Chapter 3
Preparatory Proceedings in Norway: Efficiency by Flexibility and Case Management

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Abstract Active use of the preparatory stage to promote a concentrated main hearing is a key element in Norwegian civil procedure. The judge actively manages the cage and prepares it for the main hearing. Judicial discretion is an important tool to allow the judge to tailor the proceedings to the need of the parties. If an issue or question is unclear, the judge has a duty to help the parties clarify the issues and provide guidance by helping parties identify disputed and undisputed facts and argument and to separate core questions from questions that are more peripheral. The judge has a duty to promote settlement either by judicial settlement efforts or by diverting the case to court-connected mediation. When appropriate, the case can be disposed of during the preparatory stage. The format of preparatory proceedings is flexible: the judge has discretion to combine written and oral proceedings and use telephone hearings. The 2008 reform of Norwegian civil procedure, which emphasised the role of preparatory proceedings, has made civil litigation swifter and cheaper. It has also enhanced the quality of proceedings and the outcome. In the final part, Finnish and Norwegian preparatory proceedings are compared. Norway has a long tradition of concentrated oral hearings, promotion of settlement and an active judge, whereas these ideas were introduced in Finland only in 1993. The comparison explores how the underlying structure and culture of civil proceedings influence the implementation of the main hearing model in countries with a similar (legal) culture.

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3.1 Introduction

In this chapter, the preparatory proceedings in the Norwegian civil justice system are disseminated. Norway has one of the most efficient civil justice systems with an average disposition time of slightly over five months for litigious civil cases. In 2008, the Norwegian laws on civil procedure were completely modernized and a pure main hearing-model of civil justice was introduced.

The main features of the reform of the preparatory proceedings will be discussed and the impact of the reform on the functioning and result of civil proceedings will be analysed. In the next part, a short introduction to the Norwegian civil procedure system is given. Then, the structure and goals of the preparatory proceedings are disseminated. After that, the different tools available during the preparatory proceedings and the significance of the end of the preparatory proceedings are examined in closer detail. The tools available and the rules on ending the preparatory stage are the core elements of the Norwegian system. Subsequently, two separate tracks of civil proceedings, court-connected mediation and the small claims track, are discussed. Lastly, the Norwegian system is evaluated and contrasted with the current Finnish system.

3.2 The Structure and Principles Norwegian Civil Procedure

Norway is a part of the Nordic legal family, thus is civil justice system has many typical features of other Nordic legal systems.

Norway has a very simple *structure of the court system*. There is only one set of courts, handling administrative, civil, commercial, and criminal cases. The same courts and the same judges sit all kinds of cases. The court system is three-tiered with almost all cases starting in one of the 66 *District Courts*, which decisions can be appealed to one of six *Court of Appeal*. The *Norwegian Supreme Court* hears mainly cases which can serve as precedent. There are almost no special courts and no constitutional court. All courts have powers to perform judicial review, and the Norwegian Supreme Court regularly assesses the constitutionality of laws.

The *Conciliation Boards* (forliksråd) are a special feature of the Norwegian court system. The Conciliation Boards are not courts by definition, yet they are the mandatory first instance for claims with a primarily pecuniary interest of no more than NOK 125,000 (about EUR 15,000). Family law and administrative law cases are exempted, as are cases where both parties have legal representation. The Conciliation Boards have a panel of three lay members, and have only limited powers to decide a case. About 70 % of cases are solved by a default judgement. The Conciliation Boards have limited powers to decide a case. Only if both parties agree to let the Board decide the case, and the case is simple, may the Board decide

a litigious case. There is a judgment in less than 5 % of all cases. The judgment can be appealed to the District Courts.[1]

Norwegian civil procedure is based primarily on the Austrian code of civil procedure from the late nineteenth century, mixed with old Nordic traditions and Danish procedural law. The previous *Civil Procedure Act* (tvistemålsloven), which was valid from 1915 to 2007, was influenced to a high degree of the ideas of Franz Klein. Although the concepts, structure and theories of civil procedure are clearly from the Germanic civil law tradition, the proceedings themselves reflect the common law tradition. The oral "trial" has been the core of the hearing, the proceedings can be described as more adversarial than "inquisitorial", and lay judges have an important role in the system. The judge has had the right to promote settlement. The court culture is very pragmatic, with a tendency to seek for the most practical solution rather than the solution fitting the theories and constructions of the law. The procedural rules are seldom formalistic, giving extensive discretion to the judge.

The *Civil Procedure Act* had rules on the preparatory stage. Usually the preparatory stage was written. The aim of the stage was to ensure that the main hearing could be conducted in a single session, but the purpose was still very vague. However, in practise the preparatory stage was often very limited, as it only consisted of asking the defendant to present claims, defences and other contentions in writing. In other words, the preparatory stage was in fact the pleadings stage. In more complicated cases, the court could ask the claimant to prepare a summary of the facts of the case regardless of whether the facts were disputed. The defendant would then comment on the summary. If a preparatory hearing was conducted, the parties could discuss the case and the judge could promote settlement.[2]

At the end of the 1990s a full reform of the civil procedure was initiated by the government. The proposal for new rules on civil procedure, published in 2001, was heavily influenced by the 1998 reform of English civil procedure. *The Act relating to mediation and procedure in civil disputes, the Dispute Act*[3] (hereinafter DA) was enacted in 2005 and entered into force in 2008. It is based on main hearing model of civil procedure, where the preparatory stage has an important role. According to the preparatory works (*travaux preparatoires)*, the main aims of the reform was to ensure that the courts would provide *adequate, fairly cheap and swift dispute resolution* and to ensure *effective and uniform application of laws*. The courts must be accessible, providing "correct" solutions swiftly and cheap.[4]

Although the regulation of civil procedure is very modern and Norway in general is technologically advanced society, the courts have outdated information

[1] The total annual number of cases is higher than 110,000. The statistics are on file with the author.

[2] Skoghøy (2001) pp. 486–500.

[3] Lov 17.6.2005 nr. 90 om mekling og rettergang i sivile tvister (tvisteloven). Unofficial English translation available at http://www.ub.uio.no/ujur/ulovdata/lov-20050617-090-eng.pdf. An English and a German translation is available in Lipp and Fredriksen (2011), p. 135 et seq.

