

Legal Aid In Germany

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1. Introduction

a) Overview

Germany's Legal Aid System is, from a comparative perspective, unique for a number of reasons: It is a pure *judicare* model that lacks any centralized structure that oversees its operation. Services are provided almost exclusively by lawyers in private practice, with the government limiting its role to being a funder. Legal aid in Germany is purely demand-driven with no prioritisation; it is strongly focused on representation in court and offers only limited out of court services. One of its most striking features is the lack of a true, means-based criminal legal aid scheme. Instead, Germany operates a system of court-ordered representation in certain criminal proceedings. Compared with other legal systems which put a strong focus on criminal legal aid and spend most of the legal aid budget on it, in Germany four times more money is spent on non-criminal legal aid than on criminal legal aid.

The overall expenditure for legal aid in Germany is, compared to other countries, relatively modest but must be seen before the background that Germany is the largest market for legal expenses insurance (LEI) in the world with more than 40 per cent of the population covered by stand-alone LEI. The existence of a well-developed LEI market alleviates the need for legal aid in areas of law in which the risk of getting involved in a legal dispute is insured by a commercial insurer.

b) Constitutional Guarantees

The German Constitutional Court (Bundesverfassungsgericht) has repeatedly held that the state is under a constitutional obligation, derived from Art. 3 I, 20 I and 20 III of the German constitution, to guarantee that a lack of means does not impede access to justice for indigent citizens. The Constitutional Court traditionally made a distinction between the need to provide legal aid for court proceedings and for out of court advice and representation, pointing out that the state monopoly on force that requires citizens to submit legal issues to a court decision makes it indispensable to guarantee access to the courts, but not to legal advice in general. In 2009, the Constitutional Court, however, held that the constitutional guarantees must also extend to legal aid for out-of-court advice and representation as life has become so regulated that citizens often require professional legal help to assess their legal position, particularly with a view to initiating court proceedings.

The Constitutional Court has also repeatedly stressed that an absolute equality is impossible to achieve as even better-off citizens (who do not qualify for legal aid) are always influenced by their financial situation when making a decision whether or not to go to court or to see a lawyer. Legal aid therefore should not put an indigent in a better position than someone who does not qualify for legal aid, but still only has limited financial means and will carefully weigh his options when faced with a legal problem. Consequently, one of the principles of the Constitutional Court's case law is that legal aid must be provided in all court proceedings in which court fees are due and the claimant or defendant must be represented by a lawyer. The lawmaker has extended this guarantee and also allows for representation by a lawyer even if there is no procedural obligation to be represented if the other party has instructed a lawyer.

c) The Relevant Body Of Law

The relevant body of law for legal aid is the Code of Civil Procedure (*Zivilprozessordnung*) and the Law On Legal Aid For Advice and Representation (*Beratungshilfegesetz*). The two laws apply to all non-criminal cases and regulate the requirements (means and, if applicable, merits) and procedure for a legal aid grant in civil matters. While the rules on legal aid in the Code of Civil Procedure directly apply only to civil cases, they also determine legal aid for proceedings in labour, employment, social security, tax law cases and for judicial review by way of reference in other codes of procedure

Note: Hereinafter all citations to the German Code of Civil Procedure (Zivilprozeßordnung) will be cited to ZPO, to the Legal Advice Act (Beratungshilfegesetz) will be cited to BerHG; in each case followed by the relevant section (in German: §)

The first book, second chapter of the ZPO, §§ 114 – 127a, contains the rules governing legal aid for court proceedings (“*Prozesskostenhilfe*”). These provisions apply directly only to court proceedings before the civil branch of the courts of general jurisdiction (the so-called “*ordentlichen Gerichte*”, the “*Amtsgerichte*” (“district courts”), the “*Landgerichte*” (“high courts”), the “*Oberlandesgerichte*” (“courts of appeal”) and the “*Bundesgerichtshof*” (“supreme court”). These courts have sectoral jurisdiction over such matters as contract law, tort law, property law, insolvency law, family law, inheritance law etc.

The second pillar of the German legal aid system is legal aid for advice and representation, the so-called *Beratungshilfe*. The legal framework for *Beratungshilfe* is laid down in the BerHG. BerHG § 3 states that advice and representation is provided by the legal profession, although advice in simple matters can also be given by the county courts (*Amtsgerichte*). BerHG § 1 includes a means test, which refers for details to the provisions for legal aid for court proceedings in the ZPO (BerHG § 1 II). *Beratungshilfe* pays for advice and, if necessary, for out of court representation, in civil law (excluding labour law), administrative law and constitutional law matters, although a recent decision by the Constitutional Court will lead to an extension of the scheme to areas previously excluded. The advice : representation ratio in 2009 has been approx. 1:3.

Court-ordered representation in criminal proceedings (i.e. German-style criminal “legal aid”) is regulated in the Code of Criminal Procedure (*Strafprozessordnung - StPO*). Rules are contained in the first book, chapter 11 of the StPO. By way of reference, the rules also apply for other types of proceedings regulated by different procedural rules, e.g. for misdemeanours.

