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# The structure of civil proceedings – convergence through the main hearing model?

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**ABSTRACT:**

Traditionally, European civil procedure systems have displayed a range of structures. Currently, systems are converging around the main hearing model, which international soft law initiatives on civil procedure also endorse. This text discusses the main content and principles of the main hearing model and its application in English, Finnish, German and Norwegian law. The influence of the underlying structure of civil proceedings and the legal culture, in particular the role of the judge

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is explored through a comparison of the four countries. Finally, the qualities of the main hearing model are discussed, as is the way to successful implementation of the main hearing model as a tool to achieve efficient proceedings leading to quality outcomes.

**Keywords**: Civil proceedings – structure, Main hearing, Role of the judge, Preparatory stage, case management

## 1. INTRODUCTION

European civil proceedings are characterised by a range of different structures of general civil proceedings. The structures are contingent on the diverse historical pathways of the systems and variance in legal culture. They are also a product of the interplay between the intended aims of civil proceedings and central civil procedural principles and ideas. For instance, the conception of the proper role of the judge impacts the structure of civil proceedings. A system in which the judge is expected actively to provide clarification and identification of core disputed issues requires a model in which the judge can actively take part in the proceedings well before the final hearing. Similarly, a change in the structure of civil proceedings will probably also require – at least to some extent – a reform of central concepts.

In recent decades, the *main hearing model* of civil proceedings has become increasingly popular. The model has grown from the ideas of Franz Klein and from more recent German and English procedural reforms. Further, the ALI/UNCITRAL Principles of Transnational Civil Procedure (PTCP) reflect, at least to some extent, the main hearing model. The comments on the proceedings characterise it as a "modern" approach.[2] The model is also expressed in the project on European rules of civil procedure under the auspices of the European Law Institute (ELI).[3] Several other countries, including the Nordic countries, have adopted the main hearing model.[4] Particular attention is devoted to the preparatory or interim stage of civil proceedings, as its role is pivotal in the main hearing model.

This text explores the structure of European civil proceedings by focusing on the extent and manner in which the main hearing model prompts convergence. Are there any limits to convergence, and, if so, what are these limits and in what way do they restrict harmonization? Can prerequisites for its introduction be identified, such as certain principles or goals of a civil procedure system?

2. Principle 9. Comment P-9C and Stürner (2005), p. 223-225.
3. Report from the Transnational Civil Procedure – Formulation of Regional Rules. ELI-UNIDROIT Rules of Transnational Civil Procedure to European Rules of Civil Procedure Steering Committee and Working Group Joint Meeting. Rome, 9-10 April 2018. https://www.unidroit.org/english/documents/2018/study76a/s-76a-08-e.pdf.
4. Nylund (2016a).


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This study begins by describing European models for the structure of civil proceedings as they developed in the 19th and early 20th centuries (part 2). Part 3 discusses the main hearing model, its history, structure and underlying principles. Practical applications in countries from three different traditions of civil proceedings, common law, Germanic and Nordic/Scandinavian, are examined in part 4. Part 5 explores if and how the main hearing model contributes to convergence of the structure of civil proceedings by contrasting and comparing the English, German, Norwegian and Finnish systems. The final part evaluates whether the main hearing model is a panacea or whether it has limitations.

## 2. EUROPEAN MODELS OF CIVIL PROCEEDINGS

### 2.1. Models of the 19th and early 20th centuries

At least four types of civil procedure systems exist in Europe: civil law, common law, formal communist (or socialist) and Nordic.[5] Each of these groups has had one or several distinct structure(s) of civil proceedings. However, variation within each group is significant, and some countries may have a structure that significantly differs from other countries belonging to the same group. Each category is an "ideal type" or heuristic model, rather than a description of a specific system. In recent decades, many countries have relinquished their traditional model of civil proceedings through a set of reforms. Many of the "ideal types" have slowly become descriptions of historical models rather than existing models.

The *common law* structure of civil proceedings has traditionally consisted of three stages, the written pleadings stage, the pre-trial stage and the trial. The content of the stages reflects a party-driven, adversarial process, in which the role of the judge is to be a passive umpire. The model is based on orality, in which the concentrated final hearing – the trial – is central. Pleadings should clearly specify the case and identify the questions at stake. A master, a member of the court staff or judge, conducts the pre-trial stage, deciding primarily questions about obtaining, presenting and admitting or denying evidence. In England, the case manager should help to simplify the issues and determine the key questions. The trial is the culmination of the civil proceedings, in which the parties present the evidence to the judge (or jury) and argue their case. The task of the judge is to decide the case based only on the material laid down during the concentrated trial.[6]

The *Germanic* group has had two models of civil proceedings, the German and the Austrian. In the original 1877 version of the German Civil Procedure Code (*Zivilprozessordnung)*, *German* civil proceedings had three stages. The initial pleadings

5. See Damaška (1986), Cappelletti and Garth (1987) pp. 8-10, Stürner (2002), Stürner (2005), Bernitz (2007), Amrani-Mekki (2010), Uzelac (2010), Ervo (2014) and Galič (2015).

6. Jolowicz (2000), p. 23-58.

stage was followed by a second preparatory stage. In the third and final stage, consisting of several hearings, the parties argued their case to the court. Evidence could be presented during any stage, and the role of the preparatory stage was limited in practice. In the *Austrian* civil proceedings as developed by Franz Klein, the pleadings stage was followed by an oral preparatory stage. The parties presented their claims, arguments and evidence during the final stage. Despite the goal of concentration, the final stage consisted of several hearings.[7]

The *Romanic group* of civil law also had three stage proceedings. The initial pleadings stage was followed by a second stage devoted to the collection of evidence. Originally, the proof-taking stage consisted of a number of short hearings during which the parties presented evidence to the examining – or instructing – judge. After the examining judge decided whether there was sufficient evidence to warrant proceeding further, the examining judge transferred the case to the panel to decide the case. In theory, the case should have become fixed as to the claims and the grounds for the claims at the end of the proof-taking stage. In *Italy*, the parties continued to make changes during the proof-taking stage. In the decision-making stage, the examining judge presented a report of the case to the panel deciding the case. The parties' attorneys were allowed to argue their case to the panel. Thus, the panel decided the case mostly based on the report of the examining judge and written briefs. The distinction between the stage during which evidence was taken and the stage during which the merits of the case were discussed is important.[8]

The *Nordic legal systems,* not including Finland, adopted a three-stage model based on the German and Austrian reforms of civil proceedings. The pleadings stage was followed by a written or oral preparatory stage, the function of which was to ensure a concentrated oral main hearing. However, the preparatory stage remained underdeveloped. In Sweden, proceedings were often only written, and in Denmark and Norway, the stage often consisted exclusively of exchanging briefs. Finland had a piecemeal style structure until 1993.[9]

In most *communist countries*, the model was based on civil law traditions mixed with socialist ideas. The pleadings stage is followed by the main stage consisting of a number of hearings, often lasting less than an hour each. Taking evidence and arguing the case are mixed in these sessions. This procedural model was identified by Damaška as the "piecemeal trial", as the factual and legal arguments are collected over several hearings.[10] The format is mostly written, as parties submit a brief to the presiding judge rather than engage in oral argument. New arguments and evidence may be

7. Oberhammer and Domej (2005), p. 118-123.
8. Varano (1997), Stürner (2002), Stürner (2005), p. 223-225 and 237-239, Hazard et al (2001), p. 773-778.
9. Ervo (2016) and Nylund (2016b).
10. Damaška (1986), p. 50-51.