[4] NOU 2001: 32, pp. 127–129.

technology systems. Documents, including the statement of claim can be sent by e-mail, but otherwise access to modern technology is limited to word processing, e-mail, internet, electronic databases and case registration systems. Video conferencing, video or audio recording of evidence and electronic processing is not available.

3.3 Preparatory Proceedings in Norway: Structure and Goals

Civil proceedings start with the *pleadings stage*. The proceedings start when the *statement of claim* arrives at the court. The statement must include the name of the court; the names and addresses of parties and their representatives and counsel; the claim that is made and the prayer for relief which is requested; the factual and legal basis for the claim; the evidence which the claimant intends to present; and the claimant's view on the organisation of the proceedings (DA section 9-2). Written evidence must be attached to the statement of claim.

The court proves that the statement of claim fulfils the legal requirements and that the claimant has a legal standing against the defendant. If the statement of claim does not fulfil the requirements the claimant must be given an opportunity to correct it (DA section 16-5) or the case is dismissed. The statement of claim is then served to the defendant. When the statement of claim has been served, the claimant is no longer free to withdraw the case. The case is assigned to a judge who will be responsible for preparing the case for the main hearing. The judge responsible for the preparatory proceedings will usually hear the case in the main hearing. The largest District Courts often assign the case to a different judge for the main hearing to allow for more efficient scheduling.

The *preparatory stage starts* formally when the statement of claim is served to the defendant. The court must decide if the statement of defence is requested in writing, or if it should be presented in a preparatory hearing. In practice, oral replies are almost never used. Self-represented parties can, however, present the statement of claim and the statement of defence orally at the court. A judge will write the statement of claim or the statement of defence for the party. This makes the judge partial and disqualified from deciding the case. The content of the statement of defence must fulfil the same requirements. If a statement of defence is not filed or it is filed after the time limit, a default judgment may be issued. If the defendant admits the claim, or the factual and legal argumentation, the court may decide the case immediately.

The preparatory stage ends two weeks before the main hearing. The main hearing should be held within six months after the court has received the statement of claim. The main hearing is conducted as a single hearing. If the case is complex or if there is much evidence, the case may be heard on several consecutive days. The judge who has been responsible for presiding over the preparatory stage will, in

most cases, hear the case in the main hearing. Most cases are heard by a single judge.

The *purpose of the preparatory stage* is to ensure that the case is "heard in a swift, cost effective and sound manner" (DA section 9-4). Four main methods of gaining efficient proceedings and substantially correct results were introduced to reach the goal. All measures require an active judge. First, the judge must involve in active *case management* to avoid delays. Time limits are a tool to enhance clarity and expediency. Second, the judge must help to *clarify issues*, among others, where specific prayers for relief are sought, and on which grounds, facts, pieces of evidence and legal argumentation the claims made are based on. The judge must arrange for clarification of which of the relevant facts that are disputed. Third, the judge must provide *guidance* to the parties when needed and appropriate. Fourth, *amicable solutions* should be promoted by the judge during the proceedings. Settlements are also promoted by encouraging the parties to use mediation and other alternative means of dispute resolution before they file the case.

Fifth, the claims, the factual background of the case, the pieces of evidence presented and the persons which will be heard during the main hearing are "fixed" at the end of the preparatory proceedings by using *preclusion and written closing statements*. An efficient procedure requires that the parties identify the relevant and disputed legal and factual issues early on, and no later than by the start of the main hearing. The legal and factual arguments and the evidence is presented during the main hearing, but the boundaries of the case and identification of the pieces of evidence and the persons to be heard is done during the preparatory stage.

In addition, the proceedings should be *flexible*. The proceedings should be tailored individually to each case. The judges are given discretion to choose if and how they use their powers, as long as the primary goals of efficient proceedings and substantially correct results are achieved. Finally, in a typically Norwegian way, it was stressed that over formalism should be avoided.[5]

The court proceedings are seen as a *cooperation* between the judge and the parties. The parties decide the scope and object of the proceedings, as they have the sole right to decide on the prayers for relief and for introducing the facts and the main legal arguments. The judge presiding over the case has a duty to discuss the organisation of the proceedings with the parties (usually their legal representatives). The parties and the judge cooperate to clarify the case and to identify the main legal and factual issues and the disputed facts and legal arguments.

Paragraph 2 of DA section 9-4 states which methods the judge can use during preparatory proceedings for case management. The list includes:

- court-connected mediation and judicial settlement efforts,
- preparatory hearings,
- the need for written statements,
- deciding the case, or parts of it, during the preparatory stage,

[5] NOU 2001: 32, pp. 132, 140–141.

- how evidence should be presented, secured or produced; use of expert witnesses,
- if lay judges or expert judges should participate in deciding the case,
- the need for special proceedings,
- setting time limits and a date for the main hearing,
- the need to split the case,
- the need for closing statements,
- other issues of importance.

Hence, the judge has many alternatives to consider. The decision on the preparatory proceedings is made after the judge has consulted the parties by telephone or, in some cases, in writing or even in person. The plan for the preparatory proceedings may be adjusted as needed. The judge must hear the parties before adjusting the plan. As the preparatory proceedings should be tailored to the individual case, there is no general pathway for the conduct of preparatory proceedings.

The court may choose between a *written, oral, or a combination of oral and written proceedings*. Written proceedings are cheaper and should therefore be preferred. Hearings should generally be conducted by telephone, as conference calls with the judge and the lawyers attending. *Telephone hearings* are often most convenient way to discuss issues such as the timetable for the hearing at court, use of expert witnesses, on-site inspections, and clarification of claims, facts and evidence.[6]

The concept of a hearing is partly indeterminate during the preparatory proceedings. If a hearing is considered a court hearing *(rettsmøte),* the court has several obligations, such as to document the meeting and to ensure the presence of the parties, and the public has normally access to the hearing. According to the preparatory works, preparatory hearings during the preparatory stage are court hearings, but there are a few exceptions. The language used in the preparatory works makes the role of the hearings unclear. Telephone conferences between the judge and the parties are not always a court hearing. If the judge only calls to schedule a meeting or to address some other purely technical question, the call is not a hearing. Although the telephone conversation would be considered a hearing, the general public does not have access to the hearing, as it is conducted inside the judge's chambers. Further, the preparatory works state that the judge is supposed to have a planning meeting to plan the preparatory proceedings at the beginning of the preparatory proceedings. However, in practice, there is no hearing *stricto sensu,* in most cases the judge only needs to call the parties (more precisely their legal counsel) to set the date for the main hearing, and to discuss diverting the case to court-connected mediation. The judge usually also encourages the parties to try to settle the case. The term "hearing" might, therefore, seem misleading and turgid.