2. Basic Data

a) Expenditure

aa) Overview

There is no national legal aid budget in Germany. All 16 federal states that make up the Federal Republic Of Germany fund legal aid through the budgets of the departments in

charge of their different court systems. In general, in each of the 16 federal states there are five court systems (courts of general jurisdiction and four specialized court systems: tax, administrative, social security and employment), each with a legal aid budget. Additionally, legal aid schemes in all federal states exist for non-forensic legal advice. Finally, there are (very small) budgets for proceedings before the Supreme Courts for each of the five court systems (“Bundesgerichtshof”, “Bundesarbeitsgericht”, “Bundessozialgericht”, “Bundesverwaltungsgericht”, “Bundesfinanzhof”), the Constitutional Court (“Bundesverfassungsgericht”) and the Federal Court For Patents (“Bundespatentgericht”). This feature of the German legal system results in approx. 100 legal aid budgets of different sizes which make up the overall national expenditure for legal aid. The data provided in this paper focuses on the legal aid budgets of the courts of general jurisdiction in civil matters and of the legal aid scheme for legal advice. There is no centralized body (e.g. a “Federal Legal Aid Board”) that would oversee the net expenditure.

bb) Civil Legal Aid For Court Proceedings (“Prozesskostenhilfe”)

The development of the expenditure for legal aid is characterized by some rather extreme ups and downs in the past 25 years. The expenditure grew from 93,19 million EUR in 1981 to 188,94 million EUR in 1986 (+103%). As a result of cost-cutting measures implemented in 1986, it then remained on that level for the next five years (1986-1991), eventually decreasing to 177,16 million EUR in 1991 (-6%). Between 1992 and 1996, the expenditure in most of the federal states for which data is available increased sharply by 50 up to 70 %. In 1995, another reform of the legal aid rules led to a new approach of calculating income and deductions that came into full effect from 1996 onwards. As a result, in the federal states forming the pre-1990 FRG there has only been a moderate increase in expenditure in the 1997 - 2002 time-bracket (5 – 20 %) with some states (e.g. Bremen and Hamburg) even reporting a decrease in expenditure. Between 2002 and 2004, legal aid budgets increased dramatically again, with increases of 20 – 30 per cent in most states over a two-year period. This growth was solely demand-driven as the rules governing legal aid remained unchanged. Since 2004, growth has slowed down again, over a four year period until 2008 the overall increase was approx. 15%.

The overall expenditure for civil legal aid in the year 2008 (latest data available) was approx. 504 million EUR (comparative figure for 2000: 303 million EUR). The sum of 504 million EUR is not the net expenditure. It does not include monies paid by assisted parties as contributions (in approx. 80 per cent of all grants, no contribution is required). As contributions paid do not go back into the legal aid budget, but into the budget for the court system (like general court fees), it is not known what percentage of expenditure is re-paid through contributions. Most federal states estimate that between 15 and 20% of the expenditure is re-paid. Assuming that this estimate is correct, this would result in a net expenditure of 400 - 425 million EUR (comparative data for 2000: 258 – 275 EUR). More up to date data for all federal states will only become available later in 2011. Figures that have been published by some of the federal states show, however, that expenditure has been relatively stable since 2008. A number of federal states have even reported a (slight) decrease since 2008.

cc) Other Legal Aid For Court Proceedings (non-civil/non-criminal)

Compared to the spending in the courts of general jurisdiction - which deal with all civil and criminal law matters -, the expenditure for legal aid in the four specialized court systems is insignificant. Over the past 15 years, more than 80 per cent - and over a prolonged period over 90 per cent – of the expenditure was spent on legal aid in the courts of general jurisdiction (civil/criminal). However, more recently there has been a notable shift because of a growing number of disputes in employment law and social security law matters. In Thuringia and Saxonia, federal states that provide a detailed breakdown of their expenditure, 76% / 79% of the 2010 non-criminal budget was spent on civil legal aid and the remaining 24% / 21% on legal aid for proceedings before the other four systems (employment law, social security law, tax law, administrative law). Over a four year period (2007-2010), the expenditure of legal aid in the specialised court systems in Thuringia has grown from 16 to 24 per cent.

dd) General Legal Aid For Advice And Representation (“Beratungshilfe”)

The budgets for legal aid for advice and representation (*Beratungshilfe*) have grown much faster in the past decade than those for legal aid for court proceedings. However, they still remain a rather small portion of the total expenditure for legal aid. In a combined budget for civil legal aid and legal aid for advice and representation, the latter statistically amounts to approx. 15 per of the budget for civil legal aid. The numbers given include *Beratungshilfe* for all areas of law where it is available, not only for civil matters. There are no specific *Beratungshilfe*-schemes for each of the different court systems, resulting in a single budget for *Beratungshilfe* in all 16 member states. The nation-wide expenditure in 2009 was 82,9 million EUR.

