

# Civil Justice

## *An Introduction*

### Justice—Civil Justice.



JUSTICE is the measuring out to each individual what is his due, according to the inflexible rule of right. Justice is frequently personified, and represented as holding a pair of balanced scales, thus indicating its disposition to estimate things by the true and even standard of right.

*Political* or *civil justice*, is the measuring out what a man may claim according to the laws of the land. If the laws are founded in absolute justice, then political or legal justice coincides with absolute justice.

*The Young American* (popular schoolbook, 1844)<sup>1</sup>

<sup>1</sup> S.G. GOODRICH, THE YOUNG AMERICAN: OR BOOK OF GOVERNMENT AND LAW; SHOWING THEIR HISTORY, NATURE AND NECESSITY; FOR THE USE OF SCHOOLS 23 (4th ed., 1844).

Civil justice describes the system of the administration of justice in civil matters. The law of civil procedure is the law that governs lawsuits, that is, civil actions, among private parties.

Whether in the United States, Germany, or Korea, the course of a civil action is simply stated and similar in outline. One person feels aggrieved by another person. Usually before bringing a lawsuit, the aggrieved person asks the other to make the matter right. Only if the latter fails to make the matter right does the aggrieved person take the matter to court.

The aggrieved person, that is, the plaintiff, commences a civil action with a formal complaint. The complaint declares a claim against one or more defendants. It asserts the plaintiff's right, defendant's duty, or both, and asks the court to recognize and enforce the rights or duties claimed. Upon officially receiving the complaint, the defendant has three principal alternatives: comply with the claim, ignore the claim and accept a judgment by default, or contest the claim.

Together, a complaint and any written answer or subsequent reply to such an answer constitute pleadings. Pleadings define the subject matter of the lawsuit; they begin a process of applying law to fact. Subsequent proceedings find facts that are then judged according to law. At the end of that process, if parties do not themselves otherwise resolve the dispute, the court issues a judgment that concludes the matter. A party dissatisfied with that judgment ordinarily may appeal to a higher court. After all appeals are exhausted, there is a final decision according to law.

#### A. THE PURPOSE OF CIVIL JUSTICE

The purpose of civil justice is determination of rights and duties among private parties according to law. Determining rights and duties of parties resolves their disputes.

If there were no civil justice, private parties might use self-help to realize rights and resolve disputes. The stronger, rather than the righteous, would prevail. To preserve peace and right, modern legal systems prohibit self-help except in a few cases.

Primitive legal systems worked differently. They emphasized dispute resolution over right determination. Process – not substantive law – resolved disputes. Resolving the dispute determined the right rather than determining the right to resolve the dispute. Primitive systems used methods of decision unrelated to parties' rights, such as trial by ordeal or trial by battle. At least since the eighteenth-century Enlightenment, however, modern systems of civil procedure have rested on the idea that rights of parties as set forth in law, rather than the skills of the parties or of their representatives, should determine outcomes of disputes.<sup>2</sup>

<sup>2</sup> Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 COLUM. L. REV. 1516, 1522–1523 (1998). Professor Carrington was Reporter, Advisory Committee on Civil Rules of the Judicial Conference of the United States, 1985–1992.

Realizing rights and resolving disputes are essential purposes of modern systems of civil justice. They lie at the heart of American law. Sir William Blackstone, whose famous *Commentaries* once were the Bible of American lawyers, began his third book on Private Wrongs with that lesson: “The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited.”<sup>3</sup> Nearly two and a half centuries later, a committee of the American College of Trial Lawyers echoes Blackstone: “Our civil justice system is critical to our way of life. In good times or bad, we must all believe that the courts are available to us to enforce rights and resolve disputes – and to do so in a fair and cost-effective way.”<sup>4</sup>

Civil procedure is more important than the lawsuits it governs. Civil procedure implements substantive law. Thomas W. Shelton, a founding father of modern American civil procedure, likened procedure to the arteries through which our blood flows: “[S]o surely as the human heart connected with clogged arteries must eventually cease to beat, so certainly will a government retarded by clogged judicial procedure surely decay.”<sup>5</sup>

