Recent Developments in West German Civil Procedure

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Recent Developments in West German Civil Procedure

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I. INTRODUCTION

The most comprehensive description of the West German civil litigation system to appear in United States law journals, a much-admired, practice-oriented work by two United States law professors and a Hamburg judge, was published twenty-five years ago.1 At that moment, a commission of experts, appointed in 1955 by the Federal Ministry of Justice and called the Commission to Prepare a Reform of Civil Justice, was already deep into a thorough reexamination of the entire West German system. The stimuli for this reexamination were the eternal devils of judicial procedure everywhere: technicality, inaccessibility, and above all, delay and cost. In 1961, the Preparatory Commission made extensive recommendations for change in its final report. In 1964, the Ministry appointed the Kommission für Zivilprozessrecht (Commission for Civil Procedure Law), which was charged with translating these recommendations into specific legislative proposals.2 The

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2. See Bericht der Kommission Für Das Zivilprozessrecht (Bonn 1977) [hereinafter cited as Bericht der Kommission 1977]. Commissions were also formed at the same time on Court Structure and Legal Officers and on Non-Contentious Procedures. The first of these submitted its final report in 1975. Id. at 3.
proposals came in several stages, and by the time the Commission for Civil Procedure filed its final report in 1977, the legislature had passed most of the Commission's recommendations. With the passage in 1980 of statutes revising and considerably expanding legal assistance to the poor, the legislative phase of this reexamination appears to have reached a conclusion, and lawyers and judges have some reason to hope for time to digest the new rules.

The reforms actually adopted, of course, do not satisfy the most ambitious reformers, and in several respects even the cautious proposals of the Commissions were further compromised in passage. Whether the reforms represent fundamental change in the system so deftly portrayed by Kaplan, von Mehren and Schaefer may therefore be doubted. Moreover, those changes which affect fundamental relationships within the system—between lawyers, parties, and judges, between single judge and panel, between written and oral elements of the process, between thorough examination of the evidence and acceleration of trial schedule—are phrased in terms of options which may not be fully utilized or of evaluations which may be colored by traditional reluctance to decide cases on technicalities. In short, practice may further weaken reforms which are already somewhat conservative on paper. Indeed, a major theme of the history of German civil procedure, which is echoed by experience in the United States, has been the inability of legislatures to control the habits of judges by the reformation of formal rules. This theme nourishes much skepticism about the efficacy of the current reform movement.

Nevertheless, an updating in the form of a report on the reform movement is in order for a number of reasons. First, virtually every phase of the civil litigation system was subjected to critical review both in the Commissions and in the literature, and the extent to which fundamental features of the system have been called into question is of general interest. Second, most phases of the civil lawsuit have undergone amendment at least in detail, so that in many respects the twenty year old picture is no longer accurate. Third and most importantly from the comparatist's point of view, the impetus for the reform movement was largely a condition shared by the United States and in various degrees by most industrialized societies: the so-called "law explosion," which threatens to drown the courts in a sea of litigation.

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4. See Kaplan, von Mehren & Schaefer, supra note 1.
An examination of how the German system has approached this common problem and with what success is useful in evaluating reform proposals in the United States.

This Article will attempt such an updating. Beginning with a brief sketch of the history of the present Code of Civil Procedure (Zivilprozessordnung or ZPO), the heart of the Article will be an analysis of the reforms of the 1970's in light of perceived needs. Finally, some points of contrast with United States civil procedure will be highlighted.

II. THE 1877 ZIVILPROZESSORDNUNG AND ITS REFORM

For the proceduralist familiar with the United States process of reform (the Field Code of 1848), reform of the reform (Federal Rules of Civil Procedure of 1938), and still further calls for adaptation to new social and institutional circumstances, it can come as no surprise that the German ZPO of 1877—itsel itself a significant reform as well as a national uniformization—has been subject to demands for change from its inception.

The ZPO's principal predecessor, the so-called common-law procedure, was characterized by almost exclusively written, secret, and often interminable proceedings. Reaction against this system led the nineteenth century reformers to adopt orality and immediacy in communications between the parties and the court, and party autonomy in driving the lawsuit toward conclusion, as the most important guiding principles of the new code. Orality meant that the normal and preferred (though not the only) means of party communication with the court was an oral statement in open court. Immediacy meant that the judge or judges making the final decision should also hear all the evidence and argument. Party autonomy meant that every step of the

5. Zivilprozessordnung (Ordinance of Civil Procedure) of January 30, 1877, Reichsgesetzblatt (RGBI) 83 (W. Ger.).
7. For the point that even the reformers of 1877 had no thought of excluding written pleading altogether, see Bettermann, Hundert Jahre Zivilprozessordnung—Das Schicksal einer liberalen Kódifikation, 91 ZEITSCHRIFT FÜR ZIVILPROZESS [ZZP] 365, 374 (1978).
8. See Kaplan, supra note 1, at 416-18.
9. On these interrelated concepts generally, see Bettermann, supra note 7, at 369; M. Cappelletti, PROCEDURE ORALE ET PROCEDURE ECRITE (1970); Homburger, Functions of Orality in Austrian and American Civil Procedure, 20 Buffalo L. Rev. 9 (1970).
lawsuit was essentially subject to the control of the parties. The court could consider only those factual propositions asserted by one or more of the parties, could base its decision only on evidence presented to it by the parties, and had to yield even its hearing schedule to party agreement. Moreover, the parties were responsible for service on each other of all important procedural documents, including judgments.10

Added to these expressions of nineteenth century liberalism was the more traditional principle of collegiality, which generally required that cases be heard by a panel of three judges in the Landgerichte (courts of general original jurisdiction). Finally, as a logical though not inevitable corollary of the principle of orality, the ZPO adopted the concept of the continuous hearing (Einheit der mündlichen Verhandlung), one consequence of which was that new material could be introduced at any time up to the close of the hearing at which judgment is rendered.11 Among the practical results hoped for in this general shift to openness and party control was greater efficiency in the handling of lawsuits.

Within a few decades of the ZPO's adoption, it came to be viewed by many lawyers as especially hospitable to delay because there was little or no incentive for the parties to prepare thoroughly for any one hearing or to make pleadings complete. The pleadings could always be supplemented orally, hearings could always be postponed, factual issues could be retried on appeal, and so on.12 This picture of courts as helpless to move cases along, however inaccurate it may have been for any given court or class of cases, has dominated the thinking of reform-

10. See Bettermann, supra note 7, at 385ff; J. DAMRAU, DIE ENTWICKLUNG EINZELNER PROZESSMAXIMEN SEIT DER REICHSZIVILPROZESSORDNUNG VON 1877 § 10 (1975).

11. Zivilprozessordnung [ZPO] § 251 (1877), § 278 (1898); Kaplan, supra note 1, at 418; Bettermann, supra note 7, at 381.

What then is the grand discriminant, the watershed feature, so to speak, which shows the English and American systems to be consanguine, and sets them apart from the German, the Italian, and others in the civil-law family? I think it is the single-episode trial as contrasted with continuous or staggered proof-taking. This characteristic must greatly affect the anterior proceedings that culminate in trial. It enhances the combative nature of the process. It determines in considerable part the attitudes and characters of lawyers and judges.


The other aspect of the concept of continuous hearing was that material presented at one stage of the lawsuit need not be repeated in order to be considered at a later stage.

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ers ever since.\textsuperscript{13} Major reforms were adopted in 1909 and 1924, and lesser ones in 1933 and 1943, all designed principally to tighten judicial control over the course of the lawsuit and to promote efficiency.\textsuperscript{14} The 1909 reform established the principle of court control over fixing dates and service of important procedural documents in the Amtsgerichte (local courts handling smaller cases).\textsuperscript{15} In 1924 the power of the parties in proceedings before the Landgerichte to extend deadlines, cancel hearing dates, and suspend the proceedings was eliminated.\textsuperscript{16} In addition, the institution of the single judge as preparer of the final hearing was introduced along with various devices for precluding delayed introduction of new issues or materials.\textsuperscript{17} The 1933 reform imposed a general duty of truthfulness and completeness on the parties,\textsuperscript{18} and the rules of evidence were substantially liberalized in favor of free judicial evaluation of the evidence.\textsuperscript{19} In 1943, the principle of court control in the Landgerichte was finally extended to include service of most important judicial documents.\textsuperscript{20}

At the beginning of the present reform period, then, the German system could be called "trial by colloquy."\textsuperscript{21} It was characterized by judicial control over the course of the lawsuit, by the absence of division of the lawsuit into discrete stages, by informality of pleadings, and by "episodic"\textsuperscript{22} proof-taking. The proof-taking was often spread over several hearings, during which the judge took the leading role in questioning witnesses, and at which restrictive evidentiary rules were at an absolute minimum. While the 1924 reforms provided the courts with various means to accelerate the processing of cases, they remained largely unexploited, and the length and expense of the typical lawsuit again provided the main stimulus for further reform. In general, the

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\item A leading scholar noted in 1921 that Germany had vacillated back and forth almost cyclically between continuous hearings on the one hand and strictly demarcated, preclusion enforced stages on the other, each shift justified by the need to speed up litigation. \textsc{F. Stein}, \textit{Grundriss des Zivilprozessrechts} 46 (1921).
\item The leading foreign model for these reforms was the Austrian Code of Civil Procedure of 1895, drafted by Franz Klein, whose many writings were quite as much a part of the German as of the Austrian literature. On the Austrian system, see Homburger, \textit{supra} note 9, at 19.
\item Amtsgerichtsnovelle, 1909 Reichsgesetzblatt [RGBI] 475 (W. Ger.).
\item Emmingernovelle, 1924 RGBI I 135 (W. Ger.) (named after the justice minister who drafted it).
\item Id.
\item ZPO § 138 (1933).
\item 1933 RGBI I 821 (W. Ger.).
\item 1943 RGBI I 7 (W. Ger.) (Fourth Simplification Ordinance).
\item Homburger, \textit{supra} note 9, at 24.
\item Kaplan, \textit{supra} note 1, at 420.
\end{enumerate}
trend of the changes which have been adopted piecemeal since the Commission for Civil Procedure Law began its work has been both to strengthen the role of the judge and to inject greater formality into the system.

After World War II, the first development to be put into practice came from neither the Commissions nor the legislature, but from one civil chamber of the Landgericht in Stuttgart and its presiding judge, in the form of the so-called "Stuttgart Model."23 This experiment in restructuring the lawsuit was inconsistent in some ways with the ZPO, but spread to a number of other districts and is still in use today. It utilizes: (1) a written, tightly scheduled pretrial procedure; (2) a thorough pretrial conference at which the court is required to give a preliminary indication of its position on contested legal issues; and (3) if necessary, a three-stage evidentiary hearing comprised of party examination, witness examination, and final argument during which the court twice formulates proposed resolutions before finally rendering a binding judgment.24 The experiment began in 1967, and evidence of its success in the form of high settlement rates and shorter average trial time substantially influenced the Commission and the legislature in formulating amendments to the ZPO itself.

The legislature has adopted a number of important laws amending the ZPO since the advent of the "Stuttgart Model," usually acting on the basis of proposals from the Commissions. In 1969, a revised Law on Subjudicial Personnel (Rechtspflegergesetz)25 substantially increased the scope of matters assigned for final disposition to clerks and other nonjudicial court personnel, subject to review by a judge on petition. In 1974, a law limiting the power of parties to choose a competent court by agreement was adopted,26 and the trial-preparing single judge was replaced with one to whom entire cases could be assigned for final decision.27 In 1975, the mandatory appellate jurisdiction of the Federal Supreme Court was significantly narrowed.28 The following year, in

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23. See Bender, The Stuttgart Model, in II ACCESS TO JUSTICE 433 (M. Cappelletti & J. Weisner eds. 1979). The model was based on recommendations in F. Baur, WEGE ZU EINER KONZENTRATION DER MÜNDLICHEN VERHANDLUNG IN PROZESS (1966), which in turn were derived from German Criminal procedure.
24. The model is described in detail in Bender, supra note 23.
26. Gerichtsstandsnovelle, 1974 BGBI I 753 (W. Ger.).
27. Entlastungsnovelle, 1974 BGBI I 365 (W. Ger.).
28. Revisionsnovelle, 1975 BGBI I 1863 (W. Ger.).
the context of a comprehensive reform of marital law, the entire category of marital cases was shifted from the Landgerichte to the Amtsgerichte (courts of petty jurisdiction), special family court departments were established in the Amtsgerichte, and special procedural rules were adopted for their operation. In 1977, an inaptly named Simplification Amendment sought a broad restructuring of the proceedings in ordinary civil cases, and was the most extensive of the current reforms, reaching nearly every procedural step in the lawsuit. In 1980, the statutes governing litigation-cost assistance to the poor were completely revised and a new statute adopted providing for aid in obtaining extra-judicial legal advice.

The remainder of this Article will discuss these reforms under functional headings: (1) the staffing of the trial court for the particular case; (2) the structure of the proceedings at first instance; (3) the scope and form of review in the appellate courts; and (4) costs and legal assistance. A conclusion will attempt some comparative observations.

III. STAFFING OF THE TRIAL COURT: SINGLE JUDGE OR THREE-JUDGE PANEL?

A. Historical Development

The staffing of the court to which individual cases are assigned at first instance in the Landgerichte has undergone several important changes since 1877. Judicial practice in a number of districts has usually preceded the legislature's amendments to the ZPO. The original concept embodied in the ZPO was that of the three-judge panel, taken from traditional practice. The use of a single judge was contemplated in two different types of situations, each sharply limited. Pretrial preparation of a case (not including proof-taking) by a single "assigned judge" (beauftragter Richter) was permissible for certain types of cases in which a detailed sorting out of factual issues was required before the legal issues could be decided. For example, cases involving the correctness of an accounting or the distribution of assets were eligible for single-judge preparation. Proof-taking by a single judge, here called a

29. 1976 BGBI I 1421 (W. Ger.) (First Family Law Reform Act).
30. Id.
32. Prozesskostenhilfegesetz, 1980 BGBI I 677 (W. Ger.) (Law on Assistance for Litigation Costs); Beratungshilfegesetz, 1980 BGBI 689 (W. Ger.) (Law on Legal Advice and Representation for Citizens with Low Income).
33. ZPO § 348 (1898).
"judge-commissioner" (Richterkommissar), was permitted under section 355 when authorized by a specific statute, usually involving proof-taking away from the courthouse, for example: on-site inspections; examination of witnesses who could not or ought not to be brought to court; or interviewing of expert witnesses. It is clear that these jobs for the single judge on assignment from the panel were regarded as limited exceptions to the general principle of collegiality.

The 1924 amendments reflected a general perception that the advantages of the panel in evaluating evidence, resolving disputes over the law, and formulating a reliable final judgment were counterbalanced by inadequate and dilatory preparation for trial. As early as 1906, one critic characterized the German adherence to collegiality as "an old superstition of the civil-servant state, that a collegium in and of itself offers a greater guarantee of good and just decisions." Responding to the example of the Austrian Ordinance of 1895, to the success of the single judge in the Amtsgerichte following the 1909 reforms and to the widespread practice developed in the Landgerichte without the benefit of statute, the legislature introduced the trial-preparing single judge (vorbereitender Einzelrichter). The panel was now required to assign the case to the single judge for preparation, unless under the circumstances a preparatory proceeding appeared unnecessary. The preparing judge was required first to seek a settlement, and failing that, to undertake an exhaustive examination of the case with a view toward the possibility of a decision by the panel in a single hearing. Proof-taking by the single judge was committed to his discretion.

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34. Id. § 372.
35. Id. § 375.
36. Id. § 402.
37. F. ADICKES, GRUNDLINIEN DURCHGREIFENDER JUSTIZREFORM 113 (1906). Adickes' work was quoted as thematic in BERICHTE DER KOMMISSION ZUR VORBEREITUNG EINER REFORM DER ZIVILGERICHTSBARKEIT 89 (1961) [hereinafter cited as BERICHTE DER KOMMISSION 1961].
38. See supra note 14. In this precise respect the German reform went beyond the Austrian, in which the role of the single judge in panel cases was limited to the first oral hearing, where preliminary objections such as jurisdiction were dealt with and the possibilities of resolution without full trial were explored. GOLDSCHMIDT, DIE NEUE ZIVILPROZES-SORDNUNG 7 (1924); KLEIN & ENGEL, DER ZIVILPROZESS ÖSTERREICHS 261 (1927); G. PETSCH & F. STAGEL, ZIVILPROZESS 311 (1963). The Austrian Code of Civil Procedure articles 245-56 also provided for a preparatory proceeding before a commissioner-judge, on order of the panel, either in the cases originally contemplated by the German ZPO or where the pleadings presented such a complex or extensive factual picture that pretrial examination of the allegations appeared appropriate for expedition and simplification of the final oral hearing.
39. ZPO § 349II, Emmingernovelle, 1924 RGB I 140 (W. Ger.)

Otherwise the single judge shall advance the matter to the point that it can, as
Final decision on certain preliminary questions and dilatory defenses, as well as final judgment in case of default or abandonment of claim, were also transferred to the single judge. Final judgment in contested cases, however, remained with the panel.