Judicial settlement efforts and judicial guidance often require that the judge discusses the case with the parties in a preparatory hearing.[7] With judicial guidance,

[6] NOU 2001: 32, pp. 710–713 and 749–750, Skoghøy (2014), pp. 620–627.

[7] NOU 2001: 32, p. 750.

parties may drop claims of minor importance or modify their claims. Therefore, the court should consider having a preparatory hearing, instead of a telephone hearing when appropriate. This is especially true with self-represented parties.[8] Disposal of a case often requires a preparatory hearing to satisfy the basic requirements of a fair trial. In practice, preparatory hearings are not very common.[9] Most of the oral communication is done by telephone. Judges use about 10 % of their time in preparatory hearings.[10]

3.4 The Active Role of the Judge

3.4.1 Clarification and Judicial Guidance

One of the aims of civil procedure is to provide for substantially correct judgments. Correct judgments are understood as judgments that are based on true facts and the correct application of law (substantive truth). To achieve the aim, the parties must make the right claims and submissions, and provide appropriate evidence. The court must provide the parties with guidance to prevent errors and to make the parties able to attend to their interests in the case (DA section 11-5). The court will promote clarification of disputed issues, elucidation of the contentions and positions of the parties, and clarification of factual and legal issues. The purpose of clarification and guidance is to ensure that the main proceeding is concentrated on the relevant disputed factual and legal questions.

The court will, in particular, give *guidance* to parties without legal counsel. If there are considerable differences in power between the parties, the court should to some extent try to level out the playing field by giving more guidance to the weaker party. Guidance does not mean that the court can give advice to the parties on which procedural steps they should take or which position they should take. However, the court may ask if a party has evidence to prove a claim, thus inducing the party to present new evidence. The proceedings are party-initiated, and the parties still determine which claims, defences, contentions and evidence they provide.[11]

When giving guidance, the court must refrain from actions that may interfere with its impartiality. The balance between giving enough guidance and ensuring impartiality may sometimes be difficult to strike. The tone of voice or the choice of wording a question may be decisive.[12]

[8] Schei et al. (2012), comment for § 9-5, comment 2. For a different opinion, see Skoghøy (2014), p. 625.

[9] Skoghøy (2014), pp. 627–629.

[10] Evaluering av tvisteloven (2013).

[11] See also Robberstad (2015), 189.

[12] NOU 2001:32, pp. 138–140, 708–710.

Clarification of the key questions and evidence, which questions and arguments are most relevant and which legal questions and facts are disputed, is very important. When the case becomes clear, some of the issues become undisputed or the parties may drop claims, defences or evidence of minor importance. Parties may also realise that a claim or defence will most likely be dismissed, and choose to drop it. They will also become aware of misunderstandings or errors at an early stage. The legal questions often become more defined and pointed. The more concentrated and well-defined the case is, the less likely a party will need to change submissions later, the shorter and more concentrated the main hearing will be, and the less likely the parties will appeal. The preparatory proceedings will also be swifter and the litigation costs will be lower.

Clarification of key legal questions and disputed facts enhance the quality of the argumentation of the parties and the evidence presented during the main hearing. The court may reject evidence that does not appreciably strengthen the case of the party or if the evidence offered is not proportionate with the case (DA sections 21-7 and 21-8). Consequently, the court has a better foundation for its decision and the goal of substantially correct results is promoted.[13]

Before the reform, the case could change throughout the proceedings in the District Courts and well into the Court of Appeal. Sometimes the parties understood what was disputed and which legal questions were the most relevant only after the District Court had decided the case.

The rules on guidance and clarification may require a preparatory hearing. Depending on the case, the quality of the written statements by the parties, issue (s) in need of clarification or correction, and the complexity of the case, clarification and guidance can be given in writing, on the telephone or in a preparatory hearing. Self-represented parties will more often benefit from a preparatory hearing, as will cases with many or complex issues in need of clarification. In many cases, judicial settlement efforts can be combined with guidance and clarification. The parties may understand that the dispute is based on a misunderstanding, or they may realise that the case will be expensive due to a need for extensive evidence. Consequently, the parties may wish to settle the case.

3.4.2 Early Disposal of Cases

Early disposal of cases is important to save the resources of the parties and the court. In order for the courts to save resources, they may decide a case or part of it during the preparatory stage. The judgment may be delivered after purely written proceedings, or the court may decide that a preparatory hearing is necessary to guarantee the parties the right to a fair trial.

[13] NOU 2001: 32, pp. 133–138.

Deciding the case on procedural grounds during the preparatory stage is one of the key tools to ensure efficient proceedings. The court must rule on procedural issues as early as possible (DA section 9-6). The parties are asked to raise any objection to procedural steps by the other party as soon as possible. The time limit is flexible. It depends on the complexity of the procedural step taken, on how obvious the issue is and how complex the issue is. The court cannot rely on the parties finding and reacting to possible problems; active case management requires that the judge in charge reads the statements of the parties and reacts accordingly to any mistakes, unclear actions or problems.