Civil justice makes civil society possible. People comply with law because they know what it requires and because they believe that it applies to everyone. Most people most of the time observe most laws. They apply laws to themselves. Effective civil justice is essential if law is to provide guidance that makes self-application possible. For every instance of application of law in a lawsuit, there are millions of instances of individuals applying law to themselves without lawsuits.<sup>6</sup>

## B. THE THEME OF THIS BOOK: CIVIL JUSTICE THAT IS JUST, SPEEDY, INEXPENSIVE, AND ACCESSIBLE TO ALL

The theme of our book is the practical fulfillment of the expectations of America’s founders for their nation’s civil justice. Throughout the new republics, in what are called “open courts” clauses of declarations of rights they made concurrently with the Declaration of Independence of 1776, the Constitution of 1787, and the Bill of Rights of 1789, they laid out their expectations for civil justice in what was not

<sup>3</sup> WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 2 (1768; 1st Am. ed., Philadelphia, 1772). For an indication of Blackstone’s importance in Anglo-American law, see BLACKSTONE AND HIS COMMENTARIES: BIOGRAPHY, LAW, HISTORY (Wilfrid Prest, ed., 2009).

<sup>4</sup> AMERICAN COLLEGE OF TRIAL LAWYERS, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 23 (2009).

<sup>5</sup> THOMAS W. SHELTON, *THE SPIRIT OF THE COURTS* 17 (1918).

<sup>6</sup> See James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VALPARAISO U.L. REV. 517, 523–524 (2006).

yet a new nation: a civil justice system that works well routinely. The Maryland Declaration of Rights of November 3, 1776 declares in language found elsewhere:

17. That every freeman, for any injury done to him in his person, or property, ought to have remedy by the course of the law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the law of the land.<sup>7</sup>

In this book we present our three systems of civil justice in comparative perspective; we examine the methods that each system uses to pursue those goals. In the clause we find four promises:

1. **Substantive accuracy:** Does the system work to decide disputes correctly, that is, accurately according to substantive law and consistent with justice? (Does the system provide “*justice and right ... according to the law of the land*”?)
2. **Procedural fairness:** Does the system work to decide disputes fairly? That is, does it secure the right to be heard, or a “day in court” as it is known in the United States? (Does the system decide “*by the course of the law of the land*”?)
3. **Access to justice:** Does the system assure access to courts to all? (Does the system make justice available to all persons “*freely without sale [and] fully without any denial*”?)
4. **Efficiency:** Does the system decide disputes efficiently and in a timely manner? (Does the system decide “*speedily without delay*”?)

We adopt these promises as our theme because they are timeless and universal in modern legal systems. They are not limited to the eighteenth century; they speak to our time.<sup>8</sup> They are not peculiar to the American legal system; they are fundamental to the German and Korean legal systems.<sup>9</sup> The promises of accuracy, fairness, access, and efficiency are elementary legal learning.<sup>10</sup> We return to these promises throughout the book, for these promises are ideals of every modern system of civil justice.

The open courts clauses go back to the earliest days of Anglo-American law. Their origin is chapter 40 of the Magna Carta of English law. Founding documents in most

<sup>7</sup> *Maryland Declaration of Rights of Nov. 3, 1776*, in *THE DECISIVE BLOW IS STRUCK, A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTION CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION* (1977).

<sup>8</sup> E.g., Elizabeth J. Cabraser, *Apportioning Due Process: Preserving the Right to Affordable Justice*, 87 DENVER U.L. REV. 437, 442 (2010).

<sup>9</sup> See Marion Eckertz-Höfer, “Vom guten Richter,” – *Ethos, Unabhängigkeit, Professionailität*, 62 DIE ÖFFENTLICHE VERWALTUNG 729 (2009) See also Charter of Fundamental Rights of the European Union, Art. 47. 2000/C O.J. 364/01.

