THE RELATIONS BETWEEN PARTIES, JUDGES AND LAWYERS. MODERN CIVIL PROCEDURE AND THE BALANCE OF PROCEDURAL FORCES

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SUMMARY: I. *Historical Review*. II. *Principles Governing the Relationship between the Parties and the Court*. III. *Fundamental Principles of the Civil Procedure*. IV. *Introduction of Court Automation in Austrian Civil Procedure*.

I. HISTORICAL REVIEW

The relationship between the judge, parties and the lawyers is one of the most discussed problems of civil procedure. It is based in history that the *strength* and the *position* of the main characters of the civil procedure effects the entire proceedings. Civil procedural law has always been tightly linked to the political conception of the state and has been in permanent interrelation with the current ideas concerning society and law.

Looking back to the various historical Codes of Civil Procedure extreme changes can be noticed. The *oral* trial alternates with a *written* one; the ascertaining of the truth is once forwarded by the *judge* and then determined by the *parties; free* evaluation of evidence alternates with *bound* evaluation of evidence; the civil proceedings is determined by *the power of the parties* or *of the judge*. Each model of civil procedure corresponds with a political model of a state. The historical development of the procedural law indicates the tense relationship between the individual and the state.

In Austria the Code of Civil Procedure which is still in force today was created by *Franz Klein* in 1898. The insufficiencies of the former law could be removed and new principles meeting the requirements of a modern state were introduced.

The relationship between the judge and the parties is essentially influenced by the fundamental principles of civil procedure. Two groups of procedural principles can be distinguished. One group contains the fundamental rights of the fair trial whereas the other governs the relationship between the court and the parties.

II. Principles Governing the Relationship between the Parties and the Court

1. *General Aspects*

Specifying the balance of power in civil proceedings it is to decide *who* has the determining influence on the matter in dispute, on the gathering of facts (*Stoffsammlung*) and on the running of the process (*Prozessbetrieb*), the *judge* or the *parties*. The strict realisation of one or of the other is not common, mostly it is a mixture of both.

I want to stress the fact that in Austria the judge has a strong position in contrast to —par example— the United States. We owe this to the creator of the Austrian Code of Civil Procedure, *Franz Klein*, who advocates the "strong" judge and the task of the state to care for a quick and right decision. Nowadays it is best to describe the relationship as *co-operation* between the judge and the parties respectively their lawyers. Having that in mind most new Codes of Civil Procedures strengthened the position of the judge, of course in different intensity.

2. *Principle of Party Control* (Dispositionsgrundsatz)

This principle illustrates the fact that the *parties* are largely in *control of the lawsuit*. In civil procedures parties dispute civil matters which are dominated by the parties' freedom of contracts (*Parteiautonomie*). Thus, parties are provided with a certain freedom to dispose of the civil proceedings.

This principle is realised by the following rules: The proceedings can only be *initiated by the plaintiff* (*iudex ne procedat ex officio*); the matter in dispute is specified by the *motions of the parties*; and finally parties can end a proceedings at any point by *waiving* the claim (*Verzicht*), *acknowledgment* of the claim (*Anerkenntnis*) or *settlement* of the case in court (*Vergleich*).

The initiation of the proceedings by the judge or a state organ *ex officio* (*Offizialgrundsatz*) is not common in Austrian civil procedure. Only in parts of the non-contentious probate proceedings (*Außerstreitverfahren*) and of the insolvency proceedings this principle is realised.

Another effect of the principle is that the judge is not allowed to adjudge the parties more than they applied for. Likewise in appellate proceedings the judge is bound to the motions of appeal of the parties.

3. *The Principle of Limited Investigative Powers* (abgeschwächter Untersuchungsgrundsatz)

It is based in history of the Austrian Code of Civil Procedure that the proceedings is regarded as a *task of the state*. The judge is entitled with certain powers concerning the direction of the proceedings (*Prozessleitung*). The meaning of this is not only a sort of case management but also an *ex officio proof–taking*. However, two restraints have to be mentioned: 1) documents must be submitted only if one of the parties has referred to them and 2) witnesses may not be heard if both parties oppose.

