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# LEGAL ASSISTANCE IN THE FEDERAL REPUBLIC OF GERMANY

KARL AUGUST KLAUSER\* and ROBERT A. RIEGERT†

## I. INTRODUCTION

The purpose of this paper is to make the German experience in *judicare* available to the English-speaking legal community. *Judicare* is a system whereby the client selects an attorney to service his legal needs as part of the lawyer's professional practice and the lawyer receives compensation therefor from the state. Although the English system, established in 1949, is usually taken as the model,<sup>1</sup> both the German and French systems<sup>2</sup> were in existence for a much longer time. Prior to 1966 *judicare* was unknown in the United States.<sup>3</sup>

## II. HISTORICAL DEVELOPMENT

The Germans "received" the Roman Law—or at least parts of it—to be used as German law in cases where there was no overriding local law in the period between 1400 and 1600 A.D.<sup>4</sup> For this reason Schott, who published the first work on German legal aid in 1900, begins with the Roman law and traces its development through the Middle Ages and into present-day German law.<sup>5</sup>

There were no court costs in Rome until almost the end of the third century, although there were some types of processes in

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1. Pelletier, *English Legal Aid: The Successful Experiment in Judicare*, 40 U. COLO. L. REV. 10, 13 (1967).

2. The French system is complicated in that it has two types of jurists, the *avocat* and the *avoué* (corresponding roughly to the English barrister and solicitor), and differs from the other systems in that the clients legal representatives are chosen for him, and they donate their services rather than being compensated by the state. Pelletier, *Legal Aid in France*, 42 NOTRE DAME LAW. 627, 641-42, 645 (1967).

3. In 1966, *judicare* programs were established for the first time in this country in parts of Wisconsin and Minnesota, and in New Haven, Connecticut. Schlossberg and Weinberg, *The Role of Judicare in the American Legal System*, 54 A.B.A.J. 1000, 1001 (1968).

4. Riegert, *The West German Civil Code, Its Origin and Its Contract Provisions*, 45 TUL. L. REV. 48, 50 (1970).

5. Schott, *Das Armenrecht der deutschen Civilprozessordnung*, in 4 O. FISCHER, ABHANDLUNGEN ZUM PRIVATRECHT UND CIVILPROZESS DES DEUTSCHEN REICHES (1900).

which sacrifices had to be deposited in a temple,<sup>6</sup> which were no doubt put to good use. Beginning around 200 A.D. the rule was that lawyers could not contract for a fee before litigation but could request one after the litigation was complete.<sup>7</sup> The digests show that already at this early time lawyers were assigned by judges to represent the poor.<sup>8</sup>

The seeds of the present German legal aid system are to be found in the laws of the various German states of the Middle Ages, which were composed of a mixture of the Roman law, the canon law, and German tribal law. Many European cities of the Middle Ages had public lawyers whose function was to serve the poor in much the same manner as did public doctors. These lawyers were paid by the city and were required to represent the needy in their legal processes.<sup>9</sup> The treatment afforded the poor in the secular courts is obscure and probably varied somewhat from place to place and with time.<sup>10</sup>

In the church courts, whose influence was great in the Middle Ages, there were usually no court costs for anyone, and never any for the poor, and the poor were always assigned lawyers without charge.<sup>11</sup> It was mainly due to the canon law's compassionate treatment of the poor that all the important procedural and substantive aspects of the present German legal assistance program were already developed in the fifteenth and sixteenth century ordinances regulating the organization and the procedure of the Supreme Court of the Holy Roman Empire (*Reichskammergerichtsordnungen*).<sup>12</sup> These ordinances provided that a court would examine the need of the applicant and his chances for success in the proposed court action. If the statutory prerequisites were fulfilled, the court would then find that the petitioner had a right to legal assistance and assign a lawyer who could not refuse to take the

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6. *Id.* at 4-6.

7. *Id.* at 6-7.

8. *Id.* at 7.

9. *Id.* at 15.

10. *Id.* at 14-18.

11. *Id.* at 24.

12. The *Reichskammergericht* was established in 1495 and was the highest court of the old Empire. It was famous but not influential. It was the final court of appeal from decisions of all state and municipal courts insofar as no special privilege had been granted to them making their decisions unappealable. Its procedure was cumbersome and ineffective, and, with time, more and more special privileges were granted undermining the right of appeal.

case.<sup>13</sup> This is the essence of the present German system, except that now the applicant usually suggests a lawyer whom the court appoints, and that lawyer is paid by the state, whereas earlier he served without compensation.

The principles of these early ordinances were incorporated into the civil procedure laws of the individual German states. After the founding of the second empire in 1871, they were copied into the Code of Civil Procedure (ZPO) of January 30, 1877, which is still in effect today. Its legal aid provisions have remained basically unchanged, except for the provision introduced in 1923 whereby the state pays attorneys for their services in connection with legal aid matters.

### III. LEGAL AID IN CIVIL LITIGATION<sup>14</sup>

1. *Prerequisites and Effect.* In Germany, as in many other civil law countries, the statutory provisions regulating the granting of legal aid for civil litigation are to be found in the Code of Civil Procedure (ZPO). It is indicative of the importance attached to legal aid in these countries that its rules are made a part of the basic scheme of court procedure. The applicable provisions are sections 114 (27) ZPO.<sup>15</sup> Section 114 (1) ZPO provides:

A party who is not in a position to pay the costs of litigation without endangering the necessary support for himself and his family is to have his application for legal assistance approved, provided that the intended legal action—either as plaintiff or defendant—shows a sufficient promise of success and does not appear to be unreasonable. A legal action is to be considered unreasonable, when in view of the probability of success, a person not entitled to legal assistance would not litigate or would settle for a fractional part of the claim.

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13. Schott, *supra* note 5, at 24.

14. The legal aid provisions of the ZPO are with minor modifications still valid in the DDR (German Democratic Republic), although work is in progress on a revision of the entire Code of Civil Procedure. See TEXT EDITION OF THE ZPO (7th ed. 1967), State Printing Office of the DDR in East Berlin. See also SBZ VON A-Z, ENCYCLOPEDIA ON THE SOVIET ZONE OF OCCUPATION IN GERMANY (10th ed. 1966), under the word *Armenrecht*. The Austrian ZPO of August 1, 1895 contains in sections 63-73 basically the same provisions relating to legal aid as the German ZPO.

15. See the commentaries on the Code by R. ZÖLLER (10th ed. 1968); A. BAUMBACH-W. LAUTERBACH (30th ed. 1970); STEIN-JONAS-POHLE (19th ed. 1965); B. WIEZCOREK (1957), and H. THOMAS-H. PUTZO (4th ed. 1970). In addition, see the following text,

This paragraph contains two prerequisites which can be briefly designated as a need test and a merit test. In judging need, the courts do not use a fixed-income or other procrustean test. Instead, they consider the total financial situation of the applicant, that is, his income and the amount of property he owns, his duty to support others, the amount of rent he must pay, his other fixed obligations, and also the amount of the prospective court costs and attorney's fees.<sup>16</sup> The standard applied by different courts is not always uniform, as the special situation of the applicant is taken into account in every case.

It is generally assumed that a person not responsible for the support of anyone but himself and who has a monthly income of less than 450 DM<sup>17</sup> will be unable to pay legal costs and will therefore be granted legal assistance. The cut-off level is one which will permit a person a modest, yet healthy existence. Before legal aid will be granted personal resources such as bank accounts must be used. In the case of persons with dependents, the amount necessary for support of the dependents is subtracted from income and the above principles are then applied with regard to the remainder. Retired persons and illegitimate children filing against their fathers for support are two important classes of persons who generally receive legal aid. The result is that the ordinary working man is entitled to legal aid only if unusual circumstances exist, for example, if he has a large number of dependents, or is compelled to support two households because he is divorced, or for some other reason.

