

**Rolf Stürner, Die Aufklärungspflicht der Parteien des Zivilprozesses  
Tübingen 1976**

*In English: Discovery Duties of the Parties of Civil Proceedings*

*Professor Peter Gottwald*

As a master piece of German procedural doctrine I would like to present to you the 1976 habilitation thesis of my esteemed colleague, Rolf Stürner. This monograph is a good example that comparative law may help to develop new ideas for your own national law, but that even excellent ideas are not adopted if they are not in line with national legal culture, with respect to the ideas of the majority of judges, lawyers and so on of a particular country.

Rolf Stürner opened his thesis with the general observation that the claimant loses his claim when he cannot establish his case because of lack of proof. It may also be that, during the taking of evidence, facts are ascertained to the disadvantage of the claimant and he would never have filed his claim if he had known these facts before. Stürner therefore examined whether both parties are obliged to disclose to each other all relevant information before the filing of a claim according to German law.

I suppose that most of you know that German law does not provide for any direct means of discovery or disclosure, but various special information duties can be found in the substantive civil law. Stürner therefore reviewed the established basic principles of German civil procedure as to whether they contain at least the first elements or signs of any procedural information duties.

In fact, the German CCP obliges both parties not only to argue their version of the story but to give specific facts in support of the claim, or in relation to the response of the opposite party. Furthermore, sec. 138 (1) CCP requires both parties to submit complete and truthful statements of all relevant particulars of the case. Parties are expected to make specific reference to sources of evidence in their initial pleadings and to attach all relevant documents on which they intend to rely as proof of any (disputed) facts in the case. If this exchange is not made voluntarily, a party, however, cannot be forced to provide the opponent with information he or she is lacking. Exploratory questions were, and are still, inadmissible.

The crucial question to be answered by Rolf Stürner was: Is a party who does not bear the burden of proof obliged to provide the opponent with all relevant information which the opponent is lacking to establish the case.

Before developing his own theory Rolf Stürner described English discovery law of that time. Encouraged by English law Rolf Stürner developed a general disclosure duty of both parties in German civil proceedings as law already in force. This conclusion was based mainly on two arguments:

- (1) The right of access to justice is a fundamental constitutional right based on the truth, and
- (2) To establish the truth is a central aim of civil proceedings.

Put together with the general duty to act in good faith (§ 242 CC), the partial duties to present documents (§§ 423, 445 ff), and to submit to personal investigation to establish fatherhood (§ 372a) he saw a sufficient basis for postulating a disclosure duty by way of a general analogy to the discussed rules. According to Rolf Stürner each party was obliged to provide the opponent with information of facts including means of evidence if the opponent had made allegations based upon tangible indications. The party then owed actual inspection and presentation of respective property, an examination of his body and mind, and presentation of all relevant documents.

Having established the general disclosure duty, Rolf Stürner drew far-reaching consequences still valid today. Each party has the procedural pre-action duty to preserve pieces of evidence. In special cases a party is even obliged to create pieces of evidence, e.g. due to a professional activity or as a consequence of the exclusive control over the event.

Business secrets may have limited the duty to disclose but only so far as necessary to prevent unfair exploitation. The danger of criminal prosecution was not accepted as a restriction.

If a party failed to comply with the disclosure duty, the facts alleged by the party who bore the burden of proof were deemed to be proven as a kind of procedural sanction. Only in cases of minor failures could the judge consider the probability of the facts.

For Rolf Stürner the procedural duty to disclose had priority over information claims under substantive law.

If a party failed to comply with its pre-action duty to preserve and present information and pieces of evidence, then that party had to bear the costs of a later claim even if they won.

Stürner's thesis was hailed in the scientific discussion. Wolfram Henckel wrote in a book review: "The pretended revolutionary procedural concept of Stürner is in reality an attempt, to understand systematically the procedure of the present times, to open dogmatic traditions and to integrate the procedural reality into the legal system even as it is inconsistent with the conventional dogmatic premises. Therefore, the debate to come cannot ignore the basic principles of this book, but may only have a dispute whether the author has occasionally gone too far in finding pleasure in his own discovery."<sup>1</sup>

Peter Schlosser completed his textbook on Civil Procedure with a chapter on "The Civil Procedure as a matter of jurisprudence,"<sup>2</sup> in order to confront students with results of legal science for the culture of civil procedural law. He gave two examples: the doctrine of "matter in dispute" and "the missing of mutual disclosure duties of the parties" as the great gap in German civil procedural law.

