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**International Legal Aid Group**

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Legal Aid And Access  
To Justice In Germany

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# Legal Aid And Access To Justice In Germany

by Matthias Kilian

*Since Roman times, indigent citizens have been allowed to bring claims to court as a matter of charity or mercy. Traditionally, costs incurred for court fees and counsel were “deferred” or dispensed, with lawyers assigned to such cases usually being forced to render their services for free. The French revolution brought up the idea that access to justice for everyone should be a fundamental right rather than an act of charity. The paper will outline the development of civil legal aid in Germany, the prerequisites for obtaining legal aid, its administration, the expenditure for legal aid and the importance of legal aid in the German system of access to justice. The paper will only briefly address criminal legal aid in the context of the expenditure for legal aid.*

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## **I. A short history of Legal Aid in Germany**

The first German code of civil procedure (*Zivilprozeßordnung* of 1878) - which consolidated different regulations of the states forming the then *Deutsche Reich* - provided for the first time that a party had a right to a grant of legal aid if she fulfilled a number of requirements set by law<sup>1</sup>. Those provisions, however, kept the principle of older state codifications that the lawyer could not demand any payment for his services as long as the client remained indigent<sup>2</sup>. It was regarded as a *munus honorificum* of the lawyer to work for free as there was usually little hope that the client would ever be able to pay the fees the lawyer had to credit to him. Even more, the lawyer not only had to forego his remuneration, but also had to pay the indigent's expenses out of his own pocket<sup>3</sup>. Although this approach was not unusual from a comparative point of view, the German thinking was undoubtedly influenced by the fact that until the 1860s lawyers in Germany's largest state, Prussia, were not members of a free profession but civil-servants in public service<sup>4</sup>. With legal aid regarded as a matter of administration of justice to the poor, the lawyer's active participation in this process was regarded as a logical element of the system.

The system of civil legal aid in the outgoing 19<sup>th</sup> century lacked three important features of modern German legal aid schemes: There was

- no remuneration for lawyers doing legal aid work and
- no free choice of counsel for the indigent as lawyers were assigned to legal aid cases on rotatory basis,
- no legal aid available for advice or out of court work.

The first of these three shortcomings was remedied when after the First World War legislation was introduced that guaranteed payment from state funds for the first time. Since 1919, the state has paid for the client's expenses and since 1923, the lawyer

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<sup>1</sup> For a discussion in a constitutional law context, see *Wipfelder*, Die Rechts- und Prozeßkostenhilfe – ein soziales Grundrecht ?, *Deutsche Richterzeitung (DRiZ)* 1984, pp.385, also Bundesverfassungsgericht (Constitutional Court), 13.03.1990 (Az.: 2 BvR 94/88), [1991] *Neue Juristische Wochenschrift (NJW)*, pp.413 (discussing Art. 3 I Grundgesetz (Constitution)).

<sup>2</sup> In Roman times, it was regarded as an act of imperial mercy. Later it was seen as a „beneficium“; for details, see *Trockner*, Gutachten B 51. DJT (1976), p. B7.

<sup>3</sup> Which led the German Federal Bar in 1896 to complain about a de facto “poor client tax” of 600 Reichsmark for each member per annum; see *Juristische Wochenschrift* 1896, p. 476.

<sup>4</sup> The law governing the legal profession was harmonized for the *Deutsche Reich* for the first time in 1878 by way of the *Reichsanwaltschaftsordnung* (RAO) when for all member states the principle of the lawyer being a member of a free profession was introduced. For details, see *Koch* in: *Henssler/Prütting*, *Kommentar zur Bundesrechtsanwaltschaftsordnung*, Munich 1997, § 1 para 1.

has received a remuneration for his legal aid work from state funds<sup>5</sup>. The lack of legal aid for out of court proceedings (“advice”), remained a problem until 1981<sup>6</sup>. This issue had been addressed for the first time at the turn of the century when trade unions began offering legal advice for their members<sup>7</sup>. The state quickly followed suit as it feared that trade unions would use legal advice as a powerful tool in class actions. The legal profession also began offering free advice through its organisations<sup>8</sup>. The economical crisis of the 1920s led to an overall decline of free legal advice<sup>9</sup> and in 1935, the Third Reich created a monopoly for legal advice and representation for the legal profession<sup>10</sup>. The law in question, the *Rechtsberatungsgesetz*, intended to stop Jewish lawyers that had been expelled from the profession by the Nazi regime from giving legal advice without being members of the bar. The racist legislation resulted in a vacuum for years to come as there were no statutory provisions how indigent clients could obtain legal advice if no legal proceedings were to be issued. After the second World War, a system of advice bureaux was organized by local bar associations. In some regions, state-run advice offices came into existence, but there was no statutory regulation and no implementation of a harmonized concept on a state-wide level. In the late 1960s, in the wake of the 1968 student unrests and the first Social-Democrat government, a reform discussion was initiated which resulted in the 1976 Deutsche Juristentag<sup>11</sup> addressing the subject of access to justice in Germany<sup>12</sup>. In an address to the nation, then-German chancellor *Helmut Schmidt* said in December 1976 that every citizen should have equal opportunities when seeking legal remedies and therefore the government had decided to reform state legal aid<sup>13</sup>. The 1878 provisions in the Code of Civil Procedure were to be modernised and legislation for the provision for legal aid for out of court-work to be introduced.

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<sup>5</sup> For an overview of the changes between 1877 and 1945, see in detail *Trocker*, op. cit. (fn.2), p. B7 - B22.

<sup>6</sup> For a historical discussion, see *Blankenburg*, *Beratungshilfe – Hilfe für Sozialschwache oder Subvention für die Anwaltschaft ?*, [1994] *Zeitschrift für Rechtspolitik (ZRP)*, pp.233.

<sup>7</sup> *Blankenburg*, op. cit. (fn.6), p. 233 (234).

<sup>8</sup> For the structure of *Beratungshilfe* in the pre-1914 period, see *Blankenburg*, op. cit. (fn.6), p. 233 (234).

<sup>9</sup> *Blankenburg*, op. cit. (fn.6), p. 233 (234).

<sup>10</sup> See *Weth*, in *Henssler/Prütting*, op. cit. (fn.4), *RBerG* § 1 paras 1-4.

<sup>11</sup> The Deutsche Juristentag is the traditional annual legal conference of German academics and legal professionals which has a considerable influence on policy issues in German.

<sup>12</sup> See, for example, *Eike Schmidt*, *Der Arme und sein Recht*, [1972] *Juristenzeitung (JZ)*, pp.679; *Fritz Baur*, *Armenrecht und Rechtsschutzversicherung*, [19972] *Juristenzeitung (JZ)*, pp.75; *Wolfgang Däubler*, *Bürger ohne Rechtsschutz ?* [1969] *Betriebsberater*, pp.545.

<sup>13</sup> See *Schuster*, *Das Gesetz über die Prozeßkostenhilfe*, [1980] *93 Zeitschrift für den Zivilprozeß (ZZP)*, 361 (363).

Statutory provisions for legal aid for advice and representation (“out of court work”) finally came into effect on January 1, 1981 by way of the *Beratungshilfegesetz*<sup>14</sup> (legal aid is called “*Beratungshilfe*” in that context). As announced by the government in 1976, at the same time the rules governing legal aid for court proceedings were reformed and modernised by the “*Gesetz über Prozeßkostenhilfe*”<sup>15</sup>. The most obvious change was a change of terminology. Before 1981, legal aid was called “*Armenrecht*” which literally means “law for the impoverished”<sup>16</sup>, a terminology which had been used since medieval times (“*informa pauperis* procedure”) and had a somewhat discriminating undertone<sup>17</sup>. This term was changed to “*Prozeßkostenhilfe*” (usually referred to by the acronym PKH), which can best be translated as “aid for costs in court proceedings”. Material changes resulted in much more citizens now qualifying for *Prozeßkostenhilfe* than before and a scale was introduced which allowed assessment of means and contributions on a formalised basis. Furthermore, for the first time proceedings before the *Sozialgerichte* (“Social Security Courts”) and in matters involving IP-disputes were assisted. From a procedural point of view, the procedure for obtaining a PKH grant was streamlined. For example, the requirement to produce a “proof of poverty” issued by the welfare authorities was disposed of. For the first time, a person qualifying for “legal aid” had a right of free choice of counsel. For proceedings before the county courts (*Amtsgerichte*) where there is no statutory requirement for representation by counsel, the right of the indigent party to be represented was introduced, provided that the opponent was represented as well.

