

Vaula Haavisto

COURT WORK IN TRANSITION

**An Activity-Theoretical Study of Changing Work Practices
in a Finnish District Court**

Academic dissertation

*to be publicly discussed, by due permission of
the Faculty of Education at the University of Helsinki,
in the Festivity Hall at the Department of Education
on June 28, 2002 at 12 o'clock.*

**University of Helsinki
Department of Education**

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COURT WORK IN TRANSITION

An Activity-Theoretical Study of Changing Work Practices in a Finnish District Court

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Abstract

Courts have been regarded as stable, unwavering organizations in a rapidly-changing world, resistant to improvements and difficult to change. Recently, however, it has been argued that civil justice systems around the western world are in crisis and facing serious pressures to change. The implementation of new civil justice arrangements has been considered a fundamental modification of and sea-change in the justice system, on the one hand, but as procedural tinkering and cosmetic faddishness, on the other.

The focus of the present work is on the change in and development of court practices in Finnish district courts. My study revolves around the implementation of the procedural reform in civil matters that was enforced in Finland in 1993, and examines how the reformed procedures are actualized in everyday court proceedings. The essential question concerning the court reform is whether the change constitutes a fundamental transformation, or whether it is something more gradual and stepwise. Drawing on cultural-historical activity theory, the study is theoretically attuned to the presupposition that fundamental change in work requires qualitative change and expansion in the object of the activity, which in this case would mean a shift in the ways in which court cases and clients are worked with. The empirical chapters, devoted to micro-analyses of courtroom interaction, shed light on the nature of the ongoing transition in Finnish courts.

The study is longitudinal and based on comparisons between court proceedings observed before and after the court reform. The data consist mainly of videotaped court hearings and interviews with those involved.

On the basis of my findings, the implementation of the procedural reform appears to be an incremental process in which the new rules are given meaning, shaped and enriched in authentic use in practice by the practitioners themselves. This finding challenges traditional views on implementation as either

top-down or bottom-up determined execution, and presents an alternative view on implementation *as a learning process with significant potential for expansion in court work*.

The major expansive potential lies within the small and gradual changes and novel solutions which may appear trivial but incorporate the potential for deep-seated transformation. The new, informal and actively controlled courtroom discourse, the clients' contributions to establishing their case and their expanding initiatives in particular, as well as attempts to reach a settlement instead of giving a verdict, are the spearheads of the future that may direct developments in courts most radically. At the same time, they constitute the concrete learning challenges to be worked out by legal practitioners.

Keywords: activity theory, change, civil procedure, courtroom interaction, court reform, implementation, learning

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Vaula Haavisto

1 Introduction

1.1 Unfolding Landscape of Change in Courts

The procedural code in civil proceedings is a set of norms that regulates how civil matters – disputes between people – are to be handled in courts of law. This definition easily evokes an image of precise statutes and judges who robotically follow them when conducting the proceedings in trials. If the statutes change following a court reform, for example, the judges change their working patterns accordingly. Procedures in courts resemble a highly judicial exercise, hardly interesting for a researcher oriented to work and work-related learning.

Interestingly enough, procedural rules may sometimes hide a seed of change. In this study, I will argue that the implementation of a court reform is a far cry from the mechanistic execution of top-down ordered laws. I will suggest that, rather than the mere adoption of pre-given rules, or alternatively, the adjustment of the reform to local needs, implementation could be successfully studied as a *learning process*, in which the new rules are given meaning, shaped and enriched when used in practice by the practitioners themselves. More importantly, I will identify the implementation of a court reform as a learning process with a significant *potential for qualitative transformation and expansion* in court work, a topic highly relevant as an object of study on change and learning in organizational settings.

The interest of this work lies in the change and development of court work. It opens several windows onto the changes that emerge in the civil proceedings in Finnish district courts following the implementation of a court reform. Situated practices of courtroom interaction are studied in order to shed light on the dynamics of change and the developmental potential in court work. As a result, the court reform itself unfolds as the overture of a change process that can alter our understanding of courts and justice.

Courts and the Pressure for Change

Courts of law have traditionally been highly trusted in Finnish society. For a long while, they exerted their judicial power over their subjects in an incontestable way. In the relatively folksy proceedings, people resigned themselves to the trials and decisions as they arose, and kept from criticizing the respected judicial system. Courts represented the last fortresses of formal authority and legitimization through formal hearings.

Court clients and their expectations have, however, changed. People are now more demanding, and also more willing to and capable of weighing up the decisions given by the courts. They are sensitive in assessing whether the courts' decisions conform to or confront their own sense of justice and fairness. Given the fact that the cases themselves and the legislation have become more and more complex, and that the mechanical application of laws is ever more difficult, the legal authority as the solid ground of trust has been fractured, and the source of experiences of trust is more convoluted.

Tyler (1997, p. 893) pointed out that greater attention needs to be paid to the clear distinction between formal legal proceedings and the psychology of fairness, and that courts should be more supportive of people's procedural concerns. He argued that citizens have a very different perspective on the legal system than lawyers and judges. In particular, citizens want different things from the system than they are typically given.

Hence, there is a substantial gap between desirable treatment as described by the clients of the legal system (i.e., people who come to the court with problems) and as represented in the formal structure of the law and enacted by legal authorities. (Ibid., p. 894)

In a rapidly changing world, the courts have been considered stable and unwavering organizations experiencing almost no external pressure for change. They have been widely regarded as resistant to improvements and difficult to change, if not unchangeable (Eisenstein et al., 1988; Feeley, 1983; Provine & Seron, 1988–89). Now it seems that court work is in turmoil. One signal of the pressure to change is the recognition of the crisis in civil justice systems around the western world (Zuckerman, 1999). Courts are facing criticism against the civil justice arrangements that have largely led to delay, high costs and alleged decline in the quality of the result. Storm clouds have been recognized by Davies (1999, p. 203), for example, who warns, "If courts do not provide quicker and cheaper dispute resolution they will cease to be used and will consequently lose both their authority and their status", and by Chiarloni (1999, p. 279) who

declares, “Among judges, there is a growing consciousness that public unease could turn into hostility, threatening the courts’ independence and their power within society.”

In Finland, competitors with state-run dispute resolution, such as the private system organized by the Finnish Bar Association, have started to emerge. Courts and their decisions are criticized more easily. Trust in courts has been said to be on the decrease. For the first time, courts have ended up in a situation in which they have to seriously consider whether they should adhere to their traditional role, or metamorphose and develop their service to fill the gap and fit clients’ needs better (see Arponen, 1999; Tontti, 1999). All this signals a transition in court work.

The Finnish Procedural Reform of 1993 under Scrutiny

Finland is a civil law country in which the justice system in civil and criminal matters consists of the district courts as the courts of first instance (lower courts), courts of appeal, and the Supreme Court.

During the 1990s, the Finnish court system faced a series of procedural reforms. The procedure in the lower courts concerning civil matters was revised in 1993, and concerning criminal matters in 1997. The procedure in the courts of appeal was reformed in 1998.

Focused on change in the work of courts, the present study revolves around the procedural reform in civil matters, enforced in December, 1993. The extremely textual proceedings based on briefs and minutes were replaced with proceedings that relied mainly on oral presentations. The aim was to replace the prolonged proceedings with their slow tempo and several adjournments with a more condensed process comprising preliminary proceedings and a main hearing. The passive role of the judge was abandoned in favor of a more active role in which he or she works in direct contact with the parties. One particularly new task was the obligation not only to encourage the parties to settle, but also to make proposals for compromise.

The Finnish public debate related to the court system, largely activated by the court reforms in the 1990s, has focused primarily on legal costs and delay. Sharp tones have been used in evaluating the new civil procedure and the resulting increase in legal costs and weakened access to justice.

Without downplaying these important concerns, I have chosen not to evaluate the success or failure of the reform, but rather to look into how the reformed procedures are actualized in everyday court proceedings, what kind of

developmental potential exists in current work practices, and what elements of a qualitatively new court activity are to be found.

The essential question concerning the court reform is whether the change is a fundamental transformation, described in the literature as a sea-change of civil justice arrangements (Palmer & Roberts, 1998), metamorphosis and recalibration of the role of civil litigation (Marcus, 1999), or something more incremental and cosmetic, referred to as procedural tinkering (Marcus, 1999; Saks, 1982).

Drawing on *cultural-historical activity theory*, this study is theoretically attuned to the presupposition that fundamental changes in work require qualitative change – also characterized as expansion – in the *object* of work activity (Engeström, 1987). In this case, such an expansion of the object would mean a qualitative change in how court cases are constructed and how clients are worked with. The empirical chapters of the study, devoted to micro-analyses of courtroom interaction, will shed light on this issue and construct piece by piece an understanding of the nature of the ongoing transformation in Finnish courts.

In studying the change, I will not restrict my examination to how the judges and attorneys implement the new rules in carrying out their daily work on the cases. The clients and their contributions in the hearings are also put under scrutiny in order to highlight the user perspective on courts and to offer a broader basis for considering the learning challenges and developmental potentials.

1.2 Structure of the Study

The study is comprised of eleven chapters. The chapter at hand, Chapter 1, introduces the research interest and the main themes: courts, the implementation of a court reform, and change and learning in organizations. The remaining section (1.3) gives an overview of the field of studies on court work and positions my study within it.

In Chapter 2, I will use judicial and socio-legal literature to draw a picture of court work in transition. The viewpoint is that of the court system. First I will introduce the Finnish court reform and then examine its dynamics in detail by taking three particular perspectives on its content: (1) interaction and communication in courts, (2) procedural justice, citizens' trust and the position of the client in the court system, and (3) rationalizing dispute resolution through promoting settlement.

The focus in Chapter 3 shifts from the particular system in Finnish courts and court reform to the broader questions of change, possibilities of change and the implementation of intended change. The recognition of the potential for new and emergent work practices in the implementation presupposes the recons

ideration of the connection between issues of learning and issues of change and implementation.

Chapter 4 goes further into the themes of organizational change and learning, and formulates a working hypothesis on them. Empirical and theoretical research questions for the study are set.

Chapter 5 begins with an introduction of the theoretical approach and methodology used for studying changes in court work. I also introduce my research site and its history, as well as the data gathered and the practical conduct of the fieldwork.

Chapters 6 to 9 include the empirical findings. Chapter 6 is an exploratory attempt to chart and conceptualize the research terrain opened up in the study. By comparing two court trials, one conducted before the reform and one after it, I focus on how the interaction and communication in the hearings have changed with the implementation of the new civil process.

Chapter 7 continues the elaboration of changes in court work. My approach to the local construction of court proceedings is through the notion of a script. I focus on how the participants produce the script in situ, and how possible deviations from it are managed. Again, I compare and contrast an old and a new court case.

Chapter 8 presents a new perspective on court work by focusing on the clients and their contributions in constructing a court case. This chapter introduces a method called initiative analysis to examine clients' initiatives in the hearings and their effects on the proceedings.

Practices of reaching a settlement are in focus in Chapter 9. I introduce my working hypothesis concerning the possible shift in the motive that drives the dispute resolution, and analyze episodes of courtroom interaction related to settlement in this light.

Chapter 10 contains the conclusions. The findings concerning the empirical research questions are summarized. Spearheads of development are formulated and discussed in order to identify the developmental potential pointing toward future possibilities of court work. The transformation of expertise and the nature of the implementation of a court reform as change and learning are discussed.

Finally, Chapter 11 reflects upon the research process, and considers the contributions of this study to relevant research fields and for court practitioners.

1.3 How Has the Work of Courts Been Studied?

There is little research on the activity of courts, the work of judges, court proceedings and court clients in Finland. The country lacks a socio-legal tradition, especially the empirical examination of court activity, and the majority of legal studies are focused on legal dogmatics. The weak tradition of Finnish empirical studies on “law in action” implies, that no apparent point of comparison or reinforcement for this study can be invoked.

Recent Finnish studies on the court system are – with few exceptions – historical inquiries, if the purely judicial examinations are excluded. Letto-Vanamo (1989) studied the advocate system and its development. Nousiainen (1985; 1993) examined disputes and their solutions in Finland. Her studies offer information on the lower courts and their evolvement in the context of societal development and modernization. Kemppinen (1992) studied the activity and structure of the Supreme Court in the land in his cultural-historical dissertation, his key themes being legal culture and legal mentality.

Finnish empirical studies focusing on current court practices can be counted on one hand. The set of studies conducted by Ervasti (e.g. 1997a; 1997b) represents the first study in Finland that was based on wide empirical data about court proceedings. This research produces basic data and evaluates how the aims of the reform have materialized, as well as the unpredictable effects of or problems with the proceedings. Ervasti evaluates the implementation of the lower-court reform in the light of statistics, court documents and questionnaires. Välikoski's (1996) study concerns courtroom communication in criminal cases from the viewpoint of forensic communication. Judges' moves in controlling the courtroom interaction have been observed and judges' conceptions about courtroom communication have been defined through interviews. Being the first attempt to study courtroom communication in Finland, and building on written notes on judges' turns in interaction, the study has aimed at describing on a general level, and hence, assigns the vivid and dynamic aspects of the actual interaction. Still, the findings of the study on the formal and monological characteristics of the legal communication correspond largely with and give valuable support to my own findings concerning the courtroom interaction before the procedural reform.

Contrary to the Finnish research tradition, western studies on court practice are numerous. They include analysis of individual court cases, clients' accounts, court narratives, courtroom discourse, procedural law, access to justice, models of courtroom control and decision making, and comparative studies on legal systems, all of which offer a different empirical perspective on the work of courts. To position my own research and give an overview of the field of studies, a four-square matrix is presented (Figure 1.1), in which one dimension concerns wheth-

er the study aims at a static glimpse of the prevailing court work or at the capturing of developmental dynamics in court work. The other dimension determines whether the study focuses on global, macro-level phenomena or on the local, micro level. The review is limited to studies, in which the focus is concretely on the lower courts, and more specifically on the court proceedings and the work of the courts. As a consequence, general theories of law and the evolution of law are excluded.

	STATIC	DYNAMIC
MACRO-LEVEL	1. Macro-level studies on prevailing features in the court system, e.g. surveys	2. Macro-level studies on historical developments in the court system
LOCAL/ MICRO-LEVEL	3. Local studies on prevailing features of work in courts, e.g. studies on courtroom interaction and ethnographic studies on courts	4. Local studies on developmental dynamics

Figure 1.1 Studies on Court Work

Macro-level studies focusing on some prevailing features of the court system form the major field of legal studies (Quadrant 1). Traditionally, these studies are surveys based on large numbers of questionnaires or interviews, and the statistical interpretation of data. Similarly, studies based on data gathered from court dockets are typical. Many of the surveys are from the 1980s, when quantitative research settings became popular as computing methods advanced rapidly. The study by Van Koppen and Ten Kate (1984) on individual differences in judicial behavior, the research made by McEwen, Mather and Maiman (1994) on divorce lawyers’ accounts about mediation, Hogarth’s study (1971) on judicial attitudes and sentencing behavior, as well as Tyler’s study (1984) on citizens’ perceived injustice and courtroom experiences, serve as examples of work in which the focus was on static analysis of a particular phenomenon as it appeared at the moment of gathering the data.

Some of the surveys, such as Tyler's Chicago Study on citizens' legal experiences, attitudes and behavior (1990), rest on two measurements which facilitate both cross-sectional and longitudinal analysis. As Tyler describes it, cross-sectional analysis looks at the relationship between attitudes and behavior measured at one point in time, while longitudinal analysis uses the data collected at both points in time to examine the changes in attitudes and behavior as well as in their relationship (Tyler, 1990, p. 8). What is expected to possibly change are the attitudes and behavior, not the legal system itself. Thus this view of the court system is more static than dynamic.

The studies depicted in Quadrant 2 take the dynamic, changing nature of the court system as their starting point. Change-oriented and macro-level studies on courts concentrate on analyzing the historical changes or structural transformations of court systems, usually within a long period of time and on a highly general level. For instance, Heydebrand and Seron (1990) examined the historical transformation of court organization as a long process of rationalization, during which the changes in society have had an impact on the case load and case mix in the courts, which in turn has resulted in new ways of organizing court services. The analysis is based on large and diverse statistical data from different points of time.

One field of research, in which the changing nature of the court system is taken as a matter of course, comprises studies on court reforms. For example, Feeley's "Court Reform on Trial" (1983) is a classic assessment of four reforms in criminal justice, driven by an attempt to understand the process of change. Most of this research consists of evaluation studies in which the intended or implemented reforms are assessed. The process-oriented view is rather implicitly embedded in the setting, where the problems preceding the reform are outlined, and its outcomes or effectiveness assessed. Following this format, Larivière (1997) from France, Varano (1997) from Italy and Gottwald (1997) from Germany, for example, evaluate the court reforms implemented in their respective countries. Recent developmental trends in court management, as well as procedural and organizational reforms, are also discussed in articles by Provine and Seron (1988–89), Ferrarese (1988–89) and Plotnikoff (1988–89). What is problematic in these studies is that the empirical grounds for the evaluation appear relatively weak, as they seem to lack careful empirical data on the actual changes in the reformed court practices. Only seldom are they based on careful before-and-after settings in their assessments, thus being more like static evaluations after the implemented reforms. Their undoubted value is that they foreground the multi-layered characteristics of change: new practices are adopted at the same time as old practices and resistance prevail.

Studies focusing on the work of courts as it appears at a certain moment on the local level are divided into two groups here: those deriving from micro-level analysis of courtroom interaction, and those comprising ethnographic analysis of local institutions of law (Quadrant 3 in Figure 1.1). Courtroom interaction has offered an interesting institutional setting for numerous studies on conversation analysis, discourse analysis and linguistics, since the verbal interaction has context-specific features of their own. The classic book of Atkinson and Drew, "Order in Court", from 1979, was one of the first of a bulk of studies that appeared at the intersection of law and language. According to Conley and O'Barr (1998, pp. 9–14), the area of scholarship called Law and Language has contributed to our understanding of how law actually works in everyday contexts such as the courtroom, and how broader questions of justice play themselves out linguistically. The main interest in some of these studies seems to be in the language itself, the courtroom offering an interesting and versatile resource (e.g. Drew, 1992 and Atkinson, 1992). Some other studies have focused more on language as the most important medium through which the courts accomplish their work. Studies by Aronsson & al. (1987) on the accommodation strategies of both defendants and professionals, by Adelswärd & al. (1987) on dominance in courtroom interaction, by Conley and O'Barr (1990) on the way in which litigants formulate their problems to the court and on the judges' judicial approaches to decision making, by Komter (1998) on institutional rules that promote dilemmas during criminal court proceedings, and finally by Philips (1998) on how judges practice law and courtroom control, are all examples of research aimed at showing how speakers create the reality of the courtroom through their use of language. All of these studies take as their starting point the local occurrence of linguistic practices, viewed as they occur at the moment of study.

Another sub-group within local, static studies is those investigating the different aspects of local law, depending in most cases on ethnographic data. The set of large comparative studies of American criminal courts conducted by Eisenstein, Flemming and Nardulli took as their starting point the fact that the courts vary and that the law does not adequately explain why these differences occur. Rejecting the traditional metaphor of "Law", they provide an alternative metaphor of courts as communities, and argue that this provides a superior tool for trying to understand how courts work (Eisenstein, Flemming & Nardulli, 1988; Nardulli, Eisenstein & Flemming, 1988; Flemming, Nardulli & Eisenstein, 1992). Sally Engle Merry's (1990) study on what people think about their legal problems and the ways in which the courts work with them paints an ethnographic picture of how local law contextualizes peoples' legal consciousness and use of courts in two New England towns and their respective courts.

Furthermore, the study conducted by Yngvesson (1994) examines the interaction in complaint hearings between criminal justice officials and local citizens in one district court. She shows how the court clerks handling the complaints both keep the "non legal" cases out of courts, and control the behavior of local people by acting as peacemakers. The court clerk is understood as a transitional figure linking the legal and non-legal, the court and the community.

Previous empirical studies focusing on court work fall into three distinct groups. The first consists of the surveys, which take a static look at the macro-level phenomena of work in courts. The second comprises studies aimed at understanding the macro-level change and development in court work, and the third group is made up of studies aimed at understanding current work in courts on the local level of actual court practice. What seem to be missing are *studies focusing on change and development in the work of courts, conducted on the local level of actual court practice*. The main interest in my study is to examine the change and transformation of the work in Finnish courts during the last decade of the 1990s. I use the classical setting of a before-and-after study, as the data for my research was gathered both before and after the Finnish court reform of 1993. In this study, possible changes are looked for by means of analyzing courtroom practices at a very local level, as they appear in actual courtroom interaction and in the accounts of those involved in the hearings. In this sense, my study contributes to the local understanding of macro-level development. The methodological choice was made in order to capture both aspects of change: it is both controlled and governed "from above" and shaped and modified "from below" at the same time. The changes brought about by the reformed procedural law are not seen only as ready-made or pre-given, but also as constructed by the participants themselves in the daily encounters between legal professionals and their clients.

2 Court Work in Transition: Three Central Themes

2.1 Finnish Court Practices before the Procedural Reform: Basic Problems and Contradictions

Before the procedural reform of 1993, Finnish judicial proceedings in civil matters were guided by a loose procedural law, its main parts originating from the procedural law of 1734¹. It was established practice that the phasing of the proceedings was fairly indefinite: the causes of actions were discussed along the way and witnesses could be called during almost any phase. Thus, the trial in a civil matter was a prolonged process with several adjournments, and no distinct phases or order could be found. It was also an extremely textual process, based on briefs written by attorneys and minutes written by judges. One specific feature was that the attorneys dominated the course of the proceedings, while the judge concentrated on the minutes during the hearing and on the decision after it. The division of labor followed a model, in which the attorneys were active in forwarding the case during the proceedings, whereas the judge was active in the final decision-making phase.

The lack of the principles of orality and immediacy in the procedure resulted in proceedings that were mainly written, in which cases were adjourned repeatedly, and in which even the composition of the court could change several times. Judges eventually founded their decisions on everything that was presented in the briefs written by the attorneys and in their own minutes.

¹ Some important, although partial procedural reforms were carried out during the 20th century, such as the implementation of the principle of free evaluation of the evidence in 1948, and summary-payment-order proceedings in 1954.

Furthermore, no preparatory measures were conducted and no efforts to reach a settlement were made².

In the reality of intensively growing caseloads and more complex cases, this process resulted in prolonged proceedings with several postponements, inefficient handling of the cases and high legal costs. Somewhat surprisingly, its deficiencies and limitations were not publicly criticized. The interruptions and problems in individual proceedings were repeated in case after case. Despite their recurring nature, they were understood as everyday occurrences in the work of individual judges, not as a terminal problem in the court system. The everyday happenings of the district courts were surrounded by public silence. Even the clients – both professional advocates and lay persons – drew a veil over the proceedings and avoided open criticism.

Inside the district courts, the deficiencies of the drawn-out procedure were perceived differently in different units. According to the analysis conducted by our research group, the two district courts participating in our developmental project faced different kinds of tensions in their daily work. The main problems of the judges in Lahti District Court included the need for equal distribution of work and the long-established division of labor, according to which the tasks in the proceedings were assigned on the basis of seniority. Critical problems or pressure for change in the proceedings as such were not articulated – some even thought that the system worked as it should³.

In Vantaa District Court, a contradiction between the growing number of more complex cases and the traditional procedural rules was evident: with a hard case load and work pressure the old procedural rules caused extra work and were an unsatisfactory basis on which to decide the cases correctly and in a decent time. The discrepancy between the new ideas for the active conducting of the proceedings and the current passive practice was also recognized and experienced as a source of stress among the personnel in Vantaa. Regardless of the fact that the problems were recognized, there was no strong pressure to change the current way of working and thus the established practices went on. (Engeström, Haavisto & Pihlaja, 1992, pp. 123 –124, 153 –159.)

² Proceedings based on writing and postponing represent a relatively young phenomenon along the historical continuum of Finnish lower-court practices. It seems to have been a particularly urban practice that developed in the final two or three decades of the 20th century. Court hearings in the countryside in the 1970s were typically conducted by the judge with an air of stern and distant authority, but definitely in direct communication with the parties. Paternal reprimands of the clients were also sometimes given (Hatakka & Nirikko, 2000).

³ Identical satisfaction with the existing system among the judiciary was recognized by Davies (1999) in the context of Australian courts.

In situations in which the judges were either satisfied with the proceedings or were unsatisfied but unable to make changes, the clients expressed their criticism of the courts. The criticism was strong, but it was kept from the public and expressed only on private occasions. It was openly expressed in the interviews connected to the observation of a number of proceedings, conducted by our research group. The most severe criticism concerned the courtroom interaction, and the way in which the clients' cases were handled during the trials:

A case dealing with construction defects, Vantaa 1990

Plaintiff: I'm always astonished by the extreme rigidity of the trials. It's not a discussion, but when I ask something, you answer only that specific question and this cutting short means you can construct a totally different view of the whole.

Interviewer: Do you mean that the trial does not resemble a conversation?

Plaintiff: It is not a conversation, I mean an open conversation as it should be. It's legal jargon, which I as a lay person experience as extremely humiliating and tiring and exhausting.

Later in the interview:

Plaintiff: This is all based on a few piles of paper... I think it's totally crazy that, especially when there are principals present in the hearing, they cannot be asked. Then we could get the total picture.

Interviewer: Would you have liked the judge to ask you something?

Plaintiff: Yes I would. Especially about our personal opinion. Our attorney successfully identified these "impediments for living" and such things, but somehow it was such theoretical legal gobbledeygook that a lay person, and I am a lay person, can't check it out. I was a total bystander sitting there in the hearing.

A case dealing with the cancellation of an employment contract, Vantaa 1990

Plaintiff: I only have negative experiences with judicial bodies, especially because of the boring and long-drawn-out way of working with the cases. At least it's an extremely unpleasant place for those whose cases are being dealt with there.

Later in the interview:

Plaintiff: Of course the decision making is influenced by the volume of the case. These people may be in a hurry to get to their summer cottages or they may have a flight to the Mediterranean today at 9 pm. 'Hang it, let's just slam something down here, it'll do anyway, we can just let it go to the court of appeal.' Maybe the idea is that the district courts are happy to make kind of 'middle-of-the-road' decisions, which are then given to the

court of appeal. They know that this case will proceed to a higher authority; it won't remain as such. The district court is just like an errand boy, going round taking a look at places before the manager comes and buys. It's as if we should always do business with the courts of appeal. Why give these darned lower courts the runaround, as their decisions don't hold. It's frustrating and pathetic.

On the threshold of the court reform, civil proceedings continued with no signs of potential crisis. The clients found them unsatisfactory, but open criticism was repressed by the system, the only channel being through the court of appeal. Some of the judges were unhappy, too, but had neither the motivation nor the power to change established practice. It was assumed that the forthcoming procedural reform would resolve some of the recognized problems, but it was unclear how it would resolve the simmering contradiction between the cliental needs and procedural rules, that was lying beneath the surface.

In order to understand whether the procedural reform answered to the deficiencies of the current practices, it is important to remember, that a) the legislative work for the procedural reform was done mainly by officials of the Ministry of Justice and reflected their views on the main defects in the procedure, and b) it was planned and drafted over several decades, during which the different problems within jurisdiction had been addressed⁴. The long history of legislative work has resulted in various layers in the procedural rules representing various attempts to improve court practices. The law drafting cannot be described as a univocal, unilinear and homogeneous process aimed at resolving the latest problems, but rather as a multi-layered, multi-voiced, heterogeneous process with historically evolving, often implicit interest (see also Tala, 2001).

2.2 Finnish Court Reform and Its Cultural Dynamics

The judicial proceedings in the courts of first instance were substantially reformed in December, 1993 (Code of Judicial Procedure 1052/1991). The underlying themes were the due process of law and the rational allocation of resources. The reform was intended to increase litigants' chances of obtaining correct, well-founded decisions by streamlining the procedures and making changes in the organizational structure of the courts. The reform comprised two

⁴ In this sense, the drafting of the new procedural law did not follow the standard phases of a reform – diagnosis, initiation, implementation, routinization and evaluation – as they are described e.g. by Feeley, 1983)

simultaneous stages: the unifying of the courts of first instance and reform of the civil procedure.

The old distinction between the circuit courts that operated in rural areas and certain cities and the city courts was abolished in the first stage. The composition of the courts was also renewed. The city courts had traditionally comprised of three members, at least two of whom were professional judges, while one could be a “semi-professional”, a lay member holding a permanent position. The circuit courts had a professional judge and a board of seven lay members. More flexible compositions were introduced in both courts: one judge, one judge with three lay members with an individual right to vote, or three judges. Thus the composition varied according to the nature of the case. This flexibility was meant to guarantee optimal handling in each case. The new arrangements presented learning challenges to all judges: those coming from the former city courts had to learn to work with lay members, and those from the former circuit courts had to learn how to collaborate with colleagues. Working alone with complicated cases was a challenge for all of them.

What was essentially new in the procedural reform was introduction of preliminary proceedings in civil matters before the actual court hearing. Thus, the proceedings are divided into written preliminary proceedings, a preliminary hearing and the main hearing. This procedure was concerned with the most complicated cases. The plaintiffs are compelled to reveal in their complaints whether the case is disputed or not and to write their applications for a summons on that basis. The majority of cases, however, are already decided at the written preliminary stage by the judge, court trainees or office personnel. The procedural system has been described as a filter system, where the principal aim is decide on the cases as soon as they are clear, implying an attempt to rationalize the proceedings (Ervo, 1995, p. 60). A normative model of the reformed civil proceedings in district courts is introduced in Figure 2.1.

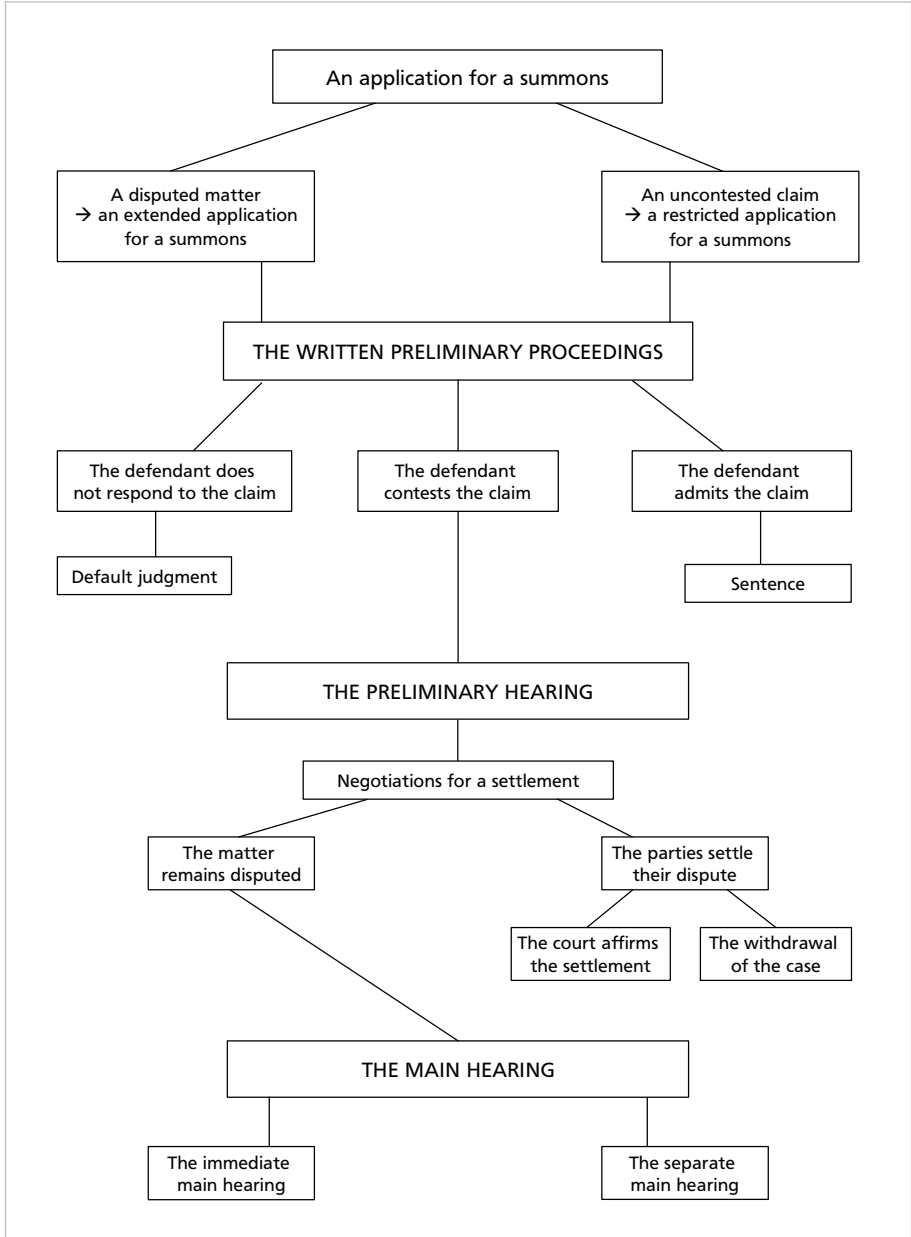


Figure 2.1 *The Normative Model of Proceedings in a Civil Case (Ervasti, 1997a, p. 25, English translation by V.H.)*

The key principles of trials are orality, immediacy and concentration. Applying these principles is assumed to produce an ideal result of the proceedings: fast, secure and at low cost. The following description of the principles is based on the definitions given by Virolainen (1991, pp. 67–80).

Orality refers to the principle according to which principals, their attorneys, witnesses, experts and all others being heard in the process have to present all their statements orally before the court. There is a ban on written statements in the preliminary hearing and in the main hearing.

The principle of immediacy calls for three conditions. Firstly, it requires that when making the decision, the court does not consider indirect material through written documents. The presenting and receiving of court material must be oral. Secondly, the decision can be based only on material presented in the main hearing. This implies that the material is presented directly and constantly to the decision maker(s). Thirdly, the principle of immediacy presumes that the composition of the court must not change during the proceedings.

According to the principle of concentration, the handling of a case is centralized in one uninterrupted hearing. The proceedings cannot be split into several sessions, and the material must be presented and discussed on one occasion.

The principles of immediacy and concentration in particular necessitate a preparatory stage before the final hearing, demanding careful preparation by all participants. The predominant idea was that the pre-trial procedure to expedite the proceedings should be informal and conversational in its nature. The exclusively oral hearings emphasize the active role of the judge in conducting the proceedings. The dialogue between the participants in the preliminary hearing and the active conducting of the proceedings were both new elements in the Finnish civil courts. What was particularly new was the obligation on the judge not only to encourage the parties to settle, but also to make a proposal for a compromise. This immediate dialogue with the parties and the active role in the settlement were probably the most demanding learning challenges for the district court judges.

Even though the main principles behind the procedural reform were judicial, the reform was not only legal and administrative, but also and mainly cultural. The fact that the courts vary in many different ways and that law does not sufficiently explain these differences has been established in empirical research focusing on local legal cultures. For example, Eisenstein, Flemming and Nardulli (1988) sought to explain the differences in court work, not as a result of behavioral differences between individual judges and lawyers, but as a product of particular courthouse culture within each community. Merry (1990)

also studied plaintiffs and court proceedings in the context of the cultural and social history of the local communities.

Chase (1997, pp. 862–863) stated that procedural systems are hardly immune from the particular local realities they are part of, neither are they immune from global developments. On the one hand, it has been argued that legal institutions are mirrors of societies: civil procedures include a political and social side as well as a legal one, and changes in the moral, political or social environment are reflected in it. This view also emphasizes the cultural differences between local practices. On the other hand, legal institutions could be seen as distinct enclaves in society, independent and controlled by legal elites. The primary way in which legal systems change is through transportation from one system to another, as the interests of legal elites more easily transcends the boundaries of countries than the borders of legal institutions. (Chase, 1997, pp. 862–863.)

These two alternative types of procedural development – change as effected by the environment and change as transportation from a system to another – could be considered as simultaneous, intertwined processes, where one does not necessarily eliminate the other. The reform cannot be understood solely as a Finnish phenomenon. It should be rather looked at as part of the development in western court systems, whether or not this connection is explicated in the legislative drafts. Several western countries are experiencing a rich debate on alternative means of renovating and intensifying judicial institutions (see e.g. Palmer & Roberts, 1998; Zuckerman, 1999; The special issue of *The American Journal of Comparative Law*, 1997, Vol. 45(4)).

The new Finnish Code of Judicial Procedure developed in parallel with the process of general modernization that started with the French revolution and led to structural changes in most European procedural codes in the 1800s and at the beginning of the 1900s (Niemi-Kiesiläinen, 1998, p. 61). This development equals the breakthrough of the liberalist view in civil proceedings. What is special to the Finnish procedural code is its late modernization – there was a remarkable delay in renewing the procedural acts, compared with developments

in other legal systems⁵. With its principles of orality, immediacy and concentration, the new procedural act introduced features that have long been self-evident in many other legal systems (Nousiainen, 1993; Niemi-Kiesiläinen, 1998).

The logic behind the reform can neither be interpreted merely as legislative effort, since there is a risk of covering up the cultural connections and tensions involved. For example, discussion on the features of court reforms often follows the viewpoint of administrative effectiveness vs. due process, where the client of the court as a communicating partner remains on the sidelines. To overcome this limitation, the approach of procedural justice and studies on courtroom discourse are also examined here. In order to avoid the purely domestic, or technical and legal-administrative view of the Finnish reform, at least three main types of discourse should be taken into account:

1. Interaction and communication in the courts

As a result of the oral proceedings, interaction and communication in the courts has increased remarkably. The shift towards orality stimulates questions concerning the possibilities and constraints, advantages and risks involved in the increasing interaction. Finland lacks the tradition of studying courtroom discourse. In many other countries, studies of institutional discourse have produced important information on the interaction between the judge and the parties, as well as between the legal professionals and the lay participants.

⁵ The reasons for the late modernization of the Finnish proceedings – also compared to Sweden, which reformed its procedural code in 1948 – are not easy to find. The specific features of Finnish history during the 20th century – the bloody civil war and the fate of the country in the second World War – have been recognized as potential reasons for the late execution of many changes (Kekkonen, 1998, p. 42). Nousiainen (1993) refers to the facts that Finland was a relatively poor, sparsely inhabited country, run by agriculture, and sees these points as the main factors diminishing the economical and political preconditions of modern legal systems. In this connection, the specific features of Finnish legal culture are also worth mentioning. Justice has always been “down-to-earth”, with no extravagant ceremonies, no special attire and not even any special premises: the court went to where the people were and proceedings were arranged in community halls, town halls, fire-brigade premises and farmhouses, for example (Letto-Vanamo, 2000). The bar was largely non-existent. The chief justices were highly respected and prestigious, and exerted strict, paternal authority over their judicial subjects. The Finnish people, in turn, relied strongly on the legitimacy of the legal officials and on their search for material truth in their decisions (Niemi-Kiesiläinen, 1998). These features prevailed until the 1970s, when work practices and culture changed remarkably: in 1972, the state started to run the courts which were previously the *enfeoffments* (or enterprises in modern terms) of the chief justices in the countryside, and organs of the cities in urban areas. The position of district court judges was established and the administrative role of the Ministry of Justice was strengthened (Letto-Vanamo, 2000). Becoming a part of everyday life, or the democratization of the justice system took place gradually during the 1970s. This was also the starting point of the rigorous attempts to reform and modernize the procedural acts.

2. Procedural justice, citizens' trust, and the position of the client in the court system

Citizens' trust in the legal institutions is one of the basic issues in evaluating the justice system and legal reforms. One of the most promising recent approaches is that of procedural justice as paradigm examining the importance of procedures to client satisfaction, compliance and trust. This approach has focused on the client and his or her role as a participant in the proceedings, as well as on the factors that contribute to client discontent or satisfaction. The Finnish reform, with its emphasis on oral proceedings, made the presence of the client in the proceedings desirable rather than obligatory. If client presence in the hearings increases, the possibilities for and constraints on active participation become interesting.

3. Rationalizing dispute resolution through promoting settlement

In recent decades, several cultures of dispute management in the western world have been subject to re-examination in terms of established judicial systems. One distinctive feature of this development has been the growing interest shown by governments in sponsoring settlement and other forms of alternative dispute resolution. In most countries, the main impetus for promoting settlement has been saving money through effective case management. The rise of new case-management techniques and settling practices highlights the importance of understanding the benefits and disadvantages of settlements.

It seems impossible to find one causal or explanatory model to fully explain the background and objectives of the Finnish procedural reform. Instead, the above-mentioned three different perspectives are considered in order to understand its cultural aspects and complex entity. Within each theme, the preceding domestic debate among scholars and legal practitioners is commented upon. Thereafter, corresponding issues are highlighted in the international discussion.

2.3 Interaction and Communication in the Hearings

Finnish procedural law originated from the year 1734, after which parts and details were revised on several occasions. Attempts to conduct a total reform rather than partial revisions started a hundred years ago, in 1892, when the first committee was set up to prepare a proposal for reorganizing the court and justice systems. During the first half of the twentieth century, several committees submitted proposals for a total reform, but the actions were interrupted by the global recession during the 1930s and the two world wars. Interestingly enough,

all of the proposals in question suggested the implementation of preliminary proceedings in civil matters, and an oral, immediate and concentrated main hearing.

In the Finnish debate of the 1980s, the introduction of preliminary proceedings was largely approved by practitioners and scholars as a necessary way to expedite the matters. Whether such proceedings should be oral or written was, however, a contested issue. For example, Halila (1989) and Huttunen (1989) argued for the right to use written statements and advised the decision makers to avoid the failings of Swedish procedural law, which was commonly seen as a model for the Finnish reform (see e.g., Laukkanen, 1999, p. 247; Niemi-Kiesiläinen, 1998, p. 62). According to Huttunen (1989), orality and immediacy are of little worth in preliminary proceedings, which could mainly be in written form. If settlement is not on the horizon, oral proceedings are only of limited use.

The Government Bill (15/1990, pp. 24–26) put forward orality as the central principle of the preliminary proceedings, with clear advantages over written proceedings in most cases, excluding simple, non-disputed cases. However, neither the Government Bill nor the eventual law gave any indication of how the actual preliminary hearing should be organized. Jyrki Virolainen and Juha Lappalainen gave some guidelines for interpreting the principle of orality in their handbooks, Virolainen stating that the content of the preliminary hearing was regulated in terms of the order in which the parties should plead their case (Virolainen, 1991, p. 147). Otherwise, it could be an informal conversation between the parties, conducted by the judge, where the atmosphere and procedure need not be as formal as in the main hearing. This suggests that the preliminary hearings could be arranged in places other than traditional courtrooms. Lappalainen (1991, p. 75) interpreted the principle of orality as genuine verbal communication, which could not be replaced by reading briefs aloud. The preliminary hearing was thus a gathering round the same table, where the parties could immediately specify their arguments and respond to the opposing party (Lappalainen, 1991, p. 71).

It is clear that there were few concrete ideas about the preliminary hearings before the reform. “More informal than formal”, “genuine verbal communication” and “gathering round the same table” were the guidelines that could be drawn from the debate. Among the practitioners, the principle of orality was received with reservation. At first, it was easy to see it as a technical principle. In practical terms, Swedish civil proceedings offered a natural, Scandinavian model for the Finns. However, it was considered as exceptionally unofficial with its informal communication and interaction between the parties, and was thus, rejected as unnaturally casual in the Finnish legal culture.

The following excerpt from the planning seminar for all court personnel during our developmental project⁶ in 1991 illustrates how unresolved the central questions were among the practitioners just before the procedural reform.

Excerpt 2.1: The planning seminar in 1991

District Court Judge 1: To what extent is the preliminary hearing a discussion, round a round table, maybe with a cup of coffee, or to what extent is it like the situation in this room, with the judge right there on his dais, and others here below? This is an important question, as it influences the duration of the preliminary hearing, and the taking of the minutes. And the model that is used in Sweden is not necessarily the only one. It was introduced there for some historical reason, but in other countries the hearings may be very, very different.

District Court Judge 2: Sweden has its own cultural background and traditions, and even though Sweden and Finland have much in common in their history, the model does not necessarily suit us. And then there's the question of the premises. If the preliminary hearings are held in Hall 1, for example, the discussion is inevitably more formal, with me sitting here, and the others there. The place is one constraint. But where do we get smaller rooms for this purpose?

District Court Judge 1 [addressing his words to an attorney who was participating in the seminar]: How about you, Timo Arvonen, you're here as a kind of representative of the parties. What do you think, what should the preliminary hearings be like?

Attorney Arvonen: I have years of experience of labor courts, and the preliminary hearings there are very similar to the hearings in the civil cases here in the district courts. The atmosphere and the discussion are much the same, it is not free discussion there either. But I think that the ethos of the new law is different, especially in that we should even try to reach settlement. At least, it doesn't promote settlement if everybody presents their own views in turn. I think that we should try to arrange a round-table discussion, where people could discuss rather freely and informally.

⁶ In 1990–1992, I worked as a member of a research group at the University of Helsinki that was conducting a research project in Vantaa District Court. The project was funded by the Ministry of Justice. Based on an educational research paradigm called Developmental Work Research, it aimed at studying court work while also trying to develop it in collaboration with the organization under scrutiny. The purpose of the study was to analyze the limitations of the existing work practices and to help the court personnel to make plans and preparations for the implementation of the impending court reform.

The attorney refers to the fluid and elusive concept of the ethos of the law. Simply reading the law and its preambles does not give a clear picture of the ethos of the new law, due to its mainly judicial-technical perspective. The judiciary, including officials in law drafting and administration, is relatively small in Finland, and thus it may well be that much of the ethos of the law was transmitted through personal contacts between those involved in the drafting and those in the field. Moreover, the massive training program organized by the Ministry of Justice just prior to the reform incorporated matters of ethos.

The Swedish proceedings also had a strong influence on the development of preliminary hearings in Finland. It was through the training program organized and the numerous visits by Finnish court personnel to Swedish courts that the Swedish way of organizing preliminary hearings gave ideas to the Finns. Many Finnish district courts started to modernize their premises and to construct new meeting rooms with a cozy atmosphere for the preliminary hearings, and, thus offered physical conditions for the hearings to be oral and communicative.

It is clear that the principle of orality, and especially its implications for communication and interaction in the hearings, were problematic, and even poorly understood at the time when the new procedural law was drafted and implemented. There were no self-evident cultural models of how the judges, lawyers and principals should act as interacting partners. Where communicative interaction in the hearings leads to is a question to which Finnish research tradition does not give any answer⁷. There have been numerous studies on legal discourse and courtroom interaction in other western countries, and especially in the USA. Such studies have highlighted several risks and problems of communication in legal encounters.

From the beginning of the 1970s, studies on the intersection of law and language started to shift the focus from written legal language to everyday contexts, where the law operates in daily practice: courtrooms, lawyers' offices, mediation centers, for example. One of the major interests in studies on language and law has been connected to the broad themes of power, dominance and asymmetrical interaction in courtroom hearings, or more generally, between legal professionals and lay people in their various legal encounters. One of the pioneering studies in this respect was Cicourel's (1968) study on juvenile courts.

⁷ In Finnish legal philosophy, the communicative aspects of legal decision making were pointed out by e.g. Tuori (1988) in his ponderings on communicative rationality, and by Aarnio (1977) in his writings connected to the concept of auditorium. A gap between legal philosophy and the reform attempts was evident: the philosophical concepts of communication were not referred to in the procedural handbooks. One empirical study on courtroom communication was published after the reform by Välikoski (1996). As a pioneering study in this field, however, it focused on communication in proceedings prior to the procedural reform.

A substantial part of the research on courtroom interaction has concentrated on constraints restricting or prohibiting the contributions of defendants and witnesses. Since courtroom discourse has traditionally consisted of questions and answers, several studies have tackled the issue of how different kinds of questions constrain answers (for example, Harris, 1984; Philips, 1984; 1987 and Danet & Bogoch, 1980). Turn taking, topic controlling, the distribution of interactive space and argumentation (for example, Atkinson & Drew, 1979; Adelswärd & al., 1987; Bogoch & Danet, 1984), as well as clients' story-telling techniques and linguistic styles (for example, Conley & O' Barr, 1990; O' Barr & Conley, 1985) have also been studied.

The main finding in the studies has been that many linguistic features characteristic of courtroom discourse - such as questions posed by the judge or the lawyers, answers given by defendants or witnesses, the turn-taking system controlled by the judge - are the means through which the court conducts the tasks given to it. At the same time, they are the very linguistic means through which legal professionals' power over their clients is realized in everyday practice (Conley & O' Barr, 1998). In their analysis of a book by Matoesian (1993) about rape trials, Conley and O' Barr (1998, pp. 24-27) describe how the form of the question is used to restrict the examinee's possibilities to answer, and how lawyers direct the topics in the direction they want. The examinees' have little chance of resisting domination and any possible resistance is short-lived. "The linguistic resources available to the lawyer are simply too many and those available to the witness too few" (Conley & O' Barr, 1998, p. 27).

This image is supported by studies on other legal situations outside courtroom hearings. In their study on divorce lawyers and their clients, Sarat and Felstiner (1995, pp. 19-20) state that the predominant image of the lawyer-client relationship is one of professional dominance and lay passivity. The lawyers govern their interaction with their clients, silencing and subordinating them, and consider their few active clients hostile and problematic.

The central finding of studies on the client's position in various types of legal practice seems to be one of client suppression and exploitation by legal professionals. This is alarming and contradictory, especially from the perspective of procedural justice, which is discussed in the next section.

2.4 Procedural Justice, Citizens' Trust, and the Position of the Client in the Court System

The most salient debate in Finland concerning clients of the courts has focused on trust. The first opinion poll (Blom 1970) was conducted in 1970, and a wide and heated discussion started on the functioning of the justice system, emphasizing the democratic control of courts and judges. At that time, the asymmetry between social backgrounds and political views of judges and their clients was considered the main reason for the citizens' distrust. This debate served to re-start the plans to carry out a total reform in the courts.

Two successive opinion polls were conducted quite recently after a break of approximately 30 years (Lappi-Seppälä & al., 1999 and Niskanen, Ahonen & Laitinen, 2000). Both of these studies indicated that citizens' trust in the courts has somewhat decreased since the 1970s, but is still relatively high: approximately two Finns out of three see them as trustworthy. The problem with studies on trust in the context of the client's position in the court system, however, is the tendency to understand trust as an experience as such, isolated from the real client's actual experiences in his or her own proceedings and hearings.

When the new procedural law was drafted and the proposals evaluated, the client's perspective was mostly missing, and if presented, only indirectly. In its official statement on the proposed reform, the Finnish Bar Association foresaw that the likelihood of clients being able to conduct their own cases without legal aid would decrease due to the complicated nature of the reform. This would make the proceedings more expensive for the clients. On the other hand, it was suggested that any inequality between the parties could be balanced through the active conducting of the proceedings by the judge, ensuring real rather than formal equality between the parties (e.g. Möller, 1989a, p. 270). In general, the legal security of the clients was not considered to be so dependent on the procedure. Instead, it was most often seen to be threatened in the reform because of the composition of the decision makers. The new court compositions, namely with one judge, and with one or two judges and lay members with the individual right to vote, were largely resisted among the practitioners (Bruun & al., 1984, p. 36; Rintala, 1986, pp. 1032–1033; Halila, 1986; Virolainen, 1986, pp.1006–1015). To sum up, the client perspective in evaluating the reform appeared as general values representing the good of the client, such as legal security or legal costs.

The lack of a client perspective in the reform was also evident in the minor concern for the principal's own activity in the hearing and in the handling of the case. This was partly because the principal's personal presence in the hearing was not necessarily expected. For example, when evaluating the Government

Bill, the parliamentary legal committee suggested that the norms generally requiring the personal presence of principals at the preliminary hearing should be relaxed. Virolainen (1991, p. 234) opposed this view and suggested that the principals should be present almost without exception. Lappalainen (1991, p. 74) also believed that the principal's presence at the preliminary hearing would be needed relatively often.

In its simplest form, the role of the parties was defined as a judicial obligation to contribute to establishing the case through the duty to be present and deliver briefs to the court. Characteristic of this kind of definition is the reference to the parties as judicial actors, not as actual principals. It rests on the assumption that the parties are mostly represented by their lawyers. The Finnish Bar Association took the viewpoint of the client and argued that the client's own activity in the hearing was ignored in the proposal, although it is important that the client can argue decisively. The predominant way to understand the role of the client, however, was to consider him or her as a source of information. For example, Hirvonen (1989, p. 163) defined the principal as an informant offering important knowledge to the court. The specific characteristic of the client as the only possessor of case-specific information was also emphasized. In these definitions, the viewpoint was more that of the courts than of the clients: the client was the source of information to serve the court in making its decision.

International studies of recent decades have introduced two especially important approaches to the user perspective on the court system: access to justice and procedural justice⁸. The access-to-justice movement, originating from the USA in the 1960s and 1970s, concerned the substantive availability of justice and the problems of costs, delays and general inaccessibility of adjudication in the prevailing systems. In its early phases, the approach concentrated on clearing the economic barriers that barred the disadvantaged from legal services. Later the movement tried to overcome the organizational barriers met by those with diffused interests (for instance, consumers) in conducting their cases, and promoted group action. In its latest phase, the movement has focused on procedural barriers in access to justice (Cappelletti & Garth, 1981; Ervasti, 1999, p. 641).

⁸ Additionally, the studies on lay expectations and clients' accounts of proceedings have been crucial in promoting the user's perspective on law (see e.g. O'Barr & Conley, 1988 and Lind & al., 1990).

However, the original interest was not in procedures as such, but in the actual possibilities for people to receive justice⁹.

The procedural justice approach was the first to make the connection between clients' experiences and the qualities of the procedures. Stemming from social-psychological studies, it took the procedures as the main determinants of clients' experiences of compliance and trust. It produced interesting findings, which suggested that the client's own activity in the hearing may also be highly significant in terms of his or her satisfaction and compliance after the proceedings.

Röhl and Machura (1998, p. ix) recognized the philosopher Rawls's (1971) suggestion of an ideal procedure to comply with the principles of a fair society as an important starting point of the approach. "Since then, the topic of 'procedural justice' has made a remarkable scientific career", write Röhl and Machura, and pointed to the extensive empirical research on procedural justice. Traditionally, social sciences have been occupied with problems of outcome fairness. The central assumption in social psychology, and in the behavioral and social sciences more generally, is that people evaluate social relations, experiences and institutions on the basis of the outcomes they receive. People's attitudes and behavior are explained by their outcome-based judgments.

Taking the classical study of Thibaut and Walker (1975) as they starting point, Lind and Tyler (1988) brought a new perspective into social psychology, projecting a different image of the person. They viewed people as more interested in issues of process than issues of outcome, and suggested that their evaluations of social relations and experiences were influenced by the form of social interaction (Lind & Tyler, 1988, p. 1).

Unlike distributive justice, which focuses on the fairness of the final outcome, procedural justice concerns the processes through which the outcomes – rewards and punishments, benefits and constraints – are produced and distributed. Lind and Tyler distinguished between objective and subjective procedural justice. The former concerns the capacity of the procedure to make either the decisions or the decision-making process more fair. The latter deals with the capacity of each procedure to be experienced as fair by those who encounter them (Lind & Tyler, 1988, pp. 3–4). These two modes of procedural justice may be in contradiction

⁹ Both "Access to Justice" and "Procedural Justice", as well as "Alternative Dispute Resolution" and "Law and Society" were originally American approaches and movements, and are largely intertwined. According to Ervasti's (1999, p. 641) characterization, they are scientific approaches and partly also social and ideological movements, which comprise a network with cross-cutting interests. Within the common interests there are differentiating starting points, paradigms and focuses. Yet, the differences between the approaches are sometimes hard to distinguish.

in the everyday court trials. People feel fairly treated when they have an opportunity to express their own viewpoints about their case. The parties would like to tell their story, taking as much time as they feel they need. Judges, however, usually limit their opportunities to speak because of concerns with efficiency and judicial relevance and propriety. In these situations, maximizing one aspect may lead to compromising the other (pp. 4–5).

Some of the most interesting findings in the context of procedural justice concern experienced fairness (subjective procedural justice) in different legal institutions and in different types of procedures. The basic finding – that disadvantageous decisions are more likely to be accepted if they are arrived at by means of a fair procedure – has been confirmed repeatedly (e.g. Lind & Tyler, 1988; Casper, Tyler & Fischer, 1988; Tyler, 1990; 1997; Rennig, 1997; Messmer, 1997). A small group of researchers have gone as far as to argue that the procedures matter even more than the outcomes (e.g. Tyler, 1984). The main variables influencing experiences of fairness have been found to be decision control (the parties' possibilities to influence the decision), process control (especially the opportunity to present evidence) and voice¹⁰ (possibilities to participate and have one's opinion heard) (Lind & Tyler, 1988; Rennig, 1997).

One of the open questions has concerned why procedural fairness and the clients' possibility to control the process seem to be so important. Two different explanations have been given in response: clients value process control either because it is a way to control and influence the outcome, or because it enables self-expression. Tyler defines these two aspects as the instrumental and the normative view of procedural justice (Tyler, 1990, pp. 115–118). In accordance with the instrumental view, process control is valued only to the extent that it affects the outcomes and decisions. According to the normative view, process control has an importance that is not linked directly to decision control, and people value participation and being heard as such. As Tyler sees it, there is evidence that a non-instrumental effect generally occurs, but it is not yet very clear in what circumstances it occurs (Tyler, 1990, pp. 117).

Tyler (1997) has recently suggested that the client's voice and participation is one of the core elements in fairness judgments, mattering as much or more than the favorability of the decision reached. Following the normative view of procedural justice, he has found that people value the opportunity to express their views to decision makers in and of itself (p. 887). Contrary to the expectations of judges and lawyers, people are not interested in sharing control over

¹⁰ Tyler uses the concept of voice as a synonym for participation in the process. Voice refers to the clients' possibility to be heard in the hearings.

the final decisions. They are rather primarily interested in sharing the discussion on the case, not controlling the decisions. Allowing each side to state their case means that the opposite sides hear the whole story. This has important additional benefits, especially in negotiations of settlement, where hearing the other side of the case is a crucial precondition for successful compromise. The high value of the client's own participation explains, for example, why people are easily dissatisfied with settlements negotiated between lawyers, or with proceedings in which their own presence is not allowed, and why they tend to be more satisfied with informal processes where they can more freely express their own standpoints (pp. 888–889).

As Tyler has stated, the lack of public confidence in the legal system creates serious problems (1997, pp. 872–873). It is particularly important to obtain voluntary compliance with any legal system. Although some coercion is possible, the system relies heavily on voluntary cooperation between the system and its clients, and a crucial aspect of this is that the proceedings are experienced as fair. Similarly, compliance through procedures seen as fair has economic and cost-effective significance in the avoidance of re-hearings and appeals (Engström, Haavisto & Pihlaja, 1992, pp. 230–231).

2.5 Rationalizing Dispute Resolution through Promoting Settlement

The rules concerning settlement are set out in one paragraph in the new Procedural Code:

In a case amenable to out-of-court settlement the court shall endeavor to persuade the parties to settle the case and, under its own discretion, present its suggestions for an amiable resolution of the case in order to further the settlement. (Procedural Code Ch. 5, section 26)

Settlement is mentioned on two occasions in the General Grounds of the Government Bill. Under the old Procedural Code of 1734, judges were supposed to advise the parties to settle, but this rule had remained a dead letter. The likelihood of reaching a settlement was said to increase remarkably in the oral hearing, as the parties became acquainted with the opposite party's arguments and with the evidence in the case (Government Bill 15/1990, p. 25). The section "Reaching a settlement in a pending case" referred to the preliminary hearing as an ideal time and place to freely discuss settlement. This phase of the proceedings is when the parties can consider their chances of success at trial, and perhaps accept a settlement. According to the rules governing the preliminary hearing, one of the objectives is to determine the prerequisites for a settlement, and consider possible suggestions. Finally, it is stressed that settling a case should

not endanger the court's impartiality, and that any suggestion offered by the court should follow the substantive law.

What is interesting is that the issue of settlement found its way into the civil procedure following such short and restricted comments, without special explanation or evaluation. The Bill did not consider the preconditions for settlement in different cases, or the extent of the court's attempts to further it (Liljenfeldt & Liljenfeldt, 1993, pp. 196–197). Neither did it disclose why settlement was desired and promoted, or how it corresponded to the other aims of the procedural reform (Ervasti & Tala, 1998, p. 315).

The origins of the idea of settling rather than adjudicating disputes can partly be traced back to the first committees planning a total reform of the court system a hundred years ago. According to Kevät Nousiainen, who has studied the history of Finnish disputing, a committee headed by Wrede submitted a report in 1900 in which they considered setting up special institutions for settling disputes in order to diminish people's willingness to litigate. However, it ended up rejecting such institutions because of the lack of competent mediators (Nousiainen, 1985, p. 107). Granfelt's committee, on the other hand, suggested in 1923 that settlement proceedings could be organized in separate municipal conciliation boards. This proposal emphasized the reasonableness of the resolution, not the correctness according to the substantive law: the aim of the board would have been fair resolution, which would have satisfied the parties. The committee of chief justices, which was set up to evaluate the Granfelt committee's proposal, rejected the idea of conciliation boards. According to Nousiainen, it felt that even a settlement should validate what was right in each case according to substantive law, and in that case having boards with lay conciliators would be in vain (Nousiainen, 1985, pp. 116–117).

According to these early committee reports, the conciliation proceedings were mainly connected to distinct conciliation boards, not to the court proceedings as such. In this sense, these reports do not fully clarify the objective of the 1993 reformed procedural law to promote settlement as an alternative outcome. It should also be noted that both disputes and clients have changed a lot in courts during the last hundred years, and the issue of settlement is now far more complicated. The focus can be shifted to the legislative drafts of the implemented reform of 1993 and to the debate in the Finnish legal journals prior to the implementation.

Articles and texts describing or commenting on the preliminary hearings generally failed to mention settlement. One exception was made by Rintala (1986, pp. 1028–1030). When assessing the legislative work prior to the reform, he criticized the drafts for not focusing enough on the position and tasks of the courts. He felt that the legislative work did not sufficiently reflect the changes

in the whole society, or the effects of those changes on the court system. Important questions included the kind of role or position that should be given to the courts and what the courts and judges could offer citizens in the future. By way of response, he wrote: “It may also be the case, that citizens expect the courts to support them in making a reasonable settlement, rather than giving a traditional, rigid judicial decision.” (Rintala, 1986, p. 1030, translation V.H.).

Another exception was Möller (1989a), who dedicated an entire section of his article¹¹ to discussing the preliminary hearing as a means of promoting settlement. In his view, preparatory proceedings could often be seen as a continuation of the parties’ earlier negotiations, and could facilitate settlement. Moreover, settlement may well result from the promotive activity of the judge (Möller, 1989a, p. 271). Despite his positive attitude towards the judge’s role as peacemaker, Möller (p. 271) recognized the dangers. Firstly, the judge may indirectly put pressure on the parties in his attempts to reach a settlement. Secondly, while the settlement should follow the substantive law, this law could be ignored in favor of whatever settlement could be sold to the parties. Thirdly, helping the weaker party to develop the case may be neglected in the rush to settle. Fourthly, it may well happen that a settlement is motivated by the judge’s wish to reduce his personal workload rather than by the desire to find a peaceful resolution.

Evidently, settlement was only of minor interest in the discussion. The unifying of the city and rural courts, the revised court compositions, the role of the lay members in the decision making, and finally the preliminary hearing itself as a new form of proceeding, dominated the debate. As Letto-Vanamo (2000, p. 1075), for example, stated, the origins of several components of the court reform lie in the 1970s: the changes in the composition of the court and the individual right to vote for the lay members were central issues in those days. Democratic control and judicial relief were emphasized in the politically-heated atmosphere of the 1970s, whereas in the 1990s it was the effectiveness of the system that was stressed. The long period of preparation clearly conflicted with the aims of the reform (Letto-Vanamo, 2000; also Ervasti, 1997a).

The debate in the 1980s and at the beginning of 1990s, just before the implementation of the reform, continued along the same lines as in the 1970s, and did not extend to the issue of settlement. It could be said that its role in transforming court practices and legal culture was not realized until the first settlements were put into practice, when a lively discussion arose as they started to shake traditional understanding of adjudication (see e.g., the special issue of *Oikeus*, 1999, Vol. 28(3) on alternative dispute resolution, and Pohjonen, 2001).

¹¹ Möller’s (1989a) article is one of the few texts describing the Finnish procedural reform in English; another is Ervo’s (1995).

One feature of Finnish writing touching upon settlement was that it only seldom referred to the international literature on settlement. Extensive debate on alternative dispute resolution (ADR), originating from the 1970s, was going on in other western countries, especially the USA.

According to the insightful analysis of Palmer and Roberts (1998), the history of promoting settlement in courts can be traced to several phases in the evolution of ADR. The very first attempts to re-examine the dominance of state-sponsored adjudication and the privileged status of litigation as the approved mode of dispute resolution comprised two discussions: one about the availability of adjudication, or access to justice, and the other about the merits of settlement (Palmer & Roberts, 1998, p. 25). The first one problematized the general inaccessibility of judgments, the other the adjudication itself, pointing to the advantages of settlement. These discussions also evoked strong criticism of informality: the informal approaches directed at settlement were seen as neutralizing the conflict and leaving disadvantaged people without the rights they would have in traditional adjudication (pp. 29–44). In the 1970s, a new debate began to develop that went beyond the merits of settlement to more general discussion on complementary and alternative forms of dispute resolution, within and outside of the courts. This view coincided with a new understanding of conflicts and disputes as social and cultural phenomena. ADR grew into a movement with multiple perspectives and focuses, representing the continuing criticism of litigation and the adjudication process in recent decades (pp. 44–48.). As its development interestingly demonstrates, the movement has its origins in client-oriented demands for appropriate legal services.

Since the 1980s, many western countries have faced similar problems of cost and delay in civil processes. Zuckerman (1999) states that a sense of crisis in the administration of civil justice is by no means universal, but many countries have difficulties in the operation of their system of civil justice. Measuring the success of procedures is complex. It is not enough to ask whether the system produces correct judgements; it is also a question of how timely judgements are and how much they cost. The problem with civil justice usually involves one or a combination of the following: the rectitude of the decision, the cost and the delay (Zuckerman, 1999, pp. 3–12).

Provine and Seron (1988–89, pp. 158–159) wrote that there was “a pervasive sense that jurisdiction and procedure are too complex, that decision-making processes are not well suited to the tasks at hand, and that the whole civil justice system is too slow, too cumbersome, too expensive, and out of date.” Many countries undertook reforms designed to reduce the costs of and delays in civil litigation, and to render judges more accountable and efficient. Provine and Seron (1988–89, pp. 159) continue, that “the broad trend appears to be toward

ever greater concern with speed, cost and accessibility in the processing of disputes. These managerially focused concepts have become significant elements in contemporary concepts of due process and fairness. The challenge for courts is to balance this new management ethos with the political responsibilities assigned to legal institutions in a democratic nation. The way this challenge is posed and met varies from country to country, of course.” (For a review of the problems of civil procedure and international evaluations of reforms, see the special issues of the *Justice System Journal*, Vol. 13(2) from 1988–89, and *The American Journal of Contemporary Law*, Vol. 45(4) from 1997.)

Again, Palmer and Roberts state that “across jurisdictions with widely different histories, entrenched cultures of dispute management are subject to re-examination and challenge” (Palmer & Roberts, 1998, p. 1). Agencies offering mediation have sprung up, and the promotion of ADR and case management has gained momentum. Three features have been seen as distinctive of this change: 1. mediation in its various forms has become institutionalized at high speed, 2. lawyers have responded to these competitive forms of dispute resolution with novel client-management devices, with the development of neutral advisory and consultancy roles, and with attempts to adopt mediation as part of legal practice, and 3. the readiness of governments to approve the promotion and control of settlement through case management as new practices in courts (*ibid.*, pp. 2–3).

By the 1990s the courts in many western countries had largely approved the ideas of ADR and manifested interest in sponsoring settlement. The principles of this originally revolutionary movement had now been co-opted by states and institutionalized by legal professionals. The motive for settlement was no longer in the client-oriented critique of adjudication, but in the need for the state to cut costs and save money. The extensive interest in efficient court processing has supplemented the traditional due-process model by producing a new efficiency model of dispute resolution, oriented to problem solving under the control and case-management techniques of the courts (Ferrarese, 1988–89). The present situation in many western jurisdictions has been described as a sea-change in civil justice arrangements – a transforming relationship between adjudication and other forms of decision making, which gradually forces us to reconsider what a court is (Palmer & Roberts, 1998, pp. 345–350).

Against this western background, Finnish attempts to sponsor alternative dispute resolution still look relatively modest¹². At the moment it covers the duty

¹² Chiarloni (1999, p. 289) wrote that in Italy, as in many other European countries, the development of “informal justice” has been much slower than in the USA. As restraining factors he mentions 1. the weight of a long tradition of ritual justice, 2. the myth of jurisdictional unity, which generates suspicion of any attempts to lessen judges’ dominance, and 3. the fact that the costs of average proceedings are still much less than in the common law system.

to promote settlements within civil proceedings, the private settlement services organized by the Finnish Bar Association, summary proceedings in courts in certain types of civil cases, courts of arbitration and boards dealing with consumers' complaints, for example (for a review of alternative dispute resolution in Finland, see Pohjonen, 2001). Yet, the western developmental trend towards efficient case management and the promotion of settlements can also be traced in Finland. Recent attempts to sponsor settlements within courts instead of and besides traditional adjudication are themselves revolutionary (Haavisto, 1999; 2001).

Interestingly, the discussion on the inefficiency of courts and court reforms practically bypasses the users of the legal services, the clients. It seems that, in its efforts to promote administrative efficiency, the establishment has adopted the idea of settlement from the originally revolutionary movement, but not the focus on the clients and their needs. The client perspective comes in through the back door in discussions other than the debate on court reforms. It is more apparent in the procedural-justice approach, in studies on trust in the court system, and in studies on courtroom discourse. Still, its position in current literature is mostly a stable one, presenting the client as a passive receiver of legal services, not as an active collaborator in producing them.

2.6 Conclusions

The aim of Chapter 2 was to examine what was the “starting post”, the context from which the practitioners begin to implement the new procedural law. In order to understand how the new rules were implemented, it seemed important to understand what kind of “ingredients” the new law itself offered for the practitioners to create new models for their everyday practices. Similarly, there was a need to understand what kinds of new models began to be constructed in the professional discussion among legal scholars and practitioners prior to the reform.

The examination shows that the grounds for the new procedural code and the discussion on it were relatively technical and procedurally oriented in a narrow sense. Furthermore, there was a strong emphasis on the rationalized streamlining of proceedings. The law itself and the way it was interpreted in the debate among the professionals did not provide particularly concrete models for facing the parties and collaborating with them in the new types of hearing. Furthermore, they did not supply the practitioners with accurate models for applying the completely new and unknown practice of making settlements. Restricted to technical interpretation and implementation, as well as to the

rationalizing the proceedings, they largely omitted the more social aspects involved in developing the court system as a whole. I refer to Leubsdorf (1999, p. 67) who has criticized the often limited understanding of procedural reform: “The most firmly implanted myth of procedural reform may be that we can talk usefully about it as simply an effort to increase judicial efficiency, without talking about our visions of procedural and social justice.”

The conclusions of Chapter 2 suggest that the way in which the procedural law was written and then, interpreted in the discussions prior to the reform, provided neither concrete working models nor broader social aspects of justice for the practitioners. This, however, does not imply that the reform had been sealed and fixed in the form it was given before the implementation. Instead of looking at the intended reform as such and at what could be anticipated beforehand, we will, in Chapter 3, turn to the more general issues of implementing a reform and discuss more generally how the intended reform is interpreted and modified while in the process of being implemented by the practitioners. The implementation will be viewed as a learning process, in which the practitioners adhere to the ideas expressed in the reform agenda, but also go beyond them.

3 Implementation of Change as a Learning Challenge

In the preceding chapter, transition in the work of courts was examined from the internal perspective of the court system. Three themes – interaction and communication in courts, the position of the client in the court system, and settlement as a means of rationalizing court work – were recognized as central to the content of Finnish court reform, and also as a part of the extensive debate in international research on socio-legal developments. To broaden the view from intending changes to implementing them, the focus in the present chapter is shifted from the particular system in Finnish courts and court reform to the broader questions of change, possibilities of change and the implementation of intended change. Later in the study, I will argue that implementation cannot be understood adequately as the execution of pre-given models, but that it is rather a process in which the potential for new and emergent models and practices is included. Recognition of this potential as a particular form of learning presupposes a connection between issues of learning and issues of change and implementation. Direct communication between courts and their clients, especially in negotiating settlements, will, in the future, set the major learning challenge for court practitioners in terms of expertise. This hypothesis requires reconsideration of the concepts of learning and expertise.

3.1 Difficult Transition: Intention vs. Implementation in Changing the Courts

“Why simple solutions fail” is the sub-title of a book authored by Malcolm Feeley (1983). Feeley begins by referring to the severe critique presented against American criminal courts. The courts have been widely reported to be in a state of crisis and most efforts to change them have been seen to fail. The fact that they resist change and easily thwart reforms, or at least carry out the intended changes to a limited extent, has been observed by several scholars (Casper & Bereton, 1984; Eisenstein & al., 1988; Flemming & al., 1980; Nimmer, 1978; more

recently Leubsdorf, 1999 and Marcus, 1999). Provine and Seron (1988–89, p. 165) pointed out that American courts tend especially to blunt the impact of externally imposed changes: legislative change may be slow and sporadic, and the attempted institutional changes do not always occur. Feeley goes a step further in considering the overall systemic resistance to change in American courts. According to him, “The central obstacle to change in courts is not the resistance to reform, but is, more fundamentally, the lack of interest in even thinking about change” (Feeley, 1983, p. 192). The same profound resistance to change in the legal system is noted by Strier, who cites Alexis de Tocqueville describing lawyers as “united in their common interest and intent to maintain status quo at all times” (Strier, 1994, p. 229). In the Finnish context, the difficulties in promoting change in the legal system have been particularly connected to the legal culture and the mentality of judges: judges have been criticized for being conservative, passive and rigid in their legal thinking (Kempinen, 1990; Yrttiaho, 1996).

Observations on the difficulties in accomplishing changes in the court system are well in line with the first findings of research on policy implementation, which showed that the likelihood of achieving intended changes was marginal. The message of many studies on policy implementation was that changes – new laws or policies – often fail, or at least are not completed as intended by the legislators (Palumbo & Calista, 1990). The titles of the classic implementation studies highlight the discontinuity between legislative intent and bureaucratic action: “The implementation game – what happens after a bill becomes a law” by Eugene Bardach (1977), and “Implementation – how great expectations in Washington are dashed in Oakland” by Jeffrey Pressman & Aaron Wildavsky (1973).

All this draws a picture of the problematic nature of change. The difficulties in achieving changes in the way they are expected does not necessarily mean that changes do not occur – it may also mean that we should re-examine the way in which change is understood. The difficulties in promoting change – the reluctance of organizations to approve intended changes and adopt new practices, as well as failings of or alteration to planned changes – raise the question whether change can be understood as big, radical and once-for-all by its nature, or alternatively as something more modest, gradual, incomplete and comprised of series of small improvements. Can the locus of change be comprehended as something independent, or is it embodied in current practices and daily routines? More importantly, is change something that can be adopted from above, or does it have to be generated from within?

3.2 Differing Considerations of Change

Studies in the field of organizational change have acknowledged the profound changes in organizations and in the practice of management, indicating a period of great business turmoil. The accelerated pace of change is agreed upon, but the ways in which it takes place and could be promoted are not. In their recent publication, Michael Beer and Nitin Nohria (2000) distinguished two opposing approaches to organizational change, two archetypes, through which they attempt to pinpoint the main theoretical differences. The two contrasting approaches are called Theory E and Theory O of change.