Even though the five ex GDR states joined the FRG in 1990, resulting in an increase of the total population of 25%, the expenditure for *Beratungshilfe* fell between 1990 and 1994 to an annual expenditure of 10.5 million EUR. Since then the expenditure has “gone through the ceiling”, growing within five years from 10,5 million EUR in 1994 to 23,55 million EUR in 1999 (+125 per cent.) and to 42 million EUR in 2004. This was an increase of more than 90 per cent over the past five years and over a 10 year period (1995 – 2004) an increase of more than 320 per cent. From 2004 to 2006, expenditure doubled to 80 million EUR. This sharp increase triggered demands by the federal states to cut back legal aid for advice. The federal states tabled a bill that was met with resistance by the federal government and the legal professions. Since 2007, however, expenditure has only grown slowly, with some of the federal states even reporting a decrease in the 2009-2010 time bracket.

dd) Court-Ordered Representation In Criminal Cases (“Pflichtverteidigung”)

As the German system of court-ordered representation in criminal cases is not a true legal aid scheme, data on expenditure is not very meaningful from a comparative point of view. If a defendant is represented by a defender assigned by the court and not acquitted, he has to meet the costs of his defender, regardless of his personal means and regardless of the fact whether or not he had asked for a defender to be assigned. Generally speaking, the expenditure for court-ordered representation in criminal cases is approx. 20-25 per cent of the expenditure for civil legal aid.

b) Applications

There is no data available on the number of applications or grants as far as court proceedings are concerned. Such applications and grants are an integral part of the proceedings and are dealt with by the judge assigned to the case. Because of that fact, there is no centralized structure to which applications have to be made or where certificates are issued, and consequently, no statistics exist. Conventional wisdom is that approx. 50 per cent of all family law cases are covered by legal aid and the bulk of civil legal aid goes into family law cases. The second most important area of law is employment law for which expenditure has increased significantly over the past five years.

In contrast, an annual statistic is kept on the number of applications for legal aid for non-forensic advice and representation. In 2009, 913.079 applications were submitted, of which all but 64.662 were granted (92,92 per cent). Although the approval rate is high, it has decreased since 2003 when it was 97,08 per cent. This suggests a somewhat stricter scrutiny on applications by the district courts that grant legal aid. Statistically, 1 out of 90 Germans applied for legal aid for advice and representation in 2009. However, applications and cases handled were very unevenly distributed: In a traditionally wealthy federal state like Baden-Württemberg, only 1 in 150 citizens filed in application, whereas in poorer federal states with a low average income and high unemployment rate, 1 in 50 citizens applied.

c) Legal Aid Lawyers

Every lawyer is entitled to take on legal aid cases in Germany as there is no system of legal aid franchising or contracting. Consequently, there is no data available how many of Germany's 156.000 lawyers are doing legal aid work.

With regard to non-criminal legal aid (for court representation) ("Prozesskostenhilfe"), a recent empirical study by the author of this paper with 2.400 German lawyers (excl. lawyers in the 65 German law firms with 40 or more lawyers) showed that roughly 18 per cent of all cases of lawyers are funded and 15% per cent of their turnover is generated by legal aid (in comparison, 31 per cent of all cases are funded by legal expenses insurance). As these figures are based on estimates by the respondents rather than on an in-depth file analysis, the percentages are, based on experience from previous studies, are probably slightly overestimated.

As far as legal aid for advice and representation ("Beratungshilfe") is concerned, in 2009 every lawyer handled 5.7 such legal aid cases. When comparing lawyers from different federal states, there is, however, a wide variation in the data, ranging from 3.5 cases (in Bavaria) to 21 cases (in Sachsen-Anhalt). These are, however, merely statistical figures based on the overall number of lawyers and the applications filed. A study conducted in 2009 showed that 18 per cent of all lawyers do not do legal aid (advice and representation) work at all. The study also showed that the percentage of legal aid cases in small law firms is significantly higher than in larger law firms and that lawyers with five years or less of experience have twice as many legal aid cases than lawyers with 20 years or more of experience.

3. Organization

a) Administration

Unlike in many other countries, in Germany legal aid is not administered by a special governmental office or a non-governmental organisation. Before legal aid was first codified on a federal level, this issue was considered and lawmakers came to the conclusion that legal aid was so closely interwoven with court proceedings that it seemed only logical to entrust the administration of legal aid to the courts. At that time, no legal aid scheme for out of court legal services was considered, i.e. legal aid was limited to court proceedings. When legal aid for advice – which technically has no point of contact with a contact proceeding – was added as a legal aid scheme in 1980, because its relatively small size its administration was conferred upon the courts as well.

The courts are independent from federal, state or local government. As a result of the legal aid system being court adjunct, the independence of the system is guaranteed through the independence of judges who deal with legal aid applications. Judges in Germany are appointed for life, not elected, totally independent and not bound by any supervision. As a result, legal aid is administered by the different court systems which are organized on state level and financed by the federal states. There are more than 500 districts courts which in most cases are the first point of call for those seeking legal aid. Each court has a counter which is available for general information and applications.

As the administration of justice – this includes legal aid - is a responsibility of the 16 federal states and not the federal government, no centralized system exists on federal level. In the 16 federal states, the administration of legal aid is entrusted to the state court systems and not to a state legal aid board or foundation. The federal states provide the money required to meet the cost of all legal aid grants to the courts through the department that oversees the operation of the court system in question. Within the courts, no dedicated office for legal aid matters exists. Applications are handled by the judges and their clerks in addition to their usual workload, including the means and merits test if required.