If it is evident that the *claim or part thereof cannot succeed* or the defences presented are unsustainable, the court may decide the case during the preparatory stage in written or oral proceedings (DA section 9-8). The provision should only be used when the court is completely certain of the legal shortcomings of the claim or defence. The simplified judgment proceedings can only be used upon request of the party. The decision is made in written proceedings, but the parties can request a preparatory hearing. The hearing should be limited to the most pertinent questions.[14]

The court may also decide a case on formal grounds if one of the *requirements of justiciability lacks*. If the problem can be corrected, the parties must be given an opportunity to correct the problem. If it is unclear if the case is justiciable, the court must usually hear the parties in writing, by telephone or in a preparatory hearing. If the issue of justiciability is difficult and connected to the claims, the decision can be postponed to the main hearing. If the claim clearly cannot succeed, the court may rule on the claim for the defendant. Thus, the court will not use resources on a difficult procedural question when the outcome of the case regarding the claim is clear in favour of the defendant.[15]

If the court decides to have a *preparatory hearing*, the court may decide the case after the hearing. The requirement is that the court considers itself to have solid basis for doing so and the parties have consented. The parties must have had a sufficient opportunity to present evidence. The relevant written evidence is usually already available, as written evidence is submitted as an appendix to statement of claim and statement of defence. If a preparatory hearing has been held, the court may have sufficient information to decide the case. Deciding the case during the hearing is mostly for simple cases or cases that became simple after partial settlement or successful clarification.

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[14] Skoghøy (2014), pp. 630–631.

[15] Skoghøy (2014), p. 620, NOU 2001: 32, pp. 145–146.

3.4.3 Judicial Settlement Efforts

Conciliation has been part of the Norwegian legal culture for centuries. One of the aims of the civil justice reform of 2008 was to provide for more settlements *inter alia* by increased use of judicial settlement efforts. Judges had had the right to *promote settlement* under the Civil Procedure Act of 1915, but some judges did not use their powers. Others were active conciliators; some even had *ex parte* meetings, which could be detrimental for the impartiality of the judge.

The judge has a *duty to consider the possibility of* a full or partial *settlement at each stage* of the proceedings (DA section 8-1). Judges have a duty to promote judicial settlement. Judges should not try to settle their cases at every stage of the proceedings, rather they must consider when and how to promote settlement in each case.

The judge can suggest the parties negotiate or encourage settlement by pointing out common ground or the costs and delays resulting from a main hearing. The judge can point out the benefits of a settlement or stress the risks of the legal decision. However, the judge must refrain from actions endangering impartiality. The judge may not have private meetings, suggest (specific) solutions or receive information that cannot be communicated to all parties involved (DA section 8-2).

The outcome of judicial settlement efforts may be settlement, partial settlement or no settlement. If the parties settle, the parties may decide that the settlement should be a court settlement. This means that the settlement is entered into the court records and that it is enforceable as a judgment. If the case is not settled, or the parties reach a partial settlement, the proceedings continue. If the parties settle the content of the case but cannot agree on who pays for the litigation costs, the court has an *ex officio* right to decide on the costs (DA section 9-7). The parties know they do not negotiate about the costs, as long as they can agree on the rest.[16]

The content of the settlement and the role of the judge have been discussed. The question is if the judge can contribute to a settlement that is against the law. Naturally, the content of the settlement does have to be identical with the probable outcome if the case were decided by the court. The question is rather how much may the settlement depart from the law, before the judge must withdraw from the case, tell the parties that the negotiated outcome is not in accordance with the law, or reject the parties the possibility to register the settlement as a court settlement. Different views have been expressed, most commentators are quite liberal but emphasise that public policy considerations and the protection of the weaker party form restrictions.[17]

The judge has the duty to consider if the case should be diverted to court-connected mediation. The question should also be discussed with the parties. Court-connected mediation is discussed *infra*.

[16] Nylund (2014); Bernt (2011), p. 111, NOU 2001: 32, pp. 217–218.

[17] Skoghøy (2014), p. 38 Bernt (2011), pp. 446–447.

3.4.4 Summary of Facts, Written Statements and Closing Statements

Norwegian courts may ask the parties to provide written summaries of facts, claims and relevant legal issues. The summaries or statements help the parties and the court to clarify the case and identify the key issues and facts and to distinguish disputed facts and issues from undisputed ones. At the end of the preparatory stage, the parties file written summaries.

In complex cases, the court may order the claimant to submit a *brief chronological* or other systematic *summary of the facts* of the case (DA section 9-9 subsection 4). To avoid unnecessary costs, this opportunity is limited to cases with complex facts. The defendant must submit a reply stating which parts of the summary of facts are accepted and which parts are contested. The defendant must give a brief account of the contested facts. The court may encourage the parties to cooperate, to make a single summary where disputed facts are clearly labelled and provided in two different versions.

The summary helps to cement the main facts of the case. Once the main facts are presented in a systematic manner, the undisputed facts of the case are set. The summary gives the parties and the court the opportunity to evaluate if the disputed facts are essential or incidental for the case, and which evidence is needed to prove the disputed facts. The court and the parties may also compare the facts with the claims and the legal argumentation: Are the claims appropriate for the facts of the case, or should they be adjusted or even dropped? Does the argumentation of the parties fit the facts and the claims?

Evidence is only to be presented for disputed facts and the parties must state what they want to prove with each piece of evidence (DA section 21-6). The court may disallow evidence that is not purported to establish disputed facts or evidence, which is disproportionate to the importance of the dispute (DA sections 21-7 and 21-8). In practice, the courts seldom decide to disallow evidence. The main method to reduce evidence is to use judicial guidance and ask the parties if they believe all the evidence is necessary to establish the disputed facts.

The parties have a duty to provide truthful accounts of the facts even if they would have to testify against themselves. The parties also have a duty to *disclose* the existence of important evidence that is not in their possession. The duty to disclosure applied when the party has reason to believe the opposing party does not know of. Third parties have a duty to testify and to give access to other pieces of evidence, unless they are exempted by law (DA sections 21-4 and 21-5).

If there are many pieces of written evidence, the court may request the parties that these are provided as a booklet with consecutive numbering. During the main hearing, finding the document referred to by one party is easy: the party can refer to the bill on page seven.

