

## **PLEASE NOTE**

**This is a draft paper only and should not be cited without the author's express permission**

### **CIVIL LITIGATION IN TWENTIETH CENTURY EUROPE<sup>1</sup>**

**C.H. van Rhee**

#### **Introduction**

Choosing a starting point and an end for a historiography of the civil procedural laws of twentieth century Europe from the perspective of case management is as simple as choosing these moments in the Europe of the nineteenth century. In the nineteenth century the historiography should commence with the French *Code de procédure civile*, that was adopted in 1806. It was this code, with its rather passive judge, that would leave its mark on the nineteenth century civil procedural law of almost all European states. The year 1898, in which the influential Austrian *Zivilprozessordnung* (*öZPO*) of the 1<sup>st</sup> of August 1895 took effect,<sup>2</sup> marked the end of the era of nineteenth century civil procedure. Both within and outside Europe the Austrian *Zivilprozessordnung* with its active judge would, to a great extent, take over from the French *Code de procédure civile* the task of setting the example. This end simultaneously forms the starting point of the twentieth century civil procedural law. With regard to this area of the law the recently passed century therefore already commenced before the turn of the century.

As regards the end of the era of twentieth century civil procedure, I would like to set this end in 1999, the year in which the English *Civil Procedure Rules* came into force, despite the fact that the choice of this moment in a period that has passed only so recently is precarious. The adoption of these rules also caused a change in trend as regards the position of the judge who now also in England and Wales has acquired extensive case management powers. Although this change is felt especially in England and Wales, this development is also of great significance to Europe, as the new *Rules* in one step bring English civil procedural law closer to its continental counterparts than it has been in centuries. Moreover chances are considerable that the new English Rules will influence legal development in other countries. For example, the large interest for the English developments in The Netherlands is striking. The commission that was composed there to fundamentally review the Code of Civil Procedure and other statutes has recently finished its task. It has paid extensive attention to the English developments.<sup>3</sup> With this, however, I enter the twenty-first century and venture myself outside the central period I would like to discuss here.

---

<sup>1</sup> The author would like to thank his student, Miss Noor Müllers, for revising the English of the present article.

<sup>2</sup> See e.g. P. Oberhammer, T. Domej, 'Germany, Switzerland, Austria (ca. 1800-2005)', in C.H. van Rhee (ed.), *European Traditions in Civil Procedure*, Antwerp-Oxford, 2005, p. 118ff.

<sup>3</sup> W.D.H. Asser, H.A. Groen, J.B.M. Vranken (m.m.v. I.N. Tzankova), *Een nieuwe balans. Interimrapport fundamentele herbezinning Nederlands burgerlijk procesrecht*, The Hague, 2003; *idem*, *Uitgebalanceerd. Eindrapport Fundamentele Herbezinning Nederlands Burgerlijk Procesrecht*, The Hague 2006.

Alongside the years 1898 and 1999 belong the names of two important ‘proceduralists’: the Austrian Dr. Franz Klein (1854-1926) and the Englishman Lord Harry Kenneth Woolf (1933). Klein was the father of the Austrian *Zivilprozessordnung*, while Lord Woolf filled the same position for the English Rules. When reading the present paper one should realise that especially the accomplishments of these two individuals are pivotal.

### **1 The starting point: The Austrian Zivilprozessordnung**

Until 1898 the *Allgemeine Gerichtsordnung* of 1781 applied in Austria. The draughtsman of this *Gerichtsordnung* was the originally Swiss Joseph Hyazinth von Froidevo (1735-1811).<sup>4</sup> Von Froidevo’s procedural model is characterised by W. Jelinek as follows: ‘zwar schriftlich, heimlich, von der Eventualmaxime geprägt und mittelbar, jedoch von extremer Parteiherrschaft gekennzeichnet’ (admittedly written, secret, stamped by the *Eventualmaxime* and mediate, but at the same time characterised by the domination of the parties).<sup>5</sup> However, in 1873 this changed for small claims with the implementation of the *Bagatellverfahren*. The *Bagatellverfahren* was characterised by orality, immediacy in proof proceedings and a free evaluation of evidence.<sup>6</sup> Due to this, part of the changes that the implementation of the Austrian *Zivilprozessordnung* brought in 1898 had already been realised before that time. It is important to keep this in mind as we take a closer look at the *Zivilprozessordnung* and the history of her materialisation.

