



“ORAL, WRITTEN AND ELECTRONIC PROCEEDINGS AND THEIR EFFICIENCY”

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RESUMO

Este artigo busca estudar as formas utilizadas nos casos de resolução de conflito dentro da esfera do direito civil. Dentre estas formas encontram-se a oralidade, caracterizada por sua informalidade, a forma escrita que ainda domina este âmbito do direito em boa parte do mundo e a forma eletrônica que vem ganhando espaço nos últimos anos com o avanço tecnológico. Segundo o autor é muito raro um procedimento puramente oral, pois ao fim de tal procedimento se deverá ter pelo menos um documento escrito seja ele um acordo, uma ata de audiência ou ainda uma sentença. Num estudo histórico, observa-se que a forma escrita, que caracteriza mais formalidade aos procedimentos jurídicos está mais presente que as outras formas.

Palavras-chave:

oralidade. Formalidade. Terminologia. Direito civil.

This article explores the forms used in cases of conflict resolution within the sphere of civil law. Among these forms are orality, characterized by its informality, the written form that still dominates this part of the law in most of the world and the electronic form which has been increasing in recent years with technological advances. According to the author is very rare a purely oral procedure, since it must have at least one document in writing, like an agreement, a protocol or a sentence. In a study throughout history, it was observed that the writing form, which features more formal legal procedures is more present than other forms.

Key-words:

Orality. Formality. Terminology. Civil Law.

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THESIS 1: TERMINOLOGY, KEY- AND CATCHWORDS

The key- and catchwords of the general title of this conference are "*Oral and written proceedings*". This *terminology* mirrors and represents a leading procedural law doctrine, which differs and contrasts the supposed types of intra court or extra court proceedings, - the "Oral proceeding" on one side and - as an opposite - the "written proceedings" on the other sides. Furthermore, a leading doctrine understands "*Orality*" and "*Writing*" as different forms of procedure. This raises the questions if just oral speaking, speeches, disputes, debates, argumentations, pleadings, palavers etc. - among private, professional and official persons like parties, lawyers and judges - as expressions of orality could really be named a "proceeding" or a "procedure" as certain "forms" of conflict resolution. This is questionable because "orality" itself means no "form" and the so called "principle of orality" as one of the basic procedural maxims is a principle of "*formlessness*" respectively "*informality*" in contrast to principles of formality like the traditional "principle of writing" related to the "written form", which is nowadays supplemented or substituted by the modern "electronic form" as a further "text form".

Besides, - as far as known - a purely or totally so called oral proceeding particularly in the frame of civil justice systems does no where exist. Even if there are - like in Thailand exceptionally - just oral judicial disputes about a legal case for conflict resolution reasons, there will be at the very end of the oral altercations at least a protocol, a written settlement, a written judgment or another document.

In the opposite, one can find not only in history but also in present times many countries, which have only and in general the written form at least in civil procedures and also many countries, which have principally the written form with exceptionally oral opportunities. The pure written form had been in Europe and elsewhere the overwhelming one during the past centuries, which holds true also for Germany, where the principle of writing had been practised up to the year 1879.

Meanwhile, presumably the majority of developed respectively civilized countries have a mix, combination or alternation, successions or sequences of orality and writing, i.e. court procedures with written as well as oral parts, elements or steps. But even then, compared with the oral parts the written parts are nowadays the dominant ones according to the very old Latin saying "*quod non est in actis, non est in mundo*".

This holds particularly true in respect of the anyway highly formalised procedures all over. This dominance of writing exists in spite of the fact, that for instance in Germany the so called "*mündliche Verhandlung*" - which is hard to translate in English (*negotiation? bargaining? dealing? communication?*) - is or should be should be a centre piece of the whole normal civil law suit. But the law suit or procedure itself is generally spoken just an outer form to canalise,

treat and dispose a legal case as its content.

The here mentioned issues lead to the next thesis.

THESIS 2: FORMALITY AND FORMALIZATION OF CIVIL PROCEDURE

When talking about the “*formality*” of court proceedings or about their non-formality in the sense of writing here and orality there, it is worse to be aware of the past period of the so called “*formalization*” of the civil procedure, its law and its science, looking here only at the German situation as an example.

