution. Anna Nylund has been one of the editors, and all of us have organised one of the named workshops at our home universities in Örebro, Tromsø and Copenhagen.

The project team otherwise consisted of Nordic academics and practitioners (Anna-Liisa Autio, associate judge at the Turku Court of Appeals, PhD student at the University of Turku; Amie Dahlqvist, plaintiff counsel, university teacher at the University of Örebro, Sweden; Professor Dr. Sigurður Tómas Magnússon, the University of Reykjavik, Satu Saarensola, judge at the Pirkanmaa District Court, PhD student at the University of Turku; and Liisa Sippel, senior lecturer, Turku University of Applied Sciences, LL.Lic student at the University of Turku. In addition, Dr. Jan Malte von Bargen, University of Freiburg, Germany; Dr. Kaijus Ervasti, Head of Administrative Unit, National Research Institute of Legal Policy, Finland; Professor Dr. Elena Martínez García, University of Valéncia, Spain; and Dr. Anna Piszcz, University of Bialystok, Poland, were invited to give presentations as guest stars in some of our workshops. Dr. Lin Adrian and district court attorney Katrín Oddsdóttir joined us later and contributed to our anthology with their academic and practical expertise. All applicants and project members, as well as

our guest stars, have put excellent effort into the workshops and the project anthology. Therefore, we want to thank you all very warmly for your wonderful cooperation during these recent years.

Professor Dr. Aleš Galič, University of Ljubljana, Slovenia, and Professor and Dr. Bart Krans, University of Groningen, the Netherlands, have worked as peer reviewers. Professor Galič is the great expert in mediation, among others, civil procedural issues, and Professor Krans has given his contribution on class actions available to the project. Despite their other duties and busy time schedules, they have been working hard and rapidly, and their effort to the project publication has been of great help. Thank you very much indeed!

Satu Svahn, who holds a juris doctor degree from Brooklyn Law School and a master's degree in urban planning from New York University and who is a member of the New York State Bar Association, has worked hard and in a surprisingly rapid way in order to check the English language of those articles that were not written by fluent English speakers.

Research assistant, law student Tomas Lindblom has effectively fixed all the technical problems and unified the manuscript written by so many authors and several computers with different settings. Thank you for your patience and technical skills.

The project publication has been published by Springer, and we are very grateful for this possibility to make results known in English and outside the Nordic countries. It is rather difficult to find an English material on Nordic law. We hope that this volume could be of help for foreign readers and cover this lack from its side. Executive director Dr. iur. Brigitte Reschke and other colleagues at Springer have been both effective and professional and made it much easier for us to publish our final product, thanks to these wonderful characteristics.

It is time to finish the pleasant project and fruitful cooperation with this book, but we do hope the discussion will continue and cause new possibilities for further researches, projects and cooperation.

In the end of October,
After a nice cranberry-picking trip

Örebro, Sweden Laura Ervo

In the wintery and snowy Tromsø

Tromsø, Norway Anna Nylund

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Chapter 1
Introduction

Laura Ervo

1.1 Background

This anthology is the project publication of the Nordic research project "The outlooks of the Nordic dispute resolution – The future of civil litigation" funded by NOS-HS (Joint Committee for Nordic Research Councils for Humanities and the Social Sciences) in 2011–2014. The project was based on workshops that studied the topic from different perspectives. All five Nordic countries, namely Denmark, Finland, Iceland, Norway and Sweden, were involved. There were academics and practitioners as project members. Also, some additional experts participated in a couple of seminars in order to widen the discussion from the comparative point of view. The broad-based background of project members was extremely important to promote the discussion between the doctrine and practice, especially now when the topic is very strongly related to the societal situation of the court proceedings and fulfilling the aim to guarantee access to the courts and access to justice. Without practical points of view, the discussion would have been too academic and would not maximally help the courts, judges and, especially, the legislator in the future. Our main aim was to help the legislative procedures in the future and to reach results that respond to the question what kind of dispute resolution is the best. Therefore, we invited into the project 'especially' those kinds of colleagues who work in the practice of law and have much experience working as judges or advocates but who, at the same time, have experience on the scientific work and academic discussion. In that way, we aimed at the best results and achieved the results that will also work well in practice.

The project focused on civil litigation. We did not cover family disputes or other special procedures as such. The starting point was how the traditional court proceedings in civil litigation can respond to the challenges of the contemporary

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society and what kind of role the courts will have in the future in comparison with alternative dispute resolution. The theme was and still is very current and important for each Nordic country, and the results achieved benefit legislators and practitioners in all countries.

The first seminar was held at the University of Örebro in Sweden in autumn 2011 on the topic "The mediation and the role of courts – Nordic approaches and comparative studies". The first workshop discussed the alternative dispute resolution, especially court-connected mediation, and its effects and needs to change the role of the courts.

During the first workshop, the following presentations were given: Dr. Jan Malte von Bargen, University of Freiburg, Germany: "In-Court Mediation – A Basic Function of the Judiciary"; Professor, Dr. Anna Nylund, University of Tromsø, Norway: "The mediation in the Norwegian tradition"; Dr., Head of Administrative Unit Kaijus Ervasti, National Research Institute of Legal Policy, Finland: "The Finnish experiences and visions"; Senior Lecturer Liisa Sippel, Turku University of Applied Sciences & University of Turku, Finland: "Comparative aspects between the Nordic Countries and Austria"; University teacher Amie Dahlqvist, Örebro University, Sweden: "Is Sweden an exception?"

The second workshop was held in spring 2012 at the University of Tromsø in Norway. The second seminar discussed what kind of obstacles there are in the Nordic countries to achieve the access to courts and justice in the best way. In Finland, for instance, the big problems are the risk of legal costs and the delays in court procedures. Costs have been too high also in Norway, and the aim to lower them was one of the main reasons for the latest procedural reform in Norway in 2008. However, the delays are not such a significant problem in the other Nordic, countries, and therefore the Finnish situation was compared with the other, especially the Swedish system. During the second workshop, the participants also discussed if mediation is the solution to the problems of this kind (costs, delays and so on) or if the state court system should be effective in its traditional form. The theme of the second workshop was "The obstacles in civil proceedings – Is the access to court in danger?", and the following presentations were given: Associate judge, PhD student Anna-Liisa Autio, Turku Court of Appeals, University of Turku, Finland: "The main problems in the access of court in the dispute resolution of the Finnish listed companies"; Professor, Dr. Laura Ervo, University of Örebro, Sweden, and University Teacher Amie Dahlqvist, University of Örebro, Sweden: "Delays in civil proceedings – comparative studies between Finland and Sweden"; Judge, PhD student Satu Saarensola, Pirkanmaa District Court, University of Turku, Finland: "The risk of legal costs and its effects into access to court"; Associate Professor, Dr. Clement Petersen, University of Copenhagen, Denmark, "The current Danish problems and good practices in the civil litigation"; Professor, Dr. Anna Nylund, University of Tromsø, Norway," ADR and Access to Justice"; and Professor Sigurður T. Magnússon, Reykjavik University, Iceland, "Is there a snake in an Icelandic paradise? The abuse of the 'ideal' system".

