RELATIONSHIPS BETWEEN THE PARTIES, THE JUDGES AND THE LAWYERS IN GERMANY

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1. *In all process (civil, penal, mercantile, etcetera) beside the activities traditions or natural for the solution of the conflicts, they assume attitudes or different functions (the parties like litigants, judges, helping; the judge like consultant, instructor, legislator, defender; and the lawyers like agents, conciliatory, promoters, consultant, etcetera). Specify the regime (legal or jurisprudential) of these functions*.

A. As to the parties
B. As to the judges
   I. Reconciliation
   II. Information and counseling
   III. Direction of the course of proceeding
C. As to the lawyers

2. *Regime (legal and jurisprudential) that controls the irregularities (or collusions) in the act of the parties, judges and lawyers that look for to twist the primary and latest of the jurisdictional function*.

A. As to the parties
B. As to the court
C. As to lawyers

3. *To what extent is it possible to demand to the parties that they behave in the process with a minimum of objectivity, transparency, respect and good faith? Will we be able to speak of basic rules or a code of ethics of the procedural parties?*

A. Duty of truthfulness
B. Good faith

4. *What are the levels of the relationships between the parties, the judges and the lawyers? Are they supra-ordinance relationships, of subordination, or of equality? In the three levels, is there pursued the same objective?*

A. Constitutional aspects
B. Procedural maxims
C. The function of the lawyer

5. *Which are the crisis elements that whip to the administration of justice attributable to the parties, the judges and the lawyers? And how much collaboration should be between the parties, the judges and the lawyers as remedy of the procedural complexity?*

A. Authority of the judge to direct the proceedings
B. Police power of the judge in the court room
C. Public regulation of the judicial service
D. Regulation of Professional Standards for Lawyers
E. Contractual liability of lawyers to their party
F. Cost rules

6. *Does it affect the development of the relationships between the parties, the judges and the lawyers, the material resources, the infrastructure and the place headquarters of the organ jurisdictional resolutor, in what degree?*

7. *What importance have the formalities of the judicial process as for the relationships of the parties, the judges and the lawyers that intervene in it?*

A. Formalities as means of procedural efficiency
B. Formalities and the workload of the judge

8. *Which other considerations you judge important an about the topic?*

The answers given by this report follow the questionnaire presented by the general reporters, our distinguished colleagues Ma. Macarita Elizondo Gasperín and Sandile Ngcobo.

In all process (civil, penal, mercantile) besides the activities traditions or natural for the solution of the conflicts, they assume attitudes or different functions (the parties like litigants, judges, helping; the judge like consultant, instructor, legislator, defender; and the lawyers like agents, conciliatory, promoters, consultant). Specify the régime (legal or jurisprudential) of these functions.

A. *As to the parties*

There various provisions involving the parties in the process of litigation, insofar letting them act as litigants. The most important aspect is the following: According to sec. 137 para 4 ZPO (Zivilprozessordnung, German Code of Civil Procedure), the court may, also in proceedings with obligatory representation by an attorney, allow either party to speak. In court practice, this rule is broadly applied so that a party may argue its own case as far as it whishes to do so.

Moreover, the principle of obligatory representation by a lawyer (sec. 78 ZPO) does not apply before the district courts (Amtsgerichte) which, in general, have jurisdiction as courts of first instance over disputes up to 5,000 Euro (sec. 23 Gerichtsverfassungsgesetz-Constitution of Courts Act).

B. *As to the judges*

I. Reconciliation

According to German understanding, the court is not only obliged to render a judgment but also to try to settle a case. The most relevant provision is:

Sec. 278 ZPO. Amicable solution, conciliatory hearing, settlement.

1. The court should consider an amicable solution of the dispute in every stage of the litigation.

2. The oral trial is preceded by a conciliatory hearing, except for cases in which a conciliatory hearing has already taken place before an out-of-court conciliatory authority or when a conciliatory hearing seems to be evidently pointless. In the conciliatory hearing, the court, carrying out a free evaluation of all circumstances, has to discuss the factual and legal issues with the parties and to ask questions as far as necessary. Parties having appeared should be heard personally.

3. For the conciliatory hearing as well as for further attempts of reconciliation, the personal appearance of the parties should be ordered…

(4)-(6)…

If the parties enter into a settlement, the court has to take down its wording into the records of the proceedings. The recorded settlement can be used for enforcement like a judgment (sec. 794, ZPO).

