

# Part 1: The Role of Civil Procedure in Modern Societies\*

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## I. Civil Justice in the US and in Continental Legal Culture

### 1. Civil Justice in the US

In the US, civil justice has in many respects the character of a public drama. But this is only true for a small part of all cases – less than 8% – that are determined by way of contested judgment after trial or hearing. Most disputes are settled before a trial or final hearing takes place, be it after negotiations between the lawyers of the parties or be it as a consequence of mediation by a third neutral. The day in court with a trial or final hearing has become more and more an exclusive and elitist event,<sup>1)</sup> because the preparation of a trial or final hearing is very cost – intensive and a prognosis on the outcome of a civil case is difficult in a legal culture, which is based to a remarkable part on case law. In many cases there is a constitutional right to jury proceedings. They are, however, much more risky than disputes before an alone sitting professional judge, and, consequently, less than 1% of all civil cases come to trial before the jury. But it is still this jury procedure that attracts the attention of the public, and this is not without reason. In cases of social or political significance plaintiffs try to take advantages from the dominant role of laymen who may be more open for progressive decisions and high compensations for the victims of a wrongdoer. Jury proceedings are, therefore, the field of claims for punitive damages based on tort or negligence and wanted and reckless disregard of the opponent's rights and interests. Prominent examples are mass torts like the asbestos cases, fraud on investors in financial markets, criminal acts against human rights etc. Most of these disputes are class actions where a lead plaintiff represents all the other group members, the final decision or consent judgment upon settlement becomes effective against and for all group members who did not opt out after public notice. Especially class actions are the ideal scenery for litigating attorneys who dominate the procedure by presenting their case through giving evidence by witnesses and

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1) See P. Murray ZZPInt 12 (2007), 283 ss.; id. ZZP 14 (2009), 241 ss.; A. Miller N.Y. Law Rev. 88 (2013), 286 ss.; Langbein Yale L.J. 122 (2012), 522 ss.

experts. In some respects US-American civil procedure is an expression of a presentation culture where the modest and hesitating participant will be the loser. In principle, judges give their judgments in open court and orally, in panels dissenting or concurring votes are permitted and have a longstanding tradition. The day in court is a social event.

## **2. The Continent and Especially Germany**

Continental and especially German court proceedings<sup>2)</sup> are not a public drama and prominent continental lawyers are not the protagonists of a publicly played justice game. The atmosphere, e.g., in German hearings is more the atmosphere of a meeting of business people and a down-to-earth and rational round table discussion. As a consequence, the social and political function and effectiveness of German Civil Justice should not be analysed on the basis of its perception by the public and mass media. It is true that during the last decades important court decisions have more and more called the attention of newspapers and other mass media. But, nevertheless, German and continental legal and political culture does not personify decisions by attributing them to judges or lawyers as is the case in the U.S., sometimes taking forms of exaggerated admiration or even personal adoration. Most judgments, which determine issues of public and social significance, were written under the influence of a long scholarly or even public discussion. Judicial decisions are rendered by judicial panels as a whole, the minority is not permitted to publish its dissenting opinion, and the deliberations and votes are conducted in secrecy and have to be kept secret. Only Constitutional Court judges may publish their dissenting opinion, but in practice this is done relatively rarely. Though some Anglo-American observers like to characterize this form of decision-making as “bureaucratic”, it has the advantage of a well-balanced legal reasoning, which is not influenced by attempts of individual judges to make a mark for themselves in politics. This does, however, not mean that such judgments do not strongly influence the continental or German social and political development. When some academics analyze a strong influence of attorneys on the development of the U.S.-American society, it would be, in contrast, not incorrect to characterize the German society as judge-dominated, though the influence of German courts is of a more silent and sometimes creeping nature.

## **II. Some Selected Examples of Strong Legal and Social Influence of Civil Justice in Germany**

### **1. Labor Law**

In most continental legal cultures labor courts are part of a specialized jurisdiction. But, nevertheless, labor court procedures are considered a form of civil justice with some

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<sup>2)</sup> See already Stürner, *The New Role of Supreme Courts in a Political and Institutional Context from a German Point of View*, *Annuario di Diritto Comparato e di Studi Legislativi* 2011, 335 ss.

