Representation by Lawyers in Court Proceedings

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A. Introduction

Dear President, dear CCBE delegates, dear colleagues, ladies and gentlemen,

first of all, let me thank the conference organizers for inviting me to Kiev to speak to you today. It is my honour and pleasure to give you a short presentation on the topic of representation by advocates in court. As has already been said in the introduction by the chair, my name is Matthias Kilian. I am a professor of law at Cologne university which has the second largest law faculty in Germany. Cologne university also houses a documentation centre for the law of the legal profession in Europe which focuses on comparative research on lawyers and is the only one of its kind in Europe. Personally, among others, my research areas are procedural law, the regulation of lawyers and socio-legal research.

Ladies and gentlemen, I have been asked to provide some insight into the subject of representation by lawyers in court by adding an additional perspective to what the economists contributed earlier today. In the next 30 minutes I will therefore approach the subject from two additional angles that add to what Hendrik Okholm and Christopher Decker have already explained so eloquently before me.

Before we get into the thick of things, I would first like to take a general look at the meaning of mandatory professional legal representation in court procedures. Generally speaking, legal representation describes that a party to court proceedings is accompanied, guided and of course represented by a licensed legal professional, like a lawyer, solicitor, barrister or advocate in civil, criminal or administrative court proceedings. If legal representation in a court proceeding is 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”. Taking such an approach is 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. In contrast, Germany and the other jurisdictions built on the Roman Law System, consider an obligatory legal representation in court
as a prerequisite for effective court proceedings, the individual’s success in litigation and thus ultimately, for justice.

Regrettably, however, things are not as straightforward as this initial distinction make them appear: Representation by someone else than the party itself does not necessarily mean representation by a member of the bar. Being a member of a bar and being a professional lawyer is not necessarily the same thing – unless the provision of legal services in a jurisdiction and/or the representation of a party in court proceedings against payment is only lawful for a member of the bar. While in some jurisdictions this is the case, in others it is sufficient to hold a law degree or to be deemed “competent” by the court. Things get even more complicated when you take into consideration that a legal system can further distinguish between different instances within a court system or between different court systems as such. It may, for example, be necessary to employ the services of a lawyer before a regional court or a Court of Appeals, but not so before a local court which has jurisdiction for low-value claims. Or the approach is different for civil courts and, say, administrative or tax courts – maybe because they follow different procedural rules, with one court system being inquisitorial in nature and the other more contradictory, maybe because one system, for historical reasons, is a court in the traditional sense whereas the other is more akin to a tribunal. I am making all these distinctions right at the beginning of my presentation to make you aware of the fact that it is very difficult to generalize when we discuss the issue of representation in courts and that we must avoid thinking in black and white.

To get to the bottom of the advantages and disadvantages of mandatory legal representation in civil courts I am going to give you an insight into some details of the approaches taken across Europe. In the first part of my presentation, I will analyze the existing rules of representation by legal professionals in civil court proceedings in Germany and selected other European countries. In the second part, I will then focus on what insight empirical research can provide into the matter we are discussing today by looking at research on the effects of legal representation on the outcomes of court proceedings. Finally, I will be drawing some conclusions about the importance of professional legal advice and representation when a layperson decides to go to court. Having only 30 minutes for my whole presentation means of course that I can only provide a very brief overview of these two aspects that both warrant a much more thorough analysis than I can offer in the timeframe available. Particularly, in the first, comparative part I can only cover a dozen or so jurisdictions – and those all only very briefly. This being a PECO conference, I have decided to skip the Eastern European jurisdictions and focus on jurisdictions from Western and Northern Europe.
B. Comparative Analysis

I. Representation in civil courts in Germany

Being from Germany, an obvious starting point for a comparative analysis for me is the situation in my home country. The German code of civil procedure stipulates that in some cases a party to a proceeding before a civil court must be represented by a lawyer who is a member of the bar, while in other cases a party is free to act on his or her own. Whether a claimant needs to be represented in a court action or not, depends on the court of jurisdiction and the amount in dispute. The representation of a lawyer is mandatory for civil and commercial cases heard before the Regional Courts (Landgericht). They have jurisdiction in cases in which the amount in dispute is more than 5,000 Euros. Representation can only be by a member of the bar, meaning that German lawyers enjoy monopoly rights in this type of proceedings as the representative who pleads the case must be a bar member. Consequently, if a litigant appears at a court proceeding without a member of the bar representing her in cases of mandatory representation, the litigant is not allowed to take any action herself and is regarded as being absent. Only in a Local Court (Amtsgericht) a litigant may bring a court action without being represented (except in family cases). The Local Court has, roughly speaking, jurisdiction for cases with a value of less than 5,000 Euros. Such proceedings are usually rather straightforward, a limited amount is at stake and the presiding judge is provided with sufficient procedural authority to guide per se litigants through the court procedure without legal representation. If a party wants to represented, not anybody can be a representative. The law stipulates that representation by a member of the bar is the norm. Other than that, the law only allows representation by an employee, family members of legal age and consumer advice bureaus. Law graduates who are not a member of the bar and who do not fall in one of the above categories can only represent a party pro bono.