In particularly complex cases, the court may order the parties to provide *written statements on a specific issue*. If the legal question is complex, the parties can be ordered to provide an overview of preparatory works, case law and legal literature

on the topic. In a case with complex technical details, the parties can be ordered to provide an overview of them. The overview will help the court understand the case. In addition, the material provided can be actively used in the main hearing. The parties can refer to the material, knowing that the opposing party and the court have access to the same documents. The documents are usually numbered sequentially, helping the parties and the court find the right place.[18]

Both parties generally submit *written closing statements* at the end of the preparatory stage. The summaries state the claims of the parties, including the relief and the grounds for the relief, the legal rules that are invoked and which pieces of evidence the party will present (DA section 9-10). The statements form the basis for the main hearing. They set the legal and factual limits of the case and define the dispute. The closing statements can be very brief, consisting primarily of keywords briefly stating the main ideas.[19]

The closing statements are submitted at the end, or after the end of the preparatory proceedings, which is, according to law, two weeks before the main hearing will be opened. Therefore, the parties and the court can prepare the main hearing knowing which claims and defences will be evoked, which factual and legal questions are disputed and which pieces of evidence will be presented.[20]

The summaries and statements help the parties and the court to organise their work and prepare for the main hearing. When the statements have consecutive numbering, the parties can refer to a page number, making it easier for the court and the opposing party to find the relevant document. However, in small and simple cases summaries and closing statements may be superfluous and cause unnecessary cost and delay. Thus, they should only be used when they can provide additional support for the court and the parties.

3.5 The End of the Preparatory Stage

3.5.1 A Plan for the Main Hearing

One of the goals of the preparatory stage is to make a plan for the main hearing. The main hearing must be held within six months of filing of the case (DA section 9-4). Not all cases are disposed of within six months, due to court congestions, holidays, illness and the complexity of the case. The managing judge has the duty to set dates as early as possible to enable a swift proceeding.

The judge must plan the main hearing in consultation with the parties. A timetable should be used to determine the approximate times for presentation of the case, testimony, hearing of witnesses and experts, discussing written evidence

[18] Schei et al. (2012), comment § 9-9.

[19] Skoghøy (2014), pp. 629–630.

[20] Schei et al. (2012), comment § 9-10

and closing speeches. The order of the witnesses should be decided in addition to approximate duration of the hearing of each witness. The parties may also decide to set time limits for the presentation of cases and closing speeches. The parties submit their suggestion for the timetable with the written closing statements.[21]

3.5.2 The Closing the Preparatory Stage and Preclusion

The preparatory stage is closed two weeks before the main hearing. The parties have time to prepare the main hearing, as they have the *written closing statements* at hand. The closing statements combined with the two week period between the end of the preparatory stage and the main hearing are one of the main tools to combat problems of a case that evolves throughout the proceedings in the District Court. It allows the parties to prepare the main hearing in an efficient way. At the same time, the period is a procedural void between the preparatory stage and the main hearing stage of the proceedings.

The closing of the preparatory stage is closely connected with *preclusion*. *Before the end of the preparatory stage*, the parties are free to change their claims, the grounds for the claims and the evidence invoked. If the changes made expand or change the object of the proceedings, a document including those changes must be served to the opposing party in the same manner as the statement of claim and statement of defence. The court may also choose not to allow the changes, or decide to deal with part of the case in a different proceeding. This depends on the changes the party wishes to make, the impact of the possible change and the stage of the proceedings.

In the *two-week period between the closing of the preparatory stage and the commencement of the main hearing* a party may submit new claims or evidence if the opposing party does not object (DA section 9-16). The opposing party must actively object: passivity counts as an acceptance of the changes.

If the opposing party objects, the court will allow changes in certain cases. Changes are automatically allowed if they are a consequence of the written closing statements of the opposing party. Changes will be also allowed if the party cannot be reproached for the late amendment; if the proceedings will not be delayed or become more costly; or if the refusal would lead to a considerable loss for a party. Typically new evidence is allowed, as is a minor modification of the claim or the grounds for it. If the buyer of goods has claimed damages, but realises that rectification or delivery of substitute goods will be more appropriate, the buyer

[21] Under the Civil Procedure Act the Gulating Court of Appeals in Bergen had a scheme of giving priority to short hearings to dealing with court congestion. If the parties agreed to limit the hearing to a single day in court, the hearing would be held within a few months of the appeal. The parties were responsible to limit the length of the presentation and closing speech and the number of witnesses to fit in a short hearing. So far no court has to the author's knowledge tried a similar scheme under the Dispute Act.

may add a payer for rectification or delivery of substitute goods. For the buyer, not allowing the addition could result in loss. For the seller, who claims the goods delivered are in conformity with what was agreed, the change will not result in any major changes. For the proceedings, the result is only a minor delay.

The rules are very flexible giving the judge ample discretion. The court has discretion to allow changes even though the requirements are not fulfilled. It has also discretion to reject the amendment even if the requirements are fulfilled, if the amendment would result in unreasonable costs for the opposing party. It seems that courts usually give parties the right to make amendments, as long as they do not result in extensive new preparation and do not cause a significant delay.

The rules on preclusion of new claims and evidence are typical for Norwegian legislation. The rules set conditions for amendments, but give the courts wide discretion. The approach is flexible and pragmatic. If rejecting a change could result in a new court case, and allowing the change would result in only a minor delay and minor additional costs, the court should allow the change.[22]

The rules reflect the goal of a cost- and time-efficient civil procedure. The court should avoid incurring cost and delay, but if the impact on cost and delay is limited, there is no reason to refrain from a measure. The cost of the change must be weighed against the benefit of claims and evidence matching the need of the parties.

Finally, discretionary rules on preclusion work against front-loading the case. Strict rules on preclusion are an incitement to bring forward all thinkable claims, arguments and evidence early on. The case can become far more complex, as both highly relevant issues and only remotely relevant issues are presented. The court must use resources to find out what is relevant.

3.6 Court-Connected Mediation as a Parallel Track

Court-connected mediation was introduced in Norway in the mid-1990s when a group of lawyers suggested a trial period for court-connected mediation in selected District Courts. From 2008, court-connected mediation has been available for all general civil cases. In administrative cases and cases with mandatory rules, court-connected mediation is often not appropriate. Court-connected mediation should not be used in the small claims track, thus, judicial settlement efforts are the key to settlements.[23] The fear of loss of time and money if court-connected mediation is unsuccessful and the problem of having self-represented parties with little knowledge of their legal rights in court-connected mediation, are the main reasons for rejecting court-connected mediation for small claims.

Before suggesting court-connected mediation in a pending case, the judge must consider if mediation is appropriate. Earlier attempts at mediation, large differences

[22] Schei et al. (2012), comment § 9-16, nr. 1, NOU 2001: 32, pp. 759–761.

