Chapter 5
In-Court Mediation in Germany: A Basic Function of the Judiciary

Jan Malte von Bargen

Abstract Effective use of alternative dispute resolution (ADR) systems requires that you find the procedure best suitable for the case at hand. This contribution focuses on in-court mediation models. The author attempts to explain why German, and also other European courts show increased interest in experimenting with in-court mediation models. Afterwards, thoughts about the importance of establishing both in-court and out-of-court mediation systems follow. The last part concentrates on the constitutional framework German in-court mediation models operate within these days following the adoption of the *Mediationsförderungsgesetz*, or Mediation Advancement Statute, which permits and regulates this special form of mediation in the procedural codes of most courts. The author identifies mediation by a judge who is not allowed to decide on the merits of the case to be a part of the judiciary as a state function and argues that it is not only an annex but a basic function of the judicial power. The qualification of this special mediation setting as an integral part of the judicial power allows mediator judges to profit from special regulations applying only to judges, such as judicial independence, among other things.

5.1 Introduction

Finally, on 28 June 2012, the German parliament adopted the *Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung* of 21 July 2013[1] (Statute to advance mediation and other procedures of alternative

[1] The German president signed the statute at this date.

J.M. von Bargen (✉)
University of Freiburg, Faculty of Law, Platz der Alten Synagoge 1,
79085 Freiburg, Germany

University of Freiburg, Law School, Freiburg im Breisgau, Germany
e-mail: malte.von.bargen@jura.uni-freiburg.de

L. Ervo and A. Nylund (eds.), *The Future of Civil Litigation*,
DOI 10.1007/978-3-319-04465-1_5,

dispute resolution; *Mediationsförderungsgesetz*/Mediation Advancement Statute), which passed the German Senate (*Bundesrat*) on 29 June 2012 and came into force on 26 July 2012.[2] Included in this statute is the *Mediationsgesetz*, basically importing all the requirements asked by the Directive 2008/52/EC of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters. Other significant changes are related to the future use of in-court mediation[3] models in most of the procedural codes, first and foremost the Civil Procedure Code (*Zivilprozessordnung*, ZPO); see, e.g., §278 Sec. 5 or §278a.[4] Germany finally managed to fulfil its obligations more than a year after the deadline set in the directive. The reasons for the delay were not to be found in the regulations of the *Mediationsgesetz* itself; it was the general future of the statewide practiced in-court mediation models[5] that were mainly responsible for the delay. For a long time, it was unsure if the successful model projects would be set on a solid legal basis or if they would explicitly be forbidden by the legislator. The proposed solutions went back and forth from allowing to banning in-court mediation during the different stages of the process of legislation. It seemed like the directive intended to foster mediation was averting the further development of in-court mediation. Not until a very late intervention of the *Bundesrat* (Senate) interested in solidifying the established models of in-court mediation at state courts led to the adopted formulation, now explicitly allowing in-court mediation under the new label: *Güterichter*. But even after this, decision in favour of in-court mediation discussions did not hush. Questions of what is allowed and what is not are still intensively discussed.[6] The article tries to describe the situation and give reasons why courts continue their keen interest in in-court mediation.

---

[2] Article 9 of the *Mediationsförderungsgesetz* states the date of effect at the day after the statute is published in the Bundesgesetzblatt 2012, Part I, No. 35 of 25 July 2012, p. 1577ff, to be found at http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBl#__Bundesanzeiger_BGBl__%2F%2F*[%40attr_id%3D%27bgbl112s1577.pdf%27]__1374613606308, accessed 21 February 2014.

[3] The term in-court mediation is used to describe a procedure where pending court cases are transferred by the deciding judge to a special educated mediator judge, if the parties agree. The mediator judge is a judge who is not allowed to decide on the merits of the case. If the mediation fails, the cases will go back to the deciding judge.

[4] See also the procedural codes of the labour courts, §§54 Sec. 6, 54a Arbeitsgerichtsgesetz, ArbGG; the administrative courts, §173 Sec. 1 Verwaltungsgerichtsordnung, VwGO; the social courts, §202 Sozialgerichtsgesetz, SGG; the tax courts, §155 Finanzgerichtsordnung, FGO, as well as the courts of family and non-contentious matters, §§36 Sec. 5, 36a Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, FamFG.

[5] A detailed description of these models can be found in von Bargen (2008), p. 71ff.; Greger and Unberath (2013), p. 267, with further references; Fritz and Pielsticker (2013), Introduction, para. 38ff.

[6] The question if the new *Mediationsgesetz* is also applicable to the *Güterichter* is still under discussion. From my point of view, the *Mediationsgesetz* is applicable to a *Güterichter* acting as a mediator; see, e.g., Article 3 a) S. 3 and 4 of the Directive 2008/52/EC. Greger and Unberath (2013), p. 43, para. 14, as well as Fritz and Pielsticker (2013), p. 213, para. 79, do not agree with this viewpoint.

5.2 Different Ways of Allocating Cases

If the potentials of alternative dispute resolution (ADR) are to be used effectively in a society, it has to be made sure that every case makes his way to the procedure that deals best with the individual problem. From the view of courts, there are basically three different ways to connect court proceedings with the different ADR systems. In detail, many different ways of system design are possible, but all can basically be brought back to those three ways: (1) the distributional model, (2) diversion model and (3) integration model.[7]

5.2.1 Distribution Model

For years, mediation was primarily seen as the opposite of the judicial attempts of adjusting conflicts and was, therefore, located out of the courts. Conflicts were either solved out of the courts in a mediation procedure or by a judge. Mediation was not thought to be an integral part of an overall system of dispute resolution. There was no real linkage between the procedures.[8] The cases were distributed to each mutually exclusive conflict-solving procedure.