Practice under this regime proved unsatisfactory in at least two respects. First, despite an attempt to limit it in 1933 through amendment, the single judge gradually took over, in the name of preparation, the lion’s share of the proof-taking in many districts. The judge thereby acquired the lion’s share of the influence over the outcome of evenly contested cases. The more prepared the reporting judge was, the less prepared were the other two judges on the panel, and thus the less they were able to make a useful contribution. Second, the single judge was unable or unwilling to function more efficiently in preparation and became an apparent source of delay; expedition and simplification were not forthcoming in the desired measure. Postwar reform proposals tended toward two extremes, therefore, either completing the transition to the single judge by abandoning the panel altogether, or

nearly as possible, be concluded by one hearing before the court. If a proof-taking is necessary, the single judge can, in his discretion, either order and take the proofs, or reserve this for the court . . .

40. Id. § 349 II, 1933 RGB1 855 (W. Ger.)

Otherwise the single judge shall advance the matter to the point that it can, as near as possible, be completed by one hearing before the court. For this purpose he can also take particular proofs; this should only be done to the extent that it appears desirable for simplification of the hearing before the court, and insofar as it can be assumed at the outset that the court can properly evaluate the evidence even without a direct impression of the course of the proof-taking . . .

41. Practice in this respect appears to have been quite varied, even among different chambers of a single Landgericht. See Kaplan, von Mehren & Schaefer, supra note 1, at 1206-07, 1247-48. The Preparatory Commission saw the dominance of the single judge as a general trend. See BERICHTE DER KOMMISSION 1961, supra note 37, at 90. See also Bergerfurth, Einzelrichter und Prozessreform, 41 Deutsche Richter-Zeitung [DRiZ] 423, 424 (1963); O. Kissel, Der Dreistufige Aufbau in der ordentlichen Gerichtsbarkeit 50 (1970). One writer saw a tendency to use the preparing judge more sparingly than the 1924 reform intended, but, when used at all, then for essentially all proof-taking. Putzo, Aktuelle Änderungen des Zivilprozeßrechts zum 1.1.1975, 28 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 185, 187 (1975).

42. Among other things, the process of shifting the case from the panel to the single judge and back again was viewed as multiplying the number of hearings. O. Kissel, supra note 41, at 50-51; BERICHTE DER KOMMISSION 1961, supra note 37, at 90. An extensive statistical study using 1971 data showed that the single judge procedure involved more hearings, even discounting the often superfluous final hearing before the panel. See II W. Blomeyer & D. Leipold, TATSACHEN ZUR REFORM DER ZIVILGERICHTSBARKEIT 197 (1974).
reemerging the “three heads are better than one” idea and restoring
the panel to its former glory.

The most radical of the first type came to be called the “great judicial reform” (grosse Justizreform). It would have merged the Amtsgericht and the Landgericht into a single entry-level court, and would have established the single judge as the source of all final judgments at first instance. Practice had put the single judge into the driver’s seat anyway, it was argued, and making the panel participate in the final judgment added to their burdens without demonstrable benefit to the system’s overall goals. Furthermore, once the single judge was established in the Landgericht, the principle of equality of treatment of all civil cases compelled merger with the Amtsgericht. In 1961, the Preparatory Commission accepted the single judge but rejected merger on the ground that there was a need for more localized justice in certain types of cases. Since they could not identify any satisfactory criteria for allocating Landgericht cases between a single judge and the panel, the Commission recommended the single judge across the board.

In the mid-1960’s, on the other hand, the Stuttgart Model sought to reinforce the panel system by requiring the panel in appropriate cases to be actively involved in the entire post-pleading process, beginning with the preliminary conference at which the proof-taking and trial were planned. In the literature supporting this aspect of the model, the operative assumption was that the panel becomes more effective and efficient with increasing complexity, whether factual or legal. A “reporter” is used in the model, but only as the panel member principally responsible for digesting the written exchanges of the parties in preparation for the preliminary conference. The “preparing judge” has been used in some courts under the model, particularly in cases involving a large number of disputed items, such as commercial commission or construction-contract disputes. Nonetheless, the Stutt-

43. For perhaps the most comprehensive statement of this position, see O. KISSEL, supra note 41.
44. Id. at 47.
45. On the superficiality of this conception of equality, see Hanack, Bedürfnisprüfung und Methodenkritik einer Justizreform, 87 ZfP 405, 409 (1974).
46. BERICH DER KOMMISSION 1961, supra note 37, at 74-77.
47. See Bender, supra note 23, at 445f.
49. Bender, supra note 23, at 448.
gart Model remains closely identified with the panel system.

B. The Legislative Solution

The solution ultimately reached by the legislature in 1974 constitutes a rather complex compromise between these extremes. It abolished the "preparing judge" altogether and replaced it with a case-deciding single judge.51 Under the new ZPO section 348,52 however, it is the panel to which the case is originally assigned which decides, in its discretion, whether to assign the case to one of its members for full determination. No criteria are given for making this decision; the provision merely precludes such transfer where the case presents "special difficulties" of a factual or legal nature, or where it is of "fundamental importance."53 If the panel retains the case, its authority to commission a single judge to take proofs away from court remains intact.54 Indeed those provisions which refer to the "trial court" apply equally to the case-deciding single judge operating under section 348, if such assignment is made.55

A further reform was adopted in the First Family Law Reform Act of 1976, which removes a large category of cases from the panel system altogether. All marital cases are now in the exclusive jurisdiction of the Family Courts, which are divisions of the Amtsgericht and which are staffed by single judges.56 Under prior practice, marital cases were in the category of cases in which the use of the single judge was most

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51. See supra note 27 and accompanying text.
52. ZPO § 348 (1974).
53. Id. Section 348 provides in full:
   (1) The civil chamber may transfer the case to one of its members as single judge for decision, unless
       1. the case presents special difficulties of a factual or legal nature or
       2. the case is of fundamental legal importance.
   (2) The chamber may decide on transfer to the single judge without a hearing. The order is not appealable.
   (3) The case may not be transferred to the single judge, if the merits have already been reached in the principal hearing before the chamber, unless in the interim a temporary, partial or interlocutory judgment has been rendered.
   (4) The single judge may after hearing the parties transfer the case back to the chamber, if it appears from a fundamental change in the procedural situation that the decision is of fundamental importance. A further transfer to the single judge is excluded.
54. Id. §§ 355, 375.
prevalent, and in which assignment to the case-deciding single judge after the 1974 amendment was most common. In terms of court staffing, therefore, the reform largely confirmed existing practice.\(^{57}\)

Published decisions interpreting section 348 have been few and not very helpful. It has been held that the assignment must be made by the panel, and that an order signed by only two of the three members is insufficient.\(^{58}\) Moreover, the assignment must occur at or before the beginning of the principal hearing on the merits \((\text{Haupttermin})\.\) Preparatory hearings are not considered to be on the merits, even if an order for proof-taking is made simultaneously with the assignment.\(^{59}\) But assignment after a hearing directed to the merits is untimely, even if the hearing is suspended.\(^{60}\)

The assignment is difficult to challenge, however. The plaintiff is expected to indicate objections in his complaint\(^{61}\) and the court must, with service, inquire of the defendant whether there are any objections to assignment of the case to a single judge.\(^{62}\) Consent is usually forthcoming, but objection is seldom ignored. There is debate on whether the assignment order, which is expressly made nonappealable under section 348, can be reviewed at all by an appellate court. The rationale is that of "essential procedural error" justifying remand.\(^{63}\) The cases are in conflict on whether violation of section 348 is such an error.\(^{64}\) In any event, the parties, whose attorneys were already used to single judges in prior practice and generally wish to keep peace with their


\(^{58}\) Judgment of Mar. 29, 1979, Kammergericht Berlin, 33 MDR 765.


\(^{61}\) ZPO § 253.

\(^{62}\) Id. § 271.

\(^{63}\) Id. § 539.

judges, and who also have access to an appellate court with three judges anyway, appear to have little motivation to complain. For these reasons it is likely that the constitutional objections to the procedure may remain undecided. The basis for objection is that without setting forth criteria for the decision, the assignment is left to the court's discretion, thus depriving the parties of their "lawful judge" under Article 101 of the Basic Law. That provision has been interpreted as requiring that the parties be in a position to determine in advance, as far as practicable, who will decide their case. This objection was made by the government when the discretionary feature was first introduced in the legislature, but the upper house committee rejected it, citing cases where the discretion of the courts to assign to certain judges was upheld. Much of the literature favors the view that the discretion provided by section 348 is unconstitutional. Of special concern is the fact that the legislature expressly justified the discretion upon the need, among other things, to consider the qualifications and work load of the particular judge to whom the case would be assigned. This is considered by the opponents to be an inappropriate basis for determining what type of court should try the case. In typical panel practice, however, the issue is muted to minor significance: the case will be assigned in any event on a strictly rotating basis to one

69. Feaux de la Croix, supra note 67; Kramer, supra note 68; Schultzze, Der Streit um die Übertragung der Beweisaufnahme auf dem beauftragten Richter, 30 NJW, 409, 410-11 (1977); Müller, Beweisaufnahme vor dem beauftragten Richter, 55 DRiZ 305 (1977) (and citations therein); Baur, Book Review, 91 ZZP, 329, 330 (1978); Bettermann, supra note 7 at 394f; A. Baumbach, W. Lauterbach, & P. Hartmann, supra note 55, ZPO § 348 Anm. 1. Contra Rasehorn, Der Einzelrichter in Zivilsachen verfassungs und Praxisgemäss, 30 NJW 789 (1977); Stanicki, Der Einzelrichter beim Landgericht als gesetzlicher Richter, 57 DRiZ 342 (1979).
70. See Kramer, supra note 68, at 15.
71. Id.; Feaux de la Croix, supra note 67, at 61.
of the panel members as reporting judge, with the responsibility for going over the initial papers and helping the presiding judge prepare for hearings. Any assignments under section 348 will be made to this judge, whose identity will be known to the lawyers before assignment is made.72

Practice under section 348 has been astonishingly varied, from court to court and from chamber to chamber of the same Landgericht. Much of the opposition to abolition of the collegial system had come from the judiciary itself, with many judges valuing the collegial judgment even where the bulk of the preparatory work and the taking of evidence had been done by the single judge. Since the new law forces a choice between the case-deciding single judge and the case-deciding panel, and since family matters have now been taken out of the collegial courts altogether, any given panel can be expected to make less use of section 348 than comparative use of the old preparing single judge. Still, the literature indicates a use rate varying from high to low, and everything in between.73

Factors to be taken into account regarding section 348 assignments can at least be identified. Case-related factors favoring retention by the panel are: (a) ripeness of the case for decision after initial pleading, without further extensive judicial preparation;74 and (b) special concern for the reliability and persuasiveness of the final decision, resulting from the fundamental legal importance of the case75 or from the complexity of the issues.76 Assignment is favored, on the other hand, in

72. This practice was observed in a chamber of the Landgericht Freiburg in May, 1981. See also Putzo, supra note 41, at 188 (suggesting it as the most logical practice).

73. The Ministry of Justice reported in 1976, a little more than a year after the single-judge reform was introduced, a range from 5 to 95% among various courts. 54 DRiZ 219 (1976). It has been reported that most chambers of the Landgericht Koblenz assigned only matrimonial matters to single judges. Klinge, Erste Erfahrungen mit dem Entlasungsgesetz, 26 ANWALTSBLATT [AnwBl] 74 (1975). In the Landgerichten Baden-Württemberg, in the years 1975-1977, an average of less than half of the non-marital matters were assigned to single judges. Blankenburg, supra note 57, at 216. Schultze, supra note 69, reported a range of 9.8 to 82.3% for Hessen in 1975-1976. In the chamber of the Landgericht Freiburg which I observed, the presiding judge indicated that currently 70 to 80% of its cases were decided by single judges, and a random sample of 1980 files confirmed this estimate.


75. The standard used by the statute, according to which assignment is prohibited, is one well outlined in judicial interpretations of ZPO § 546, requiring appellate courts to authorize revision by the Federal Supreme Court when the case has a value of less than DM 40,000 (currently) but is of fundamental importance. See, e.g., H. PRÜTTING, DIE ZULAS- SUNG DER REVISION 101 (1977); A. BAUMBACH, W. LAUTERBACH, & J. ALBERS, supra note 64, ZPO § 546 Anm. 2B.

76. Here there is practically no case law, and commentaries such as A. BAUMBACH, W.
cases involving numerous similar issues, such as commercial agent accountings or construction-contract disputes, in which factual details dominate rather than probative or conceptual difficulty.\textsuperscript{77} Administrative factors include caseload, which presumably tends to favor assignment as a spreading device, and the strength and experience of the individual judge to whom assignment would be made.\textsuperscript{78} The most important factor of all, however, is that of style and preference, in which the strongest personality will usually be that of the presiding judge. The presiding judge is generally responsible for the allocation of workload within the chamber,\textsuperscript{79} is required to preside over all chamber hearings,\textsuperscript{80} is the first to see all incoming files, and will therefore generally guide the decision on assignment. It cannot be expected that such a decision, which must be made in every case, will be heavily debated within the chamber; it is usually made by rules of thumb founded on common understanding, but guided by the presiding judge.

It is still asserted that the former practice of leaving everything but final judgment to the preparing single judge remains alive in many courts,\textsuperscript{81} despite the fact that the only authority for proof-taking by such a single judge is limited to cases in which it is impracticable to do so in the courtroom.\textsuperscript{82} Under the prior law it had been established that a breach of section 355 limitations was subject to waiver, in particular by failing to object at the time of the proof-taking. An objection could not be raised for the first time on appeal.\textsuperscript{83} The courts have continued to adhere to this doctrine, on the ground that the principle of immediacy is at stake, a principle designed for the protection of the parties and, therefore, presumably subject to their agreement.\textsuperscript{84} A rare case of reversal was based on the finding that the particular chamber had systematically ignored the limitations of section 355 and had invited

\textsuperscript{77} See Holch, \textit{supra} note 74, at n.23 (citing legislative history showing that such cases were considered assignable by the draftsmen).

\textsuperscript{78} See A. Baumbach, W. Lauterbach \& P. Hartmann, \textit{supra} note 55, ZPO § 348 Anm. 2A.

\textsuperscript{79} GVERFG § 21g (1972).

\textsuperscript{80} ZPO § 136 (1950).

\textsuperscript{81} Rudolph, \textit{Die Zivilprozesslandschaft}, 56 DRiZ 366 (1978).

\textsuperscript{82} See supra note 54 and accompanying text.

\textsuperscript{83} See Judgment of Oct. 16, 1963, Bundesgerichtshof, 40 \textsc{Entscheidungen des Bundesgerichtshofs in Zivilsachen \textit{[BGHZ]}} 179 (and citations therein).

\textsuperscript{84} Judgment of Feb. 2, 1979, Bundesgerichtshof, 33 MDR 567, 32 NJW 2528 (and citations therein); Judgment of Nov. 11, 1977, OLG Hamm, 32 MDR 676; Judgment of June 7, 1977, OLG Düsseldorf, 32 MDR 60.
agreement in the specific case.\textsuperscript{85} Thus, while the reforms made legislative disapproval of the practice clearer than before, they left it largely unsanctioned.

The question of quality, of which system is best, remains essentially unanswered. More precisely, the current approach of maximum flexibility and adaptability to the skills and personalities of the individual judges probably offers the best answer. An attempt was made by Blankenburg\textsuperscript{86} to assess, by a special statistical study, whether the case-deciding single judge was more or less efficient than the panel. The resulting figures show that single-judge proceedings have taken longer than panel proceedings, and thereby confirm findings of an earlier study of the pre-1977 preparing single judge.\textsuperscript{87}

The tempting conclusion that the single judge is inherently slower is weakened, however, by the operation of two of the best settled rules of thumb concerning assignment: (1) that cases ripe for immediate decision are not assigned; and (2) that cases involving much tedious detail are assigned.\textsuperscript{88} The findings are thus less than conclusive. The statistics regularly published by the government do not reflect the operation of section 348 at all, either in terms of elapsed time or of frequency of appeals and reversals. At best such data might be expected to both confirm and relativize the three common sense assumptions which have fueled most of the debate: (1) that difficult questions are more thoroughly weighed by three heads than by one; (2) that more sheer work can be done by three people separately than by the same three jointly; and (3) that human productivity is less determined by formal structure than by training, personality, and motivation.