## **II. The court system and rules governing legal aid**

### **1. The legal framework for legal aid for court proceedings (“Prozeßkostenhilfe”)**

For a better understanding of the system of legal aid for court proceedings it is useful to look at the rather complicated structure of the German court system as the provisions for legal aid are contained in the relevant codes of procedures and not in a general “legal aid act”.

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<sup>14</sup> Full title: Gesetz über die Rechtsberatung und Vertretung für Bürger mit geringem Einkommen vom 18. Juni 1980, Bundesgesetzblatt 1980 I (Federal Reporter – Section I), p.689.

<sup>15</sup> Bundesgesetzblatt (BGBl. – Federal Reporter) I 1980, pp.677. For an overview of the reform see *Schuster*, op. cit. (fn.13), pp.361.

<sup>16</sup> For the pre-1981 provisions, see *Stohr*, The German System of Legal Aid: An Alternate Approach, [1966] 54 California Law Review, pp.801.

<sup>17</sup> Interestingly, a similar change in terminology was made in England much earlier. After a recommendation of the Rushcliffe Committee in 1945, legal aid recipients became known as „assisted persons“, not „poor persons“

In addition to the courts of general jurisdiction, which have a separate civil and criminal branch, Germany operates four specialised court systems for matters of administrative, labour, social security and tax law<sup>18</sup>. All six have their own codes of procedure which contain provisions for legal aid<sup>19</sup>, requiring a “court proceeding” for a legal aid grant. Consequently, alternative dispute resolution mechanisms like mediation, arbitration or formalized out-of-court settlement procedures are not covered by those rules<sup>20</sup>.

#### a. Courts of General Jurisdiction – Civil Branch

By far the most important jurisdiction in the legal aid context is the civil branch of the courts of general jurisdiction. The first book, second chapter of the Civil Code of Procedure (“*Zivilprozeßordnung*” (ZPO) §§ 114 – 127a)<sup>21</sup> contains the rules governing legal aid for court proceedings (“*Prozeßkostenhilfe*”)<sup>22</sup>. 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*”, the “*Landgerichte*”, the “*Oberlandesgerichte*” and the “*Bundesgerichtshof*”<sup>23</sup>). These courts have sectoral jurisdiction over such matters as contract law, tort law, property law, insolvency law, family law, inheritance law etc.

The *Amtsgericht* has absolute jurisdiction in disputes up to 10.000 DM<sup>24</sup>, in a number of defined disputes and in matters of family, matrimonial, property and juvenile law

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<sup>18</sup> The last three usually administered – and funded - on the state level not by the department of justice, but by the departments of labour, social security and finance.

<sup>19</sup> The civil branch of the courts of general jurisdiction (*Ordentliche Gerichte*) the *Zivilprozeßordnung* (ZPO), the criminal branch the *Strafprozeßordnung* (StPO). The administrative courts (*Verwaltungsgerichte*) use the *Verwaltungsgerichtsordnung* (VwGO), the labour courts (*Arbeitsgerichte*) the *Arbeitsgerichtsgesetz* (ArbGG), the social security courts (*Sozialgerichte*) the *Sozialgerichtsgesetz* (SGG) and the tax courts (*Finanzgerichte*) the *Finanzgerichtsordnung* (FGO).

<sup>20</sup> A much debated issue at the moment is whether or not legal aid can be granted for an insolvent individual in insolvency proceedings; see *Bruns*, *Entschuldung auf Staatskosten: Darf die Prozeßkostenhilfe die materiellen Voraussetzungen für das Verbraucherinsolvenzverfahren schaffen ?* [1999] *Neue Juristische Wochenschrift* (NJW), pp.3445; *König*, *Prozeßkostenhilfe in Verbraucherinsolvenzverfahren*, [2000] *Neue Juristische Wochenschrift* (NJW), pp.2485.

<sup>21</sup> 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: §).

<sup>22</sup> All ZPO commentaries include comprehensive comments on and information about the relevant provisions. Published on an annual basis is *Baumbach/Lauterbach*, *Zivilprozeßordnung*, the most commonly used commentary on civil procedure in Germany. Also widely used is the commentary by *Zöller*, *Zivilprozeßordnung*, published every other year.

<sup>23</sup> For details on the international, sectoral, absolute and relative jurisdiction of German courts, see in general *Smits/Ynzonides*, *German Civil Procedure*, in *Snijders et al.*, *Access To Civil Procedure Abroad*, Munich 1996, pp.285

<sup>24</sup> See *Gerichtsverfassungsgesetz* (GVG) § 23 Nr.1.

regardless of the amount at stake. More than 90% of the total expenditure on legal aid for proceedings before the courts of general jurisdiction is paid for proceedings before the *Amtsgerichte*<sup>25</sup>. The main reason is that a special branch of the *Amtsgerichte*, the family courts (*Familiengerichte*) has absolute jurisdiction in matters of family and matrimonial law<sup>26</sup>. In more than 50% of these proceedings, parties are assisted by legal aid which results in 70% of the expenditure spent on such proceedings before the *Amtsgerichte*<sup>27</sup>.

The *Landgericht* as a court of first instance has jurisdiction in civil matters in which the amount in dispute exceeds 10.000 DM and in all civil matters which do not come under the jurisdiction of the *Amtsgerichte* (e.g. IP disputes)<sup>28</sup>. As a court of appeal, the *Landgericht* has jurisdiction in all appeals against decisions of the *Amtsgericht*, with the exception of decisions of the *Amtsgericht* concerning matrimonial and juvenile law for which the appeal is decided by the *Oberlandesgericht*. Approx. 6% of the net expenditure for legal aid is paid for proceedings before the *Landgerichte*, 4/5 of that sum for proceedings related to the absolute jurisdiction of the *Landgerichte* as a court of first instance and 1/5 as a court of appeals<sup>29</sup>.

The *Oberlandesgericht* is the appeal court for decisions of the *Landgericht* as a court of first instance and for decisions of the *Amtsgericht* in matrimonial and juvenile law cases<sup>30</sup>. Approx. 4.5% of the overall expenditure is spent on legal aid cases before the *Oberlandesgerichte*, split between appeals against *Landgerichte* decisions (22%) and *Amtsgerichte* decisions (78%)<sup>31</sup>.

The *Bundesgerichtshof* as the supreme civil court decides on appeals against decisions of the *Oberlandesgericht* and exceptionally against first instance decisions of

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<sup>25</sup> Data derived by the author from the last nation-wide statistics for the year 1990. See Bundestags-Drucksache (Parliament Reporter) 12/6963, p.19, "Prozeßkostenhilfebewilligungen in den von den ordentlichen Gerichten erledigten Zivilprozessen und Familiensachen nach Rechtszügen in den Jahren 1980 bis 1990". The percentage in 1990 was 89,3%. As the absolute jurisdiction of the *Amtsgerichte* was extended in 1993 to all disputes up to 10.000 DM instead of before 6.000 DM, the percentage is likely to be well above 90% today. There is, however, no more up-to-date data available.

<sup>26</sup> See Gerichtsverfassungsgesetz (GVG) § 23a.

<sup>27</sup> While there is no need for representation by a lawyer in general before the *Amtsgerichte*, it is obligatory for proceedings in family and matrimonial law cases.

<sup>28</sup> See Gerichtsverfassungsgesetz (GVG) § 71.

<sup>29</sup> Again, the data was derived by the author from the last nation-wide statistics for the year 1990. See Bundestags-Drucksache (Parliament Reporter) 12/6963, op. cit. (fn.25)

<sup>30</sup> See Gerichtsverfassungsgesetz (GVG) § 119.

<sup>31</sup> Again, the data was derived by the author from the last nation-wide statistics for the year 1990. See Bundestags-Drucksache (Parliament Reporter) 12/6963, op. cit. (fn.25)

the *Landgericht*. Less than 0.1% of the overall expenditure is paid for proceedings before the *Bundesgerichtshof*<sup>32</sup>.

Chart: Distribution of legal aid (“Prozeßkostenhilfe”) expenditure – courts of general jurisdiction:

Court	Percentage (1990)
<b>Amtsgericht (AG)</b>	89,3
family law branch	70,3
other	19,0
<b>Landgericht (LG)</b>	6,1
first instance	4,8
appeals	1,3
<b>Oberlandesgericht (OLG)</b>	4,5
appeals from AG	3,5
appeals from LG	1,0
<b>Bundesgerichtshof (BGH)</b>	less than 0,1
<b>total</b>	100

#### b. Courts of General Jurisdiction – Criminal Branch

The courts of general jurisdiction also have a criminal branch, with the *Amtsgerichte* dealing with minor cases (mainly misdemeanours) and the *Landgerichte* again with appeals from the *Amtsgerichte* and as a court of first instance for (major) felonies. Although no nation-wide empirical data exists, data from a number of federal states shows that on average the expenditure for criminal legal aid amounts to 20% of the expenditure for civil legal aid. As this paper does concentrate on civil legal aid, there is no detailed description of the rules applying to criminal legal aid included. It should be noted that the general term “*Prozeßkostenhilfe*” is not used for criminal legal aid<sup>33</sup>. The commonly-used term is “*Beiordnung eines Verteidigers*”, which can best be translated as assignment of official defence counsel<sup>34</sup>. The relevant provisions are contained in StPO §§ 140, 364a, 364b.

