

# Civil Procedures : Some Comparisons

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### Preliminary:

For the purpose of comparison with developments in Australian civil procedure I will focus upon the German system, being that with which I am most familiar and as generally reflective of procedures in European civil law systems and I shall confine my topic to civil procedures, which is to exclude any consideration of criminal (and some family law) matters.

It is not possible in the time permitted to examine the German model in detail. It is however necessary to explain, for those unfamiliar with it, that the system is characterised by the determination of actions by way of hearing and re-hearing, 2 or 3 times. The first "instance", as each level is called, may be deliberately and technically, passed through quickly. Save for limited circumstances three judges comprise the court at each 'instance'. This, and the number of actions filed, explains why there are, I believe, nearly 30,000 judges in Germany (per head of population about 1 judge for 2,700 persons. Compare Australia where there are 863 Judges and Magistrates which is about 1 per 20,857 persons). Cases are allocated to a particular panel (or 'Senat') of judges at the outset by fairly elaborate procedures designed to ensure that neither the court nor the bureaucracy is able to select an action. (Our methods of case allocation would be regarded with horror). This is part of the legacy of the allied influence on post WWII. The concept of rights with respect to litigation, drawn largely from the Constitution, has special importance with respect to judicial control or intervention.

I will commence with some general observations on the hearing process and changes occurring, or likely to occur, to it.

Commentators of the past would be, I believe, somewhat surprised at hearings which now take place in German courts – hearings which may combine, on the one occasion, the examination of witnesses (in a background of information provided by the parties by way of pleadings and answers to questions by the court) and argument by the advocates, and which is then followed fairly promptly by the delivery of a short judgment. Of importance is a movement towards one hearing, where possible, and the reduction of the number of occasions when witnesses are called and the parties appear before the court. [This may however be affected by the court's backlog. Given requirements for the time for delivery of judgments, some judges on occasion may feel compelled to keep actions on foot and withhold their reaching a final hearing.] It is difficult to know whether the reduction of hearings would have the support of the legal profession. Unlike their common law counterparts, they are often restricted to scales of fixed fees which are set according to the amount of money involved – although they may also have separate agreements for fees with their clients. However, they also earn a fee for each hearing.

The principal present and future objectives of the German courts appear to be:

to reduce the number of 'instances';

to reduce the number of hearings between filing of the action and judgment; and

to reduce the number of judges comprising the court, at least at 'first instance' to one only. (At present this is possible if the parties concur in the procedure.)

The concerns which drive these objectives appear to be the desire for efficiency, the need for reduction of substantial delays (the process through the instances may take five years); and the cost to the court and society of providing so many litigation opportunities and, in the result such a large Court structure. There appears to be less concern with the cost to the parties. The general view seems to be that it is a matter for them whether they agree to pay their lawyers more than the scales allow, and the provision of legal aid does much to remove the topic. The question for them is not so much access to justice but rather how it may be restricted to more reasonable limits. I should add that the courts in Germany are also less concerned than we are with respect to the phenomenon of unrepresented litigants. Given an extensive system for the provision of legal aid, whether by way of loan or otherwise, a litigant would rarely actively participate.

Are the German (and other civilian) courts then to be taken as moving closer to common law procedures? Fundamentally I think not. Whilst the steps to be taken will be of significance in the German system, an Australian judge or lawyer would still not recognise the procedures or hearings as truly comparable to the common law. Rather, I think, they would be perceived to be somewhat more bureaucratic (the actions are after all viewed as files); and to require the formation of opinions or judgments as to the likely outcome at an early point. There is no opportunity provided to a party to ascertain information which the other party has. Lengthy examination of witnesses simply does not occur. Similarly the prospect of substantial legal argument is actively circumscribed by the judges. The fact that there is not much opportunity for persuasion is largely accepted as the norm. It is simply part of the process. Overall I believe Australian lawyers would see the process as comparatively rushed. And Australians would likely view it as superficial, in the sense that there is no attempt to offer as much evidence or to undertake the sometimes protracted examinations, which characterise our system. And German lawyers and jurists however would regard what is undertaken as all that is necessary. Without attempting a fuller explanation of this, it can be said that there are major differences in the nature of actions which are typical within the German system and the attitude towards what is, or is not, cogent evidence.

Beyond that which I have outlined, there does not appear to have been the same 'movement' to procedural reform as has occurred in common law countries such as in England and Australia.

On the other side, Australian courts, and those in England, have already commenced to move away from the procedural model originally devised for juries, viz, one which required a judge to come to a matter/action with little, if any, knowledge of it and in which the judge would not attempt to limit or shape the litigation by exercise of controls, save where a party invoked some process to that end. Most of the courts in these systems now employ some methods of 'management' of litigation which may be instigated by the court itself and which required a judge to be well-informed in relation to the action.

Our system has sought to limit those cases which require a court determination by reference to, or in some courts the imposition of, ADR. The debate as to whether this is possible in Germany continues. In this respect it seems to me pertinent to observe another difference between the systems: the German system, it seems to me, reflects an acceptance that even superior courts, will determine commonplace disputes having little significance in the development of jurisprudence. The trend in common law systems seems to be to identify, and then limit, those cases which truly require a judicial process and decision (and at our highest levels to accept only those by which some legal or socio-legal message may be conveyed. This may be compared with a right to hearing in the highest courts in Germany on simple qualifications).

For the purpose of any further discussion it is necessary to identify what, if any, problems are considered endemic in our system and how they ought best be addressed.

I have focussed, for the purpose of this discussion, upon the questions of cost and delay or time taken in disposition as being those which have driven the debate to date. I have done so without determining whether the problem is so substantial as to warrant further major changes.