The judge has to gather the facts in *co-operation* with the parties respectively their lawyers and he has to consider the results of the entire proceedings. Thus, the principle of *limited investigative powers* is realised because the first initiative concerning information and evidence is laid upon the parties. The judge is not entitled to investigate from the beginning without any allegations of the parties. First of all it is the duty of the parties to allege the necessary facts and to offer evidences. Then the judge is obliged to collect *ex officio* all the evidences that can clarify the truth.

The *pure principle of investigative power* (*reiner Untersuchungsgrundsatz*) seldom can be found in Austrian civil procedure; it is only realised in proceedings which are dominated by a public interest to find out what has really happened. Proceedings concerning the nullity of marriage or some social matters and —to some extent— enforcement proceedings can be named in this context.

4. *Principle of* ex officio *Proceedings* (Amtsbetrieb)

In Austria the legal steps *keeping the proceedings going* are taken *ex officio* by the judge. The task of the parties —as said above— totals in

initiating the proceedings in the first as well as in the appellate instance and the matter in dispute is also determined by the motions of the parties. The *ex officio* running of the proceedings (*Amtsbetrieb*) results from the already mentioned task of the state to care for a quick and right decision. The judge is par example responsible for the *collection of evidences, the appointment of a day for a hearing, summonses*, the *service*.

III. Fundamental Principles of the Civil Procedure

1. *The Principles of a Fair Trial*

In review of the development of the civil procedure in the past century the establishment of the guarantees of a fair trial in the Constitution as well as in international regulations should be emphasized. In 1948 the General Assembly of the United Nations adopted and proclaimed the *Universal Declaration of Human Rights*, where in article 10 most important procedural guarantees are stated. The procedural guarantees of article 6 of the *European Convention on Human Rights* (ECHR) achieved crucial importance in the European Codes of Civil Procedure. They succeeded in concentrating all the experience grown in centuries concerning procedural guarantees of the European civil law as well as common law countries.

2. *Right to be heard* (Recht auf rechtliches Gehör)

The right to a fair trial granted by article 6 ECHR focuses on the right to be heard in court and is one of the most important provisions of the Convention. It has been raised to a fundamental procedural right rooting in the *freedom* and *dignity of man*. The demands for a *tribunal established by law, independence* and *impartiality* as well as for a fair trial in general have hardly been a reason for discussion in the past century. Solely the demand of the Convention that legal proceedings should be *concluded within reasonable time*, a key element of the Convention, gives reason for dispute. In Austria the principle of procedural concentration tries to fulfil these requirements.

Another point for discussion is the right to be heard of non-participating third parties whose legal position is touched by the binding force of court decisions. This problem was not been solved satisfactorily and totally different solutions have been offered.

3. *Principle of Oral Proceedings* (Grundsatz der Mündlichkeit)

Only what has been *brought forward* in an oral hearing may provide the foundation of adjudication in a civil trial. This principle is stated in the Austrian Constitution. The parties have to *litigate orally* before the competent court and their motions, allegations of facts (*Tatsachenbehauptungen*), offered evidences and legal assumptions have to be *heard*. It is prohibited to read written statements. The oral hearing is the basis for the judgement. Of course there are some exemptions such as the appellate proceedings and for reasons of legal certainty the writ, the statement of defence, have to be written.

4. *Principle of Public Hearing* (Öffentlichkeitsgrundsatz)

As well as the principle of an oral hearing the principle of a *public* hearing is stated in the Austrian Constitution. Public hearing means that it is open for the public; everybody who wants is allowed attend, even without any legal interest. This principle is a protection against the administration of justice in secret with no public scrutiny. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of article 6 ECHR.

Proceedings concerning par example matrimonial matters are not open for the public. Furthermore the judge is obliged to abandon public *ex officio* from court if morality and order are in danger or a disturbance of the trial is expected. Public can also be abandoned by party motion if facts concerning the family life or business secrets have to be discussed.

5. *Principle of Immediacy* (Unmittelbarkeit des Verfahrens)

The principle of immediacy is realised if the judgement is rendered by judges who *participated in the entire proceedings*. The crucial significance results in its favourable effect on the investigation of the truth which is only granted by the *immediate contact between the judges, parties and evidences*.