The starting point of Theory E is the maximization of economic value (Beer & Nohria, 2000, pp. 3–12). Change efforts focus on strategies, formal structures and systems, and they are conducted from the top down. Top-down leadership, excluding the participation of teams and employees, emphasizes the strategic decisions first made by the leader. Change is planned and programmatic: financial goals and programs to achieve them that are planned and controlled from the top, dominate the agenda.

Theory O addresses the development of the organization's capabilities to identify and solve work-related problems (*ibid.*, pp. 12–19). It focuses on the development of a high-commitment culture, where employees' tacit knowledge about problems is taken into account. Participation and collaboration, rather than top-down orders, are seen as vital to ensure long-term performance improvements. Change is emergent, less planned, and occurs without pre-given blueprints.

These two theories of organizational change tackle the very same questions to do with the nature of change presented earlier in this study: does change come from the top down or the bottom up, is it once-and-for-all or a series of small improvements, and most interestingly, is it planned or emergent?

Alongside the more conventional model of goal-directed organizations performing systematic changes according to pre-set objectives (see e.g. Ghoshal & Bartlett, 2000) is an alternative view of organizations as constantly evolving. Weick (2000) has opposed the overestimation of the centrality of managerial planning and the promises of fresh starts that are so common in the business of organizational change, and has argued in favor of the value of innovative sense-making on the front line, the wider applicability of small experiments and the continuous nature of change (Weick, 2000, p. 223). Looking for real-world examples to highlight the nature of emergent change, he found a recurring story of learning from both failure and success, strategy implementation that is replaced by strategy making, the appearance of initiatives and innovations that are unplanned, unforeseen and unexpected, and small actions that have surpris-

ingly large consequences (ibid., p. 225). In accordance with Weick's definition of change as emergent, ongoing, continuous and cumulative, Orlikowski (1996) provides an insightful understanding of change as locally produced, consisting of small steps and alterations.

“Each variation of a given form is not an abrupt or discrete event; neither is it, by itself, discontinuous. Rather, through a series of ongoing and situated accommodations, adaptations and alterations (that draw on previous variations and mediate future ones), sufficient modifications may be enacted over time that fundamental changes are achieved. There is no deliberate orchestration of change here, no technological inevitability, no dramatic discontinuity, just recurrent and reciprocal variations in practice over time. Each shift in practice creates the conditions for further breakdowns, unanticipated outcomes, and innovations, which in turn are met with more variations. Such variations are ongoing; there is no beginning or end point in this change process.” (Orlikowski, 1996, p. 66.)

As people meet breakdowns, exceptions, opportunities and contingencies in accomplishing their everyday routines, they improvise, produce ongoing variations and thus enact emergent changes at the micro-level. Emergent change consists of ongoing accommodations, adaptations and alterations that produce fundamental change without a priori intentions (Weick, 2000, p. 237). Weick (p. 226) equates fundamental organizational changes with the idea of emergent strategies, and refers to the work of, for instance, Eden and Ackermann on strategy maps (1998), Minzberg & al. on strategy formation as an emergent process (1998), and Czarniawska and Joerges on the travelling of ideas (1996).

Accordingly, Robert Cole (1999) referred to American organizations' adoption of the Japanese quality movement as an evolving series of “minifads” spread over time, forming the building blocks for broader development. The building-block vision of organizational change did not include the survival of each and every initiative as long as some pieces of these prior initiatives were embodied in its successors. Many firms in Cole's study abandoned the trendy terms of the quality movement and “with less fanfare, they simply added new skills and routines to the organization” (Cole, 1999, pp. 235–236). The strategy of small wins anchored in existing practices can be seen as the opposite of fostering dramatic revolutionary transformations, much more favored in business thinking. Nevertheless, Cole lists several advantages of the small-win strategy: small wins can occur in both parallel and serial form, resulting in large change; they pave the way for large changes; many revolutionary changes have been found, on scrutiny, to be based on a series of small wins; being anchored in current practices, small wins allow for learning rooted in daily routines (Cole, 1999, p. 237).

Attempts have been made to understand the gradual and overlapping character of change within activity-theoretical studies on organizational change and learning. According to this approach, the evolution of work and organizations is understood in terms of developmental cycles. Global cultural changes in the organization of work are fundamental transitions from one historical phase to another, for example from the craftsman's work to rationalized work and again to mass-customization. The concrete, local developmental cycles of reorganizing work have been the main focus of research and intervention in many activity-theoretical studies. The theory of expansive learning has been thus far applied mainly to large-scale transformations in activity systems, where the developmental cycle has taken several years (Engeström, 1999a).

Large-scale expansive cycles of local organizational transformation always consist of small cycles or mini-cycles of innovative learning. The traditional scale of analysis has been radically changed, the focus having shifted increasingly to these smaller steps or mini-cycles that push the development forward on the curve of the local cycle (Engeström, 1999a). The mini-cycles – phases or moments – of innovative learning can be regarded as potentially expansive. The emergence of small-scale cycles of innovative learning does not necessarily guarantee that a larger expansive cycle persists. Small cycles may remain isolated events, and the overall development may become stagnant or regressive, or fall apart. For this reason, the mini-cycles of innovative learning have to be examined in the framework of the larger expansive learning cycle. Nevertheless, the small cycles appear to be a promising focus of analysis, since they expose the local discursive construction of social practices and knowledge creation in which innovative learning is also embedded.

Engeström (2001) recently endeavored to make sense of the often unremarkable, piecemeal textures beneath articulated innovations by studying the “undergrowth” of change as cognitive trails. Cognitive trails – the concept originally employed by Adrian Cussins (1992) – are used to catch and analyze expansion in terms of mundane actions and small traces. Expansive learning processes are increasingly taking shape as reorganization and renegotiation of collaborative practices between and within activity systems. Concept formation is an important aspect of horizontal movement and boundary crossing where multiple competing ideas collide and emerge as potential new concepts.

A concrete analysis of boundary-crossing actions in the course of a developmental intervention in medical care showed that several boundary-crossing and stabilization actions with expansive potential did emerge, but that the participants failed to stabilize a mutually accepted idea and commitment. However, even relatively short and fragile cognitive trails, which once are acknowledged in the discourse between the representatives of different activity systems, may

be more persistent than they look. Such trails may gradually compose “the invisible underlife of learning”, an emerging texture of landmarks that will make them easier to navigate in the future and provide a fertile ground for the creation of more explicit shared instruments (Engeström, 2001).

Among the studies on court reforms, Feeley (1983) promoted an understanding of changes emerging from slow, partial efforts. What he considered typical of the American criminal-court system, however, was that change is often initiated by dramatic events and offered as a magnificent solution. It is mostly seen in terms of bold campaigns against enemies – most preferably non-reactive ones, such as the caseload or crowding – rather than as working quietly to implement incremental changes in existing institutions. Predominant thoughts do not give rise to serious thinking or realistic expectations (*ibid.*, p. 192).

Recent findings and attempts to re-examine the concept of change seem to encourage the laying aside of the idea of change as merely vigorous breakthroughs dictated from above, and the recognition that it is also gradual, often consisting of small but interconnected alterations and adjustments from below. Then, what becomes interesting is the evolving texture of these gradual changes. When conflating, the gradual and small alterations may contribute to a radical sea-change.

3.3 Implementation in the Context of Courts

The interest in this study in the change in Finnish court practices after procedural reform inevitably connects the study to research on policy implementation. The implementation of a court reform brings a unique perspective to the study of organizational change, flavored by the fact that in national court reforms, objectives and orders are always – at least to some extent – set in advance by people other than the implementors themselves. How do ideas of top-down managed, planned change and alternatively, ideas of emergent change and small alterations, resemble the dynamics of implementation?

The concept of implementation refers to how something – a law, reform, policy, program or innovation – is put into effect. Traditionally, studies on planned change have dealt with how policies and legislative drafts are planned, not with what happens once those policies and norms are adopted (Feeley, 1983, p. 35). Since the mid 1970s, interest in studying policy implementation as a distinct phenomenon in the creation of policy outputs has arisen. Early implementation studies stressed two discoveries: the significance of implementation for public policy had not been noted previously, and implementation had an independent effect on policy outcomes (Palumbo & Calista, 1990). As a result of the

special emphasis placed on implementation, the realization of actual reforms became interesting. The puzzling findings of the case analysis were that many socially important programs and reforms seem to fail (Bardach, 1980; Pressman & Wildavsky, 1984).

Implementation research focused on the gap between legislative intent and bureaucratic action. Researchers tried to make sense of why the serious intents of legislature did not materialize when put into practice. The analysis proceeded from the conventional assumption that the bureaucracy should serve as an implementor of the policies drafted and established by authoritative policy-making institutions (Brodkin, 1990, p. 109). The problem addressed in the analysis was to understand why implementation differed from the expressed purposes of the policies. Detailed case work concentrated on the obstacles to implementation, and revealed long lists of multiple impediments (Brodkin, 1990; Goggin & al., 1990). According to the critics, asking “why the objectives were not achieved” was bound to lead to pessimistic conclusions (Winter, 1990, p. 23).

The metaphor of a gap between intent and outcome¹³ has its roots in an approach that could be called a top-down model of implementation (e.g. Mazmanian & Sabatier, 1981; 1983). The top-down approach considers implementation to be the simple, purely technical execution of the policymaker’s intention, and implies that the rules are implemented as they are intended – if they are not, the problem lies with the implementors. This approach is exceptionally clear in the command and control model, which is a hierarchical model that emphasizes the mandates set out in the legislature and local compliance with them (e.g. Goggin & al., 1990, p. 183; Tala, 2001, p. 22). Tala (2001) presented a model that simplifies how legal rules are assumed to take effect in general (Figure 3.1). The model presupposes that the given rules and orders are followed and executed in a uniform and predictable way.

¹³ The gap observed in implementation studies is closely related to the gap between the law in books and the law in action, which is regarded as one of the major questions within the field of law and society studies.

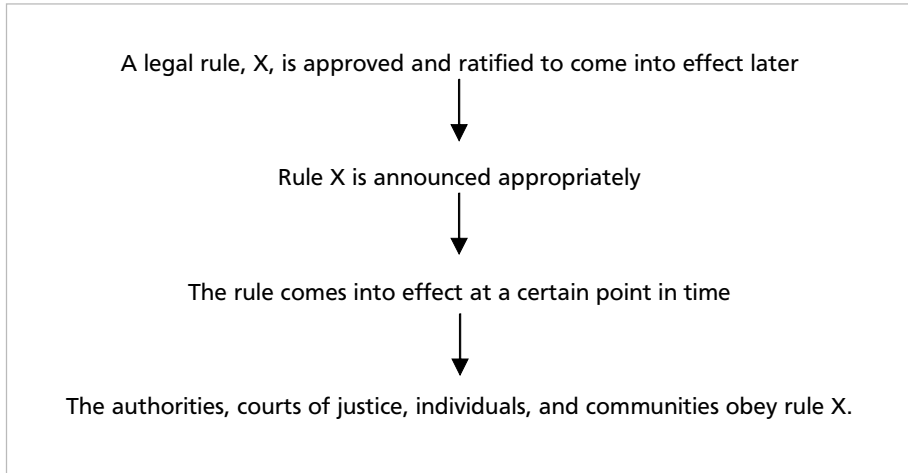


Figure 3.1 *The Command and Control Model: How a Legal Reform Should Take Effect (Tala, 2001, p. 22, translated and simplified by V.H.)*

The picture of the effects of a legal rule drawn in the command and control model appears relatively straightforward and oversimplified. Nevertheless, as Tala (2001, p. 23) points out, it still has some advantages: Firstly, it sums up some deeply-rooted assumptions about laws and their impact, which may have an undertow effect in the legislative process. The same undertow is apparent in public debates, when attempts are made to redress wrongs through new legislation. The model also emphasizes the fact that legal rules in general imply authority and control over individuals, exercised by an outside institution. This control is intensified by the possibility of the use of coercion and force by governmental officials. In this sense, the command and control model represents the elementary ruling mechanism in society.

In the Finnish context, the way in which procedural reform has been understood largely follows the command and control model described above. Unlike the large amount of Anglo-American research on legal institutions and their role in implementing legal rules, Finnish research has been confined to the right or most justified content of the rules, not to how they can be carried out in practice (Tala, 2001, p. 225). Interest has been limited to what could be considered the judicially correct reading of the new rules, trying to capture the intention of the legislator. This presumes that the rules are implemented as they are intended.

The dominance of the command and control model was also detectable during the legislative process, during the time just before the new procedural rules were implemented when the basic lines of the forthcoming legislation had already been fixed. Some of the chief justices in the Finnish district courts were

ready to update their proceedings and practices to follow the prospective procedure more closely before the new rules were legally in force. They realized that promoting the ideas of oral and centralized proceedings was already possible – and feasible – under the old procedural rules. Following rules that some doubted were exactly according to the established law raised resistance among other judges, which led to complaints to the parliamentary ombudsman (on this debate, see Halila, 1989; Möller, 1989b; Virolainen, 1989). This episode in the history of the procedural reform highlights the confidence among the Finnish legal authorities in the power of established legislation in directing legal practices. As Virolainen (1989, pp. 571–572) insightfully stated, it also touches upon the larger question of how far an individual court can develop its procedures and practices through its own measures, that is, without a dedicated procedural reform¹⁴.

One of the fundamental problems of implementation (see Browne & Wildavsky, 1983a, pp. 217–218; Tala, 2001, pp. 138–142, 266–273) was touched upon in the Finnish debate before the reform: how strictly the law should be enacted in order to reach unified and unvarying implementation (Legal Committee report 16/1990; Lindholm, 1989). This also gives an indication about the reliance on the top-down perspective, in that the implementors adjust their practices according to the intentions of the legislators.

Failure to impose top-down changes led to criticism of top-down thinking. Eisenstein & al. (1988, p. 293) directed their critique towards the reforms that legislators sought to impose from above, and argued that changes in court practices, for instance in sentencing, could not be achieved merely by passing a new law. Questioning the command and control model by implication, Eisenstein & al. state (1988, p. 296) that reformers often assume “that we have a hierarchic, centralized, obedient system of courts that will automatically and faithfully adhere to new rules.” Arguing against the top-down approach, they suggest that reforms do not operate in the “vacuum of Law”, as the mechanistic execution of legislative intentions. If changes occur, they must take place in the real world of complex legal communities and their everyday routines, which vary from court to court. As a result, reform from above is always imperfect.

Thus, a reverse perspective on implementation began to emerge alongside the top-down approach. Implementation was seen as a series of change efforts that emerge from within the agency or community, thereby drawing on local knowl-

¹⁴ In terms of the attempts of the judiciary to develop court practices by itself and on its own initiative, Finnish legal culture clearly differs in its passivity from the American one at least. Leubsdorf (1999, p. 63) stated that often “procedural reform simply put the seal of legislation on changes that many judges are already implementing”. Similarly, Marcus (1999, pp. 102–103) gives an example of bottom-up development, where the stimulus for amendments to the national rules came from judges spurred on their own experiences of developing proceedings through case management.

edge and lived experience. The bottom-up implementation was seen as more successful because, if compared with the top-down imposed changes, it would be less foreign to the local setting. According to the bottom-up perspective, implementation is not a purely technical exercise to carry out the directives of the legislators, but rather a continuous process in which the reform itself is altered and modified by the practitioners themselves (e.g. Hjern & Porter, 1981; Hull & Hjern, 1987; Elmore, 1982).

As Winter (1990, p. 19) noted, the dichotomization of the major implementation approaches into two – top-down and bottom-up – is probably too rough to do justice to the many perspectives involved. Here, I will focus on three basic types of findings, presented in several implementation studies within the bottom-up approach, that are especially relevant with regard to my interest in change in this particular study. These are: (1) the local construction of implementation, (2) the importance of local actors in implementation, and (3) the evolving nature of implementation. These three areas are overlapping and closely interconnected, but for clarity, I will endeavor to keep them analytically separate when introducing them.

Whereas studies within the top-down approach concentrate on the *gap* between legislative intent and actual implementation, those with the bottom-up perspective focus on the *discretion* employed by the implementors. As Tala (2001) has pointed out, the relation between the content of the legal rules and individual discretion in interpreting them is the main focus in implementation studies. One of the main findings has been that the control exercised by central government is inevitably deficient. From the perspective of central government, this deficiency indicates problems with or limitations in the ability to direct other agencies as intended. From the perspective of those directed by central government, it implies making the necessary room for their own discretion (Tala, 2001, pp. 227–228).

The same problematic relation between the content of legal rules and individual discretion is recognized by Browne and Wildavsky (1983a). According to them, policy formulators cannot foresee all the difficulties with implementation, and hence are confronted by a coding dilemma. Should they prospectively employ explicit, controlled implementation directions or use unspecified, implicit, discretionary implementation coding (*ibid.*, p. 218)? From the bottom-up perspective, they suggest that, during policy formulation, the implementability of a policy decision can never be comprehensively considered. As there will always be uncharted territory in the implementation process, the implementors are pioneers of a kind, forging new links in unpredicted environments. The authors emphasize the role of local organizations through which the local-level implementation of federal programs takes place, and point to the tendency

toward divergence during implementation. “As a federal policy mandate is expressed downward toward local delivery in the implementing hierarchy, its local programs, with the same directives, are translated differently in dissimilar environments” (Browne & Wildavsky, 1983a, p. 226).

Implementation has been found to be a field of many voices and divergent objectives by several researchers. The variation in implementation outcomes among countries, local settings, policy arenas and even across different sub-elements of the same program has been widely recognized (Winter, 1990, p. 23). Local variation as an inevitable starting point determined by the nature of the policy process is explained by Palumbo and Calista (1990, pp. 12–13): “Federal programs seldom are carried out exactly as specified in the legislation. The gap occurs because legislation often has broad and vague mandates and because local jurisdictions will adapt the legislation to fit their needs and there is little federal government can do to force them to do otherwise”.

Eisenstein and his co-authors (1988, pp. 298–299) also make an important contribution to the further understanding of implementation as principally a local exercise. The variation in implementing state-wide reforms is explained culturally through the character of courts as complex communities with qualities of their own: degrees of implementation and its effects vary substantially due to the differences in courts and the communities they serve. State-wide conformity is an illusion, and identical changes throughout a state can never be achieved.

Locally determined implementation is closely connected to the finding that frontline actors hold a key position in policy implementation. Studies taking the bottom-up perspective have revealed that local actors – street-level bureaucrats – actively shape public policy through their own contribution during the implementation process. The legal regulation is bound to be unclear and incomplete by nature, as different agents will always endow the rules with their own objectives, expectations and beliefs. The policy outcomes are not only shaped by the implementation process itself, but in some instances, they are actually determined by it (Palumbo & Calista, 1990).

The top-down view on implementation was most radically challenged by Lipsky (1980), who regarded the street-level bureaucrats as the factual policy-makers: laws are just statements with no social existence until they are translated into action by the implementors when they make their decisions. According to the bottom-up approach, law formulation is only a small part of policy making, and much of the policy is made during implementation itself. The implementors always exercise discretion that cannot be completely controlled: there are no precise standards that would specify exactly how judges or other street-level bureaucrats should perform their job. “In sum, policy formulation occurs

during implementation by bureaucrats developing routines and shortcuts for coping with their everyday jobs” (Palumbo & Calista, 1990, p. 11). The bottom-up perspective is summed up by Palumbo and Calista: “Implementors are involved in every stage of the policy cycle, from design to redesign. Implementors not only help define issues and solutions at the agenda-setting stage; they help to create policy during formulation. Most significantly, they shape policy because of the enormous and irreducible discretion they have, particularly at the street level” (Ibid., p. 15).

The evolving nature of implementation means that policies are changed through political and organizational conditioning and given more specific content as the implementation proceeds. As Majone and Wildavsky (1984, p. 197) suggest, “When we act to implement a policy, we change it”. That this happens does not connote policy failure from the bottom-up perspective (Palumbo & Calista, 1990, p. 6).

Pressman and Wildavsky (1984) view adaptation as an evolutionary characteristic of implementation which occurs when a policy evolves in response to its environment, as each modifies the other. Mutual adaptation – defined as a product of environmental response to the policy intent – is unavoidable, and unanticipated consequences must be expected in any process. Mutual adaptation includes the evolution of both the content of the policy to be implemented and those implementing it. “As programs are altered by their environments and organizations are affected by their programs, mutual adaptation changes both the context and content of what is implemented” (Pressman & Wildavsky, 1984, p. xvii).

3.4 Towards a New Perspective on the Implementation of Court Reform

The findings of the implementation studies – especially those taking the bottom-up perspective – support the idea of change as consisting of small developments embodied in practices at the local level. The discretion of the local actors in giving their own meaning and shape to top-down reform, as well as the evolution of the reform as it proceeds, both point to the idea that changes are best understood as locally produced small alterations, not only from the top down, but also and especially from the bottom up, embodied in the implementors’ practices. From this viewpoint, the bottom-up perspective on policy implementation could serve as the starting point in my study. Limited largely to the factors or processes promoting or inhibiting the effective execution of rules, implementation studies have nevertheless set the detailed examination of the local implementation process and the requisite learning on one side. The need to consider the viewpoint of the implementors – not only when they just

implement the rules, but also when they address the problems they encounter from a broader perspective and use the law as one potential tool – has been recognized (e.g. Tala, 2001). Yet, methodologically, studies thus far have been unable to capture the situational aspect of implementation, which appears when the legal rules are tried out in the actual practices of the implementors. In terms of situational understanding, I would argue, that despite frequent attempts to open it up, implementation has remained a closed book (see Palumbo & Calista, 1990). What are the dynamics of implementation when the reformed rules are put into practice in interactive encounters between courts and their clients? Moreover, what kind of learning and expertise is needed in that process? To answer these questions requires further development of the top-down and bottom-up approaches.

The acknowledged fruitlessness of treating the top-down and bottom-up approaches as two opposing schools was among the first warning signs of a possible deadlock in implementation studies (Palumbo & Calista, 1990; Brodtkin, 1990, p. 107; Goggin, 1990, p. 183). Combining the two approaches in one and the same study was suggested as one way forward, but theoretical and methodological difficulties were soon distinguished (Fox, 1990, pp. 203–206; Palumbo & Calista, 1990, p. 13). The need for accumulation in implementation theory and the desire for a general theory or major paradigm (Winter, 1990, p. 20; Schreier & Griffith, 1990, pp. 174, 178) were also indicative of the dissatisfaction with how the studies were progressing¹⁵.

Recently, Tala suggested that implementation could be fruitfully examined as a *variable* (Tala, 2001, p. 264). This means that when the implementation of a particular rule is under scrutiny, the starting point is that the implementation is directed and defined according to several factors. From the viewpoint of the legislators, viewing it as a variable means that it may be evaluated on a scale, at one end of which may be implementation fully as intended and at the other end it is only symbolic, totally the reverse of what was intended (ibid., p. 264).

Examining implementation as a variable excludes the evaluation that is typical of legal thinking, in which all performance is reduced to the according-to-the-rules or against-the-rules dichotomy. Although this dichotomy may be central when legal rules are implemented, it gives too narrow and one-dimensional a picture of the non-regulated interaction that occurs. If, as Tala argues, implementation is considered a variable, it could be analyzed along dimensions such as more or less implemented, effectively or deficiently implemented,

¹⁵ Following a fruitless search for alternatives to the division between the two schools (see the edited volume of Palumbo & Calista, 1990), implementation research has typically moved into other fields, such as evaluation studies, policy analysis and law enforcement (Tala, 2001, p. 223).

completely or partly implemented and well or less well implemented (ibid., p. 265).

Tala's suggestion is valuable as an attempt to broaden the simplistic and one-dimensional examination of implementation, but it seems confined to determining the extent to which some attributes define the implementation process. The concept of the variable has traditionally been associated with measuring quantities of different phenomena. Yet, it seems plausible that qualitative questions irreducible to quantity may be more interesting in implementation issues. To support this point, I will briefly refer to my data in order to give some examples.

In in-depth interviews conducted three to four years after the procedural reform, district court judges were asked to describe and explain their work practices during the proceedings and in the hearings. One of the questions was about the settlements: how the judges considered settlements and how they promoted them in their daily practice. Seven judges out of the eight interviewed discussed this issue, and as a researcher I summarized their originally long and detailed answers as follows:

Judge 1: I take up the issue of settlements, refer to the advantages and ask the parties to negotiate by themselves, maybe leaving the parties alone to negotiate after the preliminary hearing. I do not actively promote settlement. I would not negotiate with one party at a time without the presence of the other.

Judge 2: I offer time to the parties for negotiation. I inform them of the pros and cons. I once made my own suggestions for a settlement.

Judge 3: I leave the parties alone to negotiate. If needed, I could suggest a scale for a feasible settlement.

Judge 4: I do not especially work towards a settlement, but rather, see if some individual facts or demands within a case could be settled. I do not actively inform the parties about the possibility to settle.

Judge 5: I always take up the issue and advise the parties to settle, but I do not contribute more than that.

Judge 6: In the beginning, I was resistant to the idea of settling disputes. Now I suggest that the parties negotiate and I may leave them to discuss matters by themselves. I hesitate to make proposals.

Judge 7: I try to obtain settlements in disputes with small financial interest, and may even exert some pressure. In uncertain cases, a settlement is always best. If the range is known, I push hard for settlement.

Another question concerned determining in the preliminary hearing the themes that the witnesses were supposed to cover in the main hearings: what kind of practices the judges followed in the preliminary hearings when negotiating with the parties about the issues that the witnesses were going to talk about. This issue was discussed with six judges out of eight, and the responses were again condensed as follows.

Judge 1: The themes are nominated, but the actual witnessing in the main hearing can go beyond them.

Judge 2: First the disputed issues are examined, and then the themes are determined. The themes are formulated in the joint discussion.

Judge 3: I do not require firmly restricted themes, more like headings. The starting point is the dispute and the end is to clear it up. Policing the themes in the main hearing does not serve any purpose.

Judge 4: At first I did not pay any attention to the themes, now I do. If the parties are lay people, I may be almost compelled to define the themes myself.

Judge 5: The themes may well be loose. I do not discard cases even if the parties talk about something that the themes do not cover.

Judge 6: First I make a list of the disputed details, and then I require firmly condensed themes. If the theme does not sound logical, we will be discuss it together. Very often the discussion ends by relinquishing the theme.

Even a superficial comparison of the interviews reveals that there is variation in the way that the new procedural rules are implemented within one district court, and that the variation consists of *qualitative differences*. Qualitative differences in how the judges give meaning to the new rules, as well as in their practices in conducting the cases, becomes most interesting. According to the new rules, the judges are obliged to promote a settlement, and when needed, also to make their own suggestions. Although the content of the rule is relatively explicit, it is hard to say which of the responses conforms to it most. What is the aim of the rule, and how hard should the judges work in order to reach a settlement? Is it the intention of the law that judges should encourage the parties to negotiate, or that they should take an active part in the negotiations themselves? The content of a rule is hardly ever explicit enough for an evaluative judgement of this kind to be made.

The new procedural law requires that one of things that has to established in the preliminary hearing is “what evidence the parties are going to present, and what is going to be proved with each piece of evidence” (Procedural Code, Chapter 5 19§). When the law says that certain issues have to be established, it does not refer to commands ordered by a judge, nor to explanations given by the

parties, but to the collaboration and interaction between the judge and the parties (Laukkanen, 1995, p. 195). The models for this interaction are not pre-given in procedural law; instead, they comprise the gray area where discretion is to be used. Some evaluators may suspect intentional negligence of the procedural rules in some of the judges' responses concerning the themes of witnesses' testimonies. Instead of examining these as evidence of partial or bad implementation, it is more promising to focus on questions such as *how* judges interpret and carry out the new procedural rules, or *why* they choose to follow, bend or bypass them.

One step this direction is taken by Dvora Yanow (1990), who suggests an interpretive logic in studying implementation. The study of the "implementation problem" – that the outcomes do not match the intent – could be approached through four analytically distinguishable lenses: 1. the human-relations lens looking at the behavior of individuals, 2. the political lens examining the dynamics within and between groups, 3. the structural lens focusing on the organization itself as a set of rules, and 4. the systems lens targeting organizations as they relate to each other in an environment (*ibid.*, pp. 214–215). Each lens embodies an idea of what is important in studying implementation, and uses particular concepts and terminology of its own. Essential to all of them is a common logic of inquiry, which Yanow (1990, p. 220) calls "ontological logic". It holds that implementation is an activity with factual characteristics in the real world, and because they exist as objective facts, they can be discovered.

According to Yanow (1990, p. 218), the four-lenses idea was developed from several shared assumptions about the nature of the "implementation problem", many of them echoing the early view of implementation as the simple execution of policy formulations. Firstly, since implementation has been understood to begin at the conclusion of the policy-making phase, its problems have been assumed to lie in the post-policy-making realm. The second assumption is that the implementors' point of departure is the written language of their policy mandate, and particularly its literal meaning. Implementors are expected to restrict themselves to the literal meanings of the policy language, which are expressions of legislative intentions. The third shared assumption is that implementors begin with an intention to implement the policy as it is written, and any problems are the result of something interfering with that intent.

As Yanow (1990, p. 219) points out, these assumptions give only a restricted view on implementation and organizational behavior: "We do not have evidence to support an assumption that implementors are isolated from the general historical and value context of the policy they are implementing, nor that they are blind to the multiple meanings of policy language that carry those contextual values." The counter-assumptions suggest a logic of inquiry, which Yanow

calls “interpretative”. It treats implementation as a set of activities in which multiple meanings are expected. The central questions within this logic include “What meanings did agency chiefs, legislators, front-line workers and clients make of this policy?” “How did these meanings shape the policy’s implementation?” (ibid., p. 221). The task of the researcher using interpretive logic is to investigate the coexisting multiple meanings and multiple interpretations given by the different actors, and to analyze the effects of those meanings and interpretations on implementation efforts. Departing from ontological logic, the interpretive approach emphasizes individual interpretations and shared, compatible and conflicting meanings; interaction in meaning making and the role of negotiation in the creation and destruction of shared meanings; and the ongoing reinterpretation of implementation activities (ibid., p. 221).

The interpretive approach suggested by Yanow has several implications for implementation research (ibid., pp. 223-226). As far as the research design is concerned, it requires a longer time perspective and larger setting than most studies to enable the historical development and vertical and horizontal variations to be traced. For the research agenda, it implies that implementing activities are understood as interpretations of policy statements, and that goals are seen as cultural creations subject to multiple interpretations. A further implication is that the gap metaphor changes its nature. It is no longer something to be explained away, but something to be explained. From the interpretive point of view, the gap is expected, since we are encouraged to anticipate interpretations that change over time and exist in multiple versions simultaneously.

In her article, Yanow interestingly opens up the interpretative approach to implementation and puts forward good suggestions for re-evaluating our understanding its nature. The multiple, even conflicting interpretations of implementation as a process involving interaction and negotiation on shared meanings, the enlarged scope of the potential actors and its evolving and iterative nature, are insightful standpoints generating a new understanding.

What remain untackled in Yanow’s article are the origins and sources of the interpretation itself. According to her, top-down policies are interpreted and given meaning – understood, explained, and also altered – from the bottom-up by the implementors. Where do these interpretations derive from? One answer is given by Yanow herself, who refers to the accumulation of values and beliefs embedded in a policy culture as a source of the implementors’ interpretations (ibid., p. 219). The inherited models of policy culture are an important source of interpretation, but not the only one. There is also the questioning of current cultural models and the production of novel local solutions, which have no pattern in the prevailing culture. This potential for new and emergent processes urges us to connect the issues of *learning* with implementation.

3.5 Learning in Implementation: From Adaptation to Deutero-Learning

Learning has been mainly referred to in the literature as an unquestioned necessity for successful implementation, if it has been mentioned at all. Interestingly enough, in the large collection of articles on implementation edited by Palumbo and Calista in 1990, the concept of learning is not included in the subject index. Recently, the importance of implementation and evaluation research as a means of accumulating knowledge on law drafting and of generally advancing joint learning about regulation has been recognized (Tala, 2001, p. 11).

In studies with a top-down perspective in which implementation is understood as the literal execution of written mandates, learning could best be described as *adopting* the new rules. Implicitly associated with the command-and-control model, learning includes the adoption of the content and the embracing of the idea of the new policy. It is seen as a non-problematic result of “pouring” the necessary information into those who are to implement it. Even though the gap between the outcomes and the intent was the central focus of top-down research, it was not discussed in terms of learning.

The bottom-up perspective brought in the concept of discretion, rather than command and control. Discretion implies that the implementors always have several options from which to choose, ranging from the decision whether to act at all, to deciding on alternatives of active operation (Tala, 2001, p. 266). As a result, local and individual applications within a particular implementation are possible, and the implementors have more influence. Consequently, the implementation process is subject to constant modification and adjustments in goals and strategies. Thus viewed as evolution and mutual adaptation of both the policy and the implementing organization it already incorporates the concept of learning. According to this view, learning is understood as a continuous process of *adaptation*, where the implementors learn to fit and adjust the policy to local needs, and to make their practices conform to the new policy (on the notion of adaptation, see Hutchins, 1995).

The most thorough contribution to the notion of implementation as adaptation, and the most promising attempt to incorporate learning into implementation, was made by Angela Browne and Aaron Wildavsky in their two articles (1983a and 1983b), included in the third expanded edition of Pressman’s and Wildavsky’s well-known book on implementation (Pressman & Wildavsky, 1984). Browne and Wildavsky define adaptation as occurring when a policy evolves in response to its environment, each bringing about change in the other, thus describing implementation as an evolutionary process.

“Our view is based on the premise that a policy evolves during its implementation by adaptation. Words on paper, mandated by an executive or administrative order, a statute, or a court ruling are translated into actual operations in a real environment. The process of adaptive translation subjects a policy to the most fundamental evolutionary test, that of its viability within the environment.” (Browne & Wildavsky, 1983a, p. 227)

Browne and Wildavsky draw a parallel between implementation and the organizing forces of other evolutionary processes, since “all living things implement, evaluate, learn to adapt and evolve” (Browne & Wildavsky, 1983a, p. 226). The dynamics of implementation are compared to the flight of a bat, which finds its bearings by means of echolocation. It adjusts its flight according to the feedback it generates and receives from its environment. Accordingly, if implementation is the flight, evaluation should serve as echolocation on the wing (*ibid.*, pp. 226–227).

However, humans are not born with policy-evaluative abilities. As a society, we have to learn them. Policy implementation is a far more complicated process than the flight of a bat, and requires greater effort and consideration.

“More than chemical osmosis or sonar echolocation, policy evaluation is a conscious attempt to generate and learn from policy-relevant feedback. At this we are novices. Our ideal is that of increasing the effective utilization of information; evaluation during implementation should engender not a summary but a continuous learning process.” (ibid., p. 227)

Browne and Wildavsky (1983b, pp. 238–239) ground their concept of learning on the classification developed by Gregory Bateson (see Bateson, 1972). His theoretical model of different levels of learning was based on the idea that a change takes place each time something is learned, the lowest level of learning being Learning zero, the mere receiving of a signal with no evaluation of the experience. As the same error is indefinitely repeated and there is no change in response to a continuing stimulus, Learning zero is, in essence, non-learning. The next level of learning, Learning I or simple learning, incorporates feedback from the event into the organism’s memory. The classical example is a child who, after touching a hot iron, has learned something if he does not touch the hot iron again. Finally, the higher level of learning is “learning to learn”, or “deutero-learning”. On this Learning II level, the one-to-one correlation between a stimulus

and a change in behavior is superseded and instead, information concerning the process of change is recognized and purposively selected¹⁶.

Re-conceptualizing implementation as an evolutionary learning process shakes the traditional idea of achieving mandated objectives from solid ground. If self-designing and problem-defining organization is the ideal, what happens to the original objectives that were supposed to be implemented? In their response to this, Browne and Wildavsky (*ibid.*, pp. 239-241) stress the role of evaluation as essential to the learning process, especially learning to redesign: when both objectives and policies are changing, implementation is determined not only by looking back, so as to assess the fit between objectives and accomplishments, but also by looking forward to new, more informed relationships between ends and means. Learning includes learning about how to achieve objectives as well as about whether and to what extent they are worth achieving. Evaluation facilitates such change-generating learning.

Still, the question of what to learn remains and puzzles the authors: is learning to implement a policy learning how to achieve predetermined goals, learning how to alter the mix of objectives and the given resources, or learning how to change the whole system that is producing the policies? Here the authors are not concerned with what learning processes in implementation actually look like, but rather with what they ought to look like. They refer to the philosophical disagreements on what sort of learning there ought to be: programmatic, policy-oriented or systemic (p. 245).

Finally, Browne and Wildavsky re-conceptualize the role of an implementor as a purposive evaluator – that is, as a learner – and as an explorer testing a hypothesis (*ibid.*, pp. 255-256). A learning organization should not evaluate the implementation against the pre-given objectives alone, but also in light of all the discoveries made throughout the process. They suggest that evaluation that is insensitive to the problems of transforming the policy makers' ideas into practice leaves the best bits unexamined. They call evaluators who simply assess the accomplished transactions or services that are in line with the expected mere accountants, and call for the appreciation for evaluation as continuous learning. In fact, they turn around the conventional idea of comparing outcomes with objectives, and point out that the rate at which the original objectives are redefined along the way actually represents the amount of learning during

¹⁶ Bateson's famous model has inspired numerous later scholars. In the context of organizational learning, the work done by Argyris and Schön (1978; 1996) is among the best known. In their theory, a non-learning organization repeats the same error endlessly, whereas in a simple-learning organization the error is detected, its sources discovered and strategies for its correction devised. In the case of deuterio-learning, on-going self-evaluation and development becomes a goal, and the organization learns to interpret and evaluate new signals. It defines problems and generates new solutions, but also redesigns their solution-generating processes.

implementation. Evaluation that facilitates learning includes implementors as active in shaping policies and promotes a view on implementation as an exploratory process.

3.6 Expansive Learning as Creating New Forms of Activity

By integrating implementation and learning through the concept of adaptation, Browne and Wildavsky make a valuable contribution to understanding policy implementation as a process of individual and collaborative learning. In taking Bateson's concept of learning as change as their starting point, they ensure solid theoretical grounds for their own elaboration. From Bateson's classification of different levels of learning, they concentrate on Learning II, which seems to resemble the pertinent issues of implementation.

Learning II, or "learning to learn" is a corrective change in the set of alternatives from which choice is made. Following this definition, Browne and Wildavsky seem to put great emphasis on the preferring and choosing of objectives as a significant element in learning: "Obviously, learning includes learning about how to realize objectives as well as about whether and to what extent they are worth achieving" (1983b, p. 241), and "Learning is not only a matter of means – how to achieve pre-fixed objectives – but also of ends, i.e., learning to educate our preferences" (1983a, p. 223). Their statements indicate that their interest is mainly restricted to the solution of discrete, given problems – here in valuing and choosing between pre-determined objectives, or in its most transformative form, redefining the objectives as the implementation proceeds. The same idea of the given structure as one determinant setting limits in which development can occur, is also explicated as follows:

"The original genetic coding sets a range within which the organism can develop; the original policy mandate delineates the range of program development. But that is all it can do. The characteristics of the program are determined by the interaction of its inherited structure with its social environment." (Browne & Wildavsky, 1983a, p. 228.)

One aspect of their interest in Learning II is the strong emphasis on the effective utilization of evaluative information as the main source of the continuous learning process (Browne & Wildavsky, 1983b, p. 240). Constant, successful evaluation is important to learning and the other way round: learning is based on effective evaluation along the implementation process.

Unfortunately, Browne and Wildavsky limit their examination to the three lowest levels in Bateson's categorization (zero, I and II), and exclude the higher ones. Learning IV is the theoretical level since, according to Bateson (1972, p. 293), it probably does not occur in any living organism on this earth. Learning III, on the other hand, seems the most promising as far as implementation as a learning process is concerned.

Applying the activity-theoretical framework, Engeström (1987) reinterprets Bateson's theory and, in particular, furthers the understanding of Learning III. The distinctive feature of human activity is that it is the continuous creation of new instruments, which in turn complicate and qualitatively change the structure of the activity itself. New instruments also produce new objects of the activity.

In Learning I, both the object (or outcome) of the activity and the instrument are given. Learning means repetitive correction in the way the subject uses the instrument upon the object. As in the learning within the command and control model of implementation, there is a fixed, correct way in which to operate. Engeström distinguishes two aspects in Learning II: the reproductive and the productive. The object is seen as a problem, demanding efforts to solve it. Reproductive learning demands that the object is given and the solution is found through trial and error, while in productive learning, the object is also given, but the solution is invented through experimentation (Engeström, 1987, pp. 144–149). This productive aspect of Learning II corresponds well with Browne and Wildavsky's idea of learning in implementation as evolution and re-design on the basis of evaluation.

From the viewpoint of local, agent-driven and evolving implementation, Learning II is nevertheless inevitably restricted to the solving of pre-determined problems, where the set of alternatives may be altered. If evaluation is the main source of the learning, the actual instruments for problem solving are left open. Even though the problem-solving instruments within Learning II may be potentially expansive, this does not automatically imply that the context of the given problem is broken and expanded (Engeström, 1987, p. 149).

Learning III is defined in Bateson's original classification as change in the process of Learning II – a corrective change in the *system* of set of alternatives from which the choice is made. It is a rare event, produced by the inner contradictions of Learning II. Engeström (1987, p. 150) describes the development from Learning II to Learning III using Bateson's (1972, p. 208) example of a double bind¹⁷: if you call a stick real, you will get hit with it – if you say it is not

¹⁷ The double bind is a concept used by Bateson (1972, pp. 208; 271-278) to refer to situations in which all alternatives appear equally impossible. An individual receives at least two commands or messages which contradict each other and seem to leave no room for adequate performance.

real, you will get hit again. If you say nothing, you will get hit as well. In Learning III the subject receives contradictory messages, but is able to rise above the constraints of the context and break them: he or she may reach up and take the stick away from its holder. The essential difference between Learning II and Learning III is that, whereas in the former the subject tries to solve a presented problem, in the latter the problem itself must be created (Engeström, 1987, p. 150).

Learning II always involves a phase in which the acquired instrument is applied to real-life conditions of societal practice – be the instrument a habit, a model or a new rule, as in the case of law implementation. Engeström’s description of the application of a new instrument is interesting in the context of implementation: “(W)e shall find out that the newly acquired instrument never stays exactly the same as it was in the phases of its original individual acquisition and internalization. It will change and produce surprises, new qualities, in its very integration into the wider context of the social life activity of its subject. It will be concretized and generalized in practice which is necessarily richer than the abstraction originally acquired” (ibid., pp. 158-159). It is within this tacit transition from the internalization of the instrument to externalization and objectification when it is used, that the transition from Learning II to Learning III – from individual actions to collective activity also occurs (p. 159).

Bateson’s concept of Learning III has been thoroughly elaborated by Engeström as learning activity. Engeström’s main argument is that expansive processes are becoming integrated into processes of learning, and that a historically new type of learning with expansive potential is emerging in various social practices (Engeström, 1987). In this expansive learning, people are not affected by or required to adopt changes – neither are they compelled to adapt to them. Instead, they initiate and seek new solutions and actively make sense of the world they live in (Engeström, Engeström & Vähäaho, 1999). Expansive learning is not learning to make value preferences or to choose between ready-made alternatives, nor is it re-defining something already known. It essentially involves learning *culturally new forms of activity that are not yet there*. Small actions can grow into an objectively new form of activity. The expansive process has been illustrated by comparing it to the consequences of throwing a stone into the water. Normally, a stone produces a series of circles of waves, which gradually get smaller and finally die out while moving away. In an expansive process, the “waves grow while they move outward from the impulse, then turn back to mold the initial source of impulse, and finally create a new, higher-level structure of stability than the original” (Engeström, 1987, p. 163).

Activity-theoretical studies have reported on work practices in which there is a challenge to collectively learn novel ways to conduct the work – something that does not already exist. It is necessary for a fundamental change in the work that the object expands in some significant way. For example, in the reorganization of medical work, the construction of the patient as an object of the work began to expand significantly (Engeström, 1999b, p. 90). An equal object expansion has been reported by Kärkkäinen (1999) in the context of teacher teams in an elementary school. “The formation of a new, expanded object is the basis for the formation of a new motive, which in turn is the foundation for opening up the developmental dimensions of work and eventually, for achieving sustainable transformation” (Engeström, 1999b, p. 91).

When learning is seen as equivalent to the expansive transformation of work practices, the implication is that it is looked for as being embedded in social practices. From the perspective of implementation, this means that learning takes place when the new rules are enriched and given content when used in practice. This is the process of expansive learning, where “the practice is necessarily richer than the abstraction originally acquired” (Engeström, 1987). The process of implementation, in which the law is shaped, determined and sometimes altered by the actual implementors, was already recognized in the studies of researchers with a bottom-up perspective, although they did not consider it learning. In this study, the very same process of enriching and shaping is understood as learning – with a special emphasis on the new solutions that go beyond the pre-set objectives and pre-given models.

Understanding implementation as learning also means that the principles given in the legislation have to be concretized through local interpretations and constructions of the necessary tools, norms and practices. However, the major expansive potential lies within the small and gradual changes that take place in court practices during implementation. The idea of small renewals or changes driving more fundamental transformations is raised by Engeström, Engeström & Suntio (in press). From this point of view, some of the new practices or new instruments may appear to be capsules of potential expansion, leading to a fundamental change in the court work itself. Every time the practices or instruments are used, they make visible the constraints of the court work and question its motive. Simultaneously, they offer a possibility for expansion by giving a chance to move above and beyond the constraints (Engeström, Engeström & Suntio, in press).

3.7 Zone of Proximal Development: Towards a New Conceptualization of Expertise in Courts

The concept of the zone of proximal development is useful in understanding the expansive potential of implementation – the creation of the new. The concept was originally defined by Vygotsky (1978, p. 86) as the distance between a child's developmental level of independent problem solving and the level of potential development under the guidance of adults or more capable peers. This definition determines the buds of an individual's development that will blossom in the near future, but are currently in an embryonic state (Vygotsky, 1978, p. 88).

According to Engeström (1987, pp. 170–174), Vygotsky's concept of the zone of proximal development, and especially most of the current interpretations and applications of it, are nevertheless inevitably restricted to the acquisition of the given and the acquiring of discrete skills and actions. Engeström feels that interest within the cultural-historical school has largely been in the acquisition, assimilation and internalization of the tools and sign systems of the culture. Since human development is not just acquisition of individually new practices, but also the real production of new societal activity systems, he wanted to shift the focus from the course of individual development to how the activities themselves, as societal systemic formations, develop and change (*ibid.*, pp. 172–173).

In an attempt to grasp the expansive and collective nature of development and to intertwine individual and collective development, Engeström has re-defined the zone of proximal development in the following way: "It is the distance between the present everyday actions of the individuals and historically new form of the societal activity that can be collectively generated as a solution to the double bind potentially embedded in the everyday actions." (Engeström, 1987, p. 174).

Traditional theories of learning have focused on processes in which an individual – or recently also an organization – acquires knowledge or skills so as to produce observable behavioral changes. The assumption is that the knowledge or skills themselves are stable and well defined, and that there is someone competent enough to transmit the knowledge to others.

In the implementation of court reform, however, only part of the required learning meets these standards. When following the new procedure, implementors also have to learn something that is not defined or even understood. When new procedural law is implemented, a lot of concrete practices that are not yet in existence have to be learned. They are literally learned as they are being created (see Engeström, *in press*).

In this context, the zone of proximal development of court activity seems to consist of concrete, challenging situations in court work, in which novel solu-

tions need to be made. In terms of implementation, it appears as *a zone of learning challenges and possible solutions*. Daily encounters between the courts and their clients constantly bring forth undefined and unexpected situations with developmental tensions of their own, requiring concrete solutions.

When the zone of learning challenges in courts is recognized as the local production of new practices, it means, above all, that *judicial expertise* is in transition. Questions that demand answers include who the actors are who work with a court case, how the collaboration between them emerges and how their expertise is formed and developed. It seems that direct communication between the courts and their clients, especially when settlements are negotiated, strongly questions the persistent tradition of individual expert work, where expertise is regarded as individuals' superior knowledge and performance. It rather suggests an alternative understanding of expertise as more collaborative accomplishment, produced in mundane interaction in which the new practices are sought after and tried.

The Traditional Understanding of Expertise as Individual Property

Traditionally, studies on expertise have looked for the universal cognitive mechanisms that supposedly could be found in the minds of individuals considered experts. Two main streams have been distinguished in studies on expert thinking: the human information-processing approach to expert problem solving and the characteristics of individual expertise (e.g. Chi, Glaser and Farr, 1988), and the approach emphasizing intuition and tacit knowledge in expert performance (e.g. Dreyfuss & Dreyfuss, 1986).

The understanding of expertise as individual property stems from the idea of expertise as extraordinary performance based on repetitive exercise and / or extensive formal training and wide reading. Expert knowledge, used in solving well-constrained problems in the expert's respective field, appears a relatively stable and closed field of professional wisdom.

However, as Engeström (in press) points out, in present unstable work conditions, where disruptions and unexpected events are the rule rather than the exception, experts must face, diagnose and resolve novel situations for which they have little or no directly applicable knowledge or skills. His main point is that the individualistic view is intertwined with assumptions of a stable environment, and hence cannot connect expertise with the creation of new culture as an ongoing collaborative achievement.

Towards a More Collaborative Understanding of Expertise

In the 1990s, several studies on expert work, learning and cognition contributed to a new kind of understanding attempting to overcome the limitations of strictly individualistic notions of expertise. Lave and Wenger (1991) suggested that the proper unit of analysis of human activity would be a community of practice, rather than an isolated individual. They argued that skill and competence reside in local working communities, not in information that could be transmitted through traditional training. Bereiter and Scardamalia (1993) enlarged the concept of expertise from individuals to teams and noted that, instead of using familiar routines, experts construct new concepts and methods in their progressive problem solving. Again, Hutchins (1995) considered expertise as distributed achievements of human practitioners and their artifacts.

None of the above mentioned studies, however, points to the possibility that expertise may be located and distributed in fields of multiple interacting communities of practice or activity systems, rather than within one individual or isolated group. Moreover, they concentrated on learning and expertise in fairly stable settings, leaving aside issues of change, creation and expansion (Engeström, in press).

The required conception of expertise, Engeström argues, should be based on the idea of expertise as an increasingly multi-sited phenomenon between multiple interacting organizations, *and* on the radical transformations that are taking place at work. Interestingly, steps in this direction have already been taken in organizational and management literature, which has shifted its emphasis onto multi-organizational partnerships and alliances, and has started to investigate change and transformation at work (e.g. Alter & Hage, 1993; Huxham, 1996; Beer & Nohria, 2000; Nadler, Shaw & Walton, 1995).

Shifting the interest from stable and constant expert knowledge and performance to the facing and shaping of change at work makes it important to distinguish between the internalization of the culturally given and the externalization of novel ideas and models (Engeström, in press). Both belong to expertise when understood as collective activity, not only as the individual mastering of skill and knowledge. Thus far, most research on expertise has focused entirely on the internalization of given models in achieving and sustaining expert knowledge. However, as already noted above, mastering qualitative transformations and reorganization at work – externalizing novel solutions or learning something that is not yet there – has become the major challenge.

Reorganizing collaborative relations and practices between and within multiple activity systems is a recent developmental trend in organizational life, which we know only little about. The idea of individual expertise works poorly when

work is increasingly being organized in ways that call for horizontal movement and boundary crossing – interactive and collaborative expertise – between different activity systems.

“In their work, experts operate in and move between multiple parallel activity contexts. These multiple contexts demand and afford different, complementary, but also conflicting tools, rules and patterns of social interaction. Criteria of expert knowledge and skill are different in the various contexts. Experts face the challenge of negotiating and combining ingredients from different contexts to achieve hybrid solutions.” (Engeström, Engeström & Kärkkäinen, 1995, p. 320)

In addition to the interest in boundary crossing in expert work, the concept of knotworking has been another attempt to capture and understand the sideways movement and collaboration between various activity systems and actors involved. Knotworking refers to “a rapidly pulsating, distributed and partially improvised orchestration of collaborative performance between otherwise loosely connected actors and activity systems” (Engeström, Engeström & Vähäaho, 1999, p. 346). Knots of collaborative work do not belong to fixed organizational entities – although the members of the knots do – and they are not governed by permanent centers of control. The fact that several actors are connected together temporarily to solve a specific problem creates potential situations to produce a new kind of collaborative expertise between parallel activity systems.

One of the multiple interacting activity systems is that of the client who asks for the expert’s services. A new aspect of collaboration between experts and their clients is introduced by Bart Victor and Andrew Boynton, who use the notion of co-configuration to refer to the new, emerging modes of producing goods and services, in which the client participates as a partner in planning and production. The production of a good or service is seen as a long process in which the user and the producer, in collaboration and mutual dialogue, customize the product to fit the client’s needs and requirements (Victor & Boynton, 1998).

What kind of expertise, then, can the client convey to the collaboration? David Tuckett and his colleagues opposed the idea of expertise as universal and homogeneous and, instead, promoted it as more heterogeneous and multi-voiced, including the certain kind of expertise that the clients may import. In their study on doctor-patient interaction in medical consultations (Tuckett & al., 1985, p. 217), they considered the consultations a meeting between one person who has, by training and experience, access to specialist knowledge and another who has, by experience, understanding of his or her past as well as some ideas about what is best for him or her. Both parties form models of what is wrong, what the consequences of the problem are, and what should be done. A successful consultation requires a merger of these viewpoints; a process of

explicit sharing of the models, so that the patient can take advantage of the ideas and skills the specialist can offer.

Nevertheless, what Tuckett and his colleagues found out empirically was that, in the consultations, patients were not treated as competent experts in their own health care, and their ideas and opinions were devalued as irrelevant or not useful (Tuckett & al., 1985, p. 211). This implies that, while encounters between professionals and lay persons embrace the potential for fruitful and satisfactory collaboration, based on sharing different types of expertise, participation of and contributions by lay persons in expert activity is full of tensions and restraints.

Expertise in Court Work: Traditions and New Challenges

The work of a judge has represented the most individual and independent expertise with minimal collaboration. Court trials could be regarded as the nucleus of judicature and the area in which judicial expertise appears in its purest form. Judicial expertise manifests in judges and other legal professionals who master the most essential rules, the rarest exceptions and the latest details of legislation. Recently, the enormous increase and differentiation of legal norms – the flow of norms as the lawyers call it – has questioned expertise as an individual's property and made visible the limits of individual experts' capacity to endlessly adopt and apply new knowledge in their work.

In a similar vein, the court case has traditionally been regarded as something ready-made and clear-cut in which the judge will make decisions based only on his expertise. A detailed examination of trials has shown, however, that a court case with all its facts is constructed around the proceedings in negotiations between those involved (e.g. Bennett & Feldman, 1981). As early as in 1949, Jerome Frank argued – presumably in a revolutionary way – that “facts are guesses”, and that it is most misleading to talk of trial courts “finding” the facts:

“The trial court’s facts are not ‘data’, not something that is ‘given’; they are not waiting somewhere, ready made, for the court to discover, to ‘find’. More accurately, they are processed by the trial court – are, so to speak, ‘made’ by it, on the basis of its subjective reactions to the witnesses’ stories.” (Frank, 1949, pp. 23–24).

More recently, Conley and O’Barr (1998) have pointed to disputes as constantly transforming in interaction, rather than isolated, ready-made entities that are brought before the court. All the contexts in which a dispute is expressed – including courts – are interactional, and each such context shapes the dispute

in unique ways. As the trial moves along, “the product – or more accurately, the co-product – is an account produced jointly by the litigant and the law” (Conley & O’Barr, 1998, p. 89). Again, these findings seem to make room for regarding expertise more as an interactive and collaborative than individual phenomenon.

The Finnish court system has seen the court reform of 1993 concerning procedures in civil matters and the organization of district courts, and the 1997 reform of the procedure in criminal cases. Other challenging developmental trends are also evident.

Attempts to increase the power of the courts to master their own work and workload have been made by applying case management (Hovioikeuden oikeudenkäyntimenettely, 2000, 18–20). The idea behind case management is that the active control of individual cases and their flow in the system results in a rationalized total workload for the court. It has largely been regarded as a way to rationalize and effect court work by producing standard tracks for different types of cases, and differentiating the assignments of court personnel accordingly (Heydebrand & Seron, 1990; Palmer & Roberts, 1998). It may also include the potential for an alternative development in the direction of a qualitatively new kind of dialogue between courts and their clients, who negotiate together about how and through which procedures the case could be solved most satisfactorily.

A completely new area of expertise involves the broader applications of information technology in courts. The electronic transmission of documents, multi-lateral conference calls by phone or via the internet, and hearing witnesses in a video conference are examples of routines enabled by new information technology that may become more common in the near future.

The pressure to enrich and extend judicial expertise in courts also arises from several ongoing, globally linked societal and cultural developments. As a result of the increased number of immigrants and refugees, judges meet clients from different cultures almost daily. Membership of the European Union binds Finland to the harmonization of judicial codes in the civil proceedings of the member countries. The proposals suggest that the trend will be toward less formal proceedings, and toward collaboration and negotiation between the judge and the parties in establishing the case (Laukkanen, 1995, p. 99). The Finnish civil-rights reform has meant that citizens have the right to expect the court to guarantee through its active contribution a fair trial for all citizens. This deviates radically from the old interpretation, according to which the passivity of the court was sufficient to secure a fair trial and the parties’ formal equality before the law (Laukkanen, 1995, p. 98).

Even on the threshold of new and complex pressures on courts, the tradition of individual expert judges is still powerful in Finland – possibly even with a strong flavor of legalism as a cultural characteristic. Kemppinen (1992) and Engeström, Haavisto and Pihlaja (1992) pointed to the myth and also the practice of judges as lonely and silent decision makers who do not share their cases while working on them, and do not evaluate them afterwards with other colleagues. As in many other established professions, professional knowledge in courts has been regarded as self-competent, self-contained within one individual not needing further refinement by other professionals. Similarly, the knowledge that a court client may bring to the interaction is de-contextualized from professional knowledge as needless and meaningless. The distance of professionals' from their clients has been regarded as important in courts and, in fact, a necessary guarantee of professional objectivity, neutrality and impartiality. The idea of individual mastery of the work, and of an isolated judge as an impartial arbiter, has resulted in a culture in which judges have even considered further training as inappropriate and as interfering in their work.

Barbara Yngvesson (1994) referred to studies in which courts were found to consist of specialists with knowledge and skills of their own, isolated from their surroundings.

“Empirical literature provides a familiar portrait of courts as bounded and set apart, a domain of specialists controlled by an elite, or forums of ‘rough justice’ with their own subculture and behavioral routines, distant from the practices and values of those who are judged there.” (Yngvesson, 1994, p. 55).

The question is: can this individual expertise face up to all the demands that the reform and the new societal trends are bringing into the courts? Do elements of more distributed or collaborative expertise in courts exist? Furthermore, is this possible collaborative expertise distributed between legal professionals, or does it also reach the lay person whose case is being dealt with?

The following main ideas were advocated in the previous sections – (1) that change is locally produced and gradual, consisting of small steps, but still potentially expansive, (2) that the concrete contents of the reform and the new practices are constructed locally and with substantial discretion in the actual implementation process, in which the implementors hold a key position, and (3) that implementing a court reform is an on-going learning process with expansive potential for collaborative re-organization of the work. These ideas have supported the notion of the zone of proximal development as an area of challenging, concrete situations and their possible local solutions. It is in this area

that the judicial expertise will inevitably be transformed. The empirical research problems concerning the local learning challenges and the theoretical research problems about change and expertise are presented in the following chapter. I will also continue with the central themes of change and learning to formulate a working hypothesis on them.

4 Research Problems

4.1 Typologies of Organizational Change

Focusing their attention on the changing nature of organizational change, David Nadler and Michael Tushman created a typology to describe and distinguish between the different kinds of changes that their own experiences and the literature on organizational change suggested. On one level, they distinguish between two types of change. First, there are smaller changes occurring during periods of equilibrium, and secondly, there are changes that occur during periods of disequilibrium. Even during times of relative equilibrium, however, organizations constantly implement improvements and modifications, which are aimed at improving the fit among its components. Each attempt at improvement is built on the work that has already been accomplished. This type of change is called *incremental change*. (Nadler & Tushman, 1995, p. 22.)

The second type of change takes place when a radically-changing environment requires equally radical changes in the organization. The organization does not attempt to improve fit, but rather construct a whole new configuration with new strategies, new organizational arrangements and so forth. As this type of change involves a complete break with the past, it is called *discontinuous change*. (Nadler & Tushman, 1995, p. 22.)

Another dimension to consider is time, again on two levels. On the one hand, an organization is forced to respond to changes in its environment, which is referred to as *reactive change*. On the other hand, rather than being forced to react to the outside, the organization acts in anticipation of the changes that may occur later, which is called *anticipatory change*. (Ibid., pp. 23–24).

Combining these two dimensions – degree of continuity and timing – the authors end up with a framework that identifies four types of organizational change, presented in Figure 4.1.

Tuning is when an organization initiates incremental change in anticipation of environmental events or in search of increased efficiency, but without the immediate requirement to do so. *Adaptation* is when incremental changes and modifications result from environmental conditions that require a response. *Reorientation* occurs when the organization has to initiate profound changes in

order to maintain fit, but this is done before the change imperative has hit. Finally, *re-creation* implies the fast and simultaneous change of all the basic elements of the organizational system as a response to external demands, which often take the form of a fundamental crisis. To sum up, incremental changes may be thought of as changes within the frame, as they are made within the framework of the current organization, conserving its values and visions. Discontinuous change, on the other hand, aims at changing the organizational frame itself. In the case of re-orientation, the frame is modified and reshaped gradually, whereas with re-creation, it is deliberately broken and discarded, and a new frame is created. (Ibid., pp. 25–30.)

	Incremental	Discontinuous
Anticipatory	Tuning	Reorientation
Reactive	Adaptation	Re-creation

Figure 4.1 *Types of Organizational Change (Nadler & Tushman, 1995, p. 24)*

Another view on organization development is given by Jean Bartunek and Michael Moch, who employ the notion of organizational schemata. Schemata refer to organizing frameworks, which guide human cognition and ways of understanding events. As schemata generate shared meanings for the members of an organization, they allow the members to have a common orientation toward events. Organizational development affects and is affected by organizational schemata. (Bartunek & Moch, 1987, pp. 483–486.)

Bartunek and Moch (pp. 486–488; 495–496) suggest that organizational development could be fruitfully understood as three different orders of change in organizational schemata. First-order change includes changes consistent with the schemata already present, second-order change includes conscious modifications of the present schemata themselves, and finally, third-order change concerns attempts to make the organization's members aware of their present

schemata and thereby more able to change them when needed. Whereas first-order changes support the established configurations, second-order changes seek to change the schemata themselves by replacing the old ones with new ones. The main distinction between second-order and third-order change rests in defining the change agent: in second-order change, the outsider interventionist, a consultant or sometimes other organizational members, advocates the direction of the change and offers alternative schemata, while in third-order change, the consultant establishes mechanisms to enable the organization itself to reflect on the present and to take a move away if necessary.

Evidently, the theory suggested by Bartunek and Moch has some points in common with the framework promoted by Nadler & Tushman. It also echoes Bateson's theory on different levels of learning and Engeström's theory of expansive learning, both of them discussed previously in Chapter 3.

The major point of those changes that either sustain the prevailing schemata / organizational framework or transform it is made by both Nadler and Tushman and by Bartunek and Moch. They both acknowledge that second-order or discontinuous change begins with a perceived crisis and as an answer to outside pressures, although Nadler and Tushman elaborate this aspect more explicitly. What distinguishes these two models most clearly is that Bartunek and Moch more explicitly promote the improvements in the organization's own capability to transform its organizational schemata.

The model offered by Bartunek and Moch takes an important step beyond the classical model of single-loop and double-loop learning, suggested by Argyris and Schön (1978), in including a possible third level of change. With its three levels the model has resemblance to that of three different levels of learning, developed by Bateson (1972) and discussed in Chapter 3. Both models seem to point to changes in which the development itself becomes the object of learning. In this sense, they touch on Engeström's (1987) theory of expansive learning, likewise discussed in Chapter 3.

Since the definitions of the first two levels in Bartunek and Moch's and Bateson's models largely correspond, the main difference between the two is to be found in the explication of the important third level. For Bartunek and Moch, this level is only a modification of the second-order changes, when the role of an outsider change agent has switched from determining the new schemata to training the organization to determine them by itself. For Bateson and Engeström, on the other hand, the third level of learning means a specific, typically human way of learning, in which both the subject and the object transforms fundamentally. The human rises above the constraints of the context and breaks it, creating completely new solutions. Whereas for Bartunek and Moch the problem to be solved is given, for Bateson and Engeström the problem itself must be created.

4.2 Finnish Court Reform in the Context of Organizational Change: A Working Hypothesis

Nadler and Tushman, as well as Bartunek and Moch, offer their frameworks and concepts as a potential outline for understanding organizational change. The focus of my study, the Finnish reform of civil proceedings, does not fit the frameworks in a satisfactory way¹⁷. On the basis of the historical perspective given in Chapter 2, some characteristics of the reform can be addressed. Basically, the reform and its planning occurred during a period of relative equilibrium. The problems with civil proceedings were discussed on several occasions during a period of one hundred years of planning, but it is probably too much to argue that the reform was a reaction to a crisis, or to paralyzing problems that the courts would have faced.

Recent international literature has given attention to the outside pressures that seem to form an important turning point in the development of courts. References to “crisis in civil justice” (Zuckerman, 1999) and “turbulence which goes beyond just renovating long-established judicial institutions” (Palmer & Roberts, 1998) have only recently been articulated, and interestingly enough, not in Finland. However, what can be said is that it is unclear, and hard to evaluate afterwards, to what extent the Finnish reform was about reacting to environmental demands and to what extent it was about anticipating future developments.

In the Finnish debate, some practitioners considered the reform the most profound change for centuries, which would fundamentally change the framework of Finnish proceedings; others saw it as a more cosmetic change, which would sustain the currently available framework and allow the old practices to carry on. Equally, in the international literature, there are some writers who think that courts are facing deep and crucial transformation that will force us to reconsider what a court actually is (Palmer & Roberts, 1998, p. 350); on the other hand, some have hesitatingly pointed to the difficulties or even impossibility of gaining profound and essential changes in courts, to replace the status quo (e.g. Leubsdorf, 1999; Marcus, 1999). Again, it has remained open whether the Finnish reform was originally aimed at incremental alterations and modifications within the old framework, or at radical and profound transformation of processes, structures and cultures, using the framework proposed by Nadler and Tushman; or whether it involved first-order, incremental changes

¹⁷ I am aware of the potential discrepancy in fitting a judicial, governmentally ruled reform of a public institution into a framework of organizational change oriented more to the markets. However, I am of the opinion that the comparison can fruitfully bring out important aspects in studying change.

within prevailing schemata shared among the members, or second-order changes modifying the shared schemata, in terms of the categorization suggested by Bartunek and Moch.

According to Bartunek and Moch, the three orders of change emerge as alternative forms that seem to be mutually exclusive. For example, either the outsider change agent determines the new schemata (second-order change), or the organization determines them by itself (third-order change). The theory of change and learning, discussed earlier in Chapter 3 suggested that change should be understood as stepwise, small improvements, simultaneously including the potential to develop expansive processes in which learning equals creating novel solutions and practices that are not yet there. This way of understanding change presupposes that the different levels or orders of change are not so much alternative and exclusive, but rather, simultaneous and intertwined. Besides, and as a part of expansive effort, attempts to improve already existing skills and to adapt to pre-given models may also take place. *The working hypothesis of my study is that change should be approached as gradual and consisting of small steps, but still as at least potentially expansive.*

Expansive transformation of work was defined in Chapter 3 as a process in which the object of the work necessarily expands in some important ways. This hypothesis about change and expansion in work opens up the very question of the object of that activity and the possible transformation within it.

4.3 Object of Court Work: Implications for Change in Courts

Discussing the changing nature of the court, Palmer and Roberts (1998) suggest that novel procedures, supportive of settlement, represented an enormous shift when considered in the context of our existing understanding of what courts are and what they do. Old understandings about what is 'private' and what is 'public' in the sphere of dispute management become blurred in these developments, but as Palmer and Roberts (*ibid.*, p. 349) point out, so far it is uncertain how we should characterize them. The authors set important questions on changes within the courts, reflecting on how we should respond to the increasing readiness on their part to reach out into what belonged formerly to the 'private' sphere of the parties:

1. *Is the nature of 'the court' changing with this assumption of a diagnostic and managerial role, and its engagement in the active sponsorship of settlement?*
2. *How do these new ambitions accord with sustaining the capacity to deliver authoritative third-party determinations? (Palmer & Roberts, 1998, p. 348)*

The growing readiness of courts to become involved in the sponsorship of settlement takes the changes towards a fundamental transformation of the judicial role. In describing progress as a sea-change in civil-justice arrangements (p. 345), and as multiple changes of a fundamental kind in prospect (p. 350), the authors foresee future developments in a way that indicate a potential expansion of the work of courts.

The extent to which the current changes in courts represent a fundamental reorganization of civil-justice arrangements is a question to which empirical research on current court practices can give answers. Similarly, whether the Finnish court reform will consist of small improvements, radical change, or both, depends on its actual implementation and content. Analyzing actual court proceedings and how the object of court work becomes constructed in them through the interaction between the participants, offers a way to study the potential for expansive change that exists in the courts.

As in many contexts, the question of the object is complex and fluid in regards to court work, too. When asked, individual workers in the court system define the object of their work as decisions, minutes, the conducting of proceedings, single disputes or crimes, the maintenance of public peace or guaranteeing legal safety. All the responses draw attention to some aspect of the object, but generally, it could be postulated that the judges' traditional way of working reflects activity, where the object of the work is the single case in the context of litigation. The expansion of the object would necessitate qualitative and significant change in the judges' understanding of the object and in their working with it.

Alterations within the object of some work that affect the activity system from the outside – such as a dramatic increase or decrease in the number of clients, a remarkable shift in the type of object, or forceful reactions from it – sometimes serve as an important outside impetus for change, and transform the way in which the object is conceived of and worked with. The court system, however, has been critically considered as developing slowly, being resistant to change (see Chapter 3), and as having judges who are conservative, passive, strict in their legal thinking and protective of their neutrality by isolating themselves from the criticism and discussion in society (Kemppinen, 1990; Chiarloni, 1999). The stagnation of this system – the insensitivity to external pressure to change – is

interpreted in this criticism as a cultural characteristic or mentality, typical of the court system or of the individuals working for it.

An alternative way to approach court work is to define the clients and their problems as the object of the activity. This brings out an important feature: the relationship between the court (the subject) and the parties or clients (the object) has traditionally been exceptionally one-sided or “one-directional”. The court has directed its judicial power towards the clients, who give their feedback as silence or as an appeal to the Court of Appeal. There is interaction between the court and the parties during the proceedings, but traditionally this interaction has been formal and does not necessarily demand the presence of the principals. Because the work does not include direct feedback from the object, the assessment of appropriateness and effectiveness is based on other criteria. Thus, the pressure for change in court work does not seem to emerge – at least on a large scale – from the development of the object. This may, I assume, be one reason why the court system weakly recognizes and experiences outside pressure for change. On the other hand, the one-sided relation between the court and its clients means that courts are mainly used to using their power over their clients, instead of working together and collaborating with them.

Another consequential feature characterizing the object of court work is that the clients, in most cases, are the attorneys, not necessarily the principals. The attorneys act as a “damper” between the court and the clients. It is evident that court cases are sources of income for attorneys, but what importance this financial mechanism has in their activities is speculative (for different views see Jaakkola, 1993; Zuckerman, 1999). Nevertheless, it could be assumed that the special role of attorneys, between the court and the client, is to reduce criticism and maintain existing practice. Attorneys hesitate to give feedback on the proceedings, because this could turn against them and their clients in future cases. Again, this may be one reason why the problems of clients with the court system have not caused significant pressure for change in the courts. On the other hand, the mechanism, through which the attorneys are placed in between the courts and the clients, preserves the clients on the margin: judges are not used to thinking of clients as people with whom to work and cultivate personal contact (see Chiarloni, 1999, p. 278).

Attorneys work as a damper in court proceedings, but also mediate to an important degree between the courts and the object of their activity: the principals and the cases they bring before the court. This is also a special character of the object of court work: court solves the case in the form the attorney presents it – often without meeting the principal himself or herself. In civil cases, the transformation of the conflict from the problems experienced by the client to a legally modified dispute that can be litigated in court has frequently been

described (e.g. Felstiner, Abel & Sarat, 1980-81). As a counselor, the legal professional molds the experienced problem into a judicial problem, acceptable in the court system (Sarat & Felstiner, 1995). It is along this borderline between the every day and the legal, that clients first interpret their problem judicially. The legal usually “wins” the battle: the counselor acknowledges the concerns of the client, but also explains them as irrelevant in the court system (Nousiainen, 1992, p. 56). One potential source of tension related to the object of the work concerns, which of these problems is handled in the court proceedings. Since, under the procedural reform, the presence of the client in the hearings was encouraged, albeit not required, some increase in client appearance in courtrooms may be anticipated. Depending on how the clients are involved by the legal professionals in establishing the case, this potential tension may either become more critical or find some release.

The activity of the clients themselves is not especially well known. According to the interviews we conducted in the early 90s, they pay much attention to the way their case is handled in the court (Engeström, Haavisto & Pihlaja, 1992, pp. 228–230; see also Chapter 2 in this study). As noted earlier, studies on procedural justice indicate that client satisfaction is closely connected to the quality of the process, as experienced by the client (e.g. O’Barr & Conley, 1988; Lind & al., 1990; Tyler, 1990). So far, issues dealing with how experiences of justice are produced in the interaction are not widely covered. It would bring a new perspective to notion of clients as the objects of court work if they were considered not as judicial cases, but as subjects who interpret and make sense of their court experiences in the context of their everyday life, and sometimes try to participate in and contribute to the handling of their case.

In regard to the new civil proceedings, new elements in the interaction between the court and its clients were introduced in connection with the new norms. Among the new forms of activity are the orality of the process and the personal hearing of the principals. Furthermore, the physical space in which cases are handled has changed to emphasize the meeting-like character of the preliminary hearing. The preliminary hearings occur in small meeting rooms, where all the participants are gathered around the same table, and not in large courtrooms. As Jordan and Henderson (1995) argue, physical set-ups and space both encourage and hinder certain kinds of interaction between participants. Basically, these new elements allow for new perspectives on the object of court work.

The new perspective on work in civil proceedings is outlined by Laukkanen (1995) from the viewpoint of legal dogmatics and procedures. Promoting the idea of what he calls a collaborative principle, he suggests a way of working in which the judge is active and discusses openly with the parties. The aim is the

free flow of information from the judges to the parties and the other way round, so that the duties and attempts of the judge and the parties complement each other. The different interests materialize as active collaboration and informal discussions to replace the former passivity. The foundation of an open and communicative way of working lies in the rules that govern the division of labor between the court and the parties. (Laukkanen, 1995, pp. 103–106, 213.)

Laukkanen (*ibid.*, pp. 285–286) conceives of settlement as a natural continuation of the process thinking he has proposed, and regards negotiations on settlement as an event in which the new objectives and principles actually materialize. According to him, *judges have to create for themselves* a way of conducting the proceedings that enables settlements to be made (*italics added by V.H.*). The atmosphere favoring settlement stems from a thorough and profound preparing of the case. Likewise, settlements are advanced if, in the preliminary hearing, the principals are allowed to present their own viewpoints in discussion in the presence of and under the supervision of an impartial judge.

Given all this, the obligation under the 1993 law to promote settlement is interesting: on the one hand, it could mark the beginning of a new tradition and transition in the tasks of the court system; on the other hand, it could imply that an element of the conflict-solving tradition is simply being inserted into the old tradition of litigation. What is particularly interesting is Laukkanen's exposition, which emphasizes the local creation of as yet unknown settling practices by the judges themselves (see the *italics* above), and hence, the bottom-up construction of the content of the reform. The empirical study of court practices and the concrete descriptions of the actual negotiations for settlement will highlight this dilemma.