The third workshop was hold in autumn 2012 at the University of Copenhagen in Denmark, where the topic was "The Scandinavian court culture in progress". There,

Professor, Dr. Laura Ervo, University of Örebro, Sweden, gave a presentation on the historical point of view: "Coming from and going to? The procedural progress from the historical point of view". In addition, Professor, Dr. Elena Martínez García, University of Valéncia, Spain, talked about "Class actions on the continent, the Spanish example – the Anglo-American leaven or an efficient tool?" and Professor, Dr. Anna Piszcz, University of Bialystok, Poland, had the topic "Class actions in the East European court culture". Associate professor, Dr. Clement Petersen, University of Copenhagen, Denmark, talked about "Danish dispute resolution in 2035 – fears and visions" and Professor, Dr. Anna Nylund, University of Tromsø, Norway, about "European integration in the field of civil procedure from the Nordic point of view – Is there any space for individual policy?" whereas Professor Sigurður T. Magnússon, Reykjavik University, Iceland, touched the theme "Between America and Europe – how the geographical situation affects the legal culture". The third seminar discussed the Nordic legal cultures *de lege lata* and *de lege ferenda*.

The anthology is mainly based on presentations given by project members and guests at workshops. Lin Adrian as the best Danish expert on court-connected mediation and district court attorney Katrín Oddsdóttir joined us later, and their practical expertise supplements the anthology in a wonderful way.

1.2 Aims and Methods

What the status of state courts, the future of civil proceedings and the outlooks of the Nordic dispute resolution are concerned is that the situation has been dramatically changed during the latest decades, and it also varies in each Nordic country. Even if there have recently been huge civil procedural reforms in Nordic countries, the current problems and main trends are not identical. The trend to use mediation and ADR instead of traditional court proceedings is very strong in Norway and Denmark, as well as in Finland. At the same time, the atmosphere in Sweden has been more sceptical, and the traditional court proceedings have still preserved their strong role in the dispute resolution. On the other hand, there has been very much discussion on the functions of the civil proceedings in Sweden, and many scholars think that the most important function of civil proceedings is to solve conflicts, which means something much more than to only resolve the dispute.

In this book we use court-connected mediation to describe the mediation activities offered by courts in civil matters. This type of mediation is based on the generic definition of mediation as a facilitative and interest-based process, where the role of the mediator is to help the parties find a solution to their dispute or conflict. It is court-connected as the parties are referred to mediation by the court and because the program is operated by the court. The mediator might be a judge, an attorney or another professional who is paid by the court to mediate the case. If a judge acts as a mediator (s)he does it "out of robe", not in her/his role as a judge, but in a role as a mediator, and cannot usually decide the case should the mediation process fail.

National rules in the Nordic countries have some variation but are based on the same idea. Additionally, the way court-connected mediation is practiced might vary from one country to another, from one court to another and from one mediator to another, but system is built on the same ideas and same basic structure. The parts on mediation in Germany and Austria will use different terminology, as mediation is based on a different model and the Nordic terminology is not appropriate.

In addition to court-connected mediation, Nordic judges are allowed, and indeed encouraged, to promote settlements. In judicial settlement activities, the judge acts "in robe", in her/his role as a judge, and will decide the case if the parties do not settle. The judicial settlement activities are not a distinct service of the court, but rather a part of the general process is civil litigation.

The book will discuss the alternative dispute resolution, especially court-connected mediation, and its effects and needs to change the role of the courts. The Nordic point of view will especially be discussed in comparison with the continental perspective because there is a hot discussion even in the continent on the same topic, not least because of the mediation directive 2008/52/EU given by EU. In addition, the differences between the Nordic countries are taken separately into discussion.

Comparisons between the countries, their positive experiences and good practices, as well as the drawbacks and failures, should be discussed more at the Nordic level. By doing so, the best solutions, in other words, the best civil proceedings for the Nordic society and legal culture can be found. Such benchmarking will guarantee the best practices for the Nordic legal family and strengthen its position in the future. Therefore, one of our aims was to promote the Nordic comparisons and discussion and to make it familiar even outside the Nordic countries.

In addition, the book will discuss what kind of obstacles there are in the Nordic countries to achieve access to court and justice in the best way. In Finland, for instance, the big problems are the risk of legal costs and the delays in court procedures. However, the delays are not such big problems in the other Nordic countries. We can ask if mediation is the solution to the problems of this kind or if the state court system should be effective in its traditional form. The results of the project were assessments the Nordic legal culture *de lege lata* and *de lege ferenda*. At last, the project answered the questions from where we are coming and going to.

1.3 The Nordic Added Value

Before the European integration, the Nordic countries used to co-operate in a very effective way among legislative matters. The comparative studies and consultation on the experiences between the Nordic countries were really common when legislative reforms in some of the countries were under discussion. Unfortunately, this kind of co-operation has become lowered after the European integration, where Sweden, Denmark and Finland are as member states actively involved in. However,

Norway and Iceland are not member countries, and even Denmark has very often followed its own policy in the European matters and will not participate in co-operation in civil justice. Therefore, the Nordic co-operation could still have its role in legislative and jurisprudential issues. In addition, the European culture varies very much. There are countries based on common law or continental system within the same Union. Also, society and legal culture vary significantly, for instance, between the Southern Europe, Eastern Europe (especially between the former socialist countries) and the Nordic countries. The Nordic legal family is, however, still quite homogenous and therefore also unique. Also, the society in all Nordic countries is quite similar, which makes comparative studies easier and even judicial transplants possible. For these reasons, the comparative studies on dispute resolution would be very fruitful. If the comparative studies are made at the Nordic level, it is also possible to go into details. The reason is the same: similar legal and societal cultures. When comparative studies are made at the European level or from a global point of view, the context does not enable such detailed comparisons.