The largest number of cases should reach the dispute resolution system they fit best by this sort of self-distribution. If a distribution directly leading each case to its best dispute resolution system would be possible, there will not be a demand for a better adjustment of civil proceedings and other dispute resolution systems.

To establish such an efficient distribution, private mediators or mediation authorities other than courts are needed that are educated and able to handle the cases. The existence of private mediators and the theoretic preconditions to set up a distribution exist in the majority of European countries. The European Commission for the Efficiency of Justice (CEPEJ) Report states a high number of European countries that have private mediators offering their work.[9]

But ideal conditions where every case finds its "best" resolution system on its own, these conditions are far away from reality, at least in Germany. A lot of different factors influence the decision as to which dispute resolution system is chosen by the parties. These factors induce parties to find not always *ad hoc* the best dispute resolution system from an objective perspective.

Firstly, the general knowledge about the different dispute resolution systems is important to influence the parties in choosing. The European directive on mediation is trying to set standards in every national jurisdiction and promoting the knowledge

[7] In Germany, Greger (2003), p. 240ff., described and named these three different ways.

[8] Hopt and Steffek (2008), p. 79, state that the potential of mediation can only be reached if it is attractively anchored in the system of dispute resolution.

[9] See, e.g., Council of Europe (2012), p. 132.

about mediation.[10] Projects in Germany try to educate parties and attorneys about the different systems of dispute resolution.[11] Knowledge of how to identify the best system for their dispute and how to find the places where their dispute can be properly handled shall be fostered. In the long run, it is hoped that more parties and attorneys will choose other dispute resolution systems than court proceedings. But to date, the success of these projects was way behind the expected impacts.[12] The long-term changes of the projects cannot be evaluated yet.

Other important factors than information determine the choice of the dispute resolution system as well. Questions of how courts perform in comparison to ADR systems with regard to costs, time and enforceability of the results tend to influence the parties.

What do people have to pay for such a system? Private mediations do usually have to be paid privately. If the mediation fails, the costs for mediation have to be added to the growing pile of costs. Also, an important question seems to be whether a working system of legal aid for mediation and/or for additional court proceedings exists.[13]

The role of the attorneys is, of course, a major factor as well. Do attorneys earn more if they file a claim instead of settling the case very early? Especially in Germany, where the costs for lawyers are usually fixed by statute and actions in front of courts generally increase the attorney fees, the impression is allowed that other motives than to pick the best and fastest dispute resolution system might sometimes play a role, especially where insurance companies often pay for the attorneys and the client has no real interest in the amount spent.

How much do people have to pay for further court proceedings to the court, as well as to the lawyers (own and opponents)? Another question is, of course, do the courts have a "loser pays it all" rule?[14] The trend in Norway and Finland towards mediation might be found in high litigation costs, which may be one reason to force people to test other options. If a large number of private households, on the other hand, possess insurances that cover court fees and attorney costs like the situation in Germany, the process of decision-making will be completely different. Most German insurance companies realised that money could be saved and started to

[10] See only European Parliament and the Council (2008), para (25), as well as Article 9. The directive is intended only for cross-border cases, but Germany and other countries decided that the mediation statutes are applicable to national contexts as well.

[11] E.g., the A.B.E.R.-Project in Nuremberg-Erlangen; see therefore Greger (2007) or the Project in Berlin to be found at www.schlichten-in-berlin.de.

[12] See the results from the source above.

[13] See the information at Council of Europe (2012), p. 141. In Germany, §7 *Mediationsgesetz* now only allows to grant legal aid for mediation procedures within narrow scientific research projects. The parliament will have to discuss further action in the light of the results of these projects.

[14] A different behaviour can also be reached by granting indirect incentives (cost savings) for those parties that tried to mediate before filing a claim. See, e.g., the English model in Dunnet v. Railtrack Plc (2002) 2 All ER, S. 850ff.; Halsey v. Milton Keynes General NHS Trust [2004] 1 W.L.R., S. 3002ff. But see also Boyron, European Public Law (2007), p. 273: "Although Lord Woolf has subsequently repeated his encouragement regarding ADR, little has been done in practice".

include mediation procedures in their coverage as well.[15] But knowledge about these new insurance conditions and the handling of the procedure finding a mediator, getting the coverage, etc. are, to a large extent, not yet well established.

Another important factor is the amount of time that is needed by each dispute resolution system. The CEPEJ Study shows the disposition time of litigious and non-litigious civil and commercial cases in first instance.[16] The Nordic countries, as well as Germany, do not show excessive disposition times and clearance rates in civil and commercial matters in the first instance.[17] But if you look at Italy or Portugal, where already first instance cases in civil and commercial matters need a much longer time, turning to ADR systems might be owed to a different pressure,[18] even more if the length of possible appeal cases will also be taken into account.

The enforceability of results reached in different systems is also a major decision factor. To reinforce mediation, Article 6 of the Directive 2008/52/EC attempts to ensure better enforceability of mediation results.

As shown, a high number of factors can have an impact on the behaviour of parties regarding their choice of a dispute resolution system. Many other reasons are conceivable. The experiments to press different switches are always limited by the access to justice. Court systems always have to work fast, be efficient, be accessible, and the access to a court decision has to be open for everyone.[19] In countries with good working court systems, the aim is not to harden the access to justice but to improve the ADR system.

5.2.2 Diversion Model

But even if the acceptance and use of out-of-court dispute resolution systems could be fostered, all courts would be still asked to decide cases if they could be solved

[15] See, therefore, Finanztest (2013), p. 14ff. There are a lot of different configurations, especially if the insurance company only pays for a successful mediation or/and the possible court proceedings following a failed mediation. A lot of insurance companies cap their expenses for mediations at EUR 2,000 per case, per party.

[16] Council of Europe (2012), p. 184ff.