With the lack of a centralized governing body, no marketing for legal aid is undertaken. The Departments of Justice in the 16 federal states usually provide leaflets and information about legal aid on their general website. Likewise, most regional bars and local bar association inform about legal aid with the help of leaflets distributed at their offices. Generally speaking, the awareness of the public regarding legal aid is somewhat limited.

b) Legal Service Providers

aa) Lawyers

Legal aid services are provided by independent lawyers under a pure *judicare* model. Technically, this principle is restricted to some extent for legal aid for advice and representation as courts are under an obligation not to approve services by a lawyer if it is reasonable to relegate the applicant to a public or a private institution that can give the required advice (or if the court itself can immediately give the advice required). In practice, courts rarely use their powers to relegate applicants to other advice providers. Additionally, the "*Beratungshilfegesetz*" explicitly allows an initial consultation with a lawyer before an

application for legal aid for advice and representation is submitted to the court which *de facto* limits powers to relegate applicants to alternative service providers.

Every lawyer can accept legal aid cases. There is no “legal aid franchising” or “contracting” in Germany. However, it can be derived from the structure of the legal profession that for two highly specialised group of lawyers legal aid for court proceedings is an important source of income: Because of their complexity, family law cases are usually handled by lawyers who concentrate on family law work and have a specialist accreditation. As the majority of all civil legal aid cases are family matters, the importance of legal aid for that group of lawyers is well above average. Likewise, only a small percentage of lawyers do criminal work where legal aid is of above-average importance.

The Legal Profession Act (*Bundesrechtsanwaltsordnung*), § 48 I (for *Prozeßkostenhilfe* – legal aid for non-criminal court proceedings), § 49 I (for *Pflichtverteidigung* – legal aid for criminal court proceedings) and § 49a (for *Beratungshilfe* – legal aid for advice and representation), requires the lawyer to accept any assignment to a party supported by legal aid. Thus, the provision limits the lawyer’s freedom to contract. However, in almost all cases the lawyer will apply for legal aid on behalf of the client and ask the court explicitly to be assigned to the client and will not be forced into a contractual relationship. If the lawyer refuses to take on a legal aid case, he can be disciplined by the bar. However, the reporter is not aware of any such cases decided by the Lawyer’s Court (*Anwaltsgericht*), the disciplinary body of the legal profession.

As far as the quality of the services provided by law firms is concerned, no specific quality controls are in place. As only lawyers are allowed to provide legal aid work, the assumption is that a minimum quality standard is guaranteed as lawyers have to pass two state exams before being admitted. Once admitted, every lawyer is allowed to take on legal aid work and applicants are given a free choice of counsel regardless of their experience, specialization, continuing legal education or overall quality. The federal states do not select legal aid providers through tendering and contracting, limit the free choice of counsel to lawyers with a certain experience level or ban lawyers that do not meet defined standards.

bb) Legal Advice Centres

An exception to the rule that German legal aid follows a pure *judicare* model exists for legal aid for advice and representation in the two smallest federal states, Hamburg and Bremen. As these two states are identical with the large cities of Hamburg and Bremen, it was argued that the needs of the population could also be served by establishing Legal Advice Centres at central locations in which lawyers give legal advice. In all other federal states, this delivery model was seen as impractical because of the costs of establishing a network of advice centres not only in large conurbations, but also in less densely populated areas. From a comparative point of view, the per capita cost for legal aid for advice and representation in Bremen (no data for Hamburg is available) is the lowest in all federal states, although not by a great margin (0.61 EUR in 2008 compared to 0,75 EUR and 0,76 EUR for the two federal states with the next lowest per capita spending). Although now problems with running the legal aid scheme in Bremen and Hamburg have been reported, the introduction of this type of delivery model in other federal states, e.g. in the five East German states after

reunification, has never been seriously considered as the general consensus has been that it is only suited to large cities.

4. Tests and Procedures of Assessment

a) The requirements for legal aid

aa) General rules

The provisions in the Code of Civil Procedure (ZPO), regulating legal aid for court proceedings for all court systems except criminal legal aid, include a merits (ZPO § 114) and means test (ZPO §§ 114-115), details about how to apply for legal aid and how it is granted (ZPO §§ 117-119). Further sections include details about the assignment of a lawyer to the applicant (ZPO § 121), cost-shifting rules (ZPO §§ 122-123), withdrawal of legal aid (ZPO § 124) and cost rules in the event of a success of the assisted party in the court proceedings (ZPO § 125-126). By way of reference, the means test provisions also apply to an application for a legal aid grant for advice and representation (*Beratungshilfe*).

Court-ordered representation in criminal cases (*Pflichtverteidigung*) is not means-tested. In certain cases the court must assign a defender if the defendant is unrepresented (e.g. in felony cases, in indictments before superior courts or if the defendant is in pre-trial custody). In other cases the court can, at the request of the defendant or ex officio, assign a defender if the facts or the legal issues are complex, the crime is severe or the defendant is unable to defend himself. Consequently, as the assignment of a defender depends on procedural aspects rather than on means, even a millionaire can be assigned a defender by the court should he refuse to instruct a lawyer himself. In short, this means that under German a defendant is not necessarily entitled to a state-funded defender should he be unable to pay for the services of a lawyer himself.

bb) Means Test

The individual applying for legal aid either for (non criminal) court proceedings (*Prozeßkostenhilfe*) or for advice and representation (*Beratungshilfe*) must show that she would be unable to pay her own lawyer's fees because of her personal and economic situation. The means assessment follows a rather complicated pattern:

(1) Assets

As a starting point, according to ZPO § 115 III the applicant can be required to fund his litigation by using "available assets" if this would be "reasonable". ZPO § 115 III, however does not mention what assets are exempt from that requirement. The applicant has to collect debts owed to him by third-parties, use personal savings and has to make use of his litigation insurance, if available. Property owned needs not to be sold if it can be regarded as an adequate accommodation for the applicant and his family.