The system of class actions has got much criticism just because many think that it is an Anglo-American transplant, which does not fit into the Nordic or continental legal cultures as such. Professor Dr. Elena Martínez García has researched the class actions from a comparative point of view. This discussion will be fruitful also from a global point of view. There has been a discussion if the common law and continental systems will become closer to each other. That is why it is important to discuss if this phenomenon exists and how it effects the continental legal system. Professor Dr. Anna Piszcz will take up similar aspects from the East European point of view.

1.4 Contents of the Book

Two subjects arose above the rest, namely, court-connected mediation and problems in access to courts. The anthology is, therefore, called "The Future of Civil Litigation – Access to courts and court-connected mediation in the Nordic countries". It consists of five thematically organised chapters. After Laura Ervo's introduction where the background of the book, as well as the methods and aims of the research, are presented, the first main chapter covers understanding the civil justice in the Nordic countries. In that chapter, the recent Nordic reforms in civil justice are presented by a comparative perspective written by Clement Petersen, and after that the Nordic civil procedure is put in the context of European integration by Anna Nylund. Iceland is the link between the Nordic countries and the United States due to its geographical situation. Therefore, Americanisation is as its strongest in Iceland, and that phenomenon and its meaning in the North are researched 'especially from the Icelandic point of view' by Sigurður Tómas Magnússon and Katrín Oddsdóttir.

The second main chapter focuses on the current trend of mediation and how it affects the role of courts. The chapter starts with the continental point of view, and the German model for mediation is presented as a background for the mediation

mode. Traditionally, Norway has been a good example of different ways of mediation, and there the court-connected mediation is not a new phenomenon but originates already from the latter part of 1800s. Norwegian traditions are presented in Chap. 6. In Finland, the fashion of mediation is a new phenomenon, but the trend is quite strong, especially among the legislator and the doctrine. Kaijus Ervasti presents the Finnish situation in Chap. 7, especially with the help of empirical studies. Even if Sweden is geographically situated between Norway and Finland, it has not followed their example in this mediation progress. In Sweden, about 60 % of civil cases are settled during the preparation, but the court-connected mediation is not that common in practice or very popular topic in the legal literature. The Swedish situation is introduced in Chap. 8. However, in Denmark there is a strong school of mediation, which is presented by Lin Adrian in Chap. 9. The chapter is finished by Liisa Sippel's comparative analysis, where the Nordic mediation is compared with the Austrian one.

The next part focuses on access to courts and its problems and solutions. In Finland, there are no longer civil cases at courts, and this lacking trend has been frozen only, thanks to economic crisis and therefore growing debt cases. Especially, companies do not use courts to solve their disputes any longer. Anna-Liisa Autio has studied 'by using empirical method' the reasons behind this trend and taken up possibilities to make the access to courts of big companies better in the future. The other big problem in Finland is the high risk of legal costs. Parties will not take this risk to start the court procedure, but they tend to bear the loss even if having such right just to avoid the risk of legal expenses. This current situation is said to be a hindrance to access to courts and access to justice. Satu Saarensola will touch this problem in Chap. 12. The third big problem in Finland is delays of proceedings, whereas in Sweden the court procedures are working quite well from this perspective. The societal and legal backgrounds of these countries are very similar, and therefore it is fruitful to compare the countries with each other to find out the reasons and possible solutions to this difference and problem. Chapter 13, written by Laura Ervo and Amie Dahlqvist, covers therefore delays in civil proceedings—comparative studies between Finland and Sweden. After these specific perspectives to access to court problems, the topic is touched by Danish and Icelandic points of views by Clement Petersen and Sigurður T. Magnússon. In the end, the solutions to access to court problems, namely mediation and class actions, are discussed by Anna Nylund, Elena Martínez García and Anna Piszcz. Nylund discusses the positive points of mediation, at the same time, with its drawbacks, whereas Martinez Gracia and Piszcz focus on consumer protection and the consumers' access to court with the help of class actions. The latter discusses also if the system of class actions are compared from the local legal cultural point of view with the idea if this solution fits well in the current legal system or not.

The whole book is ended with historical and futuristic Chap. 19, written by Laura Ervo, where the changing court culture is discussed from historical and societal points of view. In Chap. 20, the main results are presented and the fruits of the project are put together by Anna Nylund.

Part I
Understanding the Civil Justice in the Nordic Countries

Chapter 2
A Comparative Perspective on Recent Nordic Reforms of Civil Justice

Clement Salung Petersen

Abstract The civil justice systems of Denmark, Norway and Sweden have much in common even though they, unlike other important areas of law, have not been subject to a formal Nordic legislative cooperation. This paper explores recent reforms of civil justice in Denmark, Norway and Sweden from a comparative perspective. The purpose is to identify and compare the general purposes and fundamental values, as well as some important general principles behind these Nordic civil justice systems, and to discuss to what extent they reflect a common Nordic approach to civil justice. The analyses show that these civil justice systems today generally aim to fulfill the same purposes and are essentially based on the same fundamental values and general principles and that these purposes, values and principles largely reflect a common Nordic approach to civil justice.

2.1 Introduction

The civil justice systems of Denmark, Norway and Sweden[1] have much in common even though they, unlike other important areas of law, have not been subject to a (formal) Nordic legislative cooperation. A modern civil justice system was introduced by historic reforms of civil justice enacted in Denmark (1916), Norway (1915) and Sweden (1942). These reforms were, to a large extent, inspired by the same procedural thinking from continental Europe and, in particular, by judicial codes of Germany and Austria.[2] The reforms were based, *inter alia*, on the fundamental principle that the administration of justice should be *public* and on a preference for *oral* proceedings where the judge should be free to assess evidence

[1] The analyses in this paper will not comprise the civil justice systems of Finland and Iceland.

[2] See Chap. 2.2, *infra*.

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based on his inner conviction, thus abolishing formal rules on assessment of evidence found in previous Nordic laws.