[17] Sweden 187, days; Norway, 158 days; Denmark, 186 days; Germany, 184 days; only Finland is experiencing, with 259 days, a bit of delay in proceeding compared to the other Nordic countries; Council of Europe (2012), p. 185.

[18] Disposition time in Italy is 493 days and in Portugal 417 days for a first instance civil or commercial case. Council of Europe (2012), p. 185. For other countries, as well as other procedures, see Council of Europe (2012), p. 184ff.

[19] Mandatory out-of-court settlement attempts, even only for small claims cases in Germany, did not convince a significant number of people to try to really solve their disputes with systems other than civil procedure. Due to the failure of these regulations, the responsible German states start to abolish these mandatory out-of-courts settlement attempts. The state of Baden-Württemberg was one of the first states to dispose its *Schlichtungsgesetz* in spring 2013. Others will follow in redesigning their statutes.

appropriately through, for example, mediation or other ADR procedures. Therefore, mechanisms should be installed that make sure those cases can be redirected from the court to other dispute resolution systems. German civil procedure rules allowed already for a longer time that judges could recommend ADR to the parties. With the changes of the new *Mediationsförderungsgesetz*, this possibility was emphasised for the ZPO and integrated in most of the other procedural codes.[20] But nearly no German judge used this possibility to recommend the use of out-of-court dispute resolution systems.[21] On the other hand, it was found out that parties did not want to leave the court after they decided to seek the judge for help.

The newest study of the CEPEJ shows that a lot of countries in Europe already set up different systems of diversion models.[22] So, the existence of diversion models seems to be common sense; just a functioning idea of system design is, at least in Germany, not really found yet.[23]

5.2.3 In-Court Models

The step from this diversion model to in-court[24] models is not very big. It could be argued that they form a sub-category of the diversion model. In-court mediation models are a way to avoid the disadvantages of the diversion models and to deregulate the separation of the procedures. Mediation would still be an alternative to conventional adversarial civil proceedings but would also be a part of court procedures. In these models, the judges recommend a dispute resolution attempt not by an outside expert, rather through a different "door" within the courts.[25] In-court models do not mean a multi-door courthouse, in a sense where attorneys offer dispute resolution services at the courts. In-court models always need a judge in action. These models have the advantage that the conflict stays within the institution at least as one party wanted it to be in. And judges as independent, neutral and professional conflict solvers are basically born mediators. Besides that, the quality of the mediation procedure and fair outcomes could be monitored very efficiently.

Three system designs are possible for in-court models.

[20] See §54a ArbGG, §36a FamFG, §202 S. 1 SGG, §173 S. 1 VwGO, §155 S. 1 FGO, nearly all except the code of criminal procedure (Strafprozessordnung, StPO).

[21] As one reason, it was supposed that German judges had difficulties with recommending a different system of dispute resolution to be "better" than their judicial system. For this complex, see only Etscheit (2011), p. 143ff., with further references, as well as Hommerich et al. (2006), p. 84ff.

[22] Council of Europe (2012), p. 133ff.

[23] Suggestions for a better distribution are made by Schreiber (2013) p. 113.

[24] For the definition of in-court model, see above at footnote 3.

[25] The Multi Door Courthouse is described by Sander (1976) and, for Germany, Birner (2003).

Firstly, the deciding judge can use all instruments offered by the civil procedure rules to foster a settlement.[26] Secondly, judges, especially in the settlement conference, can use elements of mediation or can even try to set up a full-structured mediation procedure.[27] Looking at the quality of the mediation procedure, a significant elevation of the efficiency could be reached if, thirdly, a judge who is not allowed to decide on the merits of the case could "really" mediate.[28] This last model is called "real" in-court mediation.

Two major positive issues of this last design are noteworthy. If the parties know the judge mediator will not decide on the merits, the personal responsibility of each participant is challenged because nobody will help out in the end, which is what is usually done if the "deciding" judge is involved. He or she will make a decision in the end if the parties will not find a settlement.

Furthermore, a real judge mediator allows the parties to work with a much more open mindset than a deciding judge at the same place would allow. Parties do not have to fear that something they said will be used against them even if the deciding mediator would explain that this would not be the case. Apparently, already some of the European states work with systems like that.[29]

5.3 Why Do German Courts Show Interest for In-Court Mediation Programmes?

Why have German courts suddenly showed increased interest in in-court mediation programmes, not only trying the special techniques and the procedure but even setting up their own model projects? In some states projects were started without the support of the state ministries of justice administrating the German courts in

[26] E.g., §278 Sec. 1 ZPO obliges the court to intend an amicable solution of the dispute at every stage of the procedure. The constitutional court stated that an amicable settlement of the dispute is always favourable to a decision by the judge, Bundesverfassungsgericht (2007), para. 35.

[27] §278 Sec. 2 ZPO installs a mandatory settlement conference before the oral hearing, with only a few exceptions. The legal reality showed that this mandatory settlement conference was usually not held in good faith and therefore did not brought significant results. The *Mediationsförderungsgesetz* tried to foster this instrument. Of course, a "real" mediation cannot be realised by the judge because he or she has to decide, in the end, if this disqualifies him or her as a mediator.

[28] §278 Sec. 5 ZPO allows to refer the parties for this settlement conference or other settlement attempts to a so-called *Güterichter*. §278 Sec. 5 S. 2 states that this *Güterichter* can use all methods of ADR, especially mediation. These models used to be called "real" in-court mediation models in comparison with "unreal" mediation models of the footnote above. www.gueterichter-forum.de/neuigkeiten/gueterichterstatistik-2012/ (accessed 21 February 2014) reports that in 2012, 1.292 Güterichter held 7.804 Güteverfahren (especially mediations) at 380 courts with a success rate of 69 %.