The precise wording of the second requirement of section 114 ZPO—that intended legal action must show sufficient promise of success—was introduced by the law of June 10, 1931.<sup>18</sup> Before that time as long as the needy party's prospects were not hopeless

books on the ZPO: L. ROSENBERG-K. SCHWAB (10th ed. 1970) and A. BLOMEYER (1963). All translations contained in this article are by the authors of the article. Because many of the codes and statutes cited in this article are amended frequently, the loose leaf collections SCHÖNFELDER, DEUTSCHE GESETZE and SARTARIUS, VERFASSUNGSUND VERWALTUNGSGESETZE should always be checked for the latest versions.

16. See discussion in note 29 *infra*.

17. 400 DM are equal to about \$110 at the official rate. It is often contended that the real purchasing power of the DM is much higher than the official rate would indicate.

18. L. ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS § 82 III 1d (7th ed. 1956).

legal assistance had to be granted. The new provisions did not make a substantial change, because a case which is not hopeless will generally be held to have sufficient promise of success to warrant the granting of legal aid. The test is reasonable, as a person of means will also generally avoid the financial risk of a law suit when the possibility of winning is remote.<sup>19</sup>

Even if the "need" and "merit" tests are met, the law provides for legal assistance as a matter of right only to German nationals, homeless foreigners,<sup>20</sup> and refugees within the meaning of the Geneva Treaty of July 28, 1951,<sup>21</sup> concerning the legal status of refugees. In addition, the court has discretion to grant legal aid to stateless persons,<sup>22</sup> and usually does so as long as the other prerequisites for receiving legal aid are met.<sup>23</sup> The granting of legal assistance to aliens is made by statute<sup>24</sup> conditional on reciprocity, that is, on whether the country of the foreigner grants legal assistance to Germans under similar circumstances. Such reciprocity exists with all West European states, and also with the Union of Soviet Socialist Republics.<sup>25</sup> Germans have more difficulty in determining the question of reciprocity with respect to the United States than with respect to any other country.<sup>26</sup>

19. The Court of Appeals (Oberlandesgericht) located in Celle has held that less strict standards are to be applied in considering the poor person's chances of success when he is applying for legal aid as a defendant rather than as a plaintiff. 1958 NJW 187. This, however, is not the view of the majority of the courts.

20. Section 11 of the Law of 25 April, 1951, [1951] BGBl. I 269, Concerning the Legal Status of Homeless Foreigners in the Federal Republic of Germany (Gesetz über die Rechtsstellung heimatloser Ausländer im Bundesgebiet).

21. BGBl. II 559 (563) art. VII. See also STEIN-JONAS-POHLE, *supra* note 15, at § 114 ZPO Anm. III 5.

22. ZPO § 114 (2) (2).

23. See STEIN-JONAS-POHLE, *supra* note 15, at § 114, ZPO Anm. III 4.

24. ZPO § 114 (2) (1).

25. See the comments to § 114 in the commentaries cited in *supra* note 15.

26. Article IV ¶ 1 of the Treaty of Friendship, Trade and Navigation of October 29, 1954, [1956] BGBl. II 488, in conjunction with numbers 7a and 7b of the Protocols of October 29, 1954, [1956] BGBl. II 502, grants reciprocity as far as federal jurisdiction is concerned. Before granting legal aid to a citizen of the United States, they first determine whether legal aid would be given to a German citizen in a like case in the state in which the United States citizen is a resident. They do this by determining first whether the action would be in a federal court or in the state courts and, if in the state courts, by determining then the legal aid rules of the state involved. For the individual states of the Union the following rules apply: full reciprocity is assured for Arkansas, California, Colorado, Illinois, Indiana, Nebraska, Virginia, Utah and West Virginia. If the applicant is a resident in the Federal Republic of Germany, reciprocity is also guaranteed for the states of Kentucky, Louisiana and Wisconsin. Reciprocity is guaranteed only in case the applicant is the plaintiff for the states of Missouri, Montana,

A declaration that the plaintiff is entitled to legal assistance does not affect the duty, imposed generally upon German litigants, to pay the court costs and the attorney's fees of their opponents should they lose the case.<sup>27</sup> Whether these costs will in fact be paid by the poor party depends on whether he has assets or income upon which execution can be had.<sup>28</sup>

Whenever a plaintiff or defendant is granted legal assistance, his obligation to pay court costs<sup>29</sup> and witness fees (including those of expert witnesses) is "temporarily" suspended, although the court may order ultimate repayment in monthly installments. He is also entitled to have execution without charge.<sup>30</sup> Theoretically, a party granted legal assistance is required to repay the amount he received as soon as he is able to do so.<sup>31</sup> In practice, however, the income and assets of a person granted legal assistance are very rarely checked after the case is closed, so that a temporary suspension usually amounts to a permanent grant.<sup>32</sup> There is also the

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New Jersey, New Mexico, New York, North Carolina, Oklahoma and Texas. Reciprocity is warranted only if the applicant is the plaintiff and domiciled in the Federal Republic of Germany for the states of Kansas, Michigan, Oregon and Tennessee. As to the remainder of the states reciprocity is not guaranteed. See the annotations to ZPO § 114 in the commentaries listed in note 15 *supra*.

27. ZPO § 117. In case the non-poor party is the plaintiff, he is initially liable for the court costs, because he is the plaintiff, even if he wins the case. This is the regular German rule for court costs. *Gerichtskostengesetz* § 95. The non-poor party may collect these costs from the poor party. This is something of an inconsistency in the German law, as the poor party is better off being the plaintiff than being the defendant. On the other hand, it is as an added deterrent to persons considering suits against impoverished defendants to know that they will have to bear the court costs if they cannot be collected from the impoverished parties.

28. For a description of property and income not subject to execution, see ZPO §§ 811 ff. and 850 ff.

29. Court costs, like attorney's fees, depend on the amount in controversy. In case the amount in controversy is 3,000 DM and evidence must be taken, three court "fees" ("fee" for filing the complaint, "fee" for the taking of evidence, and "fee" for the judgment) are due. *Gerichtskostengesetz* §§ 25 ff. Each "fee" is 75 DM, making a total of 225 DM plus the expenditures for witnesses and experts. These are the court costs proper and do not include the attorney's fees, for which see text section III (4) *infra*.

In divorce cases, the amount in controversy is usually assumed to be 3,000 DM unless the parties are extremely well-to-do.

30. ZPO § 115 (1) (3).

31. *Id.* § 125. The court may order repayment on its own motion or on application of the state treasury or the assigned attorney. *Id.* § 126.

