Chapter 19
Nordic Court Culture in Progress: Historical and Futuristic Perspectives

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Abstract This chapter addresses topical issues within the subject area of civil litigation. The perspective will be partly historical and partly futuristic. The progress that is just now going on in European civil litigation is explained and studied from the traditional and historical perspectives, both of which are used as a tool to find the explanations for recent developments. Civil litigation, the author contends, seems to return to ancient venues that are outside courts, to be resolved by alternative methods, such as mediation. There are many common factors with the ancient dispute resolution, but because the current society strongly differs from the ancient one, the reasons must be studied from the societal perspective as well. The questions to be set are if there is something new under the sun or if we are just circulating. In other words, which are the modern characteristics of the progressive civil litigation, and from which parts of it does dispute resolution seem to return to the very traditional and ancient forms only? Why can nowadays justice be seen as a negotiated compromise between parties? Why we can talk about the new court culture, why can adjudication be seen as court service and the parties as customers and no longer as "royal subjects"?

19.1 Introduction

Is there anything new under the sun, or are we just hanging out? The ancient conflict resolution in two Nordic countries (Sweden and Finland) was based on the consent and will of the parties and their families. The village community was the main actor, and the adjudication was based on communal values. The finding of the material

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truth in the case, as well as adjudication that was based on the will of outsiders (the judge and the legislator), came into the picture later, together with the centralised power and state authorities.[1]

Just recently, similar values and elements that refer to the ancient venues and types of conflict resolution can again be found in the post-modern civil proceedings. For instance, the post-modern court culture[2] in civil litigation is based on communication and interaction between the parties and the judge. Furthermore, the legislator has delegated quite a lot of its powers to actors in practice. Additionally, the judge has quite a lot of discretionary powers to find the best and the most reasonable solution in the case, together with the parties.[3] Due to the named changes, there has been a radical change from adjudication, ideals of material law and a substantively correct judgment towards the ideal of negotiated law and pragmatically acceptable compromise.[4]

There has even been a change from judicial power towards court service, which means that it is not enough to follow normative fairness, but the actors should additionally feel that the procedure was pleasant, and even this kind of experimental fairness is nowadays a significant factor in due procedure. Adjudication can, therefore, nowadays be called a court service.[5]

The civil procedural frames, the terms of references, in other words process ideas, have been fixed according to social needs instead of liberal values, and the practical distribution of work between the parties and the judge is based on the cooperation between the parties and the judge.[6]

In addition, especially in Sweden, conflict resolution has often been seen as the most important function of civil proceedings, and with this development the perspective has been changed from external towards internal and from retrospective towards prospective points of view.[7]

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[1] Summary on the history of Swedish–Finnish procedures can be found, for instance, in Ervo (2007), pp. 49–77.

[2] I use the term "court culture" in the same sense as Anna Piszcz has earlier done in this anthology (see Chap. 18.), including courts, lawyers and parties' attitudes towards resolution of cases. Like Piszcz has explained earlier, court culture is especially being shaped by procedural laws. The latter part of the court culture is even more important in this chapter than the first dimension due to the fact that this article is not sociological but a juridical one. Therefore, I am looking at court cultures, especially from the normative perspective. In addition, values, as well as the impact of numerous constitutional, economic, political and social factors, have influenced court culture not only directly but even indirectly in the form of new procedural legislation.

[3] Ervo (2013b), p. 51.

[4] Ervasti (2004), p. 168, Ervo and Rasia (2012a), pp. 62–64, Haavisto (2002), p. 20, Laukkanen (1995), p. 214, Takala (1998), pp. 3–5, Tala (2002), pp. 21–23, Tyler (1990), p. 94 and Virolainen and Martikainen (2003), p. 5.

[5] Ervasti (2004), p. 168, Haavisto (2002), p. 20, Laukkanen (1995), p. 214, Takala (1998), pp. 3–5, Tala (2002), pp. 21–23, Tyler (1990), p. 94 and Virolainen and Martikainen (2003), p. 5.

[6] Laukkanen (1995), pp. 69–106.

[7] Ervasti (2002), pp. 56–62, Leppänen (1998), pp. 32–41, Lindell (2003), pp. 82–101, Lindblom (2000), pp. 46–58 and Virolainen (1995), pp. 80–89.

All of that refers to change, even in democracy. In the current model, democracy means that the courts have to meet the needs of democracy incessantly and *in casu* via the parties. The courts or judges have no longer authority and legitimacy as such, but it has to be deserved every time, in every single case, once again.[8] All in all, the civil proceedings have become again very communal.

In this study, I will compare the current civil procedural paradigm with the historical procedural development to find out where we are coming from and to estimate which direction we are going to from this moment onward.

19.2 The Link Between Procedural and Substantive Laws

The main purpose of the procedural norms is to guarantee access to justice, in the other words, access to substantive law. The first step on that way is to guarantee access the courts, which nowadays could be described as access to conflict resolution (and also belongs to the main goals in the procedural law). The third aspect is the needs of the parties, that, is how to realise the named goals in the best way such that both society and the current parties are satisfied. Therefore, both society, as such, and the single parties and other actors in one current case are the objectives of procedural norms. Society is along, in the meaning of economic and effective[9] adjudication and conflict resolution and the individual, in the meaning of well-working procedural system.

Therefore, the procedural law does not exist for its own purposes but for the realisation of other goals. That is why the existing societal ideologies and needs play a major role in the way how all of that has been organised. The process ideas and the functions of proceedings are reflections due to the above-mentioned societal background.

Due to this link between society, substantive law and procedural norms, the current situation in society, current ideologies and values, current way of thinking in the economy and also an individual's sociological behaviour and way of thinking affect deeply the valid procedural system, procedural laws and procedural behaviour (the behaviour of actors in this field) in the sociological meaning.

Procedural system and laws are essential tools to realise substantive law and material rights, as explained above. At the same time, they can be seen as assisting methods in fulfilling other aims. They do not exist alone, but without them substantive law and the material rights cannot be reached and executed. This is a necessary symbiosis that makes the link between the valid procedural law and the current societal circumstances extremely interesting and worthy of researching.

[8] Ervo (2013b), p. 57.

[9] Effective in this sense means well-working system where the judicial relief is taken into consideration among costs and length.

In this chapter, the named link has been touched from different perspectives and it is researched, especially from the historical and sociological points of view, to capture the current stage, the reasons to that and to take a peek towards the future development to estimate the next steps in this procedural progress.