[23] Schei et al. (2012), comment § 10-2.

in relative strength of the parties and the general interest of the case are factors against court-connected mediation. Cases should not be mediated if one of the parties actively objects to court-connected mediation. The initiative to mediate can come from the parties, but the judge decides if court-connected mediation is used.

With few exceptions, a judge serves as the mediator. All courts are obliged to have a panel of external mediators, but many courts do not have one, or they do not use the mediators on the panel. If a mediator from the panel is used, the parties pay the remuneration to the mediator in question according to a pre-established fee schedule or as agreed (DA section 8-4).

Court-connected mediation is not part of the court hearings. This means that the rules on court records and access for the general public to the hearings are not applicable. Neither does the rules on the powers, duties and role of the judge applicable.

The mediator must seek to clarify the parties' interests in the dispute to help them reach settlement (DA section 8-5). The role of the mediator is according to the law primarily facilitative and mediation should be interest-based, not rights-based. The mediator decides the mediation process in consultation with the parties. There are almost no restrictions as to the mediation process so long as the mediator is impartial. The guidelines given in the preparatory works are very liberal and include both narrow evaluative mediation and purely facilitative interest-based mediation. The mediator may suggest solutions, and discuss strengths and weaknesses of the legal and factual argumentation of the parties. Evidence may be presented in court-connected mediation at the discretion of the mediator. A party can demand that an offer of settlement is recorded in the mediation record. In other words, court-connected mediation can be highly evaluative, or even a mini-main hearing or a non-binding quasi-arbitration. In practice, the role of the mediator, the mediation process and the quality of the outcome varies to a high degree.[24]

Court-connected mediation is confidential (DA section 8-6). The parties and the mediator cannot testify on what was said and done in mediation. However, parties can use information of the existence of specific evidence that they learned of during mediation. A settlement recorded in the mediation records may be used as evidence in later proceedings.

If the parties reach agreement, they can decide the settlement is binding as a judgement. If the parties do not reach agreement, or they reach partial agreement, the case continues at the court. The judge who mediated the case is normally barred from hearing the case (DA section 8-7).[25]

Court-connected mediation has become popular, with about 15–20 % of all cases going to mediation. The mediation rate varies from court to court. Settlement is reached on the average in 70–80 % of mediated cases.[26]

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[24] Mykland (2010).

[25] See Bernt (2011) and Nylund (2014), pp. 111–113.

[26] Numbers are from the Norwegian Courts Administration (Domstolsadministrasjonen), and are on file with the author.

Although judicial settlement efforts and court-connected mediation provide for swift settlements, the practices and methods used vary greatly between judges. In court-connected mediation, some judges seek for interest-based solutions, while others offer the parties an abbreviated trial. The content of court-connected mediation and the mediation process varies considerably, and mediation can be anything from passive shuttle mediation, "muscle" mediation where the judge-mediator pressures the parties to settle, highly evaluative mediation, to a process where the judge facilitates discussion, empowers the parties and helps the parties find creative, mutually satisfactory solutions. The variation in practices reduces the quality of court-connected mediation, as it reduces foreseeability. Unless one knows who will mediate the case, one does not know what mediation will be like or what the results will be. The parties may also be pressured to accept dissatisfactory solutions and a process that is not satisfactory to them. They cannot appeal the process or the result and the Supervisor Committee for Judges does not consider direct pressure unethical. Yet, the parties are deprived of their right to a trial. If the case is not settled, court-connected mediation often causes costs and delay.[27]

Court-connected mediation has become popular because it offers at least some potential for interest-based solutions and constructive dispute resolution.[28] Yet, in many cases court-connected mediation is not about just settlement, it is just about settlement. Mediation training is very short, and many judges keep to their role as a judge when mediating. The limited use of external mediators may hamper the quality of mediation. When mediation is court-conducted, the parties may not understand the difference between the role of the judge and the role of the mediator, between the litigation process and the mediation process. External mediators can be helpful in certain types of cases, for instance, construction disputes, not because they can evaluate the case, but because they understand which problems and questions are the most important to solve. Hence, the quality of court-connected mediation could be enhanced in several different ways.

3.7 Preparatory Proceedings in the Small Claims Track

Cases with a value under NOK 125,000 (about EUR 15,000) are generally directed to the small claims track. Some of the cases have already been decided by the Conciliation Board, and are, in fact, an appeal, others have been redirected from the Conciliation Board to the District Court. As there are many exemptions from the Conciliation Boards, many claims go directly to the District Courts and the small claims track.

In the small claims track a *preparatory hearing should not be held*. The rule was established to ensure fast and cheap proceedings. In small claims procedure the

[27] See Nylund (2014), pp. 113–117.

[28] Adrian and Mykland (2014).

rules are designed to allow parties to be fully or partially self-represented. Self-represented parties often need more help and guidance to clarify issues, match evidence and argumentation with the claims made, to drop or adjust claims and evidence and more help to understand if there is common ground to make a settlement feasible. Therefore, the parties will often need judicial guidance, which in turn, should be given in a preparatory hearing. In general civil cases, a preparatory hearing is recommended whenever at least one of the parties is self-represented.[29]

The ban on preparatory hearings in the small claims seems illogical. It would be more appropriate to make a preparatory hearing the norm, and reduce the main hearing and lower the boundary between the two hearings. The eagerness of the legislator to reduce costs has gone too far, and might reduce the access to justice, prolong the main hearing and hinder settlement.

3.8 Cost Rules

In Norwegian civil procedure the *loser pays for litigation costs*, as the main rule (DA section 20-2). This rule is applied regardless of the stage of proceedings. There are numerous exceptions from the rule. Only just and reasonable costs are compensated. This gives the judge discretion to adjust the compensation to less than the full amount. Often a party will not win completely on all details, thus, the question is if one of the parties has won to a significant degree to make the opposing party compensate all or some of the costs. Conduct before and during the preparatory proceedings, *inter alia*, changes in claims, ground for claims and evidence, negotiations, and settlement offers, may be considered when deciding on the costs. The parties are hence encouraged to aim for clarity and to consider the costs invoked. A party who frivolously causes lengthier and more extensive court proceedings can be punished by making that party responsible for the extra costs.