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introduced until the judge concludes that the case is ripe for decision and closes the hearings stage accordingly.

Despite their differences, there are some similarities among the models. Most models have three stages. The first stage in all of the models is the pleadings stage. During this stage, the claimant files the statement of claim at the court and an initial investigation of the statement of claim. If the statement of claim or the claim or grounds or justifications for the claim do not fulfil the requirements of the law, the court my either ask the claimant to rectify or complete certain parts or dismiss the case. At some point in the pleadings stage the case is assigned to a specific judge. Once the court accepts the statement of claim, differences among the systems appear. Some systems consider the proceedings and the *lis pendens* effect to start when the claimant files the statement of claim, while others principally give effect to the moment the summons is served upon the defendant. Some systems consider service of the summons as the start of the next stage, while others include the statement of defence in the pleadings stage.

## 2.2. Development in the Late 20th Century

Since the 1970s, a set of reforms has transformed each of these basic models. The German reforms of 1976 and the French reform of the same year are some of the central changes in the structure of civil proceedings. Among others, Sweden followed suite with a comprehensive reform in 1987 and England in 1999. The German system was reformed again in 2001, which strengthened the main hearing model.

Simplification of the civil justice system and cutting the cost and duration of civil proceedings were central aims of the proceedings. Some form of case management has been introduced in many countries, although the forms and methods vary. Increasing proceedings with a single judge, fewer hearings and adjournments and a better balance between written and oral proceedings, were among the central goals of the reforms. The reforms are examples of cross-fertilization, where reforms in each country are clearly inspired by and drawing on reforms, or reform plans, in other countries.[11]

In later reforms, an active judge and increased balance between oral and written hearings have become paramount. The early intervention of a judge may increase the likelihood of settlement through settlement efforts by the judge, by the judge encouraging negotiation, or by simply providing clarification of disputed issues. An early intervention may also result simplifying and clarifying the case. By asking questions, the judge may be able to pinpoint key issues and to avoid unnecessarily circumstantial, lengthy and complex briefs. The judge should intervene in a timely fashion to maximize the advantages. Further, an active judge may properly schedule the events in the case, setting up sessions at appropriate intervals and planning for the proceedings in general and oral hearings in particular.

11. Uzelac (2014).

Despite similarities, there are significant differences among the reforms. One reason is the underlying structure, principle and traditions of civil justice. Another reason is that the role and function of civil proceedings, the proper role of the judge and the aim of civil proceedings still vary across Europe. A third reason may be characterised as court-culture, namely the culture of judges, attorneys/advocates, court officers and litigants. [12] Modes of thinking and acting cannot be changed overnight. A further reason may be the structure of the court system as such; some countries have plenty of special courts and special proceedings, some have several tracks (commercial, labour, etc.) within the same subset of courts, while others have one set of procedural rules that must be flexible enough to serve a large range of different cases.

Romanic systems still tend to have separate proceedings for gaining evidence and only limited access to presenting evidence immediately before the judge or panel of judges deciding the case. The case managing or referencing judge still must order the taking of some types of evidence, and evidence will not always be presented immediately to the judge or the board of judges hearing the case. Written proceedings are important, and hearings are still conducted in a piecemeal or abbreviated fashion. A preparatory stage to prepare the case for the final decision has emerged, but, in the absence of a single final hearing, they have a different character than in common law systems.[13]

Since the 1990s, the former communist countries have seen a number of repeated reforms. In spite of reforms, some researchers argue that the communist mind-set, court-culture and structures are still highly visible.[14] The piecemeal format still dominates, although attempts have been made to introduce a division between preparation and a concentrated final hearing.

### 2.3. An emerging common European structure?

Despite reforms leading to some convergence, the reforms have not emanated in a common European structure of civil proceedings. The most striking difference among the systems is the view of the function of the second and final stages. Further, some of the former communist systems have retained the piecemeal structure with little or no difference between the second and final stage.

In almost all systems, the primary function of the final stage is to decide the substance – the factual and legal issues – raised in the case. The systems diverge as to how the parties present their evidence and legal arguments. In many Romanic systems, the evidence put forward is limited and may (partly) be a recollection of evidence collected earlier, whereas in Germanic, common law and Nordic systems – at

12. Ervo (2015), Ervo (2014).
13. Varano (1997), Cadiet (2011), Silvestri (2014), Jeuland (2014).
14. See Galič (2016), Köblös (2016), Piszcz (2016) and Vėbraitė (2016).


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least oral – evidence is usually presented to the court for the first time during the final hearing. The primary type and form (written or oral) of the evidence varies, as does the role of the judge in interrogating witnesses. Another difference is the presentation of legal arguments. Particularly common law and some Nordic systems have a tradition of extensive oral argument, during which the judges pose direct questions to the parties through their attorneys, which creates a kind of dialogue. In some Romanic countries, the attorneys may refer to the briefs filed earlier. In north-western Europe, a concentrated, oral final hearing is the epitome of the civil proceedings.[15]

The differences in the function, goals, formats and styles of the final stage influence the previous stage(s). The differences are *inter alia* manifested in the view of how, who and when evidence is identified, collected, and presented. In common law systems, the collection of evidence is the responsibility of the parties, with opportunities for one party to compel the other party and third parties to disclose evidence in their possession. The role of the court, when appropriate, is to mandate a party or a third person to provide access to evidence. Although the courts have inquisitorial powers, they often refrain from using their powers. During a special stage, the investigating judge determines the facts.[16] Romanic countries have continued a tradition of preferring written evidence to other methods of proof. Germanic and Nordic countries are somewhere in between; the court is involved in collecting evidence only to a limited degree.