II. Information and counseling

The obligation of the courts in this respect can be found in Sec. 139, ZPO, Substantial direction of proceeding.

1. The court has, as far as necessary, to discuss the factual and legal problems of the dispute with the parties under consideration of their factual as well as their legal side, and to ask questions as far as necessary. It has to see that the parties make their statements in regard to all relevant facts timely and comprehensively, esp. that they complete insufficient statements concerning their allegations, state their means of evidence and file correct motions.

2. The court may base its decision on an aspect which evidently has been overlooked or considered to be irrelevant by the parties, if not only interest payments concerning the claim and modalities of its execution are concerned, only if it has indicated this aspect to the parties and given them an opportunity to be heard. The same applies to aspects which the court sees differently from either party.

3. The court has to draw the parties' attention to doubts concerning aspects which have to be considered *ex officio*.

4. Any directions based on this provision must be given as early as possible and be taken to the records. The giving of such directions can be proven only by the content of the records. Against the content of the records, only evidence of forgery is admissible.

5. If it is impossible for a party to immediately answer to a courts' direction, the court should, on motion of this party, set a time limit, in which the party may present a subsequent written statement.

III. Direction of the course of proceedings

The court has different means and tasks allowing a judge to direct the course of the proceedings, *i. e*.

a) According to sec. 136, ZPO, the presiding judge directs the oral trail. This includes the duty to take care of a comprehensive discussion of all relevant issues (sec. 136 para 2, ZPO).

   Based on this authority, the court may both directly hear and ask questions to the parties and their lawyers during the oral hearing. This is esp. important if the facts presented by a party seem to be incomplete or if any contradictions arise between the allegations of both parties or between the allegations of either party and other undisputed facts. As a consequence, the court may reject the allegations of a party as not adequately substantiated if it finds the answer to be insufficient.

b) Sec. 273, ZPO, governs the responsibility of the judge for the preparation of the oral trial. Based on para 2 of this provision, this includes the power of the judge to:

   - call upon the parties to supplement or explain their written statements within a limit set by the court (sec. 273 para 2 no. 1, ZPO),
   - ask public authorities or officials for the communication of documents or a supply of information (sec. 273 para 2 no. 2, ZPO),
   - order the personal appearance of either party (sec. 273 para 2 no. 3, ZPO),
   - order the presentation of documents or other objects by the parties or third persons (sec. 273 para 2 no. 4, ZPO, with secs. 142, 144, ZPO).

c) Moreover, the date of the trial, the procedural handling of the pre-trial stage (preliminary early hearing or written pre-trial stage) is determined by the court. The court, however, is bound to set the date as early as possible (sec. 272, ZPO).

d) In general, all services to the parties or their lawyers are effected by the court (sec. 166 para 2, ZPO).

C. *As to the lawyers*

The role of lawyers may differ as a consequence of changing functions of the court or the parties (as mentioned above) since the lawyers have to comprehensively advise and represent the parties. This *e. g.* includes the aspect that, in certain situations, a settlement or another amicable solution

is in the best interest of the party. In such a situation, the lawyer is thus obliged to promote such a result.

Furthermore, sec. 15a Einfuehrungsgesetz zur Zivilprozessordnung (Introductory Act for the Code of Civil Procedure) provides that each Bundesland has the power to establish a rule providing for an obligatory pre-trial conciliation proceeding before an officially recognized conciliation agency for certain cases (small claims up to 750 Euro; neighbor disputes and actions for defamation —except for press and media cases). Lawyers may qualify as an officially recognized conciliation agent but may not act in this capacity when they are the counselor of either party.

Lawyers can of course also engage in the field of alternative dispute resolution as an arbitrator or mediator. This, again, is not possible if they act as counselor for either party.

2. *Régime (legal and jurisprudential) that controls the irregularities (or collusions) in the acts of the parties, judges and lawyers that look for to twist the primary and latest of the jurisdictional function.*

A. *As to the Parties*

The duty of the courts to give directions (*cfr*. sec. 139, ZPO *supra*) and the duty of the lawyers to counsel their party operate as safeguards against any disadvantage caused by inadequate statements of a party speaking for itself.