32. The administrative rules of the German states which are uniform throughout the Federal Republic require that the authorities check on the financial position of parties granted legal aid after the trial is over in cases in which there is an indication that the financial situation of the grantee might improve § 19(4) and (5) of the Cost-Rule (*Kostenverfügung*) of February 28, 1969. See also Lappe 1957 *DER DEUTSCHE RECHTSPFLEGER* 279, and 1958 *DER DEUTSCHE RECHTSPFLEGER* 137.

possibility that a party may obtain a partial grant of legal assistance; for example, the grant may only cover court costs, or attorney's fees, or costs of expensive expert witnesses, or only part of such costs.<sup>33</sup>

Whether an attorney will be appointed to represent the legal aid recipient depends in large part on whether representation by an attorney in the planned action is required by law or not. A party need not be represented by an attorney before a county court (*Amtsgericht*) but must be represented by one (with a few exceptions) before all other civil courts—that is, before a district court (*Landgericht*), a court of appeals (*Oberlandesgericht*) and before the Supreme Court (*Bundesgerichtshof*).<sup>34</sup> In legal proceedings before county courts, the question of whether an attorney will be appointed depends upon whether the applicant will need the assistance of an attorney, that is, upon the difficulty of the case and upon the capabilities of the applicant.<sup>35</sup> In all cases in which an attorney is required, one is appointed for a party granted legal aid. An intermediate solution between appointing an attorney and appointing none is to appoint a lawyer-intern or a justice official (a para-professional),<sup>36</sup> although such appointments are no longer common.

2. *Procedure for the Granting of Legal Aid.* In Germany the court which is competent to decide the case decides whether legal assistance is to be granted. Application must be made to that court. The application may be filed in writing or orally in the office of the clerk of court.<sup>37</sup>

The practice is that the potential legal aid recipient goes to a lawyer in private practice and tells him his problem. If the lawyer believes that suit should be filed, he will draw the com-

33. ZPO § 115 (2). The "loan" and partial grant are useful tools which do not seem to have been utilized by the American *judicare* programs.

34. In Germany, the county courts (*Amtsgerichte*) have cognizance of claims up to 1500 DM and of disputes concerning leases and support. The district courts (*Landgerichte*) have cognizance of all other claims. Appeals from the county courts can be taken to the district courts, but no further appeal may then be taken. Appeals from the district courts can be taken to the courts of appeals (*Oberlandesgerichte*). Judgments rendered by the courts of appeals can be further appealed to the Supreme Court, when the amount in controversy exceeds 25,000 DM or a basic question of law is involved.

35. ZPO § 116 (1).

36. *Id.* § 116 (2).

37. *Id.* § 118 (1).



plaint and submit it together with the application for legal assistance to the appropriate court. The application must be accompanied by certificates, usually from the tax or local authorities, proving the applicant's poverty.<sup>38</sup> Often the court will require that a statement of earnings from the employer be presented. In addition, the applicant must state the facts which he thinks give him a cause of action if he is the plaintiff; or, if he is the defendant, he must state his defenses, so that the court will be able to determine whether his claim or his defense shows sufficient promise of success. In cases in which the application for legal assistance is made through a lawyer, that lawyer is usually appointed as counsel for the poor party, if the application is approved. Before deciding whether to grant legal assistance the court may make inquiries, order that statements be produced, obtain information from governmental sources, and hear witnesses and experts, provided that these things can be done without unnecessary delay.<sup>39</sup> Such inquiries are common.

There is no charge to the applicant for the hearing to determine whether legal assistance should be granted. A decision which rejects the application for assistance should give the reasons for the rejection.<sup>40</sup> If the decision was made by a court of first instance, the applicant may appeal to the intermediate court. If the assistance is granted, the opponent has no recourse. No reasons need to be given in an opinion granting assistance.<sup>41</sup>

3. *Selection of the Attorney.* Where a party has been granted legal assistance and it is necessary to provide an attorney, the attorney is chosen by the presiding judge of the court from a list which contains the names of all attorneys admitted to practice before that court.<sup>42</sup> The attorney has no right to refuse to take the

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38. *Id.* § 118 (2).

39. *Id.* § 118a.

40. *Id.* § 126 (2).

41. *Id.* § 127.

42. As far as civil matters are concerned, every German attorney is admitted to practice before only a single court. Such admission is similar to admittance to the Bar in the United States. An exception to the rule limiting attorneys to a single court permits them to be admitted to both a county court and a district court. Law of August 1, 1959, BGBI. I 565, Federal Law concerning the Rights and Duties of Attorneys (*Bundersrechtsanwaltsordnung*) §§ 18, 23, 25. An additional exception is made to this law permitting attorneys who were admitted to both an intermediate court of appeal and lower courts before this law was passed to continue their practice before all such courts.

case;<sup>43</sup> nor does a party have the right to be represented by a particular attorney.<sup>44</sup>

If an attorney has already assisted the applicant, that attorney will, as indicated above, usually be appointed to continue with the case. Otherwise, the judge will ordinarily appoint, in rotation, attorneys who have not indicated a desire to be by-passed on the list. Very often busy lawyers are not eager to be appointed to legal assistance cases. On the other hand, some lawyers, especially young lawyers who have few clients, are eager for such appointments.

Although there are no statistics available, the authors' observations lead them to believe that more than half of the German attorneys accept at least some legal aid cases regularly. The bar as a whole probably devotes a little less than ten per cent of its time to legal aid cases, which means that attorneys who accept them regularly must devote on the average something less than twenty per cent of their time to them. There is no legal limit on the number of legal aid cases for which an attorney may be paid. Attorneys, however, who are popular enough to receive large numbers of legal aid cases, are usually also sought out by substantial numbers of paying clients, so that legal aid work seldom amounts to as much as a third of an attorney's total practice.

4. *Compensation of the Attorney for Legal Aid Services.* The appointed attorney's fees and out-of-pocket expenses are paid by the state.<sup>45</sup> In Germany, all lawyers' fees are fixed by the state. The fee of a lawyer who takes a legal aid case is fixed by law in the same way as the fee of a lawyer who represents a paying client, that is, his fee is based on the amount in controversy and the tasks which he performs. The Federal Lawyers' Fee Ordinance (BRAGEBO) makes detailed provision for the calculation of lawyer's fees.<sup>46</sup> Lawyers ordinarily determine the fees their clients

43. *Id.* § 48.

44. Court of Appeals of Celle 54 NJW 721.

45. Federal Regulations Concerning Attorneys' Fees (*Bundesrechtsanwaltgebührenordnung*) § 121 [hereinafter cited as BRAGEBO]. This has been the practice since 1923. See L. ROSENBERG, *LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS* § 82 III *Id.* (7th ed. 1956).

46. According to BRAGEBO § 31 an attorney is entitled to the following "fees": a) one "fee" for activity in connection with the case including the giving of information; b) one "fee" for a preliminary court session where the matter is dealt with, but no evidence is taken; c) one "fee" for representation when evidence is taken.

In the event that a settlement is made, the attorney is entitled to an additional "fee". *Id.* § 23.

owe them, but they can request the court to calculate them. In the instance where the lawyer makes the initial calculation, the court will recalculate his fees before granting him an order of execution against his client.<sup>47</sup> A party who has lost a case is required to pay the winning party's attorney. In such cases the court will calculate or recalculate the winning party's attorney's fees, before it includes them in the judgment.

Where the amount in controversy is less than 1,600 DM, the attorney's fees in a legal aid case are exactly the same as those in other cases. Where the amount in controversy is higher, the legal aid fees are lower than the regular fees.<sup>48</sup> This result is rationalized as follows: where the amount in controversy is small, the regular fee schedule provides the attorney with an inadequate hourly compensation and the legal aid fee schedule does not reduce this; as the amount in controversy increases, the effective hourly compensation granted by the "fees" of the regular fee schedule increases. The effective hourly rate of a legal aid attorney increases likewise, but at a slower rate, so that the legal aid attorney's effective hourly rate remains limited even when working on cases involving large amounts.

