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Impact of the ELI/UNIDROIT European Model Rules for Civil Procedure on national law – the case of Norway

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Abstract:

The article offers a first analysis of the potential impact of the new ELI/UNIDROIT European Model Rules for Civil Procedure at the national level. Taking one of the Nordic/Scandinavian countries as an example, the articles suggests that the Model Rules will come to influence Norwegian civil procedure in three different ways: i) Influence on the interpretation and application of the existing national law, ii) influence on future legal reforms and iii) influence via the law of the European Union. In general, the openness and pragmatism of the Nordic/Scandinavian legal culture is likely to facilitate the Model Rules' impact. Still, the extent of the impact in concrete cases will depend on the perceived fit of the Model Rules to the existing Code on Civil Procedure and its underlying aims and values.

Key-words: ELI/UNIDROIT European Model Rules for Civil Procedure, Scandinavian legal culture, Norway, European Union.

I. INTRODUCTION

The European Model Rules for Civil Procedure[1] is the result of a joint project of the International Institute for the Unification of Private Law (*Institut international pour l'unification du droit privé*, UNIDROIT) and the European Law Institute (ELI). The aim was, as suggested by the project's name, to develop model rules for civil procedure in Europe. It built upon an instrument produced jointly by the American Law Institute (ALI) and UNIDROIT, the *Principles of Transnational Civil Procedure* of 2004,[2] adapting those principles to the European context in the light of: (a) the European Convention on Human Rights[3] and the Charter of Fundamental Rights of the European Union[4]; (b) secondary EU legislation; (c) common traditions in the European countries; (d) the Storme Commission's work[5]; and (e) other pertinent European sources.

The project, which started in October 2013, was managed by a Steering Committee with representatives from both ELI and UNIDROIT. The work was organized by Working Groups that each had members from the various European legal families. The Working Groups were entrusted to propose model rules for all the main topics covered by the ALI/UNIDROIT Principles. Additionally, the Steering Committee decided to develop rules on appellate proceedings. Eight Working Groups were thus established, with their fields of responsibility clearly mirrored in their respective names:[6]

- Access to information and evidence
- Provisional and protective measures
- Service of documents and due notice of proceedings
- *Lis pendens* and *res judicata*
- Obligations of the parties and lawyers
- Judgments
- Parties and collective redress

1 Available online at https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules. Published in 2021 as ELI/UNIDROIT: *From Transnational Principles to European Rules of Civil Procedure. Model European Rules of Civil Procedure,* Oxford University Press, 2021.

2 Available online at https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles. Published in 2005 as ALI/UNIDROIT, *Principles of Transnational Civil Procedure*, Cambridge University Press 2005.

3 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

4 Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, p. 389–405.

5 Marcel Storme (ed.), *Rapprochement du Droit Judiciaire de L'Union européenne/Approximation of Judiciary Law in the European Union*, Dordrecht/Boston/London: Martinus Nijhoff Publishers 1994.

6 For a complete list of the members of the Working Groups: see *From Transnational Principles to European Rules of Civil Procedure. Model European Rules of Civil Procedure,* p. vii-x. One of the authors of this article, Strandberg, was a member of both the working group on obligations and the working group on appeals. The working group on appeals was organized somewhat differently from the other groups. It had only four members, was established in the latest parts of the project and worked under a tighter schedule than the other groups.

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- Costs
- Appeals

All drafts from the working groups were discussed in plenary sessions where all members of the project and all observers were invited. In the very last phase of the project, an overarching 'Structure Group' was established with the task to consolidate the texts from the various working groups, to establish a common structure, and to ensure coherence and avoid gaps where aspects might not be covered by any of the designated working groups. The Structure Group was also in charge of writing the introductory chapters to the rules. The Model Rules, in English and French, were approved by both ELI and by UNIDROIT in 2020.

For any assessment of the outcome of the project, it is important to stress that the aim was not to devise a set of rules articulating common practices, i.e. a "restatement" of European civil procedure, nor was it to devise a set of rules based on the predominance of approaches across European jurisdictions, or based on compromise.[7] Rather, the aim was to devise a set of best practice rules for the future development of European civil procedure.[8] Thus, the working method of the project was not one of traditional comparative law. Instead, the project was based on the optimum approach, which means the working groups, taking as their starting point the ALI/UNIDROIT Principles and considering the different approaches present in different European legal traditions, EU law and the European Convention on Human Rights, sought after the optimum European model rules of civil procedure for the future.[9]