The right of the court to allow and stop a party to speak (sec. 136, ZPO) and the so-called police power of the judge in the court room safeguards the efficiency and correct course of the proceedings.

B. *As to the Court*

As far as the court intervenes in the course of the proceedings, its impartiality may be endangered. This aspect is governed by the rules of impartiality. According to sec. 42, ZPO, a judge may be challenged for prejudice if there is reasonable cause to fear a lack of impartiality.

Yet, as a general rule, giving directions or stating a viewpoint on legal or factual aspects of a case, esp. within the limits of sec. 139, ZPO, does not give reasonable cause in this sense. It may even give rise to doubts as to the impartiality of a judge if he does not give directions although he or she is obliged to do so. The same (no reason for doubts as to impartiality) applies to general remarks or suggestions to a party or to preliminary state-

ments concerning the chances of the law-suit . The situation is different, if the court demonstrates a lack of willingness to hear other arguments or viewpoints or lack of openness to review its position on the bases of new arguments.

There exists a controversy concerning rights or defenses of a party which must not be considered ex officio by the court but have to be raised by a party. Whilst the traditional attitude is that the court must not draw a party's attention to such rights or defenses, it seems to be a prevailing viewpoint today that a court is allowed to do so without raising doubts as to its impartiality.

C. *As to the Lawyers*

Insofar the relevant rules are those of malpractice. The contract with the represented party obliges the lawyer to act in the clients' best interest. If this duty is violated, the lawyer has to pay damages according to general rules of obligation. Such a liability may apply if the settlement is unclear or if rights are waived which the party wishes to keep.

Moreover, a lawyer has *e. g*. to advise against a settlement if the settlement is not in the best interest of the party. This may be the case if both the legal situation and the facts of a case are clear enough to predict a judgment favorable to the represented party. This rule also applies in situations in which it is difficult to determine the certainty of a favorable judgment and where additional factors have to be taken into consideration like the speediness and likeliness of enforcing a judgment compared to a settlement. As far as these issues are relevant, the decision about a settlement nevertheless remains of the party. Consequently, the lawyer is obliged to supply comprehensive information about the pros and cons of a settlement, the risks involved, etcetera.

3. *To what extent is it possible to demand to the parties that they behave in the process with a minimum of objectivity, transparency, respect and good faith? Will we be able to speak of basic rules or a code of ethics of the procedural parties?*

A. *Duty of Truthfulness*

The most important statutory provisions concerning this question can be found in sec. 138 para 1 and 2, ZPO. Their wording is:

1) The parties have to state their facts comprehensively and truthfully.
2) Each party is obliged to make a statement on the facts alleged by the other party.

As a consequence, a party must not lie to the court when stating its case. A violation may be considered as an attempted fraud which is a criminal offense.

B. *Good Faith*

Furthermore, the doctrine of good faith (as provided for in sec. 242 Buergerliches Gesetzbuch-German Civil Code) is, in general, applicable to procedural law. Thus, each party is obliged to litigate in accordance with the requirements of good faith. Examples for an application of this well recognized principle are:

- A party obliged to present a bank's guarantee as deposit for the costs of the proceedings may claim that the other party agrees to a replacement of the guarantee by one of another bank if there is a legitimate interest for such a replacement and the interests of the other side are not endangered.
- The binding effect of statements of an attorney for the represented party (secs. 83-85, ZPO) may be restricted in exceptional situations.
- A party may not invoke a rule providing for a favorable distribution of the burden of proof if it, although obliged to provide for sufficient documents according to substantive law, has caused a situation where no evidence is available.
- Even if there is no time limit for certain procedural rights, a party can be precluded from invoking these rights (*e. g*. a right to appeal) if it has caused the legitimate expectation that it will not make use of them.