The Nordic countries have since then gone through significant societal developments. This has also influenced the nature of civil disputes which are today often international in nature and significantly more complex. International law is also increasingly affecting the Nordic civil justice systems.[3] It is therefore not surprising that the Nordic countries have made numerous amendments to their civil justice systems to accommodate the changing needs stemming from this development. Many of these reforms have been based on thorough considerations in law commissions that have often considered developments in other Nordic countries.[4] Civil justice issues have also been on the agenda at several meetings of the Nordic Congress of Jurists (*Nordisk Juristmøde*) since they began in 1872.[5] A Nordic Association for Procedural Law was established in 1981 and is still active.[6]

During this period of time, the Nordic countries have maintained a close cultural relationship sharing the same democratic and social values, as well as a distinct legal culture.[7] Since it is often held that a specific culture and its ways of disputing are closely interconnected,[8] it is reasonable to assume that the development of the Nordic civil justice systems since the historic reforms of the twentieth century has much in common. There is, however, not much comparative legal research within this area. This paper seeks to fillout this gap by exploring recent reforms of civil justice in Denmark, Norway and Sweden from a comparative perspective. The purpose is to identify and compare the general purposes and fundamental values, as well as some important general principles behind these Nordic civil justice systems, and to discuss to what extent they reflect a common Nordic approach to civil justice.

2.2 Recent Nordic Reforms of Civil Justice: An Overview

Before exploring the Nordic reforms from a comparative perspective, it is pertinent to first give a brief overview of the recent developments of the civil justice systems in Denmark, Norway and Sweden.

[3] See Sect. 2.2.4, *infra*.

[4] See Chap. 2.3, *infra*.

[5] See, *inter alia*, Tamm (1972), p. 175 et seq.

[6] See http://nffp.info (last visited 10 August 2013) and Bylander (2013), pp. 337–342.

[7] See, *inter alia*, Bernitz (2007) and Tamm (1998).

[8] See, *inter alia*, Jolowicz (2000), p. 7, and Chase (2005).

2.2.1 Denmark

The modern Danish civil justice system originates from an Administration of Justice Act (*Retsplejeloven*), which was enacted in 1916 and entered into force in 1919.[9] The preparation of this Act began as early as 1852, and most of the preparatory works were finalized in 1899. Even though this Administration of Justice Act introduced a more modern system of civil justice in Denmark, it was thus largely based on procedural ideas and thinking of the nineteenth century.[10]

The Danish Administration of Justice Act has been subject to several partial reforms since it was enacted in 1916.[11] These include a comprehensive reform of the administration and management of civil cases, which entered into force in 1980.[12] In the 1990s, an increasing pressure for a more comprehensive reform of the civil justice system emerged. This has recently resulted in three significant reforms of the Danish civil justice system.

The first of these reforms concerned the administration of the Danish court system. Historically, the Ministry of Justice has administered the Danish court system, including its funds and the appointment of judges. Even though there is no evidence to suggest that this has had an impact on judicial independence in Denmark, a law committee recommended (in 1996) a number of steps to increase the actual independence of the Danish judiciary from the Danish government and parliament. Based on these recommendations, the Danish legislature has established a new and independent administrative body, the Courts Administration (*Domstolsstyrelsen*), to administrate the Danish courts (*Danmarks Domstole*).[13] Furthermore, the Danish legislature has established an independent council, the Judicial Appointments Council (*Dommerudnævnelsesrådet*), which submits recommendations to the Minister of Justice about the appointment of judges to the Danish courts.[14] The council is composed of a Supreme Court judge, a High Court judge, a district court judge, a lawyer and two representatives of the public.[15] The council may only recommend one applicant for each position, and in practice the Minister of Justice follows the recommendations from the council.

The second reform concerned the structure of the Danish court system. In 1998, the Danish government asked a committee to look at the structure of the Danish court system and, in particular, the role of the—then 82—district courts. In its report from 2001, this committee recommended a comprehensive structural reform of the Danish court system.[16] To meet the challenges faced by the justice system,

[9] A general account in English of the Danish civil justice system can be found in Werlauff (2010).

[10] See, *e.g.*, Tamm (1969).

[11] For an overview, see, *e.g.*, Gomard and Kistrup (2007), p. 48 et seq.

[12] See Act no 260 of 8 June 1979, which was based on two law committee reports (698/1973 and 871/1979).

[13] See Act no 401 of 26 June 1998.

[14] See Act no 402 of 26 June 1998.

[15] See Section 43 a of the Danish Administration of Justice Act.

[16] Law committee report 1398/2001.

the committee, *inter alia*, recommended a significant reduction of the number of district courts. These recommendations were included in a comprehensive reform enacted in 2005.[17]

The third reform also originates from 1998, when the Ministry of Justice asked the Administration of Justice Committee (*Retsplejerådet*), a standing committee under the Ministry of Justice, to prepare a general reform of the entire Danish civil justice system. This work, which (as of 2013) is still ongoing, has so far resulted in seven reports from this committee:

- Report no 1401/2001 on the court system, the composition of district courts and administration of cases in the first instance,
- Report no 1427/2003 on public access to civil and criminal cases,
- Report no 1436/2004 on access to courts,
- Report no 1468/2005 on group actions,
- Report no 1481/2005 on court-connected mediation,
- Report no 1522/2010 on judicial enforcement of civil claims filed and growing out of the prosecution of a criminal offence (*adhæsionsproces*),
- Report no 1530/2012 on interim injunctions.

Based on the recommendations included in these reports, the Danish parliament has adopted the most comprehensive reforms of the Danish civil justice system since the Administration of Justice Act was enacted in 1916.[18] Other recent reforms also have a bearing on the Danish civil justice system, including a reform of the rules governing lawyer's practice in Denmark, a reform of the rules on the appearance of judges in court meetings and a reform of the rules governing service of documents.[19]

2.2.2 Norway

Until recently, the modern Norwegian civil justice system was based on three statutes enacted in 1915: a Courts Act (*Domstolsloven*), a Civil Procedure Act (*Tvistemålsloven*) and an Enforcement Act (*Tvangsfullbyrdelsesloven*). The preparation of this legislation began in 1891, and it was, like the Danish Administration of Justice Act of 1916, influenced by the civil procedure codes of Germany and Austria.[20] Most of this legislation entered into force in 1927.

[17] See Act no 538 of 8 June 2006 (general reform of the court system).

[18] See Act no 554 of 24 June 2005 (costs and legal aid), Act no 538 of 8 June 2006 (general reform of the court system), Act no 181 of 28 February 2007 (group actions), Act no 168 of 12 March 2008 (court-connected mediation) and Act no 1387 of 23 December 2012 (interim injunctions).

[19] See law committee report 1479/2006 and Act no 520 of 6 June 2007 (lawyer's practice), Act no 495 of 12 June 2009 (judges' appearance in court meetings), report 1528/2011 and Act no 1242 of 18 December 2012 (service).