A self-evident ambition of the Model Rules is to influence the development of civil procedural law in Europe, both on the level of supranational European law and within the different national jurisdictions. The aim of this contribution is to discuss how the Model Rules might come to fulfil this ambition in a small Nordic country: Norway. Although our analysis will be limited to Norway, parts of it may be relevant also for the other Nordic countries and perhaps even other European countries with a comparable legal culture. As the other Nordic countries, Norway has an open legal culture that is receptive to new ideas from abroad, although the impact of foreign rules depends very much upon their perceived fit and added value to the existing body of Norwegian law.[10] The civil procedure

7 Preamble, para. 9.

8 Ibid.

9 The methodological approach taken resembles the one that has always been taken by the Court of Justice of the European Union when developing general principles of Union law, see e.g. the acknowledgment of this by Advocate General Lagrange in his Opinion in Case 14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1962:19: "the case law of the Court, insofar as it invokes national laws (as it does to a large extent) to define the rules of law relating to the application of the Treaty, is not content to draw on more or less arithmetical 'common denominators' between the different national solutions, but chooses from each of the Member States those solutions which, having regard to the object of the Treaty, appear to it to be the best or, if one may use the expression, the most progressive".

10 For a brief introduction to the Nordic legal family, see Zweigert and Kötz, *An introduction to comparative law*, third revised edition, translated from the German by Tony Weir, Oxford University Press 1998, pp. 277-285.

of Norway is historically heavily influenced by Germanic law (German and, in particular, Austrian law), but has later sought inspiration from others, in particular Anglo-American law, to such an extend that it today is justified to classify it as a distinct procedural order, placed somewhere between the Germanic and the Anglo-American model.[11] As in the other Nordic countries, the Norwegian civil justice system is relatively well funded, giving judges the time required to stay updated on legal developments, including at the international level.[12] The costs of civil litigation in Norway are worryingly high, but this does at the same time allow for the lawyers to search for and include foreign legal material in their pleadings, at least in bigger cases. The knowledge of English is generally good whereas as the knowledge of other foreign languages (French, German etc.) is much lower, thus heavily favouring consideration of legal sources and literature in the English language. Despite the level of the costs, the Norwegian civil justice system, like those of the other Nordic countries, enjoys a very high degree of trust from the public.[13]

Norway is also an interesting test case because the country is not a member of the European Union but associated to it through several agreements. This is a status Norway shares with Iceland as well as, although to varying degrees, Liechtenstein, Switzerland and now also the United Kingdom of Great Britain and Northern Ireland. It complicates, but does not hinder, indirect influence of the Model Rules via Union law, as will be explained further in section IV below.

In the following, we will discuss the potential influence of the Model Rules on Norwegian civil procedure, highlighting three different paths for such influence: Influence on existing national law (section II), influence on future legal reforms (section III), and influence via EU law (section IV).

We will only discuss the Model Rules potential impact upon the general 2005 Code of Civil Procedure[14], i.e. for civil proceedings before the state courts. Hence, we will not deal with the Norwegian rules on arbitration or any other sort of private out-of-court conflict-solving mechanisms.[15] Arbitration is outside the scope of the Model Rules.[16] Nor will we discuss the potential influence from Model Rules via a contract between the parties. Outside the scope of arbitration, rules of Norwegian procedural

11 See Halvard Haukeland Fredriksen, 'German influence on the development of Norwegian civil procedural law', in: Lipp/Fredriksen (eds.), *Reforms of Civil Procedure in Germany and Norway*, Mohr Siebeck 2011, pp. 19 ff.

12 The by far most important factor is the generally manageable workload, but in addition all Norwegian judges are entitled to one month paid leave of absence for the purpose of study every fourth year.

13 In the 2020 Rule of Law index from the World Justice Project, the first four places are taken by Nordic countries: Denmark as no. 1, Norway as no. 2, Finland as no. 3 and Sweden as no. 4 (The last of the Nordic countries, Iceland, is not included in the ranking). See https://worldjusticeproject.org/rule-of-law-index/global.

14 Act 17 June 2005 No 90 relating to mediation and procedure in civil disputes (hereinafter: the Code of Civil Procedure). Unofficial English version: https://lovdata.no/dokument/NLE/lov/2005-06-17-90.

15 In Norway, there is a separate Arbitration Act (act 14 June 2004 no 25). Unofficial English version: https://lovdata.no/dokument/NLE/lov/2004-05-14-25.

