Proposed Reform of Civil Procedure.

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[1] On September 6, 2000, the German Federal Government´s Cabinet decided on a draft proposal of a Law which, if passed by parliament, will radically change the principles and the rules governing access to Germany\'s civil courts, the substance of civil proceedings and appellate review of civil matters. This radical change must be seen as part of a larger movement towards more efficiency and civility (\"Buergernaehe\") within various institutions of German public governance. Reform of German\'s public institutions and infrastructure has been influenced by the rise in privatization, global market pressure and the integration and conformity resulting from an \"ever closer (European) union.\" The German judiciary has not escaped these forces. In addition to these contemporary pressures, the reform of the present system of civil procedure in Germany draws from a long series of piecemeal legislative changes which, taken together, reflect a recurring desire in different German governments to provide for a judicial system that is accessible, transparent, comprehensive, and at the same time less time consuming.

[2] The reform of the Code of Civil Procedure (Zivilprozessordnung - ZPO, originally dating from 1877) is one of the grand goals set out by the government coalition of the Social Democratic Party (SPD) and the Green Party (Bündnis90/DIE GRÜNEN) that took power after the 1998 election. The government has plans for far reaching reform of the entire judicial system (see, the literature indicated supra). The government presented its proposal for reform of civil procedure in December 1999, which, after considerable modification following intensive debates from every political sector, legal practicioners and academics, was then presented to the German parliament on July 7, 2000. The proposed statute explained the legislative initiative for reform in this way:

[3] The system of civil procedure needs to become closer to the people, more efficient and more transparent. The rules governing civil procedure hardly meet these criteria. Instead, the layman seeking judicial redress as well as the representative of the corporate world is confronted with a set of rules, an appellate system and an overall judicial architecture that is highly unsatisfactory to their needs. Considering that the societal function of the judiciary is to bring about the fastest possible conclusion of justice and peace between the parties, judges need to be given a procedural infrastructure that allows them to engage in exactly that project. Reform of civil procedure must be guided by the zeal of ultimately improving the framework and conditions that will allow the parties to reach an agreement at an early stage of a legal dispute while still providing the parties with a decision that is comprehensive, acceptable and does not automatically prompt appellate review. Legal peace can thus be had when parties in a legal cause of action are brought to understand the legal reasoning involved in reaching a decision. The reform therefore focuses primarily on enforcing a strong role for the judge in mediating the claimant\'s search for resolution and for determining and articulating the law.

[4] Among the most important goals of the proposed reform sketched in the following commentary are: (a) the enforcement of the court of first instance; (b) acceleration of appellate review; and (c) the unity of law within judicial review. The reformers have especially emphasized that the leglislative initiative seeks to reduce the length of time that cases consume when traveling through courts and the accompanying drain on the system\'s resources.

A. Enforcement of the Court of First Instance

[5] The German judicial system consists of three instances. In the first instance an action is brought before the court where the facts are established and, in the event that the parties cannot reach a settlement, the court announces a judgment on the merits of the suit. In the case that one party choses to challenge the court\'s decision, the court of the second instance can again review the facts of the case (but only insofar as they are in dispute) but the second instance mainly serves as a forum for the resolution of legal claims. In the third instance, if the case is again challenged, the court will revise the findings of the court in the second instance and hand down a final judgment. The decision of the issues by the court in the third instance is only subject to constitutional challenge.

[6] This system encourages a high number of judgments and depends more on the court for resolution rather than peaceful settlements between the parties. The critique directed against the procedure in first instance is that it does not encourage settlement and instead emphasizes judgments by the court that are often challenged. In order to encourage more settlements in the first instance, and when no settlement is reached, fewer appeals of the court\'s judgment, the procedure will be altered to require the judge to fully involve the parties in establishing the facts and developing their positions. The judge, pursuant to § 139 of the current Code of Civil Procedure (ZPO), is asked to point the parties to obvious omissions in order to prevent a so-called surprise judgment. The new §139 will thus provide for a more active role of the judge in driving the parties to exploit all possible avenues to reach settlement. This is accompanied by the implementation of a \"Güteverhandlung\" (Proposal-Statute § 278). This provision requires the court to initiate a session in which the parties are encouraged to reach a peaceful agreement. The court is permitted to refrain from such action only if an earlier attempt to reach an agreement has failed or if the prospects

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for an agreement are obviously non-existent.