The cost rules are also used to balance flexible rules. A party can be afforded the opportunity to introduce new evidence or to make changes after the end of the preparatory stage, because the court can decide that the party making the change will be responsible for the extra cost occurred.

During both judicial settlement efforts and court-connected mediation procedures, a party can request the court include a settlement offer in its records (DA section 13-6). If the case is settled later during the proceedings to similar terms as in the offer, of if the judgment is similar to the settlement offer, the party who made the offer may ask the other party is partially responsible for litigation costs. Hence, the costs awarded to the winning party may be reduced or increased. The aim is to encourage settlement, by making an incentive for the parties to consider the likely outcome of the case early.

[29] Schei et al. (2012), comment for § 10-2, NOU 2001: 32, pp. 341–342.

3.9 An Evaluation of Preparatory Proceedings in Norway

The civil procedure reform was evaluated in 2013. The results show that the 2008 reform has been successful. The number of civil cases disposed of per judge had increased with 7.5 %. The *average time* of the proceedings has been reduced from about 6.3 months to 5.5 months (four months for small claims). The total length of meetings at the courthouse has been slightly reduced from an average of almost 11 hours to about nine hours (slightly less than 11 hours for full cases and slightly more than three hours for small claims cases). *The costs have been reduced* by more than 30 % (67 % for small claims).[30] At the same time judges and advocates believe that *the quality of the hearing and the decision has improved slightly*, as the key legal and factual issues have been identified before the main hearing starts. Thus, the argumentation and presentation of evidence is more structured and focused on the disputed questions. Simultaneously, the amount of cases filed has increased.[31] In total, there were almost 17,000 civil cases in 2014.[32] Norway spends little money on the courts as percentage of GDP per capita and has fairly few judges. However, the expenditure on legal aid is high.[33]

The preparatory proceedings with active judicial case management have proved to be a success in Norway. The rules function well, and provide for efficient civil proceedings where the key questions are identified and clarified at an early stage. Norwegian rules on preparatory proceedings provide for swift, cheap and substantially correct results.

3.10 The Impact of Regulation and Legal Culture on Efficiency: A Comparison Between Finland and Norway

3.10.1 Differences in Court Culture Between Finland and Norway

Both Finland and Norway are part of the Nordic legal family. Both have a main hearing-type model of civil procedure. The societies, the history and culture are similar. However, Norwegian civil procedure was modernised already in 1915, the

[30] The average cost in 2009–2011 was NOK 15,962 (about EUR 1,800) for small claims and NOK 110,392 (about EUR 12,300) for regular cases. The number includes the total costs for the claimant and defendant. Evaluering av tvisteloven (2013).

[31] Evaluering av tvisteloven (2013). The numbers are from the period 2006–2012.

[32] http://aarsmelding.domstol.no/#!/oversikt/tingrett. Norway has the second lowest litigation rate in Europe, surpassed only by Finland.

[33] CEPEJ (2014), p. 32, 48, 158. Norway has the second lowest number of civil litigious cases per 100,000 inhabitants in Europe (p. 203).

Finnish almost 80 years later in 1993. The Norwegian civil procedure system is more close to an English trial-system, where the main hearing has been the most important element, whereas the Finnish model was the piecemeal trial. In Norway, the legal representatives have a stronger position in the civil justice system, and the societal role of advocates has been far stronger. Despite relatively similar societies and cultures, until 1993, the civil procedure systems of Finland and Norway differed significantly.

In this final part, the current systems of Finland and Norway are compared to shed light on how the underlying civil procedure system influences implementation of a full main hearing-based structure of civil procedure. The aim is to explore how different underlying cultures require different type of regulation, and how slightly different ways of regulation an issue can lead to same or different outcomes.

Norway has a very efficient civil procedure system. The length of proceedings is about twice as long in Finland as in Norway, with about 10 months compared to 5.5 months. The average costs of litigation for first courts is about the same in both countries (about EUR 12,100 in Finland[34] and NOK 110,400, or EUR 12,700 in Norway[35]) but the average salary is far higher in Norway (about EUR 38,500 in Finland and EUR 65,000 in Norway). As percentage of average income, civil litigation is almost twice as expensive in Finland. Finnish courts handle fewer litigious civil and criminal cases than Norwegian courts (10,320 respectively 18,123 incoming cases in courts of first instance in 2012). The number of judges is significantly higher in Finland, with 18.1 judges per 100,000 inhabitants compared to 11.0 in Norway.[36] However, Finland has administrative courts, Norway has only general courts. Thus, when comparing the workload of judges, administrative court cases must also be taken to account for Finland. The figures indicate that Norwegian civil proceedings are faster and cheaper than Finnish civil proceedings.

The *court culture* is different in Finland and Norway.[37] Norway has had a legal culture and a civil procedure system based on main hearings, the main purpose of which are to allow the lawyers to present and discuss their legal and factual arguments. The culture is lawyer driven. Finnish lawyers are not used to extensive use of hearings except in District Courts. Hearings are held in about one third of the cases is Courts of Appeal, in a few percent of cases in Administrative Courts, and very seldom in the Supreme Court and Supreme Administrative Court.[38] The role of the judge was passive in terms of managing the proceedings. Because preparatory hearings and case management were not familiar to Finnish court culture, there needed to be clear rules mandating preparatory hearings and active case

[34] Ervasti (2009a), p. 21. The numbers are from 2008.

[35] Evaluering av tvisteloven (2013), pp. 136–137. The numbers are from 2009–2011. The amount is only about NOK 16,000, or EUR 1,780 for small claims.

[36] CEPEJ (2014), p. 12, 195 and 202.

[37] Ervo (2014) Ervo (2015).

[38] Information is based on the annual reports from the courts, available on www.oikeus.fi.

management. In the first ten years of the Finnish reform, the main hearing could be held directly after the preparatory proceedings. The parties did not have to repeat what had been said during the preparatory stage.