New understanding of the object of court work, such as the one outlined by Laukkanen, reflects the first steps towards potential expansion, in which the seeds of a new kind of actualization of judicial expertise are also sown. This fresh and alternative understanding of preparing a case as a communicative and collaborative effort between the judge and the parties shows expertise to be a more collaborative accomplishment, produced in the interaction of the participants.

All the aspects discussed above allow for new and alternative understandings of the object of court work, and thus make it possible to renew the one-sided relationship to it. The change in procedural rules seems to incorporate several possibilities to reorganize the work practices and the dialogue in the hearings. Ultimately, these speculations touch on the very debate on the fundamental duties and functions of the court system. In this context, one criticism has been that people are only spectators at their own trials, and that the right to participate in the handling of the problem is taken away by the state (e.g. Christie,

1982). The ideals of client participation in the proceedings, and their capacity to produce solutions and not only to consume them (Christie, 1982), are still valid issues in the empowerment of court clients.

4.4 Empirical and Theoretical Research Questions

These considerations suggest focusing the examination on actual court practices and on possible changes in them. The empirical chapters of this dissertation open different windows on the object of court work and the changes within it: the aspects of interaction and communication in the hearings, the client's position in the hearings and attempts to reach a settlement are taken into account. Hence, the empirical research questions all revolve around the issue of how the proceedings and court practices in civil cases have changed in the process of implementing the procedural reform.

- 1. How has the interaction and communication in the hearings changed?*
- 2. How has the participation of principals in the hearings changed? What kind of contributions do the clients make in the hearings and what kind of effects do the contributions have?*
- 3. How do the judges promote settlement during the proceedings, and what kind of attempts to reach settlement are made?*

The empirical research questions further the three central themes identified in Chapter 2 as pertinent characteristics of court work in transition. The possibility of a new kind of communication in court hearings, the probability of the increased presence of clients, and the obligation to try to settle disputes, represent developments that promote the basic empirical questions set out above. The lack of attention to these questions in Finnish court-related research and their relevance in the international context were explained in Chapter 2.

The findings of the empirical analyses denote some progression in tackling the issues of change and expansion, which form the theoretical research questions of the study:

4. What do the findings of the empirical analyses tell us about the zone of proximal development and its potential expansion in courts? What does this developmental potential tell us about the transformation of expertise in professional work?

5. How do change and learning appear on the basis of the implementation of a legal reform? What do the changes in court proceedings and court practices tell us about organizational change and learning?

5 Approach and Methods for Studying Changes in Court Work

5.1 Methodological Starting Points: Activity Theory as the Framework of the Study

The idea of change and reform as completely top-down, ordered by laws, was challenged in Chapter 3 and it was argued that to transfer a new rule into real practice requires constant interpretation and construction by the practitioners in the field, in order to give it living content. Those who employ the new legislation do not just adapt to new rules, but they also look for and find new solutions and interpretations. Expansion as a process in which the content and organization of work change qualitatively was referred to as a potential result of the implementation.

What kind of methodology is, then, required to study developmental dynamics and reveal the developmental potential in work? Analyzing actual empirical data on courtroom interaction in order to understand change and development in court work requires a theoretical unit of analysis and a historical perspective, which connect the seemingly random events to their contexts.

I have approached dispute resolution in district courts as *activity*, following the methodological starting points of *cultural-historical activity theory*. According to this theory, the concept of activity refers to human activity as object-oriented, collective and historically constructed (Leont'ev, 1978; Engeström, 1987; Cole & Engeström, 1993; Engeström, Miettinen & Punamäki, 1998). What is theoretically significant is the distinction between activity and situated actions: activity is realized in situated actions, but is itself always historically oriented to specific objects, which gives meaning to individual actions. Activity refers to systems that produce events and actions and evolve over lengthy periods of socio-historical time, while actions are more short-lived and have temporally clear-cut beginnings and ends. The concept of activity forms the theoretical unit of analysis for my study.

Three generations have been recognized in the development of the activity theory itself (Engeström 1996; in press). The first generation centered around

Vygotsky's (1978) idea of the cultural mediation of actions. Individual actions were viewed as a triad of subject, object and mediating artifact, rather than as direct responses to a given stimulus. The inevitable limitation of this first generation, the merely individual focus, was overcome in the second generation. Leont'ev (1978) explicated the crucial difference between an individual action and a collective activity. Vygotsky's model of individual action was developed by Engeström (1987) into a model of a collective activity system (Figure 5.1).

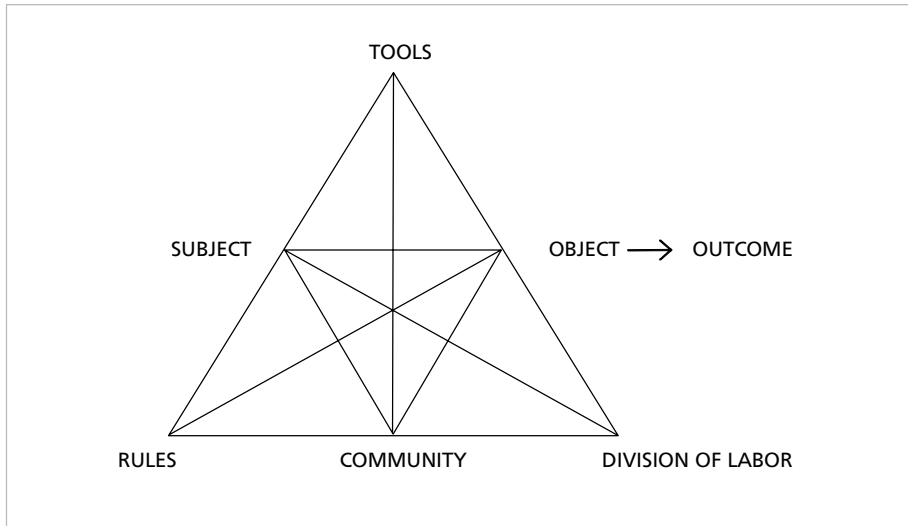


Figure 5.1 The Model of an Activity System

In this model, the subject refers to the individual or sub-group whose point of view is being adopted in the analysis. The *object* is to be understood as a project from the raw material to the transformed outcome. This “molding process” is carried on with the help of mediating instruments, including physical and symbolic *tools*. The model contains the *community* of people who share the same general object. The *division of labor* refers to how the members of the community divide the work both horizontally and vertically. The *rules* include the explicit and implicit regulations, norms and conventions that rule actions and interactions within the activity system.

The emerging third generation of activity theory expands the model to include the interplay of several activity systems in constructing a collectively meaningful object, which is at least potentially shared between the different agencies. In its current form, activity theory could be introduced in terms of five principles (Engeström, 1996; in press).

The first principle is that the prime *unit of analysis is a collective, object-oriented and artifact-mediated activity system, seen in its networked relations to other activity systems*. Goal-directed individual and group actions are interpreted against the background of entire activity systems.

The second principle is *multi-voicedness*. An activity system is always a multi-voiced community with multiple points of view, interests and traditions. The artifacts, rules and division of labor carry multiple conventions, brought into the system by the diverse histories of the individuals and the multiple historical layers of the system itself.

The third principle is *historicity*. Knowing how the activity systems have taken shape and have been transformed over long periods of time makes possible to understand their current problems and potential.

The fourth principle is the importance of *contradictions* as sources of change and development. Contradictions¹⁸ refer here to historically accumulating structural tensions within and between activity systems, rather than to problems or conflicts. They do not represent anything temporary or deviant, as activity systems are constantly working through tensions and contradictions.

The fifth principle proclaims the possibility of *expansive transformation* in activity systems. Expansive transformation requires that the object is re-conceptualized in a significantly different and qualitatively new way. It is necessarily a collective accomplishment, in which individual attempts to question established practices escalate into collaborative envisioning and change effort.

The methodological question set earlier in this chapter – concerning the kind of methodology that is required to study developmental dynamics and reveal developmental potential in work – and the answer given to it – a methodology with a theoretical unit of analysis and a historical perspective – are now further defined on the basis of activity theory. The following addresses the historical perspective and the methodology of studying change and development in court work through analyzing the situated practices of court proceedings. Later in my work, at the beginning of each empirical chapter, I will return to some aspects of activity theory that have a particular significance for my analysis. In the same connection, I will offer a description of the methods created and used in the chapter in question.

¹⁸ The primary contradiction is that between the use value and exchange value of commodities (Engeström, 1987). A secondary contradiction occurs when a new element adopted by the activity system from outside collides with some of the old elements. A tertiary contradiction appears between the motive and object of the dominant form of activity and the motive and object of a culturally more advanced form. A quaternary contradiction is what emerges between the central activity and the neighbouring activity in the interaction.

The historical perspective on court work applied in this study follows the activity-theoretical framework for studying current court proceedings and their developmental challenges as historically constructed. In order to grasp the underlying historical layers within the current practices, ethnographic data collection should be supported by historical data analysis. Therefore, analyses of history and the developmental phases of the court work were provided in order to interpret observable, ongoing practices. In this study, the historical perspective involves the theory-historical¹⁹ analysis of the cultural models and concepts in the procedural reform of 1993 (Chapters 2.3–2.5), a description of the tensions in court work in the years prior to the reform (Chapter 2.1), as well as a summary of the earlier developmental phases in the history of my research site in particular (originally published in Engeström, Haavisto & Pihlaja, 1992), presented later in this chapter.

In my study of dispute resolution in courts as a specific event, I will focus on the concrete actions through which the trial is constructed by the participants. Hence, my interest is focused on dispute resolution in courts as a culturally and historically evolving process, which I will study by analyzing the concrete actions through which the individual disputes are established. Methodologically, it is a question of the relation between social activity and situated actions that emerge in interaction (Engeström R., 1999, p. 27–32). In a sense, the activity – which is a historically evolving process with a socially important motive (such as dispute resolution in court) – and the concrete actions – which take place in the actual interaction between people (for example, the specific actions in conducting a trial in an individual case) – are different sides of the same coin. Each trial is constructed in a unique way with specific situational characteristics of its own, but still every trial serves the motive of and accomplishes the activity of dispute resolution in society.

The situational actions through which the dispute resolution is conducted are mainly linguistic. As Conley and O’Barr (1998, p. 129) state, “Most of the time, law is talk”. Physical actions are of little importance in court work, unlike in medical work, for example, where physical examination is intertwined with solving the patient’s problem through speech (Engeström, 1999c, p. 171). The cen-

¹⁹ According to Engeström (1987, p. 326), theory-historical analysis is motivated by the idea that an activity system utilizes a set of shared artifacts, such as concepts and models. These cultural artifacts are embodied e.g. in handbooks, working instructions and fixed procedures, and function as general conceptual instruments of the practical activity. A civil procedure is a shared cultural artifact imported into the activity system of the court from outside. Theory-historical analysis seeks the roots and earlier forms of these cultural models, or may simply aim to identify the shared cultural models behind current practices.

tral importance of talk means that the main focus in studying the court proceedings will be put on the communication and interaction through which the client's problem is handled. My aim is not to study the talk or the language itself, but the activity which is accomplished by that talk (see Engeström R., 1999, p. 44).

The research field of language and law has produced several studies at the intersection of sociolinguistics and studies on law and society. Conley and O'Barr (1998) concluded that, despite the success of the research programs in both sociolinguistics and law and society, each of these fields has, in isolation, failed to address fundamental issues. Study after study in sociolinguistics has supported the finding of socially patterned variation in language. What the field has failed to do is to connect the variation it has documented with broader social issues. Research on law and society scholarship, on the other hand, has aimed at explaining the significant social questions of power and inequality, for example, but has been less successful in displaying the concrete mechanisms that produce these inequalities (Conley & O'Barr, 1998, p. 12).

What Conley and O'Barr favor is, of course, the merging of the strengths of these two approaches. Interested especially in how the power of law actually operates in everyday legal settings, they look for the linguistic mechanisms through which power is realized. Their conclusion is that language is not merely the vehicle through which power operates, but in many respects, it *is* power. Power is, at the same time, both the cause and the effect of linguistic interactions in the legal system; it is both determinative of and determined by the linguistic details of court practices. (Conley and O'Barr, 1998, p. 14.)

I aim to overcome the above-mentioned restrictions in law and language research in the present study. The concept of activity offers a fruitful link between the microsociology of legal discourse and the macro-level analysis of change in court work.

The premise that work does not consist of top-down ordered constraints, but that workers also make active efforts to affect these constraints, is one starting point in activity theory. This supports the study of work practices and their development using methods that enable the discovery of various ways of working and the developmental potential within them. Recently, in social sciences, differing qualitative research paradigms have been celebrated for offering research methods that can produce knowledge that is theoretically founded, contextual and powerful in historical explanation (Silverman, 1993). Qualitative research is usually concentrated on the intensive and systematic analysis of relatively few research objects. The more recent and unexplored the phenomenon, the more vital is the need for qualitative data. Before a new phenomenon

can be examined statistically, we need qualitative data to understand what kind of a phenomenon it is.

My methodological approach is to explore the micro-processes and interactions in selected court cases, and to look at them in the context of changing court work with a particular history and evolving future directions. The method includes audio- and videotaping and transcribing the actual hearings as well as the accounts given by the participants. It brings out the different perspectives that the multiple participants have on the proceedings, and enables the voice of the client, largely suppressed thus far in Finnish legal studies, to be heard. Thus, my study conforms to a long-established international tradition in which moderately small amounts of data are used for in-depth examination of legal discourse and participants' accounts (e.g., Conley & O'Barr, 1990; Komter, 1998; Philips, 1998). In the context of Finnish judicial studies, which are mostly oriented towards legal dogmatics and theoretical pondering on judicial issues, my study introduces an alternative approach to court proceedings and development. The lack of empirical studies in this area has led to the recognition of the need for non-traditional and interdisciplinary approaches (e.g., Ervasti, 1998; Nousiainen, 1997).

5.2 Research Site and Its History

The Selection of the Research Site and My Own Position during the Research Process

The reasons for selecting the District Court of Vantaa for the research site were historical. The developmental research project conducted in Vantaa District Court in 1990–1992 provided a large and coherent database in a number of civil cases, as well as knowledge about the history of court work and a remarkable amount of ethnographic observation and interviews. The data already gathered provided excellent grounds for enlarging the database and encouraged me to build on what had already been gathered. Already familiar with this professional field with its special characteristics, I was interested in the possible changes in court work and had existing contacts with the management and personnel of the Vantaa District Court. All this made it easy to suggest to the employees there, that I could collect a corresponding database on the civil proceedings after the reform. The management and personnel were willing to take part in the research, partly – I assume – because they were already familiar with me and my research strategies, and partly because they needed to get some information on how the reform had been implemented in their own unit, and on the kinds of problems that may occur.

My own position in relation to my research site has altered during our collaboration. As a member of our research group during the developmental research project, my role was to plan and conduct interventions as well as to conduct the fieldwork. My role in the second round of research after the procedural reform was more that of a data collector than of an interventionist. The context-specific findings, however, were directly relevant to the organization studied, and offered a natural starting point for a reflective dialogue between the organization and the researcher. In a similar vein, the interviews I conducted, served as an impetus for self-reflection for those interviewed. Most importantly, the reflective dialogue between me and my research site materialized in the training seminars, or “discussion days”, that I arranged together with the court representatives. These seminars, based on selected extracts from my data and on my preliminary interpretations of the findings, were important forums for shared evaluation and developmental attempts at the Vantaa District Court.

A Short Ethnography of Vantaa District Court

The courthouse is located in Tikkurila, which is the administrative center of the city of Vantaa. In outward appearance it is a modern-looking, dark blue and white building, not like a traditional office block. It was built in 1988, and a renovation and enlargement were finished in 1995. The courthouse includes four courtrooms and four meeting rooms for the preliminary hearings. The courtrooms were used earlier for all court sessions, but now they are only used for the main hearings. These rooms, as well as the waiting area for the clients and the waiting rooms for the attorneys, are on the second floor of the building, which also houses the office of the summoners. The courthouse gives a modern and stylish impression with its color-coordinated furniture and interiors and rooms decorated with houseplants and modern art.

The offices for the personnel and for dealing with clients are on the first floor. The offices of the personnel are also cozy and nicely furnished, while retaining an office-like appearance. The first floor of the courthouse is divided into a public area, in which the client service desks are located, and a private area for the staff, accessible only with an electronic key.

Vantaa District Court is one of the biggest lower courts in Finland. The total number of permanent personnel was 61 in the spring 1997. This included thirteen judges, one senior secretary, seven court trainees, thirty office workers, and ten summoners. There were also two temporary judges and four half-time office workers. The office personnel work normal office hours, but the judges have no fixed working time.

The district courts serve as general courts of first instance in which the civil matters, criminal matters and petitionary matters, such as divorces, adoptions and establishment of paternity, are decided. One relatively new area of activity concerns the debt recovery. District court judgments are subject to appeal to a court of appeal, and the decisions of the courts of appeal, in turn, are subject to appeal to the Supreme Court. The leave to appeal is granted by the Supreme Court itself.

The total number of decided cases in Vantaa District Court slightly exceeded 20 000 cases per year in the preceding five years. The total case numbers in some of the main case types were at the time of the second round of data collecting in 1997, as follows: total number of decided cases 20,605, of which crimes accounted for 1,517, large-scale disputes 286, disputes with summary procedure 4,670, petitions including divorces 2,596, and debt recovery for private people 473, and for companies 15. The total number has been on the increase since then, being 23,459 in 2000, while the number of large-scale disputes decreased to 210.

Historical Phases in the Development of Vantaa District Court

In our research (Engeström, Haavisto & Pihlaja, 1992) we analyzed the local history of Vantaa District Court from the time before World War II up to the beginning of the 1990s. We combined locally specific information on the changing conditions there, based on interviews and historical documents, with our knowledge of the history of the former circuit courts in general. To give some local context to the implementation of the reform in my research site, a summary of the main historical contradictions and developmental phases in Vantaa District Court is offered in the following.

After the second world war, and especially during the 1970s, 80s and 90s, the city of Vantaa, located in the capital area, grew rapidly: first, the population increased heavily when the extensive suburbs became inhabited, and then the companies moved in. Characteristic of the history of Vantaa District Court, the general court of this growing metropolis has been the constant increase in caseloads. The problems caused by excessive amounts of work have been solved in different ways over the years.

In the first developmental phase, which took place from World War II to the end of the 1950s, the solution to the unbearable workload was to split the geographical area that the court was responsible for into two. In 1959, this was the only possible solution because of a regulation stating that the number of

judges in one court could be no more than one. This rule also set the supplementary income of the judges, allocated on the basis of seniority. As a result of this split, Vantaa District Court was allocated the region that it still serves today.

In the second phase, during 1959–1972, the growing caseload was thought to be threatening legal security, because the one allowable judge could not handle all the cases. More than two out of three cases were therefore dealt with by a court trainee. The problem was solved in 1972 with the introduction of a nation-wide regulation revoking the old rules about one judge in one court, and about supplementary incomes. The new solution was a new kind of organization with several personnel groups. The new courts were totally maintained by the state, whereas in the old system the head of the court was in charge of its maintenance, like an entrepreneur. This was the starting point for the development of work allocation and collaboration in Vantaa District Court. In more general terms, it was a period of rapidly growing litigation in most European countries, and consequently also a period procedures were routinized whenever possible (Blankenburg, 1991, pp. 12–13). For example, simplifying divorce procedures and summary penal judgment for traffic misdemeanors were law reforms introduced in the 1980s in order to rationalize court work.

When our research group first visited Vantaa District Court, the court seemed to be facing a new developmental phase, again struggling with a growing caseload. This time the resulting problems showed themselves as stress and burn-out experienced by the personnel. The basic contradictions in the work in 1990 are described in Figure 5.2.

We found two basic work contradictions at the beginning of the 90s. In line with the social and economic developments, the object of the court activity – the cases – had also changed. There was a polarization of court cases: both the numbers of simple routine cases, as well as the numbers of more complicated cases, increased and overshadowed the “ordinary cases”. The growing number of cases connected to business life meant more demanding and complicated issues. The judges also told in their interviews of pressures to make fast decisions and to produce more grounded justifications for their judgments.

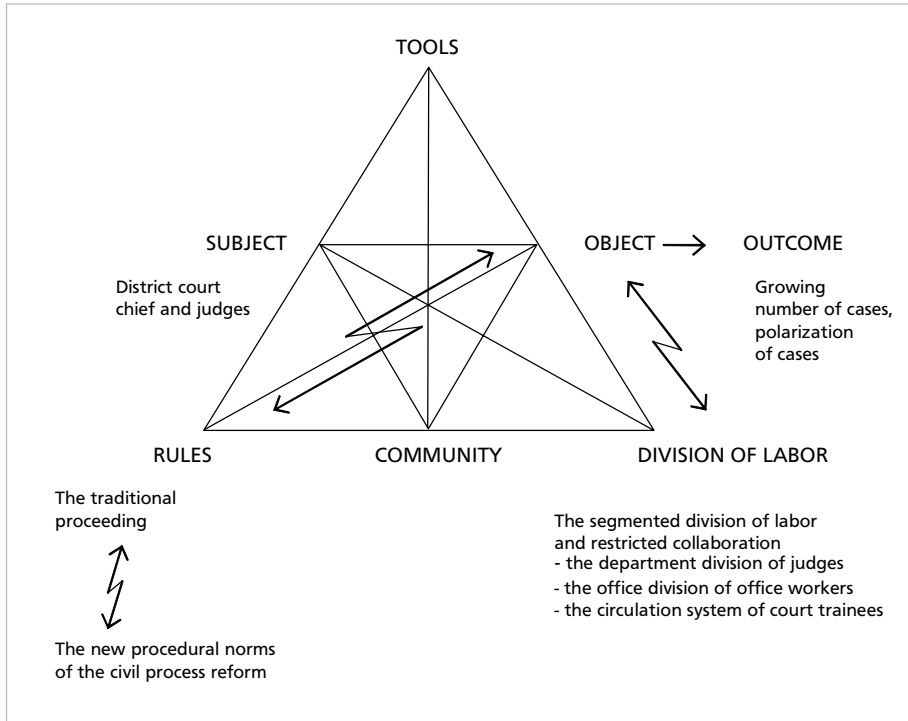


Figure 5.2 *Contradictions in the Work of Vantaa District Court in 1990* (Engeström, Haavisto & Pihlaja, 1992, p. 154)

Despite this transformation in the object of the court, the rules guiding the proceedings remained the same. The contradiction between the rules and the object was expressed in prolonged court processes, where numerous postponements compelled the judge to return to each case several times. This fragmentation diminished the judges' possibilities to master the proceeding, and compromised the decision making. This mechanism produced the workload and stress experienced by the judges. The rules were also internally contradictory: alongside the chains of the old established practice were pressures to take into account the new norms of the new legislation, especially the active roles taken in the court room (Engeström, Haavisto & Pihlaja, 1992).

Another basic contradiction in the court activity appeared between the changing object of the work and the rigidly segmented division of labor. The judges were located in their departments, the office personnel in their offices, and the court trainees, who still provided an important labor resource, were scattered around different departments and offices. The potential for collaboration among different personnel groups was not efficiently exploited. The long-established historical tradition of a judge working alone was evident: the judges in

Vantaa District Court appeared to be individual judges working alone on cases allocated to them.

5.3 Data and the Practical Conducting of the Fieldwork

Case Selection and Description

The case types on which to focus were negotiated with the judges at the beginning of our research project in 1990. At that time, the judges considered certain complicated civil cases “critical cases”, which were not necessarily difficult in a judicial sense, but which caused a lot of friction in the flow of work. Following their suggestions as to what were typical case types that caused friction, we selected a construction dispute (Case 1), the cancellation of an employment contract (Case 2), and the contesting of the partition of property between former spouses (Case 3).

After the reform, I decided to focus my attention on cases which resembled as much as possible in their setting those collected before the reform. I decided on a construction dispute (Case 4), compensation for damage (Case 5), and the contesting of the partition of property between former spouses (Case 6). Due to the decrease in the number of civil cases in the last half of the 1990s, a genuine case concerning the cancellation of an employment contract (the equivalent of Case 2) would have taken too long to materialize, so a case in which a mother claimed compensation for the delay in arranging day care for her children (Case 5) was selected instead. Basically, the case resembles disputes on employment contracts in the sense that they are both about the right to receive compensation for damage. Moreover, Case 5 represents an emerging case type, which involves the courts more closely in the social and political issues of society. A description of the key features of each case follows. The main data and cases used in the respective analyses are described toward the beginning of the respective empirical chapter (Chapters 6 to 9).

Case 1 concerned the residents of a condominium complex, who were not satisfied with the performance of the builder in repairing the defects and faults of the construction. There were also some dampness damages in the basement that were, according to the residents, due to insufficient and faulty construction. According to the builder, they were due to the wrong tilling of soil made by the residents themselves. The builder, as a plaintiff, demanded the final part of the contract price, which the residents had retained. In their counterclaim, the residents claimed for a reduction in the purchase price and for compensation for the expenses that resulted from finishing the construction with the help of other companies.

The proceedings took 18 months from the serving of the summons to the declaring of the verdict, and included seven hearings. Both the plaintiff and the defendants had an attorney representing them. Nevertheless, the plaintiff attended three of the seven sessions. Similarly, two of the residents of the condominium complex were present in three sessions. The residents of the condominium complex were not satisfied with the district court's decision and complained to the court of appeal.

Case 2 concerned the cancellation of an employment contract of the plaintiff. According to the plaintiff, the cancellation was illegal and unsubstantiated. His employer, on the other hand, claimed that the plaintiff had neglected his duties in such a way as to make the cancellation of the employment contract necessary. The defendant was a small real-estate agency with new owners, who had inherited the case when buying the firm. The new management was unaware of the actual events that had resulted in the cancellation of the plaintiff's contract.

The proceedings took six months from the serving of the summons to the decision. Three hearings were conducted, in which the plaintiff and the defendant were represented by their attorneys. Both parties appealed to the court of appeal.

Case 3 concerned the contesting of the partition of joint property. After the divorce of the plaintiff (the ex-husband) and the defendant (the ex-wife), the property was divided between them. The ex-husband was not satisfied with the partition and applied to the district court for it to be changed. When summoned to the court, the ex-wife made a counter-claim, in which she also demanded that it should be changed.

The proceedings took eight months from the serving of the summons to the verdict, and consisted of four hearings. Both parties had an attorney representing them. The ex-wife was present in two hearings out of the four, the ex-husband in one hearing. The ex-wife appealed against the decision.

Case 4 was a construction dispute, referred to in the court files as the cancellation of trade in movables. It was about construction defects and mildew problems in an apartment. Mr. Aho (the secondary defendant) had sold his apartment in a condominium complex to Mr. and Mrs. Laakso (the defendants), who in turn sold it to Mr. and Mrs. Vuori (the plaintiffs). The Vuoris found the apartment full of construction defects, and as a result of these defects, it also had severe mildew problems. They wanted either to revoke their purchase of the apartment, or to receive substantial compensation. The defendants took out a claim against the secondary defendant, Mr. Aho, and made the same demands.

The case became pending when the application for a summons arrived at the court and ended with a settlement, taking 20 months altogether. One two-day preliminary hearing and an extended preliminary were arranged. The parties were represented in the hearings by their attorneys. The plaintiff, however, was present on the first day of the preliminary hearing.

Case 5 concerned a mother who claimed compensation because the city had failed to arrange day care for her children on the day she needed it. She had to stay away from work, and lost her salary for those days. This case was a matter of principle to a large extent. In Finland, every child has the subjective right to receive day care until he or she is seven years old, and accordingly, the cities and municipalities are obliged to arrange the day care. The city in which the plaintiff and her family lived had difficulties in fulfilling its obligation and in organizing the day-care services. With her claim, the mother wanted to test the legal validity of the obligation given to the cities.

The proceedings took eight months from becoming pending to the decision. The plaintiff was represented by an attorney, but was also present in every hearing. The city was represented by one of its lawyers. The plaintiff appealed against the decision to the court of appeal, and after that, the defendant appealed to the Supreme Court.

Case 6, again, was about a previously married couple who contested the partition of their joint property following their divorce. The ex-husband wanted a higher evaluation of a few specific items. The ex-wife claimed for restoration of specific items given in the partition into her possession, but which she had never received.

The proceedings took 10 months from becoming pending to the verdict, and consisted of a preliminary hearing, and an extended preliminary hearing followed immediately by the main hearing. Additionally, at the beginning of the proceedings, the judge arranged a voluntary, informal hearing in order to get the case settled. The ex-husband was present in all of the hearings, the ex-wife in the extended preliminary hearing and the main hearing. The ex-husband appealed against the decision.

Data and Data Collection

The main data in the study comprises the proceedings in six civil cases: three cases were dealt with in 1990–1991, before the procedural reform, and the other three cases in 1997–1998, after the reform. The total time-span of my research was eight years. The proceedings in each case form a trajectory from

the plaint left by the plaintiff for the court to the decision given by the court. The research method used was chosen in an attempt to record this trajectory as completely as possible. I videotaped (in two cases audio-taped) the court hearings within each case, interviewed all those involved, and collected all the court material. Hence, the complete set around each trajectory comprises videotaped hearings, audiotaped interviews with the participants, and official court documents. A total of 11 hearings were observed in the old proceedings, and all of the ones arranged in the new: three preliminary hearings, three extended preliminary hearings and two main hearings. The hearings in the first three cases took from 40 minutes to two hours, and in the second three from two to eleven hours (divided into two days). The total number of interviews was 42 in the old and 36 in the new proceedings. Table 5.1 gives the main information about the data in the court cases observed before the reform, and Table 5.2 in the cases observed after the reform. The abbreviations used in the tables are the following: J – judge, CC – court clerk, CT – court trainee, LJ – lay judge, P – plaintiff, D – defendant, PA – plaintiff’s attorney, DA – defendant’s attorney.

The number of observed cases was relatively small, but the total amount of data was still extensive. Since the purpose was to look for possible changes throughout the whole trajectory in each case, the number of cases was determined so that it was possible for one researcher to cope with it.

Table 5.1 Data Collected before the Reform

CASE	1. CONSTRUCTION DISPUTE	2. CANCELLATION OF AN EMPLOYMENT CONTRACT	3. CONTESTING OF THE PARTITION OF JOINT PROPERTY
HEARINGS	1. January 1990, not observed	1. March 1990, not observed	1. February 1990 notes
	2. April 1990, not observed	2. May 1990, videotape	2. April 1990, notes
	3. June 1990, videotape	3. August 1990, audiotape	3. June 1990, audiotape
	4. September 1990, videotape		4. August 1990, audiotape
	5. November 1990, videotape		
	6. March 1991, videotape		
	7. April 1991, videotape		
INTERVIEWS	After the 3 rd hearing: J, CC, PA, DA	After the 2 nd hearing: J, CC, PA, DA	After the 1 st hearing: J, PA, DA
	After the 4 th hearing: J, P, D	After the 3 rd hearing / decision: J, CC, P, D, PA, DA	After the 2 nd hearing: J, P, D, PA
	After the 5 th hearing: J, CC, PA, DA		After the 3 rd hearing: J, CC
	After the 6 th hearing: J		After the 4 th hearing / decision: J, PA, DA, CC
	After the 7 th hearing / decision: J, CT, L J, P, D, PA, DA		

Table 5.2 *Data Collected after the Reform*

CASE	4. CONSTRUCTION DISPUTE	5. COMPENSATION FOR DAMAGE (THE DAY-CARE CASE)	6. CONTESTING OF THE PARTITION OF JOINT PROPERTY
HEARINGS			November 1997, informal preliminary hearing, not observed
	Two days in January 1997, preliminary hearing, audio- and videotape	December 1997, preliminary hearing, audio- and videotape	February 1998, preliminary hearing, audiotape
	May 1997, extended preliminary hearing, audio- and videotape	December 1997, extended preliminary hearing, audio- and videotape	April 1998, extended preliminary hearing and main hearing, audiotape
INTERVIEWS	Before the preliminary hearing: J, CC	Before the preliminary hearing: J	Before the preliminary hearing: J
	After the preliminary hearing: J, D, DA, D2, D2A	After the preliminary hearing: J, P, PA, DA	After the preliminary hearing: J, CC, P, D, DA
	After the extended hearing: J, CC	After the main hearing: J	After the main hearing: J, CC, PA, P
	After the settlement: J, D, PA	After the decision: J (twice), CC, P, DA	After the decision: P, D, DA

Permission to record the hearings on my own tapes was given to me by the individual judges whose cases I considered suitable. Before that, the general guidelines for allowing me to conduct a study requiring videotaping were agreed upon by the local project committee²⁰ planning the developmental research project. Before the second round of data gathering began, permission to carry out research by recording the hearings was given to me by the chief justice. However, as each judge exercises ultimate power in his or her own courtroom, the final permission was always granted or withheld by the particular judges.

Videotaping Court Hearings

²⁰ The project committee consisted of our research group, the Chief Justice, three Circuit Court Judges and three representatives of the office personnel of Vantaa District Court, as well as one representative each of local attorneys, prosecutors and the members of the lay board.

Hearings in Finnish district courts have not traditionally been recorded or transcribed within the system itself. After the 1980s, however when technical recording equipment improved, it became common to record the testimonies of witnesses. The recordings were transcribed by office workers. Following the procedural reform, the testimonies are audiotaped, but not transcribed in court. Hence, the only way to document the interaction was to make the recordings myself.

Using videotaping for the documentation appeared a natural choice, as the task was to analyze complex interaction between several participants. Moreover, my endeavor also to grasp the fragile indications of possible change in courtroom interaction favored videotaping. I recorded the hearings using one camera placed in the corner of the courtroom or meeting room in which the preliminary hearings were held²¹. I installed the camera so that I did not have to attend to it during the hearing, except for changing tape. An external microphone was installed closer to the speakers to ensure the correct volume. As I was always present in the hearings²², I also observed the interaction on the spot. Videotaping showed its advantages in the later analysis, when I was free to rewind the tape and could thus afterwards observe details that passed me by in the actual interaction (for a detailed analysis of the advantages of videotaping, see Jordan and Henderson, 1995).

One issue to ponder is whether people change their behavior when the interaction is videotaped. Jordan and Henderson suggest that this question cannot be answered in general, but should be addressed as an empirical issue in each particular study. They state, however, that people usually seem to become familiar with the videotaping without problems, especially when their attention is directed to something else (Jordan & Henderson, 1995). My experience in this study was that the participants soon forgot the video camera when the hearing started. The seriousness of the ongoing activity – the fact that the participants were in the real situation of dealing with people's legal problems and contributing to a decision with tangible implications – made it impossible to

²¹ In Case 6, the plaintiff was suspicious and against videotaping the hearings. After discussion with him and careful consideration I decided to take the case, but record it only on audiotape. I was present in the hearing and made more detailed field notes than usual and wrote down observations concerning physical actions, gestures and looks.

²² All hearings in district courts are open to the public, if it is not especially decided otherwise by the court. After the reform, situations in which a settlement is negotiated are in the gray zone in terms of public access. There are no other rules governing those occasions, except those that direct the proceedings in district courts in general. The judges have to consider issues of public access themselves, if there appears a need for it. Usually I was the only outsider in the hearings, excluding Case 5, where representatives of the press were also present.

concentrate on the video-taping rather than on the issue in question. Interviewed after the proceedings had ended, one attorney described her experience with the videotaping in a way that verifies this assumption.

Interviewer: What do you think, did the videotaping have an effect on the hearing?

Attorney 1: I don't think so. I mean, you forgot the videotaping immediately when the hearing began.

Interviewer: You mean that was your own experience?

Attorney 1: Yes. There were so many details in the case you had to bear in mind all the time, so the external factors just didn't have any effect. It's just the same if there's an audience in the courtroom. When you enter the room, you notice that OK, here are some folk following the hearing, but you don't remember that for long.

My impression was that, in interaction between several participants, the complexity involved left no room for maneuver. In one case, however, the defendant's attorneys felt that some features of the hearings resulted from the judge changing his normal habits because of the videotaping. She considered some of his actions more like a theatrical performance in front of the camera. The issue popped up twice during the interview.

Interviewer: Could you now evaluate this preliminary hearing? In what way was it successful and what problems did you see?

Attorney 2: I have been in several cases chaired by this particular judge and I have to say that he would have handled it totally differently if your cameras hadn't been there.

Later in the interview:

Interviewer: A kind of planning of the process took place at the beginning of the preliminary hearing. I mean the discussion about how the case was to proceed and how the witnesses would be heard and things like that.

Attorney 2: That was connected to this videotaping. Usually that doesn't happen and there's no need for that kind of discussion if you are experienced enough with this kind of case. Of course, the fact that the principal was present in the hearing may also have had some effect. But most importantly, I think, he was concerned about you videotaping the proceedings.

After hearing these accounts, I asked the attorney on the opposing side about her views on the issue²³.

²³ This very issue was not addressed in the interview with the judge.

Interviewer: How about the judge, did the videotaping have some effect on his working?

Attorney 1: Well well. I think I saw a clear effect. I think he was performing. He explained many things to us in detail. That was perhaps part of the performance, that he explained to us this new civil procedure so thoroughly. But I don't know, I don't have anything to compare.

Interviewing Those Involved in the Hearings

In each case, I interviewed the judges who chaired the proceedings, the attorneys of the parties and the parties themselves. If court clerks or court trainees were involved, I also interviewed them. The interviews took from 30 minutes to two hours.

The chairs of the cases were interviewed most frequently: at least twice during the proceedings, but in most cases several times in different phases. They were easy to contact which often resulted in "on-the-spot" interviews with elements of immediacy and accuracy. I sometimes interviewed the judges immediately following the hearing, sometimes a day or two after. The judges were very open, reflective and ready to share their ideas and experiences in the immediate interviews, as they were still somewhat involved in the events of the hearing. I often conducted short interviews with the judges before the hearings too, asking them to reflect on their plans. Each of them was interviewed in his or her own chamber, which provided a peaceful, undisturbed room with no intruders. On the whole, most of them were easy to interview, as they seemed to be interested in sharing ideas and reflecting on their own work. The interviews took place in a relaxed and collegial atmosphere. As I was a representative of the university staff, the judges seemed to regard me as a colleague and an equal in an academic sense. Since I have my background in adult education, I was not able to evaluate or rank them according to their professional performance as legal experts. They probably saw me as an easy-going and harmless person to talk with. Every now and then, the judges also asked me for my opinion and seemed to be pleased if I could somehow reflect on the events in the courtroom. One reason for the successful interviews was evidently that the judges knew me beforehand because of my intensive frequenting of the courthouse. They already knew that I was using ethnographic research methods that were open and sensitive to their own concerns and ideas. I think I also managed to convince them that correct answers do not exist, and they followed my advice to reflect aloud in the interview on the possible and impossible ways of thinking.

The attorneys were usually interviewed twice during the proceedings, in the middle of the process, and after the case was closed. They were sometimes interviewed in the courthouse, but mostly I visited them in their offices. They all gave me permission to interview them.

The attorneys differed in their attitudes towards my interviews. Some of them expressed their interest in the non-judicial approach of my study. Usually they soon realized that I was not interested in the judicial substance of the case, and openly discussed the proceedings. However, some of them seemed to find it difficult to find a balance between protecting their principals' interests and answering my questions. They were relatively open about evaluating the proceedings, but tight-lipped when dealing with case-related questions. That they were competent and accomplished speakers was both good and bad. On the one hand, they were easy to interview and could formulate their responses in an organized way. On the other hand, they were also trained in hiding their thoughts and turned out to be the interviewees from which open and reflective responses were the most difficult to elicit.

The clients were interviewed twice in most cases: first during the proceedings and then after the court had decided on their case. This strategy was to guarantee that the parties would first evaluate the proceedings as such, without knowing the final outcome, and then evaluate the entire case, including the decision. The interviews were held in different places: some in my office at the university, some in the courthouse, but most took place in the client's home or workplace. One client (the plaintiff in Case 4) refused my request for an interview.

Interviewing the parties first required making contact with them, because I could not necessarily talk them in the hearings. The ways of making contact differed after the reform. In all the cases observed before the reform, the clients were absent when we made our first recordings. Having obtained the permission to videotape the hearings, we informed the attorneys of our presence before we went into the courtroom. Most of the attorneys probably informed their clients of our research, but we also contacted the clients personally: we met them in the later hearings or we contacted them by phone in order to arrange a time for the interview. This changed after the reform. The number of civil cases had radically dropped by the second round of data collection, and it was more laborious to find cases for the research. I wanted to ensure, in advance, the commitment of both clients and attorneys and avoid missing potential cases because of possible on-the-spot refusals. Due to the changes in the civil procedure which included the detailed plaint and the defendant's response to it, all the persons involved in the case were known to me already before the first hearing, and it was now possible to contact them before meeting them at the courthouse.

In my view, conducting research and getting successful interviews in a court setting requires conscious efforts at inspiring confidence among the interviewees. Already facing disruption in their lives clients in particular may feel suspicious of an outsider who is gathering information about their case. During the first contact, and also later when necessary, I tried to build up their confidence in me and my research by explaining to them that I was mostly interested in the work of the courts and in how they could better serve their clients, not in the substance of their particular case. I told them how important it was for me to elicit their opinions on the handling of their case, and not just to listen to the judges. I also explained how I was going to use the data I had collected, and how I would guarantee their anonymity.

I started all the interviews with the clients with the same question: “What is this case all about?” Most often, this simple question inspired a flood of words and I could use my responses to assure the clients of my sincere interest in hearing their views. Only seldom did the interaction remain formal and the client maintain a reluctance to share his or her ideas with me. The willingness of most of them to reveal their personal concerns about delicate issues, such as failure in marriage or in house purchasing, and share them with me in the interview seemed to imply trust.

The interviews with the clients were most rewarding in their sincerity, but still most draining for me as a researcher and as a person. Becoming involved in people’s problems – which at times were serious problems – sometimes made a mockery of the academic nature of the case and required me to balance my responses as a researcher and as a person (about the personal meaning of an interview for a researcher and the contradictory roles in the field, see Emerson & Pollner, 2001; Kondo, 2001; Oakley, 1981).

Method of Interview

The interview method was always the same, a simplified version of the so-called stimulated-recall interview. The stimulated-recall method, described by Ritva Engeström (1999, pp. 127–130) would have required the interviewer and the interviewee to look together at a videotaped court session and to discussing it. The videotaped interaction then would have stimulated the respondent to give situation-specific accounts. This was tried, but was found impossible in practice, due to the long duration of the hearings. Instead, we devised a method in which the researcher used his or her own questions to stimulate the interviewee to reflect on the concrete actions and events that had taken place in the

hearings. I used my field notes²⁴ to quickly reconstruct for each interview a separate, context-specific question list (an example of a question list constructed for a client's interview is in Appendix 1). Some of the questions were ones which I had planned in advance and were common to all of the interviews. Others were case-specific, requiring concrete recall of the events and discussion in the hearing: "Do you remember, that the judge asked you to inform her about the witnesses. Why did she do that?" These questions were not necessarily formulated in a question form, but were more like invitations to continue on the topic I introduced: "I remember you asking the opposing party to visit the apartment." Sometimes I even offered an interpretation of my own, or a challenge to the idea of an anonymous respondent to provoke accounts on an area in which I was interested: "Somebody argued in his interview that the parties should not be allowed to participate in the preliminary hearings. What do you think about that?"

An interview in which the interviewee "thinks aloud" and makes sense of what happened in the hearings requires both the researcher and the respondent to be active. For the researcher, being active means that he or she cannot merely read ready-made questions from the paper. Instead, the researcher has to motivate the interviewee by making the questions appear as important, interesting and problematic. He or she has to convince the interviewee that the interviewer is not after the so-called right answers. For the interviewees, the requirement for active participation means surrendering to the hard intellectual work of explicating the invisible self-evidences in their own work practices.

On the whole, the interview method used in my study is suggestive of the method Holstein and Gubrium (1997) call active interviewing. The active interviewer does not search for the best or the most authentic response, but rather tries to activate the respondent to think aloud about the possible responses and ways of thinking.

²⁴ During the hearings, I made detailed notes about the flow of the interaction including intuitive remarks on turns or events that I considered important. "The chair is giving lessons on procedural law" or "The plaintiff is anxious to get the floor" are some examples of those remarks. I highlighted particularly intense episodes and interesting turns by adding exclamation marks. Most often those marks indicated the client's activity in the hearing or the communication between the client and his or her attorney, which I found interesting already in the phase of data collection. I also made a note of the time every five or ten minutes. Comparing the hand written time in my notes to the clock shown on the videotape minimized search time by helping to find certain episodes, registered in my notes, from the tapes.

Transcription of the Data

The videotaped court hearings and audiotaped interviews were transcribed. Transcribing the videotapes proved to be technically inconvenient and laborious, and so a parallel audiorecording was made in the second round of data collecting after the reform. In two of the three observed cases, an extra recording was made by the court clerks on the equipment installed in the meeting rooms. This served as a back-up copy and was also used in the transcribing.

In transcriptions, I followed simplified conventions as suggested, by Conley and O'Barr (1998, p. xv), for example. Both Conley and O'Barr (1998, p. 139), as well as Jordan & Henderson (1995, p. 12), point out that the detailed transcription conventions created within the tradition of conversation analysis (CA), which aim at full reproduction of the original sound patterns, are still not comprehensive and exclude some salient features. Every set of conventions inevitably involves a number of interpretations and choices made by the transcriber.

Jordan and Henderson (1995, 12) stressed that the transcribing conventions used in each study should depend on the aim and purpose of the analysis. In my study, I have emphasized the content of the speech and my interest was in *what* the speakers said. Since the main focus is on the actions that were accomplished through the use of language, there seemed to be no need for complicated elaboration of the linguistic aspects of the speech. Also, as translating the Finnish talk into English undeniably loses some of the nuances, I have chosen to simplify the speech structure to some extent so that it will stay accessible to the reader. The following notes are included in the transcriptions: the special emphasizing of words, interruptions and overlapping speech, especially long pauses, inaudible words, and clarifying editorial comments when appropriate. The transcription conventions used in the study are listed in Table 5.3.

Table 5.3 *Transcription Conventions*

<u>word</u>	word(s) with special emphasis
(-)	unclear word
word...	turn remains unfinished
##	turn starts as overlapping with the another speaker's turn
...word	turn continues from the same speaker's previous turn
(...)	short pause (less than a few seconds)
[word]	researchers comments e.g. about gestures, addressivity and especially long pauses in the interaction
(//)	whole sentences are cut out

The same conventions were used in transcribing the interviews, but the structure of the speech was simplified even further. For example, all minimal responses by the interviewer were cut out, as were the repetition of words and faltering by the respondent. This may result in some tones being missed, but greater comprehensibility is gained.

Additional Data Supporting the Analyses

The research is supported and enriched with other types of data in addition to the main data described above. Detailed, in-depth interviews were conducted with the judges and office personnel at the beginning and end of the developmental project. After the reform I repeated the in-depth interviews with the judges, emphasizing the procedural issues and questions of the division of labor and collaboration. The traditional semi-structured format was followed in the interviews, in which the questions are determined beforehand, but their order and specifications vary according to the interviewee's responses. In the interviews conducted after the reform, excerpts in which clients evaluated the court proceedings were presented to the respondents in order to provoke accounts concerning collaboration with the clients.

Selected excerpts from the in-depth interviews are presented in the study, but their main contribution was in giving indirect knowledge about the practices of those whose way of working in hearings was not recorded. These accounts of the work practices of several judges has offered a valuable framework for interpreting my observations in courtrooms and for understanding the tensions involved in judging at the present time.

In addition to the case-related database and the in-depth interviews, large-scale ethnographic data was gathered. This data mainly originates from the first period of research devoted to the developmental project in 1990–1992, but also includes some from the second period of research in 1996–1998. My work was more focused at that point, so I also restricted my involvement the most relevant observations. The ethnographic data includes:

- preliminary interviews with key persons conducted at the beginning of the fieldwork
- historical interviews targeted at gathering information about the previous developmental phases in the history of the Vantaa District Court
- field notes and/or tape-recordings of several established types of meetings in court, such as the judges' meetings, departmental meetings, and meetings of the executive group and so-called planning groups, organized during the developmental project in order to plan the work of the future district court
- field notes and/or tape-recordings of several occasional meetings inside the organization and together with key collaborators, for example, prosecutors, local attorneys and representatives of the Ministry of Justice
- field notes and video- or audiorecordings of seminars and training days held for the court personnel

Again, selected excerpts from the ethnographic data are presented throughout the study when appropriate, but its main function is to give perspectives on and grounds for the researcher's interpretations.

6 Changes in Courtroom Interaction: From Monologue to Dialogue

6.1 Introduction: Differing Aspects of Change in Courts

This chapter is an introduction to the possible changes taking place in courtroom interaction following the implementation of the procedural reform. The chapter focuses on the most salient features and alterations in courtroom discourse that seem to signal a potential shift in the object of court work. I will extend the analysis in the following chapters by opening more detailed perspectives on the different angles, but first I will briefly return to the debate concerning the change in and development of the justice system as a whole.

Challenges to judicial administration have been encountered in Western Europe and the United States since the 1980s. These include problems related to maintaining procedural fairness at the intersection of rising caseloads and declining resources, determining the optimal role of the judge in the control of litigation, and balancing due process with case-processing efficiency. In fact, many countries have recently undertaken judicial reforms designed to reduce the costs of and delay in civil litigation and to render judges more accountable and efficient (Blankenburg, 1991; Provine and Seron, 1988–89; Zuckerman, 1999).

Heydebrand and Seron (1990) argue that there is a quiet revolution taking place in American courts: a slow but cumulative process of rationalization in their organization and thus also in the actual work practices. This development has its origins in the contradiction between declining resources and increasing demands for judicial services. According to the authors, the rationalizing of justice implies that traditional adjudication is moving toward technocratic judicial administration. In this technocratic model of justice they include 1. the expansion of the judicial apparatus, including new judgeships, but also the reorganization of the work and authority structure of courts (for example, the use of magistrates, teams and court work groups), 2. technical innovations and new technology that change the nature of the work (for example, data processing, video technology and the statistical measurement of outputs) 3. the introduction of informal techniques including case management, settlement

conferences and negotiation, 4. alternative forms of dispute resolution outside the court, 5. the expansion of research and training functions and of the apparatus of the central administration in training judges and other personnel, and 6. systemic solutions where courts become part of a larger system involving law enforcement, jails and probation and the private bar (including systemic cost-benefit analysis of the justice system as a whole, rather than just of courts and judges) (Heydebrand and Seron, 1990, pp. 211–212).

Similar developmental trends are visible in the Finnish justice system. Case management entered the Finnish procedure through some of the main renovations promoted in the procedural reform of 1993: the general emphasis on the active role of the judge in the proceedings and in promoting settlement, through the meeting-like character of the preliminary hearing, and through the possibility of more informal communication and coordination with the parties. The rationalization was also evident in the new division of labor in the decision making: the judges were to concentrate mostly on complex civil cases, while the other personnel could decide the simple routine cases. However, it could be assumed that the rationalization process in the Finnish court system is still very vague compared to the American system (for a more detailed discussion, see Chapter 2).

As Provine and Seron (1988–89, p. 158) describe it, the new litigation practices – especially the judge’s active and aggressive involvement in the settlements – have raised conflicting arguments. There are those who interpret this growth of non-adjudicatory solutions as diminishing justice and as the end of the adversarial system and the concomitant legal protections. On the other hand, others welcome the development and consider it a new understanding of what justice means in the context of civil litigation. Interestingly, this new legal culture including informal negotiation and settlements has been accepted with only slight suspicion by Finnish district court judges. The reform has been justified in Finnish judicial discourse and in the causes of the new civil-process law by the improvement in orality, immediacy and centralization, resulting in turn in an increase in legal safety (Government Bill 15/1990). In this connection, judges are not especially willing to question the tradition of adjudication, but prefer to implement the settlement and informality in the old context. This manifests itself in the Finnish judges’ cautious way of encouraging the parties to settle, in their hesitation to give exact suggestions for settlement, and in their concern about losing their objectivity and neutrality if their suggestion is rejected.

Zald makes a critical point in his foreword to the book of Heydebrand and Seron (1990, p. xviii). While the authors are worried that the court rationalization will diminish justice, Zald states that it is not clear whether the participants or the wider public believe that justice is poorly served by these new mechanisms.

Similarly, I find it doubtful that the new legal proceedings are best interpreted as the rationalization of traditional adjudication. My interest is in finding out empirically whether they also include elements and dimensions that could be considered not as mere rationalization, but possibly as embryonic forms of a qualitatively new type of court work. One potential development in this new type of court work involves the team and network-based solutions according to which the work is organized on the basis of increasing flexibility and collectivity (for future alternatives for organizing court work, see Engeström & al., 1992, pp. 171–174.)

With their model of the technocratic rationalization of justice, Heydebrand and Seron make an interesting contribution to macro-level research on the court system. The main advantage of their model is that it describes qualitatively new forms of organizing court work and trial proceedings although with a certain ambivalence. On the one hand, they consider technocratic administration the dominating, although temporary, form of organization in court work, to the exclusion of other forms of administration. They also see it as a threat to traditional adjudication and the basic values of justice. On the other hand, they also see the technocratic model as having potential in that it lowers barriers to change and development in general (p. 218), and especially because – due to its temporary character – it may generate fruitful conditions for a new kind of democratic justice (p. 213). Interpreting the technocratic model as temporary is problematic, however. One could assume that it is no more temporary, or permanent, than any other historical phase in the evolution of the court system.

The question remains whether the procedural reform of 1993 will lead to a fundamental change in the everyday practices of the Finnish district courts or whether it will merely signify a change in the external form of the process. The reforms have been implemented gradually, in several stages during the 1980s and 1990s following the drafting of legislation that started as early as at the end of the 19th century (the civil procedural reform of 1993 was one of those). This long history indicates resistance to fundamental changes in legal practice (for a discussion on such resistance, see Provine & Seron, 1988–89, p. 165). Recent Finnish follow-up studies of the implementation of the civil process reform indicate that the present system involves fewer hearings, and that most cases – excluding complex civil cases – are decided during written preparatory proceedings. The studies also indicate an increase in the overall duration of proceedings and in trial costs (Ervasti, 1997a; 1997b). These outcomes could be interpreted as support for the hypothesis that the reform may slightly rationalize trials, yet the actual practices remain the same. On the other hand, Ervasti's study (1997a) reveals that a greater proportion of cases are settled in the present system than before. Findings such as this could be interpreted as supporting the

alternative hypothesis that we are witnessing a crucial interactional change in courtroom practice and discourse.

So far, the implementation of the reform has been studied quantitatively, using statistical survey data (Ervasti 1997a; 1997b). Aiming at an understanding of the possible qualitative changes in the Finnish court system, I will focus in this chapter on research problem 1, presented in Chapter 4, and on how the interaction and communication in the hearings has changed with the implementation of the new civil process. I will approach this general question through several more specific questions. How has courtroom discourse changed? How has the construction of a case changed? How has the production of minutes evolved? How has the use of language and terminology changed?

This chapter is thus an exploratory attempt to chart and conceptualize the research terrain opened up by the questions listed above. I will report and discuss findings from a case study comparing two court trials, one conducted before the reform and the other one after it. Particular episodes in the hearings have been selected from the proceedings in the two cases and, through close reading of the discourse, possible differences between the earlier and current discourse are identified.

6.2 Has the Object of Court Work Changed?

Studies in the socio-legal field commonly involve analyses that are conducted either from the point of view of individual agents or from the perspective of impersonal societal and economic structures. This study, derived from cultural-historical activity theory, focuses on collective and culturally-mediated human activity as the middle ground where agency and structure come together. The activity system (see Chapter 5) as a unit of analysis offers the possibility to study the actual work processes – how the work is done by individual actors or groups in the specific situations of each court case- in the context of larger social activity, here court activity. This starting point highlights the mutual interconnection: the individuals are forced to accommodate to the structures of the environment, yet they are continuously molding it and making an impact of their own. I believe that by examining the micro-level work practices and going more deeply into the interpretation with the help of activity-theoretical notions, I will contribute to the story of the transition in court work.

Activity theory rests on the notion of the object-relatedness of human activity. According to Leont'ev (1978), activity is fundamentally determined by the object, and object-relatedness is a constituting characteristic of activity. The concept of object is implicit in the very concept of activity, since “the expression ‘objectless activity’ is devoid of any meaning” (Leont'ev, 1978, p. 52).

To understand this definition, it is important to make the distinction between relatively durable, historically evolving collective activity, driven by a specific object and motive, and relatively short-term, individual, goal-oriented actions. Activity is driven by the object, but it is realized in the goal-oriented actions of individuals and groups.

The activity-theoretical notion of object should not be confused with the more everyday concept of objective or goal, which refers to the more short-term achievement of given ends. The object is to be understood as a project under construction, moving from the raw material to a meaningful outcome. In this sense, the object of activity is twofold: it is both something given and something to be projected or anticipated (Leont'ev, 1978).

The objects of basic material activities, such as manual labor, may be simple to envision, as the process of forming an object from the raw material to the finished outcome is relatively often clear-cut and visible. Examining work activities reveals the multi-faceted and slippery character of their objects, which are more abstract. Yet, it is clear that such activities are oriented toward something and driven by something larger and more durable than the specific goals of particular actions and individuals. This something – the object – is constantly in transition and under construction, and it manifests itself in different forms for different participants and at different moments of the activity.

When activities and activity systems undergo transition, they may have to redefine their objects. What is necessary for a fundamental change in the activity is that the object expands qualitatively in some significant way. The formation of a new, expanded object is the foundation for opening up the developmental potential in the activity and, finally, for achieving sustainable and significant transformation (Engeström, 1999b). If the object is not redefined in a qualitatively new way, individual and accidental changes in some aspects of the activity, even the remarkable ones, result in purely incremental change. Whether the object of court work has changed during the implementation of the court reform is hence the key question in understanding the changes that are taking place in the work of the Finnish district courts.

The object of the activity in the work of courts could generally be described as a *court case*. The reform of 1993 changed one essential rule in working with a court case – the code of judicial procedure in civil proceedings. This change of rule was accompanied by several other changes in court work. New tools emerged, such as new kinds of minutes, a new ADP system and new meeting rooms for the hearings. The transformation triggered by the new rule also demanded a new kind of division of labor, for example the judge and the court clerk had to work together in managing the cases. If all this is taken into account, it could be said that incremental changes, at least, seem to have taken place in the activity of district courts.

This special interest in the possible changes in the object of court activity – the cases – reflects the special interest of this chapter: how a court case is constructed by the participants in the court hearings, and what kinds of changes have possibly emerged in the construction of the case with the implementation of the reform.

The construction of a case refers to the general picture of how a disagreement between people evolves into a dispute that is judicially defined, manageable in the court and, in the end, ready to be concluded (e.g., Conley & O’Barr, 1998; Felstiner, Abel & Sarat, 1980–81). My analysis concerns the phases of this process that take place after the case has been brought into court.

In the following analysis, I will suggest that an important shift in the construction of the case is taking place in Finnish civil proceedings, reflecting a potential qualitative transformation of the object of court work. I will show how, in the old proceedings, the construction of the case was determined as a compilation of individually prepared contributions: it occurred partly in the attorneys’ offices in between the hearings while they prepared in advance the briefs to be read aloud, and partly in the judge’s chambers when he or she was engaged in decision making. Since the reform, there has been a shift towards the more shared construction of a case, which I will examine more closely in this chapter.

I will now turn in my analysis to the level of practical activity in a Finnish district court. I will approach the transformation in the Finnish civil proceedings by comparing actual civil cases handled in the same district court before and after the reform. I will examine what form the new procedural rules take in everyday practice, when the court cases are constructed in the hearings. I have grounded my analysis ethnographically on certain empirical findings in my data, and have then proceeded in the interpretations informed by the paradigm of activity theory.

6.3 Cases

In this analysis, I will compare the handling of two civil cases processed at different points in the evolution of the Finnish court system. Basically, both cases are about construction defects in apartments. The first one (Case 1) is a dispute from 1990, concerning the construction of a condominium complex. The second one (Case 4) is from 1997, more than three years after the procedural reform, and it concerns dampness damage and mildew problems in an apartment.

In the first case, the residents of the condominium complex were not satisfied with the performance of the builder in repairing the construction defects and faults. There was also some dampness damage in the basement that was, according to the residents, due to deficient and faulty construction. According to the builder, it was due to the wrong way in which the residents themselves had turned the soil. The builder, as the plaintiff, demanded the final part of the contract price, which the residents had retained. In their counterclaim, the residents claimed for a reduction in the purchase price and for compensation for the expenses that had resulted from finishing the construction with the help of other companies.

The case was handled in the district court from January 1990 to April 1991. The proceedings consisted of 7 sessions. The first three hearings were characterized by preliminary discussion and awaiting the presentation of the counterclaim. The witnesses were heard in the following four sessions. The case was handled by a judge and seven lay members, who had only a collective right to vote²⁵.

The judge was assisted by a court trainee. The judge who started the proceedings was replaced by another after the third session. The case was handled in a large courtroom. Both plaintiff and defendants had an attorney representing them. Nevertheless, they also attended three of the seven sessions.

The second case, which was dealt with after the procedural reform, was about dampness damage and mildew problems in the plaintiff's apartment. A family (the Vuoris) had bought the apartment some years previously. Now the family wanted to cancel the contract or, as a second choice, to receive substantial compensation. They claimed that construction faults in the basement of the block had resulted in dampness damage appearing in its structure. The dampness damage had allegedly led to a growing number of microbes in the air and health problems for the family. The sellers of the apartment claimed total unawareness of any faults in the structure and denied responsibility for any dampness damage. On the contrary, they accused the plaintiffs of having contributed to the damage themselves, by neglecting the maintenance of the apartment, and argued that they had exaggerated the mildew problem.

The case was handled in the district court from October 1995 to June 1997. The proceedings consisted of written preliminary preparation (from October

²⁵ The role of the lay members differs from the role of the jury. In the Finnish court system, the lay members of a district court collaborated with the judge in making the judgment, but they did not have the individual right to vote as the judge did. The judgment of the judge could be reversed only when all the lay members together opposed his or her decision. In practice, this happened very seldom.

1995 to January 1997), a two-day preliminary hearing, in January 1997, and an extended preliminary hearing of one day, in May 1997. Three days were reserved in September for the main hearing, but the case ended in a settlement in June 1997. The settlement was negotiated between the parties, without the direct influence of the court. The case was handled by a judge assisted by a court clerk. It was conducted in a meeting room for preliminary hearings. Both the plaintiff and the defendant had attorneys representing them. The plaintiff was present in court for one day, in the course of the preliminary hearing.

6.4 Practice before the Reform

In my analysis of the proceedings according to the old practice, I will use the third session of the construction dispute. This session consisted of three phases: 1. a discussion in the beginning about the claims and replies, 2. the hearing of a witness and 3. the closing discussion and postponements. It reflects a typical feature of the old practice: the script for the court processes was fairly indefinite and loose. It was based partly on the approximate phasing presented in the literature, but mainly on established practice: the attorneys dominated the process while the judge concentrated on the minutes and the decision. One feature of this script was that the witnesses could be heard in any phase of the process, and the reasons for actions were discussed during it. In this case, the hearing of the witness was a surprise to the judge, who was expecting only a formal proceeding as the defendants had not yet presented a counterclaim.

Excerpt 6.1 The 1990 construction dispute, interview with the judge after the 3rd session

Judge: I just thought this was only a proceeding where they would ask again for postponement in order to present the counterclaim. I wasn't really prepared at all.

This demonstrates an essential and general feature of the old practice, namely the passive role of judges in conducting the process. As they said in their interviews: "The cases are in the hands of the attorneys." In other words, the judges were formally in charge of the process, but the attorneys were actually conducting it.

Another characteristic to the old practice was the important role of the minutes in the proceedings. The decision could be based only on the facts that appeared in the minutes. Thus, it was in the interests of the attorneys to get every possible statement registered in the minutes. Yet the gatekeeper in producing them was the judge.

Generally, the discourse of the old proceedings was rather formal, the reading of the briefs being the dominant form. Conversation in the courtroom usually took place between the judge and one of the attorneys at a time – only seldom did the judge and both attorneys discuss issues together. The dialogue could hardly be called a discussion; it was rather a series of formal statements and questions²⁶. The judge assigned the turns to the parties by calling them in the third person as the plaintiff and the defendant: “And what does the plaintiff wish to say?” or “And then the defendant, please”. This type of talk belongs somewhere between the addressee and the topic. When giving the floor to a particular party, the judge presupposed that the party had something to state on the matter at hand.

The discourse in the civil proceedings that took place before the court reform bears much resemblance to the proceedings in criminal cases as described by Välikoski (1996). She depicts courtroom communication as formal: the chairs mainly gave the floor to the attorneys without commenting on or connecting their contributions. The judges’ responses to the parties were only minimal responses, such as “Thank you” or “Very well”. Their turns controlling the courtroom discourse were related to organizing the activity and sequencing the turns: “Please take your seat”, “Please wait for the decision outside”, “Let’s hear the charges” or “Prosecutor, please go on” (Välikoski, 1996, pp. 64, 85). When summarizing her main findings, she draws the following picture of how the judges conducted the hearings:

“The judges conduct criminal hearings in the same way in different parts of Finland, and the hearings proceed systematically in sequence. According to the findings, the chair does not explain or describe the phases of the proceedings to the parties at the beginning of the hearing, and they have to draw their own conclusions from how the hearing proceeded. The chair controls the interaction between the parties by directing the proceedings and by offering the parties the opportunity to communicate with himself in person and with each other under supervision. He does not encourage interaction, he only gets it started and terminates it. The chair does not comment on the parties’ turns. The floor is given equally to each party. The judge’s right to ask questions is used only seldom.” (Välikoski, 1996, p. 141, translation by V.H)

²⁶ The asymmetric situation, where one person asks the questions or delivers turns and others answer, has been considered typical of institutional conversations and, basically, as a main feature that distinguishes institutional conversations from everyday conversations (e.g. Drew & Heritage, 1992; Drew & Sorjonen, 1996).

In the particular case I analyzed, the session took 57 minutes. It consisted of 177 turns, including the testimony of one witness. The 25 minutes devoted to discussion between the judge and the parties comprised 35 turns. One brief was read by the defendant's attorney. Compared with everyday conversation or informal institutional interaction, 35 turn in 25 minutes is a relatively small number of turn and indicates a formal, courtroom-specific character of discourse. The attorneys' turns were quite long monologues and the conversation proceeded as a series of questions and the giving of the floor by the judge, and statements and reading aloud by the attorneys. The following excerpt is the only one that differs from this systematic flow of the judge's questions and floor-giving turns, and the attorneys' pre-prepared statements.

Excerpt 6.2 The 1990 construction dispute, the 3rd session

Defendant's attorney: Then it will be clear [confirms to the judge that the counter-claim will be made immediately after the repairs in the apartments have been done]. And, Your Honor, I believe that one question is still open, although the plaintiff's attorney claims that is not the case. The appointed inspector has stated, concerning the apartment of Tim Mather²⁷, that the repair of the defects would cost 1500 Finnish marks. The plaintiff states that he has taken this into account in his claim, but I cannot find it there. Tim Mather claims a reduction in the purchase price equivalent of 1500 marks, and I would ask on his behalf if this claim is uphold?

Plaintiff's attorney: It has been clear from the very beginning that the repair costs, as inspector Viklund has stated, are upheld. If it is not expressly mentioned in that paper, it would already have become clear in connection with the facts, if the defendant's attorney had carefully read the plaint.

Defendant's attorney: Your Honor, I would like to continue, correspondingly, on behalf of Pertti and Jaana Tamminen; it does not appear from the amount claimed from them that the 3700 marks that Viklund has mentioned has already been taken into account. The repairs have not been done, so I am asking on behalf of Pertti and Jaana Tamminen, whether the reduction in the purchase price of 3700 marks is upheld? In this same connection and on behalf of Kerttu Grahn, is the sum of 22,650 marks, that Viklund has mentioned, upheld? Since this amount has not been taken into consideration in the summons, I cannot avoid pointing it out. I would like a clear answer: is the claim for reduction upheld?

Plaintiff's attorney: Your Honor, as I just stated, the defects mentioned in the inspection report and that have been financially estimated, are basically admitted. Now I wish to point to the fact that I am not quite certain whether my principal has carried out any repairs following Viklund's last inspection report. On that condition they are admitted.

²⁷ In the Finnish institutional discourse, people are usually addressed and referred to with their family name or with their family name and first name.

Here the defendant's attorney is basically putting questions to the plaintiff's attorney, but is still addressing them to the judge. He starts his questions with the form of address "Your Honor", and speaks in the passive form: "is this claim upheld?" Moreover, the attorneys do not look at each other, but at the papers on their desks and occasionally at the judge. It is interesting to note that this dialogue is in essence between the parties, yet formally addressed to the judge. Its structure is depicted in Figure 6.1.

According to the findings in the area of conversation analysis (CA), this structure seems to deviate from the basic rules of addressivity. In a dialogue between two persons, it is normally evident who is the addressee. When more persons are present, there are several kinds of listeners. Goffman (1981, p. 133) calls a person to whom the speaker is directing his visual attention and to whom he is possibly expecting to give the next turn the "addressed recipient".

Goodwin (1981) also analyzed conversations focusing on the direction of gaze. In his analysis, the addressed recipient was mainly the person at whom the speaker was looking. In the above court example, however, the rules of addressivity seem to take on a new dimension: the content of the speech is directed to one person, while visual attention and the expressed utterance are directed to another. The episode shows that although the judge's role in the old system was passive – he did not actively intervene in the flow of the proceedings or hold any managerial role in the dispute process – the communication in the courtroom was systematically channeled through him.



Figure 6.1 *The Defendants' Attorney Is Addressing His Speech to the Judge*

6.5 Practice after the Reform

The preliminary hearing has several important functions in the new civil proceedings: according to the law, the dispute is to be clarified there (Government Bill 15/1990). The judge must actively find out what matters are in dispute. The parties also call their witnesses and say what they are going to prove by hearing them. The centralization of the process of hearing witnesses was one of the main reform attempts in the new legislation. In the old practice, this occurred in several sessions, the time between which could be months. The trial materials were presented to the court sequentially in small packages, which could ruin the possibility of getting a structured total picture of the situation and also hampered the conduct of the proceedings. This threatened the basic principles of the immediacy and centralization of the presentation of evidence.

My analysis draws on examples from the first two days of the preliminary hearing in the court case I have described above. The judge in the preliminary hearing was the chairman of the meeting conducting the process. The court clerk typed the minutes on the computer, following the judge's guidance. The plaintiff's attorney presented the plaintiff's claims in the case, the defendant's attorney the defendant's responses. The hearing consisted of phases that may be described as follows: 1. the claims of the plaintiff, 2. the general reasons for the action, 3. the defendant's defense, 4. the specific faults and damages that were said to have emerged, as well as the defendant's reply to these statements, 6. the specific claims of the plaintiff and defendant's replies, and 7. the documented evidence and witnesses of both parties. The following excerpt from the hearing is from the middle of the phase in which the defendant's attorney started to call her witnesses.

Excerpt 6.3 The 1997 construction dispute, preliminary hearing

- 1 *Defendant's attorney:* Kari Ojala's testimony will anyway concern the time
 2 of construction of the loft in apartment C.
 3 *Plaintiff's attorney:* Or apartment A?
 4 *Defendant's attorney:* Sorry, A, yes.
 5 *Judge:* Yes.
 6 *Defendant's attorney:* And then the necessary repairs in the other apart-
 7 ments and the appropriateness of the repairs.
 8 *Judge:* *The repairs and their appropriateness.*
 9 *Defendant's attorney:* And the usage of the Vuoris' apartment (...) for per-
 10 manent living.
 11 *Judge:* After 12/1/1995
 12 *Defendant's attorney:* Yes.
 13 *Judge:* That seems to be what you are...
 14 *Defendant's attorney:* ## That's right... in dispute
 15 *Judge:* Yes, then?
 16 *Defendant's attorney:* Making a complaint (...) considering the Vuoris'
 17 apartment, to the housing company (...) in 1995 and after that.
 18 *Judge:* About what?
 19 *Defendant's attorney:* About the mistakes that are mentioned in the action.
 20 *Judge:* What judicial relevance does it have that...?
 21 *Defendant's attorney:* Concerning the extent of the damage (...) timing (...)
 22 and due to this, to the amount of the claimed costs.
 23 *Judge:* [Pausing and looking at the plaintiff's attorney] Is there any dis-
 24 agreement about these? When the plaintiff says that they made the com-
 25 plaint to the housing company?
 26 *Plaintiff's attorney:* Immediately. Straight away in September.
 27 *Judge:* -95.
 28 *Plaintiff's attorney:* Yes. And before the notice (...) I mean the housing com-
 29 pany asked Viklund to make this examination on March 10. It was an ex-
 30 amination ordered by the housing company, or a preliminary inspection.
 31 *Defendant's attorney:* Was it the case, or should it be understood, that the
 32 Vuoris had not noticed any problems in the floor drain, for instance before
 33 that date?
 34 *Plaintiff's attorney:* No, no, there was no evidence of overflowing.
 35 *Defendant's attorney:* Quite right. Well yes, there's no, let's leave it away, the
 36 date of making the complaint.
 37 *Judge:* Yes.
 38 *Defendant's attorney:* And then next, was it number four or?
 39 *Court clerk:* Yes.
 40 *Defendant's attorney:* Reijo Kujala, real-estate agent...
 41 *Plaintiff's attorney:* How did I [whispering to herself]
 42 *Defendant's attorney:* The drop in the value of the apartment, or decrease,
 43 permanent decrease after the repairs.
 44 *Plaintiff's attorney:* Did I forget to mention on behalf of the plaintiff, the
 45 real-estate agent, I don't have his name yet, but the real-estate agent to be
 46 identified later, whose testimony will concern the permanent decrease in

- 47 the value of the apartment after the repairs.
 48 *Defendant's attorney:* It didn't come up here.
 49 *Plaintiff's attorney:* No, but that was my intention.
 50 *Judge:* So now we'll hear when one real estate agent says something and
 51 another says something entirely different.
 52 *Plaintiff's attorney:* That's what experts usually do, don't they. Especially ex-
 53 perts in the construction field.
 54 *Defendant's attorney:* And then...
 55 *Judge:* ## It often happens that when we have three construction experts
 56 here, none of them agrees about the matter. Luckily, we have the court sys-
 57 tem. [participants laugh together]
 58 *Defendant's attorney:* I don't know about this number five [refers to the
 59 numbers given for the witnesses in court documents], the occupation of
 60 number five, what is the exact occupation of this representative of Munters'
 61 [a company investigating the dampness damage]. Well, why don't we put
 62 'dampness inspector' there, I don't know his first name, Ekberg.
 63 *Judge:* Ekberg?
 64 *Defendant's attorney:* Ekberg, yes.
 65 *Judge:* Yes, just put down working for Munters, yes. Comma. Yes, put it down
 66 just like that.
 67 *Defendant's attorney:* And the issues being proved are the cause of the
 68 dampness damage (...) the extent of the damage (...) and (...) when it
 69 occurred (...) in the plaintiff's apartment. And then number six
 70 [continues]

The judge conducted actively the process in the preliminary hearing, mostly by asking questions (lines 18–25). What was definitely new in the hearing was its orality: the issues were discussed interactively in the session and no briefs were read. This is opposite to the old system in which reading the briefs was the dominant form of dialogue.

The dialogue in the hearing could be described as reciprocal. The attorneys were talking not only to the judge, but also to each other. These dialogues often began with words addressed directly to the opposing party: "Do we have disagreement about that...?" For example, on the second day of the preliminary hearing, a dialogue of 14 turns took place in which the defendant's attorney put questions to the plaintiff's attorney while the judge remained silent. The above excerpt gives further examples of new kinds of dialogue between attorneys. Lines 1–4 concern an episode in which the plaintiff's attorney corrects a small mistake made by the defendant's attorney. Lines 41–49 comprise a dialogue in which the plaintiff's attorney wonders if she forgot to mention one of her witnesses. The one who replies "It didn't come up here," is the attorney of the opposing party, although one would expect the judge to answer in that way. I interpret these episodes as examples of an emerging change in courtroom dialogue.

