

# A Comparison of Judges in Germany and the United States

Lisa Ann Landry  
Judging in the American Legal System  
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## I. Introduction

The American and German legal systems differ in a variety of ways, starting with the fact that the American legal system is common law while the German is civil law. At the same time, the societies of each face many of the same problems, addressing some in similar fashions. One interesting area in which the systems differ is the role of judges. Judges in the United States are viewed with great respect in the courtroom and society, have to be either elected or appointed after years of working as an attorney, substantively contribute to the law through case law, and preside over cases, deciding based on the presented evidence and legal arguments on questions of fact and law. Judges in Germany are also respected, are chosen by the government typically immediately following law school and the state exams, substantively contribute to the law through academia, and preside over cases, asking questions and bringing in outside knowledge to decide on questions of fact and law.

First, I will review the difference in the judicial setup as a whole. Second, I will briefly explore differences in the two countries' legal systems. Next, I will compare the process of becoming a judge in each country. Then, I will expound upon what judges in the German and American systems do on a daily basis and as part of court cases. Finally, I will look to how each society views judges.

## II. Judicial Hierarchy

## a. Germany

The German court system is a complex hierarchy including five independent branches of court<sup>1</sup> and many sub-courts.<sup>2</sup> There are courts of general jurisdiction as well as specialized courts.<sup>3</sup> There are also specialties within different courts, with certain judges specializing in certain areas that come before that court.<sup>4</sup> The process for determining which court has jurisdiction over a case and its parties is much more complex in Germany than in the United States.<sup>5</sup> There are more levels to the German hierarchical system than that of the United States, with certain courts being appealed to on fact and law and others only being appealed to on points of law alone.<sup>6</sup>

Each court in Germany has a variety of judges, with different combinations of judges sitting for each case. Judges with a specialty will sit for cases involving that specialty in the

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<sup>1</sup> Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 Nw. U. L. Rev. 705, 713-14 (1988).

<sup>2</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: ORGANISATION OF JUSTICE – GERMANY: THE COURTS OF LAW IN THE FEDERAL REPUBLIC OF GERMANY (2004), available at [http://ec.europa.eu/civiljustice/org\\_justice/org\\_justice\\_ger\\_en.pdf](http://ec.europa.eu/civiljustice/org_justice/org_justice_ger_en.pdf).

To be clear, in this paper, “judges” refers to professional judges rather than lay judges. Germany has lay judges, but they are beyond the scope of this paper. Markus Dirk Dubber, *The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology*, 43 Am. J. Comp. L. 227 (1995).

<sup>3</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: LEGAL PROFESSIONS - GERMANY (2004), available at [http://ec.europa.eu/civiljustice/legal\\_prof/legal\\_prof\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/legal_prof/legal_prof_ger_en.htm).

<sup>4</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: LEGAL PROFESSIONS - GERMANY (2004), available at [http://ec.europa.eu/civiljustice/legal\\_prof/legal\\_prof\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/legal_prof/legal_prof_ger_en.htm).

<sup>5</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: BRINGING A CASE TO COURT - GERMANY (2004), available at [http://ec.europa.eu/civiljustice/case\\_to\\_court/case\\_to\\_court\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/case_to_court/case_to_court_ger_en.htm).

<sup>6</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: ORGANISATION OF JUSTICE – GERMANY: THE COURTS OF LAW IN THE FEDERAL REPUBLIC OF GERMANY (2004), available at [http://ec.europa.eu/civiljustice/org\\_justice/org\\_justice\\_ger\\_en.pdf](http://ec.europa.eu/civiljustice/org_justice/org_justice_ger_en.pdf).

general courts.<sup>7</sup> One observer remarked that “the federal system of courts in Germany is much more specialized than in the U.S. and the judges are also more specialized.”<sup>8</sup>

The specialty courts have “specialist jurisdiction” in four areas, each with its own specialty court: administrative, financial, employment, and social.<sup>9</sup> In addition to these are the Federal Patent Court and Courts Martial – other federal specialty courts.<sup>10</sup>

Another reason for the greater complexity and larger number of courts in Germany is the decentralized nature of the court system.<sup>11</sup> This is also a reason for major courts being located away from political centers, such as Berlin.<sup>12</sup>

#### b. United States

The United States court system is still hierarchical but with less complexity and fewer levels.<sup>13</sup> Further, the court system is more centralized,<sup>14</sup> with the major courthouses typically being located in political centers: the Supreme Court of the United States in Washington, D.C., the Supreme Judicial Court of Massachusetts in Boston, and the New York Court of Appeals in New York City, as examples. Similarly to Germany, the United States has a hierarchical process through which to appeal points of law and fact or points of law alone (depending upon the

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<sup>7</sup> Meredith Heiser, *The German Supreme Courts*, Foothill College, 1-3 (2004), available at <http://www.foothill.edu/bss/people/heiser-meredith/01program.doc>.

<sup>8</sup> Heiser, at 1.

<sup>9</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: LEGAL PROFESSIONS - GERMANY (2004), available at [http://ec.europa.eu/civiljustice/legal\\_prof/legal\\_prof\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/legal_prof/legal_prof_ger_en.htm).

<sup>10</sup> *Id.*

<sup>11</sup> Heiser, at 1-2.

<sup>12</sup> Heiser, at 1; Dr. Philipp Eichmann & Dr. Eike Hosemann, Teachers, Bucerius Law School: Comparative Law Course: Session 5 (2014).

<sup>13</sup> Judge Young, Teacher, Boston University School of Law: Judging in the American Legal System Course (2015).

<sup>14</sup> Heiser, at 1.

court). However, the United States has fewer appeals, courts, and judges per capita in its system.<sup>15</sup>

The United States also has many executive administrative courts,<sup>16</sup> which do not appear in Germany. Administrative courts are very different from regular courts, and appeals from administrative courts go to regular courts.<sup>17</sup> The administrative courts are where much of the business of Germany's specialty courts takes place. Additionally, each state in the United States has its own court system, many of which have specialty courts such as Probate, Family, Small Claims, and Housing Courts.<sup>18</sup>

### c. Direct Comparison

While Germany's court hierarchy is more complicated<sup>19</sup> and larger<sup>20</sup> than that of the United States, both systems follow some similar general principles. In both, matters are first brought to a lower court, with jurisdiction depending upon the precise subject matter of the case. Cases may then be appealed up through the court hierarchy, with limits on appeals of fact and law versus appeals of law alone. Both have certain exceptions, including some subject matters that are brought directly to a higher court and some restrictions of jurisdiction based upon the type of case and monetary value of damages. Both systems have specialized and general courts, with some courts internally dividing into specialties as well.

