Teka Kom. Praw. – OL PAN, 2008, 149–156

ROLE OF JUDGES AND PARTY-AUTONOMY IN SETTLEMENT IN LITIGATION

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Summary. Administering justice includes settling and deciding cases by authorized judicial authorities under the provision of law. One of the crucial elements of administering justice in a democratic country of law is the situation where the state takes from the directly concerned entities the responsibility of obeying in the society the behaviour norms accepted by it. The purpose of this article is to demonstrate how to get an aim of civil procedure – using judge's activity or depending on party autonomy and activity in protection of its rights. That is a question about rules of civil proceedings – the models of civil proceedings, the rule of truth – the rule of flexibility – contradictory procedure; securing of private interest or public interest; separating the fact from the law; what ensures extensive settlement of a case – a court activity or the parties initiative and concern.

The issue of 'active judge' or 'impartial – heartless judge' an arbitrator of 'free dispute of the parties' relates to the essence of the procedural relation whether the duty to 'examine a case' extensively results form relations between a court and parties (plaintiff and defendant) and what objectives and functions are carried out by civil proceedings – only private or also public interest. Author states by all means the transparency of legal constructions and providing the com fort work of a court may not cover the protection of “weaker” party interest – providing actual 'parties equality' in proceedings.

Keywords: right to have a trial, right to be heard, flexibility, contradictory procedure, active court, rules of civil action

JUSTICE ADMINISTRATION – DEFINITION

Administering justice includes settling and deciding cases by authorized judicial authorities under the provision of law. One of the crucial elements of administering justice in a democratic country of law is the situation where the state takes from the directly concerned entities the responsibility of obeying in the society the behaviour norms accepted by it. The purpose of this article is to demonstrate how to get an aim of civil procedure – using judge’s activity or depending on party autonomy and activity in protection of its rights. That is a question about rules of civil proceedings – the models of civil proceedings, the rule of truth – the rule of flexibility – contradictory procedure; securing of

private interest or public interest; separating the fact from the law; what ensures extensive settlement of a case – a court activity or the parties initiative and concern.

THE AIM OF CIVIL PROCEEDINGS

One of the elements of administering justice is settling civil cases – particularly those relating to the property rights arising from civil law relationships. Settling civil disputes in the civil proceedings (or a court regulatory activity in non-litigious proceedings) tends to attain the 'legal peace' between the parties to the proceedings, acts as an educational and preventive body. The aim of the proceedings is to examine a case by a court – claim submitted by a party (to the proceedings) – and to adjudicate a just and complying with the law decision. As it is emphasized in a doctrine the matter concerning adjudication of a just decision (*sententia iusta*) in a fair proceedings is a final objective each proceedings aims at.

The issues relating to the justice definition, just proceedings, are widely referred to in a doctrine[1]. Just settlement procedures mean that each person (entity), whom the settlement applies to, during the act is treated in a manner consistent with the relevant procedure rules. Institutionalization of just settlements concerning somebody's acts includes several element for instance: rules determining whether the constructing entities are competent to adjudicate socially reliable decisions (e.g. courts), rules determining the manner of accurate settling the content of the accepted justice formula as well as rules regarding the manner of establishing the actual situation (e.g. hearing of evidence rules in civil proceedings).

On the basis of defined in this manner objective of the civil proceedings and the conditions of just proceedings some questions arise, namely who (what entity) is responsible for carrying out this objective – either a court (a judge), state authorities (e.g. public prosecutor) or the main burden should be imposed on the entities concerned with the financial outcome of a case – parties to the proceedings. Can a court engage in establishing the facts of a case or can it only apply the legal norm most accurate for the actual facts presented by the parties and attend to the formal conditions of proceedings are observed (?).