An episode consisting of ironic joking about disagreeing experts (lines 50–57) shows not only the discursive character of the preliminary hearing, but also a more liberal attitude toward the neutrality and independence of the judge. It could be presumed that the new orality and discussion will challenge the old idea of the independent judge and give it new contents. The judge's joke also raises the question of the possibility of a single correct decision.

Although more reciprocal than before, this courtroom discourse was still institutional conversation and, thus, formal. As before, the judge called the parties “the plaintiff” and “the defendant”. The use of the third person is traditional and obviously necessary in court settings. It has some advantages: it softens the disagreement between the parties because in a way, it hides the persons behind the role. It also reminds the participants of the fact that the attorneys speak on behalf of their principals all the time. In the terms of Goffman (1981, pp. 144–145), the attorney is the animator and the author of the ideas and values of the principal. The principals are constantly present because of those titles, even if they are not personally present²⁸. It also helps to avoid a problem with Finnish language usage, whether to informally call the people present by their forenames or more politely by their family names.

The first day of the preliminary hearing took 4 hours and 30 minutes, excluding the lunch break and other breaks. The second day took 3 hours and 30 minutes and a single half-hour discussion, for example, included 170 turns. Compared to the 35 turns in 25 minutes under the old practice, the quantitative change in the dialogue is remarkable.

From the perspective of addressivity, the discourse in the preliminary hearing was rather complex. Most of the time, the attorneys were looking at the papers on their desks when making their statements. While doing so, they were not addressing their speech specifically to anybody. Repeatedly, they detached their gaze from their papers and looked at the others present. Usually, that seemed to happen when someone asked a question outside of the expected script. The discourse appears to be a series of episodes with varying levels of reciprocity. Figure 6.2 illustrates a typical interactive setting in the new proceedings.

²⁸ Goffman (1981, pp. 144–145) uses the term “animator” when referring to one who is expressing the utterance. He uses the term “principal” to refer to one whose ideas are expressed and whose position is supported in the utterance.



Figure 6.2 *Interactive Setting in the New Proceedings*

6.6 Emerging Changes in Courtroom Discourse

Interactive Relations

The change in the courtroom interaction that began to unfold in the above excerpts becomes more understandable when we look at the physical setting of the court hearing together with the observed communication between the participants. The figures are not descriptive models on a general level, but rather illustrations based on empirical observations of the physical settings and the communication in the particular hearings observed.

Communication in the hearings is described here as interactive relations between those present in the hearing, meaning the turns addressed to one participant by another. According to this definition, a question-and-answer pair forms two interactive relations.

In the old practice (Figure 6.3), the judge and a court trainee were sitting on a long dais, half a meter higher than the other seats in the courtroom. The attorneys sat opposite the judge behind desks of their own, approximately eight meters from the judge. The board of laymen sat in a group behind desks, located diagonally opposite the others in the courtroom. The interactive relations in the analyzed hearing took place solely between the judge and the parties, in a manner in which the judge communicated with one party at a time. Talk that was substantially directed from one party to another was also channeled formally through the judge.

In the new practice after the reform (Figure 6.4), all the participants were gathered round one table. The judge and the court clerk sat at the head, the attorneys sat opposite each other at the different sides, and the plaintiff sat beside her attorney. Several interactive relations between different participants were observed in the preliminary hearing. The judge and the attorneys addressed turns directly to everybody else in the room. The court clerk was mainly silent, but still communicated with the judge and also with the attorneys in short turns. Similarly, the plaintiff communicated with all the other participants, excluding the court clerk. Thus, from all the possible interactive relations between the five participants, only those from the plaintiff to the court clerk and vice versa were missing.

Between the cases analyzed, the number of interactive relations between the participants increased more than fourfold, from 4 to 18. These observations are in accordance with the previous findings on the more dialogical and informal character of and the increasing interactivity in the reformed proceedings.

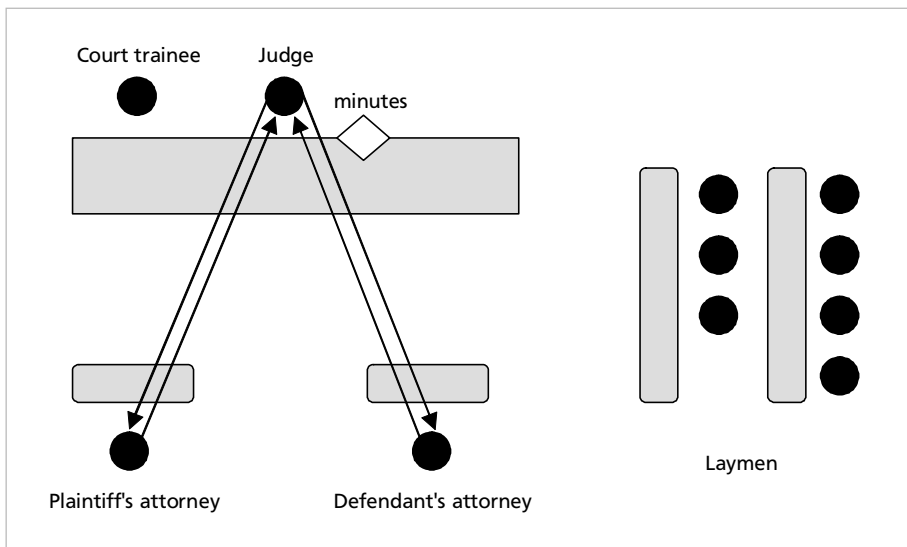


Figure 6.3 *The Physical Setting and the Interactive Relations in the 1990 Construction Dispute*

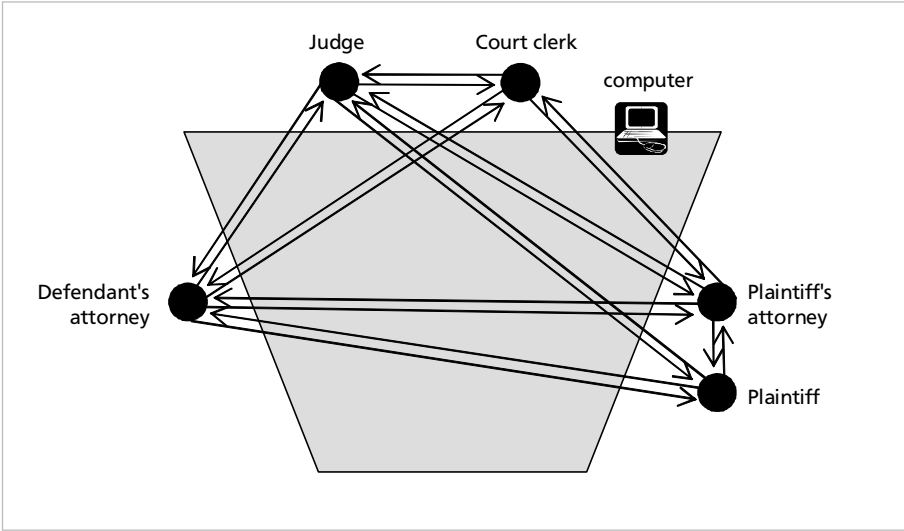


Figure 6.4 The Physical Setting and the Interactive Relations in the 1997 Construction Dispute

Joint Construction of the Object

In the old proceedings, trials were mostly for presenting formal statements and reading briefs. Thus, the cases were almost completely constructed in the attorneys' chambers during the intervals between the court sessions. To put it another way: the main work was done in the attorneys' offices, and the trials were more like showpieces. Yet, the final decision was made in the judge's office. The important point here is that cases seemed to be individually constructed by different actors in different phases of the process, which means that almost no *joint construction of a shared object* would emerge to push it forward.

In the new process, the object of the activity seems to be more collaboratively or jointly constructed in the preliminary hearing. Preparing the case to put it into a presentable form for the main hearing (that is, molding the object) is a joint activity for all the participants. The object is constructed through negotiation. One example of this kind of joint construction is the phase in the proceedings where the parties call their witnesses. The hearing of witnesses is a specific event that takes place in the main trial. It is planned and constructed jointly by the participants in the preliminary hearing.

An example of the joint construction of the object is contained in Excerpt 6.3, lines 15–37. I interpret this discussion as a dialogue in which the judge and the attorneys, in collaboration, construct or create the object, the entity that is

the hearing of the witnesses. In this situation, they negotiate who will be the witnesses and what issues they will present. It is essential that this is negotiated jointly by all parties involved, and not determined individually. This is a far cry from the old system where attorneys freely and individually brought witnesses into the trial. There was then, of course, the possibility that the parties rejected each other's testimonies, but when this occurred it was in the context of formal arguments and counter-arguments.

The common construction of the object could also be examined from the point of view of distributed problem solving (Berg, 1992; Rogalski & Samurcay, 1993; Samurcay & Rogalski, 1991). In court work, substantial problem solving traditionally takes place individually as the judge reaches a decision alone in his office. The actual problem solving (the decision) is thus separated from the procedural problem solving, that is, managing the process of the trial. Does the joint management of the process mean that also the substantial decision making comes "down", or comes closer to the process?

The shift from the individual construction of a case to the more collaborative build-up that appears through the change in courtroom interaction is evidenced in the interviews with the district court judges. Here is an example, in which one judge describes in her in-depth interview, how a case is handled in the preliminary hearing. She clearly criticizes the present system in that it transfers the work of attorneys to the judge, that is to say, transfers parts of the work traditionally considered to belong to attorneys to be jointly handled by the judge and the attorneys in court. Yet, at the same time, she considers the judge and the court to be necessary in the final solution. All in all, the excerpt shows how the preliminary hearing can be summarized as "making the case".

Excerpt 6.4: A district court judge in her in-depth interview in September 1997

Judge: I was surprised how much the case is wrapped up during the preliminary hearing. The attorneys have not considered it thoroughly in terms of "I make this claim for this reason and that is something I could negotiate". The judge starts to do the work of the attorneys, listens to both parties and examines the case judicially, its relevance in the decision making. As it is today, the discourse in the preliminary hearing does not define the claims, but makes the case! It is interesting that the work seems to be done there [refers by nodding to the meeting rooms of the courthouse]. Why can't the attorneys settle the matter together and yet protect their principals' interests? Or do we have the same old thing, that a dispute always needs a mediator, an outsider in the middle? Perhaps the parties need that forum.

Distributed Production of Minutes

One specific aspect of the analysis of how cases are handled is the addressivity of speech. Earlier I mentioned that the speech of attorneys was addressed to the judge, even if the substance was addressed to the opposing party. On the other hand, it could also be argued that much of the speech in a courtroom is addressed to no one in particular, but somehow into the air. In the context of the Finnish court system, the importance of the minutes is something that always has to be borne in mind: the participants are talking not only to each other, but also to the minutes taker.

In the case representing the new proceedings, the judge twice dictated or gave instructions about the minutes to the clerk (lines 8 and 64–65, written in italics, in Excerpt 6.3). The responsibility for the minutes is now shared between the judge and the clerk, whereas earlier it belonged solely to the judge. What is interesting is that the defendant's attorney also collaborated in producing the minutes. She spoke slowly and paused, allowing time for the clerk to record what she had said (lines 9, 16–17, 21, and 66–68 in Excerpt 6.3). Instead of having one judge dictating or writing things down as in the old system, here the judge, one of the attorneys and the clerk were producing the minutes in collaboration. In a way, this could be called "*distributed minutes writing*." This creates a new model of speech: the parties are having discussions about issues, but doing it so that the clerk can write it down. At times this creates the feeling of watching a slow-motion picture.

The example of the defendant's attorney dictating the minutes is interesting from the point of view of addressivity. To whom is the defendant's attorney actually speaking? From one perspective, she is speaking to all the participants since the case is being jointly prepared. This would imply a need for her to look at the others in the room. From another perspective, she very often presents her arguments as an answer to the questions posed by the judge. This would imply a need for her to look at the judge. What occurs, in fact, is that most often the attorney looks at the computer and the court clerk. This, in turn, indicates that she is taking an active part in the production of the minutes. Moreover, her utterance (lines 60–61) "Well, why don't we put 'dampness inspector' there..." shows that she is addressing her speech specifically to the court clerk. This is depicted in Figure 6.5.

From the point of view of addressivity and the distributed nature of human activity, the defense attorney's utterance on lines 22–22 is particularly interesting. The judge has asked for clarification on her statement. She answers the judge's specific question, addresses her speech to the judge by clearly turning towards him, but still continues her manner of cutting her sentences and having pauses, as if she were dictating to the clerk.

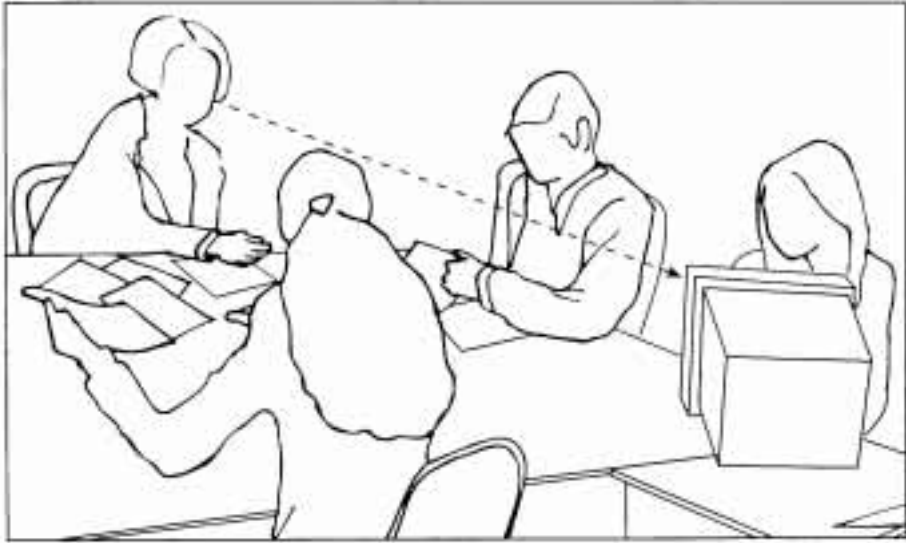


Figure 6.5 *The Defendant's Attorney Is Addressing Her Speech to the Court Clerk and the Computer*

These examples demonstrate how the new practice is still evolving and taking shape. It seems that the participants are constantly looking for ways to focus their speech. To whom should they talk? Does the construction of the case mean talking to the judge, does it mean talking to each other, or does it mean producing the minutes?

The dilemmatic and tentative character of the practice, described here as the joint construction of the object and distributed minutes-producing, demonstrates the gray area in courtroom interaction and communication. The elements deriving from the old practices -such as the importance of detailed minutes – and the new way of working promoted by the reform – such as negotiation about the witnesses and the evidence – are intertwined in the interaction, producing communication with features that were unrecognized until that time. In the case used as an example here, the slow-motion effect and the occurrence of atypical forms of addressivity were exceptionally strong because of the special character of the case: it was not only the oral contributions and negotiation, but also the numerous technical and other details that required careful recording into a written form. These special characteristics created tension between the rule of orality and the new, subsidiary role of the minutes in the new proceedings. This, in turn, set an enormous challenge in terms of creating communicative practices which could achieve a balance between the need to present everything orally in the hearing and the need not to allow the minute-taking to dominate the interaction.

Using the Form of Address, "Your Honor"

An interesting detail in the proceedings is the use of the form of address, "Your Honor". I will use this here as one example of the emerging changes in courtroom discourse. My aim is to show the interconnection between courtroom discourse and the handling of the case as different aspects of highlighting the object of the court work.

In the old practice, the dominant form of discourse involved the attorneys starting their utterances with the words, "Your Honor" – not every utterance, but most of them. This was a ritualistic way of using this form of address, connected to the formal interaction and phraseology in the proceedings. In the one-hour session, they used this form of address eleven (11) times. The use of the term may have been even more prevalent than that, given the fact that it was not used during the 30 minutes devoted to hearing the witness.

The use of this form of address has decreased remarkably in the new proceedings. The attorneys used "Your Honor" eleven (11) times on the first day of the preliminary hearing (4.5 hours of active discourse), and only twice on the second day.

However, more interesting than the quantitative aspects are the qualitative aspects. Two different ways of using the term can be distinguished. "Your Honor" could most often be interpreted as ritualistic or ceremonial in the old practice: the attorneys started their utterances with it even though the judge had already given the floor to them, and in a way, sealed the turn as received. Thus, behind the ritual lies the attorney's attempt to express respect and formal politeness, but also to ensure that the judge will consider his or her statement when taking the minutes. In the new proceedings, the use of the term can often be seen as more functional or practical. The attorneys were asking for the floor in situations in which they had to interfere with the planned script of the proceedings in some way, or interrupt the handling of some matter. This functional use comes close to the concept of meta-talk, or "talk about talk." The main difference between ritualistic and functional use seems to be in the level of intentionality or purposefulness. The speaker using meta-talk consciously and intentionally talks about his or her speaking (e.g., "I just want to say", or "Can we now discuss this"). I will give some examples of these two ways of using the form of address, "Your Honor".

The old proceedings: the 1990 construction dispute, the 3rd session

1) *Judge*: I will ask again, is the defendant going to bring that counter-claim?

Defendant's attorney: Your Honor, after this session the repairs will be finished, and then we'll know the exact price.

2) *Judge*: Postponement is requested, then. How about the plaintiff?

Plaintiff's attorney: Yes, Your Honor, concerning this apartment, the damp-proofing was sufficient, and the problems have been caused by the residents themselves.

The new proceedings: the 1997 construction dispute, the first day of the preliminary hearing

1) *Judge*: Is there anything else?

Plaintiff's attorney: Well, I have also made a list for myself to clarify this matter. "The situation when the liability of risk passes on to the buyer". Will this be of any help?

Defendant's attorney: Your Honor, one thing that I have totally forgotten until now. The first claims of the plaintiff..

2) *Judge*: If the plaintiff now has something to say about the causes that the defendant gave, it is possible now. First and foremost, we expect an answer to the particulars stated by the defendant, about the plaintiffs having contributed to the damage. Another thing is the defendant's claim that the plaintiffs have neglected their duty to investigate.

Plaintiff's attorney: Yes.

Defendant's attorney: Your Honor, concerning the contribution or the neglect of duties, I still have some additional points.

Judge: Yee-es?

The exact numbers that describe how the attorneys used the form of address "Your Honor" are given in the following table (Table 6.1). These numbers reveal not only the remarkable decrease in use, but also the difference in how it was used in the old and new practices. Ritualistic use was almost twice as common as functional use in the old practice, while in the new practice, functional use was about three times as common as ritualistic use. Individual differences are also apparent, and the defendant's attorney used the term more often in both cases.

It could be presumed that the ritualistic speech in the old proceedings was connected to issues of power and authority²⁹. Yet, I assume that it was also related to the way the cases were handled, and also to the spatial features of the courtrooms in which the interaction occurred. The large courtroom and the physically long distance between the participants contributed to the mental or psychological distance. Likewise, the physical setting in which the parties were

²⁹ Collaboration and joint construction do not exclude unequal power and dominance. For example, Linell and Jönsson (1991) emphasize the issues of power and dominance while discussing mutuality in actual discourse of social practices.

sitting not opposite but parallel to each other, and opposite the judge, resulted in formal interaction and routinized traditions. The spatial setting of the court trial affirmed the established way of handling cases. The attorneys dominated the process, and the judge quite passively received the material that the attorneys wanted to bring forward. The judge was active only in producing the minutes and in making the decision.

Table 6.1 *The Use of the Form of Address, "Your Honor"*

	The old proceedings in 1990 (57 minutes)			The new proceedings in 1997 (4.5 hours)		
	Ritualistic use	Functional use	Total	Ritualistic use	Functional use	Total
Plaintiff's attorney	3	0	3	2	1	3
Defendant's attorney	4	4	8	1	7	8
Total	7	4	11	3	8	11

Similarly, the dominance of functional use of the term in the new proceedings also seems to be related to the space in which the interaction takes place, and to the way of handling the cases. The change in the nature of the interaction, particularly in the use of the form of address "Your Honor", seems to be connected to the emerging change in the proceedings, particularly to the move toward collaborative and anticipatory clarification of the dispute. The same words, "Your Honor", have received new meaning in the new context of handling the case.

6.7 Conclusions

In sum, it is evident that the change in court activity consists of changes in several elements of the activity system. Change in the division of labor in the context of a single case includes that the construction of a case is not solely a combination of sequential and individually prepared attainments, but also collaborative efforts in the interaction of the preliminary hearing. The parties and the judge collaborate while jointly constructing the case, instead of the previous, more separated practice. Change in producing the minutes reflects change not only in the object, but also in the tools due to the dual nature of the minutes. The division of labor in producing the minutes has also changed in that it is now distributed between the judge and the clerk, and sometimes also among the attorneys.

Change in the activity of the court is intertwined with change in courtroom discourse: in a move from formal, brief-based statements to more informal conversation. The same words acquire new meanings in the context of reorganized activity. The new meanings emerge in the practice and in the change of practice. For example, the form of address, “Your Honor” has been given a new meaning as the actual context of handling the case has been transformed. The distributed and evolving nature of the preliminary hearing reflects this shaping and construction of new meanings.

What do these empirical findings concerning courtroom discourse imply? First, they pertain to the complex question of power and authority in the court system. In the old practice, communication in the courtroom was channeled exclusively through the judge, although his or her role was rather passive. This passivity hid power within it. The power resided largely in the gatekeeper role of the judge: speech had to be addressed to him, since he had the monopoly over keeping the minutes that were the sole foundation of the decisions and appeals. Conversely, in the new practice, the producing of the minutes is distributed among the judge, the clerk and on some occasions and to some extent, the parties involved. The attorneys can, in principle, dictate directly to the minute taker, but the judge still has the final control. In her interview, the court clerk assisting in the case said: “He’s doing it awfully well. I think you can see it on the videotape, when he was holding his hand like this [shows an inhibiting gesture], when I was about to start typing something that wasn’t so relevant.”

In court work, the minutes are a tool for conducting the process, a tool for participating in the process, a tool in making the decision, and a tool for making appeals to higher courts. Nevertheless, they are still produced in the court sessions and themselves become an object in the process. Having these multiple functions, they are constantly shifting from being a tool to being an

object, and vice versa³⁰. The new legislation emphasizes the meaning of the minutes as a tool of the process instead of being an object of it, or an end in itself. The question about power and hierarchy in the court emerges not only as different positions of authority, but also as differences in access to the minutes: who takes and uses them and to what ends.

Secondly, my analysis raises the question of how a court case is constructed. Previously, it was constructed in the offices of the attorneys in between the court sessions. Now, given the dialogue in the preliminary hearing, it seems to have become more a matter of joint construction. My preliminary interpretation is that the actual forming of the object is shifting from the sequential contributions of the parties and the judge to the interaction in the courtroom. The relatively unpredictable and uncontrolled nature of this new interaction makes the area of constructing a case “a no-man’s land” in which there are no stable or generally accepted forms of the interaction and communication. The old established traditions and the elements of the new proceedings are intertwined. Yet, the emergence of such a “no-man’s land” strongly implies that the object of the court work is evolving and that the court work itself is in transition. Reflecting the findings of Heydebrand and Seron (1990), I strongly suggest that the collaborative construction of a case has some elements of rationalization, but also elements of a qualitatively new kind of court work and justice. As the authors point out, this rationalization is connected to increasing interactivity. Joint construction inevitably indicates increasing interactivity; new informal forms of interaction and an increase in the amount of interaction. The evolving, non-routinized nature of this interaction gives us reason to examine the construction of the case as the basis for a new kind of court work for the future.

Finally, I would like to return to the evaluative question I posed at the beginning of this chapter: Will the reform lead to a fundamental change in everyday court practice, or will it remain merely a change in the external form of the process? On the basis of the cases analyzed above, my answer is that the change is neither fundamental nor purely formal.

The new process clearly maintains the dominance of the judge and reproduces the traditional adjudication. In this respect, the changes I observed can hardly be characterized as fundamental or radical. The locus and nature of power in the new process is, however, largely an open question that requires more study. An important task for further analysis is to answer questions such as who initiates changes of topic and what happens to the initiatives taken by the different parties. In particular, the activity-theoretical idea of the central impor-

³⁰ The same problem of the critical shift between the tool and the object, and the situation in which an instrument becomes an overwhelming problem and thus an end in itself, has been analyzed by Hasu & Engeström (2000).

tance of the object calls for analysis of the role of the principals in the interaction. Will there be a shift from the traditional position as an object of the proceedings toward a more subject-like position?

I also found changes in the construction of the case and in the courtroom discourse that cannot be dismissed as cosmetic. These changes include the rather dramatic overall increase in the number of turns, the more reciprocal and dialogical character of the discourse, and the change in the use of the term “Your Honor”. These first findings imply that the change in court practice is at least potentially more than merely formal. The new complexity of the discourse implies the emergence and expression of novel perspectives and initiatives. This cautiously optimistic conclusion could be considered a challenge to continue the examination of change in court practices that are understood as multi-layered and multi-dimensional interactional phenomena.

7 Changes in Scripting the Proceedings: “How Shall We Proceed?”

7.1 Transformation as Local Construction

First, when the proceedings start in a court case, I ask the chair how the new procedural law is applied in this particular court. The situation is that every court has its own system. (An attorney interviewed in August 1997)

The above excerpt describes the situation with respect to the implementation of the new procedural law in Finland. The lower courts went through an extensive procedural reform in 1993, which set new standards for handling disputes in district courts. What happened, in fact, was that the actual practices of individual judges vary a great deal and the proceedings in individual court cases differ from each other.

The court system has been criticized for developing slowly and being resistant to change. According to Provine and Seron (1988–89, p. 165), “American courts are ideally constituted to blunt the impact of externally imposed reforms.” When the hoped-for institutional changes do not occur, individuals and organizations committed to reform get frustrated, proving Arthur Vanderbilt’s dictum that “court reform is no sport for the short-winded” (Provine and Seron 1988–89, pp. 165).

In the Finnish context, the institutional resistance to change in the legal system has been connected particularly to the mentality of judges: judges have been criticized for being conservative, passive, rigid in their legal thinking, and for isolating themselves from criticism and discussion in society (Kemppinen, 1990; Yrttiaho, 1996). Finnish judges display the same inertia when they state in their interviews that the adoption and consolidation of the new civil procedure will take more than an entire generation.

All this illustrates the dilemma of transformation in the court system. On the one hand, the system seems to be resistant to change. On the other hand, the national court reform has resulted in heterogeneous practices in the lower courts. How should one study change and transformation in the court system to clarify this picture?

Traditionally, administrative rationality dictates that changes occur from the “top down”, from the plans made by administration to the actual implementation by the practitioners (for a more detailed discussion, see Chapter 3). In this study, change and transformation are approached from another – almost from the opposite – perspective. I will put my focus on the initiation of change by studying the actual work processes. This kind of approach differs from the more common way of studying changes in the court system and in the adjudication of disputes by focusing on macro-social and historical issues (e.g., Heydebrand & Seron, 1990) or, as in the case of Finland, by using statistical survey data on the implementation of reforms (e.g., Ervasti, 1997a; 1997b). Studying changes merely at the macro level easily excludes the notion that national changes are interpreted and constructed in the activity of participants in actual court practices. Although changes are set forth in the law, they are defined and made visible by the practitioners themselves. This calls for the studying of *the local discursive construction of the transformation* in the Finnish court system.

Every court case can be understood as a thread in an evolving texture of practice. The threads of single court cases make up a texture of evolving court practices. Change and development are produced locally, but not independently of the whole system. The current court practice – or our understanding of the general court practice of today – does not exist as such, but only as a result of actual court proceedings in specific cases. In developmental work research, transformation has traditionally been analyzed in terms of developmental cycles (Engeström, 1987). The present analysis is one of the recent attempts to study the small developmental steps in more of a local context; to give a more specific and concrete shape to development and to study how the new practice actually originates in the everyday work with individual cases.

7.2 Change in Procedural Legislation and in Court Proceedings

How, then, has the civil procedure changed? Before the procedural reform of 1993, the civil procedure was guided by loose legislation. As Virolainen (1988, pp. 33–36) pointed out, the procedure is always more or less regulated by the written law. Equally, judges are obliged, when conducting the proceedings, to follow the prevailing procedural rules. However, the conducting of the proceedings was only partly regulated by the legislation. The existing rules were not compulsory, or at least they were not regarded as compulsory in practice. The fact that the legislation contained few detailed rules of procedure undermined the efficiency of the process-generating practices.

This vague procedural legislation in Finland meant that the established practice became a more important norm than the written law. It resulted in

unwritten laws which co-existed with and even outflanked the written law (Takala, Heinonen & Lappalainen, 1985, p. 62). The inadequate legislation was partly replaced by procedural literature which gave norms and interpretations. Viro-lainen (1988, p. 3) suggested that, because the insufficient and loose procedural legislation left too much to individual choice, the conducting of legal processes was not uniform and had become more passive than the written law intended.

The actions taken within a legal framework to resolve a civil case may be said to constitute a *court process*. According to the procedural literature (e.g., Takala, Heinonen & Lappalainen, 1985, pp. 86–87), the court process prior to the procedural reform of 1993 was divided into three main phases: 1. the initial discussion (the statement of facts), 2. the presentation of evidence, and 3. the final discussion. These phases were not separate from each other as sequences in their own right, but the proceedings were rather a monotonous series of identical sessions. The division of phases was merely theoretical. This situation was criticized frequently (e.g., Möller, 1988; Lappalainen 1990). Extensive cases needed several sessions, which compelled the parties to write briefs in order to manage the generated material.

The three theoretical phases can be taken as a general starting point in describing the proceedings in court cases before the procedural reform. Figure 7.1 illustrates the process in an actual court case comprising seven sessions. The primary form of presentation – reading a brief – is singled out as an action of its own. The other two actions involve the presentation of statements – or the discussion about the case – and the hearing of witnesses. The numbers in the illustration refer to the sequential numbers of the hearing. Figure 7.1 demonstrates the disorganized and uncontrolled nature of the proceedings.

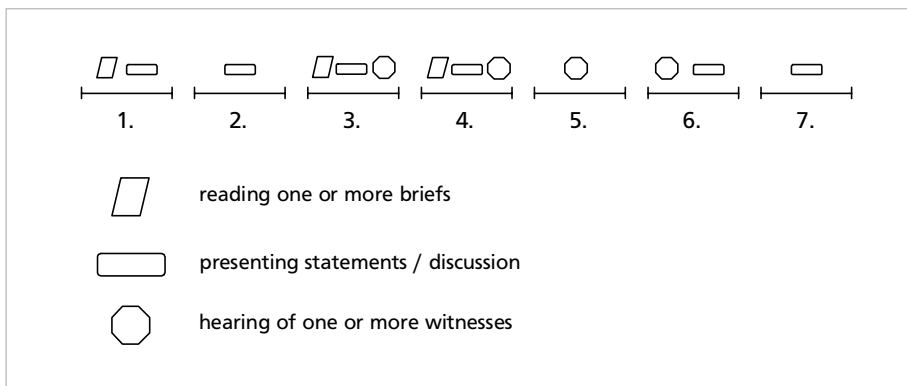


Figure 7.1 Proceedings in an Actual Court Case Comprising Seven Sessions before the Procedural Reform of 1993

The new civil procedure of 1993 introduced preliminary proceedings, which are subdivided into a written preliminary phase, a preliminary hearing and a main trial. The change in the form of the process was evident. In the application for a summons, the plaintiff has to declare, for example, his or her specified demands, the basis of the demands, and if possible, the evidence he or she will bring to court and what he or she intends to prove with each piece of evidence. In the written reply, the defendant has to indicate, for example, whether he or she admits or denies the claim, and if the latter, the grounds for the denial, as well as the evidence he or she intends to bring before the court. After that, the court may ask the parties for more clarification of specified issues. After the written preliminary phase, the court calls the parties to a preliminary hearing, where they have to declare orally 1. their claims and the grounds, 2. what issues are disputed, 3. what evidence the parties will present to the court and what they intend to prove with each piece of evidence, and 4. whether a settlement is possible. If the case is neither decided nor settled after the preliminary hearing, it will be dealt with in the main hearing, when the parties have to explain their perspectives in greater detail and comment on the grounds put forward by the opposing party. The court receives the offered evidence and, in the end, the parties give their final statements. (Code of Judicial Procedure, Chapter 5 2§, 10§, 15§ 19§; Chapter 6 2§) The general model of the proceedings in a civil case is depicted in Figure 7.2.

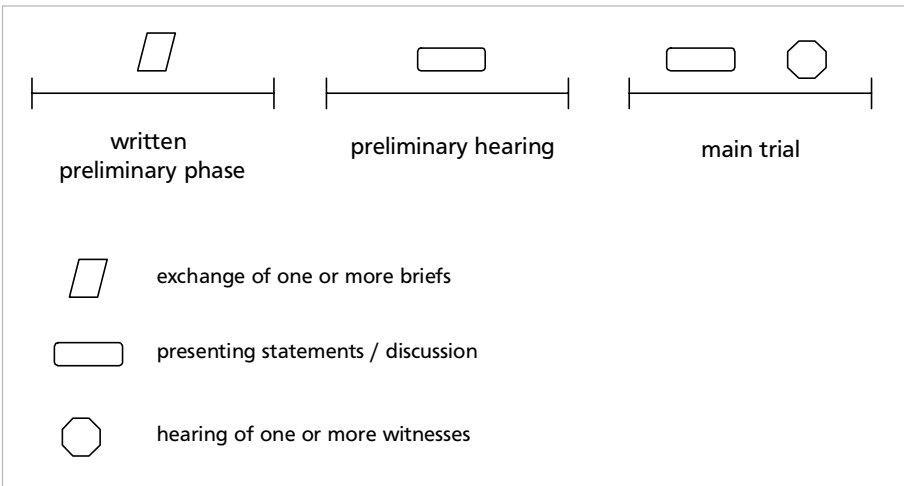


Figure 7.2 *General Model of the Proceedings in a Civil Court Case after the Procedural Reform*

Today, the written law offers detailed norms for the adjudication of civil disputes³¹. Despite the number of such norms, however, the procedural law cannot cover all the minutiae. The judge still has a lot of freedom to choose how to proceed in the case and how to chair the proceedings. If the guiding role of the legislation is fundamentally and inevitably loose and limited, how, then, are the court proceedings constructed in actual court cases?

At present, no generally accepted procedure seems to exist – just a variety of different ways to apply the procedural law. Some of these applications will probably, in time, become generally accepted universal norms. It follows that the focus of this analysis is on how the emerging script for the court process is being constructed in each set of actual proceedings. The current construction of the emerging script is compared to the construction of the script in the old proceedings before the procedural reform.

Analyzing the local construction of court proceedings draws attention to the discursive interaction in the courtroom. Handling court cases is fundamentally a discursive activity. Talk and interaction are central instruments, especially in the court setting, in which the work of judges and attorneys is based on symbols and abstractions (Danet, 1985). What is achieved in legal proceedings is produced by using the instruments of talk and interaction.

7.3 Notion of a Script

In the following analysis, I will approach the local production of court proceedings by using the notion of the *script* as a tool. The notion of a script refers to the plans, norms or traditions that regulate standard actions in recurring situations (Engeström, 1992). The script represents the specialized cognitive structure that retains expectations of how to behave in specific situations and contexts (Mangham, 1995). The classic example was put forward by Abelson (1981), who described how the clients and waiters in a restaurant follow an implicit script. The clients expect the waiter to escort them to their table, to hand them a menu, to take the order, and so on. A person listening a story about going to a restaurant can easily recall these items of the general script.

³¹ The procedural changes have been communicated to the practitioners in different ways. The most systematic one was the training offered by the Ministry of Justice for all the court employees before the new law came into force. The attorneys did not participate in this training, but instead, their own association arranged training sequence for them. The annual meetings of different professional associations constituted also one forum where the new ideas, often introduced by those participating in the drafting of the new law, were discussed. Furthermore, the law journals published several articles in which the renewals were interpreted and debated. The law schools did not provide any further education for professionals, but of course, were responsible for teaching the new procedural code for present students.

Sometimes the script is explicit, when it is in a written form, but more often it is implicit and the participants may not be fully aware of the script they are following (Engeström, 1992, p. 79). Typically, it dictates the sequence of events from the beginning to the end, and it may also specify the roles of the participants in a specific situation.

Mangham's (1995, p. 495) argument is that individuals shift from relatively improvised behavior in novel or problematic situations to relatively structured behavior in situations which they take to be routine. When scripts become established, they are used without thought or reflection. They may also become difficult to access and change. After a time, they may well appear natural and the only possible way of behaving.

The notion of the script has been applied to activities that follow stereotypical sequences, such as selection interviews and the socialization of new members into an organization. Cognitive scientists have used the notion to understand individual cognition. Poole & al. consider the question of how scripts develop in organizational settings fundamental, usually involving a process in which the members construct knowledge about appropriate patterns of events for particular activities (Poole & al., 1990, p. 213). Engeström (1992, p. 79) also focuses on the social and cultural aspects of scripts in his investigation into how scripts emerge and develop in collective activity, and how people jointly follow, violate, modify and change their scripts.

As far as the legal script is concerned, we can distinguish two levels or aspects. The first is the general, written legal script, such as procedural legislation, or the established practices that replace or complement the legislation. The second aspect is the local, case-related script that is constructed through and in action. As I argued above, there seems to exist no generally accepted legal script in current Finnish legal practice – although it does exist in the written law – only a variety of different ways of applying the general script. Studying the local actions involved in scripting the procedure, will help us to capture the practitioners' interpretations and modifications of the general script.

When we talk about the script for court proceedings, we are talking about one crucial element in court work. The work of a judge has a dual nature. He or she is both the one to conduct the proceedings and the one to make the decision in the case. In this sense, the object of the judge's work is also twofold: both the process (steering the case through the proceedings) and the final decision (the so-called material truth). The two main components in this object are the script for the process and the judicial content of the case. This makes studying the script of the proceedings a central aspect of the work of the court.

7.4 Cases and the Descriptions of the Proceedings

In the following I will compare the handling of two civil cases processed at different points in the evolution of the Finnish court system. The cases analyzed in this chapter, Case 1 and Case 4, are the ones presented in Chapter 6. Whereas Chapter 6 introduced changes in a few features of courtroom discourse that signal a possible expansion in court work, this chapter concentrates more on how the proceedings and the procedure are constructed in situ by the participants themselves. I will start my analysis with a simplified description of the proceedings in the two cases.

Case 1: Proceedings before the Procedural Reform

After the proceedings had started, the judge described the case as follows:

Excerpt 7.1 The old proceedings, Interview with the judge after the 3rd hearing in June 1990

Interviewer: Do you consider these proceedings to be troublesome?

Judge: Well yes, if you consider that in any case there are several owners and several apartments and several details. So you have quite a lot of material. But it isn't very difficult, it can be handled with reasonable effort. It's just an excellent example of the inefficiency of the current process. This case was pending last year and we have not yet even agreed on what the issues are. This is a fine example of what we should get rid of after the procedural reform.

The proceedings started with a summons. In the first session, which took place in January 1990, the defendant's attorney contested the action in an oral brief. The plaintiff's attorney upheld the repair costs as stated by the appointed inspector. The plaintiff's attorney also accused the defendants of having contributed to the dampness damage in the apartments.

In the second session, held in April 1990, the plaintiff's attorney read a list of specific claims. The defendant's attorney explained the delay in presenting the counter-suit, and stated that the claims were partly unfounded.

In the third session, in June 1990, the defendant's attorney read a brief and explained why the counter-suit was still not ready. The plaintiff's attorney stated that they disagreed about the definitions of the inspections carried out in the apartments, and confirmed the repair costs that the inspector had stated. The defendant's witness was heard.

The fourth session, in September 1990, started with the counter-suit read by the defendant's attorney. The plaintiff's attorney contested the claims, while accepting the inspector's statement regarding the defects. The defendant's attorney read another brief specifying their action. The plaintiff's attorney read a response to the counter-suit. Two of the plaintiff's witnesses were heard. The attorneys put forward arguments about completing the outdoor repairs, about retaining security deposits and about the residents' own impact on the damage.

The plaintiff's witness was heard in the fifth session, in November 1990, and in the sixth session, in March 1991, it was the turn of one of the plaintiff's and one of the defendant's witnesses. The plaintiff's attorney stated that the residents had been too impatient and paid too much for having the construction work finished by other companies.

The seventh session, in April 1991, started with the attorneys' closing statements in which they repeated what they had written in their final briefs. After a short break, the judge gave his decision, which he had prepared in advance. An overview of the proceedings is depicted in Figure 7.1 above.

Case 4: Proceedings after the Procedural Reform

The case dealt with after the procedural reform started with the written preliminary proceedings. The application for a summons arrived at the court in October 1995. The written preliminary proceedings consisted of four briefs, including the application for a summons, the defendant's reply, the specified claims of the plaintiff and the defendant's reply. The plaintiff asked the court once, and the defendant five times, to give an extension of time for their replies. This phase took over a year.

In November 1996, the court set the date for the preliminary hearing in December. This was canceled, and the date for a two-day preliminary hearing was rescheduled for January 1997.

The hearing in January consisted of the following phases: 1. scripting the proceedings, 2. the claims of the plaintiff, 3. the general grounds for the action, 4. the defendant's defense, 5. the detailed specification of alleged defects and damage followed by the defendant's reply to each of these arguments, 6. the plaintiff's specific claims in detail, and the defendant's reply to each of these, and 7. the documented evidence and the witnesses of both parties.

The extended preliminary hearing in May 1997 had the following phases: 1. the plaintiff's claims and the defendant's reply, 2. more precise handling of the revealed defects in an effort to determine whether they were due to construction methods in contravention of the building regulations, or caused by mildew,

3. the repairs that the housing company had carried out and what it was still going to do, 4. the judge's summary of the burden of proof, 5. the documented evidence and the witnesses of both parties.

The judge was interviewed before the preliminary hearing of January 1997, and described his expectations and plans. He was disappointed with the prolonged written preliminary phase and wanted to push the proceedings onwards in a stricter manner.

Excerpt 7.2 The new proceedings, interview with the judge before the preliminary hearing

Judge: I have decided not to accept any more briefs at all. I will take the case into preliminary hearing and see what happens there. This means that I have acted as the new civil procedure allows me to act if I realize that writing briefs is not improving the situation. I said "This is it. Next time we'll meet in the hearing." The case will be conducted orally in the hearing, but I'm afraid it will go wrong.

Interviewer: How can it go wrong?

Judge: I'm afraid they can't present their claims and the grounds. Orally, I mean. Well, the claims are not difficult, but the grounds are. When one [refers to the plaintiff's attorney] has written 45 pages, can she compress what the legal grounds are for her claims? On what does she base her claims? Also, I'm afraid the defendant's attorney is not as prepared for the hearing as she should be, which means, being able to present in a compressed, logical form all the grounds in defense of her client.

Interviewer: What if everything does go wrong?

Judge: There are two alternatives. In any event, the hearing has to be postponed. The first alternative is to give the preclusion. This means that, in a dispositive dispute, you can impose a sanction, a threat, in case they don't obey the procedural law. The court, in a way, reminds you that you should have been able to present everything in the hearing. But if you didn't, the court makes the threat so that at least next time you'll have to do it. This means that I can, the court can, make this threat, if it sees that the parties are not prepared properly, if the hearing doesn't progress, if the grounds for the claims don't become clear, if the witnesses can't be named. Preclusion, then, is one possibility. Another is that we just discuss where we are in the proceedings. More gentle methods are used instead of threats. I suppose that when it comes to the first hearing, I will use gentle methods. Unless it goes totally wrong.

The following section concerns how the script for the court process was constructed in the actual, particular proceedings of the two court cases introduced above.

7.5 Scripting the Proceedings before the Procedural Reform

The court case of 1990–1991 (hereafter the “old case”) started without an expressed script. At no point was the script explicitly or jointly discussed. On the other hand, there was obviously an implicit script. Given the long tradition of established practice, all the legal professionals were expected to be acquainted with the general script. If the script was not explicitly discussed, how did the participants know how to proceed in this particular matter?

The following excerpt is from the third session. It was planned that the defendants would present their counter-claim, but it was not ready. In her first turn, the judge confirmed that both parties were present and gave the floor to the defendant.

Excerpt 7.3 The old proceedings, the 3rd session:

Judge: Present here are the plaintiff, Talonen Ltd., the advocate and the defendant. Last time the case was postponed at the defendant’s request. Yes, please do sit down. What does the defendant wish to say in order to bring the counter-claim?

Defendant’s attorney: Yes, Your Honor, the counter-claim is not ready because the plaintiff’s standpoint was unclear. I have made a short summary of the defects and a report on the repair costs accumulated thus far. I have also invited here the expert who was consulted by the residents, Jukka-Pekka Salonen, who can tell you about these matters himself. Perhaps I’d better read this summary aloud before he is heard.

Judge: Go ahead please.

The defendant took the brief to the judge and read it aloud. Because the plaintiff had not seen the brief before, he could not comment on it. In his turn, he anticipated his next steps in the procedure.

Excerpt 7.4 The old proceedings, the 3rd session:

Plaintiff’s attorney: As far as the extra costs presented in this brief are concerned, I cannot say anything about them right now. After hearing the witness I have to ask for postponement in order to respond in detail and also to present clarification on the other matters involved in the construction. This is all, for now.

Later in the session, the judge questioned whether the time was right to hear the witness, Jukka-Pekka Salonen.

Excerpt 7.5 The old proceedings, the 3rd session:

Judge: I have begun to wonder whether this witness is about to tell us something that is yet to be claimed in the counter-claim. Is it necessary to hear him at this stage?

Defendant's attorney: At any rate, the witness will state that the repairs that the original claim is based on have not been finished.

Judge: Well, let's hear him now and then look at the situation again. Let's call the witness, Jukka-Pekka Salonen into the courtroom.

The local script of the third session of this proceeding was constructed in three main sequence. The first sequence (Excerpt 7.3) and, in particular, the defendant's attorney's turn, were most critical in this process. In his turn, the defendant's attorney explicitly declared in what order he was going to proceed in the matter, beginning with a summary of the defects and repair costs, then hearing the witness. The attorney seemed to bring his individual influence to bear on the script ("I'd better read this summary aloud"), and this seemed to be acceptable. Excerpt 7.4 also clearly shows the same freedom of the advocates to direct the course of the proceedings. He outlined the situation as follows when he was interviewed.

Excerpt 7.6 Interview with the defendant's attorney after the 3rd hearing

Defendant's attorney: In principle, you can just go to court with your plans, and the poor judge behind the table knows nothing about what is going to happen.

This corresponds to the judge's assessment of the proceedings in this case, after the fourth session:

Excerpt 7.7 Interview with the judge after the 4th hearing

Judge: Hearing witnesses will continue next time, and everything is happily upside down. Next time there may be a witness, or they may put the case to a decision, or they may slip in some final statements and so on and so forth. It's hard to say what the next session will be like.

Nevertheless, it is worth noting that the attorneys were not constructing the script totally on their own. In Excerpt 7.5, the judge did not automatically accept the script defined by the defendant's attorney and questioned the usefulness of hearing the witness. Bringing the witness into court before the counter-suit had been heard was something that stretched the limits of the script, and particularly this judge's interpretation of them. But was it the judge who devi-

ated from the smooth run-through of the implicitly shared script, or did she actually try to maintain the established script that the defendant's attorney tried to stretch more than she could accept?

The episode highlights the fluid and emergent nature of the script. As the defendant's attorney stated in his interview when commenting on the judge's question (Excerpt 7.8), the general script was not consistent or explicit as far as the timing of the hearing of witnesses was concerned.

Excerpt 7.8 Interview with the defendant's attorney after the 3rd hearing

Defendant's attorney: It was a reasonable and proper question to ask, whether the witness was going to talk about something that was coming up in the counter-claim. It was only alertness that she showed in this matter. From my point of view it was entirely positive. But it is difficult to determine when you're allowed to bring witnesses into court. There is a rule, which is not based on any law, that you can't bring a witness into the first session. The older judges in the Helsinki District Court in particular go mad if you bring a witness to the first session.

Interviewed after the third session, the judge explained her question as follows.

Excerpt 7.9 Interview with the judge after the 3rd hearing

Judge: They indicated that they were going to claim for this and that. I just wanted to see what he [the defendant's attorney] would say. I think he was right: the witness was also heard to reverse the original claim.

Interviewer: Why did he want to hear the witness at that stage?

Judge: It just occurred to me that perhaps his principals had put some pressure on him. Maybe he wanted to show that the case was going ahead, the witness was heard and now it was the opposing party that asked for postponement.

Established scripts which are not explicated leave the door open for differing interpretations and competing scripts. In this case, there seemed to also exist the possibility of alternative interpretations of the script. Nevertheless, it was not split into two competing scripts, which could have resulted in a never-ending search and competition between the scripts of different participants (see Engeström, 1992, pp. 88–91). The construction of the script in this episode was more a question of defining whose interpretation of it was legitimate.

A new judge chaired the proceedings in the fourth session, replacing the first one during her leave of absence. The script for this session was constructed in the first few minutes of it, which are reproduced in Excerpt 7.10.

Excerpt 7.10 The old proceedings, the 4th session

Judge: Let's start the handling of the case. First, I presume, we'll have the counter-claim

Defendant's attorney: Yes.

Judge: Let's start with the original claim. Talonen Ltd. can present their case, and then we can move on to the other claim.

Plaintiff's attorney: Yes, your Honor, I have here a brief that actually contains both a presentation of our more specific action and also a response to the counter-claim, point by point. This being so, I will only renew our claims and ...

Judge: Are there going to be witnesses?

Plaintiff's attorney: Two witnesses.

Judge: Two witnesses.

Plaintiff's attorney: Perhaps it is appropriate that after we have heard the counter-claim I should read that brief aloud, because it contains overlapping points.

Judge: We will return to that brief later, and please sit down [plaintiff's attorney was standing while talking to the judge]. Then we probably have a new claim here?

Defendant's attorney: Yes, your Honor. I have written in the plaint that the claims will be specified, claim by claim, and I have an additional brief for specifying, on behalf of every plaintiff, the basis for these claims.

Judge: Does this grouping correspond to your brief?

Defendant's attorney: Well, I have looked at the brief of Talonen Ltd., and the grouping corresponds to it.

Plaintiff's attorney: I'm afraid I have not read their brief.

Judge: Okay. [a pause of 15 seconds] About this claim that I received first, is this, does it concern, I mean, shall we proceed claim by claim or in what order? Will the briefs be read separately?

Plaintiff's attorney: I have these [takes the brief to the judge].

Judge: [a pause of 20 seconds while the judge takes a look at the brief] So. We will proceed according to today's claim and after that you can... and, I see you have already answered that in your brief.

Plaintiff's attorney: Yes.

Defendant's attorney: Here is the additional brief [takes the brief to the judge and to the plaintiff's attorney]. Shall I read this?

Judge: Why don't you read just the beginning of the brief. After that we can go through Tim Mather's [one of the residents] claims.

Defendant's attorney: [reads the plaint from beginning to end]. Your Honor, I have written these specifications on the supplementary brief, which is more like a specific claim. I could continue immediately with that brief.

Judge: If I may ask, just preliminarily, what the plaintiff's attitude to this presented claim is, I mean very generally?

Plaintiff's attorney: Generally, it is contested.

Judge: Perhaps we could now go on to the supplementary brief.

The script for the fourth session was constructed in this episode through the attorneys' attempts to influence the proceedings ("Perhaps it is appropriate that after we have heard the counter-claim I should read that brief aloud"), and by questions posed by the judge or the attorneys (Judge: "Are there going to be witnesses", or Defendant's attorney: "Shall I read this?"). The episode clearly shows the significant role of the briefs in the old proceedings. The script evolved according to the kind of briefs that the attorneys had prepared before the session, and managing all of them dominated the script construction. This scripting episode contained a disturbance that was connected to the question of how all the briefs that were not familiar beforehand could be managed. I will return to this disturbance and analyze it more closely in a subsequent section on deviations from the script.

To conclude, the scripting in the old proceedings reveals the passive role of the judge and the rather important role of the attorneys in moving the proceedings along. To put it more precisely: the attorneys steered the proceedings, while the judge received the materials and decided on the case. Scripting involved very little joint reflection on how to proceed, and mainly consisted of individual efforts to influence it. While all the participants, the judge and both attorneys, treated each other as judicial professionals, they based their way of proceeding on the generally accepted script, and obviously felt no need to explicate it. The elasticity of the script having been tested, the judge interfered with her question at the point when the defendant's attorney wanted to hear his witness before even presenting his counter-suit. On another occasion, the judge made an innovative attempt to define a new, unusual script, but the attorney did not understand this unexpected way of proceeding.

On the whole, the old proceedings represented *uncontrolled* discourse: the participants could freely present their viewpoints and comment on the opponent's viewpoints throughout the proceedings. I have chosen to define the discourse as uncontrolled, as the opposite of controlled discourse, in which certain parts of the argumentation are restricted to defined phases in the proceedings, and the discourse in general is more controlled by the judge. It could also have been described as unrestricted – restricted, open – closed, or undisciplined – disciplined.

The purpose of the written procedural law is to guarantee that justice is achieved through legitimate court processes. It has been shown that the parti-

ment legislation provided only general guidance. As the written law was gradually replaced by established practice, the logic of its legitimacy changed as uncontrolled and unrestricted discourse served to guarantee the legitimacy of the court processes. The passive judge was thought to be the independent judge. When the judge remained passive, he or she was merely making room for the attorneys freely to make their statements and bring materials to court throughout the proceedings. The legitimate process presupposed that the proceedings would be open for free argumentation and presentation of evidence and testimony, without strong interference by the court. Uncontrolled discourse was a guarantee of due process.

7.6 Scripting the Proceedings after the Procedural Reform

As I move on to the court case of 1997 (hereafter the "new case"), my focus is directed to the preliminary hearing. Preliminary hearings are, in practice, the phases in which the cases are constructed. The scripts for the whole proceedings are determined, and the case is worked out into a form in which it can be forwarded to the main trial - if not decided or settled after the preliminary hearing.

My interpretation is that, in contrast to the old proceedings, the discourse of the preliminary hearing is *controlled*. The claims and their grounds, as well as the replies, among other things, have to be presented in the preliminary hearing, and not after it. The logic of the new proceedings is to restrict parts of the argumentation to the preliminary hearing. According to this logic, following the principles of legislation and controlling the discourse during the proceedings will legitimate the process and achieve justice. This prompts me to analyze in detail how the local script for the preliminary hearing is constructed.

The preliminary hearing of the new case started with the judge expressing his plans and ideas about the proceedings. This explicit scripting took eight minutes and mainly comprised a monologue by the judge, although there was some dialogue between the participants. The first part of the judge's monologue was addressed to the plaintiff, who was present on the first day of the preliminary hearing. After this, he addressed his remarks more generally to all of the participants. The following excerpt contains some examples of explicit scripting.

Excerpt 7.11 The new proceedings, preliminary hearing in January 1997

Judge: [addressing the client] In this session, we will try to find out what the dispute between you is, what the dispute concerns, and then, we'll try to chart what kind of evidence we need and what evidence is available. So, this is not a trial as such and, for example, you will not be heard in this session. Why you are present here is, of course, because this is your case and you are the one who knows best all the details, and because your attorney may also need you. She may want to ask you something, and the court may also need to ask you some questions.

Judge: [now addressing all the participants]: Now, it would be best for us to check on what I have been thinking of how to proceed. As it was stated in the summons to this meeting, I've been thinking that today we would deal with the demands the Vuoris are making with respect to the Laaksos and, after that, the grounds for the action. I hope we can finish them today, if not, we'll continue tomorrow. // And, considering the nature of this dispute, it would be appropriate to change some of the wording about how to proceed today. We have here the primary demands and then the secondary demands. The basis of both of these demands is the dampness and mildew damage alleged by the plaintiff, the Vuoris, and also the specific constructional solutions. And then we also have quite a few demands for compensation for damage. I thought we could first take up the grounds for the primary demands. You could talk about the defects and their relevance maybe and that kind of thing. After that, we'll go separately through the different instances of dampness and mildew damage that you allege exist in the apartment and, also separately, the constructional solutions that you allege are faulty. We'll go through them all separately, point by point, and find out what they're all about.

In his plan for the proceedings the judge determined the order in which the items were to be taken up. He also expressed his preference as to how the participants were to present their material, emphasizing the detailed handling and point-by-point procedure. In doing so, he set limits on the proceedings. The script that was established by him at the beginning of the session was like a scaffolding framework: the individual actions of the participants were to follow the explicit script and stay within the framework. The interview with the judge after the preliminary hearing verifies this analysis. In contrast to the old case in which the judge was the one “who knows nothing about what is going to happen”, this indicates a significant qualitative change in the role of the judge.

Excerpt 7.12 Interview with the judge after the preliminary hearing

Judge: I think it should be apparent at what phase we are in the case. I strive to be clearly in charge of the proceedings. That, of course, requires that the participants know what kind of proceedings they are joining. I won't let

them talk freely about what they want and how they want it. I just tell them how we are going to proceed. We'll deal with the demands and then go into the grounds, and we'll split the case up into several parts and make it more accurate. I want to comment, I want to interrupt, I want to ask questions.

In this case, the explicit script was established by the chairing judge in the first minutes of the proceedings. From the point of view of the attorneys, it seemed to be dictated by the judge. Were the attorneys able to follow this top-down script and did they try to change it in some way?

Although the script was explicitly established at the beginning of the session, it was not yet complete. Time after time throughout the preliminary hearing it was addressed by the participants, becoming more and more defined. This is clear from some of the examples of episodes in which it was reflected on and reconstructed in the course of the actual proceedings.

The first reconstruction occurred immediately after the episode of explicit script construction. The judge finished establishing the script and proceeded to questions of substance by asking the plaintiffs to present their demands.

Excerpt 7.13 The new proceedings, preliminary hearing in January 1997

Judge: Now, to the demands. What demands are the Vuoris making with respect to the Laaksos ?

Plaintiff's attorney: You mean I should present all the demands here orally and also...?

Judge: Yes. We'll take them demand by demand, so that we also get it on record what they are.

Plaintiff's attorney: In other words, the plaintiffs demand primarily that, firstly...

Judge: So there should be primary and then secondary demands. Yes, number one.

The script was checked for the second time only a few minutes later.

Excerpt 7.14 The new proceedings, preliminary hearing in January 1997

Plaintiff's attorney: Moreover, number three in my written statement...

Judge: Is it unchanged?

Plaintiff's attorney: There will be changes to some of the details in number three.

Judge: Okay.

Plaintiff's attorney: Should I give only the details that have changed?

Judge: Let's go through all of them, so that they'll all be properly dealt with.

In the sequences presented above, the plaintiff's attorney checked whether she was following the script by asking for confirmation of the way in which she was proceeding. The judge confirmed the correct procedure. Sometimes the attorneys tried to exceed the limits of the script. In her first two turns in the next excerpt, the plaintiff's attorney was trying to take up matters that were not yet in order, according to the script. The judge interrupted and refused to take them up at that point. In the old case analyzed earlier, the judge allowed the defendant's attorney to continue reading the whole brief, although it was against the script the judge had outlined. Thus, the new case indicated a different way of determining the script.

Excerpt 7.15 The new proceedings, preliminary hearing in January 1997

Plaintiff's attorney: We deny that the underdrain could have been constructed only after the house had been connected to the communal drain...

Judge: ## We have not yet taken up the defects.

Plaintiff's attorney: Yes, all right. Well, yes. Then, on some occasion, the defendants stated that the Vuoris should have understood that the window upstairs could not be opened. The significance of the window was realized only when the Vuoris got to know that the second story had not been constructed in compliance with the drawings.

Judge: I think we haven't dealt with that yet.

Plaintiff's attorney: No we haven't, except in writing. Is it the case that the written statements are not taken into account if they are not restated here in the preliminary hearing?

Judge: Yes, not re-stated, but presented here. All that matters is what is presented here orally. We all have to be clear about what the material is that the court will take into account when making the decision. It is only the material that is brought up here in the preliminary hearing, not what is only presented in writing. That's the way it is. What is presented here is taken into account.

Defendant's attorney: Mmm.

Plaintiff's attorney: [laughing] Well, that's why you're so anxious to present every possible thing, but it's making a mess of the whole procedure.

The reconstruction of the script was enmeshed in the instructional talk by the judge. As in the previous example, the script construction was often followed by a phase in which the judge informed the attorneys about the new procedural law – or rather, about his interpretation of it. As Engeström (1998, pp. 213–217) points out, instructional talk has been missing from Finnish hearings. My analysis refers to the fact that such talk made its appearance in conjunction with the discursive change after the procedural reform³².

Sometimes, the testing of the limits resulted in the judge allowing the attorneys to exceed the limits of the script, and he did not guide them back to it. Yet, he noted more or less explicitly when the script was not followed. In the following episode, the judge had just informed the parties about what items would be taken up next when the defendant's attorney wanted to return to the previous item. The judge indirectly showed his annoyance by using a certain kind of intonation in his speech:

Excerpt 7.16 The new proceedings, the preliminary hearing in January 1997

Defendant's attorney: Your Honor, concerning the contribution or the neglect of duties, I still have some additional points.

Judge: Yee-es?

Occasionally, the attorneys tested the limits of the script, and the judge was ready to adjust it according to their suggestions.

Excerpt 7.17 The new proceedings, the preliminary hearing in January 1997

Judge: Have we now progressed so far that we can go on to the alleged construction defects and then to the dampness and mildew damage, and after that, to all of these different demands that (...)?

Plaintiff's attorney: How about the plaintiff's reply to the defendant's response?

Judge: You mean concerning these items?

Plaintiff's attorney: Yes, yes, I do.

³² The tradition of some former chief justices was to give a moral lecture to the defendants in a criminal case, and advise them not to enter the courtroom again. With the implementation of the reform, however, a new type of instructional talk, more oriented to introducing the procedure to the client and more informative, seems to be emerging.

Judge: It could, of course, be examined more closely. It is indisputably something that you have not actually...

Plaintiff's attorney: ## Not in detail.

Judge: You have not expressed your opinion in detail. But, on the other hand, they just reject what you demand. But of course, if there is something to say, we'll take care of that at first and then go ahead.

Once, the judge was compelled to twist the script more than he wished, when it became evident that the preliminary hearing had to be continued later. The defendants had to gather more evidence by carrying out inspections in the apartment. This was a deviation from the original idea of a single preliminary hearing as set forth in the procedural legislation (see Figure 7.2).

Excerpt 7.18 The new proceedings, the preliminary hearing in January 1997

Plaintiff's attorney: Do you mean you intend to wait for the housing company to finish its inspections?

Defendant's attorney: I think it's necessary. You have presented today new claims for 100,000 marks and the claims are based on the argument that everything is not right in the apartment.

Judge: Here we go again. It seems we are postponing the case into yonder future and then we'll desperately try to remember what this case was all about. Why didn't you look at these things earlier?

The judge's comment in the above excerpt was exceptionally strong, and one highly unlikely to have been made in the old proceedings. With its element of "preaching", it could be described as instructional in the extreme. A similar example of instructional talk is given by Engeström (1998, p. 215) when he cites a judge didactically telling a client how to be concrete in defining a date by which his fine must be paid. An important difference between the cases, however, is that whereas in Engeström's example the judge gave her lesson to a client, here the judge directed his comment to his legal colleagues.

In the new proceedings, the script may be described as a "tube" the design and dimensions of which the judge determines at the start. The attorneys' actions inside the tube sometimes stay in line and flow smoothly according the script, but sometimes they collide with the sides of the tube. After such a collision, the judge either brings the parties back into line, or alternatively modifies the tube to fit the additional points in the script. Every such incident calls for further reflection on the script. Additionally, the script is re-conceptualized through meta-talk (see Engeström R., 1999a; 1999b) every now and then, so as to keep the proceedings in line. This is depicted in Figure 7.3.

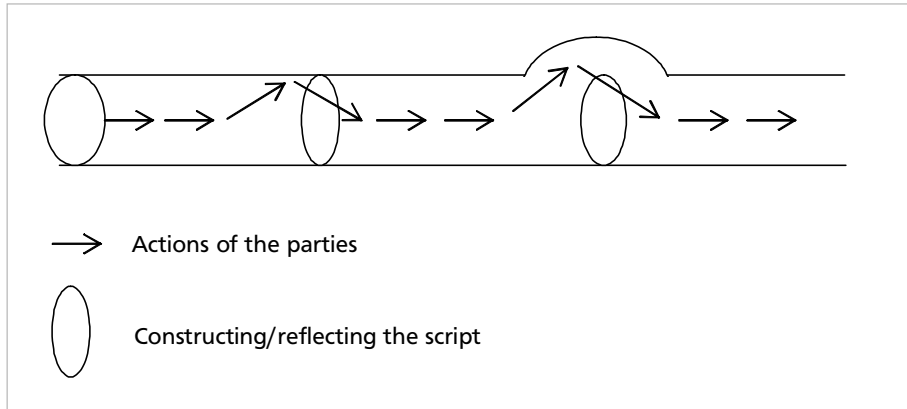


Figure 7.3 *Scripting the New Proceedings*

To conclude, the script for the new proceedings was explicit from the very beginning, but still required constant reflection and maintenance. Although all the participants taking an active part in the discussion (the judge and both attorneys) were judicial professionals, they did not count on everybody knowing the script, and thus reconfirmed it frequently. The analysis shows that no generally accepted procedure exists that all the professionals follow, but rather a local and case-related script is constructed during the proceedings. In this particular case, the limits of the script were tested often when the attorneys tried to proceed differently from what the judge had planned. The tube of the process was defined quite closely and the judge actively ensured that the script was followed.

The collisions in the tube were situations in which the attorneys attempted to proceed differently from how the judge had planned it – but not just differently, also according to the logic of the old proceedings (for example, referring to the written statements, talking about “re-stating”, wanting to have the preliminary hearing postponed). Being diametrically opposite, the old uncontrolled discourse and the new controlled discourse collided during the hearing. Interestingly, the moments of collision between the attorneys’ actions and the judge’s script were also the moments of collision between the old and the new practices.

I showed the tube model and discussed my analysis presented above with the particular judge who handled the case. My field notes in late May 1998 show how he agreed with my interpretation, and he started to reflect on the case again.

Field notes, May 1998

“He immediately started to analyze why, in this particular case, there were so many collisions in the tube. He thought it was because the script was created only at the beginning of the preliminary hearing, and because it was not created together. He said that maybe the script for the whole process should be produced in advance, long before the actual hearing, by sending some kind of memo to the parties, for example, or alternatively, at the beginning of the hearing through joint discussion. He justified the narrow and slim tube in this type of case in the following way: the amount of material on which the decision is based would be enormous and impossible to handle at the end of a wide tube.”

7.7 Deviations from the Script

The purpose of this analysis is to investigate how the script of the court process is constructed in actual cases – not primarily to look for deviations from the written script. Nevertheless, I would now like to examine more closely two deviations, two disturbances that clearly departed from the judge’s plans. The “outcomes” were very different, depending on how the disturbance was handled in the interaction. The two in question are (1) the episode in the old proceedings when the defendant’s attorney read the whole brief despite the expressed intentions of the judge, and (2) an episode in the new proceedings in which the defendant’s attorney unexpectedly asked the court to give a proposal for a settlement, after the judge had already finished the proceedings.

The episode in the old proceedings in which the first disturbance occurred was presented in Excerpt 7.10 above. It concerned the judge and the defendant’s attorney. The judge intended first to discuss the general part of the claim, and then, to take up one resident’s claim at a time. His instruction to do so was: “Why don’t you read just the beginning of the brief. After that, we can go through Tim Mather’s claims.” What happened was that the defendant’s attorney did not stop after the general part but read the whole brief aloud. The judge did not interrupt him, and let him continue to the end. In the interview, the judge commented on what had occurred.

Excerpt 7.19 Interview with the judge after the 4th hearing

Judge: There was a small mistake, a misunderstanding, neither one of them realized that the intention was to take up one demand at a time, and then take the response of the opposing party. Perhaps I mumbled it unclearly because the defendant’s attorney started to read the whole brief. I saw that I couldn’t change it any more and I gave up trying. The whole lot was read, and I saw in their faces that they were not prepared to correlate individual-

ly itemized claims and responses to them. That's why it was such a massive reading and both the attorneys started to yawn.

This disturbance was the result of the judge's innovative attempt to conduct the proceedings more actively and, in fact, to create a qualitatively new script for the proceedings. Paradoxically, this is probably, at the same time, one reason why the innovative attempt failed: it was outside the familiar, generally accepted script. The judge explained his intentions in the interview:

Excerpt 7.20 Interview with the judge after the 4th hearing

Judge: Usually the attorneys just throw in their proof and we just receive the briefs, and next time we get together and respond to them. Anyway, that wasn't the original idea. You could immediately ask the opposing party for their reactions. Do they contest or admit. We could have discussed every statement right away. Usually, when we don't usually proceed in that way, then the case just becomes a blur. This was my starting point, but the plan didn't work because the advocate read the whole brief.

The judge's innovation attempt was very tentative and fragile. He did not carry out his plan, and gave it up when the others did not instantly understand it. He hid his objectives, and by his silence he retained his formal neutrality. Compared to the judge's strong comment in the new proceedings (Excerpt 7. 18) when the attorneys did not follow his idea of the script, the difference is striking and nicely illustrates one aspect of uncontrolled vs. controlled discourse.

Perhaps the innovation also failed and became a disturbance because the old, generally accepted script was not explicitly replaced by the new and unusual script at the beginning of the session. The judge had planned to change it quite radically but did not explain his plans clearly enough in this case. This may also explain the origins of the disturbances in the old proceedings more generally. The disturbances resulted from the participants' counting on a general script, and a mutually explicated, case-related, local script could possibly have prevented them.

The disturbance in the new proceedings was actually a potential one. As can be seen, the deviation from the presumed script, the potential disturbance, led to a discussion charting the possibilities for a settlement. This episode occurred at the very end of the preliminary hearing as the judge was actually finishing the proceedings.

Excerpt 7.21 The new proceedings, the preliminary hearing in May 1997

Judge: Yep. Thank you.

Plaintiff's attorney: Thank you. [intending to stand up]

Defendant's attorney: Will the court make a proposal for settlement in this case?

Judge: That was quite a surprising move! [laughing] I exactly didn't expect it!

Defendant's attorney: I mean, we've now gone through it thoroughly from all angles.

Judge: [becoming serious] Yes, well. You mean a proposal for a settlement by the court?

Defendant's attorney: Uh-huh

Judge: Well, we've talked a lot about the possibility of a settlement, but making a proposal is (...) but of course, if the parties ask for a proposal. Now, one party has asked for it, will the other one also [wipes his knees with his hand for 3 seconds]. Then, another question is the character of the case and that sort of thing. I'd think this depends so much on the evidence you're going to present, so I won't make a proposal [looking at the defendant's attorney and shaking his head]. You know what the evidence will be, I don't. Where does it lead? You both know that what is coming [refers to the main hearing] won't be free of charge. The plaintiffs take the risk of having to pay all the trial costs if they lose. Well I don't know, are you both insured for your legal expenses according to the old conditions?

Plaintiff's attorney: No.

Defendant's attorney: Whether old or new, in this kind of case, it doesn't help.

Judge: I see, you mean the maximum limits for compensation are exceeded. But as I said, I won't make any proposal in the sense that the law intends. If you're willing to discuss it, I can help in several ways. But are there preconditions for that [gestures by turning his palms up and then down again]? The claims seem to be quite far apart, when everything is contested.

Plaintiff's attorney: The principals should definitely be present then.

Judge: But do you yourselves still see any realistic preconditions? As far as I know, you have tried to settle.

Plaintiff's attorney: We have tried and we're still quite far apart.

Defendant's attorney: In this new situation, I have difficulties explaining to my principals why they should pay anything at all.

Plaintiff's attorney: Uh-huh.

Judge: That is something you both have to consider.

Defendant's attorney: In principle, both of us as attorneys know how the

land lies in the purchase of shares, in terms of fault and in what the compensation for a purchase price is and what it requires.

Judge: This remains open and, primarily, the principals are the ones to decide on this, but we could look into this a little [leads to a discussion on the precedents of the Supreme Court concerning construction disputes].

Judge: Going through this kind of consideration you will get the idea [on how to proceed], and you are sitting on the evidence. You may have an idea where this is leading, I don't. This case depends on the evidence you are going to present. But if you end up with a settlement, we also welcome that solution.

Defendant's attorney: If we can't draw up a settlement in this kind of case, we would be very lousy attorneys.

The main difference between these two disturbances is clear when they are compared. The first one did not surface, but remained hidden as the judge did not divulge his plans or open up a discussion on the matter. The second one was only potential, as the judge first admitted being surprised and then started a discussion about settlement. If not directly contributing to the settlement, the discussion clarified the participants' thoughts about it in this case. In this sense, this could be called an innovative disturbance, the explicit working out of which resulted in an expanded sequence of practice.

7.8 Conclusions

Two critical dimensions emerge in this analysis of the general and local scripts of the old and new court proceedings. First, the discourse appeared as either *uncontrolled / unrestricted* or *controlled / restricted*. In the old case, the proceedings were uncontrolled in the sense that they were controlled not by the court, but rather by the parties, and unrestricted discourse was relied on in the pursuit of justice³³. In the new case, the proceedings were actively controlled by the court and the process was legitimated by the restricted discourse in the preliminary hearing.

³³ Paradoxically, unrestricted discourse was not enough in the pursuit of justice, as the immediacy was missing in the old proceedings. In the case analyzed here, the defendants finally considered themselves as having lost the case which according to the defendant's attorney, was due to the fact that the judge who started the proceedings decided to hear the testimony (see Excerpts 7.5, 7.8 and 7.9), and the one who finally decided the case could not understand the importance of the testimony in rejecting the claim. One is tempted to ask whether explicit reflection on the script, documented in the court files, could have prevented such a discrepancy in the judges' interpretations.

Secondly, the discourse of the script construction appeared as either *formal* or *informal*. This dimension is defined on the basis of the key finding concerning the formal and informal characteristics of the discourse first reported in Chapter 6, and furthered and reinforced when the actions in the construction of the script were brought to light. The scripting episodes in the old proceedings represented formal discourse with monological features of individually determined speech turns, and the formality overwhelmed the explicit reflection on the script. In the new proceedings, on the other hand, such episodes revealed a more informal and dialogic way of interacting and sharing the script construction. The informal discourse and personal comments helped to make the script visible and explicit.

The dimensions of the proceedings are depicted as a matrix in Figure 7.4. The prototype of the discourse in the old proceedings appears as formal and uncontrolled /unrestricted, and in the new proceedings as informal and controlled / restricted.

A similar kind of conclusion on the differences between the old and the new procedures was drawn by Niemi-Kiesiläinen (1998, pp. 63–64). She emphasizes the fact that the ultimate aim of both procedures is to reach the material truth, but the methods are different. Formerly, the idea was to ensure that all the trial materials were available to the court. Bringing new material again and again resulted in series of postponed hearings, but the trial materials were exhaustive. The material truth is still the main objective in the new proceedings, but the understanding of how it is reached is radically different: the materially correct decision is arrived at with the help of oral, immediate and centralized input (Niemi-Kiesiläinen, 1998, p. 63). In a similar vein, Laukkanen (1995, p. 4) emphasized the differing ways of achieving legitimacy: whereas formal authority was regarded as the source of legitimacy in the old proceedings, the new ones rely on careful and rational preparation of the case.

In the old case, for the judge the main source of tension in the actual conducting of the proceedings was the pressure to move from uncontrolled and unrestricted towards more controlled and restricted discourse. As he said when he was interviewed, the case was “happily upside down” and out of his hands. The innovation that became a disturbance, namely the judge’s attempt to control and organize the discussion and restrict the reading of the claims to one item at a time (Excerpt 7.10), could be interpreted as his effort to resolve the tension and move the discourse in a more restricted direction, thus to regain control of the proceedings (depicted by the shaded arrow on the left on the matrix). Similarly, the judge’s questioning whether the witness should be heard or not (Excerpt 7.5) was an attempt to move the proceedings in a more controlled and restricted direction.

