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**“THE ANONYMITY REQUIREMENT IN PUBLISHING
COURT DECISIONS”**

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REPORT

**“THE ANONYMITY REQUIREMENT IN
PUBLISHING COURT DECISIONS”**

by

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Introduction

The principle of public access to court trials and court decisions is a fundamental principle in a state governed by law. It is a condition for democracy and rule of law.

There are different interests that can be emphasized in this context:

Democracy - The Courts represent a substantial factor of power in the society. It clarifies and decides upon rights and duties between two private persons or a private person and the state, and is an active force in interpreting the applicable law. The public through the legislation gives this power to the courts. Therefore it is the privilege of the public to control how the courts manage the trust they are shown. The British jurist Robertson has said¹:

“Trials derive their legitimacy from being conducted in public, the judge presides as a surrogate for the people, who is entitled to see and approve the power exercised on their behalf. No matter how fair, justice must still be seen before it can be said to have been done.”

Through the review by the public, the courts have to be aware that any errors may cause criticisms and this encourages the courts to a constant improvement of their court proceedings and decisions.

Control – the courts are institutions with great power and it is of vital importance that the public has the necessary confidence in the institution. Without this confidence, the courts would lose their legitimacy as the messenger of what is right and what is wrong. Free access to information of how court proceedings are conducted and the court’s decision in the specific case give the public the possibility to control that the parties are treated fairly.

Legal safeguard of the parties – The chance of being a victim of injustice or infringement is reduced when the public are paying close attention to how the court proceedings are conducted and can also study the court decision in detail.

However, public access to court proceedings and court decisions can be a burden for the parties involved, especially in cases concerning personal matters. It can also be a hindrance for the investigation of a criminal case. For the first 165 years of the history of the Supreme Court of Norway, inclusion of names and personal information in a judicial opinion had little reach beyond the litigants of that case and the relatively few lawyers who had both access to the books where the cases were published and the legal education necessary to find the information there. Although the commercial database Lovdata increased the availability of information in the 1980s and 1990s, the information was limited to a fairly small universe of paid subscribers, almost all of whom were legal professionals. The pervasiveness of internet access and the ease with which information of all types and sources may be accessed by search engines such as Google now allow virtually anyone – employers, neighbours, acquaintances and even adversaries – to access a wealth of personal information about others with a few keystrokes.

Therefore there are certain limitations to the public’s access to court proceedings and court decisions. This report presents an overview of the Norwegian system, with regards to

¹ Robertson and Nicol 1992, Media Law, page 305.

Norwegian legislation, practical measures and case law from the Norwegian Supreme Court in the field of anonymity requirement in publishing court decisions.

An overview of the legal basis

The Norwegian Constitution dates from 1814 and it is the oldest written Constitution in Europe still in effect.

Few individual rights are expressly laid down in the Norwegian Constitution. The Constitution does not have a general "Bill of rights" – like the one found in the amendments to the Constitution of the United States – nor an extensive list of economical, social and cultural rights found in certain recently adopted Constitutions. In 2004 the Norwegian Constitution was amended as to reflect the importance of public access to courts of justice.

Section 100 Fifth Paragraph of the Norwegian Constitution declares that²:

“Everyone has a right of access to documents of the State and municipal administration and a right to follow the proceedings of the courts and democratically elected bodies. Limitations to this right may be prescribed by law to protect the privacy of the individual or for other weighty reasons.”

In addition to this, the Norwegian Constitution was amended ten years earlier, in 1994, as to reflect the importance of human rights. The provision declares that:

"It is the responsibility of the authorities of the State to respect and ensure human rights. Specific provisions for the implementation of treaties hereof shall be determined by law."

The Human Rights Act of 1999 gave The European Convention of Human Rights the legal force of national parliamentary legislation. The Convention is therefore invoked directly before the national courts. The Human Rights Act states that the Convention shall prevail over any other conflicting statutory provisions.

According to the Human Rights Act Article 6 (1) everyone is entitled to a fair and public hearing:

“Judgments shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

In the International Covenant on Civil and Political Rights Article 14 First section it is declared:

“(…) In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal

² <http://stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/>

case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

Both the Human Rights Act and the International Covenant on Civil and Political Rights emphasize the importance of public access to court proceedings and court decisions, but there are also established certain limitations to this principle. The Norwegian legislation is perceived to be in accordance with the Human Rights Act Article 6 and the International Covenant on Civil and Political Rights Article 14. However, these Articles give a frame for interpreting the national legislation on this field of law.