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<sup>15</sup> Heiser, at 2.

<sup>16</sup> Judge Young, Teacher, Boston University School of Law: Judging in the American Legal System Course (2015).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: ORGANISATION OF JUSTICE – GERMANY: THE COURTS OF LAW IN THE FEDERAL REPUBLIC OF GERMANY (2004), *available at* [http://ec.europa.eu/civiljustice/org\\_justice/org\\_justice\\_ger\\_en.pdf](http://ec.europa.eu/civiljustice/org_justice/org_justice_ger_en.pdf).

<sup>20</sup> Heiser, at 1-3.

The two systems also have many differences. Some of the matters German courts deal with, and even specialize in, are considered administrative court matters in the United States.<sup>21</sup> The German system has a more complex hierarchical structure than the United States system. The German system also has more levels than the United States within the court hierarchy.

The Supreme Court of the United States deals with cases that are split in Germany between the Federal Constitutional Court and the Federal Court of Justice.<sup>22</sup> In Germany, importantly, any question regarding constitutionality must be decided by the Federal Constitutional Court.<sup>23</sup> If a case is only regarding constitutionality, the case begins and ends there.<sup>24</sup> If a question of constitutionality arises in a case in a lower court, that court submits the question of constitutionality to the Federal Constitutional Court, which decides the constitutionality matter and returns the case to the lower court.<sup>25</sup>

### III. Legal Systems

#### a. Germany

As a civil law country,<sup>26</sup> Germany's approach to legal interpretation is to begin with the code, decide what the law is, and then look to the facts. "A civil lawyer usually starts from a

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<sup>21</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: ORGANISATION OF JUSTICE – GERMANY: THE COURTS OF LAW IN THE FEDERAL REPUBLIC OF GERMANY (2004), *available at*

[http://ec.europa.eu/civiljustice/org\\_justice/org\\_justice\\_ger\\_en.pdf](http://ec.europa.eu/civiljustice/org_justice/org_justice_ger_en.pdf).

<sup>22</sup> Heiser, at 6.

<sup>23</sup> *Id.*

<sup>24</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: LEGAL ORDER - GERMANY (2004), *available at*

[http://ec.europa.eu/civiljustice/legal\\_order/legal\\_order\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/legal_order/legal_order_ger_en.htm).

<sup>25</sup> *Id.*; Heiser, at 6.

<sup>26</sup> Civil law has its origin in Roman law, as codified in the Corpus Juris Civilis of Justinian. Under this influence, in the ensuing period [sic] the civil law has been developed in Continental Europe and in many other parts of the world. The main feature of civil law is that it is contained in civil codes, which are described as a "systematic, authoritative, and guiding statute of broad coverage,

legal norm contained in a legislation, and by means of deduction makes conclusions regarding the actual case.”<sup>27</sup> The judge finds the correct interpretation of the law without legal arguments from either party.<sup>28</sup> Rather, judges conduct a trial through many written documents and, sometimes, oral hearings to decide the proper application of law to the facts.<sup>29</sup> In fact, oral hearings are rare in German courts, as the majority of a case occurs on paper.<sup>30</sup>

“With respect to the resolution of legal issues, the civil law system is based on the principle ‘*jura novit curia*’ (‘the Court is supposed to know the law’), which means that there is no need for parties to plead the law.”<sup>31</sup> Due to the belief that judges are correct in their interpretation of the law and should be united,<sup>32</sup> dissenting opinions are also rare in Germany – less than 1% of all opinions.<sup>33</sup>

Judges are enabled – and, in fact, need to – go outside of the information presented by the parties in deciding cases.<sup>34</sup> Depending upon the subject matter, there may be a

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breathing the spirit of reform and marking a new start in the legal life of an entire nation. . . .

Civil law is largely classified and structured and contains a great number of general rules and principles, often lacking details. One of the basic characteristics of the civil law is that the courts [sic] main task is to apply and interpret the law contained in a code, or a statute to case facts. The assumption is that the code regulates all cases that could occur in practice, and when certain cases are not regulated by the code, the courts should apply some of the general principles used to fill the gaps.

Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VUWLR 817, 818-19 (2001).

<sup>27</sup> Pejovic, 32 VUWLR at 820.

<sup>28</sup> Heiser, at 5.

<sup>29</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: BRINGING A CASE TO COURT - GERMANY (2004), available at [http://ec.europa.eu/civiljustice/case\\_to\\_court/case\\_to\\_court\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/case_to_court/case_to_court_ger_en.htm).

<sup>30</sup> Heiser, at 5.

<sup>31</sup> Pejovic, 32 VUWLR at 830-31.

<sup>32</sup> Pejovic, 32 VUWLR at 830.

<sup>33</sup> Heiser, at 5.

<sup>34</sup> Heiser, at 6; Interview with Dr. Ulrike Malcher, Criminal Court Judge, Germany (April 2015).

requirement for the citizen to be represented by a solicitor.<sup>35</sup> In principle, all actions must be in writing (in German), but in practice, oral actions are often brought, with written confirmation, in many subject matter areas.<sup>36</sup> Costs of a legal matter are always borne by the losing party, though the costs must be fronted by the party incurring them.<sup>37</sup>

A major difference between civil law and common law is the force of precedent. Under civil law, case law does not have formal binding effect. In fact, “it is not uncommon for courts to reach opposite conclusions in similar cases,” based on the court’s task of interpreting the law in the legislation.<sup>38</sup> After all, “under civil law, the courts do not create the law, but only apply and interpret it.”<sup>39</sup> However, there is some informal precedent in civil law countries, as “[j]udges normally try to avoid the reversal of their decisions by higher courts as if too many of their decisions are reversed their promotion may be adversely affected.”<sup>40</sup> Thus, judges will look at what higher courts decided in related matters and use that to influence their decisions. “Hence, even though in civil law systems the case law formally has no binding force, it is generally recognized that courts should take into account prior decisions, especially when the settled case law shows that a line of cases has developed.”<sup>41</sup>

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<sup>35</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: BRINGING A CASE TO COURT - GERMANY (2004), available at [http://ec.europa.eu/civiljustice/case\\_to\\_court/case\\_to\\_court\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/case_to_court/case_to_court_ger_en.htm).

