

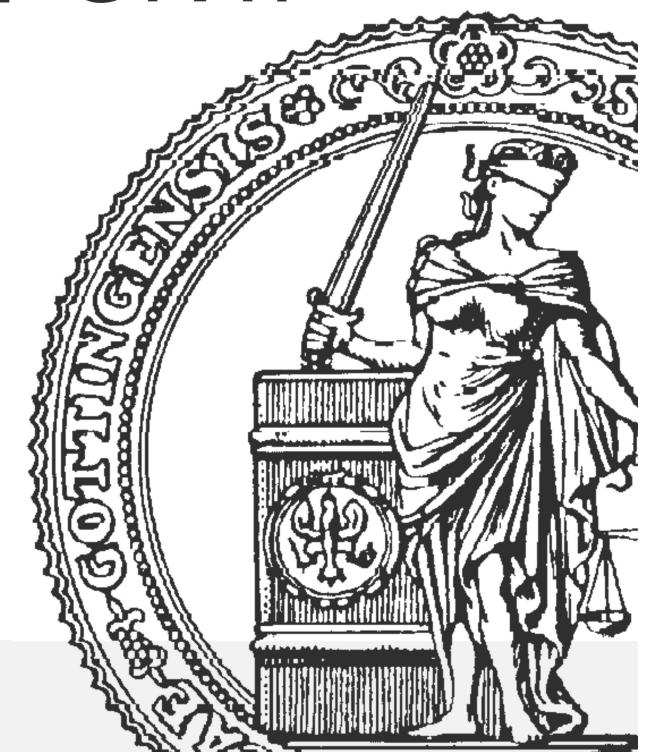
Institute of Private Law and
Procedural Law

Ritsumeikan, November 26th 2022 | Kyoto, Online

The Orality Principle and the Digitalisation of German Civil Procedure Law

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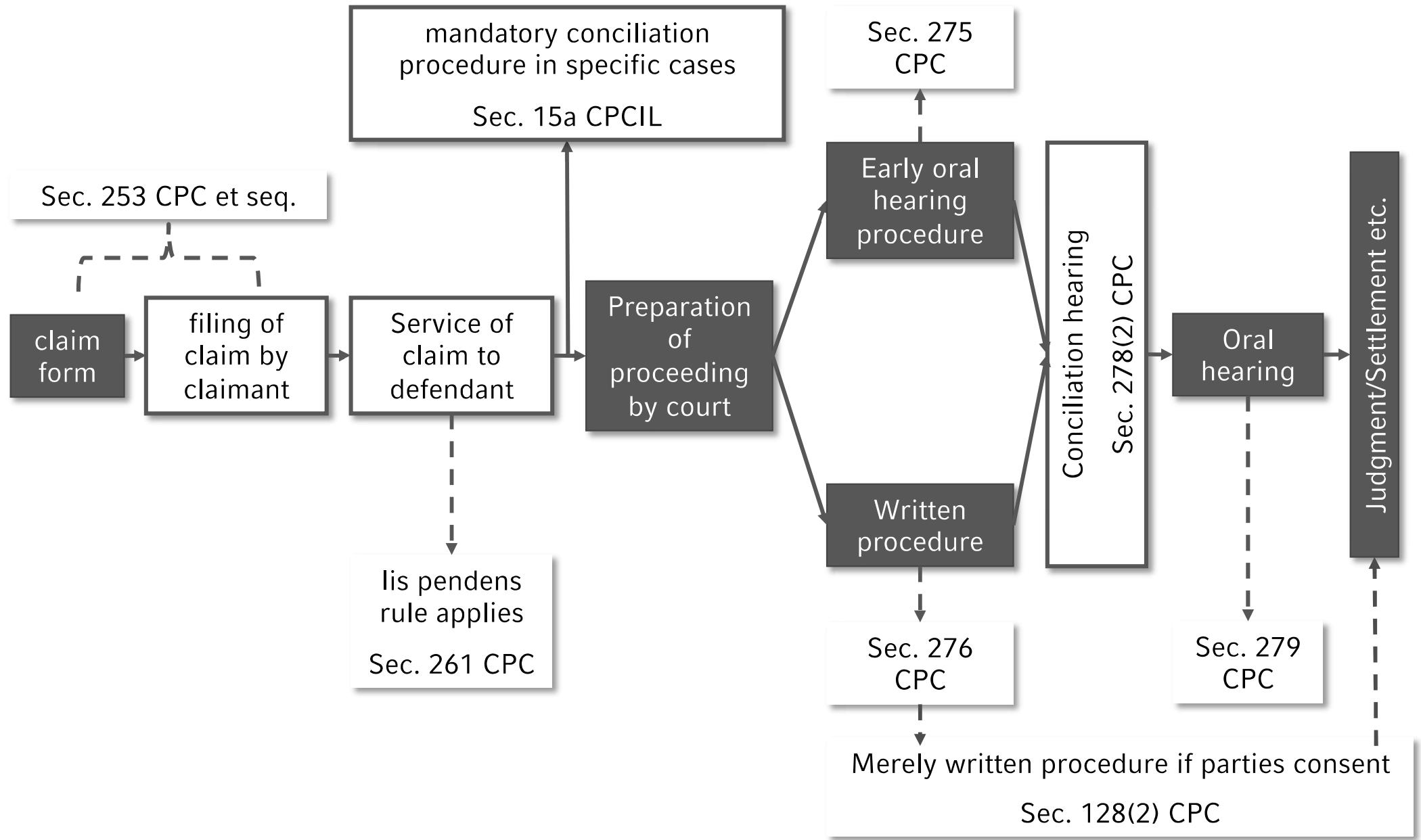
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Roadmap

