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Improving Access to Justice Through Social Media Service of Process in Germany: Thinking Outside the (In)Box

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A. Introduction

Access to justice in its purest form relates to a person's ability to have his case heard in court. As a basic principle of the rule of law this fundamental right ensures that one can enforce his legal rights and seek redress. Access to justice is, however, a two-way street. Allowing a legal subject to litigate also implies affording his opponent the right to defend. In that regard, it is crucial that the other party be warned about the claim that has been filed against him. The rules of procedural law lay down how the defendant should be notified about the commencement of the lawsuit. Service of process on the defendant safeguards the latter's right to access to justice.

In most instances service of process in civil matters is uncontroversial. The bailiff hands the service papers to the defendant or a family member at his residence, leaves it in his letterbox or effectuates service via post. These traditional methods are widely accepted as valid procedures for informing the defendant. When there is no address for the defendant in Germany or abroad, the situation is more complicated and fragile. In such cases the law specifies that service by publication acts as the last resort (Section 185, 1 ZPO). Such service is implemented by hanging a notification on the court's bulletin board or by publishing the notification in an electronic information system that is publicly accessible in the court. Additionally, the notification may be published in an electronic information and communications system established by the court for such notifications (Section 186(2) ZPO). The court may also order the notification to be published once, or several times, in the Bundesanzeiger (Official Gazette) or in other publications (Section 187 ZPO). These means of service amount to a large extent to fictitious service

of process as it is extremely unlikely that the defendant will actually see the notice.

This paper contends that access of justice (on the side of the defendant) is encroached upon by the use of the current last resort service methods. Fictitious service guarantees the plaintiff access to justice as it ensures that his lawsuit can continue, despite the fact that the defendant is untraceable. On the other hand, the methods are not the most appropriate ones to achieve the ultimate purpose of service: notification of the defendant. It is argued that serving the defendant via one or more of his social media accounts may be a viable addition to the existing last resort service techniques. This idea should not be dismissed out of hand because, as noted by an American court at the end of the previous century,

> 'any unspecified form of alternative service usually has its genesis in untried or formerly unapproved methodology . . . It would be akin to hiding one's head in the sand to ignore such realities and the positives of such advancements' (United States Bankruptcy Court for the Northern District of Georgia, Broadfoot v. Diaz, 15 February 2000, 245 B.R. 719 (2000)).

Social media are ubiquitous in today's society. They can be defined as 'a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user-generated content' (Kaplan and Haenlein 2010: 61). The term Web 2.0 was first used by Darcy DiNucci (DiNucci 1999: 32). The Web 2.0 model stands for the transition the Internet has made from users who passively view websites to users as creators of content. The list of social media is long but the most important ones for the topic of this paper are: Facebook, Twitter, LinkedIn and Instagram.

In addition to penetrating our daily lives, the platforms are starting to intersect with the law as well. Citizens' social media accounts are a rich source of information which leads to them being used for evidence-mining (Mark Howitson, in his capacity of Deputy General Counsel at Facebook, reportedly said that Facebook receives almost daily requests for user information from law enforcement and legal counsel: http://eddblogonline.blogspot.ch/2010/02/facebook-gc-tells-lawyers-hes-looking.html). It is questioned whether the existence of a Facebook 'friendship' between a judge and a lawyer is sufficient to disqualify the judge (Supreme Court of Florida, Law Offices of Herssein and Herssein, P.A., etc., et al. v. United Services Automobile Association). Defamatory statements on social media, referred to as "Twibel" (a combination of the words "Twitter" and "libel"), are prevalent. In Germany there was a case before the Kammergericht of Berlin about whether a Facebook account is inheritable (Zimmermann 2017). The International

Criminal Court in the Hague issued the first ever arrest warrant based largely on evidence collected via social media (Irving 2017). Courts around the world have a social media presence: the European Court of Justice and the UK Supreme Court, for instance, are active on Twitter. Different fields of law are wrestling with how social media should be handled (Finke 2016: 139). One – for the topic of this paper – notable field in which social media are used for legal purposes is the area of class action notification. Especially in the United States courts increasingly consider using social media websites to inform potential class members (on this issue see *inter alia* Piché 2018; Aiken 2017: 967–1018; Bartholomew 2018: 217–274; Wyman 2014: 103).

