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FRANK ORTON*

Some Special Features of Swedish Civil Procedure

Introduction

The current Swedish Code of Procedure, Rättegångsbalken,[1] was adopted in 1942 and came into force on 1 January 1948, following decades of investigation and preparation.[2] It replaced the corresponding part of the Swedish lawbook of 1734 with main changes inter alia in 1849, 1901 and 1915.

The then new Code was described, at least in Sweden, as being very modern for its time. And it is still in use, 60 years later, by and large with few structural changes.[3] It is applicable for criminal as well as civil procedure.

The court system

The court system in which this Swedish Code of Procedure is generally applied, consists in principle of two types of courts, the ordinary courts and the administrative courts. In addition, there are some special courts as the Patent Court and the Labour Court. There are no special juvenile courts or family courts, no small claims courts, no justices of the peace and no investigative judges. The Code is directly applicable only in the ordinary courts.

The ordinary courts deal with criminal cases and civil cases, family cases included, while the main bulk of the cases in the administrative courts are taxation cases.

* Former Swedish Judge, Former Swedish Ombudsman against Ethnic Discrimination, Former Human Rights Ombudsman of Bosnia and Herzegovina.
E-mail: Frank.Orton@swipnet.se

[1] *Svenk författnings-samling*, 1942:740.

[2] For a summary in Swedish regarding the preparatory work, see *Nytt Juridikt Arkiv,* II 1943.

[3] Partial changes and modifications have been made and are made, none significantly relevant, though, to this presentation.

There are three levels of courts in the ordinary as well as the administrative court system.[4] All ordinary court cases start in principle at the first level. Thus, there is no rule that civil cases regarding a huge sum of money nor a criminal case concerning a serious crime should start at the second level.

The courts at the third level, the Supreme Court, Hőgsta domstolen, and the Supreme Administrative Court, Regeringsrätten, are in principle only to establish precedents. When appealing from the second level, a party first has to get review permission, and review is in principle only permitted, and strictly so, if there is a matter of interesting principle involved and it is likely that the court will come in a position to rule on that principle, this ruling not being likely disturbed by changed testimonies or other matters of fact.

Criminal cases and civil cases concerning family matters are in principle judged by one or more professional judges together with lay judges at the first and second level, but only by professional judges at the third level. Other civil cases are always judged only by professional judges at all three levels of the judicial system.

The procedure

The procedure is strictly adversarial, not investigative. Thus, the case should be presented to the court by the two parties and the court has to judge on what is presented, nothing else. A prosecutor is in principle the plaintiff in a criminal case with the victim as a possible co-plaintiff.

The procedure is described as based on three main principles, three central pillars, „oralness", „immediateness" and „concentration". These principles are interlinked and somewhat overlapping each other. They imply that the case, whether a criminal or a civil one, should be presented orally during one time wise concentrated trial with immediate access for the court to all relevant material, and with the judgment delivered in close connection with the trial.

Previously, prior to 1948, it was allowed and common to present written party and witness statements, on which, inter alia, the court should base its judgement. Now, the judgement should be based on one, concentrated trial– what is then and there orally presented to the court.

[4] Sweden, with an area for instance somewhat 20% smaller than that of France and somewhat 20% larger than that of Japan and with a population of some 9 million inhabitants, has 53 ordinary and 23 administrave first instance courts and six ordinary and four administrative appellate courts.

These principles are moreover closely connected with the evidence rules. The prevailing rule is now the principle of free evaluation of the evidence.[5] There are no binding rules as prior to 1948, when for instance two witnesses in principle equalled full proof and one witness equalled half proof, the other half possibly being filled with circumstantial evidence of various kinds.

There are no exclusionary rules as in the USA. If, for instance, the police has acquired evidence in an unlawful way, then that evidence will not be excluded for that reason. The unlawfulness by the police will be dealt with separately as a matter of police error, not a matter in the proceedings in question.

