Conflicts Before the Courts and Court-annexed Mediation in Finland

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1 Introduction

Both the environment in which the courts operate and the procedures applied in them have been subject to constant change over the past twenty years. The reforms of the 1990s have covered civil procedure, criminal procedure, administrative judicial procedure, as well as appellate procedure. In addition, there have been extensive reforms relating to public legal aid, legal costs, the prosecution service, the appointment of judges, and summary penal orders. Moreover, an entirely new judicial institution, court mediation, was introduced in the courts of general jurisdiction as of the beginning of 2006. At the same time, there have been significant change occurring also in the societal and legislative environment.

In the context of this development, an intensive debate has arisen in Finland about the courts, their relevance and their proper duties. On one hand, there has been an increasing emphasis on the importance of fundamental rights, the consistency of adjudication, legal safeguards and the independence of the judiciary. At the same time, legal principles have gained in currency. On the other hand, recent developments have been marked by the privatisation of the law, new alternative conflict resolution methods, new non-legal regulatory mechanisms, attempts at regulatory constraint, and the fragmentation of the law.

The present article contains an overview of recent developments in Finnish adjudication and civil procedure on the basis of empirical data. In addition, the article contains a discussion of court-annexed mediation as it is being applied in Finnish courts. At present, there are two distinct methods for the amicable settlement of a dispute between litigant parties; one is *the promotion of settlement in civil proceedings* and the other is *court mediation*. The article stresses the effects that these methods have on the judicial culture. It should be kept clearly in mind that the matter is of two quite separate methods, which should not be mixed up.

2 Caseloads in the District Courts

Nowadays the Finnish courts of general courts in the first instance (the District Courts) have a total annual caseload of some 500,000 registration matters pertaining to real property, some 150,000 civil cases, some 45,000 petitionary matters and some 60,000 criminal cases, adding up to approximately 800,000 cases per year.[1] It should be noted in this juncture that the greater part of the civil cases actually pertain to undisputed money claims, which are decided in written proceedings by default judgment, without the trouble of a full-scale trial. Hence, when taken as a whole, about 90 per cent of the caseload of the District Courts consists of registrations, petitions and undisputed money claims. The present article will concentrate on disputed civil claims.

> Civil procedure in Finnish courts of first instance was reformed in 1993. A case is initiated when the plaintiff presents an application for a summons to the

1 *See* "www.tilastokeskus.fi" (Website of Statistics Finland).

> court. The new civil procedure in the courts of first instance in Finland is divided into three stages: The written preparatory stage, the oral preparatory stage and the main hearing. The purpose of the written and oral preparatory stages is to distinguish between what is disputed and what is not, and to prepare the case so that it can be decided in the main hearing. In the preparatory stages one judge handles the case, and in the main hearing, depending on the situation, either one or three judges consider the case. The decision of the court of first instance can be appealed to the Court of Appeal. The decision of the Court of Appeals, in turn, can be appealed to the Supreme Court, subject to leave to appeal by the Supreme Court.

In 2005, a total of 3,640 cases were decided in the *main hearing* of a District Court, that is, in a full-scale trial. Another 2,160 cases were decided already in the *oral preparation*. In all, 5,800 civil cases received an oral hearing in the District Courts. This, as a matter of fact, is a relatively small caseload. In 2004, more than half of the District Courts had fewer than 52 cases proceed all the way to a main hearing or, in other words, they held less than one civil trial per week.[2]

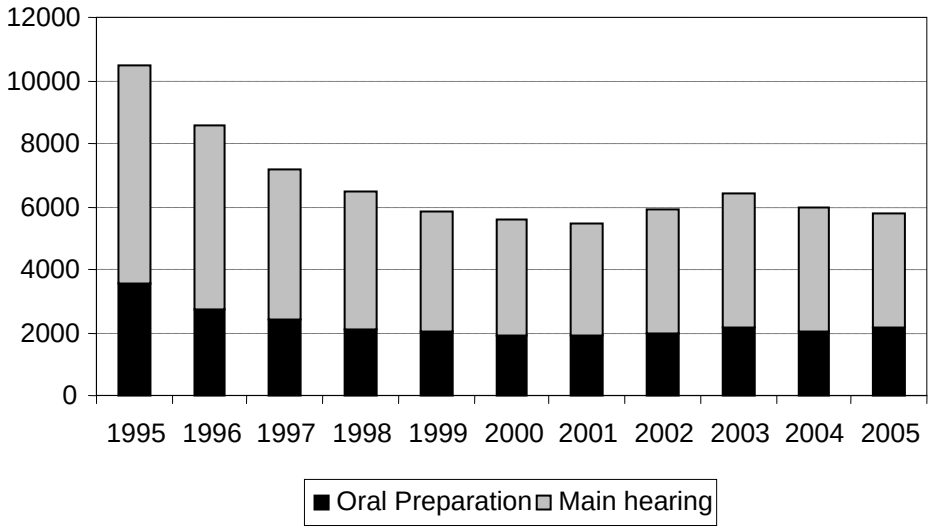


Fig. 1: Civil cases decided in oral preparation or main hearing, all District Courts, 1995-2004.