The unusual and remarkable idea to rely on social media for service of process (outside the class action sphere) is inspired by a relatively recent practice observed in the common law world. In this paper we, therefore, first outline this trend of employing social media networks to bring notice to defendants (part B). Subsequently, we set out the benefits of this type of service (part C). Lastly, we put forward some initial reflections about the concrete implementation of such service (part D). In the concluding part we wrap up our thoughts (part E). This paper uses the methodology of traditional legal research. It builds in particular on foreign case law and doctrinal literature in order to give advice as to how the (German) legal system may be enhanced.

B. Fragmented Common Law Endorsement of Social Media Service

I. Examples

In various common law nations around the world the possibility of serving the defendant via their social media profile(s) has emerged. In multiple cases the plaintiff has petitioned the court for approval to send notice to the defending party over social media platforms. A few examples will illustrate this new development.

In the Canadian case of *Knott v. Sutherland*, for instance, Byron Knott, as administrator of the estate of Carol Dianne Knott, sued several people and organisations for medical negligence. As to one of the defendants, Abdulmutalib Al-Masloom, he obtained permission to serve by publication of the notice in the Edmonton Journal, by forwarding it to the Human Resources department of the hospital where the defendant had previously worked and by sending notice of the action to the Facebook profile of the defendant (Court of Queen's Bench of Alberta Judicial District of Edmonton, Knott v. Sutherland, 5 February 2009, AJ No 1539).

In a shareholder dispute the New Zealand High Court also had to consider the acceptability of using social media networks as avenues for

service of process. The matter of *Axe Market Gardens v. Craig Axe* dealt with a corporation suing one of its minority shareholders for misappropriation of funds. The company Axe Market Gardens was represented by Mr. Axe and its claim was directed at Craig Axe, Mr. Axe's son. According to the plaintiff the defendant had electronically accessed the plaintiff's bank account and had transferred a large sum of money out of it. The defendant was resident in England but his exact whereabouts were unknown, therefore rendering publication in a newspaper impractical. As the conventional methods of service had failed, a more creative solution had to be sought. Father and son had communicated with one another via e-mail and Facebook. Under those circumstances the High Court allowed service via e-mail and Facebook (High Court of New Zealand, Axe Market Gardens v. Craig Axe, 16 March 2009, CIV: 2008-485-2676).

The American federal case of *Ferrarese v. Shaw* saw the plaintiff bring an action against his ex-wife, who he alleged had absconded with their daughter. He sought to secure the immediate return of his child and to ensure his rights of custody. His lawyers were unable to locate his ex-wife. The latter took active measures to avoid being located and to evade service. Service at her last known address proved unsuccessful as the house was occupied by the defendant's sister who refused to cooperate. Judge Pollak agreed that it would be impracticable to serve the defendant using traditional methods and ordered service via e-mail, Facebook message and certified mail on defendant's last known address and on defendant's sister (United States District Court, Eastern District of New York, Giovanni Ferrarese v. Vinda Shaw, 19 January 2016, 164 F.Supp.3d 361).

In *Graves v. West* before the Supreme Court of New South Wales in Australia the victim of an assault on a football pitch sued the offender, a player of the other team. The defendant had moved to England. At first a lawyer appeared for him, but this legal representation did not last. The lawyer did not have a street address for the defendant, only an e-mail address. The Australian court ruled that service via the defendant's LinkedIn account, along with service via a personal e-mail account (as well as service on the defendant's lawyer), was sufficient to bring documents to the attention of the defendant (New South Wales Supreme Court, Graves v. West, 24 May 2013, NSWSC 641).

Closer to home, the English High Court was confronted with a request for service via Facebook in *AKO Capital LLP v. TFS Derivatives*. The plaintiffs were investment managers who brought suit against their broker for overcharged commission. The defendant contested the claim and asserted that any liability should be shifted to – among others – Mr. Fabio de Biase, a former employee of the broker. It, therefore, sought to implead Mr. De Biase

in the proceedings. The defendant served the claim at his last known address but sought judicial approval to serve via Facebook message as well because there was doubt over whether he still lived there. For the first time the High Court allowed service of process via Facebook (High Court of Justice, 17 February 2012, AKO Capital LLP & another v. TFS Derivatives & others, unreported but the case is *inter alia* discussed in the press and in Browning 2012: 175).