\textbf{IV. THE STRUCTURE OF THE PROCEEDINGS AT FIRST INSTANCE}

By far the most important of the recent wave of amendments, the "Simplification Amendment" of 1977,\textsuperscript{89} dealt chiefly with the procedure on the merits at first instance. As noted above, the principal goal of these changes was efficiency and economy, to combat a perceived and persistent tendency to delay. Already under existing law, dating back at least as far as 1924, the court, in principle, was to try to dispose

\begin{itemize}
\item \textsuperscript{85} Judgment of Feb. 18, 1976, OLG Düsseldorf, 29 NJW 1103.
\item \textsuperscript{86} See Blankenburg, \textit{supra} note 57.
\item \textsuperscript{87} See W. Blomeyer & D. Leipold, \textit{supra} note 42.
\item \textsuperscript{88} Blankenburg, \textit{supra} note 57, at 218; Holch, \textit{supra} note 74, at 40.
\item \textsuperscript{89} 1976 BGB\textsuperscript{l} I 3281 (W. Ger.).
\end{itemize}
of the case in a single oral hearing. But the "preparation process," largely planned only from one step to the next, itself tended to produce multiple hearings. Typical cases, therefore, were taking half a dozen or more hearings and many months to complete. The Stuttgart Model sought to realize the single hearing goal by means of written pretrial procedure and tight scheduling, eventually achieving an average of just over two meetings per case. The 1961 report of the Preparatory Commission, on the other hand, recommended an early first hearing for the purpose of disposing of the easy cases and planning preparation for a final hearing in the difficult ones. The legislature, following the pattern set with the single-judge problem, adopted both models, formulated as options in the preparation of the final hearing to be chosen in the court’s discretion. The amendment also strengthened the formal position of the judge in setting deadlines for the presentation of claims and defenses, in encouraging settlement, and in directing the final hearing. Finally, the 1977 amendment attempted a revision of the two principal procedures for rendering enforceable judgments without a contested hearing: the so called "dunning process" and the judgment by default. These revisions and a few other minor changes will be discussed in roughly the order in which they would be encountered in a typical lawsuit.

A. Steering the Lawsuit: Calendar Control and Service of Documents

With theAmtsgericht reforms of 1909 and theLandgericht reforms of 1924, the courts assumed general responsibility for fixing deadlines and hearing dates, as well as for service of important judicial docu-

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90. ZPO § 272b (1950).
91. G. BaumgärTEL & P. MEs, RECHTSTATSACHEN ZUR DAUER DES ZIVILPROZESSES (erster Instanz) 170 (1972) (data gathered in 1970-71, indicated that 63% of all Amtsgericht cases and 49.4% of all Landgericht cases were completed with five or fewer hearings and conferences); II E. BLANKENBURG, H. MORASH & H. WOLFF, TATSACHEN ZUR REFORM DER ZIVILGERICHTSBARKEIT 49 (1974) (data gathered in 1971, found that cases pursued to contested judgment required an average of from 4.2 to 8.5 hearings (or conferences), depending on the court, the type of case, and whether any proof-taking occurred).
92. See supra note 23 and accompanying text.
93. E. BLANKENBURG, H. MORASH & H. WOLFF, supra note 91 reported 2.2-3 hearings including pretrial conference and proof-taking for the Stuttgart Model.
94. BERICH DER KOMMISSION 1961, supra note 37, at 204. The Second Commission pursued this recommendation. See BERICH DER KOMMISSION 1977, supra note 2, at 33.
95. ZPO § 272 (1977).
96. For the prior law see Kaplan, von Mehren & Schaefer, supra note 1, at 1265-67; ZPO §§ 688-703d (1977) (current law).
ments such as complaints, answers, and essentially all party documents requesting any sort of action by the court relating to the merits.\textsuperscript{97} Under the Simplification Amendment of 1977,\textsuperscript{98} service of judgments was added to the court’s responsibilities.\textsuperscript{99} The parties may still serve judgments to expedite execution;\textsuperscript{100} and they remain responsible for serving attachment orders\textsuperscript{101} and other orders granting temporary or preliminary relief.\textsuperscript{102}

B. Preparing the Principal Hearing

Former ZPO section 272(b)\textsuperscript{103} called for the disposition of the case “as far as possible in one oral argument” (\textit{mündliche Verhandlung}). The new ZPO in section 272 I, puts the matter somewhat more forcefully, with a revealing change in terminology: “The case is as a rule to be disposed of in one comprehensively prepared hearing for oral argument (principal hearing).”\textsuperscript{104} Section 272 then prescribes the manner of preparation for the principal hearing, either an early oral hearing or a written pretrial procedure, reserving the choice of procedure to the discretion of the presiding judge.\textsuperscript{105} Section 273 directs the court to take all necessary preparatory measures and to cause the parties to declare themselves promptly and completely.\textsuperscript{106} Additionally, this section specifically authorizes the court, before any hearing, to require the parties to explain or expand on their pleadings within specified time limits; to request information from, or production of, documents by public officials; to direct the appearance of the parties; and to subpoena witnesses to testify at the hearing.\textsuperscript{107}

1. Early First Hearing

The statute provides no guidance as to when to choose a first hear-

\textsuperscript{97} See \textit{supra} notes 15-17 and accompanying text.
\textsuperscript{98} 1976 BGBI I 3281 (W. Ger.).
\textsuperscript{100} ZPO § 750 I (1977).
\textsuperscript{101} \textit{Id.} § 922.
\textsuperscript{102} \textit{Id.} § 936 (incorporating ZPO § 911 by reference).
\textsuperscript{103} ZPO § 272(b) (1950).
\textsuperscript{104} \textit{Id.} § 272 I (1977). Thus, the confusion created by the concept of “continuous oral argument” is avoided. This concept allowed a \textit{mündliche Verhandlung} to dissolve into many \textit{Termine} in the absence of serious pressure.
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.} § 273.
\textsuperscript{107} \textit{Id.}
ing or a written pretrial procedure. Section 275 merely provides that in preparation for such a first hearing, a deadline for answer may be set. If the case is not resolved at the hearing, section 275 requires the court to take all measures still necessary to prepare the principal hearing, including the setting of a deadline for answer. In practice, the choice depends upon a number of factors, not the least of which is the general inclination of the presiding judge. In particular, the first hearing is favored where the case appears likely to be settled or uncontested, or where there is a good chance that proof-taking will be unnecessary in preparing the case for decision. An early first hearing is also favored where it is necessary to discuss the case with the parties before it becomes clear what preparatory measures will be required.

2. Written Pretrial Procedure

When the written pretrial procedure alternative is chosen, section 276 requires the court to set two deadlines for the defendant: notice of intention to contest the claim must be filed within two weeks of service, and the claim must be answered within at least an additional two weeks. The court may also set a deadline for a reply. This method may be chosen where the case is straightforward and proof-taking appears necessary either for settlement or for judgment, where the case is one of factual detail (with many specific issues, such as accountings) and the complaint is clear enough to allow the defendant to answer point for point, where it appears likely that defendant will default, or even where the court's calendar is so crowded that an early hearing cannot be scheduled early enough to be especially

108. Id. § 275. This is normally done in the Landgericht of Hamburg and of Freiburg, which I observed, and it appears to be the general rule. See the form of order reprinted in G. von Craushaar, Zivilprozess und Zwangsvollstreckung 60 (1979). See also Walchshöfer, Die Auswirkungen der Vereinfachungs-Novelle in der gerichtlichen Praxis, 94 ZZP 179 (1981).


110. See Bundestag Drucksache 7/2729 35 (Nov. 5, 1974) (the Government's explanation of its draft); A. Baumbach, W. Lauterbach & P. Hartmann, supra note 55, ZPO § 272 Anm. 3B.

111. Id.

112. ZPO § 276 (1977).

113. Id.

114. A. Baumbach, W. Lauterbach & P. Hartmann, supra note 55, ZPO § 272 Anm. 3B.

115. Id.
Although it has complicated rather than simplified the procedure, the legislature's decision to provide a choice between alternative methods of preparation has generally been well accepted by the judiciary and the bar. A 1978 survey of Bavarian courts showed that most courts made substantial use of both methods, but where a strong preference was shown, the single-judge Amtsgericht, tended toward the written procedure and the collegial Landgericht tended toward the oral procedure. The same study found no evidence that the choice of preparatory procedure affected the overall length of the lawsuit.

C. Judgment Without Hearing

In a number of situations, the ZPO contemplates the possibility of a judgment without a hearing. The 1977 amendments generally sought to refine the previous rules so as to limit their use as well as to make them more efficient.

1. Contested Cases

Section 128 II, for example, deals with the agreement of the parties to a judgment without a hearing. The 1977 amendments provide for withdrawal of consent only after an essential change in procedural circumstances, require the immediate setting of deadlines, and limit to three months the length of time within which judgment must be rendered after consent is given. The purpose of these changes was to discourage a perceived practice of extending the device to complex cases, resulting in undue delay.

Without the consent of the parties, the court may order an entirely written procedure for cases involving DM 500 or less in controversy, where representation by an attorney is not required (Amtsgericht) and a hearing would cause a party undue hardship. This provision replaced one under which DM 50 cases could be referred to an arbitrator. The party for whose benefit the procedure is ordered may

117. See, e.g., Hartmann, Ein Jahr Vereinfachungsnovelle, 30 NJW 1458 (1978).
118. Walchshöfer, supra note 108, at 181-82.
119. Id. at 182.
120. ZPO § 128 II (1977).
121. Id.
122. BUNDESTAG DRUCKSACHE 7/2729, supra note 110, at 39-40.
123. ZPO § 128 III (1977).
124. For criticism of this exchange of unlike procedures, see Leipold, Gerichte und Verfahren für geringfügige Streitigkeiten, in HUMANE JUSTIZ 106 (P. Gilles ed. 1977).
demand a hearing, but it was hoped that the procedure would be more extensively used than its predecessor.125

2. Default Judgments

Where a written pretrial procedure is chosen under ZPO section 276 and the defendant fails to make a timely declaration of his intention to defend, a default judgment may be entered against him without a hearing.126 Otherwise, the traditional definition of default, which is the failure to appear at the oral argument itself, is retained.127 The principal sanction for failure to meet a deadline for the answer is the preclusion of defenses.128

3. The "Dunning Process"

The "dunning process" has taken on an increasing role in everyday practice during recent decades. This procedure allows a claim for a specific sum of money to be submitted to the court for an ex parte payment order, upon which execution can be levied if no objection is submitted within a specified period.129 While a relatively small proportion of payment orders produce objection,130 nearly forty-five percent of all civil cases in the Amtsgericht131 and over thirty-five percent of those in the Landgericht132 are begun with a dunning procedure. The

125. BUNDESTAG DRUCKSACHE 7/2729, supra note 110, at 40.
126. ZPO § 331 III (1976).
127. Id. § 331 I. See Kaplan, von Mehren & Schaefer, supra note 1, at 1262-63.
129. For the prior law, see Kaplan, von Mehren & Schaefer, supra note 1, at 1265-67. The "specific sum of money" of ZPO § 688 I is not a term of art comparable to the "sum certain" in Anglo-American law, but can arise out of a claim for personal injury or property damage and is not limited in amount. See G. von CRAUSHAAR, supra note 108, at 46-47.
130. In 1981, 5,275,629 dunning cases were commenced nationwide. In that year the Amtsgerichte disposed of 425,020 cases, and the Landgerichte 122,433 cases, which had been begun by a dunning petition. Statistisches Bundesamt Wierbaden, RECHTSPFLEGE ZIVILGERICHTE, fachserie 10, Reihe 2, tables 4.1, 4.5 & 5.5 (1981) [hereinafter cited as RECHTSPFLEGE]. This relationship of about one in 10 cases producing objection represents a slight decline in recent years. For 1980 there were 4,652,215 dunning petitions with 500,229 dispositions after objection for 10.8%. Id. tables 3.1, 3.5 & 4.5 (1980). For 1979: 4,319,733 petitions with 477,751 dispositions for 11%. Id. (1979). For 1978: 4,237,605 petitions with 512,150 dispositions for 12%. Id. (1978). For 1977: 4,408,659 petitions with 578,460 dispositions for 13%. Id. (1977).
1977 reforms of this numerically important device have been among the most heavily criticized. The reforms purported to serve somewhat conflicting goals: to increase the debtor's protection against unjustified claims, to rationalize and expedite the procedure, and to prepare the way for computerization. The first goal was honored by extending the deadline for objection to two weeks from service, precluding demand for execution order until after expiration of the objection deadline, and requiring that the demand for execution order recite any payments received. The second goal was served by adopting uniform printed forms, reducing the detail required in specifying the basis for the claim, and making the claimant's home court the exclusive venue. The third goal was furthered not only by the uniform forms but also by the authorization of a national program and a centralized administration within each Land. The greatest administrative difficulties arise from the venue rules. The petition must be filed in the plaintiff's home court. Upon objection and request for trial, it must be transferred to the court designated by the plaintiff in his petition as the defendant's domestic home venue. The second court must again transfer the case on finding itself not competent. At least one writer finds a decline in relative utilization of this procedure attributable to these administrative difficulties, but the national statistics suggest, if anything, both a marginal increase in relative use and a marginal decrease in the frequency of objection since the reforms.

133. See Schulz, 11 ZRP 93 (1978) (reporting the position of the Federation of German Rechtspfleger); Hartmann, supra note 117, at 1464; Franzki, supra note 109, at 14.

134. BUNDESTAG DRUCKSACHE 7/2729, supra note 110, at 46.

135. ZPO § 692 I 3 (1977). The previous deadlines had varied from 24 hours to one week.

136. Id. § 699 I.

137. Id.

138. Id. § 703c.

139. Id. § 690 I 3 (the section requires a "designation" (Bezeichnung), whereas it formerly required a "substantiation" (Begründung)).

140. Id. § 689 I 2.

141. Id. §§ 703b, 689 I 3.

142. Id. § 696 I, in conjunction with § 692 I 6. More than 10% of all dunning cases sent to the regular calendar require transfer to a court other than that designated in the dunning notice. See Holch, Mahnverfahren Zwischen Schuldnerschutz und Entlastungsfunktion, 14 ZRP 281 (1981).

143. Id. (emphasizing figures from Baden-Württemberg).

144. The ratio of dunning petitions to regular court commencements (both Amtsgerichte and Landgerichte) increased from 3.26/1 in 1977, RECHTSPFLEGE, supra note 130, tables 3.1 and 4.1 (1977), to 3.64/1 in 1981. Id. tables 4.1 and 5.1 (1981). The frequency of objection
D. Enforcing Concentration: Deadlines and Preclusion

1. Deadlines

Under prior law, deadlines played only a minor role in driving the lawsuit to a conclusion. As a practical matter, the setting of a date for oral argument was the principal means, because the parties were required to submit preparatory writings before the hearing. The Stuttgart Model was able to find permissive authority in section 272b for its system of strict deadlines. Moreover, section 279a called for the setting of a deadline for written clarification of points which remain unclear after the hearing. In the normal case, however, the use of deadlines imposed on the parties was desultory at best because the court itself was not under heavy statutory pressure to reach the final hearing.

Under the 1977 reforms, on the other hand, the deadline forms a centerpiece of the procedural rules. The new mandatory deadlines for an answer in the written preparatory procedures, as well as the permissive deadline for reply have already been mentioned. In addition, section 273 II authorizes setting a deadline for a statement of position on unclear points prior to any hearing. Section 283 authorizes setting a deadline for written response, after the principal hearing, to matters presented by the other side where a party has been unable to respond because of surprise.

The most important deadline is that for the answer. In terms of practice, perhaps the most interesting question is the extent to which the courts use the discretionary deadline prior to an early first hearing, pursuant to section 275. Use of the discretionary deadline is quite frequent, particularly where crowded court calendars preclude setting an early hearing before four to six weeks after filing of the complaint,
thereby leaving sufficient time for an answer. Use of the prehearing deadline for clarification of specified issues seems to be less widespread, especially with an early first hearing, whose purpose is one of clarification anyway.

2. Duties to Expedite

The court's duties to expedite judicial proceedings have already been mentioned in connection with preparatory measures and deadlines. For the first time, however, the 1977 reform also added an express duty of the parties to expedite the proceedings. Section 282 requires the parties to present their materials in a timely fashion at the hearing, and to extend, before the hearing, materials to the other side that would facilitate adequate response at the hearing. Section 282 III requires the defendant to present defenses which go to the permissibility of the complaint before the main hearing, and by the deadline for answer, if one is set. Section 277 I requires the defendant to present his defenses in the answer, insofar as the procedural situation and expedition call for it. The principle that the parties may present their materials at any time until the close of the hearing on the basis of which the judgment is rendered, understood as a consequence of the concept of the "unity of oral argument" and expressed literally in former ZPO section 278, is no longer stated directly in the code.

153. See supra text accompanying note 108. The Bundesgerichtshof has held that the notice of deadline must inform the defendant (who at this point normally is not yet represented by counsel) exactly how to meet it, and that the court must also inform the defendant of the effect on the deadline of subsequent submissions by the plaintiff, in order for the defendant's tardiness in answering to support preclusion. Judgment of Jan. 12, 1983, Bundesgerichtshof, 36 NJW 822.

154. See supra text accompanying notes 108-11.

155. See supra text accompanying notes 153-54.

156. ZPO § 282 provides that:
   I. Each party shall present his material in support of claims or defenses at the oral hearing . . . with that promptness called for in the procedural situation by careful and expeditious case management.
   II. Demands for relief and other material to which the opponent probably could not respond without advance notice shall be transmitted early enough before the oral argument to allow the opponent to gather the necessary information.

157. Id. § 282 III. This is a substantially expanded version of former ZPO § 274, which covered only certain so-called "dilatory defenses" (prozesshindernde Einreden). It is doubtful whether the preclusive effect of ZPO § 282 III is broader than its predecessor, since many of the defenses now covered are non-waivable and subject to judicial control sua sponte. See A. BAUMBACH, W. LAUTERBACH & P. HARTMANN, supra note 55, ZPO § 282 Anm. 5.