The number of civil cases has undergone a considerable decrease over the past ten years. The consequence of this development has been that the District Courts increase their emphasis of the consideration of criminal cases. For good reason, as disputed civil cases make up only a few per cent of the total number of cases proceeding to full-scale trial. There has been a similar decrease in the numbers of civil cases dealt with by the Courts of Appeal and the Supreme Court. An international comparison of civil caseloads in European countries would also

2 In 2004, there were 63 District Courts in Finland.

suggest that the number of disputed civil cases in Finland is not especially great in proportion to the population.[3]

This development may lead to a situation where different judges adopt wildly different approaches to the same problem. As a matter of fact, there now are so few civil cases that, on average, a Finnish District Judge deals with only one civil case in oral proceedings per month. Moreover, it is a rare occurrence — only some 3 per cent of the total — that a civil case is heard by the full composition of three judges. Now, with the imminent retirement of the baby-boomer generation there is a real risk of a loss of skills in the courts, with new judges lacking an experience of how their older colleagues have proceeded, and often lacking a reasonably large caseload of their own as well.

A significant background factor for the decrease in the number of civil cases is the 1993 reform of civil procedure, which entailed the amendment both of the mechanics of a civil trial and of the rules governing legal costs. It is not particularly easy to compare caseloads under the old and the reformed systems, because under the old system also the collection of money claims was channelled through oral hearings, with the decisions being handed out by default owing to the non-appearance of the defendant. Under the current system, these are decided in written preparation. But even with this qualification, over the ten years preceding the reform, there were some 20,000 civil cases closed with a judgment, that is, with both parties appearing, per year. Moreover, immediately after the enactment of the reform, there were almost 7,000 cases that proceeded all the way to a main hearing and another 3,000 that were taken up to an oral preparation. The reform resulted in a considerable increase in the legal costs of the parties, as well as an increase of the risk of liability for the legal costs of the opposing party. This, in turn, has raised the threshold of going to court in the first place.

> In 2004, the plaintiffs' median legal costs in civil cases proceeding to a main hearing were approximately EUR 4,900 and the defendants' comparable costs some EUR 4,300. In nine cases out of ten, the losing party was rendered liable to compensate the winning party for his legal costs. In 80 per cent of the cases, the liability was assessed at the full amount of the winner's costs. Between 1995 and 2004, the legal costs of the plaintiffs have increased by 65 per cent and those of the defendants by 50 per cent. Over that same period, the amount at stake in the proceedings has increased by 41 per cent. While the absolute number of cases has been decreasing, their magnitude and complexity has been increasing.[4]

During the same period when the court caseloads have diminished, there has been a clear increase in the significance of various alternative conflict resolution methods. This development has been described as *the privatisation of the law*. The privatisation of the law is composed of two elements: The transfer of public tasks to private operators, and the impact of private tasks and private procedures

3 Ervasti, Kaijus, *Riitojen ratkaiseminen Suomessa Access to Justice –näkökulmasta*, Defensor Legis 1999, p. 646-648.

4 Ervasti, Kaijus, *Riidat käräjäoikeuksissa. Empiirinen tutkimus riita-asioista ja oikeudenkäyntikuluista*, Publication of the National Research Institute for Legal Policy 217, Helsinki 2005.

on the public sector. As regards conflict resolution, this means that cases are taken out of the courts and pursued in other fora and that the conflict resolution practiced by the courts is influenced by the private sector. For instance, according to Vindeløv the decrease of civil cases experienced in Denmark during the 1990s is a direct result of the phenomenon of privatisation of the law.[5] In Finland, the idea of promoting settlement in civil proceedings, as adopted in the context of the procedural reform, as well as the 2006 introduction of court mediation, reflect a similar development.