In the period of 1890-1891 the *Privatdozent* Franz Klein expounded his ideas about civil procedure in a series of articles in the *Juristische Blätter*. These articles were later brought together in his well known *Pro Futuro. Betrachtungen über Probleme der Civilprocessreform in Oesterreich* (Leipzig/Veinna 1891).<sup>7</sup> Evidently Klein drew attention with his articles, as on the 17<sup>th</sup> February 1891 he was appointed *Ministerialsekretär* in the Austrian Ministry of Justice. He was given the task of reforming Austrian civil procedural law, which had been attempted a number of times without success.<sup>8</sup>

Already in 1893 the draft for the Code of Civil Procedure had been completed, in addition to a draft-*Jurisdiktionsnorm* (this Code contains regulations on the organisation of the Judiciary and related issues) and a draft-*Exekutionsordnung* (Enforcement Code). The Code of Civil Procedure was implemented five years later, in 1898.

According to Winfred Kralik in *Forschungsband Franz Klein*,<sup>9</sup> the main goal of Klein’s activities on the Code of Civil Procedure was to improve the practice of litigation. His aim – and this may not come unexpectedly to an expert on the history of civil procedural law – was to create procedural regulations that would induce fast and cheap litigation, leading to a judgment based on the facts as they had happened in

---

<sup>4</sup> W. Jelinek, ‘Einflüsse des österreichischen Zivilprozessrechts auf andere Rechtsordnungen’, in: W.J. Habscheid (ed.), *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen*, Bielefeld 1991, p. 50.

<sup>5</sup> Jelinek, o.c., p. 49.

<sup>6</sup> Jelinek, o.c., p. 53.

<sup>7</sup> For Klein’s bibliography, see: H. Hofmeister (ed.), *Forschungsband Franz Klein (1854-1926). Leben und Wirken*, Vienna 1988, p. 67.

<sup>8</sup> R. Sprung, ‘Der Lebensweg Franz Kleins (24. April 1854 bis 6. April 1926)’, in: Hofmeister (ed.), o.c., p. 26.

<sup>9</sup> W. Kralik, ‘Die Verwirklichung der Ideen Franz Kleins in der Zivilprozessordnung von 1895’, in: Hofmeister (ed.), o.c., p. 89.

actual practice (the ‘substantive truth’ hereafter, as opposed to the ‘formal truth’, i.e. the truth as advanced by the parties). Procedural formalities were to be pushed back as much as possible and the judge was given an active role in the conduct of the action.

Various authors agree that Klein’s virtue was not so much that he developed new ideas about procedural law, but that his importance should be sought in the fact that he combined existing views in a valuable manner.<sup>10</sup> Here one could point out his leading principle, the realisation of the *Sozialfunktion* of civil procedure. This *Sozialfunktion* is a reaction to the liberal view of legal proceedings of the 19<sup>th</sup> century, a view that pervaded the French *Code de procédure civile*; after all this *Code* saw civil procedure as a struggle between independent citizens, who decided for themselves about the way in which they would solve their disputes. Conversely, those who lay the emphasis on the *Sozialfunktion* place litigation in a much wider framework. When this principle is observed, one will pay attention to its two constituent elements, namely the fact that settling specific disputes is not the sole purpose of civil procedure but that it also serves the common good (*Wohlfahrtsfunktion*), and that civil litigation should be looked at from an economic angle. Franz von Zeiller (1751-1828), the creator of the Austrian Civil Code of 1811, already formulated the *Wohlfahrtsfunktion* clearly.<sup>11</sup> With regard to the economic perspective (for example the fact that the legal process should not be a way to postpone the payment of debts or to acquire money against a low interest rate), one could point out Klein’s tutor, Anton Menger (1814-1906).<sup>12</sup>

When summarising the most important characteristics of the new procedural model one comes to the following list: (a) the pushing back of the role of preliminary defences (exceptions), (b) far-reaching case management powers of the judge, who *ex officio* safeguards the (short) terms for performing the various procedural steps<sup>13</sup> and who has important powers in the field of the inquiry into the facts of the case, (c) a division of the lawsuit in a written preparatory phase and an oral main phase that should, if possible, take place in a single court-session, (d) a strict implementation of the *Preklusion* principle, that is to say, the principle that specific procedural steps cannot be taken anymore after the given time period has expired, and (e) the *ex officio* notification to the opponent party of the various procedural documents that have been submitted to the court.<sup>14</sup> This list is an indication that Klein was predominantly looking for a new balance between the powers of the judge and those of the parties.