16 Rule 1, 2 litra d

law cannot be replaced by such a contract.[17] Procedural contracts are partly dealt with by the Model Rules in Rule 58, which takes a more flexible approach than the tradition in the Nordic countries.[18]

II. INFLUENCING EXISTING NORWEGIAN LAW

A first route of influence for the ELI/UNIDROIT Model Rules is as a matter of inspiration for the interpretation of existing Norwegian procedural law. Due to the general openness of the Norwegian legal method, no formal recognition by parliament or the government is required for Norwegian courts to be able to pay account to the Model Rules. However, as a soft law instrument, the Model Rules will only be considered relevant for the interpretation of the Code of Civil Procedure if the latter's provisions leave a gap, provide the judge with discretionary powers or at least leave room for interpretation.

As already alluded to in the introduction, several characteristics of the Norwegian legal tradition suggest that the Model Rules might be able to influence the interpretation and application of the Code of Civil Procedure in this way. The Nordic legal tradition is not only open to foreign influence, but also of a rather pragmatic nature.[19] The historical roots goes long back in time, but of particular importance was the development of Scandinavian (or Nordic) legal realism, in particular by the Swedish philosopher Axel Hägerström and the Danish philosopher and jurist Alf Ross, from the first half of the 20th century.[20] A common ground for all versions of Scandinavian/Nordic legal realism is the stripping away of metaphysical aspects of legal thinking, concentrating instead on the societal effect of law as the way in which a legal system or a legal rule could be justified. Interestingly, key figures of Scandinavian/Nordic legal realism dealt with procedural law and gained massive influence on the theoretical development of procedural concepts and theories. In Sweden, where the Uppsala-school of legal philosophy was a dominating force, Karl Olivecrona and Per-Olof Ekelöf were both instrumental for the philosophical development and authored classical books of Swedish procedural law.[21] In Norway,

17 As stated in the *travaux préparatoires* to the current Code of Civil Procedure, see NOU 2001: 32.

18 Rule 58 on "Related agreements" reads as follows: "In so far as procedural rules are subject to party disposition, parties may agree on any procedural matter, such as the jurisdiction of the court, provisional measures, and publicity of hearings".

19 This may also be explained under the label of "Norwegian legal culture". For such an approach, see Marius Mikkel Kjølstad, Sören Koch and Jørn Øyrehagen Sunde, "An Introduction to Norwegian Legal Culture", in *Comparing Legal Cultures* (Koch/Sunde eds), 2nd ed, Bergen/Fagbokforlaget p. 125.

20 See Jes Bjarup, "The Philosophy of Scandinavian Legal Realism", *Ratio Juris* (vol. 18) p. 1–15. See also the texts concerning legal philosophy in the Scandinavian/Nordic countries in *Legal Philosophy in the Twentieth Century: The Civil Law World* (Pattaro/Roversi eds.), Springer 2016. For a contemporary view from the outside, see the two chapters in part III of H. L. A. Hart, *Essays in Jurisprudence and Philosophy*, Clarendon/Oxford 1983/2001.

21 Olivecrona dealt in particular with the burden of proof (*Bevisskyldigheten och den materiella rätten*, Uppsala 1930) and res judicata (*Rätt och dom*, Stockholm 1960). Ekelöf dealt with general procedural law especially in his series of six books called "Rättegång" which is still updated and among the leading books on Swedish

Torstein Eckhoff is both the most important figure of legal methodology and he a key figure of Norwegian civil procedure law from 1940s till the 1960s before he re-entered the scene when contributing to the theories of evidence in the 1980s and early 1990s.[22]

Even though the philosophical underpinnings of Scandinavian/Nordic legal realism have been challenged,[23] core elements of realism or pragmatism are still characteristic for Nordic law and legal thinking. Nordic law is not based on grand theories, there is no such thing as the constructive or system-building traditions of many civil law countries, and there is not a heavy tradition of developing abstract concepts.[24] These aspects of Nordic legal thinking prepare the ground for input from abroad,[25] and they fit well with the ELI/UNIDROIT-project. That Model Rules do not try to introduce a grand theory or a complete system with abstract concepts, rather it is based on a quite pragmatic best practice-approach which take the quality of expected consequences as the guiding principles for the preferred solutions.

In line with Scandinavian/Nordic legal realism, the Norwegian doctrine of legal sources, and the guidelines for interpretation of such sources, is open and rather flexible.[26] Norwegian legal methodology consists of a rather long list of generally accepted sources of law, which includes not only hard sources as statutes and case-law, but also softer policy considerations, comparative arguments based on the law in other countries and international sources of law.[27] Soft law of foreign origin may be relevant even if it has not been formally approved by parliament or the government. Within contract law, both the *UNIDROIT Principles of International Commercial Contracts (UPICC)*, the *Principles of European Contract Law (PECL)*, and the *Draft Common Frame of Reference (DCFR)* are in general regarded as relevant sources of

procedural law. He also established an original theory of evidence, which is found in a simplified English version in "My thoughts on evidentiary value", *Evidentiary value: philosophical, judicial and psychological aspects of a theory. Essays dedicated to Sören Halldén on his sixtieth birthday*, Lund 1983.