3 Promotion of Settlement in Civil Proceedings

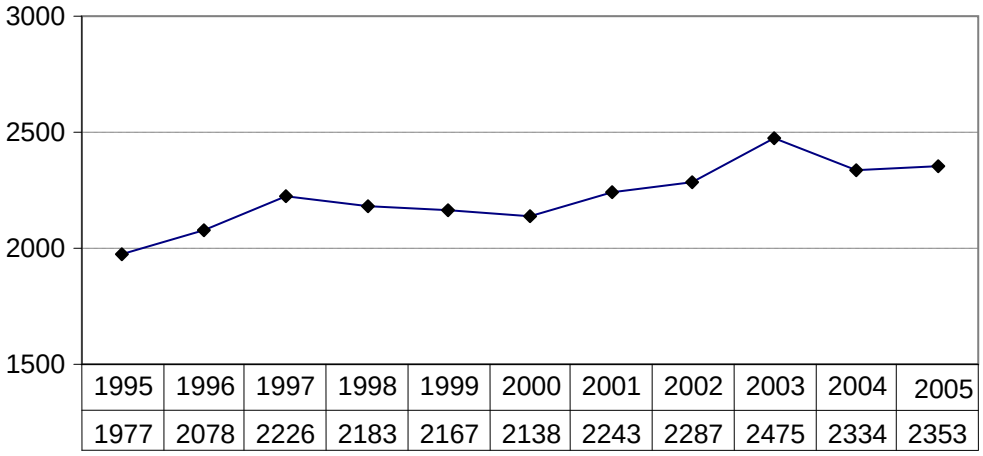
3.1 Number of Certified Settlements

In the civil procedure reform of 1993 provisions were taken into the legislation to the effect that the judge must ascertain during the preparation whether a settlement can be reached in the case (Code of Judicial Procedure "CJP", chapter 5, section 19(4)), as well as seek an amicable settlement to it (CJP chapter 5, section 26(1)). Under the new legislation, the judge may also make a proposal for a settlement (CJP chapter 5, section 26(2)). In addition, the court can certify a settlement that the parties have reached on their own accord (CJP chapter 5, section 27(1)). There were a few provisions on the promotion of settlement already in the pre-reform CJP, but these were only seldom applied in practice.[6]

In the post-reform period, the number of settlements certified by the District Courts has risen nearly to 2,500 per year. This is a relatively high figure, when one considers that a total of 6,000 cases per year proceed to oral preparation or main hearing in the first place. And moreover, not all of parties who reach settlements request that they be certified. Many judges surmise that almost a half of the cases that they deal with end with one or another sort of settlement.

5 Vindeløv, Vibeke, *Civil Konfliktløsning i Danmark et privatiseringsprojekt*, in Ret och privatisering, Copenhagen 1995, p. 19-20. There has been a decrease in civil cases also in the Norwegian courts of first instance. Betænkning nr. 1401, *Reform af den civile retspleje I. Instansordningen, byrettens sammensætning og almindelige regler om sagsbehandling i første instans.* Copenhagen 2001, p. 105-106 and p. 584.

6 For details of the reform, *see* Ervasti, Kaijus, *Käräjäoikeuksien sovintomenettely. Empiirinen tutkimus sovinnon edistämisestä riitaprosessissa*, Publication of the National Research Institute for Legal Policy 207, Helsinki 2004.



1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
1977	2078	2226	2183	2167	2138	2243	2287	2475	2334	2353

Fig. 2: Settlements certified by the District Courts, 1995-2004.

Recently, an extensive empirical study was carried out on the promotion of settlement in civil procedure, utilising statistical data, as well as questionnaires and interviews of advocates and judges.[7] According to the results of the study, most settlements are reached during the oral preparation. Failing a settlement, also these cases would proceed to a full-scale trial. Accordingly, it is clear that the promotion of settlement saves the time and other resources of the court and the parties alike. It is also apparent that a settlement is in many cases an outcome that is attractive to the parties. Especially in family cases and disputes between business partners a settlement is also conducive to maintaining good relations between the parties than would a full-scale contested trial. The most serious drawbacks in this respect, according to judges and advocates, are that the settlement may not be the materially correct outcome and that the judges may try to force the parties to settle the case.

The practices of the judges relating to the promotion of settlement vary widely, as do their opinion of what measures are appropriate to use to this end. Most judges take a positive attitude towards the promotion of settlement. Most of them are also of the opinion that the promotion of settlement is a task that fits well to the role of the judge. There are only few judges whose attitude to the procedure is negative. Many advocates are also in favour of the promotion of settlement, albeit that they often have a critical view of the practices of certain judges in this respect.

That being said, the judges do hold different opinions and approaches to the promotion of settlement, e.g. in view of whether they should do so in clear and simple cases, whether the judge can discuss the case with one party without the other party being present, what kind of measures compromise the impartiality of the judge, when the judge can make a proposal for a settlement, whether the settlement proposed by the judge should accord to the material law, and whether the judge can advise the parties about their respective procedural positions in the case at hand.

7 Ervasti 2004.

3.2 Conflict Resolution or Dispute Resolution?

The fundamental problem with the Finnish model of settlement promotion is how to achieve harmony between two modes of operation that are opposites in terms of their ideological and theoretical basis, their procedures and their objectives, that is, adjudication and the search for an amicable settlement. It is a characteristic common to all settlement methods that the solution is in accordance with the wishes of both parties. Adjudication, in contrast, aims for a solution that is consistent with the official law in force. Settlement proceedings are often also informal and unconstrained, while a civil trial is bound by formulations and procedural rules. The contrast becomes even more pronounced when the same person sits as the judge and tries to get the parties to settle. Some authors argue that mediation in court is in fact a something of a culture clash. The risk is that both modes of operation — adjudication and mediation — become tainted.[8]

The idea that adjudication and mediation are different and that they cannot be reconciled is based on a theoretical controversy, one where they are played one against the other, as it were. As a matter of fact, the very legal system and court proceedings begin with the principle that conflicts are not always matters solely for the parties, but that society has an interest to intervene in them as a "third" party, respecting given procedural rules. The core concept of alternative conflict resolution and various mediation methods is the autonomy of the parties as regards their conflict, so that the authorities do not "steal" it from them.[9] The concepts of "adjudication" and "alternative conflict resolution", as well as "settlement" and "mediation", are constructed and created precisely by means of this kind of controversy. As a result, the activity of one and the same person both as the judge and as a promoter of settlement, in the same case, is inherently a paradox.