Does that mean that before the local courts most litigants are litigants in person? Not at all. An interesting piece of statistical information is that only roughly a fifth of all litigants in Germany are unrepresented in proceedings where they have the options 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. It has been suggested that the reason for this may be that litigants with a better educational background are more likely to trust themselves to be able to deal with a legal matter without assistance, or to have acquired some sort of legal knowledge.
The rules on representation in court I have just explained are inextricably linked to rules on unauthorized practice of law. Such rules, by and large, prevent someone with whatever source and extent of legal knowledge to provide legal advice and representation against payment if he is not a member of the bar. Those rules on unauthorized practice of law have three purposes that are indirectly reflected in the rules for mandatory representation as well. They guarantee...

(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.

More specifically, the additional rationale for mandatory representation in German courts is that it is seen as a guarantee for social justice and the effectiveness of the democratic welfare state. The concept of legal representation in court proceedings is based on the principle of “equilibrium” or “equality of opportunity” for every litigant. Germans use a somewhat more martial terminology – we call this principle “Waffengleichheit”, which means equality of arms. Every individual involved in a court proceeding must be guaranteed the chance to plead her case before a court based on the legal merits of the case. As civil proceedings are contradictorily by nature and not based on inquisitorial powers of the court, the assumption is that litigants in all but small claims disputes therefore should be represented by a person with adequate legal training. To allow litigants without sufficient means to employ a lawyer, they are, based on the merits of a case, entitled to legal aid and a so called “Notanwalt”, which can be loosely translated as “emergency counsel”.

All what I have just described is, of course, based on the assumption that a party in court proceedings which is represented by a legal professional will fare better than a litigant in person. Whether this assumption is just wishful thinking or indeed reflects the realities of legal life and court practice is the big question – I will try to answer that question in the second part of my presentation.
II. Representation in civil courts in Scandinavia, the Roman law System and the Common Law System

Ladies and gentlemen, but let us now first take a look at how representation by a lawyer in civil proceedings is regulated throughout Europe. I will start by explaining the rules of legal representation in the Roman Legal System, then I am going to give you an overview of the situation in the Common Law System and finally I will have a look at the system of legal representation in Nordic countries.

1. Representation in jurisdictions based on the Roman Legal System

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

a) In France there are a number of cases which require the representation of a lawyer in civil court proceedings. In actions brought in a Regional Court the parties must generally be represented by an advocate, except in cases concerning commercial leases, injunctions or actions for withdrawal of parental authority. However, 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 (bailiff, avoué, notary, auctioneer, etc.) and to a waiver of court costs.

b) In Spain it is the general rule to use a Procurador (procurator) or an Abogado (lawyer) to conduct actions in the court. However an individual 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. However, if the debtor does not pay, it is not possible to bring further action as a litigant in person. Those granted legal aid in Spain also receive free pre-trial legal advice and financial aid for lawyers’ fees.

c) In Italy, as a general rule, all litigants need to be represented by a lawyer. Only for claims concerning very small amounts of less than 1,100 Euros or if the plaintiff is a qualified Italian lawyer herself, the litigant can initiate procedural actions in person.
d) In short, the idea of mandatory representation by a lawyer in court finds its basis in the Roman Legal System which in its modern form is inspired by the concept of a “social state”. However, for small and straightforward court actions even in jurisdictions following the Roman Legal System the requirement of representation by a lawyer is to some extent dispensed of.

2. **Representation in jurisdictions based on the Common Law system**

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

a) However, 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 anyone to a court hearing to speak on his or her behalf. Such a person is called a 'lay representative' and may be a spouse, relative, friend or an advice worker. A legal background is not required to be allowed to speak for a litigant. To ensure an orderly administration of justice and well-organized court proceedings in the absence of a lawyer representing a claimant or defendant, 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. It involves things such as writing to the person who the plaintiff is claiming from, to set out the details of the dispute or to exchange evidence, etc.