In another litigation in the United States, *WhosHere v. Orun*, the court ordered service via Facebook, LinkedIn and e-mail. The plaintiff had sued the Turkish defendant for trademark infringement. Service via the Turkish Ministry of Justice under the Hague Service Convention did not work out because the defendant could not be located at the Turkish address provided by the plaintiff. Judge Thomas Rawles Jones Jr. subsequently approved service via the social networks Facebook and LinkedIn as well as via e-mail (United States District Court for the Eastern District of Virginia, Alexandria Division, WhosHere, Inc. v. Gokhan Orun, 20 February 2014, 2014 WL 670817, *5).

II. Common Conditions

From the available case law two recurring requirements for this type of service can be distilled. First, the plaintiff must provide convincing evidence that the social media account marked for service actually belongs to the defendant. Second, the court must be satisfied that the defendant is regularly using this account. The judicial insistence on these safeguards is logical because it is essential in the interest of due process that the right person is notified, and that this person views his account regularly enough to discover the notice in time for him to prepare a defence. Access to justice would be distorted if service of process were to be effected on an account that is not controlled by the defendant or on an account that he seldom looks at or has abandoned.

As to the former condition, the English High Court in *AKO Capital LLP v. TFS Derivatives* found support in the fact that Mr. De Biase was Facebook friends with employees at the defendant company TFS Derivatives (High Court of Justice, 17 February 2012, AKO Capital LLP & another v. TFS Derivatives & others, unreported but the case is *inter alia* discussed in the press and in Browning 2012: 175). In *Axe Market Gardens v. Craig Axe* the authentication of the Facebook profile of the defendant was relatively easy to establish because there was a communication trail between the defendant and his father (the head of the plaintiff company) on the social medium platform. Many forms of proof could be useful to convince the court. In an effort to link the defendant to the social media profile the plaintiff could point to various information contained in the profile, such as education, occupation,

hobbies, friends, interests, age, hometown, and possibly general location, to match this to information known about the defendant sought to be served (Knapp 2014: 576).

As to the latter condition, the United States District Court for the Eastern District of Virginia in *WhosHere v. Orun* noted that the parties had already exchanged e-mails with regard to the alleged trademark infringement. In this conversation the defendant had provided the plaintiff with an alternative e-mail address and had indicated that he was present on all social networks under that e-mail address. The plaintiff indeed found a Facebook and a LinkedIn account under the defendant's name. The District Court derived from the defendant's announcement that those channels were his preferred methods of communication which he used on a regular basis (United States District Court, for the Eastern District of Virginia, Alexandria Division, WhosHere, Inc. v. Gokhan Orun, 20 February 2014, 2014 WL 670817, *4). In *AKO Capital LLP v. TFS Derivatives* the English High Court concluded that the account was in use because Mr. De Biase had accepted a few recent friend requests (High Court of Justice, 17 February 2012, AKO Capital LLP & another v. TFS Derivatives & others, unreported but the case is *inter alia* discussed in the press and in Browning 2012: 175). Verification as to whether the defendant is the one in control of the social media account targeted for service can take place through a wide range of factors. Naturally, prior conversations between plaintiff and defendant on the platform take the crown but other actions of the defendant may serve the same purpose. Activities on social media are usually time-stamped and the plaintiff may avail himself of them to demonstrate that the defendant engages with his profile. Written posts, the changing of one's profile picture, the posting of pictures, comments on other users' posts, checking into an event, updated job titles and the "last active" feature on the chat function are but a few examples. Similar to the first requirement, the privacy settings enacted by the defendant will dictate the depth of the investigation that can be carried out.

C. Why Social Media Service Deserves a Friend Request: Advantages Over Other Forms of Service

As argued, the administration of justice would benefit if last resort service in Germany were to be supplemented by sending the notice to the defendant's social media account(s). The current methods employed in those situations fail to achieve the core purpose of service, namely actually informing the defendant of the claim filed against him. Very few citizens are looking for these published legal notices.