The perception of the interplay among factual and legal question related to both substantive and procedural questions is also a key difference among the systems. Whereas some systems emphasise procedural questions explicitly devoting part of or an entire stage to them, such as the French system, while others have no specific stage for them. Rather, procedural questions, such as legal standing, can be deferred. The Norwegian system may serve as an example. If it is clear that the claimant or defendant lacks legal standing, the court will immediately reject the case at the pleadings stage. If the question of legal standing is less certain, the court will serve the summons upon the defendant and wait until the second stage to resolve the question. If the question of legal standing is difficult, tightly interlinked with the substantial question in the case, and the evidence or legal arguments relating to the procedural and substantive questions are closely connected, the court may postpone the question to the main hearing.

Many systems strive to identify and name the cause of action and (detailed) legal and/or factual grounds as early as possible. The difference is the extent to which and under which circumstances the parties may amend their pleadings. Some systems favour early preclusion or caesura (the eventuality principle). In other systems, the rules are more lax, recognising that facts, law and evidence are in constant interplay.

15. See inter alia Silvestri (2014), Jeuland (2014), Cadiet (2011), Ervo (2016), Nylund (2016), Galič (2016), Vėbraitė (2016), Andrews (2013), Prütting (2013) and Murray and Stürner (2004).
16. Varano (1997) and Cadiet (2011).

The modification of a legal argument may alter the assessment of which facts are more relevant or interesting and consequently which evidence is paramount to winning the case and vice versa. Some systems have very limited preclusion and others have no system for preclusion, allowing the parties the right to modify their arguments and evidence until the judge closes the case. The latter is typical for a system with a piecemeal structure of civil proceedings.

Recently, a distinct pre-filing stage has emerged in numerous systems. The parties are encouraged, or required, to engage in negotiation or alternative dispute resolution (ADR) processes. In some countries, parties are also required to disclose or exchange information, or give advanced notice of the prospect of initiating court proceedings. The role of the pre-filing stage will be discussed in more detail below.

## 3. THE MAIN HEARING MODEL OF CIVIL PROCEEDINGS

In recent years, the so-called main hearing model of civil proceedings has influenced the development of the structure of civil proceedings both in Europe and internationally. The main hearing model can be traced back to the ideas of Franz Klein in the reforms of Austrian civil proceedings in the late 1800s. German reforms have also implemented some of the ideas. In 1987 this model was implemented in Sweden[17], and, in 1998, the new English Rules of Civil Procedure implemented the model in England and Wales. Several other countries have also chosen to follow the model, including the Nordic countries, Spain[18] and Lithuania[19]. The model presented below is an ideal model rather than specific for any particular country.

### 3.1. Content and structure of the main hearing model

In the main hearing model, civil proceedings consist of three parts: the pleadings stage, the preparatory stage and a (single) concentrated main hearing. In some contexts, the preparatory stage is called the interim stage[20] or the interlocutory stage[21]. The preparatory stage is more precise, as it stresses the primary function of the second stage: to prepare for a concentrated main hearing.[22] The final stage is the main hearing, which in some contexts is called the final hearing or trial.[23]

17. See SOU 1982: 86 Sveriges Offentliga Utredningar. Översyn av Rättegångsbalken 1. Processen i tingsrätt Del B. Motiv m.m. Delbetänkande av rättegångsutredningen, p. 82-85.
18. Stürner (2005), p. 224-225.
19. Vėbraitė (2016).
20. PTCP, Principle 9.
21. Jolowicz (2000).
22. Stürner (2005), p. 225 and Nylund (2016a) also use the term "preparatory". See also Murray and Stürner (2004), p. 191 ff.
23. PTCP, Principle 9. The term "trial" is culturally specific for civil proceedings in common law systems. See Andrews (2003), p. 33-36, and Marcus et al. (2009), p. 1-2. Murray and Stürner (2004) use the term "plenary and evidentiary proceedings".


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The *pleadings stage* (initial stage) occurs before the preparatory stage. The pleadings stage is short, consisting only of initiating the proceedings and serving the pleadings and the reply to the parties. During the pleadings phase, the parties present their claims, defences and other contentions in writing. The aim is to identify the type of case and to give the court an opportunity to dismiss cases over which it lacks jurisdiction, in which one of the parties lacks legal standing or in which any other requirements are not met. During this stage, the court may decide to join other cases, to split a case, or to add or change parties. The case is allocated to a specific track (when applicable) and sent to a judge for preparation.[24]

The *preparatory stage* is a key element, as it is the main tool to secure a successful concentrated main hearing as the climax of the proceedings. Preparation goes beyond technical issues, *i.e.* deciding on time management and other technical matters. Case management, which includes both tailoring a schedule and acting for timely resolution, is important. However, the key to the preparatory stage is identifying the core disputed legal and factual issues and clarifying the relevant law, facts and evidence. Clarification requires an active judge, who actively has contact with the parties. The judge helps the parties to clarify the most important legal and factual issues, correct misunderstandings and to sort out the relevant evidence available. The judge directs the parties away from a set of general comments to focus their argumentation on specific topics that may be unclear or may be central to the case. The judge may wish to bring clarity to any point of agreement between the parties. The preparatory stage may have an iterative character, as a round of clarifying answers or statements may lead to new questions or to a party wanting to adjust the party's legal and factual argument and evidence.

The court may hold preparatory meetings in addition to or in lieu of written preparation.[25] Telephone conferences and e-mails may supplement traditional modes of communication. The main hearing model presupposes active contact between the court and the parties. It manifests the idea of civil proceedings as the joint effort of the court and the parties. The court may have an oral hearing to rule on procedural issues and may dismiss a case early.

The preparatory stage also facilitates early disposal of cases, timely hearings, and settlement.

The *main hearing* is the culmination of the civil proceedings during which all claims, grounds for the claims, evidence and legal arguments are presented directly to the judge or panel deciding the case. What counts is the information and evidence that is presented directly to the court during the main hearing. Orality and concentration are the main principles of the main hearing. A concentrated main hearing serves the purposes of efficiency, orality and concentration.[26] By concentrating the presentation

24. Kramer (2014) p.7–8.
25. Andrews (2013) p. 198-203 and Zuckerman (2005), p. 149.
26. See Kramer 2014, p. 4 and 11.

of claims, legal and factual arguments and evidence to a single hearing (which might be carried out over several consecutive days), the court achieves the best basis for its decision. The process is oral and adversarial. Although the systems are based on orality, the underlying conception of orality differs. In some countries, the legal counsel often refer only to what they have earlier stated in written format; other countries have explicit provisions that forbid such references. The main hearing model is efficient, since the parties, the lawyers and the judge need to prepare for the main hearing only once and do not need to use time to recall what happened at the earlier hearing(s).[27] The pleadings stage and especially the preparatory stage are important tools to ensure the success of a concentrated main hearing.