158. See supra note 11 and accompanying text.

159. Compare L. ROSENBERG & K. SCHWAB, supra note 99, § 81 (to the effect that the principle still applies, although the law provides for preclusion of late material); A. BAUM-
stead we find only its negative corollary, that new material can no longer be presented after the close of the final hearing.\textsuperscript{160}

3. Preclusion

Under the prior law, preclusion of late material fell into two categories, each with a different standard of fault. The first and most important provision applied either where material was offered after the first hearing at which it was appropriate, or where it was not alleged in a timely preparatory writing as required.\textsuperscript{161} This provision permitted the court in its discretion to preclude such material, if it was shown both (1) that admission of the material would delay conclusion of the lawsuit, and (2) that the untimeliness was attributable either to intent to delay or to gross negligence.\textsuperscript{162} The second provision, not often used and less often disputed, applied where a party failed to meet a court-imposed deadline for clarification of matters which remained unclear after the hearing. That provision permitted the court in its discretion to refuse to consider an untimely clarification if the party failed adequately to excuse the delay.\textsuperscript{163}

An example\textsuperscript{164} from the sparse postwar case law illustrates the reluctance with which this authority was exercised. The plaintiff's complaint was served on the defendants on March 18, 1972, a supplementary complaint was served on April 26 and the first hearing was held on May 17 at which time the defendants did not appear. On June 14, the resulting default judgment was served. The defendants first hired a lawyer on June 19, who then reopened the default judgment. The plaintiff served a memorandum on the defendants on July 24 complaining about delaying tactics and demanding a timely response prior to the new hearing scheduled for September 27. The defendants' first

\begin{thebibliography}{164}

\bibitem{bach} BACH, W. LAUTERBACH, & P. HARTMANN, supra note 55, \textit{Übersicht vor § 253 Anm. 2(B)} (relegate the principle to a presumption); R. BRUNS, \textit{Zivilprozessrecht} 109 (2d ed. 1978) and G. VON CRAUSHAAR, supra note 108, at 106 (refer under this heading only to the effect that allegations made in earlier hearings need not be repeated in later ones). The principle's converse is called the \textit{Eventualmaxime}, or "just-in-case principle," which calls for the presentation of all even conditionally or potentially relevant allegations as early as possible. The \textit{Eventualmaxime} is associated with the pre-Code common law procedure, and carries a negative emotional burden in many theoretical discussions about procedure. \textit{See J. SCHULTE, \textit{Die Entwicklung der Eventualmaxime} passim} (1980).
\bibitem{zpo296a} ZPO § 296a (1977). This has been characterized by the legislative draftsman as an expression of the duty to expedite. \textit{Bundestag Drucksache 7/2729, supra note 110, at 76.}
\bibitem{zpo279} ZPO § 279 (1950).
\bibitem{id} \textit{Id.}
\bibitem{id2} \textit{Id. § 279a.}
\bibitem{judgment} Judgment of May 8, 1973, OLG Köln, 26 NJW 1847.
\end{thebibliography}
substantive response to the complaint was delivered at the September 27 hearing. The Landgericht rejected the response as untimely. In sustaining this ruling on appeal, the Oberlandesgericht held that if the plaintiff was unable to respond to the defenses on the spot, it was within the Landgericht's discretion either to reset the hearing, allow the plaintiff time after the hearing to respond in writing, or to preclude the defenses under former section 279. A prior ruling of the appellate court, to the effect that preclusion was never proper at least as long as the second alternative was feasible, was abandoned. Less than a year later, however, the same Oberlandesgericht held that neither special pre-hearing deadlines nor the statutory requirement that writings be served one week before hearing could support preclusion at the first hearing, absent extraordinary circumstances.165

Under the 1977 amendments, the general preclusion provision, section 296,166 defines two categories of situations in which preclusion of late material is not discretionary, but presumptive; that is, the material must be precluded unless the offering party satisfies the court that certain conditions are fulfilled. Material which was subject to a specific deadline may be accepted late only if the court is persuaded either that admission will not delay the proceedings or that the party's delay is adequately excused.167 Waivable dilatory defenses may be accepted late only if the delay is adequately excused.168 The former standard,

166. ZPO § 296 (1977). Section 296 provides in full:
I. Material in support of claims or defenses, which are first presented after expiration of a deadline fixed for them (§ 273 II 1, § 275 I 1, III, IV, § 276 I 2, III, § 277), are only admissible if the court is persuaded that disposition of the case would not be delayed or if the party has adequately excused the tardiness.
II. Material in support of claims or defenses, which were not timely presented in accordance with § 282 I or not timely transmitted in accordance with § 282 II, may be rejected, if the court is persuaded that their admission would delay disposition of the case or that the untimeliness is attributable to gross negligence.
III. Untimely objections which go to the permissibility of the complaint and which are waivable may only be admitted if the defendant adequately excuses the untimeliness.
IV. In the case of paragraphs I and III the basis of excuse shall, on demand of the court, be proven by a preponderance of the evidence.
167. Id. § 296 I.
168. Id. § 296 III. The defenses referred to here are principally (a) the defense of improper venue, which must be asserted at first instance before any argument to the merits, ZPO § 397; (b) the defense that the dispute is subject to agreement to arbitrate; (c) the de-
discretionary preclusion if the court is persuaded that admission would delay the proceedings and that the tardiness resulted from gross negligence, remains for violations of the general obligation to expedite.\textsuperscript{169}

With the introduction of these provisions, preclusion, though of course exceptional, is no longer rare. The number of published decisions dealing with various issues of preclusion has increased significantly.\textsuperscript{170} The most important of these issues are the concept of "delay," the extent to which the court is required to take preparatory measures to avoid delay, and the concept of "adequate excuse."

a. \textit{Delay}

The concept of delay suggests a comparison of circumstances, and one of the questions which most frequently arose in the first years after the 1977 reform was that of choosing the standard against which the time consumed by admission of the late material should be measured. A number of courts and writers took the position that inappropriate delay occurs when the case will take longer after admitting the late material than it would have if the material had been offered on time—often called the "hypothetical delay" standard.\textsuperscript{171} Others argued that the basis for comparison should be the circumstances which would obtain if the late material were simply rejected—called the "absolute delay" standard.\textsuperscript{172} Such pre-1977 authority as existed supported the "absolute delay" standard,\textsuperscript{173} and the Federal Supreme Court has consistently taken that position.\textsuperscript{174}
Applying the absolute delay theory, the Bundesgerichtshof (Federal Supreme Court) has sustained a lower court’s preclusion of a defendant’s answer, where the latter missed a deadline prior to the early first hearing but did answer the day before, and where the early first hearing itself failed to produce a settlement or to resolve disputed issues.\(^\text{175}\) The Court rejected the argument that the holding of a principal hearing as such can never constitute delay, finding rather that the early first hearing was intended by the legislature not merely to prepare for final hearing but also to achieve disposition where feasible.\(^\text{176}\)

The “absolute delay” standard is not necessarily friendly to preclusion. When the court sets a deadline for an answer prior to an early first hearing and the defendant fails to meet it, the defendant may seek to avoid the preclusion by failing to appear at the hearing itself, and then enter objection against the resulting default judgment. Since there must be a hearing on the objection\(^\text{177}\) and since the objection must state the defenses which will be asserted on the merits,\(^\text{178}\) it is likely that appropriate preparatory measures prior to the post-default hearing will permit final disposition without precluding the defenses. Under the “absolute delay” standard, there would then be no delay, and the court could not preclude the admission of material. The Federal Supreme Court so held in 1980,\(^\text{179}\) after lower courts and several writers had taken the position that such an “escape by default” is inconsistent with the purpose of the 1977 reform.\(^\text{180}\) At the same time, the Federal Supreme Court made it clear that the late defenses are admissible only to the extent that they can be dealt with in the same hearing, stating that “the applicable law accepts the delay produced by the default pro-


\(^{176}\) Cf. Deubner, Die Zurückweisung fristwidrigen Vorbringens im frühen ersten Termin, 36 NJW 1026 (1983), who argues that this decision constitutes “overacceleration,” and that the delay involved in setting and holding a principal hearing which would have been required if the answer had been timely should be regarded as immaterial.

\(^{177}\) ZPO § 341a (1977).

\(^{178}\) Id. § 340 III.

\(^{179}\) Judgment of Feb. 27, 1980, Bundesgerichtshof, 76 BGHZ 173. See also Judgment of July 4, 1979, OLG Saarbrücken, 33 MDR 1030, which found error in the preclusion of defendant’s material at the early first hearing, where defendant had missed a pre-hearing deadline, where judgment was to be handed down at a later date anyway, and where the court could have set a final hearing for both proof-taking and judgment.

Admission of the late material, however, must not cause additional delay.\footnote{Judgment of Feb. 27, 1980, Bundesgerichtshof, 76 BGHZ 173, 177.} When the issue is not multiplication of hearings, but merely extending the amount of time spent at a single hearing, the cases suggest a strong presumption against a finding of delay. Thus, the fact that one or two witnesses would have to be examined at the hearing has been held insufficient for a finding of delay, where the scope of examination would be narrow and there would be a full opportunity to respond to such proof at the hearing.\footnote{Judgment of Mar. 25, 1980, Bundesgerichtshof, 33 NJW 1848.} Moreover, the Federal Supreme Court has held that delayed "disposition of the case" (Erledigung des Rechtsstreits) means delay of the entire case, so that where late material relates to a separable part of the claim which upon preclusion can be disposed of by partial judgment, but the remainder of the claim or claims will require further hearings, there would be no delay within the meaning of the statute and preclusion is improper.\footnote{Judgment of June 16, 1980, Bundesgerichtshof, 77 BGHZ 306; see the critical note by Deubner, 33 NJW 2356 (1980), who argues that the provision for partial judgments, ZPO § 301, itself expresses a policy of expedition and implies separability of claims for preclusion purposes as well. Cf. Judgment of June 6, 1979, Bundesgerichtshof, 34 MDR 50 (an interlocutory judgment under ZPO § 304 on liability may sustain preclusion). This case was distinguished in the 1980 decision as affecting the entire claim whereas the partial judgment does not.} On the other hand, where a necessary hearing which ought to be set "as soon as possible" would have to be set substantially later to accommodate a late offer of proof, the Federal Supreme Court has held that preclusion would be proper.\footnote{Judgment of Oct. 23, 1980, Bundesgerichtshof, 34 NJW 286 (alternative ground). Cf. Judgment of Oct. 30, 1979, OLG München, 34 MDR 148 (holding that a delayed date for judgment, to make room for a written post-hearing exchange on material tardily introduced at the hearing, was not such a delay as to justify preclusion).}

b. \textit{Contributory Error by the Court}

A number of cases have dealt with the question of whether failure by the court to fulfill its duties constitutes a barrier to preclusion. In general, it is held that where reasonable preparatory measures under section 273 can prevent delay, the court must undertake to do so before precluding late material.\footnote{See, e.g., Judgment of May 22, 1979, BVerfG, 51 BVerfGE 188, 192.} Preclusion was thus held improper where
the court, after receiving a late memorandum offering proof of a defense, failed to direct the production of the proof and the personal appearance of other parties at a hearing already set for six weeks later, and where the defense could have been considered on the merits without delay. It has been held unreasonable, however, to require the court to subpoena eight witnesses to appear at the first appellate hearing, where those witnesses ought to have been offered at first instance, or to require the court to take special measures to reach a witness rather than rely on the mails, even though in either case the court might have succeeded in avoiding the delay.

It is clear that any formal defect in the setting or notification of deadlines will bar preclusion of late material. This includes cases in which the order served on the defendant setting a deadline is signed by the clerk rather than the presiding judge, or is informally communicated rather than formally served, or fixes the earliest permissible date despite evidence before the court that the defendant may not actually know about the pendency of the lawsuit, or the clerk uses a notice of early first hearing form to notify the unrepresented and still silent defendant of the date for a final hearing after written pretrial procedure.

**c. Excuse**

Preclusion of late material can also be escaped by excusing the delay. In this respect, the major change effected by the 1977 reform was to establish ordinary negligence or fault as the standard for preclusion of material subject to a fixed deadline, while the former standard of gross negligence remains for material subject only to the general duty to expedite. The failure of an attorney, at least, to meet a fixed deadline is presumptively negligent. There are few published deci-

195. See A. BAUMBACH, W. LAUTERBACH, & P. HARTMANN, supra note 55, ZPO § 296 Anm. 1.
sions in which the adequacy of any excuse is discussed.\textsuperscript{196} It has been
held that the failure of the defendant to hire a lawyer in time\textsuperscript{197} or to
tell the lawyer soon enough about particular defenses\textsuperscript{198} were not suffi-
cient excuses, while the fact that the defendant’s regular attorney was
on vacation at the time of service and did not return until too late to
meet a deadline has been held to be a sufficient excuse.\textsuperscript{199} There have
been many complaints that the forms of court notice, which require the
addressee to check one or more of a number of boxes, are confusing
and inadequately inform the party about what is required. While such
an excuse may be more forceful in \textit{pro se} cases than in attorney-repre-
sented cases, its chances are slim in any event.\textsuperscript{200}

Finally, the ambivalence of the courts toward preclusion of late
material can be observed in their answers to two further questions.
First, it is firmly established that erroneous admission of late material is
not reviewable on appeal, and that appellate courts cannot ignore evi-
dence which has been erroneously admitted below. It is argued that the
sole purpose of the preclusion rules is to expedite the lawsuit, and that
that purpose cannot be accomplished either by remand to the court of
first instance or by ignoring on appeal that which has already formed
the basis of judgment.\textsuperscript{201} Second, the preclusion rules are a direct limi-
tation on the constitutional right to be heard, which has been inter-
preted as including the right to have one’s properly presented offerings
actually considered.\textsuperscript{202} Every erroneous preclusion of relevant mate-

\textsuperscript{196}. ZPO § 85 II makes it clear that negligence of an attorney is attributable to the client. But

courts are not always unmindful of the reality behind that rule—that clients frequently
have little control over their counsel and have difficulty even selecting one on an informed
basis—and may try to avoid preclusion on that account. For a critical discussion of the rule,
see Leipold, supra note 171, at 254. \textit{See infra} for the nonreviewability of an improper admis-
sion of delayed material.


\textsuperscript{198}. This excuse was rejected in a case which I observed in the \textit{Landgericht}
Freiburg, May 20, 1981, where the client admitted he had known all along that there was evidence
available to help establish a particular point, but had not bothered to tell his lawyer until the
hearing itself.

\textsuperscript{199}. Judgment of May 23, 1979, OLG Köln, 33 NJW 2421.

\textsuperscript{200}. \textit{Cf.} Judgment of Feb. 13, 1980, Bundesgerichtshof, 33 NJW 1102, and the note to
this decision by Schneider, \textit{supra} note 189, at 499 (the excuse itself was rejected because it
was late). The criticism of forms is also voiced strongly by Franzki, \textit{supra} note 109, at 11.

\textsuperscript{201}. Judgment of Jan. 21, 1981, Bundesgerichtshof, 34 NJW 928. \textit{Cf.} Deubner, \textit{Com-
ment}, 34 NJW 929 (1981) (arguing that the court’s ruling on this point was unnecessary).
\textit{See also} Judgment of June 4, 1980, OLG Köln, 33 NJW 2361; Judgment of July 19, 1979,
LG Freiburg, 33 MDR 1030. Under the prior law as well, an appellate court could not
preclude material accepted at trial level. Judgment of Nov. 12, 1959, Bundesgerichtshof, 13
NJW 100.

rial, therefore, presents a potential federal constitutional issue, and the Federal Constitutional Court has handed down a few decisions which suggest that a simple error in applying the preclusion rules may be basis for constitutional review. The proposition has been criticized both as undermining the effectiveness of the reforms and as an undue burden on the Federal Constitutional Court itself. The latest Federal Constitutional Court pronouncement on the subject indicates future caution. Nonetheless, the issue emphasizes the great seriousness with which the West German Court system takes procedure's primary goal of rendering a materially correct decision.

4. Other Sanctions for Delay

Under the prior law, section 278 II provided for a cost sanction to be imposed upon the offering of late material, defined as that which

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1, 1978, 47 BVerfG 182 (1st Sen.). In pre-reform decisions, the Constitutional Court had made it clear that preclusion on procedural grounds was not per se unconstitutional, but that a clearly erroneous application of preclusion rules would be. See, e.g., Judgment of Oct. 10, 1973, BVerfG, 36 BVerfGE 92 (2d Sen.), where material was properly offered but ignored at the trial level, then properly reoffered on appeal, but the appellate court rejected it as having been offered for the first time on appeal. This error was held to violate article 103 of the Basic Law, i.e., the right to be heard.

203. The First Senate has appeared to distinguish between a lower court's erroneous interpretation of the preclusion provisions, and its erroneous application thereof. The former is properly a matter for the regular courts and does not rise to the level of constitutional violation. Judgment of Mar. 12, 1979, BVerfG (1st Sen.), 32 NJW 277. The latter, however, constitutes a per se violation of the right to be heard, Judgment of May 22, 1979, BVerfG, 51 BVerfGE 188 (1st Sen.); Judgment of Feb. 9, 1982, BVerfG, 35 NJW 1453 (1st Sen.) (improper to preclude for violation of a deadline, where the order fixing the deadline was unclear). Its latest decision, however, may even have abandoned that distinction. The court found that the interlocutory review procedure of the ZPO (Beschwerde) expressly rejects preclusion of late material, and that therefore erroneous preclusion on interlocutory review constituted a violation of the right to be heard. Judgment of Feb. 9, 1982, BVerfG, 35 NJW 1635 (1st Sen.). Such an interpretation of the ZPO § 570, however, had been rejected in most prior decisions of the regular courts. See Schumann, Keine PrÃ¼klarung im Beschwerdeverfahren: Das Bundesverfassungsgericht als Bundesgerichtshof, 35 NJW 1609 (1982).