<sup>32</sup> The system of appeals in civil matters relates, unless a question of law of general interest needs to be answered, to the amount at stake. Appealable are only Oberlandesgerichte decisions if the cause of complaint exceeds a value of 60.000 DEM. It is fair to assume that the average legal aid case does not involve such a value as in general, the level of damages in Germany is significantly lower than in the U.K. or even the U.S.

<sup>33</sup> This applies only to the defendant. Legal aid for a party acting as an (additional) private prosecutor is paid according to StPO § 397a or § 379 III; for details see *Kalthoener/Büttner*, *Prozeßkostenhilfe und Beratungshilfe*, 3<sup>rd</sup> ed., Munich 1999, pp.6.

<sup>34</sup> The reason for this differentiation is that unlike in the *Prozeßkostenhilfe*-scenario there are no contractual relationships between client and attorney (see StPO § 142 ). Therefore the client literally does not receive financial support for paying his lawyer.



### c. Specialised court systems

As mentioned, in addition to the courts of general jurisdiction, Germany operates four specialised court systems for matters of administrative, labour, social security and tax law<sup>35</sup>. All four have their own codes of procedure<sup>36</sup> (the *Zivilprozeßordnung* with its provisions relating to legal aid (*Prozeßkostenhilfe*) only applies to the proceedings before the civil branch of the courts of general jurisdiction). However, all four codes contain a blanket clause which refers to the *Zivilprozeßordnung* for all questions involving legal aid<sup>37</sup>. Compared to legal aid for proceedings before the civil branch of the courts of general jurisdiction, the expenditure for the other courts systems is insignificant. The last available data on a nation-wide basis (1990) shows the following distribution<sup>38</sup>:

*Chart: Distribution of expenditure for legal aid for court proceedings between the court systems on a nationwide basis in 1990:*

court system	percentage
courts of general jurisdiction – civil branch	78.6
courts of general jurisdiction – criminal branch	15,5
administrative courts	1,4
labour courts	4,1
social security courts	0,4
tax courts	0,01

<sup>35</sup> The last three usually administered – and funded - on the state level not by the department of justice, but by the departments of labour, social security and finance.

<sup>36</sup> The administrative courts (*Verwaltungsgerichte*) the *Verwaltungsgerichtsordnung* (VwGO), the labour courts (*Arbeitsgerichte*) the *Arbeitsgerichtsgesetz* (ArbGG), the social security courts (*Sozialgerichte*) the *Sozialgerichtsgesetz* (SGG) and the tax courts (*Finanzgerichte*) the *Finanzgerichtsordnung* (FGO).

<sup>37</sup> VwGO § 166, ArbGG § 11a III; SGG § 73a; FGO § 142 I. For details see *Kalthoener/Büttner*, op. cit. (Fn.#), pp.8. There are minor differences compared to the ZPO standards. For example, the standard that has to be applied to the merits test in labour court proceedings is more lenient than in civil court proceedings (see ArbGG § 11a II).

<sup>38</sup> The numbers were derived by the author from the last nation-wide statistics for the year 1990. See Bundestags-Drucksache (Parliament Reporter) 12/6963, op. cit. (Fn.25). As no data for criminal legal aid is available, it was assumed that it amounts to 20% of the expenditure for civil legal aid, as data available from some of the federal states suggests.

Compared to data for the year 2000 available from one of the German federal states, Thuringia<sup>39</sup>, there has not been much change over the past 10 years.

Chart: Distribution of expenditure for legal aid for court proceedings between the court systems in the federal state of Thuringia in 2000:

court system	percentage
courts of general jurisdiction – both branches	92,4
administrative courts	0,6
labour courts	6,3
social security courts	0,7
tax courts	0,01

#### d. Others

Legal aid is also available for proceedings before the Constitutional Court (*Bundesverfassungsgericht*)<sup>40</sup> and in patent law cases before the German Federal Patent Office (*Deutsches Patentamt*) and the Patent Court (*Bundespatentgericht*). These are the only proceedings where legal aid is paid from federal funds. The expenditure is insignificant and amounts to less than 0.1% of the nation's expenditure for legal aid<sup>41</sup>. Therefore, 99.9% of the costs for legal aid is met by the 16 federal German states.

## 2. Legal Aid for advice and representation (“Beratungshilfe”)

The second column of the German legal aid system is legal aid for advice and representation, the so-called *Beratungshilfe*. It became, as outlined in the introductory historical remarks, available for the first time only in 1981. The legal framework for *Beratungshilfe* is not included in any of the Codes of Procedure - these only apply to court proceedings – as *Beratungshilfe* is granted for out of court work. There exists a dedicated act, the *Beratungshilfegesetz* (BerHG) that provides all details<sup>42</sup>. 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

<sup>39</sup> Information of the Department of Justice dated May 4, 2001 (3715/E-1/01).

<sup>40</sup> For details, see *Kalthoener/Büttner*, op cit. (fn.33), p.4.

<sup>41</sup> See Bundestags-Drucksache (Parliament Reporter) 12/6963, op. cit. (fn.25), p.1.

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. For penal law matters, funding is restricted to advice (BerHG § 2 II). The ratio of legal aid for advice and legal aid for representation changed since the introduction of *Beratungshilfe* in 1981. For the past decade, the advice:representation ratio has been approx. 1:3 :

*Chart: Legal aid for advice and presentation – ratio between advice and representation:*

year	advice %	representation %
1981	54	46
1986	28	72
1991	25	75
1996	27	73
2001	n.a.	n.a.

<sup>42</sup> Two dedicated commentaries exist: *Schoreit/Dehn*, *Beratungshilfe / Prozeßkostenhilfe*, 6<sup>th</sup> ed., Heidelberg 1998, and *Lindemann / Trenk-Hinterberger*, *Beratungshilfegesetz*, Munich 1987 (out-dated).

### 3. Summary

Chart: The system of legal aid in Germany at a glance:

<b>legal aid</b>	
<b>for court proceedings</b> (“Prozeßkostenhilfe” / “Beiordnung”)	<b>for advice and representation</b> (“Beratungshilfe”)
↘ in the courts of general jurisdiction – civil branch	↘ advice
↘ in the courts of general jurisdiction – criminal branch	↘ representation
↘ in the administrative courts	
↘ in the labour courts	
↘ in the social security courts	
↘ in the tax courts	

#### **III. Requirements for a legal aid grant**

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)<sup>43</sup>. By way of reference (BerHG § 1 II), the means test provisions also apply to an application for a legal aid grant for advice and representation (*Beratungshilfe*)

#### **1. Means Test**

The individual applying for legal aid either for 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:

### **a. Assets**

As a starting point, according to ZPO § 115 III the applicant can be required to fund her litigation making use of her “available assets” if this seems “reasonable”. ZPO § 115 III, however does not mention what assets are exempt from that requirement<sup>44</sup>. 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<sup>45</sup>. Property owned needs not to be sold if it can be regarded as an adequate accommodation for the applicant and his family<sup>46</sup>.

### **b. Income**

ZPO § 115 I 1 states as the 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<sup>47</sup>.

### **c. Deductions**

From the “income”, a couple of deductions have to be made (ZPO § 115 2 Nr.1): Taxes, social security contributions, reasonable insurance premiums, work-related spendings, 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 *Bundessozialhilfegesetz* (So-

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<sup>43</sup> For an easy-to-read checklist how to obtain legal aid see *Friedrich*, *Wie erhalte ich Prozeßkostenhilfe ?*, [1995] *Neue Juristische Wochenschrift* (NJW), pp.617.

<sup>44</sup> For a comprehensive A-Z check-list see *Baumbach/Lauterbach*, op. cit. (fn.21), ZPO § 115, paras 51-68.

<sup>45</sup> The criteria which assets the applicant has to use before qualifying for legal aid are the same as for someone who applies for social welfare benefits. Therefore, ZPO § 115 III refers to the relevant provision in the *Bundessozialhilfegesetz* (BSHG § 88 II; Social Welfare Act). BSHG § 88 II is reprinted, for example, in *Thomas/Putzo*, *Zivilprozeßordnung*, # ed., ZPO § 115 para 23.