19.3 Historical Development: All in One Go Will Be?

There is not much information on the ancient civil proceedings in eastern Nordic countries before the state Sweden–Finland. However, ancient conflict resolution was based on village communities, as well as families and their power to solve conflicts at a local level. There might be differences between inside conflicts (inside the family) and conflicts between families. Inside conflicts were probably solved by light means and damages, and compensation played a main role, whereas in conflicts between families, and especially when the conflict was caused by a serious "criminal" offence, the resolution happened by using the oath taking, where the defender had to give an oath that several people from the same village or family confirmed by their own oaths. The meaning of this procedure was to show if the person still had confidence in the community or not. The aim was to guarantee public peace and to reach law and order in the community to go on and to return from disunity to the unity.[10] As we can see, the main function of the proceedings was to find a concrete solution to the case to continue the peaceful life in the community. Loser/winner relations were not on the focus that time, but the procedural perspective was totally communal and in societal needs as such. The similar characteristics can still be found in the later eastern Nordic proceedings, even if the mentioned features were no longer that strong. Despite of the centralised power in Sweden–Finland, the law and jurisdiction included still l village communal undertones. The total change happened not before than during the 17th century even if this tendency towards state law started already in the end of 16th century.[11]

In the middle ages (1150–1523), Finland was occupied by the Swedes and the state was called Sweden–Finland. As one of the consequences, Swedish legal order, which was based on the continental system, was accepted in Finland as well. In the 1200 century, the centralised power started to develop, which was a good start for the development of procedural law as well. The adjudication and the administration of justice started to move from parties and their families to the societal organs. However, as mentioned before, state adjudication did not fully take place before the 1600 century.[12]

In the beginning of the 1300 century, Western legal order started to take root in Finland, together with Christianity, and by time Sweden–Finland started to get

[10] Tirkkonen (1974), p. 48 and Ylikangas (1983), pp. 7–19.

[11] Letto-Vanamo (1995), pp. 6, pp. 264–268 and Ylikangas (1983), pp. 7–19.

[12] Jokela (2005), p. 6, Letto-Vanamo (1995), p. 6 and Tirkkonen (1974), s. 48.

even national legislation—though provincial ruling was still typical in medieval Sweden–Finland. The *provincial laws* included still a lot of ancient common laws, and originally they existed only in an oral form. Later on, in the 13th and the 1300 centuries, they were also written down by the Catholic Church and by the more powerful king. The provincial laws also included family justice, canon law, and king's orders. The family justice effected, for instance, in the way that the victim and his/her relatives they played the central role and lot of decision power in the procedure. In addition, they had a wide choice of procedural conduct.[13]

The procedural code was failing in most cases and, even later, the procedural rules; they were included in the substantive laws. It was common to all provincial codes that the substantive law and procedural rules were not separated but were blended in. Even juridical discretion and evaluation of evidence were not separated. However, the law of evidence was important as such, and the provincial laws included many rules on the burden of proof and on admissibility of evidence.[14]

The earlier mentioned system of oath takers was still a very common way to solve conflicts in the medieval Sweden–Finland, and it was used even in civil cases if the plaintiff had no proof, such as documents or witnesses. The claim was, namely, enough to win the case if the defendant could not find those, usually 12, people to confirm by oath that the defendant has a right. The burden of proof, which belonged to the plaintiff, meant only that in case the plaintiff had evidence, even the oaths given by those 12 people could not save the defendant. Otherwise, the defendant had to give evidence against the claims of the plaintiff to win the case.[15] As we can see, medieval proceedings were based on the idea of conflict resolution instead of dispute resolution. The main aim was to solve the conflict materially and not to be satisfied with the not proven decisions. This was due to the goal to reach peace and to avoid revenge.

The medieval proofing was therefore based on oaths and not that much on material truth finding due to the aim to avoid revenge and to continue a peaceful life between the parties. The system of oath takers was based not on the truth as such but on metering how much trust the involved person had in the local society. Due to the same reasons, to find public peace, the main aim was to make a friendly settlement between the parties. However, the church and its adjudication stressed the meaning of truth finding. From the 1200s onward, truth finding was more important and the nature of the system of those 12 oath takers changed to the jury system,[16] where the jury had to decide the material truth in the case. At the same time, oath taking lost its significance and the plaintiff got the burden of proof.[17]

[13] Jokela (2005), p. 6 and Letto-Vanamo (1995), p. 10.

[14] Letto-Vanamo (1995), p. 84.

[15] Letto-Vanamo (1995), pp. 127–132.

[16] From the beginning of 1400s on, all litigation cases were decided by the jury.

[17] Letto-Vanamo (1995), pp. 142, 230–231.

Despite of the provincial laws, their application did not correspondend to the modern interpretation of nationwide statutes, but that time the lighter practice was applied, especially in a case where the parties made a friendly settlement or when the jury or the general audience asked for a lighter judgment. The role of the assize was important, and the general audience played a central role at the district court sessions as well. The general audience did attend in the decision-making, and it was an essential part in the proceedings. By doing so, the procedure and decisions achieved even publicity. The general audience took part in decision-making not only in criminal cases but also in civil cases, especially when ownership of land was the issue. As time went by, the general audience was no longer present in large numbers and its significance became minor. One reason for that was that district court sessions turned to inside instead of ancient venues in the nature. This fact that assizes were shifted inside from earlier ancient outdoor venues furthered the progress where private and communal justice became state justice because all the assize audience could no longer find seats to be present. These changes in factual procedural frames caused changes in the internal proceedings as well.[18]

The era during the provincial laws was a border line between private and state justice. Still, in those provincial laws, family justice, church justice and state justice existed side by side. More or less, this period continued until the 1550s, where the acts done by parties had already diminished significance, but, on the other hand, legitimacy and power in adjudication were not yet based on state authority but on the way the result had been reached, in the other words, by communality.[19]

Later in the middle of 1300s, *two nationally wide laws* were enacted, one for cities and the other for countryside. The procedural code included so many new rules, and the assizes became the means to solve the dispute. Friendly settlements were no longer that important than earlier, and the negotiated justice made by the parties, communities and traditions was not any more important, but adjudication in courts was underlined. It has been said that the medieval era found the law and justice, whereas the new era legislated it.[20]

The sessions of assize became more and more state court type of proceedings in the 1600s. At the same time, the using of attorneys became more and more typical. This development was mutual in the sense that, on one hand, the proceedings changed to the type where it was possible, necessary and essential to use attorneys instead of own party actions and, on the other hand, the development of the law profession made it possible and the named changes in proceedings facilitated the occurrence of the law profession.[21]

There were long distances to the courts of appeal, which also made it useful for the parties to use attorneys instead of appearing in court themselves. Attorneys sued and responded in the name of the parties and with binding consequences for them.

[18] Ervo (2007), p. 67, Letto-Vanamo (1995), pp. 10–13 and Nousiainen (1993), p. 327.

[19] Jokela (2005), p. 6 and Letto-Vanamo (1995), p. 10.

[20] Virolainen (2004), p. 576.

[21] Letto-Vanamo (1989), p. 223.

Family justice and the oath taking were of the past and the state proceedings had become instead.[22]

The development where the central power became more and more important continued reaching its top in 1540, when the private settling of crimes became forbidden and the power to sanction was taken to the society and the state only.[23] It was no longer a private affair of the parties, their families and the local community.