204. See Schumann, supra note 203, at 1610; Deubner, Comment, 33 NJW 1945 (1980). For a detailed and comprehensive critique of the Constitutional Court's failure to distinguish between constitutional and nonconstitutional standards, see Schumann, Bundesverfassungsgericht, Grundgesetz und Zivilprozess, 96 ZZP 138 (1983).


206. See, e.g., Bettermann, supra note 7, at 379; Bruns, Die Frist als gesetzgeberisches Mittel der deutschen Zivilprozessreform zur Beschleunigung der Verfahren, in STUDI IN ONORE DI E.T. LIEBMANN 123, 130 (1979). On the profusion and confusion of mechanisms for correcting judicial error in Germany, see Gilles, Die Berufung in Zivilsachen und die zivilgerichtliche Instanzenordnung, in HUMANE JUSTIZ 147 (P. Gilles ed. 1977).

207. ZPO § 278 II (1950).
ought to have been presented at a previous hearing (nachträgliches Vorbringen). The court was thus required to impose on a party the costs caused by his delay. It is not at all clear how often this sanction was utilized although some costs of delay—such as having to continue the hearing to another date or changing a judgment date into a date for proof-taking—might be relatively easily fixed. The difficulties of proving the cost of delay, however, could be avoided by the use of a fixed “delay penalty,” utilizing the regular court fee structure based on the amount in controversy. Cost burdens were also the chief sanction behind the default judgment, which was otherwise so easy to reopen.

The initial successes of the Stuttgart Model were achieved through the use of such cost sanctions as reinforcement for the undoubtedly more important sheer effort of the judges to adhere to schedules and drive the parties and the lawsuit to a conclusion. For this reason, the chief architect and implementer of the Model argued against the introduction of sharper preclusion rules as sanctions for delay. Procedural sanctions are adequate if properly used, it was maintained, and preclusion of material produces an unacceptably false factual basis for decision.

From its first draft in 1967, however, the Civil Procedure Commission took the position that cost sanctions alone were inappropriate or inadequate and that preclusion was the most promising sanction against delay, although the basis for this argument shifted from the

208. Cf. F. Stein, M. Jonas, E. Schumann & D. Leipold, supra note 147, § 278 Anm. 2B. See also ZPO § 95 (1950), permitting imposition of costs for any delay caused by a party’s fault.

209. A. Baumbach, W. Lauterbach, & P. Hartmann, supra note 55, ZPO § 95 Anm. 2 (pointing out that the provision, which includes all cases to which § 278 II would apply, has little significance in practice, precisely because the amounts involved are often negligible or simply inseparable from general costs). Accord Deubner, Gedanken zur richterlichen Aufklärungs und Hinweispflicht, 79 Festschrift für Gerhard Schiedermeir 79, 88 n.13 (1976).

210. Gerichtskostengesetz [GKG] §§ 34 (1975) (formerly § 47 (1957)). See A. Baumbach, W. Lauterbach & P. Hartmann, supra note 55, at 234 (noting that even this provision is too little used).

211. ZPO § 344 (1950).

212. See Bender, supra note 23, at 442-44.

213. See supra note 206 and accompanying text. The main criticism of the preclusion provisions in the first draft of the reform proposal was of this character. See Stötter, Lange Prozessdauer und ihre Ursachen, 22 NJW 521 (1968); Deutscher Anwaltsverein, Stellungnahme, 1968 AnwB1 354. Cf. Leipold, supra note 171, who argues that the chief defect of the preclusion device is its authoritarian character.
divisiveness of cost sanctions\textsuperscript{214} to their discriminatory and ineffective nature.\textsuperscript{215} The express cost sanction in the provision dealing with late offerings of proof was therefore eliminated. Nonetheless, the general cost sanctions for delay remain.\textsuperscript{216} Since the general cost provisions apply to any delay caused by a party's fault, and not merely to situations where preclusion would be mandatory under section 296 I, they could still be useful.

E. The Principal Hearing and the Role of the Judge

The effort to overcome the traditional diffusion of the lawsuit into multiple hearings by concentrating as much as possible into a single, comprehensively prepared hearing required a broad statutory blueprint for the principal hearing. This is provided by new ZPO section 278,\textsuperscript{217} which, in combination with section 137,\textsuperscript{218} presents the following model:\textsuperscript{219}

(a) call of the case and identification of participants present;
(b) introduction and statement of the case by the judge or presiding judge;
(c) response of the parties, if any, to that statement;
(d) discussion of the case among court and parties and/or attorneys;
(e) proof-taking;
(f) further discussion and argument with reference to the results of the proof-taking;
(g) deliberation by the court; and
(h) announcement of the judgment, or fixing of a subsequent date for the announcement, possibly with an interim deadline for written statements by the parties.

This model corresponds roughly to that followed by the Stuttgart Model. The role of judicial proposals for settlement, central to the Stuttgart Model, was also formally strengthened by the 1977 reform. This was accomplished largely by transforming a technically permis-

\textsuperscript{214} BERICHTE DER KOMMISSION 1961, supra note 37, at 206.
\textsuperscript{215} BUNDESTAG DRUCKSACHE 7/2729, supra note 110, at 39 (discriminates against poorer parties); BERICHTE DER KOMMISSION 1977, supra note 2, at 52 (ineffective to secure compliance).
\textsuperscript{216} See ZPO § 95 (1950) and GKG § 34 (1975); see supra notes 209-10 and accompanying text.
\textsuperscript{217} ZPO § 278 (1977).
\textsuperscript{218} Id. § 137.
\textsuperscript{219} See A. BAUMBACH, W. LAUTERBACH, & P. HARTMANN, supra note 55, ZPO § 278 Anm. 1; L. ROSENBERG & K. SCHWAB, supra note 99, at 616.
sive provision\textsuperscript{220} into a duty to consider settlement possibilities at every stage of the lawsuit.\textsuperscript{221}

Other than the fact that a model for a single hearing is now set forth in the statute, perhaps the only new item in the list is the required statement of the case by the judge at the outset, although even this was already standard practice in many courts before 1977.\textsuperscript{222} This provision has been viewed with scorn by some writers, on the basis that, at least in cases with counsel, the parties are already informed about the matter.\textsuperscript{223} It is clear, however, that what was intended is a statement from the court’s point of view, including indications of how the court views the questions of law, probable outcome, and so forth.\textsuperscript{224} This is often the most important missing link in settlement discussions, and of course, it gives the parties something to focus on during argument. The extent to which this device is used for the purpose of disclosing the court’s thought varies from judge to judge and from case to case.\textsuperscript{225} So used, however, it is a powerful instrument for guiding the hearing directly to the disputed points. In current terminology, this is often referred to as “legal dialogue” (\textit{Rechtsgespräch}). There are arguments to the effect that open disclosure by the court of its views soon enough to allow the parties to respond and direct their factual statements accordingly is not merely a good idea, but an obligation.\textsuperscript{226} This form of disclosure, of course, can occur already prior to the hearing, in the form of directions to the parties to clarify specified points.\textsuperscript{227} The ZPO now also contains an express requirement that the court give the parties an opportunity to speak before ruling on a legal basis which one or both

\begin{itemize}
  \item \textsuperscript{220} ZPO § 296 (1950).
  \item \textsuperscript{221} ZPO § 279 (1977).
  \item \textsuperscript{222} A. BAUMBACH, W. LAUTERBACH, & P. HARTMANN, \textit{supra} note 55, ZPO § 278 Anm. 2.
  \item \textsuperscript{223} \textit{See}, e.g., Bettermann, \textit{supra} note 7, at 372.
  \item \textsuperscript{224} A. BAUMBACH, W. LAUTERBACH, & P. HARTMANN, \textit{supra} note 55, ZPO § 278 Anm. 2; Grunsky, \textit{supra} note 109, at 203; Putzo, \textit{Die Vereinfachungsnovelle}, 30 NJW 1, 3 (1977); G. \textsc{Von Craushaar}, \textit{supra} note 108, at 96.
  \item \textsuperscript{225} Franzki, \textit{supra} note 109, at 11, notes that many courts simply skip this step for reasons of time. \textit{See also} L. ROSENBERG & K. SCHWAB, \textit{supra} note 99, at 616. Judges with whom I spoke in Hamburg and Freiburg who make effective use of it were at some pains to caution me that there were many judges who were much less “open” in their hearing techniques.
  \item \textsuperscript{226} For a thoughtful espousal of this view, with references to the literature, see Hensen, \textit{Zum Rechtsgespräch im Zivilprozess}, in \textit{AUS DEM HAMBURGER RECHTSLEBEN} 167 (Festschrift für W. Reimers 1979). \textit{See also} R. WASSERMAN, \textit{DER SOZIALE ZIVILPROZESS} 122-23 (1978); Nagel, \textit{Funktion und Zuständigkeit des Richters}, in \textit{HUMANE JUSTIZ} 53, 58-59 (P. Gilles ed. 1977); Deubner, \textit{supra} note 209, \textit{passim}.
  \item \textsuperscript{227} ZPO § 173 II (1977).
\end{itemize}
parties have obviously overlooked or thought unimportant.\textsuperscript{228}

The obligation of the court, embodied in ZPO section 139, to assure that the parties make full statements concerning the relevant facts and make appropriate demands for relief, has remained formally unchanged since 1924.\textsuperscript{229} While it is difficult to point to a universal trend, the new emphasis on expedition by the parties, enforced with deadlines and preclusion, brings a corresponding focus of attention on the role of the court in assuring that the case is as fully developed as possible. Moreover, at least one decision of the Federal Constitutional Court gives this judicial duty another dimension: a violation of section 139 caused by obtaining the consent of a non-represented spouse to accept the other spouse's low bid at an execution sale without first ascertaining that she understood the consequences was held to be a denial of equal treatment under Article 3 of the Basic Law.\textsuperscript{230}

Some recent decisions have dealt with the question of whether section 139 permits a court to bring previously overlooked claims or defenses to a party's attention. There is a split of authority on the propriety of court initiative regarding the defense of prescription (statute of limitations).\textsuperscript{231} No doubt the traditional conception of the judicial role supports disapproval of such initiative, and would limit the role of the court to pointing out the burdens and risks of the parties regarding issues over which they hold the power of disposition.\textsuperscript{232} Contemporary notions of the welfare state (\textit{Sozialstaat}) pull in the op-

\textsuperscript{228} Id. \S 278 III. For the point that this was already a constitutional requirement anyway, see Order of Mar. 27, 1980, Bundesgerichtshof, 33 NJW 1794. To that effect, without mentioning \S 278 III, see Judgment of Oct. 7, 1980, 55 BVerfGE 95 (2d Sen.).

\textsuperscript{229} ZPO \S 139 (1950). On this provision and its many facets, see Kaplan, von Mehren & Schaefer, \textit{supra} note 1, at 1224. ZPO \S 139 provides in pertinent part:

1. The presiding judge shall see to it that the parties declare themselves fully on all material facts and put the appropriate demands for relief, in particular also supplement inadequate statements of alleged facts and designate sources of proof.

For this purpose, in so far as necessary, he shall discuss the dispute with the parties from the factual and the legal points of view and put questions.

\textsuperscript{230} Judgment of Mar. 24, 1976, BVerfG, 41 BVerfGE 64 (2d Sen.).


\textsuperscript{232} \textit{See}, e.g., R. Stürner, \textit{Aufklärungspflicht der Parteien des Zivilprozesses} 64, 65 (1976). The prevailing view understands ZPO \S 139 I thus as simply a duty to remind, which imposes no independent clarifying task upon the judge, rather obliges him merely to remind the parties to avoid the risk of nonsubstantiation and completely fulfill their duty to clarify. Deubner, \textit{supra} note 209, at 88, points out that judges "all too often" simply asked counsel if they had anything more to present.
posite direction, demanding that public authorities compensate for differences in resources among social combatants. It is certainly difficult to distinguish judicial questions designed to raise new issues from those designed to clarify those issues imperfectly stated. Likewise, it is difficult for the court to separate its obligation of assuring awareness of the necessity for offers of proof on disputed propositions, from its duty to assure that appropriate demands for relief are made concerning facts already fully alleged and proven. The specific issue of the defense of prescription fits within the latter category if the passage of the crucial period of time is proven by the plaintiff's own allegations. Moreover, it has been held that the defense of prescription can be raised at any time, even for the first time on appeal, and cannot be waived by mere silence nor be precluded as a late offering under section 296, because it can only work to shorten the proceedings. The public interest in efficient judicial administration therefore supports judicial initiative. Otherwise, a silent defendant can strike at any time, nullifying the court's preparation for other disposition of the case. Finally, critics have noted the irony of correcting the error by disqualifying the judge, when the newly educated defendant will surely present the defense to a new judge. The result may well be a rule, purporting to limit judicial activity, which can be relatively easily evaded by judges so disposed, just as the command of section 139 to stimulate the parties to clarify was apparently ignored by more passive judges.

Active pursuit of settlement by the court during the course of the lawsuit, including formulation of concrete proposals, has long been a staple of German civil procedure. Under the prior law, in addition to the general provision permitting the court to attempt settlement at every stage, the Amtsgericht judge was under a duty to work toward settlement, and the preparing single judge in the Landgericht had a

233. Wache & Selig, supra note 231, at 1171:

The judge should be on guard, that no party to a lawsuit lose merely because he is linguistically or intellectually less developed than the other, can spend less money for pursuit of legal rights or has ended up with a less expert lawyer. Such accidental factors in legal success are, according to the rule-of-law and social-state clauses of the Basic Law, as far as possible to be eliminated.

234. For discussion of practical problems in implementing the restrictive view, see Schneider, supra note 231, and Deubner, supra note 209, passim.


236. See Schneider, supra note 231, at 977; Deubner, supra note 209, at 87.

237. Wache & Selig, supra note 231, at 1171.

238. See Kaplan, von Mehren & Schaefer, supra note 1, at 1222-24.

239. ZPO § 495 (1950).
settlement attempt as the first order of business.\textsuperscript{240} With the elimination of the preparing single judge in 1975,\textsuperscript{241} however, the general permissive provision was the only statutory basis for such activity in the \textit{Landgericht}. The 1977 amendment of the permissive section, current section 279, was designed not only to close this gap, but also to foster further assimilation of \textit{Amtsgericht} and \textit{Landgericht} practice.\textsuperscript{242} The language of section 279 suggests compromise in some respects, but it is doubtful that significant substantive change was intended.\textsuperscript{243}

There has also been a quickening of critical interest in the subject of judicial settlement activity during the reform period. An obvious concern, already present in the \textit{Amtsgericht} but perhaps emphasized by the elimination of the preparing single judge in the \textit{Landgericht}, is that the same judges who are ultimately responsible for judgment are also involved in settlement efforts. The question of how far the judge can go in urging settlement without compromising either impartiality or responsibility to the substantive law is acute. In one of the most comprehensive analyses of these issues, published in 1976,\textsuperscript{244} the position was taken that the judge may not assist in the conclusion of a settlement which is inconsistent with the substantive law. In particular, according to this source, if the complaint does not state a legally sufficient claim, the judge may not suggest or support a compromise granting the plaintiff partial relief.\textsuperscript{245} Further, the judge should not propose a settlement favoring the party bearing the burden of persuasion, where the allocation of the burden reflects a substantive policy and it appears unlikely that the party will be able to meet the burden.\textsuperscript{246} It was also maintained

\textsuperscript{240} \textit{Id.} § 348 I.
\textsuperscript{241} See supra text accompanying note 53.
\textsuperscript{242} On the goal of assimilation see, e.g., Putzo, supra note 224, at 6; A. Baumbach, W. Lauterbach, & P. Hartmann, supra note 55, ZPO § 495 Anm. 1.
\textsuperscript{243} On the terminological subtleties, see Stürner, \textit{Die Aufgabe des Richters, Schiedsrichters und Rechtsanwalts bei der gütlichen Streiterledigung}, 33 JR 133 (1979). At least one judge has interpreted the amendments as requiring greater emphasis on settlements, and has reported with satisfaction a substantial shift in the mix of dispositions in his court away from final judgments (28.9\% in 1976, 14.2\% in 1977) toward settlements (8.9\% to 12.0\%), voluntary dismissals (12.5\% to 17.7\%), and acknowledgements of claim (4.5\% to 9.9\%). Weber, \textit{Gütliche Beilegung und Verhandlungsstil im Zivilprozess}, 56 DRiZ 166, 169 (1978). The judge emphasizes the role of judicial style at hearings in encouraging settlement, and identifies three style-types: authoritarian, laissez-faire, and democratic. He argues that the democratic style, utilizing direct participation of and dialogue between the parties, not their lawyers, is best suited to promotion of settlement. The judge attributes his own success to adoption of that style.
\textsuperscript{244} Wolf, \textit{Normative Aspekte richterlicher Vergleichstätigkeit}, 89 ZZP 260 (1976).
\textsuperscript{245} \textit{Id.} at 276.
\textsuperscript{246} \textit{Id.} at 278-79.
that judges should not propose a settlement disadvantaging a party to whom the law gives special protection—such as that afforded tenants against eviction—unless it is highly probable that a fully litigated judgment would go against that party. 247 Other writers, as well, have viewed judicial drive toward settlement as potentially dangerous to substantive interests, 248 especially because the structure of attorneys’ fees, which are based generally on the amount in controversy rather than on the amount of work done, provides a strong incentive to settle. 249 In addition, sociological studies have attempted to identify the conditions under which formal settlement can be achieved, the factors which influence the success of formal settlement in ending the underlying dispute, the advantages and disadvantages of settlement over coercive judgment, and so on. 250

With all of this attention on settlement in the literature, it is interesting to note that the relative frequency of settlements as against fully litigated judgments has slightly decreased nationally in the course of the 1970’s, 251 and remains considerably lower than comparable figures

247. Id. at 280.
249. See Grunsky, supra note 248, at 168.
251. Rohl, supra note 250, at 283, shows that from 1970 to 1976 the percentage of dispositions of ordinary civil cases in the Amtsgericht attributable to settlement remained fairly constant at about 10% and in the Landgericht at about 19%. The percentage attributable to contested judgment, on the other hand, rose in the Amtsgericht from 19% to 30% while varying between 30% and 34% in the Landgericht. Official data in Rechtspflege, tables 3.2 and 4.3, show little change from 1977 to 1980. By 1981, (tables 4.2 and 5.3), settlements were down to 9.5% in the Amtsgericht and 17.1% in the Landgericht, counterbalanced somewhat in the latter courts by a rise in default judgments (which can reflect de facto settlement) from 16.9% to 19.3%. Of course, the figures for particular courts may vary dramatically. See, e.g., Weber, supra note 243.