To limit the length of this contribution, I will only further examine elements a-c.

#### (a) *Preliminary defences (exceptions)*

Important characteristics of legal proceedings that are shaped according to the *Sozialfunktion* are efficiency and speed. It shall be clear to anyone who has knowledge of the delaying effects that preliminary defences have,<sup>15</sup> that Klein

---

<sup>10</sup> H.W. Fasching, ‘Die Weiterentwicklung des österreichischen Zivilprozessrechts im Lichte der Ideen Franz Kleins’, in: Hofmeister (ed.), o.c., p. 101-102.

<sup>11</sup> F. von Zeiller, ‘Grundsätze über die Haupteigenschaften einer Civil-Gerichtsordnung’, *Jährlicher Beytrag zur Gesetzkunde und Rechtswissenschaft*, 3, 1808, p. 133.

<sup>12</sup> Fasching, o.c., p. 101-102.

<sup>13</sup> Kralik, *Die Verwirklichung* (o.c.), p. 94-95.

<sup>14</sup> R. Stürner, ‘Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen - von Deutschland aus gesehen’, in: Habscheid (ed.), o.c., p. 19.

<sup>15</sup> See my ‘The Role of Exceptions in Continental Civil Procedure’, in: P. Brand, K. Costello and W.N. Osborough (eds.), *Adventures of the Law. Proceedings of the Sixteenth British Legal History Conference, Dublin 2003*, Dublin, 2005, p. 88-105.

primarily wanted to limit the use of these preliminary defences. At the time of Klein preliminary defences were especially detrimental since, according to the *Allgemeine Gerichtsordnung* 1781 the Austrian judge, as his colleagues in many other European countries, usually had to decide on these preliminary defences in a separate judgement; until this judgment was pronounced, the proceedings were halted. However, as we shall see hereafter, the pushing back of preliminary defences is just what Klein was not very successful in.

An important reason for the frequent use of preliminary defences in eighteenth century Austria were the complicated rules on jurisdiction. These rules gave rise to preliminary defences stating, for example, that the action had been brought before the wrong court. Klein pleaded for simplifying those rules. Furthermore Klein wished to limit the raising of preliminary defences to a set moment in time in the proceedings: they were only to be permitted at the moment that the case came before the judge the first time (*in der ersten Tagsatzung*).<sup>16</sup> When analysing the situation as it was after the implementation of Klein's reforms, one would have to conclude that the Austrian rules on jurisdiction have not become simpler, and that the attempt to bring the preliminary defences together during the first hearing of the case was only partially successful.<sup>17</sup>

Other suggestions Klein made with regard to the preliminary defences were more successful. For example, the appeal proceedings concerning preliminary defences were simplified and the pace of the hearing of these proceedings was increased. This was realized by incorporating the decision at first instance in a *Beschluss* instead of in a *Prozessurteil*, which was common practice in Germany. Contrary to a *Prozessurteil*, against which *Berufung* was possible, only the legal remedy *Rekurs* was accepted against a *Beschluss*. This remedy had a simpler set-up than *Berufung* and could only be applied once.<sup>18</sup> Furthermore it was decided that a preliminary defence (apart from one regarding a *Prozesskostenkaution*, i.e. the preliminary defence that the opponent party should make a deposit with the court for the costs of the lawsuit) would no longer be a ground to refuse to try a case. Besides this it was left to the judge's discretion whether to decide by separate judgement about a preliminary defence raised, in the judge's opinion, without good grounds. In this manner he could leave the possibility of appeal against this judgment open, or postpone the decision about the preliminary defence until the final judgement. With this last method a delay in the conduct of a case due to the suspending nature of an appeal against an interlocutory judgement was prevented.<sup>19</sup>

#### *(b) Case management and the search for the substantive truth*

Apart from the measures taken regarding the preliminary defences, Klein's draft also brought reform in the field of the inquiry into the facts of the case. The judge received a *materielle Prozessleitungspflicht* (this active attitude of the judge is in accordance with the *Sozialfunktion* of the legal procedure; after all, inconsistent with the liberal view that promotes a passive attitude; the interests that are linked to the case are not

---

<sup>16</sup> *Materialien zu den neuen österreichischen Civilprocessgesetzen* (vol. 1), 1897, p. 286; F. Klein, 'Die österreichischen Civilprozess-Gesetzentwürfe', *Zeitschrift für Zivilprozess*, 19, p. 52.