In a divorce action, for example, which is the most typical legal aid case, if evidence is taken the attorney is entitled to the three "fees" which are due if a case is litigated to conclusion. In such a case, three fees would amount to 225 DM and the attorney would receive a flat sum of 20 DM for postage expense, making a total of 245 DM.<sup>49</sup> If his fees were not subject to the poor law regulations, the attorney could charge the same amount for postage expense plus 455 DM, almost exactly twice as much. When the amount in controversy in a legal assistance case is 15,000 DM, one fee of an appointed attorney is 216 DM, and three fees, the usual amount earned in a case in which evidence is presented, amount to 648 DM. If the attorney were compensated on the regular fee schedule, he would receive a total of 1,100 DM, somewhat less than twice as much. A legal aid fee is never figured on the basis of an amount in controversy in excess of 15,000 DM, no matter

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47. *Id.* § 19.

48. See the fee table BRAGEBO § 123. The attorney's fees for legal aid cases were increased on Jan. 1, 1970.

49. See material in *supra* note 46. The fees would, at the official rate of exchange, amount to about \$68.

how high the actual amount in controversy. Thus, the maximum legal aid fee that can be earned never exceeds that which would be earned were the amount in controversy 15,000 DM. In cases on appeal, the attorney's fees are increased by three-tenths, the same as they are in non-legal aid cases.<sup>50</sup>

There is no doubt that in some cases attorneys' actual expenses exceed the authorized reimbursement. Likewise, in some cases, the legal aid fee paid is inadequate for the work done. This is particularly true of cases which involve a great deal of correspondence and many court sessions. Members of the bar often complain that they are not adequately paid in such cases. But there are many cases (such as uncontested divorce cases) which do not involve much work or expense and which compensate for the less profitable cases.

If the poor party wins the case, his appointed attorney is entitled to collect from the losing party his *full* fees and out of pocket expenses, not merely those to which he is entitled under the poor law provisions.<sup>51</sup> Therefore, if a suit is filed against a solvent opponent the attorney has considerable personal interest in winning the case. The Germans do not permit contingent fees and regard them as a potential source of much greater dangers than the American experience indicates them to be.

#### IV. LEGAL ASSISTANCE IN OTHER NON-CRIMINAL LITIGATION

The German court system includes, in addition to the courts for civil and criminal matters, a Supreme Constitutional Court, and four other complete court systems: the general administrative courts, the labor courts, the social welfare courts, and the tax courts. Legal assistance is made available for legal actions in all of these courts. Indeed, some commentators consider the right to legal assistance to be a right guaranteed by the Constitution.<sup>52</sup> They argue that since article 20, sections 1 and 3 of the Constitution, define the Federal Republic as a democratic, social and legal

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50. BRAGEBO §§ 11 (1), 123 (3).

51. ZPO § 124 (1).

52. See, e.g., T. MAUNZ, SIGLOCH, SCHMIDT, BLIEBTREU and KLEIN, FEDERAL SUPREME COURT LAW ANNOTATED (KOMMENTAR ZUM BUNDESVERFASSUNGSGERICHTSGESETZ § 34 ANM. 1.

state, the state must provide even its poor citizens with a means to assert their legal rights.<sup>53</sup>

To provide for legal aid in these special courts, the statutes regulating their procedure either provide that the rules of the ZPO shall apply, or they make reference to particular provisions of the ZPO. The former procedure applies in the Labor Court,<sup>54</sup> while the latter procedure is followed by the law regulating the special "free-will" (or administrative) jurisdiction of the ordinary courts,<sup>55</sup> by the Administrative Court Law,<sup>56</sup> and by the laws regulating the procedure of the Courts for Social Welfare<sup>57</sup> and the Finance Courts.<sup>58</sup> Legal assistance is a matter of much less importance in the special courts than it is in the ordinary civil and criminal courts because the judge, at least in the initial proceedings, safeguards the interest of the poor litigant.<sup>59</sup> In addition, the costs

53. *Id.*

54. Law of Sept. 3, 1953, [1953] BGBI. I 1267, Labor Court Law (*Arbeitsgerichtsgesetz*) §§ 46, 64, 72, 79. The Labor Court Law provides that a party who is not represented by his union should be assigned an attorney if the other party has one. This is done in order to preserve the equality between the two parties. *Id.* § 11a.

55. Law of July 21, 1879, [1879] RGBI. 189, relating to the Administrative Jurisdiction of Courts (*Gesetz über die Angelegenheiten der Freiwilligen Gerichtsbarkeit*) § 14. This law deals with the procedure in matters of guardianship, registration, adoption and some other types of cases. All these cases belong to the civil judiciary.

56. Law of January 21, 1960, [1960] BGBI. I 17, Administrative Court Ordinance (*Verwaltungsgerichtsordnung*) § 166. The administrative courts have cognizance of public controversies, especially those involving injunctions against administrative officials.

57. Law of May 3, 1953, as revised Aug. 23, 1958, [1958] BGBI. I 613, concerning Social Welfare Court (*Sozialgerichtsgesetz*) § 167. The courts of social welfare have cognizance of claims against the Social Security Administration and the Offices of Maintenance for wounded veterans. Under the procedure of the courts for social welfare an attorney can only be appointed for the poor party in cases before the Supreme Court for Social Welfare. The reason is that lower courts of social welfare investigate the case on their own motion and are not bound by the evidence brought by the parties. *Id.* § 103. The parties can, however, be represented before the lower courts of social welfare by an official of their organization (for example, trade union). *Id.* § 186. There are no court costs. *Id.* §§ 183, 184.

58. Law of October 6, 1965, [1965] BGBI. I 1477, Tax Court Ordinance (*Finanzgerichtsordnung*) § 142. Grants for legal assistance are seldom necessary here, as needy persons seldom litigate the amount of their taxes. The Law of March 12, 1951, [1951] BGBI. I 243, Regulating the Supreme Constitutional Court (*Bundesverfassungsgerichtsgesetz*) does not contain any regulations relating to legal assistance nor does it refer to the ZPO. Nonetheless, the regulations of the ZPO are applied by analogy. See T. MAUNZ, SIGLOCH, SCHMIDT, BLEIBTREU, and KLEIN, *supra* note 52, at § 34, comments. The granting of legal assistance here is of practical importance only for a procedure known as a "constitutional complaint" (*Verfassungsbeschwerde*), a procedure open to anyone who claims his constitutional rights were violated. Before a person can take a case to the Supreme Constitutional Court he must have exhausted his remedies in all other (civil, administrative, etc.) courts. BUNDESVERFASSUNGSGERICHTSGESETZ § 90.

59. It is ordinarily not possible to be represented by an attorney in labor court

of litigation in the special courts are non-existent, or at least lower than the costs in the regular civil and criminal courts. Finally, it should be pointed out that independent public notaries must perform their functions,<sup>60</sup> which relate to certification and verification, free of charge, if the party is entitled to legal assistance under the provisions of the ZPO.<sup>61</sup>

## V. LEGAL ASSISTANCE IN THE FRAMEWORK OF CRIMINAL PROCEDURE

### 1. *Types of Cases in which an Attorney will be Appointed.*

The German Code of Criminal Procedure (StPO)<sup>62</sup> takes a completely different approach from that of the ZPO<sup>63</sup> insofar as the appointment of an attorney is not dependent on the financial need of the accused. The Code<sup>64</sup> requires that an attorney be appointed to represent an accused person when any one of the following conditions is met: (1) the trial is held in the first instance in the Supreme Court, a court of appeals, or a district court;<sup>65</sup> (2) the accused is charged with a serious felony;<sup>66</sup> (3) a legal action brought against him might result in his commitment to a psychi-

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cases where the amount in controversy is less than 300 DM. ARBEITSGERICHTSGESETZ § 11. It is not necessary to have an attorney even in the intermediate courts of the administrative court system. In highest instances of the special courts, attorneys are usually necessary. *Id.* VERWALTUNGSGERICHTSORDNUNG § 67.