[20] See law committee report (*Norges offentlige utredninger*) NOU 2001:32 (Part A), p. 124 et seq. For an introduction in English to the history of the Norwegian Civil Procedure Act of 1915, see, *inter alia*, Sunde (2011) and Fredriksen (2011).

The Norwegian civil justice system has remained essentially based on this legislative package throughout most of the twentieth century.[21] However, a new Enforcement Act was enacted in 1992, and, subsequently, the Norwegian parliament has passed three major reforms of the Norwegian civil justice system.

The first reform concerned the administration of the Norwegian court system. Traditionally, the Norwegian Ministry of Justice has administered the court system, including its staff, budget and other resources. In 1996, a commission (*Domstolkommisjonen*) was established to consider the future administration of the Norwegian court system, and this commission submitted its recommendations in a report in 1999.[22] Based on these recommendations, the Norwegian parliament adopted a comprehensive reform of the administration of the Norwegian courts in 2001. The purpose of this reform was to ensure the independence of the Norwegian judiciary. The administration of the Norwegian courts was moved from the Ministry of Justice to a new and independent body, the Norwegian Courts Administration (*Domstoladministrasjonen*). Furthermore, the procedure for appointment of judges was changed: the government now appoints a Council for Nomination of Judges (*Innstillingsrådet for dommere*), which consists of three judges, two lawyers and two lay representatives. Based on interviews of applicants, the council nominates three applicants to each position and lists the nominated applicants in order of priority. The King-in-Council will normally appoint the nominated applicant with the best priority, but it may instead choose one of the other nominated applicants. The reform also included new rules on the extrajudicial activities of judges and establishment of a new Supervisory Council (*Tilsynsrådet for dommere*) to hear complaints against judges (and take up cases on its own initiative in this respect).[23]

The second reform concerned the courts of first instance. In 1997, a committee (*Strukturutvalget*) was set up and asked to look at the structure and functions of the courts of instance, and this committee submitted its recommendations in a report in 1999.[24] This committee, *inter alia*, recommended a reduction of the number of district courts from 92 to somewhere between 52 and 56.[25] Based on the recommendations from the committee, the reform reduced the number of district courts to a total of 66.[26]

The third reform concerned the rules on civil procedure as a whole: in 1999, the Norwegian Ministry of Justice decided to initiate a comprehensive reform of the rules on civil procedure by setting up a law committee. This committee submitted

[21] See, *inter alia*, NOU 2001:32 (Part A), pp. 125–126.

[22] See report NOU 1999:19 (*Domstolene i Samfunnet*).

[23] The reform was enacted based on Ot.prp.nr. 44 (2000–2001) and Innst. O.nr. 103 (2000–2001). The reform is described in English by Backer (2011), p. 42 et seq. See also Rosseland (2007), pp. 608–628.

[24] See report NOU 1999:22 (*Domstolene i første instans*).

[25] See report NOU 1999:22, pp. 39–42.

[26] See, *inter alia*, the government report St.meld. nr. 23, *Førsteinstansdomstolene i Fremtiden* (2001), Order no 1014 of 31 August 2001 and Order no 1494 of 16 December 2005 (*Forskrift om domssogns—og lagdømmeinndeling*) with subsequent amendments.

its recommendations in a comprehensive report in 2001.[27] Based on these recommendations, the Norwegian parliament adopted an entirely new Dispute Act (*Tvisteloven*) in 2005, which completely replaced the Civil Procedure Act of 1915.[28] This reform entered into force in 2008 and constitutes a comprehensive reform of the Norwegian civil justice system.

2.2.3 Sweden

Whereas Denmark and Norway both have a single court system with general jurisdiction, Sweden upholds a separate system of administrative courts. This paper will focus only on the Swedish general court system (*allmän domstol*).[29]

The modern Swedish civil justice system is based on a Code of Judicial Procedure that was enacted in 1942 and entered into force in 1948. This code replaced the old code of judicial procedure that was part of the historic Code of 1734 (*1734 års lag*). Work on the reform that eventually led to the 1942 code began as early as the beginning of the nineteenth century,[30] but it would take two different law commissions several decades to finalize the work in the beginning of the twentieth century.[31]

The Swedish Code of Judicial Procedure has been subject to several amendments since it was enacted in 1942.[32] In particular, the Swedish legislature enacted significant reforms in 1987 (district courts) and 1989 (courts of appeal), which were based on recommendations from a law committee established in 1977 (*Rättegångsutredningen*).[33]

Within the past decade, the Swedish civil justice system has also been subject to significant changes. In 1999, the Swedish government set up a law committee to look at the needs for reform of the Code of Judicial Procedure (*1999 års*

[27] See report NOU 2001:32, (*Rett på sak*). Volume B, Chapter 2, includes a summary and overview in English of the report.

[28] See Act no 90 of 17 June 2005 (*Lov om mekling og rettergang i sivile tvister*).

[29] For an overview of the Swedish court system in English, see, *inter alia*, Unknown (2007). An older comprehensive account in English of Swedish civil procedure can be found in Ginsburg and Bruzelius (1965).

[30] See, *e.g.*, Modéer (1999), p. 400.

[31] A law commission was established in 1911, which submitted its recommendations for a comprehensive reform in a report from 1926; see SOU (*Statens offentliga utredningar*) 1926:31–33, *Processkommissionens betänkande angående rättegångsväsendets ombildning*. Subsequently, another law commission was set up, which presented its recommendations in 1938; see SOU 1938:43–44, *Processlagberedningens förslag till rättegångsbalk*.

[32] See, *e.g.*, Gullnäs (1999).

[33] See, in particular, prop. 1986/87:89 (*Ett reformerat tingsrättsförfarande)* and prop. 1988/89:95 (SFS 1989:656). See also the committee reports SOU 1982:25–26, SOU 1986:1, SOU 1987:13 and SOU 1987:46.

rättegångsutredningen). Based on the recommendations of this committee, as well as other important input, the Swedish legislature enacted a comprehensive reform in 2005 (*En modernare rättegång—reformering av processen i allmän domstol*).[34] This reform was recently evaluated.[35]

The structure of the Swedish court system has also been subject to significant changes. A major reform was enacted in 1971, and the number of district courts has subsequently been further reduced from 96 to 48 through several reforms in the period from 1999 through 2007.[36] At the same time, the overall role of the Swedish Supreme Court was changed to focus mainly on issues of a general public importance (*precedents*).[37]

Other significant reforms include the introduction of group actions (*grupprättegång*) in 2003,[38] new rules on mediation and settlement[39] and new rules on the appointment of judges.[40]

2.2.4 International Influence on Nordic Civil Justice

Civil justice in the Nordic countries is today deeply affected by international law. International human rights law, in particular the European Convention on Human Rights (ECHR), and the law of the European Union (the European Economic Area) play a significant role in this regard.