22 His first book was on the burden of proof (*Tvilsrisikoen (Bevisbyrden)*, Oslo 1943), and his doctoral thesis was on res judicata (*Rettskraft*, Oslo 1945). His contributions to the theory of evidence are: "Temametode eller verdimetode i bevisvurderingen", *Svensk Juristtidning* 1988 p. 321–339 og "Temametode og bevisverdimetode på ny», *Festskrift till Per Olof Bolding* (Heuman ed.), Stockholm 1992 p. 85–103.

23 Svein Eng, «Legal Philosophy in Norway in the 20th Century", *Legal Philosophy in the Twentieth Century: The Civil Law World* (Pattaro/Roversi eds.), Springer 2016 p. 761-783.

24 See the view from the outside provided by Zweigert and Kötz, *An introduction to comparative law*, third revised edition, translated from the German by Tony Weir, Oxford University Press 1998, p. 285: "the tendency to undue conceptualism and the construction of large-scale integrated theoretical systems have never really been followed in the North, thanks to the realism of the Scandinavian lawyers and their sound sense of what is useful and necessary in practice."

25 Similarly, from the perspective of contract law, Amund Bjøranger Tørum, *Interpretation of Commercial Contracts*, Oslo/Universitetsforlaget p. 15: «The absence of grand theories and abstract concepts in Norwegian law on the interpretation of contracts makes it particularly open and well suited for such imports."

26 Kjølstad/Koch/Sunde i *Comparing Legal Cultures*, 2nd ed, Bergen/Fagbokforlaget 2020 p. 126–135.

27 International legal sources were not included in the list set up by Torstein Eckhoff, *Rettskildelære*, 5th ed Oslo/Universitetsforlaget 2000 p. 23, but he still regarded these factors as relevant, see p. 283 ff. Nils Nygaard, *Rettsgrunnlag og standpunkt*, 2nd ed, Oslo/Universitetsforlaget, 2004 p. 51–55 explicitly includes such factors.

law.[28] Most scholars include such soft law in their analysis of Norwegian contract law even in textbooks designed for students. As one of many examples, Amund Tørum makes several references to these soft law instruments when dealing with the Norwegian rules for interpretation of commercial contracts.[29] In the field of tort law both the aforementioned DCFR and the European Principles of Tort Law (PETL) are generally regarded as relevant,[30] and these soft law instruments are routinely included in academic analysis and in textbooks. For example did Bjarte Askeland make extensive use of ECTL when elaborating the requirement of causation in Norwegian tort law.[31] Critical voices are heard, of course, but most of the criticism relate either to the content or the quality of a soft law project, or highlights certain conditions that must be fulfilled for European soft law to be relevant to Norwegian courts.[32] Arguably, the ELI-UNIDROIT Model Rules of civil procedure will play a similar role for any future theoretical analysis of Norwegian civil procedure law.

Nevertheless, there may very well be a difference of theory and practice in these matters. While European soft law instruments will be expected to be included in any thorough scholarly analysis, that may not so readily be the case for the courts' reasoning. Again, a parallel is found in contract law as well as tort law, where a very small number of court decisions include references to European soft law. Recent case-law of the Supreme Court provides just one example where a European soft law instrument was explicitly mentioned in the reasoning. The judgment from 2014 referred to the UNIDROIT Principles of International Commercial Contracts.[33] The Supreme Court stressed that the principles were used only as an additional support, meaning that the court would have reached the same result anyway.[34]

If the Model Rules get a similar role in Norwegian civil procedure law, the courts will primarily refer to them when they provide support to a solution which already has a legal basis in the Code of Civil Procedure or established case-law. However, it is also possible that the Model Rules will be invoked in cases where a corresponding rule of Norwegian civil procedure has yet to be fully established. That is arguably the case for the principle of cooperation, which is perhaps the most prominent principle of the Model Rules. It is fairly well developed both in a general way in Rules 2, 6 and 9 and in greater detail in the subsequent chapters of the Model Rules.

28 Viggo Hagstrøm, *Obligasjonsrett*, 2nd ed, Oslo/Universitetsforlaget 2011, p. 61–70, Kåre Lilleholt, *Kontraktsrett og obligasjonsrett*, Oslo/Cappelen Damm 2017 p. 38–41.