60. Certain promises, *e.g.*, promises to transfer real property and promises to make gifts, must be made by "notarial contracts" to be effective. Notaries are further authorized to notarize declarations made upon oath or affirmation and often record wills and important contracts. Law of Feb. 24, 1961, [1961] BGBI. I 98, Federal Law Concerning the Activities of Public Notaries (*Bundesnotarordnung*) §§ 20-22.

61. *Id.* § 17 (2). These cases are relatively rare as poor people seldom do business which requires a notary's assistance.

62. Law of Sept. 17, 1965, BGBI. I 1374. An earlier version of this code has been translated into English: GERMAN CODE OF CRIMINAL PROCEDURE (H. Niebler transl. 1965).

63. *See generally* the following commentaries to the German Code of Criminal Procedure §§ 140-43 (*Kommentare zur Strafprozessordnung*) [hereinafter cited as StPO]: SCHWARZ-KLEINKNECHT (29th ed. 1970); MÜLLER-SAX (6th ed. 1966); LÖWE-ROSENBERG-DÜNNEBIER (21st ed. 1963).

64. StPO § 140. As a consequence of the liberal movement of the 19th century, already the German Code of Criminal Procedure of 1877 provided for court-appointed attorneys. The list of cases in which an attorney must be appointed has, however, been considerably enlarged since then.

65. These courts have cognizance of criminal acts endangering the security of the state and of other serious criminal offenses. *See* Law of Sept. 12, 1950, [1950] BGBI. 513, Court Organization Law (*Gerichtsverfassungsgesetz*) §§ 74, 74a, 80, 120, 134, 134a.

66. According to the 1969 revision of the Penal Code, "*Verbrechen*" are offenses which are punishable by imprisonment for one year or more. Law of Sept. 1, 1969, [1969] BGBI. I 1445, Criminal Code (*Strafgesetzbuch*) § 1 (1).

atric hospital or his being suspended from the right to practice his profession; (4) the accused is deaf or dumb; (5) the accused has already been in investigatory imprisonment for three months; (6) the question of committing a person to an institution to determine his mental condition is involved; (7) the accused is to be tried *in absentia*.

Even if the accused does not want an attorney, the court will appoint one for him in each of the above types of cases. The court will also appoint an attorney in other types of cases upon request of the accused or *sua sponte*, if it believes the assistance of an attorney is needed because of the nature of the crime or the difficulty of questions of facts or law. The court will also insist upon appointing an attorney if at any time it becomes obvious that the accused is unable to defend himself.<sup>67</sup>

In Germany it is not necessary that the accused have counsel in every criminal case because the court itself may investigate the case and it is the court which questions the witnesses. Although cross-examination is theoretically possible only when the accused is represented by an attorney,<sup>68</sup> German attorneys virtually never take advantage of the possibility.

When an attorney is necessary, he is appointed by the presiding judge just as in civil cases.<sup>69</sup> Lawyer-interns who have served at least 15 months of their legal internship after completing their law school education may also be appointed.<sup>70</sup> However, in practice they are seldom appointed, and then only for cases in the county courts. An accused who is found guilty must pay court costs and his attorney's fees if he had an attorney even though the attorney was forced upon him by the courts.<sup>71</sup> There is no charge for the services of an assigned intern.

The requirement that an attorney be appointed is an added protection for the accused, but, theoretically, it can be an extra

67. StPO § 140(2). The appointment of an attorney is generally possible at present in cases involving civil penalties (*Bussgeld*), e.g., traffic violations, which are handled by administrative authorities. Law of May 24, 1968, [1968] BGBI. I 481, Law on Civil Offenses (*Gesetz über Ordnungswidrigkeiten*) § 60.

68. StPO § 239.

69. *Id.* § 142(1).

70. *Id.* § 140(2).

71. *Id.* § 465; GERICHTSKOSTENGESETZ § 92 No. 7. The court-appointed attorney is entitled to recover from the non-poor defendant the ordinary fee, provided that the court has determined that his financial situation is such that he can pay it without endangering the necessary support of himself or his family. BRAGEBO § 100.

punishment, as he is now required to have, and perhaps to pay for, an attorney he may not want. A convicted person, however, is usually in financial difficulty, and costs and lawyers fees are normally not collected, even after his release from prison, so as not to make his new start more difficult.

2. *The Attorney's Fee.* The appointed attorney is entitled to reimbursement of fees from the state. These fees are considerably lower than those he would be able to charge a paying client. Ordinarily an attorney can charge between 50 and 600 DM for defending an accused before a court of lower jurisdiction, between 60 and 720 DM for defending an accused before a court with jurisdiction over offenses of intermediate seriousness, and between 100 and 1,200 DM for defending an accused before a court with jurisdiction over the most serious offenses.<sup>72</sup> In the event the case is not too complicated and the trial does not take more than one day, the medium fee, that is to say 325, 390 or 650 DM, is considered appropriate. A court-appointed attorney receives only 1½ times the minimum fee—75, 90 or 150 DM. If he has assisted the accused during the preliminary hearing he is entitled to a small additional fee—37, 45 or 75 DM. If the trial lasts longer than one day, he receives reimbursement at the same rate for each additional day.<sup>73</sup> In the event a court-appointed attorney must deal with an extraordinarily extensive case, a court of appeals may grant the attorney a higher fee upon his request.<sup>74</sup> Even if the fees are modest, attorneys are generally pleased to accept these cases, especially the larger, more publicized cases.<sup>75</sup> If a defendant is acquitted, the German state ordinarily pays all costs, including lawyers fees.<sup>76</sup>

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72. *Id.* § 83. These fees were raised on Jan. 1, 1970.

73. *Id.* § 97.

74. *Id.* § 99.

75. Criminal offenses, the prosecution of which is not in the public interest, for example, slight injuries or insults, can be prosecuted by private parties. StPO §§ 374 ff. In these cases the private-party plaintiff—who can be represented by an attorney—acts as a district attorney in prosecuting the case. He may be granted legal assistance under the same conditions as in civil cases. *Id.* § 379 (3). An attorney may be appointed for the defendant under StPO § 140 (2). These cases, however, are too rare to be of any practical importance.

76. This is now true regardless of whether the accused was acquitted because he was (affirmatively) found to be innocent or because there was insufficient evidence to convict him. *Id.* § 467.



VI. EXTENT TO WHICH LEGAL ASSISTANCE AVAILABLE  
FOR LITIGATION HAS BEEN USED AND ITS TOTAL  
COST TO THE PUBLIC

In civil cases before county courts,<sup>77</sup> the granting of legal assistance is most common in suits for support where the party is normally in need. In the district court legal assistance is most frequently granted for divorce cases. In most cases the husband is living separately from his family, thus creating a higher cost of living. Therefore, he is not able to pay the costs. Although legal assistance is usually granted only to a party whose cause shows "a sufficient promise of success," in divorce actions it is frequently granted to both sides, as the chances of success are very difficult to estimate in advance, and many marriages are dissolved on the basis of equal fault.

