The German System of Legal Aid: An Alternate Approach†

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WITH THE ENACTMENT of the Criminal Justice Act of 1964,[1] the right of the indigent criminal defendant to legal counsel in federal court proceedings is no longer dependent upon his means. Moreover, public defender and similar systems now employed in many of the states guarantee the same right to the indigent accused in the state courts.

Unfortunately, the plight of the *civil* litigant of modest or negligible financial means has not been affected by either of these developments. Aside from the often rather hit-and-miss assistance provided by existing legal aid programs, no provision has been made within the framework of the American legal system to afford counsel as a matter of right to the indigent involved in civil litigation, the consequences of which are frequently as profound for the individual as are those of many criminal proceedings.

The German *Armenrecht* (literally, law for the impoverished), implemented by some seventeen provisions of the German Code of Civil Procedure, represents an imaginative approach to the problem of the indigent's need for legal assistance in civil proceedings, and a brief consideration of its principal features may prove useful in the re-examination of our own legal aid system.

It should be made clear at the outset that the German system does not purport to guarantee legal counsel for the indigent in every type of civil proceeding. Appointment of an attorney is mandatory only with respect to the litigation in which representation by an attorney is a condition precedent to the bringing of a suit.[2] It is within the discretion

† Much of the research for this article was done in Germany under a grant from the Graduate Division of the University of California, Berkeley. The article relies heavily on information gained in the course of many interviews with judges, professors, and attorneys in Germany, which explains the absence in some cases of the usual citations of authority.

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1 78 Stat. 552, 18 U.S.C. § 3006A (1964).

2 ZIVILPROZESSORDNUNG § 115(1)3 (Ger. 38th ed. Beck'sche 1965) [hereinafter all citations to the German Code of Civil Procedure (ZIVILPROZESSORDNUNG) will be cited to ZPO, followed by the relevant section. All citations are to the edition noted unless otherwise indicated]. Germany has two sets of courts of the first instance, the *Amstgerichte* and the *Landgerichte*, and in the latter, all litigants must be represented by counsel. The *Landgerichte* are very roughly analogous to California's superior courts (courts of general jurisdiction) as to their function. They are charged with jurisdiction over all monetary claims in excess

of the court whether counsel is assigned in other cases. When representation by counsel is not required by law, the courts are also authorized to appoint justice officials or student referendars (post-graduate law students) to serve as counsel. This latter provision has been criticized as an unjustified compromise of the basic precept underlying the *Armenrecht*; that is, appointment of able and competent counsel.[3]

Even in those cases in which representation by counsel is required by law, the financially disadvantaged party must meet two basic prerequisites before counsel will be appointed by the court. First, the individual must show to the satisfaction of the court that he would be unable to pay his own counsel fees without jeopardizing his ability to support his family and himself.[4] In practical terms, this requirement is nothing more than a consideration of the individual's income and the various demands upon it, as set forth by the *Armenrecht* applicant in a standard form supplied by the administrative office of the court. It is therefore difficult to cite any specific figure as the income level required for allowance of the applicant's petition for state-appointed counsel. The Code avoids an ironclad standard in favor of a definition capable of application to the variety of economic circumstances presented to the courts.[5]

In addition to this economic prerequisite, the applicant must meet a second requirement that the litigation he wishes to undertake, or his defense if an action has been filed against him, bears a reasonable chance of success and is not foolhardy and reckless.[6] The Code provides for a preliminary hearing at which the court may require the applicant to establish the plausibility of his case.[7] The applicable section also directs that the applicant's opponent should be heard at this preliminary hearing unless, for some particular reason, it would serve no purpose to hear his views. While the court may also require the filing of relevant documents or hear the testimony of nonparty witnesses, the Code makes it

of 1000 DM ($250) and are also the competent courts for all domestic relations litigation. KERN, GERICHTSVERFASSUNGSRECHT 187 (3d ed. 1959).

[3] Heindle, *Der Justizbeamte als Armenvertreter nach § 116 ZPO*, 13 NEUE JURISTICHE WOCHENSCHRIFT [hereinafter cited as NJW] 1749 (1960). Judge Heindl asserts in his critique that in the usual *Amtsgericht* proceeding—as indicated above, the amount in dispute is less than $250—it is a rare occurrence when a practicing attorney is assigned as counsel for the indigent litigant. In an interview with the writer, a Heidelberg *Amtsgericht* judge was equally critical of the frequency with which justice officials and law students are appointed to assist indigents.

[4] ZPO § 114(1).

[5] It should be noted that the Criminal Justice Act of 1964 features an equally flexible criterion, permitting the district court in its discretion to appoint counsel "if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel . . . ." 18 U.S.C. § 3006A(b) (1964).

[6] ZPO § 114(1).