29 Tørum p. 14–15.

30 Viggo Hagstrøm and Are Stenvik, *Erstatningsrett*, 2nd ed, Oslo 2019 p. 49–50.

31 Bjarte Askeland, «Om hypotetisk, hendelig skadeårsak i erstatningsretten», *Tidsskrift for rettsvitenskap*, 2017 p. 347–388.

32 E.g. Birgitte Hagland, *Erstatningsbetingende medvirkning*, Oslo/Gyldendal Juridisk 2012 p. 53–59.

33 HR-2014-247-A, case no. 2013/1839, para. 37. There is a remarkable contrast here between Norway and Sweden, as the Swedish Supreme Court regularly makes references to European soft law.

34 Lilleholt p. 40.

In Norway, there is no general principle of cooperation, neither in any statutory provision nor in the case-law. Still, some rules in the Code of Civil Procedure can be regarded as expressions of a general principle of cooperation between the parties. The law commission that prepared the Code regarded the duty of truthfulness and completeness in section 21-4 as a concrete expression of such a principle.[35] Even though the *travaux préparatoires* are important sources of law in the Nordic legal family, the lone statement from the law commission does not suffice to establish a general principle of Norwegian procedural law. It thus remains unclear whether there is sufficient support in traditional legal sources to establish such a principle, either in general or for specific situations. Consequently, is also unclear what such a principle would mean in practice. Here, the Model Rules prepare the ground for further debate and, potentially, the development of a principle of cooperation as part of Norwegian civil procedure.

Another, albeit related example, is the Model Rules' repeated emphasis on sanctions of non-compliance with the duty to cooperate. There is a general lack of available sanctions of non-compliance in Norwegian civil procedure law, and the Model Rules' rich variety of such sanctions and emphasis of their importance, may prepare the ground for a further development of Norwegian law.[36] A deep change in this direction requires a legal reform, because of a need for a formal legal basis for new sanctions. However, at least the use of damages in tort as a sanction may be developed by the courts.

A further example where the Model Rules may be a source of inspiration concerns third party funding of civil litigations. In Norway, various versions of such funding have become more frequent during the last years, but the problematic sides of this development have not yet been properly recognized, neither in the doctrine nor in the case-law. Rule 245 of the Model Rules, requiring third-party funding to be disclosed to the court and the other party at the commencement of proceedings, and requiring such funding not to provide for inadequate compensation for the funder or enable the funder to exercise any undue influence on the conduct of the proceedings, ought to be taken into account in this debate. This also includes the approach to the question of sanctions for violations of the requirements for third party funding, as set out in Rule 245(4): Violations ought not to not constitute a defence against the claim of the party availing itself of third party funding, but it should be taken into account when the court renders its final decision on costs determining the part of the claimant's costs to be reimbursed.

In general, the weight of an argument based on the Model Rules will depend on its perceived quality, i.e. the ability of the relevant rule to fit into the existing Norwegian Code on Civil Procedure and the underlying aims and values of Norwegian

35 NOU 2001: 32 p. 946–947.

36 See Model Rules 7, 27, 28, 99, 104, 110, and 191.

civil procedure. Nevertheless, a more extensive impact of the Model Rules might be required in cases that concern the application of substantive EU law in situations where there are no specific EU procedural rules involved. However, the potential impact of the Model Rules in such settings will be indirect, via general principles of EU law, in particular the principle of effective judicial protection of rights stemming from EU law, see further section IV below.

III. INFLUENCING LEGAL REFORMS

Another route of influence for the Model Rules is as a matter of inspiration for legal reforms. Historically, Norwegian civil procedure law has been shaped under international influence. The two main reforms of the last century, the old Code of Civil Procedure of 1915 and the current one from 2005, were both inspired by developments in other European countries. Whereas the old Code was highly influenced by Austrian law after the Franz Klein-reforms,[37] the current Code draws inspiration from English civil procedure after the Woolf-reform.[38] Thus, both reforms took specific jurisdictions as their main foreign source of inspiration. Still, the 1915-reform was the result of a much more thorough process than the 2005-reform, including many years of studies and discussions. The then accepted importance of knowledge about the state of affairs in other jurisdictions was reflected in the fact that parliament awarded two of the scholars entrusted with the drafting of the new code generous scholarships to enable them to go abroad and report in detail on recent reforms of civil procedure in several European countries. In contrast, the studies of foreign law before the 2005-reform were rather more limited, primarily focused on English and US law.