### 3.2. Underlying principles of the preparatory stage

Some of the underlying goals of the main hearing model are clarification, concentration and timely resolution rendering substantially correct results. It is also based on a set of principles and concepts of civil procedure, including party disposition, orality and flexibility.

*Clarification* is not a goal in itself, rather a vehicle to achieve the other goals. By crystallizing the case, the parties will focus on the core questions. Finding the core legal and factual questions may be contingent on the judge posing the right questions. Clarification helps courts to deliver better justice in less time, as the parties and the court may focus on what is important rather than use their time on circumstantial issues. Thus, the main hearing can be concentrated in two ways. The main hearing is to the point, limited to relevant legal arguments, facts and evidence, and the main hearing is concentrated to a single day or a few consecutive days.[28] Clarification may also reveal common ground, leading to early disposal due to dropped claims or a settlement. [29] Thus, the main hearing concentrates on disputed questions only.

Clarification as a concept does not require an inquisitorial judge. It requires only that the judge intervene when an argument or account is ambiguous, obscure or vague. The aim should be to focus on central issues rather than peripheral ones. The judge may ask the parties to summarise the background of the case, the claims and the arguments, or try to summarise all or part of the case for the parties. The parties are responsible for providing intelligible, logical, and coherent arguments consistent with law and provide sufficient and appropriate evidence to support their arguments in a timely manner. In providing clarification, the judge must avoid becoming partial. Interventions must be done in a way that helps the judge retain neutrality. The judge should be cautious about introducing elements that the parties did not bring to the

27. Kramer 2014, p. 9.
28. See Kramer (2014), p. 8–9.
29. Andrews (2013), p. 197-202.


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table, because parties decide the scope of the proceedings. The latter is also expressed in PTCP Principles 10.3 and 10.4. Obtaining a substantially "correct" outcome may sometimes require the judge to introduce an interpretation of the law, facts or evidence "that has not been advanced by a party"[30], while allowing the parties an opportunity to respond. The judge must find a new role that differs from the inquisitorial role and the passive role of an umpire.

The ideas of clarification and letting the case evolve should not be taken as an excuse for lackadaisical preparation of the statement of claim and the statement of defence. As Principle 11.3 of the PTCP states, the parties must present "in reasonable detail the relevant facts, their contentions of law, and the relief requested, and describe with sufficient specification the available evidence to be offered…" during the pleadings stage. Clarification should not be an extensive process; rather it should be reserved for selected questions only. Ideally, the parties and the judge need to prepare themselves for the case only a few times during the entire proceedings, once during the pleadings stage when drafting and reading the statement of claim and defence, once or twice during the preparatory stage, and once before the main hearing.

Clarification requires that the case evolve in terms of a need to add further details and sometimes to provide room to amend the factual or legal arguments. The statement of claim and the statement of defence must be "reasonably detailed", yet not too extensive. Parties may add details as needed, but adding entirely new arguments and facts should be avoided. Some flexibility is needed to avoid front-loading the case. This message is echoed in PTCP Principle 22.2, which states that the court may "permit or invite a party to amend its contentions of law or fact and to offer additional legal argument and evidence accordingly".[31]

However, clarification should not mean that the parties argue their case or present their evidence during the preparatory stage. Rather, the idea is to identify the core of the legal and factual background, questions; and arguments. The parties will then present their full arguments during the main hearing.

The parties are responsible for presenting relevant arguments and evidence. Although the court decides what the law is (*jura novit curia),* the parties are obliged to present arguments and facts relevant to the applicable legal rules. The claims and the factual background of the case tie the hands of the judge. The judge should be cautious to raise issues that the counsel do not see, as this could make the judge look partial.[32]

The main hearing is based on the principles of *concentration and immediacy*. The main hearing is conducted during a single day or consecutive days. During the main hearing, the parties present their claims, the grounds for the claims, the evidence

30. PTCP Principle 22.
31. Hazard et al. (2001), p. 773 and 777-778.
32. This is also expressed in PTCP Principle 22.

and the legal arguments for their case directly in front of the judge or panel of judges deciding the case. The court considers only the material presented in the main hearing when deciding the case.

The goal of civil justice is to balance a "correct" result with efficient proceedings and the proportionate use of resources. Thus, substantially correct results remain a relative goal. The correct result is then not determined using an absolute measure of reaching the substantive truth, rather as coming as close to the absolute truth in the proceedings as is feasible. Efficient use of time and money restricts the effort to reach the substantive truth. The will of the parties further reduces the substantially correct result, as the parties may decide to omit aspects of their dispute. Proportionality results in the systems abandoning substantive truth as an absolute goal of proceedings. Rather, the conquest for truth is relativized to balance it with the need for the proportionate use of resources and redirected to sufficient evidence on relevant disputed facts.[33]

*Settlement* is also a key tool, particularly during the preparatory stage. Most, if not all, countries with a main hearing system consider settlements to be inherently good. Settlement is a goal in itself and may be a by-product of clarification. Settlements and partial settlements ease the burden on the judiciary and provide an avenue for swift, cheaper and more individualised dispute resolution. The will of the parties further restricts the judge, as the parties determine the scope of the case and have the ultimate power to present or omit claims, facts, legal arguments and evidence. PTCP Principle 24 declares that the court should "encourage settlement between the parties when reasonably possible" and that the court should facilitate the use of ADR processes. The emphasis on settlements reveals that the main hearing model is based on valuing party disposition and initiative over the substantive truth, settling the dispute and the private functions of civil proceedings over the public functions.[34]

Expediency is accomplished by active *case management*. The managing judge must set deadlines and plan the conduct and timetable of the court proceedings. By involving the parties in forming the plans, the court actively involves party participation and can include the views of the parties. The parties know the facts and the case and therefore often have a better opportunity to estimate inter alia how much time will be used in hearing a specific witness.[35] Although preparation for a main hearing is a joint effort of the court and the parties, too much leniency towards the wishes of the parties has a pernicious influence on achieving efficient proceedings. Efficiency is contingent on identifying core issues and relevant evidence.

The proceedings must be flexible and tailored to each case rather than following a standing order.[36] The judge must take into account *inter alia* the factual and legal

33. For different conceptions of truth in civil justice, see Taruffo (1996).
34. Galič (2015), Galič (2016), Uzelac (2010) and Uzelac (2014).
35. Zuckerman (2013), p. 128-130. See also Uzelac (2014), p. 19-23.
36. See also PTCP Comments P-9A and P-14A stressing the need to tailor proceedings.