4. *What are the levels of the relationships between the parties, the judges and the lawyers? Are they supra-ordinance relationships, of subordination, or of equality? In the three levels, is there pursued the same objective?*

A. *Constitutional Aspects*

Since the judge has the power to render a binding decision binding, the parties are subject to the authority of the court. Insofar the court rules "over" the parties and one may speak of a supra-ordinance of the court. On the

other hand, the court is not free to arbitrarily use this power but it is bound by certain rights, in particular constitutional rights, of the parties. As far as a party can exercise these rights, one may speak of a supra-ordinance of the parties. The most significant ones are:

- the right to access to justice in all civil cases (guaranteed as a consequence of the principle of rule of law provided for by article 20 Grundgesetz-Basic Constitutional Law and by article 6 European Convention on Human Rights);
- the right to an effective procedure (guaranteed by article 20 Grundgesetz) including the right to an independent and competent judiciary (as instituted by articles 92, 97 Grundgesetz);
- the right to a fair trial (article 20 Grundgesetz and article 6 European Convention on Human Rights);
- the right to be heard (article 103 Grundgesetz and article 6 European Convention on Human Rights); and
- the right to the statutory judge (article 101 para 1 sentence 2 Grundgesetz).

As far as these principles, the power of the judge over the parties and the lawyers is limited. Whilst most of these rights can —at least in general— be considered to be a well recognized part of most national procedural laws, there are some aspects which are typical of German law. In particular, the right to be heard and the right to a statutory judge are construed rather broadly in Germany.

According to the right to be heard, the judge has to take notice of all factual allegations of either party and consider their legal relevance *ex officio*, even if they are presented in a way which causes unnecessary difficulties for the court. The grounds for a rejection are limited to reasons provided for by procedural law. The powers of the court to reject any facts for reasons of delay are construed rather narrowly. Even if, *e. g.*, a party has failed to comply with time limits set by the court, the judge is obliged to take notice of delayed allegations and to take any available steps in order to avoid a delay of the trial as a whole; if the court fails to do so, a rejection is deemed to be unjustified; if it does, a rejection is deemed to be unnecessary.

The constitutional right of the party to the statutory judge requires that the legal system provides for rules which define the competent judge by

abstract criteria. First of all, the competent court must be defined by law as precisely as possible. Secondly, within the court, there has to be a comprehensive schedule for the assignment of cases to each panel and judge based on pre-defined objective criteria. Any discretion of a judge whether he or she should be involved in a case is not acceptable at all.

B. *Procedural maxims*

Furthermore, the relation between parties and judges is governed by so-called procedural maxims.

According to German legal doctrine, the commencement of the law suit (by service of the complaint, sec. 253, ZPO) results in the establishment of a procedural legal relationship between plaintiff and defendant as well as between the parties and the court ("Prozessrechtsverhaeltnis"). Whilst in criminal cases, the establishment and existence of this legal relationship is governed by the court, the situation is different in civil procedure. Here, in general, the legal relationship is governed by the parties (principle of disposition, "Dispositionsmaxime" as opposed to principle of official determination "Offizialprinzip"). The principle of disposition can be found in the following aspects:

- Sec. 253, ZPO: The law suit is commenced by a complaint of the plaintiff and (except for non-contentious proceedings) not *ex officio* by the court.
- Sec. 263, ZPO: The plaintiff may change the subject matter of the law-suit without the judge's consent if the defendant agrees; only if the defendant does not agree, the court has to determine whether the change of subject matter contributes to the expediency of the law-suit.
- Sec. 269, ZPO: The plaintiff may withdraw the complaint without reason (subject to the defendants consent once an oral hearing took place but without consent of the judge).
- Sec. 308, ZPO: The judgment must not exceed the parties' motions.
- Sec. 91a, ZPO: The parties may declare the termination of the lawsuit without the judge's consent.
- Sec. 794, ZPO: The parties may settle the case without the judge's consent.

Limits of this principle: The court may (and has to) suggest adequate motions and pleadings by the parties and may interpret them in cases of doubt or lack of clarity.

Concerning matters of fact, the law-suit is governed by the "principle of party presentation" (*Beibringungsgrundsatz*, also called "principle of litigation", *Verhandlungsmaxime*, as opposed to the "principle of investigation", *Amtsermittlungsgrundsatz*). According to this principle, the presentation of facts and evidence is a responsibility of the parties. This principle, since its existence is beyond all doubt, is not expressly stated by law. The ZPO limits itself to stating exceptions (*e. g*. in sec. 616, ZPO for family proceedings). The most significant consequences of the principle of party presentation are:

- The court may base its decision only on facts presented by the parties.
- Which allegations need to be proven depends on the statements of the parties (no proof is necessary nor admissible for facts expressly or tacitly conceded by the other party, sec. 138 para 3, ZPO; the same applies to facts which are obvious for the court, *i. e*. either that they are generally known or that they are known to the court, sec. 291, ZPO).
- The court has to determine the legal relevance of the presented facts *ex officio* (principle of *iura novit curia*).