<sup>36</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: BRINGING A CASE TO COURT - GERMANY (2004), available at [http://ec.europa.eu/civiljustice/case\\_to\\_court/case\\_to\\_court\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/case_to_court/case_to_court_ger_en.htm).

<sup>37</sup> *Id.* Legal aid is available to those who cannot afford the costs of the court action. To qualify, the court considered the likelihood of success, whether or not there is any malice in bringing the claim, and the financial preconditions. If a party qualifies for legal aid, then that party is not required to front court costs. *Id.*

<sup>38</sup> Pejovic, 32 VUWLR at 820.

<sup>39</sup> Pejovic, 32 VUWLR at 821.

<sup>40</sup> Pejovic, 32 VUWLR at 820-21.

<sup>41</sup> Pejovic, 32 VUWLR at 821.

Common and civil law systems also vary significantly in procedural law. “Civil law procedure is usually called “inquisitorial,” because the judge examines the witnesses, and the parties in dispute practically have no right of cross-examination.”<sup>42</sup> This “inquisitorial” judiciary is supposed to provide judicial supervision over the entire legal system, unlike the American use of police and prosecutorial discretion, for example.<sup>43</sup> “Compared to common law, the judge in civil law plays a more active role in the proceedings.”<sup>44</sup>

#### b. United States

As a common law country,<sup>45</sup> the United States’ approach to legal interpretation is to begin with the facts, compare them with similar cases and statutes, and then apply the law. “[A] lawyer in common law starts with the actual case and compares it with the same or similar legal issues that have been dealt with by courts in previously decided cases, and from these relevant precedents the binding legal rule is determined by means of induction.”<sup>46</sup> Of course, “[t]he claim that common law is created by the case law is only partly true, as the common law is based in large part on statutes, which the judges are supposed to apply and interpret in much

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<sup>42</sup> Pejovic, 32 VUWLR at 830.

<sup>43</sup> Unlike the American use of discretion, Germany “imposes an obligation of compulsory prosecution” for some serious crimes and lessens discretion in a variety of other manners. Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three “Inquisitorial” Systems: France, Italy, and Germany*, 87 YALE L. J. 240, 271 (1977).

<sup>44</sup> Pejovic, 32 VUWLR at 830.

<sup>45</sup> Common law evolved in England since around the 11<sup>th</sup> century and was later adopted in the USA, Canada, Australia, New Zealand and other countries of the British Commonwealth. The most obvious distinction between civil law and common law systems is that [sic] civil law system is a codified system, whereas the common law is not created by means of legislation but is based mainly on case law. The principle is that earlier judicial decisions, usually of the higher courts, made in a similar case, should be followed in the subsequent cases, i.e. that precedents should be respected. This principle is known as stare decisis and has never been legislated but is regarded as binding by the courts, which can even decide to modify it.

Pejovic, 32 VUWLR at 819.

<sup>46</sup> Pejovic, 32 VUWLR at 820.



the same way as the judges in civil law.”<sup>47</sup> Oral hearings take place as a matter of course, with each side’s lawyer arguing its legal point of view in hopes of persuading the judge and/or jury. “[T]he law has to be pleaded, the precedents for or against have to be submitted and distinguished.”<sup>48</sup> In fact, oral arguments are often more influential than written information. Dissenting opinions appear frequently, showing how the law can apply to different facts in a variety of ways.<sup>49</sup>

Unlike civil law, common law has the doctrine of stare decisis, meaning that past cases are binding precedent. “[I]n the common law system, the law has been dominantly created by judicial decisions, while a conceptual structure is often lacking.”<sup>50</sup>

[I]n the common law the courts are supposed not only to decide disputes between particular parties but also to provide guidance as to how similar disputes should be settled in the future. The interpretation of a legislation given by a court in specific case is binding on lower courts, so that under common law the court decisions still make the basis for interpretation of legislation.<sup>51</sup>

In the United States, court proceedings are considered an adversarial process, with the parties facing against one another – even in matters where both parties want the same outcome. “Common law procedure is usually called ‘adversarial’, . . . the judge acts as neutral arbiter between the parties in dispute as they each put forward their case. The parties in a dispute lead the proceedings, while the position of judge is rather passive.”<sup>52</sup>

### c. Direct Comparison

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<sup>47</sup> Pejovic, 32 VUWLR at 820.

<sup>48</sup> Pejovic, 32 VUWLR at 831.

<sup>49</sup> Heiser, at 6.

<sup>50</sup> Pejovic, 32 VUWLR at 820.

<sup>51</sup> *Id.*

<sup>52</sup> Pejovic, 32 VUWLR at 830.

“While there are many legal issues which are dealt with in the same way by the civil law and Common Law systems, there remain also significant differences between these two legal systems related to legal structure, classification, fundamental concepts and terminology.”<sup>53</sup> The two systems are from “fundamentally different approaches to the legal process,”<sup>54</sup> with the difference in the role of precedent being

the result of [the] different role of [the] legislator in civil law and common law. The civil law is based on the theory of separation of powers, whereby the role of legislator is to legislate, while the courts should apply the law. On the other hand, in common law the courts are given the main task in creating the law.<sup>55</sup>

Further,

[w]hether courts are bound or not by precedents, judges in all legal systems are aware that the need of reasonable certainty and predictability requires that like cases be treated alike. Hence, in contemporary civil law the role of judges in the creation of law is increasingly important, while the difference between civil law and common law courts shows a tendency of disappearing, or at least looking less significant. The presence or absence of a formal doctrine of *stare decisis* does not have crucial importance and it may be expected that differences between the common law and civil law systems in this area will diminish over time.