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complexity of the case and the importance of the case to the parties and society. The judge must have discretion to shape the proceedings.[37] Yet judges must not "exercise their powers in a capricious, inconsistent and unpredictable way".[38] The duty to cooperate with the parties reduces the possibility of inconsistency and unpredictability.

Time limits and preclusion of evidence and issues enhance efficiency and expedient proceedings. A concentrated, well-prepared main hearing requires that the case attain its final form in advance of the hearing. Unless unforeseen circumstances require otherwise, such as a party learns of new evidence, amendments and additions should not occur in the days before and during the main hearing. Ambush tactics should not be allowed. Rules on preclusion of new claims, arguments and evidence in the case can be "fixed" to allow the parties to prepare and finalize their arguments. However, if the rules on preclusion are too strict, the parties may be tempted to frontload the case with all possible claims, facts and evidence. Finding the essence of the case will be more difficult. The same problem arises if the time period for preclusion ends early. Lack of appropriate rules on preclusion or too lenient application of those rules may dilute preclusion and ultimately result in a less concentrated main hearing.

The main hearing model may also help to reduce the problem of the court of first instance being "a rehearsal" for the appellate proceedings. Often, a case will evolve and transform throughout the process in the first instance. Cases have been reheard in the appellate court, because the parties have not been able to sort the case out before the early stages in the appellate court.[39] By focusing on clarification during the preparatory hearing and by including stricter rules on the preclusion of new evidence and the amendment of pleadings, the first instance should be the "real" trial, the "real" hearing. Instead of re-examining the case, the appellate courts should focus on contested parts of the judgement. The main hearing model may also be applied *mutatis mutandis* to second courts to provide for increased efficiency.

### 3.3. The enhanced main hearing model: ADR processes and the pre-action stage

In recent years, two new features have emerged as a supplement to the main hearing model: increased focus on settlement and ADR processes and the pre-action stage.

An amicable solution has become an alternative to, and an ingredient of, civil proceedings in many countries. An amicable solution may be a by-product of identifying the core issues and clarification. The judge may help to find common ground and pinpoint the differences between the parties. However, increasingly,

37. Andrews (2003), p. 333-361.
38. Andrews (2003), p. 343.
39. Hazard et al. (2001), p. 774 and 778.

judges are required actively to promote settlement by encouraging the parties to negotiate, suggesting that the parties consider court-connected mediation or another ADR procedure, or by engaging in judicial settlement activities. The latter may consist *inter alia* of pointing out common ground and discussing the benefits of reaching settlement. Additionally, many courts offer court-connected services, in which the court has at least minimal regulation and oversight of the process and third-party neutrals. Other courts offer no such services or a mixture of court-connected and out-of-court services.[40] If the parties engage in negotiation or ADR processes, the schedule of the court proceedings may have to be adjusted accordingly. Flexible scheduling supports settlement, as the court may stay the proceedings for the duration of settlement proceedings.

Germanic and Nordic countries have a long tradition of judicial settlement activities. Judicial settlement activities range from indirect suggestions that the judge considers settlement feasible to using appropriate techniques from mediation theory, such as discussing the wider interest of the parties and brainstorming for alternative solutions. The judge acts "in-robe", in the role of a judge, and may not act in a way that is inconsistent with the requirements of a fair trial.

The *pre-action stage* of civil proceedings has emerged as a European trend. Courts should be a last resort, and consensual dispute resolution should be the primary means. Parties are required to attempt to find an amicable solution through negotiation or by engaging in an ADR process before initiating court proceedings. The aim is to reduce the number of court proceedings and to narrow the pleadings to contentious issues only. Considering the possibility of settlement suffices; the parties should not be required to engage in extensive negotiations. The only requirement is good faith consideration of negotiation and ADR.[41]

Parties are increasingly required to give advance notice of filing to enhance the possibility of settlement through clarification. The parties need to understand each other's positions and to narrow the contested issues before deciding whether to initiate court proceedings. Parties should share information and documentation supporting their positions and resolve any misunderstandings. Advance notice also helps the parties consider if, and which, consensual dispute resolution processes are appropriate.[42] Typically, the parties are required to exchange concise details about the claim, the legal and factual bases of the claim and a summary of the facts.

40. For a discussion of the difference between judicial settlement activities and court-connected mediation, see Adrian (2016), pp. 210-215.
41. See Norwegian Dispute Act (civil procedure act) § 5-4 and paragraphs 8-11 of the English "Practice direction – pre-action conduct and protocols" issued by the Ministry of Justice. https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct.
42. See paragraph 3 of the English "Practice direction – pre-action conduct and protocols" issued by the Ministry of Justice. https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct.


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Failure to consider settlement or a rejection of participating in them may result in the party having to bear the costs of the proceedings in both English and Norwegian law.

Despite its obvious advantages, the pre-action stage may reduce access to justice, forcing particularly weaker parties to accept an outcome clearly inferior to the probable outcome of civil proceedings. Negotiation and ADR may be used both as tactics to increase costs and delay and as a platform for "fishing expeditions", during which a party seeks to gain access to as much information as possible.

## 4. THE MAIN HEARING MODEL IN PRACTICE

Although the theory of the main hearing model is clear, the question remains whether it provides a coherent model that leads to significant harmonization or whether the underlying ideology, structure and culture of each civil justice system leads to significant differences.[43] In the following, the main hearing model in each of four countries is studied. Germany and England represent two large countries, the civil procedure reforms of which have served as an inspiration, template and even epitome for other countries. The main hearing model permeates Nordic civil proceedings, yet by studying Finland and Norway, interesting differences between the countries are revealed.

### 4.1. The German model

The main hearing model has long traditions in the German civil justice system, but, in practice, its modern form has emerged gradually through a set of reforms. The judge has traditionally had a central role in structuring the proceedings (*Prozessleitung* in German). The judge manages the case by setting dates for hearings; setting, extending and shortening time limits; deciding to join or separate cases, etc.[44] Although foreseeability and equal treatment are pivotal in German law, the preparatory proceedings are flexible, and the judge has discretion to choose between written and oral preparation. Even in oral hearings, the parties often refer to written material without repeating it. The goal is to provide for early resolution of the case and for comprehensive preparation to make the case expediently ripe for the concentrated main hearing. A preparatory hearing is called for, particularly if the parties are self-represented or if the case is fully or partially dismissed. The preparatory stage may not by bypassed. The court may *inter alia* direct the parties to amend their pleadings or provide further information; summon witnesses, appoint experts and request authorities to provide information.[45] The judge may use time limits to provide expediency. German law only sparsely gives indication as to the length of time limits