As a result of the rising standard of living and full employment, the number of grants for civil legal aid has been on the decline since the 1950's.<sup>78</sup> The West German States (excluding the city of Hamburg and the State of West Berlin for which no figures were available) have spent about 14,800,000 DM per year<sup>79</sup> for civil legal aid in 1966 and 1967. Adding for Hamburg and West Berlin an amount estimated in proportion to their population, one would end up with a total sum of approximately 16,000,000 DM for all of West Germany. If we were to estimate the cost of the average legal aid case at 300 DM, and assume that a third of the legal aid cases present no substantial expense to the state treasury<sup>80</sup> (because the legal aid recipient wins the case with the result that the other party is obligated to pay his counsel fees and the court costs), it would mean that about 80,000 civil cases were litigated with the assistance of legal aid in each of the years 1966 and 1967. The total number of regular civil cases litigated in the Federal Republic in 1967 was approximately 1,120,000.<sup>81</sup> This would

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77. As to the jurisdiction of these courts, see text of note *supra* 34.

78. Although statistics on the number of legal aid cases are not available judges could not help but notice this decrease.

79. The authors are grateful to the Federal Ministry of Justice for making these and the following figures relating to legal aid available to them.

80. These figures are based on the authors' general observations.

81. It should be stated here that Germany is a litigious country. In 1967 more than 850,000 civil cases were pending before county courts and more than 270,000 civil cases, not counting cases on appeal from the county courts, were pending before district courts. See FEDERAL BUREAU OF STATISTICS, STATISTISCHES JAHRBUCH 101 (1969). Not

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indicate that between seven and eight per cent of all civil cases are litigated with full or partial legal assistance. Expenses of legal aid in the Administrative, Social Welfare, Labor, Finance, and Supreme Constitutional Courts are not included in the figures given above but are so small as to be unimportant.<sup>82</sup>

The amount paid under the legal aid system for attorney's fees and the court costs in criminal matters has risen sharply during the last few years. The reasons are that crime has been increasing in Germany and that the courts are finding it necessary to appoint an attorney in a larger percentage of the cases. Payments to attorneys rose from 5,273,000 DM in 1966 to 6,200,000 DM in 1967. These figures do not include amounts expended in Hamburg and West Berlin. Adding the sums estimated for these two cities, the totals for the Federal Republic were 5,640,000 DM in 1966 and 6,600,000 DM in 1967. If we assume an average cost per criminal case of between one hundred and one hundred and fifty DM—an assumption which is not unreasonable—this would mean that forty-four to sixty-six thousand criminal cases were tried in 1967 with the help of legal aid.

No figures are available for 1968 and 1969 but it is certain that these amounts have increased. The expenditures for legal assistance in criminal and civil matters show an annual per capita expense of 38 German (about 10 American) cents based on a population of 60,000,000. The increase in attorneys' fees which took effect on January 1, 1970 will increase the cost of legal aid.<sup>83</sup>

### VII. LEGAL ASSISTANCE IN MATTERS NOT INVOLVING LITIGATION

There exists no organization in the Federal Republic whose principal aim is to give legal advice to needy people, although in most larger cities there is a bar-operated counselling service for

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included in these figures are those cases handled by a special summary procedure (*Mahnverfahren*, ZPO §§ 688 ff.) not known in the United States.

82. The Supreme Constitutional Court has informed the authors that it had not spent more than 1,000 DM (\$275) during the past five years on court appointed attorneys. The Court proceedings are without charge. BUNDESVERFASSUNGSGERICHTSGESETZ § 34.

83. The cost of legal aid in the United States has also been rising. For example, civil legal aid cost \$55,000,000 in 1969 compared to \$4,300,000 in 1964. Voorhees, *Legal Aid: Past, Present and Future*, 56 A.B.A.J. 765, 767 (1970). The 1969 figure translates into a per capita cost, based on a population of 200 million, of about 27 cents.

the needy. State-operated counselling services exist in very few cities because the bar rejects the idea of such centers.

The ethics of the bar require attorneys to participate in counselling service systems free of charge.<sup>84</sup> As a rule, all local attorneys are summoned to serve in turn. This service has, however, been used only by a small percentage of the people entitled to use it, with the result that in some cities the bar has suspended it. In Karlsruhe,<sup>85</sup> a city of about 250,000 people, the service is held only one afternoon a week by one or two attorneys in a small room in the courthouse. Members of the bar argue that the service they supply is adequate and that there is no need for its expansion.<sup>86</sup> But many judges are of the opinion that the bar-run legal aid services are not adequate. Since the existence of the service is not made known to the public either by newspaper advertising or otherwise, those who really need it often do not learn of it. The situation differs from city to city. Attorneys claim that the needy come directly to their offices for legal advice, instead of going to the legal counselling centers. They maintain that they always assist these people if real need is present and the many applications for legal assistance filed by attorneys indicate that this is true. On the other hand, there is the real possibility that many needy persons may lack the courage to go to attorneys' private offices for legal advice.

Applications for legal assistance in civil cases can always be filed orally in the clerk of court's office. In the county courts even the complaints can be filed orally.<sup>87</sup> An administrative assistant gives advice only on the legal basis of the claim and how best to formulate the application for legal assistance. Further requests for legal advice are referred to the bar-operated organizations. These limitations, however, do not apply to the courts of labor and of social welfare,<sup>88</sup> which also give legal advice even when no case is

84. FEDERAL BAR ASSOCIATION, ETHICS OF ATTORNEYS (*Standesrichtlinien für Rechtsanwälte*) § 3.

85. The Supreme Court for Civil and Criminal Matters is located in Karlsruhe. Civil and criminal courts of all other instances are also located there.

86. During recent years an average of 600-700 people per year used this service. In most cases, however, only brief inquiries were made.

87. ZPO §§ 118 (1), 496 (2). As to the jurisdiction of these courts, see text of *supra* note 34.

88. For the Laws governing these courts, see *supra* notes 54 and 57. The litigants before these courts are often economically disadvantaged.

pending. The bar has little reason to resent this practice as representation by attorneys in lower instances of these courts is not common and is, in many cases, prohibited by law.<sup>89</sup>

### VIII. ANALYSIS AND COMPARISON

1. *Legal Aid in Civil Cases.* The German experience with a *judicare*-type program has been long and successful. Its strength lies principally in the fact that the poor have, in theory as well as practice, an unequivocal right to legal assistance for litigation in appropriate cases. This right does not depend on the whim of the legislature in making appropriations or upon the amount of free time local lawyers have available for public service. Furthermore, they can select their lawyer from a large group of private practitioners. They can visit him at his private office without feeling stigmatized as beneficiaries of an act of charity. Administrative costs are almost non-existent and the total cost to the state is low. All available indications point to a general satisfaction with this system. For example, a commission, consisting of university professors, attorneys and judges, which was formed in the 1950's to prepare a reform of the civil judiciary, generally approved the present legal assistance law.<sup>90</sup>

The reason for the success of the system, even under adverse circumstances,<sup>91</sup> is probably the large and willing source of part-time manpower of the private practitioner which it utilizes. Many lawyers who do not have many regular clients are grateful for an opportunity to acquire additional experience, to render a socially

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89. For example, in certain labor cases. See text of *supra* note 59. It should be added that marriage counselling centers exist in almost all larger cities. Such centers are organized partly by the church and partly by private institutions and do not charge for their service. Legal advice is also given by these centers. People of all income groups are permitted to use them.

90. FEDERAL MINISTRY OF JUSTICE, REPORT OF THE COMMISSION FOR THE PREPARATION OF A REFORM OF THE CIVIL COURTS (*Bericht einer Kommission zur Vorbereitung einer Reform der Zivilgerichtsbarkeit*) 268 ff. (1961).