CIVIL PROCEEDINGS AS EMANATION OF RULES GOVERNING PRIVATE LAW

The answer to this question is not easy – for many years a lively discussion has been led regarding the active role of a court (judge) in the hearing of evid-

[1] Por.: Z. Ziembiński, *O pojmowaniu sprawiedliwości*, Lublin 1992, pp. 15 ff.

ence (establishing the facts of a case). Is it to be active – aiding the parties to settle a case (social model – active court – A. Klein) or is it to be an impartial arbitrator of proceedings between the parties, watching over the course of proceedings and adjudicating a decision under the provisions of law (liberal model – passive court – Napoleonic). Does procedural justice require from a judge to support a weaker party, which is not represented by a professional attorney (lawyer). Is a rule of truth prioritized in proceedings – a rule construed as a situation where a court decision is based on actual (in compliance with the actual facts) relationships between the parties to the proceedings. Can the activity of a court in this scope replace the party concern about the proceedings outcome or can it be only its supplementation? Can the demand for ensuring swift court protection be taken into account while estimating the probability of engaging a court (judge) in settling civil proceedings (?).

It is essential to apply a system approach to the raised issue and find answers complying with the character of civil cases settled by a court as well as with the system foundations of a democratic country of law.

Civil proceedings is based on certain guiding ideas, directives – they are accepted and carried out in its decisions. As it is emphasized by W.J. Habscheid, in a European culture of civil proceedings some principles are universally accepted: just proceedings (party to the proceedings), swift settlement, free legal aid for poor party, hearing, preventive legal protection. General system guidelines of law (justice administration) are carried out this way, which include the principles and rules of: justice, truth, equality, openness, court instance, efficiency as well as ideas characteristic for civil proceedings itself (particularly): rule of flexibility and contradictory procedure which pass the concern to explain the actual facts of a case universally to the party involved.

The sense of trail flexibility contained in the provisions of all classical codes of civil proceedings takes into account during the proceedings (civil proceedings) the nature of legal relationships which are protected under this procedure. If we assume that civil proceedings include carrying out private rights which can be defined as autonomy and formal equality (reciprocal non-liability) of parties to the rights (relationships), which can be easily exercised by them, we must, as a logical consequence of this circumstances also in civil proceedings, particularly in a trial, assume the autonomy of the entities in question – the owners of each right to assert or not the rights in such proceedings. An entity, which claims that he is entitled to the right in question in a particular scope, thus decides whether the proceedings shall be commenced or continued (e.g. apply the remedy at law) or whether not to do this. It is also connected with the legal category so called burden of proceedings which, as opposed to the proceedings duty, when are desisted lead to the threat of negative proceedings effects (e.g. losing the case as a result of not having appealed). The theory of burden of proceedings was developed in German science by J. Goldschmidt and it points to

the duties to 'oneself', impulses which stimulate the parties to act accurately and for their own benefit within the limits of statutory frameworks. Therefore the omission of accurate acting results only in losing the benefit provided for in an Act within the scope of a particular action in connection with legal proceedings – it is so called the principle of trial risk of a party, which is based on the fault towards oneself. To 'arrange' the trial accurately under the principles of foresight and trial diligence it is particularly essential to regulate precisely 'the burden of proof' (proving). The rule of flexibility and the contradictory procedure resulting from it are the chief ideas of the correctly modelled civil proceedings – which deals most of all with the individual interests protection. The consequence of its effectiveness is the assumption the axiom that a court cannot exceed the parties demands (that is to adjudicate more or about something else – *ne eat iudex ultra (vel extra) petita partium,* or *ne procedat iudex ex officio*). Furthermore, it can be claimed that the objective of a civil trial is not, contrary to the objective of a criminal trial, to examine 'substantive truth' but to decide which of the two parties to the proceedings is right. Therefore – *iudex iudicat secundum allegata et probata partium* – a judge shall adjudicate on the basis of the parties motions and the proofs presented by them. Thus in this case aiming at truth is set in some frameworks from the beginning, that is within the scope of action which elements (demand and its justification) are formulated by the plaintiff. It is expressed by the principle *ne eat iudex ultra petita partium*. It is obvious that the total execution of 'the right to a court' reflected in an explanation of 'the actual relationships being the subject of examination' provided by a court would be desirable, however, it would be complicated in most civil cases (disputes) or even impossible to carry out apart from the parties' initiative which cannot be replaced by a court actions *ex officio*.