Schlosser recognized that the rules Stürner relied on for his general analogy obviously had mere exceptional character and provided only a narrow basis for this analogism.

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<sup>1</sup> ZP 92 (1979), 100, 104.

<sup>2</sup> Peter Schlosser, *Zivilprozessrecht I*, 2. Aufl. 1991, § 14.

Nevertheless he praised Stürner's book as a very successful work of theoretical jurisprudence in the field of civil procedure.

Yet, the judiciary and prevailing opinion rejected Stürner's thesis.

They held that this kind of disclosure duty is incompatible with general principles of German civil procedure. German law adheres to the principle "nemo contra se edere tenetur." The substantive law provides specific information claims, but outside of this scope nobody is obliged to inform their opponent and help him to litigate successfully. The duty to be truthful is subordinated to the free procedural disposition of each party. This principle was formulated by the Federal Supreme Court in the following words: "Whether a party has a right to information, accounting or delivery of documents is a matter of substantial law. This law contains a number of express rules being adjusted to the specific legal relationship, the interests of the parties and good faith. The substantial law does however not provide for a general information (or disclosure) duty and it is not the function of procedural law to introduce it."<sup>3</sup>

Attempts at a legal reform were ultimately unsuccessful. In my opinion for the 61<sup>st</sup> German Lawyer's Forum of 1996 I recommended adopting a disclosure duty along the lines of Rolf Stürner's style.<sup>4</sup> The legislator did however not accept such a general duty of the parties, and only inserted a discretionary power of the judge to order the parties to give particulars and to present pieces of evidence (see §§ 139 sec. 1 (2), 142 CCP). Even this power has remained unpopular and is used only in extreme circumstances.

Some years later the implementation of the TRIPS agreement of 15 April 1994<sup>5</sup> and of the Intellectual Property Rights Enforcement Directive of 29 April 2004 (2004/48/EC) was an opportunity to adopt a general disclosure duty as part of the German CCP. Art. 6 sec 1 of the Enforcement Directive requires that the court may order the opposing party to present evidence which lies in its control provided that the claimant has presented reasonably available evidence sufficient to support his claim. This wording could have suggested implementing a general procedural duty of this kind. The German legislator however transformed the Directive by inserting new information claims into the Patent Law (§§ 140b, 140c), the Trademark Law (§ 19a), the Utility Model Law (§ 24a) and the Copyright Act (§ 101a).

German courts see, of course, that pure execution of the principle of party presentation of facts (and of means of evidence) would quite often lead to unjust results. Therefore, courts have created some procedural instruments to mitigate this principle.<sup>6</sup>

Sometimes courts stress the duty to substantiate allegations through particulars.

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<sup>3</sup> BGH NJW 1990, 3151.

<sup>4</sup> Gottwald, *Empfehlen sich im Interesse eines effektiven Rechtsschutzes Maßnahmen zur Vereinfachung, Vereinheitlichung und Beschränkung der Rechtsmittel und Rechtsbehelfe des Zivilverfahrensrechts?*, Gutachten für den 61. Deutschen Juristentag, 1996, A 1 (15ff).

<sup>5</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights.

<sup>6</sup> Cf. BGH NJW 1990, 3151.

Sometimes they operate using the so-called secondary burden to make or deny (concrete) allegations if just one party has easy access to all information while the opponent has no knowledge and providing the opponent with full information is justified in equity.

Finally, German courts accept an information duty based upon good faith (§ 242 CC).

It is certainly true that the practical effect is in many cases similar to that fulfilled by discovery or disclosure in the common law style.<sup>7</sup> The dispute about the principle of a general disclosure duty or specific substantiated information claims is however not a mere academic one. A party who files suit based on a legal, non-contractual claim must still establish his claim without the help of his opponent and, if he is lucky, third-parties or the police can help him.<sup>8</sup>

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<sup>7</sup> Stürner/Murray, *German Civil Justice*, 2004, p. 239.

<sup>8</sup> Cf. Gottwald, *Festschrift Rolf Stürner*, 2013, S. 301, 303.