If one takes a glance at the history of the development of civil procedural law and its scholarly treatment, one must unfortunately say, that in Germany, at least up until a few years ago, there was a noticeable disregard of civil procedural law within the rankings and prestige scales of legal subjects and legal disciplines among the generally predominant opinion of German jurists. The disregard was based in a large part on the widely-held wrong belief, that civil procedural law (just as any kind of procedural law) was and is only concerned with a purely “technical,” “practical,” “functional” or “formal,” if not “formalistic”, branch of law or even with a mere accumulation of rules about forms, time limits, services of process and technical measures, which has to be strictly distinguished from material respectively substantive law, namely private law, which is and was viewed as the actual, the proper, the real or the true law and the only gage of justice for judicial decision-making. Especially within the university education of jurists, civil procedural law has, for the most part, only played secondary role as a mere appendix to civil law for decades.

In short: Civil Procedural Law is and was viewed for a long time as a pure “law of legal enforcement”, i.e., an area of law, that merely serves for the “enforcement of subjective private laws”, - a view, which to this very day can often still be found in descriptions of the goal or purpose of civil procedure.

It is also interesting to note, that the representatives of the discipline also suffered for a long time from this outright naive perception of the fundamental character of civil procedural law and the resulting grossly wrong assessment of its qualities and functions. Not infrequently were the representatives reproached for an “interest blind,” “value neutral” or “nonpolitical” depiction of institutions or for a legal doctrine “free of morals” in “splendid isolation.”

This period of formalization has been followed by a period of a so called “materialization” discovering and recognizing the substantive respectively material and even constitutional values of the so called formal procedural law. a period, which is currently followed by a period , criticized as an “*hyperformalization*” of civil procedure particularly by its ongoing punctual, partly or full so called “*electronification*”, we can observe nowadays in many parts of the world.

THESIS 3: WRITTEN PROCEEDING AND ORAL NEGOTIATION IN GERMAN CIVIL PROCEDURE

Looking at the provisions of the German Civil Procedure Code ("Zivilprozessordnung", ZPO), we find in the 1.Book, named "General Provisions" of this codification, stemming from 1877, in section 3 named "Procedure" under Title 1 named "*Oral Negotiation*" ("*mündliche Verhandlung*") in the first paragraph (§ 128 I ZPO) the apodictic sentence: "The parties negotiate the legal dispute in the face of the adjudging court orally". The mere location of this paragraph makes clear, that at least the lawmakers themselves attached great importance to the oral negotiation as a communicative interaction between the litigating parties and only between the parties and/or their lawyers. Only in case, that both parties agree, the court discretionary can - but not must - render a decision exceptionally "without an oral negotiation" (§ 128 II ZPO). In case that lawyers are involved in the trial, this oral negotiation has to be prepared by preparatory writs ("*vorbereitende Schriftsätze*" §§ 129,130 ZPO), which are apart from the initial written complaint ("*Klageschrift*") of the plaintiff (§253 ZPO) and the followed written answer to the complaint ("*Klageerwiderungsschrift*") of the defendant (§ 277 ZPO) as decisive writs ("*bestimmende Schriftsätze*") are practically the main sources of factual information for the court in particular.

According to a strict legal order (§ 272 ZPO) the legal dispute has to be disposed principally in one comprehensive main hearing ("*Haupttermin*") after its preparation either by a so called early first hearing ("*früher erster Termin*", § 275 ZPO) or by a written pre-trial ("*schriftliches Vorverfahren*", § 276 ZPO).

A relatively new section asks now for a mandatory so called conciliation negotiation ("*Güteverhandlung*", §278 II ZPO) aiming an amicable settlement of the dispute, which has to take place directly just before the beginning of the intrinsic controversial oral negotiation of the case, - a new regulation, which in practise turned out be a legislative flop.

In concern of the course of the negotiation the regulations are the following: The presiding judge has to open, to guide and to close the negotiation taking care of a exhaustive debate and complete argumentation of the case (§ 136 ZPO) before rendering a decision. The oral negotiation is started by the applications of the parties and their pleadings must be done in a free, ad-lib speaking covering the litigation as a whole in all its factual and legal relations (§ 137 I,II ZPO).The parties are obliged to declare the factual circumstances completely and truly (§138 I ZPO), while the court has the duty - as far as required - to discuss the litigated subject, its factual as well as its legal side, to ask questions and to give advices and directions (§ 139 ZPO).In concern of the more detailed content of the oral negotiation it normatively requested , that the parties have to utter their statements particularly their means of offence and defence, their allegations and contradictions, their objections evidence and counter evidence in time, i.e. as early as - according to the actual procedural situation - a careful and the promotion or expedition intending procedural

conduct of the case requires (§ 282 ZPO).