<sup>46</sup> For the adequateness standard see *Baumbach/Lauterbach*, op. cit. (fn.21), ZPO § 115, para 58.

<sup>47</sup> For a comprehensive A-Z check-list see *Baumbach/Lauterbach*, op. cit. (fn.21), ZPO § 115, paras 16-40.

cial Welfare Act) receive<sup>48</sup>. 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<sup>49</sup>. In 2001, the deduction that can be made for an adult is 676 DEM and for each child supported 475 DEM<sup>50</sup>.

#### d. Contributions

After calculating income and deductions, the resulting sum shows if the applicant qualifies for legal aid. If, as a result, the disposable monthly income is less than 30 DEM, the applicant qualifies for legal aid for advice and representation. She has to pay, however, a nominal fee of 20 DEM payable to the lawyer who gives the advice (BerHG § 8 I)<sup>51</sup>. Similarly, with an income of less than 30 DEM she qualifies for legal aid for court proceedings without any contributions. If the disposable income is between 30 and 1500 DEM, the applicant qualifies for legal aid for court proceedings but has to make contributions according to a sliding scale (ZPO § 115 I 4)<sup>52</sup>:

relevant income	monthly contribution
up to 30 DEM	0 DEM
up to 100 DEM	30 DEM
up to 200 DEM	60 DEM
up to 300 DEM	90 DEM
up to 400 DEM	120 DEM
up to 500 DEM	150 DEM
up to 600 DEM	190 DEM
up to 700 DEM	230 DEM
up to 800 DEM	270 DEM
up to 900 DEM	310 DEM
up to 1.000 DEM	350 DEM
up to 1.100 DEM	400 DEM
up to 1.200 DEM	450 DEM
up to 1.300 DEM	500 DEM
up to 1.400 DEM	550 DEM
up to 1.500 DEM	600 DEM
more than 1.500 DEM	600 DEM + all remaining income

<sup>48</sup> The system how deductions are calculated has changed over the past two decades. See, for example, *Hoppenz*, *Wir brauchen eine neue Prozeßkostenhilfetabelle !*, [1986] *Zeitschrift für Rechtspolitik*, pp.189; *Behn*, *Prozeßkostenhilfe und Sozialhilfe*, [1985] *Zeitschrift für Sozialrecht*, pp.98.

<sup>49</sup> As said, they are subject to revision each year with effect July 1. For details, see *Thomas/Putzo*, op. cit. (fn.45), ZPO § 115 para 6; *Friedrich*, op. cit. (fn.43), 617 (619).

<sup>50</sup> BGBl. 2000 I (Federal Reporter, Section I), p.815.

<sup>51</sup> The contribution can be waived by the lawyer. Quite a few lawyers waive the nominal fee because of the extremely low amount of DEM 20.

<sup>52</sup> With a relevant income of more than 30 DEM, no legal aid for advice and representation is granted; see BerHG § 1 (2).

In roughly 80% of all cases, legal aid is granted without the requirement of making contributions<sup>53</sup>. If required, contributions have to be made as long as the costs advanced from state funds have been re-paid, but with a cap of 48 monthly contributions. If the applicant has not paid her contributions for three consecutive months, legal aid will be withdrawn altogether.

Finally, there is a provision in ZPO § 115 III according to which an applicant does not qualify for legal aid if litigation costs for the first instance are unlikely to exceed the amount of four monthly contributions. The rationale of this exemption is that the costs for administration are much higher than the likely benefit for indigent. Consequently, an exclusion of very small claims (which under the German cost regime result in low litigation costs) from legal aid is justified<sup>54</sup>.

## 2. Merits test

To qualify for legal aid for court proceedings (“Prozeßkostenhilfe”), 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 her defence if an action has been filed against her) bears a reasonable chance of success and is not frivolous or reckless<sup>55</sup>. 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 such merits test needs to be passed as the advice is usually sought to establish the merits of a

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<sup>53</sup> Data from 1990, see Bundestags-Drucksache (Parliament Reporter) 12/6963, op. cit. (Fn.25), p.21. As of 2001, the percentage may be lower as there has been a slow but steady increase of the percentage of grants requiring contributions. See also *Müller-Alten*, Worauf beruht der Eindruck, Prozeßkostenhilfe werde zu großzügig bewilligt ?, [1985] Deutsche Richterzeitung, p.466.

<sup>54</sup> See Bundesrats-Drucksache No. 187 / 1979 (i.e. the Parliament reporter for the second chamber), p.24.

<sup>55</sup> 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; see *Baumbach/Lauterbach*, op. cit. (fn.21), ZPO § 114, para 107.

case<sup>56</sup>. However, the applicant has to show that her wish to consult a lawyer is not reckless (BerHG § 1 I Nr.3)<sup>57</sup>.

#### **IV. The administration of legal aid**

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 (for court proceedings) was first codified on a federal level, such an alternative was considered, but 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. Therefore, the applicant has to apply for legal aid at a court and her application is processed and decided there.

According to ZPO § 117 I, the indigent has to apply for legal aid for court proceedings (“*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 a merits assessment. 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<sup>58</sup>.

For legal aid for advice and representation (“*Beratungshilfe*”) one has to apply with 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)<sup>59</sup>. An application can be filed (usually by the lawyer) after the consultation, with the lawyer assuming the risk that the appli-

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<sup>56</sup> See *Kindermann*, *Gebührenpraxis für Rechtsanwälte*, Herne/Berlin 2001, p.232.

<sup>57</sup> For details, see *Kindermann*, *op. cit.* (fn.56), p.232.

<sup>58</sup> For details, see *Thomas/Putzo*, *Zivilprozeßordnung*, *op. cit.* (fn.#), ZPO § 117 para 3.

<sup>59</sup> 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; for details, see *Wolfgang Hartung / Thomas Holl*, *Berufsordnung*, Munich 1997, § 16, paras 1.



cation is turned down<sup>60</sup>. In 1999, approx. 65% of all applications fell into that category. Approx. 3% of all applications are turned down because they do not meet the statutory requirements<sup>61</sup>.

Chart: Applications for legal aid for advice and representation:

year	no. of applications	filed by applicant	filed by lawyer	turned down
1981	148 639	n.a	n.a.	6,4%
1986	222 138	30%	61%	9 %
1991	221 197	27%	68%	5%
1996	311 771	36%	60,5%	3,5%
1999	414 538	39%	58%	3%

## V. The legal aid grant

If legal aid for court proceedings is granted, the court order has the following 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<sup>62</sup>.

The 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 her opponents' 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<sup>63</sup>, 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<sup>64</sup>.

<sup>60</sup> See for details *Kindermann*, op. cit. (Fn.56), pp.233.

<sup>61</sup> See statistic of the German Federal Bar dated Sep. 13, 2000.

<sup>62</sup> 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.

<sup>63</sup> For a discussion of the different alternatives how to reduce the cost risk in the German system of civil litigation, see *Alfred Mümmler*, Beschränkung des Prozeßkostenrisikos, [1971] Das juristische Büro (JB), pp.1

<sup>64</sup> For an overview of the financial risks of civil litigation in general, see *Klaus Müller*, Zur Problematik des Prozeßkostenrisikos im Zivilprozeß, [1987] Juristische Rundschau (JR), pp.1.

## **VI. The lawyer and legal aid**

There is no “legal aid franchising” or “contracting” in Germany. Every lawyer can accept legal aid cases. 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. In 2000, 3.000 of the 105.000 registered lawyers in Germany were certified specialists for family law<sup>65</sup>. As 80% 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 as well.

The Legal Profession Act (*Bundesrechtsanwaltsordnung*), § 48 I (for *Prozeßkostenhilfe*) and § 49a (for *Beratungshilfe*), requires the lawyer to accept any assignment to a client supported by legal aid. Thus, the provision limits the lawyer’s freedom to contract<sup>66</sup>. 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.