There are no rules against hearsay as in anglo-sachsian legal tradition. The court should indeed try to get access to a witness in person, but would nevertheless accept hearsay as such, if the hearing of the witness in person is not reasonably possible. Naturally, the court has to take into account the hearsay nature, when assessing the value of such evidence. Likewise, children could per se be heard as a witness, the value of the testimony naturally having to be assessed with due regard to the child's maturity etc. It is another matter, that a child might not be heard out of respect to the best of the child and that a child could not be heard under oath.

The principle of concentration calls for a two-stage system at the first instance level. Due preparation is needed to hold a concentrated trial. Therefore, there is a preparatory phase of the trial and a main hearing phase–in criminal and civil cases alike, however rather different in form, when it comes to the preparatory phase.

In criminal cases, the preparatory phase takes place mainly outside the court under the leadership of the prosecutor together with the police and with possible influence of the defense.

In civil cases on the other hand, the preparation is undertaken in court under the neutral leadership of the responsible judge without the participation of any lay judges. It could be in writing, but normally there is one or more oral hearings. The aim is to clarify all factual and legal issues as well as available and needed evidence, making it possible to have a concentrated oral main hearing, soon followed by a judgement.[6]

This all does not mean that the Swedish system as now described functions altogether well. This goes especially for other civil cases than family cases. They may take a lot of time before a final outcome of the case is achieved, if handled according to the principal rules. Therefore, large commercial firms

[5] Chapt. 35 art. 1.
[6] Chapt. 42 art. 6 sect. 2.

often find it useful to insert into their contracts a provision that a dispute should be dealt with via arbitration and not via the ordinary court system. The primary reason is normally speed but business secrecy and the possibility to choose qualified and experienced judges could also be of importance.

Judicial mediation

The matter of speed to come to a final decision is important also to parties, where an arbitration clause is not applicable. Already the first instance preparation of a case could take a lot of time, and it might then be difficult to find a suitable main hearing time. The court, however, is seldom solely responsible for delays in these regards. The parties themselves and their lawyers might in various ways contribute to slow speed. And the appeal possibilities naturally contributes substantially to a final say in a case taking its time.

Consequently, an alternative way is widely used. The Swedish Code of Procedure envisages the possibility for the court in consultation with the parties to assign an outside mediator, medlare,[7] to try to achieve a friendly settlement in civil cases.[8] Whether successful or not, such a mediator is to be paid by the parties in due course. The possibility to assign such an outside mediator is, however, extremely seldom used. The alternative is instead the first instance judge mediating in his or her own cases.

This approach is most commonly used in Sweden. In fact, according to the Code, the judge is obliged to try to achieve a friendly settlement, if it appears appropriate considering the nature of the case and the situation in general.[9] Consequently, the judge will in most civil cases, at some or more points during the procedure, explore the possibilities to achieve such a friendly settlement. He or she will try to inspire and help the parties to agree. The exercise of his or her impartiality and experience will contribute to the opening or re-opening and fostering of a dialogue between the parties, and the judge will in many cases be successful in his or her efforts. In fact, the Swedish court system would probably collaps, had not quite a number of disputes at the first instance level been settled by the parties under the guidance of a mediating judge. The

[7] Chapt. 42, art. 17, sect. 2.

[8] Here and in the following, the term „civil cases" will only refer to other civil cases than family cases.

[9] Chapt. 42, art. 17, sect. 1.

advantages are substantial, not only to the court and the court system but also to the parties and to society at large.

Various techniques seem to be used by mediating judges, some perhaps less professionally commendable than others.

It seems to occur that the mediation process sometimes more or less come to resemble old-fashioned horse-trading. The judge might for instance start the preparatory phase by suggesting that the parties should simply split 50–50 or might come up with such a suggestion after a while, without a closer assessment of the legal and factual situation at hand. The method might work, either by the parties directly accepting the suggestion or by the suggestion initiating a dialogue leading to an agreement. Criticism against the method is often countered by the argument that no real objections could be made, if the parties do not object and they come to a speedy agreement.