There is a certain tension between this principle and the principle of procedural concentration including the economic running of the trial. Consequently it has to be decided to what extent the collection of evidence by an instructed judge who does not participate in court or the utilisation of evidence taken in another trial shall be permitted. In Austria the expert

witness' report or the records of evidence can be used in a second trial if both parties have already participated in the first proceedings. If not they have to agree explicitly.

6. *Principle of Procedural Concentration* (Grundsatz der Verfahrenskonzentration)

The principle of procedural concentration, together with the case management of the judge (*Prozessleitung*) and the running of the proceedings *ex officio* (*Amtsbetrieb*), realises the demands of Article 6 ECHR for a *decision within reasonable time*. Especially the judge has certain possibilities to enhance a speedy and efficient trial, to save time and costs and to impede attempts of the parties to retard the proceedings. Aiming at procedural concentration the judge can *deny* a motion for the *admission of evidence*, the *offer of evidence* or the *allegation of facts* as irrelevant or immaterial and set a *final date* for the taking of evidence. Nevertheless the judge has always to keep in mind that he is obliged to gather the entire facts and evidences.

In Austria the most important instrument to guarantee a speedy and efficient trial is the rule that no new evidence or facts may be introduced on appeal (*Neuerungsverbot*). The appellate instance is restricted to control the judgement of first instance on the basis of the facts gathered by the court of first instance. Hence the gathering of facts is pooled in the first instance proceedings Austria has one of the *world's shortest duration* of proceedings.

The main target of the amendment of the Code of Civil Procedure in 2002 was the further simplification and acceleration of the proceedings. Various measures were taken to speed up the proceedings. I would like to stress the fact that jurisdiction of summary proceedings concerning small money claims resulting in an order for payment was extended to Regional Courts. A detailed report on that will be given later.

IV. Introduction of Court Automation in Austrian Civil Procedure

1. *General Aspects*

One may attest the Austrian procedural system a slight imbalance of the direct relationship between the parties, the lawyers and the judge because

of the implementation of court automation in the late eighties. It started with the automation of the Land Register and soon the electronic legal communication concerning summary proceedings of small money claims followed. The Austrian civil procedure was subject to great changes during the last years and court automation was undoubtedly one of the largest steps. The fast and successful changeover was considered as epoch making; the Austrian legislation gave therewith a convincing answer to the demands for *quicker and more efficient civil proceedings*. Court automation could very successfully release the overburdened justice. As mentioned above the acceleration of the proceedings is one of the most important principles in Austrian civil procedure.

2. *Electronic Legal Communication*

Electronic legal communication allows electronic —that means paper free— transmission of documents (applications, appeals, etc.) from the public to the courts and *vice versa*. Additional paper copies and postage can be saved with this quick electronic transmission.

In Austria electronic legal communication started on January 1, 1990. In January 1997 the 1,000,000 document and in November 2001 the 10,000,000 document was transmitted to court. Nowadays 90% of all District Court matters are carried out electronically, that's ¾ of all civil matters in Austria.

Due to the complete computerisation of the courts lawyers, notaries, the Federal Law Office of Austria and other institutions (like insurance companies or banks) can file money claims electronically by using provided forms up to an amount of controversy of € 30,000. This automated summary proceeding offers a quick, efficient and cheap way to obtain a title for enforcement. The payment order is issued after a limited examination without hearing on the basis of the claim. The procedural requirements have to be met, the claim has to be due, actionable and sufficient and must not depend on consideration to be given. Further, the defendant's residence —that must be in Austria— has to be known. These requirements given the court is obliged to issue an order for payment. If the defendant intends to dispute he can raise an objection within 4 weeks with the effect that the ordinary proceedings is initiated. These provisions mean to fulfil the requirements of Article 6 ECHR with regard to the right to be heard.

Until the year 2002 orders for payment have only fallen within the jurisdiction of District Courts but by the amendment of the Code of Civil Procedure 2002 jurisdiction was extended to Regional Courts. That means that proceedings concerning money claims up to € 30,000 can be carried out automatically. The introduction of this regulation was extremely disputed because € 30,000 is definitely not a "small money claim". Opponents feared the fact of the issuing of a title for enforcement in the amount of € 30,000 without any oral hearing. For this reason the period of time to raise an objection was extended to 4 weeks and a compulsive examination of the sufficiency (*Schlüssigkeit*) of the claim was introduced.