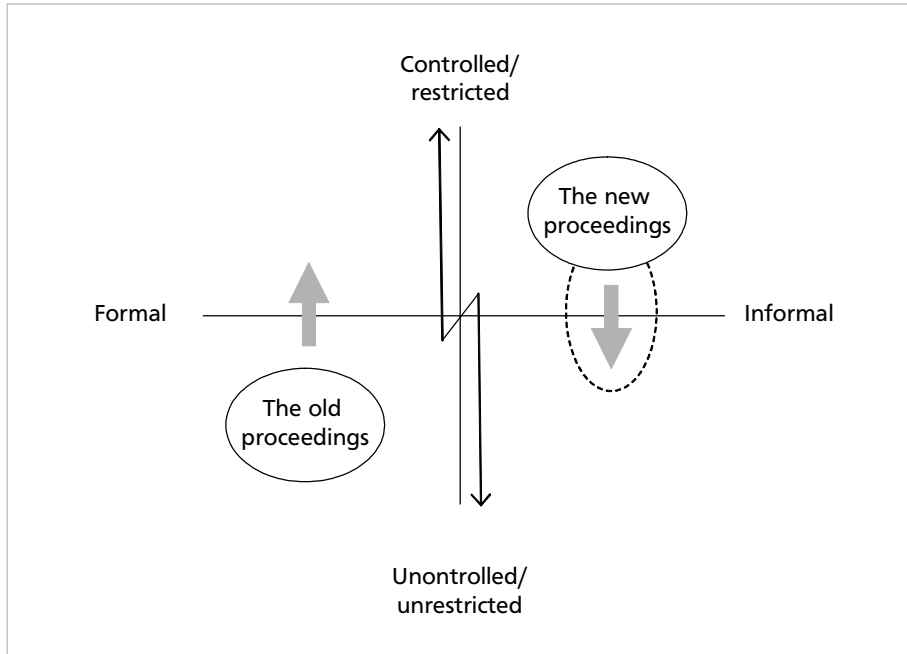


Figure 7.4 *Dimensions of the Proceedings and the Emerging Pressures*

The tension in the conduct of the new case appeared, paradoxically, as pressure to move from controlled and restricted towards more uncontrolled and unrestricted discourse. In fact, the actual course of the proceedings in the observed case – the first preliminary hearing and the extended preliminary hearing three months later – was an expression of this tension. The extended preliminary hearing could be viewed as the actual transition from restricted to more unrestricted discourse (depicted by a broken line in the matrix). This was a clear deviation from the general script explicated in the procedural code (see the model in Figure 7.2) and also from the wishes of the judge (see Excerpt 7.18). Extended preliminary hearings are held so frequently in Finnish lower court practices that it is more the rule than the exception. This suggests that in the actual court processes, for some reason or other, the idea of a single preliminary hearing does not function as the Procedural Code intended. In practice, there seems to be pressure to loosen the restricted discourse by arranging continued preliminary hearings.

The tension in the new proceedings also appeared as concrete attempts to shift from controlled to uncontrolled processes. The situations in which the attorneys' actions tested the limits of the local script were often attempts to get the case handled in a more uncontrolled and unrestricted way, as it was in the

old procedure. Trying to move on to issues that were not in order, referring to arguments that had not yet been presented in the hearing (Excerpt 7.15), and asking for an adjournment (Excerpt 7.18) were attempts to turn back to more uncontrolled proceedings (depicted by the shaded arrow on the right of the matrix).

The controlled and restricted nature of the preliminary hearing in the new procedure has raised discussion among judicial professionals. On the one hand, attorneys in particular have seen the rigidity as a threat and as a disadvantage of the new system over the old one. One attorney, Mr. Ruokonen, said in his interview, “You cannot correct mistakes once the case has been presented. In every situation, you have to be more prepared than before. In the old proceedings, if something was forgotten, you could return again to the issue in the next session” (Ahvenniemi, 1997, p. 17). On the other hand, some others would like to restrict the discussion even more in the preliminary hearing and alter the significance of the different phases in the process in order to make the idea of controlled and restricted discourse work properly. A working group established in 1998 to prepare a suggestion for adjusting the new civil procedure³⁴ stated that, in the current proceedings, the main deviation from the intended procedure is that issues are shifted to the preliminary hearing when they should not be discussed until the main trial. The preliminary hearing has actually become the “main hearing”. The new proceedings are “front loaded” and thus increasing the trial expenses (Riita-asiain oikeudenkäyntimenettelyn kehittäminen, 2000).

All this illustrates the dilemma of conducting court processes at the crossroads of old and new procedures. As far as the legislation is concerned, the old procedural script has been completely replaced by the new one. In the actual cases, however, the court processes are a mixture of old, deep-rooted routines and new, divergent applications of the written script. This work supports the idea of studying court processes as scripts, in which the interpretation of the general script is constructed through and in local action. The local construction of the general scripts of procedural law also implies that the interpretation and concrete contents of the procedural reform are, to a great extent, given by the practitioners in their daily practices, rather than that implementation is merely adaptation to pre-given models (see Chapter 3).

³⁴ Problems of cost and delay after the new procedural law led to the establishment of a working group by the Ministry of Justice to consider whether the problems could be overcome by making some adjustments and refinements to the Procedural Code.

The starting point of the analysis was that interaction is essentially and in all conditions a collaborative accomplishment of the participants. Chapter 7 has demonstrated an emergent shift in the collaborative nature of litigation. Whereas the proceedings before the procedural reform were mostly individually determined as a series of individual contributions with only minimal joint reflection over the script, those after the reform seemed to rely more on collaboration and joint negotiation over how to proceed in each case. After the reform, the process was clearly controlled by the judge, who used ultimate power in the courtroom, but the script for the proceedings was constructed and maintained more collaboratively and informally than before in interaction between the judge and the parties. This finding reinforces my preliminary observations, introduced in Chapter 6, concerning the more intensive and joint construction of the object and more dialogic discourse in the courtroom.

It seems that, thus far, there has been some shift in courtroom discourse rather than a fundamental, observable sea-change in Finnish court proceedings. This may remain an important but still rather modest change towards a more dialogical style of litigation, which still sustains the traditional division of labor between the judge and the parties, and maintains the judges' long-established practice in working with clients and cases. At the same time, research findings indicate an expansive potential for a qualitatively new kind of teamwork, which invites parties not only to compete with each other, but also to collaborate with each other and with the judge to maintain the feasible handling of the case. The potential expansion resides in the new kind of informal communication, which was brought into the proceedings through the principle of orality (see Chapter 2), and which, at least in principle, enables them to be constructed as a process of collaborative problem solving, in the spirit of negotiation. In the context of litigation activity in Finnish district courts, the zone of proximal development could be considered an open and dialogic way of working, where the most appropriate ways to proceed are negotiated, where any possible disturbances in the flow of the process are worked out, and where the conventional antagonism between the parties is mediated through the encouragement of joint problem solving.

Chapter 7 has shown that the future expertise in courts will emerge as interaction and communication between legal professionals. The construction of the object and the meta-level discourse concerning how to proceed seem to take place in communication between professionals. Do the zone of proximal development and the expansion in the object of court work only affect the legal professionals, or do they involve the clients as well? In Chapter 8, I will focus my attention on the clients in the cases, and on their position in constructing a court case.

8 Client Initiatives and Their Effects on Courtroom Interaction

8.1 Introduction: Tradition of Marginalizing the Clients in the Hearings

Citizens' trust in the court system was examined recently in Finland (Niskanen, Ahonen & Laitinen, 2000). The results of the study showed that people's trust in the courts in the 1990s had diminished slightly from the 1980s and from the end of the 1960s, when the previous surveys were conducted. In 2000, 67.6 percent of the public regarded the activity of courts as successful (*ibid.*, pp. 26–28). An interesting detail for my study was that the more experiences people had of having a case in court, the less they trusted in the court system. This means that those who had no experience of litigation were the most satisfied with the working of the courts (*ibid.*, pp. 47–48). However, when the clients of one particular district court were interviewed two weeks after their appearance there, this systematic pattern was broken: those currently involved in or fresh from a court case were even more satisfied with the system than those who had never been involved in a lawsuit. (Niskanen, Ahonen & Laitinen, 2000, pp. 147–149).

The authors of the study do not discuss these contradictory findings. Indeed, the results are difficult to interpret. Do they mean that the courts are generally functioning poorly, but well in that one particular district court? Or do they mean that when people think about courts in general they express dissatisfaction, but when thinking about one case in particular they tend to be more satisfied. These results also reveal the problems of studying trust as a statistical phenomenon: Trust is probably not best understood as a general and static matter of opinion, but rather as something which evolves and becomes produced in various forms of interaction between clients and courts (see Tyler, 1997).

The general secularization of authorities in society has also touched the court system. Trust in courts is no longer based on formal authority, but has to be constructed case by case through the actual court proceedings and reasoned sentences. The findings on procedural justice (see chapter 2.4) lead us to believe that experiencing trust is connected to fair and legitimate processes (e.g., Tyler, 1990; 1997). People trust the justice system if they see that court decisions are reached

by procedures seen as fair. Thus, developing the processes – how the cases are handled in the courtroom interaction – is vital to increasing people’s trust in the courts. In this, clients’ opportunities to participate and make their voices heard in their own trials are likely to be crucial.

However, in a number of studies so far, the position of lay clients in court hearings has been seen as weak and their chance to influence procedures as minimal (see Chapter 2.3). Referring to studies done in Germany, Messmer (1997, p. 138) claims that clients’ negotiation position in court is weak and their status mostly that of a mere provider of information. Their ability and willingness to provide complex descriptions of facts also diminishes when their communication becomes hindered. Messmer (1997, p. 138) argues that lay persons are prevented from presenting themselves as factually competent speakers. Similarly, Conley and O’Barr (1998, p. 21) point to the highly unusual rules of courtroom conversations. Following the principles of Conversation Analysis, they state that institutional settings such as the courtroom employ the basic rules of everyday conversation, but modify them in important ways. These courtroom-specific rules specify, for example, that lawyers ask questions and witnesses answer them, and that the judge oversees the system of turn-taking, monitors the substance of what is discussed, and resolves interactional problems when they arise. As the authors argue, such institutional rules help the court to carry out its assigned task of trying cases. At the same time, they have the effect of empowering lawyers linguistically over the witnesses they examine. “From the outset, the structural arrangements for talking in court do not privilege all speakers in the same way” (Conley & O’Barr, 1998, p. 21).

The weak position of clients in court is evident in my data on the civil proceedings from before the procedural reform. In the old proceedings, represented by Cases 1, 2 and 3, the clients were present in two out of the three cases. In Case 1, the plaintiff was present in three hearings out of seven. Similarly, two representatives of the defendant were present in three hearings. In Case 2, neither of the principals participated in the hearings. In the four separate hearings of Case 3, the plaintiff was present once and the defendant twice. What is important is that, in these hearings before the reform, the clients *did not* participate in the discourse with their own turns of talk, but were totally represented by their attorneys.

The following excerpts illustrate what kind of reasons the clients gave for their silence in the hearings:

Excerpt 8.1 Case 3, interview with the defendant after the 2nd hearing

Interviewer: Do you remember, this judge asked you at the end of the hearing whether you would like to say anything?

Defendant: Well you see, she recognized that I was kind of “arghh”, as I was so furious when it was prolonged again. She saw in my face that there was something, and asked just because of that. But I couldn’t comment, because Pauli [her attorney] had my proxy. I couldn’t say “blast it, give us some decision”, so that we can end this.

Interviewer: But you didn’t say that?

Defendant: No, no I couldn’t. It would have been a vote of no confidence in Pauli. He had said that it would serve both parties to postpone the proceedings, so I couldn’t go against him, he has the proxy. I have to abide by what he says.

Excerpt 8.2 Case 1, interview with the defendant after the 7th hearing

Interviewer: How about the judge, at the end of the hearing, he asked if you would...?

Defendant: No, Hallvik [refers to her attorney] just looked at us and said “no”. I asked him later why he didn’t allow us to speak, and he answered that he [unclear whether she refers to the attorney or to the judge] would have fainted. I really don’t know if it’s possible in that kind of situation to say anything more.

Interviewer: But what if someone asks you if you have anything to say?

Defendant: But you know, thus far we have not been asked, only Hallvik has.

Interviewer: I think he [the chair] asked if the principals had anything and I interpreted it that he mentioned you in particular.

Defendant: Or is it again just one of those phrases that you have to respond to, but it’s not the style that you start to say anything because the verdict is already there, ready to be announced.

The clients’ accounts reveal that even when the judge offers the floor to them, it is extremely difficult to take it. As reasons for this, the accounts point to two important factors: the attorneys act as dampers between the court and the client (for a more detailed discussion, see Chapter 4), and either in the client’s mind or in reality, they inhibit the client’s own verbal contributions; on the other hand, the judges make their offer to the clients at the very end of the hearings when the substance has actually already been discussed. Välikoski (1996, p. 102) described how the judges offered each party an equal number of opportunities to speak, and often just before the judgment asked if the parties had anything to add. The same idea of “just asking” for the sake of tradition or to be on the safe side is expressed in the interview with the judge in Case 1.

Excerpt 8.3 Case 1, interview with the judge after the 7th hearing

Interviewer: Can you remember, at the very end of the hearing, you asked if these principals had anything to say?

Judge: Well, I just in general, as they were anyway there on the spot. They have a right to speak, you know, it was just a very general question. They had been there as silent figures and I just thought they might have had something.

In Excerpt 8.2, the defendant clearly recognized the formal or ritualistic character of this offering. Altogether the comments made by the clients showed that, in the interactional context of everybody else having finished their statements, it is almost impossible for them to take the floor and start to develop arguments of their own. The dynamics of courtroom interaction in the civil proceedings before the reform were described in Chapters 6 and 7. The result of these dynamics, the marginalized position of the client, is evident in the following two excerpts which form the developmental story of a client's ideas before and after getting to court.

The following episode, related to Case 1, took place in an interview in which I and the plaintiff were looking at a video, recorded in the 4th hearing, where the plaintiff himself was not present but two of the defendants were.

Excerpt 8.4 Case 1, interview with the plaintiff after the 4th hearing

Plaintiff: Let's take a look at the point where Pertti and Kerttu [refers to the defendants] speak, that's what interests me now.

Interviewer: I think the situation was that they didn't say anything there.

Plaintiff: Didn't they?

Interviewer: No.

Plaintiff: Weren't they admissible?

Interviewer: It happened that they weren't asked anything and they didn't themselves indicate that they had anything to say.

Plaintiff: I thought that -, but we agreed with Kurki [his attorney] that, I said that I would come next time, if just that would do. I'd give my own point of view.

The plaintiff was present in the two hearings that followed, but contrary to his plans, he did not take the floor. In a telephone interview after the decision had been given, he gave the following explanation:

Excerpt 8.5 Case 1, interview with plaintiff after the 7th hearing

Interviewer: Would you have liked to speak there on some occasion or get your voice heard in some way?

Plaintiff: Well no, but it doesn't make any difference, but, you see, in principle I can bring up the issues through Kurki [his attorney]. They don't rate my statements at all there, so in principle, it's no use to talk.

The two excerpts from different points of time reveal how the client learned the system and his own position within it. Excerpt 8.5, however, shows the dilemma behind his words. In addition to the explicit disappointment, the frequent use of the word “but” reveals his ambivalence about the events in court. He uses these conversational tactics in trying to make sense of his contradictory experiences in court (see Billig & al., 1988).

Findings on procedural justice emphasize the role of the process in the determination of whether people experience trials as legitimate and fair, and courts as trustworthy. On the other hand, studies on institutional conversation and discourse in the courtroom report on one-sided communication and interactional asymmetry, which were also detectable in my own data on the traditional litigation process in Finland. The implementation of the procedural reform calls attention to the clients' participation and collaboration with the legal professionals when working on a court case. Even though the new procedure requires neither the client's presence nor his or her participation, the possibilities for actual participation in the proceedings are more real. In the following I will examine whether or not the implementation of the reform has brought about new ways of being a client or new forms of collaboration between legal and lay participants in civil proceedings. On the basis of my empirical analysis I will try to determine whether the black and white picture of suppression and asymmetry in interaction dominate, or whether there are seeds for development and change to be found. The absence of client contributions in the proceedings before the reform explains why the analysis in this chapter is not based on a comparison between the old and new proceedings. Here the focus is on the new proceedings and the developmental potential in them.

From an activity-theoretical perspective, what the participants are actually doing in the proceedings is transforming the object of their activity – trying to give the problem a form in which it can be solved. In the new procedure, the problem is solved either traditionally by making the decision or – what is new – by settling the dispute. This transformation is produced through making claims in which the experienced “wrong” is conceptualized into a judicially meaningful, often monetarily measurable form, through responding to the other party's claims, and through giving evidence to support one's own statements and to counteract the other party's statements. What is considered as relevant

information in the process of transformation was previously mostly individually determined by the participants but, after the reform, is negotiated to an increasing extent collaboratively in the courtroom interaction (see Chapters 6 and 7).

One of my key questions is: What is the task of the client in the negotiation? In procedural law, the client is mainly defined by his or her judicial role as a plaintiff or a defendant, through his or her judicial rights and obligations in the proceedings. From an interactive point of view, he or she is described in the law as an important informant giving information about the disputed issue (Government Bill 15/1990, pp. 13, 28, 35). The purpose of analyzing client talk in the courtroom is to give a more detailed picture of the client in the proceedings – not just in a judicial role, but as somebody taking part in the transformation of the dispute. He or she may not only give information, but also seek to affect the way the dispute is being constructed. Here, *the initiatives of the client* serve as the key tool for the analysis of his or her attempts to participate in the negotiations.

The research questions addressed in this chapter are:

1. *What kind of initiatives do the clients take in the courtroom interaction?*
2. *What kind of an impact can these initiatives have on the proceedings?*
3. *Did the procedural reform of 1993 lead to any changes in client contributions?*

8.2 Initiatives

What, then, is an initiative? Different traditions of studying talk and interaction have approached initiatives from varying viewpoints. Even so, they are rarely analyzed in studies on institutional discourse, and are mostly understood in conversation analysis as topic initiations, thus connected to topics and topic changes (e.g., Button & Casey, 1985; Maynard, 1980; Vehviläinen, 1999).

Lacoste (1981) studied medical consultations in hospital and drew conclusions on the underlying control systems. Because of the doctor's medical expertise and intention to work towards the patient's good, control of the encounter is entirely in the hands of the doctor, who may interrupt the patient whenever she or he likes. The patient has the role of a possessor of data. This leads to a one-directional relationship in which the doctor sets questions in order to guide the interaction, and the patient responds strictly to these questions. The effect of this routine is to make the patient a passive partner without initiative (ibid., pp. 169–170.)

The expert's dominance has its limits, however. Lacoste showed how patients attempt to counteract the prevailing model of the medical interview, or even try to influence the outcome of the consultation. She poses the question: "In this forced and unequal situation whose outcome is not completely known in advance, how can the patient make his or her needs known?" (p. 170).

Lacoste (*ibid.*, p. 175) looks for an answer in different approaches, one of them focused on the patient's initiatives. Her starting point is that if there is active participation by the patient, it must translate into verbal initiatives. She suggests the following definition of an initiative: An initiative is a verbal act which 1) is not a response to the explicit contents of a preceding act nor to an implicit content accepted by the two participants, 2) calls for a response. She found that initiatives in medical consultations are surrounded by introductory metacommunicative phrases and clauses that mitigate the possible violation of the other participant's territory.

She found four different interactional functions that the initiatives serve:

1. *Contribution of information with a view to cooperating in making the diagnosis*
2. *Request for information with a view to achieving personal objectives in terms of access to the diagnosis*
3. *Request for information with a view to cooperating in carrying out the prescribed treatment*
4. *Contribution of information with a view to contesting a diagnosis or a prescribed treatment.*

Whereas Lacoste defines initiatives in the context of the medical encounter according to what interactional function they serve, Linell (1998) takes a more linguistic starting point and emphasizes the dialogic nature of discourse contributions. He sees all the contributions to dialogue related to their local contexts (their preceding and following units) in a Janus-like manner where what is said is always in response to what was said before and in anticipation of what comes next. While utterances are dependent on prior utterances, they simultaneously create conditions for next utterances (Linell, 1998, p. 164). Linell analyzed the dialogical nature of contributions in terms of a response-initiative structure, meaning that each contribution is defined by its response links – its relations to the prior contributions in the discourse – and by its initiative links – its relations to the anticipated continuation in the discourse (pp. 164–166).

Discourse contributions fall into different categories depending on the strength of the initiatory aspect with respect to the responsive aspect. Some contributions display a rough balance between the responsive and initiatory aspects,

thus being initiatives that are relevant responses to the other's preceding turns. When the responsive aspect dominates, we have responses – at the extreme, minimal responses, where the actor answers the question only in terms of what was asked. When the initiatory aspect dominates, we see “pure” or “free” initiatives, where the contribution is not tied to the prior discourse and the actor is free to bring up a new topic (Linell, 1998, p. 169). Initiative-Response (IR) Analysis (Linell, 1998; Adelswärd & al., 1987) is a coding system where the discourse contributions are placed in twenty different categories according to the type of combination of responsive and initiatory links they represent.

One part of Lacoste's definition is that an initiative calls for a response. Linell (1998, p. 170) differentiates soliciting initiatives, which are questions and requests for immediate action, from non-soliciting initiatives, which may invite but do not oblige continuation by the other. He notes, however, that the distinction between soliciting and non-soliciting initiatives is a fuzzy one, and when the initiatives are coded, the distinction must be based on the formal properties of turns (Linell, 1998, p. 170).

In terms of initiatives, my study draws on both Lacoste's and Linell's studies, but it also has its own starting points and characteristics. Given that my aim is to examine the client's attempts to participate in the negotiations, the focus of the analysis is on the client's initiatives and on the effects they may have on the interaction or, more broadly, on the proceedings. The legal professionals' initiatives in the interaction are excluded. Another characteristic is that the initiatives are studied specifically in relation to the dispute and to how the dispute is constructed in the interaction. Thus, this analysis puts a strong emphasis on the object of court work – object here being understood both as the client of the court and as the dispute that is being negotiated.

8.3 Data

The data analyzed in this chapter consist of three court cases handled after the court reform. The main data corpus is the court hearings, videotaped and transcribed. This corpus is supplemented by interviews and court documents.

The three cases recorded after the court reform – Cases 4, 5 and 6 – were introduced in Chapter 5. Their main characteristics are summarized in Table 8.1.

Table 8.1 The Cases Analyzed in Chapter 8

	Case 4: Cancellation of trade in movables / Construction case	Case 5: Compensation for damage	Case 6: Contested partition of joint property
Duration of proceedings	October 1995 – settlement in June 1997	April 1997 – decision in January 1998	June 1997 – decision in April 1998
Sessions	A two-day preliminary hearing in January 1997	A preliminary hearing in December 1997	A voluntary, unofficial hearing in November 1997
	An extended preliminary hearing in May 1997	An extended preliminary hearing and main hearing in December 1997	An extended preliminary hearing and a main hearing in April 1998
Present at the hearing	Judge, court clerk, plaintiff (during the first day of the hearing), plaintiff's attorney, 1.defendant's attorney, 2.defendant's attorney	Judge, court clerk, court trainee, plaintiff, plaintiff's attorney, defendant's attorney	Judge, court clerk, plaintiff, plaintiff's attorney, defendant's attorney
	Judge, court clerk, plaintiff's attorney, defendant's attorney	Judge, court clerk, court trainee, plaintiff, plaintiff's attorney, defendant's attorney, one witness (in main hearing)	Judge, court clerk, plaintiff, defendant, plaintiff's attorney, defendant's attorney, executor of partition (in main hearing), three witnesses (in main hearing)

Discursive Features of the Cases

In order to give an overview of the three analyzed court cases, I offer here some general information and parameters concerning their discursive features. The parameters are: 1. duration of hearing, 2. total number of each participant's turns in the hearing, 3. average length of each participant's turns in the hearing, and 4. average number of participants in the discussion. Each parameter is first described in detail, and then presented in a concluding table.

1. The duration of the hearing gives the duration of each session – preliminary or main hearing – in hours.

2. The total number of each participant's turns reveals how much the various participants use the interactional space in each hearing. Only the preliminary hearings are included here, because in the main hearings there are also witnesses whose presence influences the interaction, usually by increasing the turns of the attorneys as they ask questions and by reducing the turns of the judge while he listens to the testimony.

3. The average length of each participant's turn in a trial is an estimated parameter, based on ten-page samples of each trial transcript. The samples were chosen discretionarily from similar phases in the trials – the phase of going through the demands and replies in detail – but randomly within that phase. This parameter offers the opportunity to see whether the amount of talk differed between the legal professionals and the lay persons. Inter-case variation in terms of this parameter also reflects the general interactive type of session.

4. The average number of participants in the discussion is, again, an estimated parameter, which is hard to define specifically. It is based on the same sample of ten pages described above, and the number of different speakers per one page of transcript is counted. The parameter is revealing when compared to the number of potential active speakers in the situation: For example, let us take consider a hearing in which those present are the judge, the plaintiff, the plaintiff's attorney and the defendant's attorney, excluding the court clerk or court trainee, who are not potential speakers. The number of the potential active speakers is four. If the average number of actual speakers on ten pages is between 3 and 4, we know that all the potential speakers have actively taken part in the discourse, because all the participants have used turns on almost every page of the transcript. If the number is below three, the discourse does not constantly involve every participant, and at least one person is out of it at any time.

Table 8.2 Discursive Features of the Hearings

	Case 4: Construction dispute (Cancellation of trade in movables)		Case 5: Compensation for damage		Case 6: Contested partition of joint property	
	Preliminary hearing 1. day	Extended preliminary hearing 2. day	Preliminary hearing	Extended preliminary hearing and main hearing	Preliminary hearing	Extended preliminary hearing and main hearing
1. Duration of hearing (including breaks if any)	9.10 – 15.30	9.10 – 13.45	9.10 – 11.20	9.00 – 12.00	9.15 – 13.45	9.10 – 15.15
2. Number of turns of each participant in the preliminary hearings	Judge	537	297		655	
	Plaintiff's attorney	308	146		445	
	Defendant's attorney	332	197		291	
	Plaintiff	22	47		185	
	Defendant					
	All together	1199	687		1576	
3. Average length of each participant's turns in words	Judge	15.6	32.0		14.1	18.5
	Plaintiff's attorney	21.2	20.5		11.4	12.4
	Defendant's attorney	12.7	13.7		23.4	15.9
	Plaintiff	12.5	25.1		7.3	15.5
	Defendant					24.7
	All together	15.5	22.8		14.1	17.4
4. Average number of participants in the discussion	2.7 speakers from 5 potential /page		3.3 speakers from 4 potential /page		3.5 speakers from 4 potential /page	3.6 speakers from 5 potential /page
			2.6 speakers from 3 potential /page			

The parameters concern interaction in the preliminary or extended preliminary hearings. The interaction in the main hearings takes a special form, for this hearing consists mostly of the witness's testimonies. If the extended preliminary hearing can be clearly separated from the main hearing, as it is in Case 6, the parameters are also taken from that section.

In comparison with the civil proceedings before the court reform, Table 8.2 confirms the change in time scale: the case is now handled in two or three half-day or whole-day meetings instead of several one-hour sessions. Instead of giving long monologues, all the participants use turns that are more conversation-like in length. All the judges use turns of almost equal length, except the one in the preliminary hearing of Case 5, who takes slightly longer turns. There is a small variation in the attorneys' turns, which may reflect differences between attorneys, but may also result from the special kind of discourse prompted by the different phases of the negotiation. Taken together, the judges' and the attorneys' turns are approximately of the same length.

The length of the clients' turns varies from 7.3 to 25.1 words. In Case 4, the result is ambiguous, as there are only two observations – turns with 1 and 24 words respectively – in the sample. However, as these observations show the extremes of variation in all this client talk, we know that they are quite typical in the context of this case. Case 5, where the average length of the client's turns was relatively high, 25.1 words, and Case 6, where it was rather low, 7.3 words, reveals two different kinds of client orientation to the discourse. In Case 6, the client used long turns with extensive explanations, but also constantly inserted short confirmations (yes, sure, etc.) A high number of one-word utterances makes the average length of turns relatively short, which in this case implies dialogic and reciprocal interaction. The client also used long turns in Case 5, but did not sprinkle in confirming utterances so frequently, and so the average length of the turns was maintained.

The average number of participants in the discussion gives some hints about the interactive character of the discourse in each case. In the preliminary hearing of Case 4, where the average is 2.7 from the 5 potential speakers, the discourse was mainly carried on between two or three participants. In this case, there was one exceptional participant, the attorney of the secondary defendant, who was present at the session only to listen to what was being discussed. The plaintiff spoke rather seldom. The preliminary hearings in Cases 5 and 6 seem to show more balanced interaction, since at least three, but quite often all four participants were active in speech.

Viewing the general discursive features of the hearings suggests some differences – although quite minor – between the cases. Given the substantial differences in reality and the different outcomes, the discursive features are

surprisingly alike and do not reveal much of the possible qualitative differences. A closer look at parameter 2, the number of each participant's turns in the hearing – this time as percentages (Table 8.3) – yields more information.

Table 8.3 *The Percentage of Each Participant's Turns in the Preliminary Hearings*

	CASE 4	CASE 5	CASE 6
Judge	45	43	41
Plaintiff's attorney	25	21	28
Defendant's attorney	28	29	19
Plaintiff	2	7	12
Total	100%	100%	100%

What arouses interest in Table 8.3 is the difference in the proportions of the plaintiffs' turns, which vary from two to twelve percent between the cases. This closer look at the different participants' contributions gives some hints of the quality of the interaction in each case. In Cases 4 and 5, the plaintiffs and their attorneys counted together speak as much as the defendant's attorney alone, but still essentially less than the judge. In Case 6, the defendant's attorney speaks clearly less than the plaintiff's attorney – and if the plaintiff and his attorney are taken together, substantially less. Contrary to Cases 4 and 5, the plaintiff and his attorney counted together use approximately the same number of turns as the judge. Despite these differences – quite surprisingly – the proportion of the judge's turns is approximately the same in every case, a little less than half of all the turns. This raises the question whether these statistical pointers conceal different ways of interacting and communicating in practice. Do these quantitative differences also suggest differences in quality? Where do the differences arise from? These questions gave rise to my methodological interest in creating a method of analysis which could tap the qualitative differences in the court proceedings under investigation.

8.4 Process of Analysis

The data analysis comprises the following steps. First, the court hearings were divided into phases for the purpose of later analysis. Second, the initiatives of the clients were defined and separated from other kinds of turns in the data. Third, initiative categories were constructed from the data, and finally, the different effects of the initiatives were categorized.

1 The Phases of the Hearings

For the purposes of later analysis, the hearings of the cases are divided into phases (Tables 8.4, 8.5 and 8.6). The grounds for separating one phase from another rest on three points. Firstly, civil procedural law sets some rules, which give structure to the hearings. Secondly, court hearings feature extraordinary discussion in which the participants most often name and articulate the topics they are following. Thirdly, on some occasions the coherence of the discussion may indicate the shift from one phase to another. The transformation from one phase to another sometimes constituted a shifting phase in itself, which reflected the script of the proceedings. These shifting phases are marked with an asterisk (*) between the primary phases in the following tables.

Due to practical needs in the later analyses, the phases were determined only for the parts of the proceedings in which at least one client was present. The following tables present the phases of the analyzed cases separately for each case.

Table 8.4 Phases in the Hearing of Case 4

The first day of the preliminary hearing
1. Scripting and negotiating the further proceedings (57 turns) * (8 turns)
2. The plaintiff's demands and the defendant's reply (74 turns) * (10 turns)
3. The grounds for the demands and for the reply (276 turns) * (42 turns)
4. The factors having contributed to the damage: the design errors and construction defects in the apartment (334 turns) * (11 turns)
5. The detailed grounds for the demands and the replies (329 turns)
6. Further planning (74 turns)

Table 8.5 *Phases in the Hearings of Case 5***The preliminary hearing (Phases 1-9)**

1. Starting the proceedings and looking for a possible settlement (45 turns)
* (1 turn)
2. General presentations (6 turns)
* (18 turns)
3. Reviewing the demands and the reply (32 turns)
4. The grounds for the demands (43 turns)
5. The grounds for the reply (10 turns)
* (1 turn)
6. The judge's specifying questions: the point in time at which the plaintiff received the information on the day-care place and the municipality's efforts in arranging the day care (179 turns)
* (1 turn)
7. The disputed and undisputed facts: reasonably set expectations for the municipality, the plaintiff's contributions to the damage prevention, the relevance of a previous decision of the Supreme Court for this case. (254 turns)
8. Declaring the evidence the parties will bring to court (46 turns)
9. Arranging the date for the main hearing (65 turns)

The extended preliminary hearing and the main hearing (Phases 10-14)

The extended preliminary hearing

10. The proposal for a settlement (76 turns)
11. Correcting the minutes of the preliminary hearing, declaring the evidence, the judge's specifying questions (92 turns)
* (9 turns)

The main hearing

- * (1 turn)
12. Hearing the plaintiff (73 turns)
13. Hearing the witness (169 turns)
14. The final statements and the claims for legal expenses (18 turns)

Table 8.6 *Phases in the Hearings of Case 6***The preliminary hearing (Phases 1-6)**

1. Possible ways to settle the dispute (21 turns)
* (9 turns)
2. The plaintiff's demands, their grounds, and the defendant's reply with its grounds (847 turns)
3. The defendant's additional demands and the plaintiff's reply (296 turns)
* (12 turns)
4. Negotiating how the evidence will be declared and the date for the main hearing (81 turns)
5. The counter-claim: the plaintiff's demands, their grounds and the defendant's reply with its grounds (174 turns)
6. Declaring the evidence and arranging the schedule for the further proceedings (146 turns)

The extended preliminary hearing and the main hearing (Phases 7-14)

The extended preliminary hearing

7. Beginning the proceedings, the handling and deciding of the application for a cost-free trial (77 turns)
8. Specifying and correcting the minutes of the preliminary hearing (43 turns)
* (6 turns)
9. The plaintiff's demands and the defendant's reply (332 turns)
10. Declaring the evidence and what will be proved with each piece (120 turns)
* (34 turns)

The main hearing

11. Hearing the executor of the partition of the joint property (221 turns)
12. Considering the material brought into the court: looking at the paintings (64 turns)
13. Hearing the witnesses (562 turns)
* (13 turns)

2 Identification of Initiatives

The second step was to select the units for analysis by taking a stance over what an initiative is. Lacoste defined it as something that in itself is not a response, but which demands a response. The latter part of the definition is problematic: I found turns in the discourse turns that attempt to initiate something but that are overlooked by other participants. These turns may still be called initiatives, although perhaps failed ones. Linell, for his part, stressed the dual nature of each turn with its responsive and initiatory aspects, and presented a detailed scheme for analyzing the relative weight of these aspects. Linell's detailed analysis is too complicated for my purposes, for the interest of the present study does not lie in the linguistic relationships, but in the content and the forms of the initiatives in relation to the dispute.

Empirically, from the point of view of court practices, we know that clients may answer the questions they are asked, or they may make a contribution to the discourse without anyone's asking. In the historical context of court trials, the role of the client has merely been to answer the questions, if the attorney has not answered them on his or her behalf. In this context, all voluntary contributions from the client are interesting and worth taking a closer look at.

Given the above-mentioned aspects, initiatives are defined here as the contributions of the client to the courtroom discourse that are not direct and mere answers to questions posed by others. By their linguistic form, initiatives can be either contributions (statements, explanations, suggestions, arguments) or questions and requests. The client's turns that seem to be purely answers to questions are excluded in this analysis, where the focus is on the initiatory attempts. However, Linell's ideas on the dialogicality of utterances are followed: when an answer grows from being purely responsive to carrying with it a clear initiatory aspect, it is interpreted as an initiative. The following excerpts illustrate how the responsive and initiatory elements have been interpreted, and where the borderline between a response and an initiative has been set.

Example 1

Judge: Have you checked by calculation whether this claim is relevant at all?

Plaintiff: Yes, we have checked it, and the end result is different.

Example 1 illustrates an utterance which was interpreted as an answer due to its relatively weak or missing initiatory aspects, and which was thus excluded from the close qualitative analysis.

Example 2

Plaintiff's attorney: Now we could ask the plaintiff if he left the apartment in that condition?

Judge: Well, let's hear it now, is it correct to say that the apartment was left like this?

Plaintiff: As I already said, there had been people there emptying all the closets and shelves on the floor, and here we can see the result [refers to a photograph]. And they declared themselves that they had taken the closets and shelves with them, *and we have all the offence reports and pre-trial investigation protocols available, which we can bring along if necessary.*

Example 2 represents an utterance which starts as a mere answer to a question, but that also contains elements that go beyond just answering what was asked. Even the first parts of the turn are not exclusively responsive in so far as the plaintiff does not answer simply yes or no, but volunteers an explanation of his own. The most initiatory elements, which widen the dispute by suggesting new evidence, are distinguished from the more responsive ones by being written in italics. In this example, the client's initiatory contribution that is embedded in the answer, converts it into an initiative.

Example 3

Defendant's attorney: In what capacity do you know this Kimmo Koivu? [refers to the plaintiff's attorney]

Plaintiff: *What relevance does that have?* [laughing]

Example 3 shows a special way of turning an answer into an initiative. It occurs when the client dodges the question with a counter-question.

The empirical analysis and interpretation of the data started at the same time as the conceptual borderline between the initiatives and responses was drawn. First, all the clients' turns were marked, and those too incomplete for analysis were left out. The incomplete turns were the ones interrupted by other participants, and sometimes also by the speaker him/herself. Secondly, the turns interpreted as pure answers were extracted from the data and excluded from the analysis. After these operations, I had a total of 296 client initiatives at hand for qualitative analysis.

3 Initiative Categories

The initiative categories were constructed on the basis of data-driven interpretation. When qualitatively distinct categories are specified, it is the content of the turn – what is being said – that is important. The initiatives differ from each other in respect of how the client wants to affect the dispute. A basic kind of initiative, which the procedural law also recognizes, involves giving information. The client explains, describes and specifies the dispute at hand, and brings elements of his or her own to the prevailing topic. The data also reveals several other functions that the initiatives may serve. The following list names and defines ten initiative categories and gives examples of each one.

1. *Expanding initiatives* bring into the prevailing discussion a new concept or a new perspective that gives the participants an opportunity to think about and work on the dispute in a qualitatively new way. It could be assumed that such initiatives are often connected to the fundamental questions of what the dispute is about and what motivated it. One example would be a case in which, instead of understanding the community of the defendant as an entire unity, the plaintiff attempted to understand the defendant's activity as a contradictory organ of several actors. A client's fundamental suggestion to try to settle the dispute instead of adjudicating it would embody an expanding initiative, which could offer a new approach to its handling. Bringing new issues or elements into the dispute does not make it expansive, but expansion seems to require a new and alternative principle or concept through which to perceive it.

2. *Extending, enlarging initiatives* bring a new issue or item into the dispute, or otherwise enlarge it from the form it had earlier. Typically, enlarging initiatives occur when the client presents new claims that have not been presented earlier, suggestions for new witnesses or new evidence.

3. *Questioning initiatives*, in accordance with their name, question something in the dispute or its handling, such as a statement presented, the way of proceeding, or an ongoing topic in the discourse. Typical manifestations of questioning initiatives include turns such as "is this item really worth discussing?" or "I don't see the relevance of this question". Basically, it could be assumed that the questioning could lead either to closing the subject or to expanding it with a new perspective.

4. *Contesting initiatives* occur when the client contests the statement presented by the opposing party. Such initiatives are typically marked by clear negations such as "I was not", "it is not so" or "it did not happen". They represent one of the basic speech types in courtrooms, where contesting has also judicial relevance.

5. *Alleging, claiming initiatives* also come close to one of the basic speech types in courtrooms, where everything alleged has to be taken into consideration in the sentence. These initiatives include clear statements in support of some matter or state of affairs, such as “my statements were not considered in the partition” or “I did sell the car”. They also come close to explaining initiatives, defined later, and are sometimes hard to distinguish from them although they are usually stronger in claiming and taking a stand.

6. *Correcting initiatives* are those in which the client corrects or reshapes some detailed what of what is presented, but does not contest or question the statement as a whole. Such initiatives reflect the statements presented earlier either by others or by the client her/himself. Typical examples include “Sorry, I said it wrong, it was one thousand”, or “I’m sure you meant June, not July”. The difference between correcting initiatives and contesting initiatives is that the former lead to correcting the presented information, whereas the latter leave the participants in contest.

7. *Explaining, specifying initiatives* form a twofold category. On the one hand, the client explains, describes and rationalizes the events or state of affairs under dispute, and on the other hand, he or she specifies what has already been stated. Conceptually, and some times empirically, these subcategories can be separated, but courtroom discourse contains a lot of turns in which the distinction is difficult to make. Thus, in order to guarantee the reliability of the category, the two types of initiative are treated as one. What is common to them is that they are confined to giving information about the disputed matter. Thus, this category contains initiatives which the procedural law understands as the client’s basic task in the proceedings. Examples include “I sold the old car in June and bought a new one in July”, and “We visited the apartment twice and looked around very carefully”.

8. *Confirming, strengthening initiatives* direct either the speaker’s own or another speaker’s statements. Confirmation occurs when the speaker affirms that the statement is right, for example, “That’s correct”, or strengthens the statement by giving new definitions or details, such as “As I already said, the car was brand new”. Some confirming initiatives are produced by repeating one’s own or another’s turn, sometimes literally. Repeating initiatives were not put in a category of their own, because the main reason for repeating a turn was to confirm the statement.

9. *Stating initiatives* refer to turns where the client expresses some state of affairs in a way in which the utterance is “only a statement”, without a well-defined relation to the subject matter. These initiatives are neutral in purpose, and the speaker’s intention remains hidden. They do not aim at transforming the dispute: they do not extend, correct or specify. Examples are difficult to find,

as their stating and neutral property is revealed specifically in the context in which they emerge. The following excerpt may serve as an example:

Plaintiff [asking the witness]: Have you had business with X.X.?

Witness: Only seldom.

Plaintiff: But you have had business with him?

Witness: He has bought some books from me. Yes, European History, two hundred marks.

Judge: Would you mind now telling the court who this X.X is?

Plaintiff: He is her father [refers to the defendant]

Judge: Okay.

Witness: Well, he has just...

Defendant: ## *He is 83 years old.*

Witness: He just visited the exhibitions and so on. Came around the shop. We've met on those occasions.

In this context, the defendant's turn (in italics) is a stating initiative in the sense that it seems to be irrelevant in the local context of the discourse. It might be supposed that the defendant's intention was to play down or question the importance of the fact that the witness knew her father. However, this is only the researcher's speculation, especially so since the other participants in the situation do not give any meaning to the turn either. Thus, stating initiatives might be defined as initiatives without an explicit intention in relation to the dispute.

10. *Restricting, terminating initiatives* are the client's attempts to restrict or reduce the issues at hand, or even to terminate the discussion on a specific topic. Typically, these initiatives follow the form, "That has nothing to do with this dispute". They may be contesting or questioning in their tone, but they are categorized as restricting/terminating when they contain elements of restricting the dispute.

The ten initiative categories differ from each other according to their relation to the prevailing topic. Contesting, alleging, correcting, specifying/explaining, confirming and stating initiatives (categories 4–9) maintain the ongoing topic and do not contain attempts to change it. In this sense, they are the client's initiatory contributions to keep up the flow of the prevailing topic. Even though the client may contest or correct something presented, he or she approves the topic and continues it with his or her own turns. Conversely, expanding, enlarging, questioning and restricting/terminating initiatives (categories 1–3 and 10) endeavor to change the prevailing topic. The first two involve

the client suggesting a new topic to discuss; with restricting/terminating initiatives, he or she suggests stopping the discussion, but does not necessarily offer an alternative topic for its continuance. Questioning initiatives basically contain two alternatives: terminating the topic or opening a new one by enlarging or expanding.

To sum up, these ten initiative categories form two basic groups: *topic-maintaining and topic-changing categories*. On a scale from the most expanding to the most restricting, the most neutral are in the middle. In this case, the topic-maintaining initiatives occupy the middle ground, and the topic-changing ones both of the extremes.

In addition to these ten initiative categories, is a group of “secondary” initiatives, where the client verbally asks for the floor in order to initiate something. These turns and their effects are also looked at.

4 The Effects of the Initiatives

After dividing the initiatives into the ten categories, I shifted the focus to their apparent effects. Because the emphasis of this study is on the developmental potential in the lay-professional collaboration and on drawing a picture of the new ways of being a client in court, the effects of the initiatives could be considered as significant. The effects of the topic-changing initiatives (categories 1–3 and 10) are now prioritised and analysed more closely, partly for reasons of research economy, but mainly because their topic changing nature means that they are most likely to have effects on the discourse. However, the analyses do not concentrate only on the extremes, and also take account of the effects of the topic-maintaining initiatives, although on a more general level.

In her study on medical interviews at a hospital, Lacoste (1981) analyzed not only the patient’s initiatives, but also the medical responses given to them. She found that patient initiatives were few, and most of them were likely to be refuted, either as contrary to the diagnosis or as not worth considering. She observed the following typical ways of refusing these initiatives: 1. silence, 2. formal acquiescence, 3. initiated but not terminated response, 4. response announced but not given and 5. expressing another initiative rival to the first (Lacoste 1981, p. 177). The only initiative that received immediate success in the form of obtaining a response was a request for information to abide by the prescribed treatment, which belonged to a situation that both the doctor and the patient had accepted. The other initiatives were in the gray zone: according to Lacoste (p. 177) they suffered from a confused status which was subject to disagreement. The success of the initiatives in the long run depended on how per-

sistent the client was, and on his or her interactional ability. There Lacoste emphasized the fact that what is more important than intermittent initiatives is the entire strategy for putting forward one's point of view.

In my study, the effects of the initiatives are not seen as mere implications for the interaction, but mainly as implications for the dispute. The interest does not lie so much in how people react to the client's initiatives, but rather in what happens to the dispute.

Here the effects of the client's topic-changing initiatives are classified into four different effect categories. Again, each category is briefly defined and illustrated with an example.

1. Instead of using Lacoste's five categories of rejecting an initiative I decided to take *the total bypass of the client's initiative and rejection without explanations* as one category of effects. This category includes situations in which the client's turn is ignored by the other participants, and is thus totally passed over. Rejection without explanation occurs when the client's initiative is simply and briefly denied. "Not now" or "We won't take up this issue now", as other participants' responses to the client's initiative, are typical examples of rejections without explanation.

2. The second effect category is called *fracture and repair in the process*, and is divided into two sub-groups. The first sub-group includes instances when the client's initiative is treated in a smooth way, usually with one word or sentence by one participant. On these occasions, the initiative has caused a break in the process, which is then repaired by a short comment before the script is resumed. This kind of repair work could also be called a smoothing process, and at least sometimes it may be a question of containing the client's initiatives in a socially approvable way.

The second sub-group is repair, where the client's initiative, whether actually accepted or rejected, calls for explicit discussion about procedure. Unlike the first category, where the initiatives are rejected without explanation, this category includes situations in which, even if rejected, they result in discussion, where the rules and procedure are reflected upon. For that moment, the proceedings become transparent for the client her/himself. The initiative may lead to a rejection, which is then explained away, for example, "Don't comment now. Now we can only ask questions of the witness, but later we can also comment." It could also lead to a longer debate on how to proceed. What is relevant is that the client's initiative does not change the topic, but imposes reflection on the possibilities of changing it. This reflection is frequently surrounded by participants' meta-talk. Here the break that resulted from the client's initiative is not smoothed over with an answer, but is taken as an opportunity for reflection and explicit repair.

3. The third effect category concerns situations in which the client's initiative leads to *a change in the topic*, supported by the other participants. Such a change occurs for example, when the client suggests that the disputed paintings should be evaluated by a professional, and the other participants approve this as a shared new topic and start to discuss that issue.

4. The fourth effect category can be determined on the level of the whole court case and its proceedings, when the client's initiative has *effects that go beyond or at least are intended to go beyond the script* of the proceedings: it may have led to major changes in the proceedings or it may have affected the court decision. My data only showed an indirect example of effects that went beyond the script of the proceedings when the client initiated a new way of considering the dispute. However, this not realized in the hearing, being ignored by the attorneys during the proceedings. The interview data show however, that it was considered by the judge when he made his decision, and was also re-evaluated in the briefs when the parties appealed to the court of appeal.

8.5 Findings: Quantitative Results of the Analysis

The first step in the analysis was to distinguish from all the clients' turns those that were incomplete and impossible to analyze. As Table 8.7 shows, the clients were interrupted by other participants in four out of the six hearings. If the client frequently participated in the discussion, he or she was also likely to be interrupted frequently. The proportion of interruptions was relatively similar in each case at nine, 10 and 15 percent.

Table 8.7 *The Number of Client Turns Interpreted as Initiatives, Responses and Interrupted Turns*

	Case 4: Construction dispute			Case 5: Compensation for damage		Case 6: Contested partition of joint property		
	Preliminary hearing 1. day	Preliminary hearing 2. day	Extended preliminary hearing	Preliminary hearing	Extended preliminary hearing and main hearing	Preliminary hearing	Extended preliminary hearing and main hearing	Extended preliminary hearing and main hearing
1. Total number of client turns	Plaintiff			Plaintiff	Plaintiff	Plaintiff	Plaintiff	Defendant
	22			47	43	185	144	34
2. Number of initiatives	100%			100%	100%	100%	100%	100%
	4			35	14	129	91	23
3. Number of responses	18%			74%	33%	70%	63%	67%
	18			8	29	38	40	6
4. Number of interrupted turns	82%			17%	67%	20%	28%	18%
	0			4	0	18	13	5
	0%			9%	0%	10%	9%	15%

The interrelationship between the initiatives and the responses varied within the hearings. As the table shows, in the preliminary hearings of Cases 5 and 6, and also in the main hearing of Case 6 – where the principals were not interrogated as witnesses – the number of initiatives was two, three or even four times bigger than the number of responses. The preliminary hearing in Case 4 was an exception, the number of initiatives being remarkably smaller than the number of responses. Responses were also twice as frequent as initiatives in the main hearing of Case 5, as the principal was herself heard for the purpose of obtaining evidence.

The numbers of initiatives in the different initiative categories in each case are presented in Table 8.8.

Table 8.8 reveals, firstly, that the cases differed from each other in several respects. In Case 4, for example, the client took only topic-maintaining initiatives, whereas Cases 5 and 6 featured both topic-maintaining and topic-changing initiatives. Case 6 was particularly rich in explaining and confirming initiatives, whereas Case 5 was the only one to carry expanding initiatives. This calls for further study of the initiative profiles in each case, and these will be returned to later in the analysis.

Secondly, the table shows that the most common type of client initiative was explaining and specifying which, together with initiatives confirming and strengthening what had been previously presented, formed the overall majority of initiatives. However, there were several occurrences in all the initiative categories. This seems to support the starting point of the analysis – that the role of the client may be something other than only that of an informant – and lead to consideration of the qualitative differences between the cases.

Table 8.8 The Number of Initiatives in Each Case according to the Type of Initiative Category

Type of initiative category	Case 4: Construction dispute		Case 5: Compensation for damage		Case 6: Contested partition of joint property			TOTAL		
	Preliminary hearing 1. day		Preliminary hearing		Extended preliminary hearing and main hearing		Extended preliminary hearing and main hearing			
	Plaintiff		Plaintiff		Plaintiff		Plaintiff Defendant			
1. Expanding			4						6	
2. Extending							8	5	1	15
3. Questioning			4		8		3	6	1	21
4. Contesting			2				4	4	2	12
5. Alleging	1		5				5	8		14
6. Correcting	1		1				4	1	1	8
7. Explaining	2		8		1		49	37	5	102
8. Confirming			8		3		43	21	8	88
9. Stating			1				10	5	2	18
10. Restricting			2				2			4
Verbal request for the floor							1	4	3	8
Total			4	35	14		129	91	23	296

8.6 Client Initiatives and Their Effects in Case 4: “Excuse me. I especially said...”

1 Introduction and the Overall Profile of the Hearing

Case 4 was a dispute that concerned five principals altogether – a married couple as the plaintiffs, a divorced couple as the primary defendants and a man as the secondary defendant. Of these five, one principal – one of the plaintiffs – was present on the first day of the preliminary hearing. During the hearing, held in a commodious meeting room, the plaintiff sat next to her attorney, opposite the defendants’ attorneys and diagonally opposite to the judge and the court clerk.

For the majority of the time, the plaintiff quietly listened to the proceedings. Sometimes she whispered something to her attorney. During the six hours of the hearing her turns were relatively few compared to the other cases in the data, but compared to proceedings before the procedural reform, they offered tentative implications for a new, emerging type of client participation. Table 8.9 describes the phases of the hearing in which the client’s initiatives occurred in Case 4.

Table 8.9 *The Number of Client Initiatives in Each Phase of the Hearings in Case 4*

Hearing	Phase	Number of initiatives
Preliminary hearing	1. Scripting and negotiating the further proceedings	-
	2. The plaintiff’s demands and the defendant’s reply	-
	3. The grounds for the demands and for the reply	1
	4. The factors having contributed to the damage	-
	5. The detailed grounds for the demands and the replies	2
	6. Further planning	1

2 The Initiatives during the Proceedings in Case 4

The plaintiff was silent in *the first two phases* of Case 4. In *the third phase*, where the grounds for the demands and responses were presented, she wanted to correct her attorney's statement (Excerpt 8.6). In my analysis, this was interpreted as a correcting initiative.

Excerpt 8.6 Case 4, preliminary hearing

Judge: Do I understand correctly that they had forbidden the installation of the blower and that the prohibition was not made during the repair work?

Plaintiff's attorney: No.

Judge: But the prohibition was made, but it was made because it would have, the blowing would have caused...

Plaintiff's attorney: ## health problems and extra damage.

Plaintiff: Excuse me. I especially said *as long as we live* in the apartment. So, it [the blower] cannot be placed there. For this particular reason that it is even more dangerous.

Plaintiff's attorney: Did this conversation occur in autumn '95? Before you moved away?

Plaintiff: Yes.

Plaintiff's attorney: Well, yes, excuse me, I said incorrectly that it was at the beginning of the year 1996. This means that the blower had already been discussed in autumn '95, after the damage had been recognized.

At first, the judge addressed his question to the attorney by naming the principals as "they". When the client noticed the false detail in her attorney's and the judge's discussion, she interrupted with the polite opening "Excuse me", and then corrected the false detail concerning the point of time at which the blower was discussed. The simple opening nicely reveals the mode of interaction, where the discourse mainly occurs between the professionals and the client is intervening as if an outsider. The plaintiff's attorney's last turn in the excerpt also brings out an interesting aspect of the discourse: the plaintiff is the one to know the facts, but it seems as if her information needed to be confirmed and re-presented by the attorney in order to be considered. In the end, the plaintiff's initiative was successful and what she said was taken into account.

The client was again silent in *the fourth phase*, in which the construction faults were discussed, but participated more actively in *the fifth phase*, when the detailed grounds for the demands were laid, than in the other phases. This was mainly due to the several questions that she was asked during this phase. Excerpt 8.7 includes several client responses, and thus illustrates the mode of

interaction. All of the client's responses in Case 4 were aimed at giving more detailed information on specific points in the dispute – in this excerpt on the closets and curtain rods, the inclusion of which in the purchase price was in contest.

Excerpt 8.7 Case 4, preliminary hearing

Defendant's attorney: Perhaps this would be a good moment for me to ask what Mrs. Vuori's personal opinion is about what closets we are now talking about. What kind of closets are now included... so that we could reach a more specified (—).

Plaintiff: In the children's room there were kind of wood-like closets, one unit. Then there were also white closets, there were four of them, I'd remember. They had mirrors in the doors.

Plaintiff's attorney: You mean in the bedroom?

Plaintiff: They are bedroom closets.

Defendant's attorney: How about the hallway?

Plaintiff: There is kind of place in the hallway where you can put outdoor clothes, a kind of closet with mirrored doors.

Defendant's attorney: Are there curtain rods in every room? Are we now talking about the curtain rods in every room? In your opinion?

Plaintiff: There are curtain rods in every room.

Defendant's attorney: What kind of curtain rods are they, in your opinion?

Plaintiff: Wooden. Curtain rods.

Defendant's attorney: Are the painted or are they wooden?

Plaintiff: Both.

Defendant's attorney: How many are there?

Plaintiff: Five.

Defendant's attorney: This is all that comes to mind?

Plaintiff: Yes.

[A pause of 12 seconds]

Judge: In the hallway, one closet, was that so?

Plaintiff: Uhm.

Judge: In the bedroom?

Plaintiff: In the bedroom there's a wooden children's closet.

Judge: And then?

Plaintiff: In the loft, there are, I think I remember, three closets. Three kind of white closets for clothes.

Judge: Are there mirrors or?

Plaintiff: Yes, there are mirrors.

Judge: (—) wooden curtain rods?

Plaintiff: Yes, five.

The majority of the client's turns in Case 4 were answers to other participants' questions. Of the client's eighteen responses in the hearing, the episode related in Excerpt 8.7 contained thirteen. It is clear that many of the responses were minimal responses. In this sense, the principal seemed to carry out the traditional role of a lay client in asymmetrical interaction, familiar from previous studies (Adelswärd & al., 1988; Conley & O'Barr, 1998). What was not so typical, and could also be seen as problematic from the traditional procedural point of view, was that most of the questions to the client were posed by the opposing party's attorney. Traditionally, the attorneys are not allowed to be in contact with the opposing party's principal if she or he has an attorney representing her or him. The discussion in this hearing, supposed to be an open discussion between the participants about the relevant items, is thus at the crossroads between the old ethical traditions and the new forms of interaction. The old ethical rules have to be tested and negotiated again in the preliminary hearing. This movement within the gray zone is clear from the defendant's attorney's cautious opening at the beginning of this episode – "Perhaps this would be a good moment for me to ask" – and the explanation for asking – "so that we could reach a more specified (—)".

Later in the same phase, the plaintiff was asked about the child's insurance. The answer given to the question had an initiatory aspect, which suggested that the answer should be interpreted as a specifying initiative (Excerpt 8.8).

Excerpt 8.8 Case 4, preliminary hearing

Defendant's attorney: On this matter, I would ask when this insurance was taken?

Plaintiff's attorney: Do you remember when you took out the insurance?

Plaintiff: It was taken three months before the child was born. *According to the policy conditions.*

Defendant's attorney: On this matter, I state that the insurance existed before the apartment sale, and it would have been in force in any case, even without the sale.

In the above excerpt, a minimal response, which seemed to be typical of this client, would have been the first sentence of her turn. However, she continued with the addition "According to the policy conditions". At first, this addition may sound odd or surprising, but in the legal context it may be seen as the plaintiff's

attempt to resist the defendant's attorney's phrasing of the question by justifying her only possible course of action when taking out the insurance. This addition is interpreted as an explaining/specifying initiative. As a result of the plaintiff's response and initiative, the defendant's attorney received the information she needed in order to go ahead.

The next initiative occurred some minutes later, again in the same phase.

Excerpt 8.9 Case 4, preliminary hearing

Defendant's attorney: How many days did this move take?

Plaintiff: It took some...you mean altogether? You mean to Viljakuja and from Viljakuja?

Defendant's attorney: Yes.

[A pause of 4 seconds]

Plaintiff: Five days.

Defendant's attorney: In addition to this, the defendants consider high this demand of 10,000 marks. Even a removal firm does not charge this much for moving an ordinary private home.

The plaintiff started answering the defendant's attorney's question, but then turned her answer into a specifying question ("You mean altogether?"). Given the pause of four seconds before the final answer, it appears that the client was buying more time to think about her response. By using this discursive tool of asking a question of her own, she could manipulate the time needed for answering. This initiative is interpreted as an explaining/specifying initiative.

The client expressed her fourth initiative – the last one – in the *last phase of the hearing*, in which the next stage of the proceedings was being planned. In that connection, the defendant's attorney expressed a wish to visit the apartment that was the object of the dispute (Excerpt 8.10). The client did not resist this idea. The professionals were discussing a suitable time to visit the apartment when the client intervened by saying what was a suitable time for her. This initiative is interpreted as an alleging or claiming initiative. It was responded to by the defendant's attorney, who accepted the time suggested by the plaintiff.

Excerpt 8.10 Case 4, preliminary hearing

Judge: It isn't very far away from here, is it? We could arrange it so, as far as we're concerned, I mean that we could start the hearing later.

Plaintiff's attorney: It won't take long to take a look at it.

Defendant's attorney: Is it near here [refers to the court house]?

Plaintiff's attorney: Yes. Well, I mean... Is it all right to be there at nine o'clock?

Plaintiff: Eight o'clock, you should be there at eight o'clock.

Judge: I beg your pardon?

Defendant's attorney: Eight o'clock is just fine for us.

What is there to be said about the effects of the client's initiatives in general? Since they were all topic-maintaining in nature, success would have meant getting a response or maintaining the topic, and not being ignored. The client's initiatives were immediately responded to (Excerpts 8.6, 8.9 and 8.10), or at least they contributed to the continuance of the topic (Excerpt 8.8), in all of the episodes in Case 4. Two of the four initiatives involved the plaintiff interfering in the discussion between the other participants (Excerpts 8.6 and 8.10), and were considered and responded to by the others. The other two, excerpts 8.8 and 8.9, grew from client's responses, and could be considered either as collaborative efforts to specify the issue or, which is also plausible, as slight resistance to the opposing party. Whatever the truth, the client's responses in which the initiatives arouse contributed to the defendant's attorney's arguments.

3 Summary of Case 4

Case 4 could be said to represent the ideal type of client participation expressed in the preambles of the procedural law. The principal was present at the hearing – although on only one of the three days –, and contributed to the proceedings by giving information about the relevant circumstances, and the court was able to use its right to ask questions in order to establish the facts. Yet, the client's contributions could be considered minor. She mostly gave minimal responses to the questions she was asked.

However, it is also clear that the legal professionals did not make any effort to get the client more fully involved. She was asked to answer only restricted questions on restricted issues which, on the top of everything else, often worked to the opposing party's credit. The client was not drawn into the discourse by the other participants and, as a result, the discourse remained mainly between the legal professionals. It is interesting to think about what would have happened if the client had been asked open questions instead of restricted ones, for example. The most open question was the defendant's attorney's first question in Excerpt 8.7, "What kind of closets are included?" This was also the question to which the principal was, in a way, compelled to give not only a minimal response, but also a broader description of the closets, their location and appearance.

A closer look at the plaintiff's initiatives shows that something went beyond the minimal contributions, although compared to those in the other cases analyzed, they were cautious and topic-maintaining in nature. The discursive tools used seemed to be few and modest: excusing the intervention ("*Excuse me. I especially said...*") and asking specifying questions ("*you mean altogether?*").

The mode of interaction was legal discourse between professionals, obviously relatively hard for an outsider to get into. Getting into it would have required strong and effective discursive tools. As discursive tools of that kind were not available, the plaintiff accepted the role of an outsider.

Case 4 shows that the client may be present in the hearing but does not necessarily participate in it in a subject-like position. It is an example of "no man's land", or the gray zone in the emerging court practice. The procedural law introduced the idea of the principals' participation in establishing their case, although in a very tentative form. The implementors of the procedural law, judges, attorneys, and also principals, as a collaborative unit in constructing cases are now, through their actions, creating ways to effect this rule in practice. The proceedings in this case were constructed in such a way that the client was not heard, but she did hear what the other participants said. Unfortunately, the significance of hearing the others remains hidden, as we do not have interview data on the plaintiff's opinions. Rather than continuing further, the case was quite surprisingly settled after the extended preliminary hearing. An outcome like this, raises the question whether simply being present and hearing the opposing party's arguments may, in some cases, work for a settlement.

8.7 Client Initiatives and Their Effects in Case 5: "Could it at least be said that...?"

1 Introduction and the Overall Profile of the Hearings

In Case 5, the dispute mainly concerned one person, the plaintiff. The defendant was a public corporation, represented in the hearings by the attorney. The plaintiff was present in all of the hearings. The preliminary hearing was held in a meeting room and the extended preliminary hearing and the main hearing in a traditional courtroom. The plaintiff always sat next to her attorney, and closer to the judge. In the preliminary hearing they sat opposite the defendant's attorney, diagonally opposite to the judge and court clerk. The parties sat next to each other, opposite the judge and court clerk, in the extended preliminary hearing and the main hearing, which were separated by a short break. Representatives of the press were present in all of the hearings.

Typical of the case was the client's presence and active participation in the hearings. The number of her initiatives was relatively high – 33 in the preliminary hearing and 15 in the main hearing –, her turns were some of the longest in the data, and the initiatives were diverse. In the preliminary hearing, the client expressed expanding initiatives and ironic alleging and confirming initiatives that were characteristic of this case.

The plaintiff's initiatives in different phases of the hearings are described in Table 8.10.

Table 8.10 *The Number of Client Initiatives in Each Phase of the Hearings in Case 5*

Hearing	Phase	Number of initiatives
Preliminary hearing	1. Starting the proceedings and looking for a possible settlement	1
	2. The general presentations	1
	3. Checking the demands and the reply	-
	4. The grounds for the demand	-
	5. The grounds for the reply	-
	6. The judge's specifying questions	8
	7. The disputed and undisputed facts	22
	8. Declaring the evidence the parties will bring to court	1
	9. Arranging the date for the main hearing	3
Extended preliminary hearing	10. The proposal for a settlement	1
	11. Correcting the minutes of the preliminary hearing	1
Main hearing	12. Hearing the plaintiff	5
	13. Hearing the witness	7
	14. The final statements and claims for legal expenses	-

2 The Initiatives during the Proceedings in Case 5

From the numerous initiatives the plaintiff expressed in the hearings, one set and their effects are described as a narrative built around the expanding

initiatives and their effects. Case 5 is the only case in my data to include expanding initiatives, and that is why they are of special interest. The most salient features of the client's initiatives are also evident in the narrative.

The possibility of settling the dispute was discussed in *the first phase* of Case 5. Within the very first minutes of the hearing, the plaintiff had her first turn commenting on the prerequisites for settlement (Excerpt 8.11).

Excerpt 8.11 Case 5, preliminary hearing

Judge: Well, yeah. Please, go ahead [nods to the plaintiff who gestures with her hand that she wants to say something]

Plaintiff: I was just thinking that, I mean it appears to me that the main problem is that the municipality has nobody to decide that we make a settlement. It would have been feasible to do that long ago. And that's the problem, *who is the municipality of V?* I doubt that you alone could represent the municipality. It is difficult for you [addresses her speech to the defendant's attorney] to say here, "Let's make a settlement", because you have to get a group behind you. But there exists no such person to make that decision, and that's why we are in this situation here.

Defendant's attorney: No, no, of course a decision maker can be found. If I can't give the decision right away, it's only as far away as the nearest telephone. It is not a problem.

In her first turn, which was interpreted as an expanding initiative in my analysis because of its strongly conceptualizing nature, the plaintiff introduced her fundamental ideological standpoint – although here only in an allusive and rather mysterious form: "Who is the municipality of V?" This specific point in the initiative was passed by in the discourse, however, as the defendant's attorney continued on to the practical aspect of finding a person to make a decision. This represents effect category two, where the fracture in the process caused by the client's initiative is smoothed over and the script is returned to.

The plaintiff was mostly silent in *phases two to five* with the exception of a few responses and one whispered contesting remark.

The plaintiff elaborated the theme she started in her first initiative in *phase six* as shown in Excerpt 8.12.

Excerpt 8.12 Case 5, preliminary hearing

Plaintiff: Yes, Your Honor, just that, well, I have been active, starting with, I have really made phone calls daily and asked for a day-care place, thinking that I would get one by a phone call by the twentieth of November.

Defendant's attorney: What then, what responses did you get then? Have they responded so ...

Plaintiff: ## It goes just like this, that the officials blame the politicians and the politicians blame the officials. Certainly nobody said that I would get the place, but everybody said that it was being worked on. But this walking over between the officials and the politicians, this is what I have heard.

Judge: Well, yes, this raises the question of what evidence the defendant can present proving that the plaintiff would have already had the information in October that she wouldn't get a place before the twentieth of November. What is the evidence?

The client's expanding initiative grew from her response to the defendant's attorney. She certainly gave an answer and explained the background to the situation, but her initiative was interpreted as expanding because it brought a new perspective to the issue of trying to get day care for the child. By understanding the issue as a more general and communicative problem involving the different actors – the officials and the politicians – in the municipality's decision-making process, the client also brought a new perspective to the whole dispute.

The way in which the client constructed her response was interesting. She started by interrupting the defendant's attorney. The first part of the turn, "It goes precisely so that that the officials blame the politicians and the politicians blame the officials", actually bypassed the defendant's attorney's question and, instead, strongly introduced the speaker's own viewpoint. The second part of the turn, "Certainly nobody said that I would get the place, but everybody said that it was being worked on", was the exact answer to the question asked. This was followed by the third part, again a personal view of the same issue, "But this walking over between the officials and the politicians, this is what I have heard". It seems as if the client was using the implicit strategy of surrounding her obligatory responses with initiatives, taking advantage of the very questions presented to her in order to express her own arguments and interpretations. This can be understood as a specific discursive tool when participating in discourse.

In terms of effects, Excerpt 8.12 is problematic, as it seems to include elements that fit several categories. The general topic being discussed – the point of time at which the plaintiff learned the exact date when the day care would begin – continued. In this sense, the plaintiff's contribution maintained the topic, which the judge continued further. The topic-maintaining element in the turn was the plaintiff's contribution's most responsive part, her answer to the defendant's attorney ("Certainly nobody said..."). What was glossed over was the plaintiff's expanding initiative outlining the dispute in terms of tension between the officials and the politicians in the municipality. These initiatory attempts were not taken up by the other participants as potential candidates for a new topic in the joint discussion. Thus, this expanding initiative is interpret-

ed as having been bypassed because the expanding elements in the turn were ignored. However, in a communicative or interactive sense, the plaintiff's contribution was not discounted.

In the same phase six, the plaintiff also expressed another kind of expanding initiative, where she employed the concept of anticipation in terms of the municipality's actions.

Excerpt 8.13 Case 5, preliminary hearing

- 1 *Plaintiff: Your Honor, could it at least be said that the municipality was very*
 2 *late, or that the point at which it began to look for new day care places was all*
 3 *too late. It is widely known that when the implementation of the law was*
 4 *brought forward, the municipality believed all the time that the law would not*
 5 *come into force at all. I was involved in the municipal management group as a*
 6 *workers' representative at that time, and it was a clear opinion that the law*
 7 *wouldn't come into force. So if the city had started to work toward it then,*
 8 *there wouldn't have been such chaos. It seems like you can't anticipate things,*
 9 *and when you are forced, you just shirk your duties .*
- 10 *Judge: What does the defendant say to this?*
- 11 *Defendant's attorney: The fact is that there have been difficulties in arrang-*
 12 *ing day care and, and that this anticipating...*
- 13 *Judge: ## Has it been too late?*
- 14 *Defendant's attorney: It has already been admitted that it was eight days too*
 15 *late, but...*
- 16 *Judge: ## Yes but I mea-, now we're talking about on a general level, that is,*
 17 *is, I mean...*
- 18 *Defendant's attorney: ## Well, on a general level, there have been difficul-*
 19 *ties, have been in other municipalities and have been here.*
- 20 *Judge: Ye-es?*
- 21 *Defendant's attorney: So it's, it's ...*
- 22 *Judge: ## Is it admitted that...*
- 23 *Defendant's attorney: ...the situation with the queue is... [refers to families*
 24 *waiting for a day-care place]*
- 25 *Judge: Is it admitted that the municipality thought that the law wouldn't*
 26 *come into force?*
- 27 *Defendant's attorney: I can't know anybody's thoughts except my own ...*
 28 *[turn continues]*

Here, the plaintiff's first turn is interpreted as an expanding initiative, introducing the new concepts of being late and anticipating. What is interesting is that the client seemed to be aware of the fact that she was suggesting a new way of perceiving the dispute. This can be seen in the formulation of the very first sentence of the excerpt: "Could it at least be said that the municipality was very late". The idea that the municipality was not prepared for the situation had been contested earlier by the opposing party, and now the plaintiff suggested a new

interpretation that the municipality was late in its preparations. What is noteworthy is that by using the passive form (“could it be said that”), the plaintiff seemed to be seeking a joint understanding of the matter.

The effect that the initiative had in the hearing is interpreted as a change in topic. The judge continued the topic that the plaintiff started in her initiative by asking an open question addressed to the defendant’s attorney (line 10). Later on, the judge supported the topic by asking the defendant’s attorney questions that specified the points made by the plaintiff (lines 13, 16–17, 22, 25–26). These detailed successive questions and the fact that the judge interrupted the defendant’s attorney several times, gives the impression that the judge considered the plaintiff’s initiative important, and therefore made an effort to clarify the issue by maintaining the topic.

Phase six also contained another of the characteristic features of Case 5 in addition to the expanding initiatives. This was the special kind of ironic comment that the plaintiff actively used in putting forward her viewpoints. These comments are categorized as either alleging/claiming or confirming initiatives in the analysis.

Excerpt 8.14 Case 5, preliminary hearing

Judge: How many are there who did not get their day-care place in time?

Defendant’s attorney: There were 246 in November-December 1996 who were compelled to wait, but I can’t say whether it was some days or a week or longer...

Judge: ## They had to wait, yes...

Defendant’s attorney: ...or was it a month, but those who couldn’t get the day-care place on the day they were entitled to it.

Plaintiff: Which is really many.

Judge (jokingly): Then we’ll get 246 claims for compensation if...

Plaintiff: ## Let’s hope so.

The initiatives here reflect the plaintiff’s constant effort to follow her own agenda, not only through systematically explaining her own viewpoints, but also through sharp, ironic comments stuck into the discourse every now and then. With her comments, she was strongly expressing her opinion and taking a stance. For example, she stepped into the discussion when the judge was asking questions of the defendant’s attorney, and made her comments there. The initiatives expressed in Excerpt 8.14 are interpreted as alleging/claiming initiatives, as the client was clearly and strongly asserting her own viewpoint. They could also be interpreted as a special form of confirming/strengthening initiative, as they were strengthening the client’s basic views of the experienced wrong.

The same kinds of initiative that both strengthen a viewpoint and take a stand on an issue recurred in *phase seven*. An example is given in Excerpt 8.15.

Excerpt 8.15 Case 5, preliminary hearing

- 1 Judge: Then there's the issue of Kirsti Kuutti here. The defendant has asked
 2 why Kirsti Kuutti who I suppose is your mother...
 3 Plaintiff: Yes.
 4 Judge: Well, then, why were the kids not taken to their grandma's?
 5 Plaintiff: Yes, quite right.
 6 Judge: Well, yes, now it's possible to ...
 7 Plaintiff: ## I think Kirsti Kuutti would have reason to sue the municipality
 8 here ...
 9 Judge: ## Let's hope not.
 10 Plaintiff: ... ## Is it a grandma's job?
 11 [participants are laughing]
 12 Plaintiff: As a general rule, I think it's quite absurd and insulting. As such,
 13 that you can even suggest that a grandma should do it. Temporary care is a to-
 14 tally different thing. Even though it's a question of eight days, it's a long time
 15 for a sick old person [turn continues]

Here, again, we see the same phenomena: the plaintiff took a stand on the dispute and supported her viewpoints with ironic comments. She was clearly irritated by the defendant's drawing the person of her mother into the dispute. When the judge repeated the question set out in the statement of defense – “Why were the kids not taken to their grandma's”–, the judge received the ironic answer “Yes, quite right”. This answer was actually not directed to the question itself, but to the whole idea of even asking it. By saying “yes, quite right”, the plaintiff actually said “no” (for the use of irony as a means of criticism, see Ghita 2001 and Weizman 2001). Although linguistically an answer, the turn had no responsive elements in it. It is consequently interpreted in the analysis as a strengthening initiative – here in the specific meaning of strengthening someone's own viewpoint.