In case that a proof taking has taken place the parties again have to negotiate about its result reconsidering the whole dispute relations (§ 283 ZPO).

Finally: as an expression of orality can be also seen in the pronouncement of the judgement by reading the formula of the decision (§§ 310,311 ZPO).

Recognizing all these legal texts of the German Civil Procedure Code one may gain - at a first glance - the impression, that in Germany the orality plays a significant or even a dominant role at least in the regular, ordinary or normal civil proceedings. But, what was presented before, is all just text-law, paper law or law in the books, as the Americans would say, and not the living law, the law in action or the practised law or in other words: the mentioned norms reflect just *idealities* and not or only rarely the *realities* of the German judicial and procedural situation respectively actual condition ("Istzustand") and not the target state implied in the norms ("Sollzustand"). Besides, most of the quoted paragraphs have to do more or less with orality, while from the masses of provisions dealing with writing or the written form only a very few had been mentioned up to now. As already stated before, our German civil procedure has still mainly the character of a "*file-process*", a process of writs or a paper-process ("*Aktenprozess*"), an opinion which can easily be substantiated by the huge numbers of procedural norms and procedural phenomena, which deal with the written – or text-form and which are indicators for the *principle of writing*. The most significant indicators are:

the initial written complaint (§ 253 ZPO) and the written answer to the complaint (§ 277 ZPO) as so called constitutive or decisive writs as well as the so called preparatory writs (§§ 129, 130 ZPO), produced by the parties or their lawyers;

the written pre-trial for preparation of the main hearing;

the formal requirements for all types of judicial decisions, sentences, judgements, directives, degrees, or orders ("*Urteile*", "*Beschlüsse*", "*Verfügungen*"), particularly for the most important judgements ("*Urteile*", §§ 313, 317 ZPO) and for those decisions, which function as a written conditions for execution i.e. as an executory title ("*Vollstreckungstitel*") (§§ 704,794 ZPO);

the requests for writing in concern of the form and the content of judgements (§ 313 ZPO) their service and executive copies (§ 317 ZPO) and for the correction and additions of decisions (§§ 319ff ZPO);

the coercively demands of detailed protocols (§§ 159ff ZPO) about the whole negotiation and about each proof taking and in plain words about all important actions, reactions and interactions of the private, professional and official participants of the law suit:

the uncounted provisions, mentioning "*files*" (§§ 143, 168, 298, 299 ZPO) and "*documents*" (§ 131 ZPO), "*signatures*", "*copies*" (§ 133

ZPO), "writings", "letters", "excerpts", "certificates", "enclosures", "binders", "booklets", "dockets", "registers", "catalogs", "indexes", "transcriptions", "lists", "protocols", "records", "titles", "clauses", "attachments", "storages", "handwritings", "holographs", "notarizations", "authentications", "attestations", "credentials", etc.;

the formal requirements for an own proof taking intra-court procedure, asking for a Beweisbeschluss (§§ 358, 359 ZPO);

- the regulations about writs and protocol for proceedings at local courts (§ 496 ZPO)

certain types of none oral special procedures like the so called document procedure, including bill procedure ("Urkunds- und Wechselverfahren §§ 592ff ZPO);

the formalized proceeding for provisional judicial protection ("Arrest und einstweilige Verfügung §§916ff ZPO)

last but not least, as a further and practically, immensely important special procedure the payment order procedure ("Mahnverfahren" §§ 688ff ZPO), a procedure, which is highly formalised to a far extent automatically mechanical and meanwhile, also punctually or partly electronic. In this context, it might be interesting to know that in Germany the estimated number of incoming payment order proceedings at local courts is about twelve million proceedings per year.

THESIS 4: WRITING AS REALITY, ORALITY AS IDEALITY

Even the mandatory written elements of German civil proceedings are overwhelming in their quantity, there is nevertheless according to law a respectable space left for orality.