[7] In the first instance, the value of the matter in dispute determines whether the case first proceeds in the Amtsgericht (lower regional court) or the Landgericht (higher regional court). If the value equals or is higher than DM 10,000 the Landgericht presides over the case where a panel of three judges will decides the matter. Generally the cases are handled by only one of the three judges except when the panel of three judges is needed to address cases of particular factual or legal difficulty or that are of an eminent importance. The statute proposal strenghtens the role single judges in the first instance. Following the reform proposal the the three-judge panel only hears cases that concern a subject matter for which the panel\'s jurisdiction has been established by the court\'s presidency or if the single judge is in his or her first months of serving the judiciary as a judge. The previously existing rules governing the transfer of a case to the three-judge panel still apply. This reform changes the central structural characteristic of the Landgericht, namely that it functions as a panel of three judges. Under the reform the Landgericht continues as a *de jure* three-judge panel but *de facto* operates under the primary jurisdiction of a single judge.

[8] Cases brought before the Amtsgericht (lower regional court) have no right to appeal when the value in dispute does not exceed DM 1,500. Only a constitutional challenge of the lower regional court\'s decision remains, especially a constitutional challenge alleging a violaiton of the right to due process of law (Art. 103 of the German Basic Law). These constitutional challenges constitute a significant portion of the docket of the German Federal Constitutional Court and the proposed legislation seeks to relieve this appellate burden by requiring parties to bring their constitutional complaint from a low-value Amtsgericht decision to the Federal Constitutional Court within a two-week period after receipt of the Amtsgericht\'s judgment.

B. Appeal (*Landgericht, Oberlandesgericht*)

[9] The reform\'s emphasis on single-judge proceedings is carried over to the review of decisions on appeal. This is supposed to accelerate the process that leads to a final judgment in a case. Under the proposed reform, a case will, regardless of its value, automatically go a single judge on appeal. The present system relies on a single judge for the preparation of the case so long as no extraordinary conditions apply. As noted before, appeals will also be limited to addressing legal questions as opposed to the present procedure that allows reconsideration of facts. This limitation of the scope of review on appeal empahsizes the appeal judge\'s role in carrying out nothing more than a review of the conclusive decision reached by the court in the first instance. The value of the case at issue necessary to be eligible for appeal is lowered by the proposal, from DM 1,500 to DM 1,200. This reduction supports the justification for the porposed reform which seeks not to make appeals impossible but rather unnecessary.

C. Unity of Law and Judicial Review

[10] Pursuant to the proposed reform, appeals will be further limited by restrictions on review of cases by the Federal Court of Justice (the third instance). Judicial review carried out by the Federal Court of Justice (Bundesgerichtshof) will be available only to those causes of action where the eminent importance of the case justifies the review or when the development of judicial doctrine (Rechtsfortbildung) will be enhanced. This constitutes a radical shift away from the former two-track review system that allowed review with regard to the importance of the case or the value of the matter in dispute (DM 60,000).

Figure 1: Ontological Standpoints and Significance of Charter

Assumed Shape of Constitution

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		symbol	**substance**
Conceptions of History	**efficient history**	**(II)** history-dependent	**(III)** strategic institutionalism *(top-down)*
	ineffecient history	**(I)** strategic intervention *(top-down)*	**(IV)** strategic interaction *(mutually constitutive)*

For more information: Draft Proposal of a Law altering the German Codeof Civil Procedure: Bundestagsdrucksachen 14/3750: http://dip.bundestag.de/parfors/parfors.htm\">http://dip.bundestag.de/parfors/parfors.htm

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