One reason for this stagnation in the relative proportion of settlements may be their cost treatment. Once a case has proceeded to formal hearing and proof-taking, it may be more expensive to settle than to allow the court to proceed to judgment. In such a situation, settlement will save the court fees payable for rendition of a judgment, but will add a much larger fee payable to the attorneys which is not payable for the judgment. See Bundesgebührenordnung für Rechtsanwälte [BRAGO] § 23 (attorneys’ fee for settlement):
in American experience,\textsuperscript{252} where judicial pressure towards settlement tends to be less obtrusive.

V. THE SCOPE AND FORM OF APPEAL

A. First Appeal: \textit{Berufung}

1. Two Fact-Instances

From the American point of view, the most striking aspect of the German \textit{Berufung} is that it is not limited to questions of law, or even to the record developed below, but opens up the entire dispute for redetermination to the extent requested by the parties. In the traditional view, appeal is a continuation of the original proceeding, part of the "unity of oral argument."\textsuperscript{253} This means, on the one hand, that the record below is part of the appellate proceeding, and need not be regenerated in order to be relied upon by the appellate court. On the other hand, the appellate court is free to reexamine the witnesses who testified in the proceeding below, reevaluate the documentary evidence offered below, and entertain new allegations and evidence.\textsuperscript{254} This freedom to reopen cases on appeal, as originally adopted in 1877, soon led to the common experience of lawsuits in which the trial at first instance was only an inadequately prepared and incompletely presented prelude to the real

\textsuperscript{252} GKG Annex 1, No. 1016 (fee for judgment). For general discussion of the developments in costs and fees, see infra section V of the text.

\textsuperscript{253} It is usually asserted that more than 90\% of civil cases in the United States are ultimately settled by agreement of the parties. \textit{See}, e.g., Nejelski, \textit{With Justice Affordable for All}, 19 JUDGES’ J. 4, 7 (1980). In 1980, in the federal district courts, only 6.5\% of civil cases reached trial, and 44.5\% were disposed of without any court action—these figures showing a decreasing and increasing trend, respectively, since 1969. \textit{Administrative Office of the United States Court, Annual Report of the Director} 80, table 34 (1980). The category of "contested judgments," however, is broader than fully tried cases; it has been estimated that 38\% of all civil dispositions in federal courts in 1970 were "contested cases" (up from 18\% in 1960). \textit{See} Hurst, \textit{The Functions of Courts in the United States 1950-1980}, 15 LAW & SOC’Y REV. 401, 426 (1980-81). In view of the concentration of cases of higher amounts in controversy in the federal courts, that figure would certainly be lower in any state court system. In two California counties in 1970 less than 15\% of civil dispositions were "contested judgments:" Friedman \& Percival, \textit{A Tale of Two Courts: Litigation in Alameda and San Benito Counties}, 10 LAW & SOC’Y REV. 267, 284-85 (1976).

\textsuperscript{254} ZPO § 515 (1950) provides: "Before the appellate court, within the limits of the parties' demands, the dispute is argued \textit{de novo}.” \textit{See also} L. ROSENBERG \& K. SCHWAB, \textit{supra} note 99, at 850.

\textsuperscript{254} ZPO § 537 (1950) provides: "The subject matter of argument and decision in the appellate court is all disputed points relevant to a claim sustained or rejected below, with respect to which the parties' demands on appeal require argument and decision, even if these points were not argued or decided below.” \textit{See} L. ROSENBERG \& K. SCHWAB, \textit{supra} note 99, at 850.
trial on appeal.\textsuperscript{255}

By the time of the first major overhaul of German general civil procedure in 1924, the Austrian Code of Civil Procedure had eliminated the second fact-instance altogether, limiting appeals to inquiry into errors of the court below.\textsuperscript{256} Nonetheless, the 1924 German reforms rejected this aspect of the Austrian model, preferring to discourage delay by introducing new preclusion rules, which were further strengthened in 1933. New matter in support of or in defense of a claim, which could have been offered below and whose consideration would delay conclusion of the lawsuit on appeal, could be entertained by the appellate court only if it determined that neither intent to delay nor gross negligence caused the failure to present the material earlier.\textsuperscript{257}

The measure proved to be relatively ineffective. The Preparatory Commission found that over twenty-five percent of all contested judgments at first instance were appealed, that more than one-third of all appeals were successful, and that perhaps one-fourth of all successful appeals were attributable to new allegations or proofs.\textsuperscript{258} These facts were perceived to be evidence of unacceptable delay, and the Commission considered a number of alternative remedies designed to push the center of gravity of the lawsuit back to the first instance. Again, both limitation of appeal to questions of law and the Austrian example of review for error below were discussed and rejected. In particular, the Commission's majority saw two undesirable effects of limiting appeals to a review of questions of law: first, the job of the appellate court would be more complicated, by reason of greater concern for the procedural behavior of the court below; and second, the court of first instance would proceed in a more formal manner, in order to avoid being found in error on appeal.\textsuperscript{259} Similar objections prevailed against the proposal to follow the Austrian example. The German and French tradition of two fact-instances, on the other hand, was seen as favoring the most thorough factual determinations and embodying the least obsession with procedural technicalities.\textsuperscript{260}

The Commission therefore recommended strengthening the rules of preclusion, so as to discourage the practice of holding back materials

\textsuperscript{255} See Bundestag Drucksache 7/2729, supra note 110, at 40-41 (1974).
\textsuperscript{256} See Bericht der Kommission 1961, supra note 37, at 128.
\textsuperscript{257} ZPO § 529 II (1933).
\textsuperscript{258} Bericht der Kommission 1961, supra note 37, at 119.
\textsuperscript{259} Id. at 127-28.
\textsuperscript{260} Id. at 131.
until appeal. By the time the Commission for Civil Procedure Law presented its proposed amendments, it was able to state that the decision to retain the second fact-instance was no longer challenged.261

2. New Preclusion Rules

The new preclusion rules for appeals largely track the changes instituted for the courts of first instance. The latter are incorporated by reference in ZPO section 527,262 to govern failure in meeting the deadlines imposed by the appellate procedure itself. The core of the reform, however, is a revised provision, now section 528,263 for the handling of new material. Section 528 divides material into three categories, each with a different standard for preclusion. If the material was subject below to a specific deadline but not presented, it is precluded on appeal

261. BERICHT DER KOMMISSION 1977, supra note 2, at 163. No doubt as corollary to this conception of appeal the availability of new trial at first instance is quite limited. Before judgment, the court has the discretionary power to reopen a hearing which has been concluded pursuant to ZPO § 156. While exercise of this power has been relatively liberal in the case of newly discovered evidence, the court is obligated to reopen a hearing only if it is shown that the court itself failed to fulfill its duty to clarify under ZPO § 139. In other words, the court must reopen only if it ought to have made further inquiry on the basis of what had already been presented. See Judgment of Feb. 17, 1970, Bundesgerichtshof, 53 BGHZ 245; L. ROSENBERG & K. SCHWAB, supra note 99, at 618. After judgment, a case may be reopened in the same instance only under narrowly specified circumstances, ZPO §§ 578-80, which are: when the court was improperly constituted; when a judge was subject to disqualification; when a party was improperly represented without its consent, ZPO § 579; where the judgment was based on perjured or falsified evidence; or where the judgment was obtained as a result of misconduct on the part of attorneys, judges or the winning party, ZPO § 580. Aside from these fundamentally tainted circumstances, only two sorts of newly discovered material can afford a basis for reopening a hearing, ZPO § 580(7): a previous judgment or award which would have bound the parties in the subsequent action, or a previously unknown or unproveable document which would have produced a more favorable judgment for the moving party. Less than .1% of all cases filed in the Landgericht, and scarcely .1% in the Oberlandesgericht, are petitions for reopening of judgments. See RECHTSPFLEGE, supra note 130, tables 5.1 and 8.1 (1980). None of these grounds, of course, is comparable to new trials in the United States based on the weight of the evidence.

Also unchanged by the reform are the longstanding provisions for reversal and remand to the court of first instance as a remedy on appeal. Zivilprozessordnung § 538 requires remand for further proceedings, if the judgment below erroneously: rejected a defense as legally impermissible, rested solely on procedural defenses, rested on denial of liability without reaching contested damages issues, or rested on default. Section 539 permits remand where the proceedings at first instance suffered from essential procedural error. Section 540, however, goes on to provide that the appellate court may forego remand and render a decision itself, if it deems that procedure to be more appropriate for that particular case. This remedy of remand, which is the normal disposition for correction of error below in systems where appeal is limited to review of the record, is used in a little over 10% of all successful appeals in Germany. See RECHTSPFLEGE, supra note 130, table 8.7 (1981).

262. ZPO § 527 (1977).
263. Id. § 528.
unless the offering party shows either that admission would not delay disposition of the lawsuit, or that there is sufficient excuse for the omission. If the failure to offer the material below violates the general duty to expedite the proceedings, it is precluded unless the offering party shows either that admission would not delay disposition of the lawsuit or that the omission below was not grossly negligent. If the material was offered below but properly excluded, it remains excluded on appeal whether or not its admission there would cause delay.

These provisions have presented a number of problems of interpretation, the most troublesome of which stems from the difference in treatment between material offered for the first time on appeal and that which was offered but rejected below. If material is offered for the first time on appeal which should have been offered below, a showing that admission will not delay the proceedings will allow it to be considered. The normal procedure on appeal is a written, pre-hearing exchange followed by a single hearing. Since the courts have held that there is no delay if the matter can be handled at a hearing which must be held anyway, such a showing can usually be made, even if late admission of the material would have delayed the proceedings below. On the other hand, if the material was actually offered below but properly precluded as untimely, it will not help to show that admission on appeal will not delay disposition at that level. The obvious practical result of this differentiation is to encourage the party with late material at first instance to save it for appeal, a result which contradicts the goal of concentration.

264. Id. §§ 528 I.
265. Id. §§ 528 IIId (ii).
266. Id. §§ 528 II.
267. Id. §§ 528 III.
268. See id. § 528 IIId (iii)(A).
269. See, e.g., Hartmann, supra note 117, at 1463; compare this “escape by appeal” with the “escape by default” allowed at first instance. See supra text accompanying notes 179-80.

To the extent that the tactic is successful, however, ZPO § 97 II may require some portion of the costs of appeal to be imposed on the winning party. Under that provision, the court must tax the costs of an appeal to the winning party “in whole or in part,” where the party’s victory on appeal rests on new material which that party was in a position, and had occasion, to present below. It is not clear how often or how effectively this sanction is employed, since reported decisions applying it are infrequent. It has been held that it does not apply where the proof-taking which produced the victory was ordered by the appellate court on its own motion, rather than on the basis of an offer by the winning party. Judgment of Mar. 14, 1980, OLG Karlsruhe, 80 OLGZ 384. At least one lower court has held, moreover, that it does not apply where it appears that, even if the appellant presented the defense below, the other side would have appealed anyway. Judgment of Jan. 30, 1979, OLG Hamm, 1979 GEWERBLICHER RECHTSSCHUTZ UND ÜRHEBERRECHT [GRUR] 326.

The other major risk in the tactic, of course, is that any delay in the appellate proceed-
It was hoped by some that this inconsistency could be eliminated by constitutional objection, on the ground that the provision violates the equal treatment clause of Article 3 of the Basic Law. That hope has now been dashed by the Federal Constitutional Court. The provision does not discriminate between different persons similarly situated, according to the Court, but rather between the same person in different procedural situations. Section 528 III, nonetheless, represents a legitimate effort to reinforce concentration of fact determination by making preclusion orders binding on the appellate courts, while avoiding the technicality of precluding all material which might have been offered earlier.

B. Second Appeal: Revision

In regular civil cases, judgments of the Oberlandesgericht are subject to appeal, if at all, to the Bundesgerichtshof. Here, review is limited to questions of law, and is called Revision. Over sixty percent of the civil caseload of the Bundesgerichtshof is made up of these review cases, and they are clearly the most time-consuming civil matters before that court. The percentage of Oberlandesgericht judgments in which review is sought has been relatively high: the Preparatory Commission found that twelve to thirteen percent of all contested Oberlandesgericht civil judgments in the 1950’s were appealed to the Bundesgerichtshof, and in 1981 the review rate was still close to ten percent. The Bundesgerichtshof, as the court of last resort for questions of ordinary civil and criminal law, serves a role analogous to that of the supreme courts of all fifty of the United States as well as the nonconstitutional cases of the United States Supreme Court. It should not be surprising, therefore, even with judicial staffing which has increased from about 58 in 1951 to 112 in 1981, that the Bundesgerichtshof will be fatal. See Judgment of June 4, 1981, LG Koblenz, 35 NJW 289.


271. See Rechtspflege, supra note 130, table 12.1 (1981) (2421 of the 3844 new cases filed in the BGH in 1981 were review cases).


273. Rechtspflege, supra note 130, table 8.2 (1981) reports 25,299 contested judgments of OLGs in 1981; table 12.1 reports 2421 new review cases filed in the same year. While not all of those review cases challenged 1981 judgments, the figures give a rough approximation of appeal rates.


275. Rechtspflege, supra note 130, table 2.3 n.2 (1981).
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ichthof's caseload has been a matter of continuing concern since its inception. In civil cases specifically, the chief complaint has been the length of time it takes to process a matter in the Bundesgerichtshof. The Preparatory Commission found that about three quarters of all civil review cases took over nine months. Proposals to increase efficiency have focused on two approaches: (1) reducing the court's jurisdiction, and (2) streamlining its procedures. The measures actually adopted have taken both forms.

1. Jurisdiction of the Reviewing Court

Since 1950, the Bundesgerichtshof has had jurisdiction to review cases on two bases: (1) by leave of the Oberlandesgericht rendering judgment granted without regard to the amount in controversy if the court found the case to be one of fundamental importance or if it deviated from a prior opinion of the Bundesgerichtshof (Zulassungsrevision); or (2) without leave of court, if the amount in controversy exceeded a specified sum, originally DM 6000 (Wertrevision). As of 1961, about twenty percent of the ordinary review cases came by way of certification by the lower appellate courts, and eighty percent on the basis of amount in controversy. This ratio was the same in 1981.

The original jurisdictional bases responded to the two best accepted functions of appellate review: assuring uniform interpretation and development of the law on the one hand, and correctness of individual judgments on the other.

The Preparatory Commission concluded, however, that the Bundesgerichtshof could not continue to perform both functions without an unacceptable increase in personnel, and that uniformity of interpretation was the more appropriate function for the only national civil court. It therefore recommended that Wertrevision be abandoned altogether. The Civil Procedure Commission, on the other hand, maintained that abandonment of Wertrevision would simply encourage more litigation over whether a particular matter was of "fundamental importance," and would not produce the desired relief. Moreover, it

276. Among the most recent expressions of alarm is Kornblum, Zur Revision des Revisionsrechts, 13 ZRP 185 (1980).
277. BERICHT DER KOMMISSION 1961, supra note 37, table 5(a), at 146.
278. ZPO § 546 (1950).
279. See BERICHT DER KOMMISSION 1961, supra note 37, table 3, at 144.
280. RECHTSPFLEGE, supra note 130, table 12.8 (1981): 1773 Wertrevision and 395 Zulassungsrevision dispositions were recorded in 1981.
281. BERICHT DER KOMMISSION 1961, supra note 37, at 157.
argued that the court's procedure is designed solely to produce a correct result in the individual case, so that a shift to "fundamental importance" as the sole criterion for jurisdiction would require basic changes in the manner of handling cases once accepted for review. The Civil Procedure Commission therefore recommended simply raising the minimum amount in controversy for Wertrevision. Prior to 1975, the parliament responded twice to this position, raising the minimum amount from DM 6000 to DM 15,000 in 1964, and again to DM 25,000 in 1969.