<sup>17</sup> Kralik, *Die Verwirklichung* (o.c.), p. 90; *Materialien* (o.c.) (Vol. 2), p. 322.

<sup>18</sup> *Materialien* (o.c.) (Vol. 1), p. 339ff, p. 363ff; F. Klein, *Vorlesungen über die Praxis des Civilprocesses*, Vienna, 1900, p. 272ff; F. Klein & F. Engel, *Der Zivilprozess Österreichs*, Mannheim etc. 1927, p. 451ff; H. Sperl, 'Franz Klein', *Zeitschrift für Zivilprozess*, 51, p. 435.

<sup>19</sup> Kralik, *Die Verwirklichung* (o.c.), p. 90-91; *Materialien* (o.c.) (Vol. 1), p. 30ff, p. 294ff; Klein, *Pro Futuro* (o.c.), p. 51ff; H. Sperl, o.c., p. 435; Klein & Engel, o.c., p. 313.

necessarily the interests of the individual parties).<sup>20</sup> This active role of the judge promotes the search for the substantive truth, and can be realised by asking questions *ex officio* and also, for example, by the collecting of evidence on the judge's initiative. In practice, however, the final implementation of the *Prozessleitungspflicht* is dependent on the good will and skills of the judge. In the period after the implementation of the Austrian Code of Civil Procedure the *Prozessleitungspflicht* appears to have led to positive results, despite the fact that the penalty for violation of this duty only consisted of the possibility for the parties to lodge an appeal based on irregularities in the procedure (*Berufung wegen Verfahrensmangel*).

It should be noted that the active attitude of the judge was seen as a typically German contribution to procedural law at the time. It was claimed, however, that in Germany the situation changed under French influence as a result of the introduction of the Code of Civil Procedure of 1877 (*ZPO*). For example, in Prussia the existing *Offizialbetrieb* principle (i.e. the principle of the active judge) was replaced by the *Parteietrieb* principle (the passive judge) due to the implementation of the *ZPO*.<sup>21</sup>

Klein's preference for an active judge brought along that he was unfavourably disposed towards the *Verhandlungsmaxime*, i.e. the principle of party control over allegations and proof. According to Klein this *Maxime* only led to a situation where the parties were given the possibility to tempt the judge to give an incorrect, only partially correct, or unclear judgement.<sup>22</sup>

Although Klein did not like to use the word *Inquisitionsmaxime*, the procedure he designed still got a somewhat inquisitorial character. This, however, will not have saddened him, because in his view the rules of procedure should offer ample opportunity to find the substantive truth.

Following on the more inquisitorial character of the procedure and the strive after the substantive truth, a duty of truth for the parties (*Wahrheitspflicht*) was implemented. This duty did not only apply in the proof stage, but already during pleading. Whether this duty of truth actually led to results is controversial. W. Kralik, for example, describes her as a mere 'ethical postulate'.<sup>23</sup>

Klein's perception of civil litigation as a search for the substantive truth also manifests itself in what he called the 'gegenseitige Unterstützung der Prozessparteien'.<sup>24</sup> This 'Unterstützung' implies that every party can ask her opponent questions, or have questions asked, about facts and circumstances unknown to her as well as about proof. One will now instantly think of the Anglo-American 'discovery' (currently known as 'disclosure' in England) and this is very appropriate: Klein himself already associated this procedure with it.<sup>25</sup>

### (c) *A written preparatory phase and an oral main phase*

According to Klein an efficient pace of civil litigation and the search for the substantive truth are stimulated by an oral procedure and immediacy during proof proceedings.<sup>26</sup> Nevertheless the procedure shaped by Klein was not entirely oral. Apart from the preparatory written phase of the proceedings before an *unus iudex*,<sup>27</sup>

---

<sup>20</sup> Fasching, o.c., p. 102.

<sup>21</sup> J. Damrau, 'Der Einfluss der Ideen Franz Kleins auf den Deutschen Zivilprozess', in: Hofmeister (ed.), o.c., p. 161.

<sup>22</sup> Klein, *Pro Futuro* (o.c.), p. 13. Zie ook Kralik, *Die Verwirklichung* (o.c.), p. 91.

<sup>23</sup> Kralik, *Die Verwirklichung* (o.c.), p. 91-92.

<sup>24</sup> Klein, *Pro Futuro* (o.c.), p. 36.

<sup>25</sup> Klein, *Pro Futuro* (o.c.), p. 41 en p. 46ff.