With his next turn “...now it is possible to...”, the judge encouraged the plaintiff to explain her viewpoints. She started by taking a stand on the issue: the grandmother could also sue the municipality. This was immediately followed by a questioning of the defendant's idea: “Is it a grandma's job?” This rhetorical question was covered by the judge's laconic but humorous comment “Let's hope not”, which was given in response to the suggestion that the grandmother could sue the municipality. As a result, the participants laughed at the judge's comment. After that the plaintiff continued her response to the judge's original question of why the children were not taken to their grandmother's.

The whole of the plaintiff's turn (lines 7–8 and 10) is interpreted as a questioning initiative in the analysis. It is clear, that the judge's request for information encouraged the plaintiff to continue discussing the issue. This way of treating the client's initiative represents the first sub-category of effect category two, where the fracture in the process it caused is smoothed over and the script is returned to.

Still within the same phase, the client attempted to restrict what was being discussed. As the episode takes several pages in the transcript, the long turns are abridged here. Missing sentences are indicated by (//).

Excerpt 8.16 Case 5, preliminary hearing

Plaintiff: But if I think about it, I mean, in a way this whole question about my days off is totally irrelevant, because if I worked in the private sector, the municipality would not even know about my days off. (//) I mean, I think there's no point referring to this issue, which should have no relevance. And when I have my own holidays should not be dependent on the day-care place. Especially when I agreed with my boss back in May when to have my holidays. (//)

Some turns later in the discussion, the judge returned to what the plaintiff said about the irrelevant issue.

Excerpt 8.16 continues

Judge: This is an interesting question, this, uhh, these facts and getting the facts. It's interesting in two ways. I don't know the jurisdiction on that part, is it quite all right that the defendant's attorney has been given these facts, and I don't want to interfere in that. I think we won't continue to dispute that. I think we have dispute enough here. But on the other hand, I don't understand the plaintiff's thinking that some issues in this dispute should be covered up, and that it would be tempting fate to open them up when the other party is the municipality. I suppose some kind of honest decision is to be sought. (//) I think it's best for both parties that this is cleared up and that all these details come out. At least the justice wants the case to be cleared up thoroughly and has no sympathy with this kind of mentality of hiding things.

Here the client's initiative resulted in a reflection by the judge, when he clearly took a stand on the issue of whether to discuss the holidays or not. The client's initiative was in effect rejected, but the rejection was explained and grounded. This can be seen as a fracture in the process: for a moment, the script of the proceedings became transparent and defined. Discussion then continued on the principal question of whether or not the plaintiff should have saved her holidays and used them when the day care could not be arranged in time, and on the practical issue of how the plaintiff spent her free days.

Fractures in the process are interesting especially because of the repair work that they often seem to trigger. The repair work done by the judge in the previous excerpt was not only reflective of the script. Whether intended or not, it had an instructive and educational function, aimed at helping the client to understand and evaluate the dispute and the proceedings. Repair work may make the proceedings more transparent to the client when she or he hears the grounds and explanations. This, in turn, may help him or her to understand the proceedings and its judicial logic better.

In *phase eight*, when the parties produced the evidence they were going to present in the main hearing, the plaintiff questioned the relevance of the opposing party's witness (Excerpt 8.17).

Excerpt 8.17 Case 5, preliminary hearing

Defendant's attorney: Another witness is Mette Miettinen, and she is the day-care expert, children's day care.

Plaintiff: But she was not the day-care expert at that time, when this issue was going on, because I also called for her, but she was then the director of the day-care center of Sepontie.

Defendant's attorney: She is now the one in the municipality who knows most about the day-care issues.

Judge: Yes and she obviously knows...

Defendant's attorney: ## Then and now

Judge: ...obviously also at that time...

Defendant's attorney: ## Yes

Judge: ...in any case, even though the tasks are... uhh...

Defendant's attorney: ## has been forced to become familiar with that as well.

Judge: Okay. Early in this morning I discussed the main hearing with Koivu [plaintiff's attorney] [continues and shifts to the next phase]

In Excerpt 8.17, what resulted from the questioning initiative was not joint discussion on the new topic, but only the short repair of a fracture. Just as in Excerpt 8.16, the plaintiff's initiative was factually rejected – instead of being considered questionable, the witness was regarded as competent – but in the interaction, the judge and the defendant's attorney reflected and thereby made visible the grounds on which the witness could be heard.

Phase 12 was the first phase of the main hearing. The plaintiff was heard in the role of a witness, and both her own and the defendant's attorneys addressed questions to her. She answered the questions posed by her own attorney with long explanations describing the situation when the day care was being arranged.

When she began to answer the defendant's attorney's questions, an interesting change occurred (Excerpts 8.18 and 8.19).

Excerpt 8.18 Case 5, main hearing

- 1 *Defendant's attorney*: When the plaintiff got the information that she was
 2 still in the queue [still waiting for the day-care place], it was probably the
 3 23rd of October, uhh, and if she still thought that on the 20th of November
 4 she would have a place, then why did she contact an attorney?
 5 *Plaintiff*: Because this is what it especially advises here [refers to the in-
 6 structions for claiming redress]. I did just what the Municipality of V, the
 7 office for social affairs and health, advised me to do. It says here: Instruc-
 8 tions for claiming redress. The person in question can appeal against the
 9 judgment with a claim for redress. Such a claim has to be lodged within the
 10 given period to the division of the municipal board of social welfare and
 11 health. The time limit is fourteen days blah-blah-blah. In other words, I ha-
 12 ve done exactly what I have been advised to do. *What else could have I done?*
 13 *Defendant's attorney*: This means you thought or did you think that the
 14 day-care place would not be arranged on 20th of November, since you hired
 15 anyway, or you reacted quite strongly, I mean it's probably not usual to hire
 16 an attorney immediately?
 17 *Plaintiff*: No, but I thought that if I took these actions, I would get a day-
 18 care place starting on 20th November.
 19 *Defendant's attorney*: Was this contacting of an attorney influenced by the
 20 fact that you already knew each other?
 21 *Plaintiff*: Of course it's easier to contact a person you already know, but I
 22 don't believe that it influenced me, because I had already before this eight,
 23 no, was it after this brief, already written a letter to the mayor where I said I
 24 would look for legal help to bring this issue to a conclusion.
 25 *Defendant's attorney*: In what capacity do you know this Kimmo Koivu?
 26 [refers to the plaintiff's attorney]
 27 *Plaintiff*: *What relevance does that have?* [laughing]
 28 *Judge*: That was a good, a good point. I regard that as an irrelevant matter
 29 to some extent. Okay. Please, go ahead.
 30 *Defendant's attorney*: Did you discuss these possible claims for redress with
 31 Kimmo Koivu before October, 28th ?

Excerpt 8.18 shows new discursive tools that the plaintiff was implementing in conducting her case. While in the traditionally suppressed position of a witness being heard, she introduced a battery of tools such as keeping the important document concretely in her hands, using reported speech – that is reading aloud the instructions given by the municipality – and the informal “blah-blah-blah” expressing her attitude towards the municipality's written instructions. This culminated on line 12 with a question in response to the defendant's attorney's original question, “What else could have I done?” The whole turn of the plaintiff is categorized as a questioning initiative due to its

strongly questioning mode that was explicated in line 12. Again, a strong questioning of the defendant's attorney's question occurred on line 27. This was an example of an answer turned into an initiative. The plaintiff dodged the question by questioning it, and instead, presented a question of her own. The effect was that the plaintiff's questioning of the issue finished the prevailing topic.

The plaintiff's contribution as a witness seems to deviate strongly from the weak position of the witness in cross-examination, reported for example by Conley & O'Barr (1998). Their finding was that the use of controlling questions by the lawyers transforms the cross-examination from a dialogue into a self-serving monologue. The transcendent linguistic resources available to lawyers make possible witness resistance likely to be short-lived (Conley & O'Barr, 1998, pp. 26–27). In Case 5, the plaintiff's resistance as a witness appeared to be rather successful: she succeeded in keeping the examination as a dialogue, and even in closing one issue.

Excerpt 8.19 Case 5, main hearing

- 1 *Defendant's attorney*: What if the municipality had had a place for one
- 2 child from somewhere further away and for another in a different location,
- 3 and it could have been arranged on the 20th of November, what if you had
- 4 been offered this kind of alternative?
- 5 *Plaintiff*: *I think the municipality should absolutely have some kind of system,*
- 6 *some back-up system so that...*
- 7 *Defendant's attorney*: ## I asked which of these alternatives...
- 8 *Plaintiff*: Certainly it's human, and I can't say, because I 'm old enough to
- 9 know that you can't say how you would act in a certain situation, because
- 10 you act surprisingly differently in different situations, but well, uhh, *I think*
- 11 *it's not a question of opposing, because you constantly claim that I should*
- 12 *have arranged the care. You demand all the time that I should have arranged*
- 13 *the time period, and then you refer to the worst alternative as being like this*
- 14 *and the children would have been in temporary care even if I had arranged it.*
- 15 *I don't understand the relevance of this.*
- 16 *Defendant's attorney*: Nothing to ask.
- 17 *Judge*: All right. I would have called a halt here, if you had not stopped. I
- 18 think these last questions on behalf of the defendant were slightly irrele-
- 19 vant. Then again, Minna Kuutti forgot that she was now being heard in a
- 20 special and not, uhh, in a party's role, but of course you don't have to, uhh,
- 21 have to be here every day, fortunately, but, well, this kind of, these roles are
- 22 not clear, and that's totally understandable. But now, obviously this hearing
- 23 of Minna Kuutti in the artificial role of a witness has finished. I suppose
- 24 there's nothing for either of you to ask. You are allowed to speak, speak in
- 25 the role of plaintiff, that, uhh that is not denied, if you want, but in this
- 26 role, I mean personally in order to testify, this hearing has now finished.
- 27 And after this, we'll hear the witness nominated by the defendant. Is she
- 28 present?

Here, again, the plaintiff bypassed the question posed by the defendant's attorney. At first, instead of answering the question, she expressed her own alleging/claiming initiative (lines 5–6) by giving her opinion that the municipality should have a back-up system in arranging the day care. When asked again, she refused to answer (line 8), explained the reasons for her refusal (lines 8–10), and finally expressed an initiative that questioned the whole setting of the defendant's attorney's question (lines 10–15).

Here is a repetition of her special way of constructing her response, analyzed for the first time after Excerpt 8.12. At first, the plaintiff again bypassed the defendant's attorney's question and instead strongly introduced her own viewpoint. The second part of the turn was the exact answer to the posed question – although in this case actually a refusal to answer and an explanation for the refusal. This was followed by the third part, again a personal viewpoint on the same issue, here the questioning of the posed question. The plaintiff seemed to employ a three-step structure in her responses with an initiative followed by an answer and again followed by an initiative. Surrounding the answers – that have to be given in a court setting – with initiatives appears to be an effective discursive tool for putting forward one's own viewpoints.

Excerpt 8.19 shows how the judge, in a way, gave a reprimand to the plaintiff for forgetting her role, but also expressed understanding for the lay person. This was followed by a rather clear procedural instruction addressed personally to the plaintiff (lines 24–26). In terms of the effect categories, this was interpreted as a fracture and repair in the process. The educational function of the repair is especially evident.

The instructive and educational aspect represents a mode of talk that was missing in Finnish courtroom hearings in the old proceedings before the reform (Engeström, 1998). Evidently, the mere presence of clients in the hearings, and especially their active participation, makes it necessary to explicate the script and explain the procedures in situations, in which their contributions do not fit the script, or where the script cannot be adapted to the contributions.

On the whole, the instructive aspect of repair work is important, as it brings up the issue of learning and developing. On the one hand, it draws attention to the learning of the client during the court proceedings. What are the possible means of making the proceedings transparent and understandable to the lay client, and in that way of promoting the client's learning in his or her own court case? On the other hand, the instructive aspect points to the learning by the legal professionals to handle cases in a new way after the court reform. It seems evident that the client's presence and participation in the hearing puts pressure on the professionals to take note of the lay persons. It teaches the professionals

to talk in a qualitatively new way, accommodating their talk to the client's presence.

An important finding is that the episodes of repair work seemed to be connected to the use of meta-talk. Speakers talking meta-talk are expressing the practices of interaction in the discussion through words (Engeström R., 1999a, p. 275). Everyday examples of meta-talk are "I'm sorry to interrupt" and "May I ask something". In Excerpt 8.18, for example, the instruction given to the client involves frequent use of meta-talk: "You are allowed to *speak, speak* in the role of plaintiff, that, uhh that is not *denied*, if you want, but in this role, I *mean* personally in order to *testify*, this hearing has now finished".

This coincides with Engeström's finding that meta-talk was connected to innovations of interaction in medical encounters (Engeström R., 1999a, pp. 275–277, 315–316; 1999b, p. 47)). In this study, the meta-talk seemed to be especially connected to situations in which the script was reflected upon and repaired. However, meta-talk is, to some extent, an integral part of the talk in court hearings, where the activity is produced mainly through talk. In the context of court activity, it is inevitably a tool for planning the proceedings, whether intended or not. "Next we will *discuss* the evidence", or "Do you wish to *argue* further on that?" could be examples of meta-talk in the context of court hearings, whereas statements such as "Next we will help Martha get dressed" or "Do you want to go for a walk with David?" could be examples of planning work ahead in a context in which the activity is realized through more physical actions, for example in the care of children's or the elderly. The special vocabulary of court hearings supports the idea of meta-talk as an intertwined element in courtroom talk. Terms such as *allege*, *argue*, *state*, *testify*, and *hear* are both judicial and discursive. They are verbs referring to certain actions with a judicial meaning and judicial consequences, and also verbs referring to certain ways of talking.

Phase 13 comprises the hearing of the witness in the main hearing. The plaintiff returned to the issue with which she was concerned: the contributions of officials and politicians, and their interrelationship in arranging day care in the municipality. Her initiatives concerning this issue had been passed over in the earlier phases, but now she drove her central point home more powerfully – she questioned the witness by herself (Excerpt 8.20).

Excerpt 8.20 Case 5, main hearing

- 1 *Plaintiff's attorney* [after finishing his own questions to the witness]: Your
- 2 Honor, Minna Kuutti herself will ask some more questions.
- 3 *Judge*: Please, go ahead.
- 4 *Plaintiff*: Well, I thought, uhh, at that time I made those phone calls to sever-
- 5 al places and, well, many officials said here in our region's social office that
- 6 they had put forward several proposals concerning different possibilities for

- 7 *arranging day care, and they had done all they could and even more, but the*
 8 *politicians had rejected or shelved their proposals.*
 9 *Witness:* That’s absolutely true. There were proposals to employ child-
 10 *minders and that’s why the regions had to start to build these “mini-*
 11 *centers” (a home-like day care for small groups of children; ryhmäperhe-*
 12 *päivähoitokoti in Finnish) and try to resolve the situation anyway.*
 13 *Plaintiff:* *What do you think, do the trustees belong to the municipality?*
 14 *Witness:* Uhh, well yes in the sense that they make these decisions, the final
 15 *decisions. But as I said, the regions started to do as I said, but the officials*
 16 *started to solve the problem in their own way.*
 17 *Plaintiff:* *How can you say that the municipality has done everything if one*
 18 *part of it has acted all the time as a brake on progress?*
 19 *Witness:* Well, in that sense, yes, that’s true. I somehow think myself about
 20 *what we have done as officials, because I feel that we have done everything*
 21 *in this regard.*
 22 *Plaintiff:* *But that one part of municipality (—)*
 23 *Witness:* Yes.

In the excerpt, the plaintiff produced four initiatives – four questions to the witness nominated by the opposing party. The first of them (lines 4–8), which in its linguistic form was not a question at all, introduced the plaintiff’s understanding of the problem as a conflict in the municipality between the officials and the politicians. In the context of hearing the witness, this introduction was collaboratively treated as a question by the plaintiff and the witness, who then gave her answer. This was followed by the plaintiff’s new question concerning whether politicians belonged to the municipality (line 13). Both of these questions are categorized as expanding initiatives, because with them the plaintiff contributed a new perspective to the dispute. This was a kind of ideological way of understanding the dispute and its origins, originally put forward in the preliminary hearing by the plaintiff and now systematically furthered in the main hearing in the questioning of the witness. In this context, the plaintiff could effectively maintain the topic she wanted, because as questioner she was now the one managing it.

Drew (1992) wrote about “strugglings” for the position of “doing questions” as a human attempt to get control in conversations. He argued that bearing in mind the specific preallocation of turns in courtroom examination, there is no struggling for such a position. The specialized speech-exchange system allocates the fixed roles of questioner to the attorney and answerer to the witness. The element of control always lies with the attorney (Drew, 1992, p. 507). In this light, the plaintiff’s initiative in asking questions of the witness in Case 5 is remarkable. When she established the position of questioner, she was momentarily given control over the conversation. In this sense, the plaintiff developed a strong discursive tool for herself.

The plaintiff's third initiative (lines 17–18) was a questioning of the claim that the municipality had done everything possible, which had been the predominant message in the earlier phases of the witness's testimony. The fourth initiative (line 22) was a confirming initiative verifying the previous statement.

In the immediate interaction, the plaintiff's questions were treated collaboratively by the witness, who gave objective answers to them. Later in the hearing, the discussion between the plaintiff and the witness was not touched upon. This is surprising because in her testimony, the witness, representing the opposing party, admitted the assumed tension between the officials and the politicians, and sympathized with the plaintiff's arguments. However, the long-term effects of the initiatives were far-reaching.

In order to show the effects of the plaintiff's expanding initiatives, it is necessary to supplement the on-line interaction data from the hearing with the interview data. The interview data was gathered from different participants at different points in time before and after the hearings. Again, for purposes of clarification, it should be said that the plaintiff lost her case in the district court. She made a complaint to the court of appeal and won her case there. Permission to appeal to the Supreme Court was granted, and the final judgment, declared in September 2001, was that the municipality was obliged to compensate the plaintiff for the damage that resulted from the delay in getting day care for her children.

The judge was interviewed immediately after the main hearing and reflected on the subject of officials and politicians. At first, he considered the witness's testimony from the point of view of decision making (Excerpt 8.21). His immediate impression was that the issue was important. What he saw as problematic was that it was not considered worth elaborating by the attorneys.

Excerpt 8.21 Case 5, interview with the judge after the main hearing

Judge: Then came on interesting detail, the importance of which I haven't yet pieced together, I mean those contradictions inside the municipality.

Researcher: So, are you referring to the question the plaintiff asked herself?

Judge: Yes. I considered it a good question and it was interesting that it was put by the plaintiff herself and not her attorney.

Researcher: What did you think about that? Did you interpret it somehow?

Judge: It was a good question, but it remained that. There was no attempt to contest it. It will have some significance in this case, but I don't know how much.//

What was left in my hands, I can't even tell yet. It was just remained as it was. The evidence was that the politicians had overruled them, made adverse decisions, postponed things. This remained as a truth, it may well be the truth, but nobody ever commented on that. It was the plaintiff's

own point and it was a good point. At least my thoughts went back and forth at that moment.

In the same interview, the judge also reflected on the testimony in terms of how the proceedings were conducted, which he determined as “not formal” (Excerpt 8.22).

Excerpt 8.22 Case 5, Interview with the judge after the main hearing

Researcher: How about this question of the politicians. Should it have appeared somehow earlier?

Judge: Now we get the nucleus of the civil procedure in the sense that if we think that all the facts and claims should be explicated in the preliminary hearing. Well, then the witnesses may say whatever and totally new points may come up. Anything formal doesn't work at all. It was a detail that just happened to come up. Procedurally it was problematic that it was not referred to, even in the final statements, because the plaintiff's attorney obviously did not understand how significant I considered it to be. // I will comment on that in the decision, even though it was not referred to in the final statements. You can't be so formal, or the whole exercise becomes pointless.

After deciding on the case, the judge reflected on his own way of conducting the proceedings (Excerpt 8.23). This reflection demonstrates his difficulty in reaching the decision if everything relevant is not discussed in the hearing. This points to the central tension in civil procedural law concerning the division of labor between the judge and the parties: whether to count on the parties and their abilities to establish the case by themselves, or to actively participate and interfere (e.g., Laukkanen, 1995). Relatively soon after deciding the case, the judge seemed tentatively to prefer the latter alternative. He saw it as “not wrong” if he had interfered and asked for comments.

Excerpt 8.23 Case 5, interview with the judge after the decision was made

Judge: It would have been this question of the politicians. But when I started to look at what there was on that issue, there was almost nothing. It was not at all sufficient. I mean, on the basis of what the witness had said, or actually she did not said anything, because what happened was that the plaintiff brought up the issue and the witness then admitted it. Of course the attorney can't read my thoughts, but somehow I think he should have continued on this. Where I possibly blew it, or I don't know whether I blew it or not, but what, in hindsight, I could have done differently, would have been to ask the defendant's attorney to comment on that statement. // It would not have been wrong, if I had asked that. That's what I regret a bit.

A few months later, in a chance interview, the judge pondered again on the same issue. What was interesting was that he emphasized the parties' duties in their own case, and thus took an opposite side in the procedural dilemma to what was presented in Excerpt 8:23. Still, he also recognized the tension-laden nature of the question.

Excerpt 8.24, Case 5, interview with the judge long after the decision had been made

Judge: It [officials vs. politicians] was a theme that I expected the attorneys to elaborate on a little. When the witness started to answer, my pencil stopped for a second, and I thought my oh my, this will get quite exciting. But it wasn't taken any further. //

This was again a procedural principle, with which everybody doesn't totally agree, but my opinion is that in that situation, even though my pencil stopped, I could not begin to pump them for more. Come on, this is a civil matter. It was their job to bring it out. If the theme had come up in the preliminary hearing, then I could have interfered in a different way. //

The preliminary hearing is more like gathering the material, where the justice also participates, but not in the main hearing. This is what I think about it. Following this format, I noticed it myself, was a little problematic in this case, however. You know, it's the truth that we are always trying to bring out.

An interesting detail in the previous excerpt is that the judge considered the theme of politicians vs. officials as not having come up in the preliminary hearing. Yet, my analysis shows that the plaintiff touched upon this theme twice; first in a very allusive form (Excerpt 8.11), then in a somewhat more articulated reference to the conflicting roles of officials and politicians (Excerpt 8.12). Despite the strong discursive means used by the plaintiff – or was it because of them – the client's tentative initiatives remain on the sidelines.

When he was interviewed before the main hearing, the plaintiff's attorney explained how he had considered the issue of officials and politicians. The excerpt shows that he saw it as originating from the plaintiff's experiences rather than as a judicially relevant point.

Excerpt 8.25, Case 5, interview with the plaintiff's attorney after the preliminary hearing

Researcher: Is this issue [officials versus politicians] somehow essential here?

Plaintiff's attorney: It is not judicially essential, it has nothing to do with it. But Minna [the plaintiff] has experienced it in that way, of course, when she worked in the organs of trust, as a workers' representative. She has

come up against it there, and she thinks that it's also a problem here. She feels that the officials explain all the problems as being due to the politicians and the politicians explain that they are due to the officials.

In her own interview after the main hearing, the plaintiff explained the questions she asked of the witness (Excerpt 8.26).

Excerpt 8.26 Case 5, interview with the plaintiff after the main hearing

- 1 *Researcher*: Then you asked the witness. Why did you yourself ask that
 2 politician thing?
 3 *Plaintiff*: It was sort of clarification to what Kimmo [her attorney] had
 4 asked. This was exactly what he had been demanding all the time, but he
 5 asked it with regard to money. And I had actually begun to think after the
 6 last hearing, that that's the way it was. I was always told that we had done
 7 everything and more that we could in the office, but. Then they're here to
 8 testify that they have done everything. That's what the defendant's attorney
 9 tried to prove.
 10 *Researcher*: So is this the correct interpretation that in the preliminary
 11 hearing, the discussion was mainly about what the officials had done?
 12 *Plaintiff*: Yes.
 13 *Researcher*: But you think these things can somehow be distinguished.
 14 *Plaintiff*: And those who were present here were officials, so of course they
 15 knew better what the officials had done.
 16 *Researcher*: Then you started to think that this should be more...
 17 *Plaintiff*: ## In a way one problem here is this official-politician system
 18 altogether.
 19 *Researcher*: What kind of problem do you mean?
 20 *Plaintiff*: That, that we are in these situations, and that things don't work in
 21 the municipality. I mean, on a general level, neither with the handicapped
 22 nor with the day care.
 23 *Researcher*: Do you remember what made you think about this?
 24 *Plaintiff*: Maybe it was the defendant's attorney's claim versus those phone
 25 calls I made. When she tried to claim all the time that everything had been
 26 done and then you remember that others have said that we have done
 27 everything, but. And then that 'but'. It's those 'but' people who make the
 28 decisions.
 29 *Researcher*: Then you wanted to focus on the 'but' people. What did the
 30 witness answer to that?
 31 *Plaintiff*: I think she admitted it. She said that's the way it is.
 32 *Researcher*: There was no discussion on the particular decisions [that were
 33 postponed in the municipality], was there?
 34 *Plaintiff*: No. I focused more on the question of whether the politicians
 35 belong to the municipality. There I got stuck, and I couldn't, and we had no
 36 facts. You just knew that it was like that. But as to what decisions had been
 37 postponed, I had no facts.

Excerpt 8.26 confirmed the plaintiff's attorney's idea that the origins of the plaintiff's questions lay in her own experiences. Nonetheless, that was only part of the truth. The plaintiff did not just recall her personal experiences, she rather saw that her experiences had some judicial relevance. She explained how she tried to complement her attorney's statement, which concentrated on the money used for day care (lines 4–5). Moreover, she described her thoughts as she began to understand that, in practice, the officials and the politicians had different kinds of contributions to make in arranging day care, and that, the refore, they should be evaluated separately in court. Furthermore, when asked, she returned to the issue she had herself initiated earlier in the interview – that they produced no evidence about the actual decisions that had been postponed by the politicians (lines 32–37).

When interviewed after the decision was declared, the plaintiff strongly criticized the reasoning of the decision in terms of this particular issue. She found it difficult to understand the decision maker's thoughts (Excerpt 8.27).

Excerpt 8.27 Case 5, interview with the plaintiff after the main hearing

Plaintiff [at first reading aloud an excerpt from the decision]: “However, in terms of the evidence of this detail, the witness's statement is only general compared to the extended and detailed list concerning the municipality's operations. Thus, the reasonableness cannot be considered otherwise than presented.” Quite right. This was something I read several times. This just can't be true. Does he [the judge] now suppose that [the witness] should have made a list here, she was there as the municipality's witness anyway. This was something... how can anybody even think that if the witness has prepared a list [of the municipality's operations] and then she is asked something [referring to her own questions about politicians], that she would have an equally relevant list for that question. I didn't understand that. This was a totally crazy point in the decision.

In view of the judge's intention to include the officials versus politicians question in his final decision (see Excerpt 8.22), it can be assumed that these particular sentences were his contribution to the argument. From the point of view of the client, the statements were too abstract and the judge's judicial reasoning remained hidden. That the treatment of the witness's testimony in the hearing was insufficient according to the judge did not come across in the decision.

When she was interviewed after the decision, the plaintiff was also thinking about how an appeal to the higher court could be prepared (Excerpt 8.28). The plaintiff was convinced of the significance of the tension within the municipality. The excerpt also reveals how the plaintiff, as a lay person, seemed to have adopted the judicial logic of obtaining evidence to support her argument.

Excerpt 8.28 Case 5, interview with the plaintiff after the main hearing

Plaintiff: Kimmo and I have to consider how the appeal will be made. We don't have to explain a lot, since principally all our arguments were sustained. What could be listed are all the proposals that the city council and city government had postponed during 1995–1996. This was one thing that I thought that could have been done earlier, of course.

Researcher: Does this kind of list exist or can it be made?

Plaintiff: I'm pretty sure there isn't one, but I wonder if it can be done if you dig around the old protocols. At work we get a bulletin that includes issues concerning the social and health-care sector. I think I could try to dig around and see if I can find anything.

In the final appeal to the court of appeal, the plaintiff did not list the proposals postponed by the politicians, as she planned in the interview. The incomprehensible detail in the decision and the officials-vs.-politicians theme were nevertheless stressed in the appeal. The postponing of decisions by the politicians was, according to the plaintiff, “the main fault, which resulted in the municipality's failure to fulfill its obligations.”

In summary, the indirect effects of the particular expanding initiatives in Case 5 – the ones dealing with the officials and politicians in the municipality – can be assigned the following consequences:

- There was no joint understanding of the significance of the issue among the participants
- The judge had difficulties in making the decision in this respect, as the facts that appeared in the witness's testimony were not argued further by the parties themselves in the proceedings
- The decision included one detail that was especially incomprehensible to the client, which was that reason why the witness's answers could not be considered more strongly in the verdict was not explicated in the reasoning behind the decision. The way in which the case was constructed by the participants in the proceedings was not evident from the decision
- The plaintiff and her attorney stressed the issue of officials and politicians more in the appeal.

3 Summary of Case 5

Of the cases analyzed, Case 5 most clearly represents a new type of case in which the origins of the dispute are largely social and political, and where the court is one means among others of furthering the client's societal interests. These types of dispute are pushing the courts to more and much closer involvement in social issues and their development. They are also disputes over which the legislation has shifted discretionary power to the courts and the judges who finally make the judgment in individual cases. Clients' initiatives, and especially expanding initiatives, are probably most likely to occur in this kind of dispute if anywhere. In my data, all the expanding client initiatives occurred in Case 5.

All in all, the client's initiatives in this case were frequent and diverse. All the initiative categories were represented, except extending initiatives. This finding challenges the relatively narrow position that the client is given in procedural law as a source of information (Government Bill 15/1990). Rather than that, it seems to suggest that the client may work as a participant and collaborator in establishing the dispute.

As a participant in the discussion, the plaintiff used several discursive tools in carrying on her initiatives. I found the following:

- Surrounding her obligatory answers with initiatives by employing a three-step structure (Excerpts 8.12 and 8.19)
- Putting forward her own viewpoints by means of ironic comments (Excerpts 8.14 and 8.15)
- Keeping important documents to hand and using reported speech (Excerpt 8.18)
- Turning answers into questions (Excerpt 8.18)
- Questioning the questions as a witness being heard (Excerpt 8.18)
- Taking the role of an questioner and posing questions to the witness (Excerpt 8.20)

This list includes tools that are exceptionally powerful and probably rather unique in the context of court hearings. The position of the witness in a court hearing has been seen as powerless in the literature (e.g., Conley and O'Barr, 1998; Danet & Bogoch 1984; Messmer, 1997). Without questioning the traditional imbalance between participants in hearings, I would argue that the picture is not totally black and white. Although seldom used, powerful discursive tools for clients do exist. For example, as Ghita (2001) has stated, the speaker's ironic position is always one of superior power. Thus, the client's use

of ironic comments in courtroom interaction affects momentarily the balance of power. The initiatives shown by the plaintiff in Case 5 reveal that the client may also use effective means and contribute to the shaping of the process together with the professionals. Even in the position of a witness, the plaintiff can avoid being dominated.

How should one describe the mode of interaction in Case 5? Typical of the case was the type of discourse which was quantitatively dominated by the professionals but in which the plaintiff made qualitatively strong contributions. Whereas in Case 4, the plaintiff only occasionally intervened in the discourse between the professionals, in Case 5, she participated actively, offering a large, but not exceptional, number of initiatives. What was characteristic of the mode of interaction was her contribution in the form of expanding initiatives and the use of strong discursive means.

The plaintiff's initiatives resulted in various kinds of effects (Table 8.11). None of the initiatives was explicitly rejected, although three were bypassed. In an interactive sense, however, the client was not bypassed. What were bypassed were the expanding initiatives she expressed in an attempt to understand the dispute differently. To put it another way: the legal professionals were not ready to follow the client and re-consider their way of understanding the dispute. The client's initiative led to a fracture in the process seven times. A slight majority of the fractures were repaired by reflecting on the proceedings, the rest by smoothing them over interactively. These fractures point toward the significant finding concerning the instructional tools used by the judge. The use of such tools in the proceedings did not leave the client as an outsider, but rather offered her the means to understand the judicial logic. This seems to come near to what Messmer (1997) called for in asking for transparency in proceedings. He criticizes the fact that the transformation of lay events into judicial cases is hardly ever transparent. As a result of the different viewpoints given on the same events, the majority of clients feel that they are not correctly represented before the courts (Messmer, 1997, pp. 137–139). In Case 5, the instructional tools used by the judge probably contributed to more transparent proceedings as far as the client was concerned. For the future development of court proceedings in district courts, it is important that the educational aspect is not an illusion. Case 5 is a concrete example of how the judge can take advantage of instructional tools.

The client's initiatives led to a change in the topic eight times. Yet, it should be remembered that, with her topic-maintaining initiatives, which were not analyzed here in terms of their effects, the plaintiff was also able to express her viewpoints.

The effects of the expanding initiatives in Case 5 are of particular interest. In the immediate interaction, the consequence of the client's initiatory questions to the witness was merely that she succeeded in changing the topic for a while. These direct effects also provided the basis of the categorization given in Table 8.11. Had the participants started to discuss the issue on the new grounds put forward by the plaintiff, the whole script of the case would probably have changed and the dispute would have been understood in a qualitatively new way. However, the initiatives pushing forward the plaintiff's understanding of the case had indirect consequences, which became visible in the participant interviews. With her initiatives, she intervened in the proceedings in such a way that procedural tensions came to the surface. Her contribution made the judge evaluate the procedural principles: whether to follow the principle of the party autonomy or to start to establish the facts himself. It was also evident that the judge carefully considered the perspectives and conceptualizations the client brought into the case.

Table 8.11 *The Effects of the Client's Initiatives in Case 5*

Initiative	Rejecting without explanation, bypassing	Fracture in the process		Change in topic	Going beyond the script, change in understanding the dispute
		Repair by smoothing over	Repair by reflecting		
Expanding	1	1		4	
Extending					
Questioning	3	2	3	4	
Restricting	1		1		
Total	3	3	4	8	

After all, the client's initiatives did have effects on the script of the proceedings: they caused fractures that had to be repaired and they brought up new topics to be discussed. It was also evident that the client could freely present her viewpoints and get herself heard.

Excerpt 8.29 Case 5, interview with the plaintiff after the preliminary hearing

Interviewer: What do you mean? What makes the proceedings hard?

Plaintiff: Maybe it's a certain insecurity and the fact that I was under the impression that there are strict rules on how to behave in the courts. As I don't necessarily obey the rules of behavior so strictly, I was worried that I might say the wrong words in the wrong places. I didn't have the slightest idea of how to behave there. The situation felt like "oh dear, my stomach is in knots".

Interviewer: How did the situation finally work out? How would you describe the hearing?

Plaintiff: It was in the end an incredibly freewheeling thing.

Interviewer: Were you allowed to say what you wanted?

Plaintiff: I think I was. Maybe I was a bit tense, and of course, when you think about it afterwards, I would have liked to have been more deliberate and calmer, and to have considered it more so that I could have talked more slowly and deliberately. In that situation, I just felt like "Help! Now I want to say something", and then I was soon going "yak-yak-yak".

From the point of view of court clients, the most important finding is that they can actually influence the proceedings in court cases if they wish. Case 5 proves that, as a result of the court reform and the procedural changes, hearings can now be more open and also allow the client's participation. In this case, the client probably employed exceptionally advanced discursive means and expressed strong expanding initiatives, which may be rare in cases in which the ideological starting point is not so dominant. However, Case 5 represents a type of case that will probably become more common in the future. In this sense, it highlights many future challenges for courts in terms of collaborating with clients.

8.8 Client Initiatives and Their Effects in Case 6: "I can comment on that"*1 Introduction and the Overall Profile of the Hearings*

Case 6 was a combination of two cases: a claim made by the ex-husband and a counter-claim made by the ex-wife. The ex-husband was present in the preliminary hearing, as well as in the extended preliminary hearing and, directly after that, in the main hearing. The ex-wife was present in the extended preliminary hearing and in the main hearing. In fact, the principals were obliged to be present in the extended preliminary hearing, according to the edict of the judge in the

preliminary hearing. All the hearings were held in a meeting room where the principals sat next to their attorneys, diagonally opposite to the judge and the court clerk. No outsiders other than myself were present.

Typical of Case 6 was the plaintiff's active participation in all the hearings. The number of his initiatives was extremely high: 129 in the preliminary hearing, 48 in the extended preliminary hearing and 43 in the main hearing – 220 altogether. The initiatives were diverse and covered all the categories, except expanding initiatives. Among them, the most frequent categories were explaining and confirming initiatives. The defendant's initiatives were fewer: there were 23 altogether, most of them explaining or confirming initiatives. The plaintiff's and the defendant's initiatives in different phases of the hearings are described in Table 8.12.

Table 8.12 *The Number of Client Initiatives in Each Phase of the Hearings in Case 6*

Hearing	Phase	Number of initiatives	
		Plaintiff	Defendant
Preliminary hearing	1. Possible ways to settle the dispute	1	
	2. The plaintiff's demands, their grounds, and the defendant's reply with its grounds	79	
	3. The defendant's additional demands and the plaintiff's reply	11	
	4. Negotiating how the evidence will be declared and the date for the main hearing	4	
	5. The counter-claim: the plaintiff's demands, their grounds, and the defendant's reply with its grounds	20	
	6. Declaring the evidence and arranging the schedule of the further proceedings	14	
Extended preliminary hearing	7. Beginning the proceedings, the handling and deciding of the application for a cost-free trial	10	2
	8. Specifying and correcting the minutes of the preliminary hearing	6	-
	9. The plaintiff's demands and the defendant's reply	28	5
	10. Declaring the evidence and what will be proved with each piece	4	1
Main hearing	11. Hearing the executor of the partition of the joint property	13	1
	12. Considering the material brought into the court: looking at the paintings	12	4
	13. Hearing the witnesses	13	8
	14. The final statements and the claims for legal expenses	5	2

The first impression of the interaction in Case 6 is that it is reminiscent of everyday conversation rather than of courtroom interaction. In fact, the case challenges my methodological starting point, based on Linell's (1998) ideas: the simultaneous presence of responsive and initiatory elements in each utterance. Responsive and initiatory aspects intertwined in such a way that they became difficult to distinguish. However, a distinction was made in the analysis according to the principles described in the section, "What is an initiative". The result of the analysis, with its large number of explaining and confirming initiatives, verifies the first impression regarding the conversation-like nature of the interaction. In particular, it was the explaining initiatives, which maintain and continue the prevailing topic with the client's own explanations, and the confirming initiatives, which often support the previous speaker ("Exactly", "That's right"), that contributed to the dialogical, conversation-like interaction.

2 The Initiatives during the Proceedings in Case 6

The possibility of settling the dispute was discussed in *the first phase* of the proceedings. The discussion started when the judge referred to the informal negotiations the parties had had before the preliminary hearing, and wondered why these bilateral negotiations were not continued.

Excerpt 8:30 Case 6, preliminary hearing

- 1 *Judge:* Did the attorneys consider the attendance of the principals unnecessary in the negotiations, or what was the reason why the principals had not
- 2 been in contact with each other?
- 3
- 4 *Plaintiff:* Well, the matter...
- 5 *Plaintiff's attorney:* ## Better to ask the principal himself about that.
- 6 *Plaintiff:* ## I suppose the principals never received the stuff from their at-
- 7 torneys in that state. What's more, the opinions seem to deviate quite a lot.
- 8 *Judge:* Personally, I found that surprising, because last time, when we went
- 9 through the figures we noticed that, in the end, there was not that big a dif-
- 10 ference in the sums...
- 11 *Plaintiff:* Ye- ...
- 12 *Judge:* Concerning this, I would have assumed that...
- 13 *Plaintiff:* ## Well, it was mainly about...
- 14 *Judge:* ##...something had happened.
- 15 *Plaintiff:* Yes, *the opposing party offered something like minus one thousand*
- 16 *marks.*
- 17 *Judge:* Well, I hope the principals got my message. And I hope that the
- 18 attorneys have also explained the various possibilities in the proceedings
- 19 and how advantageous they may be to the principals.

This short episode discussing the settlement introduces a full range of different kinds of client contributions: initiatives (line 15–16), answers (lines 6–7) and interrupted turns caused by overlapping speech (lines 4, 11 and 13). In his response (lines 6–7), the plaintiff gave two reasons why the principals had not negotiated with each other. The latter reason, that their opinions deviated a lot, was then elaborated on in his explaining and specifying initiative (line 15–16). His focus on the deviating opinions was passed over by the judge, who still seemed to favor a settlement.

As mentioned above, I saw Case 6 as questioning the method used in the analysis. The virtually indistinguishable conflation of initiatory and responsive in Excerpt 8:30 is evident. The judge's turn starting on lines 8–10 and continuing on lines 12 and 14 (“Personally, I found that surprising...”) is typically one which is not a direct question, but strongly invites the other person to answer and continue on the same topic. Instead of generating silence, it is more likely to generate explanations and counter-arguments. Despite this strong invitation, the plaintiff's subsequent turn is not, according to the original definitions, considered as an answer, but an initiative.

Phase 2 was an extended period of going through the plaintiff's demands, their grounds, the defendant's reply and its grounds. The plaintiff's seven different demand points were handled one by one. From the numerous initiatives he expressed in the hearings, one set and their effects are described as a narrative focusing around two particular themes: “The bills” and “The condition of the apartment”.

The theme “Bills” concerned the unclear issue of bills that the plaintiff had paid. He showed a hand-written paper stating that he had paid 1500 Marks to their gardener, and the ex-wife declared had paid 1000 marks to the telephone company. An understanding of how these payments should be recognized in partition was sought in *Phase 2*.

Excerpt 8:31 Case 6, preliminary hearing

- 1 *Judge*: The next issue in the reply [refers to the defendant's written reply
- 2 given during the written preliminary phase] is this 1000 marks. Does it
- 3 have relevance in this matter?
- 4 *Defendant's attorney*: Yes it does in the sense that Elomaa has stated (—)
- 5 that he has paid it with his own property, but this receipt shows that Falck
- 6 [the ex-wife] has given him half of the sum. So this should not be sought,
- 7 this...
- 8 *Plaintiff*: But in that same...
- 9 *Plaintiff's attorney*: ## Please, hold on a second. Where can we find that, if
- 10 we can now...
- 11 *Plaintiff*: ## This appendix reveals that, uhh, I have paid an even bigger
- 12 amount for her, and it compensates, which means, in reality, I have a credit

- 13 *balance according to that receipt.*
- 14 *Judge:* This is exactly what I mean. When we chase up these bills, all these
 15 money tubes should be cleared up and one shouldn't just pick the receipts
 16 that look favorable and then just hope that the opposing party doesn't...
- 17 *Plaintiff's attorney:* Yes, but...
- 18 *Plaintiff:* *It's obviously on page 18 in your papers*
- 19 *Judge:* Of course there's a limit to what can be handled here, but in terms of
 20 the spouses', ex-spouses' relations as a whole, it would be feasible to...
- 21 *Plaintiff:* ## Well it's now ...
- 22 *Judge:* ##...the correct decision... [inaudible]
- 23 *Plaintiff:* ##...it's now clear that there were two sums, this phone bill and then
 24 the one for the gardener, and, and they compensate each other. Actually I have
 25 paid, well, more, and I have a credit balance according to that receipt.
- 26 *Defendant's attorney:* There's nothing to imply that Falck did not pay the
 27 same 1500 to the gardener.
- 28 *Plaintiff:* Well, this receipt implies that they cancel each other out, so that
 29 these 1000 marks make no difference.
- 30 *Defendant's attorney:* If, if, well, unless also Falck paid to the gardener 1500
 31 marks.
- 32 *Plaintiff:* But then, then we stretch this to include all the possible bills that
 33 there are in a family.
- 34 *Plaintiff's attorney:* ## Well, we're not stretching anything with these, these
 35 bills, but ...but...
- 36 *Plaintiff:* ## That's just what I mean here, that
- 37 *Plaintiff's attorney:* What is the demand that the defendant is now pre-
 38 senting on these grounds?

Excerpt 8:31 again features discourse full of overlapping speech, interruptions and free sequencing of talk without a given speech order. The plaintiff's first initiative (line 8) was interrupted by his attorney who rejected his turn with his objection "Please, hold on a second" (line 9). The plaintiff, however, took the floor again and expressed an explaining initiative (lines 11–13). As a consequence, the judge opened up the issue of what would be the right and feasible way to gather information on the bills, as he questioned the way they had been presented to the court (lines 14–16). This could be interpreted as the repair of a fracture by reflecting the script. The judge's questioning was passed over by the plaintiff's attorney, who made an attempt to take the floor, and then by the plaintiff, who specified the page number at hand.

Despite the bypassing, the judge continued his reflection. For his part, he seemed to make an expanding effort to understand the dispute in a qualitatively new way, as a relation between ex-spouses: "but in terms of the spouses', ex-spouses' relations as a whole, it would be feasible to..." Again, the judge's turn was bypassed and overlapped by the plaintiff, who continued explaining his own

viewpoint. Unfortunately, the continuation of the judge's turns became inaudible as a result of the overlapping speech.

The plaintiff continued putting forward his views with explaining initiatives. He claimed that the defendant's attorney's statements about the bills paid by the defendant just extended the dispute (line 32–33) – contributing in a way that the judge had just opposed. This questioning was commented on only by the plaintiff's own attorney, who supported his principal's idea of not extending the discussion.

It appears that there were two competing, mutually questioning scripts in this particular episode: that of the judge and the defendant's attorney, who wished to take into account all the money transactions, and that of the plaintiff and his attorney, who preferred focusing on the bills already presented. The existence of the two alternative scripts was not acknowledged openly. Instead, both the judge and the plaintiff attempted to question the competing script.

Excerpt 8:32 Case 6, preliminary hearing

- 1 *Plaintiff: Money has not been transferred here, because here we have, uhh,*
 2 *two approximately the same kind of sums being dealt with in the same*
 3 *connection...*
 4 *Judge: ## Yes, and then it's a different thing that there's another, another,*
 5 *uhh, sum, which is, uhh, slightly bigger, and then again at his point-, but*
 6 *you just said here that you have never paid anything to this gardener.*
 7 *Plaintiff: ## That's correct, I haven't paid, I...*
 8 *Judge: ## Well, has this 1500 marks also been paid to him by someone else?*
 9 *Plaintiff: Falck [the ex-wife] has taken care of all the money matters with*
 10 *the gardener, I have never taken any part in that. And he was hired by Falck,*
 11 *I don't even know their payment arrangements, how they were arranged, so*
 12 *this-*
 13 *Judge: The contents of this appendix 18 are like this, and there are docu-*
 14 *ments presented by Elomaa, and this is how the parties explain them.*
 15 [a pause of 14 seconds]
 16 *Plaintiff: Let's take another look... there is, you know, it's that there's only my*
 17 *signature, and this is written by my ex-wife, so, so...*
 18 *Judge [slightly irritated]: Here we could, as this case will be postponed any-*
 19 *way, we could order Falck to be present personally at the extended prelimi-*
 20 *nary hearing, so that these things could be thought about. What was the*
 21 *case in reality. Well, let's move on.*

My comments about the ambivalence in interpreting the initiatives in Case 6 also apply to Excerpt 8:32. The distinction between the initiatory and the responsive aspects is problematic, for example, in the judge's turns in lines 5–6 (“but you just said here that you have never paid anything to this gardener”). Linguistically, the turn is more a contention than a question, nevertheless

requiring an answer in a similar way as a question. In the context of the traditional model of courtroom interaction where the judge asks and the clients answer, the judge's turn (in lines 5–6) was not interpreted as a question and, consequently, the plaintiff's turn (in line 7) was not interpreted as an answer. Instead, the plaintiff's turn was understood as a confirming initiative, with which he verified the judge's correct understanding. This interpretation points to a development in which the strict order in court, the simple question-answer structure, is being replaced by more informal and conversation-like discourse. Questions are not the only means for a judge to clarify things; he or she may also make claims and statements, which are then contested or confirmed by the other participants.

Excerpt 8:32 brought to a close the discussion on the bills. The disagreement on who had paid what remained and no consensus was reached. The judge summed up the state of affair (lines 13–14) and included the mismatch in the minutes of the hearing. The plaintiff's initiative after a long pause, and the additional explanation regarding the signatures on the bill (lines 16–17), caused the judge to make a stronger attempt to “clear up all the money tubes”, as he said in Excerpt 8:31. He employed a new tool given to him by the new procedural law. He used his right to order the defendant and, according to the court documents, the plaintiff of course, to be present in person in the forthcoming hearing (lines 18–21). According to the Code of Judicial Procedure (Chapter 12, Section 7), “the party may be ordered to appear in court in person, under threat of a fine, if this is deemed necessary with regard to the clarity of the case.” In this situation, the frequent initiatives from the one side seemed to push the judge to require the presence of the opposing side.

Excerpts 8:31 and 8:32 saw the plaintiff pushing his own advantage in the adversarial way of traditional litigation. He was persistent in repeating his explanations, in which he gave his own interpretations of what had happened and contested the opposing interpretations. Excerpt 8:33 shows how the plaintiff also had another role in the hearing, when he worked towards a common good: he collaborated with the other participants in clarifying the unclear issues.

Excerpt 8:33 Case 6, preliminary hearing

- 1 *Judge:* Is it, I mean is it...it can't be the bill mentioned in the answer, this
- 2 due date of April, the second, or can it? Or is it the same bill?
- 3 *Defendant's attorney:* I beg your pardon, the second of April?
- 4 *Judge:* It isn't the same one we're talking about now, or is it? At least they
- 5 aren't equivalent in terms of money.
- 6 *Defendant's attorney:* But there's interest included.
- 7 *Plaintiff:* There's interest, yes.
- 8 *Defendant's attorney:* It also includes interest.

- 9 *Plaintiff: It includes late-payment interest.*
 10 *Judge: Oh, there's also late-payment interest. That's how it goes, yes, yes.*
 11 *Plaintiff: It was paid in May. That's why it's 955. And the normal charge is*
 12 *946. That means there's nine mark's interest.*
 13 *Judge: Okay, okay, that's, yes, yes. Here in the insurance company's notice,*
 14 *they talk about the basic charge...*
 15 *Plaintiff: ##Yes, that's right.*
 16 *Judge: ...no penalty is mentioned there. Well, okay, now also this clarifies...*
 17 *Plaintiff: Yes.*
 18 *Judge: ...the matter, while the sums differ from each other.*
 19 *Plaintiff: Yes.*

Excerpt 8:33 brings out the cooperative aspect in the plaintiff's initiatives. The number of the client's confirming and explaining initiatives was exceptionally high in Case 6, and Excerpt 8:33 is a typical example of these initiative categories. The confirming initiatives (lines 7, 15, 17, 19) are hardly initiatives in an everyday sense, but in context of the courtroom discourse, they can be seen as the client's voluntary attempts to contribute and collaborate in establishing the case. They are employed as discursive tools for collaborating, and also make the discourse resemble everyday conversation more than a strictly ordered trial.

The collaborative aspect of the plaintiff's contributions is also evident in the next short example.

Excerpt 8:34 Case 6, preliminary hearing

Judge: Well, then on to the next item.

[Pause of 9 seconds]

Plaintiff: That is that loan on the apartment.

Judge: This concerns the loan on the apartment.

This excerpt shows the judge introducing a move to the next item. During the pause of nine seconds, the judge kept leafing his papers. The plaintiff did not wait for the judge to continue and make a second move. Against the odds, the plaintiff was the one to utter the next item on the agenda (defined in the memo made by the judge), which the judge then confirmed. Here, the introduction of the new item was jointly constructed by the judge and the plaintiff. The traditional turns and speech order seem to be in transition in the discourse of the preliminary hearings, thus implying a new way of talking and negotiating which differs from traditional courtroom interaction.

Hayden (1987) called attention to differences in the sequencing of speech turns between Western trials and Indian caste councils. In the traditional

western courtroom, we find the strict sequencing of talk where overlapping speech is seen as dysfunctional and obstructive. In the Indian councils, there is a lot of overlapping and only a few rules for sequencing speakers. Hayden explains the contrast between strict sequencing and the tolerance of overlap as a difference in the primary tasks of these two legal institutions. Dispute processing involves two analytically distinct issues. The first is the factual question: what happened? The second is more normative and evaluative: knowing what happened, what the result is, or what it is worth (Hayden, 1987, p. 253). Fact finding is the primary task in the western system, whereas the Indian caste councils focus on evaluating the facts. Whether the legal institution is aiming at establishing facts or evaluating them in a normative way is important because the speech actions may vary significantly. Procedures aimed at determining facts are likely to require more control over the presentation of information than those that are meant to evaluate the normative value of uncontested facts (*ibid.*, pp. 254–255). It is in this difference, Hayden believes, that underlies the dissimilarity between the orderliness of most Western judicial proceedings and the seeming chaos of Indian caste councils.

To support his hypothesis on speaking-order flexibility in evaluative proceedings, Hayden points to Western court-centered negotiations, such as plea bargaining, and in general to different kinds of negotiations outside the formal trial where the speaking turns are not well ordered (p. 263). The task at hand in the Finnish preliminary hearing includes elements of both fact finding and fact evaluating. The aim is to establish the facts, but the possibilities of settlement are also discussed. The latter is more like evaluating the normative value of the facts – whether or not such an evaluation is based on established facts. The judge may also make such assessments before the final decision, during the proceedings. It seems that the task at hand in the preliminary hearing is more like the joint construction of the case, where the finding and normative evaluation of the value of the facts are part of an intertwined process³⁵. In this process, the discourse can be understood as problem-solving talk in which new forms of informality, less ordered sequencing, and greater tolerance of overlapping speech emerge.

³⁵ This kind of double commitment of the participants has been pointed to by Komter (1998) in regard to Dutch criminal proceedings, where due to the combination of inquisitorial and adversarial elements in the same procedure, the parties act both as sources of information and as the defending party. In a similar vein, Engeström & al. (1997) assessed the ‘collaboration between adversaries’ as necessary to smooth proceedings.

In *Phase 5*, the counter-claim presented by the ex-wife became the subject of the proceedings. Now the crosswise roles and designations may confuse the reader. To achieve some clarity, I have chosen to refer to the persons according to their judicial role in the respective phase of the hearing. For example, the ex-wife who was the defendant in the earlier phases of the hearing, acts now as the plaintiff. I have inserted clarifying remarks in square brackets to show whether the person is the ex-husband or the ex-wife.

The condition of the ex-spouses' apartment – the second of the specific themes in my narrative – was discussed in this phase. When the former couple moved apart, their apartment was in a poor state and some things had disappeared. In fact, the condition of the apartment was outside the scope of this particular civil case, but the plaintiff in the counter-claim wanted to use it to support her response. Excerpt 8:35 shows how the discussion on the apartment started so as to be continued in later phases of the hearings.

Excerpt 8:35 Case 6, preliminary hearing

- 1 *Judge*: If I ask now the defendant [the ex-husband], so that we can probably
- 2 establish that in January, February the defendant took some things away
- 3 from the apartment?
- 4 *Defendant [the ex-husband]*: I have taken my own things away.
- 5 *Judge*: Yes, that's right, yes. There now seems to be some disagreement
- 6 about what has been taken away and what has not.
- 7 *Defendant [the ex-husband]*: *This process has of course been remarkably*
- 8 *larger. There have been a few reports of an offense concerning housebreaking.*
- 9 *Judge*: Yes, so it appears from these documents.
- 10 *Defendant [the ex-husband]*: *Of course, if we start to enlarge on this, we'll an*
- 11 *extra day for the proceedings.*
- 12 *Plaintiff's attorney [the ex-wife's attorney]*: So do you claim that you have
- 13 taken away your own things and that the other things have been taken by
- 14 somebody else affiliated to the break-ins?
- 15 *Defendant [the ex-husband]*: Yes, I have made two reports of offenses.
- 16 *Plaintiff's attorney [the ex-wife's attorney]*: And reported that the movables
- 17 had been taken.
- 18 *Defendant [the ex-husband]*: That's right.

Excerpt 8:31 shows the ex-husband preferring not to extend the case beyond the bills that had already been presented. Excerpt 8:35 shows the same tendency to questioning the extension of the case, but in a dilemmatic way. With his enlarging initiative he referred to the fact that conflict was actually larger than the current court case, and to the offense reports he had made (lines 7–8). The effect of that initiative was that the discussion continued on the substance – who had taken what from the apartment. He also expressed an initiative referring to extending the case and simultaneously questioning the enlargement

(lines 10–11). His questioning was bypassed, however. The discussion in Phase 5 ended with the ex-husband's stating initiative when he concluded: "Just a little bit of stirring and we'll get something new to litigate".

It is interesting that when the condition of the apartment was discussed in the context of the counterclaim, the ex-husband questioned the whole topic as extending the case. In this phase, the questioning was in line with the judge's contributions, who had questioned the counterclaim several times during Phase 5 and asked about the motives. Despite this questioning, the ex-husband still maintained the topic.

The discussion on the condition of the apartment started again in *Phase 6*. When the evidence for the main hearing was presented, a video was named as a piece of evidence. Again, the ex-husband (here again in the role the defendant) questioned the topic, but also contested it actively.

Excerpt 8:36 Case 6, preliminary hearing

1 *Defendant [the ex-husband]*: The video shows mainly that things were in
2 different kinds of piles, which were down to the defendant [refers to his
3 ex-wife], because she and her pals have been there emptying the contents
4 of the shelves onto the floor and so on. Well, this was also reported to the
5 police.

6 *Plaintiff's attorney [the ex-wife's attorney]*: Yes, there are plenty of them.
7 Well, as far as I remember, it was the case that, this has to be checked, but I
8 remember it was the case that the video was recorded as soon as the lock-
9 smith had opened the door, after Elomaa had moved away, that means that
10 nobody had entered the apartment.

11 *Defendant [the ex-husband]*: ## Yes, yes. Yes I also made a report of an
12 offense, that all my personal clothes had been stolen. That can also be brought
13 into the court. Well, I can call these policemen to testify. Now it's only a ques-
14 tion of how far we're going with this soup. Are we really going to dig up the
15 dirt?

16 *Plaintiff's attorney [the ex-wife's attorney]*: We'll dig it all up.

17 *Defendant's attorney [the ex-husband's attorney]*: Well, the opposing party
18 wants the dirt dug up and that suits us of course. But I think some sense of
19 proportion should prevail here, because the most we are talking about is a
20 couple of thousand marks, so some sense should prevail.

21 *Judge*: Here are the photographs.

22 *Defendant's attorney [the ex-husband's attorney]*: Actually they could be
23 looked at. I have seen copies and things ...

24 *Judge*: If the apartment was left in this condition when Elomaa left, I can
25 draw my own conclusions. [A pause of 12 seconds] The photographs were
26 attached to the reply to the original claim.

27 *Defendant [the ex-husband]*: Yes, these same photographs (—) in other
28 courtrooms.

29 *Defendant's attorney [the ex-husband's attorney]*: Hmm, I could probably
30 now ask Elomaa if the apartment was left in that condition by him, so...

- 31 *Plaintiff's attorney [the ex-wife's attorney]:* Possibly (—)
- 32 *Judge:* Well, let's have it now, is it true that the apartment looked like this?
- 33 *Defendant [the ex-husband]:* A-as I already said, there were people who
- 34 came and emptied all the closets and shelves onto the floor and the result
- 35 looks like this. And they [refers to his wife and her friends] have themselves
- 36 said that they took closets and shelves. *And we have the offense reports and*
- 37 *the investigation records, all of which will be taken as evidence if necessary*
- 38 *Judge:* But, if now, if the plaintiff in this case [refers to the ex-wife] now
- 39 states that on the day she entered the apartment, the locksmith opened the
- 40 door. Is it the case that you changed the locks so that no one else could get
- 41 in?
- 42 *Defendant [the ex-husband]:* On po-police's advice, uh, I changed the locks
- 43 because, because things had been taken out on several occasions.
- 44 *Judge:* Yes.
- 45 *Plaintiff's attorney [the ex-wife's attorney]:* If I remember right, the locks
- 46 were changed three days before Elomaa moved away, if I don't remem...
- 47 *Defendant [the ex-husband]:* ## Yes, because before th-that when I, it seemed
- 48 that the things were disappearing quite fast.
- 49 *Judge:* Was this apartment in the same condition as in the photographs
- 50 when you were in possession?
- 51 *Defendant [the ex-husband]:* Yes it was, because these outsiders had been
- 52 and we could call on one of the policemen who came to the apartment to testi-
- 53 fy, who said "this is a real mess".
- 54 *Judge [clearly displeased]:* Well, I don't know. I urge the parties to consider
- 55 seriously if it is worth bringing witnesses to say who has taken what, and all
- 56 the videotapes and everything. Try to settle this issue at least. I really mean
- 57 it.
- 58 *Defendant [the ex-husband]:* Uhh.
- 59 *Judge:* Holmberg [refers to the ex-wife's attorney] should also give this
- 60 message to his principal. [pause of 11 seconds]. But, hmm, can we now
- 61 proceed so that, now that we have gone through the evidence, the defend-
- 62 ant could now consider the necessary counter-evidence.

The ex-husband's dilemma-like initiatives were even more striking in Excerpt 8:36. In his second turn (lines 11–15), he helped to construct the topic and even initiated enlargement of the dispute ("Yes I also made a report of an offence, that all my personal clothes had been stolen. That can also be brought into the court. Well, I can call these policemen to testify."). Immediately in the same turn, however, he questioned the whole issue, this time using a more effective discursive tool, a direct question ("Now it's only a question of how far we're going with this mess. Are we really going to dig up the dirt?"). This questioning initiative resulted in a fracture in the process, which was repaired with a short reflection on the reasonableness of such a dispute. Interestingly, this short period spent getting close to the nucleus of the conflict, interspersed with metaphors such as

“digging up the dirt”, was soon over when the participants turned their attention to the photographs of the apartment.

After that, the ex-husband concentrated more on enlarging the dispute than on questioning the enlargement. He answered questions directed at him by the judge, but transformed the answer into an enlarging initiative (lines 33–37 and 51–53). It seems as if such initiatives had a cumulative effect on the judge’s response: he became irritated and asked the parties to consider whether the issue was worth disputing at all. This could be interpreted as reflecting on the script, although in a manner that suggests frustration.

With his response (“Try to settle this issue at least”), the judge clearly made his opinion clear in a way not traditionally expected in a court hearing. Susan Philips (1990) criticized the typical characterization of Anglo-American court trials as ones in which each of the two sides presents its view on relevant events and then the judge chooses which of the two versions of reality sounds plausible. In these characterizations, the judge is either invisible, or cast in the role of the person who must choose absolutely between two sides. Philips (1990, pp. 197–198) challenges both the characterization of the judge’s role and the characterization of the sequential order in the structuring of conflict management in the American trial court. She sees the judge as a third party, mediating by proposing third positions and arguing actively. She claims that the bulk of judges’ interactional moves are very much like those of lawyers: they all offer positions (p. 208). In her arguments, she seems to put a similar emphasis on the task at hand as Hayden (1987) did. Her findings are valid in terms of dispute processing where matters of law are being decided and where motions are ruled upon out of the presence of a jury. When matters of fact are being decided, as they are in a jury trial, the judge plays a relatively minor role in the structuring of courtroom speech (Philips 1990, p. 197).

It seems that, after the Finnish procedural reform, the active role of the judge in conducting the proceedings has changed to become that of a “third party” who not only makes a decision after the hearings, but who may also comment, reveal his or her own opinions, question, and argue during the proceedings. This goes together well with Philips’s finding (1990, p. 209) that judges’ and lawyers’ verbal contributions are very similar in kind, and that it cannot be said that what distinguishes the judge’s role is the kind of move or use of language he or she makes compared to lawyers.

The condition of the apartment was taken up again in *Phase 9* in the extended preliminary hearing this time in order to evaluate whether it affected the accommodation allowance the plaintiff had claimed for. In Excerpt 8:37, the long monologues have been abridged.

Excerpt 8:37 Case 6, extended preliminary hearing

- 1 *Plaintiff's attorney:* Veli Elomaa had something... what did you want to say?
 2 *Plaintiff:* I could say something about the condition of the apartment, what it
 3 meant in practice. Here the situation was such that I filed three offense
 4 reports, because her friends had emptied my apartment. (//)
 5 *Plaintiff's attorney:* Well, what he is trying to say here is probably that the
 6 opposing party has contributed to the poor condition of the apartment.
 7 *Judge:* Yes, yes. It was marked down like that.
 8 *Defendant's attorney:* Can I answer that?
 9 *Judge:* I suppose it's fair to let you answer. We are now discussing the issue,
 10 after all.
 11 *Defendant's attorney:* I should say that if someone calls the police and shuts
 12 his family out of their home (//)
 13 *Plaintiff:* I can comment here that I have followed the instructions of the
 14 police.
 15 *Defendant's attorney:* That doesn't sound credible.
 16 *Judge:* Credible or not, we'll go on. I would understand that it is sufficient
 17 to record that the plaintiff states that the condition of the apartment does
 18 not affect the basis or amount of the allowance, and the defendant states
 19 that it does not affect the basis, but it does affect the amount. Well, we'll
 20 return this issue when the evidence is presented. Then I will decide whether
 21 to allow evidence on the condition of the apartment, or not.
 22 *Defendant:* Could I ...
 23 *Judge:* ## Point six.
 24 *Defendant:* ## Just a moment...
 25 *Judge:* ## The car radio.
 26 *Defendant's attorney:* Only a short comment on this...
 27 *Defendant:* On this mess in the apartment. We only changed the children's
 28 beds and desks. (//) But he was the one who took the shelves and closets, and
 29 then there was quite a mess.
 30 *Judge:* Okay. This point is closed. Point number six. The car radio.

In this episode, the plaintiff, in his explaining initiative, told his story about the condition of the apartment (the beginning of the story is on lines 2–4). His own description of his personal experience was then converted into legal language by his attorney (lines 5–6). Later in the episode (lines 16–19), the judge continued translating the discourse into judicial notes in the minutes.

Since the excerpt includes explaining initiatives expressed by both the plaintiff and the defendant, it could serve as an example with which to take a closer look at the effects of topic-maintaining initiatives. The plaintiff's first initiative on lines 2–4 was followed by a comment by his own attorney (lines 5–6) and, after that, confirmation by the judge (line 7), both of which continued the prevailing topic. The plaintiff's second initiative on lines 13–14 was first followed by an objection by the opposing party's attorney and then a concluding comment by the judge, both of which again continued the prevailing topic.

The defendant's initiative (the beginning of the turn in lines 27–28) was similar to the plaintiff's first one: she gave her personal account of how she saw the condition of the apartment and blamed her husband for contributing to the mess. This initiative was followed by the judge's short comment aiming to finish the topic quickly (line 30).

The same initiative-effect structure after both principals' explaining initiatives was present in Excerpt 8:38.

Excerpt 8:38 Case 6, extended preliminary hearing

- 1 *Plaintiff:* And our comment is that these two bills cancel each other out. Then
 2 there's only this actual telephone bill for 2000 marks. This paper is only about
 3 how you use the money.
 4 *Judge:* Well, unfortunately your use of money is represented here in some
 5 pieces of paper plus converging viewpoints. This is what the decision has to
 6 be based on.
 7 *Plaintiff's attorney* [jokingly]: We have plenty of papers here [taps the pa-
 8 per pile].
 9 *Judge:* Okay. Well, defendant has still something [nods and gives floor to
 10 the defendant]
 11 *Defendant:* Only very briefly, that our, my intention was to continue produc-
 12 ing these pieces of paper every month, concerning payment for the gardener
 13 and everything, but Elomaa did not agree to pay one dollar, not a half, not a
 14 quarter, nothing, so I paid for the gardener myself. That's why writing these
 15 pieces of paper didn't last long. That's all.
 16 *Judge:* Okay. Is point seven now clear?

Again, the plaintiff's explaining initiative (lines 1–3) was followed by the judge's comment, which still maintained the topic while strongly criticizing the plaintiff's way of conducting the case (lines 4–6). The defendant's initiative (lines 11–15) was given the floor (line 9) and responded to (line 16) by the judge, who exhibited a wish to pass the turn on quickly.

If the analysis is extended to cover the plaintiff's topic-maintaining initiatives in general, it shows that they were quite effective. They were carried forward either

1. by his own attorney who either continued on the same topic or translated it into judicial concepts:

Plaintiff: It's clear if you look at page ten. This is only a list.

Plaintiff's attorney: The answer is that he denies receiving that sum, because it's only a receipt.

2. by the judge asking a specifying question:

Plaintiff: After two weeks the motorbike was sold again.

Judge: Was it sold again after two weeks?

3. or by an objection by the opposing party's attorney followed by a comment by the judge trying to change the topic or calm down the situation:

Plaintiff: Usually, when policemen arrive, you tell them something very approximate.

Defendant's attorney: Such as six teacups, if I remember correctly.

Judge: Here I'm again tempted to chime in that it's as if you are only arguing on principle, when you get worked up about whether there were four or five paintings. The sum of money probably doesn't mean anything to either of you. I am amazed. This was again only my comment here.

The defendant's topic-maintaining initiatives, on the other hand, seemed to close the subject instead of maintaining it. Her explaining initiatives in Excerpt 8:37 and 8:38 were not followed by questions from the other participants, they were not supported by the defendant's attorney's comments, and neither were they objected to by the opposing party. They were received and then dealt with in an impatient manner by the judge.

On the one hand, the judge's approach seems odd because he specifically ordered the defendant to be present and to be heard (see Excerpt 8:32) and because he stated (Excerpt 8.37, line 9) "We are discussing the issue, after all". On the other hand, the defendant seemed to choose her moments for initiating speech turns poorly, entering the discussion when there appeared already signs of moving forward to another topic. In Excerpt 8:37, the defendant made her initiative after the judge had already summarized how the issue under discussion would be recorded in the minutes (lines 16–21) and indicated movement to another topic with his words "we'll go on" (line 16). Simultaneously with the defendant starting her turn, the judge made the shift by introducing the next point in the agenda "Point six" (line 23). The situation described in Excerpt 8:38 was the end of closing the issue of the bills, with signs of the topic closure already in evidence. In line 9, the judge's word "okay" was intoned with a strong indication that he was about to finish the topic. The fact that the defendant took her turn relatively late, at least in the judge's mind, became clear from the judge's words "Well, the defendant has still something". Similarly, the defendant seemed to recognize that the topic was about to close ("Only very briefly, that our...").

Moreover, it is evident that the defendant and her attorney were not used to co-operating in court, otherwise the attorney would have supported and accompanied his principal in her communicative efforts. He did help her in a small way to take the floor (Excerpt 8:37, line 26), however.

The marginalization of the defendant was indisputable. Given the fact that the judge had ordered her to be present, and that she won the case to a large extent, the ignoring of her initiatives is difficult to explain. Without more supportive data, such as sense-making given in the interview, attributing it to individual or gender-based motives could be risky. While lacking any hints from the judge's interview, I am not able to clarify the motives behind the judge's conduct. One way to try to understand it is to look at the interplay with the client from the perspective of the transformation of a dispute.

One of the most well-known studies on the transformation of disputes from experiences of wrong to a legal case was conducted by Felstiner, Abel and Sarat (1980-81). They propose a model of three developmental stages – naming, blaming and claiming – through which disputes pass in their early phases. Elaborating on this model, Conley and O'Barr (1998) focus their microlinguistic analysis on what actually happens in each stage, and on what events trigger the developmental transitions. At every stage, the interaction between the injured party and the ones to whom he or she is telling the story – his or her audience – transforms the dispute collaboratively. The experienced problem is articulated in the phases of naming and blaming, and the responsibility assigned – usually in collaboration with a friendly listener in an informal atmosphere. If the claiming has resulted in the accused denying his or her responsibility, the claimant may turn to the legal system which, again, involves retelling the problems to a new audience. Now the story must be retold to a potentially hostile opposing party in the professional world of lawyers and judges. There the law system requires a particular framing of the dispute: the blaming must be explicit and the claiming monetary (Conley & O'Barr, 1998, pp. 80–90). The product, a new account of the dispute, is jointly produced by the litigants and the legal professionals in the courtroom interaction.

Sarat and Felstiner (1995) studied the transformation of disputes in encounters between divorce lawyers and their clients. In terms of the three-stage model of the transformation of disputes, the interaction in the lawyer's office takes place on a stage where disputes evolve from blaming to claiming. Sarat and Felstiner found that the transformation of the dispute was a contest between competing discourses. Whereas clients typically framed disputes in terms of moral blame and legal rights, lawyers used a variety of linguistic strategies to recast them as battles over such tangible issues as houses, support payments and

visitation schedules. The linguistic strategies employed in changing the focus from moral to tangible issues included offering unsupportive or neutral responses to clients' rhetoric about blame, as well as ignoring the morality and blame by bringing the talk back to the legal process (Sarat & Felstiner, 1995, pp. 30–42).

The strategies mentioned by Sarat and Felstiner are recognizable in Excerpt 8:37 in the courtroom context. The plaintiff initiated a personal explanation about the condition of the apartment in lines 2–4, mainly blaming his ex-wife for making a mess in there. His blame was transformed into a legal statement by his attorney (lines 5–6) through the legal term “contributing”. Interestingly, the defendant's attorney, inconsistently with his professional status, also continued the discussion in a moralistic and blaming tone against the plaintiff (lines 11–12). The judge then pronounced his conclusion in legal terms, explicitly making the transformation from blaming to claiming (lines 16–19). At the end of the excerpt, the defendant initiated a similar explanation in which she mainly accused her ex-husband of ruining the apartment. This time, another linguistic strategy mentioned by Sarat and Felstiner (1995) was employed by the judge: the defendant's story was ignored and a new topic was introduced. In a similar way, the defendant's accusatory explanation in Excerpt 8:38 was ignored and bypassed.

The findings of my analysis seem to support the findings and conclusions of the studies mentioned above (Conley & O'Barr, 1998; Sarat & Felstiner, 1995). Both the plaintiff's and the defendant's initiatives in Excerpts 8:37 and 8:38 seemed to occur at the “wrong” stage. The blaming tone is expected to be filtered out, at least in the encounter with the attorney, and transformed into framed, monetary claims in the court. The professionals involved in Case 6 seemed to have few discursive tools with which to deal with the blaming in the courtroom. One of these was to try to develop and transform it by assigning it legal labels, which are more manageable in court. Another was to make personal comments on the relevance of blaming, and basically on the whole dispute. Yet another tool was to ignore and bypass the blaming.

Again, this is a question of learning: of finding new ways and new tools to interact and communicate in the preliminary hearing. Attorneys also have to look for fresh ways to work together and communicate with their clients. A client who is present and active in the hearing changes the traditional flow of communication between the attorneys and the judge. Interestingly enough, the phrases used in the course of court proceedings and in court documents to describe the division of labor between attorney and principal vary according to the presence or non-presence of the principal. If the attorney appears before the

court alone, without the principal, he or she is recorded as *representing* (or advocating for) the principal. An attorney who is in court with the principal is recorded as *assisting* him or her. According to the dictionary, synonyms of the verb to assist include to co-operate, to collaborate and to support. Concrete forms of assistance in the hearings are now under construction. This is a serious and highly interesting challenge for innovative learning.

From now on, the focus of my analysis will be solely on the effects of the initiatives.

All the pieces of evidence were presented and negotiated in *Phase 10*. Following the new procedural law, all the evidence should concern the disputed issues and nothing extra is admissible. In Excerpt 8:39, the evidence concerning the price of the motorbike is being negotiated.

Excerpt 8:39 Case 6, extended preliminary hearing

Judge: Is this evidence necessary?

Plaintiff's attorney: It's not necessary, especially since it 's admitted that the motorbike was sold for 19 000 marks.

Judge: For that very reason, too. We'll strike this out.

Plaintiff's attorney: Let's strike it out.

Plaintiff: Well, this same ad shows the general level of prices, they're around 20 000 marks.

Plaintiff's attorney: Well, then they're other motorbikes. This can be removed.

Plaintiff: Same brand, same age.

Plaintiff: But it can be removed.

Judge: Then, next is the sales agreement for the motorbike.