In 1615, Sweden and Finland got a new act on juridical procedure, where, for instance, written proceedings were stressed. In addition, advocates took care of proceedings in the name of parties. Also, this is a good example on the development, where the family type procedures were recessive and the proceedings started to be more and more state based.[24] At the same time, the sequential jurisdiction became ruled and the summoning and rules covering the absence of the parties were institutionalised. All that led towards state jurisdiction, instead of earlier family jurisdiction.[25] In addition, in the end of the fifteenth century, the legislator tried to effect and speed up proceedings by so many state orders.[26] At the same time, the material truth became a more and more important aim in court procedure. The party's status to be a tool for evidence became minor, and witnesses as well as the jury became more important in this sense. The judge and the jury decided together what the truth was in the case and confirmed the law in the case.[27] The jury had important status, especially in civil cases where equity played a huge role.[28]

From 1617 to 1721, the nature of the proceedings became more rational. The courts got the instance hierarchy, and the characteristics of the law of evidence changed. Truth finding became the most important. The parties lost their autonomy to decide the case. This power was taken by the state, and adjudication and justice started to be based on authority, state power, rules and coercion. At the same time, adjudication became professional and bureaucratic.[29]

In 1695, Sweden–Finland got a new procedural order by which oath taking was even formally abolished and the witnesses should be outsiders from this on, which was a major change in the characteristic of the law of evidence and in the function of proceedings.[30] By the same 1695 procedural order, the procedure got even otherwise the modern frames in its present form.[31]

Evidence was based on the legal theory where the court was dominant instead of the parties. Even the participation of the judge played a major role in

[22] Letto-Vanamo (1989), p. 255.
[23] Letto-Vanamo (1995), pp. 85–101 and Nousiainen (1993), pp. 319–320.
[24] Letto-Vanamo (1989), pp. 221–233 and 307.
[25] Letto-Vanamo (1989), pp. 233–236 and 307–308.
[26] Letto-Vanamo (1989), p. 308.
[27] Letto-Vanamo (1989), pp. 246, 256 and 308.
[28] Letto-Vanamo (1989), p. 248.
[29] Nousiainen (1993), pp. 318–319.
[30] Letto-Vanamo (1995), p. 85.
[31] Virolainen (2004), pp. 407–408.

the Swedish new era proceedings. It was the judge who was the main element in court communication and participation. The judge could decide the fact gathering and the adduction of evidence and whether the parties should be present or not despite of the fact that the case was a non-discretionary or non-mandatory type. The Truth finding played the most essential role as well, and the judge could use party hearing to investigate this even in non-mandatory cases, and the method was widely in use, especially in the countryside and generally in lower courts.[32] The development got its height in 1734 with the famous codification, where it was stressed that the judge is the servant of the law and not its boss, which meant that the judge has to follow the law in all its details and should not settle or amend for reasons of equity. Legalism was therefore very important, and it was underlined that the roles of the legislator and the judge are highly separated.[33]

The system continued like this for quite a long time. In 1809, Finland became an autonomous part of Russia, having still earlier Swedish laws in force. Therefore, Russian adjudication did not have much of an effect in Finland, but the Swedish model was followed even later in the independent country from 1917 onward. The 1734 Judicial Code of Procedure is valid in Finland even today, even if no original paragraphs are valid any longer. However, from 1870s on, there were plans to reform the proceedings comprehensively. So many partial reforms were fulfilled; for instance, the law of evidence was reformed in 1948 when the legal theory of evidence was abolished even formally. In practice, courts had followed the free theory of evidence from the late 1800s on. There were so many plans and suggestions for this overall reform, but they were not realised before 1993, when the overall reform in Finnish proceedings finally seriously started. In 1993, reform was drafted with the three main goals to build the procedure at lower courts into the oral, immediate and concentrated proceedings.[34]

The reasons for the long-lasting planning were partly societal and political. There were wars and economic crisis, in addition to political disunity.[35] From 1993 onward, there have been so many procedural reforms in both civil and criminal proceedings covering especially the lower courts and the courts of appeal. In the latest development, the possibility to make friendly settlements has been strongly stressed by the legislator. In addition, mediation has played a huge role and even court-connected mediation; judges as mediator has existed since 2006.

[32] Inger (2011) and Letto-Vanamo (1989), p. 241.

[33] Nousiainen (1993), p. 389.

[34] Aggregated in Ervo (2007), pp. 77–95.

[35] Aggregated in Ervo (2007), pp. 82–93.

19.4 The Functions: For the Parties or Society?

There has been a very wide discussion in the Nordic countries, especially in Sweden, on the function of civil proceedings, which nowadays has mostly seen to be conflict resolution. Traditionally, it has been seen that the function of procedure is to grant judicial relief.[36] According to it, the function of procedure is to grant the interests of civil law. The proceedings are the instrument in order to achieve access to justice strictly according to substantive law. The point of view is internal what the procedure is concerned.

However, nowadays, the point of view is wider and takes the aspects of society into consideration. The main function of procedure has been seen to be dispute resolution,[37] conflict resolution[38] or even both.[39] Those who see that the function of procedure is dispute resolution keep the process as a sanction mechanism. The idea is that procedure has a strong influence on material law and therefore judgments should be given strictly according to substantive law. The point of view is to consider procedure as an institute. The viewpoint is external to what the single proceedings are concerned. The function of proceedings as an institute is to guide the behaviour of people so that they would obey the norms of substantive law. At the same time, the proceedings have the task to maintain and advance morality in society. This function is quite close to the traditional thinking. The main difference is, however, that the point of view is not internal but external and the proceedings have been seen to have effects on the whole society.[40]

The other current viewpoint is to see conflict resolution as a function of proceedings, which seems to be the most popular and current trend among both academics and legislator. According to this thinking, it is most important to resolve the conflict between the parties as a whole not only as a judicial problem. The correctness of the judgment and its contents are not the most important things, but the task is to resolve the conflict in a way that it will no more exist but the parties can go on in their lives and even together. The latter is especially important in case parties are, for instance, neighbours, colleagues, former spouses or business partners, who still have common activities even in the future. In order to achieve this

[36] The goal of civil procedure has traditionally been said to be the realising of the interests and of the rights of civil law. That is why also procedural values have been seen to be identical with the values of substantive law. See, for instance, Henckel (1970), p. 409.

[37] For instance, Hägerström, Lundstedt, Olivekrona, Ekelöf, Andenæs, Boman, Werin, Scott and Fiss.

[38] For instance, Aubert, Bolding, Eckhoff, Lindell and Palmgren. According to Lindell, the procedure in non-mandatory civil cases should be conflict resolution and in mandatory cases, dispute resolution. Lindell (1988), p. 87.

[39] For instance, Lindblom and Strömholm; see in the procedure the influences of both theories. Lindblom (2000), pp. 52–58.