As already explained, the "oral negotiation" has to be seen as the central event, holding an exponent position in the whole CPO. Besides the main rule (§128 I ZPO), one can find much more than one hundred provisions mentioning the "negotiation" or a "negotiating" ("Verhandlung," Verhandeln") in many respects and procedural relations, which always mean an "oral negotiation" or "oral negotiating, which also holds more and less true for terms like "pleading" and "hearing" or other expressions more.

But this ideal world of norms, does not fit to the real procedural practise, particularly not to the full fledged normal or ordinary first instance fact- and law finding proceedings at the local courts ("Amtsgerichte") and district courts ("Landgerichte") as entrance courts. There, the oral negotiation plays nowadays no significant role on factual as well as normative reasons

First of all, the entrance courts suffer from an extreme case load or even overload in regard to circa 1.5 millions of incoming civil cases per year. This immense amount of work for the judges and courts in civil jurisdiction does not

allow case by case an extensive oral negotiation and oral argumentations, mostly presented anyway already in written form, comprehending all factual and legal issues completely, as the law demands.

Besides, already since the amendments of the German CPO from 1909 and 1924 the parties and their layers are expressively permitted (§ 137 III ZPO) during the still so called judges' "hearing" of parties' "speaking" to refer to all their writs, delivered in advance, - an opportunity which is extensively used and the daily practise at courts.

This possibility of referring to the written statement has weakened since a long time and more and more *the principle of orality* severely blaming the alleged orality nowadays as an "illusion", a "farce" or "myth" and criticising the development as a decline or "downfall of the oral negotiation".

An additional remark about an oral discussion not only on the factual side but also on the legal side of the debated subject:

There are judges, who do not like or unlikely just tolerate in proceedings, where lawyers voluntarily or coercively are involved, any legal explanations by the lawyers as equally educated and trained legal experts. at all. This judicial attitude and habitude corresponds with the old and questionable devise "iura novit curia", and no one else then the "curia". Even in appellate proceedings at High District Courts ("Oberlandesgerichte") and at the Federal Supreme Court ("Bundesgerichtshof", where just the pure or a main legal control of the appealed decision is at stake, we can find occasionally such an approach among judges. This approach is far away from the idea of a legal cooperation among the experts in law during the steps of fact finding and law finding, while the final judgement is undoubtedly in the responsibility and autonomy of the judges only.

THESIS 5: INFORMATION AND COMMUNICATION IN CIVIL PROCEEDINGS

But orality and especially the oral negotiation is not only a debacle from a practical point of view but also from a theoretical one for several reasons:

The described destruction and devaluation of the principle of orality particularly in regard of so called "hearings", where the judge and - according to the principle of publicity - also an audience in the courtroom should hear, what the parties and their lawyers have to say - based on the fundamental right of the litigants to be heard (Art. 103 GG) and the corresponding fundamental duty of the judge to lend them his ear - is for sure caused by the two circumstances mentioned before:

There is in the first place the immense workload by the millions of incoming of civil cases at the civil courts every year and the respectable efforts of the judges to manage this load by huge amounts of disposals avoiding an increasing yearly backlog.

Then, there is the legal permission for the parties to refer to all their writing and writes to a far extent, replacing the original regulation, asking the parties for comprehensive and complete oral presentations at the hearings.

But the procedural scholarship, too, has to be blamed to be also responsible for the decline of the theoretically still praised principle of orality as an important and characteristic one among the amount of so called fundamental principles respectively basic maxims of civil procedural law. This has to be explained: For nearly all German proceduralists the immense high value of private autonomy finds in civil procedure its expressions in the "principle of parties' disposition" upon the course and subject of litigation ("*Dispositionsgrundsatz*") and - most relevant for the here treated topic - in the "*principle of negotiation*" which is by the absolutely leading procedural opinion equated with the "*principle of parties' submission of facts and evidence*" ("*Beibringungsgrundsatz*") in the sense of the parties responsibility to bring forward and to introduce into the trial orally or in written form the relevant historical facts of the case to help to reconstruct presently the past factual situation ("truth finding"), causing the legal dispute. For most scholars and practitioners the both principles are identical, the different names just synonyms, containing nothing else than the submission of facts and evidence and nothing more, neglecting or even ignoring totally the aspect of negotiation. This equalisation or identifying of the "*Beibringungsgrundsatz*" as a - in modern term - "*principle of information*" with the "*Verhandlungsgrundsatz*" as a - in modern term - "*principle of communication*", absorbing the *Verhandlungsgrundsatz* by the *Beibringungsgrundsatz*, is a momentous mistake with the consequence of a dogmatically cultivated ignorance about

theoral negotiation. No wonder therefore, that - as far as known - in none of all the study boo and commentaries on civil procedural law we will find any deeper definitions, descriptions and explanation, what "*Verhandlung*" in the true sense of this terminus could mean and should mean. Insofar the *Verhandlungsmaxime* is not yet really discovered and developed.