Furthermore, the Human Rights Act Article 8 (Right to respect for private and family life) and Article 10 (Freedom of expression) must also be taken under consideration in this context, but this report does not allow me to go thoroughly into this subject.

The rules of public access to court decisions are linked to the rules of right to a transcript of court decisions and the rules of public reproduction of a case. I will first give an overview of the rules concerning right to a transcript of court decisions in civil and criminal cases, and thereafter the rules of public reproduction of a case. I will also touch upon other ways of publishing the decisions of the Supreme Court of Norway: namely publishing of the courts decisions in electronic databases like Lovdata and in the Official Gazette and on the court's homepage.

Right to a transcript of court decisions in civil cases

In civil cases access to court decisions is regulated in the Act relating to mediation and procedure in Civil Disputes (the Dispute Act) Chapter 14. As a main rule, the public is entitled to a transcript of judicial rulings and statements of costs pursuant to section 20-5. "The public" can be anyone and there is no requirement for the person concerned to establish a legal interest in access to the court's decision. Most often "the public" will mean the press and the media.

In Section 14-3 there are exceptions to the main rule. If there is a prohibition against publication of the court's decision, the public shall nevertheless have access to the conclusion of the ruling if the ruling is not more than five years old. If the ruling is more than five years old, the public don't have right to access to the decision nor the conclusion. Access may also be restricted to the conclusion of the judgement if it would be inadvisable to allow inspection or provide transcripts in the interests of national security or relations with a foreign State, or if there is reason to fear that the information will be used in an unlawful manner. The same applies if the court has imposed an order of secrecy. In the concrete assessment after Section 14-3, Subsection (2), it is relevant to consider both who has filed the petition for access to the court's decision and the purpose of the petition.

Pursuant to the Dispute Act Section 36-7 the public shall not have access to the documents relating to cases concerning administrative decisions on coercive measures in the health and social services. These decisions might never be published unless the names of the parties and other personal information are made anonymous.

Right to a transcript of court decisions in criminal cases

According to the Act relating to legal procedure in criminal cases (the Criminal Procedure Act) Section 28 any person may require a transcript of a judgment in a specific criminal case as long as no ban applies against public reproduction of the judgment, or if such a ban does apply, access to the conclusion of the judgment. Such requirement may always be refused if the judgment is more than five years old or the person who requires the transcript identifies the judgment only by the name of the accused. The decision must be individualized by either its case number, date of the decision or the main hearing or name of the judge etc. There is no

requirement for the person concerned to establish a legal interest in access to the court decision.

Public reproduction of court decisions

According to the Courts Act Section 124, the main rule is that court proceedings are open to the public and court decisions may be summarized in public without any anonymity requirement if not otherwise is decided by law or by the court itself according to law. This applies to all types of court decisions and in both civil cases and criminal cases. The court decisions may be quoted or summarized by the press or by the public in the newspapers, Radio, Television and on the Internet, but also through public distribution of the decision in a book.

There are some limitations to the main rule. According to the Courts Act Section 130 the court may prohibit that the court decision is published if this is required due to protecting the personal life of someone or the reputation of the aggrieved party. This does not apply to the conclusion of the judgment. The conclusion of the judgment may always be published. The condition of protecting the personal life of someone applies both to witnesses in the case, including the aggrieved party, and to the convicted person himself. In a decision in 2002³, the Appeal Selection Committee of the Supreme Court of Norway denied a petition for a transcript of a judgment in full text pursuant to Section 130 in the Courts Act. The court stated that the convicted person's life would be jeopardized if two specific paragraphs of the court's decision were revealed. In those paragraphs his cooperation with the police and contact with a third party was referred to. The court found that the decision was in accordance with the Human Rights Act Article 6 and the International Covenant on Civil and Political Rights Article 14.

The court may also prohibit that a court decision given during investigation of a criminal case and not under the main hearing, is published if this is required due to the investigation. This applies both to the on-going investigation in that specific case, and also to the investigation in other cases that in some way are connected to the first case. Furthermore, it applies to methods of investigation. If it is necessary to conceal the methods of investigation in order not to deteriorate the investigation methods, the court can prohibit publication of the court decision.