The limits of this principle are set by secs. 139 and 273, ZPO as well as by the authority of the judge to direct the oral hearing. Furthermore, the interrogation of witnesses and experts is primarily conducted by the court, sec. 396, ZPO. The lawyers and the parties may ask additional questions, 397 para 2, ZPO. Furthermore, the court may, according to its discretion and as a part of its competence to direct the proceedings *ex officio*, order the production of such documents which the parties have referred to (sec. 142, ZPO) or the production of parties' files concerning the law-suit in order to complete the court files (sec. 143). It may also order the judicial inspection of certain objects or an expert investigation.

Notwithstanding these court powers, the burden of presenting evidence remains with the parties. However, the burden of offering evidence by an expert does not include the burden of naming or presenting the expert or his/her opinion itself. Expert evidence is offered by a statement of facts and general reference to "expert evidence". Consequently (in order to safe-

guard neutrality), the expert is chosen and appointed by the court. The lawyers or parties may suggest a person to be nominated as an expert and present additional own experts.

C. *The Function of the Lawyer*

As far as the relation between lawyers and judges is concerned, the most important aspect is that the lawyers' function is to represent the parties. As a consequence, the rights of the parties mentioned above can, indirectly, be seen as rights of the lawyers in their capacity as representatives of the parties.

In the relation between the lawyers and the parties, two main legal aspects can be distinguished. Firstly, the legal relationship between lawyer and party is a contractual one which can be categorized as so-called agency service contract ("Geschaeftsbesorgungsdienstvertrag"), governed by secs. 675, 611 *et seq*. Buergerliches Gesetzbuch. By this contract, the lawyer is to supply the promised service to his or her client. Within the limits of this promise and relevant legal provisions, the client has the right to give orders to the lawyer. Insofar, one may speak of a supra-ordinance of the party. Yet, since the lawyer is, in principle, free to terminate this contract at any time, the factual situation may quite be the opposite, esp. in cases of a strong demand for services of this specific lawyer.

Secondly, the lawyer has power of attorney which is a different legal issue. The scope of this power of attorney is defined by law and gives the lawyer a general power to speak for the party concerning all procedural aspects within a certain law-suit. Restrictions imposed by the party are relevant only for the relation between lawyer and party, not for the court and the other party. The situation is different only for settlements and waivers (sec. 83, ZPO).

5. *Which are the crisis elements that whip to the administration of justice, attributable to the parties, the judges and the lawyers? And how much collaboration should be between the parties, the judges and the lawyers as remedy of the procedural complexity?*

A. *Authority of the Judge to Direct the Proceedings*

The most important powers of the judge to promote an effective administration of justice derive from its competence to formally and substantially direct the proceedings as mentioned above. As far as the goal of an

effective administration of justice is endangered, the judge may use these competences more extensively.

B. *Police Power of the Judge in the Court Room*

The basic provision in this respect is sec. 176 Gerichtsverfassungsgesetz stating that the presiding judge has to maintain the order during the oral trial. Secs. 177 and 178 Gerichtsverfassungsgesetz provide for the powers of removing persons out of the court room, imposing fines or imprisoning persons who do not comply with court orders. According to sec. 180 Gerichtsverfassungsgesetz, the same powers apply when the court performs official acts other than the oral hearing.

C. *Public Regulation of the Judicial Service*

As far as the judge fulfills specific functions as a member of the judicial branch, esp. when he or she handles and decides cases, the principle of judicial independence applies, *i. e*. the judge is not subjected to any direct or indirect orders as to how to handle or decide cases nor may he be removed from his office or transferred to another court (article 97 Grundgesetz, sec. 1 Gerichtsverfassungsgesetz, sec. 25 Deutsches Richtergesetz —German Judges Act). Yet, according to secs. 8-24 Deutsches Richtergesetz, the legal framework for the office of a judge is shaped as a public service position, so called judge's service relationship— "Richterverhaeltnis". Insofar, the judge is supervised by his or her superiors. The distinction between judicial independence on one side and allowed supervision may be difficult. The general rule is that only the formal order of the execution of the office of a judge, *e. g.* the compliance with formal requirements for the administration of the judicial service, may be subject to any measures of supervision. Intentional twisting of the law is, according to sec. 339 German Penal Code ("Strafgesetzbuch") a criminal offense.