[29] See the lists at Council of Europe (2012), p. 133f.

other states "judicial grass-roots movements set up projects even against the will of those ministries."[30]

Finding an answer to this question seems interesting because this phenomenon is, in Germany, not limited to civil cases but also finds its place in administrative, employment, social benefits and even tax courts.[31] And the phenomenon is also not limited to Germany, as can be seen in the CEPEJ Study mentioned above.[32] So, is it only a trend that lawmakers or courts feel obliged to set up projects? Or have the mediation projects a potential to equip courts with better tools to handle the situations brought in front of them so that research and practical experience about in-court mediation is worth putting time and effort in?

5.3.1 *Reduction of the Disadvantages of Adversarial Court Proceedings*

Since German courts aim to improve the quality of their work, they detect that for parties of court proceedings who get a court decision, this decision does way too often not match the expectation of neither side.[33] Disappointment is the result of that. Exaggerated it could be said that the parties expect an interest-based and practical solution, and all they get is a court decision. One of the reasons, therefore, is that a court decision usually has a winner and loser.

"Translation issues" are also a reason for this disappointment. Already during the first meeting with a legal counsel, but of course even more in front of the courts at the latest, the reality that a party presented is converted into legal issues. This conversion can cause a lot of problems. Issues that are important for a party can be found irrelevant in terms of judicial handling; other issues that are minor points for a party might get into the centre of attention. In many cases, not legally trained lay parties do not fully understand their case after the conversion. They think the case they presented is handled by the court and do not understand the outcome.

Furthermore, court proceedings are not designed for parties to be really "heard". They are only heard with the converted, legally relevant issues. Parties therefore often get the feeling that the courts do not hear their cases. It seems to them that judges and attorneys do not allow them to speak. Input that seems important to the

[30] Up-to-date information on German in-court mediation projects can be found at http://www.guetrichter-forum.de (accessed 21 February 2014).

[31] For models within the administrative courts, see von Bargen (2012), p. 469f., and von Bargen (2011), p. 1027ff., as well as http://www.vg-freiburg.deservlet/PB/menu/1192816/index.html?ROOT = 1192792 (accessed 21 February 2014), with a detailed documented mediation example (accessed 21 February 2014); for tax courts, see the homepage of the tax court in Bremen, to be found at http://www.finanzgericht-bremen.de/sixcms/detail.php?gsid=bremen87.c.1935.de (accessed 21 February 2014).

[32] See footnote 29.

[33] Röhl (2000), p. 220ff., and Hobeck (2005), p. 179.

parties is sometimes disqualified as irrelevant. The reality that parties led to seek help of an attorney and a court is not always fully covered in court proceedings. Feelings of helplessness or paternalism might be the effect. A basically positive attribute of civil proceedings that allows placement of the dispute in the hands of a legally trained attorney or judge can have the different effect. Parties might feel that the conflict was taken out of their hands.

It can be observed finally that another quality attribute of adversarial civil proceedings can cause problems. Civil proceedings are designed to reduce the complexity of the reality to put a judge in a position to find a decision in an adequate amount of time. Therefore, a decidable question hast to be distilled out of the reality. Consequence of this distillation process is that everything gets dropped that is not necessary to answer the legal question. This necessary reduction of the reality to a legally decidable question always bears the risk to miss relevant issues for the parties. A court decision on that irrelevant part of the reality will not be helpful to them. Also, parties will lose the confidence in the courts if judges inform them that the issues they grieve about, what is really important to them, are not relevant for the decision.

In-court mediation programmes can help to deal with these problems with all the benefits mediation procedures can provide.

5.3.2 In-Court Mediation as a Corrective of an "Over-Legalised" Culture of Dispute Resolution

That courts are not only following a trend is also emphasised by the fact that mediation is not an invention of these days. Its roots reach back to the ancient world, and over longer periods of time it has been the dominant dispute resolution system. Not until the modern continental civil proceedings in the second half of the nineteenth century were developed, which precisely regulated the frame for the "fight for right" with all the attack and defence mechanisms at this very high level, the courts were able to diminish the relevance of consensual dispute resolution systems. But the more the system of civil proceedings was differentiated and improved, the more people were sensitised for rights and justice. Of course, this development is not only bad and should not be questioned today. But what should be questioned is the claim of absoluteness that the realisation of rights and justice dominates all other objectives.[34]

The "over-legalisation" of all living conditions reached a critical point these days, at least in Germany. The law tends to spread out in areas of life that formerly have not been regulated at all or have been regulated only in a very rudimental way. Areas of life that are not touched by the law become fewer and fewer. This tendency created an increasingly complex and confusing netting of regulations—as a

[34] For this and the following, see Schlink (2005), p. 9ff.

consequence, new and even more detailed regulations are necessary. On the other hand, it is always moaned about the flood of regulations and furiousness of the lawmakers. This obsession to regulations has its price. It leads to disregard and dismisses the realities of life. Looking at the context of rights and justice, it becomes obvious that people insist too much and do not learn enough. It will be helpful if a lot of problems might not be solved on the level of rights and justice (Do I have an enforceable right?) but, even more profoundly, on the level of the reality of live, which is in the focus of the mediation (Why do I pursue my assumed right? Which interest—necessity, personal concern—do I have? What do I have to do to match this interest with those of my opponents in the given conflict?). So, in-court mediation could work as a corrective regarding that "over-legalisation" of a society.[35]

5.3.3 *In-Court Mediation as a Way Out of the Court-Dominated Society*

Consensual dispute resolution systems might not have been forgotten in Scandinavia, but somehow the rediscovery of mediation as dispute resolution procedure started when the Americans became interested 30 years ago.[36] The reason for the renaissance of the mediation was a reaction to a crisis of their judicial dispute resolution systems. The Americans hoped to solve their problems in intensifying the use of ADR systems. Overcrowding court dockets was the main trigger for the experiments. Another reason can be seen in the fact that in many conflict situations consensual techniques seemed to work better, to produce better and more sustainable solutions, to be faster and cheaper than ordinary court proceedings. Due to the mannerisms of US civil procedure, where judges have only a very passive umpire role and active case management is very slowly developed,[37] these systems were mainly developed outside the reach of judges.

