Torbjörn Andersson

The Balance of Powers Between Court and Parties in Swedish Civil Procedure

1 Background

Unlike e.g. Denmark and Norway, Sweden did not replace its old code of procedure of 1734 in the beginning of the 20th century. In stead the Swedish code of procedure – like the Spanish including both civil and criminal procedure – came into force 1948. But then the new code was the result of decades of laborious work, discussions and proposals.[1] Germany was the dominating influence as to Swedish culture, thinking and science during the 19th century and first half of the 20th. Therefore during that period, also Swedish legal thinking was mainly influenced by Germany and other German speaking countries. Possibly due to the fact that during that period Swedish legal scholars had to devote their energy to interpretations and extrapolations of a very old, out of date and in certain respects obsolete procedural code,[2] the influence from, and usage of, German civil procedural theories and conceptions are particular.[3]

[1] See Marius Kohler, Die Entwicklung des schwedischen Zivilprozessrechts. Eine rezeptionshistorische Strukturanalyse der Grundlagen des modernen schwedischen Verfahrensrechts. Mohr Siebeck, Tübingen 2002.

[2] You cannot, though, explain the importance of German theory in Swedish procedural law and writings on procedure with reference to Swedish scholars having to use German ideas to bring the old law on terms with the modern society growing and new societal demands; you see the same influence in areas in Swedish law which were subject to new acts (contracts and sales of goods) and also in Scandinavian countries the procedural laws of which were regulated by newly enacted codes (Denmark and Norway). I would say that the important German influence on Swedish civil procedure is just one tiny aspect of the major importance German thinking had in the spheres of society, culture and science at large.

[3] As late as in the 1950's you may pick up a Swedish dissertation or a law school text book and find at least as many references to German authors as there are to Swedish.

Slovenia's connection to Austrian civil procedure did not untie when the country parted from Austria in 1918. Of course the Austrian influence on Swedish civil procedure was lesser, but it may be interesting to note that the rapidly diminishing Germanic influence on the Swedish society at large after the Second World War, still allowed for the bringing into force of the Swedish code in 1948, in spite of its being highly inspired by German and Austrian thinking. Possibly, the growing importance of the social democratic party in Swedish politics and the building of the welfare model society made Klein's model of "social procedure" attractive for the legislative process leading to the new code.

In this paper I will discuss the balance of powers between court and parties in Swedish civil procedure. I will use the same delimitations and approach the same procedural questions as does professor Galic in his article. Since the purpose of this book is to reveal common features and challenges in procedural systems developed in different political contexts and consider the common inspiration from Austria and Franz Klein, I will try to focus on the similarities and differences between Slovenian and Swedish civil procedure.

Since the principles for dealing with the balance of powers between court and parties were established in 1948 and have since then been subject only to minor changes, there is nothing to say on major legislative reforms as from the latter part of the last century.[4] One may point, though, to the difference in this respect to Slovenia and draw the natural connection to the development of political systems and ideologies in the two states. Whereas Slovenia has undergone dramatic political changes and three wars during the 20th century, Sweden has been a stabile society, not involved in a war in over 200 years, and has cultivated the idea of being the inventor of the welfare state model. In view of this, it is striking that the subject of prof Galic's and my papers are subject to so similar regulations and display the same difficulties.

Still, Swedish civil procedure has seen one major development of some importance the last two decades and that is the incorporation of the ECHR as well as the growing impact of EU law. In this respect it is interesting to observe that it appears like Slovenian legislation and court practice take European law much more seriously and are willing to adjustments and integration, while their Swedish counterparts seem to

[4] Cf Bengt Lindell, Civil Procedure in Sweden. Kluwer Law International 1996. p. 30 et seq.

be somewhat reluctant and slow. It may be too quick an explanation that Slovenian law is used to and willing to change, while Swedish law can appear self-contained and sceptic of change.

As said above, this paper is set out to deal with the subject of how power is balanced between the court and parties in Swedish civil procedure and it aims at a comparison with Slovenian civil procedure in this respect. *Since* this paper has an element of comparison, *since* Slovenia and Sweden has a history of different prevailing ideologies during the 20th century, *since* we have a common element of inspiration in Austrian civil procedural thinking and *since* the balance of powers in civil procedure is closely linked to prevailing political ideologies concerning the relation between state and individual, it would seem natural to try and develop a grand thesis or a theory on the connection between prevailing political ideology on individual autonomy and the actual regulation of individual autonomy in civil procedure. Perhaps this cooperation may be the beginning of building such theories, but for the time being I more or less have to make a halt after the comparison, just adding some flavour of political ideology when explaining some of the regulatory choices made by Swedish courts, in particularly with respect to human rights.