In today's impatient political culture, committees preparing law reforms are rarely given enough time to explore and utilize foreign law. New reforms of civil procedure tend to be initiated by isolated and more or less urgent problems, with the Ministry of Justice looking for quick solutions. Consequently, the appetite for systematic analysis of foreign law as a source of inspiration for proper reforms is much smaller than it once was. Somewhat paradoxically, however, this development in the legislative culture could actually facilitate the impact of the Model Rules on

37 See Jørn Øyrehagen Sunde, "Der organische Zusammenhang des Rechts: How the reception of Savigny came to influence legal reception in Norwegian law in the 19th century", *Reforms of Civil Procedure in Germany and Norway* (Lipp/Fredriksen eds.), Mohr Siebeck 2011 p. 7–18. Further reading on Franz Klein's ideology for civil procedure law: C. H. van Rhee, "Introduction", in *European Traditions in Civil Procedure* (van Rhee ed.), Intersentia 2005 on p. 3–23. See also: THE DEVELOPMENT OF CIVIL PROCEDURAL LAW IN TWENTIETH CENTURY EUROPE: A RETROSPECTIVE VIEW (harvard.edu)

38 See NOU 2000: 32 p. 183–184. The influence did inter alia concern case management and the preparatory stages, see Anna Nylund, "Preparatory Proceedings in Norway: Efficiency by Flexibility and Case Management", *Current Trends in Preparatory Proceedings. A Comparative Study of Nordic and Former Communist Countries* (Ervo/Nylund eds.), Springer 2016 p. 57–80. Further reading on the Woolf reform: *Reform of Civil Procedure* (Zuckerman/Cranston eds.), Oxford 1995, John Sorabji, *English Civil Procedure after the Woolf and Jackson Refoms. A Critical Analysis*, Cambridge 2016.

future reforms of civil procedure in Norway. The Model Rules and the accompanying comments are easily available online, and in a language that most Norwegian lawyers master quite well (English). Whilst contemporary law commissions may not have the time to consider foreign law, it will be easy for them to consult the Model Rules. Of course, comparative lawyers will rightly object that the Model Rules, as a soft law instrument that has yet to be tested in practice, cannot fully replace the knowledge one can get from comparative studies of 'living' procedural systems. Still, if the realistic alternative is superficial studies of more or less random national systems, recourse to the Model Rules is surely preferable.

The potential impact of the Model Rules is further strengthened by their making. Unlike the situation before the 1915-reform, Norway has a comprehensive and mostly coherent Code of Civil Procedure that generally works fairly well. There is and will presumably always be a need for further reforms, but arguably not one that allows for a complete makeover, inspired by the system of another country. One of the reasons why the law commission preparing the current Code of Civil Procedure thought German law to be of little help, was the view that the various parts of German procedural law are all interconnected in ways that makes it difficult to draw inspiration from them without taking over the entire thinking of German procedural law. This is much less so with the Model Rules, given their making and the fact that they are just Model Rules and not fully operational procedural rules embedded in a specific legal culture.

In general, there is therefore reason to believe that the Model Rules will be taken into consideration when the Ministry of Justice or a future law commission struggles with a legal question that the Model Rules provides a possible solution for. Whether the solution suggested by the Model Rules will be followed, will depend on the perceived fit of the solution into existing Norwegian civil procedure and the aims and values upon which it is based. Nevertheless, the pragmatic and down to earth style of Norwegian law, as described in section I and II, should allow for the Model Rules to be taken into consideration. Any law commission that is given a mandate to suggest new rules for Norwegian civil procedure law, will be expected to consider Model Rules and to include them in their reasonings.

An example of this is to be found in an important reform proposed by the Court Commission in 2020. The Commission worked from August 2017 till October 2020 with a broad mandate which first and foremost concerned the structure of the Norwegian court system, including the number of courts and the relationship between the different instances. The commission was empowered to suggest new areas for reform and were invited to bring forward concrete suggestions for new legislation. Interestingly, when analysing the system for first appeals, the commission made several references to the Model Rules.[39]

39 The comparative analysis is based on Magne Strandberg and Anna Nylund, «Utsikt til innsikt: En komparativ tilnærming til reform av reglene om anke lagmannsretten over dommer i sivile saker», *Lov og Rett* 2020 p. 84–

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On a general level, the commission underlined that the Norwegian rules for first appeal differs rather fundamentally from the approach found in the Model Rules.[40] While Norwegian law, at least in practice, follow the *de novo* principle, the Model Rules limit the competence of the appellate courts considerably.[41] In accordance with recent trends of European procedural law, the Model Rules takes the view that an appellate proceeding should not be a 'new' trial. Rather, the appellate courts job is primarily to test the legality of the proceedings in the first instance court. The commission noticed these differences, acknowledged the old-fashioned and rather ineffective character of the Norwegian rules on appeal and pointed out this area of Norwegian procedural law as ripe for reform.