Beside orders fore payment and applications for enforcement all documents can be filed electronically that are suitable with regard of volume and structure and if no enclosures have to be presented that cannot be transmitted electronically. There is an exception for documents concerning Land Register and Commercial Register proceedings.

Lawyers do not e-file their claims directly at the courts but at a clearing house put between ("Telekom Austria AG") that collects the information, carries out technical checks and confirms the received data. Once a day the data is transmitted to the Federal Computing Centre for further processing and distribution to the courts. Due to the closed network that can only be accessed by authorised people neither electronic signature nor email is necessary.

The use of electronic legal communication is recommended for lawyers by the Guidelines for Lawyer's Practice of Profession (*Richtlinien für die Ausübung des Rechtsanwaltsberufs RL-BA 1977*). They have to make sure that the facilities to take part in Electronic Legal Communication are at their disposal. As consideration for the costs the court fees are slightly reduced and the remuneration of the lawyer is raised to € 3.20 if the pleading initiating the proceedings was filed electronically.

Electronic legal communication allows not only the e-filing of money claims up to a certain amount but also the *electronic application for enforcement*. Analogue to the automated proceedings for payment orders the enforcement proceedings for money claims is carried out in a simplified automated proceeding to benefit from facilitation and acceleration. This enforcement proceeding can be carried out automatically even if the application was not filed electronically. Parties use provided forms to accelerate the proceedings. Documents are made public in the edicts data base which is accessible via Internet.

This development shows clearly that the civil procedure has been subject to change: It can be questioned if this is an absolutely positive development because the traditional order of the proceedings, especially the oral hearing has been slightly pushed into the background. During the coming decades we will be able to determine the effects on the population when the court turns out to be more and more an anonymous authority.

Concluding I would like to stress one thing: The usage of information technology has great advantages but is naturally limited because the free evaluation of evidence, the application and interpretation of law cannot be replaced by a computer.

3. *The Internet as Means of Information*

Not a very long time ago all court information that has to be made public was published on the official notice-board of the court and in the official publication newspaper of the Republic of Austria (*Amtsblatt der Wiener Zeitung*).

Now, as the internet is regarded as a common and quick means to reach the majority of the population, *publication* in *enforcement proceedings* and *insolvency proceedings* is carried out by taking up in the *edicts data base* (*Ediktsdatei*) with a legally binding effect. This data base is accessible via internet free of charge, there is no password or login name required (www.edikte.justiz.gv.at).

The opening of an insolvency proceeding as well as the termination of such a proceeding due to insufficient assets is published via internet. Therefore, publication costs in insolvency proceedings could be reduced significantly from € 1,090 to € 58.

Concerning enforcement proceedings the edicts data base provides par example the time to view the real estate before the auction or the edict of auctions of real estates which has to be enclosed by a short summary of the expert report; if it is a building a map, a ground plan and photos should be provided.

There is no further explicit court information obtainable in the internet. Up to date information concerning *amendments* and *future plans for law rules* can be retrieved from the homepage of the Federal Ministry of Justice. Further official forms of the most frequent court applications and information brochures are available (www.justiz.gv.at).

Not only publication is carried out electronically, in Austria the *Land Register* and the *Company Register* can be both accessed via internet. Concerning the Land Register, Austria has —together with Germany and Switzerland— one of the most highly developed systems. The Land Register is kept by the District Courts and it is necessary for the establishment, transmission and termination of ownership on real estates. Everybody who is in good faith can rely on the correctness and the completeness of the Land Register. The Company Register is also kept by the courts and is a public directory (*Register*) providing certain, for business transactions important facts for publication. Its purpose is the registration and publication of important facts and legal relationships concerning legal entities that have to be entered into the register.

The Land Register and the Company Register are nowadays kept as electronic data bases, the changeover was finished in 1992. For the access via internet a password and a login name are required and a certain fee has to be paid.

As a summary it can be stated that the Austrian System uses new technologies to a large extent in order to make the access to the courts as easy and quick as possible.