1. Course of Civil Court Proceedings – 1st instance
2. Constitutional and Human Rights Perspective
3. Orality Principle in Current Civil Procedure Law
4. Aspects of Reform I Digitalisation
5. Concluding Remarks

Course of Civil Court Proceedings – 1st instance



Constitutional and Human Rights Perspective (1)

- No explicit guarantee of a right to oral hearing
- Right to be heard, Art. 103(1) Basic Law (BL)
 - Shall enable parties to...
 - plead their case, i.e. articulate their position before the deciding court
 - gather information on the respective proceeding
 - Orality Principle is in line with this goal
 - Art. 103(1) BL does not prescribe oral hearings in civil court proceedings

German Constitutional Court, Dec. of 08.02.1994 - 1 BvR 765, 766/89 NJW 1994, 1053:

Aus Art. 103 I GG ergibt sich grundsätzlich kein Anspruch auf mündliche Verhandlung oder persönliche Anhörung; es ist vielmehr Sache des Gesetzgebers zu entscheiden, in welcher Weise das rechtliche Gehör gewährt werden soll (vgl. BVerfGE 60, 175 (210 f.) = NJW 1982, 1579 m. w. Nachw.). Soweit das Gesetz keine verbindliche Entscheidung trifft, liegt die Form der Anhörung grundsätzlich im Ermessen des Gerichts.

*Art. 103(1) BL does **not award parties a right to an oral hearing** or to be heard orally by the court; it is **up to the lawmaker to decide on the forms** how the right to be heard shall be realised [...]. As long as the **law does not prescribe a particular form of hearing**, **it lies within the discretion of the court to decide on the form**. [translated and highlighted by the presenter]*

Constitutional and Human Rights Perspective (2)

- but Art. 103(1) BL is violated, if oral hearing is prescribed by procedural law but not conducted by court in violation of procedural law

German Constitutional Court, Dec. of 3.7.2019 – 1 BvR 2811/18

Hat eine mündliche Verhandlung aber von Gesetzes wegen stattzufinden, wie dies in den Fällen des § 495a S. 2 ZPO auf Antrag einer Partei vorgeschrieben ist, begründet der Anspruch auf rechtliches Gehör aus Art. 103 I GG ein Recht auf Äußerung in der mündlichen Verhandlung und zugleich auf deren Durchführung durch das Gericht.