<sup>10</sup> See JAY M. FEINMAN, *LAW 101: EVERYTHING YOU NEED TO KNOW ABOUT THE AMERICAN LEGAL SYSTEM* 90–91 (2000).

states show the influence of that chapter. Language close to that of Maryland is found in several states. Article XI of the 1780 Declaration of the Rights of the Commonwealth of Massachusetts is similar in language. The Commonwealth of Virginia's proposal for a federal Bill of Rights follows the language of the Maryland declaration and adds "that all establishments or regulations contravening these rights are oppressive and unjust."<sup>11</sup> Today the open courts clause is part of the constitution of Maryland and other states. In most state constitutions there are analogous or related provisions.<sup>12</sup>

The ideals of the open courts clauses are fundamental to the Federal Rules of Civil Procedure of 1938 on which modern American civil procedure is based. The Federal Rules "seek the costless application of substantive law onto specific disputes in the form of judicial decisions."<sup>13</sup> Rule 1 provides that the Rules are to "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." When the drafters formally unveiled the Rules to the legal profession at the Fifty-Ninth Annual Meeting of the American Bar Association in 1936, the Secretary of the drafting committee blessed them by reading from Magna Carta chapter 40: "To none will we sell, to no one will we deny, or delay, right or justice."<sup>14</sup> He explained the need for the new rules: "What is the matter with present methods of the trial of cases? Every one, I think, will agree that our methods of procedure have three major faults. First, delay; second, expense; third, uncertainty."<sup>15</sup> The then-new rules were to remedy these maladies. They were to fulfill the promises of open courts: accuracy, fairness, access, and efficiency.

### C. THE STATE OF CIVIL JUSTICE IN THE U.S., GERMANY, AND KOREA.

In this book we ask how our respective systems seek civil justice that is just, speedy, inexpensive, and accessible. We engage in a comparative study because we believe it to be one way to identify those methods that work better than other methods. We are not conducting a contest to judge which is better.<sup>16</sup> Each system has its unique

<sup>11</sup> See A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 284–297 (overview), 458 (Massachusetts), 464 (Virginia), 483–487 (cataloging state constitutional provisions [1968]).

<sup>12</sup> See Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1311 (2003).

<sup>13</sup> SAMUEL ISSACHAROFF, *CIVIL PROCEDURE* 1 (2nd ed. 2009).

<sup>14</sup> Edgar B. Tolman, *Statement, The New Federal Rules of Civil Procedure*, 61 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 423, 432, 433 (1936).

<sup>15</sup> *Id.* at 437.

<sup>16</sup> See, e.g., *DOING BUSINESS IN 2004: UNDERSTANDING REGULATION* (The International Bank for Reconstruction and Development/The World Bank 2004); Benedicte Favuarque-Cosson & Anne-Julie Kerhuel, *Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law*, 57 AM. J. COMP. L. 811 (2009); RICHARD A. POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* 76 (1996) (asking that question of England and America).

properties. Each system has its successes and its failures. None is perfect. Our search is for better ways for each system.<sup>17</sup> Necessarily, each solution will be different, but each system can profit from experiences of the others.

Although our intention is not to judge one system better than another, we cannot avoid a seemingly competitive observation: The consensus judgment of Americans of their own system of civil justice is that it fails to achieve the goals that it sets out for itself. It does not deliver justice justly, quickly, and inexpensively to all.<sup>18</sup> The consensus judgment of Germans of their own system of civil justice, in contrast, is that it does do these things well, if not perfectly. The consensus judgment of Korean jurists is that their system – still a relatively new one in historical terms – is on its way to achieving these goals and that their job is to win the confidence of a skeptical public by making sure that it does achieve them.

A natural consequence of these different judgments is that we give attention to those aspects of the American system that undermine the realization of a civil justice system that is just, quick, inexpensive, and accessible, as well as to those aspects of the German and Korean systems that promote the realization of these goals. We turn now to consider the states of civil justice in our countries.