[7] ZPO § 118a.

clear that the latter means of proof are to be employed only when the court cannot make its decision on the basis of the parties' own statements. As a rule, the courts do not require this additional proof. In interviews with two judges in Heidelberg, the writer gained the impression that in the usual case this preliminary hearing resembles the hearing of a general demurrer under California procedural law. Both judges stressed that the court should not have to look beyond the face of the complaint, aside from the amplifying remarks of the parties themselves. Some courts, however, have been criticized for converting this summary preliminary hearing into a proceeding resembling the main trial itself.[8] The 1961 report of a commission established to review the German Code of Civil Procedure and to study various proposals for its reform contains a recommendation that the Code be amended to eliminate the court's prerogative to hear witnesses at the preliminary hearings on the grounds it unnecessarily prolongs the proceedings.[9]

Until 1931 the law required the applicant to show only that his contemplated court action was not without some prospect of success. The law was amended in that year to provide in somewhat more positive terms that counsel would be appointed by the court if the applicant's case exhibited a "sufficient prospect of success."[10] This new phraseology apparently has not in practice subjected the applicant to a significantly more formidable burden of proof. According to one judge interviewed by the writer, the indigent's petition for counsel will be granted if his purported cause of action is not entirely without merit. The court's approval of the petition is tantamount to an acknowledgement that the allegations of the complaint may be true and sufficient to state a cause of action, even though the problem of proving their validity at the trial remains. As may be seen, this type of cursory examination of the applicant's complaint commits the matter in large measure to the discretion of the individual court.

The German courts generally apply the prospects-of-success test more leniently to the petition of the civil *defendant*. This is so for a number of reasons. Of primary importance, however, is the fact that the defendant is generally brought into the lawsuit involuntarily.[11] Accordingly, his defense is not viewed with the same scrutiny as is the original case brought by the plaintiff.

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8 Jacobs-Martini, *Das Armenrechtsprüfungsverfahren*, 6 NJW 246 (1953).

9 DEUTSCHER BUNDES VERLAG, BERICHT DER KOMMISSION ZUR VORBEITUNG EINER REFORM DER ZIVILGERICHTSBARKEIT 268 (1961).

10 Law of June 10, 1931, [1931] Reichsgesetzblatt 537 (Ger.).

11 Judgment of Oct. 23, 1957, Oberlandesgericht Celle, 11 NJW 187 (1958) (Ger. Fed. Rep.).

An adjunct to the prerequisite that the petitioner's case bear some reasonable chance of successful prosecution is the provision that counsel will not be appointed and compensated by the state if his action is brought unnecessarily or frivolously.[12] The Code itself states that an action will be considered frivolous if a party of means in the same factual situation would not have brought an action at all or would have sued for only a portion of the relief sought in the indigent's complaint.[13] However, the concept of the frivolous lawsuit has been expanded in practice to encompass a number of situations in which the courts have sought to prevent misuse of the right to appointed counsel. One type of case falling into this category is that in which the petitioner's action is clearly superfluous with respect to the object he seeks to attain. Thus, appointment of counsel for an indigent was refused when he sought to recover a debt by means of a full-scale lawsuit when a summary remedy, equally effective and far less expensive and time-consuming, was available to him.[14] The courts will also reject a petition on this basis when it appears that the two parties in interest, one being of adequate financial means to bring his own lawsuit, conspire to bring a suit in the name of the other who is eligible for state-appointed counsel.

It should be noted that a finding by the court that a particular complaint is frivolous in the sense outlined above is not always tantamount to a complete rejection of the indigent's petition for counsel. In the case of the "superfluous" action, for example, a court will generally permit the petitioner to amend his complaint to seek relief by the more economical procedure. If, on the other hand, the indigent exhibits bad faith or in any way abuses his right to appointed counsel, as, for example, in a case of collusion with a party of means, the benefits of state-supported legal aid will be denied altogether.

The Code of Civil Procedure also authorizes revocation of the original order granting the *Armenrecht* petition in the event that one of the statutory prerequisites is found lacking at a later point in the proceedings.[15] The petition may also be revoked if the right of free counsel is abused. While some courts have held that the *Armenrecht* may be withdrawn retroactively in the case of an improvement of the petitioner's financial status to the point where he is able to pay his own counsel fees,[16] the weight of authority stands opposed to the retroactive applica-

12 ZPO §§ 114(1), 115(1)(3).

13 ZPO § 114(1).

14 Judgment of July 2, 1955, Oberlandesgericht Stuttgart, 9 MONATSSCHRIFT FÜR DEUTSCHES RECHT [hereinafter cited as MDR] 556 (1955) (Ger. Fed. Rep.).