It is emphasized in judicial decisions and in a doctrine that the right to a court includes:

– actual access to a court (territorial court administration, moderate fees, etc.),

– procedure ensuring that participant's rights are observed (diligent and public – open, just trial),

– obtaining in a reasonable period a court decision (judgment).

The court of law itself shall be duly authorized by an Act and also shall be: independent, impartial, unbiased, providing guarantees for a reliable proceedings (*ein feires Verfahren*, *fair trial*, *due process* – Article 6 of Convention of 1950). The term 'decision' shall mean an examination, investigation of 'a case' – construed as an authorized entity demand for legal protection – and adjudication whether the demand in question (and in what scope) is subject to legal protection.

IMPARTIALITY AND INDEPENDENCE AS COURT ATTRIBUTES

1. The right to the judgment – a case adjudication done by a court – is a completion of the right to a court. By rendering a judgment a court expresses its opinion on 'a case' submitted to it to be settled. The term 'rendering a judgement', the right to a decision, is construed narrowly – as a right to have a case settled in a reasonable period, and widely – as a right to receive a decision which can be characterized by particular features (profiles). Formal features of such a decision shall particularly include: compliance with procedure principles, firmness, accuracy as to the scope of subjective and objective settlement, open pronouncement. Hence, it is also essential to point to the motives for a settlement in question, which proves that the court applies the principle of just and open settlement and also emphasizes the aspect of jurisdiction of proceedings and its educational function. The reasons for the judgement shall reflect the choice of the particular provisions used, establishing their importance by the means of law interpretation and application of statutory standards with reference to the actual arrangements made.

2. The issue of judge impartiality is also connected with the judge (judges) independence – his neutrality towards the parties and the subject of the case adjudicated by him, which can be ensured by the provision of exclusion of judge. A positive side of this principle is the right to be heard (*recht zu* (*rechtlisches*) *Gehőr*): enabling the participants to the proceedings not only to submit the case to a court but also to present their arguments. This ability includes:

a) informing by a court about the right to be heard,
b) treating participants as entities shaping the proceedings,
c) considering (taking into account) participants reasons – the lack of discretion and arbitrariness.

Accoring to W.J. Habscheid the right to be heard shall include the triad of:

1) the right to notice,

2) the right to express an opinion,

3) the right to actual legal statements and arguments, which in English comprises: *right to notice, to be heard,* and the Latin dictum *audiatur et altera pars* (the right to notice about a case institution, the right to insight, making copies and notes, the right to take part in a case). This right is based on the man's dignity. As it is maintained by Lord Devlin, quoted repeatedly, the greatest injustice can happen not in a situation when a case is brought to a court but when it is impossible to bring it to a court.

3**.** The principle of judge impartiality can be noticed in a postulate of his independence (Article 178.1 of the Polish Constitution) – being out of the influence of other participants to the proceedings or other bodies which does not concern the substance, apart from the explicit indication in the Constitution and Acts. As it is emphasized, the formal guarantees of judge independence are in his person and

come from him, as he is an honest man and fully aware of his vocation. The substantive guarantees of judge independence result form the provisions of law – particularly Constitution, law on organization of courts, and also from certain codes regulating jurisdiction proceedings. Procedural guarantees of judge independence include: collegiality of the court composition, open sitting, free proof-assessment, confidentiality of deliberation before pronouncing the decision.

ENSURING THE IMPARTIALITY OF A JUDGE IN COURT PROCEEDINGS. 'PASSIVE' JUDGE VS. 'ACTIVE' JUDGE (COURT)

1. As it was mentioned above, the basic element ensuring the right to court is the case examination by an independent, impartial and unbiased court. The provisions of civil proceedings comply with the principle of judge impartiality by, for instance, regulating the rules of judge exclusion under an act (*iudex inhabilis*) or upon the motion of a party (*iudex suspectus*), judge immunity or open proceedings.

2. It can be also argued that the judge impartiality clashes with the duty of a court to take care of a weaker party and a court engaging in establishing the actual circumstances of a case, which may seem as if a court supported one of the parties to the proceedings.