Although continental civil procedures differ fundamentally from the US system, the reasons why countries in Europe become interested in mediation are mainly the same. In Germany, the number of actions in front of courts is high,[38] and a huge amount of judges tries to handle the flood.[39]

---

[35] For further references, see von Bargen (2008), p. 138f.

[36] For the ADR Movement in the United States, see Goldberg et al. (2007), p. 6ff.

[37] See Murray (2011), p. 305ff.

[38] See, therefore, only Budras (2006), p. 140, describing the crowded dockets at the social courts.

[39] 24.3 professional judges sitting in German courts for 100,000 inhabitants, in Norway 11.2, Finland 18, Sweden 11.5, Denmark 9, England 3.6, Ireland 3.2, Scotland 3.5, Austria 29.1, Poland 27.8, Croatia 42.8, Council of Europe (2012), p. 144ff.; for the US Federal numbers, see http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2011/Table101.pdf (accessed 21 February 2014); for the state court numbers, http://www.ncsc.org/microsites/sco/home/List-Of-Tables.aspx (accessed 21 February 2014).

Every attempt to reduce the workload was not really successful. A lot of arguments seem to stand to reason that a flexible system of dispute resolution proceedings, oriented at the individual case, would not only be more efficient but also a lot more effective than every other attempt to accelerate civil proceedings, which usually went along with less legal protection of the parties and in the long run caused more harm than benefit.[40]

Even with the large amount of judges, it is said that access to justice is becoming a rare commodity.[41] The reasons for that can be found in the already mentioned over-legalisation and also in the process propensity of at least the Germans. Germans happily delegate the liability for every conflict to the courts. Fostered by the German phenomenon of "legal protection" insurance that a large proportion of persons are equipped with,[42] they fight through every instance available, and if they lose they seek "procedural revenge". That a concept like mediation based on personal responsibility of the citizens allowing faster and more satisfying results would be able to curb this insanitary developments is obvious. In-court mediation is as well a possibility to spare the courts' resources for conventional litigious civil proceedings and not to burn up these resources for conflicts that could be solved more efficiently and more effectively with other dispute resolution systems.

5.3.4 In-Court Mediation as Adequate Proceeding for a New State Conception

A lot of people think that the resources of the increasingly over-strained state do not suffice anymore to bear the whole responsibility for fulfilment and solution that the state offered its citizens in the last decades and to which they are accustomed. It might be only possible for the state to guarantee fundamental structures and give textured directions. The effort of the state is reducing itself to a responsibility guided by the principle of subsidiarity, first and foremost giving help for self-help. One of the many fundamental consequences out of this change can be seen in the fact that the state will not be able to allocate indefinite funds for a constantly expanding legal system. Citizens will have to take over the responsibility for the resolution of their conflicts, turning away from the attitude to be relieved of the responsibility for the dispute by the courts in conventional court proceedings. The guideline of that new state conception is to foster the mediation especially

[40] Describing the general situation of the last three decades is Schütz (2005), p. 278ff.; for the situation at the administrative courts, see Reimers (2006), p. 56ff.

[41] Benda (1979), p. 362.

[42] This insurance is already mentioned above, footnote 15.

out of the courts. But that does not prohibit fostering the responsibility of parties in adequate cases that are already brought before a judge.[43]

5.3.5 *In-Court Mediation as an Answer to a Change of the Law*

Increased multipolar, multifaceted and complex business relations within networks elude of formalised and definite legal patterns.[44] In the area of private law, and also in the public sector, the encroachment of the informal can be found. Commercial practices and compliance guidelines play important roles and form relationships. Some sort of "soft law" is created that cannot be enforced easily in the conventional civil proceedings. Mediation offers an adequate conflict resolution system for these cases. Especially in the sector of public administration, the development can be perfectly described with the headword of the "cooperative state": a state that works in a network with the private sector (the public private partnership), concentrating less on one-sided, mandatory, hierarchic instruments (like statutes or the administrative acts) but more on negotiation and balance, on strategies of persuasion and mediation.[45] A significant boost into this direction is caused by the increasing "Europeanisation" and internationalisation of the legal relationships.[46]

5.3.6 *In-Court Mediation as a Mirror of a New Self-Image of Judges*

Not only the guidelines of the state and of the law are changing; the self-image of German judges is also in a period of transition. Judges, to a greater extent, see themselves as service providers for the society.[47] They initiate quality management; they pay heed to handle cases quickly brought before them and to satisfy their end-customers.[48] It is a contribution to the quality of the procedure if courts not only offer the conventional proceedings but also supplement their offer with mediation by specially trained judges in adequate cases, if this mediation can be faster and cheaper, and also more efficiently satisfy the interests of the customers in a significant number of cases.

---

[43] See Hoffmann-Riem (2005), p. 102; for information about the ideas of the *Gewährleistungsstaat*, see Schuppert (2005).

[44] See Lange (1998).

[45] Ritter (2001), p. 3440ff. is describing this development.

[46] Ritter (2001), p. 3444f.

[47] Ritter (2001), p. 3447.

[48] For courts being increasingly interested in quality issues, see von Bargen (2010b), p. 205ff.

