

plans toward this end. When economic considerations permit, it may therefore be expected that India will adopt a legal aid system comparing favorably with those in more developed countries.

Italy

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In Italy, legal services for persons unable to bear the costs of assistance and proceedings are presently inadequate and wanting in efficiency. The current system has long been the target of criticism by legal scholars, attorneys and judges. The pressure of public opinion has moved the government to sponsor a bill in Parliament, Number 323, which was approved by the Senate on March 10, 1971 and is now pending before the House of Deputies. In considering legal aid in Italy, therefore, we shall first describe the system presently in existence and then outline briefly the most important features of the proposed new legislation.

A. THE PRESENT SYSTEM

Italy has a system of state free legal assistance which is made available to persons of limited means pursuant to Law Number 3282 enacted on December 30, 1923.⁵⁵ The law provides for legal aid relating to litigation, but not for legal counseling on matters unrelated to litigation. It is available to individuals and to legal entities, to Italian citizens and foreigners whether residents or not.⁵⁶ In order to obtain legal aid, the indigent must file a written application and show that he meets two requirements:⁵⁷

1. He must be in a "state of indigency" and prove it, unless the applicant is a charitable institution, which is legally presumed to be indigent. "State of indigency" does not imply an absolute lack of financial means, but only that the applicant is unable to pay the costs of litigation. Proof of financial state is furnished by submitting two certificates, one issued by the Mayor of the applicant's town of domicile and/or residence⁵⁸ and one by the tax assessment authority

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⁵⁵Royal Decree No 3282 of December 30, 1923, "Law on Free Legal Assistance," 1923; Gaz. Uff. 117 and Suppl., 1924 Suppl. Lex 406 (hereinafter referred to as Law 1923).

⁵⁶*Id.* Art. 14.

⁵⁷*Id.* Art. 15.

⁵⁸*Id.* Art. 16.

showing the amount of real estate and income taxes paid, if any, as well as an opinion on the applicant's state of indigency.⁵⁹

2. He must establish that his case has a good chance of being favorably decided by the judge. This requirement does not apply to criminal cases.⁶⁰

Legal aid is available in any jurisdiction and court, in civil, criminal, administrative and special cases, that is, in any litigated matter.⁶¹ It is excluded only in cases where the applicant is the assignee of a claim.⁶²

The application must be submitted to the Committee on Free Legal Assistance established at every Tribunal, at every Court of Appeals and at the Supreme Court of Cassation,⁶³ as well as at any other major special court.⁶⁴ Each Committee is composed of three members: a judge, who acts as Chairman, a public prosecutor, and a member of the Bar. In Committees established at administrative and special courts, the judge and/or the public prosecutor are replaced by officials of the service concerned. These Committees have authority to pass on applications in civil and administrative cases,⁶⁵ while in criminal cases, authority to decide on applications is vested in the adjudicating judge himself.⁶⁶ In case of emergency, legal aid may be authorized temporarily by a Committee Chairman, subject to final ratification by the Committee itself.⁶⁷

Application for legal aid must be made in writing on taxed legal paper and filed with the Chairman of the proper Committee. Applications must allege relevant facts in sufficient detail, legal grounds and supporting evidence, and make reference to the two requirements described above. All documents, including the certificates of the "state of indigency," must be attached. The application must be signed by the applicant and/or by an attorney. If the application is signed by the applicant, it must be sent to the Chairman of the Committee through a judge.⁶⁸ No forms are provided to help the applicant.

The Committee notifies the applicant's adversary, setting a date within which he may file his comments and objections.⁶⁹

⁵⁹*Id.* Art. 15.

⁶⁰*Id.* Art. 15, last paragraph.

⁶¹*Id.* Arts. 2 and 10.

⁶²*Id.* Art. 3.

⁶³*Id.* Art. 5.

⁶⁴*Id.* Arts. 6 and 7.

⁶⁵*Id.* Arts. 8, 9 and 10. This authority may be vested in the adjudicating judge, however, in small claim cases before the *Giudice Conciliatore* (justice of the peace), in bankruptcy and labor cases.

⁶⁶*Id.* Art. 15, last paragraph.