Any examination of the public debate about settlements must begin with the comprehension of how the various debaters perceive adjudication. In the Nordic research on procedural law, there has been much debate about the objectives of civil procedure and the identification of its primary purpose.[10] If the emphasis is on the task of the courts to protect the rights and interests of parties in individual cases or to guide human behaviour through their decisions, the primary function of the court is *judicial dispute resolution*. If, on the other hand, the emphasis is on the task of the courts as removers of conflicts between members of society, the function of the courts is *conflict resolution*. This dichotomy has been

8 Menkel-Meadow, Carrie, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, Florida State University Law Review, 1991, p. 1-46.

9 *See* Christie, Nils, *Conflicts as Property*, The British Journal of Criminology, 1977, p. 1-15.

10 For the debate in Finland, *see* e.g. Leppänen, Tatu, *Riita-asian valmistelu todistusaineiston osalta. Prosessioikeudellinen tutkimus*, Vammala 1998, p. 32-41 and in Sweden Ekelöf, Per Olof, *Civilrätt och civilrättsskipning*, in Festskrift till Jan Hellner, Malmö 1984, p. 229-252, Lindell, Bengt, *Partsautonomins gränser - i dispositiviva tvistemål och med särskild inriktning på rättsanvändingen.* Uppsala 1988, Andersson, Torbjörn, *Rättsskyddsprincipen. EG-rätt och nationell sanktions- och processrätt ur ett svenskt civilprocessuellt perspektiv*, Göteborg 1997, Lindblom, Per Henrik: *Progressiv process. Spridda upsatser om domstolsprocessen och samhällsutveckling*, Uppsala 2000.

extended also to the promotion of settlement, in that the type of settlement sought indicates whether the promotion activity is more in the nature of dispute resolution or conflict resolution.

If the promotion of settlement is seen as conflict resolution, the settlement that is being sought is one that corresponds to the will of the parties. The objective is to remove the conflict from between the parties and to restore (the disturbed) peace between them. A result that corresponds to the will of the parties may incorporate also extraprocedural elements, and the focus is not merely on the achievement of the materially correct decision. In dispute resolution, on the other hand, the focus is on the resolution of a legal dispute. This model aims at an outcome that corresponds to what would happen if the trial proceeded in the absence of settlement. In this context, the settlement is more in the nature of a pre-emptive ruling. Even though it is largely a matter for the parties to decide what kind of settlement they prefer, the judge also plays an important role when he or she chooses the type of settlement to promote.[11]

> The terms 'conflict' and 'dispute' have had a number of meanings in international scholarly debate.[12] Many authors consider the terms as synonyms, making no distinction between them. For instance, there are Finnish scholars in the field of procedural law who draw a parallel between legal disputes and conflicts, in effect arguing that there is no difference. When discussing the tasks of the courts, they mention the resolution of "legal disputes", "disputes" or "conflicts" without noting any specific difference in the meaning of these terms.
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> Conflict theorists, on the other hand, often make a distinction between a conflict and a dispute. The basis for making this distinction, however, has varied from one point of view to another and from one theoretical premise to another. Generally the term 'conflict' is used as a description of a disagreement between two or more parties, while 'dispute' is used as a description of a judicialised (civil) conflict, with all the legally irrelevant aspects omitted. In this context, it has been argued that the courts resolve disputes, but not the conflicts that underlie those disputes.[13]

3.3 Change in the Nature of Civil Procedure

The new civil procedure of Finland, which involves oral preparation and the promotion of settlement, is more informal and more interactive than the earlier procedure. One could say that the new procedure is a mix of two approaches to the finding out of the truth. According to the first approach (which agrees with the earlier procedure), the truth will out by way of communication based on regulated and rationalised procedure. According to the second approach, the

11 Koulu, Risto, *Hukkuuko riidanratkaisu sovintoon?*, Oikeus 1995, p. 24-35.

12 *See*. e.g. Abel, Richard L., *A Comparative Theory of Dispute Institutions in Society*, Law & Society Review 1974, p. 227, Aubert, Vilhelm, *Rettens sosiale funksjon*, Oslo 1976, p. 172, Sandole, Dennis J. D., *Paradigms, Theories, and Metaphors in Conflict and Conflict Resolution: Coherence or Confusion*? in Conflict Resolution Theory and Practice. Integration and Application. (eds. D.J.D. Sandole and Hugo van der Merwe). Manchester 1993, p. 7, Burgess, Heidi & Burgess, Guy M.: *Encyclopedia of Conflict Resolution*, Santa Barbara, California 1997, p. 74-75.

13 Vindeløv 1997, p. 25, Ervasti 2004, p. 48-52.

truth will in fact out by way of free and unfettered communication. [14] This approach includes also the notion that the parties "know" the truth and that their common view about it is more reliable than the view of a someone external to the dispute.