5.4 Reasons for a Coexistence of In-Court and Out-of-Court Mediation

Looking at the developments in the United States, it seems obvious to locate mediation, particularly in the area out of the courts, and to cede it first and foremost to professional mediators, who need, of course, a qualified education. It is, on the other hand, not plausible to exclude everyone else except those professional mediators from the mediation and declare the courts to mediation-free zones. A significant number of people would benefit from a qualitative improvement of the judicial conflict resolution offer by the integration of mediation into court proceedings. Looking only at the numbers of German civil courts, a little bit less than 1.6 million first instance cases were brought to the civil courts in 2010. With the employment courts added, more than two million civil cases were brought to the courts in 2010. A conservative estimation is that only 10 % of these cases, for Germany a number of 15–20 % seems much more realistic, would be better handled in a mediation procedure than in front of traditional court proceedings. A high number of people would benefit, especially in highly emotional conflicts,[49] conflicts within permanent relationships[50] or cases in a context with relevance to the environment.[51]

Another argument for in-court mediation can be seen in the task of continental judges who, other than their US colleagues, have not only to decide about adversarial procedures but also to foster a consensual dispute resolution. In Germany and other countries as well, the judges are committed by the civil procedure rules to keep in mind and try to achieve a consensual resolution of the case or at least single aspects of it in every stadium of the dispute.[52] Why a judge taking this commitment seriously should not fall back to the use of mediation is not reasonable. All the more, after 10 years of German experiences with model projects, a tremendously high number of positive reactions are reported.[53]

At this place, it must be clarified that it is not argued to replace the conventional civil procedure by mediation procedures. This would be unreasonable because the predominant number of cases brought in front of a judge is not adequate for mediation. Furthermore, the conventional civil procedures contribute indispensably to the legal protection and the development of the legal system in the society.

But some people in Germany are very sceptical about in-court mediation programmes. They argue that a good working system of civil procedure should not be diluted by the integration of an interest-not-legal-based system.

---

[49] Family Affairs.

[50] Business relations, partnerships, neighbour or employment disputes.

[51] E.g., airports, stadiums, disposal areas, incineration plants, nuclear disposal sites, and also in the context of accumulation lakes to "store" electric energy and the set up of modern power lines.

[52] See §278 Sec. 1 ZPO and above in footnote 26.

[53] See, e.g., only for the courts in the State of Schleswig Holstein Görres-Ohde (2011), p. 269ff., and in the state of Berlin Wischer (2011), p. 264f.

On the other hand, the number of adequate cases for mediation brought to the judges is so high that training the judges is worth the effort. Mediation is not the "better" civil procedure, but it broadens the chances to find the best solution in a case brought in front of a court. There is the accurate psychological wisdom by Maslow that who only has a hammer treats every problem like a nail.[54] It seems obvious that judges—to stay in the picture—have additionally to acquire the ability to differentiate between a nail and a screw and that judge mediators have to acquire the ability to pull tight or remove these screws with an adequate tool instead of treating them with their hammer as well.

5.5 Legal Framework

Already before in-court mediation was permanently established in Germany by the *Mediationsförderungsgesetz*, the question arose if judges had the legitimate right to mediate. Judges could claim this competence if mediation in the described way falls into the field of activities assigned to judges at that time. The German *Grundgesetz* states in Article 92: "The judicial power shall be vested in the judges". It was thought that judges would have been allowed to mediate cases if this task is enfolded by the term "judicial power".

It seems noticeable that especially the question of the legal basis and therefore of the legitimation of a judge mediator not allowed to decide on the merits of the case was answered at the German model projects, if it was answered at all, very differently. This is noticeable because, first and foremost, without a classification into the classic structure of the organisation of a state, the fundamental question of admissibility cannot be answered, as well as other important consequences combined with that classification. For example, the questions if a special statutory legitimation is needed or which procedural principles apply cannot be answered without a sustainable answer to the question formulated above. The principles of executive procedures significantly vary from those of the judiciary. If the in-court mediation is classified as executive work, the civil procedure rules that will otherwise be applicable do not apply.

The qualification as task of the executive or of the judiciary predetermines the important decision if the tasks are fulfilled within judicial independence and therefore free of directions (judiciary) or basically bound to directions of the supervisor (executive). The qualification of in-court mediation as an executive task could mean in times of short funds that the court administrations, responsible for the executive tasks, could forbid the judges to mediate or set a time limit of 2 h for mediations. This would not be possible if the mediation of judges belongs to the fundamental tasks of the judiciary.

[54] See Maslow (1966), p. 22.

Even after the changes in §278 ZPO establishing the *Güterichter*, the functional attribution is still important for the system design.[55]

5.5.1 The Design of State Functions in the Context of the Separation of Powers

Starting to look closer into the design of state functions, it appears that still serious problems occur to set up a harmonious, balanced system of all three powers.[56] A remarkable number of approaches exist, at least in Germany, to define every single power. Mutual consent is reached regarding the statement that the endorsement of the judiciary to the judges follows in concretion of the principle of the separation of powers.[57] But this mutual consent stands in demonstrative disagreement with the undisputed content that can be taken out of the principle of separation of powers. The principle asks for a highly complex control system, which is set up by the interdependence of the functions. Besides this aspect, this aspect more and more people begin to think that this is not everything. The principle also wants that decisions made by the state body be made correctly. In this context, it means that decisions are issued by those functions that have the best assumptions for the decision, regarding organisation, composition, function and procedure.[58]

5.5.2 The Different Definitions of Judiciary

Scholars undertook multiple approaches to define the tasks of the judiciary within this given frame.[59] But nearly every approach is not able to design an all-embracing and practical definition to create a coherent system of organisation and give seamless explanations for the direction of state duties to the different functions. To give only one example, there is the widely accepted term of "dispute decision" as the defining element of the judiciary. Deciding disputes is an important and central element of the judiciary, but the administration is also deciding disputes, for example, in decisions of neighbour disputes concerning the permission of construction activity. Even the legislative function is on a higher level involved in the decision of disputes within the society. On the other hand, especially the German employment courts settled more than 226,000 cases and had to decide in only 30,000 cases in 2010, and also

[55] The *Mediationsförderungsgesetz* answered the fundamental question of permissibility in favour of in-court mediation.