⁶⁷*Id.* Art. 25.

⁶⁸*Id.* Art. 18.

⁶⁹*Id.* Art. 20, first paragraph.

If legal aid is denied, applicants may appeal to the Committee at the Court of Appeals. The review is limited to ascertaining the chances of success in the litigation. Denial of applications on the ground that standards of indigency have not been met are not subject to appeal. An appeal may also be brought by any party with an interest in the decision granting legal aid.⁷⁰ Moreover, the tax assessment officer may petition the Court at any time for withdrawal of legal aid on the ground that the beneficiary never was or has ceased to be in a state of indigency.⁷¹

Counsel is selected and assigned by the Committee. In criminal cases the selection is made directly by the judge before whom the case is pending.⁷² The assisted person, therefore, has no right to choose his counsel. It often happens in practice, however, that the Committee appoints the attorney who signed the application on behalf of the indigent. The assigned counsel provides his services as if the indigent client were his private paying client, subject only to occasional supervision by the Committee. The assigned counsel will receive no compensation from his client or from the State, as legal aid is entirely free. There are no provisions permitting persons of moderate means to obtain a contribution towards legal expenses: no legal aid at reduced fees. The assigned counsel may get his fees paid only if his client wins a civil case against an adversary who has financial means.⁷³ In criminal cases, however, even in the event of acquittal, assigned counsel receives no compensation.

Grant of legal aid will yield the following benefits:⁷⁴

(a) Exemption from legal and court costs, including an exemption from the requirement to use taxed legal paper. All costs and taxes are recorded, however, so that eventually they may be collected from the losing adversary.

(b) Free assistance from public officials, notaries and experts, whose services are required by law and who, like attorneys, serve without compensation. They may, however, collect their fees from the losing adversary in civil cases.

(c) All travel expenses and disbursements incurred by public officials, experts and witnesses are reimbursed by the State.

(d) Free publication in newspapers of court-ordered legal notices concerning the case.

⁷⁰*Id.* Art. 22.

⁷¹*Id.* Art. 21.

⁷²*Id.* Art. 29.

⁷³It is the general rule in Italy, applicable to privately financed as well as legal aid cases, that the judgment binds the losing party to pay his adversary's court expenses, including his counsel fees. C. PRO. CIV. Art. 91.

⁷⁴Law 1923 cit. Art. 11.

If the legal aid recipient succeeds initially, aid is automatically extended for proceedings on appeal. If the beneficiary loses in the court of first instance, however, he must apply again to the Committee at the Court of Appeals in order to obtain legal aid in the appeal proceeding.⁷⁵

Legal aid does not affect the usual rights and liabilities of parties in litigation. Thus, the general rule that the unsuccessful party must refund the costs and attorney's fees of his adversary applies whether the indigent person is successful or not. If he wins, the reimbursement will go directly to the State (for court costs and taxes) and to the counsel (for his disbursements and fees).⁷⁶

A notable feature of the Italian system of state legal aid is the status of assigned counsel. Legal aid is construed as a public service, which is performed by attorneys in private practice rather than by public servants. No counsel, once assigned, may refuse to serve (except for grave and documented reasons and for reasons of conflict of interests). He is obligated to provide this public service as a duty attendant to his membership in the legal profession.⁷⁷ Penalties are provided against attorneys who refuse to provide the services⁷⁸ as well as against attorneys who perform their duty inefficiently and without diligence.⁷⁹ In practice, however, penalties for lack of diligence are rarely enforced.

Supervisory authority concerning performance by assigned counsel is conferred on public prosecutors and State Attorneys, who have the right to apply for dismissal and replacement of the originally assigned counsel.⁸⁰

Apart from the statutory system of legal aid described above, facilities designed to provide legal assistance to persons of limited means are virtually non-existent in Italy. No organizations have developed comparable to the National Legal Aid and Defender Association or the Neighborhood Law Offices in the United States. A few private legal aid organizations have operated in some of the major cities in Italy, but their effectiveness has been negligible. The major labor unions have offices for free legal assistance with a paid staff. They also use the services of private attorneys whose fees are paid by the unions. These services are available only to members of the unions and their families and are limited mainly to labor matters.