Based on this analysis, the Commission suggested a reform of the rules concerning challenges to procedural decisions (decisions regarding legal standing or jurisdiction, case management decisions, decisions regarding access to evidence or admissibility of evidence, etc). The status of Norwegian civil procedure is that a procedural decision may be challenged separately and invoked as a ground for appeal against a final judgment.[42] In sharp contrast, the Model Rules follow the final judgment rule: in order to promote procedural efficiency and proportionality, a procedural decision cannot be the subject of a separate appeal except in certain specific situations, see Rule 179:

> **Rule 179. Separate Appeal Against the Review of Procedural Orders by the Court**
>
> (1) Unless otherwise provided for in Rule 179(2), a decision on a challenge to a procedural error cannot be made the subject of a separate appeal.
>
> (2) A separate appeal is available against decisions made in respect of
>
> (a) a stay of proceedings;
>
> (b) the transfer of proceedings to another court;
>
> (c) security for costs;
>
> (d) the exclusion of a party from a hearing or the imposition of a fine on a party;
>
> (e) a refusal to disqualify a judge or court-appointed expert; and
>
> (f) if provided for in a specific rule.
>
> (3) A separate appeal must be filed with the court within two weeks of notice of the decision.

102. Strandberg and Nylund also functioned as consultants for the Court Commission on matters concerning first appeal.

40 NOU 2020: 11 *Domstolene i endring* p. 324.

41 Rule 169.

42 F ex the Dispute Act §§ 29-2, 29-3 and 29-21.

The Court Commission quoted this Rule and discussed whether Norwegian should be reformed in the line suggested by the Model Rules.[43] The commission concluded that there are good reasons to reform Norwegian law on this matter and proposed a provision quite similar to the one found in Rule 179 of the Model Rules.

Another important suggestion made by the Court Commission was a rule called "preclusion between instances",[44] which means that procedural steps cannot be taken before the appeal court if they were not taken before the first instance court. At present, a party to appellate proceedings before a Norwegian court can present any source of evidence and rely on any fact even if they were not included in the first instance procedure. In sharp contrast, a rule on preclusion between instances is found in Model Rule 168:

> **Rule 168. New facts and taking evidence**
>
> (1) Within the relief sought, the appellate court shall consider new facts alleged by the parties
>
> (a) in so far as those facts could not have been introduced before the first instance court, or (b) in so far as the first instance court failed to invite the parties to clarify or supplement facts that they had introduced to support their claim or defence under Rules 24(1) and 53(3).
>
> (2) Within the relief sought, the appellate court shall take evidence offered by the parties only if
>
> (a) the evidence could not have been offered to the first instance court;
>
> (b) the evidence was offered to the first instance court and was erroneously rejected or could not be taken for reasons outside the party's control; or
>
> (c) the evidence concerns new facts admissible according to Rule 168(1).

The justification of this rule in the accompanying comments are rather telling: New facts may, and must, be considered only insofar as they could not have been introduced before the first instance court or insofar as the first instance court failed to invite parties to clarify or supplement facts. The limitation ensures that parties cannot withhold facts and evidence as part of their litigation strategy. It also ensures that parties take proper account of, and comply with, the concentration principle.[45]

A similar, but not identical, rule was suggested by the Court Commission.[46] However, in the consultation round following the suggestion, the Lawyers Association,

43 NOU 2020: 11 p. 332–334 and 365–366.

44 NOU 2020: 11 p. 328–330 and 364.

45 Comments to Rule 168, para. 2.

46 NOU 2020: 11 p. 364.

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various courts and other instances voiced their scepticism towards the suggested rule on preclusion between instances. The Supreme Court, for instance, considered the rule too strict and opined that such a reform would diminish the chances of having a materially correct solution to the conflict.[47]

Even though the consultation round revealed some resistance towards the latter reform proposal, the work the Court Commission does demonstrate the importance of the Model Rules as a source of inspiration for reforms of Norwegian civil procedure law. Even if the end result should be that Rule 168 will not get an offspring in the Norwegian Code of Civil Procedure in this round, it will surely continue to inform future debates about this matter in Norway.

IV. INFLUENCING NATIONAL LAW VIA EU LAW

A third route for the Model Rules to influence the national civil procedure of European countries is through the European Union. For those countries that are members of the Union, this route requires little explanation. If the EU legislators draw inspiration from the Model Rules, the ensuing EU legislation will naturally result in the relevant parts of the Model Rules affecting the respective parts of the national procedural law of the member states. The same is true if the Union's Court of Justice draws inspiration from the Model Rules in its further elaboration of the general principles of Union law, in particular the principle of effective judicial protection of substantive EU law rights and obligations. Both ifs are considerable, however, as it remains to be seen whether the EU legislators (the European Commission, the European Parliament and the Council of Ministers) and/or the Court of Justice will take the Model Rules into consideration, see further on this towards the end of this section.