[56] The *Bundesverfassungsgericht* (constitutional court) stated that scholars did not finish the discussion about the term Rechtsprechung, BVerfGE 22, p. 79; BVerfGE 103, p. 136.

[57] Von Bargen (2008), p. 151f., with further references.

[58] Von Bargen (2008), p. 161ff.

[59] An exposure of the different approaches can be found at von Bargen (2008), p. 165ff.

courts with ordinary civil proceedings only had 410,000 contested judgments of their overall rate of 1.56 million finished cases in 2009.[60] So, the term of "dispute decision" does not function very well to define the content of the judiciary's task.

Only an approach that tries to describe the functions not with a single term but with the procedure they follow allows to describe a coherent system and to provide detailed criteria for the allocation of tasks that are apprehended by the state in the future. Within one of these procedural approaches, the judiciary is described as a "neutral procedure"; administration and legislation are described as "open procedures" in this model.[61] This description is able to embrace all the different tasks without being boundless and is therefore the best description to be found defining whether in-court mediation is a judicial task or not.

5.5.3 In-Court Mediation as "Neutral Procedure"

Comparing the similarities of the defined procedures of state functions and in-court mediation, it is obvious that mediation procedures are allocated best within the "neutral procedure" of the judiciary.[62] This function, with its specially designed procedure, has the largest similarities within their key elements. For example, both the judicial procedure and mediation procedure are shaped by the term of neutrality. This defining term sets them apart from the other two state functions. Due to that definition, mediation by a judge who is not allowed to decide the case on the merits would be embraced by the judiciary power. Therefore, it can be assessed that in-court mediation is a basic function of the judiciary with all the consequences.[63]

Of course, this allocation in Germany was not undisputed.[64] Every other allocation, especially to the executive function, might have had advantages on the short run and would allow more latitude for experiments but has, in the long run, disadvantages and leads at a closer look at least in Germany to insurmountable legal problems.[65]

[60] For the actual German numbers, see http://www.destatis.de/EN/FactsFigures/SocietyState/Justice/Justice.html (accessed 21 February 2014). See also Schreiber (2013), p. 110; von Bargen (2010a), p. 413.

[61] See, for this model, Voßkuhle (1993), p. 94ff.

[62] Von Bargen (2008), p. 201ff.

[63] Agreeing Schreiber (2013), p. 110f. and now Greger, Unberath (2013), p. 279, para 95.

[64] See only Walter (2005), p. 55.

[65] Von Bargen (2008), p. 253ff.

5.6 Final Thoughts

The allocation of in-court mediation to the judiciary's function does not only fit in the constitutional guidelines but also allowed to set up model projects without violating any statutes before an explicit legal foundation was laid within the *Mediationsförderungsgesetz* in Germany. Furthermore, it seems desirable from a political view, proven by the activities of the German Parliament regarding the *Güterichter*.

With the implementation of the *Güterichter* into nearly all procedural codes[66] in the course of the implementation of the Directive 2008/52/EC, mediation is not only promoted outside the courts but also within the German court system. In-court mediation by a *Güterichter* opens up the real chance to improve the performance of the courts. Courts are enabled to accomplish a significant part of the cases brought to them in a more efficient manner. Their capacities for adversarial procedures will be higher for cases that can only be dealt with in these procedures. The judiciary generally is now better equipped to handle future tasks. Judges of all courts get an important enhancement of their ability to foster an adequate dispute resolution in general with the possibility to refer parties to a *Güterichter* for in-court mediation. The judges will have to learn how to use this enhancement and develop strategies to identify the correct dispute resolution system for the presented case. Their role as distributors will become more important. Maybe this will also reduce their retention to refer to out-of-court mediators and help to promote this way of dispute resolution. Furthermore, the courts now can set standards within mediation procedures that out-of-court mediators will have to match and be measured with.

But courts can now provide a significant contribution to an advancement of the dispute resolution culture, and therefore their function as a role model cannot be estimated high enough. If more and more parties of court proceedings experience to have made the right decision with in-court mediation, because the fast and self-acquired consensual resolution of the conflict led to a satisfying and sustainable agreement that even fostered the consensual basis of the parties in the future, this would not have been unheard of for a long time. Such an experience could advocate the willingness to try to settle the conflict on one's own or with the help of a professional mediator instead of running to the court immediately. The approach of consensual conflict resolution is clearly enhanced.

References

Benda E (1979) Richter im Rechtsstaat. Deutsche Richterzeitung 57(12):357–363
Birner M (2003) Das multi-door-courthaus. Otto-Schmidt Verlag, Köln

[66] Except the Criminal Procedure Code (StPO).