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 *Bundesrechtsanwaltsgebührenordnung*, 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 cli-

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<sup>65</sup> The number is quickly increasing as the accreditation for family law was only introduced a couple of years ago. The provisions are laid down in the „Fachanwaltsordnung“, subordinated legislation that is based on the „Bundesrechtsanwaltsordnung“ (the Legal Profession Act), and in BRAO § 43c (Legal Profession Act). Traditionally, the title “Fachanwalt” can be earned for Social Security Law (459), Administration Law (785), Employment Law (3315) and Tax Law (2792) (the number in brackets shows number of accredited lawyers as of Jan. 1, 2000). The number of available titles has been extended since the late 1990s and now also covers Penal Law (702), Family Law (2997) and Insolvency Law (70). Introduction of further titles is under discussion (for example Insurance Law; Landlord & Tenant Law). For 105.000 members of the Bar, 11.130 certificates have been issued so far (a lawyer can hold two titles simultaneously). The Fachanwalt-title is regarded as a valuable marketing tool for smaller and mid-sized law firms. Upon request, the local Bar association will name accredited specialists if a lay client requires legal advice in a certain are of law.

ent are free to negotiate any fee as long as the fee is reasonable (BRAGO § 3 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 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 BRAGO is rather complicated. For certain stages of the court proceeding a „full fee (10/10)“ is earned by the lawyer (for pre-trial work, for pleading in court, for hearing of evidence 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 6.000 DEM, 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. For example, for a value of 10.000 DEM the „legal aid fee“ is 435 DEM, while the non-legal aid fee is 595 DEM. Also, the legal aid fee does not increase any more above a value of 50.000 DEM:

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<sup>66</sup> See for details *Schaich*, in *Henssler/Prütting*, op. cit. (fn.4), BRAO § 48 para 1; BRAO § 49a, para.1.

Chart: Comparison of normal and legal aid fees of the BRAGO

value of the claim of up to	full normal fee	full „legal aid“ fee
	BRAGO § 11	BRAGO § 123
600 DEM	50 DEM	50 DEM
2400 DEM	170 DEM	170 DEM
4000 DEM	265 DEM	265 DEM
6000 DEM	375 DEM	375 DEM
10 000 DEM	595 DEM	435 DEM
20 000 DEM	945 DEM	485 DEM
40 000 DEM	1 265 DEM	645 DEM
50 000 DEM	1 425 DEM	725 DEM
100 000 DEM	2 125 DEM	765 DEM
1 000 000 DEM	6 225 DEM	765 DEM

In the light of the absolute 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 her client wins the case. 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. For example, if the value at stake is 50.000 DEM and the legal aid client achieves a 100% win, her lawyer will earn 3 x 1.425 DEM = 4.275 DEM (excl. VAT and expenses) compared to 3 x 725 DEM = 2.175 DEM in the event of a loss. 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<sup>67</sup>.

Remuneration for advice and representation is much more straightforward<sup>68</sup>: According to BRAGO § 132, the lawyer receives 45 DEM for giving an oral or written advice

<sup>67</sup> See Müller-Alten, op. cit. (fn.53), p. 466 (468) and the same author for a discussion of possible reforms of legal aid in family law cases in [1984] Zeitschrift für Rechtspolitik (ZRP), pp.306.

<sup>68</sup> For details, see Kindermann, op. cit. (Fn.56) pp.228.

and for representation she receives 110 DEM (excl. VAT). In addition, the lawyer may charge the client an additional 20 DEM to be paid directly to her by the client<sup>69</sup>. If representation of the client leads to an out-of court settlement, the lawyer is paid an additional 200 DEM. 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 350 DEM instead of 45 DEM, depending of the value of matter of interest<sup>70</sup>. For representation in non-legal aid cases, the fee is not capped and can amount to thousands of DEM, again depending of the value of matter of interest. As the payment for advice and representation in legal aid cases does hardly cover the production costs even of High Street law firms, *Beratungshilfe* is regarded as a kind of de-facto pro bono work of the legal profession<sup>71</sup>. However, as the total number of grants for legal aid for advice and representation was 401.209 in 1999, each of the 97.941 registered German lawyers handled little more than 4 *Beratungshilfe*-cases per year on average (although it is evident that this calculation is over-simplifying as a lot of larger law firms employ several ten-thousand lawyers nation-wide do not do any legal aid work). On a nation-wide basis, every 198<sup>th</sup> citizen applied for legal aid for advice and representation in 1999, with the average cost per consultation being 116 DEM<sup>72</sup>.

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<sup>69</sup> It is disputed if this is a fixed sum or if VAT can be added to that sum; for the different opinions see *Kindermann*, op. cit. (fn.56), p.236.

<sup>70</sup> See the critical remarks of *Winters* (former director of the German Bar Association (Deutscher Anwaltverein - DAV), *Die Zukunft der Rechtsberatung*, [1988] *Neue Juristische Wochenschrift*, p.521 (527).

<sup>71</sup> See the press release of the German Federal Bar (BRAK) dated Sep 13, 2000; also *Winters* (op.cit (fn.70), p.527.

<sup>72</sup> The bulk of work is representation (see chart above) where the lawyer can charge 110 DEM + VAT.

Chart: The structure of Beratungshilfe in 1999 in the 14 states that operate Beratungshilfe-schemes

state <sup>73</sup>	no. of consultations	cost per capita	cost per consultation	ratio consult. /. population
Baden-Wuerttemberg 10 476	41591	0,51 DEM	129 DEM	1 : 251
Bavaria 12 155	39875	0,40 DEM	122 DEM	1 : 305
Berlin 3 387	16782	0,64 DEM	129 DEM	1 : 201
Brandenburg 2 601	8605	0,31 DEM	n.a.	1 : 302
Hessen 6 052	27944	0,55 DEM	n.a.	1 : 216
Mecklenburg-Vorpom. 1 789	8975	0,46 DEM	91 DEM	1 : 199
Niedersachsen 7 899	61191	0,93 DEM	121 DEM	1 : 129
Nordrhein-Westfalen 18 000	89202	0,53 DEM	n.a.	1 : 201
Rheinland-Pfalz 4 031	15666	0,48 DEM	124 DEM	1 : 257
Saarland 1 072	9450	1,04 DEM	118 DEM	1 : 113
Sachsen 4 460	28129	0,60 DEM	96 DEM	1 : 158
Sachsen-Anhalt 2 649	21361	0,77 DEM	96 DEM	1 : 124
Schleswig-Holstein 2 777	21049	0,97 DEM	129 DEM	1 : 132
Thueringen 2 449	11389	0,44 DEM	n.a.	1 : 215
total (14 of 16 states) 79795 <sup>74</sup>	401 209	n.a.	116 DEM	1 : 198

## VI. The expenditure for legal aid

### 1. Structure

Although legal aid is governed by federal laws, funding takes place on the state level<sup>75</sup>. The 16 German federal states (*Bundesländer*) are responsible for the court system in each state and as legal aid is administered by the courts, funding does not come out of the federal budget, but from state funds. Matters are further complicated

<sup>73</sup> The states of Hamburg and Bremen do not operate Beratungshilfe-schemes, but run civil advice bureaux instead.

<sup>74</sup> Excluding the population of Bremen (663) and Hamburg (1 705).

by the fact that not all courts systems are run by the 16 states' departments of justice. In most states, only the courts of general jurisdiction (*Amts-, Land- und Oberlandesgerichte*) and administrative courts (*Verwaltungsgerichte*) are under the auspices of the department of justice, while the labour courts (*Arbeitsgerichte*) are usually run and funded by the department of work, the social security courts (*Sozialgerichte*) by the department of social matters and the tax courts (*Finanzgerichte*) by the department of finance. To get a rough idea about the expenditure on legal aid in Germany, one has therefore to look at the budget of four different departments in each of the sixteen German federal states. The last time it was endeavored to collect the necessary data to calculate the expenditure on a nation-wide level was in the early 1990s when the Federal Parliament considered a reform of legal aid. I have not tried to collect as much data as the Parliament did back then, but have decided to concentrate on the most relevant data.

## **2. Expenditure**

The overall expenditure for legal aid in Germany can be divided into three main areas of funding: legal aid for court proceedings, criminal legal aid and legal aid for advice and representation.