D. *Regulation of Professional Standards for Lawyers*

Lawyers fulfill their duties towards their clients independently. However, there are certain regulatory professional standards. In serious cases, the admission to the bar may be revoked (sec. 14 Bundesrechtsanwaltsordnung-Federal Attorney Regulation).

E. *Contractual Lability of Lawyers to their Party*

Based on the contractual obligation to deliver the promised services, the lawyer has to take the legal or procedural appropriate steps in order to

reach the client's goals. Consequently, lawyers are liable for any breach of this contractual obligation. Party betrayal is a criminal offense.

F. *Cost Rules*

The system of cost rules aims at avoiding any unnecessary procedural efforts. According to secs. 91 *et seq*., ZPO, the winning party may recover its costs from the other side; and furthermore, the loosing party has to pay all court fees. In cases of a partial success, the costs shall be proportionally divided, sec. 92, ZPO. According to sec. 96, ZPO, the costs of unsuccessful means of attack or defense can be imposed on a winning party.

6. *Does it affect the development of the relationships between the parties, the judges and the lawyers, the material resources, the infrastructure and the place headquarters of the organ jurisdictional resolutor, in what degree?*

One cannot exclude such an effect. It seems, however, that its practical relevance in Germany, if any, should not be overestimated. Its most important aspect probably concerns the speediness of justice. In this respect, one may say that —as a general rule— the more time is needed for a lawsuit, the more dependent are the parties from the judges.

7. *What importance have the formalities of the judicial process as for the relationships of the parties, the judges and the lawyers that intervene in it?*

A. *Formalities as Means of Procedural Efficiency*

Formality and technicality are typical aspects of procedural law. In German doctrine, this aspect has been esp. emphasized by a famous dictum of the German scholar Friedrich Stein: "Procedural law is technical law in its sharpest mode, dominated by changing needs of suitability, bare of any eternal values". Although this does not take into account that there are some procedural principles which reflecting such a value like the principle of judicial impartiality and the right to be heard, the technical aspect of procedural law also has its merits. Behind them, there is the idea that a subordination of procedural law under technical requirements suits best for the needs of a speedy and efficient justice. Insofar, one may argue that formalities are in the best interest of the parties, their lawyers and the judges.

A very important aspect of this concerns legal certainty. As far as, *e.g.*, certain time-limits or formal requirements for appeals apply, the appellant as well as the respondent can be sure about the circumstances under which an appeal is possible. After the time limit has expired, both can be sure that an appeal is no longer admissible. Insofar, formalities can also be a help for the judge to avoid any unnecessary work.

B. *Formalities and the Workload of the Judge*

As far as the parties do not comply with the relevant formal requirements, the judge's work may become much easier since the merits of the case must not be considered. Thus, one might think of formalities as a method to reduce the workload of judges. This, however, is (and must be) only a side-effect of procedural formalities and not their rationale.

8. *Which other considerations you judge important an about the topic?*

Other issues in this context concern arbitration and mediation. Arbitration and mediation seem important for our topic in, at least, two respects:

a) As far as arbitration and mediation are open, the parties do not depend on the state's judges. Insofar both operate as an indirect limit to the power of judges. The workability of arbitration or mediation is, however, influenced by procedural rules, esp. those concerning the

   - enforceability of arbitration clauses,
   - enforceability of arbitral awards and
   - enforceability of agreements reached as a result of a process mediation.

   Concerning arbitration, the German rules follow more or less exactly the provisions of the Uncitral-Model Law on International Commercial Arbitration so that there is no need for a survey in this report. One should, however, note that in Germany, these rules apply for all cases of arbitration, also in a purely national context. Results of mediation can, *e. g.*, be enforced as a binding contract between the parties.

b) The need for mediation may be differ from one legal system to another as a result of a different understanding of the role of the judge.

The less active the role of the judge is in the process of settling cases the stronger is the need for mediation. In the context of a procedural environment giving the judge a rather active role like Germany , the need for conciliatory proceedings out of the judicial system seems to be not as strong as in other countries where the judge is confined to a more passive role.