Still, it is hardly subject to dispute to claim that the legal and political ideology prevailing in both Sweden and Slovenia is, roughly spoken, liberal. And consequently also civil procedure in both countries may be said to be built on liberal ideas. The exact meaning of "social procedure" in a system built on liberal ideas may still have to be addressed and perhaps you can discuss it if you consider some of the overriding objectives, or values or functions, which are attributed to civil procedure in Swedish literature. The following objectives are coexisting, counteracting and also reinforcing each other and they are all addressed in professor Galic's paper. It is interesting to note that they all, even if to varied extent, are values which are quite characteristic for liberal ideas.

Thus, civil procedure is here to

- certify the useful effect of substantive law (effet utile),
- resolve conflicts (achieving peace between parties – individually – and in society – collectively),
- obtain protection of individual rights/justice (retrospectively and prospectively),
- fulfil the constitutional responsibility of the third branch of government (clarify the law, make law and control other governmental branches).

During the passing of time since the development of modern civil procedure, emphasis has been put differently on these objectives. In the early 20th century, the discourse tended to focus on protection of individual rights and the quest for truth and substantively correct judgments. When modernity had its high during the 20th century (a period where the welfare state was created in Sweden, while other parts of Europe saw state systems being built on communism, fascism and economic liberalism), the focus shifted to the useful effects of substantive law, from the individual dispute towards the collective effects of individual disputes. The late 20th century clearly indicates a shift both to conflict resolution (mediation and arbitration) and to the constitutional role of courts. I would say that the growing importance of ECHR has less to do with the traditional concept of individual rights protection, than the constitutional aspect. The right to a fair hearing is less concerned with providing exact justice for every individual who has a right, than with upholding individual participation in processes which determine the life conditions of the same individual (participatory values).

In my concluding remarks I will comment on where the regulation of the balance of powers between court and parties in Slovenia and Sweden puts emphasis in respect of these general objectives/values. In that context I will also deal briefly with how the concept of "social civil procedure" shall be understood and how party autonomy in these two countries should be qualified in that respect.

2 A distiction between the appropriate level of activity of judges and the balance of powers between court and parties in Swedish civil procedure

When you ask yourself the question whether a specific procedural system may be considered to require its judges to be *active*, you have to reflect on various forms and degrees of possible activity performed by judges. Of course, procedure construed from the ideal of the *official maxim*, requiring the court to establish the facts relevant to the dispute at issue on its own motion, must be characterised as presupposing the judges to be active during the proceedings. Some parts of Swedish administrative procedure can be said to be designed that way, as well as some parts of civil law cases concerning e.g. parenthood. Naturally, there are other parts of Swedish procedure which seem, explicitly or implicitly, to value passive rather than active judges. One obvious example would be arbitration proceedings.

Before looking more carefully at Swedish civil procedure and analysing whether it may be said to favour active or passive judges in proceedings, I would like to make a distinction between the question of *required activity* of the court and the question of *the balance of powers between the parties and the court*. The required degree of activity seems to be connected in some way with the balance of powers: it would appear that a system which puts in the hands of the court to determine the process of proceedings would require active judges; and it would seem that a system which puts the power to determine the course of proceedings in the hands of the parties would require that judges have passive roles. Furthermore, if you connect the power structure laid down within a specific procedural system, with the general idea in society at large of a fair/just/proper division of powers between state and individual, you can easily justify a thesis that a society upholding and based upon an authoritarian political ideology would promote a procedural system tipping the balance of power to the courts, from the parties, and presupposing active judges and passive parties. And consequently, a society embracing a laissez-fair liberal ideology would need a procedural system putting emphasis and power on the will of the individual parties and requiring the judges to be passive and parties active.