The differentiation of fact submission from negotiation respectively information from communication, in civil procedure is also necessary for a better understanding of the functions and effects of orality here and writing there: Writing or the written form have always or mostly a conserving, preserving, affirming, assuring or contesting function in concern of its content being the bearer of all kinds of information or - in a modern term - of "datas". In civil proceedings the writs of the litigants contain typically the contrasting standpoints of the parties, who contest their contrary positions like a modern kind of the old roman "*litis contestatio*". Insofar the written form documents mainly the adversary, contradictorial or confrontational character of a procedure or of certain of its phases.

In the contrast, orality in procedure and in the first place the legally ordered but practically neglected "negotiation" is always already by definition

an oral one, because just the exchange of papers, the mailing and re-mailing or a correspondence could not be named a negotiation in the true sense of the word. Such a face to face negotiation stands not only for oral controversies and dispute (“streitige Verhandlung”) but also for the approximation, clearing and compromising of the standpoints, for cooperation and compensation, for reconciliation and settlement (“gütliche Verhandlung”) or in short for “communication” as an interaction between the parties and only between them.

When therefore judges full of pride, report about how many proceedings or how many parties they have negotiated or even settled, then this outing at-tests a great misconception or the role and tasks of a judge, who himself is not a negotiating partner but at the most just a moderator or mediator.

In sum: All the justice-system reformers, who want to replace the existing “litigation culture” by a “reconciliation culture”

Being aware of the orality and its denoted functions and effects we may move to the question of its efficiency.

THESIS 6: ORALITY AND WRITING AS FACTORS OF EFFICIENCY

When asking now for the influences of orality and writing to the *efficiency* of court procedures, the often raised question, if oral proceedings are more efficient or less inefficient than written ones and vice versa, such an indifferent question in all its generality does no make much sense and does not allow any profound answer.

First of all one have to make clear, what he means, when using the nowadays overall used word “efficiency”, sometimes also called “effectiveness”, which may contain aspects of quantity as well as of quality, of time span, workload, work management and manpower, of duration, delay, acceleration and deceleration, of resources, personal, facilities and equipment, of costs and expenditure, of organisation, structures and functions and other aspects more, often embraced by catchwords like “economization”, “rationalization”, “rationing”, “centralization”, “concentration” or “simplification” or by reform slogans like “lean justice” and “lean procedure”. If one reduces procedural “efficiency” just to the question if a court proceeding is simple, cheap and quick, combined with reform efforts to make an existing complex, slow and expensive proceeding just more straight, more speedy and less costly, the consideration is missing about what by a court procedure could and should be achieved or in other words what its goals or targets are or should be. To present an own opinion: Its very difficult main task insofar is the balancing or “optimizing” of the partly contrary aims, i.e. to render an as just as possible judgment in an as reasonable as possible time with an as justifiable as possible expenditure. If this target is reached the proceeding may be valued as “effective”.

In this context it is worth to mention the old and overages pre-justice,

that written procedures, compared with oral ones, are generally slow, heavy, circumstantial and costly, an opinion, rooted in ancient court situations, when and where writs and files had been produced by handwriting and handicraft or by using old fashioned mechanical type writing machines.

But nowadays in the era of High-Tec, multimedia, internet, electronics and audiovisual equipments also the written proceedings could be at least as speedy as mainly oral litigations.

When therefore for example in Costa Rica, where first instance civil proceeding had lasted in the average about seven years, since already a decade the justice system reformers call for nothing else but for "Oralidad" as an "Gran Reforma" and a panacea to cure all the maladies of the written processes, this will be a very illusionary reform approach.

Furthermore, as already mentioned, most of the present civil procedures are consisting in a combination of written as well as oral parts, phases or steps as possible "factors of efficiency"; Therefore we cannot plainly ask if an oral procedure

Is more or perhaps less efficient than a written procedure. Instead we have to ask, which procedure in which oral-written-construction and course is more efficient than another one of this combination type.