91. There are no juries in German civil cases so that a civil trial can take place in segments instead of all at once. German ethics prevent lawyers from talking to witnesses before the trial and therefore prevent them from organizing their case. Often one bit of evidence leads to another so that a trial may ramble on, sometimes for well over a year. The first German appeal is similar to a trial *de novo*, although it takes place on the basis of the rather sketchy record of the original trial, because new evidence can usually be introduced and old witnesses heard again. Such a system gives a high chance of reversal on appeal and leads to appeals being taken in a much larger percentage of cases than in the United States.

useful service, and at the same time to be paid—even if at a lower rate—for this service. Furthermore, for the many successful practitioners, who would not consider full-time legal aid service, this system provides an opportunity to serve the community. For them the small compensation they receive may have meaning principally as a symbol of the community's approval of their service.

Not only the Germans, but also the English and French rely on private practitioners as the major source of their legal aid manpower. The French system is criticized because the lawyers are not usually compensated;<sup>92</sup> the English system, because legal aid is a lucrative business.<sup>93</sup> A critical factor in the success of the German program is its fee schedule which is neither lucrative nor non-existent.<sup>94</sup> If judicare, compared to traditional legal-aid programs, has been too expensive in the United States,<sup>95</sup> it may be that more weight should be given to the public service aspect of such programs. The fee should be reduced sufficiently to make the judicare type of service more competitive with other systems of legal aid from a cost point of view.

Probably the chief criticism of judicare, which is not always stated in plain language, is the fear that it is more a program for the financial benefit of lawyers than for the legal benefit of the poor.<sup>96</sup> To remedy this all one need do is to adjust the hourly fees downward. If the bar decides that judicare is a system of legal aid which will benefit both the impoverished classes and itself, it will have to adjust the price so that public authorities will purchase it.<sup>97</sup> It could be argued that the training and insights with regard

92. "The most serious defect of the French legal aid system is that it calls upon the members of the legal profession to provide their services gratuitously in most legal aid cases." Pelletier, *supra* note 2, at 645.

93. Pelletier, *supra* note 1, at 11-12. See note 115 *infra* and accompanying text.

94. See the section, "Compensation of the Attorney for Legal Aid Services," following note 44 *supra*.

95. The fees of the Wisconsin program were \$5 for a preliminary conference and \$16 per hour up to 80% of the Wisconsin minimum fee schedule. The maximum for any one case was \$300 unless special approval was granted and no attorney could bill more than \$3,000 in a twelve-month period. The figures were the same in the Montana program except it was \$15 per hour, \$200 per case and \$1,500 per year. In the New Haven program, the figures were \$15 per hour for court time, otherwise \$10 per hour and \$250 per case. Schlossberg and Weinberg, *supra* note 3, at 1002-03.

96. See remarks of Theodore Voorhees cited by Schlossberg and Weinberg, *supra* note 3, at 1004.

97. For example, the OEO's reluctance to finance additional judicare programs is based in part on its belief that they are considerably more expensive than other types of programs. *Id.* at 1003.

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to poverty law which a large number of lawyers may obtain from occasional participation in judicare programs is of such value to the state as to justify the additional expense to the state above that which legal aid would cost if rendered in legal aid offices.

The fees paid individual counsel under judicare programs are already fairly competitive. There is evidence that it is the cost of full-time attorneys (who perform both legal and administrative duties) and the pure administrative costs which make the judicare programs non-competitive.<sup>98</sup> Here the experience of the German system is particularly valuable because it has no full-time attorneys, and virtually no administrative costs. The only administrative activity in the German system is that of the courts in approving the legal aid application. This system has proved so successful in Germany that an attempt might be made to adapt it to the United States.

It is in keeping with the German system, in which the courts play a more active role in litigation vis-à-vis lawyers, that a legal aid applicant can file his application directly with the court having jurisdiction over the case. In view of the more passive role of the judge, any adaptation of this system for use in the United States would probably require that the application for legal aid be made first to an attorney rather than to the court (which is probably the usual but not the required practice in Germany). If the attorney believed the application had merit it could be passed upon by the court in a pretrial hearing which also dealt with the merits of the case, thereby serving a dual purpose.<sup>99</sup> The Montana judicare pro-

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98. In the period January through June, 1967 the New Haven program reported a per case cost of \$256.48, but the charge of the participating private practitioners was only \$80 per case, the remainder being the charge for legal work done by the central staff and for administrative overhead. *Id.*

99. Formerly there were apprehensions as to whether a court which had approved a legal aid application could later judge the case impartially. These fears have been completely dispelled. The Commission for the Preparation of a Reform of the Civil Courts reported that experience has shown that the courts do remain impartial after passing on legal aid applications. It suggests, however, that no witnesses be heard in making decisions on applications for legal aid, so that the procedure can be speeded up. FEDERAL MINISTRY OF JUSTICE, *supra* note 90, at 270-71.

A system requiring the California District Court of Appeals to make an independent investigation of the record and to determine whether it would be of advantage to the defendant or helpful to the court to have counsel appointed and to deny counsel, if in their judgment appointment would be of no value to either the defendant or the court, was struck down by the United States Supreme Court in a 6-3 opinion, apparently as being contrary to the due process and equal protection clauses of the fourteenth amendment. *Douglas v. California*, 372 U.S. 353, *rehearing denied*, 373 U.S. 905 (1967).

gram relied upon the attorney to make the initial determination of eligibility on the basis of need and apparently all the American judicare programs have relied on the attorney to make the determination on the basis of merit, so long as his fee did not exceed a fixed limit.<sup>100</sup> The main lesson of the German experience here is that judicare plans *can* operate well with court assistance, and virtually no administrative expense.<sup>101</sup>

Probably the most cogent objection to the judicare approach to legal aid is that judicare does nothing except give service to the individual client. It does not effectively provide for law reform, for community action, or for community education.<sup>102</sup> It is, for example, not in a position to carefully select and litigate cases likely to produce landmark decisions for the benefit of the underprivileged classes.

Where judicare programs have been set up in the United States, they have not been exclusive, but have coexisted in the same state alongside legal-aid-office type programs.<sup>103</sup> Such coexistence seems to be the easy answer to the problem of the things which judicare cannot do alone. Since judicare can be set up with almost no administrative machinery, dual operation would not be

That case involved criminal matters and would not necessarily prevent the use of a similar system in civil cases. It will be remembered that the Germans apply this system only to civil cases. Cf. Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 452 (1967). Furthermore, under the California system the court decided the legal aid petition without the benefit of counsel while in practice the German court usually decides only after presentation by counsel, and such a requirement could be made mandatory if the German system were to be tried in the United States. Such a requirement would remove from the system a feature to which the United States Supreme Court specifically objected. If this minor alteration of the German system were not sufficient to remove any possible constitutional objection to it, another variation of the system could probably be found which would not be constitutionally objectionable. In determining the constitutionality of a system based on the German system the Supreme Court would no doubt give some weight to the long and satisfactory German experience with the system.

100. Schlossberg and Weinberg, *supra* note 3, at 1001-03.

101. Pelletier reports that seventeen per cent of the 8.7 million pound budget of the English legal aid and advice program went for administration in the accounting year 1965-66. Pelletier, *supra* note 1, at 34. Schlossberg and Weinberg, writing in 1968, put the administrative cost of the English program at almost one-third of the governmental expenditure. Schlossberg and Weinberg, *supra* note 3, at 1001.