It might come as a surprise to nominate this novel type of service as the saviour among the last resort methods. However, social medial service has a

number of benefits and outshines other service techniques in many respects. An important advantage of this means of service is that it has a high likelihood of actually reaching the person for whom it is intended. This is caused by the fact that users regularly access their accounts. Figures relating to the social network Facebook confirm this. In a quarterly report, the company announced that as of 30 September 2018 there were 2.27 billion monthly active users (Facebook 2018). Instagram reached 1 billion monthly active users in June of 2018 (Statista 2019a). In the third quarter of 2018 Twitter had 326 million monthly active users worldwide (Statista 2019b). A large number of people are thus active on social media. Besides, the platforms themselves reach out to their users on a continuous basis, for example by the applications on the users' mobile devices that push notifications to the account holders (Upchurch 2016: 601). Under Facebook's default settings the account holder will receive a notification through e-mail of received messages (See for instance the District Court for the Southern District of New York in *FTC v. PCCare 247 Inc*: '*Defendants would be able to view these messages when they next log on to their Facebook accounts (and, depending on their settings, might even receive email alerts upon receipt of such messages).*') ('FTC v. PCCare247 Inc.': 7 March 2013, WL 841037, *5). Social media platforms represent a direct and instantaneous pathway to the defendant. Even the passive defendant who makes no effort to look for legal notices containing his name either in newspapers or on Internet sites, could be informed of the litigation in this manner. The existence of the digital divides thwarts the usefulness of service via social media to some degree. Due to socio-economic deprivation and/or a lack of digital literacy citizens might not have access to the Internet and social media platforms. Their online absence prevents them from receiving notice of the upcoming litigation through social media accounts. For these people the current last resort mechanisms, as prescribed by the law as it stands today, would remain the default, thus lowering the likelihood of providing actual awareness.

Furthermore, social media service outperforms other (potential) last resort methods in terms of achieving actual notice (Beazley 2013: 18). Service by publication is not very effective at informing the defendant about the impending lawsuit. The number of copies of newspapers circulated in Germany is dropping every year (Statista 2019c). In contrast, social media usage penetration is on the rise (Statista 2019d). To give but one example: out of a world population of 7.7 billion people (Worldometers 2019) over 2 billion people are to be classified as monthly active Facebook users (Facebook 2018). The inadequacy of publication was noted in the United States as well. In *Baidoo v. Blood-Dzraku* the Supreme Court of New York County rejected this service technique, calling it 'a form of service that, while neither novel

nor unorthodox, is essentially statutorily authorized non-service' ('Baidoo v. Blood-Dzraku': 27 March 2015, 48 Misc 3d 316). It found that even for publications in more widely circulated newspapers 'the chances of it being seen by defendant, buried in an obscure section of the paper and printed in small type, are still infinitesimal' ('Baidoo v. Blood-Dzraku': 27 March 2015, 48 Misc 3d 317; in the same vein the court in *Mpafe v. Mpafe* considered service via publication in a legal newspaper but argued that it would be unlikely that the defendant would ever see it: 'Mpafe v. Mpafe': 10 May 2011, No. 27-FA-11-3453). A further advantage of social media as a channel for service lies in the costs attached to performing the service. Whereas publication in newspapers is relatively expensive (this is no different in the United States: in *Mpafe v. Mpafe* service by publication was called 'antiquated and prohibitively expensive' ('Mpafe v. Mpafe': 10 May 2011, No. 27-FA-11-3453)), social media service is free (Eisenberg 2014: 814). Social media service is generally less expensive than traditional service methods (Upchurch 2016: 606).