<sup>26</sup> Klein, *Vorlesung* (o.c.), p. 31; Klein, *Pro Futuro* (o.c.), p. 87 ff.; Fasching, o.c., p. 112.

<sup>27</sup> Jelinek, o.c., p. 69.

writing also played a role in the second ‘oral phase’. Due to the prohibition to introduce new facts on appeal (the so-called *Neuerungsverbot*),<sup>28</sup> it was consequently very important that a reliable protocol was kept during the oral phase. Nonetheless, according to many this criterion deprived the oral phase of a large part of its dynamics,<sup>29</sup> resulting in criticism of Klein.<sup>30</sup> Despite this criticism, however, it can still be said that Klein’s approach was modern. His intention, after all, was to increase the speed of litigation by providing the judge with instruments to prepare the case (during the mainly written preparatory phase) to such an extent that it could be decided in a single session in the oral main phase.<sup>31</sup> Adjournments of the hearing should be avoided as much as possible (this is in accordance with the principle of the *einheitliche mündliche Streitverhandlung*). To attain the latter it was determined in the Austrian Code of Civil Procedure that, apart from adjournments that were explicitly provided by law, the judge was under no circumstances to allow other adjournments. The only concession Klein made, be it against his will, was that the case could be stalled for a period of time at the request of both parties.

Unfortunately it has to be acknowledged that the preparatory phase died an early death in Austria.<sup>32</sup> After World War II it no longer occurred in practice and in 1983 the Articles that were related to this phase were removed from the Austrian Code.<sup>33</sup>

## 2. Austria’s exemplary position

The Austrian civil procedural law was very influential in Europe (and beyond) for a long period of time; without a doubt it was exemplary. Firstly, the influence in Germany has been very significant. For example, here one could think of the *Novelle* of the German Minister of Justice Emminger from 1924. In accordance with Austrian law Emminger expanded the powers of the judge. According to the *Novelle* the judge became responsible for the observance of time-limits. At the same time, a concentrated oral hearing was aimed for. Furthermore a preparatory phase under the leadership of an *unus iudex* was introduced. Additionally in a *Novelle* from 1933 the duty of truth for the parties (*Wahrheitspflicht*) from Austrian procedural law was adopted.<sup>34</sup> Other examples, and so there are many more, are the influence of the Austrian *Neuerungsverbot* that led to restrictions concerning the introduction of new facts on appeal in Germany<sup>35</sup> and the implementation of the notification of judgements to the parties by the court in 1976.<sup>36</sup> According to several authors the German procedural model in turn influenced Austrian procedural law (especially at

---

<sup>28</sup> Fasching, o.c., p. 111. The aim of the *Neuerungsverbot* was to concentrate on first instance proceedings and thereby reduce the workload of the appeal courts. The prohibition was not an invention of Klein; it was adopted from the *Allgemeine Gerichtsordnung* 1781, paragraph 257. The prohibition was implemented in a stricter manner than Klein himself had wanted. See Fasching, o.c., p. 109-110, and Jelinek, o.c., p. 51: ‘Das Verbot neuen tatsächlichen Vorbringens in der Berufungsinstanz entstammt der öAGO; der Versuch Kleins, dieses Verbot zu lockern, ist gescheitert’.

<sup>29</sup> For that matter, in practice the protocol has become more and more a short summary of the hearing. Originally the idea was that a detailed account would be made. Kralik, *Die Verwirklichung* (o.c.), p. 93-94.

<sup>30</sup> E.g. E. Demelius, *Kritische Studien zu den Gesetzentwürfen aus dem Jahre 1893* (Volume 2), Vienna 1895; Sperl, o.c., p. 419.

<sup>31</sup> Fasching, o.c., p. 113.

<sup>32</sup> Jelinek, o.c., p. 49.

<sup>33</sup> Jelinek, o.c., p. 69.

<sup>34</sup> Jelinek, o.c., p. 69; Damrau, o.c., p. 166.

<sup>35</sup> Stürner, o.c., p. 21.

<sup>36</sup> Damrau, o.c., p. 163.

the doctrinal and structural level). These same authors maintain that as a result one may speak of an Austrian-German model of civil procedure.