The first approach is traditional, typical jurisprudence, well represented e.g. by the earlier procedure in the courts of first instance. The second approach, in turn, is more characteristic to various models of settlement theory; it is gaining in significance in the new civil procedure in Finland. And indeed, some scepticism is surely allowed when one considers whether it is in fact possible for the courts to arrive at the material truth, as they are dependent on the facts and other material that the parties present, and the parties can of course provide only a partial picture instead of the whole. It can well be argued that the courts are in the business of discovering the procedural truth, which is sometimes quite far from the material truth.[15]

In many developed countries, court settlements have become a very important means of closing pending cases. The increase in the number of settlements has had a profound impact on the nature of judicial work. The development in Finland would in this respect appear to follow the experiences of other countries. It is evident that the introduction, with the reform of civil procedure, of oral preparation and settlement promotion has changed the way the courts work, and the very judicial culture, in a significant manner.

Nowadays, conflict resolution has become a major task of the judiciary, at a par with the traditional task of providing protection under the law. And when the courts adopt the point of view of conflict resolution, the main focus will be on the relationship of the parties and the healing thereof, the perceived justice of the proceedings and, more generally, the experience that the customers have of the work of the courts.[16]

From the viewpoint of conflict resolution, we can in fact allow the judge to take considerable freedoms in his or her work, provided that the judge operates in accordance with the wishes of the parties or by their consent, and that the judge does not apply duress on them. We can permit the judge talking to the parties separately, the "marketing" of an amicable settlement, the provision of information to the parties on their respective procedural statuses, the making of settlement proposals, some deviation from the material law in force, and the consideration of extrajudicial issues in the promotion of settlement in civil procedure.

As noted, it is a prerequisite for all this that the parties approve of the judge operating in this manner and that they feel it to be just. If, however, the judge operates against the wishes of the parties or if this may compromise the impartiality of the judge in the eyes of the parties, there must be more restraint in

14 Haavisto, Vaula, *Court Work in Transition. An Activity-Theoretical Study of Changing Work Practices in a Finnish District Court*, Helsinki 2002, p. 295.

15 Liljenfeldt, Raija & Liljenfeldt, Robert, *Sovinnosta riita-asioissa*, Defensor Legis 1993, p. 303.

16 For procedural justice, *see* Tyler, Tom, *Why People Obey the Law*, New Haven, London, 1990.

the promotion of settlement. However, the perception of the wishes of the parties requires that the judge has a sense of social interactions and sensibility in the recognition of people's reactions to his or her actions. It is clear that there are judges who do not today meet these requirements. It is undoubtedly difficult for the judges to adopt a psychological role in the preparation of a case that is, in its fundamental nature, legal .[17]

Earlier, before the new procedure of court mediation was taken into use, there was a perceived need to adopt a broader view of settlement promotion in court than what had been envisaged when the relevant provisions were drafted. With court mediation, and unlike regular adjudication, the main focus is not on the reaching of the materially correct outcome, nor is the procedure bound by the general rules of procedural law. The procedure can be very informal, and the result can be attained creatively, so as to have it meet the interests of the parties. At the same time, there is less pressure to promote settlements in regular proceedings; this approach can be more closely aligned to the other elements of normal adjudicative procedure.

4 Court Mediation

4.1 A New Judicial Institution

In the beginning of 2006, the Act on Court Mediation (663/2005) entered into force, as did the amended provisions in the CJP on settlement certification in court (amendment Act 664/2005). These statutes introduced *court mediation* to Finland, modelled on the experiments carried out in Norway and Denmark.[18] Court mediation is a procedure, voluntary to the parties and managed by the judge, aiming at a situation where the parties themselves find a satisfactory resolution of their conflict. The objectives of the new legislation are as follows:

1 to add to the palette of procedures available to the courts and to improve their service in the ever more complex area of dispute resolution,
2 to follow international developments in conflict resolution and to respond, in part, to the recommendations of the Council of Europe and the European Union regarding the introduction of alternatives to adjudication,
3 to reach the advantages that mediation has over regular adjudication and judgment (relationship of the parties, no winner/loser dichotomy, flexibility, final decision, compliance and enforcement),

17 Heuman, Lars, *Rättegångsbalken och alternativa tvistlösningsmetoder,* Svensk Juristtidning 1999, p. 481.

18 For more details on court mediation in Finland, *see* Ervasti, Kaijus: *Sovittelu tuomioistuimessa*, Vantaa 2005, and Knuts, Gisela: *Förfarandegarantier vid domstolsanknuten medling*, Jyväskylä 2006, in Denmark Vindeløv, Vibeke, *Konfliktmægling*, København 2004, and in Norway Austbø, Anne & Engebretsen, Geir, *Mekling i rettskonflikter. Rettsmekling, mekling ved advokater og mekling i forliksrådene og konfliktrådene,* Oslo 2003.