Copies of all those protocols are available from the responsible court or on the website of the Ministry of Justice. 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 at some stage of their case. Also almost two thirds of family cases involve unrepresented litigants in person.

b) In Scotland the "small claims" procedure in the Sheriff Court – which is the local court of first instance - was even designed to give special support to litigants in person who do not enjoy the benefit of a professional legal representation. Court users in several Scottish sheriff courts have access to “in-court advice” projects. These provide court users with legal and other advice including court procedure and self-representation in small claims matters, summary cause debt and eviction work as well as ordinary debt collection matters.

c) In Northern Ireland there is no obligation to be legally represented in civil court procedures either. However, in the High Court the so-called “next friend” or a “guardian ad litem” of a person under a disability (e.g. under eighteen) must act through a solicitor. A corporate body
must also act through a solicitor, unless the court allows a director to represent the company himself. Furthermore Northern Irish courts may impose conditions or restrictions to the legal representation to ensure that the case proceeds in an orderly manner. People who do not want to instruct a lawyer can also seek advice or assistance from the voluntary sector or a statutory body such as the Consumer Council for Northern Ireland.

d) Despite relatively relaxed rules on mandatory representation, it is worth noting that most litigants in common law countries choose to be represented by lawyers at least in the higher courts and in major legal matters in general even without a legal requirement to do so.

3. **Representation in the Nordic Jurisdictions**

Finally, a very quick look at the Nordic countries. In Sweden, Finland and Norway individuals are permitted to bring a case to court as litigants in person. Thus, there is no requirement to be represented by a lawyer in civil court hearings. Furthermore there is also no lawyers’ monopoly in the Swedish legal system in the sense that a legal representative or counsel must be a lawyer and/or a member of the bar. In Denmark there is also no requirement to be represented by a legal professional. However, the regional and higher court may set the obligation of legal representation to secure an effective court proceeding. Anecdotal evidence suggests that more recently the courts’ have begun to use these powers more often than in the past. As a result, nowadays almost all civil proceedings before Danish Courts are pursued through a legal professional representing the party. The same, I understand, is true for Sweden as well.

C. **Research on the impact of representation in civil court processes**

Ladies and gentlemen, after this bird’s eye view on the legal landscape of mandatory representation in Europe, let me now look at the effects of legal representation. Or to put it differently: Does it make sense for a party to be represented by a member of the bar in court or is it just a waste of money without any measurable effect - as the case is the case and the law is law with or without the intervention of a member of the bar? I want to introduce you to interesting research from the United Kingdom, the United States and Germany that has analyzed the impact of representation in court.

1. **German Studies**

Two interesting studies that can help us better understand the relevance of legal representation have come out of Germany. One goes back as far as the 1980s, while the other has just been published.
a) In the 1980s, a comprehensive research project tried to identify barriers to success in court proceedings for claimants and defendants. For that purpose 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. The analysis produced a number of interesting findings which I can only briefly summarize:

- According to the study, representation by a lawyer leads to significantly more activities of the judge hearing the case. A legal professional acting on behalf of a party, one could argue, therefore serves as a catalyst for more commitment of the judge and therefore for a better quality of judication. One explanation is obvious: 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.

- The study also showed that parties from lower classes are more often unrepresented in court. This means that those who are the most vulnerable cannot effectively control the judge and/or influence the court proceedings because their legal knowledge and intellectual capabilities do not allow such a control.

- The most striking finding is that chances of a successful outcome of litigation depends extremely on representation by a member of the bar as far as defendants are concerned: 31 per cent of the defendants were entirely successful in defending the claim when represented by a lawyer, but only 12 per cent of those representing themselves. 79 per cent of unrepresented parties lost the case to a full extent, but only 35 per cent of those defending the claim with the help of a member of the bar.

b) More recently, another research project analyzed a couple of hundred court cases that were decided at one German High Court. The approach was slightly different as it involved a court where only members of the bar have a right of audience and litigants cannot represent themselves. The aim of that research was to find out if the cost of representation has an impact on the quality of representation. In the context of our conference, this research has 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, but holds a law degree, assuming that he or she offers cheaper legal services than a member of the bar. A common notion is that a lack of competition between different types of legal professionals as a result of monopoly rights of members of the bar leads to higher costs for the consumer without any additional gain in quality and outcomes. The research project has shown 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. To come to that conclusion, the
research project used a couple of indicators that were applied to the court files. The research found out that lower remuneration served as a disincentive for a professional to invest additional time in a court case that potentially could have bettered the chances of a more positive outcome for the client. Unless 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. At least this is what this recent research tentatively suggests.