Boyron S (2007) Mediation in administrative law: the identification of conflicting paradigms. European Public Law 13(2):263–288
Budras C (2006) Hartz IV lähmt die Sozialgerichte. Deutsche Richterzeitung 140
Bundesverfassungsgericht (2007) - 1 BvR 1351/01 – February 14, 2007. https://www.bundesverfassungsgericht.de/entscheidungen/rk20070214_1bvr135101.html. Accessed 21 February 2014
Council of Europe (2012) European judicial systems, Edition 2012 (data 2010): efficiency and quality of justice, European Commission for the Efficiency of Justice (CEPEJ). http://www.coe.int/cepej. Accessed 21 February 2014
Etscheit N (2011) Verweisung in die außergerichtliche Mediation – Ergebnisse einer Erhebung zum Umgang der Berliner Familienrichter mit § 278 Abs. 5 S. 2 Zivilprozessordnung (ZPO). In: Gläßer U, Schroeter K (eds) Gerichtliche Mediation – Grundsatzfragen Etablierungserfahrungen und Zukunftsperspektiven. Nomos Verlag, Baden-Baden, pp 143–157
European Parliament and the Council (2008) Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF. Accessed 21 February 2014
Finanztest (2013) Ruhe nach dem Streit. Finanztest 14–16, 95, 96
Fritz R, Pielsticker D (2013) Mediationsgesetz – Kommentar, Handbuch, Mustertexte. Luchterhand Verlag, Köln
Goldberg S, Sander F, Rogers N, Cole S (2007) Dispute resolution – negotiation, Mediation, and other processes, 5th edn. Aspen Publishers, New York
Görres-Ohde K (2011) Persönliche Erfahrungen mit der Etablierung der Gerichtlichen Mediation in Schleswig-Holstein. In: Gläßer U, Schroeter K (eds) Gerichtliche Mediation – Grundsatzfragen, Etablierungserfahrungen und Zukunftsperspektiven. Nomos Verlag, Baden-Baden, pp 269–279
Greger R (2003) Die Verzahnung von Mediation und Gerichtsverfahren in Deutschland. Zeitschrift für Konfliktmanagement 240–245
Greger R (2007) Abschlussbericht zum Forschungsprojekt "Außergerichtliche Streitbeilegung in Bayern". http://www.reinhard-greger.de/aber/abschlussbericht.pdf. Accessed 21 February 2014
Greger R, Unberath H (2013) MediationsG, Recht der alternativen Konfliktlösung. Beck, München
Hobeck P (2005) Flucht aus der deutschen Gerichtsbarkeit bei wirtschaftsrechtlichen Streitigkeiten – warum? Deutsche Richterzeitung 177–180
Hoffmann-Riem W (2005) Das Recht des Gewährleistungsstaates. In: Schuppert GF (ed) Der Gewährleistungsstaat – Ein Leitbild auf dem Prüfstand. Nomos Verlag, Baden-Baden, pp 89–108
Hommerich C, Prütting H, Ebers T, Land S, Traut L (2006) Rechtstatsächliche Untersuchung zu den Auswirkungen der Reform des Zivilprozessrechts auf die gerichtliche Praxis – Evaluation ZPO-Reform. Bundesanzeiger Verlag, Köln
Hopt K, Steffek F (2008) Mediation – Rechtstatsachen, Rechtsvergleich, Regelungen. Mohr Siebeck, Tübingen
Lange KW (1998) Das Recht der Netzwerke: moderne Formen der Zusammenarbeit in Produktion und Vertrieb. Verlag Recht und Wirtschaft, Heidelberg
Maslow A (1966) Psychology of science: A Reconnaissance. Harper & Row, New York
Murray PL (2011) The role of American judges in alternative dispute resolution. In: Stürner R, Kawano M (eds) International contract litigation, arbitration and judicial responsibility in transnational disputes. Mohr Siebeck, Tübingen, pp 305–314
Reimers W (2006) Möglichkeiten zur Verfahrensbeschleunigung im verwaltungsgerichtlichen Verfahren. BDVR-Rundschreiben 56–61
Ritter H (2001) Justiz – verspätete Gewalt in der Wettbewerbsgesellschaft? Neue Juristische Wochenschrift 3440–2448
Röhl K (2000) Justiz als Wirtschaftsunternehmen – Budgetierung, Controlling und Professionalisierung der Justizverwaltung. Deutsche Richterzeitung 220–230
Sander F (1976) Varieties of dispute processing. FRD 70:111–134

Schlink B (2005) Der Preis der Gerechtigkeit. In: Dreier H (ed) Rechts- und staatstheoretische Schlüsselbegriffe: Legitimität – Repräsentation – Freiheit, Symposion für Hasso Hoffmann zum 70. Geburtstag. Duncker & Humblot, Berlin, pp 9–32

Schreiber F (2013) Mediationsgesetzgebung als Justizreform. Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 102–114

Schuppert GF (ed) (2005) Der Gewährleistungsstaat – Ein Leitbild auf dem Prüfstand. Nomos Verlag, Baden-Baden

Schütz C (2005) Der ökonomisierte Richter: Gewaltenteilung und richterliche Unabhängigkeit als Grenzen Neuer Steuerungsmodelle in den Gerichten. Duncker & Humblot, Berlin

von Bargen J (2010a) Konfliktlösung mittels richterlicher Mediation als Alternative zum konventionellen Verwaltungsprozess. Die Verwaltung 405–428

von Bargen J (2010b) Qualitätsbestrebungen in den Gerichten. In: Hill H (ed) Wege zum Qualitätsmanagement. Nomos Verlag, Baden-Baden

von Bargen JM (2008) Gerichtsinterne Mediation – Eine Kernaufgabe rechtsprechender Gewalt. Mohr Siebeck, Tübingen

von Bargen JM (2011) Mediation in Verwaltungssachen. In: Quaas M, Zuck R (eds) Prozesse in Verwaltungssachen, 2nd edn. Nomos, Baden-Baden, pp 1001–1038

von Bargen JM (2012) Mediation im Verwaltungsverfahren nach Inkrafttreten des Mediationsförderungsgesetzes. Zeitschrift für Umweltrecht 468–474

Voßkuhle A (1993) Rechtsschutz gegen den Richter: zur Integration der Dritten Gewalt in das verfassungsrechtliche Kontrollsystem vor dem Hintergrund des Art. 19 Abs. 4 GG. C.H. Beck, München

Walter H (2005) Mediation durch Verwaltungsgerichte. Zeitschrift für Konfliktmanagement 53–56

Wischer A (2011) Etablierung der Gerichtlichen Mediation an den Berliner Zivilgerichten. In: Gläßer U, Schroeter K (eds) Gerichtliche Mediation – Grundsatzfragen, Etablierungserfahrungen und Zukunftsperspektiven. Nomos Verlag, Baden-Baden, pp 255–267