When seeking an appropriate service method for the digital age in which we live in, the natural reflex could be to look at e-mail. The problem with e-mail is that the sender cannot be sure if the account actually belongs to the intended recipient, unless the recipient explicitly acknowledges so (Knapp 2014: 569). A social media profile, on the other hand, can be examined, depending on its privacy settings, to verify whether the defendant and the account owner are one and the same. To that end, confirmed information about the defendant can be compared to information found on the social media profile (see supra part B.II). Social media networks are also less spam-infested than e-mail (Wolber 2016–2017: 450, footnote 1; Shultz 2008–2009: 1525, footnote 205 (in the context of Facebook)). This is relevant because all forms of electronic service lack the ritual function that only paper-based, in-hand service can provide (Hedges, et al. 2009: 73). They do not create the same ritualistic formality and finality as the hardcopy traditional methods of service (Specht 2012: 1955–1956). Formality is crucial to warn the defendant about the seriousness and legal implications of the act of service. If the recipient's inbox is not swamped by spam attacks, there is more chance he will not doubt the believability and authenticity of the notice.

The idea to rely on social media networks for subsidiary service finds support in the ELI-UNIDROIT Draft European Rules of Civil Procedure (UNIDROIT 2017). UNIDROIT and the European Law Institute (ELI) cooperate towards the development of European Rules of Civil Procedure. In light of the emergence of an expansion of rules at the European level in the field of procedural law, they aim to create a tool to avoid a fragmentary and haphazard growth of European civil procedural law. Completion of the

instrument was expected in 2019 (UNIDROIT 2019). Rule 13 of the Draft deals with service methods of last resort. It provides that when the defendant's address is unknown, service of documents may be effected by publication of a notice to the addressee in a form provided for by the law of the forum state, including publication in electronic registers accessible to the public, and by sending a notice to the addressee's last known address or e-mail address. The comments accompanying Rule 13 state that:

> 'The wording of the rule is also broad enough to cover giving notice via text message, "Facebook" or other social media if appropriate and accepted in the forum state, although it is not a "publication" in a narrow sense' (UNIDROIT 2017).

Reference can also be made to the service of process rules in the country of Estonia. The tiny Baltic republic is one of the most technologically advanced nations in the world, aptly called E-stonia for its competences and knowledge in technology. In Estonia a court may notify the defendant of the existence of procedural documents using social network accounts belonging to the recipient. § 311, paragraph 2 of the Code of Civil Procedure states:

> "The court may also send a notice on making the document available to the phone number or e-mail address found in the public computer network, on the presumed user account page of a virtual social network or on a page of another virtual communication environment which the addressee may be presumed to use according to the information made available in the public computer network or where, upon sending, such information may be presumed to reach the addressee. If possible, the court makes the notice available on the presumed user account page of a virtual social network or on a page of another virtual communication environment in such a manner that the notice cannot be seen by any other persons than the addressee" (own emphasis) (English translation of the Estonian Code of Civil Procedure))

When the defendant has not retrieved the file from his personal e-toimik account (e-toimik is the country's e-File procedural information system), Estonian courts sometimes notify him through social media. A court clerk will perform an Internet search for the defendant and will reach out to him through, for example, the court's official Facebook Page to inform him and to encourage him to visit his e-toimik account. Although this practice does not amount to official service, it shows a willingness to embrace social media platforms as viable portals to the defendant.

D. Precursory Considerations

The introduction of social media service as an additional *ultimum remedium* in Germany gives rise to a number of fundamental and practical questions. One of these relates to whether the notice should be sent via a private message or through a public communication. A Facebook message or a Direct Message on Instagram are examples of private messages. These are only viewable by the recipient. Public communications are, for instance, a post on the defendant's Facebook Timeline or a public Tweet. They are visible by more people than just the addressee, such as his digital friends or the general public. In the common law cases the issue of privacy is very rarely addressed.