43. Prütting (2002), p. 319-321 and Trocker and Varano (2005).
44. German Code of Civil Procedure §§ 136, 272, 273, 275 and 276.
45. Murray and Stürner (2004), p. 255 ff., Prütting (2013a) and Prütting (2013b).

and depends on judicial discretion. Although the law seems to provide strict rules on preclusion, German judges are hesitant to enforce them strictly.[46]

German judges have an extensive duty to provide for clarification: "[T]he court is to discuss with the parties the circumstances and facts as well as the relationship of the parties …, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions".[47] The duty extends only as required and is limited by the claims for relief set forth by the parties and their pleadings and the facts presented. The court must ensure that the parties' declarations are complete, particularly regarding all significant facts, and that the parties provide further information if facts have been asserted incompletely. The court must ensure that the parties designate the relevant evidence and file the relevant petitions.[48]

Clarity is not limited to the view of the parties or to what is claimed or disputed. It includes identifying the decisive issues of the case. When the judge has identified the central issues of the case, the parties can turn their attention to these issues and know which facts, evidence, norms, and arguments will be relevant. The underlying idea is to help the parties to identify the important issues and to provide equality of arms. An error, mistake, misapprehension, or oversight that a party has made should not directly lead to disadvantage or harm.[49] The judge has a duty to give hints and feedback to the parties (*Hinweisplicht*), but the duty extends only to unclear statements and to concrete elements that may be overlooked, unclear or insufficient. The judge has no duty to ask general questions and is bound by the principle of party disposition. Clarification should stay within the boundaries of the case, particularly the claims made, relief sought and the main factual background of the case.[50]

German courts have a duty to promote the amicable resolution of all or part of the dispute at all stages of the proceedings. German courts have a duty to have conciliatory hearings unless such a hearing is unnecessary due to prior attempts to settle the case or if such a hearing is obviously without any prospect of success. The judge may suggest that the parties consider negotiation or an ADR process. Agreement could involve dropping or admitting claims, facts or grounds for the claims, or a formal settlement agreement. The court may also refer the parties to a conciliation judge, who has no power to decide the case, or to an ADR process.[51]

46. Oberhammer and Domej (2005), p. 115-117.
47. German Code of Civil Procedure § 136. English translation provided by the German Federal Ministry of Justice, see https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.
48. Murray and Stürner (2004), p. 164 ff. and Fritsche (2013).
49. Murray and Stürner (2004), p. 165-170 and Wagner (2013).
50. Baumbach et al (2014), p. 715-737.
51. German Code of Civil Procedure §§ 278 and 278a. Murray and Stürner (2004), p. 245-248, von Barge (2014) and Prütting (2013c).


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The preparatory stage culminates in a main hearing. In practice, German law has a lenient stance towards dividing the main hearing into successive hearings. Although the goal is a single, concentrated hearing, the judge has discretion to split the hearing if appropriate.[52]

## 4.2. The English model

English civil proceedings start with pre-action protocols to encourage parties to find an amicable settlement, to communicate the nature of the claims between the parties and to disclose information. In some courts, a master is in charge of the interim stage.

The current rules require the parties to define the essence of their dispute and the relevant issues in their statements of the case, which should be a "skeleton" of the case. However, the court has discretion to approve amendments to the pleadings and must consider *inter alia* the nature and impact of the amendment, whether the amendment expands the factual boundaries of the claim, and how cumbersome and costly the amendment would be for the court and the opposing party.[53]

During the preparatory stage, the English rules of civil proceedings stress case management to achieve focussed, speedy and economical proceedings. The case is allocated to one of three tracks depending on the value and complexity of the case. Each track has slightly different rules for the proceedings, with the multi-track having the most flexible rules to fit complex cases. The parties are required to consider negotiating or using an ADR process. The court may use pre-trial reviews and case management conferences to discuss issues related to scheduling and to review the steps necessary to prepare the case. The court may issue directions to the parties for disclosing documents and may discuss the need and scope of expert evidence and the need for preparing and disclosure of factual evidence. Although non-compliance with case management orders should be sanctioned, many English judges are comparably tolerant and exercise discretion in their reactions to avoid draconian consequences.[54]

Disclosure of documents is still a central feature of the preparatory stage to enable access to information, to facilitate settlement and to avoid "trial by ambush".[55]

The court must also provide for clarification by considering whether the claimant has made the claim clear for the other party to understand and whether any amendments are required.[56] Clarification is aimed to help the parties to identify the

52. Prütting (2013a).
53. Andrews (2013), p. 106 ff. and O'Hare and Browne (2011), p. 196 ff.
54. For a summary of the discussion on relief, see Andrews (2013), p. 204-209. See also O'Hare and Browne (2011), p. 553-554 and 557-559.
55. Andrews (2013), p. 66-69.
56. Andrews (2014) and Practice direction 28 – The Fast Track and Practice Direction 29 - The Multi-Track, rules paragraphs 4 and 5. https://www.justice.gov.uk/courts/procedure-rules/civil/rules.

main issues. The parties are encouraged to do so in cooperation and to make a joint statement specifying contested and uncontested facts and issues. The court may require a party to file and serve further information if the circumstances so require. The parties must consider whether a case summary will be useful and provide a summary when needed. The parties must also provide a trial bundle that includes copies of the statements of the case, a summary or chronology where appropriate, requests and responses for further information, witness statements, expert reports, and other necessary documents.[57]

The English rules reflect the classic common law approach to the preparatory stage as a stage for preparing and disclosing evidence. The role of the judge is more active than before, as the judge must actively promote expedient resolution and consider which steps are required. Although the judge has a duty to promote clarity, achieving clear claims is still a task primarily for the parties. Parties prepare summaries and trial bundles, in which all information exchanged prior to the main hearing is consolidated in a single file. In more complex cases, parties often provide a skeleton argument, which informs the judge of the issues the counsel will present at a hearing.

The trial is the paramount English proceeding in which all arguments and evidence is presented. Today, many actions end without trial through settlement, summary judgment or dismissal.

Proportionality is the epitome of English civil procedure rules. The court has powers to disallow or exclude issues, amendments, evidence etc. that are or would result in disproportionality between what is at stake in the case and the time and cost of the proceedings.