### 1. *The State of American Civil Justice*

That American civil justice did not work well until the 1938 Federal Rules of Civil Procedure – that it was expensive, time-consuming, and even incoherent – has become an “organizing perspective” for American law school classes.<sup>19</sup> That the Federal Rules, despite great hopes, have led to ever more expensive and

<sup>17</sup> See, e.g., *American Law Institute Study on Paths to a “Better Way,” Litigation, Alternatives, and Accommodation, Steering Committee Report*, 1989 DUKE L.J. 811; GYOOHO LEE, IN SEARCH OF THE OPTIMAL TORT LITIGATION SYSTEM: REFLECTIONS ON KOREA’S CIVIL PROCEDURE THROUGH INQUIRY INTO AMERICAN JURISPRUDENCE (J.S.D. dissertation, Washington University in St. Louis, 1998), available at SSRN: <http://ssrn.com/abstract=1656205>

<sup>18</sup> Jay Tidmarsh, *Resolving Cases “On the Merits,”* 87 DENVER U.L. REV. 407 (2010) According to Justice Ronald Sackville, civil justice systems in common law countries generally are thought to be “unable to meet basic objectives of fairness, affordability and efficiency.” Ronald Sackville, *Reforming the Civil Justice System: The Case for a Considered Approach*, in BEYOND THE ADVERSARIAL SYSTEM (Helen Stacy & Michael Levarch, eds., 1999). With these hopes in mind, England and Wales changed their civil justice system. See LORD WOOLF, MASTER OF THE ROLLS, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996).

<sup>19</sup> John Leubsdorf, *The Myth of Civil Procedure Reform*, in CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 53 (Adrian A.S. Zuckerman, ed., 1999). Cf. Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 932 (1996) (“nineteenth century civil procedure was a sport of chance in which the substantive merits of claims and defenses played a minor role” [citations omitted]).

time-consuming lawsuits has become a commonplace of our generation.<sup>20</sup> The Federal Rules of Civil Procedure of 1938 have not lived up to the hopes of their drafters. Although few jurists doubt the continued validity of the drafters' ideals,<sup>21</sup> many question the system's fidelity to them.<sup>22</sup>

In 2009, a committee of the American College of Trial Lawyers reported that the civil justice system "is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much."<sup>23</sup> A survey of the members of the Litigation Section of the American Bar Association found general agreement that it is not cost-effective to litigate cases for less than \$100,000.<sup>24</sup> That amount is nearly double the median American household income.<sup>25</sup> Thirty-seven percent of litigating lawyers responding said the Federal Rules are not conducive to attaining the Rules' goals of just, speedy, and inexpensive determination of all suits.

Criticisms of American civil justice are legion. The history of American civil procedure is said to be "an unending effort to perfect the imperfect."<sup>26</sup> In the last generation criticisms have swelled,<sup>27</sup> but there has scarcely been a time in American history without substantial criticism. Even in the colonial era, a generation before independence, Benjamin Franklin's *Poor Richard's Almanack* of 1733 included a satirical poem on the "Benefit of Going to Law."<sup>28</sup>

In finding the American system in need of fixing, we are not being unduly critical in our comparison. So that no reasonable reader shall doubt our impartiality, we list in a Bibliographic Note more than 150 mostly separately published critiques; many make judgments more dire than ours. We begin our list with titles that predate Jesse Higgins's 1805 pamphlet, *Sampson against the Philistines, or the Reformation of Lawsuits; and Justice made Cheap, Speedy, and Brought Home to Every Man's*

<sup>20</sup> Leubsdorf, *supra* note 19 at 53.

<sup>21</sup> But see Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENVER U.L. REV. 287, 288 (2010) at 288 (asserting that Rule's statement of them is "misleading and counterproductive" and has three assumptions that "make little sense for modern litigation").

<sup>22</sup> E.g., Steven S. Gensler, *Justice! Speed! Inexpense! An Introduction to the Revolution of 1938 Revisited: The Role and Future of the Federal Rules*, 61 OKLA. L. REV. 257, 273 (2008) ("the future of federal rule making depends not on finding new ideals but on fidelity to the ones we have").

<sup>23</sup> AMERICAN COLLEGE OF TRIAL LAWYERS, FINAL REPORT, *supra* note 4, at 2.

<sup>24</sup> *Id.* at 6.

<sup>25</sup> In 2008, the median household income was \$52,029. U.S. Census Bureau, State and County Quick Facts, <http://quickfacts.census.gov/qfd/states/00000.html>

<sup>26</sup> Tidmarsh, *Resolving Cases "On the Merits,"* *supra* note 18, at 407.