The state legal aid system is so encumbered with formalities and ob-

⁷⁵*Id.* Art. 13.

⁷⁶*Id.* Arts. 35 ff.

⁷⁷*Id.* Art. 1.

⁷⁸*Id.* Art. 31.

⁷⁹*Id.* Art. 4.

⁸⁰*Id.* Art. 32.

stacles that, rather than responding to the significant needs of persons of limited means, it appears in practice to restrict the availability of legal assistance to poor people.⁸¹ In the few cases in which legal assistance is finally granted, the service available is substantially limited in scope, for the beneficiary is entitled to no aid by way of legal counseling. He receives assistance solely for the matter ripe for adjudication. No provision has been made for advice aimed at keeping him out of the courts.

In addition to these general comments concerning the deficiencies of the present system, critics have pointed up more particular failings⁸² which may be summarized as follows:

(a) The requirement that the application be made in writing imposes a hardship where poverty is often accompanied by illiteracy.

(b) The application requirements, establishing the standard of indigency, and making a *prima facie* case of the validity of the claim or defense, are such that even a literate person may hardly be expected to manage without the help of an attorney. To convince the Committee that one's case has a chance of success is already a difficult task. The task becomes much more difficult when the adversary is assisted by paid counsel who argues against the application. At the application stage, the indigent has no right to free legal services. If an attorney provides assistance at this stage, he is usually someone offering his initial services free or at a reduced rate asking in return that the applicant request the Committee that he be assigned as counsel. In this phase the indigent may be easy prey for an unscrupulous attorney who exacts a promise of compensation on a contingency basis in case of success. This not only violates the indigent's right to free assistance, but also violates the prohibition against receipt of contingent fees by Italian attorneys.

(c) The right given to the adversary to appear before the Committee has an unfair result, for it seriously disadvantages the appli-

⁸¹From 1952 to 1956, legal aid cases before all courts in Italy ranged from 7,300 to 8,900 per year against a total of civil cases ranging from 520,000 to 600,000 per year. Legal aid thus figured in only 1.5% of the cases, which in no way reflects the proportion between rich and poor people in Italy. See: Marafioti, *L'Assistenza Giudiziaria ai Non Abbienti*, Giuffrè, Milano, 1960 at 50. This miniscule percentage decreased further to one percent in 1960. See: Cappelletti, *Processo e Ideologie*, Il Mulino, Bologna, 1969 at 550.

⁸²See, in general: Marafioti, *op. cit.*, *supra* at note 81; Vigoriti, *Fumus boni juris* e Diritto d'Azione e di Difesa, 21 *Rivista di Diritto Processuale* 284 (1966); Pizzorusso, L'Art. 24 III comma, della Costituzione e le Vigenti Disposizioni sul Gratuito Patrocinio, [1967] *Foro Ital.* V 1; Cappelletti, *La Giustizia dei Poveri*, [1968] *Foro Ital.* V 114; Cappelletti, *Poverta e Giustizia*, [1969] *Foro Ital.* V 42; Denti, *Gratuito Patrocinio davanti alla Corte Costituzionale*, 24 *Rivista di Diritto Processuale* 149 (1969); Denti, *A Proposito di Riforma del Gratuito Patrocinio*, [1969] *Foro Ital.* V 132.

cant's litigation position. The poor person must win the case twice: first before the Committee, then before the Court. In addition, the applicant must reveal the major points of his claim or defense to the Committee, while the adversary is not required to disclose his but may keep silent or use only the arguments necessary to demonstrate that the applicant has negligible or no chance of success.

(d) Since the Committees are administrative rather than judicial bodies,⁸³ their proceedings do not enjoy all constitutional and procedural guarantees of trials before the courts. Their authority to pass on applications for legal aid in civil cases represents a further disadvantage for the indigent, who would be better protected if the authority were given to a judge, as it is in criminal cases.

(e) If the assisted person loses his case in the court of first instance, he must apply again to the Committee in order to obtain legal aid on appeal. After a defeat, of course, the burden of proving his chances of success will be more arduous than before.