special features. After the Second World War and with the beginning of the economic reconstruction of Germany, it was necessary to develop rules of law governing collective bargaining and conflicts between management and workers' representatives, especially in case of strikes and industrial actions. The government and the legislature did not feel strong enough to draft and enact a Labor Law Code. On the one hand politicians were afraid of deep conflicts with the powerful new free trade unions, and on the other hand they did not want to hinder the more and more successful free market economy by limiting the flexibility of entrepreneurs. As a consequence, only a part of labour law was regulated by statutory law, many decisive issues, e.g. of the law of strikes, were determined by the labor courts and especially the Federal Labor Supreme Court, which developed a well-working system of collective labor law. The success of German economy is, in part, a result of the Federal Labor Supreme Court's skill and common sense, when this court had to balance the conflicting interests of employees, trade unions and employer associations. The participation of experienced lay judges at the level of a court of last instance has been a big advantage and stands for the extremely political character of this court's decision-making, which replaced the legislature in a field of law of fundamental significance for Germany's economic and social welfare. The Federal Labor Supreme Court's case law has been the basis of a working-together of employers and trade unions, which has been a special feature of the German social and economic structure and one reason for the strength of Germany's economy.<sup>3)</sup> Some years ago, a new generation of judges changed important rules of the judge – made case law on strikes, giving more leeway for smaller trade unions in big and important enterprises. The consequences of these not well-considered changes are strikes of small groups, which can put disproportionate pressure on enterprises like the German Railway Company or Lufthansa. It is now up to the legislature to establish again the old judge-made rules by statutory law.

## 2. Civil Law and Civil Codes

All continental legal cultures enacted codifications of their civil laws during the 19<sup>th</sup> century. One could imagine that real need and remarkable room for judicial case law of social significance do not exist to a meaningful degree in fields of law, where codification has a long standing tradition, as is the case in the area of the continental civil codes and accordingly the German Civil Code. This first glance, however, gives a more or less wrong impression, though it sometimes seems to be the perception of foreign observers, especially from case law countries. The German Federal Supreme Court rendered many landmark decisions, which changed the existing law dramatically. Under the explicit rules of the German Civil Code damages for pain and suffering or punitive damages were not permitted

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3) For an overview on German collective labor law see especially Brox/Rüthers, *Arbeitskampfrecht*, 2<sup>nd</sup> ed. 1982; Seiter, *Individuelle und kollektive Koalitionsfreiheit*, 1981; ders., *Streikrecht und Aussperungsrecht*, 1975.

even in cases of defamation or of infringement of the right of privacy by mass media. The German Federal Supreme Court granted damages for pain and suffering in an early first step, and decades later a modest form of punitive damages in cases of continuous and stubborn infringement of the right of privacy or in cases of false light privacy.<sup>4)</sup> It was not the legislature, it was the Federal Supreme Court which abandoned the Civil Code's strict limitation of damages to concretely realized economic loss and permitted more generously damages for loss of the pure possibility to use assets like cars, apartments or houses, or for loss of holidays as a consequence of tort or breach of contract in special cases.<sup>5)</sup> In cases of infringement of a patent or copyright or in cases of unfair competition the Federal Supreme Court developed a special form of calculation of damages based on the wrongdoer's profits.<sup>6)</sup> Detailed rules of professional liability including special rules on the burden of proof in cases of medical malpractice,<sup>7)</sup> attorney's liability,<sup>8)</sup> the liability of issuers or sellers of securities<sup>9)</sup> have been and still are the result of the Federal Supreme Court's case law, legislative activities are mostly not an innovative step but a conversion of case law into statutory law only.<sup>10)</sup> The German modern law of security interests in tangibles and receivables<sup>11)</sup> has been the invention of the Federal Supreme Court and its predecessor, the German Reichsgericht. The idea to permit securities interests in all tangibles and rights without preventing their owner from further use and even transfer was so brilliant that it was also the solution of the UCC, where the third party effect of security interests needs, in contrast to German law, a form of custody or registration after the financing statement.<sup>12)</sup> The protection of consumers from unfair terms in adhesion contracts has been the result of the Federal Supreme Court's case law,<sup>13)</sup> the German and later the European legislature's statutory law has been again more an affirmation of the Federal Supreme Court's case law than a legislative innovation.

Until now, German law does permit class or group actions only in special cases and the same is true for other collective actions by consumer or trade associations.<sup>14)</sup> At

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4) See for this development 35 BGHZ 363, 367 (1961); 128 BGHZ 1, 14 (1994); for further details and references Stürner, *Persönlichkeitsschutz und Geldersatz*, 29 Archiv für Presserecht 1 (1998).

5) Federal Supreme Court 61 NJW 915 (2008); 98 BGHZ 212 (1986); 60 JZ 731 (2005).

6) Federal Supreme Court 60 BGHZ 206 (1973).