### 4.3. Norwegian model[58]

The 2008 Norwegian comprehensive reform of civil proceedings introduced a full version of the main hearing model. Earlier, the preparatory stage was limited and almost exclusively written. The 2008 reform stressed the need to achieve expedient proceedings by encouraging early resolution, settlement and focus on the key legal and factual issues disputed in the case. The new rules on civil proceedings stress the importance of the preparatory stage to ensure that the case is "heard in a swift, cost effective and sound manner" and that the outcome is correct.[59]

Five main methods of achieving the goals are used. First, *clarification* is a specific goal of the civil proceedings. The judge must help the parties to find the key issues of the case, not just securing that the opposing party understands the claims and the

57. Practice Direction 39A – Miscellaneous provision relating to hearings, paragraph 3.

58. For a more detailed discussion, see Nylund (2016b).

59. Dispute Act (civil procedure act), § 9-4. Unofficial translation: http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-090-eng.pdf.


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ground therefor. The Norwegian civil justice system bears resemblance to common law systems, as it is party-driven. The court will ask the parties to provide a summary of the case and written closing statements summarising the case to which with copies of written evidence are attached. Second, the judge may provide *guidance* to the parties to prevent errors and to ensure that the parties are able to attend to their interests in the case.[60] The court may not give advice to the parties or act in a way that will interfere with its impartiality. Third, *preclusion* of amendments or addition of claims, grounds for claims and evidence occur at the closing of the preparatory stage two weeks before the date of the main hearing. In addition, the court has discretion to set an earlier time limit for certain issues and to allow changes after the limit for preclusion has occurred. Despite stronger focus on clarification and preclusion, Norwegian judges still have a comparably passive role in civil proceedings and have a lax policy on enforcing preclusion.

Fourth, *case management* has become a part of Norwegian civil proceedings by setting a plan for the progress of the proceedings. It is unclear what case management encompasses apart from the judge's duty to promote expedient proceedings and schedule hearings. There are no set time limits, except that the main hearing should be held within six months of the initiation of proceedings.

Fifth, *amicable settlements* are a pronounced goal of civil proceedings. Their role is reflected in the name of the civil procedure act: Act relating to mediation and procedure in civil disputes. The judge has a duty to consider if amicable resolution is possible at every stage of the proceedings. The judge may actively promote settlement, encourage negotiation or the use of ADR processes, or divert the case to court-connected mediation.

Sixth, during the *pre-action stage,* parties must give notice in writing of the claim and the grounds for the claim. The prospective claimant must await a response to the notice and information about important evidence.[61] The parties must also investigate whether it is possible to reach an amicable settlement before initiating court proceedings. Failure to comply with pre-action requirements may result in liability for the costs of litigation.

The concentrated main hearing has been the paramount of Norwegian civil proceedings for years.

The new rules underline proportionality between what is at stake in the case and the use of party and court resources. The enhanced preparatory stage is central to achieving the goal but remains under-utilized in practise.[62]

60. Dispute Act (civil procedure act), § 11-5. The difference between clarification and guidance is ambiguous.
61. Dispute Act, Chapter 5.
62. See Nylund (2016b) and Nylund (forthcoming).

### 4.4. Finnish model

Until late 1993, Finnish civil proceedings followed an archaic piecemeal model dating back to 1734. During the hearings, arguments and evidence was collected in writing and, when a judge considered the case ripe, a judge decided the case based on the documentation in court files. Until the reform, proceedings were almost exclusively written in all courts, as oral elements often consisted of reading written submissions. Today, oral proceedings dominate in District Courts.

The 1993 reform's introduction of the main hearing model was a profound change. Preparation starts with a written stage. Written preparation is limited to one written statement per party absent a special reason. A preparatory hearing is held almost without exception, and two or more hearings are held in 60% of the cases.[63] The court may decide to waive the preparatory hearing, "if the goals of the preparation … have been met".[64]

The Code of Judicial Proceedings identifies clarification as the goal of the preparatory stage. The court must clarify claims, grounds for claims, disputed and undisputed issues, which evidence will be introduced and the possibility of settlement. The court has an active role during the preparatory stage, and the courts have gradually received more duties. During the written stage, the court must indicate the issue on which a statement is required and direct the parties to focus on particular questions only. Further, the court must ensure that no irrelevant arguments, facts or unnecessary evidence is presented. The court must prepare a written summary of the claims of the parties, the grounds for the claims and a list of the evidence introduced and what each party intends to prove with each piece of evidence. Evidence is limited to evidence related to disputed facts, and only a proportionate amount of evidence and the best evidence available is admissible.

The judge has a duty to persuade the parties to settle the case, and, if appropriate, to propose a particular solution to the case.[65] The case may also be diverted to court-conducted mediation.

Immediately after the reform, the main hearing had an almost ancillary role in Finnish civil proceedings. Courts were allowed to have the main hearing directly after the preparatory hearing. In such cases, the distinction between the preparatory hearing and the main hearing was obliterated, and any claims, grounds for claims or arguments presented during the preparatory hearing became a part of the main hearing. The main hearing was in effect a stage for hearing evidence, as it was *de facto* merged with the final preliminary hearing. Subsequent reforms

63. Ervasti (2009a) p. 9.
64. Code of Judicial Proceedings Chapter 5 §§ 15a and 15b. Unofficial translation, http://www.finlex.fi/en/laki/kaannokset/1734/en17340004.pdf.
65. Code of Judicial Proceedings, Chapters 5 §§ 19 and 26.


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have eliminated the possibility of merging the final preliminary hearing and the main hearing.[66]

Finnish court proceedings tend to be frontloaded. Initially, the 1993 reform introduced early preclusion, forcing the parties to present all possibly relevant claims, arguments and facts in the statements of case. Hence, legal counsel frontloaded the case, and the court had an onerous task in finding the core issues. Today, preclusion occurs at the beginning of the main hearing. Parties are expected to present all relevant claims and causes of action, including the specific factual basis and main legal arguments, and to identify evidence in their respective statements of the case. Although the rule is more useful, it still contributes to frontloading. The rule on preclusion is strict, possibly leading to draconian outcomes. In the beginning, strict and early preclusion was probably necessary to change the culture of piecemeal proceedings. Culture change was successful, but the side effects were adverse.

The reform has significantly improved the quality of Finnish civil proceedings, yet it has not lead to increased efficiency. On the contrary, particularly the cost of proceedings has escalated. The length of civil trials is significantly longer than in other Nordic countries, and the number of contentious general civil and particularly commercial cases, except family cases, is considerably low even in comparison with other Nordic countries.

## 5. COMPARATIVE PERSPECTIVES ON THE MAIN HEARING MODEL

The brief examination of chosen countries with a main hearing model of civil proceedings displays both similarities and differences.

The four systems studied have the same structure of proceedings with the main hearing as the paramount and the preparatory stage as the *sine qua non*. The goals of the preparatory stage are expediency, proportional use of resources, early resolution, settlement and clarification. Case management, flexibility, judicial discretion, active use of preclusion or time limits, and amicable resolution are pivotal. Despite their similarities, each system has its particular details, such as if there is a general date for preclusion as in Finnish and Norwegian law, or if the court sets the time limits as appropriate. There are also differences as to how strictly courts enforce time limits and the extent to which exceptions are allowed.