Apart from Germany there are other European countries that experienced the influence of Austrian procedural law.<sup>37</sup> First one may refer to the Eastern and Central-European countries that still belonged to the Austrian-Hungarian Double Monarchy in 1898. Additionally there was Austrian influence apparent in Scandinavia, Greece, Lichtenstein, and the Swiss Kanton Zurich. Also in Italian scholarly writing, but less so in the *Codice di procedura civile* (1940) itself, Austrian influences can be found that were possibly exerted from the former Austrian areas in modern day Italy. Through Italy some influence might be discerned on the Iberian Peninsula. Even the French *juge de la mise en état* may have been inspired by the Austrian 'preparatory judge'.

In the Netherlands little attention was paid to the Austrian procedural model for a long time. As a result, The Netherlands are not discussed in a recent collection of essays on the influence of the Austrian-German procedural model abroad.<sup>38</sup> Taking note of the reform proposals in the area of the Dutch civil procedural law from the beginning of the 20<sup>th</sup> century it appears that this is unjustified. These reform proposals called into existence draft bills of the *Nederlandsche Juristenvereniging* (Dutch Association of Lawyers), the *Vrijzinnig Democratische Bond* (Liberal Democratic Society) and a draft bill by the government-appointed *Gratama-Commission*. The fact that the Austrian influence in The Netherlands nevertheless did not get any attention was probably due to the fact that these draft bills were not adopted. As a result, for a long period of time, Dutch civil procedural law was behind when considered from a European perspective.

In another context<sup>39</sup> I already paid attention to the aforementioned reform proposals. In the current contribution I will therefore confine myself to a summary of some of my findings in connection with the most important bill, that of the *Gratama-Commission*.

### 3. The Gratama (draft) Bill

To a great extent the Gratama bill was inspired by Klein's Austrian *ZPO*. This becomes apparent where emphasis is placed on (a) the diminution of the role of preliminary defences (exceptions), (b) the case management powers of the judge and the search for the substantive truth, and (c) the division of the proceedings into two stages, with an oral hearing in the second stage.

#### (a) Preliminary defences (exceptions)

The *Gratama-Commission*, like the creator of the Austrian *ZPO*, paid attention to the delaying effect of preliminary defences on litigation. The aim was to eliminate the distinction made between preliminary defences and the defence on the merits. The *Gratama-Commission* was of the opinion that this distinction gave rise to too many differences in opinion and resulted in undue delay. Consequently the draft bill did not include such a distinction. The system suggested by the bill was that, apart from the defence that the court was not competent *ratione territoriae*, every defence could be brought forward at any time in the procedure. However, a restriction was imposed that

---

<sup>37</sup> See W.J. Habscheid (ed.), *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen*, Bielefeld 1991.

<sup>38</sup> W.J. Habscheid (ed.), o.c.

<sup>39</sup> C.H. van Rhee, 'Ons tegenwoordig sukkelproces. Nederlandse opvattingen over de toekomst van het burgerlijk procesrecht rond 1920', *Tijdschrift voor Rechtsgeschiedenis* 2000, p. 331-346.

left it to the judge to determine whether the defence could have been presented earlier. If the judge was convinced this was the case he ought to reject the defence in order to 'prevent unreasonable delay and prejudice to the other party'.

*(b) Case management and a search for the substantive truth*

For the *Gratama-Commission* the new Austrian *ZPO* also formed the prime example for the position of the judge in the legal procedure. In the Commission's bill the authority of the judge was thus extended regarding the determination of the time-limits, the oral hearing and the preparation of the case for judgment.

Regarding the time-limits for the exchange of the statements of case (i.e. statement of defence, reply and rejoinder; a separate statement of claim was not submitted anymore since the statement of claim should be part of the summons according to the bill) the parties were deprived of any influence on their length. The time-limits were to be determined by the examining judge, making due allowance for the circumstances of the case. A term was not permitted to be longer than four weeks under any circumstances, even if it was evident in advance that this maximum term of four weeks would be too short. Nevertheless, once a term had commenced (and this also applied for other terms than those for the exchange of statements of case), it could be prolonged (such that it exceeded four weeks) or reduced. Since prolongation or reduction could even occur *ex officio*, the judge was once more granted great freedom. The possibility for parties to let the procedure linger for some time, as it existed in Austria, was absent in the *Gratama Draft*.