But the connection between the degree of activity of the judges and the power structure of the proceedings is not really clear cut. For instance, it is quite possible to allow for heavy *materielle Prozessleitung* on matters which only the parties have the exclusive power to decide, say the bringing of new facts; the activity of the judge in such a context has the purpose to allow the parties to use their powers and make *informed choices*.

Another example would be that it is semantically difficult to say that a court by actively deciding not to allow e.g. new evidence is taking passive action; even if a rule on preclusion has as its purpose to make the parties active at an early stage of the proceedings, this purpose can only be fulfilled if also the court is active by applying the rule – thus, party activity may require judge activity[5]. And the same may be said about the first example.

[5] This also one of prof Galic's main points.

Therefore, the question of determining the political ideology as expressed in the balance between judge and parties in civil procedure, cannot be assessed solely with reference to active-passive roles of judges and parties; you have to analyse the presupposed activity/passivity with a view to the whole context of how the balance is struck between court and parties when it comes to have decisive influence on the course of the proceedings.

3 The Balance of Powers: The principle of Party Disposition

During the 19th century Swedish writers on procedural law used only one principle to describe the influence of the parties on the proceedings and that was the "*Verhandlungsmaxime*". In literature from late 19th century and early 20th century, a period dominated by something in Sweden called the "classical school",[6] two separate principles were used: *the principle of party disposition*[7] and *the adversarial principle*[8]. These two principles had their contraries in *the officialmaxime* and the *inquisitorial principle*.

Although many things have been written on the correct meaning of the principle of party disposition as from the beginning of the 20th century and onwards and although lots of disagreement have been displayed, sometimes in fierce academic style, the pragmatic approach of Swedish professor Per Olof Ekelöf introduced in the midfifties has prevailed. According to him the adversary principle should be considered the wider principle encompassing all procedural rules providing for the parties to be active during the proceedings, while the principle of party disposition should cover all procedural rules allowing for the court to decide only after initiative from one or both of the parties. Generally it was, and is, considered in Swedish civil procedure that there should be a direct correlation between procedural rules covered by the principle of party disposition and the freedom of individuals in society at large to dispose over their substantive rights and relations.

[6] Inspired by German juridprudence and most followers of this path were, at least later, claimed to handle law like concepts (conceptual jurisprudence, begriffsjurisprudenz).

[7] Thus, *Dispositionsmaxime*.

[8] In German *Verhandlungsmaxime*.

As corollaries to these two principles: the *officialmaxim* may be defined to cover rules which allow the court to decide matters independently of party initiative; the inquisitorial principle would cover also rules allowing the court to take initiative, even where a decision eventually requires action of one of the parties. Thus: the choice of either of the pair of principles depends merely on perspective.

The principle of party disposition is considered to characterise the proceedings as governed by Swedish civil procedure.[9] And this, I would say, goes for every civil procedural system in Europe today. Therefore, the consequences of building a procedural system on these principles are well-known. The parties are not only, roughly spoken, free to determine what shall be brought before the judge to be decided, they are also responsible for their determinations in this respect. Even if generally freedom is considered to be a good thing, it may be an expensive and heavy burden to carry in civil procedure.[10]

Due to res judicata, the judgment precludes all the disputed facts of relevance to the subject-matter. That may have the consequence of altering the legal relationship between the parties compared to the outcome if all relevant facts had been considered and correctly applied with complete knowledge of all relevant rules of private law. A judgment precludes not only facts presented as relevant, but also facts which could have been relevant had they been presented as relevant to the claim.

Furthermore: of course the petitum, the specific claim, is precluded by the judgment, but as from the 1990s, due to a number of precedents by the Swedish Supreme Court, also different, but alternative and economically equal petitas may be precluded. Thus, if a buyer considers that purchased goods are deviating from what has been agreed and brings an action for reduction of the price, a judgment not allowing a reduction also precludes a second claim to have the purchase cancelled due to the fault. The same would occur where a buyer of services against a claim for payment for services presents only some of the faults which are possible to use as objections to the claim for payment; the res judicata of the judgement will prevent the buyer to bring a claim for damages founded on faults not

[9] Almost a plattitude: today you never hear an advocate of any procedural system claiming that it is characterised by the inquisitorial system.