On the other hand, large sections of common law have been regulated by statutes and even codes . . . . This proliferation of statute law in the common law system has narrowed the court’s power of interpretation. Modern common law courts also tend to give greater weight to the problem of individualized justice in the particular case of trying to provide guidance for the future. This tendency makes the role of common law courts similar to that played by the civil law courts.<sup>56</sup>

“[T]here are more similarities than differences between these two legal systems. Despite very different legal cultures, processes, and institutions, common law and civil law have displayed a

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<sup>53</sup> Pejovic, 32 VUWLR at 817.

<sup>54</sup> Pejovic, 32 VUWLR at 820.

<sup>55</sup> *Id.*

<sup>56</sup> Pejovic, 32 VUWLR at 837-38.

remarkable convergence in their treatment of most legal issues.”<sup>57</sup> While there are many differences in the substantive law, the end result in many situations is similar, if not the same.<sup>58</sup> The differences in process, particularly regarding the civil procedure, are more distinctive and a greater hindrance to harmonization.<sup>59</sup>

#### IV. The Path to Becoming a Judge

##### a. Germany

The process of becoming a judge differs based on the region and court in Germany. Many individuals become judges immediately after completing school and both state exams,<sup>60</sup> which some (though others contest this idea) view as making the profession less prestigious and attracting only a certain homogenous group of individuals.<sup>61</sup> Others work first as professors of law before applying to become a judge. German judges are appointed in an “overtly political, but consensual manner.”<sup>62</sup> The lower court judges are determined almost entirely based upon the state exam scores.<sup>63</sup>

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<sup>57</sup> Pejovic, 32 VUWLR 838.

<sup>58</sup> See Pejovic, 32 VUWLR.

<sup>59</sup> Harmonization has been attempted in the EU, with other projects working to make civil and common law systems compatible. *Id.*

<sup>60</sup> I studied law at Bucerius from oct. [sic] 2011 until oct. [sic] 2004 (ll.b), then prepared for the first exam that ended with an oral examination in feb. [sic] 2006. From jan [sic] 07 til march [sic] 09 I made my Referendariat at OLG Düsseldorf ending with the oral examination for the second exam. I then worked at Bucerius at the same time starting my phd [sic] thesis. This one is not required to become a judges and does not really help when applying. It should help [regarding] the respect of people towards [sic] me. After having two children, I applied for a part-time job. As the state is obliged to choose between applicants first of all comparing “achievement” with my very good exams, it was not really a question that they would choose me.”

Interview with Dr. Ulrike Malcher, Criminal Court Judge, Germany (April 2015).

<sup>61</sup> Allen, 82 NW. U. L. REV. at 745-46.

<sup>62</sup> Heiser, at 4.

<sup>63</sup> Interview with Dr. Ulrike Malcher, Criminal Court Judge, Germany (April 2015); Dr. Philipp Eichmann & Dr. Eike Hosemann, Teachers, Bucerius Law School: Comparative Law Course: Session 4 (2014).

For the regional courts, the process varies by region. In some regions, judges are appointed by executive agencies.<sup>64</sup> The appointment is done by the competent minister, normally the region's Justice Minister.<sup>65</sup> In other regions, there is a judicial selection committee making, or at least involved in making, the appointment. These committees vary by region in both composition and function, but "mostly consist of members of parliament or of persons instructed by them; representatives of the judiciary sometimes also belong to them, and in many [regions] one or two attorneys at law."<sup>66</sup>

For the lower federal courts, the federal minister for that court, without any input from the judicial selection committee, proposes which judges to appoint, and the Federal President appoints the judges.<sup>67</sup> Judges are selected for the highest federal courts by the federal judicial committee and the federal minister for the court in question. The Federal President then appoints the judge.<sup>68</sup>

The Federal Constitutional Court (as well as the regional Constitutional Courts) is a hybrid body; it is both a court and a constitutional body.<sup>69</sup> Due to this unique structure, the decisions regarding judges on the Federal Constitutional Court are more complex than for the other courts. Half of the Federal Constitutional Court judges are selected by the Federal Council. The other half of the Federal Constitutional Court judges are selected by a delegate

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<sup>64</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: LEGAL PROFESSIONS - GERMANY (2004), *available at* [http://ec.europa.eu/civiljustice/legal\\_prof/legal\\_prof\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/legal_prof/legal_prof_ger_en.htm).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

committee of the Lower House of Parliament. Both selections require a two-thirds majority,<sup>70</sup> after which the selected judges are appointed to the Federal Constitutional Court by the Federal President.<sup>71</sup> Justices on the Federal Constitutional Court are limited to a single term of twelve years, limiting each justice's individual power.<sup>72</sup>

#### b. United States

In the United States, there are a variety of ways to become a judge.<sup>73</sup> Few, if any, students passing the bar immediately become judges.<sup>74</sup> Depending upon the system, judges may be elected or appointed. Both are a political process, though those who are elected must run for re-election regularly, whereas those appointed are typically appointed for life.<sup>75</sup> Justices of the Supreme Court of the United States are appointed for life, meaning that their term ends only upon their death or their own decision to step down. The appointment process involves being proposed by the President and confirmed by a majority vote of the Senate after public hearings – “a very political process.”<sup>76</sup>

Judges in the United States are not politically active, though some try to decipher political leanings from past decisions and actions, particularly in the appointment of Supreme

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<sup>70</sup> Even though a two-thirds majority is required, everyone who is proposed is elected. Heiser, at 4.

<sup>71</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: LEGAL PROFESSIONS - GERMANY (2004), *available at* [http://ec.europa.eu/civiljustice/legal\\_prof/legal\\_prof\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/legal_prof/legal_prof_ger_en.htm).

<sup>72</sup> Heiser, at 4.

<sup>73</sup> Judge Young, Teacher, Boston University School of Law: Judging in the American Legal System Course (2015).

<sup>74</sup> Dr. Philipp Eichmann & Dr. Eike Hosemann, Teachers, Bucerius Law School: Comparative Law Course: Session 5 (2014).

<sup>75</sup> Judge Young, Teacher, Boston University School of Law: Judging in the American Legal System Course (2015).

<sup>76</sup> Heiser, at 5.