There is, however, one decision that explicitly touches upon the defendant's right to privacy. In a case before the Kwazulu-Natal High Court of Durban in South Africa Judge Steyn argued that the privacy of the defendant would not be infringed upon because the notice would be transferred via a personal Facebook message, to which no other person than the defendant would have access ('CMC Woodworking Machinery (Pty) Ltd v. Pieter Odendaal Kitchens': 3 August 2012, case no. 6846/2006, para. 13). The overwhelming majority of courts have subscribed to the position that the defendant should be informed via an individualised method of communication ('MKM v. Corbo & Poyser': 16 December 2008, case no. SC 608; 'Blaney v. Persons Unknown': 1 October 2009, IHQ/12/0653 (Ch.); 'Byrne v. Howard': 21 April 2010, FMCAfam 509; AKO Capital LLP & another v. TFS Derivatives & others: 17 February 2017, unreported but the case is *inter alia* discussed in the press and in Browning 2012: 175; 'CMC Woodworking Machinery (Pty) Ltd v. Pieter Odendaal Kitchens': 3 August 2012, case no. 6846/2006; 'FTC v. PCCare247 Inc.': 7 March 2013, 2013 WL 841037; 'Biscocho v. Antigua': 12 September 2014, docket no. F-00787-13/14B; 'Baidoo v. Blood-Dzraku': 27 March 2015, 48 Misc 3d 310 (although not entirely clear whether a private message was sanctioned); 'K.A. & K.I.A. v. J.L.': 11 April 2016, docket no. C-157-15). Only one judgment approves of a public communication (a public Tweet) as the avenue for service of process on the defendant ('St. Francis Assisi v. Kuwait Finance House, et al.': 30 September 2016, 2016 WL 5725002).

Reliance on public pathways of communication, such as the Facebook Timeline of the defendant, arguably augments the chances of actually notifying him about the matter in which he is expected to defend himself. If the latter's social media connections can view the communication, they are likely to inform him of the existence of the service (Wagner and Castillo 2013: 275, footnote 114; Grové and Papadopolous 2013: 434). In our estimation

this purported increase in likelihood of actual notice is too limited to justify the infringement of the defendant's privacy. Social media service ought to remain as discreet as possible: a private message should be the norm (Finke 2016: 162; Knapp 2014: 576; McEwen & Robertson 2010: 8). In that regard the Estonian Code of Civil Procedure takes the same stance as its § 311, paragraph 2 reads in relevant part:

> 'If possible, the court makes the notice available on the presumed user account page of a virtual social network or on a page of another virtual communication environment in such a manner that the notice cannot be seen by any other persons than the addressee'.

The informal nature of social media platforms (as already noted supra part C) is another issue that needs advanced thought. For many people social media networks form sources of entertainment. On social media users chat with their friends and family, watch funny videos, follow pages of companies or celebrities they like and participate in groups. Most, if not all, citizens do not associate these networks with official legal communication. If service of process is suddenly effected through social media, it is conceivable that the receiver will not give the notice the attention it deserves. He might not take the notice seriously or he might deem it to be a fraudulent message seeking to trick him. In such circumstances, the objective at the heart of service has not been fulfilled.

One possible solution could be to include a unique case identification number in the private message to the defendant, a suggestion already formulated in the context of e-mail service (Wolber 2016–2017: 468). The defendant can subsequently visit an official website where he can find the documents of the service by entering the number provided in the message. This approach is to be preferred over providing a link to the documents because Internet users are – with good reason – wary of clicking on links to unknown websites.

E. Conclusion

It is by no means time to write an obituary for the traditional methods of service of process. The arrival of social media in the toolbox of service methods will not send shockwaves through the legal system. Service via social media networks will not become the new gold standard, replacing personal service or service by post. It is suggested that the current means of service in cases where there is no known address for the defendant are ineffective at actually reaching him, which negatively impacts his right to access to justice. Social media can act as a backstop because they open a direct line of communication to the defendant, provided it can be shown that the account indeed belongs to the defendant and he regularly accesses it.

If the German legislator decides to incorporate this form of service, the use of social media in the everyday life of citizens may undergo a significant transformation. At the moment, members of social media do not perceive their participation as capable of producing legal consequences. In the future they could be surprised to find notice of a lawsuit in their social media inbox. Once it becomes common knowledge that one is able to be sued through one's social media account(s), some users may decide to delete their profiles (McEwen & Robertson 2010: 7). After an Australian court's pioneering approval of Facebook service (Supreme Court of Australian Capital Territory, MKM v. Corbo & Poyser, 16 December 2008, case no. SC 608), Facebook warmly welcomed the ruling, expressing in a statement:

> 'We're pleased to see the Australian court validate Facebook as a reliable, secure and private medium for communication. The ruling is also an interesting indication of the increasing role that Facebook is playing in people's lives'(The Associated Press 2008).

Faced with an exodus, however, social media giants like Facebook may decide to rethink their initial delight at the new trend.

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