[10] A concrete party disposition may be constituted by explicit positive action, but also by refraining from taking action, passivity. A party's freedom of choice is balanced by his or her burden of the risk of neglect and miscalculations.

presented in the first trial. Thus, in Sweden where a judge finds that the fault is not grave a enough to entitle the buyer to cancel the agreement, where cancellation is claimed, the judge must not only dismiss the claim without deciding on price reduction, the judge must do so knowing that a subsequent claim for price reduction on the facts, will be stopped due to res judicata.[11]

In Sweden, unlike in Slovenia, the principle of party disposition is not laid down in an introductory part to the Code of Civil and Criminal Procedure. Neither is it embedded in the constitution. In fact it is not literally addressed anywhere in the legislative body of Swedish law. Its strongest expression is considered to be the rule of Ch 17 sec 3 where it is provided that, where the dispute concerns a matter over which the parties may reach a settlement, the court must not base its judgement on facts not alleged by the party as a foundation of the claim. Furthermore, the court must not give its judgment on something other or something more than that which the claimant has claimed.

This means that the principle applies only in civil procedure and only in such cases in which the parties are allowed to reach settlements. First, this is a basis for the proposition that an individual's ability to decide on his or her legal position should be the same independently of whether the individual is before a court or not; if you can make valid agreements or contracts on a subject-matter, then you should also have the power to enter into a settlement concerning the subject-matter and consequently have the freedom/responsibility to make other kinds of procedural dispositions in respect of the subject-matter. Second, even where a dispute concerns a subject-matter over which the parties may reach a settlement, the subject-matter may contain elements over which the parties may not dispose of under private law. E.g. although the parties may make a settlement in a dispute concerning property, a valid agreement on property may require consent from a spouse where one of the parties are married. This, it has been argued, would mean that the rule does not allow for parties to dispose over property in proceedings neither; facts beyond party disposal have been called *officialfakta*.

Like in Slovenia, it is beyond the control of the court to commence proceedings.[12] And like in Slovenia, the court is bound by the claim (petitum) and also by the facts presented by the claimant as the relevant

[11] Cf Galic.

[12] Nemo judex sine actore.

factual basis of the claim. Similarly, the court must not decide something more or other than that which has been claimed.[13] An application for a summons shall contain a clear claim, a complete description of the facts presented as relevant as a basis for the claim, the evidence presented and what each piece of evidence is supposed to prove and facts relevant to the jurisidiction of the court.[14]

The claim must not refer to a specific relief or remedy. In Sweden, it is possible to bring two types of action, either a claim of performative character or a claim of declaratory character.[15] A judgment on a claim of the first kind is enforceable, while a judgment on the latter kind of claim is not. Therefore, it is perfectly possible to bring an action claiming the court to declare that the claimant and not the defendant is the rightful owner of some property. It is also possible to bring an action claiming the court to declare that the claimant should be entitled to damages from the defendant, for any damages occurring due to some harmful behaviour undertaken by the defendant. In the latter kind of situations, the claimant does not have to specify injuries or damages, nor specify a specific amount of money claimed. A declaratory judgment possesses res judicata in respect of subsequent declaratory claims concerning the same subject-matter, but not in respect of subsequent performatory claims. In a subsequent action for a specified claim in damages, a previous judgment concerning the defendant's liability must not be tried again, but the court is bound by the previous judgment.[16]

Like in Slovenia, a claimant may voluntarily give up the claim and a defendant may accept the claim and an in-court settlement may be decided by the court, thereby encompassed by the res judicata effect of

[13] After the commencement of proceedings and in all three instances, the claimant may substitute a claim, or add a new claim, if this is due to something which has occurred during the proceedings (e.g. alter a claim for specific performance of some property to a claim for money, should the property have gone missing or been destroyed). This is the only exception to the rule that no new claims are allowed before the court of appeal. Apart from what is said above, new claims are probably allowed in the first instance where they do not alter the subject-matter of the dispute (possible where the new claim is alternative and of equal value). New claims are allowed when they concern interest, quantitative raises of the original claim and when they rest on essentially the same facts as the original claim.

[14] Preconditions for judgment in default; possibility to make a request for specifications; possibility to rule without issuing writ when the claim apparently has no legal basis.

[15] This follows from Ch 13 sections 1 and 2.