Does the law prescribe the performance of an oral hearing, as it is the case for Sec. 495a S. 2 CPC on the application of one party, the right to be heard according to Art. 103(1) BL awards the party a right to plead in an oral hearing and to conduct the very hearing. [translated and highlighted by the presenter]

- Right to effective remedy, Art. 2(1), Art. 20(3) BL, Art. 47(1) EUCh
- Access to justice, Art. 19(4) BL
- Right to a fair trial, Art. 6(1) ECHR, Art. 47(2) EUCh
 - Public character of hearings!
 - Principle of Immediacy

Orality Principle in Current Civil Procedure Law (1)

- Orality Principle, Sec. 128(1) Code of Civil Procedure (CPC)
 - i.e. Parties plead before the sitting court by oral argument
 - General principle
 - applies to all civil court proceedings and all procedural stages under the CPC
 - unless exceptions apply (see below)
- Rationale of orality of proceedings
 - Procedural economy
 - Quick gathering of the subject matter
 - Quick decision-making by immediate exchange of arguments
 - Effective resolution of the dispute
 - Maxim of Concentration, Sec. 272 CPC
- What does orality require?
 - **Verbal expression**, i.e. speaking, of persons involved must be possible, see esp. Sec. 137(2) CPC (arguments of parties shall be presented in freely articulated manner)
 - **Presence of persons involved** generally necessary with respect to Sec. 128(1) CPC
 - Presence requirement not necessary in some cases
 - Sec. 128a CPC allows for **use of video conferencing**

Orality Principle in Current Civil Procedure Law (2)

■ Exceptions

- Mutual consent of the parties, Sec. 128(2) CPC
 - Rationale: procedural economy
 - Discretion of the court
 - Inadmissible if consent of parties was given more than three months ago
- Settlement in already in written proceedings possible, Sec. 278(6) CPC
- Decisions on costs and incidental claims (e.g. interests), Sec. 128(3) CPC
- Decisions in other forms than judgments, Sec. 128(4) CPC
- Decisions after acknowledgement, Sec. 307 S. 2 CPC
- Summary judgments in written proceedings, Sec. 331(3) CPC
- Judgment rejecting opposition against summary judgments as inadmissible, Sec. 341(2) CPC
- and... e.g. Sec. 321a(3) 1 CPC, Sec. 495a S. 2 CPC

■ Violations

- Appellate proceedings
 - Sec. 513(1), 538(2) 1 Nr. 1 CPC (Berufung = appeal on issues of fact and law)
 - Sec. 545(1), 562(2) CPC (Revision = appeal on issues of law)
- Complaint against not being heard, Sec. 321a CPC

Aspects of Reform I Digitalisation (1)

- Increased demand for digitised court proceedings due to COVID-19 pandemic

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LTO AKTUELLES KANZLEIEN & UNTERNEHMEN ANWALTSBERUF JUSTIZ STUDIUM &

| Coronakrise

Plant die Regierung "Online-Gerichte"?

von Annelie Kaufmann und Pia Lorenz und Dr. Markus Sehl 02.04.2020

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Die Gerichte kämpfen mit den Folgen der Coronakrise. Könnten Online-Verhandlungen helfen? Ein Vorstoß aus der Justiz deklariert sich selbst zum Referentenentwurf - was aber ist wirklich an angeblichen Plänen der Bundesregierung dran?

Aspects of Reform I Digitalisation (2)

- Reactions and instruments on national level, e.g.
 - Sec. 128a German Code of Civil Procedure (ZPO)
 - Enables partly-digitised oral hearings
 - Enables partly-digitised taking of evidence
 - Alterations e.g. in employment procedure due to Corona pandemic
 - Working Group „Modernisierung des Zivilprozesses“
 - Position Paper comprising theses for reform of civil procedure law (Thesenpapier)
 - Discussion Paper comprising detailed reform proposals (Diskussionspapier)
 - Law on Enhancing Electronic Communication with the Courts 2021
 - Introducing an electronic mailbox for citizens (elektronische Bürger- und Organisationenpostfach, eBO)
 - Extending possibilities of electronic service of documents
 - Extending possibilities of electronic communication with court



Bundesministerium
der Justiz und
für Verbraucherschutz

Themen Verbraucherportal Ministeri

Aktuelle Gesetzgebungsverfahren

GESETZGEBUNGSVERFAHREN | 10. FEBRUAR 2021

Gesetz zum Ausbau des elektronischen Rechtsverkehrs mit den Gerichten

Die Digitalisierung und der mit ihr einhergehende digitale Wandel haben die Lebenswirklichkeiten der Gesellschaft tiefgreifend verändert. Auch die Justiz vollzieht einen digitalen Wandel.