### **a. Legal Aid For Court Proceedings**

Legal aid for court proceedings is by far the biggest chunk of the cake, consuming approx. 80 % of the whole legal aid budgets of the federal states. As explained above, legal aid for court proceedings can further be divided into proceedings in civil law, labour law, administrative law, social security law and tax law cases as five different court systems exist for these areas of law. Over 90% of all funds for legal aid for court proceedings are spent on civil law cases. The following figures relate to the expenditure for proceedings before the courts of general jurisdiction in civil law cases only. The last nation-wide data was collected in 1991. The expenditure had grown from 182 million DEM in 1981 to 369 million DEM in 1986 (+103%). It then remained on that level for the next five years, eventually decreasing to 346 million DEM in 1991 (-6%). The stable expenditure in the 2<sup>nd</sup> half of the 1980s was to some extent the result of cost-cutting measures implemented in 1986. Between 1991 and 1996, the expenditure of the federal states for which data is available increased between 31 and

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<sup>75</sup> The only exception being cases before the German Patent Office and the Federal Constitutional Court. Spending on legal aid for those amount too as little as 60.000 DEM in 1991 (last

58%<sup>76</sup>. In 1995, another reform of the legal aid provisions led to a new approach of calculating income and deductions. As a result, there has only been a moderate increase in expenditure since then in the federal states forming the pre 1990 FRG (Baden-Württemberg + 2%; Bavaria +15%; Bremen 4%; Hessen +11%; Niedersachsen +19%; Rheinland-Pfalz +21%). Unsurprisingly, in the five ex GDR states in East Germany with their poor economical conditions and high unemployment rates, there has been more growth in expenditure (Thuringia 93%; Sachsen +52%; Mecklenburg-Vorpommern +40%). As there is no data available for all 16 states, the overall expenditure can only be an educated guess: The 11 states for which data is available spent approx. 508 million DEM in 2000. As they represent roughly 86% of the total population, for the remaining states a figure of 83 million DEM can be derived<sup>77</sup>, resulting in an overall expenditure of 591 million DEM for civil proceedings before the courts of general jurisdiction. For court proceedings before the administrative, labour, social security and tax courts, another 7% have to added<sup>78</sup> (41 million DEM), resulting in an overall expenditure for all court proceedings (except criminal legal aid) of 632 million DEM. This sum is not the net expenditure, as it does not include monies paid by assisted parties as contributions. As contributions paid are booked like general court fees, it is not known statistically what percentage of expenditure is re-paid through contributions. Most states asked believe that between 15 and 20% of the expenditure is re-paid. This results in a net expenditure of 505 – 537 million DEM. The following chart only reflects the spending on legal aid for court proceedings in civil law cases, therefore only representing 90 % of the expenditure in category (1).

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data available).

<sup>76</sup> The only data available for that period is from Nordrhein-Westfalen, Niedersachsen, Bayern and Baden-Württemberg. The five ex-GDR states have been disregarded for that period as they only began to implement legal aid in 1991 and growth figures in the followings years were in 200%+ range.

<sup>77</sup> More likely to be a little bit more as these five states have a slightly above average expenditure.

<sup>78</sup> See the chart „distribution of expenditure for legal aid for court proceedings between the court systems“.



chart: Expenditure for civil legal aid for court proceedings – courts of general jurisdiction („Prozeßkostenhilfe“) 1990 – 2000 (1 = 1000 DM)

state (pop. 1 000)	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	growth 1991- 2000	cost per capita 1999
B-W 10 476	38 969	38 900	42 700	46 300	52 400	61 300	64 900	66 400	65 500	62 840	+61%	6,25 DEM
BAY 12 155	44 780	42 837	49 892	50 232	55 782	64 619	71 878	73 905	72 792	74 448	+67%	6,13 DEM
BRE 3 387	12 278								21 461	21 899	+78%	6,46 DEM
BRA 2 601										18 000 (est.)	n.a.**	6,92 DEM
BRE 663	4 739				5 553	5 802	6 489	6 826	6 535	5 973	+26%	9,00 DEM
HAM 1 705	14 154											
HES 6 052	27 812					48 700*	52 500*	56 000*	57 200*	54 400*	+55%	9,45 DEM
M-V 1 789	380	3 019	4 601	5 758	7 580	9 887	10 782	13 099	12 321	13 838	n.a.**	6,88 DEM
NDS 7 899	40 989	48 193*	49 515*	52 462*	59 377*	66 229*	71 439*	74 759*	74 276*	78 172*	+53%	9,40 DEM
NRW 18 000	112 251		116 100		136 600		164 400		164 400	165 000 (est.)	+47%	9,13 DEM
R-P 4 031	20 000					25 700	29 200	29 000	30 300	31 800	+59%	7,51 DEM
SAAR 1 072	7665											
SACHS 4 460	829	4 769	9 616	13 273	15 233	19 383	23 187	28 324	29 118	29 755	n.a.**	6,53 DEM
S-A 2 649	550										n.a.**	
S-H 2 777	19 448											
THÜ 2 449	669				11 100*	12 008*	12 008*	16 500*	18 000*	23 100*	n.a.**	7,34 DEM

\* sum includes criminal legal aid as the state does not differentiate the expenditure for legal aid into different categories. Experience from other states that do differentiate tells that between 20-25% of the expenditure for legal aid is spent on criminal legal aid and 75-80% on civil legal aid.

\*\* no growth figure has been calculated for the five ex GDR states as they only began to establish a legal aid system in 1991.

chart: Expenditure for civil legal aid for court proceedings – courts of general jurisdiction  
 („Prozeßkostenhilfe“) 1980 – 1990 (1 = 1000 DM)

state (pop. in 1.000)*	1980*	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	growth 1981- 1990
B-W 10 476	13 718	17 649	26 150	33 837	38 091	38 579	39 530	42 968	43 569	43 073	41 534	+135%
BAY 12 155	13 931	18 736	29 217	37 452	42 680	45 619	44 982	48 105	46 916	46 535	45 357	+147%
BER 3 387	7 230	8 500	10 880	11 000	12 100	12 380	12 040	12 790	12 360	15 221	12 835	+51%
BRE 663	2 651	3 452	4 551	5 598	6 042	6 042	6 257	7 190	6 670	6 399	5 562	+59%
HAM 1 705	7 864	12 456	13 299	15 967	17 389	16 903	16 331	18 508	17 180	14 994	14 906	+19%
HES 6 052	11 747	15 127	21 806	23 740	27 916	28 840	29 647	30 165	31 198	30 456	28 718	+89%
NDS 7 899	18 503	24 307	32 012	39 018	43 815	44 465	45 050	45 524	45 889	44 222	42 240	+74%
NRW 18 000	44 442	56 924	82246	102 026	114 313	120 557	125 436	128 171	128 858	123 600	115 900	+102%
R-P 4 031	7 436	9 423	14 790	17 168	19 188	20 342	20 773	22 365	22 751	21 529	20 169	+114%
SAAR 1 072	2 695	3 289	4 788	5 805	6 586	7 770	7 479	7 855	8 654	8 329	7 938	+142%
S-H 2 777	9 902	11 808	16 472	19 264	21 705	21 581	21 527	22 780	21 443	20 738	19 936	+67%

\* The chart does not include the five ex GDR states that were reunited with the Federal Republic of Germany in 1990. The population data are the numbers for the year 1999

\*\* The expenditure for 1980 relates to the pre-reform system of legal aid. Therefore, growth figures have been calculated beginning with the year 1981 when the reform had their first fiscal effect.

### **b. Criminal Legal Aid**

It is extremely difficult to gather data about criminal legal aid as some of the German states do not differentiate in their budget between legal aid court proceedings and criminal aid as it does not make a difference from a budgetary point of view. Those states that keep a separate statistic spend another 16 – 22% of their expenditure for non-criminal court-proceedings on criminal legal aid (the exception is Berlin, the nation's capital, with almost 50% due to the high crime rate of Germany's largest city). It can also be derived from those statistics that the expenditure for criminal aid legal has grown slightly faster in the past few years than legal aid for non-criminal proceedings.

chart: ratio expenditure for Civil Legal Aid / Criminal Legal Aid 1996 – 2000 for selected federal states

I a type		1996	1997	1998	1999	2000
BER 3 387	civil criminal				21 461 12 503	21 899 12 798
B-W 10 476	civil criminal	61 300 13 138	64 900	66 400 ...	65 500 ...	62 840 16 377
R-P 4 031	civil criminal	25 700 6 700	29 200 7 700	29 000 5 700	30 300 5 500	31 800 6 200
SACHS 4 460	civil criminal	19 383 5 943	23 187 7 001	28 324 6 971	29 118 7 288	29 755 8 468

With an assumed ratio of 20:100 between criminal and non-criminal legal aid for court proceedings, it is reasonable to assume that the expenditure for criminal legal aid was approximately 125 million DEM in 2000.

### **c. Legal Aid For Advice And Representation**

Legal aid for advice and representation (*Beratungshilfe*) has grown much faster than legal aid for court proceedings recently, but still remains a rather small portion of the total expenditure. The net expenditure in 1999 was somewhere near 48 million DEM<sup>79</sup>. It has grown over the years from 12.6 million DEM in 1985 to 20.9 million DEM in 1990. 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

<sup>79</sup> No data available for Hamburg, the other 15 states spent 46.705 DEM.

between 1990 and 1994 to 20.5 million DEM. Since then the expenditure has, as one state justice department commented, “gone through the ceiling”, growing within five years from 20.5 million DEM in 1994 to 46 million DEM<sup>80</sup> in 1999 (+125%).

Bremen and Hamburg, Germany’s smallest and third smallest states, do operate a system of Citizen Advice Bureaux instead of providing funds for payment of lawyers in private practice for giving advice. Therefore, their expenditure is not directly comparable to the other states.