[16] In Sweden this has been called "positive rechtkraft", "the private law effect of a judgment".

a judgment. The court is bound by such dispositions by the parties even when they are clearly erroneous and/or completely out of line in comparison to what follows from substantive law. In Swedish law, unlike in Slovenia and various other jurisdictions in Europe, there are no rules on abuse of procedure, apart from rules on costs and preclusion. Where one party is tricking the other to admit a claim by way of fraud, the new circumstances may constitute a basis for re-opening the case.[17] Where both parties try to circumvent compulsory rules, by using their freedom to dispose in civil procedure, as submitted above, the court should draw the line for the party autonomy in correspondence to where the lines are drawn by private law and, under Ch 17 section 3, not allow party dispositions over subject-matters or elements of subject-matters which they cannot dispose over substantively.

Furthermore, like in Slovenia the court is bound by parties admitting facts, even when it is clearly wrong.[18] In court practice, courts have allowed parties to acknowledging also some specific legal relevance of facts, although some authors argue that that may be an interference with the obligation on the courts under the principle of *jura novit curia* to decide issues of law independently of the attitudes and opinions of the parties. Unlike in Slovenia, the courts are not under an obligation to check a claim's foundation in substantive law, where a defendant admits all the facts.

In Sweden, like in Slovenia, a claimant may withdraw a claim without it being subject to the force of res judicata via a judgment. Up until the defendant has replied to the writ, the claimant may unilaterally withdraw the claim without a judgment. But should the defendant have replied, then the defendant is entitled to apply for the subject-matter to be tried by the court.[19] Due to rules on cost, the defendant generally favours to have a judgment rather than the matter withdrawn.

Even if, as said above, the parties are required to submit the evidence which they rely on and what they want to prove with each piece of evidence, the court is not completely bound by the parties dispositions in this field. The court may on its own motion decide to have a second hearing with a witness. If one of the parties apply for it at a later stage of

[17] In practice, this have happened on a number of cases concerning in-court settlements.

[18] Ch 35 section 3.

[19] Ch 13 section 5.

the proceedings, the court may allow for new witnesses and new written evidence. Furthermore, the court may dismiss evidence where it finds that the evidence would prove something that obviously would be of no importance in the case or where the evidence is superfluous.[20] Here, Swedish law seems to be the same as Slovenian.

In Sweden the principle of jura novit curia is not laid down in legislation. In stead its meaning can be comprehended by reading rules on party autonomy *e contrario*. Thus, it is considered that the parties cannot bind the court by e.g. presenting agreements, or making procedural acknowledgments, on how the law should be interpreted or by limiting the scope of substantive rules under which the claim should be tried. In fact, there are some cases where only the Supreme Court has discovered legal grounds not previously addressed by the parties or courts, legal grounds which the Supreme Court has not hesitated to apply where the relevant facts founding the claims cover them. At present, there is no doubt that the court even at a late stage of the proceedings may, yes, in fact the court is obliged to, apply a relevant substantive rule which the parties have overlooked. But before so doing, the court has to offer the parties an opportunity to bring forward their opinions on the question of law. The general opinion is that it would constitute a procedural error, possibly a grave procedural error, to apply a substantive rule without letting the parties have their say.

4 Active Case Management

Like the Slovenian CPA, the Swedish code is inspired and influenced by Austrian and German procedural thinking, and the area of active case management is a spot where the influence has had a major impact. At least, that may be said in respect of legislation, preparatory works and jurisprudence, the law as it stands leave room for many variations on how actively cases really should be managed and I think it fair to say that court practice shows that judges make use of that wide margin of variation. I will come back to it, but as a starting-point I would say that the views on active case management seem very similar in Sweden and Slovenia. In comparison, though, the Swedish legislative text is more laconic: "Besides, the court shall see to it that the case is disentangled in the way its character requires and that nothing unnecessary is brought into it. By

[20] Ch 35 sections 6 and 7.

way of questions and remarks, the court shall try to remedy vagueness and incompleteness in the statements which are made".

As said above, also in Sweden the court is bound by the claims made by the parties and also by the relevant facts brought forward, allegedly forming the factual basis of the claim. Basically, the court is also bound by the evidence brought forward by the parties. As to questions of law, though, the court is not bound by rules addressed by parties or by assessments proposed by the parties.