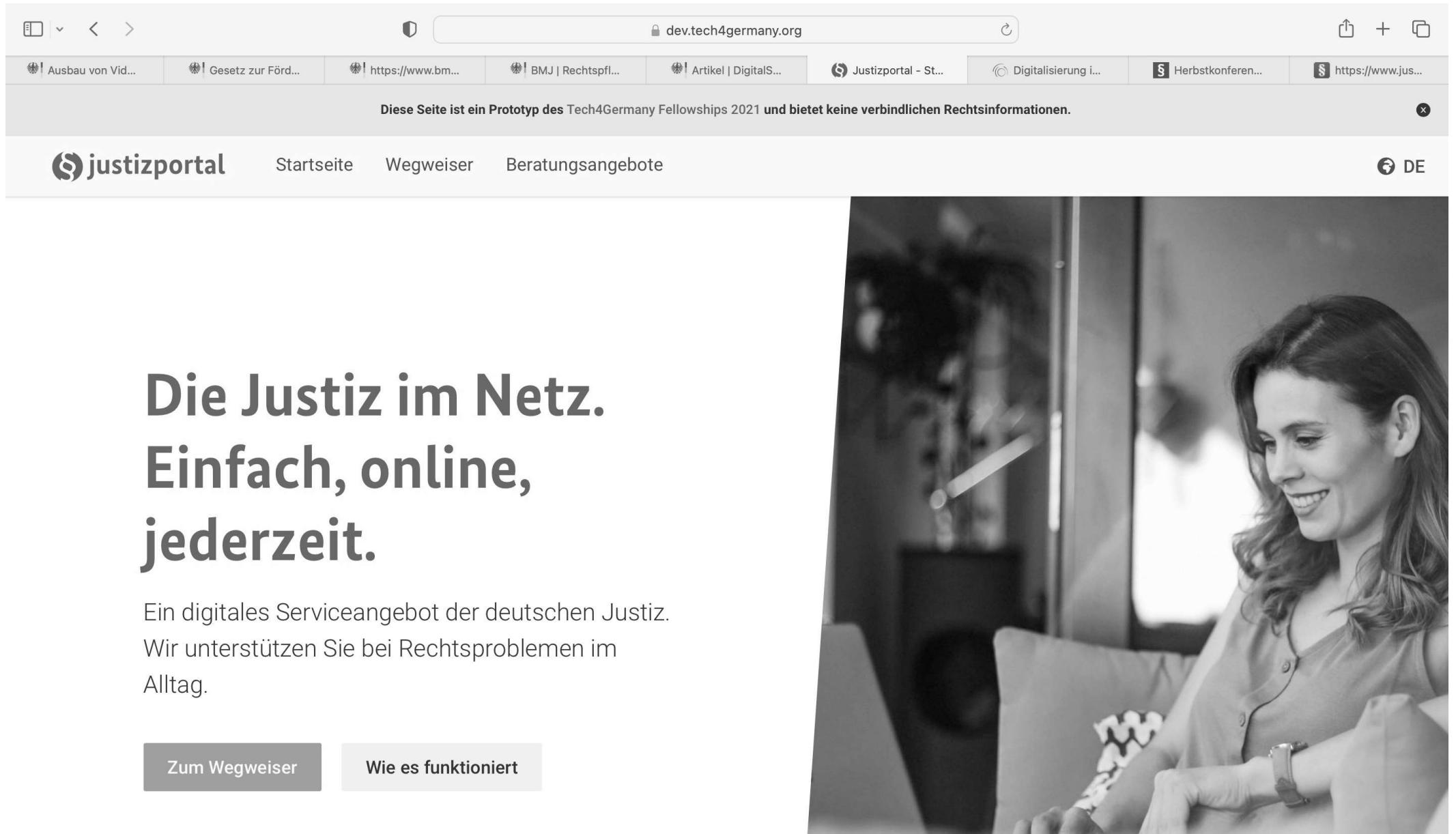
Aspects of Reform I Digitalisation (3)