15 ZPO § 121.

16 *E.g.*, Judgment of Sept. 8, 1949, Oberlandesgericht Düsseldorf, 3 NJW 229 (1950) (Ger. Fed. Rep.).

tion of any order withdrawing legal aid.[17] Among the factors emphasized by those courts espousing the majority view is the adverse effect of a retroactive order upon the attorney who in good faith reliance on the original order has expended considerable time and effort on behalf of the indigent client.

Even as regards *prospective* application of the withdrawal order, the German courts have displayed considerable caution, in recognition of the fact that summary withdrawal under given circumstances can impose unjustified hardship on the litigant. Thus, it has been held that once having ruled that a petitioner's action bears a sufficient promise of success to warrant appointment of counsel, a court may not then withdraw the *Armenrecht* at some later stage in the proceedings solely upon the grounds that the court has revised its original estimate of the litigant's chances.[18] The soundness of this position is apparent. To hold otherwise would be to make the indigent's right to counsel contingent upon the vagaries of a particular court from one moment to the next. Another important factor discussed in the cases is the particular stage of the proceedings at which the court makes its determination that the litigant is no longer entitled to legal aid: For example, one court has stated categorically that aid may not be withdrawn in the final stages of an action.[19]

A singularly important feature of the German legal aid system is the provision of the Code of Civil Procedure which permits the state under certain circumstances to seek reimbursement from the indigent for the expense incurred in providing counsel.[20] Pursuant to the Code, the erstwhile indigent may be required to pay back the fees advanced by the state, either during or after termination of the lawsuit, if it is demonstrated to the satisfaction of the reviewing court that the litigant's financial position has improved to the point that he is able to pay his own fees without detriment to his support obligations. While the Code itself does not require actual improvement in the indigent's financial affairs, the weight of authority has adopted this interpretation,[21] generally on the grounds that an order requiring the litigant to reimburse the state

[17] ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS 391 (9th ed. 1961), citing in particular the Judgment of Nov. 29, 1928, Kammergericht, 64 JURISTISCHE WOCHENSCHRIFT [hereinafter cited as JW] 802 (1928) (Ger.).

[18] Judgment of Nov. 5, 1959, Oberlandesgericht Cologne, 14 MDR 232 (1960) (Ger. Fed. Rep.)

[19] Judgment of Apr. 24, 1962, Oberlandesgericht Neustadt, 16 MDR 744 (1962) (Ger. Fed. Rep.).

[20] ZPO § 125.

[21] Lappe, *Die Voraussetzungen der Nachzahlungsverpflichtung gemäss § 125 ZPO*, 1958 RECHTSPFLEGER 137; BAUMBACH & LAUTERBACH, ZIVILPROZESSORDNUNG § 125, at 254 (27th ed. 1963); STEIN, JONAS & SCHÖNKE, ZIVILPROZESSORDNUNG § 125 (18th ed. 1953).

even though his economic circumstances had not changed significantly would constitute blatant disregard for his good faith reliance on the original order granting legal aid.

None of the parties to the lawsuit, including the appointed counsel, is authorized under the Code to petition for an order requiring repayment of fees. This watchdog function is entrusted instead to the administrative wing of the courts, although a party to the suit or even a member of the general public can suggest that the economic circumstances of a particular litigant bear further investigation.

It is regarded as sufficient that the indigent's improved financial situation existed at some point of time subsequent to the order granting legal aid, and the improved condition need not also exist at the time of the hearing upon the matter.[22] Accordingly, the indigent may not quickly squander a sum of money inherited during the course of the action and assert at the subsequent hearing that his indigent status remains unchanged.

Another issue in this area is the extent to which the courts may consider sums of money recovered by the indigent in the litigation itself in determining his ability to pay his own counsel fees. In those cases involving recovery of a sum earmarked to meet a particular need of the indigent, as for example in a personal injury suit, the courts have generally declined to include the money recovered among the indigent's available funds.[23] Some courts, however, have taken exception to any general rule excluding these sums from consideration in all cases and stress that each case must be examined on its facts to determine to what extent these monies can be applied towards reimbursement of the State without unduly prejudicing the indigent's return from his lawsuit. In the latter regard, these courts point out further that it is not the object of appointment of counsel by the State to place the indigent in a position more favorable than that of the nonindigent litigant, who in many instances must also resort to his recovery to pay legal fees.[24]

Much of this article has assumed that the indigent party is without counsel at the time he petitions the court for legal aid. In the actual practice of the German courts, this is not the case. To the contrary, the

[22] Lappe, *supra* note 21; Gaedeke, *Die Nachzahlungg anordnung aus § 125 ZPO*, 65 JW 1634 (1929).