[40] Aggregated in Ervasti (2004), p. 507.

aim, the parties should participate widely in procedure and have wide possibilities to make dispositions as well.[41]

Among the school of conflict resolution, the law of evidence, especially the burden of proof, as well as the standard of proof, is in centre. This school has used the idea of so-called preponderance of evidence in the law of evidence. It means that the burden of proof and somehow even the standard of proof will become invalid. That party will win who has the overweight, that is, who has proven his or her claim to be more probable. So even the 51 % overweight can be enough for what the standard of proof is concerned about. The main idea is, of course, again to resolve the conflict. With the judgment "not proven", the conflict between the parties will not become resolved will exist even after the procedure has been finished. The rules on the burden of proof and the standard of proof are therefore not useful in conflict resolution.[42]

The most current trend is to see the function of procedure as conflict resolution and to underline that kind of characteristics. The legislator, academics and actors in practice seem to both seek and appreciate elements that realise this type of civil litigation. Party autonomy, friendly settlements and different types of mediation are the current procedural tools to fulfil the goal. Communication, interaction, cooperation—they are psychological approaches towards the same direction. Mediation and class actions are examples of more communal conflict resolution as earlier. By those means, the legislator tries to achieve access to justice and experimental fairness better and in a more effective way. By conflict resolution, the proceedings and therefore even state justice come closer to alternative dispute resolution and private justice.[43]

19.5 Truth Finding: Societal and Moral Interests Involved?

The intensity to find out the material truth in the case has varied the course of the day. Sometimes it has been underlined more, whereas there are periods when the procedural truth has been stressed more. Sometimes truth finding has not been a goal at all, but the parties could have settled the case according to their wills despite the proof, sometimes even despite the substantive law. in the case.

It has also been said that the truth is illusory, incomplete and dependent on the knower and knowledge. The truth is especially very complicated.[44] Therefore, we can even ask the question whether truth finding is important and why it is if it is.

[41] Aggregated in Ervasti (2004), p. 507.

[42] Lindell (1988), p. 88 and Saranpää (2010), pp. 227–290.

[43] Ervo (2009a, 2011a, b).

[44] Menkel-Meadow (1996), p. 5.

In addition, we can ask what kind of role it has played and what kind of role it should play in the civil proceedings.

In the recent centuries, the aim of procedure has been to find out the material truth, that is, what has really happened in the case, whereas in the olden times, in other words in the ancient conflict resolution, material truth finding played no role at all.[45] The recent trend in the legal literature has again been to stress the meaning of procedural truth mostly.

According to Chap. 17, Sect. 17.2 of the Finnish Code of Judicial Procedure "after having carefully evaluated all the facts that have been presented, the court shall decide what is to be regarded as the truth in the case". This has been interpreted to refer to the material truth as an aim. However, the real result, the judgment, is always based on the procedural truth that is what has been proved during the trial.[46] Still, it has been important to make the difference between these two dimensions and to aim at the material truth at the illusory level and not to be satisfied with something that is false.[47] The material truth is illusory when the procedural truth is incomplete and dependent on the knower and knowledge.

However, this has been the situation. In the newer literature, the material truth is no longer stressed, but it has been pointed out that the result reached in the proceedings is based on the procedural truth only, and the material truth as an aim has been underestimated.[48] Quite recently, the Finnish legislator made a suggestion to change even the above-named section.[49] According to the proposal, the court shall decide what has been proved in the case. This decision shall be based on the presented pieces of evidence and other facts that have arisen during the proceedings. In Sweden, this has been the case even before, and both the aim and the result in the proceedings have been based on the procedural truth only. According to the Swedish Code of Judicial Procedure, Chapter 35, Section 2, the court shall namely determine what has been proved in the case after evaluating everything that has occurred in accordance with the dictates of its conscience.

If we compare this development with traditional dispute resolution, we can find some similarities. In olden times, the power to decide the case belonged to the village communities. In addition, family and relatives played a huge role in conflict resolution, which is based on the aim to find public peace again and to avoid the spiral of revenge. The significance of the truth became more important just later by the canon law and when the central power started to develop.[50]

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[45] See Sect. 19.3.

[46] Tirkkonen (1969), pp. 24–25.

[47] Ervo (2012b), p. 3.

[48] Frände (2009), p. 366, Niemi-Kiesiläinen (2003), p. 346, Huovila (2003), p. 179, Turunen (1999), p. 496, Virolainen and Pölönen (2003), p. 174. However, Jokela, Lappalainen and Saranpää have stressed aspects that refer to the material truth and its importance as well. Jokela 1996 (2005), pp. 40–41, Lappalainen (2001), p. 993 and Saranpää (2010), pp. 28–29. About the significance of the material truth in criminal cases, see Ervo (2013a).

[49] Oikeusministeriön mietintöjä ja lausuntoja 69/2012, p. 215.

[50] See Sect. 19.3.

It has been also said that the increasing complexity of modern life and trials has led to the fact that in conflicts there are often more than two parties. This development will also affect how the truth as a goal is understood in the proceedings. If we accept that modern conflicts are complex entities that belong to more than only the main parties to the conflict, it may be necessary to accept the relativity of truth and to emphasise the function of proceedings, specifically as conflict resolution.[51]

As mentioned above, the current trend in civil proceedings has since some decades been conflict resolution. Therefore, it is natural that the material truth and its finding is no longer that important, but the most vital aim seems more and more often to be that the parties are satisfied and that the conflict between them has been solved fundamentally, finally and by legitimate means.[52] Thus, the importance of the procedural truth is growing in such a way that the parties may be permitted to even dispose of it.

19.6 Process Idea: A Link to Societal Ideologies

Process ideas refer to theoretical frames of reference covering the objectives of the trial and the norms and methods with which the objectives, in a concrete trial, are carried out. Especially, the frames of civil procedure have been described with the process ideas.

The process ideas or civil procedural frames,[53] the terms of references, can be organised according to liberal or social values; nowadays, even the third form, namely the modern social procedural frames, has been found.[54]

The liberalistic process idea is based on the thinking 'wherein the parties' role is very strong and the court is passive. This is due to the equality of parties. The proceedings are seen as a fair play between parties who should have an open playground for the play that should not be restricted by the judge or the procedural norms. Their equality is based on the equal freedom and equal norms and on the passive judge who will not take care of one's rights but focus on the dispute resolution only. It does not belong to the duties of the judge to take care of the judicial relief of the parties or the material truth in the case.[55]

[51] Menkel-Meadow (1996), p. 5.

[52] Tolvanen (2006), p. 1343.

[53] With the procedural "frames", I refer to the way how the distribution of the procedural work has been dealt with by the actors, like the judge and the parties, for instance, who are active and responsible for the truth finding, pleadings, etc. If it is mostly or only the parties who take care of this kind of procedural acts and by those means decide the frames in the single case or if the judge is more active.

[54] Ervo (2005b), pp. 102–103.

[55] Ervo (2005b), pp. 98–99, Laukkanen (1995), pp. 35–68 and Saranpää (2010), pp. 82–84.