4 to improve trust in the courts,
5 to create a procedure that is cheaper, simpler and faster than going to court, and
6 to lower the threshold of seeking judicial redress.[19]

Court mediation cases become pending in court either by way of a specific *mediation application* or *a request* attached to the application for a summons (action). The request may be made also later, during the preparatory stage of the court proceedings. A case in court mediation may be closed by a settlement certified by the court, or by the case being struck from the court docket. The case is struck from the docket, if the parties cannot reach a settlement or if they do not wish to have their settlement certified. If the case is pending also as a regular adjudicative matter, the failure of mediation means that the civil proceedings are resumed and may then be closed by a judgment, by a certified settlement or by the case being struck from the docket. The following diagram shows the progress of a case in civil proceedings and in separate court mediation proceedings.

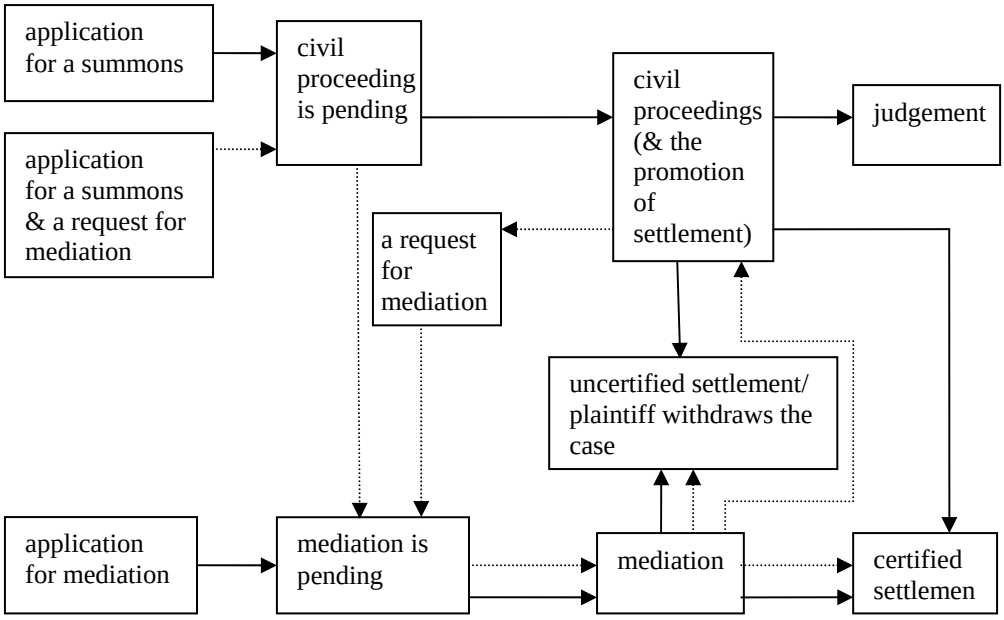

Figure 3: Court mediation in Finland.

19 Bill no. 114/2004: *Hallituksen esitys Eduskunnalle riita-asioiden sovittelua sovinnon vahvistamista yleisissä tuomioistuimissa koskevaksi lainsäädännöksi* and Ministry of Justice Working Group report 2003:2: *Tuomioistuinsovittelu.*

4.2 Main Features

Disagreements arising from a legal relationship between the parties may be the subject-matter of court mediation. The disagreement must be by nature such that it could be dealt with as a civil dispute in regular adjudicative proceedings. Thus, mediation is possible in all types of civil case, including family law cases, always provided that the interests of the child are upheld. That being said, mediation cannot be used in all situations. Mediation can be declined e.g. when the parties are not equal, as this could lead to a situation where a party is incapable of pursuing his or her interests in an appropriate manner.

The court decides whether mediation is to be undertaken. If the case is pending also as a regular adjudicative matter, the court proceedings are interrupted for the duration of the mediation. A judge sitting in the court where the case is pending serves as the mediator. Thus, no one else but a judge can mediate in court mediation in Finland. In order to obtain necessary expertise or to further the progress of the mediation, the mediator may enlist an auxiliary mediator. The use of an auxiliary is subject to the consent of the parties. The parties bear the costs arising from the fee and the expenses of the auxiliary.

The mediation process can be informal; there are no detailed procedural provisions in the legislation. That being said, the mediation must proceed equitably and impartially. The mediator may also discuss the matter with each party separately, if the parties consent to the same.According to the law, "[t]he mediator shall assist the parties in their endeavours towards agreement and an amicable settlement". In other words, Finnish court mediation is by nature a facilitative effort. However, by the request or on the consent of the parties, the mediator may also make a settlement proposal. Secondarily, therefore, Finnish court mediation is evaluative by nature.[20]

Mediation ends, when (1) a settlement is certified or the parties notify the mediator that they have settled in some other manner, (2) a party notifies the mediator that he or she no longer wishes mediation in the case, or (3) the mediator decides, after having heard the parties, that the continuation of mediation is no longer justified. If the case is pending as an adjudicative matter, it lapses upon the certification of the settlement. If the settlement covers only a part of the matter under dispute, the pending proceedings are resumed in respect to the remaining part. The mediator is disqualified from sitting as a judge in the case; another judge must be assigned to preside over the resumed proceedings.