Court of the United States justices. The need for objectivity in interpreting the law is the main reason for this.<sup>77</sup>

## V. Judges' Position

### a. Germany

In Germany, “[j]udges are in a unique service and fiduciary relationship under public law with the State, the ‘judicial relationship.’”<sup>78</sup> With the power to make judicial decisions, judges, unlike civil servants, are independent and “not required to follow instructions.”<sup>79</sup> One German criminal municipal court judge described the role as “to serve the nation by ‘branding’ and sanctioning criminal behavior.”<sup>80</sup> Judges are still paid under the Federal Salaries Act, however.<sup>81</sup>

The basic salary is primarily calculated according to salary groups linked exclusively with the functions given to the judges. A judge only goes up to a higher salary group if a higher-value function has been given to him. The salary level of judges in the two lower salary groups (R1 and R2) is determined in principle by age. The salary is paid by the respective employer (Federal Government or [regional government]).<sup>82</sup>

One German judge, Dr. Ulrike Malcher, explained that the basic salary for judges is very low; enough to live on, but it would be difficult to survive on the judge’s salary with a family.<sup>83</sup>

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<sup>77</sup> Judge Young, Teacher, Boston University School of Law: Judging in the American Legal System Course (2015).

<sup>78</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: LEGAL PROFESSIONS - GERMANY (2004), *available at* [http://ec.europa.eu/civiljustice/legal\\_prof/legal\\_prof\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/legal_prof/legal_prof_ger_en.htm).

<sup>79</sup> *Id.*

<sup>80</sup> Interview with Dr. Ulrike Malcher, Criminal Court Judge, Germany (April 2015).

<sup>81</sup> The term used for judges’ pay is “independent salaries of judges.” EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: LEGAL PROFESSIONS - GERMANY (2004), *available at* [http://ec.europa.eu/civiljustice/legal\\_prof/legal\\_prof\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/legal_prof/legal_prof_ger_en.htm).

<sup>82</sup> *Id.*

<sup>83</sup> Interview with Dr. Ulrike Malcher, Criminal Court Judge, Germany (April 2015).

Further, while working in Baden-Wurttemberg (one of the regions), there was a “special trick” under which,

[f]or 4 years, they cut off 8% of my earnings – they say, I will not be able to work as good as someone who does the same thing for a longer time. Butt [sic] well: I get the same number of cases and have to work harder to get them done and I am really working hard to make it right. The older ones do not have to invest that much time and they maybe don’t invest as much love.<sup>84</sup>

Judges’ position and status within the government are found in the Basic Law,<sup>85</sup> in a section called “judicial decisions.”<sup>86</sup> Due to this, judges are not only the ones entrusted with judicial decisions but also must be involved in any judicial decisions.<sup>87</sup> “The Basic Law states that the power to make judicial decisions is entrusted to the judges . . . and it guarantees judicial independence.”<sup>88</sup> The specific structure are then found in different Acts, most notably the German Judiciary Act.<sup>89</sup> Many of these provisions cross-reference each other “for technical legal reasons.”<sup>90</sup> Further, each of the sixteen regions has its own judiciary act on top of the various federal acts and provisions.<sup>91</sup>

Judges on the Federal Constitutional Court and the regional Constitutional Courts “occupy a special position, as these courts are constitutional bodies, the rights and obligations of which are laid down in separate acts.”<sup>92</sup>

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<sup>84</sup> Interview with Dr. Ulrike Malcher, Criminal Court Judge, Germany (April 2015).

<sup>85</sup> The Basic Law in Germany is the equivalent of the United States’ Constitution.

<sup>86</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: LEGAL PROFESSIONS - GERMANY (2004), *available at* [http://ec.europa.eu/civiljustice/legal\\_prof/legal\\_prof\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/legal_prof/legal_prof_ger_en.htm).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

b. United States

Judges in the United States are also paid by the government for which they work, whether federal or state. Their salary is based upon the government pay tables, though it is typically low as in Germany. The specifics of the judge's position depend upon the court in which they work. For example, administrative judges fall under administrative law (varies depending upon which agency), Article III of the United States Constitution (federal judges), or various state provisions for state judges.

VI. Judges' Daily Work

a. Germany

In Germany, as in most civil law jurisdictions, the judge is an active participant in trial and court proceedings.<sup>93</sup>

Compared to common law, the judge in civil law plays a more active role in the proceedings, eg by questioning witnesses and formulating issues. This is because the court has the task to clarify the issues and help the parties to make their arguments. The judge plays the main role in establishing the material truth on the basis of available evidence. The judge does not have to wait for the counsels to present evidence, but he or she can actively initiate introducing of relevant evidence and may order one of the parties to disclose evidence in its possession. The judge has a task not merely to decide the case according to the stronger of the competing presentations, but to ascertain the definite truth and then to make a just decision.<sup>94</sup>

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<sup>93</sup> Dr. Philipp Eichmann & Dr. Eike Hosemann, Teachers, Bucerius Law School: Comparative Law Course: Session 5 (2014); Astrid Stadler, *The Multiple Roles of Judges and Attorneys in Modern Civil Litigation*, 27 HASTINGS INT'L & COMP. L. REV. 55 (2003).

<sup>94</sup> Pejovic, 32 VUWLR at 830.



The parties are also active, presenting evidence, proposing motions, and making additional questions for witnesses.<sup>95</sup> One judge explained the process as receiving “the written accusation and the police files ahead of time” for review, then deciding which witnesses to call and what evidence to present, as well as the ordering.<sup>96</sup>

[T]he court is mainly concerned with the claims of the parties as they are expressed in the pleadings. . . . [T]he complaint actually determines the parameters of the case. Consequently, the judges in civil law countries will concentrate on the facts which are submitted by the parties and if the facts as presented by the parties differ, the judge will make a decision on the basis of the available evidence as presented by the parties.