When we want to avoid mere speculations, then this question can only be answered on the basis of empirical analyses and research particularly done by sociologists and economists, like they had been done in Germany once in the eighties of the past century embedded in a huge project of the German Ministry of Justice called "Strukturanalyse der Rechtspflege SAR"). The empirical results of that project had led unfortunately to only very few legislative reforms of the German Civil Justice System.

Meanwhile many of the SAR-results are already out-dated, because the Electronic Data Processing, Teleinformation and Telecommunication, have started to conquer the justice administration systems and the court procedures as well.

THESIS 7: ELECTRONIFICATION AS HYPERFORMALIZATION OF CIVIL PROCEDURES

Caused by the current problems, miseries or even crisis of justice systems and boosted by the turn of the millennium and an upcoming atmosphere of a totally "new era in the history of manhood" there is another tendency worth to be mentioned. This tendency has also to do with the here dealt topic and is covered by the word or better by the phrase of "*modernization*" likely used by ministries of justice, legislators and politicians and to be found as slogan or goal also in many justice reform projects and declaration about how to make judicial administration more effective and court proceedings "speedier, cheaper, and better" or more attractive for the people. But when we look behind this term

there is mostly not much more to detect than a mere punctual planed or already practiced introduction of the so called "modern media" or teletechnics like teleinformation and telecommunication to improve just the bureaucratic and organizational side of justice administration and just the technical, operational or processing side of court management and court procedures.

This tendency, which I will call - according to often used abbreviations like "e-justice", "e-procedure", "e-law etc. - "*electronification*", is also named "technicalization", "virtualization", "digitalization" or "computerization" in the sense of an ongoing permeation or infiltration of antiquated judicial administration, old fashioned court office equipments and outdates procedural behavior by an installment of new media and the use of their possibilities.

Particularly looking at the respective new "e-procedural-law" or "e-justice-administration-law"(like for example the new German Judiciary Modernization Act from 2003 or the German Judiciary Communication Act from 2003) and the new splinters of scattered single "e-norms", just slipped over certain provisions in the old Codes of procedural law (like for example the German Civil Procedure Order from 1877) one gains the impression that all this legislative novelties concerned are offering nothing else or at least hardly nothing else than a new form, the "*electronic form*", replacing or augmenting the traditional , mainly the "paper form" respectively the "written form"(both named "text form"), while their substantive contents, the action, reactions and interactions or the working processes behind, remain unchanged.

As like all forms also the electronic form has the function to preserve and to conserve its content, this means, that exactly that reform movement, which sounds to be the most progressive one, is in reality an utmost *conservative* one as long as this so called modernization deals with nearly nothing else than with a pure new form.. It is insofar a mere "*reform of the form*", and not a "*reform of the content*".

This substitution or enrichment mainly of the traditional written form by the new electronic form, particularly in the field of information and communication, finds its expression for example in e-registers, e-files, e-folders, e-documents, e-signatures, e-databanks or e-mails, which allows to describe this as an "exchange" of one "data storage media" by another.

In other words: the officially almost euphorically and emphatically praised so called "modernization of justice" by the new media does quite often mean not much more, than the effort to replace or to augment the conventional form of actions, reactions and interactions of procedural or administrative working processes and this is all over Europe to a far extent still the "*paper form*". This form finds for example its expression in the procedural law vocabulary using words like "register", "catalogue", "list", "document", "signature", "booklet", "docket", "writs", "writing", "file", "folder" "paper", "binder", "index", "certificate", "transcription", "copy", "protocol", "record" etc. Compared with

this traditional paper form the electronic form presents itself quasi as a “step-up” from the conventional paper form or as a “hybrid”.

Besides, in some countries also another electronic form, i.e. an up to now still quite imperfect supplementation of in-court “live” oral communications and negotiations by “virtual” audio-visual transmissions of motion-pictures and sounds into a courtroom (*video conferences*), is prospected or under construction.

All this let the “modernizers” appear simply as “formalizers,” who almost only pay attention to forms and not or hardly also to contents, which themselves urgently need to be reformed. To illustrate in short the unalterable need for such a “material” or “substantial” justice-modernization it must be sufficient just to know, that business-accountants and management-consultants, chartered by the German Ministry of Justice to analyze the present judicial realities, were really shocked by the circumstantiality, intricateness, formality, heaviness, slowness, costliness and complicatedness of the traditional court management and the court proceedings and by the immense waste of time, manpower and money.