As is clear from the wording of the above-mentioned statute, a Swedish judge like his or her Slovenian colleague has a right and a duty to make the parties to clarify their assertions of facts. But this is a general obligation which allows for different courses of action by judges in specific situations. Some judges would say that the appropriate level of clarification, which must be reached, would be to have the facts just clear enough to make it possible to found a judgment in default on them. Others would find themselves, if not obliged so at least free, to draw the parties attention to possible alternative factual grounds. And I would say that both kinds of attitude is within the limits of the requirements of the law – neither course of action would constitute a procedural fault on the part of the court.

In comparison to Slovenian law, I would say that Swedish court practice is more relaxed when it comes to some aspects of case management. Even if it may happen occasionally that a judge says something on the distribution of the burden of proof and on whether or not the evidence produced is sufficient, Swedish judges do not consider themselves obliged to do so. And I would say that this also reflects the law as it stands on these issues.

As to neglected legal viewpoints, like mentioned above, it would constitute a grave procedural fault on part of the judge to rule on one such point without offering the parties a fair possibility to have a say on it. Here Sweden does not differ from Slovenia. Even if jura novit curia requires judges to draw neglected legal viewpoints into the case ex officio, the attention of most judges are probably not directed towards new legal angles before the case is brought to decision. Since it is rather unusual that a presented factual basis can be requalified under another legal rule without amending the relevant facts, I would say that most judges at a late stage of the proceedings hesitate to bring in a new legal viewpoint. Perhaps it would make the frame of the proceedings burst and require doing some of it again.

There are major advantages of having cases managed actively in civil procedure. As said above, to some extent this is required under Swedish law; to some extent it is up to the individual judge. The disadvantages of active case management are well known. An active judge may appear being partial to the one of the parties presumably benefiting from activity. Generally, lawyers consider active case management an interference in their domain. Active case management requires skilled judges with profound knowledge in substantive law; Swedish judges are "generalists", not specialists.

5 New facts and evidence

In Sweden the main rule is that the claim, including the presented facts, must not be altered at all as it is put to the court in the application for summons. Still, Ch 13 section 3 submits that under certain preconditions you may alter, expand or substitute the petitum; and it is submitted that it should not be considered to be an alteration if the claimant, without it changing the subject-matter of dispute, reduces the claim or adds new facts to the factual basis. A new petitum will not be accepted if brought forward at the main hearing (or if the case in some other way has been brought to decision), if it would cause difficulties to handle it. New petitas are not allowed after appeal. An exception to this are petitas brought forward as substitutes to the original petitum and where a substitute is needed due to something that has occurred during the proceedings. Such petitas are accepted even if they cause difficulties at the main hearing and they are accepted also in higher court.

As a general rule, the claimant will not suffer an incurable loss if a new petitum is dismissed; generally, new petitas escape res judicata of the judgment. Still, after the above-mentioned turn of court practice meaning that alternative claims may be precluded, the general idea in literature is that also petitas which otherwise are precluded by the judgment must be allowed, at least during first instance proceedings.

The general rule is that new facts may be introduced as late as during the main hearing in the first instance. But there are some exceptions to this. First, should a party alter or add to what has been said earlier, or present facts or evidence which have not been presented before the main hearing, the judge may neglect the new material. For this, though, it is necessary that the judge suspects that the party by introducing the new material tries to prolong the proceedings, or tries to surprise the counterparty or that presenting the material aims at some other illicit objective or is made out of gross negligence.[21] Second, under Chapter 42 section 15a the court may set a dead line, after which the preliminary phase of the trial should be concluded. After that point no new facts or evidence may be presented, unless the party makes probable that he/she has had a *valid excuse*[22] not to present the material at an earlier stage or if the introduction of the new material does not considerably prolong the proceedings. If a party wants to introduce new facts or evidence before the Court of Appeal or the Supreme Court, accordingly, the party needs to have had a valid excuse for not presenting the material earlier.[23] Furthermore, it is possible to set a definite time limit in an order directed against one of the parties, if it seems necessary from how that party has conducted his or her plea earlier during the proceedings.[24]