The prohibition may apply to the court's decision as a whole or only parts of the decision. The court may decide for example that private information of the parties is made anonymous by not mentioning their names, addresses, date of birth etc. The names of the judges are always public. According to Section 130, the condition that must be fulfilled before the court can prohibit that the court decision as a whole or partly is made public, is that this is "necessary". In most cases it will be sufficient if the court decides that the court's decision only can be made public if the anonymity requirement is fulfilled. It will for example not be necessary with an anonymity requirement if there is reason to believe that the press – who wants to publish the decision – will refer to the case without mentioning the names of the parties involved or other information that will make it possible to identify the parties. The Norwegian Press Association adopted in November 2007 Code of Ethics of the Norwegian Press⁴. Point 4. 7 and 4.8 of the Code of Ethics declare that the press must:

“4.7. Be cautious in the use of names and photographs and other clear identifiers of persons in referring to contentious or punishable matters. Special caution should be exercised when reporting cases at the early stage of investigation, cases concerning young offenders and cases in which an identifying report may place an unreasonable burden on a third party. Identification must be founded on

³ The decision is published in the Official Gazette, Rt-2002-1606.

⁴ http://presse.no/Spesial/Skjulte_artikler/?module=Articles;action=Article.publicShow;ID=250;

a legitimate need for information. It may, for instance, be legitimate to identify someone where there is imminent danger of assault on defenceless individuals, in the case of serious and repeated crimes, if the identity or social position of the subject is patently relevant to the case being reported on, or where identification protects the innocent from exposure to unjustified suspicion.

4.8. Reporting on children, it is considered good press conduct to assess the implications that media focusing could cause in each case. This also pertains when the person in charge or parent, has agreed to exposure. As a general rule the identity of children should not be disclosed in reports on family disputes or cases under consideration by the childcare authorities or by the courts.”

The court will very seldom decide that a court decision might not be made public at all due to the strict conditions for doing so. An example is a decision from the Appeals Selection Committee of the Supreme Court of Norway in 2002⁵. The accused had a very special sexual orientation and this information was undoubtedly of private character. However, his sexual orientation was crucial in deciding the sentencing for a very serious crime, and in this context it was important that the public was informed about the details of the decision and the court's argumentation. Therefore the conditions in the Courts Act Section 130 for not allowing public reproduction of the case at all were not fulfilled. The Court also found that the newspaper was entitled to a transcript of the decision pursuant to the Criminal Procedure Act Section 28. Pursuant to the Code of Ethics of the Norwegian Press it was no risk that the newspaper would reveal the name of the accused in its review of the case.

In another decision in 2007⁶, a father was found guilty in sexually abuse of his eight year old daughter. The decision contained intimate details of both the father and the daughter and the abuse. The Appeals Selection Committee of the Supreme Court of Norway found that the conditions for not allowing public reproduction of the case at all were not fulfilled and reference was made to the important principle of public access to court proceedings and court decisions. However, the court found that public reproduction of the decision only was allowed if the name, address and other information, which could identify the daughter, was made anonymous. Under reference to the seriousness of the abuse and the private information about the daughter, she had a clear interest in not being identified.

If the court decides that a court decision only can be made public if the anonymity requirement is fulfilled, this will as a general rule also apply to the parties to the case. However, it is difficult to draw the line between publishing of the court decision, which is prohibited, and the party's expression of his or her own opinion of the case and the court proceedings. The party is free to express his or her view of the latter, and this has also a side to the principle of freedom of speech.

It is not required to give reasons for the courts decision to prohibit whole or partial publication of its decision. The decision lasts until the court itself sets it aside. Anyone who wants to make a court decision public may appeal a decision that prohibits whole or partial publication of the decision.

The court's decision in cases regarding the Act relating to marriage, the Act relating to Children and Parents and cases regarding the division of assets between spouses before or after a divorce may only be made public if the names of the parties and other personal information are made anonymous. The same rule applies to the court's decision in cases regarding the division

⁵ The decision is published in the Official Gazette, Rt-2002-151.