Court mediation in Finland is in principle open to the public, unlike Norway and Denmark. Separate discussions with the parties proceed behind closed doors, however. On the request of a party, the mediation must be closed to the

20 The major mediation models are facilitative, evaluative, transformative and narrative mediation. For details of these models, *see* Boulle, Laurence, *Mediation: Principles, Process, Practice.* Sydney 1996, p. 29-30, Mayer, Bernard, *Facilitative Mediation,* in Divorce and Family Mediation. Models, Techniques and Applications (Edited by Jay Folberg & Ann L. Milne & Peter Salem), New York, London 2004, p. 29-52. Lowry, Randolph, L.: *Evaluative Mediation*. Divorce and Family Mediation. Models, Techniques and Applications (Edited by Jay Folberg & Ann L. Milne & Peter Salem), New York, London 2004, p.72-91, Bush, Robert A. Baruch & Folger, Joseph P., *The Promise of Mediation. The Transformative Approach to Conflict.* Revised edition, San Francisco 2005, Winslade, John & Monk, Gerald, *Narrative Mediation. A New Approach to Conflict Resolution,* San Francisco 2001.

public also in other respects, if the attainment of a settlement would otherwise be compromised and if trust in the appropriateness of the mediation or some other important reason do not necessitate openness. In general terms, requests for closed proceedings should be granted. It is likely that court mediation will in most cases be closed to the public.

It has been emphasised in the preparatory works of the legislation that court mediation is a process presided over by a third person, by nature impartial and confidential, as well as voluntary. Some of the mentioned advantages of court mediation over other forms of mediation are the independence and impartiality of the courts, as well as the trust that the courts enjoy. Another specific advantage of court mediation is that the settlement can be certified as binding on the parties and that it can be enforced at once. In this respect, however, there is reason to note that an outcome reached together does not normally require specific "enforcement" measures, as compliance will occur without compulsion.

In a nutshell, court mediation is *a voluntary process under the management of the judge, aiming at the parties themselves reaching a mutually satisfactory resolution of their conflict*.

It has been stressed in the preparatory works that it is not the purpose of court mediation to reduce or otherwise alter the current situation as regards the promotion of settlement in civil proceedings. In most cases, court mediation is available at an earlier stage of the dispute, that is, before the positions and claims of the parties have been assembled in accordance with the rules of civil procedure. According to the Bill, "a mediation process that builds on the situation of the parties and freely seeks a settlement acceptable to both is therefore useful as an addition to the measures that the court takes when it promotes settlement during the course of civil proceedings."[21]

The specific procedure of court mediation is thus a typical model of mediation which seeks to reach a settlement that accords to the needs and interests of the parties. The goal is not to reach an outcome that accords with the substantive law in force. By and large, the procedure can be arranged quite freely. This means that when a judge undertakes to serve as a mediator, he or she must let go of the earlier judicial role and assume a mindset that is quite different than that of an adjudicator.

5 Change of Court Culture

The introduction in 1993 of settlement promotion and oral preparation in the courts, and the introduction in 2006 of court mediation, are major change agents as regards court culture. It is no longer possible to hold that the courts are solely in the business of directing conduct or of providing protection under the law. Besides these traditional tasks, conflict resolution has become a more and more important aspect of court work. The courts do not only resolve legal disputes, but they often also strive towards amicable outcomes, so that the conflict between the parties is resolved holistically and conclusively.

21 Bill no. 114/2004, p. 5-6.

It can well be said that Finnish court procedure is moving away from the ideals of material law and a substantively correct judgment and towards the ideal of negotiated law and a pragmatically acceptable compromise.[22] It is no longer enough that the procedure meets the requirements of formal justice, but it must meet also the requirements of perceived procedural justice. In our times, the courts must be aware of the views of the parties regarding the quality of court work and the fairness of the trial. In short, the judicial role is undergoing a tremendous change.

Over the past decade, there has been debate about the fragmentation of the law and about the role of justice in post-modern society. Some mention has been made also of "post-modern lawyering", where the lawyer must come forth from behind the barrier of the legal system; thus, a judge who encounters a difficult case cannot hide behind abstract legal concepts, but he or she must face the moral issues and take moral responsibility of the ruling. In a system such as this, the personality and the personal responsibility of the judge are brought into sharper relief.[23]

> Dalberg-Larsen describes three distinct lawyer roles. The classical model of lawyer is represented by the *role of a lawyer under the rule of law*, where the lawyer works in a traditional legal position, such as a court. The second role is the *role of a lawyer in the welfare state*, where the lawyer is seen as a "social engineer". Its connection to classical constitutional values and concepts is less clear than that of the role of a lawyer under the rule of law. The third role is the *role of a post-modern lawyer*, characterised by complexity and pluralism in both social and legal values. This role does not emphasise solely public values or traditional values, but more often the values and roles that the lawyer himself or herself chooses. With the law becoming more flexible and more contextual, also the application of the law has become more creative and more constructive. Under such circumstances, the lawyer cannot expect the state to offer exact guidance by way of detailed provisions.[24]

It appears that not all judges are yet in possession of adequate tools and skills — such as interaction and communication skills — for this new situation. There would be a clear need to develop incentives for the customers to participate in the discourse of the professionals, tools to grasp the customer's way of conceiving of the conflict, as well as methods to manage the customers so that this promotes the settlement of the conflict and prompts the experience of justice being done.[25]

When all is said and done, alternative conflict resolution and various mediation procedures have gained in importance over the past decades in all developed countries. In Finland, the development has occurred as late as in the

22 Haavisto 2005, p. 450-452.

23 Wilhelmsson, Thomas: *Senmodern ansvarsrätt. Privaträtt som redskap för mikropolitik*, Helsingfors 2001.

24 Dalberg-Larsen, Jørgen: *The Legal Profession in a Changing World*, in From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law (Ed. Thomas Wilhelmsson and Samuli Hurri), Aldershot 1999, p. 99-114.