Denmark, Norway and Sweden became members of the Council of Europe on 5 May 1949 and ratified the ECHR in 1950. Following an increasing awareness of the obligations under the ECHR, all three countries—which generally follow a dualist approach to international law—chose to incorporate, *inter alia*, the ECHR into their national laws in the 1990s.[41] By doing this, the obligations of the ECHR became an inherent part of the national civil justice systems in these countries. In 1971–1972, Denmark, Norway and Sweden also ratified the UN International Covenant on Civil and Political Rights (ICCPR).

[34] See prop. 2004/05:131.

[35] See law committee report SOU 2012:93 (*En modernare rättegång II—en uppföljning*) and the comments to this report by Ekeberg (2013) and Levén and Wersäll (2011).

[36] See *Förordning (1982:996) om rikets indelning i domsagor* as subsequently amended. See also, *inter alia*, SOU 1998:135.

[37] See Chap. 2.4.6, *infra*.

[38] See Act no 2002:599 (*Lag om grupprättegång*), which is based, *inter alia*, on prop. 2001/02:107 and SOU 1994:151.

[39] See, *inter alia*, Prop. 2010/11:128, *Medling och förlikning*.

[40] See, *inter alia*, Prop. 2007/08:113, Prop. 2009/10:181 and Prop. 2010/11:24.

[41] The legislation incorporating the ECHR was adopted in 1992 Denmark, in 1994 in Sweden and in 1999 in Norway.

It is wellknown that also European Union law is increasingly influencing the national civil justice systems of its member states.[42] In this regard, there are some important differences between the Nordic countries: Denmark and Sweden are EU member states, but Denmark has been granted certain opt-outs from the European cooperation, including from the area of freedom, security and justice, which, *inter alia*, entails that Denmark participates in the EU judicial cooperation at an intergovernmental level only.[43] As a consequence, several important EU instruments within the area of civil justice do not apply directly in relation to Denmark. Some of them instead apply under special agreements between the EU and Denmark.[44] Norway is not a member of the European Union but an EEA EFTA member country.[45] This affects Norwegian civil procedure law in many of the same ways as EU law affects the civil procedure of the EU member states.[46]

2.3 Purposes and Fundamental Values

The Nordic judicial codes have traditionally not included any specific provisions about the purposes and fundamental values of their civil justice systems. This was changed with by the recent comprehensive Norwegian reform of civil justice, which introduced a new general provision about the purposes of the Norwegian Dispute Act. The first part of this provision reads as follows:[47]

> The Act [. . .] shall provide a basis for dealing with legal disputes in a fair, sound, swift and confidence inspiring manner through public proceedings before independent and impartial courts. The Act shall attend to individual dispute resolution needs as well as the need of society to have its laws respected and clarified.

This provision will serve as a starting point for the analyses below of the purposes and fundamental values of Nordic civil justice.

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[42] See, *inter alia*, Lenaerts et al. (2006), in particular Chaps. 2 and 3, Storskrubb (2008) and Hess (2012).

[43] See www.eu-oplysningen.dk.

[44] As an example, the Brussels I Regulation (44/2001) does not apply directly in relation to Denmark, but the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters makes the provisions of the Regulation applicable also in relation to Denmark.

[45] See www.efta.int.

[46] See, *inter alia*, Fredriksen (2008).

[47] §1-1(1) of the Act. See also §1-1(2) of the Act mentioned *infra*, Chap. 4. The English translation is taken from NOU 2001:38.

2.3.1 Purposes of the Civil Justice System

It is explicitly stated in the provision that the civil justice system has two distinct purposes. One purpose is to accommodate the needs of individuals for dispute resolution, *i.e*. for settlement of specific disputes and protection of individual legal interests (access to justice). This is an important aspect of how the civil justice system supports the fundamental function of law as "civilization's substitute for vengeance".[48]

Another purpose is to accommodate the need of society to have its laws respected and clarified. This actually covers two distinct and well-known needs of society.[49] The first is related to the need of any society based on the rule of law to ensure an adequate level of respect for and compliance with its laws. Here, the civil justice system has an important purpose to demonstrate the effectiveness of the law. It may provide "corrective justice" to the individual, and ideally this will have a preventive effect that will support a general respect for the law.[50] This supports social stability and order.[51] As such, the civil justice system may be regarded as an important instrument to serve the social goals decided by the legislator (behavior modification). This has become particularly pertinent in modern welfare states, which eventually require courts to ensure the web of rights that they create. Indeed, one may regard this as the main societal purpose of the civil justice system.[52]

The civil justice system also provides an opportunity for judges not only to interpret and apply but also to clarify and develop the law. This accommodates another important societal need. Judge-made law (precedents) is thus common in the Nordic countries not least because of the lack of modern codifications within the area of private law.[53] It falls outside this paper to go into a discussion about the extent of this role of the judiciary.[54]

The general purposes discussed so far are also recognized as fundamental to the civil justice systems of Denmark and Sweden.[55] Whereas these purposes appear to be regarded as uncontroversial in Denmark and Norway, there has been a rather intense scholarly debate in Sweden about the importance of the different societal

[48] See Couture (1950), p. 7.

[49] See, *inter alia*, Jolowicz (2000), pp. 71–80, Skoghøy (2010), p. 3, and the works mentioned *infra*.

[50] See, *inter alia*, Lindblom (1997), p. 606.

[51] See, *inter alia*, NOU 2001:38, vol. A, p. 128.

[52] This has particularly been emphasized in Swedish legal doctrine; see *infra*.

[53] See, *inter alia*, Bernitz (2007), pp. 20–23.

[54] For a discussion of the limits for such judicial activity under Danish law, see, *inter alia*, Zahle (2005), pp. 134–150, and Gomard (1986).

