

# **Representation in Court Proceedings**

## **- Comparative Aspects and Empirical Findings -**

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# I. Introduction

## 1. Terminology

- Legal representation describes that a party to court proceedings is accompanied, guided and represented by a licensed legal professional, like a lawyer, solicitor, barrister or advocate in civil, criminal or administrative court proceedings.
- Mandatory representation usually is linked to the right to be heard by the court and the ability to invoke certain procedural rights pursuant to the applicable code of procedure.
- The opposite of litigation with mandatory representation by a professional is a procedural system in which private individuals are able to participate in court proceedings without professional guidance by lawyers. The most common legal terminology for such a scenario is “per se litigant” or “litigant in person”.



# I. Introduction

## 2. Overview

- Litigants in person are typical for the Common Law world and for the Nordic countries. It is based on the simple thought of personal freedom and self-responsibility in any circumstance of life.
- Germany and the other jurisdictions built on the Roman Law System consider a mandatory legal representation in court as a prerequisite for effective court proceedings, the individual's success in litigation and thus ultimately, for justice.



# I. Introduction

## 3. Problems

- It is very difficult to generalize when discussing the issue of representation in courts.
- Representation by someone else than the party itself does not necessarily mean representation by a member of the bar, but can also be by a non-lawyer professional.
- For the purpose of mandatory representation, a legal system can further distinguish between different instances within a court system or between different court systems as such.



## II. Comparative Analysis

### 1. Mandatory representation in Germany

#### ➤ **General rules for representation in German courts**

- Whether a claimant needs to be represented in a civil court action or not, depends on the court of jurisdiction and the amount in dispute.
- Representation can only be by a member of the bar (lawyer).
- Only in a Local Court (Amtsgericht) a litigant may bring a court action without being represented. The Local Court has, in principle, jurisdiction for cases with a value of less than 5.000 Euros.

#### ➤ **Characteristics of a litigant in person in Germany**

- Only roughly a fifth of all litigants in Germany are unrepresented in proceedings in which they have the option to instruct a lawyer or represent themselves.
- Unrepresented litigants are more likely individuals with a higher income and educational level, and are more likely to be male.



## II. Comparative Analysis: Germany

### ➤ Three common goods for mandating representation

1. Consumer protection: In the interest of clients, the lawmaker regards it as necessary that a state-controlled standard of professional legal services is maintained and rules are obeyed when those services are provided.
2. An effective administration of justice: court proceedings can be slowed down and stalled by parties who are not familiar with procedural rules and the practical aspects of court proceedings to the detriment not only of party the itself, but also the opponent. In can also negatively effect the quality of court services in general.
3. A functioning legal system as whole: This aspect relates to, e.g., the furthering of the case law which requires input from legal professionals rather than lay persons.



## II. Comparative Analysis: Germany

### ➤ Rationale of mandatory representation in Germany

- Mandatory representation guarantees social justice and the effectiveness of the democratic welfare state.
- The obligation is based on the principle of “equilibrium” or “equality of opportunity” for every litigant.
- Civil proceedings in Germany are contradictorily by nature and not based on inquisitorial powers of the court. Therefore litigants should be represented by a person with adequate legal training.
- It is assumed that a party in court proceedings which is represented by a legal professional will fare better than a litigant in person.





## II. Comparative Analysis:

### 2. Legal representation in the Roman Legal System

- The Roman Law System is the foundation of many European legal systems, such as the French, German, Italian or Spanish one.
- It considers mandatory legal representation in civil proceedings as an important factor of an orderly court procedure and fair process for the individuals involved.



## II. Comparative Analysis: Roman Legal System

### ➤ France

- In actions brought in a French Regional Court the parties must generally be represented by an advocate.
- Exception: Cases concerning commercial leases, injunctions or actions for withdrawal of parental authority.
- In a District Court as a court of lower instance, representation by an advocate is not mandatory in the majority of the cases, as well as in the Commercial Courts, the Family and Social Courts and the Juvenile Court.
- Legal aid entitles the recipient to free assistance from an advocate or other legal practitioner and to a waiver of court costs.



## II. Comparative Analysis: Roman Legal System

### ➤ Spain

- general rule: use of a Procurador (procurator) or an Abogado (lawyer) to conduct actions in the Spanish court.
- Individuals can act without these professionals when the dispute involves an amount of less than 900 Euros.
- It is also possible to submit an initial claim as a litigant in person through a fast-track procedure called “proceso monitorio” which can be used for claims of no more than 30.000 Euros if there is documentary evidence as proof.
- Those granted legal aid in Spain also receive free pre-trial legal advice and financial aid for lawyers’ fees.



## II. Comparative Analysis: Roman Legal System

### ➤ Italy

- as a general rule, all litigants need to be represented by a lawyer in Italy.
- Claims concerning very small amounts of less than 1.100 Euros or if the plaintiff is a qualified Italian lawyer herself, can be pursued in person.



## II. Comparative Analysis:

### 3. Legal representation in the Common Law System

- England and Wales, Northern Ireland or Scotland follow Common Law traditions.
- In the Common Law System, generally there is no statutory requirement for a person to seek the advice of, or be represented by a lawyer in civil court proceedings.



## II. Comparative Analysis: Common Law System

### ➤ England and Wales

- In England and Wales, it is common practice to seek the advice of a solicitor when the claim is for a sum over £10,000 and particularly if it includes a claim for compensation ('damages').
- Litigants are allowed to take a 'lay representative' to court to speak on his or her behalf.
- A 'lay representative' may be a spouse, relative, friend or an advice worker.
- Courts follow a 'pre-action protocol' for certain claims, which sets out the steps the court will expect the plaintiff to have taken before he or she issues the claim.
- Self-representation is relatively common on England and Wales: 85% of individual litigants in County Court cases and 52% of High Court litigants are unrepresented.