By the 1970's, an alternative to Zulassungsrevision gained prominence in the debate, inspired in part by the example of the United States Supreme Court. In this alternative, called "revision by acceptance," the Bundesgerichtshof's jurisdiction would not depend on the Oberlandesgericht's findings of importance, but on the highest court's determination that the case was of general interest.

The legislature was ultimately unwilling to give up the policy of correcting errors in a particular case. In 1975, the Review Amendment struck a compromise among the various proposals. New ZPO section 546 retains Zulassungsrevision, but the minimum amount in controversy, below which judgments involving money or property can be reviewed only by lower appellate court certification, is raised to DM 40,000. New section 554b adopts a backhanded version of Annahmerevision, by authorizing the court to deny review by a two-thirds vote with respect to judgments with an amount in controversy exceeding DM 40,000, unless the case is one of fundamental importance.

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282. BERICHTE DER KOMMISSION 1977, supra note 2, at 168.
283. See 1969 BGBI I 1141 (W. Ger.).
284. See supra note 21.
285. ZPO § 546 (1977). Section 546 reads as follows:
   I. In cases involving patrimonial claims, in which the amount in controversy does not exceed forty thousand German marks, and those involving non-patrimonial claims, review is available only if the Oberlandesgericht has authorized it in its judgment. The Oberlandesgericht must authorize review if:
   1. the legal issues are of fundamental importance, or
   2. the judgment deviates from a decision of the Bundesgerichtshof or the Joint Senate of Federal Courts and rests upon this deviation.

The reviewing court is bound by the authorization.

II. In cases involving patrimonial claims, the Oberlandesgericht must fix the amount in controversy in its judgment. The reviewing court is bound by this determination, if the amount so fixed exceeds forty thousand German marks.

286. Id. § 554b. Section 554b reads as follows:
   I. In cases involving patrimonial claims, in which the amount in controversy exceeds forty thousand German marks, the reviewing court may refuse to accept the review, if the matter does not have fundamental importance.
Thus, in *Wertrevision* the court now has jurisdiction unless it explicitly denies it, whereas the original idea of *Annahmeverision* was that jurisdiction would depend on affirmative acceptance. The provision offers no criteria for such a denial, but the permissive mode suggests discretion. A number of writers and the Federal Supreme Court itself interpreted the provision to include consideration of substantively unrelated factors, such as the court's workload.

Constitutional objections were raised against section 554b as soon as it was proposed in legislative committee. The argument crystallized around two points. First, the discretion arguably violates the rule of law (*Rechtsstaatprinzip*), which demands not only material justice but also reasonable legal certainty. The applicant bears the costs of an unsuccessful application for review, and is entitled to know the criteria upon which a decision will be based, so that the risks can be reasonably predicted. Second, the discretion violates the litigants' right to equal treatment, since persons in comparable situations—those against whom erroneous judgments have been rendered—may be treated differently for nonmaterial reasons, such as the court's workload.

In 1980, the Plenum of the Federal Constitutional Court, after its two Senates had taken opposing views, adopted the argument that discretionary jurisdiction violates the constitutional right to equal treatment. It saved the statute, however, by placing a limiting interpretation on it: the *Bundesgerichtshof* may deny review only on the ground that the application has no prospect of ultimate success. The workload of the court may not be considered. Denial thus becomes analogous to the United States Supreme Court's dismissal of an appeal for want of a substantial federal question.

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II. For denial of acceptance of a majority of two-thirds is required.

III. The decision may be made by order without oral hearing.


292. *Id*. The court found that the principal legislative purpose for retaining *Wertrevision* and for leaving denial of review of nonfundamentally-important cases in the court's discretion, was to leave some room for the correction of error in those cases. An interpretation of the statute which removes the discretion, but bases denial on the absence of a prima facie showing of error, is therefore not inconsistent with its general purpose.

293. 28 U.S.C. § 1257 (1976); Sup. Ct. R. 15(1)(h), requires a statement, among other
2. Streamlined Procedure

The two Commissions considered a number of possible economizing changes in the procedure of Revision by the Federal Supreme Court, three of which were the most prominent: (a) permitting the court to dispense with an oral hearing; (b) permitting the court to render a decision without an opinion; and (c) precluding a review by the court of the Oberlandesgericht's determination that a case is of fundamental importance.

a. Dispensing With Hearing

Largely because it advocated restricting review to cases of fundamental importance, the Preparatory Commission rejected as unproductive a proposal granting the court discretion to dispense with the oral hearing. The Civil Procedure Commission, on the other hand, having opted to retain the Wertrevision, recommended that the court be authorized to decide any case under review without an oral hearing, if it concluded by unanimous vote that the petition for review was unfounded and a hearing was not necessary. This recommendation was immediately taken up by the parliament as a temporary measure, adopted in 1969 and applicable until 1972. The Review Amendment of 1975 allowed this more general provision to lapse, but new section 554b permits the decision rejecting Wertrevision to be made without a hearing, on a two-thirds vote. The ZPO had long permitted the court to decide, without a hearing, whether the petition for review is sufficient on its face. This provision is retained in section 554a. Out of the 1773 Wertrevision dispositions in 1981, seventy-two were made under section 554a and 896 under section 554b, a combined total of 54.6% of such dispositions.

b. Dispensing With Opinion

The Preparatory Commission's rejection of Wertrevision also led to its disapproval of the no-opinion device. The Civil Procedure

things, of the reasons why the questions presented are so substantial as to require plenary consideration. See generally 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 4014 (1977).
294. BERICHT DER KOMMISSION 1961, supra note 37, at 150.
295. BERICHT DER KOMMISSION 1977, supra note 2, at 169.
296. 1969 BGBI I 1141 (W. Ger.).
297. ZPO § 554b (1979).
298. RECHTSPFLEGE, supra note 130, table 12.8 (1981).
299. BERICHT DER KOMMISSION 1961, supra note 37, at 149-50.
Commission in turn recommended that the otherwise universal requirement of opinion\textsuperscript{300} be dropped in the case of assignments of ordinary procedural error which the court finds to be unsubstantiated.\textsuperscript{301} The Review Amendment of 1975 adopted this recommendation by adding present section 565a.\textsuperscript{302}

In practice, the court has also dispensed with opinion in denying acceptance of \textit{Wertrevisions} under section 554b. This developed, to be sure, under the original assumption that that provision gave the court true discretion. The 1978 case in which the Second Senate of the Federal Constitutional Court first held this discretion unconstitutional was one in which the Federal Supreme Court's order was without opinion. The order was overturned because it was impossible to tell from the order that it was not based on the unconstitutional interpretation.\textsuperscript{303} A year later, however, the Second Senate upheld a similar order which read: "[Review denied] pursuant to 554b I ZPO as interpreted by the BVerfG (order of 9.8.78) . . . ." The Second Senate found this language constitutionally satisfactory.\textsuperscript{304}

c. Eliminating Review of Appellate Court Findings of Fundamental Importance

Both Commissions recommended that the existing system of \textit{Zulassungsrevision} be retained, but with the Bundesgerichtshof being expressly bound by the Oberlandesgericht's certification of cases for review because of fundamental importance. Two alternatives—leaving the determination of fundamental importance wholly to the highest court and permitting review of an appellate court denial of certification—were rejected, principally on the ground that the task of making such threshold rulings would overload the Bundesgerichtshof with

\textsuperscript{300} ZPO § 323 I 6 (1977) (made application to \textit{Revision} by ZPO § 557's general incorporation of the first-instance procedural rules).

\textsuperscript{301} BERICHT DER KOMMISSION 1961, \textit{supra} note 37, at 169.

\textsuperscript{302} ZPO § 565a (1975). The decision does not require a statement of reasons, to the extent that the reviewing court considers assignments or procedural error unsubstantiated. This does not apply to assignments under § 551 (specifying certain automatic grounds for reversal, such as a disqualified judge, lack of jurisdiction, improper exclusion of public at hearing, or failure to give reasons for judgment).


groundless petitions.\textsuperscript{305} The Review Amendment of 1975 adopted this recommendation in new section 546 I 3: "The reviewing court is bound by the certification."\textsuperscript{306} The court has interpreted section 546 as precluding review of certification denials.\textsuperscript{307}

3. Results

The Preparatory Commission posited as a principal goal in reforming the review procedure that the normal length of time for processing cases in the Bundesgerichtshof be six to eight months.\textsuperscript{308} Most of its specific recommendations for reform were not adopted, but the changes that were made have allowed some modest improvement. Whereas the Preparatory Commission found nearly 75\% of all review cases taking more than nine months, with the median over twelve months,\textsuperscript{309} the 1981 figures show only 59.6\% lasting more than nine months and 58.9\% lasting less than twelve months.\textsuperscript{310}

The efficiency measure most relied upon, the summary denial of Wertrevision, which many feared would be emasculated by the Federal Constitutional Court's limiting interpretation,\textsuperscript{311} is entitled to most of the credit for this improvement. Indeed, two sets of statistics indicate particular improvement since 1978, when the limiting interpretation was first imposed. In the first place, denials of review were more frequent in 1981\textsuperscript{312} than in 1977 (the last full year before the interpretation).\textsuperscript{313} In the second place, the 1977 figures show a processing time only marginally better than the 1950's, with more than half of the cases still lasting more than twelve months.\textsuperscript{314}

\textsuperscript{305} Bericht der Kommission 1961, supra note 37, at 157-58; Bericht der Kommission 1977, supra note 2, at 168-69.
\textsuperscript{306} ZPO § 546 I 3 (1975).
\textsuperscript{307} Judgment of Sept. 26, 1979, BGH, 33 NJW 344; A. Baumbach, W. Lauterbach, & J. Albers, supra note 64, ZPO § 546 n.2 (D)(b).
\textsuperscript{308} Bericht der Kommission 1961, supra note 37, at 147.
\textsuperscript{309} Id. table 5(a), at 146, 148.
\textsuperscript{310} Rechtspflege, Bundesgerichtshof, supra note 130, table 12.9 (1981).
\textsuperscript{311} A member of the Bundesgerichtshof is quoted to this effect in Radloff, Comment, 32 NJW 534 (1979). See also Kaempfe, supra note 304; Kornblum, supra note 276.
\textsuperscript{312} Rechtspflege, supra note 130, table 12.8 (1981): 897 of 2343 dispositions (38.3\%) were made under ZPO § 554(b).
\textsuperscript{313} Id. table 10.11 (1977): 664 of 2374 dispositions (28\%) were made under ZPO § 554(b).
\textsuperscript{314} Id. table 11.8 (1977): 51.3\% had lasted more than 12 months.
VI. COSTS AND LEGAL ASSISTANCE

A. Costs in General

Despite much debate, the current West German reform movement has produced no change in the fundamental pattern of cost determination and the allocation of cost burdens in the ordinary civil action. The two most important cost elements, general court fees and attorneys' fees, are still fixed by statutory fee scales graduated by amount in controversy. The ultimate judgment loser must normally carry the entire cost burden for both sides and for all stages.

There has been some inflation in the amount of the cost burden for a given amount in controversy, most notably in attorneys' fees. Between 1957 and the present, the basic unit of court fee for a case involving DM 5000 has increased 12.6%, from DM 103 to DM 116. During the same period, the increase in the basic unit of attorney's fee for the same case has been from DM 185 to DM 247, or 33.5%. The overall basic cost burden for a case involving DM 5000, if fully litigated through the Landgericht, is made up of multiples of each of the two elements. Leaving out incidentals, that burden has increased from 28.4% of the amount in controversy in 1957 (DM 1419) to 36.6% of the amount in controversy today (DM 1830). The comparable overall figures for a case involving DM 100,000 are more dramatic: in 1957, a total burden of DM 7071, or 7.1%; today, a total burden of DM 11,946, or 11.95%.

315. General court fees are governed by GKG § 11 (1975) (W. Ger.); Annex 1 is a catalogue of procedural events giving rise to fees; Annex 2 is a table of amounts in controversy and corresponding fee levels. Attorneys' fees are governed by BRAGO § 11, with a table of amounts in controversy and corresponding fee levels. Sections 3-9 of the ZPO govern determination of amount in controversy. See Kaplan, von Mehren & Schaefer, supra note 1, at 1461, with excerpts from then current tables; more recent data are found in Bender & Streckert, Federal Republic of Germany, in I ACCESS TO JUSTICE 530 (M. Cappelletti & B. Garth eds. 1978).

316. ZPO § 91 (1950). Section 92 requires allocation among the parties pro rata where each party wins in part and loses in part. Since this provision applies where a claimant is awarded substantially less than his original demand, ZPO § 92 II, it has been noted that a divided cost award is the rule rather than the exception. See R. Trott, PRACTICAL LEGAL GUIDE ON COSTS & FEES, COURT PROCEEDINGS AND COMMERCIAL LAW 28-29 (1977). On the system of cost allocation generally, see L. Rosenberg & K. Schwab, supra note 99, § 87 III.

317. GKG, 1957 BGBl I 941 (W. Ger.).

318. GKG, 1975 BGBl I 3047 (W. Ger.).

319. BRAGO, 1957 BGBl I 907 (W. Ger.). The most recent amendment of the table in the Annex to BRAGO § 11 was adopted in the BRAGO, 1980 BGBl I 1503 (W. Ger.) (Fifth Law to Amend), which took effect January 1, 1981.
B. Legal Aid in Litigation

While the Preparatory Commission did consider the problem of legal aid and made some recommendations, it did not become a matter of overriding concern until the late 1960's, a period of heightened social consciousness in general. After the 1976 Congress of German Lawyers made access to justice a principal topic of its deliberations, the federal government adopted legal aid reform as a major program. The Civil Procedure Commission made extensive recommendations for reform, and a comprehensive draft of new legislation was presented to the legislature in 1979. While the final product may ultimately have only modest actual impact on access to the courts for low income persons, it did change the former system in a number of interesting respects.

1. Eligibility

The most noticeable change in eligibility for legal aid in litigation is the extension of assistance to a much broader range of income levels, through the device of a sliding scale of partial contributions from the beneficiary. New ZPO section 114 now includes, as an appendix, a table of amounts which a beneficiary is required to contribute toward litigation costs, according to the amount of monthly income and the number of dependents. A single person with a monthly income of under DM 851 (about $360) or a person with five dependents earning up to DM 2400 (about $1000) per month pays nothing. A single person earning DM 2400 or a person with five dependents earning DM 3950 pays DM 520. According to ZPO section 115, a beneficiary must also apply his property to the payment of litigation costs, so far as this

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325. ZPO §§ 224 (1950) (entitled "Poor Law" (Armenrecht)); for a description which remained generally valid until 1980, see Kaplan, von Mehren & Schaefer, supra note 1, at 1467. A more recent summary of the actual situation and of reform proposals is found in Baumgartel, Zugang zum Gericht fur Unterprivilegierte: 'Rechtshilfe' und Rechtsberatung, in Humane Justiz 17 (P. Gilles ed. 1977). See also Bender & Strecker, supra note 315; G. Baumgartel, Gleiches Zugang Zum Recht Fur Alle (1976).
326. ZPO § 114 (1980).
327. Id.
is conscionable by the standards applicable to public welfare cases.\footnote{328}{Id. \S 115.} If the amount of anticipated costs remaining after application of the property in satisfaction does not exceed four monthly contributions by the table under section 114, no legal aid will be granted.\footnote{329}{Id.}

As under the prior law, legal aid will be granted to a financially eligible person only if he can show both that he has a "sufficient prospect of success" and that his pursuit of claim or defense is not "capricious" (mutwillig).\footnote{330}{Id. \S 114.} In general, the first criterion has been interpreted as a prima facie case requirement, satisfied if the beneficiary can raise serious issues for resolution by regular proceedings.\footnote{331}{Id. \S 114. 2(B)(a).} The second criterion refers to the value of a judgment once obtained: if the opponent is judgment proof, or the relief sought would have no concrete value to the beneficiary, assistance will be denied.\footnote{332}{See A. Baumbach, W. Lauterbach \& P. Hartmann, supra note 55, ZPO \S 114 2(B)(b); L. Rosenberg \& K. Schwab, supra note 99, \S 90 III.}

2. Procedure

The 1980 reform effected a simplification of the procedure for obtaining legal aid in several respects. A nationally uniform statement of financial circumstances was adopted,\footnote{333}{See 34 NJW 804 (1981) (a report).} and the application to the court no longer requires certification by the applicant's local welfare office.\footnote{334}{Id. \S 117 (1980).} Moreover, the procedure or application is to be written; an oral hearing is permitted only under rare circumstances.\footnote{335}{Id. \S 118.} On the other hand, each new court through which the case passes requires a completely new application for assistance.\footnote{336}{Id. \S 123.}

3. Costs Covered

As under prior law, the granting of legal assistance affects only the costs attributable to the beneficiary—that is, the beneficiary remains personally responsible in full for his opponent's taxable costs, should the beneficiary lose.\footnote{337}{See, e.g., Grunsky, Die Neuen Gesetze über die Prozesskosten—und die Beratungshilfe, 33 NJW 2041, 2046 (1980); Schuster, supra note 320, at 390.} This hangover has been subjected to criticism.\footnote{338}{See id. 2(B)(b); L. Rosenberg \& K. Schwab, supra note 99, \S 90 III.} To the extent that assistance is granted without contribution
by the beneficiary the opponent's obligation to pay court fees is waived pending final outcome.\textsuperscript{339}

4. Appointment of Attorney

Under the prior law an attorney would be appointed for the beneficiary only where such representation is required (in the \textit{Landgericht} and higher courts), or where it appeared "necessary." In general, appointment was made by the court from attorneys of its own choice, and could include apprentice attorneys or bureaucrats. Under the new section 121, the beneficiary is entitled to have an available attorney of his own choice appointed not only where representation is required by law or appears necessary, but also when the opponent is represented by counsel.\textsuperscript{340} Apprentices and bureaucrats are no longer options.\textsuperscript{341}

As under the prior law, the fee scale for attorneys appointed under legal aid is set by a separate provision.\textsuperscript{342} For amounts in controversy up to DM 6300, the scale is identical to that for unassisted parties. For higher amounts in controversy, the fee for appointed counsel still rises much more gradually than the regular fee, and the highest permissible basic fee unit is DM 540. To the extent that the beneficiary is required to contribute to payment of costs, additional compensation is due the attorney, up to the regular fee.\textsuperscript{343} The disparity between the regular scale and the legal aid scale is generally somewhat less than before.