These factual deficiencies found out are to a big part raised by widely inflexible and obsolete legal over-regulation in the contemporary judicature acts and procedure codes, which are - at least in Western Europe -, often stem from the 19th century. And - if emended, enacted or imported by one nation from another one at later times - they mostly are still deeply rooted in their own or in a foreign legal history and are gluing on old patterns. In sum: The procedural codes are - perhaps with rare exceptions in regard to faintly modernized newer codes - outdated, retrospective and past-orientated, while really “modern”, i.e. updated, prospective and future-orientated justice administration codes, court acts or procedural orders - as far as known- do until now nowhere exist.

Coming back again to the so called electronification of justice systems and court procedures the presumption has to be pointed out, that this ongoing - with already here and there uttered final aims like totally “*virtual court procedures*” or pure “*tele-courts*”, will be achieved to which extent ever *irresistible*, regardless to the questions, how necessary and useful its out-comes will be.

Already now this development creates also for us as proceduralists severe theoretical and practical problems. For example: the rapidly ongoing electronification of court procedures, accompanied by more and more so called “e-procedure-law”, forces us to reconsider nearly all of our confided *procedural principles* like the principle of accessibility, the principle of submission of facts and evidence (in modern terminology: “principle of information”), the principle of negotiation (in modern terminology: “principle of communication”), the principle of directness, the principle of presence, the principle of publicity, the principle of effectiveness and others. Besides, we have to recognize, that our court proceedings - in spite of the here and there but not everywhere accepted principle of orality (i.e. formlessness) - are in wide and in their most important parts a “*file process*” or a “*paper process*”, which could have been and can be

characterized and described in modern terms as a “*data processing system*”, an “*information system*” and a “*communication system*”. As such, our old-styled court procedures on one side and the new world of tele-techniques with their, “*electronic data processing*”, “*tele-information*” and “*tele-communication*” on the other side show a great deal of reciprocal attractions, affinities and compatibilities. This makes it apparent, that the court proceedings in particular and the judicial systems in general being fallow lying fields or open flanks, which will be sooner or later to a smaller or bigger extend conquered by the new media. This holds true, even it will be turned out, that the fully electronic or partly electronically supported court procedures will be not all “faster, cheaper and better” then the old fashioned one. Insofar we have to keep in mind the high *costs* for buying, installing, maintaining and up-dating of the hard- and software and furthermore the fact, that for example by using E-mails only the *information-transfer-speed* can be reduced to splits of a second, which does not mean at all, that also the proceeding as a whole (including hearings, proof-taking, negotiation, decision-making etc.) will become faster. And last but not least we should consider the opinion of experts, that a “court procedure without any paper” would never exist. This opinion contains the option of a future “double-track” model, which would be for sure not cheaper and faster than a one-track procedure of the old or of the new style.

One more remark to finish this chapter: the ongoing legalization of judicial or procedural phenomena by the creation of e-justice or e-procedural norms also stands for a strong move, here called “*formalization*”, towards a new quality of “*formalism*” in our procedural law, a field of law, which is anyway since long and still characterized as a “formal” or even formalistic field of law, neglecting all its “material”, “substantial” and even “constitutional” impacts and values.

THESIS 8: FINAL REMARK INSTEAD OF A SUMMERY

As the author of this report feel unable to summarize all the touched aspects of the general topic of this colloquium, just a very last observation to end with: Being aware of this to a far f extent unavoidable and irresistible formalization or even “hyperformalization” particularly of court procedures by the ongoing electronification this movement is widely embedded, submitting and aggravating the *controversial, adversary or contradictorial style* of legal conflict resolution by litigation at courts, a contemporary movement, which means a strong contrast to another current fundamental worldwide movement, asking also in respect to intra-court procedures for “*reconciliation*” contra pure litigation, i.e. for much more oral and direct face-to-face *communication* and *cooperation* among parties, lawyers and judges, present in the court room.

This challenging goal may also be described by the general title of the world congress of the IAPL at Gent, Belgium, in 1977 as the striving for a “*Justice with a Human Face*”.

LITERATURHINWEISE:

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