The social process idea is almost the opposite of the liberal one. It is central in the social process idea to secure the parties' real equality. The judge's role becomes active, and the objective is to reach materially the right judgment. Theoretical equality is no longer enough if the parties are anyways unequal in practice due to different resources.[56]

The modern social process idea is the second step in this development where the parties' real possibilities should be secured[57] but where also their freedom and free will should be respected with the help of the party autonomy in both substantive and procedural questions. In addition, the object of the proceedings, the problem the parties have, is seen not only as a juridical problem but as a comprehensive way where the conflict as such should be solved, and the parties should get the possibility to touch even sociological, psychological and moral dimensions of their problem instead of the issues with the pure juridical nature.[58]

The liberalistic process idea took shape in Germany in the 1800s, and its basic structures reflected the liberalistic way of thinking in the field of economy, which was typical for the period. In the background of the liberalistic process idea is the concept of freedom in which the autonomy of the individual is essential in relation to the government. This idea of freedom is the same that was typical for the era of the Enlightenment. The freedom is manifested in the failing of the adjusted norms. The freedom rights formulated the so-called freedom circle for the individual, where the state did not use its power but it was free for individuals to use their power independently. According to this way of thinking, the individuals had to have freedom to use their individual power freely even during the trial.[59]

The procedural freedom was manifested, especially with using the principle of the party disposition by the fairly orthodox way, which expressed the above-mentioned private autonomy in the law of procedure. There was no significance whether the party was able to make pleadings or if he or she understood their significance. The formal equality between the parties was sufficient in the process. The judge's role was passive. His/Her task was to solve the quarrels defined by the parties and not to take care of their legal protection or of the material truth. The liberalistic process idea was based on the distinctive neutrality of the court, and the parties' equality was carried out particularly with the passiveness of the judge. Passiveness and equality were even compared with each other.[60]

The liberalistic process included the dispute resolution perspective in which the court was considered as a tool to solve the quarrels impartially. Society offered this alternative to the parties to solve their quarrels independently. The private quarrelling was namely seen to be more dangerous than the peaceful settling of quarrels by a trial from the point of view of societal peace. However, the purpose of the

[56] Ervo (2005b), pp. 99–101, Laukkanen (1995), pp. 69–88 and Saranpää (2010), pp. 84–85.

[57] Ervo (2005b), pp. 102–103.

[58] Ervo (2009a, 2011a, b, 2013b).

[59] Laukkanen (1995), pp. 35–68.

[60] Laukkanen (1995), pp. 35–68.

alternative was only to offer the setting and controlled conditions to the solution of quarrels. The offering of formal methods was a sufficient and the material interference with the solution of quarrels; it was kept as a forbidden interference to the private autonomy. Within the liberalistic sphere of the process idea, the trial was understood as a competition between the formally equal parties. The trial was strongly based on the idea of the two-party proceedings. In addition, the perspective in the proceedings was retrospective. The main point was to solve the judicial problem due to the historical facts that happened in the past.[61]

In the trial shaped by the liberalistic process idea, it was sufficient to reach this formal freedom and equality. It was not at all significant if the party was able to achieve his real objectives by his pleadings. A responsibility also was connected to the freedom as an essential part. From the stupidity it was fined.[62]

The social process idea was created as a reaction to a liberal process idea and thus is mainly the opposite of the liberalistic one. At the same time, it is a question of competing process ideas because they foremost will pay attention to the same features of the frames of the process and usually appear in the same legal culture. The social process idea rose especially out in Germany 1950–1970 in connection with discussions concerning the objectives and goals of the civil procedure. As such, the social process idea developed already at the end of the 1800s, and, for example, Austria's 1895 Civil Procedural Code is considered as its one manifestation. The social process idea is not as uniform a theory as a liberalistic process idea is. Instead, the social process idea mainly criticises some procedural features that are typical of the liberal theory. However, there is one common feature in all social process ideas, and it is the active judge. It belongs to the judge's duties to find out the material truth and to take care of the judicial relief of the parties. In addition, the perspective is future oriented, and the conflict should be resolved in the way that makes the possible cooperation of the parties possible even in the future. The main point is, therefore, not to find the juridical compensation to the past event but to look towards the forthcoming cooperation and relation between the parties.[63]

The proceedings are not only the matter of the parties, but it can have links to the other actors as well. The structure of procedural actors is likewise more versatile than in the liberalistic process idea. It is not necessarily a question of a tight two-party proceedings, but the interests that are related to the matter can vary more widely. The conflict situation is understood in a way that it may reach also outsiders and not only the formal parties. In addition, it has effects to the whole society because one aim of the proceedings is to affect the behaviour of the people in the future. Therefore, one of the functions of civil proceedings is seen to be one kind of sanction mechanism. At the same time, even the other civil procedural function, namely conflict resolution, fits well into the social process idea because the social process idea stresses that the conflict should be solved as a

[61] Ervo (2005b), pp. 98–99 and Laukkanen (1995), pp. 35–68.

[62] Ervo (2005b), pp. 98–99, Ervo (2007), pp. 106–111 and Laukkanen (1995), pp. 35–68.

[63] Ervo (2005b), pp. 99–101, Laukkanen (1995), pp. 69–88 and Saranpää (2010), pp. 84–85.

whole and not only from the judicial point of view. In social process, the conflict should be solved as the whole, including all its projections.[64]

It is central in the social process idea to secure the parties' real equality. Therefore, the judge's role became active, and the objective was to reach the judgment that was materially correct. The judge became the central character in the trial, which was isolated neither from a surrounding society nor from parties. The judge was a process subject who could use his or her own advisers and experts. An attempt was also made to reduce the formality of the procedure and to intensify the flexibility and speed of the procedure. According to the social process idea, the judgments are more negotiated than condemned. The procedure indeed is a many-sided interdependency where the active judge leads the process. The procedure itself can be seen as a flexible service that takes the parties' needs into consideration.[65]

In Germany, in which the social process idea especially developed the Civil Procedural Code was considered as a law of for the elite. The different procedural burdens and the parties' responsibility to carry on the procedure were seen easier to the subjects who were able to do the business better. They were successful in the process who knew their rights and were familiar with both legislation and procedure. Within the sphere of the social process idea, a criticism was presented against this inequality. The procedure and the court were seen instead of the implementer of the stronger party's rights as a servant of the whole right community and society. However, it was not necessarily a question of the class war that was brought to the law of procedure, but the social process idea may have been understood also as an implementer of general interests, such as in consumer protection or environmental protection. In the Nordic countries, however, the sociability appeared, for example, in achieving of the objectives of the material legislation in which the law of procedure operated as executor of these objectives.[66]

The Austrian Civil Procedural Code of 1895 has often been mentioned as a good example of the procedure that has been built on the social process idea. The above-presented German critic was taken into consideration, and the Austrian procedural rules were no longer that formal but, the whole proceedings were built on the social idea. An attempt was made to accelerate the trial by shortening deadlines. The judge got wide power for the process management. Furthermore, the principles of orality, immediacy and concentration were brought into use. The formality of the trial was reduced by emphasising the objective of the material truth, by the judge's active project management and by bringing into use the free examination of a witness and the free consideration of evidence. With these reforms, the basic idea of the process as a matter that belongs to the parties' private autonomy was stepped aside in Austria, and the process got distinctly social features. The judge had

[64] Ervo (2005b), pp. 99–101, Ervo (2007), pp. 111–118, Laukkanen (1995), pp. 69–88 and Saranpää (2010), pp. 84–85.