- Discussion Paper comprising detailed reform proposals
(Diskussionspapier) proposes **speedy electronic online procedure**
 - Role Model
 - EU Small Claims Regulation (Reg. No 861/2007)
 - Speedy EU proceeding on claims up to € 5.000,- in civil and commercial matters
 - Proceeding **designed as mainly written proceeding**, Art. 5(1) but if an **oral hearing is necessary, it has to be conducted via videoconferencing**, Art. 8(1), 9(1)3
 - see also Sec. 1097-1109 CPC
 - Application of EU Evidence Regulation if person to be heard is domiciled or habitually resident in other Member State, Art. 8(1)2, 9(1)3
 - Key features of working group proposal
 - Speedy electronic online procedure, supported by **intelligent (AI) online communication portal**
 - Portal shall be combined with a **structured electronic document** (Basisdokument) to structure the facts of the case presented by parties
 - prototype of such document (drafted by Legal Tech University of Regensburg and Higher Regional Court Nuremberg) already presented at University of Würzburg Research Seminar

Aspects of Reform I Digitalisation (4)

- Concentrated proceeding at a specially designed **central online court**
- Scope: restricted to **disputes up to € 5.000,- in B2C-constellations**
- Restricted to subject matters that arise often (mass claim style, highly standardised cases)
- **Optional instrument for consumer** (claimant), **mandatory for businesses** (defendant)
- **Transferral (Aussteuerung)** of online procedure **in ordinary procedure possible** by court if online procedure not sufficient to solve the case
- Orality of proceeding?
 - Oral hearing only if necessary
 - If necessary → use of videoconferencing or telephone
 - Gathering of evidence → mainly electronic, informal evidence possible
- Structure of appellate procedure
 - Appellate proceedings in fact and law → also merely online
 - Transferral possibility if ordinary procedure necessary
- Aspects of critique
 - Mandatory nature for businesses
 - Restricted scope
 - Amount of the dispute
 - B2C-constellations
 - Parallelism with Judicial Payment Procedure (Mahnverfahren)

Aspects of Reform I Digitalisation (5)



A screenshot of a web browser displaying a prototype of the Justizportal website. The URL in the address bar is `dev.tech4germany.org`. The page header includes the Justizportal logo and navigation links for "Startseite", "Wegweiser", and "Beratungsangebote". A banner at the top states: "Diese Seite ist ein Prototyp des Tech4Germany Fellowships 2021 und bietet keine verbindlichen Rechtsinformationen." Below the banner, the main headline reads: "Die Justiz im Netz. Einfach, online, jederzeit." A subtext below the headline says: "Ein digitales Serviceangebot der deutschen Justiz. Wir unterstützen Sie bei Rechtsproblemen im Alltag." At the bottom left are two buttons: "Zum Wegweiser" and "Wie es funktioniert". To the right of the text is a black and white photograph of a woman with long hair, smiling and looking at a laptop screen.

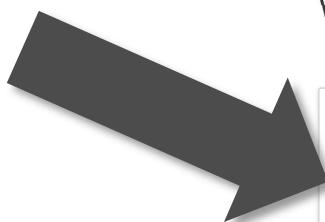
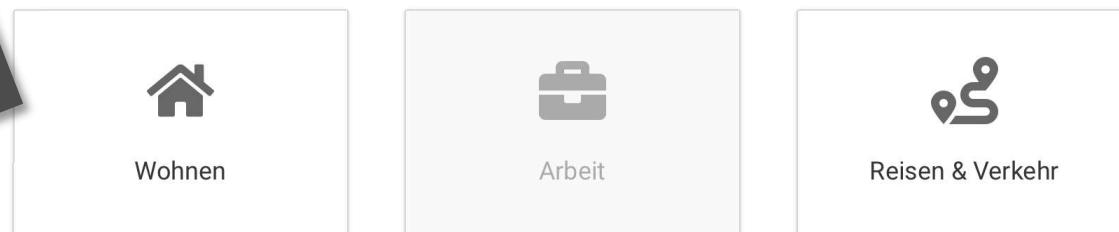
Aspects of Reform I Digitalisation (6)

Diese Seite ist ein Prototyp des Tech4Germany Fellowships 2021 und bietet keine verbindlichen Rechtsinformationen.