There are also nuances regarding which elements each system emphasises. English law stresses case management and the clarification and disclosure of evidence, and it is clearly party-driven. German law accentuates the role of an active judge to achieve clarification and to find the core of the case. Norwegian law falls somewhere between English and German law, and Finnish law is similar to German law. In Germany and Finland, judges have long had an active role, as the result of which they easily embrace

66. See Ervo (2016).

their powers to promote clarification actively. In contrast, a tradition for a more passive judge still reflects the practices in England and Norway. Preparing summaries, skeleton arguments and trial bundles is a task for the parties in England and Norway, but in Finland, and partly in Germany, the duty falls on the courts. Although the goal is clarification, the idea of which aspects in particular need to be clarified, exactly what clarification entails, which tools are appropriate and who should primarily use the tool vary. There is still a visible demarcation between common law and civil law, between party-driven systems and systems in which the court has a more active and central role.

Preparatory hearings are used in different ways. In Norway, preparatory hearings may be too scarce and thus result in less clarification and less concentrated main hearings. In Finland, the use of preparatory hearings may be excessive and result in increased cost and delay. Finding the proper balance between oral and written preparation is important.[67]

The role of evidence differs. The English system focuses on the preparation of evidence, the other systems on identifying relevant evidence. Disclosure is central to the English system, but the other systems do not have a full system of disclosure, although parties are obliged to report the evidence that they intend to present and to provide written evidence to the opposing party at an early stage. In all systems parties need to establish which pieces of evidence they intend to present and which witnesses (and experts) will be heard.

In Finland and Germany, the tradition of judicial settlement efforts is long, and many judges actively promote settlement. English judges are more passive and have not explicitly been given powers or a duty to promote settlement actively.

Judges are generally lenient towards enforcement of preclusion and time limits, which may result in delay and insufficient preparation. However, Finnish judges have a more formalistic approach, which has resulted in frontloading the case and thus less efficiency. The Finnish system also has a formalistic approach towards the format of the preparatory stage, as the rules give less discretion to the judge to find the balance between the written and oral formats.

The conduct of the main hearing is different. In the English and Norwegian legal traditions, the main hearing has been the essence of civil proceedings. The main hearing – at least in the public image – constitutes the civil proceedings, and the interim stage has had an inferior role. In German and Finnish civil proceedings, written elements have been stronger, which is still reflected in the main hearing. Until 1993, Finland had no tradition for a main hearing, which is still reflected in the, comparatively speaking, lesser role of the main hearing. In fact, the main hearing was diluted as a consequence of the practice of merging the final preparatory hearing and the main hearing. German law is less strict on concentration than the other systems.

67. See also Stürner (2002), p. 504.


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England and Norway have introduced a mandatory pre-action stage – the enhanced main hearing model. In both countries, parties are required to give advance notice that they consider initiating civil proceedings and to share information (and evidence) related to the forthcoming case. Further, parties have an obligation to seek an amicable solution through negotiation or ADR processes.

Despite some differences between countries with a main hearing model, it has clearly contributed to convergence between the four countries studied.[68] However, the approximation should not be exaggerated, as clear differences in conceptions of *inter alia* the role of the judge and the concept of orality are still striking.[69]

## 6. THE MAIN HEARING MODEL – A PANACEA OR A LONG AND WINDING ROAD?

The main hearing model has become popular in Europe and internationally, forming a baseline for reforms of civil proceedings in many jurisdictions. It promises expedient, economic civil proceedings and a quality outcome, be it through full or partial settlement, dismissal on procedural grounds or by a final judgment.

The English, German and Norwegian systems seem to serve as arguments for considering the main hearing system – if not a panacea – a successful model that increases the quality of justice. Each of the three systems has adapted to suit their legal traditions. At least in Norway, a tradition with almost non-existent judge-led preparation of cases have resulted in a limited preparatory stage. This in turn has adverse consequences for the main hearing, as the core of the case has not become sufficiently established. The main hearings are often lengthy and postponed to allow for further preparation.

The Finnish experience with relatively lengthy and costly civil proceedings indicates the opposite. Several circumstances may have contributed to the relative lack of success of the main hearing model in Finland, and some of the circumstances have little to do with the main hearing model itself. Reasons for inefficiency include insufficient legal aid and legal aid insurance and a self-perpetuating scarcity of general civil cases. The reform was introduced during the near financial meltdown in the early 1990s, which is likely to have hampered implementation.

As the pre-1993 Finnish civil proceedings were archaic, the reform constituted radical changes in almost every aspect of proceedings. The reform required a metamorphosis of principles, ideas and practices. Compared to the other three countries studied, the reforms were significant. Old practices carried over to the new

68. Several authors have also noted a tendency to convergence across Europe, see Stürner (2002), Amrani-Mekki (2010), Cadiet (2010), Chase and Walker (2010), Damaška (2010), Glenn (2010), and Taruffo (2010).

69. See also Chase (1997) for a discussion of the possibilities of procedural harmonization.

system. Later reforms changed practices, at least to some extent. For Finland, the main hearing model was imperative for a successful modernisation of civil proceedings, but it alone is not sufficient to solve all of the problems related to expedient and affordable proceedings.

Many former communist countries have attempted to change the structure of their civil proceedings to implement the main hearing model fully or partially. In several countries, the road to the main hearing model seems to be long and winding. One reason appears to be the mentality of judges and attorneys and the court-culture at large. Old habits of piecemeal trials, including lack of preparation for early hearings, piecemeal presentation of arguments and evidence and disinclination towards using preclusion carry over from the old system. Sometimes old habits are eradicated by awkward new practices, such as an overly strict stance of enforcing preclusion in Finland.[70]

Aversion to judicial discretion and settlement are other obstacles to the main hearing model. It requires flexibility, and the judge must continuously evaluate which tools should be employed and the right moment for using a specific tool. Settlement is a by-product of clarification but also an essential method of early resolution and satisfactory results. Although the main hearing is the centrepiece of civil proceedings, it is paradoxically also a last resort. In the countries studied in this text, the aim is to make court proceedings a last resort to be used only when strictly necessary, and, even then, the court must continuously consider the possibility of early resolution.[71]

The main hearing model is not a panacea. Rather, its success is contingent upon several factors, particularly the underlying structure of civil proceedings and the specific legal culture of each country. The model has clear merits, and, as it is flexible, each jurisdiction may adapt it to fit its specific needs.

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