Ensuring the equality of the parties to the proceedings and granting a status of a court – as an impartial arbitrator of the dispute between parties concerned with the result of a case – on the basis of a rule of flexibility and contradictory procedure is a focus of a doctrine debate and rich judicial decisions.

Construing the court in such manner and its role in proceedings shall enable it to interfere only when the proceedings are evidently exposed to violation of fundamental principles of justice. It is a 'liberal' trial model. A judge shall be 'active' only in a narrowly specified cases – civil proceedings become then more 'social' and a judge shall be an assistant not of a party but of 'justice administration' – carries out the objective of proceedings – rendering a just and legal decision. It is assumed that civil proceedings is not only conducted to secure just private interests but also for the benefit of the whole society; since the society is always interested in complying with the norms of correct behaviour by all entities what is clearly evident in matters of non – contentious jurisdiction). This tendency is also noticed in the latest changes in civil procedures in 'socializing' Europe and elsewhere. For instance, a great amendment to ZPO – a German Code of Civil Procedure which has been effective since 1 January 2002. (Act on civil proceedings reform of 27 July 2001 Gesetz zum Reform des Zivilprozesses (Zivilprozessreformgesetz – ZPO-RG, of 27 July 2001, BGBl I, 1887) – changed among other things the principles of substantive supervision of the proceedings by a court (§ 139), provisions for remedies at law (§ 511 and others

which changed their numbering in comparison to the state before the amendment)[2]. This is also considered in Austrian doctrine (in the scope of labour law and social law) where a judge activity – instructing a process by him – is advisable because of social considerations. This significance is noticed by French[3], Greek[4] and Dutch[5] legislator. Similar features can be noticed in Anglo-Saxon law[6]. In transnational law, as it is emphasized by R. Stűrner, the concept of 'passive' judge' was abandoned following the Austrian modern regulations (§ 182 and next of ZPO), German (§ 139, 141 i n., 273 ZPO), French (Art. 8, 10, 12, 143 of a new code of civil procedure – Nouveau Code de Procedure civile), Spanish (Art. 414 ff, 424, 426, 429 of a new code – Código de Procedimiento Civil), and also American (etc). It was also emphasized in a doctrine based on a Polish code of 1930. (e.g. Art. 227, 240 of former code of civil procedure which vested the presiding judge with evidence initiative 'so that the trial exhibits extensively all the sticking points' and also enables (Art. 240) to close the trial when the presiding judge considered the case 'sufficiently cleared'. As it was emphasized by Xawery Fierich 'judicial-civil proceedings shall give a judge the

[2] See, e.g. about the German rules of procedure reform in 2001: R.K.H. Steffens, *Zivilprozessreform 2001/2002 in der Bundesrepublik Deutschland*, Deutsch-Polnische Juristen – Zeitschrift 2002, No 1, p. 39 ff. This reform applied to many provisions of ZPO, including the provisions of appeal proceedings, which became an instrument for correctness control and removing the mistakes in applying the law (see § 529.1 ZPO). See § 528, 557, 577 ZPO: P. Hartman [in:] *Zivilprozessordung*, ed. A. Baumbach, 62. Auflage, München 2004, p. 656 ff, L. Rosenberg, K.H. Schwab, P. Gottwald, *Zivilprozessrecht*, 16. Auflage, München 2004, p. 983 ff. See also: P. Gottwald, Aktuelle *Entwicklungen der Zivilprozessreform in Dutschland* [in:] *Procedural law on the threshold of the new millennium*, ed. W.H. Rechberger, T. Klicka, Wien 2002, p. 47 ff. The necessity to 'make a judge active' in proceedings was considered by H. Koch (*Współczesne tendencje rozwojowe prawa cywilno-procesowego w Republice Federalnej Niemiec* [in:] *Współczesne tendencje rozwoju prawa procesowego cywilnego*, ed. E. Warzocha, Warszawa 1990, p. 190 ff.). See also the latest: P.L. Murray, R. Stürner, *German...*, p. 164 ff., K. Reichold, in: H. Thomas, R. Putzo, *Zivilprozessordnung…*, p. 260 ff. See also: K.D. Kerameus, *Niektóre zagadnienia procedury cywilnej w Grecji*, Nowe Prawo 1988, No 7–8, p. 96 ff.