(2) Income

ZPO § 115 I 1 states as a general rule that the applicant has to use her income before qualifying for legal aid. ZPO § 115 I 2 defines "income" as all income with a monetary value, but does not give examples or provides for an exhaustive list. The definition of income is

therefore a matter of case law. The income is calculated on a monthly basis and may include salaries, income from professional work, pensions, annuities, income from savings, the monetary value of free lodging, social welfare benefits, gratifications, non-repayable loans etc. "Income" means net income.

(3) Deductions

From this "income", a couple of deductions have to be made (ZPO § 115 2 Nr.1): Taxes, social security contributions, reasonable insurance premiums, work-related spending, trade union membership fees, costs for lodging, instalments for credits, maintenance payments for children and/or former wife/husband. In addition to these individual deductions, lump sums for the applicant, his/her wife/husband and for each child can be deducted. These lump sums are calculated as a percentage of the support citizens qualifying for social welfare benefits under the Social Welfare Act receive. The lump sum stands for the „general costs of living“ as a calculation of these costs on an individual basis would be far too complicated. The deductions are adjusted annually.

(4) The threshold: Relevant Income

After calculating income and deductions, the resulting sum ("the relevant income") shows if the applicant qualifies for legal aid. The current threshold below which the applicant qualifies for legal aid is 15 EUR.

With a relevant income of more than 15 EUR, no legal aid for advice and representation is granted. Similarly, with an income of less than 15 EUR the applicant qualifies for legal aid for court proceedings without any contributions, while a relevant income above the threshold requires contributions by the applicant (see below).

The assessment made at the time of the grant is binding for the duration of the proceeding which is covered by the grant. There is no continuous re-assessment of the applicant's means throughout the proceedings. Legal aid can only be cancelled (ZPO § 124 I) if the applicant has given false information, if at the time of the court's decision the requirements for a grant were not met or if the applicant has not met his obligation to pay contributions for three months in a row.

(5) Contributions

If the applicant qualifies for legal aid for advice and representation, she has to make a contribution of 10 EUR payable to the lawyer who gives the advice (BerHG § 8 I). The contribution can be waived by the lawyer. Almost half of all lawyers never or rarely ask for the contribution to be paid.

In the case of legal aid for court proceedings, the applicant has to make monthly contributions according to a sliding scale (ZPO § 115 I 4) - which range from 15 EUR to 300 EUR - if the relevant income is above the threshold of 15 EUR relevant income. The contributions are payable to the court.

(6) Example

John Doe has a net income of 1.920 EUR. He is married with two underage children, his wife does not have an income. From his net income he can make the following deductions: 360,- EUR each for himself and his wife, 253,- EUR for every child that is maintained, 180,- EUR as a lump sum for work-related spendings and 500,- EUR for lodging. Because of these

deductions, his “relevant income” is only 14 EUR while his net income is 1.920,- EUR. With a relevant income of just 14,- EUR, he does not need to make contributions.

bb) Merits Test

To qualify for legal aid for court proceedings, the applicant needs to pass a merits test. In addition to the economic prerequisite described above, the applicant must meet a second requirement that the litigation she wishes to undertake (or his defence if an action has been filed against him) bears a reasonable chance of success and is not frivolous or reckless. An action will be regarded as brought frivolously 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 by the applicant. For that purpose, the applicant has to establish the plausibility of the case by submitting the necessary facts. ZPO § 118 I requires the court to hear the applicant’s opponent before making a decision, unless, for some particular reason, it would serve no purpose to hear her views. If a decision cannot be made on that basis, the court may require the filing of relevant documents or hear the testimony of witnesses, ZPO § 118 II 3 makes it clear that these means of proof are to be employed only when the court cannot make its decision on the basis of the parties own statements. Unlike before the 1980 reform, preliminary hearings with the parties can only be scheduled if a settlement is likely.

For legal aid for advice and representation (*“Beratungshilfe”*), no merits test needs to be passed as the advice is usually sought to establish the merits of a case. However, the applicant has to show that his wish to consult a lawyer is not reckless (BerHG § 1 I Nr.3).

b) Procedure

According to ZPO § 117 I, the indigent has to apply for legal aid for court proceedings (civil legal aid - *“Prozeßkostenhilfe”*) at the court which has jurisdiction over the claim she intends to bring. The applicant has to outline the intended litigation in order to allow an assessment of the merits. The application has to include copies of documents proving the means of the applicant. Usually, the indigent does not apply for legal aid herself and, if approved, then consults a lawyer assigned to her. More often the indigent consults a lawyer first who will check if the client is covered by a litigation insurance and, if not, qualifies for legal aid. The lawyer will then draft the writ which is connected with an application for legal aid. In the writ it will be stated that the proceedings are only issued under the condition that legal aid will be granted. The judge (the same who will ultimately decide the case) will assess the application and, depending on the information given, grant or deny legal aid in a formal decision of the court.

