ROLE OF
JUDGE AND PARTIES
IN CIVIL LITIGATION

Origins and Comparative Perspective

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BIRTH: 1100–1500

- “Renaissance” 12th c.

- Important changes in legal field

- Modern system of procedure - Romano-canonical procedure

BIRTH: 1100–1500

Features Romano-canonical procedure

1. Professionals (judges, attorneys)
2. Party autonomy
3. Writing
4. Sophisticated system of proof (Actori incumbit probatio)
5. Absence immediacy
6. Appellate procedure
7. Role of legislation

BIRTH: 1100–1500

Exceptional position England

Courts of Common Law (from 11th c.)

- Pre-trial & Trial
- Oral
- Immediate

Court of Chancery (from 14th c.)

- Link with Romano-canonical procedure

CHILDHOOD: 1500–1800

- Procedure loses cosmopolitan character

- New ideas in period of Enlightenment

  1. Party autonomy (control)
  2. Orality (vernacular) and publicity
  3. Free judicial evaluation of evidence
  4. Systematic

- Towards codification

PUBERTY AND BEYOND: 1800-1990

1806 French Code of Civil Procedure

1. Based on 1667 Ordinance
2. General pattern – specific requirements
3. Exemplary Code

PUBERTY AND BEYOND: 1800-1990

1806 French Code of Civil Procedure

1. Préliminaire de conciliation
2. Principe dispositif (Liberal – individual responsibility - ne eat iudex ultra petita partium)
3. Principe du contradictiore (Passive judge)
4. Limited appeal
5. Rationalisation and simplification

a) Amendment Vth Republic: Juge de la mise en état (judicial case management)
b) 1975 Code of Civil Procedure (Code de procédure civile / CPC)
c) Guiding Procedural Principles (principes directeurs de procès)
d) Three tracks
e) Taking of evidence if necessary ex officio by court
f) Applicable law? Iura novit curia; da mihi factum dabo tibi ius.
g) New: Principle of loyalty/cooperation

PUBERTY AND BEYOND: 1800-1990s

1895 Austrian Code of Civil Procedure

1. Franz Klein
2. Societal dimension of civil litigation
3. Active judge
4. Wahrheitspflicht (duty to speak the truth)
5. Applicable law? Iura novit curia; da mihi factum dabo tibi ius

PUBERTY AND BEYOND: 1800-1990s

German Code of Civil Procedure

Important amendments since 1877:

1924: power judge to control substantive aspects and time-limits
1933: liberal ideology renounced
1976: Beschleunigungsnovelle (Abbreviation Amendment)
  a) Principle of speedy trial (Beschleunigungsmaxime)
  b) Co-operation between judge and parties
  c) Preclusion: 296(2) ZPO
  d) Preparatory stage - Main hearing
  e) Duty court to give instructions
2002: ideal of a concentrated procedure

PUBERTY AND BEYOND: 1800-1990s

German Code of Civil Procedure

Throughout litigation court attempts settlement by agreement (278 ZPO)

Dispositionsmaxime: Ne eat iudex ultra petita partium (308 ZPO)

Richterliche Hinweispflicht / duty of the judge to give guidance to the parties (139 ZPO)

a) Facts which have ex officio come to the court's knowledge
b) Relief or defence not covered by alleged facts
c) Used very restrictively where parties are represented by an attorney

Wahrheitspflicht / duty to tell the truth (138(1) ZPO)

a) Parties must tell the truth and allege all relevant facts completely
b) No direct sanctions

Applicable law? Iura novit curia; da mihi factum dabo tibi ius.

PUBERTY AND BEYOND: 1800-1990s

German Code of Civil Procedure

Preparation of the case for the main hearing (= Haupttermin)

a) Early first hearing / früher erster Termin (275 ZPO)

b) Written preliminary proceedings / schriftliches Vorverfahren (276 ZPO)

c) No specific preparation (272(2) ZPO

PUBERTY AND BEYOND: 1800-1990s

German Code of Civil Procedure

Haupttermin (Main Hearing)

Ideal of a single hearing on a single date / Konzentrationsmaxime (272(1) ZPO)

Consisting of:

a) oral argument (judge starts with outlining status of proceedings and issues that need to be addressed; parties state their positions and views on the case)

b) taking of evidence (only challenged facts; if necessary ex officio by court (apart from witness evidence); free evaluation of evidence)

PUBERTY AND BEYOND: 1800-1990s

Judicature Acts 1873-1874

1998 English Civil Procedure Rules

1. Excessive length and high costs
2. Lord Woolf: Access to Justice
3. Introduction of judicial case management
4. Pre-action protocols
5. Content pleadings (no notice pleading)
6. Witness depositions and cross-examination
7. Expert evidence (single joint expert)
8. Law should be pleaded
9. Three procedural tracks (allocation stage)

ADULTHOOD: 1990s-PRESENT

1. Prehistory: Council of Europe
2. Storme Project (1994): No case management
3. ALI/UNIDROIT Principles of Transnational Civil Procedure (2006)
4. ELI/UNIDROIT European Rules of Civil Procedure (2020) (Lecture Professor Alan Uzelac)

Council of Europe

Principle 1

1. Normally, the proceedings should consist of not more than two hearings, the first of which might be a preliminary hearing of a preparatory nature and the second for taking evidence, hearing arguments and, if possible, giving judgment. The court should ensure that all steps necessary for the second hearing are taken in good time and, in principle, no adjournment should be allowed except when new facts appear or in other exceptional and important circumstances.