<sup>27</sup> One of the first and best of the new wave is MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1976). It was reviewed by the then-director of the Max Planck Institute for Foreign and International Private Law in Hamburg. Hein Kötz, *The Reform of the Adversary Process*, 48 U. CHI. L. REV. 478 (1981). Kötz concluded his review with the exhortation: "If there is a desire to reform American civil procedure, either by making changes within the adversary system or by developing alternative methods of dispute resolution, the Continental experience may be well worth studying." *Id.* at 486.

<sup>28</sup> Quoted below in the Bibliographic Notes.



Door, and conclude with titles that postdate Al Sampson's 2004 book, *Lawyers Under Fire: What a Mess Lawyers Have Made of the Law!* We note several criticisms by Chief Justices of the United States (e.g., Taft, Warren, and Burger) and by several presidents of the United States (e.g., Taft, Wilson, and Bush) who have joined in the clamor for civil justice reform.

## 2. *The State of German Civil Justice*

German civil justice approximates the ideals of the open court's clauses. According to the German Federal Minister of Justice, it "is predictable, affordable and enforceable. [German] legislation balances the various interests in a fair and equitable manner, ensuring just solutions. Everyone has access to law and justice, independent of their financial means. . . . German courts decide without delay. . . ."<sup>29</sup> Although this sounds like political puffery, the minister's claim is credible. In Germany, legal aid is available to most people who need it. The system is not limited to large claims, but handles them all.<sup>30</sup> Courts deal with most cases with dispatch: In 2009, the courts of general jurisdiction in first instance concluded 56.9 percent of cases within six months and 80.1 percent within a year.<sup>31</sup>

We explain in the Historical Notes that the present-day German civil justice system in its fundamentals was established in the twenty-five years immediately following German unification in 1871. These fundamentals were set out in the Code of Civil Procedure of 1877, the Court Organization Law of 1877, and the Civil Code of 1896. That system worked well then and does today. It has long been admired in the world,<sup>32</sup> including in the Common Law world.<sup>33</sup> At home it has long been held

<sup>29</sup> LAW – MADE IN GERMANY; GLOBAL–EFFEKTIV–KOSTENGÜNSTIG 3 (2008), available at [www.lawmadeingermany.de](http://www.lawmadeingermany.de)

<sup>30</sup> In the United States, only cases in excess of about \$100,000 are considered viable. In Germany, only about 20 percent of all cases exceed about €50,000 (about \$62,500).

<sup>31</sup> STATISTISCHES BUNDESAMT, RECHTSPFLEGE, ZIVILGERICHTE, JUSTIZSTATISTIK DER ZIVILGERICHTE (FACHSERIE 10 REIHE 2.1) Table 5, 50–51 (2009), available at [www.destatis.de](http://www.destatis.de)

<sup>32</sup> See DAS DEUTSCHE ZIVILPROZESSRECHT UND SEINE AUSSTRAHLUNG AUF ANDERE RECHTSORDNUNGEN (Walther J. Habscheid, ed. 1991). In Bavaria, the numbers were still better, 60.7 percent within six months and 83.2 percent within a year.

<sup>33</sup> See Frederick William Maitland, *The Making of the German Civil Code* in 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 484 (Fisher, ed., 1911); Roscoe Pound, *The Causes of the Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 397 (1906) ("the wonderful mechanism of modern German judicial administration"); FREDERICK FRANK BLACHLY & MIRIAM EULALIE OATMAN, *THE GOVERNMENT AND ADMINISTRATION OF GERMANY* (Brookings Institution 1928). For an exhaustive listing of contemporary Anglo-American reactions to the 1877 laws on civil justice through to the First World War, see MARCIS DITTMANN, *DAS BÜRGERLICHE GESETZBUCH AUS SICHT DES COMMON LAW: DAS BGB UND ANDERE KODIFICATIONEN DER KAISERZEIT IM URTEIL ZEITGENÖSSISCHER ENGLISCHER UND ANGLOAMERIKANISCHER JURISTEN* 310–332 (2001). Two World Wars led to diminished American interest in foreign law in general and in German civil justice



in high regard; it has been subject to no criticism remotely comparable to that of its American counterpart. As we shall discuss, it is the task of the Federal Ministry of Justice to watch over that system to assure that it continues to work well.<sup>34</sup>

The principal problem that the system has had to cope with in recent years has been resources: Demand for civil justice continues to rise, but financial means available to meet the demand have not kept pace. To keep costs within bounds, many first-instance cases that formerly would have been handled by three judges are now handled by one. Appeals that formerly would have been conducted as proceedings *de novo* now concentrate on correction of incorrect decisions. Some are even conducted by a single judge.