[55] For Denmark, see, *inter alia*, law committee report no 1401/2001, pp. 83–84, and Gomard and Kistrup (2007), pp. 19–23. For Sweden, see, *inter alia*, SOU 1982:26, p. 138; SOU 1994:99 (*Domaren i Sverige inför framtiden*), pp. 39–50; and SOU 2007:26, pp. 110–111.

purposes of civil justice mentioned above.[56] In this debate, some scholars have argued that the *main* societal function of the Swedish civil justice system is to ensure that persons comply with the law and its values, *i.e.* to ensure the *effectiveness* of law and its values in society.[57] As such, the civil justice system is a social institution that contributes to the upholding of good public morals and cultural integration.[58] Other scholars have disputed this view and claimed that the main function of the civil justice system is (or should be) to solve specific disputes.[59] It appears that the Swedish legislator has not clearly addressed this scholarly debate.[60] However, it seems to be a prevailing view today that the two functions should not be regarded as distinct alternatives and that the Swedish civil justice system generally serves (and should serve) both purposes.[61]

The purposes mentioned so far are *intended* general purposes or functions of civil justice. To my knowledge, there is limited research on the *actual* functions and dysfunctions of the Nordic civil justice systems.[62]

Despite the important societal functions discussed above, it should be noted that the Nordic civil justice systems generally favor settlements based on amicable solutions, including through private measures (ADR). Nordic judges are under an obligation to look for amicable solutions, which in Norway is supplemented by a partly mandatory out-of-court pretrial mediation procedure before the Concilliation Boards (*Forliksråd*).[63] This obligation was recently emphasized in Norway and Sweden.[64] Denmark and Norway have introduced new rules on court-connected

[56] For an overview of the different views, see, *inter alia*, Ekelöf and Edelstam (2002), pp. 13–30 (in particular, p. 20); Lindell (2012), pp. 21–29; Lindblom (1997), p. 606; Westberg (2012); and the contributions in Rättsfonden (1972). For an account in English, see also Lindblom (2007), pp. 281–310, and Storskrubb (2008), pp. 295–301.

[57] This was, *inter alia*, the view of Swedish professor Per Olof Ekelöf; see Ekelöf and Edelstam (2002), pp. 13–30 (in particular, p. 20), and Lindell (2012), pp. 21–29.

[58] Ekelöf and Edelstam (2002), p. 20.

[59] See Lindell (2012), pp. 21–29. For an overview, see also Westberg (2012), pp. 53–77.

[60] Lindblom (1997), p. 604 (footnote 39), and Westberg (2012), p. 57. The matter is briefly discussed, *inter alia*, in SOU 1982:26, p. 138; SOU 1994:99, pp. 39–50; and SOU 2007:26, pp. 110–111.

[61] See, *inter alia*, Ekelöf and Edelstam (2002), pp. 13–30; Lindell (2012), pp. 21–29; Lindblom (2007), pp. 281–310; and Bertilsson (2010), pp. 31 et seq.

[62] Westberg (2012), p. 57, notes that no Swedish scholars have presented empirical data to support their views on the general function(s) of Swedish civil justice. Professor Westberg has provided a comprehensive analysis of (manifest and latent) functions and dysfunctions of preliminary enforcement measures in Sweden in Westberg (2004). I have analyzed functions and dysfunctions of using preliminary injunctions to enforce intellectual property rights in Petersen (2008).

[63] The obligation of judges to function as a mediator in civil litigation can be found in Chapter 26 of the Danish Administration of Justice Act, Chapter 42 (Sections 6 and 17) of the Swedish Judicial Code and Chapter 8 (Sections 8-1 and 8-2) of the Norwegian Dispute Act. The special Norwegian rules on Concilliation Boards (*Forliksrådet*) can be found in Chapter 6 of the Norwegian Dispute Act.

[64] See the general Norwegian reform of civil justice and Swedish Prop. 2010/11:128. The Danish Committee on Administration of Justice has announced that it will later look at the Danish rules on mediation by courts (*forligsmægling*); see Report no 1481/2005 on court-connected mediation.

mediation that also aim to support amicable solutions.[65] At the same time, there is a strong general support for private dispute resolution. Denmark, Norway and Sweden have enacted new legislation governing arbitration that generally encourages private dispute resolution in the form of arbitration with some exceptions, most notably consumer disputes.[66] The strong societal support for arbitration is probably based on financial considerations.[67] These aspects of the Nordic civil justice systems can be perceived as attributing special emphasis on the needs of individuals for dispute resolution to the detriment of the societal needs discussed above.[68] Recent initiatives from the EU support this development.[69]

The Nordic civil justice systems also serve other purposes than those discussed above. One important purpose is that of *judicial review*. In Denmark and Norway, judicial review is a task entrusted to the civil justice system.[70] In Sweden, judicial review is, for all practical purposes, a task for the administrative court system.[71] Whereas judicial review of administrative rules and decisions is readily available and quite common, judicial review of legislation is also available but less common, at least in Denmark.[72]

The Nordic civil justice systems also have an important—and increasing—function in enforcing international law obligations governing relations between states and private individuals (vertical treaty rules) and transnational relations between private individuals (transnational treaty rules).[73] This is particularly

[65] For Denmark, see law committee report no 1481/2005 on court-connected mediation and Act no 168 of 12 March 2008. For Norway, see Section 8-3 et seq. of the Dispute Act. See also the contribution by Lin Adrian elsewhere in this book.

[66] This legislation is widely based on the UNCITRAL Model Law on International Commercial Arbitration.

[67] See in this regard Westberg (2012), p. 76.

[68] See in this regard Westberg (2012), p. 61.

[69] See, *inter alia*, Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters, which, according to Article 1(1), has the objectives of facilitating access to Alternative Dispute Resolution (ADR) and promoting the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings. See the recent Directive on Consumer ADR (Directive 2013/11/EU) and the recent Regulation on Consumer ODR (Online Dispute Resolution) (Regulation No 524/2013). As explained in Sect. 2.4, *supra*, these initiatives do not directly affect Denmark and Norway.

[70] For an overview of judicial review in Denmark, see, *inter alia*, Report no 1401/2001, pp. 88–91 and 135–142. For an overview of judicial review in Norway, see, *inter alia*, NOU 2001:32, pp. 193–202.

[71] See, *e.g.*, Westberg (2012), pp. 69–70.

[72] For a comprehensive analyses in English about the role of judicial review in the Nordic countries, see the papers published in Nordisk Tidsskrift for Menneskerettigheder, vol. 27 (2009) Issue 2. See also Rytter (2001), pp. 137–174, and Lindblom (2000a), p. 335.