If the issues are cost and time in our courts, then the vexed question of control over proceedings arises – it being generally accepted that judges are both in a position to and more likely to pursue a shortening of issues and evidence. The question then however is how much ought Judges do?

The Woolf reforms pointed to a need to empower judges to determine what were unnecessary or irrelevant claims and strike them from the proceedings. The rules proposed by the Woolf report will be in effect shortly. It will be interesting to see how the historical background and culture of non-intervention is to be overcome, even with these rules.

In the German system those steps would not even be contemplated, since they would be viewed as inconsistent with a citizen's rights relating to their action. There, such a level of judicial intervention would be regarded as positively dangerous and in some cases, provide ground for appeal.

It has been suggested that Australian courts should employ the initiatives taken by judges in civilian countries such as Germany. This is often presented not so much as a pursuit of the objectives of cost and efficiency, as a 'search for truth', which appears to assume that our system has, somewhat cynically, never been concerned to ascertain truth or as close an approximation of it as is possible. Another assumption appears to be that our system, unlike the civilian Europeans', is designed to distract from the truth. The focus, once again, is on the apparent power of judges in those other systems to inquire and ascertain the true facts.

In common law systems it is the parties who have historically been empowered to find the truth in their opponent's case – by processes such as discovery and by the obligation on a party to disclose documents – and in doing so to seek the aid of the courts to enforce that obligation. There is simply no comparison here with systems, such as the German – where there is no obligation at all to do so.

The parameters of the dispute are also set by the parties in civilian countries, as they are here. German lawyers may explain to you that the important part they play in civil litigation, is in choosing the facts they will rely upon and shaping the litigation towards the resolution of the legal point which they consider will win the case. Nor should one underestimate in this process just how technical and tactical they can be – and moreover – that there are few, if any, sanctions available to German courts to moderate practices.

But the focus there is less upon the evidence itself – it simply does not assume the importance it does in our system – and the extent of the controversy will be much narrower. Perhaps this is itself a desirable objective?

This is not to say that German judges, like judges elsewhere, will not attempt to narrow issues and elicit relevant and sometimes missing information. The point of my observation is that it is often misconceived that they have any substantial power to do so in civil cases (in criminal and some family law disputes they have special powers).

One function of German courts, considered desirable, is the ability to call witnesses and ascertain the necessary evidence – and thereby the truth. The reality however is that German courts call witnesses nominated by the parties. The courts have the power to call any witness who is referred to in a document – whilst this is given a fairly extended meaning it does not amount to a roving enquiry beyond the limits of the parties' case. Beyond that they are left to much the same devices as common law judges. That is to say they operate substantially as we do – by attempting to influence the parties in relation to the calling of evidence.

Certainly it is the function of judges in Germany to ask the witnesses questions. The lawyers usually ask only a few at the conclusion. But those who believe some in-depth inquiry was taking place would be quite taken aback at its brevity; which seems to me to result largely from their different view as to evidence. (From the point where their initial opinion is formed they have in mind only what is necessary

to permit a final judgment.)

So far as true control is concerned, if wholly new and different facts emerged in the process of evidence in an action in Germany the use to be made of that evidence would largely depend upon whether it was taken up by the parties as part of their case.

In summary, I do not understand the system to be one of more intensive inquiry than that of the common law. It is however much shorter.

I interpolate here (more by way of interest) that for those who consider the common law method of cross-examination to be aggressive, they would find the German method of judicial questioning alarmingly confrontational – but this is altogether another topic.

How, then, in our system are the search for an approximation of truth and the pursuit of efficiencies in time or cost to be accommodated?

Will the courts be better disposed to ascertain the truth and, if so, does one simply transfer the parties' powers to the judge? But in doing so, would we be simply shifting the problems of time and cost to the court system? Does the answer lie in granting some greater powers to judges to exercise as necessary, without altering the basic right of action? What guidance will be given to judges regarding its exercise?

In relation to cost and efficiency there may be some lessons to be learned from systems which employ simpler pleading procedures and where the culture is not one of multiplicity of causes. How this may be changed is a more difficult question – but one which clearly needs greater judge control. The civilian countries can not however offer us much guidance here.

Beyond the point of our limiting the process to what is the essential dispute between the parties, it seems to me that our system of more prolonged hearing and preparation for it will continue unless our views about evidence and the need to run many alternative actions, substantially alter. This is also a large topic.

Before I conclude there is one further matter I would suggest ought to be considered in the future. In the debate relating to efficiencies in our system little, if any, consideration appears to be given to just how much time is taken with true disposition, viz judgment-writing. Even if they are delivered promptly, judgments in our style are very time-consuming, and I believe unnecessarily discursive. I am not advocating adoption of civilian methods which in some countries would leave one wondering about how a conclusion had been reached although their less detailed reasoning to factual findings and, their early identification of the key issue and concise reasoning with respect to it, hold some attraction.

In conclusion, may I suggest some points for discussion as to procedures for the future.

We have already, I think, undertaken substantial reforms in process.

We have reached a point of acceptance of 'management'. Procedures may yet require further simplification.

The question now is probably whether greater judge-control is necessary and

If we accept that actions initiated mostly go well beyond the essential issue, how are they to be circumscribed?

Do we want judges taking over some /all of the parties' roles, or exercising a stronger supervisory role?

What is to be done then with the right to discovery in any new 'model'?

Should we be looking at the law of evidence?

If access to justice remains an issue, should our society be looking (again) at how to make available legal aid?

How much is necessary by way of judgments?

**The Hon. Justice Kiefel**