Here, the plaintiff seemed to disagree with the decision his attorney and the judge were coming to. He expressed two questioning initiatives in which he attempted to justify why the newspaper ad should be retained as a piece of evidence. These initiatives resulted in rejection by his attorney, who merely repeated the decision to exclude the evidence.

The executor of the partition³⁶ was heard in *Phase 11*. The plaintiff wanted to comment on a statement made by her, but was directed not to do so.

³⁶ With this term I refer to the person (usually an impartial lawyer), appointed by the court, who carries out the distribution of the matrimonial assets after a divorce.

Excerpt 8:40 Case 6, main hearing

Executor of the partition: There were three installments, each of 2110 marks. Isn't that right?

Plaintiff: Can I comment on this directly?

Plaintiff's attorney: No, no comments yet.

Judge: Let's not comment, just ask, although the executor of the partition is not a traditional witness like others.

This shows the client's initiative in commenting on what was said being rejected by his attorney, and immediately after that the rejection was rationalized by the judge. He advised the plaintiff that comments were not appropriate at that moment, only questions could be asked. The judge's explanation was: "although the executor of the partition is not a traditional witness like the others". This is, again, an example of a fracture in the process which was repaired through reflection. The explanation given by the judge was perhaps not very informative to the clients, but it was rather more understandable to the professionals. It was also problematic because half an hour earlier, at the end of the extended preliminary hearing, the judge had asked the principals to consider whether it was necessary to be present when the witnesses were heard, adding that "maybe it is good to comment when hearing the witnesses". This sentence may have given the parties the wrong idea of the clients' role in hearing the witnesses.

The instructive and educational aspects of such reflections were discussed in the analysis of Case 5, and their connection to clients' learning was pointed out. Excerpt 8:40 reveals the often incomplete and spontaneous nature of these reflections. They are not meant to be informative or didactic, yet they serve the function of making the proceedings more visible to the client.

A reflection with a more didactic emphasis occurred in *Phase 13*, just before a witness was called to the hearing room.

Excerpt 8:41 Case 6, main hearing

1 *Judge:* It's been suggested here that the paintings are not the ones that were
2 in your home.

3 *Plaintiff's attorney:* Yes, that's right.

4 *Defendant:* We also have pictures of the paintings.

5 *Plaintiff's attorney:* They should of course have been declared as evidence
6 in the preliminary hearing. Now they can't be included anymore, I suppose.

7 *Judge:* The pictures?

8 *Plaintiff's attorney:* Yes, or whatever they may be. I suppose we deal with
9 the case with the material we have here now.

10 *Judge:* Yes. But that doesn't stop Edelman [refers to the witness] coming
11 here with the paintings, does it?

12 *Plaintiff's attorney:* Of course not, he's welcome, that suits us.

Here the defendant expressed an extending initiative (line 4) when she referred to the photographs of the paintings as a possible proof of what paintings were at the home. This caused a fracture in the process which was repaired by the opposing side's attorney, who contested the idea of including the photographs but also explained that they should have been declared as evidence in the preliminary hearing (lines 5–6 and 8–9). Here, again, the plaintiff's attorney's reply was probably not purposefully didactic, but it served to make the formal procedure more visible.

In Phase 13, after all the witnesses had been heard, the plaintiff's extending initiatives caused one more fracture in the process (Excerpt 8:42).

Excerpt 8:42 Case 6, main hearing

- 1 *Judge:* Should we take a short break of ten to fifteen minutes before the
- 2 final statements?
- 3 *Plaintiff:* What appeared here was that these paintings are without the frames
- 4 and here I have Stockmann's estimate of the value of a 40 cm x 50 cm frame.
- 5 What I knew is that these frames were gold-covered wood.
- 6 *Plaintiff's attorney:* Well.
- 7 *Plaintiff:* I can leave this original here.
- 8 *Plaintiff's attorney:* It should have been left in the preliminary hearing
- 9 [slams the paper pile with his hand].
- 10 *Judge:* Well it can be...
- 11 *Plaintiff's attorney:* ## We're just making a verbal statement here.
- 12 *Judge:* ...It can be stated in the final statement that the witness was talking
- 13 about the value of the paintings, but that the total value was then
- 14 something else.

As the judge had already closed the subject after hearing the witnesses, the plaintiff surprisingly again opened up the issue of the value of the paintings. He said that he had a new estimate (lines 3–5), and also suggested submitting the estimate to the court, actually as a new piece of evidence (line 7). The initiative was, at first, rejected by his attorney (lines 8–9), but then the issue was both smoothed over and reflected upon by the judge (lines 12–14).

3 Summary of Case 6

Case 4 featured a client who complemented the professionals' discourse. Case 5 introduced a dispute in which attempts to influence the social reality forced the client to create strong discursive means for expansion. Case 6 showed us a talkative and interactive client who was allowed to speak perhaps surprisingly much. The discourse seemed to be a far cry from standard courtroom discourse.

In fact, Case 6 introduced two clients who made differing contributions. Those of the defendant were quite similar to those of the plaintiff in Case 4, although slightly more numerous. She expressed one extending initiative in the hearing, the others being mostly explaining initiatives and confirming initiatives supporting her attorney. The plaintiff, on the contrary, participated in the hearings very actively and his initiatives were extremely frequent. All of the initiative categories except expanding initiatives were represented, the explaining and confirming types being the most frequent. Again, his exceptionally active participation in the hearings challenges the informant position assigned to the client in procedural law. Whereas Case 5 featured a client who used strong, expanding initiatives, Case 6 challenged the conventional picture of the law by introducing a client whose initiatives were frequent. The plaintiff was not only asked questions, he also contributed himself when he needed to.

Case 6 was a dispute considered futile and pointless by all involved. Even the parties themselves saw the fruitlessness to some extent, but once the court process had started, they were engaged in claiming and defending. In general, the case represents court cases which are usually seen as not belonging to the courts. The court is seen as an inappropriate and incompetent institution to handle this kind of dispute in which the problems are only judicial on the surface.

Given these circumstances, the judge made an effort to get the dispute settled at the very beginning. When this failed, his intention was to deal with the troublesome case as quickly and simply as possible. From this point of view, the traditional script for proceedings in which the client does not talk would have been the most convenient.

The plaintiff, however, followed the opposite script. The discursive tools that he employed when participating seemed to be almost the same as those that are used in everyday conversation. Here lies a clear difference between Cases 5 and 6. In Case 5, the discourse required new, strong discursive tools because it was not ordinary everyday discourse, and because the plaintiff did not want to reside in the traditional role of a court client. In Case 6, the mode of interaction resembled everyday discussion and the client could manage with the discursive tools he was already familiar with. In fact, it seems that everyday talk itself was the plaintiff's tool for participation, as were the strong discursive tools of the client in Case 5.

When examining the transformation of disputes, Conley and O'Barr (1998) noted the different speech used in the phases of naming and blaming when the experienced wrong was explained to co-operative and friendly listeners, compared to the formal, judicial speech used in courtrooms to insensitive or even hostile listeners. In Case 6, the choice of a strategy of everyday explanations and

blaming in the courtroom seemed to be, at the same time, both unproductive and successful. On the one hand, the client's initiatives were rejected, his talk was twisted to fit the judicial format, and the judge became frustrated. On the other hand, the client could take the floor and present his viewpoints relatively often with his everyday talk. It was not only the interaction data, but also the supplementary interview data that gave support to the idea that the plaintiff succeeded in presenting his own viewpoints.

Excerpt 8.43 Case 6, interview with the plaintiff after the preliminary hearing

Interviewer: When you held the floor, did you think that you were being allowed to present...

Plaintiff: ## Of course, there was no problem there. This was informal discussion, so you could basically explain as much as you wanted.

As in Case 5, the plaintiff in Case 6 was satisfied with the opportunities he was given to speak. Again, this deviates clearly from the accounts given by clients involved in proceedings before the reform.

The greatest challenge for the judge and other legal professionals in Case 6 was how to organize the plaintiff's rambling speech flow. It seems that the legal professionals were poorly equipped to manage the client's speech, and lacked the tools for constructive control. His words were partly rejected or bypassed, and partly allowed to flow in a way that seemed to irritate and frustrate the judge in particular. In order to avoid the frustration, it would appear to be important to create and implement new tools for managing cases in a more expansive way. The trend towards more actively participating clients seems to require tools that help the participants to submit the script of the proceedings for a joint reconsideration. Embryos of these expanding tools can be seen in several episodes in which the script was reflected upon and made explicit to the participants.

At the same time as featuring an unusually active and talkative plaintiff, Case 6 also introduced a defendant who took the position of an outsider, and whose rare initiatives were bypassed and marginalized. Paradoxically, in addition to needing more elaborated tools for managing extremely active clients, courts seem to lack tools for catering to clients' more tentative contributions.

Unfortunately, the interview data do not give any direct reasons for the defendant's retiring and minor contribution in the hearing. One possible explanation may, however, be gleaned from her interview, in which she described her general aversion to and exhaustion with all the conflicts with her ex-husband.

Excerpt 8.44 Case 6, interview with the defendant after the preliminary hearing

Defendant: You asked why I don't like the hearings. I really don't like those occasions. I just stay here at home and look at my kids and think about them. It's all about them, about these kids. And those strange people decide something on the nod. Jani [refers to one of the children] has nightmares, he wakes up wet, comes to my bed and I just say again and again "Don't be afraid, no one is coming to our house". After all this I think it's totally ridiculous that I have to sit there [in the court]. All those strangers, how dare they! They're just doing their job and they get paid for that.

Interviewer: Are you talking about the attorneys or...?

Defendant: ## All of them. All this rigmarole. Everything.

The effects of the plaintiff's initiatives in Case 6 are summed up in Table 8.13. These initiatives were restricted or bypassed six times. While the effects in Case 5 were more in the form of bypassing than rejecting, there were more rejection than bypassing in Case 6. The plaintiff's initiative led to a fracture in the process ten times altogether. Seven out of the ten fractures were repaired through reflection on the proceedings, the rest by being smoothed over interactively. Instructional tools for explicating the procedure to the client were used not only by the judge, but also by the plaintiff's attorney several times (e.g., Excerpts 8:40 and 8:41). Although more short-run and accidental than in Case 5, the momentary reflections again served, in an embryonic form, an educational function in the proceedings.

Table 8.13 The Effects of the Plaintiff's Initiatives in Case 6

Initiative	Rejecting without explanation, bypassing	Fracture in the process		Change in topic	Going beyond the script, change in understanding the dispute
		Repair by smoothing over	Repair by reflecting		
Expanding					
Extending	2		6	5	
Questioning	4	1	1	3	
Restricting		1	1		
Total	6	2	8	8	

Six initiatives in Case 6 resulted in a new topic. The condition of admission to that effect category was set relatively low: the client did not have to offer a totally new topic, and a new point or detail was deemed sufficient if the others started to follow that instead of the previous topic.

Of the defendant's two topic-changing initiatives, one was bypassed and the other one led to a fracture, repaired by reflecting.

The effects of the explaining initiatives are of particular interest in this case as they were the clients' most typical way of contributing to the proceedings. The plaintiff's explaining initiatives were likely to be responded to in a way that maintained the topic, whereas the defendant's initiatives were more likely to result in the closure of the topic. This finding suggests a need to create new tools for interacting and collaborating with clients in hearings.

All in all, the plaintiff in particular was able to influence the flow of the discussion, and even to modify the topics according to his own interest. If not introducing a new topic, he could at least initiate fractures in the process that had to be repaired. On the other hand, the clients' initiatives were also rejected and bypassed, sometimes even in a hostile manner.

Case 6 shows up the tension between different interests in court proceedings. The interest of the court is to ensure quick, effective and reliable proceedings. The interest of the client is to be heard, to participate, and to have an impact on his or her own court proceedings (Tyler, 1990; 1997; Vidmar 1997). With its high frequency of client participation, Case 6 pushes this tension to its extremes. As court clients cannot be selected, nor their needs easily altered, developing interaction in the hearing remains a task for the courts and their judges. Thus it would appear necessary to develop tools for channeling the interaction in a constructive way as the number of active clients will probably increase.

8.9 Conclusions

This analysis of client initiatives in courtroom interaction was fruitful in uncovering their contributions to the hearings. All of the clients in the hearings conducted after the procedural reform participated in the discussion at least a few times. This means that, unlike in the proceedings before the reform, all of the clients who attended the hearings also made some verbal contribution. In addition to the more traditional situation in which the client mainly complemented the professionals' talk, numerous and diverse clients' initiatives were also found. Thus the clients attempted to expand, extend, question or restrict the dispute, or to maintain its ongoing course through contesting, alleging, correcting, explaining, confirming and stating. Their initiatives were sometimes rejected

or bypassed, and sometimes they opened up a new topic in the discussion. Most often they caused a fracture in the process, which had to be repaired by the professionals either by reflecting on the procedure or by smoothing it over. When explicating the proceedings and procedures, the professionals contributed to making the court process more visible or transparent for the client, and thus strengthened the instructive and educational function of the proceedings.

The findings show that clients can use everyday talk in courtroom interaction, but their talk may be put into a legal format by the professionals. However, making strong, expansive attempts to change the participants' understanding of the dispute seems to require from the client the employment of especially advanced discursive tools, such as surrounding the obligatory responses with initiatives, turning answers into questions, questioning the presented questions, and addressing questions to the witness.

In the procedural law and its preambles, the task of the principal has been defined mostly as that of an informant complementing the professionals' discourse if needed – no further elaboration on the role is offered. The findings of my analysis imply that the principals' contribution in the hearings is in giving information, but also much more. The principals may be active participants who attempt to have an effect on the dispute and its construction during the proceedings. These findings encourage studies of court hearings as communicative processes where the dispute is transformed from claims to a decision or settlement. For the legal professionals this sets a remarkable challenge to learn from and develop trials as processes where the dispute and the script for the proceedings are negotiated between the participants.

What kind of picture do the findings draw of the future development of civil proceedings in courts of law? The zone of proximal development for Finnish court hearings may be described as a matrix of four fields (Figure 8.1), where the formality – informality of courtroom interaction is one axis and the client's contribution as adaptive or expansive is the other.

The one extreme on the horizontal axis, formal interaction in the hearing, is detectable in existing studies in which courtroom interaction is typically described as strictly ordered, its turns carefully sequenced, and the question-answer structure as predetermined (e.g., Conley & O'Barr, 1998; Hayden, 1987; Välikoski, 1996). The other extreme on this axis, informal interaction, seems to violate these traditional rules. Several deviations from the traditional rules were found in the preliminary hearings of my data. The order of speech turns was not rigorously controlled by the judge, and the participants took the floor without asking or being given permission. Overlapping speech and interruptions occurred frequently. A blurring of the methodological initiative-response distinction used in the analysis can also be seen as indicating the presence of

informal, everyday talk where the initiatory and responsive elements are intertwined and the border between them hard to define (on the artificiality of the coding, see Linell, 1998, pp. 178–179). Equally, the frequent use of “minimal confirmations” (turns such as “yes”, “that’s right”) contributes to making the interaction more informal. Especially in Case 6, many of the plaintiff’s confirming initiatives were minimal confirmations which are not typical in courtroom interaction, but assure the understanding of speech and thus make the interaction more fluent.

The vertical axis in Figure 8.1 describing the clients’ contribution on a general level was derived by applying the criteria I used when categorizing the clients’ initiatives. Those that merely maintained the prevailing topic are interpreted here as adaptive, and those aimed at changing the topic are considered expansive, expanding initiatives being at the highest extreme.

The client in Case 4 was most adaptive, her initiatives being solely topic-maintaining. The interaction in the hearing diverged from the most formal aspects of traditional courtroom interaction but lacked the most informal elements, such as minimal confirmations and continual overlapping. Case 5 was similar to Case 4 with regard to the formality of the interaction in the hearing, but the client’s contribution was expansive, featuring several expanding initiatives connected to strong discursive tools.

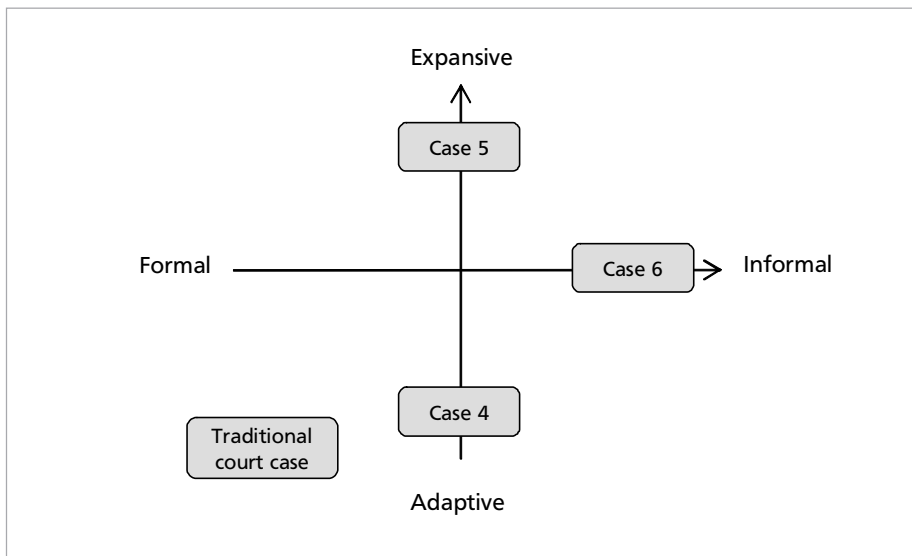


Figure 8.1 *The Zone of Proximal Development in the Finnish Court Hearings*

The clients' contributions in Case 6 were on the borderline between adaptive and expansive. The clients mostly adopted the role of an informant with their numerous explaining initiatives, but also made some attempts to alter the dispute with topic-changing initiatives. The interaction in the hearing was strikingly informal.

The cases analyzed illustrate a future characterized by growing activeness among clients, in both the intensity and quantity of their participation, and a move towards more informal communication between clients and legal professionals. Apparently, along with the new civil procedure and new practices in conducting the proceedings, the dialogic and interactive elements in the hearings have increased, not only among the legal professionals, but also among the clients. However, it also seems clear that the legal professionals do not yet have new tools that are sensitive enough to respond to the challenges imposed by different client and case types. These cases point at least to the need for tools for mobilizing the client to participate alongside the legal professionals (Case 4), for tools for taking into account the alternative ways of understanding the dispute expressed by the client (Case 5), and for tools for controlling and guiding a talkative client in a way that serves both the rational establishing of the case and the client's need to be heard (Case 6).

My hypothesis concerning the zone of proximal development (Figure 8.1) contributes to the more general discussion on expertise in courts by addressing the division of labor between the clients and the legal professionals in court hearings. The findings of the initiative analysis show that clients are interested in and capable of contributing to and affecting the dispute resolution, which signals a potential shift in collaboration between clients and legal professionals.

A qualitatively new kind of collaboration between clients and professional was outlined by David Tuckett and his colleagues, who interpreted the interaction between doctors and patients as negotiations to which both parties bring expertise of their own: the doctor's expertise based on knowledge of medicine and the client's expertise based on his or her own experience (Tuckett & al., 1985). Likewise, Ritva Engeström (1999a; 1999b) analyzed the encounters between clients and professionals as joint problem solving, where negotiation aims at combining the knowledge of both. In the process of problem solving in doctor-patient encounters, the question-answer structure, typical of the clinical interview, collapses and questions such as what knowledge is relevant, and what issues the patient wishes to include and exclude become negotiable. Similarly, the findings of my initiative analysis support the idea of the court client employing and developing his or her own expertise when participating in constructing the case and in negotiating what is important in it.

My findings also challenge approaches which simply emphasize professionals' power over clients. While certainly subordinated to some extent, the clients also had their moments of power when they structured the flow of the speech or examined a witness. The findings strongly suggest that the dichotomy of the powerful and the powerless is inadequate. Instead of looking for power as connected to certain institutional roles or practices, we might try to understand it as being continuously produced in social interaction in a dynamic, fluid, and contradictory way. What Sarat and Felstiner argue about power in lawyer-client interaction also holds for courtroom interaction: "Power in lawyer-client interactions is less stable, predictable and clear-cut than the conventional view would have us believe. Power is not a 'thing' that can be possessed; it is continuously enacted and re-enacted, constituted and reconstituted" (Sarat & Felstiner, 1995, p. 22). Like lawyer-client encounters, the activity in court hearings emerges as "ongoing, varied, changing efforts to negotiate shared understandings" (ibid, p. 144). As Sarat and Felstiner point out, the negotiation of meaning is rarely neat and orderly.

"Conversations are started but often are never completed; agreements are reached, only to unwind rapidly. In this ambiguity and circularity, drift and delay, and in the accompanying negotiations of meaning, power is exercised and resisted. The subjects of these negotiations cross the boundaries between law and society and intermix the social world of the client, legal world of divorce, and the nature of professional services." (p. 144).

What, then, would be the upper-right field in the four-square matrix (Figure 8.1) to which the overall constellation of the analyzed cases seems to point? What would be the expanded practice toward which certain initial elements seem to emerge in the clients' initiatives and their effects in the court hearings? The zone of proximal development appears to offer a way of working in which the client neither gets marginalized nor dominates the process, but collaborates as an equal partner with the legal professionals. He or she is both heard, and hears important aspects that may affect his or her own way of understanding the case. The judge is given important information and, considers the client's own viewpoints of the case and the proceedings.

Developing informal discussion and negotiation appears to be a well-grounded way of working, also stressed in the procedural justice approach. Messmer (1997, pp. 154–156) in particular emphasized the communicative nature of justice and legitimacy: justice is always negotiated and arises as a product of mutual understanding between parties. Laukkanen (1995, pp. 195, 213–215) emphasizes discussion and informality as the basis of authority and the origins of trust in a modern court. Tyler (1990) concluded that the quality of proceed-

ings and experiences of justice are closely connected to how people obey the law. Developing interaction in hearings may be of crucial importance if we wish to influence clients' compliance and hence also the future workload of the courts themselves.

New tools and models for courtroom communication are needed for this new kind of collaboration with clients. Clients are currently responded to by judges mainly in ways that are situationally and individually determined, and that lack collective reflection on their accuracy and meaningfulness.

The change that is taking place is emergent. Both the clients and the legal practitioners at the local level are working in search of new ways to communicate. The initiatives expressed by clients and the ways in which practitioners respond to these initiatives, sometimes accommodating them, sometimes ignoring them, are evidence of the changes in the activity of district courts. A need and an opportunity for expansion was signalled in these practices.

The change in the way in which courts work with their clients cannot be understood only in terms of adapting to the procedural reform. It can also be understood as an ongoing process of implementation in which learning and expansion may take place.

This potential expansion would mean re-consideration of the object – the client and his or her problem – as a collaborative problem-solving unit where the client is no longer a passive target of court measures but more of a subject-like partner. It would also mean a new definition of the traditional rules governing collaboration in courts, including the division of labor and the tools and models used in court work. This kind of systemic re-orientation cannot be a task of individual practitioners, however, since it requires collective visualization and reflective dialogue within the whole work community of a district court, and between district courts. The different ways of working with clients are an important source of expansive learning when put under scrutiny and joint reflection in the service of collective work redesign.

9 Settlement as a Window on Change in Court Activity

9.1 Introduction: Court Activity as a Context for Courtroom Discourse

In the set of four empirical chapters of my dissertation, this final one focuses on the settling of civil cases inside the courts. In the procedural act of 1993, the courts were given the obligation to attempt to persuade the parties to settle. Settlement as an alternative outcome to traditional verdicts is examined in the analysis as a window on qualitative changes in court activity, informing us about the developmental dynamics and potential in the courts.

In this chapter, I will suggest that a transition is taking place in the activity of the lower courts: alongside the traditional idea of finding the material truth, an alternative understanding is developing in which the outcome of the proceedings appears as a compromise that satisfies both parties. As far as actual court cases are concerned, this transition materializes as a gray zone – a tension-laden and contradictory field of talk and actions. The empirical analysis focuses on the particular episodes in the hearings in which a settlement is discussed or touched upon. The data used was videotaped courtroom interaction supported by interviews with those involved in the videotaped cases.

How, then, can one study and interpret data that record and describe human interaction and discourse? I will endeavor to overcome the distinction between the micro-analysis of legal discourse and the macro-analysis of legal institutions by introducing the notion of an *activity system* as a unit of analysis, giving context and meaning to seemingly random events. In the same connection, I will evaluate more closely the relationship between discourse and productive activity, especially in the court setting. Human activity will be studied as constantly changing through its inner contradictions.

Traditional Studies of Legal Discourse: An Example of CA

One of the traditions in analyzing legal discourse is conversation analysis (CA). An example of this approach is given in Atkinson's article (1992) on informal court proceedings, in which the topic comes close to the themes of my study. Atkinson's basic findings are that the parties may speak relatively freely and produce non-minimal answers to questions in informal courts, whereas in other types of court, non-minimal answers attract a hostile or impatient response by the legal professionals (Atkinson, 1992, pp. 200–204). He shows how small claims court arbitrators systematically try to display neutrality by avoiding overt hostility and the kind of affiliation typical of everyday conversation. He also connects the techniques of displaying neutrality to the role of arbitrator and to the systemic differences between informal and formal court proceedings (pp. 210–211).

Atkinson's article is powerful in showing how the use of recipient markers and a particular recurring sequence are essential for allowing small claims court proceedings to be designated as informal. Similarly, it shows how the formality of other types of court is locally constructed through the participants' own actions in the interaction. On this local and situational level, the analysis is coherent and systematic.

However, the author is more vague in describing the relationships between the talk and the work of which it is part. He does not acknowledge the different motives and different logics of traditional court proceedings and the alternative informal proceedings. Instead, he compares institutional courtroom interaction to the rules of everyday conversation. Informal justice is taken as a non-historical and non-problematic phenomenon. Yet, we know that courtroom conversation is part of the actual proceedings in which the court produces a certain material outcome, a decision, which is to finish the court case and to say what is right and legal in this particular case. By giving the verdict in the individual case, the court is simultaneously fulfilling its societal task of solving disputes and maintaining law and order in society. Recently, the practice of giving the verdict has been challenged by that of negotiating a settlement. Today, the organization of justice is very much in transition (Heydebrand & Seron, 1990; Palmer & Roberts, 1998; Zuckerman, 1999). The findings of different studies concerning procedural justice in formal and informal court proceedings are not linear, nor do they suggest any self-evident preference between these two (for example, Vidmar, 1997; Wissler, 1995). How should one include in the analysis the perspective of productive, socially important, practical performance?

The Activity System as a Context

Lave (1988) analyzed the restrictions of current ways of defining contexts. According to her, the determinist environmental view of contexts as containers of behavior leaves almost no room for the human construction of novel contexts. The standard cognitivist view easily excludes the societal and cultural aspects in its depiction of mental models and cognitive structures as the context of problem solving and thinking. Various phenomenological and ethnomethodological analyses, on the other hand, focus on interaction, defining contexts as social situations or fields of discourse. Contexts are seen as interpersonal constructions, and often as purely linguistic entities independent of material practices and socio-economic structures (Lave, 1988).

Engeström (1993) points out that in all the notions of context Lave criticized is a deep-seated common feature: individual experience is analyzed as if consisting of relatively separate and situational actions, for example conversational turns. The given objective context is described as something beyond individual influence, if described at all (Engeström 1993, p. 66). Cultural-historical activity theory attempts to analyze the relationship of practical actions to the broader cultural, social and physical context of which they are a part. The approach emphasizes the fact that contexts are constructed by humans and are not beyond our influence, although not often directly or visibly molded by our actions. A prolonged and closer look at the legal institution, for example, reveals a continuously constructed collective activity system (Engeström, 1993; Leont'ev, 1978).

Cole (1996, p. 135) also criticized the definition of context as that which surrounds, often represented as a set of concentric circles. In these models, the more inclusive levels are considered to constrain the lower levels. According to Cole, no unilinear relation or temporal ordering between the event and its context exists. Instead, context creation is an actively achieved, two-sided process, taking place before, after and simultaneously with the event. Referring to the metaphor of a rope, he describes the relation between the event and its context as *a weaving together*. The boundaries between the task and its context are ambiguous and dynamic.

In terms of activity theory, contexts are neither containers – something that is given and surrounds us – nor situationally created interactive spaces, produced entirely locally by the participants. The activity system is a self-organizing system which creates its own context. It constructs itself locally, but not only by local means. It makes itself durable by means of mediating artifacts, which we use in our activity, and which carry history and culture within them (Cole, 1996). Moreover, as Latour (1996) points out, it is the object and artifacts that make

human activity durable. In this sense, the activity theoretical approach transcends the limits of many interactional and phenomenological theories that take the situation as constructed here and now by the participants as the only context.

While activity is a theoretical concept, the activity system is an analytical one defining the unit of analysis. A model of the activity system was presented in Figure 5.1. It is used later in this chapter to give context to the situated practices. When the settlement-related discourse in the interaction of a specific case is analyzed, it is described as an accomplishment of the *multiple activity systems* of the court, the attorneys and the clients.³⁷ This is followed by a general analysis of the settling practices from the viewpoint of court activity alone.

Activity systems, for instance different kinds of organizations and institutions, emerge in order to produce goods, services and other outcomes for customers and users. Studies of talk and communication in some institution or organization should take into account the fact that “organizations may emerge through conversations, but they do not emerge for the sake of conversation” (Engeström, 1999c, p. 170). In this sense, the notion of activity offers a way of linking communicative events to the contexts in which they occur. In discourse studies, the utterances and their analysis as such easily become the main purpose. Analyzing the utterances within the framework of the practical object-oriented activity helps one to see the wood for the trees.

What, then, is the relationship between practical activity and discourse? Are they more or less the same phenomenon? One possibility is to make the tricky questions disappear by proclaiming that speech actions and physical actions are essentially similar discursive practices. However, it may be more useful to assume that there are different types of “distances” between practical activity and discourse (Engeström, 1999c, p. 171). Phone calls between friends, for example, would represent one end of the spectrum, where talk and practical activity seem entirely divorced. Most activities stay in the middle of the spectrum, where practical activity is accompanied and complemented by talk. At the other end are cases in which practical activity and discourse seem to merge and to become almost the same, as in the auctioneer’s work, for example. Practices in legal proceedings come close to this: a court case is, to a great extent, conducted through talk, argumentation and negotiation. The practical activity of legal professionals in the court setting is mainly accomplished through talk and text.

³⁷ Attorneys in Finland are not officers of the court in the same sense as in the USA, for example. Due to their more separate role, they are treated as a separate activity system in my analyses.

Methodologically, this means that discursive data become the main source of information in studying court proceedings and the work of judges. Besides the recorded data concerning the talk in interaction, the gazes, gestures and motor movements of the participants may also offer significant information about the proceedings (Goodwin, 1981). Yet, even if talk in the courtroom provides the main empirical data, putting emphasis on the productive and practical aspects of the activity invites the employment of complementary sources, such as interviews and participant accounts, court documents produced during the proceedings, and historical data.

9.2 Court Work Activity in Transition

The activity system model represents the ideal type of any activity system, but does not yet reveal how the elements and structure of the activity change and evolve in the course of time. When concrete data is analyzed, the elements of the activity system and the relationships between them do not appear stable and clear-cut, but the theory rather emphasizes the constantly evolving character of concrete systems. Troubles, tensions and disturbances in everyday practices belong to the nature of such systems and are, in fact, potential indicators of change and development within the one in question. The theoretical tool for making sense of empirically observable disturbances is the concept of contradiction. Contradictions are understood as the basic mechanism of development and change. They are not accidental problems or conflicts, but systemic tensions between and within the elements of the activity system.

Methodologically, the focus on change and development in activity systems, rather than on stability, promotes the building of “windows” onto the ongoing changes in the activity. Analysis of disturbance-related actions or turns in interaction offers an opportunity to ask, “what dynamics and possibilities of change and development are involved in this action?” (Engeström, 1999, p.180).

One manifestation of the ongoing change in the activity of Finnish district courts is in the settlement reached as an alternative solution to the dispute. This way of settling disputes is a relatively new practice here, introduced as a possible alternative to traditional adjudication in the procedural court reform of 1993. Even before that, there was a clause in the Code of Judicial Procedure guiding the judge to persuade the parties to settle, but this was seldom applied in practice. Current norms state that “the court shall endeavor to persuade the parties to settle the case and, under its own discretion, present its suggestions for an amiable resolution of the case in order to further the settlement” (Code of Judicial Procedure, 5:26). Negotiations leading to settlement most likely take

place in the context of a preliminary hearing, the interaction in and physical setting of which are illustrated in Figure 9.1 (for the structure of the new proceedings, see Chapter 2.2).

Since 1993, judges have begun to follow the new rules and to create a new practice and legal culture where they can, instead of giving a verdict, negotiate a settlement with the parties. This change is neither technical nor judicial, but cultural and practical: it requires a shift in the traditional way of thinking and of conducting the proceedings (Laukkanen, 1995; Virolainen, 1988). The motive for adjudication is to make the right decision according to the law, whereas the motive for settling the dispute is to find an outcome that satisfies both parties.



Figure 9.1 *The Physical Setting of a Preliminary Hearing*

Literature on alternative dispute resolution has stressed the differences between traditional litigation and alternative forms. In a wider philosophical context, the two forms of conflict resolution could be viewed as representatives of two types of social order (Nader, 1969). Systems of social control vary from governmental third-party control on the basis of legal rules and systems to “order without law”, where people govern themselves according to informal rules and contracts. The interplay between informal social control and legal systems is an overarching topic in social and legal sciences (see for example, Ellickson, 1991; Black, 1989).

Pia Letto-Vanamo (2001, p. 39) refers to the historical alternation of different forms of social control in Finland. Nowadays, we tend to view settlement as a new alternative to counteract the defects of contemporary litigation, which we now understand as the standard. A longer perspective reveals, however, that what we regard as normal is merely one phase in the history of court systems. Litigation relates to the modern understanding of justice and decision making, and settlement and alternative dispute resolution to post-modern understanding. Yet, settlement was also the predominant form of conflict resolution in pre-modern forms, understood as collective justice among local communities, oriented to verbal communication instead of normative texts, and negotiated instead of ordered (Letto-Vanamo, 2001, pp. 57–58).

The current interest in alternative forms of dispute resolution has arisen mainly from two sources. On the one hand, settlement has been viewed as a way to improve the quality of conflict resolution through proceedings that enable the parties to maintain their relationship and continue possible co-operation. On the other hand, it has also represented a means of rationalizing and streamlining court proceedings. While settlements have been appreciated for their significance in maintaining the self-control of the parties, the discussion has often been driven by criticism of traditional litigation and by a search for new alternatives.

Recent developments in western legal systems have nevertheless been interpreted as a process in which the forms that originally substituted governmental dispute resolution have become a part of the governmental system itself, and of its technocratic efforts to cut costs and rationalize (Heydebrand & Seron, 1990; Palmer & Roberts, 1998).

From the practitioners' point of view, the essential question is how the logically different motives of traditional adjudication and the search for compromise can be combined in the everyday work practices of courts. The first experiences of making a settlement raised a number of questions in debates in Finnish legal journals (see Haavisto, 2001). Is the main purpose of the civil proceedings to give a verdict or to find a compromise? Does the content of a settlement have to correspond to the materially correct decision? If a judge tries to settle the case but fails, can he or she still give a verdict? Can promoting settlements and giving verdicts be tasks of one and the same institution? These questions are important to practicing judges who have to resolve them in their everyday actions while working on cases. At the same time, they lead to more theoretical issues concerning the borderline between the two different forms of social control within one organization.

A Shift from Material Truth towards Negotiated Justice

My hypothesis is that, in Finnish litigation, there is an ongoing transition from the traditional idea of material truth and a substantially correct decision towards a more pragmatic and relative idea of seeking a negotiable compromise. Behind the key principles of orality, immediacy and concentration, and the new practices in the preliminary hearings, lies one of the most fundamental changes which is probably the alternative to make a settlement, and which strongly questions the previously governing idea of material truth in a case. This possible shift is depicted in Figure 9.2.

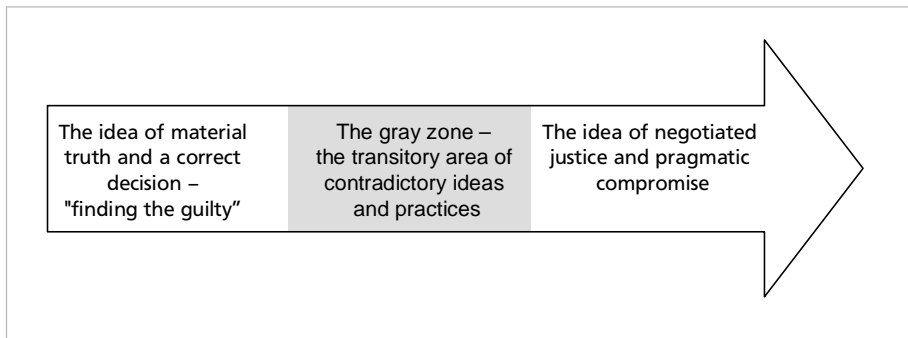


Figure 9.2 *The Shift from Material Truth towards Negotiated Justice*

In practice, such a transition is never linear from one pure form of activity to another. On the contrary, the transition is complex, hard to predict and not totally controlled. In the middle of the continuum emerges a “gray zone” of practices with tensions, disturbances and innovations³⁸. Typical of the gray zone is the intertwining of old and new practices and logics. My hypothesis does not claim that searching for substantially correct decisions could be replaced by negotiated compromises. Rather, the shift seems to indicate that various layers, and thus various and alternative practices, are emerging in dispute resolution.

³⁸ Ellickson (1991, p. 131) describes hybrid systems of social control, which are combinations of different kinds of controlling rules and sanctions. For example, a judge may use state enforcement to enforce the decision in a case, but personal ethics – not governmental laws – in making it. The idea of the gray zone, in which different logics and practices are combined is in tune with the notion of hybrid systems. However, the gray zone emphasizes the transitory, developing nature of practices.

The ongoing transition – the historical layers and the possible shift between them – forms the zone of proximal development in court work (on the notion of the zone of proximal development, see Engeström, 1987). It suggests a potential developmental transition from one historical form of activity towards another, in which the object of the activity changes. A corresponding developmental hypothesis concerning problem solving in medical encounters was put forward by Ritva Engeström (1999a, p. 99). As she points out, the meaning of this kind of hypothesis is to serve as a framework for interpreting the empirical observations, and to describe the activity as an ongoing historical process with a past and a future (pp. 99, 101).

The gray zone in Figure 9.2 refers to the concrete practices that need to be learned and created when moving on in the zone of proximal development. It refers to the undefined and unexpected situations in the daily encounters between the courts and their clients, which constantly bring forth developmental tensions of their own, requiring concrete solutions.

Placing settlement in the gray zone helps us to understand it as an important learning challenge, requiring the creation of and experimentation with new ways of working. One problematic question concerns what the clients expect from the court system - judicially justified decisions or negotiated compromise? Traditional adjudication and aiming at the correct decision are, as is well known, expensive, slow and often inconvenient for the client. On the other hand, clients may feel suspicious about settlement, and prefer the traditional idea of “finding the guilty” to dealing with compromise. This is closely connected to the debate on the advantages and disadvantages of alternative dispute resolution (see for example, Tyler, 1997; Vidmar, 1997; Menkel-Meadow, 1991; Lind & al., 1990; Kressel & Pruitt, 1989; McEwen & Maiman, 1984). Settlement appears as one way to address problematic issues concerning what the clients expect from the court system, and how to find new ways of responding to their expectations and communicating with them.

Settlement as a new rule to be implemented offers a good opportunity to study the developmental potential of court work because systemic contradictions are likely to become manifest in settlement negotiations. This brings us back to the fundamental question about change, already dealt with in previous chapters. Is the development toward favoring settlement a cosmetic change, consisting of rationalization efforts (Heydebrand & Seron, 1990), or does it also include attempts to offer qualitatively different legal services to citizens and to contribute to fundamental changes in the court system (Palmer & Roberts, 1998)?

Traditionally, administrative rationality has dictated the implementation of a reform as occurring from the top down; from the plans made in the administration to the actual implementation by the practitioners in everyday work (for a more detailed discussion on implementation, see Chapter 3). In practice, changes are never readymade for the practitioners, not even when they are ordained by legislation. Nationwide changes in civil procedure are interpreted and constructed in the activity of participants in actual local court practices. The change is not given in the beginning, it is defined and made visible by the practitioners themselves. This perspective calls for discovering the initiation of change by studying actual work processes. The present analysis is an attempt to give a more specific and concrete shape to the developments taking place, and to study how the implementation of procedural rules concerning settlement take shape in everyday work on specific cases.

9.3 Cases and Data

The analysis presented in this chapter is based on the cases that represent the reformed civil proceedings (Cases 4, 5 and 6). The data was gathered in 1997 and 1998 and consists of videotaped or audiotaped preliminary hearings and interviews with the clients. A brief introduction to each case is given at the beginning of the respective section. The cases are introduced in more detail in Chapter 5.

The focus of the analysis is on the sequences of interaction in the preliminary hearings in which the settlement is discussed or touched upon³⁹. Thus, the empirical unit of analysis is an *episode* which relates to settling the dispute. Following the method suggested by Ritva Engeström (1999a, pp. 135–137), the episodes were defined on the basis of the topic and the collective construction of the discourse. First, the topic of the episode had to be oriented towards the issue of settlement. Settlement, or more often, the possibility of settlement, was either discussed explicitly or touched upon indirectly, for example through the questioning of traditional adjudication (see Case 6). Secondly, the discourse oriented towards settlement had to be produced collaboratively by at least two participants. Thus, the accidental mentioning of it in an individual turn, which did not become the topic of the participants' discourse, was not considered a settlement-related episode.

³⁹ In this analysis, the focus is only on the preliminary hearings, since attempts to reach a settlement are most likely to take place there. However, in Case 5, a proposal for a settlement was also made by the judge in the main hearing. This episode is not included here.

9.4 Three Discourses on Settlement

I will begin by presenting one episode from the data representing the proceedings before the procedural reform of 1993. This episode is the only one in the old hearings which dealt with the possibility of settlement.

Excerpt 9.1 Case 2 (Cancellation of an employment contract) 3rd hearing, August 1990,

Judge: Well you have tried to reach a settlement, wouldn't you say?

Plaintiff's attorney: Well, Your Honor, unfortunately we have not.

Judge: Was there any serious effort?

Plaintiff's attorney [slightly laughing]: Well, not really a serious effort. The gap is so wide, from zero to what is being claimed.

Judge: I see.

When interviewed, the plaintiff's attorney interpreted the judge's question as "just a remark thrown in the air". The discourse in the episode seems to validate his observation that the question was not meant to be the beginning of serious negotiation on settling the dispute in court. As the only episode related to settling the dispute in all of the pre-reform data, it also provides evidence for the claim that the paragraph of the 1734 Procedural Code concerning settlement (Chapter 20 section 2) was a dead letter.

Next, I will introduce excerpts from three different civil court cases handled in the Vantaa District Court in 1997 and 1998. As the Code of Judicial Procedure presupposes, the possibility for settlement was discussed in all the observed proceedings. The point of time at which it was taken up varied from the very beginning to the end of the proceedings.

Case 4: "If you end up with a settlement, we also welcome that solution"

Case 4 was about construction defects, dampness damage and mildew problems in the plaintiffs' apartment. A family had bought an apartment from another family some years previously. Now the first family wanted to revoke the contract or, alternatively, obtain a reduction in the purchase price and receive compensation. The sellers of the apartment claimed that they were unaware of any construction defects and, on the contrary, accused the plaintiffs of having contributed to the damage themselves. The case was expanded when the defendants summoned to court the person from whom they in turn had bought the apartment. These two cases were handled together in the proceedings.

Case 4 was dealt with in the district court between October 1995 and June 1997. There was an exceptionally long written preliminary phase, during which the parties argued by writing briefs. The two-day preliminary hearing was held in January 1997, and a postponed preliminary hearing of one day in May 1997. Three days were reserved for the main hearing in September 1997, but the case was settled in June 1997 in the course of negotiations between the attorneys. The appended case [hereafter Case B] between the sellers of the apartment and the person from whom they had originally bought it, was settled in April, also through the efforts of the attorneys. In the hearings, in addition to the district court judge and the court clerk, the attorneys of all the parties were present. The plaintiff was present in court for one day in the course of the preliminary hearing.

The issue of settlement was mentioned every now and then during the proceedings, often introduced by the defendant's attorney, but it seemed unlikely because the parties disagreed about almost all the details in the case. In contrast to the other preliminary hearings in my data, this one started with a script explicated by the chair (see Chapter 7). In this script, settlement was not scheduled for discussion at the beginning of the hearing, but the possibility arose unexpectedly at the very end when the judge was in the act of finishing the proceedings. The following excerpt was part of that episode.

Excerpt 9.2 Case 4, postponed preliminary hearing, May 1997

- 1 *Judge*: Yep. Thank you.
- 2 *Plaintiff's attorney*: Thank you. [intending to stand up]
- 3 *Defendant's attorney*: Will the court make a proposal for settlement in this
- 4 case?
- 5 *Judge*: That was quite a surprising move! [laughing] I exactly didn't expect
- 6 it!
- 7 *Defendant's attorney*: I mean, we've now gone through it thoroughly from all
- 8 angles.
- 9 *Judge*: [becoming serious] Yes, well. You mean a proposal for a settlement
- 10 by the court?
- 11 *Defendant's attorney*: Uh-huh
- 12 *Judge*: Well, we've talked a lot about the possibility of a settlement, but
- 13 making a proposal is (...) but of course, if the parties ask for a proposal.
- 14 Now, one party has asked for it, will the other one also [wipes his knees
- 15 with his hand for 3 seconds.] Then, another question is the character of the
- 16 case and that sort of thing. I'd think this depends so much on the evidence
- 17 you're going to present, so I won't make a proposal [looking at the
- 18 defendant's attorney and shaking his head]. You know what the evidence
- 19 will be, I don't. Where does it lead? You both know that what is ahead [re-
- 20 fers to the main hearing] will have its price. The plaintiffs take the risk of
- 21 having to pay all the trial costs if they lose. Well I don't know, are you both
- 22 insured for your legal expenses according to the old conditions?

- 23 *Plaintiff's attorney*: No.
- 24 *Defendant's attorney*: Whether old or new, in this kind of case, it doesn't
25 help.
- 26 *Judge*: I see, you mean the maximum limits for compensation are exceeded.
27 But as I said, I won't make any proposal in the sense that the law intends. If
28 you're willing to discuss it, I can help in several ways. But are there precon-
29 ditions for that [gestures by turning his palms up and then down again]?
30 The claims seem to be quite far apart, when everything is contested.
- 31 *Plaintiff's attorney*: The principals should definitely be present then.
- 32 *Judge*: But do you yourselves still see any realistic preconditions? As far as I
33 know, you have tried to settle.
- 34 *Plaintiff's attorney*: We have tried and we're still quite far apart.
- 35 *Defendant's attorney*: In this new situation, I have difficulties explaining to
36 my principals why they should pay anything at all.
- 37 *Plaintiff's attorney*: Uh-huh.
- 38 *Judge*: That is something you both have to consider.
- 39 *Defendant's attorney*: In principle, both of us as attorneys know how the
40 land lies in the purchase of shares, in terms of fault and in what the
41 compensation for a purchase price is and what it requires.
- 42 *Judge*: This remains open and, primarily, the principals are the ones to
43 decide on this, but we could look into this a little [leads to a discussion on
44 the precedents of the Supreme Court concerning construction disputes].
- 45 *Judge*: Going through this kind of consideration you will get the idea [on
46 how to proceed], and you are sitting on the evidence. You may have an idea
47 where this is leading, I don't. This case depends on the evidence you are
48 going to present. But if you end up with a settlement, we also welcome that
49 solution.
- 50 *Defendant's attorney*: If we can't draw up a settlement in this kind of case,
51 we would be very lousy attorneys.

At the beginning of the episode, the defendant's attorney's question about a settlement surprised the chair, who was oriented to finishing the session (lines 3–4). The participants had an intensive and long preliminary hearing behind them, aimed at getting the judicial facts and disputed details clarified so that the correct decision would emerge. In this connection, the question was “quite a surprising move”, as the chair expressed it.

The chair's conduct in Case 4 was ambiguous. On the one hand, he seemed to be seeking the substantially correct decision. In lines 16–17, and again in lines 47–48, he reiterated that the case depended on the evidence the parties were going to present. He did not know the contents of the evidence and, therefore, considered it impossible to make suggestions for a settlement. On this basis, the chair could be regarded as representing a way of working in which ideas of material truth and correct decisions are predominant. On the other hand, he left the door open for a settlement to be negotiated by the parties themselves and, in fact, encouraged them to consider carefully their chances of success in the case.

He also warned them of the cost and burden of the impending main hearing (lines 19–20). While preferring to hear the evidence rather than give the proposal for a settlement, he still encouraged the parties to consider a settlement. The simultaneous presence of these two contradictory ideas was most visible in his successive turns “But as I said, I won’t make any proposal in the sense that the law intends” (line 27) and “If you’re willing to discuss it, I can help in several ways” (lines 27–28).

If this situation is considered in terms of an activity system (presented in Figure 9.1), it seems that the judge constructed a division of labor between the participants: the chair himself was the one to receive the evidence; the parties were the ones to negotiate the settlement. However, this division of labor appeared not totally unified or coherent, as the judge himself deviated from it in his turn: “If you’re willing to discuss it, I can help in several ways.” It remains open in the discourse, what this help might have meant in practice.

The chair’s trust in the parties’ initiative in seeking settlement was in line with the attempts of the defendant’s attorney. Her comments during the proceedings and her appeals to postpone the hearings in order to settle the case reveal a way of working which strongly favors settlement as an outcome. Her last turn on lines 50–51 also reflects the same preference. Although she did ask the court for a settlement proposal, she, as indicated in the same turn, clearly considered the settling of the dispute as the attorneys’ prerogative, not as a business of the principals themselves. Unlike the defendant’s attorney, the plaintiff’s attorney seemed to underline the role of the principals in reaching a settlement (line 31).

The principals in Case 4 were not present when settlement was discussed, and there were few references to them. This may have been due to the fact that they were absent, but may also be connected to the habit among legal professionals of constructing the case in terms of the division of labor between them alone.

Case 5: “Do the parties need a judicially justified decision?”

Case 5 was referred to in Finnish newspapers as “a mother vs. the city of V”, wherein the mother claimed compensation from the city for its failure to provide municipal day care for her children on the day the family needed it. According to the plaintiff, this was against the law that stipulates every child’s right to municipal day care on the day it is required.

The preliminary hearing was arranged at the beginning of December 1997, and the postponed preliminary hearing together with the main hearing at the end of December 1997. Present in these sessions were the district court judge chairing the proceedings, the court clerk taking the minutes in the preliminary

hearing and recording the witnesses' testimonies in the main hearing, the court trainee observing the judge's conduct, the plaintiff, the plaintiff's attorney and the lawyer working for the city as the defendant's attorney. Furthermore, one representative of the press was present.

The district court judge started the preliminary hearing by sounding out the parties to determine whether they were looking for a settlement or a judicially justified decision. The following excerpt is from the first part of that discussion.

Excerpt 9.3 Case 5, preliminary hearing, December 1997

1 *Judge:* I'd like to ask whether there is any chance for a settlement in this
2 dispute. The plaintiff is is no way compelled to tell us what this case is all
3 about, or what kind of motives lie behind it, but one just can't help getting
4 the impression that this is a matter of principle. Could it be possible for the
5 plaintiff and the defendant to accept symbolic compensation? The defend-
6 tant would agree to having acted in an erroneous manner, and the plaintiff
7 would be compensated by a lesser sum, that is less than what is demanded
8 in the plaint. What kind of thoughts does this provoke?

9 *Plaintiff's attorney:* Your Honor, I don't believe that the amount demanded
10 will be instrumental in ruining the defendant financially. We had negotia-
11 tions a year ago, but the defendant's attitude has been that they have not
12 done anything wrong and that they are not liable for any damages. True
13 enough, whether the defendant has done wrong or right is mainly a matter
14 of principle, and I don't think the defendant's attitude will change if the
15 sum is one thousand marks higher or lower.

16 *Judge:* Is the defendant ready to opt for a settlement and then accept the
17 fact that there is no judicial examination in this case?

18 *Defendant's attorney:* Would it be possible to get the court's suggestion for a
19 settlement?

20 *Plaintiff's attorney:* Well, that of course depends on whether the defendant
21 admits to having acted in an erroneous way and, thus far, the defendant has
22 not admitted that.

23 *Judge:* Well, yeah. Please, go ahead [nods to the plaintiff who gestures with
24 her hand that she wants to say something]

25 *Plaintiff:* I was just thinking that, I mean it appears to me that the main
26 problem is that the municipality has nobody to decide that we make a
27 settlement. It would have been feasible to do that long ago. And that's the
28 problem, who is the municipality of V? I doubt that you alone could repre-
29 sent the municipality. It is difficult for you [addresses her speech to the
30 defendant's attorney] to say here, "Let's make a settlement", because you
31 have to get a group behind you. But there exists no such person to make
32 that decision, and that's why we are in this situation here.

33 *Defendant's attorney:* No, no, of course a decision maker can be found. If I
34 can't give the decision right away, it's only as far away as the nearest tele-
35 phone. It is not a problem.

36 *Judge:* I am not prepared to make any suggestions, but I think we could
37 formulate the question in this way. Do the parties here need a judicially

38 justified decision, which means a verdict? Or will a settlement do, which,
 39 on the contrary, would mean that the defendant would pay compensation
 40 with no further justification by the court. Do the parties need a judicially
 41 reasoned decision? That's what this is all about, in my opinion.

42 *Plaintiff's attorney:* As far as we are concerned, there is no need for a
 43 reasoned decision. The opportunity to pay was also offered to the defen-
 44 dant earlier, and we're still ready to let the defendant pay that amount
 45 without a court decision.

46 *Judge:* And what does the defendant say to that?

47 *Defendant's attorney:* Presumably, the point of departure has been that the
 48 case will be finally decided in court as judicially grounded.

49 *Judge:* This means that the plaintiff does not have that kind of need, but the
 50 defendant does.

Unlike in the two other cases, the judge in Case 5 explicitly raised the question about settling the dispute (lines 4–8). The preliminary hearing started with the charting of the different alternatives to resolve the case, and of the clients' needs in regard to the outcome. Whereas in Case 4, the judge at the same time favored adjudication and still questioned its feasibility for the parties, in Case 5 he posed the question to the parties themselves, in terms of the kind of needs they had (lines 37–41). This attempt was innovative and indicated a shift in which the settlement and the verdict appeared as alternative outcomes, subject to negotiation.

However, a closer reading of the episode reveals the relatively restricted character of the understanding and working model concerning settlement. According to the judge, settlement would consist of symbolic monetary compensation for the plaintiff *and* the defendant's admission of having acted in an erroneous way (lines 5–7). Although the judge openly looked at the possibilities to settle, and listened to the clients' needs, at the same time, he constructed the content of the settlement by himself, not in collaboration with the clients. Would it have made any difference if the parties had chosen an alternative in which the settlement consisted of monetary compensation together with a statement it did not imply whether the defendant has acted inappropriately or not?

Studies of alternative dispute resolution have emphasized flexible and case-specific settlements. For example, Strier (1996, p. 279) observed that forms of remedies are few and pre-determined, mainly restricted to monetary remedies, arguing that, "when the actual needs of the parties are ascertained – rather than converted by the attorneys to impersonal demands for money and/or an injunction – the possible means to mutually acceptable and ultimately more satisfying dispute resolution rise dramatically." The fact that Case 5 concerns a matter of principle strengthens the idea that a satisfactory settlement could not have been solely monetary compensation. The case challenges us to contemplate the

conditions for a possible “developmental settlement”: instead of money, the defendant could have invited the plaintiff to negotiation and offered her the chance to use her insights in developing municipal decision making and services that produce a better match to clients’ needs.

The principals were strongly in the forefront throughout. The plaintiff was present in the preliminary hearing and participated actively (lines 25–32). The dialogue also includes several references to the principals as the plaintiff and the defendant.

Case 6: “I would like to know how seriously settlement was being sought”

Case 6 concerned a previously married couple contesting the partition of their joint property. The ex-husband wanted a higher evaluation of a few specific items (e.g., a motorbike, winter tires for a car, five paintings), whereas the ex-wife claimed for the restoration of specific items that had been ordered into her possession (e.g., small statues, a sofa, a wok), but which she had never received from her ex-husband. The claim of the ex-husband was decided by a verdict, but the ex-wife’s claim for restoration was settled after the preliminary hearing.

The preliminary hearing was arranged in February 1998, and the postponed preliminary hearing, together with the main hearing, at the beginning of April 1998. Those present in the sessions were the district court judge chairing the proceedings, the court clerk taking the minutes in the preliminary hearing and recording the witnesses’ testimonies in the main hearing, the ex-husband as the plaintiff, the plaintiff’s attorney and the defendant’s attorney. The ex-wife as the defendant was present in the postponed preliminary hearing and the main hearing. What was exceptional in the proceedings was that before the preliminary hearing, after the parties had argued in a written form, the district court judge arranged an informal, voluntary meeting, the aim of which was to get the parties to settle the dispute. His idea was to negotiate with the attorneys in a professional manner, and to try to find ways of settling the dispute or, at least, some aspects of it. The plaintiff insisted on joining the meeting and, according to the judge, the meeting therefore did not achieve its aims.

When interviewed the judge said that he had been informed before the hearing that no settlement had been reached. He started the hearing by posing questions about how the parties had tried to settle the dispute. The next excerpt is from the first minutes of the preliminary hearing, when settlement was being discussed.

Excerpt 9.4 Case 6, preliminary hearing, February 1998

Judge: In November [refers to the informal meeting], we looked at this case in the same composition in order to get some parts of the dispute settled. Then I was informed that nothing concrete had been achieved. This is still the state of affairs, I guess. I would like to know how seriously settlement was being sought and how it was attempted in practice. Were the principals in touch with each other at all, or was all this just between the attorneys?

Plaintiff's attorney: Yes.

Judge: Did the attorneys consider the attendance of the principals unnecessary in the negotiations, or what was the reason why the principals had not been in contact with each other?

Plaintiff: Well the matter...

Plaintiff's attorney: ## Better to ask the principal himself about that.

Plaintiff: ## I suppose the principals never received the stuff from their attorneys in that state. What's more, the opinions seem to deviate quite a lot.

Judge: Personally, I found that surprising, because last time, when we went through the figures we noticed that, in the end, there was not that big a difference in the sums.

Plaintiff: Ye...

Judge: Concerning this, I would have assumed that...

Plaintiff: ## Well, it was mainly about...

Judge: ...something had happened.

Plaintiff: Yes, the opposing party offered something like minus one thousand marks.

Judge: Well, I hope the principals got my message. And I hope that the attorneys have also explained the various possibilities in the proceedings and how advantageous they may be to the principals.

Plaintiff's attorney: As far as explaining these things goes, since the chair is now asking about this, so as not to leave anything unclear: There has been precise correspondence which I gave to my principal. We calculated all this very carefully, it was not just talking over the telephone like "we won't accept their offer". I think we've at least tried to settle the case.

Judge: When we went through this case, it became clear that it was not so much about the law as about mathematics. Let's say I was a little surprised at the fact that nothing could be taken away. But it doesn't matter. Let's go through it now.

Here, “what is the case” was actually being negotiated. The judge made no division of labor between the participants but discussed whether or not the case was valid for a civil procedure: “not so much about the law as about mathematics”.

The plaintiff’s attorney showed surprise by commenting on the judge’s exhortation to the attorneys to explain the different alternatives to their principals: “As far as explaining these things goes, since *the chair is now asking about this* “. This kind of meta-talk seems to indicate the “gray zone” here, the confusing area in which the new practices and interpretations are questioned and tested.

As the trial proceeded, the pressure to control the ramblings increased. The judge strongly questioned the feasibility of traditional litigation in regards to this case.

Excerpt 9.5 Case 6, preliminary hearing, February 1998

Judge: These items are in the possession of one of you, or alternatively they are in the possession of some third party. Or they have vanished and so aren’t possessed by anybody. Is this issue really worth taking so far? That’s what I’m asking.

Defendant: When I worked out the current value of these items, it was about three hundred marks.

Judge: Well, that’s something the plaintiff disagrees with.

Defendant’s attorney: I’d say that concerning the features of the case (...), but let’s let the plaintiff say something about this, too.

Judge: Well I’m just asking whether it’s worth it in this case to bring in two or three witnesses, and to bring in evidence that would prove where the items actually are?

Defendant’s attorney: For us it would have been simple to accept this judgment granting affirmative relief. The execution officer would have arrived and said “Give me the items.” He [refers to his principal] would have said: “I don’t have them.” The execution officer would have said: “Thank you. Goodbye.”

Judge: That’s why I specified that, I mean what [a pause of 7 seconds]. What is the ultimate aim of the plaintiff? Was this claim taken out only because of the contesting of the partition?

Plaintiff’s attorney: I cannot know what is the ultimate aim of my principal, but as far as I understand, she has the right to get these items into her possession, but the defendant has not delivered them.

Judge: That of course is her basic right. That of course is completely true. But I suppose that the attorney understands that even if the claim succeeds, it doesn't necessarily mean that the items will actually be returned. In that sense, I just mean that I suppose these are not such crucial items that they are worth fighting in a dyed-in-the-wool way. But of course, the field is open for the parties. And the court is obliged to give its verdict on the basis of the evidence. [continues]

Thus, the judge directly asked what was the motive behind the counter-claim, why it was taken out. The tension between the substantially correct decision and the settlement was crystallized in the judge's final turn. Having the items returned was the right of the plaintiff, but were they worth such a stubborn fight? The questions posed by the judge were important and they could have served as a basis for a re-definition of the case. It seems, however, that the other participants did not consider them an invitation to open reflection on the possibility of a settlement. At the end of the episode, the judge strongly urged the parties once more to consider the possibility of a settlement.

Excerpt 9.6 Case 6, preliminary hearing, February 1998

Judge: Well, I don't know. I urge the parties to consider seriously if it is worth bringing witnesses to say who has taken what, and all the videotapes and everything. Try to settle this issue at least. I really mean it.

Whereas the chair in Case 4 asked the parties themselves to reflect on whether a settlement would be more advantageous than a verdict, in Case 6, the chair made it known that he himself favored settlement. In this sense, he seemed strongly to prefer the emerging idea of feasible and pragmatic compromise to the traditional idea of finding a substantially correct decision. He also had a relatively strong way of explicating his preferences⁴⁰.

In this case, the judge's explicit preference for settlement seemed to be partially successful, as the counter-claim taken by the ex-wife was settled soon after the preliminary hearing in negotiation between the attorneys. As they said in their interviews, the attorneys considered the judge's clear suggestions to settle the main impetus for the defendant withdrawing the case from court.

⁴⁰ An interesting feature of the discourse was the plentiful use of the pronoun "I". For example, in Excerpt 9.4, the chair used the pronoun "I" eight times, often in a relatively strong manner, as in "I hope", "I would have assumed", "I was a little surprised". This kind of highly personal and informal speech is not typically expected in the court setting. The frequent use of the pronoun "I" may implicate the gray zone. Everyday routines in the gray zone are still missing, so there is no established language or speech genres of settlement on which judges could rely. The personified way of talking may also be connected to the change in judicial roles, thus corresponding to Philips's (1990) finding of "the judge as a third party", whose use of language does not especially differ from that of others in the hearing.

Interview with the plaintiff's attorney after the main hearing

Interviewer: Why was this counter-claim resolved in the way that the opposing party withdrew their case and paid you some compensation?

Plaintiff's attorney: I guess it was because the opposing party believed the judge as soon as he flared up a little.

Interview with the defendant's attorney after the decision

Interviewer: How do you see it, did the court have any influence on reaching settlement in your case?

Defendant's attorney: Yes, yes, I got the impression that it was better to stop the case. I mean, I got a pretty strong message that we should now try to reach a settlement.

Interviewer: Where did you get that impression?

Defendant's attorney: Just from the judge.

Interviewer: Did he say so directly?

Defendant's attorney: Pretty directly, I think!

Interviewer: If I remember right he said something like "Think once more about settlement" and "Is this worth arguing about?"

Defendant's attorney: I remember he used the exact words "I urge the parties to consider seriously, whether this case should be settled" [laughs]. At least I would interpret that as he means what he says.

On the whole, the proceedings in Case 6 appeared mostly as balancing in the gray zone between traditional adjudication and settlement. On the adjudication side, the discourse included exceptionally frequent questioning and personal viewpoints of the judge, and also attempts at reflection on the script. For a process aiming at a settlement, the discourse concentrated exceptionally strictly on the rules of civil procedure, claims presented and the evidence to be given.

Case 6 represents a civil case which profoundly challenges the search for material truth. When the judge's informal attempt to settle failed, the pressures to conclude this complicated and rambling case grew in the preliminary hearing. The judge's means of promoting settlement included questions and comments concerning such negotiations, suggestions to settle, and the questioning of the litigation. On the one hand, some of the means were destructive and resulted from the judge's frustration with the adjudication. On the other hand, he also raised the issue of motive and the script for the proceedings. Since discussion about motive and possible elements for compromise did not develop in the hearing, the responsibility for promoting compromise was left to the parties to be negotiated outside the court.

What would have been an expansive solution to the contradictions in the gray zone? It seems evident that the court alone was unable to resolve the conflict between the ex-spouses. A holistic problem solving and overall treatment-centered approach are examples of an expanded vision of meliorating disputes, suggested by Strier (1996, p. 275). Furthermore, it seems clear that multi-professional collaboration is also needed in expansive services in the future. This means that boundary crossing between courts and other professional groups and organizations will be crucial.

The principals were strongly in the forefront of the discourse. They were present in the proceedings and participated in the dialogue, which included several references to them. This may reflect not only the presence of the principals, but the way the case was constructed in the discourse.

9.5 Settlements from the Clients' Viewpoint

Paradoxically, Cases 5 and 6, in which the judges were sympathetic to the idea of a settlement, ended up with traditional decisions, and Case 4, in which the chair did not contribute to efforts to settle, ended up with a settlement. The discussion thus far, has focused on how the chairs and parties dealt with the issue of settlement in the preliminary hearings. How, then, did the clients feel about their disputes being settled? What kind of implications did such settlements have?

I will take a closer look at the two sets of settlements reached in Case 4. The data here are the interviews with the principals after the case had been settled. As mentioned earlier, Case 4 was, in reality, two cases, both of which were settled: the first one was between the original plaintiffs and defendants – settled in June 1997 – and the second one between the defendants in the first case, here the plaintiffs, and the second defendant, who had originally sold the apartment to the defendants in the first case – settled in April 1997. The plaintiffs in the first case were Mrs. and Mr. Vuori, and the defendants Mr. and Mrs. Laakso. The defendant in the second case was Mr. Aho.

The defendants were satisfied with the compromise reached over the first claim – settled by the attorneys – but still astonished at the surprising outcome. After the various claims and contested proceedings, they could not explain how the case had been settled.

Excerpt 9.7 Interview with the plaintiffs in the first case, September 1997

Mrs. Laakso: It's quite interesting why they agreed, I mean, at first their claims were just unbelievable. In the end they still demanded 200,000

marks and then the other one offers 10,000 [refers to their own offer to the other party], I think that's quite incomprehensible. It's really a small sum of money, and we find it amazing.

As far as the second claim was concerned, the defendant, Mr. Aho, recalled in his interview how he had considered the circumstances and wanted to find a middle ground. He put himself in the position of the opposing party and offered a fair and reasonable solution, a friendly gesture, to Mrs. and Mr. Laakso. Surprisingly, Mr. Aho's interview revealed a disturbance in the settling process: the Laaksos had not paid the agreed amount to Mr. Aho's bank account by the appointed time. He was wondering whether the Laaksos had been informed at all about the settlement.

Excerpt 9.8: Interview with the defendant in the second case, May 1997

Interviewer: Well, you reached some kind of settlement with the Laaksos here?

Mr Aho: I don't know whether the Laaksos even know that the case has been settled and that I will walk away from it if I get 5,000 marks. I saw that the Laaksos are nice young people, I don't have anything against them. A couple with children. This case caused me a loss of about 10,000 marks, and I will be satisfied with 5,000 marks. The sum should have been credited to my bank account by the first of April, but it isn't there yet [May 4th]. I don't think their lawyer has even informed them that they should pay this sum.

The interview with Mr. and Mrs. Laakso revealed a gap in the information flow between the parties. They had been informed about the settling of the case, but their intention was not to pay the sum.

Excerpt 9.9 Interview with the plaintiffs in the second case, September 1997

Mr. Laakso: It's crazy, I'm trying to arrange it so that the sum doesn't have to be paid. I think it's sort of wrong that we have to bear all the costs.

Mr. and Mrs. Laakso had, at first, agreed to the settlement, but had afterwards begun to wonder whether this agreement was just and fair to them. They considered themselves in an unfair position, and Mrs. Laakso found it especially difficult to understand why they were liable to compensate Mr. Aho.

Excerpt 9.10 Interview with the plaintiffs in the second case, September 1997

Interviewer: How was this case with Aho to be settled? Who negotiated the agreement?

Mr. Laakso: One morning, our lawyer called us and told us the case had taken such a turn that it was no use keeping Aho involved. It would only mean extra expenses. I was still half asleep and just said okay, let's do that. My only thought was that the loser pays all, but at the moment we are paying it all.

Mrs. Laakso: I thought it was stupid, I was really angry. It makes no sense that we have to pay in both directions⁴¹.

Mr. Laakso: That's true, both directions.

Mrs. Laakso: Everybody is being charged by their lawyers, so why do we also have to pay other peoples' bills, that's something I can't understand. I don't see why we have to pay Aho, I think it's weird. I don't know whether it's according to the law or what.

Mr. Laakso: Well, Aho felt that he was dragged into this case without reason and he is trying to get some compensation for the money he's lost.

Mrs. Laakso: Well, he sold the apartment to us just as we sold it. He is guilty in a similar way, if we are guilty.

Mr. Laakso: That's exactly why I'll try to arrange it so that we don't have to pay him.

The principals in Case 4 thus showed ignorance of several key questions in the process after the settlement had been reached. Why did the other party accept the compromise? Did the other party know that the case had been settled? Why did they find themselves as the party who had to pay? A real problem also emerged: Mr. Aho did not get the promised payment by the appointed time.

As the settlements in Case 4 were negotiated between the lawyers, the principals were left outside of the process. Mr. Aho saw the settlement as a friendly gesture to the "nice young people", but the Laaksos could not decide whether it was justified or not. Their viewpoints did not converge, because the settlement was not prepared in interaction with the principals. As the principals did not participate in the negotiation or the legal process, they presumably did not perceive them either as fair or legitimate (see Tyler, 1990; 1997). The settling process and the grounds for the settlement remained unclear and unknown to them with the consequence that one of the parties did not fulfil the contract.

⁴¹ Mrs. and Mr. Laakso had also made an agreement in the first case of Case 4, where they promised to pay the plaintiff. Thus, they were the ones to pay in both cases.

Settling disputes between lawyers alone reflects the old way of working in which the substantially correct decision and material truth could – at least in principle – be pursued without the presence of the clients themselves. In fact, their presence was and still is often regarded as undesirable or risky by the attorneys. If the way of solving disputes is to negotiate a pragmatic solution, the necessary interaction seems to demand the presence of the principals. It seems that Case 4 can be placed in the middle area between the two practices described on the continuum in Figure 9.3, carrying elements of both. The tension between the contradictory elements was expressed in the form of several open questions posed by the principals, and as an actual disturbance in the settling process.

Assessing the settlement in the interview, Mrs. Laakso used expressions such as “according to the law” and “guilty”. Conceptually, these expressions are more connected to traditional adjudication and verdicts than to the settling of disputes. The tension between ideas of material truth and negotiated compromise was visible and concrete in the client’s talk. Obviously, the tension between the different ideas of dispute resolution is crucial not only among legal practitioners, but also among citizens. It is not self-evident that the clients of the court system are ready for the shift towards negotiated outcomes, or that they are eager to find out who is right and who is wrong. It is more likely that in the same clients’ accounts will simultaneously express both orientations, as “Am I right or am I wrong?”, as well as “Let’s find some feasible solution.”

9.6 Conclusions

The context of the courtroom discourse has been understood in my analysis as the activity system of the court. This constantly evolving activity system has been the unit of analysis giving context and meaning to events in the legal process and to the turns in the courtroom discourse.

For example, the data in Case 4, comprising the settlement-related discourse in the court proceedings and in the interviews with the clients suggested that, in this particular court case, the settlement contract did not materialize in practice, and the principals were ignorant of several key issues afterwards. Why did the settlement remain problematic? Possible explanations may be found in contradictions within and between the activity systems involved in the case. Figure 9.3 shows some possible explanations.

To start with, there was a primary contradiction within the court case which formed the common object of the multiple activity systems: the object appeared both as the correct decision and as negotiated compromise (tension A in Figure 9.3).

As far as the chair was concerned, the rules governing the proceedings represented an internal dilemma (tension B in Figure 9.3). On the one hand, he wanted the case to be decided “according to the law”, on the basis of the evidence, but on the other hand, he encouraged the parties to consider a settlement (see Excerpt 9.2).

The chair’s ambivalent orientation to the alternative rules resulted in a specific division of labor in the case. The discourse revealed a clear distinction between receiving the evidence as a task belonging to the judge and making the settlement as a task belonging to the attorneys (see Excerpt 9.2). The division of labor appeared as a means of making sense of or rationalizing the unfamiliar gray zone, but in practice it meant that the chair left the responsibility for finding a settlement largely in the hands of the parties themselves, thus moving it outside the court’s activity system (tension C in Figure 9.3).

The attorneys’ orientations to the division of labor between their clients and themselves varied. The plaintiff’s attorney thought that the principals should definitely be present if settlement was being attempted through the conduct of the chair. The defendant’s attorney kept her principals more in the background and seemed to think that the negotiations belonged to the legal professionals (see Excerpt 9.2). The tension between these orientations (tension D in Figure 9.3) eliminated the principals from participating in the settlement process.

The principals’ mental models also differed from each other. The defendants in the first case were looking for someone responsible for paying the costs (see Excerpt 9.9), while the defendant in the second case was looking for a feasible outcome which would be easiest for everybody (see Excerpt 9.8). The tension between these models (tension E in Figure 9.3) left the settlement superficial and made the outcome of the process seem strange to the Laaksos (see Excerpts 9.8, 9.9 and 9.10).

Furthermore, the defendants’ attorney’s mental models differed from those of her principals. She advised her principals to accept settlement, but the principals did not understand why (Excerpt 9.10). The tension between these models (tension F in Figure 9.3), again, left the settlement in the air and unsatisfactory for the Laaksos.