But most of all, it is the system of unpaid assigned counsel that impedes effective legal aid. The current system has far less to recommend it than the system of the *Avvocatura dei Poveri* which existed in Piedmont and other territories of the Kingdom of Sardinia prior to the unification of Italy. This system was organized as a government service performed by a staff of paid attorneys, who provided both litigation legal aid and counseling, litigation-prevention advice to the indigent.⁸⁴ Although this government service was effective and had considerable appeal with young attorneys attracted by social and humanitarian activities, it was abolished in 1865 for budgetary reasons. The new system placed the whole burden of legal aid on the legal profession, which was required to offer the services without compensation as an honorary duty attendant to being a member of the bar. With some exceptions, attorneys who make themselves available today for assisting indigents are either the young and inexperienced or the failures, who would take any client in the hope of collecting fees from the adversary.

With the enactment of the 1948 Republican Constitution some improvement for legal aid in Italy appeared imminent. Article 3 of the Constitution affirms the principle of full, substantial equality of all citizens before the law and sets an obligation for the government to remove any obstacles to the actual fulfillment of the principle of equality. The second paragraph of Article 24 states that the right of defense in any legal proceeding is

⁸³See: Corte Cost., Judgment No. 98 of June 16, 1970, [1970] Foro Ital. I 1848.

⁸⁴On the *Avvocatura dei Poveri* see Marafioti, *op. cit.*, *supra* note 81, at 13.

“inviolable,” while the third paragraph of the same article states that “the means for action and defense in any legal proceeding are guaranteed to the indigent by way of *ad hoc* institutions.” Furthermore, Article 38 of the Constitution grants all disabled and indigent citizens the right to be maintained and assisted by the social security system.

These constitutional provisions establish as a matter of principle effective legal assistance for the indigent. In practice, however, the only application of this principle remains the Law of 1923, which was enacted during the Fascist regime. The inadequacies of the law have become even more intolerable in the light of the constitutional principle and have been further underscored by a series of recent decisions of the Constitutional Court enforcing the right of defense provided by Article 24 of the Constitution.⁸⁵ Many provisions of the old Fascist Codes have been declared unconstitutional and the right to be assisted by counsel has been considerably extended, especially in criminal cases. Since, as a matter of fact as well as law, the availability of legal aid is very limited, the more the average citizen's right to defense is recognized, the more the indigent citizen (who cannot afford such defense) is discriminated against.

Cases brought before the Constitutional Court challenging the present legal aid system have followed two approaches. One raises the unconstitutionality of specific provisions of the law, for example, the provision requiring the indigent to prove that he has a good chance of winning his case. The other claims the unconstitutionality of the whole law and the entire system. The Constitutional Court, however, in two decisions, one in 1964⁸⁶ and the other in 1970⁸⁷ upheld the state legal aid system as not violative of the Italian Constitution.

In the 1964 decision, the Constitutional Court recognized that the present legal aid system is inadequate and that a new and better system should replace it. Moreover, the Court disclosed the key argument (hardly a strictly legal one) on which it based its decision not to declare the present system unconstitutional. The argument may be phrased roughly in the following terms: to declare the present system void would leave the indigent without legal aid and a bad system is better than none at all. Both legal scholars and judges of the lower courts were highly critical of the attitude taken in 1964 by the Constitutional Court, for it manifested little faith in the capacity of the government and the legislative branch to act.⁸⁸

⁸⁵See, in general, Vigoriti, *Garanzie Costituzionali del Processo Civile*, (Giuffrè), Milano, 1970.

⁸⁶Corte Cost., Judgment No. 114 of December 22, 1964, [1965] *Foro Ital.* I 158.

⁸⁷Corte Cost., Judgment No. 97 of June 16, 1970, [1970] *Foro Ital.* I 1848.

⁸⁸See the authors cited *supra* note 82. See also Tribunal of Vercelli, Order of August 12, 1968, 24 *Rivista di Diritto Processuale* 149 (1969).