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<sup>80</sup> Unlike before, excluding Bremen and Hamburg for the ease of comparison as those two states were not included in the 1994 statistics.

chart: Expenditure for Legal Aid For Advice And Representation („Beratungshilfe“) 1981 – 1999

	1981	1985	1990	1995	1996	1997	1998	1999	growth 1990- 1995	growth 1995- 1999	cost per cap. 1999	cost per consult 1999
B-W 10 476		1 320	1 996	3 096	3 784	4 596	4 892	5 358	+ 55 %	+ 73%	0,51 DEM	129 DEM
BAY 12 155	265	1 044	1 844	3 006	3 615	4 208	4 706	4 879	+ 63 %	+ 62%	0,40 DEM	122 DEM
BER 3 387	63	501	1 175	1 066	1 056	1 317	1 548	2 173		+ 104%	0,64 DEM	129 DEM
BRA 2 601	./.	./.	n.a.	n.a.	n.a.	n.a.	n.a.	817 <sub>81</sub>			0,31 DEM	n.a.
BRE* 663	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	510	748			1,13* DEM	n.a.*
HAM* 1705												
HES 6 052	175	1 178	2 148	2 114	2 568	n.a.	n.a.	3 353 <sub>82</sub>			0,55 DEM	n.a.
M-V 1 789	./.	./.	n.a.	428	464	635	793	825	n.a.	+ 92,7%	0,46 DEM	91 DEM
NDS 7 899	222	2 395	4041	4 487	5 319	6 213	7 048	7 418	+ 11%	+65,3%	0,93 DEM	121 DEM
NRW 18 000	594	4 050	6 423	7 548	n.a.	8 300	n.a.	9 500 <sub>83</sub>	+ 17,5%		0,53 DEM	n.a.
RLP 4 031	103	716	1 012	1 265	1 518	1 511	1 699	1 948	+ 25%	+54%	0,48 DEM	124 DEM
SAAR 1 072	50	417	604	620	904	1 080	1 026	1 120	+ 2,6%	+ 80%	1,04 DEM	118 DEM
SACH 4 460	./.	./.	n.a.	1 221	1 448	1 798	2 235	2 711	n.a.	+ 122%	0,60 DEM	96 DEM
S-AH 2 649	./.	./.	n.a.	599	1 030	1 293	1 699	2 057	n.a.	+ 243%	0,77 DEM	96 DEM
S-H 2 777	95	1 027	1 667	2 014	2 337	2 477	2 906	2 716	+ 20,8%	+ 35%	0,97 DEM	129 DEM
THÜ 2 449	./.	./.	n.a.	n.a.	n.a.	n.a.	n.a.	1 082 <sub>84</sub>			0,44 DEM	n.a.

<sup>81</sup> Brandenburg does not have a statistic for expenditure on legal aid. The expenditure is a best guess, derived from the fact that the average consultation cost was approx. 95 DEM in 1999 in the five ex GDR federal states (where a deduction of 10% is made on all statutory fees paid according to the *Bundesrechtsanwaltsgebührenordnung*). Brandenburg issued 8.605 certificates in 1999 and assumed the average cost was 95 DEM, this results in a gross expenditure of 817.000 DEM.

<sup>82</sup> Hessen did not provide data on expenditure. The number is a best guess, derived from the fact that the average consultation cost was approx. 120 DEM in 1999 on a nationwide basis. Hessen issued 27944 certificates in 1999 and with an assumed average cost of 120 DEM, this results in a gross expenditure of 3.353.000 DEM.

<sup>83</sup> The number is an estimated guess. The growth between 1995 and 1997 in almost all states in the western part of Germany was twice as much as in the 1997-1999 period (because the fees according to the scale of lawyers' fees were raised in 1995, resulting in an over-average increase in the following two years). Growth in NRW in the 1995-1997 period was 9,9% and from this a climb rate of 5% was derived for the period 1997-1999. This results in an approximate expenditure of 8.77 mill. DEM. It is also known that in 1999, 89.202 consultations were funded. The average consultation cost 120 DEM in 1999 on a nationwide basis, resulting in an estimated expenditure in NRW for 1999 of 10.77 mill. DEM. Therefore it is fair to assume that the expenditure was somewhere between 8.77 and 10.77 mill. DEM.

<sup>84</sup> Thüringen does not have a statistic for expenditure on legal aid for advice and representation. The expenditure is a best guess, derived from the fact that the average consultation cost was approx. 95 DEM in 1999 in the five ex GDR federal states (where a deduction of 10% is made on all statutory fees paid according to the *Bundesrechtsanwaltsgebührenordnung*). Thüringen issued 11389 certificates in 1999 and assumed the average cost was 95 DEM, this results in a gross expenditure of 1.082.000 DEM.

total	1 627	12 721	20 910	27 462	n.a.	38 000	n.a.	47 000				
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For the „cost per consultation column“ it has to be noted that in the five East German states a 10% deduction from the statutory fees according to the fees of scales (*Bundesrechtsanwaltsgebührenordnung*) is made.

### 3. Summary

Taking the different legal aid schemes altogether, the net expenditure for legal aid in Germany in 2000 amounted to a sum of 805 million DEM. With 104.067 lawyers practising in Germany in that year, the legal aid income per lawyer was 7666 DEM, the legal aid expenditure per capita was 9.80 DEM. However, the expenditure per lawyer has decreased since 1981 (even without taking inflation into consideration), mainly due to the fact that the profession has tripled in the past 20 years with over-average growth of medium-sized and large law firms that traditionally do little or no legal aid work:

*chart: growth of legal aid expenditure and the legal profession*

Year	number of lawyers*	Expenditure on legal aid in mill. DEM	income per lawyer in DEM
1980**	36 077	175	4 850
1985	46 927	480	10 228
1990	56 638	484	8 545
1995	74 291	n.a.	n.a.
2000	104 067	805	7 735

\* Figures taken from the annual statistics of the German Federal Bar (BRAK)

\*\* Expenditure for 1980 relates to the pre-reform legal aid schemes

### **VIII. Legal aid and alternative ways of making legal services available**

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 pave the way to 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 law-

yers and finally, scales of fees which limit the remuneration of the lawyer<sup>85</sup>. 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.

### **1. Legal expenses insurance**

Germany is the largest market for litigation insurance policies world-wide. In 2001, 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, a 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 calculatable: The insurer pays the lawyer's fees according to the scale of fees in the BRAGO (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 200 DEM p.a. The following chart gives an idea about how much premium income the German litigation insurance industry has generated over the past 20 years, how many policies it has issued and how much a policy costs on average:

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<sup>85</sup> For details, see *Kilian*, Determinanten des europäischen Rechtsschutzversicherungsmarktes, [1999] Zeitschrift für Versicherungswissenschaft (ZVersWiss) 1999, pp.23.

chart: Development of the litigation insurance industry in Germany 1980 – 1999<sup>86</sup>

Year	Premium Income in mill. DEM	Expenditure on civil I a in mill. DEM	Policies issued number	cost per policy DEM
1980	1 676	146	-,-	-,-
1985	2 420	400	-,-	-,-
1990	3 358	403	22 271 000	147
1995	4 487	n.a.	26 640 236	162
1999	5 356	680	25 500 000	n.a.

With a net income of the insurers of more than 5.3 billion DEM in 1999, the German population has spent almost 8 times as much money of their own income on litigation insurances than the 16 federal states have spent 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). It remains to be seen if this new product will make significant inroads into the market and consequently will ease the pressure for the federal states to fund family law cases with legal aid in the future. It is conventional wisdom that at the moment roughly 50% of all family law cases are funded by legal aid. With an insurance policy now available for these

<sup>86</sup> The data is taken from the annual reports (GB-BAV) of the Bundesaufsichtsamt für Versicherungswesen (BAV, the federal office serving as a watchdog over the insurance industry) and from the reports on the litigation insurance industry, published between 1987 and 1998 in the journal „Versicherungswirtschaft“ (VW) . The expenditure on legal aid which is included in the chart for the ease of comparison is taken from charts included in the appendix which are based on information provided to the author by the various state departments of justice.



cases, there is a significant cost-saving potential if the risk of financing such cases can be shifted from legal aid funds to insurance policies<sup>87</sup>.