[23] See, *e.g.*, Judgment of Nov. 22, 1954, Oberlandesgericht Koblenz, 8 NJW 1116 (1955) (Ger. Fed. Rep.); Judgment of Oct. 31, 1955, Oberlandesgericht Hamm, 10 MDR 33 (1955) (Ger. Fed. Rep.).

[24] For an enlightening discussion of the various policy considerations bearing on this issue, see Judgment of Sept. 28, 1953, Oberlandesgericht Nurnberg, 4 Versicherungs-Recht 441 (1953) (Ger. Fed. Rep.).

indigent party in the great majority of cases has already contacted an attorney independent of the courts when the *Armenrecht* petition is presented.[25] The process of selection of attorneys to serve as appointed counsel in the minority of cases in which the indigent approaches the court without counsel is quite similar to the "list-at-large" procedure which prevails in the California courts with respect to the appointment of criminal defense counsel. At the time they are sworn, all German attorneys are asked if they would be willing to serve as *Armenrecht* counsel. The vast majority of the Bar offer their services in a spirit consistent with the duty imposed by the Attorney's Code.[26] A roster of the willing attorneys is prepared accordingly and the courts then proceed to select one name after another in the absence of peculiar facts or particularly difficult questions of law, in which case more experienced or specialized counsel is appointed.

The fees for appointed counsel do not compare favorably with the normal attorney's fees except in those cases involving relatively petty sums. Thus, in the case of a civil complaint for 1000 DM ($250), the statutory *Armenrecht* fee is 52 DM while the normal statutory fee is 54 DM. However, where 3000 DM ($750) are at stake, the fee for appointed counsel is set at 85 DM while the regular fee is 155 DM. The disparity between the two sets of fees increases markedly as the amount in dispute increases. For all cases in which 6000 DM or more are at issue, the *Armenrecht* fee is fixed at the arbitrary figure of 130 DM. In contrast, the normal fees continue to increase in direct relation to the amount at issue. Thus, the normal fee in an action for 60,000 DM is 730 DM. The appointed attorney would receive the set figure of 130 DM in the same suit.[27]

This discrepancy in fees is compensated for to some extent by a provision in the Code of Civil Procedure which authorizes the attorney to seek the difference between the *Armenrecht* fees and the normal statutory fees from the opposing party in the event that the indigent's case is successfully prosecuted.[28] Protection of the pecuniary interest of the appointed attorney is also the object of another Code section providing that any sum of money recovered from the indigent by virtue of a reimbursement order is to be divided equally as between the State and

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[25] Interview with Dr. Hans Hachenburg, retired presiding judge of the *Landgericht* Heidelberg, June 24, 1964.

[26] BUNDESRECHTSANWALTSORDNUNG § 48(1)1 (Ger. 38th ed. Beck'sche 1965).

[27] Comparative figures are drawn from BUNDESGEBÜHRENORDNUNG FÜR RECHTSANWÄLTE §§ 11 (appendix), 123 (Ger. 38th ed. Heinrich Schönfelder 1965).

[28] ZPO § 124(1); see Ehrenzweig, *Counsel Fees and the Great Society*, this symposium.

the attorney if the order does not require repayment in full of both claims.[29]

Legal aid is also available at the appellate level under the German system. If the party desiring counsel for his appeal has previously sought and obtained legal aid in the first instance, the appellate court need not review his financial circumstances as a prerequisite to granting *Armenrecht*, although the courts generally do so if a substantial period of time has elapsed between the first instance proceedings and the appeal.[30] Similarly, the appellate court may not review the applicant's case with respect to its promise of successful defense on appeal when the indigent has prevailed in the first instance.[31]

On the basis of numerous conversations with German professors, judges, and attorneys, the writer is of the opinion that the *Armenrecht* has proved a workable and effective means of providing legal services for the impoverished. As might be expected, many of those interviewed directed criticism at the substantial discrepancy between the normal attorney fees and those paid the appointed counsel. This, however, is a remediable shortcoming, and does not affect the question of the overall soundness of the *Armenrecht* system.

The question remains, however, whether the *Armenrecht* system can be adapted to American conditions. While peculiar social conditions, in particular the geographical concentration and cultural isolation of the impoverished in our cities, may well render the concept of the neighborhood legal center the most effective program for the administration of legal aid in the United States, the referral system exemplified by the *Armenrecht* presents an alternative approach worthy of study and consideration. Granted the active and enthusiastic support of the local bar associations, there is no reason why a referral program could not operate as effectively in the context of the American legal system as it has in Germany, and it is to be hoped that this alternative will not be overlooked as scores of American communities prepare to implement new legal aid programs.

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[29] ZPO § 126(3).

[30] ZPO § 119(2), as amplified in an interview with Dr. Hans Hachenburg, retired presiding judge of the *Landgericht* Heidelberg, July 1, 1964.

[31] ZPO § 119(2).