As several Constitutional Court decisions after 1964 inclined toward a more liberal attitude, the issue of unconstitutionality of the legal aid system was raised again. Contrary to expectations, in its 1970 decision the Court again rejected the claims of unconstitutionality, resorting to the reasoning advanced in its 1964 decision. At this point, legislation appears indeed the only way to modify the present system. The passage of Bill Number 323 by the Italian Senate on March 10, 1971, seems to be a decisive step forward in this direction.

B. THE PROPOSED REFORM

Although it hardly presents a system that would provide comprehensive, efficient assistance to the indigent or person of moderate means, Bill 323 does offer some definite improvements over the present system. They may be summarized as follows:

1. Elimination of the anachronistic concept of legal aid as a duty imposed on assigned counsel to serve without compensation. The State would pay counsel fees and disbursements at the professional rates applicable in cases of private paying clients.⁸⁹ This would also apply to experts and public officials providing services on behalf of legal aid beneficiaries.⁹⁰

2. In place of the present multiplicity of Committees on Free Legal Assistance, one such Committee would be established at each Tribunal. The Committee would have jurisdiction over all applications for legal aid in civil cases to be tried by all courts sitting in the Tribunal's district.⁹¹ In criminal proceedings grant of legal aid would remain within the province of the judge in charge of the case.⁹²

3. The requirements for admission to legal aid would be liberalized:

- a) the "state of indigency" is presumed in all cases in which the applicant is not registered in the tax rolls for the payment of the "complementary tax" (a tax paid by individuals having a family income of at least 960,000 lire, equal to about \$1,550). In litigation involving either labor or social security matters, legal aid would be granted if the applicant shows that he is registered in the rolls for

⁸⁹Senato della Repubblica, V Legislatura, Disegno di Legge No. 323, *Istituzione del Patrocinio Statale per i Non Abbienti* art. 22.

⁹⁰*Id.* Art. 2.

⁹¹*Id.* Arts. 5 and 6, first paragraph. There is only one exception, that of the *Giudice Conciliatore*, who maintains jurisdiction on legal aid in his own cases. *Id.* Art. 6, fourth paragraph.

⁹²*Id.* Art. 6, second and third paragraphs.

“complementary tax” as having an income of not more than two million lire (equal to about \$3,200).⁹³

b) Rather than proving a good chance of a favorable decision, the applicant would have to show that his case “is not manifestly unfounded.” This requirement need not be met in criminal cases.⁹⁴

4. The formalities for the application would be simplified. The application may be either written (taxed legal paper would not be required) or oral before the Committee or a court clerk. Written minutes are made of the oral application.⁹⁵ The adversary is not permitted to argue against the granting of legal aid.

5. Once granted legal aid, the beneficiary would have the right to choose his own counsel with only certain limitations of a territorial nature. In addition, the beneficiary would be entitled to apply to the Committee (or the trial judge in criminal cases) requesting for “valid reasons” dismissal of the assigned counsel and his replacement with another counsel of the litigant’s choice.⁹⁶ Counsel, once appointed, could not refuse to serve without serious reasons to be reviewed by the Committee or the trial judge.⁹⁷

6. Once granted, legal aid would extend automatically to all stages of the case, including appeals.⁹⁸

Grant of legal aid would have the same results as in the present system.⁹⁹ If the adversary of the assisted person loses and is required to refund disbursements and fees, the refund would go directly to the State which has advanced these sums.¹⁰⁰ The assisted person eventually may be liable to refund to the State some registration taxes and stamp duties connected with the case if, as a result of his winning the case, he receives from the adversary at least six times the amount of such taxes and duties. He would also be required to refund the costs and fees of his counsel if the amounts received from the adversary are more than four times costs and fees.¹⁰¹

The proposed new system has some important negative aspects. Despite the strong recommendations of all scholars and experts who addressed the

⁹³*Id.* Art. 11.

⁹⁴*Id.*

⁹⁵*Id.* Art. 12.

⁹⁶*Id.* Art. 15.

⁹⁷*Id.* Art. 17.

⁹⁸*Id.* Arts. 8 and 9.

⁹⁹*Id.* Art. 7.

¹⁰⁰*Id.* Art. 18.

¹⁰¹*Id.* Art. 19.