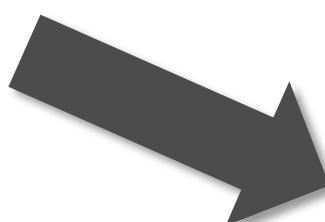
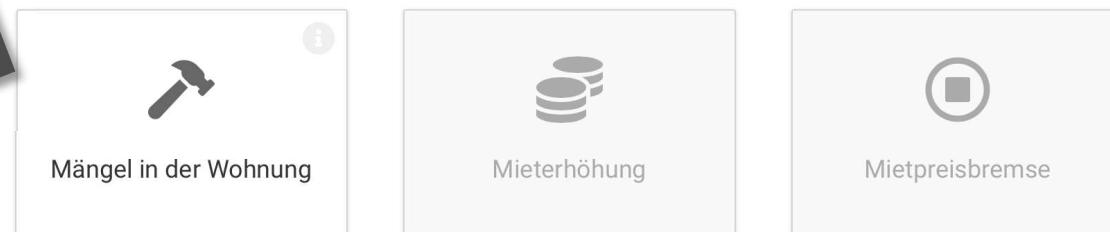
justizportal Startseite Wegweiser Beratungsangebote



Wobei haben Sie ein Problem?



Wobei haben Sie ein Problem?



Aspects of Reform I Digitalisation (7)



Bundesministerium
der Justiz



Themen Ministerium Service Publikationen Presse

Artikel

BMJ

DigitalService des Bundes startet Projekte für die Justiz

Digitale Rechtsantragstelle und zivilgerichtliche Online-Verfahren werden entwickelt



WEITERE MELDUNGEN

15. NOVEMBER 2022

› Weltkongress gegen die Todesstrafe

10. NOVEMBER 2022

› Mehr Digitalisierung der Justiz:
Treffen der Justizministerinnen und
Justizminister

Aspects of Reform I Digitalisation (8)

- New Digital Strategy of the German Government 2022
 - Targets (amongst others)
 - Enable mere online-proceedings in model proceedings
 - Enable online hearings and gathering of evidence via a centralised online portal
 - Digital justice services in an online portal starting end 2023
 - Introduce concept for a justice cloud
- New Draft Regulations of the Justice Ministry on Online Hearings

Referentenentwurf

des Bundesministeriums der Justiz

Entwurf eines Gesetzes zur Förderung des Einsatzes von Videokonferenztechnik in der Zivilgerichtsbarkeit und den Fachgerichtsbarkeiten

Aspects of Reform I Digitalisation (9)

- New Draft Regulations of the Justice Ministry on Online Hearings
 - Alteration of Sec. 128a CPC enabling fully digital hearings
 - Judge must no longer sit in the court room
 - Internal deliberations of the Court may also be held online, Sec. 193 Judicature Act-Draft (Gerichtsverfassungsgesetz-E)
 - Mandatory broadcasting of the hearing to a specific room in the court to enable public access
 - Instituting online hearings possible
 - By binding order of the court (opt-out possible)
 - By mutual demand of the parties (denial by court possible)
 - Extended possibilities of gathering evidence by digital means, Sec. 284 CPC-Draft
 - Provisional Protocol: extended video recording possibilities

Concluding Remarks

- Orality Principle is a general principle under German civil procedure law
- It applies in all stages of proceedings, nevertheless exceptions are numerous
- It is closely linked to constitutional and human rights guarantees such as the right to be heard
- Orality of proceedings, however, is neither required by constitutional nor by human rights guarantees in general
- Thus, current endeavours to install speedy online proceedings with limited scope for oral hearings in specific cases and plans to introduce extended online hearings are not in conflict with the principle