For legal aid for advice and representation (*“Beratungshilfe”*) one has to apply to the local county court regardless whether or not the court has jurisdiction over the matter in question (BerHG § 4 I). The applicant has to describe her legal problem and give details of her means (BerHG § 4 II). If the court does not give advice in its own responsibility, it will issue a certificate which entitles the applicant to consult a lawyer of her choice (BerHG § 6 I). It is, however, possible to consult a lawyer without having applied for a certificate before (BerHG § 7). According to Professional Rule 16 (§ 16 Berufsordnung), the lawyer has to remind the client that she can obtain a legal aid grant if it is evident that her means fulfil the requirements of the BerHG. An application can be filed (usually by the lawyer) after the

consultation, with the lawyer assuming the risk that the application is turned down. Approx. 45% of all applications fall into that category. The application can be made by the applicant in person or by a representative, typically a lawyer. No special arrangements, e.g. for making and assessing applications, for particular disadvantaged groups such as women, children or employees exist. However, while in general lawyers have a monopoly to provide legal services, in the interest of certain groups that otherwise may be disadvantaged, non-lawyers such as trade unions are allowed to give advice on legal issues.

In cases of court-ordered representation in criminal proceedings, the assignment of a defender follows procedural rules in the Code Of Criminal Procedure. The judge will check if there is a case of “necessary representation” as stipulated by StPO § 140 and, if so, assign a lawyer even against the will of the defendant and regardless of his personal means.

5. Effects And Consequences Of The Grant

a) Court And Lawyers’ Fees

If legal aid for (non criminal) court proceedings is granted, the court order has two main consequences: No court fees have to be paid in the course of the proceedings (ZPO § 123 I Nr.1) and the lawyer assigned to the client cannot demand any payment from his client (ZPO § 123 I Nr.3) as all payments to her will be made out of state funds (the rationale is to prevent the lawyer from entering into any agreement according to which the client has to pay an additional fee to him).

b) Cost-Shifting

Cost-shifting principles are unaffected by a grant for legal aid. As Germany operates a system of two-way cost-shifting (ZPO § 91), a party supported by legal aid who loses her claim is liable for his opponent’s costs. In the event of a loss, only the court fees and the fees of the assisted party’s lawyer are covered by the legal aid grant. The cost-risk is therefore significant, although somewhat eased by the fact that court cannot, as a matter of law, grant legal aid if there is no reasonable prospect of a successful outcome of the litigation.

In cases of court ordered representation in criminal proceedings, the defendant will have to re-imburse the public purse for the costs of the defender should he not be acquitted.

c) Lawyer Remuneration

Although lawyer and indigent client enter into a contract, ZPO § 122 I Nr.3 and BerHG § 8 II forbid the lawyer to receive any remuneration directly from his client. Instead, the lawyer is paid a statutory fee from state funds. The provisions of the ZPO and the BerHG, however, do not deal with this remuneration of the lawyer. Instead, remuneration in legal aid cases is regulated in the *Rechtsanwaltsvergütungsgesetz*, the Federal Lawyers’ Fees Act.

To understand the remuneration for legal aid work, it is useful to have a look at the general principles of lawyers’ remuneration in Germany: In principle, lawyer and client are free to negotiate any fee as long as the fee is reasonable (RVG § 4 I) and not contingent on the

outcome of the services rendered (BRAO § 49b II). The widespread belief that Germany operates a binding scale of lawyers' fees is a misunderstanding. The scale of fees is binding for party-party costs when it comes to cost-shifting. For court proceedings, the lawyer may also not agree to render services for less than the statutory fees. As a matter of fact and not because they are bound by the scale of fees, many lawyers charge according to the scale of fees as they find it difficult to convince their clients to pay more than the losing opponent will have to pay as party/party costs.

The scale of fees is also important in the legal aid for non-criminal court proceedings context: As the lawyer is not allowed to receive contractual payments from his legal aid client, the scale of fees defines the statutory fees a lawyer is paid for legal aid work. The calculation of fees according to the RVG is rather complicated. For certain stages of the court proceeding a „fee“ is earned by the lawyer (for pre-trial work, for pleading in court, for a settlement etc.). For an average proceeding in a civil case, the lawyer will earn two or three fees. What sum is earned from a fee depends on the monetary value of the claim, not on the time invested by the lawyer. For a monetary value of more than 1.500 EUR, the fee the legal aid lawyer is paid from state funds is discounted compared to the normal fee paid for the same value in a cost-shifting situation. In the light of a far-reaching statutory prohibition of conditional and contingent fees under German law, a rather striking feature of the legal aid system is that the lawyer will earn the non-discounted normal fees if she wins the case for her client. As the two-way cost-shifting system is not affected by the legal aid provisions, the opponent remains liable for the normal costs if the party supported by legal aid wins the case. For the lawyer, this results in a conditional top-up fee if she wins a legal aid case. However, it has to be noted that in family law proceedings which make up the bulk of legal aid cases, most often - because of the absence of a winner and loser - no cost-shifting is ordered, but each party remains liable for her own costs.