## 2. Speculative funding

When the British Lord Chancellor, *Lord Irvine of Lairg*, complained in 1997 at the annual Law Society Conference in Cardiff that legal aid in Britain had become a “leviathan with a ferocious appetite”, he was determined to appease the money-consuming beast by legalizing speculative funding of legal costs<sup>88</sup>. Speculative fees are indeed the third 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), Germany does prohibit any form of output-based remuneration. Unlike most other jurisdictions, Germany does not distinguish between a contingent fee, a conditional fee and a success fee: BRAO § 49b II declares any contract void under which either remuneration as such or the amount payable to the lawyer depends on the outcome of the matter or is a portion of an awarded claim. Before the amendment of § 49b to the BRAO in 1994, conditional fees were not forbidden by statute but only by case law. The Supreme Civil Court has held since 1915 that conditional fees are contrary to the public interest<sup>89</sup>. In the absence of any statutory prohibition of CFAs until 1994 such contracts were regarded as conflicting with public morals<sup>90</sup>. However, most of the expenditure for legal aid in Germany is for family law and criminal law.

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<sup>87</sup> Although compared to other areas, the attractiveness of an insurance for family law is somewhat more limited because with a lack of a winner and a loser in such cases, the two-way cost-shifting rules do not apply and each party has to bear her own costs. As a result, there is no need to be liable for the other side’s costs.

<sup>88</sup> For an overview of the fiscal aspects of the reform, see *Neil Rickman / Paul Fenn / Alastair Gray*, *The Reform of Legal Aid in England and Wales*, [1999] 20 *Fiscal Studies*, pp.261.

<sup>89</sup> See Reichsgericht, *SeuffArchiv* 69, 471; Reichsgericht RGZ 115, p.141ff.; Reichsgericht RGZ, p.70ff.; Reichsgericht, [1939] *Juristische Wochenschrift*, p.411ff.; Bundesgerichtshof, BGHZ 34, p.64ff.; Bundesgerichtshof BGHZ 39, p.143ff. All these decision tend to quote the argumentation of the first decision mentioned which is only 17 lines long and lacks of any thorough analysis of the history of the prohibition.

<sup>90</sup> The Supreme Court has never given a satisfying explanation for this. The first decisions on CFAs that emerged were by disciplinary courts which held that such agreements were not in accordance with the professional code of ethics. The Supreme Court, without any further ado, then held in 1915 that this also meant that any contract between lawyer and client was void.

For these areas of law speculative fees are forbidden in most countries even if speculative funding is allowed in general. Most tort litigation - for which speculative fees are of great importance in other countries - is covered by litigation insurance policies in Germany. This eases the pressure to lift the ban on speculative fees as, from the government's point of view, such a move would not lead to huge cost-savings for the state legal aid budgets.

### **3. Legal Service Programmes**

Lawyers in Germany enjoy monopoly rights not only for representation in court, but also for all out of court work<sup>91</sup>. 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 guarantee, to a certain extent, the existence of the free profession and the officers of the court the profession provides for the legal system. These often criticized monopoly rights, enshrined in the *Rechtsberatungsgesetz* (RBerG), prevent not only commercial legal advice by non-lawyers, but also voluntary and altruistic legal services provided by non-lawyers. Consequently, neither non-commercial organizations nor fully-trained individuals which are not admitted to the bar nor self-help groups nor legal clinics can provide legal services in Germany. (RBerG Art.1 § 3 Nr.9 contains the only noteworthy exemption clause for state-run consumer advice bureaux which may give legal advice to consumers for matters of consumer law). Even the answering of individual legal questions by the media is not allowed, with the provisions of the RBerG being strictly enforced by the public prosecutor offices and the Bar associations.

### **4. Pro bono - work**

German lawyers, unlike their American colleagues (see M.R. 6.1.), are not expected to provide legal services *pro bono publico*. Even more, the Legal Profession Act (*Bundesrechtsanwaltsordnung* - BRAO) does require the lawyer to charge a minimum fee for her services (BRAO § 49b I) according to the scale of fees in the Lawyers' Fees Act (*Bundesrechtsanwaltsgebührenordnung*) for all work in court proceedings. This makes *pro bono* work more or less impossible as the lawyer may not waive his fees in advance. He can only do so after the lawyer-client relationship has come

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<sup>91</sup> Some minor exceptions exist for incidental legal services

to an end. The only exemption relates to services for family members and for employees for whom work may be provided for free. The rationale of BRAO § 49b I is twofold: Firstly, it intends to prevent cut-throat price competition between the members of the profession at the expense of the quality of work; therefore serving the legal system as a whole. Secondly, in a system of two-way cost-shifting, undercutting of the scale of fees would result in a de facto output-based remuneration as in the event of a victorious litigation, the winning party could demand the statutory lawyer's fees as client/client costs. Undercutting the statutory fees used to be prohibited also for out-of court work, this literally making hourly fees (billing) impossible. Government finally gave in for good a couple of years ago when it became evident that input-based remuneration (billing) had become the standard for larger law firms. If billing results in undercutting the statutory fees of the BRAGO, the prohibition in BRAO § 49 b I does not apply. However, the lawyer must charge a reasonable fee for his services and cannot provide them for just a nominal hourly rate (see BRAGO § 3 V 2).

### **IX. The European Context**

In an European context, the importance of legal aid in Germany can best be understood by looking at the per capita spending for legal aid schemes in different European countries<sup>92</sup>:

*chart: legal aid expenditure in Europe in the year 2000*

country	population (in 1000)	net spending (in 1000 €)	per capita spending
Austria	8 100	24 700	3 €
Belgium	10 200	25 200	2,5 €
Denmark	5 300	34 800	6,6 €
England & Wales	52 800	2 600 000	49 €
Germany	82 200	358 000	4,3 €
Finland	5 200	42 000	8 €
France	59 400	235 000	4 €
Ireland	3 800	37 400	10 €
Liechtenstein	32	1 050	32 €
Lithuania	3 700	897	0,24 €
Luxembourg	400	471	1,2 €
Norway	4 500	75 000	16,8 €

<sup>92</sup> For a comparison of expenditure in England/Wales, the Netherlands and West-Germany in 1989, see *Blankenburg*, op. cit. (fn.6), p.233 (234).

Scotland	5 100	207 000	40 €
Sweden	8 900	19 100	2,1 €

The above figures have to be treated with care. They were collected by the German Federal Bar for a conference organised in March 2001 from sister organisations throughout Europe. It is not known which sources those sister organisations used<sup>93</sup>. As legal aid terminology differs from country to country, it is almost impossible to compare data on a 1:1 basis. Huge amounts of money can also be consumed by indirect funding of state-run advice centres etc. although they will not be understood as legal aid expenditure in all countries. Court fees waived for indigent parties can also be understood as legal aid expenditure but are not necessarily included in the figures as no actual payment is made.

Having these caveats in mind, it can be said that the highest expenditure for legal aid can be found in the common law jurisdiction of England & Wales, Scotland and Ireland and in the Scandinavian welfare states. The difference between Finland and Norway on the one hand and Sweden and Denmark on the other hand reflects on important aspect: Like Germany, Sweden and Denmark have a developed litigation insurance market, resulting in less need for public funds. The rather dramatic figures for England & Wales may be explained by the fact that the withdrawal of legal aid from most personal injury cases will only have an effect on the expenditure from 2001 onwards as the necessary conditional fee regulations did not come into effect before 2000. However, with 75% of the expenditure spent on criminal legal aid and legal aid for family cases, the cost-saving potential is not as huge as it may be derived from the above figures.

For a better understanding of the importance of legal aid across the nations, the following chart shows whether or not speculative funding is allowed in the above-mentioned countries<sup>94</sup> and if a monopoly for delivering legal services exists for the legal profession<sup>95</sup>:

<sup>93</sup> The German Federal Bar, for example, simply called me and asked me for an educated guess as they knew that I was researching the subject.

<sup>94</sup> Information taken from *Kilian*, *Der Erfolg als Bedingung der anwaltlichen Vergütung*, Köln 2001, Appendix 1 (upcoming).

<sup>95</sup> See for details *Kilian*, op cit. (fn.85), pp.23-57.

chart: speculative funding and legal aid in Europe

country	speculative funding contingency fees	speculative funding "no win no fee"	monopoly rights court/out of court
Austria	no	yes	
Belgium	no	no	yes / no
Denmark	no	yes	yes / to some extent
England & Wales	no	yes	yes / to some extent
Germany	no	no	yes / yes
Finland	no	yes	no / no
France	no	yes	yes / to some extent
Greece	yes	yes	yes / no
Ireland	no	(yes)	yes / to some extent
Italy	no	yes	yes / no
Liechtenstein	no	yes	yes / no
Lithuania	(yes)	yes	n.a.
Luxembourg	no	yes	yes / to some extent
Norway	(yes)	yes	yes / no
Portugal	no	yes	yes / no
Scotland	no	yes	yes / to some extent
Spain	no	yes	yes / to some extent
Sweden	no	yes	no / no