⁶ The decision is published in the Official Gazette, Rt-2007-518.

of assets between former cohabitants. In these instances, the court will not make a separate decision about the anonymity requirement – the anonymity requirement is a direct consequence of the Courts Act Section 130 last section.

Lovdata and the Official Gazette

All the decisions of the Supreme Court of Norway are published on Lovdata⁷, which is a subscription based database where all the Supreme Court decisions are published together with all the decisions from the Courts of Appeal and some decisions from the First instances. The Supreme Court decisions on Lovdata are accessible for the public the first three months for free. After the first three months, access to the decisions requires a subscription to the database. Lovdata is an important tool for jurists and the public to search for relevant case law and the decisions will not be removed, but remain available in the database for all future. The anonymity requirement that Lovdata imposes on itself is more excessive than what follows from the Courts Act. In criminal cases, Lovdata removes the names, addresses and other private information of the accused and the victims before the decision is published in order to make it impossible to the public to identify the parties. In civil cases, all cases that contain private information of the parties who they will have an interest in not being publicly known will be removed. The decisions will still be of relevance as a legal source even though the names and other private information of the parties are not divulged.

The decisions of the Supreme Court of Norway are also published in the Official Gazette, which have the same anonymity requirements as Lovdata.

The homepage of the Supreme Court of Norway

The decisions of the Supreme Court of Norway are also published on the court's own homepage⁸.

Pursuant to the provision of public access to court proceedings and court decisions⁹ Chapter 4, the courts may publish their decisions on Internet on Internet-pages that are open to the public and on Internet-pages that are for a limited group of persons only. Internet-pages, which are open to the public, are pages open to everyone without logon-id and password. The homepage of the Supreme Court of Norway is an Internet-page that is open to the public. If there is a condition that the court decision can only be referred to in public after being made anonymous, the decision must be made anonymous before it can be published on the Internet-page. It is prohibited to publish court decisions that by court order cannot be reported in public.

On Internet-pages that are open to the public, court decisions in criminal cases may only be published if the name, address and date of birth of the indicted are made anonymous unless the indictment is known to the public. Often it might also be necessary to remove more information in order to obtain the anonymity of the indicted person. Information that may identify the aggrieved party can only be published on the Internet if it is not considered critical to do so. The court must make a concrete assessment in each case of if and what anonymity requirement that applies. In some cases it will be necessary to remove also information that can identify the aggrieved party, and the court has to make a concrete assessment of this in each case. If the public knows the indictment and it is also known who the indicted person is, the decision may be published without any anonymity requirement. This rule applies no matter the

⁷ www.lovdata.no

⁸ www.hoyesterett.no

⁹ FOR-2001-07-06-757

seriousness of the criminal conduct. On Internet-pages with a restricted access for the press, the courts may publish all their decisions without any anonymity requirement.

If the court's decision in a criminal case is published without any anonymity requirement, the decision must be removed from the Internet after three months. This applies both to Internet-pages open to the public and Internet-pages with a restricted access.

In civil cases the court decision can only be published on the open Internet-page if the decision doesn't contain sensitive information and the court has not prohibited publication of the decision. Sensitive information might for example be medical information or information about sexual relations. If so is the case, the decision must be made anonymous before publishing it on the Internet. Decisions that are published without any anonymity requirement must be removed from the Internet after three months. Decisions that are published with an anonymity requirement can be published on the Internet for a longer time and with no specific time limit for removal.

The courts are not obliged to publish their decisions on the Internet or in equivalent databases. The courts may for example choose to publish only summaries of their decisions, and through these summaries the public might ask for the decision in full text.

“Press-file”

Pursuant to the provision of public access to court proceedings and court decisions Section 10, the courts are obliged to make all their decisions available in a so-called “Press-file”. The file is for the press only. The decisions shall be available in the “Press-file” for at least four weeks, and no longer than three months. The press has a right to view the full text of the decisions and there is no anonymity requirement. If the court has decided that it is prohibited to report a decision pursuant to Section 130 in the Courts Act, only the conclusion of the decision shall be made public in the “Press-file”. The “Press-file” is a special arrangement for the press, and the purpose is to facilitate the work of the press in reviewing the court proceedings and court decisions.

After all, the press is an important watchdog for the Courts. Their constant eye on the court proceedings and court decisions is important in the Courts constant effort to sustain the confidence and trust of the people.