One German criminal municipal court judge described the everyday role of the judge as being “to prepare the case and the schedule in the best way possible.”<sup>97</sup> In describing what the main tasks for a German judge to perform, the judge explained:

Preparing trials so that there can be a sentencing as early as possible with enough time on the other hand to see all necessary evidence. In criminal law at the regional courts, we almost always have the sentencing the same moment: Prosecutor presents the case, judge hears accused, prosecutor and defense may ask as well, then evidence is brought up (it’s the judges [sic] responsibility to have everything prepared, although the preparation is normally (sufficiently) done by the prosecutor) and questioned by the judge, prosecution and defense, last word of the accused, judge leaves room [sic] (rather for 3 than 20 minutes, normally ybout [sic] 5 minutes), sentence is announced.<sup>98</sup>

In a typical week, this part-time judge says there are trials two days a week, between one and five criminal trials or between six and ten administrative offences. “The day before [a

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<sup>95</sup> Pejovic, 32 VUWLR at 831.

<sup>96</sup> Stephen Ross Levitt, *The Life and Times of a Local Court Judge in Berlin*, 10 GERMAN L. J. 169, 179-80 (2009).

<sup>97</sup> Interview with Dr. Ulrike Malcher, Criminal Court Judge, Germany (April 2015).

<sup>98</sup> *Id.*

trial], I reserve about 1 hour for preparation of the next days [sic] trials.”<sup>99</sup> The remainder of judges’ time is spent preparing cases “(summoning of witnesses, preparing questions of law, calling prosecutors and defense lawyers when appropriate) and the written judgements.”<sup>100</sup>

During trials, German judges are very active, presiding over the courtroom and managing the trial. Judges “have the right to ask [questions] first and whenever [they] want to,” though it is typical for this judge to ask all questions in the beginning, then allow the prosecutor to ask questions, and finally to allow the defense to ask questions.<sup>101</sup> A Berlin judge explained that

it is primarily the responsibility of the presiding judge during the trial to question the defendant and witnesses. When the judge’s questions are finished, the attorney for the defendant and the state attorney may also pose questions. Even the defendant has a right in Germany to pose questions to the witnesses.<sup>102</sup>

If there is a question of whether or not a question is allowed, typically based upon relevance, the judge decides.<sup>103</sup> During trial, “written evidence prevails over oral evidence. If a claim is supported by a document, the judge will usually not go further. If a document is contradicted by oral statement of a witness the document will normally prevail.”<sup>104</sup> Cross-examination does not occur, though parties may either submit questions to the judge to ask witnesses or have a chance to question the witnesses themselves, with the judge’s approval.<sup>105</sup> On the rare occasion that a question of law arises to be discussed, the judge decides on that as

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Levitt, 10 GERMAN L. J. at 179.

<sup>103</sup> Interview with Dr. Ulrike Malcher, Criminal Court Judge, Germany (April 2015).

<sup>104</sup> Pejovic, 32 VUWLR at 833.

<sup>105</sup> Pejovic, 32 VUWLR at 832-33; Astrid Stadler, *The Multiple Roles of Judges and Attorneys in Modern Civil Litigation*, 27 HASTINGS INT’L & COMP. L. REV. 55 (2003).

well.<sup>106</sup> Frequently, parties will work on a deal, which the judge facilitates if all three agree that the breach was minor “and the accused offers money or social work in return.”<sup>107</sup>

Much of a trial occurs via numerous hearings and written communication between the parties and the judge, in stark contrast to the common law system.<sup>108</sup> The judge, once notice has been served,

will either set a date for the preliminary oral hearing or will initiate written preliminary proceedings. Both parties will be notified of the date or arrangement of written preliminary proceedings. The court may order the parties to appear in person at any hearing.

In preparation for any hearing, the court may order the parties to add to or explain written statements and set a deadline for the parties to provide an explanation of any specific points requiring clarification. The court may order documents and visual evidence to be submitted by the parties to the action or by third parties, and may seek information from official sources.

The parties to the action must be informed of each of these orders.<sup>109</sup>

Unlike common law, there is no pre-trial discovery in civil law, as “[t]he main purpose of evidence presented by a party is to prove his or her legal or factual arguments. Consequently, a party is obliged to produce only those documents which are referred to in its pleadings.”<sup>110</sup>

Further, parties have no obligation to provide documentation or evidence to the other side.

“[T]he judge plays the main role in collecting evidence. If one party wishes to obtain access to documents held by another party, it will have to ask the court to order the other party to

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<sup>106</sup> Interview with Dr. Ulrike Malcher, Criminal Court Judge, Germany (April 2015).

<sup>107</sup> *Id.*

<sup>108</sup> Pejovic, 32 VUWLR at 831.

<sup>109</sup> EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: BRINGING A CASE TO COURT - GERMANY (2004), *available at* [http://ec.europa.eu/civiljustice/case\\_to\\_court/case\\_to\\_court\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/case_to_court/case_to_court_ger_en.htm).

<sup>110</sup> Pejovic, 32 VUWLR at 832.

disclose the document in question.”<sup>111</sup> Thus, “the civil law process of collecting evidence is a public function conducted by the court. This is in accordance with the general principle in the civil law system that the court rather than the parties is in the charge of the process of the development of evidence.”<sup>112</sup> Further,

the court procedure is not bifurcated into guilt and sentencing phases, [so] evidence concerning the personality, circumstances (work, education, and family history) and character of the accused is adduced at trial. At the end of the proceedings, the prosecutor may address the court concerning guilt and sentences; then the defendant’s attorney also will have her turn to speak one last time to the court. Finally, the defendant has the right to the last word; he is given the privilege to address the court one final time before it considers its verdict and possible sentence.<sup>113</sup>

The way German trials occur, with everything being presided over and managed by the judge, without bifurcation, and with all actions taking place as part of the longer trial concept, “is a direct result of the fact that investigation and presentation of evidence is a public function, dominated by judges, rather than a private function run by lawyers.”<sup>114</sup>

These elements of the judge’s role in cases can be seen in a typical German opinion. The opinions generally do not make citations by page numbers but rather by pointing to related sections of the code. The judges use dry, technical language with citations to the journals and reporters rather than by using case names. Few facts are detailed in the opinion, making it difficult for a reader to truly understand a case simply from reading the issued opinion. The parties are called “plaintiff” and “defendant” rather than by using the parties’ names, making

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<sup>111</sup> *Id.*

<sup>112</sup> *Id. See, generally, Astrid Stadler, The Multiple Roles of Judges and Attorneys in Modern Civil Litigation, 27 HASTINGS INT’L & COMP. L. REV. 55 (2003).*

<sup>113</sup> Levitt, 10 GERMAN L. J. at 179-80.