6 The Preparatory Stage of Civil Litigation and the Main Hearing

Like in Slovenia, Swedish rules on the process of proceedings are rooted in the principle of concentration. When a writ is issued and served the defendant, preparation is compulsory.[25] The purpose of the preparation is to establish and clarify the claims of the parties, their objections and the relevant facts they present as basis for their claims. The preparation also aims at clarify to what extent the parties disagree on questions of fact and to clarify which evidence that shall be presented and what it is expected to prove. Furthermore, the preparation aims to clarify if further inquiries or measures are needed before the determination of the case; and if there is a possibility to settle the case. In principle, the court is responsible to make a time schedule for the continuation of the case.[26]

At the preparatory phase, the defendant has to present the defence, which shall include objections, a statement on whether and to what extent the claim is admitted or denied, the facts which the defendant considers

[21] Ch 43 section 10.
[22] I guess in practice this corresponds to “reasons beyond control”.
[23] Ch 50 section 25.
[24] Ch 42 section 15.
[25] Ch 42 section 6.
[26] Ch 42 section 6.

support her/his denial of the claim and the evidence the defendant wants to present, as well as what each piece of evidence is supposed to prove.[27]

The preparation may be undertaken during a meeting, exchange of written submissions or in some other way. Generally, the preparation is undertaken by way of a meeting and generally the meeting is supposed to terminate the preparatory phase. The court shall order the parties to participate at preparatory meetings at the risk of otherwise receiving a judgment in default on the subject-matter.[28] Above, I also mentioned that the court may set a time limit for the termination of the preparatory phase, which precludes the parties from presenting new facts and evidence.

The main hearing shall be conducted without unnecessary delays and as far as possible without interruptions. This is laid down in detail: should the main hearing not require more than three days, it shall be conducted within a week. If the main hearing is expected to take longer, the main hearing should go on for at least three days every week until it is finished. There are exceptions: you may take longer breaks where the case is big or if extraordinary circumstances are at hand. Where a main hearing have been subject of delays and interruptions to an extent where its purpose has been lost, the court has to set out a new main hearing.[29] After the end of a main hearing, the court has the possibility to supplement the main hearing by hearing the parties again.

7 The Consideration of Human Rights in Civil Procedure

From the article of professor Galic it is apparent that the right to fair trial is a living and integrated part of Slovenian civil procedure. The same may be said about Swedish civil procedure, but it is clear that this is true to a comparatively minor extent. I will try to illustrate this with reference to a recent case decided twice by the Supreme Court, which does not concern the application of a preclusion rule but another rule of preclusive character.

[27] Ch 42 section 7.
[28] Ch 42 section 12.
[29] Ch 43 sections 11 and 12. A new main hearing means that everything that has taken place must be undertaken again, see section 13.

The case concerned a dispute over a piece of land. On the one side, a pair of cousins considered themselves the rightful owners of the land. On the other, a collective of landowners considered the land collectively owned. The cousins applied to the local real estate agency to have their real estate determined to include the disputed piece of land. They were successful, but first the court of first instance and then the court of appeal decided that the property should be determined to be included in the property collectively owned. This case was brought in the procedure specially designed for the determination of real estate boundaries. Even if the decision by an agency is appealed to an ordinary court (acting in the capacity of real estate court), the court in such a case does not have jurisdiction to make ultimate decisions on questions of ownership.

After losing the case, the cousins brought a case before the first instance court, claiming a declaration that they are the rightful owners of the disputed piece of land. The Swedish code of procedure contains a rule which was introduced in the 1980s in order to make it easier for the court to deal with "crazy claims". Ch 42 section 4 provides that if the claim is not legally founded or else obviously lacks foundation, the court may rule immediately without serving the writ. The court used that rule and issued an immediate judgment in the negative. The same happened in the Court of Appeal and also in the Supreme Court.[30]

This is indeed interesting when considering earlier case law of the Supreme Court. In the late 1990s a case for damages based on injuries allegedly inflicted by way of smoking tobacco was brought before a Swedish first instance court. That court used the above-mentioned rule and immediately ruled in the negative, without issuing a writ. The Supreme Court in that case held that the rule in question must be used with caution and particular respect must be paid to the European Convention on Human Rights. In that case, with reference to the fact that immediate judgment constituted a grave procedural error, the Supreme Court quashed the judgment by the lower instance and sent the case back. And that was in line with earlier case law, but more explicit in how restrained the use of this rule should be.