[65] Ervo and Rasia (2012a), pp. 62–64.

[66] Ervo (2005b), pp. 99–101, Ervo (2007), pp. 111–118 and Laukkanen (1995), pp. 69–88.

a social role with the active process management, a task to study the matter thoroughly and a duty to take care of the parties' substantive interests. The new tendency began to spread also elsewhere to Central Europe, as well as to the Nordic countries soon. Austria's reformed law affected especially Norway's and Denmark's similar laws, which likewise were reformed at the turn of the 1900s.[67]

In the early 1970s, the social process idea reached its second step when in Germany a so-called *co-operation principle* developed as a fruit of the social process idea. It talked about a social civil procedure and about humanisation of the civil procedure by emphasising the parties, and the judge's active interaction. A discussing judge was brought out instead of a passive solver. The discussion began already in the 1950s, in which case the social process idea was brought up in a discussion concerning the objectives and principles of the civil procedure.[68]

In 1976, a specific prohibition was taken to Germany's reformed Civil Procedural Code to avoid surprising judgments, and a duty to reserve an opportunity to utter from all the matter questions and questions of law that have emerged for the parties was set for the courts. Thus, the discussion between the parties and the court increased and was directed to essential matters. The judge's social role was emphasised by the active process management and duty to study the matter thoroughly. The judge has discretion in the choice of the legal consequence. Even legislation does not necessarily restrict this consideration, but the judge has permission to shape a suitable legal consequence and also has a responsibility for the finding of the suitable consequence. It is significant to achieve the objectives of, especially, material legislation.[69]

With the reform the cooperation principle, the social process idea got the point of reference in a valid law. With it also the views that are related to the social process idea were systematised and organised. The school that studied the cooperation principle also was born. Except a social process idea, thoughts were connected to the cooperation principle from a humane civil procedure and from a discussing judge's points of view. Within the sphere of the school, it was shown that the social structures on which the liberalistic process idea had been based once had changed during the century.[70]

Nowadays, the cooperation principle is understood as particularly the court's and the parties' concrete cooperation. Originally, the thought was to restrict the principles of party disposition and method of treatment because in court instituted civil action was not considered as only the parties' personal affair, but the quick and right solving of it was also in the interest of society. The purpose was to guarantee the parties' real equality in the process with a more active process management than before.[71]

[67] Ervo (2005b), pp. 99–101, Ervo (2007), pp. 111–118, Laukkanen (1995), pp. 69–88 and Saranpää (2010), pp. 84–85.

[68] Laukkanen (1995), pp. 89–108.

[69] Laukkanen (1995), pp. 89–108.

[70] Laukkanen (1995), pp. 89–108.

[71] Laukkanen (1995), pp. 89–108.

With a social process idea, an attempt was made to replace as a battle between the parties the thought of the process that has dominated earlier. As the judge's task, the achieving of the objectives of especially the material legislation in its solutions was raised. The thought was that fairness does not develop only from the case-specific analysis of the right, but to achieve the objectives of the legislation in the individual cases is central. In the discussion, the questions of the normativity of the law of procedure, of the judge's person and social profile also were brought up. Thus, it was not a question merely of the criticism of process rules and of the change demands, but also the criticism was directed to the lawyers' education, the judges' working methods and attitudes and the possibilities of the court system to offer a real legal protection. On the whole, humanisation of the civil procedure was required. The objective was to increase citizen's confidence in the courts.[72]

19.7 Modern Social Process Idea: Back to Ancient Venues?

The dominating process idea is developing towards *the modern social process idea*, which can be seen as a developed version of earlier social process idea. In its modern form, the parties are even given the concrete tools to act in an equal and active way in the proceedings. It is not sufficient to correct a possible inequality with the procedural laws or with the active operation of the court only, but the cooperation principle must be supplemented, if necessary, by developing the external methods of the court to create the equality. This kind of a method is, for example, an opportunity to get a free legal aid.[73] These kind of concrete tools are typical in the current process idea. The other examples are interpreters, support persons, experts like psychologists and so on. No one should—due to the lack in resources—be unable to act in the proceedings or to reach the conflict resolution. By those means, even the court is given the best possibilities to solve the case.

This is essential in a fair trial that also belongs strongly to the modern social process idea, thanks to international human right conventions and thanks to the internationalising[74] and constitutionalising[75] of legal procedures. The named phenomena have caused the boom of human and constitutional rights, which is very strong especially in Finland during decent decades and has affected strongly in the

[72] Laukkanen (1995), pp. 89–108.

[73] Ervo (2005b), pp. 102–103 and Ervo (2007), p. 118.

[74] Procedural law has been said to be internationalised because there are more and more international conventions and other rulings, which include very often quite deep regulating procedural norms. Especially, this has been the situation in Finland, where the European Convention on Human Rights and its Article 6 plays a huge role in adjudication. Also, EU law has deep-going effects, especially in the field of civil proceedings and nowadays more and more even in criminal procedure.

[75] This concept refers especially to the Finnish phenomenon where the constitutional rights in the field of procedure play a significant role nowadays.

procedural law and court proceedings. Therefore, also access to court and access to justice have been taken more seriously and even in the way where the court proceedings are viewed critically. Foremost, legal aid and this kind of tools to reach the procedure are stressed and other hindrances in proceedings, such as the delays, are taken into consideration. Different solutions to those problems have been found or at least tried to be found. Still, court proceedings have been reviewed critically as such and alternative dispute resolution has been arising, especially in the form of mediation procedures. This significance of fairness is one very important element in the modern social process idea. In addition, not only normative fairness but even experimental fairness have been stressed in recent development. The parties and all actors in the procedural field should even feel that the process was fair. Currently, the most important function in adjudication is that contextual decisions, which the parties are satisfied with, are produced through fair proceedings. Therefore, one of the main goals is substantial satisfaction. There has been a change from formal justice to perceived procedural justice and from judicial power to court service, which means that it is not enough to follow normative fairness but the actors should additionally feel that the procedure was pleasant, and even this kind of experimental fairness is nowadays a significant factor in due procedure. Adjudication can now be called court service.[76] All of that means that major changes in the role of a judge and the parties, as well as fundamental changes in the main goals of civil procedure, have been done during the latest 20 decades, that is, since 1990s.

The other characteristics of the current process idea are that the discursivity and communication of the proceedings are stressed more than ever since the ancient dispute resolution. In its modern form, the adversarial principle (*audiatur et altera pars*) bears with it, as human and fundamental rights, the chance for active involvement in a trial. The parties have to have an equal opportunity to present their case and to participate in the proceedings. The inequality of the starting point has to be brought into a rightful balance by emphasising the legal security of the weaker party. The parties in the case have to be guaranteed sufficient practical means for their participation so as to put forward their side of the matter. Neither lack of resources nor ignorance should serve to hinder the exercise of their adversarial right. Nor should participation of this kind be prevented or restricted by the imposition of too strict a set of procedural limitations upon the hearing of the case. This is based both on the normative and experimental needs of procedural fairness.[77] Therefore, nowadays, the concept of adversarial right covers much more than the provision of a formal opportunity that a judge is asked to ponder in answering the contentions of the other side.