Remuneration for advice and representation is much more straightforward: According to the RVG, the lawyer receives 30 EUR for giving an oral or written advice and for representation she receives 70 EUR (excl. VAT). In addition, the lawyer may charge the client an additional 10 EUR to be paid directly to her by the client. If representation of the client leads to an out-of court settlement, the lawyer is paid an additional 125 EUR. These sums are considerably lower than the fee they lawyer may charge in non-legal aid cases. For advice, the lawyer normally can charge up to 190 EUR instead of 30 EUR, depending of the value of matter of interest. For representation in non-legal aid cases, the fee is not capped and can amount to thousands of EUR, again depending of the value of matter of interest. As the payment for advice and representation in legal aid cases does hardly cover the costs even of High Street law firms, *Beratungshilfe* is regarded as a kind of de-facto pro bono work of the legal profession.

In criminal proceedings, the statutory fees are based on lump sums. For court-assigned defenders, these lump sums are discounted by a certain percentage. Unlike in criminal cases, no contractual relationship between defendant and lawyer exists.

d) Public Purse

If legal aid is granted and the case is eventually lost (despite the assessment of its merits prior to the grant), the applicant has to meet the opponent's court fees and lawyer's fees. The public purse has to meet the applicant's court fees and lawyer's fees. If the case is won,

there is no loss for the public purse unless the opponent has obtained a legal aid grant as well: Because of the cost-shifting rules that apply in Germany, the losing opponent has to reimburse the applicants court fees and lawyer's fees.

In cases of court ordered representation in criminal proceedings, the lawyer only deals with the court as far as his fees are concerned. If the defendant is not acquitted, the court will pay the lawyer and then will demand repayment of these costs from the convict.

6. Legal Aid In Context

a) Access To Justice

It has to be taken into account that the significance of legal aid depends on how the legal system as a whole guarantees access to justice. Legal aid is just one of a number of ways which can open the courthouse door for the citizen. Others are legal expenses insurance policies, speculative funding of lawyer's fees, state-run legal advice bureaux or legal clinics, the lack of monopoly rights of audience for lawyers and finally, scales of fees which limit the remuneration of the lawyer. An additional aspect that influences the attractiveness of legal aid is the system of cost-shifting. Thus, the importance of legal aid in Germany can only be understood taking a whole range of such determining factors into consideration.

b) Legal expenses insurance

Germany is the largest market for litigation insurance policies world-wide. In 2009, roughly 25 million policies were issued for a population of 82 million citizens. The coverage is extremely high as policies often cover more than one person (typically a family). The reason for the attractiveness of litigation insurance policies is twofold: For the insured, litigation insurance, unlike legal aid, covers the opponent's costs in the event of a negative outcome of the court proceedings. The insurer, on the other hand, can offer insurance premiums at relatively low cost as her risk is easily calculable: The insurer pays the lawyer fees according to the scale of fees in the RVG (which are also relevant for cost-shifting). Therefore, an insurance company always knows in advance if, for example, a sum (x) is at stake, the maximum amount it has to pay is (y). This certainty has a considerable impact on the calculation of the insurance premium. The widespread use of insurance policies guarantees a very good risk-pooling for the insurer, resulting in low premiums for stand-alone insurance products. The average premium for a stand-alone policy in Germany is less than 150 EUR p.a.

With a net income of the insurers of more than 3.2 billion EUR p.a., the German population spends 6 times as much of their own income on litigation insurances than the 16 federal states spend on legal aid. These numbers show that legal aid is of much less importance in Germany than in many other countries because of the highly developed insurance market. For all areas of law which are covered by litigation insurances, legal aid is of insignificant importance. The main area which has traditionally been not insurable was family law and therefore, it cannot be a surprise that almost 80% of legal aid is spent on family law cases. The remaining sum for all other civil law cases is surprisingly low compared to U.K. standards. This is easily understandable if one takes into consideration that tort law, especially road traffic accident cases, are covered by the average litigation insurance policy

and are seldom funded by legal aid. In the year 2000, Germany's second largest insurer ARAG for the first time offered an add-on to its stand-alone litigation insurance policy which covers family law (with some restrictions). Until now, this new product has not made significant inroads into the market and consequently has not eased the pressure for the federal states to fund family law cases with legal aid in the future. As at the moment roughly 50% of all family law cases are funded by legal aid, there would be a significant cost-saving potential if the risk of financing such cases could be shifted from legal aid funds to insurance policies.

c) Speculative funding

Speculative lawyer's fees are another theoretical approach to guarantee access to justice for the indigent as they allow risk-shifting from the client to the lawyer. However, they work differently compared to traditional legal aid and litigation insurance as they only assume the risk of the party's own lawyers costs (and sometimes the court fees). They do not cover the opponent's costs in the event of a loss. In countries operating a two-way cost-shifting system, an additional safe-guard in the form of an after-the-event cost insurance is needed that assumes the risk of an unsuccessful result of the litigation. While most European jurisdictions allow speculative funding (and prohibit US-style contingency fees), German maintains a general prohibition of output-based remuneration. Only in exceptional circumstances, i.e. that a client would otherwise be denied access to justice, a lawyer is allowed to enter into a speculative funding agreement. Unlike most other jurisdictions, in those cases Germany does not distinguish between a contingent fee, a conditional fee and a success fee.

d) Legal Service Programmes

Lawyer in Germany enjoy monopoly rights not only for representation in court, but also for all out of court work (some minor exceptions exist for incidental legal services). The rationale of the monopoly rights is threefold: To guarantee a high quality standard for the consumer, a high level of protection for the client which is only possible if the legal adviser is bound by professional rules addressing issues like conflicts of interest, professional secret and independence. Thirdly, the rights shall protect, to a certain extent, lawyers as officers of the court the profession provides in the interest of the legal system. These monopoly rights do prevent commercial legal advice by non-lawyers, but also voluntary and altruistic legal services by advisers without a legal qualification.