When the cousins in the real estate conflict applied to the Supreme Court for re-opening the case, due to the judgment constituting a grave procedural error as well as substantive errors, the Supreme Court merely

[30] See NJA 2007 s 125.

held that the judgment was correct in substance and dismissed the application.

In my opinion, the Supreme Court misses the point with the ECHR. It may be that a judgment over a matter concerning the determination of real estate boundaries has the actual effect of positively determining also the ownership of a piece of land subject to that determination. But this question is definitely unclear enough to require that the parties are allowed to put forward their arguments and argue. From my point of view, this clearly indicates that the Supreme Court puts the emphasis on the practical effect of substantive law and the quick resolution of conflicts elements of the overriding procedural objectives, before the participatory values embedded in the ECHR and also the old school idea of civil procedure promoting protection of individual rights. If a legal order possesses the peculiarity of singling out questions of determining real estates boundaries within a special jurisdiction, it should take the full consequence of this and not allow property rights (protected by ECHR) to be determined indirectly.

As said before, in contrast to Slovenian civil procedure this case shows a reluctance and slowness in Swedish court practice, when it comes to adjust to the requirements of the ECHR.

8 Conclusion

Not surprisingly, it is apparent that Sweden and Slovenia have chosen more or less the same mix between the balance of power and case management: the parties have the ultimate power to determine the claim, the facts and evidence, but questions of law are subject to the power of the court; this is balanced by a) preclusion rules (exempted where the parties are excused) and b) active case management. This should give the parties incentives to avoid delay and to use their powers by way of informed choices. Flexibility is brought into the system by a) some of the preclusion rules do not apply automatically, but only after an active decision by the judge, and b) rules permitting and requiring active case management, allow for a wide variety of course of action by the specific judges. Even if flexibility is necessary, it is also risky putting a lot of responsibility on the individual judges.

The mix chosen by Slovenia and Sweden tends to be in line with all four overriding objectives as lined out in the beginning of this paper. Keeping the power to decide questions of law reserved for the court, promotes the practical effect of substantive law. Giving the parties the power to determine the subject-matter of dispute, also means allowing them the power and the responsibility to protect their own individual rights. This is a liberalistic ideal of course, and the fact that the parties' responsibility in this respect is mitigated both in Slovenia and Sweden indicates a "social liberalistic" ideal, rather than a laissez-faire liberalistic ideal. Also, not allowing the parties to have decisive influence over questions of law, displays some social (or paternalistic, if you like) consideration.

Rules of preclusion have as their objective to concentrate the dispute and, ultimately, to make the proceedings as speedy as possible. The fact that preclusion rules may promote individual protection must be viewed as a positive side-effect. The main purpose of preclusion rules is to have the parties' conflict resolved and over with as soon as possible, for the benefit of them and, primarily, society; it is of course a natural state objective to have its citizens engaged so little as possible in disputes with one another, and so much as possible in activities which help society to prosper and develop. The other side of the coin is that preclusion rules, in promoting the termination of disputes, are negative in respect of objectives such as the protection of individual rights and the effet utile of substantive law. When Slovenia after the enactments in 2008 takes about the same position as Sweden, it must be admitted that this change of position is a change from individual protection and effet utile, towards resolution of conflicts as an overriding objective.

I would say that that the emphasis of the constitutional role of courts in civil procedure is poor in Sweden compared to Slovenia. This is not only clear from the legislation which is introduced, but also, and perhaps primarily, from the court practice. The discourse on the regulation of party autonomy seldom relates to the ECHR in Sweden, whereas it is clear from prof Galic's article that the right to a fair trial is a concept which is well integrated in both the legislation and in court practice in Slovenia.

The constitutional role of courts in civil procedure is a value which is difficult to determine with reference to the social liberal ideal of civil procedure. It promotes protection of individual rights to participate and be active. By doing so it is more in line with the laissez-faire ideal than the social, paternalistic liberalistic ideal. Perhaps that is why it has had some difficulty of being integrated in Swedish civil procedure. Another aspect of the constitutional role of courts, would be that of controlling the legislator. Also this aspect is in conflict with the social liberalistic view of procedure as it appears to be construed in Sweden; only this year the first step was taken to lift the limits to court control over the legislation. Since traditionally there have been limitations in this respect and since courts in civil procedure mainly perform controlling activities within the field of questions of law, there has been little emphasis of the obligation to control in civil procedure.