The fact that case management was entrusted to the judge is very evident from the rules concerning the oral hearing. The *Gratama* bill differentiates itself from the system in which the parties are heard in a fixed order. The entire regulation of the oral hearing is orientated towards an informal discussion, in which the presiding judge determines the order in which the parties are given the opportunity to expound their case. There is thus the possibility that the defendant or his counsel is heard first, something that was contrary to the existing practice where the plaintiff came first. In addition both the judges and counsel from both sides were given the opportunity to question the parties. The parties themselves were also allowed to present their opponent party with questions. Once again it was the presiding judge who determined the order in which the parties were questioned. The court could even *ex officio* decide that a certain question would not be permitted.

Similar to the Austrian *ZPO*, the *Gratama* bill was aimed at the discovery of the substantive truth. This is, inter alia, apparent from the active role the judge fulfils with regard to the hearing of witnesses. The judge could even decide *ex officio* that the hearing of (further) witnesses was required. For this purpose he was free to select witnesses himself. Only if both parties opposed to the hearing of a specific witness by the judge *ex officio*, this witness could not be heard.

*(c) A written preparatory phase and an oral main phase*

As stated above, according to the Austrian Code an action was subdivided into a written preparatory phase and a largely oral main phase, in which the case was preferably prepared for adjudication in one session. The *Gratama* bill also subdivided the procedure into a written preparatory phase and an ensuing oral hearing. The emphasis was to be laid on the oral hearing. This main stage could only be omitted if the parties requested the judge in charge of the written preparatory phase to decide the case on the basis of the documents that had been submitted.

The general rule, nevertheless, was that after the initial phase an oral main phase would take place before a panel of judges. Parties had the duty to appear before this panel in person, save exemption in exceptional cases. Before the panel the parties and their counsel had the opportunity to elucidate their case. This entire oral phase was to be aimed at the search for the substantive truth.

#### **4. The final stage of twentieth century developments: The English Civil Procedure Rules (1999)**

We have now come to the end of the history of the civil procedural law of the twentieth century and the role of case-management. At the end of the aforementioned century Paul Michalik alleged that 'It is well recognized that the existing system of civil procedure in England and Wales is beset by excessive costs, delay, and complexity'.<sup>40</sup> The main objective of Lord Woolf, *Master of the Rolls* at the time and drafter of the English Civil Procedure Rules, was to change this situation. To this end he did far-reaching proposals in his two reports *Access to Justice*. To a great extent the proposals mentioned in these reports were implemented by the new Civil Procedure Rules that became effective in 1999. The international importance of these rules does not lie in the fact that they had significant influence on the development of procedural law in other European countries, at least not until now. In view of the short time span between the implementation of the English Rules and the end of the twentieth century this would be inconceivable. However, that in the period to come the English Rules will be influential on the European Continent may be anticipated by, for example, the attention for them in The Netherlands. Particularly the three procedural tracks that the new English Rules distinguish could be of interest outside England, as well as the pre-action protocols. Before addressing these tracks and protocols, however, some observations must be made as regards the importance of English procedural law for the development of law in the twentieth century. In my opinion, this importance lies primarily in the fact that the new Rules reduced the adversarial character of English civil actions, increasing the judge's case-management powers considerably, and that, consequently, English legal procedure was brought closer to the Continental procedural models. After all, in the past the contrast between English civil procedural law and that of the Continent was mainly to be found in the fact that the English judge was more passive in the conduct of a civil case than his continental colleagues. In England there was no question of far-reaching case management powers of the judge, as is the case in Austria and Germany, but rather a judge who oversaw the case as an umpire. This situation was changed only in 1999 by the new Rules. Before that time, litigation in England was slow and this was mainly due to a lack of discipline during the legal proceedings.

In theory English civil actions were to go smoothly. An important means to achieve this situation were (and still are) the so-called 'directions'. These directions contain instructions from the judge on the course of the legal proceedings in the pre-trial phase, the preparatory phase in which the case is prepared for oral hearing in the main phase (trial). The directions are given after the parties have presented their pleadings. They contain, inter alia, deadlines for the exchange of lists that state which documents the parties possess that could be of importance to the trial ('discovery', currently referred to as 'disclosure'), the inspection of documents, the exchange of expert evidence, written testimonies of witnesses, etc. Although at first glance this

---

<sup>40</sup> P. Michalik, 'Justice in Crisis: England and Wales', in: A.A.S. Zuckerman (ed.), *Civil Justice in Crisis. Comparative Perspectives of Civil Procedure*, Oxford 1999, p. 117-165.