7. Recent Developments

a) Alternative Providers of Legal Services

Following the publication of a green paper in September 2004, the German Department of Justice in late April 2005 published a white paper containing proposals for a reform of the regulation of legal services. The white paper suggested a more liberal Legal Services Act ("Rechtsdienstleistungsgesetz - RDG"). The white paper took a number of decisions of Germany's Constitutional Court ("Bundesverfassungsgericht") that have challenged the

constitutionality of the comprehensive monopoly rights for lawyers as the starting point of a reform that aimed at opening up the legal services market.

One of the goals of the reform was to satisfy legal needs currently unmet in a market monopolized by lawyers. The white paper explicitly blamed lawyers for not offering sufficient expertise in areas of law which often affect the underprivileged – asylum seekers, refugees, unemployed, debtors, disabled etc. One of the main reasons why very few lawyers traditionally specialize in these areas of law is that very little money can be earned because of the German fee system which is based on ad valorem fees. Additionally, barriers to access to justice not only exist because of a lack of interested lawyers, but also because underprivileged clients often are reluctant to consult a lawyer. Experience shows that they are much more at ease when they contact a familiar organization already well-known to them or others. It was hoped that the lack of readily available legal services could be overcome by allowing pro bono organizations to offer free legal services. New rights for associations to provide ancillary legal services for members were suggested with the same rationale impact. Although the reform undoubtedly improved access to legal services to some extent, its impact on the legal aid system was rather insignificant. More than 90 per cent of the German legal aid budget goes into legal aid for court proceedings. As the reform only covered non-forensic legal services, it did not take away pressure from the public purse. The expenditure for “legal aid for legal advice”, which is the area covered by the reform, in 2009 was just 1 EUR per capita. As one of the reasons for the reform was that in areas which are insufficiently covered by lawyers - despite the availability of “legal aid for legal advice” – new providers should have the opportunity to enter the market, the aim of the reform was to widen access rather than to shift (state-financed) work from lawyers to (free) non-lawyers.

b) Increase in Expenditure

A 2004 reform of cost rules, including the above-described statutory scales of fee, had a major impact on lawyers doing legal aid work. In that year, reformed cost rules for court fees and for party/party costs came into force after a decade-long discussion about the need for a reform (these cost rules cover, in a rather complex system, all courts systems and all types of work provided by lawyers). Fees for lawyers doing legal aid work are paid (in most cases with a discount) according to these scales of fees (see above). Consequently, the reform resulted in a - modest - increase of income for lawyers doing legal aid work. Depending on who did the maths (the government, lawyers or insurers), the overall increase was said to be between 14 and 29 per cent (as lawyers were quite keen to point out, the increase had been the first since 1994 and it had not off-set the increase in the overall costs of living in the same period). The link between the general statutory fees for lawyers and the remuneration for legal aid work becomes a contentious issue every time the government bows to the profession’s pressure and adjusts the scale of fees. As a result, usually a year or so later the legal aid expenditure increases and triggers a discussion about the necessity to cut back legal aid spending. Consequently, as a result of the 2004 fee increases, the federal states suggested legal aid cut-backs in 2006. A bill was tabled that year, but was met with resistance by the federal government and could not be passed before the 2009 elections. As the overall expenditure has not increased since 2008, the proposals for cut-backs have lost much of their persuasiveness. Tellingly, when the bill was tabled again in 2010, the 2006 figures were not updated.

c) Growing Need For Legal Aid In The Long-Term

As has been explained above, one of the reasons why legal aid expenditure in Germany is relatively modest is the widespread use of legal expenses insurance by the population. However, legal expenses insurance coverage of the German population is slowly decreasing. It currently stands at 41.9 per cent after an all-time high of 48 per cent in the mid-1990s. Although it is still relatively affordable, its costs have increased by more than 200 per cent over the past two decades whereas the average income in Germany has only increased by approx. 50 per cent. When comparing different types of insurance, the decrease of LEI coverage has been above average since 2002. This indicates that the population, although aware of the general usefulness of a LEI policy, view LEI as more dispensable than other types of insurances. A further decrease of coverage therefore is likely in times of cut-backs in social security systems as the population is forced to insure against risks of life that traditionally were covered by social security (illness, retirement, care etc.). This assumption is backed by evidence that the market share of indemnity insurance is decreasing at the expense of life and health insurance products. In the long term, this will result in an increasing demand for legal aid by the population, making efforts to cut back legal aid expenditure more or less futile unless some prioritization will take place.