[3] P. Julien, *Reforma procedury cywilnej we Francji po 1970 r.* [in:] *Współczesne tendencje...*, ed. E. Warzocha, p. 146 ff. Seeaslo particularly in regard for Art. 8, 10, 12, 143 of the French Code: L. Cadiet, *Code de procedure civile*, dix-huitieme ed., Paris 2005, p. 13 ff.

[4] See: G. Mőller, *Recent tendencies…*, p. 312.

[5] P. Meijknecht claims that 'we are less afraid of an active judge than we used to'. At the same time legislator assumes that the parties to the proceedings are adults who shall not be 'guided' from the beginning to the end of the proceedings. They can have more liberty, just as a judge, they can be given more possibilities, according to the author (*Współczesne tendencje...* [in:] *Współczesne tendencje...*, ed. E. Warzocha, p. 160 ff.).

[6] See: J. A. Jolowicz, The active role of the Court in civil litigation, ,,Studies in Comparative Law" t. 15, Milano 1975, p. 187 ff., J. Lapierre, *Angielska procedura cywilna w przededniu radykalnej reformy* [in:] *Wokół problematyki cywilnoprocesowej. Studium teoretycznoprawne. Księga Pamiątkowa dla uczczenia pracy naukowej Profesora Kazimierza Korzana*, ed. A. Nowak, Katowice 2001, p. 146 ff. See also the regulations of CIS: M.M. Bogusławskij, A. Trunk, *Reform des Zivil- und Witrschaftsprozessrechts in den Mitgliedstaaten der GUS (Zjazd IPCL w Kiel, 15–20 października 2000 r.)*, ed. P. Gottwald, Bielefeld 2004, p. 20 ff.

possibility to examine the actual state of affairs in compliance to the reality. The issue of examining the substantive truth, if it can be harmonious with the many proceedings institutions, and relating to it free evidence theory, would be undoubtedly the major guidelines'.

The issue of 'active judge' or 'impartial – heartless judge' an arbitrator of 'free dispute of the parties' relates to the essence of the procedural relation – whether the duty to 'examine a case' extensively results form relations between a court and parties (plaintiff and defendant) and what objectives and functions are carried out by civil proceedings – only private or also public interest? To get to the 'truth' – to base the settlement made by a court on the true actual foundation either by parties initiative (interested in extensive elucidation of a case for 'their own benefit') or by a court which safeguards if the provisions of law are obeyed by the participants to the proceedings and sets the legal peace between them; which is also for the public (social) benefit[7]. These two tendencies shall be harmonized to achieve the most ideal result – a just decision.

An auxiliary activity of a court shall be visible not only in actual settlement but also in pointing to the parties the possibilities to settle the case amicably or direct it to non-judicial forms of settling disputes (mediation, conciliation or other ADR).

By all means the transparency of legal constructions and providing the comfort work of a court may not cover the protection of weaker party interest – providing actual 'parties equality' in proceedings[8]. According to M. Cappelletti constitualization, socialization and internationalization of basic guarantees of the parties to the proceedings are of significant importance here[9].

Undoubtedly, it is extremely difficult to achieve the balance between these values protected by law in contradictory civil proceedings, however, it shall be noticed with some respect that a discussion concerning these issues is carried out, as it was mentioned above in many countries and always leads to the optimization of legal solutions.

[7] For 'truth theory' and its function in civil proceedings see: M. Taruffo, *Legal cultures and Models of Civil Justice*, Pavia, p. 629 ff. See also: M. Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford 1989, p. 9 ff.

[8] T. Liszcz, *Paragrafy eleganckie, lecz bezduszne*, „Rzeczpospolita" 2004, No 176 of 29 July 2004.

[9] M. Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford 1989, p. 262 ff.