Fair trial in its normative sense has even been compared with the theory of discourse ethics, according to which the goal of communicative endeavour is

[76] Ervasti (2004), p. 168, Haavisto (2002), p. 20, Laukkanen (1995), p. 214, Takala (1998), pp. 3–5, Tala (2002). pp. 21–23, Tyler (1990), p. 94 and Virolainen and Martikainen (2003), p. 5.

[77] Ervo (2005b), pp. 425–426 and Ervo (2008), pp. 155–157.

consensus. And this may best be reached in an ideal speech situation. The latter prevails when everyone participates. Each party may contest every argument put forward and may themselves put forward their own arguments: nor may any party challenge the use of these rights. The ideal speech situation is thus a right to participate, which means the right to be present and to enter into argumentation. In the ideal speech situation, a joint understanding is reached only by the force of the most powerful argument. Internal or external coercion such as the relative strengths of the parties or their actual chances of participation should not determine the conclusion or influence its formulation. It is certainly true that a trial has a strategic side and that in consequence every party would like to gain his own advantage. Notwithstanding this, when seen in terms of the modern-day concept of a social process, it is the fair trial in particular that should be intensely communicative, for the aim of the trial is the granting of legal protection so that the correct outcome is attained in a fair manner reflecting respect for fundamental and human rights and for the self-determination of the individual. An indication of this is the extension of the opposite party's right to be heard (that is, of the adversarial principle) so that it would cover all practical rights of participation in place of the earlier, more formal right simply to be heard. In other words, in order to be fair, the trial should not contain hidden strategic aspects, which would endanger the reality of participation, adversarial or otherwise. A fair trial has to be as wide a discourse as possible even to the extent that actual participation should be encouraged, where necessary, by the support of legal aid and interpreters. Naturally, it is once again worth stressing that an ideal speech situation in a trial, too, can only be attempted. Real discourses are even at their best only a glimmer of ideal discourses. Reality is always therefore inadequate, that is to say, to some degree strategic.[78]

To sum up, a system based on the concept of a fair trial is a communicative one and, to a certain degree, does recall the ideal speech situation, though it cannot be said that it is a total reflection of it. In the formal procedure, there is inevitably a strategic aspect, too, which appears, for example, in questions relating to the burden of proof. A trial has to take place within a reasonable time, and the solution has to occur not merely in terms of the trial materials but also in terms of the law. These limitations do mean that it is far from being the case that the consensus aimed at in the theory of discourse ethics is always attained. In spite of this, in a fair trial, in particular, communication has an important procedural role. The adversarial principle and the other principles that enhance communicativeness only serve to strengthen the chances of realising a fair trial. Indeed, they constitute its very core.[79]

There has also been a big change from adjudication, ideals of material law and a substantively correct judgment to the ideals of negotiated law and pragmatically acceptable compromise. In this kind of procedure, the judge is seen more as a helper of the parties than the actor who is using his/her public power to make final

[78] Ervo (2005b), pp. 57–112, Ervo (2005a), pp. 226–235 and Ervo (2009b), pp. 361–376.

[79] Ervo (2005b), pp. 425–457, Ervo (2005a), pp. 226–235 and Ervo (2009b), pp. 361–376.

decisions. The development has proceeded from judicial power to court service.[80] Sometimes mediation and this kind of assistance action carried out by the judge have even been seen as a main function of adjudication,[81] which is a significant sign of a totally new paradigm in the procedural world. During liberalism, the judge was seen as a passive outsider who was observing the formally equal parties who had the courtroom as a playground for their match. Later, when the proceedings were understood from the more social, maybe even more socialistic, point of view, the role of a judge became more active and participating. It belonged to her/his duties not only to observe but also to guarantee that the proceedings were fair and the parties factually had possibilities to advocate in the case.[82] In the current post-modern and more global procedural world, the result of the proceedings plays a more significant role for the parties, especially in civil litigation, than before. The parties prefer controlling the outcome, and they do not want to take risks of surprising decisions made by judges. This is due to the societal changes. People are more aware of their individuality and human dignity. They are aware of their rights. In their relation to the authorities, they demand service instead of obeying. Even in their internal relations to the other actors, whether human beings or juridical bodies, people appreciate human communication and discretion, that is, the possibility to control the output by themselves in case the result affects their daily lives. All of that has affected so that the modern social process idea can be seen as a fair communication between the actors where all can participate in active, factual and equal way. In addition, they should have party autonomy both in procedural and substantive matters, and the outcome should be seen more than together reached—that is, as negotiated law—than the decision made by an outsider by the traditional means adjudication. In sum, these elements refer to ancient venues and to communal, social conflict resolution made by parties themselves.

19.8 Newest Trends and Conclusions

In court-connected mediation, the most important thing is to reach the decision made by the parties themselves, which they accept and to which they commit themselves. In the traditional judicature, the decisions are instead made by authorised officials (judges). In the court-connected mediation, the procedural fairness is mostly based on the experiences of the parties in the mediation procedure, and their participation is important. In traditional court proceedings, the fairness is significantly based on the formal procedure, which should produce fair and correct judgments. However, civil litigation in courts via traditional court proceedings has

[80] Ervasti (2004), p. 433, Ervo (1995), Haavisto (2001), pp. 98–102 and Haavisto (2002), pp. 165–251, 260–262 and 287.

[81] Von Bargen (2008).

[82] Laukkanen (1995), pp. 35–36 and 58–98.

recently reached many similar dimensions that are fully realised in the court-connected mediation. Therefore, also the court proceedings approach to similar values which are hallmarks in the court connected mediation that is the party autonomy both in procedural and substantive matters and the experimental fairness which have become more and more important elements even in the traditional civil litigation earlier done by courts but nowadays done in co-operation and together by all actors involved in the case.[83]

In court-connected mediation, the main point is to find out the interests and needs of the parties, while in civil litigation, the main point of view is their juridical rights and duties. In court-connected mediation, the most important thing is not to find out if the parties have a right or not but to find out a solution that they both accept and follow.[84] In Finland, court-connected mediation is a strong trend among scholars and research,[85] as well as among the judiciary where court-connected mediation has been developed and widened recently to cover even family mediation in a specific, originally Norwegian form.[86] As referred above, even civil litigation has similar characteristics nowadays. In Sweden, court-connected mediation is not that common yet, but 60 % of judgments in civil cases are reached by friendly settlements done during the preparatory stage of the civil litigation.[87] Therefore, it can be said that eastern Nordic civil litigation is nowadays quite strongly based on the idea of negotiated justice and procedural, experienced fairness.[88]

The alternative dispute resolution is quite a popular topic, especially among Nordic scholars.[89] The phenomenon of alternative dispute resolution (ADR) has been described as the strongest judicial megatrend of this moment, at least, on the basis of written numbers of pages.[90] It has also been said that this debate has thoroughly changed earlier ideas as to how to solve conflicts that arise in society;[91] however, when researching backwards and looking at history, those ideas and models are not unique or modern, but the similar conflict resolution models can be found already in the ancient venues. Still, it has even been claimed that the question is about the revolution of the resolution of disputes. Within ADR, mediation has

[83] Ervo (2009a, 2011a, b, 2013b).