2. England and Wales

Much more research than in Germany has been carried out in England and Wales. The amount of research led the Ministry of Justice to publish a literature review on the impact of litigants in person in civil and family court proceedings in the United Kingdom a while ago. The aim of this review was to examine the demographics of litigants in person, their motivations and the impact of self-representation on outcomes by condensing the findings of various studies into a single research report. In short, most research analyzed suggested that non-represented litigants may experience a number of problems, which not only create problems for the litigant and the prospects of his case, but in turn also impact on the court. Let me highlight a few findings:

A number of studies found out 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 many unrepresented appellants and applicants felt ill-equipped to present their case effectively at their hearing. They felt intimidated, confused at the language and often surprised by the formality of proceedings. Problems with understanding principles of evidence and identifying facts relevant to the case, but also difficulties with forms were common occurrences in many studies.

Research was also able to identify that as a result of such problems, unrepresented litigants tend to be an extra burden for court staff, judges, but also opponents. Studies found out that court staff need to spend additional time on litigants in person. Judges highlighted the role of good representation in producing properly investigated cases, provision of the correct type of evidence and relevant facts, researching the law and presenting relevant cases. It was found that some representatives had to do extra work to compensate for the lack of representation on the other side, such as preparing documents that would normally be prepared by the other party’s representative.
Where studies looked at the duration of court proceedings with active litigants in person, the evidence suggested that those cases may take longer. There was also evidence that representatives in some situations speed up court proceedings.

Various studies indicated that case outcomes were adversely affected by lack of representation. Researchers found that lawyers obtain significantly better results in tried cases than unrepresented litigants, after controlling for the amount at stake, complexity and party characteristics. In addition it was found that representation significantly and independently increased the probability that a case would succeed in tribunal cases.

Research also shows that the quality of outcomes is affected by legal representation. One research project found that cases involving fully unrepresented litigants were 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. In the area of family law, another research project presented evidence that representation alters custody outcomes, for example shared decision-making and visitation arrangements were more likely to be achieved when both parties were presented.

3. United States

Rebecca Sandefur, a renowned scholar in the field of socio-legal research in the United States, is about to publish a study that is a meta-analysis of 45 research studies of the relationship between representation and adjudicated civil case outcomes in the United States. The study will bring together the findings of research on lawyer and non-lawyer representation in the United States of the past 50 years. The meta-analytical approach allows to look at the effects of representation by lawyers, representation by non-lawyers and self-representation. The findings of the meta-analysis are striking in three respects.

- First, they reveal a potentially very large impact of lawyer representation on case outcomes. Available evidence reveals that expanding representation by a legal professional could radically change the outcomes of adjudicated civil cases. This potential impact is notable when lawyers’ work is compared to that of non-lawyer representatives, and, as Sandefur puts it, “spectacular” when compared to lay people’s attempts at self-representation.

- Second, and maybe even more importantly: 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. By contrast, a need to use and understand more complex substantive law appears to explain little of lawyers’ superior performance relative to unrepres-
sented lay people in these kinds of cases. Surprisingly, it is in fields of law that involve less complex substantive law where one observes larger potential of lawyer representation. Conventional wisdom that big law requires lawyering whereas run of the mill cases can do without therefore appears to be an urban legend.

- Third: Research therefore hints at the significant impact of relational expertise on the outcomes of professional work. Relational expertise reflects skill at negotiating the interpersonal environments in which professional work takes place.

Sandefur argues for example that lawyer representation may act as an endorsement of lower status parties that affects how judges and other court staff treat them and evaluate their claims, perhaps because court staff believe represented cases are more meritorious. The presence of a lawyer signals something important about a case to the people involved in processing it. The presence of a lawyer also may encourage court staff to obey rules and so enhance people’s chances of winning their cases. This interpretation is in line with the German study I mentioned earlier in my presentation. The findings also suggest that there is a difference between a litigant being represented by a member of a bar or by someone who just happens to hold a “law degree” as usually only additional post-graduate training and experience provides the knowledge to work the ropes of the court system and interact with a judge on a level playing field.

D. Conclusion

Ladies and gentlemen, let me summarize my presentation briefly:

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; setting it is often based on political and fiscal considerations and also subject to change. Whether or not representation is required reflects not only the origins of a legal system, but also the self-concept of the political system we are looking at: It can stress the responsibility of the individual for personal well-being and accept that financial or intellectual inequalities also impact the individual’s abilities to navigate the legal system and to resolve legal problems. A political system can, however, also 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. The deci-
sion for or against representation in court proceedings therefore is always a trade-off that needs to take into consideration the conceptual disadvantage of restricting one’s self-determination on the one hand and the various positive effects of representation by lawyers that have been proven by empirical research. Empirical research from across the globe shows that representation in court has a positive impact on outcomes, guarantees a better quality of adjudication and lets the court operate more effectively by speeding up case disposal, reducing the need for assisting litigants and minimizing the intimidation of individuals involved in a court case.