### 3. *The State of Korean Civil Justice*

Korea today has a modern legal system that in structure and methods differs little from western legal systems. The goals of civil justice in modern Korea are the same as they are in the United States and Germany. However, conditions are different. As we explain in the Historical Notes, due to thirty-five years of foreign occupation (1910–1945), when judicial administration was part and parcel of repressive government and the legal system was seen as a means of obliterating national identity, and thanks to another forty-two years of authoritarian rule (1945–1987), the Korean system is a newcomer to the rule of law. In the last quarter-century, however, Korea has had success building a rule-of-law state suitable to support its modern economic and social systems. So great has been that success that Korea is often seen as a model for other developing countries.<sup>35</sup>

in particular. Langbein sought to reinvigorate American interest in German civil justice. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985). His article created a stir in the American legal community, which mostly attacked it for suggesting Americans might learn from foreign civil justice. For reviews of that stir, see Michael Bohlander, *The German Advantage Revisited: An Inside View of German Civil Procedure in the Nineties*, 13 TUL. EUR. & CIV. L.F. 25, 33 (1998); Bradley Bryan, *Justice and Advantage in Civil Procedure: Langbein's Conception of Comparative Law and Procedural Justice in Question*, 11 TULSA J. COMP. & INT'L L. 521, 523 (2004).

<sup>34</sup> For example, although the system handles most cases expeditiously, to meet claims that it is too slow in some instances, the Ministry has proposed a law that would give litigants subject to undue delay a modest monetary claim for damages. See Gesetzentwurf der Bundesregierung: Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren (12 August 2010).

<sup>35</sup> See Youngjoon Kwon, *Korea: Bridging the Gap between Korean Substance and Western Form*, in LAW AND LEGAL INSTITUTIONS OF ASIA: TRADITIONS, ADAPTATIONS AND INNOVATIONS 151, 152 (Ann Black & Gary F. Boll, eds., 2011); Won-Ho Lee, *Kurzer Abriss über Koreanisches Recht in Vergangenheit und Gegenwart*, in FESTSCHRIFT FÜR BERNHARD GROBFELD ZUM 65. GEBURTSTAG AT 687 (Ulrich Huber & Werner Ebke, eds., 1999).

Korean jurists recognize that they are still overcoming a deep alienation to law that developed in those dark years.<sup>36</sup> Neither a long tradition of faith in institutions, such as in the United States, nor a similar tradition of faith in law, such as in Germany, exists in Korea. Both are under construction. Consequently, Korean jurists cannot count on the benefit of the doubt that long traditions bring; more than their counterparts in the United States and Germany, they must prove the virtues of their institutions, rules, and decisions.

Among the greatest challenges to modern Korean civil justice is improving public confidence in the legal professions. Surveys find public confidence in the judiciary at a low level (only 50 percent in one). In Chapter 3 we discuss some of the possible sources for this lack of confidence. One is a civil service system for judges that finds ex-judges representing clients before former colleagues. Another is a lawyer-licensing system that until recently allowed only a very few people to become lawyers. Still today, most parties in civil cases represent themselves.

In building the rule of law, Korean jurists have taken profound interest in foreign legal systems, in particular the Japanese system (which they inherited from the occupation), the German system (on which the Japanese system is based), and the American system (thanks to the overwhelming economic and political presence of the United States and the English language in Korea). Many Korean jurists have investigated foreign legal systems looking for optimal solutions for their civil justice system. As we shall see, in civil justice, although Korean jurists have flirted with American innovations, they have gravitated toward modern German methods.

#### D. THE FACTS OF THE HYPOTHETICAL CASE<sup>37</sup>

Mary Roh and John Doh Sr. have been personal friends and business associates for decades. Their two children, Rosa Roh and John Doh Jr., fell in love in college and were engaged to be married.