[84] Ervasti (2005), p. 242.

[85] Koulu (2009), p. 26 and Koulu (2011), p. 5.

[86] http://www.oikeus.fi/55281.htm, visited 2013-09-23.

[87] According to court statistics, the amount of civil cases at district courts where the case has been decided by a judgment are the following: (per cent) in 2008, 40.5 %; in 2009, 40.2 %; in 2010, 40.4 %; in 2011, 42 %; and, in 2012, 41.2 %. http://www.domstol.se/Publikationer/Statistik/Domstolsstatistikpercent202012.pdf, visited 2013-09-23. Similar results also in Lindell (2012), p. 303, and in SOU 1982/26: 137, which shows us that the trend has quite long traditions by now.

[88] See also Ervasti (2005), p. 243.

[89] See, for instance, the publications of Lindell from Sweden, Nylund from Norway and Ervasti, as well as Koulu from Finland.

[90] Ervo and Sippel (2012c), pp. 352–353 and Koulu (2011), p. 5.

[91] Ervo and Sippel (2012c), pp. 352–353 and Koulu (2011), p. 5.

received the largest amount of interest from scientific and other people.[92] The availability of access to justice has improved in this context because of the lower legal expenses arising out of this sort of device in comparison with a court trial.[93]

As explained above in Sect. 19.4., the ultimate function of civil proceedings has been seen to be a conflict resolution instead of dispute resolution or granting of juridical relief. In conflict resolution, the conflict should be solved as a whole, taking also social and moral dimensions into consideration, and not only judicially as described earlier. In addition, the solution should be prospective to cause the parties to go on in their lives and in their possible cooperation instead of mostly retrospective judicial decisions.[94] All of that refers to the change of the paradigm in civil litigation.[95]

The other current trend that refers to collective dispute resolution is collective redress. In that context, the collectivity plays a little bit different role, as I explained earlier. Now the point is how to react together to get access to justice. However, even in that type of collectivity, the above-presented changes in the paradigm play a significant role. Namely, in this context it is the question of multiparty litigation where the whole community who feels hurt tries to react together towards "the enemy", that is, a defendant in a class action case who is an outsider of "the community" (the members of the group). Somehow, I can easily find the similar social and communal characteristics even in the class actions in the form they exist[96] in the eastern Nordic countries.

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[92] Koulu (2011), p. 5.

[93] Ervo and Sippel (2012c), pp. 352–353 and Viitanen (2001), pp. 245–247 and 252.

[94] Lindell (2003), pp. 82–101.

[95] Ervo (2013b).

[96] In Sweden, there has been a system of class actions in force since 2003. The possibility of class actions covers civil cases, which belong to the competence of general courts, as well as the cases concerning environmental damages in environmental courts. The possible class actions in Sweden can be individual group actions, governmental (public) class actions, as well as suits by organisations. The system is based on the opt-in-method. One individual who is a member in the group concerned can bring a suit against a defendant in the case of individual group action. Physical or legal persons can sue the individual group action. In suits by organisations, the plaintiff is a non-profit-making association by consumers or employees. In environmental cases, the non-profit associations can bring class actions if they work for the interests of nature or environmental conservation. Also, the associations for fishermen, farmers and reindeer management and forest societies can bring an organisational suit on environmental issues. A public class action is possible in cases where a suit has not been brought as an individual class action or by the organisations named above. Possible authorities that can bring a public suit are a consumer ombudsman and conservancy authorities in environmental cases. (See Lindblom (1996), pp. 15–21 and Swedish Class Action Act, Sections 1, 2, 4, 5, 6 and 14 as well as the Code of Environmental Matters, Chapter 32, Section 13 and Government bill 2001/02:107, p. 54.)

In Finland, class actions are possible in disputes between consumers and entrepreneurs. The Act on Class Actions came into force on 1st October, 2007. Even if the name of the act seems to cover class actions in general, class actions are possible only in consumer disputes. Participation in a class action requires registration as a member of the class. The system is therefore based on opt-in method. Only governmental (public) class action is possible and it is the Consumer Ombudsman

Summa summarum, conflict resolution seems to return to ancient venues in a way that means privatisation and widener party autonomy, as well as variety in conflict resolution models even in courts. In this development, the communication and interaction between decision-makers and parties have a significant importance. Therefore, conflict resolution, including traditional adjudication in courts, has become more communal.

The way of thinking of archaistic people was, namely, dependent on habit, orality and tradition. Therefore, even conflict resolution was based on oral discussions. This legal debate took place in the assize venues, and there the consensus that had been broken by the conflict was found again by a very concrete way, in other words, by talking. It is even alleged that outside this "court of communication" there existed no other binding legal order or positive law. The question was about opinions and arguments against other opinions and arguments. To be valid, the opinions and arguments had to pass the formal process, reach each other, and thereby reach a consensus. The consensus that had been found during the trial by party and family/neighbour discussions meant that before the nationwide state law existed, law and justice existed and were valid only when they were reached by the above-mentioned communal means, in other words, by mutual understanding. Law and justice were, therefore, one type of convinced justice whose validity was not based on authority but on consensus, which was found or renewed by adjudging. The precedents were not important, but the new justice was created by the same means whenever needed. However, the most important thing in the validity of law and justice was mutual understanding and therefore communal consensus. This consensus was reached by negotiations. The legal decision got its authority and validity therefore from the community, which practised adjudication by itself. In the current post-modern dispute resolution, we can find so many similar phenomena, and the values in the background of the civil litigation are surprisingly identical. Orality, immediacy, concentration, cooperation, communication, interaction and rapid resolution are appreciated. Civil litigation has been seen more as a conflict resolution than a juridical relief or a sanction mechanism. Access to justice and access to court are stressed by both the state and the individuals, and different types of solutions in this sense have been found to make the system more rapid and easier to use, as well as cheap enough to reach.

As a result, civil litigation as a whole, including even ADR, has become more communal and more or less returned in this way to ancient venues even if the reason today is different compared with the olden times. In our current situation, we have alternatives in the form of state courts and nationwide legislation. In the past, village and family-based conflict resolution was the only possibility, in addition to private revenge or that type of solutions. Therefore, the reasons behind this development are today different, and the choice seems to be voluntary and based on the will, on one hand, of the legislator and the state and, on the other hand, on the

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who will bring the class action and act as the representative of the class, thereby ensuring that an action cannot be brought for malicious purposes. (Sections, 1, 2 and 4 of the Finnish Class Action Act. See also the Government bill 154/2006, p. 20.)

will and wishes of individuals. In the other words, society seems to be ready or in the need for this kind of change, which leads back to more human and more communal dispute resolution in our modern world.

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