system prescribes an exact schedule that prevents delays, the reality was different. Firstly, the sanctions that could be imposed if the directions were not complied with were not effective. The sanction usually existed merely of the order to indemnify the costs that had been caused without reason. Furthermore there was the judge's tolerant attitude regarding exemptions from the failure to comply with the civil procedure rules. According to P. Michalik this tolerant attitude was a reaction to the strict discipline in civil litigation that was observed before the implementation of the *Judicature Acts* 1873-1875 (these Acts brought along fundamental reform of English procedural law). Michalik states: 'A new spirit of liberality was inaugurated, which has since become firmly established at the heart of English civil procedure'. This was expressed in two cases from the late 19<sup>th</sup> century quoted by Michalik. In the first case Brett MR stated:

'However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated in costs'.<sup>41</sup>

In the second case Bowen LJ agreed with this and added:

'[T]he object of the courts is to decide the rights of parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights [...]. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy [...]. It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice'.<sup>42</sup>

The only exception to the rule that failing to observe the relevant civil procedure rules could be excused, was the circumstance that the error could not be atoned for by compensating the costs. However, the traditional approach of the English courts was that compensation of the costs was sufficient in almost all cases.

According to Lord Woolf the 'adversarial culture' was the root of many of the problems in English procedural law, particularly in the pre-trial phase. Consequently Lord Woolf dedicated himself to the introduction of 'case management'. According to his case management method the judges are responsible for the course of the procedure in every phase of the legal proceedings. The judges and the supporting judicial staff ensure that a balance exists between, on the one hand the significance and complexity of the case, and on the other hand the procedural techniques applied and the costs made. A standardized regulation of three 'tracks' has been adopted. These tracks are used depending on the significance and complexity of a case. Small cases can be dealt with in the informal *small-claims track*, whereas the *multi-track* can be used for complicated cases. For the remaining cases there is the *fast-track* procedure. Furthermore only limited legal costs can be recovered from the losing party, and eventually the procedural rules were unified and simplified for the County Courts and the High Court.

Lord Woolf's report encourages parties to embrace a new attitude in which cooperation is emphasized. Lord Woolf would like to see cases settled amicably, at an early stage in the procedure, more regularly. For certain cases the learned Lord

---

<sup>41</sup> *Clarapede & Co. v. Commercial Union Association* (1883) 32 WR 262, 263.

<sup>42</sup> *Cropper v. Smith* (1884) 26 Ch. D. 700, 710 11.

introduced *pre-action protocols*. These protocols explain how the parties and their counsel should behave before a case is commenced, and indicate how long the procedural steps they need to take should last. According to Lord Woolf public funds ought to be invested in ADR-techniques simultaneously, thereby relieving the courts.

In addition the Bowman Committee dealt with litigation on appeal. As a result of the proposals of this committee, the system of leave for appeal, which was already known at the House of Lords, has been extended to the Court of Appeal.

## **5. Conclusion**

In this contribution I have tried to demonstrate that for the civil procedural law in Europe the twentieth century, especially from the perspective of case-management, lasted 101 years, from 1898 to 1999. From the issues discussed one could conclude that there has been a development in the sense that civil procedural law was originally dominated by the liberal nineteenth century procedural model with its comprehensive party autonomy, and that it became eventually judge-centered (with the 1898 Austrian Code of Civil Procedure as the first example of the new approach). It appears that Austria paved the way, whereas England, in contrast, was one of the last countries to depart from the purely adversarial approach. It was not until 1999 that English civil procedure reduced the far-reaching powers of the parties in the conduct of civil litigation, increasing, at the same time, the judge's case-management powers. The given picture is, however, so simple that it is almost too good to be true. Moreover it is not true, certainly not if one follows the developments in Eastern Europe closely. In my opinion one cannot speak of a rising line with respect to the judge's case management powers, but rather of a cyclic movement whereby the emphasis lies temporarily on party autonomy, and then once again on the judge's case management powers. An Eastern European country, Croatia, may serve as an example. Given that Croatia formed part of the Austrian-Hungarian Double Monarchy, the procedural law in this country was already influenced by Franz Klein's procedural model, with its active judge, at an early stage. In Croatia, however, the judge's active attitude became suspect during the Socialist period, when Croatia formed part of the Yugoslav Federation. As a reaction to the procedural law from this period, that was dominated by the *Untersuchungsmaxime*, at present one can discern a striving for the strengthening of party autonomy. In other former Socialist countries it seems that similar developments are occurring. It remains to be seen if, and in what way, these developments will influence the civil procedural law in an expanding European Union.