[73] For a comparative (non-Nordic) introduction to this topic, see Sloss (2009).

evident as regards EU (and EEA) law where the national court systems of the member states play an essential role in the enforcement of EU law.[74]

2.3.2 *Fundamental Values*

The provision in the Norwegian Dispute Act quoted *supra* (in the introduction to this Chap. 2.3) also lists a number of fundamental values and considerations behind the Norwegian civil justice system.[75] These values are, to a large extent, overlapping ("fair", "sound" and "confidence inspiring"), but they can also be contradictory (*e.g.*, "swift" may not always be "fair", "sound" and "confidence inspiring").[76]

These values are strongly influenced by international law, in particular the ECHR and its requirements for "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".[77] It is therefore no surprise that the Danish and Swedish civil justice systems are essentially based on the same values.

Thus, in connection with the recent general reform of the Danish civil justice system, the Danish Administration of Justice Committee identified four fundamental values:[78] courts must be available for dispute resolution (access to court), the dispute resolution must be justifiable for the purpose of correct decisions, disputes brought before courts must be settled within a reasonable time and the costs must be acceptable to the parties and the society at large.[79] The Committee emphasized that it is also important in itself that the civil justice system promotes confidence in this system.[80] The Committee emphasized the influence of, *inter alia*, the ECHR.[81]

Similar values can be found in the Swedish civil justice system. Since the Swedish Judicial Code entered into force in 1948, several reforms have thus focused on making procedures more efficient and less costly without prejudicing

[74] See, *inter alia*, the *Peterbroeck* judgment of 14 December 1995, Case C-312/95, §12, which includes references to the previous case law of the ECJ on this matter, and the *van der Weerd* judgment of 7 June 2007, Joined Cases C-222/05 to C-225/05, §28.

[75] See NOU 2001:32, Bind A, pp. 149–150; NOU 2001:32, Bind B, pp. 649–651, prp. pp. 44 and 363 and innst. pp. 11–12. See also Schei (2007), vol. I, pp. 21–26.

[76] See Schei (2007), vol. 1, p. 23.

[77] Article 6(1) of the ECHR.

[78] See, *inter alia*, the Danish law committee report no 1401/2001 (mentioned *supra*), pp. 83–86.

[79] These values were also mentioned as "especially important" in the Norwegian report NOU 2001:38, p. 129.

[80] *Op. cit.*

[81] *Op. cit.*, pp. 95–104.

the ability to make correct decisions.[82] Recently, the Swedish government has also focused on promoting public confidence in the (civil) justice system.[83]

2.4 General Principles

The Norwegian Dispute Act includes a list of general principles that aim to support the purposes and fundamental values discussed *supra*.

Norwegian Dispute Act §1-1(2) states:

> In order for the purposes under (1) to be achieved:
>
> - Each party shall be permitted to argue its case and to present evidence,
> - Each party shall be permitted access, as well as the opportunity to respond, to the arguments and evidence of the opposite party,
> - Each party shall at one stage of the proceedings be permitted to argue its case orally, as well as to make a first-hand presentation of its evidence, before the court,
> - The procedure and costs involved shall be in reasonable proportion to the importance of the case,
> - Differences between the parties in terms of resources shall not be decisive to the outcome of the case,
> - Grounds shall be given for important rulings, and
> - Rulings of special importance shall be open to review.

The analysis below will show to what extent these principles can be regarded as general principles of civil justice also in Denmark and Sweden. It should be noted that this analysis does not pretend to comprise *all* general principles of Nordic civil justice and that it falls outside the scope of this paper to discuss what other principles may be identified as general principles of civil justice.[84]

2.4.1 Arguing of the Case and Presentation of Evidence

According to the two first-mentioned principles, each party shall be permitted to argue its case and to present evidence, including in response to the arguments and evidence of the opposite party. Nordic lawyers have traditionally deduced these

[82] This was one of the overall objectives of the reforms based on *Rättegångsutredningen*; see, *inter alia*, SOU 1982:26, pp. 13–16.

[83] See SOU 2008:106 and Ds 2009:66.

[84] For a discussion of this topic from a Nordic perspective, see, *inter alia*, Lindblom (2000b), pp. 105–155.

principles of civil procedure from three fundamental ideas or principles (*maxims*) behind Nordic civil justice: *dispositionsprincippet* (the dispositive principle), *forhandlingsprincippet* (the principle of party presentation/initiative) and *kontradiktionsprincippet* (*audiatur et altera pars*). It follows, *inter alia*, from these principles that the court must respect the autonomy of the parties, including their right to decide on the content and scope of their litigation; that the court must decide the case on the basis of the claims, allegations and evidence presented by the parties (the court should thus not conduct its own investigations of the facts of the case); and that each party has a right to comment on all arguments and evidence presented by the other parties.[85]

The rights of a party to argue its case and to present evidence are related to the concept of a "fair hearing" under Article 6 of the ECHR.[86] This concept implies, *inter alia*, the right to adversarial proceedings, according to which the parties must have the opportunity not only to make known any evidence needed for their claims to succeed but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision.[87]

2.4.2 Traditional Preference for Oral Communication, Immediacy and Free Evaluation of Evidence

According to the third-mentioned principles, each party shall at one stage of the proceedings be permitted to argue its case orally, as well as to make a first-hand presentation of its evidence, before the court. These principles are also largely protected by Article 6(1) of the ECHR.[88]

The right of a party to argue its case orally is closely associated with the traditional Nordic preference for oral communications in civil litigation (often referred to as the *principle of orality*), which, as already mentioned, was a fundamental principle behind the modern Nordic civil justice systems.[89] This principle is connected to the principle of *immediacy*, according to which the court can base its

[85] On these principles in Nordic civil procedure, see, *e.g.*, Lindell (2012), pp. 101–124; Gomard and Kistrup (2007), pp. 500–541; and Skoghøy (2010), pp. 477–526. Compare Jolowicz (2000), pp. 175–182.

[86] See also Article 47 of the Charter of Fundamental Rights of the European Union.

[87] See, *inter alia*, Mantovanelli v. France (ECtHR judgment of 18 March 1997, AppNr 21497/93) at §33 and Krčmář and Others v. the Czech Republic (ECtHR judgment of 3 March 2000, AppNr 35376/97) at §40.

[88] On the right to an "oral hearing", see, *inter alia*, GÖÇ v. Turkey (ECtHR judgment of 11 July 2002, AppNr 36590/97) at §47 and Miller v. Sweden (ECtHR judgment of 8 February 2005, AppNr 55853/00) at §29.

[89] See Chap. 2.1, *supra*.