Another method, which might work, is the judge's tipping the parties off at some stage of the proceedings concerning his or her opinion on the outcome of a judgement, giving the parties the possibility to base a settlement on this tip. One might question why a seemingly winning party would agree to a settlement in such a situation. However, a number of reasons are conceivable, not the least the avoiding of an appeal with its delays and its risks for another view on the case by the appellate court. A considerable and obvious risk with this method is the judge not being able to deal further with the case, should the parties not settle the case, based on his or her tip. Another obvious deficiency is the judge, when stating his or her opinion, naturally not being able to consider the case as a whole, witnesses not being heard etc, and the parties thereby not really being on the safe side concerning the actual outcome of a judgement.

A third method, fairly recently introduced in Sweden, allegedly inspired by the way cases are often handled in the USA, calls for the judge to ask a colleague to discuss the settlement possibility with the parties in a somewhat more informal way. This colleague might for instance talk with each party separately and thereby inter alia being able to explore and discuss the real settlement limits of each party without these limits becoming known to the other party. The method obviously calls for great skill on the side of such a mediator in order to keep the trust of both parties and not to be seen as being partial in any regard. A draw-back from a resource point of view is also the engagement of a second judge in the case.

A fourth method combines efforts to prepare the case for a main hearing with efforts to reach a settlement. As stated above, it is the duty of the judge during the preparatory phase to clarify the standpoint of the parties on all legal and factual issues in order for the case to be swiftly and correctly dealt with

during the main hearing.[10] By way of asking clarifying questions, the judge will make the parties aware of the various weaknesses of their respective position, whether regarding for instance the interpretation of a precedent or the evaluation of a witness. The weaknesses will then eventually „stick out as a sore thumb", to quote a most experienced and respected civil case judge of southern Sweden,[11] making each party inclined to seriously consider the advantages of „getting some instead of loosing all", to quote the same judge.

In all mediation, it is naturally useful for the judge to be prepared to highlight the applicable advantages of a settlement and the disadvantages of a continued court case. This is facilitated by the judge being aware of a case not being first and foremost an interesting legal problem but rather a conflict between the parties, typically solved by themselves, and often being better solved by the judge helping the parties to a settlement than by him or her providing a judgement, subject to appeal as well as possible enforcement problems.

It is also facilitated by the understanding that a court case is very often derived from carelessness on the side of each party. Both parties have often been at fault in one way or another. Since a judgement, due to the nature of the legal order, often results in one party winning and the other one loosing, one could reasonable state that, in a general perspective, a settlement is more fair in such situations.

Successful mediation is further facilitated by the judge's accepting the fact that very few, not to say almost no cases cannot be settled by the help of a skillful judge. This is for instance relevant even regarding legally quite clear cases, where a friendly settlement could often be in the interest also of the presumably winning side. This side might inter alia appreciate getting some money immediately as compared to more money much later or even no money at all in the end, the other party at that time being without any assets at all.

Here is not the place to enumerate all possible good arguments for a friendly settlement such as avoiding loss, continued business relations, more profitable time-use etc nor all specific techniques available to the mediating judge to help the parties to a settlement. It might not be out of place, though, to add some concluding remarks.

When mediating, timing is essential, i.e. not to start agreement talks until the situation is „ripe" and the parties have become disposed to consider a settlement. It is further useful, if the conditions of the settlement include that they should be fulfilled before the court dismisses the case, i e that for instance

[10] Chapt. 42 art. 6 sect. 2 (see above).
[11] Chief Judge Anders Arvidsson, Klippan.

an agreed amount of money is actually paid. It is also useful, if the conditions of the settlement are taken down in writing, preferrably in only a couple of clear sentences. And it is finally useful, if a settlement explicitly implies all loose ends between the parties being tied up and nothing left to further dispute. Such a settlement equals a binding contract, which will neither be successfully appealed or otherwise further contested in court nor in need of a confirming court decree.