102. See Note, *Beyond the Neighborhood Office—OEO's Special Grants in Legal Services*, 56 GEO. L.J. 742, 744 (1968). This note discusses a number of experimental approaches to legal aid problems which have been funded by the OEO.

103. Schlossberg and Weinberg, *supra* note 3, at 1000, 1001-02. A "Washington Administrative Counsel for the Poor" is soon to be established under the auspices of the National Legal Aid and Defender Association. Voorhees, *supra* note 83, at 768.

interdicted by cost. It appears that a combination of the two systems would provide the best possible program.

In determining eligibility on the basis of need, the guideline should be that a person ought not to be deprived of what are regarded as the necessities of life by the costs of litigation. In Germany, probably fifteen per cent of the population are eligible for full legal aid and another five to ten per cent for partial legal aid. In England more than fifty per cent of all litigation in the country is brought by legally assisted clients.<sup>104</sup> The exact point where the line is to be drawn is a matter of opinion.

Any system of judicare established, while emphasizing the necessity of representation for the indigent, should recognize the serious problems confronting low and moderate income persons in their contacts with the law, as is the case in Germany, and apparently also in England. The use of devices such as partial grants, temporary suspension of costs and deferred monthly payments would prevent the establishment of a system in which only the poor and the wealthy can litigate.

Schlossberg and Weinberg conclude that the future of judicare lies principally in sparsely populated areas.<sup>105</sup> The authors of this article see no such inherent limitation. The system itself is capable of functioning well in urban areas, as the German experience indicates. Its success or failure in American urban areas will depend on the mode of application, the use of an efficient but inexpensive administrative system and, above all, on a fee schedule commensurate with the goals of the system.

2. *Legal Aid in Criminal Cases.* The German pattern of legal aid in criminal cases is not basically different from the American pattern. The Germans assign the accused a lawyer in some types of cases in which he might not receive a lawyer in the United States; for example, where the defendant has been held for trial for more than three months, where a conviction may result in his being barred from his profession, or where an attempt is made to commit him for a mental examination. The lawyers are always compensated—even though at moderate rates—for their services. The Province of Ontario has extended its new judicare sys-

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104. Schlossberg and Weinberg, *supra* note 3, at 1001.

105. *Id.* at 1003-04.



tem to cover criminal cases.<sup>106</sup> This has the advantages that the accused has more freedom of choice in the selection of his attorney<sup>107</sup> and that the attorney is better paid than in most other systems.<sup>108</sup>

3. *Legal Assistance in Matters Not Involving Litigation.* The most important defect of the German legal system is its emphasis on litigation instead of settlement.<sup>109</sup> In a civil case a German lawyer can earn three "fees"<sup>110</sup> by litigating in the first instance,<sup>111</sup> three more by litigating in the intermediate court, if he is admitted there,<sup>112</sup> and possibly a seventh for forwarding the case to a lawyer practicing before the Supreme Court. If he decides to litigate, he can, as a practical matter, often put much of the burden of researching the case on the court. Section 139 of the civil procedure code requires the court to assist the parties (and therefore also the lawyers) in developing the facts and law of their cases. If the case is a district court case, it is likely that the three-judge court will be in a better position to research the case than the lawyer himself. If the lawyer wants to settle without litigation he must do his research alone and is only entitled to a single "fee."<sup>113</sup> It would seem that the German legal system could be improved substantially by increasing the emphasis on settlement in both legal aid and non-legal aid cases, possibly by increasing the fees therefor. American judicare plans should be astute to avoid the danger of creating an undue incentive to litigate.

106. *Id.* at 1001.

107. Based on experience, the Ontario Judicare program has increased the accessibility of attorneys to the poor and to the low and moderate income persons. Instead of the normal limited access of the poor to government and private legal aid centers, over half of the legal community is now available to this group. The program has virtually transformed every participating attorney's office into a legal aid center thus making legal assistance physically more readily available than is possible under the traditional legal aid system.

108. The Ontario Provincial Government provided the initial outlay of monies amounting to approximately seven million dollars. ANNUAL REPORT, THE LAW SOCIETY OF UPPER CANADA 6 (1969). The money was used to litigate and complete 32,240 cases and to give initial pre-trial advice to 75,583 criminal defendants. *Id.* About 2,000 attorneys elected to participate in the Judicare program and their schedule of fees was established in accordance with those normally payable by a client of modest means. *Id.*

109. This is also a defect in the English system. Pelletier, *supra* note 1, at 26.

110. The amount of a "fee" in a particular case is determined by the amount in controversy. BRAGEBO § 11.

111. BRAGEBO § 31. See material in *supra* note 45.

112. See discussion in *supra* note 42.

113. BRAGEBO § 23.

4. *Cost of Legal Aid.* The overall cost of legal aid has been surprisingly low in Germany—only eleven American cents per person per year.<sup>114</sup> One reason the cost is so low is that the graduated German fee schedule—which is geared to the amount in controversy—often makes it possible for people of moderate means to pay their own attorney's fees. A second reason is that legal aid, when granted, is relatively inexpensive because of the almost non-existent administrative costs. In England, where the legal aid program is said to be lucrative, the cost for civil legal aid alone has been about fifty-four American cents per person per year.<sup>115</sup>

### IX. CONCLUSION

One reason for the German success may be that the Germans emphasize the intellectual approach and long range planning in solving their problems. They give great weight to the opinions of scholars in making important choices such as the passage of laws. They spend over a million dollars a year alone on their institutes for research in foreign and international law.<sup>116</sup> The German ministry of justice carefully utilizes the results of extensive comparative studies made by the full-time, tenured—and therefore genuinely independent—research scholars who work in these institutes.<sup>117</sup> Once they have made a choice, they are not likely to abandon it unless there are compelling reasons, and then only after further extensive, detailed studies. The Germans do not have the waste of rapid expansion caused by excessive funding, followed immediately by a rapid closing down because a legislature has dried up the funding. German legal aid is funded with the general court budget and no one entitled to it is refused because of lack of funds in a particular year. The German legal aid system has been in use in its present form in the entire country for almost fifty years. Since much of the German legal aid system was taken

114. See *supra* notes 79 through 83 and accompanying text.

115. Pelletier, *supra* note 1, at 34. Figures based on the reporting year 1965-66. Compare the figures in *supra* note 83.

116. See generally R. RIEGERT, THE MAX PLANCK ASSOCIATION, PARENT ORGANIZATION OF THE MAX PLANCK INSTITUTES FOR FOREIGN AND INTERNATIONAL LEGAL STUDIES I (1970) and the five articles listed in the first footnote of that work.

117. Some of the comparative studies made for the purpose of law reform by the Hamburg Institute for Private Law are listed in Riegert, *The Max Planck Institute for Foreign and International Private Law*, 21 ALA. L. REV. 475, 488 (1969).

over from the Middle Ages, a comparative view of the way the German statutes are written and amended suggests that if we had more painstaking studies and more long-range planning we would have better legal institutions.

The most important factor in German legal aid, however, is the solicitude which German law makers have traditionally had for the poor. This protective attitude is clearly visible in the conduct of the German princes of the Middle Ages, who no doubt realized that they had a direct interest in the welfare of the poor. It has, to a large extent, been taken over by modern German legislators and administrators.<sup>118</sup> Whatever the motive—justice or merely enlightened self-interest—German legal aid has provided the poor with an adequate means of litigating and has been a strong force in providing equal justice for rich and poor alike.

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118. Compare Rheinstein, *Common Law And Civil Law: An Elementary Comparison*, 22 REV. JUR. U. P.R. 90, 93 (1952).