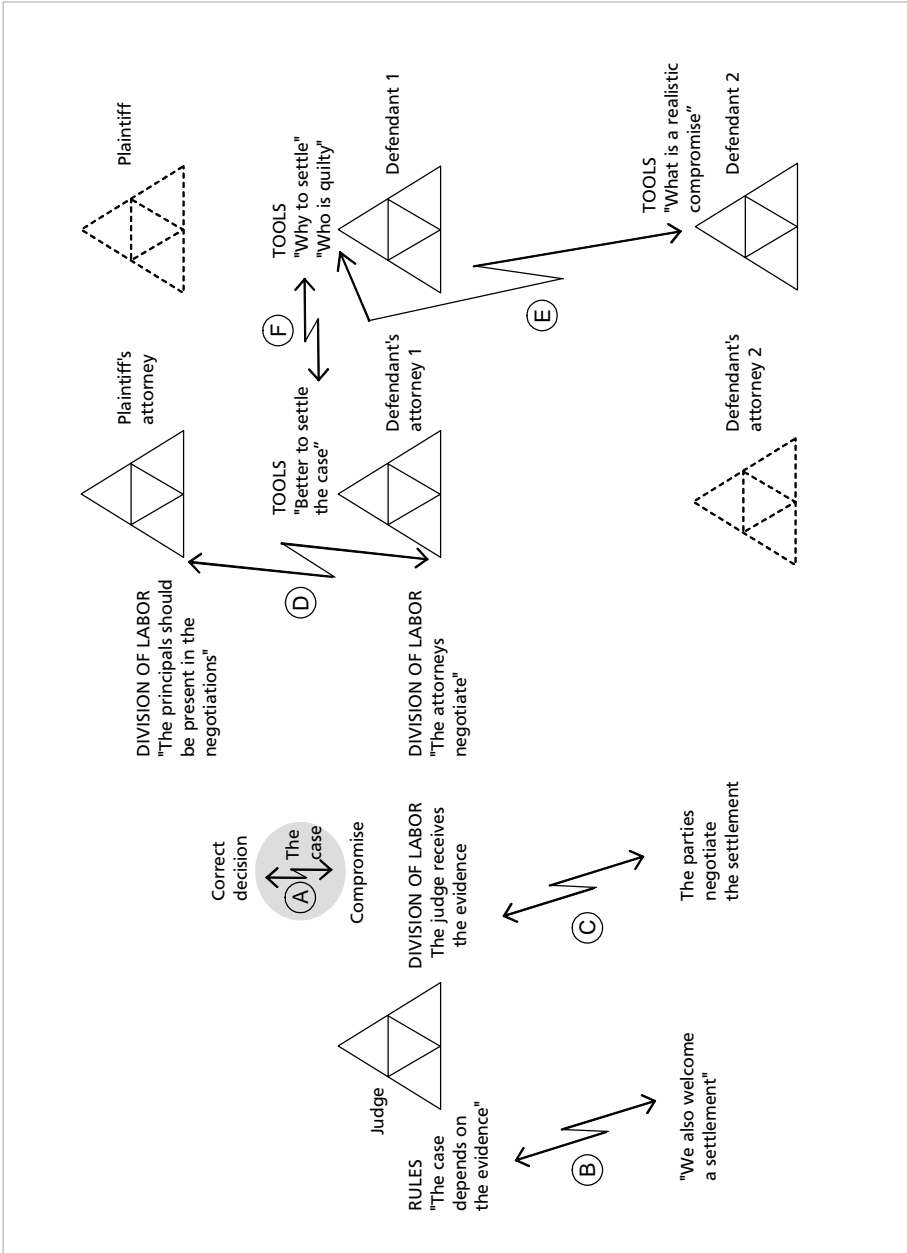


Figure 9.3 Contradictions of the Activity Systems in Case 4

These findings on the tensions and actual disturbances in the situated practices of multiple actors indicate the possible generalization of certain contradictions from the perspective of court activity. On the basis of the model of an activity system introduced in Figure 5.1, the contradictions can be elaborated as presented in Figure 9.4. In the preliminary hearings, when the possibility of settlement is discussed, the object of the activity changes, at least temporarily, from verdict to settlement. This transformation constitutes the object as internally contradictory (contradiction 1). Despite the transformation of the object, the tools, the rules and the division of labor are in part typical of traditional adjudication, and in part oriented to the possibility of a settlement, causing several contradictions within the activity system (contradiction 2, 3 and 4). Tools, such as the implicit mental models of the clients and the attorneys, which partly favored settlement and partly relied on finding the guilty parties, made the settlement incomprehensible to the clients and endangered its execution (contradiction 2). The rules that partly ordered the verdict to be traditionally dependent on the evidence and partly left the door open for settlement transferred the settlement from the court to the attorneys (contradiction 3). The division of labor, according to which negotiating the settlement was defined as a task of the attorneys, actually left both the judge and the clients out of it (contradiction 4).

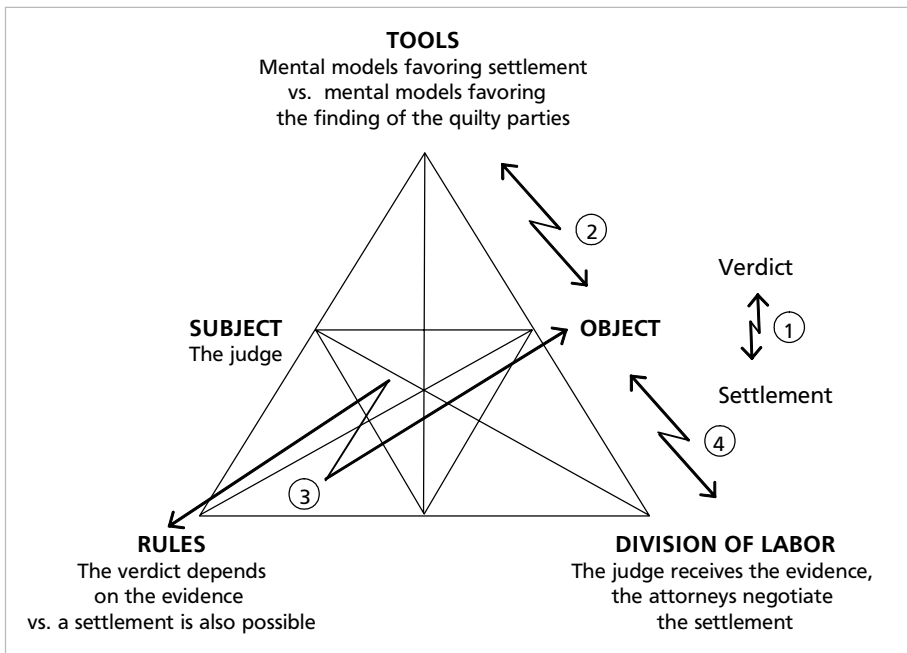


Figure 9.4 Contradictions from the Perspective of Court Activity

I will now return in my interpretation of the possible change and development in court practices to my hypothesis concerning the shift from the idea of material truth towards the idea of a negotiable solution, presented in Figure 9.2. Each analyzed case can be positioned in the figure with regard to what kind of dispute resolution it supported. Table 9.1 connects the dispute resolution ideas with the empirical findings of the cases.

All the cases analyzed include elements of *both* the idea of the material truth and a substantially correct decision, *and* of the idea of negotiated justice and a feasible outcome, representing historical layers in the activity of dispute resolution in courts. The settlement practices in all the cases could be interpreted as moving in the gray zone where there are no ready-made answers to questions, and where the activity is constantly evolving. Change is a zone to be constructed by the practitioners themselves, not a linear development from one pre-fixed practice to another. It consists of simultaneously existing elements, however contradictory they may be to one another. The ideas of material truth and negotiated compromise exist as intertwined in the interaction of the preliminary hearings.

Table 9.1 *The Gray Zone in the Light of the Empirical Findings*

THE GRAY ZONE – THE TRANSITORY AREA OF CONTRADICTORY IDEAS AND PRACTICES		
	<i>The idea of material truth and the correct decision – “finding the guilty parties”</i>	<i>The idea of negotiated justice and pragmatic compromise</i>
Case 4	<p>The chair considers the decision to depend on the evidence and does not make a proposal for settlement</p> <p>The defendants in the first case wonder if the settlement is according to the law: “He is guilty if we are guilty”</p>	<p>The chair asks the parties to consider whether it really is advantageous to go ahead with the main trial and decide the case by verdict</p> <p>The defendant in the second case makes a compromise</p>
Case 5	<p>The chair asks if the parties need a justified decision</p>	<p>The chair asks if a settlement would satisfy the parties’ needs</p>
Case 6	<p>The chair follows the procedures of adjudication; establishes the facts and receives the evidence</p> <p>The plaintiff’s attorney is surprised about the chair’s questions concerning the settling of the dispute</p>	<p>The chair arranges an informal meeting in order to settle the case</p> <p>The chair expresses on several occasions his preference for the parties to settle</p>

The analysis of court practices gives clues about the developmental potential in the activity system. Here it shows that questions such as “Who are supposed to negotiate?” and “How should we define a settlement?” are at the core of the development of new practices. The excerpts presented show that the issue of settling the dispute is entering into the hearings, in which there emerged no established settling practices or routines, but only tentative and contradictory attempts to start the negotiation process. The attorneys were both pushing their clients to join the proceedings and pulling them aside from the dialogue; the principals had contradictory orientations to the proceedings and

their outcomes; the chairs constructed the issue of settlement in different ways in order to make sense of a novel and contradictory phenomenon.

The findings also support the idea of implementation as a learning process in which the models and working practices are not predetermined but have to be locally created. The judges' differing attempts to get the parties to settle were a far cry from implementing a pre-given model of "how to settle a dispute". The episodes analyzed reveal the whole issue of settling disputes in courts as a contradictory and tension-laden area. Communicative models and rules of collaboration for the emerging practices have to be developed and adopted by the practitioners themselves. This will constitute one of the major learning challenges in the future, not only for individual judges but especially for local courts as organizations developing their own work. The understanding that individually implemented procedural rules lead to individually determined idiosyncratic interaction with clients emphasizes the importance of shared reflection among court organizations on the differing work practices of their individual judges as a source of collective learning and evolving work patterns.

The findings also give support to the working hypothesis, presented in Chapter 4, that change should be approached as gradual and consisting of small steps, but still as at least potentially expansive. The judges' efforts at promoting settlement may appear as fumbling attempts to look for an alternative to the traditional verdict. They could indeed be criticized for having nothing to do with streamlining the procedure or especially, with giving the parties the chance to continue their relationship after a satisfactory compromise. Yet, it is evident that the judges' efforts differed qualitatively from those in the proceedings before the reform. Thus, they seem to represent stepwise and gradual change toward something radically new. Apparently, the change is both cosmetic and potentially expansive at the same time.

Where, then, does the expansive potential in the settling of the disputes reside? The findings indicating the clients' non-active role and marginality when discussing possible settlement, as well as the actual disturbances connected to their not being present in the negotiations (see Figure 9.3), seem to point to the importance of the client as an active participant in defining a settlement. Tyler (1997, pp. 887–889) argued that the participation of the clients and their being heard is the most central element in experiencing proceedings as legitimate and fair. It is not only what the client says in the hearing, but also what he or she hears, that is relevant. The parties usually assume that justice is on their side. When there is a settlement, it is necessary that they are ready to be resilient and to change their conceptions. Compromise can be negotiated when the parties understand that the case has two sides. The perception of the other side is lacking when the clients are not present in the negotiation process.

In line with findings of the procedural-justice approach, my observations seem to indicate that the expansive potential in settling disputes resides in the possibility to work on settlements in collaboration with the clients. As Arponen (1999, p. 295) stated, “We should improve the courts’ capability to encourage the clients to understand their own needs, and how these needs can be satisfied with the customized services offered by the court.” (translation V.H.). Customization as a novel way of organizing court services requires a new way of working, based on negotiation, in which judicial expertise is integrated with the clients’ knowledge and specific needs.

Producing goods and services in collaboration with the client is a new and emerging form of production. Victor and Boynton (1998) call such production *co-configuration*. From the perspective of Finnish district courts, the crucial aspect of co-configuration is that the client participates in the production of the services *as a partner* in collaboration with the producer. Negotiations about settlement resemble the process in which the service is co-configured to fit the client’s needs, described by Victor & Boynton (1998), as well as Engeström, Engeström & Vähäaho (1999).

Producing settlements through customized services and negotiation, representing the zone of proximal development in courts, also challenges the traditional understanding of judicial expertise as the individual property of expert professionals. Instead, it strongly favors the understanding of expertise as a collaborative accomplishment of both legal professionals and lay clients, taking place in interaction in which the different aspects of client conflict are negotiated and resolved.

10 Conclusions

This study has opened several windows onto emerging changes in the activity of courts. Situated practices of courtroom interaction were studied in order to understand the dynamics of change and the developmental potential in court work. At the time of the second round of data collection in 1996–1998, the implementation of the 1993 reformed civil procedure was still going on at the local level. The legal practitioners, between their everyday duties in conducting the proceedings, were trying to make sense of the novel phenomena introduced in the reform.

In the following, I will first sum up the main findings in the four empirical analyses as answers to the empirical research questions. I will define the spearheads of future development as well as the possible tensions in the zone of proximal development, and consider the new tools that are emerging. Finally, I will discuss what the empirical findings tell us about the theoretical research questions.

10.1 Empirical Research Questions

In Chapter 4, I set out the empirical research problems for the study and formulated them as follows.

1. *How has the interaction and communication in the hearings changed?*
2. *How has the participation of principals in the hearings changed?
What kind of contributions do the clients make in the hearings and what kind of effects do the contributions have?*
3. *How do the judges promote settlement during the proceedings, and what kind of attempts to reach settlement are made?*

Research Problem 1 was the focus in Chapter 6, which introduced an exploratory attempt to identify the possible changes in courtroom discourse with the implementation of the procedural reform, and in Chapter 7, which compared

the local construction of a script for the proceedings before and after the reform. Chapters 8 and 9 did not focus on changes in courtroom interaction, as they did not include the comparative setting, but they still gave information about the discursive features of the reformed proceedings.

Research Problem 2 was addressed in Chapter 8, which focused on clients' initiatives in their attempts to contribute to the handling of the case. Research Problem 3 was considered in Chapter 9, in which different practices of reaching settlement were examined.

10.2 Summary of the Empirical Findings

Chapter 6 compared hearings in two court cases – one before the procedural reform and one after – and looked for possible shifts in courtroom discourse between the hearings that would indicate potential change in court activity. A change in the discourse from a formal monologue to a more informal dialogue was indeed identified. The amount of dialogical speech and reciprocal, informal interaction increased to replace the reading aloud of briefs. The same increase was also distinguishable in the other cases after the reform, observed in the excerpts presented in Chapters 7, 8 and 9. Along with the increased dialogue, the construction of the case seemed to become more like a shared and collaborative effort. The notion of a shift in courtroom discourse was also supported by findings concerning changes in distributing the production of the minutes among the participants, in the addressivity of speech turns, and in the ways in which the attorneys used the form of address, “Your Honor”. These identified changes preliminarily suggested that some kind of change evidently was and is taking place in court activity.

Chapter 7 continued the elaboration of the object in court work from the activity-theoretical perspective, initiated in Chapter 6. Focusing on the local construction of the script in court proceedings, the chapter concentrated on one aspect of the object of court work, namely the conducting of the proceedings. A comparison of pre- and post-reform proceedings indicated a radical change in the dynamics of local scripting. To replace the individual determination of the script in the old proceedings the new proceedings featured a more informal, negotiation-like dialogue between those involved. This new way of scripting was modeled (Figure 7.3) in terms of particular, joint actions that constructed, tried, and maintained the script by reflecting on it and by using meta-talk. A different logic in the search for legitimacy was identified, and tensions between the uncontrolled and controlled nature of the proceedings were pinpointed. The local construction and testing of the script supported the hypothesis that change and implementation reflect local interpretation of the reformed norms.

The analysis revealed the distributed nature of expertise in courts, shared horizontally between the participants. The emerging collaborative expertise was restricted to the legal professionals, however.

Chapter 8 introduced a new dimension to the object of court work by focusing on the client's contribution in constructing a case. The analysis of client initiatives in the hearings revealed that the clients were not merely informants as defined in the new Procedural Code, but rather appeared as participants who may have tried in many ways to affect the proceedings and the construction of their case. Most importantly, it also showed evidence of expanding initiatives. This was a far cry from the client's marginal position and silence in the old system. It was also clear that client initiatives did have an effect on the proceedings. Although sometimes rejected or bypassed, they most often succeeded in changing the topic, or at least in causing a fracture to the expected flow.

The cases analyzed projected a future characterized by growing activeness among clients, in both the intensity and quantity of their participation, and a move towards more informal communication between clients and legal professionals (Figure 8.1). However, it also seems clear that the legal professionals do not yet have new tools that are sensitive enough to take up the challenges posed by different client and case types. The findings in Chapter 8 contribute to our understanding of expertise in courts by addressing the division of labor between the clients and the legal professionals in the hearings, and by signaling a potential shift in the collaboration between clients and legal professionals.

The object of the court work was approached from another new perspective in *Chapter 9*, when settlement was selected as the focus of the analysis. Settlement as a new possible outcome of the proceedings indicated a change that was described as an ongoing transition from the traditional idea of material truth and a substantially correct decision towards the more pragmatic and relative idea of seeking a negotiable compromise (Figure 9.2). Practices of making a settlement appeared as varied and often contradictory, individually-determined patterns. Judges' practices included discussing the possibilities of settlement and the constraints involved (Case 4), sounding out the parties' needs in regard to the outcome (Case 5), and questions, comments and suggestions concerning settlement (Case 6). Their need for new concrete tools was apparent. Their efforts at promoting settlement appeared as tentative attempts to look for an alternative to the traditional verdict, but mainly built on the premises of the old way of working. The gray area in making settlements, characterized by the intertwining of the old and the new work practices, disclosed the developmental potential of change involving concrete learning challenges for legal professionals. The analysis showed that questions such as "Who are supposed to negotiate?" and "How should we define a settlement?" are at the core of the development of the new practices.

10.3 Theoretical Research Questions

The findings of the empirical analyses will throw light on the more theoretical questions concerning change and expansion in courts, and contribute to broader questions of organizational change and learning. The theoretical research questions were formulated as follows.

4. *What do the findings of the empirical analyses tell us about the zone of proximal development and its potential expansion in courts? What does this developmental potential tell us about the transformation of expertise in professional work?*
5. *How do change and learning appear on the basis of the implementation of a legal reform? What do the changes in court proceedings and court practices tell us about organizational change and learning?*

Both theoretical research questions were touched upon in conclusions drawn in each empirical chapter. Research Problem 4 was brought up more thoroughly in Chapter 7, which concerned the local scripting of the proceedings, and in Chapter 8, which concerned clients' initiatives in the hearings, as these findings highlighted in concrete terms the zone of proximal development in court work, and thus indicated a potential shift in legal expertise. Research Problem 5 was addressed in Chapter 6, which introduced the first findings concerning the nature of change in court work. The topic was elaborated in the following chapters, and especially in Chapter 9 which continued the discussion on the cosmetic and fundamental nature of change and of required learning.

The expansive potential and zone of proximal development in court work will be discussed in section 10.4, in which the implications for our understanding of expertise will also be addressed (Research Problem 4). Section 10.5 will summarize what the findings of this study tell us about change and learning in the implementation of court reform (Research Problem 5).

10.4 Spearheads of Development

The most crucial elements in the zone of proximal development of activity in Finnish district courts can be described as spearheads that pinpoint the developmental potential and learning challenges in court work. At the same time, they are the source of disturbances and tensions in work practices, thus implying developmental contradictions. This is depicted in Figure 10.1 in a four-square matrix, in which the formal – informal character of courtroom discourse forms

the horizontal axis, and the controlled/restricted – uncontrolled/unrestricted character of the interaction forms the vertical axis.

The findings of the empirical analyses of this study suggest that the active control of the proceedings by the judge and the informal collaboration and negotiation-like discussion between the participants together form one of spearheads of future development (Arrow 1 in Figure 10.1). The findings in Chapters 6 and 7 in particular indicated an emerging shift towards more dialogical and informal courtroom discourse, joint construction of the case, and more active and controlled conducting of the courtroom discourse by the judge.

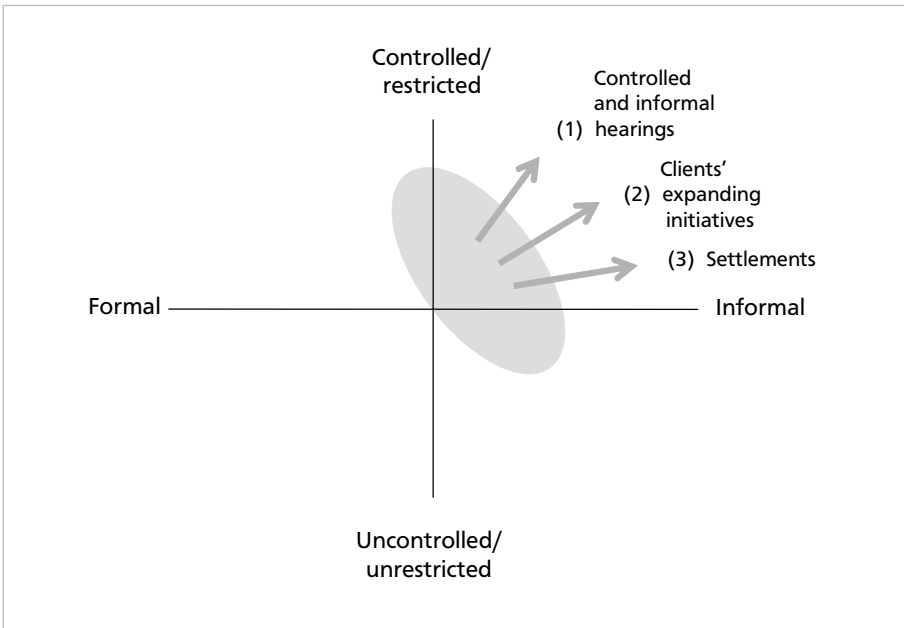


Figure 10.1 *Spearheads of Development*

The second spearhead seems to be the new role of the client in the hearings (Arrow 2 in Figure 10.1). The analysis of client initiatives and their effects (presented in Chapter 8) indicate an emerging shift towards a more active and participatory role for clients in establishing the case. Expanding initiatives seem to offer significant potential for a new kind of collaboration between clients and the legal professionals, and for clients to adopt a more subject-like position in their own cases.

Settlement as an outcome of civil proceedings clearly forms the third spearhead of development (Arrow 3 in Figure 10.1). The possibility of negotiating a

settlement rather than giving a verdict indicates a radically new way of working with clients and cases, which transforms not only the outcome but also the process of dispute resolution. The findings in Chapter 9 suggest that working towards settlement paves the way for a new type of collaboration in which the settlement is co-configured by the client and the court as partners in producing the service.

A personal view of the developmental potential included in settlements was given by a judge from Tampere District Court, Jukka Peltonen, in an unpublished paper given to a committee on developing the court system, in which he outlined the future developments in district courts.

“The approval that originates from a settlement reached in legitimate proceedings, renders positive feedback to the court and to the whole justice system. For citizens, settlement includes an idea which will probably interest them more and more in the future – the possibility to personally participate in and contribute concretely to the handling of the case, and maybe even to the decision. For judges, settlement represents a completely new way of working, as it means establishing the case in collaboration with the parties. In this sense, we can already catch in settlement a glimmer of the possible future role of the judge, which I personally consider most desirable.”
(Jukka Peltonen, unpublished paper given at a committee meeting, translation V.H.)

Figure 10.1 depicts the zone of proximal development in the context of dispute resolution in courts as an area of emerging, qualitatively new work practices among which actively controlled and informal courtroom discourse, the expansive contributions of the clients and settlements serve as spearheads of development directing possible expansion in the future. According to Engeström’s (1987) definition presented in Chapter 3, the zone of proximal development in civil proceedings can be defined as the distance between the everyday actions of individual judges and the new form of dispute resolution that could be collectively generated as a solution to the tensions embedded in everyday actions. The crucial new elements determined here as spearheads of development signal the specific sources of the full expansive potential in court work, and address the areas in which collective efforts to create new practices and new tools are required.

Contradictions in the Zone of Proximal Development

The zone of proximal development, in accordance with its name, represents a moving *area of possible development* rather than a unilinear direction of change. For this reason, the zone depicted in Figure 10.1 was presented as an area which points in a certain direction, denoted in the empirical findings of this study, but which at the same time moves in other directions as well. Its unfixed nature results in the developmental tensions and contradictory elements found in dispute resolution in courts.

The most salient contradiction becomes apparent when the models that envisioned the potential development in Figures 7.4 and 8.14 are compared. The matrix in Figure 7.4 shows that the new proceedings rely on informal and controlled /restricted discourse between the court and the attorneys in the hearings as a means to legitimize the process and the search for material truth. Figure 8.14, on the other hand, portrays a future characterized by growing activeness among clients, in both the intensity and quantity of their participation, and a move toward more and more informal communication between clients and legal professionals.

The increasing informality brought into the hearings through the active participation and contributions of clients is likely to clash with the methods used to legitimize the proceedings by actively controlling and restricting the interaction (arrow A in Figure 10.2). Giving the client the opportunity to participate in a preliminary hearing based on informal discussion is contradictory and difficult to arrange under the rules controlling and restricting the discourse.

Some symptoms of this clash were seen in the analysis presented in Chapter 7 as pressure to move from controlled and restricted towards more uncontrolled and unrestricted discourse. Concrete attempts to twist the script of the new Procedural Code, and to shift from controlled to uncontrolled proceedings, were made by the attorneys. Similarly, the actual course of the proceedings in the observed case – the first preliminary hearing and the extended preliminary hearing three months later – was an expression of this pressure and of the actual transition from restricted to more unrestricted discourse. That the clash was visible in a hearing taking place only between legal professionals suggests that it would be sharper in a hearing in which clients were taking part.

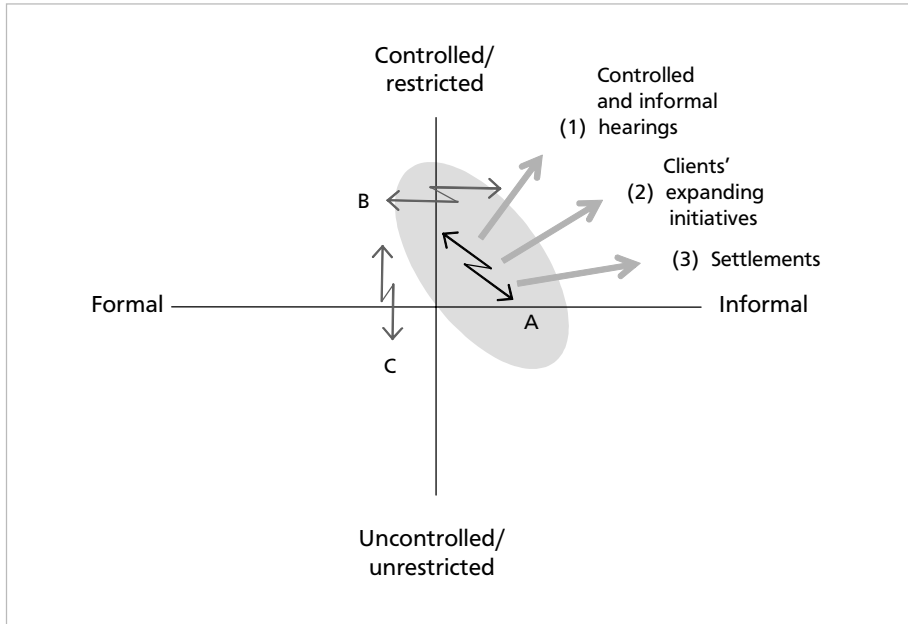


Figure 10.2 *Contradictions in the Zone of Proximal Development*

As I mentioned in the concluding paragraphs of Chapter 7, the controlled and restricted nature of the preliminary hearing in the new procedure has been largely discussed among judicial professionals and scholars. My findings coincide with more general observations suggesting that the idea of a single preliminary hearing is not functioning as the Procedural Code intended, and that in practice there seem to be pressures to loosen the restricted discourse by arranging further preliminary hearings. The increased legal costs and weakened access to justice, especially among citizens with average incomes, have intensified the debate on the feasibility of the new procedure. On the one hand, it has been stated that the rigidity and restricted interaction represent a threat and a disadvantage in the new system. On the other hand, it has been argued that the discussion in the preliminary hearing should be restricted even more in order to make the idea of controlled and restricted preliminary hearings work properly. The biggest problem and the main deviation from the intended procedure is that issues have been shifted to the preliminary hearing that should not be discussed until the main hearing. The preliminary hearing has actually become the “main hearing” and the new proceedings are “front-loaded” (see e.g., Riita-asiain oikeudenkäyntimenettelyn kehittäminen, 1998).

It could now be concluded that arranging the hearings in a fluent way involves problems that are likely to become aggravated if clients activate their participation in the future and demand a more subject-like position in the hearings. There have been attempts in judicial debate to ameliorate problems by reverting to the uncontrolled discussion that was characteristic of the old proceedings or by suggesting a more orthodox reading of the Procedural Code with its strict phrasing.

The problem with the first suggestion is the danger of returning not only to the less controlled presentation of arguments, but also to unorganized, undirected proceedings that easily begin to flow without direction. The problem with the second one is that the Procedural Code seems to be insensitive to the perplexing, dispersed and sometimes verbose character of human communication and interaction, and that it itself is internally contradictory in terms of its objectives.

Chapter 5 in the Code of Judicial Procedure postulates that it has to be established in the preliminary hearing what the parties are claiming for, what are the grounds for their claims and what issues are being disputed. This is not just a judicial-technical exercise. These actions of establishing a case occur through human communication and interaction, which is often intricate and time-consuming by nature. It seems that, according to the Procedural Code, a simple and swift review allows quick passage to the main hearing. The special meeting rooms in the new courthouses, which may be reserved for preliminary hearings, were supplied to support informal, intimate discussion between the participants. At the same time, however, the Procedural Code assumes the discussion in the preliminary hearings to be only a cursory run-through of the disputed claims.

The main hearing is determined as an event in which the client should be heard. Such hearings are normally arranged in traditional courtrooms that are more suitable for formal presentations than for informal dialogue. Again, it seems that hearing the client is regarded as a judicial-technical exercise, rather than as dialogical communication in which the client listens and is heard.

Moreover, the Procedural Code ordains that the possibilities for settlement shall be cleared up in the preliminary hearing. Here technical preparation of the case is not enough – also undisturbed negotiation about it and about the client's needs is required.

Two related and somewhat less pronounced tensions can be added to this most salient contradiction. These are the tensions between the formal and informal elements of the hearings, and between controlled and uncontrolled proceedings as opposite means of legitimation.

The talk of legal professionals, which is intrinsically formal at least to some extent, meets with the talk of lay clients, which is necessarily informal, in the interactive encounters within the court institution. The different voices represented by the activity systems of the court, the attorneys and the clients converge in the hearings. The tension between their formal and informal nature (arrow B in Figure 10.2) appears as a deep-rooted tension in the work of courts, and possibly as a basic dilemma of institutional discourse in general.

Formal patterns of courtroom discourse related to the formal authority of the judge have been traditionally regarded as the foundation of the court's neutrality and impartiality. A recent book of recollections from previous city and circuit courts (Hatakka & Nirkko, 2000) shows chief justices and senior judges as distant, authoritative persons who required respectful manners and the observance of formalities in the interaction. Keeping the interaction in the hearing formal and immune to criticism was seen to ensure independent proceedings.

At the present time, the logic of attaining impartial and trustworthy proceedings seems to have changed and the importance of informal communication in producing trust has been recognized. According to Laukkanen (1995, p. 214), informal discussion and the active conducting of proceedings is the basis of authority in the modern court. An active judge who discusses and participates raises trust among the clients. The same idea is supported by Tyler (1997), who found that disputants' assessments of court trustworthiness are an important factor affecting judgments about the fairness of procedures. He argues (*ibid.*, pp. 889–891) that the basis of authoritativeness is changing from neutrality-based to trust-based. He further suggests that neutrality-based authority, built on signs of professionalism such as the even-handed application of the rules, a lack of bias and the use of procedures, is less attractive to the public. People rather focus on the morality and benevolence of the authority with which they are personally dealing. This leads to an interest in knowing the authority in question, and thus encourages personal connections between citizens and authorities. As a consequence, authorities need to create their own legitimacy on an individual basis. They cannot completely rely on the general legitimacy which their office gives them.

The tension between formal and informal discourse in the hearings also materializes in the transformation process of the dispute from the grievances experienced to judicially specified complaints. The experiences of individuals are translated into another form in the judicial process before they can become legal issues and before they can be processed through the legal system. This transformation is simultaneously a shift from the informal to the formal conceptualization of a dispute.

The problems with formal discourse and the legal conceptualization of disputes are those acknowledged in the criticism against adjudication: parties have little control over the process and often find it incomprehensible. Issues are framed in legal language rather than in terms of how they are experienced by the parties involved. What is dilemmatic is that, at the same time, the legal conceptualization is a way of categorizing the problem, and thus a way of systematizing the process and standardizing the decisions.

The tension between the controlled/restricted and uncontrolled/unrestricted discourse in the hearings (arrow C in Figure 10.2) appears as an expression of the two alternative logics that have been used to legitimate the proceedings. In its extreme forms, the first one assumes that the truth will emerge in free and unlimited communication, the second that it will evolve in communication that is regulated and rationalized by procedures. The dilemma in terms of the practical conducting of the cases is that the first easily leads to unorganized proceedings which drift out of control, whereas the second one may well result in proceedings in which the clients become outsiders and experience a sense of disenfranchisement.

From the historical point of view it is interesting to note that the substance of control has changed in recent decades. The control exercised by previous chief justices was described in a recent book based on the recollection of court workers (Hatakka & Nirkko, 2000). In his contribution entitled "Learning management skills in a circuit court", Ari Heiniö (*ibid.*, pp. 51–57) described his experiences as a court trainee and gave a vivid illustration of the way in which a chief justice worked on cases at the turn of the 1970s. At that time, the equipment and furniture in the court were ascetic. No ballpoint pens were allowed, and ink bottles were just being replaced by pens with refills. The chief justice lived in an apartment attached to the court. He worked hard, including during the weekends and late in the evening, except on Wednesdays when he went home at 9.30 pm to see Peyton Place on TV. He smoked his pipe, even in the hearings, but did not allow anyone else to do the same. He was also insistent on finding out the truth. He might refer to facts that the parties had not presented at all in his decisions on civil matters, and thus acted as an inquisitorial judge. He also emphasized the local nature of the circuit courts. When he felt that it was time the reckless driving of youngsters on the "main street" of the hamlet should be stopped, he began to hand out sentences of one month's imprisonment for endangerment of traffic. As the author wrote, "it was the end of the play" (*ibid.*, pp. 55–56).

This shows how the judge controlled the work in court, the behavior of the parties in the hearing, and also the local community. On the one hand, the control of those days was undoubtedly formal authority that belonged to the

status of chief justice, or sometimes even arbitrariness. On the other hand, it also facilitated the constructive control of the proceedings and of the local community.

The era of chief justices and their often rather coercive control was followed by a period of uncontrolled proceedings and non-active judges, which persisted until the implementation of the procedural reform. Nowadays, activity and control are required from the judges, but it is not self-evident of what this new control over the proceedings is comprised. Since this new position of the judge with active control cannot be derived from the traditional autocratic chief justices, a new basis of control needs to be created. It is exactly on this issue that viewpoints on control differ in their emphasis on either controlled and restricted discourse or on more uncontrolled and unrestricted discourse as the way of legitimating the proceedings and finding the truth.

One way of reconciling opposing views on the effects of courtroom control as merely good or bad for the final outcome is to look for the types of controlling rules and conceptualize the possible differences more precisely. Adler and Borys (1996) developed a theory of how employees distinguish good from bad rules, and suggested a distinction between two types of bureaucracy: coercive and enabling.

The authors (*ibid.*, pp. 70–74) describe coercive procedures as those in which any deviation from the standard procedure is seen as suspect, and which do not help the workers to determine whether the process is operating well or to navigate the inevitable troubled waters of the work process. Coercive procedures are not aimed at guiding the workers' efforts as much as sanctioning punishment in case of deviation. They rely on strictly partitioned tasks and the strict maintenance of borders. Coercive procedure manuals define the specific sequence of steps to be followed in some detail, and forces workers to ask for approval for skipping those they consider unnecessary.

Enabling procedures, in contrast, facilitate responses to work contingencies, and consider breakdowns and their repair signaling problems in the procedures, and thus an opportunity for improvement. They provide users with a view of the processes and an understanding of the rationale behind the rules. They are designed to afford the workers an understanding of how their own tasks fit into the whole. Enabling procedure manuals assume that deviations are not only risks, but also learning opportunities, and encourage the specifying of alternative processes to replace the failed ones.

The tensions described above illustrate the dilemmas encountered in developing court practices, in which opposing requirements intersect. Emerging tools that may incorporate the potential for mastering these dilemmas are summed up in the following section.

Emerging New Tools

The findings of this study imply that it is not only the implementation of the court reform as such, but also the emerging new pattern of work that needs to be constructed as a collective and collaborative effort among practitioners. The empirical analyses reported on the work practices involved in conducting the proceedings, in working with the clients, and in making settlements that, although more collaborative and joint than before, still rested on individually determined manners and tools.

As I argued in Chapter 2, the new Procedural Code was weak in offering concrete tools and models for the practitioners to start with. As a result, judges employ their own working models, which may accidentally be adopted by colleagues in the same workplace. This is a slow and ineffective way to go about the implementation of the reform. The individual working models and tools, nevertheless, effectively serve to improve court practices if they are considered a source of collective reflection and developing effort in the organization. Exposing the judges' differing working models to joint examination opens up the opportunity to consider and facilitate not only well-functioning practices and tools, but also the desired direction of development. Likewise, the contradictions in developing court work require collective rather than individual efforts.

Characteristic of a tool is that it is relatively durable (its production and use can be preserved and it has some stability over time), replicable (it is not too problem-specific to be used only once for a singular problem), and transmittable (other individuals or groups can adopt its production and use) (see e.g., Wartofsky, 1979, p. 203). As tools often embody what is stable in work practices, Leont'ev (1978) described them as something in which the work practices and operations crystallize (see also Keller & Keller 1996). My empirical analyses revealed several emerging instruments that the judges at least tentatively employed when conducting proceedings. These were (1) tools related to the script of the proceedings, (2) tools related to the client, and (3) tools related to the settlement. Figure 10.3 shows the tools inserted into the matrix illustrating the spearheads of development and the contradictions in the zone of proximal development.

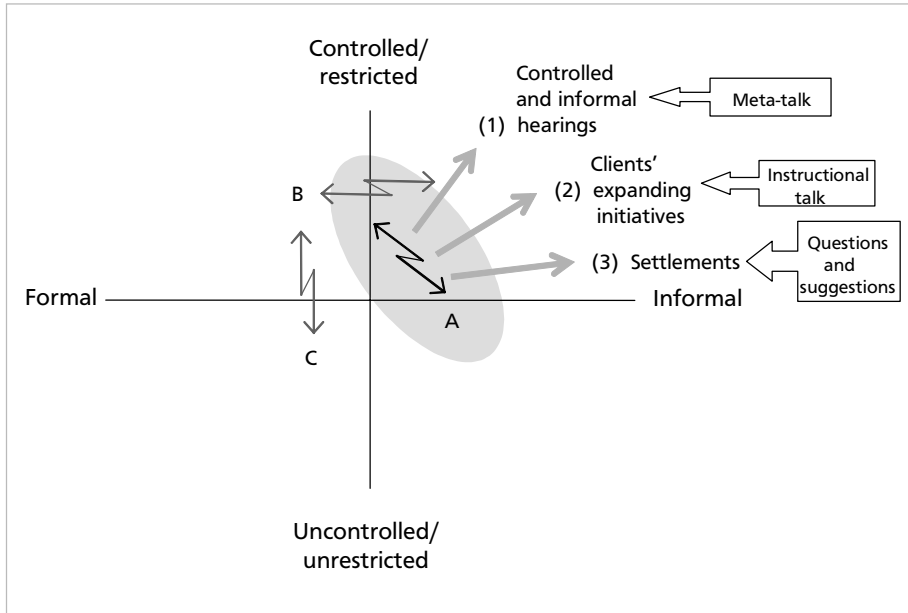


Figure 10.3 *Emerging New Tools*

One tool related to the script of the proceedings was *meta-talk*, which was employed for the construction of and reflection on the local script. Excerpt 7.11 in Chapter 7 showed how the judge formulated the script for the proceedings by using meta-talk to outline concretely how he expected to trial to proceed (“You could talk about the defects and their relevance maybe”, “We’ll go through them all separately, point by point, and find out what they’re all about”). Excerpts 7.15 and 7.17 were examples of episodes in which the participants employed meta-talk in keeping the procedure in line and in reflecting on it (“We have not yet taken up the defects”, “All that matters is what is presented here orally”, “Have we now progressed so far that we can go on to the alleged construction defects...?”).

When interviewed the judge who employed meta-talk in making the script explicit also elaborated the idea of moving from explicit towards more collaborative scripting together with the other participants, which would undoubtedly necessitate more conscious use of meta-talk. Scripting the proceedings is connected to the active controlling of them and to the interaction in the hearings, which is the very same area in which the most salient contradiction was recognized. The tension-laden zone in which the need for informal and open communication collides with the need for controlling the interaction is clearly where concrete models are needed for creating practices that both restrict and enable.

The special character of the tools required for active control is that they should at the same time restrict the informal interaction to the disciplined handling of the case under the control of the court, while still enabling joint reflection on the procedure, collaborative repair of possible deviations and collective efforts in keeping the procedures in line.

A tool related to the client was *instructional talk*. When working in immediate contact with the clients, the judges used it as a special tool for explicating court-specific rules and behavior to lay people. For example, in Excerpt 7.11, the judge used instructional talk purposefully when he explained how the proceedings would progress and why it was important for the client to be present at the hearing. In Excerpt 7.15, the judge explained the procedural law to the attorneys. Further on, Excerpts 8.19, 8.41 and 8.42, in which the legal professionals explained the way of working in the hearings, included elements of instructional talk, in a more or less systematic and intentional form.

It seems that instructional talk is a tool worth further refinement and purposeful utilization, as it may turn out to be important in making the hearings more visible and comprehensible for the clients, and thus also more legitimate and trusted. The lack of concrete discursive tools was evident in the systematic directing of the clients and in informing them about the way of working in courts. The tools for encouraging clients to participate in the hearing on the one hand, and for controlling their rambling speech on the other, were recognized in my analysis as potential areas for development.

Tools related to settlement seemed to be mainly *questions and suggestions* concerning the possibility of a settlement. Examples of questions used by the judges for eliciting information on such a possibility, or for sounding out the parties' needs, included, "Are you both insured for you legal expenses according to the old kind of conditions?" and "But do you yourselves still see any realistic preconditions?" (Excerpt 9. 2), "Is it possible for the plaintiff and the defendant to accept symbolic compensation?" and "Do the parties need a judicially reasoned decision?" (Excerpt 9.3), and "Were the principals in touch with each other at all, or was all this just between the attorneys?" (Excerpt 9.4). Questions were also used for more provocative probing about the dispute and litigation, and seemed to contain advice to reconsider the settlement. Examples can be found in Excerpt 9.5 (e.g., "Is this issue really worth taking so far?" and "Was this claim taken out only because of the contesting of the partition?").

The judges' suggestions concerning settlement were more like explicit recommendations to consider it once more: "Try to settle this issue at least" (Excerpt 9.6). They also seemed to take the form of more neutral advice to go on with the negotiations ("That is something you both have to consider" in Excerpt 9.2), or a suggestion for a possible starting point for settlement, such

as in Excerpt 9.3 (“The defendant would agree to having acted in an erroneous manner, and the plaintiff would be compensated by a lesser sum”).

The tools related to the script of the proceedings, the client and the settlement were far from being durable and established, and were rather emergent and tentative. This suggests that tools are not only stable and structural, but may also be subject to constant reconsideration and reformulation. These emergent tools had been developed and adopted by the practitioners themselves. The notion that individually developed models lead to individually determined idiosyncratic behavior highlights the importance of systematic, collective efforts to construct concrete tools for new work practices.

The Transformation of Expertise

The research question concerning the zone of proximal development in court work led to the further question of what this developmental potential tells us about the transformation of expertise in professional work. Issues such as who the actors are who work with court cases, how collaboration between them emerges, and what kind of expertise is involved, also came to light in the empirical analyses. The clients’ contributions in the hearings now include elements of a subject-like position, the legal professionals construct cases in ways which are more collaborative and dialogical than before, and the court’s expertise is directed not only at giving verdicts, but also at helping the parties to reach a settlement. This seems to indicate a shift towards *collaborative expertise*, understood as an accomplishment of multiple interacting activity systems that face and shape qualitative transformations and reorganization. The activity systems of the court, the attorneys and the clients, face the major challenge of producing novel solutions incorporating interaction and collaboration in establishing cases and in reaching settlement.

It seems that the developmental potential in court work, described above in terms of spearheads for the future, indicates a new type of expertise, which resembles the expertise invoked in the work that Victor and Boynton (1998) call co-configuration. The typical features of co-configuration that are detectable in emerging court work include the necessity to adjust the services to the client’s needs, the involvement of several actors, the significant contribution of the client as a partner in producing the service, and the “customer-intelligent” products that adapt to the client’s changing needs. First and foremost, settlement seems to be a phenomenon that the concept of co-configuration helps to put into context in terms of the apparent transformation of expertise. In negotiations on settlement, the user and the producer – the client and the court – in collabora-

tion and on the basis of mutual dialogue, customize the settlement to fit the client's needs. The client's participation in the process is of crucial importance: the empirical analysis revealed how the co-configuration collapsed when the client was not personally involved in the negotiation process.

Co-configuration requires dialogue as a new form of communication through which all the participants are involved in negotiating the object of their joint effort (for instance, a verdict or a settlement), how they are going to proceed (what is the script that they will follow), and the division of labor between the them (for instance, what is the role of the client).

The negotiation that is elementary here could be understood as a new, potential source of learning in the context of court proceedings. Palmer and Roberts (1998, p. 70) point out that negotiation is not just about "bargaining", but it is primarily a process of information exchange and learning. Learning is embedded in the cyclical process of the repetitive exchange of information between the parties, assessment of this, and the resulting adjustments to expectations and preferences. The potential for a new kind of learning and expansion in dispute resolution is also being assessed in recent attempts to promote the idea of transformative justice (Law Commission of Canada, 1999). This focuses on the developmental potential inherent in all conflicts, and uses the substance of the conflict as a means of exploring options that are not only acceptable, but that also develop and strengthen the relationships among those involved. On the whole, understanding court proceedings as a learning process among those involved is a new area in the field of learning and the development of expertise, about which we know only a little.

An essential element of co-configuration is the lay knowledge that the client brings to the process. In my analysis, client expertise appeared not only as knowledge of their case, but also as ideas and preferences concerning how the case was being constructed, and as expansive suggestions on how it should be understood. The emergence of this lay expertise that is apparently finding its way to civil proceedings paves the way for the potential merging of professional and lay expertise, which in itself is full of tensions and constraints.

Tuckett & al. (1985) recognized the tension-laden collaboration between professionals and lay persons when reporting on communication failures in doctor-patient encounters. Doctors and patients did not manage to achieve a dialogue in which ideas could be shared. The doctors did not encourage the patients to present their views, and often inhibited them from doing so. The patients also often limited their communication and did not make it easy for the doctors to achieve a dialogue. In short, the patients were not treated like competent experts in their own health care (*ibid.*, p. 211).

The authors (*ibid.* pp. 211–212) considered the fact that the consultations did not provide the patients with the opportunity to make decisions based on the biomedical knowledge given to them by their doctors, an important shortcoming with disadvantageous implications. Their argument follows the one presented within the procedural-justice approach (e.g., Tyler, 1990; 1997) on the interrelation between clients' experiences of fairness and compliance: "Patients will be less likely to be well motivated and more likely to ignore advice, vary treatment and, therefore, waste resources of time and money." (Tuckett & al., 1985, p. 211).

Thus far, the client's satisfaction with the product or service in itself has been acknowledged in co-configuration (Victor & Boynton, 1995, p.196). Interpreting negotiations on settlement in this kind of framework introduces a new perspective: the importance of the co-configuration process itself for client satisfaction. Transferring the findings of the procedural-justice approach to this context suggests that the way in which the product is configured, and how the negotiations to adapt the product to the clients' needs are conducted, are of crucial importance to the client's satisfaction with and commitment to the product.

On the other hand, co-configuration appears as a way of producing goods and services that lays the ground for the client's experience of trust and fairness. Configuring products in a dialogue, in which the client works as a partner in collaboration with the professionals, resembles the factors that studies on procedural justice have found to enhance client satisfaction and their acknowledgment of the procedures as fair: the opportunity to express their views to the decision makers, to participate in the discussion of the case, and to be taken seriously and treated with dignity (Tyler, 1997).

10.5 Implementation of Court Reform as Change and Learning

The findings of my empirical analyses support the hypothesis concerning transition in court work, which was outlined with the help of the developmental spearheads and contradictions and the emerging new tools described in the previous section. What, then, do these findings tell us about change and learning in the implementation of legal reform?

To begin with, the findings suggest that the implementation of a court reform cannot be adequately understood as the mere adoption of top-down rules. Further, they imply that implementation is not solely a process of adjusting the reform to local needs. What they do support is an alternative or complementary view on implementation as *a learning process*, in which the new rules are interpreted, shaped and enriched when applied in practice. The methods used

in this study revealed in a powerful way how the implementation of a reform takes place as an incremental process, in which the possible and alternative ways of working unfold as the concrete cases are dealt with in everyday practices.

The need for the local construction of a script for the proceedings and the actual deviations from the script that the procedural law intends (Chapter 7), the clients' active participation that took them out of the role of informant given to them in the procedural law (Chapter 8), and the clear differences in the judges' practices in reaching a settlement (Chapter 9) are examples of my findings that require going beyond the top-down perspective on implementation. They clearly illustrate that the rules set out in the legislation are not carried out by the practitioners exactly in the way that was intended by the legislators. The analyses that concentrated on the local, changing and contradictory elements in court practices revealed that the top-down procedural rules were interpreted and given content by the practitioners themselves when working with the actual cases. The principles given in the legislation have to be concretized through local interpretations and constructions of the necessary tools, norms and practices. The process of implementation, in which the law is shaped, determined and altered by the actual implementors, has already been recognized in recent studies on implementation. For example, Yanow (1996, p. 222) acknowledged policy implementation as the social construction of reality and viewed it as an iterative and interactive process of meaning making through interpretation. My contribution to the theorizing of implementation is to view it as *a learning process with significant potential for expansion* in court work. What is essential is to look for the new that goes beyond the pre-set objectives and pre-given models.

The major expansive potential lies within the small and gradual changes that take place in court practices during implementation. From the outside, these changes may appear accidental or trivial, but they incorporate the potential for the deep-seated transformation and reorganization of court work. What I have called spearheads of development are the very same elements that may direct the development in courts most radically.

The informal discourse in the hearings challenges the idea of dispute resolution as exclusively judicially-determined problem solving, and includes the potential for conducting proceedings in which the client does not experience a discrepancy between the problem that bothers him or her and the judicial treatment of it. The clients' contributions in the hearings, especially their expanding initiatives offering new ways of interpreting the case, challenge the traditional understanding of expertise in courts and invoke questions concerning the kind of expertise the client brings into the hearings, and whose expertise is needed in reaching a satisfactory outcome. Settlement questions the solid foundation of civil courts in their pursuit of material truth.

Informal hearings, clients' expanding initiatives and settlement may be seen as a "Trojan horse" forcing an entry into the nucleus of the court system. Once inside, they could fundamentally change our understanding of what justice is, of how fairness and legitimacy are produced, and of who are involved. Every time they occur, they make visible the constraints of court work and question its motive. Simultaneously, they offer the possibility for expansion by giving a chance to move above and beyond the constraints.

The nature of some of the new court practices as capsules of potential expansion, or as a "Trojan horse", is especially evident in terms of settlement. In terms of the elements of an activity system, settlement can be considered a tool in the sense that it serves as a means for solving the dispute more quickly and cutting the proceedings short. Basically, it looks like a convenient technical instrument for avoiding the complex and time-consuming work of establishing the facts and giving a verdict. At the same time, it "smuggles" in a completely new notion of what justice is, and changes the object of court activity.

This implies that, at times, a tool is more like "a tool in disguise" – something that in fact represents a radically different object. Settlement can be conceived of as a technical tool for rationalizing the proceedings, and many judges obviously use it for that purpose. Whether they wanted to or not, they simultaneously started to work with a new object and to unfold the potential expansion in court work.

The metaphor of "a Trojan horse" turns the traditional idea of court reform upside down. A reform is not an end product of a legislative planning process, that only needs to be put into practice, but it is rather *the beginning of a developmental process* in which the court activity itself may transform and expand. This process of expansion can radically alter our understanding of what justice is and what courts stand for.

Studies in the field of organizational change and learning have distinguished two opposing approaches to organizational change (e.g., Beer & Nohria, 2000). The first one views change as planned and programmatic. Top-down leadership, excluding the participation of teams and employees, emphasizes the strategic decisions first made by the leader. According to the second approach, change emerges, is less planned, and occurs without pre-given blueprints. Participation and collaboration, rather than top-down orders, are seen as vital to ensure long-term performance improvement.

These two approaches embrace the very same questions that have been tackled in this study: does change come from the top down or the bottom up, is it once-and-for-all or a series of small improvements, and most interestingly, is it planned or emergent?

The findings and conclusions of this study seem to encourage the laying aside of the idea of organizational change as merely forceful breakthroughs dictated from above, and the recognition that it is also gradual, often consisting of small but interconnected alterations and adjustments from below. What is essential to our understanding of organizational change is the evolving texture of these gradual changes. Giving support to my working hypothesis on change (Chapter 4), the results of my study indicate that these gradual and small alterations in everyday work practices may conflate to contribute to a radical sea-change in producing court services. When it materializes, this sea-change will influence the whole network of activity systems connected to dispute resolution in courts.

11 Reflections on the Research Process

Qualitative research relying on fieldwork raises questions regarding the collection and validity of the data. Any evaluation of a qualitative study, presupposes the integration of the researcher into the organizational setting of those observed, since the quality of the data depends very much on the cooperation and trust obtained in the field. Recent studies have pointed out the importance of reflection of the ethnographer's position and relation to the field (e.g., Emerson, 2001). In the following reflection on my research process I will connect issues to do with conducting fieldwork with issues of validity.

The current qualitative research wave has questioned the traditional way of validating knowledge against the objective reality (Altheide & Johnson, 1998; Emerson, 2001; Kvale 1995). Instead, knowledge is considered contextual and validity is also related to the responses of the audience. Bloor (2001) has suggested that the two main techniques considered alternative methods of validation in recent qualitative research – triangulation (using different data-collection methods on the same research object) and member validation (comparing the analyst's findings with the understanding of those being studied) – cannot be regarded as tests of research findings. Pointing to the problems of corroboration and comparison in validating techniques, he argues that there can be no tests of validity. "Neither technique can validate findings, but both techniques can be said to be relevant to the issues of validity, insofar as both techniques may yield data which throw fresh light on the investigation and which provide a spur for deeper and richer analyses." (ibid., p.395). Validation techniques thus seem to best serve as opportunities for rather than as a test of reflexive elaboration.

I will utilize Kvale's (1995) conceptions of validity in qualitative research as a means of organizing my reflections on the research process. Kvale treats validity as an expression of craftsmanship and extends the concept to incorporate communicative and pragmatic aspects⁴². I will conclude the study by

⁴² Kvale's (1995) notion of craftsmanship has similarities with what Bloor (2001) calls triangulation, and the notion of communicative validity resembles member validation.

assessing its contribution to activity-theoretical and socio-legal research and to the study of implementation and organizational change, as well as its relevance to legal practitioners working within the court system.

An Overview of the Research Process

My study, which was based on a before-after design around the court reform, started in 1990 and ended in 1998 when the second round of data collection was finished. I have maintained contact with my research site and visit it every now and then. My position as a researcher in relation to the research site has altered over the years. The first three years of the developmental project (1990–1992) were years of intensive fieldwork and systematic interventions organized by our research group. After that, my role changed to that of the individual researcher collecting data. The data, however, was used to support the court personnel in their own developmental efforts.

The specialty of my research lies in the exceptionally long time-span of the fieldwork and the gathering of comparable data before and after the court reform. My knowledge of the time before the reform is not based on accounts and recollections given by current workers, but on the actual court proceedings of that time.

The developmental research project in Vantaa District Court started with intensive fieldwork. In addition to collecting data by observing court proceedings and conducting an extensive number of interviews, I spent a lot of time making ethnographic observations in the field. In those three years of ethnographic study I gained a considerable knowledge of court work and civil proceedings, while maintaining the status of a researcher with free access to events and the confidence of the subjects. The second round of data collection in 1996–1998 were years of picking the fruits of work already done, and I was able to carry out data collection in a more focused and systematic way.

My own knowledge of court work and civil procedure increased during the process. I was a complete newcomer when I began, and I had difficulties even distinguishing civil cases from criminal cases. The practitioners in the field were my teachers. The extensive discussions – both informal ones and those that took place in the context of the interviews – with practitioners representing different viewpoints and different positions in the court system were my most fruitful source of knowledge. In 1991, I also had some training in conducting proceedings, in the form of a five-day seminar for judges organized by the Ministry of Justice.

When I started my doctoral studies in 1995 and revisited my research site after a two-years break, it was not at all clear where I should put my focus. Having made my first observations, I was prepared to consider the wider ethnography of change. This would have included observing changes in collaboration between court personnel, and in the division of labor, and would have required data collection on different forms of cooperation, such as meetings and collaboration between judges and court clerks. I started the data collection with these issues in mind, but it soon became clear that the most important changes had taken place in the organization of the court hearings. I wrote my research plan to cover changes both in the court proceedings and in the collaboration within Vantaa District Court, but soon became convinced that it would be most fruitful to concentrate on the changes in the civil proceedings.

Integration and Obtaining Trust

When the development and research project started in Vantaa District Court in 1990, I felt that some of the personnel were suspicious about our objectives as researchers and about the significance of the project. Since the Ministry of Justice was funding it, I assumed that some of the workers may have wondered for whom we were working and reporting the results. We planned to interview all of the judges and some of the office workers, but some of our informants suggested that we should interview the whole office personnel in order to give a more realistic picture of our research to everybody and to get us in contact with every worker at the court. Following this advice was probably wise. I think the interviews were useful, not only in giving a multi-voiced description of how things worked in the district court, but also in building up trust in our research project.

At first, the judges were clearly uncertain about how to regard and cooperate with us. They were used to maintaining formal relationships with people in their work, and they kept their distance and kept up the formalities when collaborating with us. When we observed a court hearing for the first time, the judge did not allow us to enter the courtroom through the back door in advance with the court workers, but directed us to the waiting area and called us in over the public-address system: "Researchers from Helsinki University, courtroom number two". The first copies of court documents that we asked for were supplied with the judge's signature and the typewritten text: "For the researchers from Helsinki University. Free of charge."

My regular visits to the courthouse and frequent contacts with the workers there intensified my integration into the organizational setting. I received an electronic key that enabled me to move freely inside the courthouse, I was given my own mail box, I had my lunch and coffee breaks with the court workers, and I was invited to the parties they organized. I was also given a nickname when they jokingly referred to me as their “Honorary notary”. I interpreted all this as signs denoting trust and mutual respect, and it gave me confidence in the data.

In Chapter 5, I described how the interviews with those involved in the hearings were conducted, and I preliminarily assessed the information produced in them. Obtaining trust in interviews is essential in order to elicit responses from the interviewees, and especially responses that are more than just self-evident facts and trivialities, already known in the work community and easy to impart to someone not trusted. On some occasions, the interviewees made explicit their own opinions of being interviewed, or indirectly showed their willingness to contribute to the study. Comments on the usefulness and on the appeal of the study could also be interpreted as signs of the high quality of the data.

Case 5, interview with the judge after the preliminary hearing in December 1997

Judge: While I have been talking here with you my thoughts have become clarified. This was not a waste of time.

Case 1, interview with plaintiff’s attorney after the decision in May 1991

Researcher: Do you still have something on your mind concerning the proceedings or the decision?

Plaintiff’s attorney: Well, we have now thrashed out this case. I have nothing else on my mind, only that it would be very interesting sometimes to kind of hear an outsider’s perspective on these issues.

Later on:

Researcher: Thank you for this pleasant cooperation.

Plaintiff’s attorney: My pleasure. This has been most interesting for me, too.

Case 6, interview with the defendant’s attorney after the decision in June 1998

Defendant’s attorney: If you still have something to ask, you can always give me a call and then we’ll take a look.

Reflections on the Validity of the Research

The quality of craftsmanship in an investigation includes continually checking, questioning and theoretically interpreting the findings. Validating means quality control throughout the stages of knowledge production rather than an inspection of the validity at the end of the research process (Kvale, 1995). In the present study, multiple data sources and data-gathering methods provided a basis for continuous checking and weighing up of the evidence. The relevance of the research problems and interests was evaluated during the different phases of fieldwork and analysis. This required close and continuous interaction with the informants.

My examination of change and development in court activity had its starting point in activity theory with the assumption that a fundamental change in a particular activity necessarily requires a change in the object of that work; the object here being understood in its dual nature as the process from the raw material to the meaningful outcome. My working hypotheses on the nature of implementation, change and learning (Chapter 4), and on the possible shift in court work (Chapter 9), made explicit my theoretical point of view from which I worked with the data.

In my empirical analyses, attention was focused on how the object is constructed in the court process. In this sense, one could say the change in court activity was operationalized as changes in the construction of the object. Several windows onto this object construction were opened through my study of courtroom interaction in terms of scripting the proceedings, clients' contributions, and settlements.

The frequent use of excerpts from authentic interaction is a solution that offers the reader the possibility to evaluate the preciseness of my observations and to see the data on which the interpretations are based.

According to Kvale (*ibid.*), communicative validity involves testing the validity of knowledge claims in a dialogue. Valid knowledge is not merely obtained by approximations to a given social reality. It also involves conversation about the social reality, and what is a valid observation is decided through the argumentation of the participants. Valid knowledge claims are established in discourse through which the results of a study come to be viewed as sufficiently trustworthy for other investigators to rely upon in their own work.

In this study, the dialogue between the researcher and the practitioners in the field was built into the research process. Different forms of dialogue concerning my analyses and preliminary findings were set up, including (1) interviews, (2) informal discussions on my observations and preliminary interpretations,

and (3) meetings and seminar days in which I presented selected pieces of videotaped data and my preliminary findings. These events were planned in collaboration with some of the district court judges, and they were aimed at enabling the workers to reflect on their own practices.

The researchers' interpretations were discussed in all of these forms of dialogue, and this provided opportunities to evaluate their validity from the practitioners' perspective while I was still working with the data. Dialogue with practitioners from different organizational positions within and outside the court was also an important source of validation. One special, solitary form of dialogue was writing an article together with the court clerks for the newsletter of the Ministry of Justice. The article was entitled "The bold and the beautiful" (Heikkinen & al., 1992), and it described the pioneering work of court clerks in the hearings and their efforts in developing that work. Outlining the content of the article together in one meeting was a good opportunity for the clerks to articulate their differing working practices, to reflect on them and to differentiate the needs for changing them.

Writing articles about my research during the research process also served as a means of enhancing the communicative validity of my findings. These articles were written in Finnish and, since they were published in legal journals, they were directed to legal practitioners working with court cases. The feedback I received helped me consider current issues in the court system. It also gave me some hints concerning the zone of proximal development in court activity. One indication of the positive feedback from the court system was my appointment as a member of a Government Committee designing guidelines for the future development of the court system.

In the pragmatic validation of a knowledge claim, justification expands to application. Pragmatic validity goes beyond communicative validity, as it represents a stronger knowledge claim than mere agreement through dialogue (Kvale, 1995). It focuses on the relevance of the interpretations for instigating change. In the present study, the starting point of the research was that the researcher's interest coincided with the practical problems faced by those involved in the cases. The practical relevance of the study was articulated in the willingness of the workers of Vantaa District Court to build their efforts to improve the civil proceedings on the videotaped working situations and participants' accounts that my study could offer them. The importance of this kind of mirror, set up by the researcher to reflect current problems and disturbances, was assessed by the chief justice when wrapping up one of the seminar days.

Seminar on civil proceedings, December 1997

Chief justice: When we began this seminar we talked over the conditions for its success, and we found that one condition was that we could discuss and were open-minded. At least I feel that this has been extremely useful, and for a long time, the discussion has been really open and constructive. We have now really seen the work practices of each other and we must have learned something, and everybody can reflect these lessons in his or her own practices. I think these seminars could be held more often.

Contributions of the Study to the Intersecting Research Approaches

My study was an attempt to apply the *activity-theoretical approach* in the realm of court work, thus offering a new context for scholars interested in activity theory and its applications in different fields of social practice. With its concentration on the implementation of court reform on the very local level of one district court and its everyday practices, the study focuses the limelight on the local actors and gives them a voice. In this sense, it counters the view of individuals merely as subject to structural power, or in the case of implementation, as targets of policies (Yanow, 1996, p. 232). In particular, the contribution of this study was to make visible the viewpoint of the court client and his or her actions in the hearings.

The most challenging research effort for me in terms of activity theory was to create a method for elaborating the activity of the clients, *the object* of the court work itself. The development and testing of this method of analyzing clients' contributions in constructing the case was reported in Chapter 8. In order to capture the user perspective on courtroom interaction, I used the notion of initiative and developed a method of initiative analysis. This method proved to be a powerful tool in analyzing the various and differing forms of client contributions in an elaborated way. It was also sensitive enough to detect fragile client initiatives, which could easily be bypassed as irrelevant or accidental. Furthermore, the method was not restricted to client initiatives, but also served in the analysis of their effects and the responses given by the legal professionals.

The notion of initiative and the method for analyzing initiatives and their effects were used in an attempt to develop an intermediate tool for analyzing and understanding situated practices and discourse from the viewpoint of constructing the object. The special challenge in the analysis was to define the criteria for a client's initiative in relation to his or her other verbal contributions. This definition incorporated knowledge of the initiatory and responsive

elements in speech turns (Linell, 1998) and knowledge of the history of the client's position in the hearings. The developed method was valuable in bringing in user perspective on courts, and in making visible the client's contribution in constructing the case. It also helped me to recognize the judges' problems and lack of necessary discursive tools in working in direct contact with the clients. In this respect, the analysis contributes to the understanding of collaborative expertise and boundary crossing across different activity systems, which is currently a theoretical and methodological challenge in many studies on multi-actor collaboration. The method was also crucial in showing what kinds of learning challenges and potential for the change and transformation of expertise are included in face-to-face communication with clients.

With its activity-theoretical approach to reform in the court system and in dispute resolution, my study brings a novel and alternative perspective to *socio-legal studies* on courts. Using the theoretical concept of activity, I tried to overcome the dichotomy between agency and structure, in much the same way as is currently being called for by scholars welcoming cultural studies of law as a promising interdisciplinary approach to tackling law-related phenomena (Sarat & Simon, 2001). With its emphasis on the historical aspect of change and development in courts as well as on the situational aspect of the construction of everyday court proceedings, the present study largely complies with Silbey's (1992) description of cultural studies as treating consciousness as historical and situational, and shifting attention to the constitution and operation of social structure in historically specific situations. It also endorses Sarat & Simon's (2001) remark that legal meanings are not invented and communicated in a unidirectional process, in which actors appear as inert recipients of the law's external pressures. Litigants, clients and others deploy and use meanings and "press their understandings in and on law, and, in doing so, invite adaptation and change in legal practices." (ibid., p. 20).

As a contribution to efforts to forge a new interdisciplinary synthesis, cultural studies of law, the present study introduced the methodology of cultural-historical activity theory (e.g., Engeström, Miettinen & Punamäki, 1999). Local activities are simultaneously unique and general, momentary and durable, in that general cultural means – for instance, artifacts, rules, and division of labor – created by previous generations are used in solving the problems in unique situations.

In the context of Finnish court-related studies, this study is the first one to introduce authentic data on actual courtroom interaction. It also gives an overview of the "grass-roots" implementation of the procedural reform by analyzing how it is being carried out when concrete cases are established and

decided. With its longitudinal design covering the time before and after the reform, it also captures an eight-year period in the history of Finnish lower courts.

My study contributes to *research on policy implementation* in presenting implementation as a learning process with the potential for expansive transformation. The use of qualitative data on the local conducting of everyday court work showed how the reform was implemented in the actual practices of establishing the cases. In this sense, the method complies with the notion of giving full weight to the interpreted meanings of the implementors as well as to the differences in interpretation (Yanow, 1996, p. 222). Rather than framing the study in terms of legislative intent, and comparing agency outputs or outcomes to the intentions of the legislation, I looked at how the new procedural laws were constructed in local practice. The study thus offers an alternative view on implementation, not as the final phase of a legislative process, but rather as an overture for a change process which can fundamentally transform the activity of the implementors.

As far as *studies on organizational change and learning* are concerned, this study theorized change as both fundamental and incremental at the same time. It suggested understanding change as stepwise and gradual, but still including the potential for fundamental transformation and expansion. My analysis of court work explored change in an area that is traditionally regarded as stable and unchangeable. Positioning the research in a before-and-after setting and concentrating on the micro-level analysis of situational and local interaction in court proceedings, also made it possible to trace emergent and deliberate change, and to grasp its fragile seeds.

The Contribution of the Study for Court Practitioners

One important aim of this study was to produce knowledge that is radically local, and thus applicable to the practitioners working on court cases. In an attempt to grasp the changing and contradictory features of the work, I did not even try to offer statistically conclusive facts, but rather aimed at formulating working hypotheses on the possible development of the activity in question. The hypotheses offered a researcher's viewpoint on development that can be tested, experimented with and modified by the practitioners themselves. This kind of knowledge can serve the needs of practitioners in their own developmental efforts, and still be scientifically regarded as theoretical, systematic and critical.

I hope this study will give legal practitioners ideas that are testable and empirically useful. My outlines of the potential development and expansion in court work in particular might serve as one starting point for a critical discussion on what kind of courts we would like and how they should serve us in our legal problems in the future. Much in line with Kvale's (1995) suggestions of sifting the focus from mapping the social world as it is to what it could be, in addition to "telling it like it is", I have also concentrated on "telling it as it might become".

Lately, the success or failure of the procedural reform in civil cases has been assessed in public. High legal costs and the complexity of the new rules have been acknowledged as the main failings of the new system (e.g., Hallberg, 2001, pp. 38, 78). Although these questions are at the very nucleus of assessing the activity of the lower courts, and they evidently seem to indicate deficiencies in court work, I nevertheless solicited another viewpoint, more oriented to the future. The emphasis of my study has been on what is potential and promising in current court work, and on the expansion that appears accessible in the light of current practice. Observed disturbances or contradictions have been interpreted as sources of change and expansion. Berman (2001, p. 99) noted a move in law and society scholarship away from "a legal-realist-inspired reform agenda" toward a focus on law as a pervasive and inescapable force in defining social relations. He criticized the recent tendency in socio-legal studies of seeing power and domination everywhere, and argued that relentlessly critical researchers lead us to despair of the prospects of development. He advocated sympathetic rather than suspicious reading, and the emphasizing of "what is worthwhile in the efforts of people to construct ideas, systems or principles, flawed though they might be." (ibid., p. 101). Instead of overall skepticism and suspicion, he encourages research that tells stories of noble efforts, optimism and hope. A less suspicious story might actually be more effective in achieving reform.

Emphasizing the user perspective on courts – the role of the clients and the recognition of their needs and problems – does not denote devaluing or superseding judicial knowledge and expertise. On the contrary, I wish to highlight the judge's role in translating and solving people's judicial problems. The impending pressure to settle disputes, and clients' emerging needs to be involved in and discuss the dispute as they have experienced it, nevertheless, require new ways of organizing services based on the judge's special knowledge, such as the use of new artifacts, new solutions concerning division of labor, and a new kind of boundary-crossing collaboration between judges and other experts. The service and counseling given by the court has always been recognized as problematic

among legal practitioners, and as a threat to neutrality. The findings of this study suggest a new content of counseling in courts. In its new form, counseling could include endeavors to help the client to understand his or her problem in terms of recognizing what is judicial in it, and thus resolvable through judicial dispute resolution. This emphasizes the instructional function of court proceedings and, respectively, opportunities of learning through negotiation.

The final words have not been said about the implementation of the Finnish procedural reform in civil courts. The process is still going on. The emphasis has largely been on how extensively judges and attorneys have absorbed the new Procedural Code. It could be fruitful to shift the focus from the internalization of the new rules to their externalization: how the local actors and court communities use the Procedural Code to carry out their daily activities with the cases, and how they could further cultivate and sweeten the procedures. Cultivating the procedures to fit better the needs of both clients and courts requires the building up of novel ways of developing court practices. Instead of, or in addition to, nationwide training campaigns, new forms of local developmental efforts and attempts at networking are needed. Novel types of collaboration between judges and attorneys in terms of joint learning about civil proceedings, developmental co-projects involving several district courts, and developmental work in which the client's perspective is also represented, serve as examples of open-minded solutions, which could be organized and reported by the Ministry of Justice.

Laukkanen (1995, p. 2) introduced a metaphor in which the procedural rules are compared with the rules of chess. The rules of chess are not changed easily. The rules of civil proceedings changed remarkably with the 1993 reform. What is special and different from chess is that, in procedural law, a change in the rules of the game also changes the objectives of the game. A player in procedural law typically has to conclude from the rules whether the objective of the game has changed or not. Laukkanen's comparison provides an insight into the fuzziness of the procedural reform, and illustrates the dire need for interpretation from the practitioner's point of view.

Engeström (1990, pp. 193–194) referred to the necessity for an overall perspective that gives a framework to separate renewals and innovations. Presenting such frameworks that configure the future development of the whole activity system requires tools that Engeström calls "where to" artifacts, and which Wartofsky (1979, pp. 207–209) considers tertiary artifacts, used in imagining and constructing possible worlds irrespective of practical constraints. Their importance is in their motivational power and potential for subjectification among the participating practitioners. This includes an important lesson in regard to the

implementation of the court reform and the logic of the procedural law in general: demanding new rules are hard to accept and implement when an overall vision of the future form of the activity system – introduced with the help of the “where to” artifact – is missing (see Engeström, 1990, p. 194).

The implications of the missing “where to” artifacts in the procedural law have to be considered. On the one hand, more legislative effort could be put into conveying to the implementors a careful analysis of the overall future development that is being pursued through the change in the procedure. On the other hand, there seems to be an ever stronger emphasis on the significance of local learning and the collective efforts of the legal practitioners themselves in constructing the future of their own activity. This doctoral thesis may serve as a necessary “where to” artifact in these efforts helping to elaborate the possible and desired alternatives of the future development of courts.

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Appendix 1

Case 6 – Contesting the partition of joint property

An agenda for the plaintiff's interview after the preliminary hearing

February 1998

1. Tell me about your side of the story: What is this case all about?
2. What has happened in this case so far? Do you have other cases pending right now?
3. What happened in the informal hearing in November? Why was it arranged?
4. Your case was brought before the court last June. What has happened after that in the process?
5. What kind of contacts have you had with your attorney? How often do you meet? How do you feel he is pleading your cause? Did you find it necessary to have an attorney? How did you come to hire this attorney?
6. What's the reason for your presence in the preliminary hearing?
7. Are you familiar with the procedure in civil hearings? Has your attorney informed you about the proceedings? What is the meaning of the preliminary hearing in the entire process?
8. How did you find the judge's way of handling the case in the hearing? Was it active or passive? How would you describe the discussion that took place in the hearing? The judge advised you to consider whether certain details were worth fighting to the end – how did you receive his request? Did you feel that the judge lost his temper a bit?

9. Why do you think the judge obliged you and the defendant to be present in the extended preliminary hearing?
10. Why did the judge ask about your efforts in reaching a settlement?
11. What did you think when the judge wished to see all the money transactions and not just individual bills? What about the judge's remarks about fair play and gentlemanliness?
12. Every now and then, you and your lawyer seemed to negotiate on which of you would take the floor. Had you agreed beforehand on a division of labor?
13. Was it easy or difficult for you to understand the judicial details of the discussion? (for example, whether the defendant made a plea of trial or not, whether the cause of action was material or procedural, or whether the defendant's claims should be rejected or dismissed without prejudice)
14. Which one do you prefer: to handle all the problems and unfinished business between your ex-wife and yourself, or to stick to the claims pertaining to the case, only? Is this the last court case between you and your wife?
15. Do you know the composition of the court in the main hearing, if the case proceeds that far?
16. Do you find a settlement feasible in this case? What could be the court's role in reaching a settlement?
17. How do you assess the strategy of the adversary in this case – “what's the name of the ball game”? How does the defendant's lawyer fight their case? Have you had any collaboration with the adverse party?
18. Do you anticipate the final decision in this case?
19. What importance does the time and money spend in the case have for you?
20. What kind of an understanding have you formed about the courts handling this type of cases? In your regard, how do the district courts work today?
21. You told me earlier that you had turned to the parliamentary ombudsman. On what matter was that?