For the European countries that are not members of the Union, the picture is more complicated. Many of them are, in different ways and to various extent, associated to the EU, through bi- or multinational agreements with the Union. Especially close ties exist between the EU and the four remaining member states of the European Free Trade Association (EFTA) – Iceland, Liechtenstein, Norway and Switzerland.[48] Among those four, Iceland and Norway are even closer to the EU than Liechtenstein and Switzerland, as they are parties both to the 1992 Agreement on the European Economic Area (EEA) and to the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[49] In many situations, the

47 Consultation response from the Supreme Court to the Ministry of Justice, 26 March 2021.

48 Following Brexit, it should not be ruled out that the UK might want to rejoin EFTA, even though the preference so far has been for traditional free trade agreements with the four EFTA States.

49 Liechtenstein is a party to the EEA Agreement, but not to the Lugano Convention. Switzerland is a party to the Lugano Convention (as indeed suggested by its name), but not to the EEA Agreement. Both countries are also tied to the EU through several other agreements.

combined effect of the EEA Agreement and the Lugano Convention is that Norwegian judges find themselves in a situation very similar to that of their colleagues from EU Member States.[50] Still, parts of the EU's interventions into the procedural law of its member states fall outside the scope of the EEA Agreement. As the Agreement was negotiated in 1990–1991, its scope essentially reflects the scope of the EU law as it stood prior to the 1992 Treaty of Maastricht.[51] Thus, the EEA Agreement knows of no parallel to Article 81 TFEU[52] on judicial cooperation in civil matters. As a result, none of the EU legal acts based on Article 81 TFEU have been incorporated into the EEA Agreement. As far as the Brussel I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is concerned, this is largely remedied by the above-mentioned Lugano Convention, but Norway's interest in similar agreements concerning certain other parts of the EU rules on judicial cooperation in civil matters has so far not been acted upon by the EU. Neither has the proposition to update and widen the scope of the Lugano Convention been followed up.[53]

As a result of this peculiarities, the indirect EEA law impact of the Model Rules in Norway (and Iceland) depends not only on the EU institutions openness to the Model Rules, but also in what ways the EU lets future EU legislation be influenced by them. If the European Commission were to follow up the European Parliament's proposal of 2017 for a general directive on common minimum standards of civil procedure in the European Union,[54] the directive is unlikely to be incorporated into the EEA Agreement due to its expected EU law legal basis being Article 81 TFEU. However, based upon the Commission's response to similar propositions from Parliament to propose general directives harmonizing entire fields of national law, such as the initiatives towards an EU Civil Code or an EU Administrative Code, there is little reason to believe that the proposal will be followed up in its current form. For political reasons, the Commission prefers a more limited, low-key incremental approach, based on the Union's competences to regulate the internal market (in particular Article 114 TFEU).[55] Thus, any impact of the Model Rules on EU law is, at least in the short and

50 See Halvard Haukeland Fredriksen and Magne Strandberg, 'Norwegian Civil Procedure Under the Influence of EU Law', in: Uzelac/van Rhee, *Transformation of Civil Justice – Unity and Diversity*, Springer 2018, pp. 41-62.

51 In order to maintain a level playing field with equal conditions, the Annexes to the EEA Agreement are continuously updated with new EU legal acts of EEA relevance, but the scope of the Agreement has not been widened to include new fields of EU law.

52 Treaty on the Functioning of the European Union, who got its current name through the 2007 Treaty of Lisbon.

53 In 2020, the UK applied to (re-)join the Lugano Convention as an independent party. UK accession to the Convention would have provided an opportunity to update and broaden it, but the European Commission opposes the UK's accession, citing the UK's status as a third country with an "ordinary" Free Trade Agreement facilitating trade but not including any fundamental freedoms and policies of the internal market, see COM(2021) 222 final, 4 May 2021, *Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention*.

54 European Parliament resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union (2015/2084(INL)).

55 The calls for an EU Civil Code or an EU Administrative Code has not been followed up by the Commission.

medium long range, likely to be on sectorial internal market legislation, e.g. rules which harmonize national procedural law on topics – such as EU consumer protection law. Incidentally, this approach will cause any such impact of the Model Rules to be of EEA-relevance, and therefore to apply to the EEA/EFTA States in the same way as to the EU member states.