2. Sanctions should be imposed when a party, having perhaps received notice to proceed, does not take a procedural step within the time-limits fixed by the law or the court. Depending on the circumstances such sanctions might include declaring the procedural step barred, awarding damages, costs, imposing a fine and striking the case off the list.

3. The court should be able to summon the witnesses and appropriate sanctions (…) should be applied in cases of unjustified non-attendance of such witnesses. …

4. …

Council of Europe

Principle 2

1. …
2. When a party fails to observe the duty of fairness in its conduct of the proceedings and clearly misuses procedure for the manifest purpose of delaying the proceedings, the court should be empowered either to decide immediately on the merits or to impose sanctions such as fines, damages or declaring the procedure barred; in special cases it should be possible to require the lawyer to pay the cost of the proceedings.
3. …

Council of Europe

Principle 3

The court should, at least during the preliminary hearing but if possible throughout the proceedings, play an active role in ensuring the rapid progress of the proceedings, while respecting the rights of the parties, including the right to equal treatment.

In particular, it should have

- proprio motu powers to order the parties to provide such clarifications as are necessary;
- to order the parties to appear in person;
- to raise questions of law;
- to call for evidence, at least in those cases where there are interests other than those of the parties at stake;
- to control the taking of evidence;
- to exclude witnesses whose possible testimony would be irrelevant to the case;
- to limit the number of witnesses on a particular fact where such a number would be excessive.

These powers should be exercised without going beyond the object of the proceedings.

PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (PTCP) (2006)

- Standards for transnational commercial litigation
- Also for other types of disputes
- Reform projects
- Discretionary powers judge

PTCP (2006)

Case-management

- Principle 14 (court manages case actively)
- Principle 7 (Cooperation)
- Principle 9 (Structure proceedings)
- Principle 22,2,1 and 2 (court invites parties to amend contentions of law or fact/offer additional legal argument and evidence)
- Principle 17 (sanctions)

PTCP (2006)

Principle 14

14. Court Responsibility for Direction of the Proceeding

14.1 Commencing as early as practicable, the court should actively manage the proceeding, exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed. Consideration should be given to the transnational character of the dispute.

14.2 To the extent reasonably practicable, the court should manage the proceeding in consultation with the parties.

14.3 The court should determine the order in which issues are to be resolved, and fix a timetable for all stages of the proceeding, including dates and deadlines. The court may revise such directions.

PTCP (2006)

Principle 7

7. Prompt Rendition of Justice

7.1 The court should resolve the dispute within a reasonable time.

7.2 The parties have a duty to co-operate and a right of reasonable consultation concerning scheduling. Procedural rules and court orders may prescribe reasonable time schedules and deadlines and impose sanctions on the parties or their lawyers for noncompliance with such rules and orders that is not excused by good reason.

PTCP (2006)

Principle 9

9. Structure of the Proceedings

9.1 A proceeding ordinarily should consist of three phases: the pleading phase, the interim phase, and the final phase.

9.2 In the pleading phase, the parties must present their claims, defenses, and other contentions in writing, and identify their principal evidence.

9.3 In the interim phase, the court should **if necessary**:

9.3.1 Hold conferences to organize the proceeding;

9.3.2 Establish the schedule outlining the progress of the proceeding;

9.3.3 Address the matters appropriate for early attention, such as questions of jurisdiction, provisional measures, and statute of limitations (prescription);

9.3.4 Address availability, admission, disclosure, and exchange of evidence;

9.3.5 Identify potentially dispositive issues for early determination of all or part of the dispute; and

9.3.6 Order the taking of evidence.

9.4 In the final phase, evidence not already received by the court according to Principle 9.3.6 should be presented in a concentrated final hearing and the parties should make their concluding arguments.

PTCP (2006)

Principle 22

22. Responsibility for Determinations of Fact and Law

22.1 The court is responsible for considering all relevant facts and evidence and for determining the correct legal basis for its decisions, including matters determined on the basis of foreign law.

22.2 The court may, while affording the parties opportunity to respond:

22.2.1 Permit or invite a party to amend its contentions of law or fact and to offer additional legal argument and evidence accordingly.

22.2.2 Order the taking of evidence not previously suggested by a party; or

22.2.3 Rely upon a legal theory or an interpretation of the facts or of the evidence that has not been advanced by a party.

22.3 The court ordinarily should hear all evidence directly, but when necessary may assign to a suitable delegate the taking and preserving of evidence for consideration by the court at the final hearing.

PTCP (2006)

Principle 17

17. Sanctions

17.1 The court may impose sanctions on parties, lawyers, and third persons for failure or refusal to comply with obligations concerning the proceeding.

17.2 Sanctions should be reasonable and proportionate to the seriousness of the matter involved, and the harm caused, and reflect the extent of participation and the degree to which the conduct was deliberate.

17.3 Among the sanctions that may be appropriate against parties are: drawing adverse inferences; dismissing claims, defenses, or allegations in whole or in part; rendering default judgment; staying the proceeding; and awarding costs in addition to those permitted under ordinary cost rules. Sanctions that may be appropriate against parties and nonparties include pecuniary sanctions, such as fines and astreintes. Among sanctions that may be appropriate against lawyers is an award of costs.

17.4 The law of the forum may also provide further sanctions including criminal liability for severe or aggravated misconduct by parties and nonparties, such as submitting perjured evidence or violent or threatening behavior.

THANK YOU