7) See, e.g., Federal Supreme Court 41 NJW 2948 (1988); 61 NJW 1304 (2008).

8) Federal Supreme Court 126 BGHZ 217, 221 (1994).

9) See Federal Supreme Court 71 BGHZ 284 (1978); 15 NJW-RR 1497 (2000).

10) For securities liability based on more recently enacted statutory law see Federal Supreme Court 160 BGHZ 134 (2004).

11) See the survey in: Baur/Stürner, *Sachenrecht*, 18<sup>th</sup> ed. 2009, §§ 56-59, p. 773 ss. with references.

12) See for the security interests of the UCC Sigman, *Perfection and Priority of Security Rights*, in: Eidenmüller/Kieninger, *The Future of Secured Credit in Europe*, 2008, p. 143 ss.; for their similarity with German security interests see P.L. Murray 11 Boston College Industrial and Commercial Law Review 355 (1970); Baur/Stürner, *Sachenrecht*, § 64 mn. 112, p. 953.

13) See especially Federal Supreme Court 22 BGHZ 90, 94 (1956) with references to some first attempts of the German Imperial Court; 41 BGHZ 151, 154 ss. (1964).

14) See, e.g., German Law on Test Procedures in Securities Litigation (Kapitalanleger-Musterverfahrens-

present, some group actions and test proceedings of investors against bond issuing corporations or banks attracted public attention. In other European countries, the legislatures were much more active in installing group or class actions on a broad and general basis,<sup>15)</sup> though class actions in the US were not so efficient and successful as expected, many cases of fraud on capital markets are until now sanctioned in administrative or even criminal proceedings and not in class action procedures. But the German reluctance to use civil procedure for the regulation of mass torts and to install more group actions does not mean that private actions do not strongly influence the development of law and social life. Often it is a public or private insurance, which is the powerful opponent of the wrongdoer in a civil action after legal assignment of the individual citizen's claim. In Germany, the consequences of the financial crisis are mostly regulated by court decisions or in-court-settlements. Until now, the traditional form of individual procedures prevails, and it happens often that the results of a first final decision are the basis of settlements between other reasonable parties and lawyers. Many disputed issues of liability in this field of law are already or will be determined by the Federal Supreme Court.

### III. The Future of Civil Justice

The future of civil procedure is unsure.<sup>16)</sup> In the US and many European legal cultures civil justice is more and more replaced by various kinds of mediation processes, which are often the mandatory first stage of civil disputes. Acting in bad faith in the eyes of the later deciding court may result in cost shifting measures. What are the reasons of this development? Many legal cultures were not able to develop a well working modern civil procedure, which is not too expensive for the average citizen. They tolerated a development towards law as a business and were not ready to invest in public justice. Law as a business and doubtful forms of mass litigation were the origin of a deformation of civil procedure. Modern civil procedure needs an active managerial judge and the transparent dialogue between judge and parties, which enables the court to propose well considered rights based settlements. In Germany, about 30% of all cases are settled upon the court's proposal, and about 35% of all cases end by contested judgment. The rest ends with out-of-court-settlements or without a result. Mediation processes have in common that the mediator initiates a process where the parties come to their own solution, thus serving the interest of both parties. The mediator is mostly permitted to negotiate the dispute with one party in the absence of the opponent and the reverse, and this under the precondition to keep confidential information secret (Caucussing). The result may often be a status of

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↘ gesetz) § 8; for collective actions by associations see, e.g., German Law Against Unfair Competition §§ 8, 15(3), and German Law on Actions for Inhibitory Injunctions § 3 ss.

15) For a survey Stürmer ZZPInt 17 (2012), 259 ss.

16) See Stürmer ZZP 127 (2014), 271 ss., 316 ss.

asymmetry of information that excludes in most cases a really honest agreement meeting the requirements of party autonomy and informed consent for the furtherance of mutual understanding and balancing of interests. The right to be heard is a very old and perhaps the oldest procedural principle, it guarantees equality of information, and therefore it is also an indispensable requirement of contractual justice. Mediation agreements without full knowledge of contested and uncontested facts, means of evidence and risks, favour the stronger and cleverer part. Their growth to the most usual form of dispute resolution may motivate citizens to risk the breach of law to come to a more favourable compromise, which is a form of a reward for illegal behaviour and acting in bad faith. A society, which understands the legal order as an order for the daily life, will prefer dispute resolution by civil procedure and rights based settlements. Societies, which understand the legal order as a matter of last resort, may keep distance to legal rules and favour flexible forms of mediation. This could be the future society of the great guys and clever business people. But this it not the way mankind should go.