25 Haavisto 2000, p. 1150-1153.

2000s. One author has referred even to "the renaissance of mediation, producing applications of the method in more and more fields of social problems".[26] The development is a reflection of change in Western culture in general, not only in our courts.

The increasing importance of alternative conflict resolution has in many comments been linked to the privatisation of the law, legal pluralism, polycentrism, the increase of cross-border legal relationships, social ruptures and post-modern law. The phenomenon has likewise been linked to judicialisation and litigiosity, "bargaining in the shadow of law", problems in access to justice, and reflexive justice.[27] Many have argued that Western adjudication is in crisis. Court caseloads have been growing for a long time, but at the same time the long duration and high cost of court proceedings have prevented individuals from getting justice through the courts. People have turned their attention to out-of-court alternatives. Some have stated that in the post-modern society justice has become flexible, multifunctional and contextual, thereby losing its unitary nature.[28]

An American scholar, Menkel-Meadow, has postulated that the Western, adversarial court system is no longer the best means for dispute resolution in today's post-modern, multicultural world. According to her views, the truth is illusory, incomplete, ambiguous and dependent on knower and knowledge, as well as, more importantly, complex. The increased complexity of modern proceedings, as well as modern life in general, means that most conflicts now have more than two parties. A multi-party and multiple conflict will become distorted if it has to be expressed as a two-party relationship. The courts, for instance, deal with issues relating to pollution, consumer affairs, mass misdemeanours and access to public services.[29]

Moreover, diagonally opposite presentations of the facts in a conflict are not the best means of getting to the truth. In contrast, polarised debate distorts reality, omits crucial pieces of information, oversimplifies complex issues and complicates clear ones. In addition, in a complex and multicultural world individuals perceive "reality" in different manners. There are scholars who for this reason have questioned the assumptions that the adversarial system has about objectivity, neutrality and fairness.

In the opinion of the present author, in today's post-modern world there is scope for multiple conflict resolution mechanisms, operating with differing sets of logical instructions and appropriate for the unlocking of different conflicts. There is a need for traditional court proceedings in cases where the parties clearly wish to have a judicial resolution of their dispute or where there is a public interest in the case being decided in this way. But there is also a need for various mediation processes, both court-annexed and free-standing. That being

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26 Iivari, Juhani, *Rikosten sovittelua modernissa yhteiskunnassa - miksi?*, Yhteiskuntapolitiikka 2004, p. 177-185.

27 *See* Nuotio, Kimmo, *Mihin enää tuomaria tarvitaan?*, Oikeus 1999, p. 198-215.

28 Dalberg-Larsen 1999, p. 111.

29 Menkel-Meadow, Carrie, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, William and Mary Law Review 1996, p. 5-44.

said, however, also the traditional form of adjudication will have to be more responsive to the needs of perceived procedural justice and customer-centred conflict resolution.

To summarise, the Finnish system of conflict resolution is undergoing a number of changes: (1) the importance of extrajudicial conflict resolution methods will increase, (2) the importance of alternative methods — such as mediation — will be emphasised in the work of the courts, (3) the personality, professional competence and personal responsibility of the judges will become more prominent, and (4) perceived procedural justice will be more of a focal point in all court operations. All of these changes are reflections of the change in the fundamental task of the courts and civil procedure. In post-modern society, conflict resolution will be an ever more important function of civil procedure.

Most developed countries operate some sort of mediation mechanism linked to the courts. This development can be seen as an example of the privatisation of the law, but also as a sign of changing court culture in the post-modern world. In this way, both adjudication and mediation have as their main objective to produce decisions that satisfy the parties in context, in proceedings that are perceived as being fair. At the same time, the role of the courts as conflict resolvers becomes more prominent. This is a challenge also to legal scholarship.

Legal scholarship has for long lacked proper tools for analysing the changes in the tasks and functions of the courts. One reaction has been to emphasise the traditional, rule-of-law tasks of the courts and to give more and more weight to legalist principles and values in the courts. It is, of course, a given that these lay down the ground rules for the work of the courts and the judges. That being said, however, mere legalism will not serve as a tool for understanding the entirety of (post)modern court operations or for developing such structural methods or principles that would aid in maintaining the uniformity of those operations at least to some degree. It is also clear that the traditional research paradigm in procedural law, the interpretation and systematisation of formal rules, will not alone suffice as a viewpoint to the courts' operations; instead, a multidisciplinary approach must be adopted.