Mary Roh has a Honda dealership in the nation's capital; John Doh Sr. holds the regional Honda distributorship, Honda Capital Area Distributorship, Inc., that supplies the dealership. The distributorship is located in Second City. John Doh Sr.

<sup>36</sup> *Id.* See Chang-Rok Kim *Where Is the Korean Legal System Going?* in *LAW IN A CHANGING WORLD – ASIAN ALTERNATIVES: PROCEEDINGS OF THE FOURTH KOBE LECTURES BEING THE FIRST ASIA SYMPOSIUM IN JURISPRUDENCE*, TOKYO AND KYOTO, 10 AND 12TH OCTOBER 1996, 11, at 14–16 (Yasutomo Morigiwa, ed., 1998).

<sup>37</sup> The case facts find inspiration in: Armin Weber & Harriet Weber, “Geldsegen,” material distributed at the *Richterfortbildung* seminar of the Bavarian State Ministry of Justice, December 2006; 2 E.J. COHN, *MANUAL OF GERMAN LAW* 191–97 (1971); and *Ver Bryck v. Ver Bryck*, 379 Md. 669, 843 A.2d 758 (2004), *affirming in part, reversing in part*, 150 Md. App. 623, 822 A.2d 1226 (2003).

intends for his son, John Doh Jr., to take over the family business. To foster that goal, in January 2011, he set up his son as manager of a new Honda dealership, DohSon Honda, LLC, in Second City.

In April 2011, Mary Roh and John Doh Jr. attended the annual spring party of the national Honda dealers' association. The meeting was sponsored by Capital Honda Distributorship, Inc., and was held in the nation's capital. John Doh Sr. was not there. John Doh Jr. and Roh disagree about what was said between them at the party, but they agree that the next day Roh transferred \$75,000 – €60,000 – 75 million to the account of DohSon Honda, LLC.

In June of the same year, the Roh-Doh engagement fell apart acrimoniously.

Later Roh said that John Doh Jr. had come to her with an urgent request for cash. DohSon Honda, LLC, suddenly had a shortfall. It did not need much – just \$75,000 – €60,000 – 75 million – but Doh Jr. did not want to go to his father for it because that would shake his father's faith that he could handle the dealership. He wanted a short-term loan – four months at the longest.

John Doh Jr.'s version of events was different. He said that Roh's version was nonsense: If he had needed money, he had personal credit lines of \$75,000 – €60,000 – ₩75 million. He said that the money was a gift. Roh denied that the money was a gift: If the money had been a gift, it would have been motivated by Doh Jr.'s announced engagement to her daughter Rosa.

A broken engagement was not the only problem the two families had. Both parties' automotive businesses experienced unexpected industry-wide crises. At a summit of Honda dealerships held in early September to address the problem, Mary Roh asked Doh Jr. when he was going to pay back the loan. It had been due, she said, August 15. She demanded that he pay it back immediately. Doh Jr. looked surprised and asked why she was asking. Hadn't she always intended it as a gift? If you want your money back, he asked sarcastically, why don't you ask your daughter for it? Roh was speechless.

When Doh Jr. paid nothing, Roh asked Doh Sr. to intercede with his son. She told him that the money was a loan, but even if it had been a gift, now that the engagement was off, Doh Jr. should give it back. When Doh Sr. could not persuade his son to repay the money, Roh decided to bring a lawsuit to get back the money that she now desperately needed.

The Dohs and the Rohs live in three incarnations: in Maryland and Virginia, United States; in Bavaria and Berlin, Germany; and in Busan and Seoul, Korea. The American Dohs live in Baltimore, Maryland, whereas the Rohs live in Alexandria, Virginia, in suburban Washington, D.C. The German Dohs live in Munich, Bavaria, whereas the Rohs live in Berlin. The Korean Dohs live in Busan, whereas the Rohs live in Seoul.

	United States	Germany	Korea
Plaintiff Mary Roh	Virginia	Berlin	Seoul
Defendant John Doh Jr.	Maryland	Bavaria	Busan
DohSon, LLC	Maryland	Bavaria	Busan
John Doh Sr.	Maryland	Bavaria	Busan
Location of meetings	D.C.	Berlin	Seoul