## II. Comparative Analysis: Common Law System

### ➤ **Scotland**

- The "small claims" procedure in the Sheriff Court was designed to give special support to litigants in person.
- Court users in several Scottish sheriff courts have access to "in-court advice" projects.

### ➤ **Northern Ireland**

- There is no obligation to be legally represented in civil court procedures.
- A corporate body must also act through a solicitor, unless the court allows a director to represent the company himself.
- Northern Irish courts may impose conditions or restrictions to the legal representation to ensure that the case proceeds in an orderly manner.



## II. Comparative Analysis: Nordic Jurisdictions

- In Sweden, Finland and Norway there is no requirement to be represented by a lawyer in civil court hearings.

### ➤ Sweden

In the Swedish legal system there is also no lawyers' monopoly in the sense that a legal representative or counsel must be a lawyer and/or a member of the bar.

### ➤ Denmark

In Denmark, the regional and higher court may set the obligation of legal representation to secure an effective court proceeding.

- Anecdotal evidence suggests, however, that parties are often represented





### III. The impact of representation in civil court proceedings

- **Is it beneficial for a party to be represented by a lawyer in court?**
- Research from the United Kingdom, the United States and Germany has analyzed the impact of legal representation in court and found answers to the relevance of lawyer representation in civil court proceedings.



### III. The impact of representation in civil court proceedings

#### 1. German research projects

Two German studies give an insight into the relevance of legal representation.

##### a) Study I (1980s)

- Study identified barriers to success in court proceedings.
- Almost 8.000 court cases were assessed by a thorough analysis of court files of selected local courts from one federal state in southern Germany.
- According to the study, representation by a lawyer leads to significantly more activities of the judge hearing the case.
- Representation by a legal professional bridges the problem of asymmetrical knowledge of the parties on one side and the court on the other side and allows, to some extent, control of the court.
- Parties from lower classes are more often unrepresented in court.
- A successful outcome of litigation depends extremely on representation by a member of the bar as far as defendants are concerned.



### III. The impact of representation in civil court proceedings

#### b) Study II (2010s)

- Study analyzed a couple of hundred court cases that were decided at one German High Court.
- The aim of that research was to find out if the cost of representation has an impact on the quality of representation.
- Relevance with a view to the question if a distinction should be made between representation by a member of a bar and some other legal professional who is not a member of a bar.
- The study showed, that on the basis of an identical legal qualification, lower remuneration for a legal professional results in a lower service quality and poorer outcomes for the party represented.
- In conclusion a legal professional who is not a member of the bar has much lower costs than a bar member, he thus can only compete on price with a bar member at a disadvantage for the client.



### III. The impact of representation in civil court proceedings

#### 2. Research from England and Wales

- A number of studies found that many litigants in person may have difficulties understanding the nature of the court proceedings, were often overwhelmed by the procedural and oral demands of the courtroom, and had difficulties explaining the details of their case.
- Some studies also found out that unrepresented litigants tend to be an extra burden for court staff, judges, but also opponents.
- Evidence that court proceedings with active litigants in person may take longer and that representatives in some situations speed up court proceedings.
- Researchers also found that lawyers obtain significantly better results in tried cases than unrepresented litigants.
- One research project found that cases involving fully unrepresented litigants were much more likely to be resolved by withdrawal, abandonment, default judgment or dismissal, rather than agreement between the parties or by judgment following a trial or appeal hearing.



## III. The impact of representation in civil court proceedings

### 3. Research from the United States

- meta-analysis of 45 research studies of the relationship between representation and adjudicated civil case outcomes in the United States (*Sandefur* study).
- The findings of this meta-analysis are striking in three respects
  1. They reveal a potentially very large impact of lawyer representation on case outcomes.
  2. In fields of law studied to date, the element of lawyers' expertise that is associated with greater potential impact is the ability to manage more complex procedures.
  3. Research therefore hints at the significant impact of relational expertise on the outcomes of professional work.
- *Sandefur* argues that lawyer representation may also act as an endorsement of lower status parties that affects how judges and other court staff treat them and evaluate their claims.
- The presence of a lawyer also may encourage court staff to obey rules and so enhance people's chances of winning their cases.



## IV. Conclusions:

- In contrast to Common Law jurisdictions or Nordic countries, legal systems in continental Europe tend to focus more on the importance of representation in court proceedings.
- Representation is usually mandated in civil proceedings and exemptions are only made for low value claims heard before local courts of first instance.
- The threshold beyond which representation is required differs quite significantly between those jurisdictions.
- Whether or not representation is required reflects also the self-concept of the political system.
- The political system may stress the responsibility of the individual for personal well-being or can be based on the understanding that self-responsibility in the context of legal issues can be detrimental not only for the individual, but also for the legal system and the common good.
- With such an understanding, regulation will be based on the principle of “equality of opportunity” for every individual involved in most court procedures.



## IV. Conclusions:

- Although mandatory representation in court proceedings is restricting one's self-determination, positive effects of representation by lawyers as proven by empirical research outweigh those restrictions.
- Empirical research from across the globe shows that representation in court..
  - has a positive impact on case outcomes
  - guarantees a better quality of adjuration
  - Allow the courts to operate more effectively by speeding up case disposal,
  - reduces the need for assisting litigants
  - minimizes the intimidation of individuals involved in a court case.