<sup>114</sup> Samuel R. Gross, *The American Disadvantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 735 (1987).

them appear to the reader more like objects. The writing is impersonal and technical: there is not personal language, and there are no instances of the first person or the writing judge speaking to the reader. The German judge uses the opinion to legitimize the holding.<sup>115</sup>

b. United States<sup>116</sup>

In the United States, the role of the judge is less so a member of the investigation and more so the arbiter of the dispute.<sup>117</sup> A greater emphasis is placed upon oral arguments and examination in the common law than in civil law jurisdictions, including Germany.<sup>118</sup>

. . . the judge acts as neutral arbiter between the parties in dispute as they each put forward their case. The parties in a dispute lead the proceedings, while the position of judge is rather passive as he or she does not undertake any independent investigation into the subject matter of the dispute. The role of judge is not to find the ultimate truth. The judge's main task is to oversee the proceedings and to ensure that all aspects of the procedure are respected. The judge does not himself interrogate the witnesses, but his take is to ensure that the questions the parties put to the witnesses are relevant to the case. At the end, the judge should decide the care according to the more convincing of the competing presentations.<sup>119</sup>

The parties are active in common law cases, from the start of a case with a complaint, which "is merely a formality which starts a procedure of investigation aimed at establishing the truth," through discovery and trial, including presentation of evidence and cross-examination of

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<sup>115</sup> Dr. Philipp Eichmann & Dr. Eike Hosemann, Teachers, Bucerius Law School: Comparative Law Course: Session 2 (2014).

<sup>116</sup> As this topic was a large part of our course, I did not include the many details learned from Judge Young in this section but instead used the comparative section to include some of the more striking differences. Judge Young, Teacher, Boston University School of Law: Judging in the American Legal System Course (2015).

<sup>117</sup> Dr. Philipp Eichmann & Dr. Eike Hosemann, Teachers, Bucerius Law School: Comparative Law Course: Session 5 (2014).

<sup>118</sup> Pejovic, 32 VUWLR at 831.

<sup>119</sup> Pejovic, 32 VUWLR at 830.

witnesses.<sup>120</sup> In fact, “in America, almost everything happens before trial; in Germany, relatively little.”<sup>121</sup>

These elements of a judge’s role in a court case can be seen from an example of a court decision. The judge often writes with a personal touch, using party names, colorful language, and oftentimes the first person in a manner of speaking directly to the writer. Each judge’s personality and legal persona comes out in the opinion due to this. Many detailed facts are included to allow future comparisons to and distinguishing from the case at bar, as well as comparing and distinguishing the case at bar to past precedent. Judges may write concurring or dissenting opinions to show other interpretations of the law and include the *dicta* for future readers. While this *dicta* does not hold the force of law, it can be persuasive in future cases.<sup>122</sup>

## VII. Judges’ Role in Society

### a. Germany

German judges are intended to be close to the people.<sup>123</sup> The German judicial system is meant to be both representative of<sup>124</sup> and for the public, allowing many methods of providing citizens with access to the judicial system.<sup>125</sup> Due to Germany’s history, the judge is seen as a

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<sup>120</sup> Pejovic, 32 VUWLR at 831-34.

<sup>121</sup> Gross, 85 MICH. L. REV. AT 735.

<sup>122</sup> Dr. Philipp Eichmann & Dr. Eike Hosemann, Teachers, Bucerius Law School: Comparative Law Course: Session 2 (2014).

<sup>123</sup> Heiser, at 3.

<sup>124</sup> Heiser, at 4, 7.

<sup>125</sup> Heiser, at 3-4.

political check on the executive and legislative branches of government.<sup>126</sup> Judges are therefore seen as politically important, resolving political problems throughout the political system.<sup>127</sup>

Due to Germany's freedom of association under the Basic Law, judges "can also form professional associations but are not obliged to do so."<sup>128</sup> Judges are allowed to be active members of political parties, though judicial decisions are objective, with no politics allowed to sway a position: "it is assumed that they of course will respect that the court is a body based on law and not politics."<sup>129</sup>

With German judges' closeness to the people comes a great deal of trust by society. "Society sees them as wise, old men/women. . . . [S]ociety and law defines them as independent, being above things, and, of course, infallible."<sup>130</sup> In fact, the impression is that judges never make any mistakes.<sup>131</sup>

On the other hand, looking at what judges are paid in Germany shows a lower societal value placed on judges. One study comparing the income of judges and prosecutors in the EU "compared to the average income in the country in numbers and percent. Germany pays 93% of the average German income to its judges," which is quite low compared to the other countries studied.<sup>132</sup> One judge responded to this study saying "[s]o what tells me society about

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<sup>126</sup> Heiser, at 3.

<sup>127</sup> *Id.*

<sup>128</sup> L EUROPEAN COMMISSION: EUROPEAN JUDICIAL NETWORK: LEGAL PROFESSIONS - GERMANY (2004), available at [http://ec.europa.eu/civiljustice/legal\\_prof/legal\\_prof\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/legal_prof/legal_prof_ger_en.htm).

<sup>129</sup> Heiser, at 4.

<sup>130</sup> Interview with Dr. Ulrike Malcher, Criminal Court Judge, Germany (April 2015).

<sup>131</sup> *Id.*

<sup>132</sup> In fact, Germany is in the bottom for pay both by percent and actual number. *Id.*

my value – after 10 years of education and in my case of phd?”<sup>133</sup> indicating her displeasure and feeling that German society might in some ways respect judges but in monetary value holds judges low.<sup>134</sup>

b. United States

Though the American government was set up with three branches, each having checks and balances on the other, this is not how the system is viewed today. The judicial branch was initially “the least dangerous branch,”<sup>135</sup> but then the courts’ power grew over time. The American people today view the Supreme Court of the United States as elitist, unelected, and the least legitimate of the three branches.<sup>136</sup>

Judges in the United States are viewed with respect, particularly within the courtroom. American society believes judges to hold the important position of neutral arbiter and upholders of the Constitution.<sup>137</sup> Judges often are seen as conservative or progressive, but generally with more freedom than their German counterparts to interpret precedent broadly, distinguish from precedent, and substantially influence the progress of law in the land.<sup>138</sup> Further, judges work with their freedom to allow for greater freedom of contract and market development, lessening the government’s influence on the marketplace.<sup>139</sup> American judges

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Heiser, at 3 (internal quotation marks omitted).