3.10.2 The Preparatory Stage in Finland and Norway

As discussed in Chap. 2, the preparatory stage is massive in Finland, and its scope has been reduced to some extent. Thus, its role is far more important in Finland. The role of the preparatory stage is reflected in the duration of it and *the balance between oral and written format*. In Finland, a preparatory hearings are held in almost all cases. In 50 % of all cases, two hearings are held, and in 10 % of cases, three or more hearings are held.[39] Although preparatory hearings contribute to clarification, judicial settlement efforts and enable the judge to give guidance to the parties, they also account for increased costs and delay. One can ask if having preparatory hearings is important in all cases, and if hearings should as a general rule be limited to a single hearing.[40] In Finland, the preparatory hearing has often in practice become the acme of civil proceedings, and the main hearing remains underdeveloped. The result is a front-loaded proceeding, where the preparatory hearing is too substantial causing extra costs and delay.[41]

However, one may ask if the opposite is true for Norway, if there are too few preparatory hearings. The advantage of preparatory hearings is the possibility for clarification, guidance and judicial settlement efforts. Part of these advantages may be lost if fear of costs prevent judges from conducting preparatory hearings.

Another significant difference between Finland and Norway is the *allocation of duties between the parties and the court*. In Norway, the parties, in practice their counsel, write summaries of fact and legal arguments when needed. In Finland, the judge summarises the case based on the pleadings and the discussions during the preparation..[42] From the point of view of the parties, having the judge perform the work is advantageous, as the judge does not charge the parties by the hour. However, because the legal counsel does not have to refine the material and to work to find out if there are misunderstandings or common ground, the counsel has reduced incentives to do in-depth work before filing the case. When judge write summaries, they have less time for other duties.

Strict rules on preclusion add to the aforementioned problem. As discussed in Sect. 2.4 Finland has strict rules on preclusion giving little discretion to the judge. Strict rules were perhaps necessary in the beginning when the old system with short consecutive hearings, where the counsels submitted written evidence or arguments

[39] Ervasti (2009a), p. 9.

[40] See also Stürner (2002), p. 504.

[41] See Sect. 2.2.1.

[42] See Sect. 2.3.1.2.

was replaced by a system with a concentrated main hearing where all arguments and evidence were to be presented orally in a single hearing. However, strict preclusion can have adverse effects in the long run, as cases become front-loaded to avoid preclusion.

Finland does not have *a small claims procedure*. Small claims cases have in practice almost disappeared from the courts.[43] The reason is thought to be high costs. Most commercial cases have also disappeared from the courts, and are now solved by negotiation, arbitration or other dispute resolution procedures. In Norway, the small claims procedure is seemingly a success and there are fairly many small claims cases. However, the question remains if the procedural rules for small claims are adequate and provide for good solutions as the preparatory stage should be as short as possible.

In terms of court-connected mediation and judicial settlement efforts, Finland and Norway are quite similar. In Norway, there is a longer tradition for both out-of-court mediation and judicial settlement efforts.[44] However, the *duty to judicial settlement efforts* has existed longer in Finland. In practice, judges actively promote settlement in both countries. In Finland almost half of all cases are settled during the preparatory stage or the main hearing stage.[45] The role of Finnish District Court judges is to be a peacemaker.[46]

Norway introduced *court-connected mediation* about 10 years earlier than Finland. Thus, court-connected mediation has become an integral part of the Norwegian civil justice system. In Finland, court-connected mediation is still in the process of consolidating its position. In few a few years, court-connected mediation will probably be ubiquitous in Finland as well. One reason for the slow start of court-connected mediation in Finnish courts is that the duty to judicial settlement efforts was introduced in 1993, 13 years before court-connected mediation was introduced. In Norway, the trial on court-connected mediation started in 1997 and the duty to judicial settlement efforts entered into force in 2008. Finnish judges and lawyers were already accustomed to judicial settlement efforts on a large scale when court-connected mediation was introduced. The extensive use of preparatory hearings in Finland probably reduces the need for court-connected mediation, as the judge can actively promote settlement during the hearing.[47]

[43] Ervasti (2009a).

[44] Nylund (2014).

[45] Ervasti (2009b), p. 51. In 2008 almost 2,500 cases were settled in oral preparatory hearings and main hearings. Annually about 5,000–6,000 cases are heard in oral preparatory hearings or main hearings or both.

[46] See Sect. 2.6.1.

[47] Judicial settlement efforts and court-connected mediation are compared in more detail in Chap. 9.

3.10.3 Outcome of Preparatory Proceedings in a Nordic Perspective

Preparatory proceedings are considered a success in both Finland and Norway. However, they function more efficiently in Norway than in Finland. Norway has more discretionary rules on the choice between oral and written format, and on preclusion. Some of the tasks performed by Finnish judges, such as writing the summary, are performed by the party counsel in Norway. The process is more counsel driven in Norway, easing the workload of the judges and forcing the party counsel to work through the case in more detail.

The transition to the main hearing model has been easier in Norway than in Finland. The reason is probably the distance between the former system and the main hearing model. In Finland, preparatory hearings were a new concept, and the judges had a passive role. Finnish lawyers were not used to a concentrated main hearing where evidence and arguments were presented directly to the presiding judge. Thus, the transition to the main hearing model involved fundamental changes in the role and tasks of the judge and the conduct and structure of civil proceedings. For Finland the main hearing model was a revolution, for Norway it was more as an adjustment. Therefore, the criticism of the Finnish rules and the need for later modification, should not be surprising.

The comparison of Finland and Norway indicates that preparatory proceedings contribute to efficient proceedings mostly in countries with a strong tradition for a hearing. The courts and lawyers must be used to a main hearing format to make preparatory proceedings efficient. Oral preparation can be a good tool for gaining more efficient proceedings, but it requires the right mixture of oral and written proceedings. In Finland, civil proceedings are front-loaded, in Norway preparatory hearings could be held more often. Rules on preclusion and practices regulating the division of duties between the court and the parties have an impact on the efficiency of the preparatory stage. Efficiency in preparatory hearings is a matter of both legal culture and regulation.

The comparison of Finland and Norway shows that the main hearing model is indeed no quick and easy solution to more efficient proceedings in countries with no tradition for a single, immediate, concentrated final hearing. Despite problems with comparably slow courts and the criticism of some of the details of the system, the main hearing model provides a more flexible and settlement oriented procedure, and probably also leads to more accurate judgments.

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