C. Extra-Judicial Legal Assistance

The year 1980 also brought a major innovation in the West German system of public assistance for extra-judicial legal services. Under the Law on Legal Advice and Representation for Low Income Citizens,\textsuperscript{344} persons may be eligible for consultation with a lawyer of their choice at public expense, on three conditions: (1) that the person is unable to pay for a lawyer with his own funds;\textsuperscript{345} (2) that other sources of assistance, such as group legal services arrangements,\textsuperscript{346} are not rea-

\begin{footnotesize}
\bibitem{339} ZPO \S 122 (1980).
\bibitem{340} \textit{Id.} \S 121.
\bibitem{341} \textit{Id.}
\bibitem{342} BRAGO \S 123.
\bibitem{343} BRAGO \S 124.
\bibitem{344} Beratungshilfegesetz [BerHG], 1980 BGBI I 689 (W. Ger.) (effective date Jan. 1, 1981).
\bibitem{345} According to \S 1(2) of the law, this condition is met when the applicant would be eligible for litigation-cost assistance without personal contribution.
\bibitem{346} See Bischof, \textit{Praxisprobleme des Beratungshilfegesetzes}, 34 NJW 894, 895 (1981); Grunsky, \textit{supra} note 338, at 2047.
\end{footnotesize}
reasonably available; and (3) that the pursuit of his rights is not "capricious." Lawyers are required to take eligible clients who approach them directly, unless "important reasons" justify turning them down.347 The law provides for compensation at modest levels to attorneys providing such services,348 but in certain states where publicly funded legal advice facilities are established, the low income person may be required to utilize these services instead of consulting with an attorney of his choice.349 Prior to 1980, such public assistance was provided in most states by local bar organizations on an uncompensated basis, and was found wanting.350 While it is too early to tell how well the new system is working, it is generally assumed that it effects a substantial improvement.351

VII. CONCLUSION

A. The Impact of the Reforms

The overriding emphasis of the postwar reform movement in West German civil procedure has been an increasing efficiency in order to combat delay, the most generally acknowledged evil. To the extent that the system has been perceived as unfair, the principal focus of criticism has been on cost barriers to access to the courts. Procedural rules as such have not been widely challenged as unjust. If the impact of the reform movement is to be measured by its own goals, therefore, improvement in the areas of cost and delay must first be sought. It then remains to ask what price has been paid for such improvement.

347. BerHG § 11, 1980 BGBI I (W. Ger.) (adding a new § 49a of the Bundesrechtsanwaltsordnung [BRAO] (Federal Ordinance on Attorneys)).
348. Id. § 8. The attorney is entitled to a waivable fee of DM 20 from the applicant. Section 10 of the law adds a new BRAGO § 132, which sets fees to be paid from public funds: for advice or for information not otherwise compensated, DM 30; for the handling of a matter by the drafting of instruments, evaluation of documents, representation before courts, agencies or others, or participation in proof-taking, DM 80; and for such activity resulting in a settlement or disposition of a matter, DM 100.
349. Id. § 14. In Hamburg and Bremen, the public facility is the exclusive source of assistance; in Berlin, subject to local law, the applicant may choose between the public facility and private attorneys. On the operation of the Hamburg facility, which dates from the 1920's, see Falke, Bierbrauer & Koch, Legal Advice and the Non-judicial Settlement of Disputes: A Case Study of the Public Legal Advice and Mediation Center in the City of Hamburg, in II ACCESS TO JUSTICE 103 (M. Cappelletti & J. Weisner eds. 1978).
350. Critical essays and case studies are gathered in RECHTSBERATUNG ALS LEBENSHILFE (T. RASEHORN ed. 1979).
1. Delay

The vast majority of the changes effected by the reform movement, from the case-deciding single judge and the concentration of the oral hearing to the restriction of access to the Federal Supreme Court, have been designed to reduce the overall length of the lawsuit. The statistics indicate at least marginal improvement in this respect in the late 1970's, in all types of cases and at all levels. Since the court most affected by the changes is the Landgericht sitting at first instance, it is not surprising to find the most improvement in those courts. The following tables show the percentage of cases disposed of within six months and twelve months, respectively, in three categories defined by the form of disposition: (a) all ordinary civil cases; (b) those disposed of by contested judgment; and (c) those disposed of by formal settlement. Data for 1971 are taken from a private compilation of official statistics;\textsuperscript{352} data for 1977-1981 are taken directly from official publications.\textsuperscript{353}

<table>
<thead>
<tr>
<th>year</th>
<th>all civil cases (%)</th>
<th>contested cases (%)</th>
<th>settled cases (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>63.9</td>
<td>41.8</td>
<td>55.2</td>
</tr>
<tr>
<td>1977</td>
<td>62.9/66.7</td>
<td>43.9/46.5</td>
<td>56.3/58.0</td>
</tr>
<tr>
<td>1978</td>
<td>68.4</td>
<td>49.0</td>
<td>60.9</td>
</tr>
<tr>
<td>1979</td>
<td>70.3</td>
<td>51.0</td>
<td>63.7</td>
</tr>
<tr>
<td>1980</td>
<td>71.5</td>
<td>52.4</td>
<td>64.1</td>
</tr>
<tr>
<td>1981</td>
<td>71.7</td>
<td>51.5</td>
<td>64.1</td>
</tr>
</tbody>
</table>

\textsuperscript{352} E. Blankenburg, H. Morasch & H. Wolff, I Tatsachen zur Reform der Zivilgerichtsbarkeit 36 (table 2.41) (1974).

\textsuperscript{353} Rechtspflege, supra note 130, table 4.3 (1977-1980), table 5.3 (1981).
Table 2: 12-Month Completion Rate

<table>
<thead>
<tr>
<th>year</th>
<th>all civil cases (%)</th>
<th>contested cases (%)</th>
<th>settled cases (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>85.7</td>
<td>73.7</td>
<td>82.0</td>
</tr>
<tr>
<td>1977</td>
<td>84.2/85.6</td>
<td>72.7/75.3</td>
<td>80.8/82.7</td>
</tr>
<tr>
<td>1978</td>
<td>87.4</td>
<td>77.2</td>
<td>84.0</td>
</tr>
<tr>
<td>1979</td>
<td>88.7</td>
<td>79.5</td>
<td>86.1</td>
</tr>
<tr>
<td>1980</td>
<td>90.1</td>
<td>81.6</td>
<td>87.8</td>
</tr>
<tr>
<td>1981</td>
<td>90.5</td>
<td>81.5</td>
<td>88.2</td>
</tr>
</tbody>
</table>

It is almost impossible to tell whether these improvements are directly attributable to formal changes in procedural rules, or simply the result of a docket-clearing psychology generated by the debate over delay and its causes. The fact that a significant improvement appears in the second half of 1977—after the ‘‘Simplification Amendment’’ went into effect on July 1, 1977—suggests that the formal changes did have some effect. On the same date, however, the Family Law Reform Act went into effect as well, transferring family cases to the Amtsgericht and thus arguably freeing judicial energy in the Landgericht for other cases.354

2. Cost

Except for legal aid, it is obvious that no improvement has been achieved in the cost system from the litigant’s point of view. While a comprehensive dismantling of court cost assessment, the so-called ‘‘no charge judicial service’’ (Nulltariff), was proposed and considered in the 1970’s, it met with general opposition on purely fiscal grounds and was abandoned.355 The best that can be said about legislative changes in the cost area is that increases in court and attorneys’ fees may not quite have kept up with overall inflation in the economy. There has been substantial improvement in the availability of assistance for litigants unable to pay costs, but beyond the smallest cases it falls short of an equalization of resources. In particular, the residual cost burden on a poor litigant who is unsuccessful—payment of the opponent’s attorneys’ fees and costs—must continue to operate as a considerable deterrent. For the unassisted litigant, however, even a substantial acceleration of the overall pace of lawsuits brings no cost relief, be-

354. See supra note 30 and accompanying text.
cause all fees are fixed by a combination of the amount in controversy and classes of procedural event (filing, negotiating, hearing, proof-taking, settlement, and judgment). Neither reducing the number of hearings nor shortening the overall length of time between filing and disposition of the case would directly affect the principal cost burden.

The court statistics indicate one area of modest improvement in efficiency which has some cost-saving impact, however. This improvement is an increase in the percentage of Landgericht dispositions, both by contested judgment and by formal settlement, without proof-taking. Proof-taking is no longer a separate court fee event, but dispensing with it does save attorneys' fees. The following table demonstrates the progress between 1971 and 1981 for disposition without proof-taking by (a) contested judgment and (b) formal settlement.

<table>
<thead>
<tr>
<th>Year</th>
<th>Contested Judgment (%)</th>
<th>Formal Settlement (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>30.3</td>
<td>29.4</td>
</tr>
<tr>
<td>1977</td>
<td>35.0</td>
<td>36.3</td>
</tr>
<tr>
<td>1978</td>
<td>35.8</td>
<td>35.9</td>
</tr>
<tr>
<td>1979</td>
<td>37.1</td>
<td>35.9</td>
</tr>
<tr>
<td>1980</td>
<td>38.0</td>
<td>36.8</td>
</tr>
<tr>
<td>1981</td>
<td>39.8</td>
<td>38.3</td>
</tr>
</tbody>
</table>

3. The Price of Acceleration: Formalism

The device most heavily relied upon by the reforms to effect an acceleration of the lawsuit is the deadline sanctioned by preclusion of late material. It is clear that the incidence of preclusion is greater since the adoption of the new rules, although it is difficult to quantify. Unless the lawyers respond to this increased pressure by more aggressive investigation than is traditional, the result may well be the increase in artificial and unresponsive judgments which critics have feared.

356. See GKG Annex 1, No. 1016.
358. Walchshöfer, supra note 108, at 188 found in data gathered by the Bavarian Ministry of Justice in 1978 that between 6% to 10% of all cases in most Landgericht involved preclusion.
359. See supra note 206 and accompanying text.
Judgments finding negligence on the part of lawyers for missing deadlines have begun to appear, but they are in themselves just another judicial burden and a poor substitute for a sound judgment on the merits. Moreover, the legislature's reluctance to forego admission of late material altogether produced loopholes such as "escape by default" and "escape by appeal," perhaps encouraging a tactical approach to procedure from which the German system has been relatively free in the past.

B. Points of Contrast with American Procedure

1. Episodic Proof-Taking Disapproved

The West German reforms of the 1970's have gone a long way to discourage that feature which Kaplan thought to be the German lawsuit's distinguishing characteristic: the fragmentation of the proof-taking process into multiple hearings, with freedom of the parties to raise new issues at virtually any time before judgment. Century-long criticism of the delays inherent in this practice finally gained favor, and the reformers' stated goal of concentrating the trial into a single principal session has been backed up by real commitment. The use of deadlines and preclusion generate considerable pressure to disclose claims and defenses, supported by offers of proof, in the pre-hearing procedure. Even where prooftaking is done separately, there is now typically only one such session.

2. The Dominant Role of the Judge

The "grand discriminant" between West German and American procedure today is the division of labor between judge and lawyers. German civil procedure is a judge-driven system, and, if anything, the reforms of the 1970's have reinforced that tendency. A number of functions which are performed principally by the lawyers or a court reporter in the United States are allocated to the judge in West Germany. The most important of these functions are: (a) determination of the trial agenda, including an order of proof directing appearance of the parties and witnesses, and the presentation of documents;
(b) examination of parties and witnesses, with lawyers performing only an interstitial role; (c) production of the record of witnesses' testimony, excluding questions and frequently rephrasing or reorganizing answers; and (d) direct communication with the parties, not only for factual assertions, but also to explore settlement possibilities.  

While West German procedural theory continues to adhere to the principle of party control (Verhandlungsmaxime) in civil cases, it seems clear that this guarantees only the judge's ultimate dependence on the raw material which the parties present. The opportunity of the judge, as fact finder, to influence the form and organization of the material on which he must base his findings, and even to stimulate production of more material, is so much greater in the West German than in the American system that it must be regarded as a distinguishing feature—however varied its exploitation by different judicial personalities.

3. Evidence and Its Production

Kaplan's observation that "the search for facts is neither broad nor vigorous" in West Germany is essentially valid today. There is some possibility that the pressures of malpractice claims for failure to meet deadlines, resulting in preclusion of otherwise dispositive material, will infuse the legal profession with greater investigative desire. Increases in the statutory fee scale may also help, but the scheme of attorneys' fees remains virtually free of rewards for extra effort.

Moreover, the German system remains relatively indifferent to possibilities for pretrial exchange of information and evidence between the parties. The reform discussions contain some expressions of concern over this issue, and some references to United States or English discovery procedures occasionally appear in the literature. At this

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365. See supra note 243.
367. See supra text accompanying notes 229-37. In addition to the general judicial duty to clarify through questioning, the ZPO § 142 empowers the judge to require production of documents in a party's possession to which the party has referred or which relate to the matter in dispute, § 143, to call up documents in the possession of public officials, § 27211, to order a judicial view or call for an expert opinion, § 144. Betterman, supra note 7, at 385, sees a shift from party control to judicial control as a principal feature of 20th-century reform, and disapproves.
368. Kaplan, supra note 1, at 420.
point, however, no fundamental change seems likely. What has changed in this respect, perhaps, is the United States attitude toward discovery. Given the current obsession in the United States' with the abuses, costs and delays of discovery, and our efforts to bring its use under control, it can hardly be expected that other systems will follow the United States example.

With the disapproval of "episodic proof-taking" as the principal means of self-correction available to the German judge, appeal now bears the major burden of factual correction. Here, too, the trap of preclusion may seriously limit the opportunities for new evidence or defenses, and the corrective measure may often consist simply of renewed examination of the evidence by a different set of minds.

4. Quick Access to a Judge

Whether it results from these differing attitudes toward judges and evidence or from some other cause, the West German system retains and perhaps has strengthened its single greatest advantage over the typical United States lawsuit, namely, its comparative ease of access to a judge for consideration of the merits at a relatively early stage in the litigation. Judges are sufficiently numerous that backlogs are at bearable levels in most places. Hearings can be scheduled within a few months, at least. Despite the long standing and recently intensified interest in settlement, the continued high proportion of contested judgments suggests that decision is what litigants most frequently desire after all. This impression is now being reinforced in the United States

mends consideration of similar devices for West Germany). The Civil Procedure Commission recommended the establishment of a general obligation of the parties to cooperate in the evidence gathering process, sanctioned by permitting the judge to draw inferences favorable to a party whose efforts to prove an allegation are frustrated by even innocent conduct on the part of his opponent. See Bericht der Kommission 1977, supra note 2, at 121. In a few cases involving unfair competition and medical malpractice, the Bundesgerichtshof has imposed a duty on the party in possession of information to produce it, even though the other side has the burden of persuasion. See Huber, Ungleiche Aufklärungsmöglichkeiten der Parteien, 35 MDR 95 (1981); these are largely founded on the nature of the norm involved or on pre-existing obligations, however. R. Bruns, supra note 159, at 210-11, regrets the prevailing attitude that a party has no obligation to supply the other with weapons he doesn't already have. Arens, Zur Aufklärungspflicht der nicht beweisbelasteten Partei im Zivilprozess, 96 ZZP 1 (1983), with an extended review of the literature, opposes the further loss of party control which would result from a general duty to disclose relevant material. In short, the situation remains much as it was described in Kaplan, von Mehren & Schaefer, supra note 1, at 1246-47.

by the experience of at least some compulsory arbitration plans, in which it appears that the overall settlement rate declines as processing time is shortened.\textsuperscript{371} Certainly, the West German system is especially well suited to the average dispute, flexible and still relatively inexpensive. As we search for the best way to handle such disputes, we can profit by further study of their approach.