<sup>136</sup> *Id.*

<sup>137</sup> Judge Young, Teacher, Boston University School of Law: Judging in the American Legal System Course (2015).

<sup>138</sup> Dr. Philipp Eichmann & Dr. Eike Hosemann, Teachers, Bucerius Law School: Comparative Law Course: Session 6 (2014).

<sup>139</sup> *Id.*



used to be considered heroes of the people, helping to preside over proceedings and dole out justice to all members of society.<sup>140</sup>

c. Direct Comparison

In any country, the law is embedded as a part of the culture, informed by not only judges interpreting the law and legal theorists providing underlying theories but also broader legal culture and the country's culture more generally. With this information, comparative legal academics and lawyers are able to determine the proper interpretation of the law as well as how legal players, such as judges, are viewed in each country.<sup>141</sup>

"Our German friends tend to criticise the English judges for adopting too strict a method of interpretation," showing that the German public typically views judges as broadly interpreting principles in application to the facts of the case at hand rather than stringently following precedent.<sup>142</sup> Yet the American belief in *stare decisis, quia non movere*, a belief in keeping the same rather than disturbing settled law, and in judges deciding cases based on distinguishing is based in the principles of legal certainty, separation of powers, court hierarchy, and the professionalization and necessity of legal reporting.<sup>143</sup> Germans, on the other hand, believe that judges, typically thought of as conservative and a hindrance to the progressive

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<sup>140</sup> Dr. Philipp Eichmann & Dr. Eike Hosemann, Teachers, Bucerius Law School: Comparative Law Course: Session 2 (2014).

<sup>141</sup> Dr. Philipp Eichmann & Dr. Eike Hosemann, Teachers, Bucerius Law School: Comparative Law Course: Session 1 (2014).

<sup>142</sup> Dr. Philipp Eichmann & Dr. Eike Hosemann, Teachers, Bucerius Law School: Comparative Law Course: Session 2 (2014) (quoting Lord Goff (1997)).

<sup>143</sup> Dr. Philipp Eichmann & Dr. Eike Hosemann, Teachers, Bucerius Law School: Comparative Law Course: Session 2 (2014).

legislature, interpret the law directly from the statutes and cannot be incorrect; judges are infallible.<sup>144</sup>

Both Germany and the United States see the judiciary as a check on the executive and legislative branches of government, though to different lengths. From this view, both societies view the judiciary as an important element of government. Traditionally, Germans tended to see the judiciary as more of a hindrance to progressive legislation and a hold on the other branches of government, finding “legal heroes” in law professors and academics rather than judges.<sup>145</sup> Americans used to view the judiciary as “legal heroes,” with “common law considered as a safeguard against the legislature.”<sup>146</sup> However, both of these viewpoints began changing direction in the twentieth century, with the rise of legal academia and legislation in society’s eyes in the United States and the rise of courts in the public’s eye in Germany.<sup>147</sup>

Germans tend to view individual judges with less respect solely from their position, due to many judges assuming the role immediately after law school and the state exams.<sup>148</sup> Americans view individual judges as more prestigious, as judges typically have distinguished careers before being either elected or appointed to the bench.<sup>149</sup>

## VIII. Conclusion

Throughout this paper, many similarities and differences have been highlighted between German and American judges. While this short paper is unable to examine the many

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

facets of this comparison in depth, the goal was to provide a broad overview of a judge's role, with an emphasis on the judge's role during a case as well as in society overall.

While both legal systems are hierarchical, the German system is more complex and contains more levels. However, Germany does not have executive agencies with administrative courts as the United States does, and thus Germany must include these courts in the overall court hierarchy. An interesting formal distinction between the two systems is the question of whether or not precedent is binding. Even though each case in Germany requires the judge to take a fresh look at the applicable statutes and interpret them accordingly, with the legal principle that the judge is always correct (other than appeals), German judges often look to past cases as a guide, particularly cases from higher courts, as judges do not wish to have their cases overturned on appeal. American judges are bound to precedent, though this binding comes with the flexibility of distinguishing cases. Thus, both systems arrive at a similar conclusion, with judges using past cases as an authoritative guide for interpreting the law in application to the case at hand, yet still with some flexibility in certain situations to distinguish from precedent.

A major difference between the two legal systems is the role of the judge. In Germany, judges are very active participants in cases, asking questions, viewing evidence, researching the law, requesting evidence, and deciding on the case based mainly on written communications. The case is viewed as the entirety of written communications and hearings, with a goal of completing cases as quickly as possible while having justice prevail. The judge rules over the entire trial and makes a determination of law and fact (in lower courts), with no jury. In the

United States, judges take a more passive role as a neutral arbiter, with parties asking questions, researching law, and presenting evidence. American judges typically place greater weight on oral arguments, particularly in jury trials (as the jury only has the oral argument and presented evidence to help it decide matters of fact).

A changing facet of the difference in judges is the judges' role in society. German judges used to be considered with respect, but not prestige, with society seeing them as conservative and necessary. American judges at the same time were viewed as legal heroes, bringing justice to the masses, and being flexible to change law so that justice was served, both now and in the future. However, during the twentieth century, each of these extreme positions began to shift in the other direction. German judges are now treated with greater respect, with society seeing them more as protectors. American judges, on the other hand, have somewhat lost their role as legal heroes.

Society's changing viewpoints may in part be due to globalization, which has included efforts to harmonize laws, particularly within Europe and between Europe and the United States. In fact, many of the changes that have made civil and common law come closer together have been due to such harmonization efforts. Going forward, these two strong, influential judicial systems will likely continue to influence each other, emphasizing more similarities and eliminating some differences. While it is not possible for the systems to converge without a complete re-thinking of the system, legal thought, and legal process by one, the other, or both, many of the outcomes have been harmonized and working together will continue this harmonization process.