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### Recommended Citation

Schlesinger, Rudolf B. (1977) "The German Alternative: A Legal Aid System of Equal Access to the Private Attorney," *Cornell International Law Journal*: Vol. 10: Iss. 2, Article 3.  
Available at: <http://scholarship.law.cornell.edu/cilj/vol10/iss2/3>

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# The German Alternative: A Legal Aid System of Equal Access to the Private Attorney

RUDOLF B. SCHLESINGER\*

Mr. Chairman, Ladies and Gentlemen: Having held forth on these premises for twenty-seven years, I am truly gratified that I have been invited back to hold forth again—for fifteen minutes.

I would like to begin on a personal note. I think I was the first to inject comparative aspects into the discussion of legal aid in this country. I did so more than twenty-five years ago, at a time when the discussion was purely academic. Those who were in charge of making policy in this area did not listen. But since then we have travelled a long way, and I think today's meeting proves the point: two of the participants in this comparative discussion are leading policymakers in the area of provision of legal services for the poor in the United States. I submit that that is an encouraging sign.

As my starting point I should like to present a very brief description of the German system. There are two reasons for this choice. First, the German system of legal aid is the one foreign system on which I have more than theoretical knowledge; I know the system in practice. And second, it is the oldest, one of the most successful, and—one might say—the archetype of the so-called *judicare* systems.

Most of the foreign countries which have instituted publicly financed legal aid do have *judicare* systems. Germany started in 1919. From a political standpoint, there is an interesting parallel here between Germany and Great Britain. The latter country adopted its *judicare* system through a Labour Government soon after World War II. In Germany, the *judicare* system was established by a Social-Democrat Government in 1919, immediately following World War I.

The essence of the German system is simple.<sup>1</sup> An indigent person who contemplates or faces litigation can go, in person, to the clerk of the

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1. For details and further references, see R. SCHLESINGER, *COMPARATIVE LAW: CASES - TEXT - MATERIALS* 276-80 (3d ed. 1970); Klauser & Riegert, *Legal Assistance in the Federal Republic of Germany*, 20 *BUFF. L. REV.* 583 (1971).

court. As a practical matter, however, he will not go directly to the court, but will contact a lawyer. Either personally or through the lawyer, he will make an application to the court to be permitted to sue or to defend as a poor person. The court examines only two matters. First, the court determines whether the applicant is truly poor—this is done in a summary, very simple fashion. Second, the court will examine, sometimes after giving the opposing party an opportunity to be heard, whether there is some arguable merit in the indigent party's case. If the case of the applicant is not totally hopeless, and if he can show that he is indigent, then his application to sue or defend as a poor person will be granted. This means that he is at least provisionally relieved of the payment of any court costs, and that the court will appoint a lawyer for him. Theoretically, the court does not have to appoint the lawyer who made the application for the poor person; but in practice, that is what is done. In other words, the lawyer who has made the application will be officially appointed as his poor client's lawyer, to be compensated out of public funds.

How much will he be paid? In order to understand that, one has to have some slight familiarity with the German fee system in general.<sup>2</sup> What a lawyer earns in a litigated case in Germany is governed by a statutory fee schedule, determined essentially by the amount involved in the litigation. This is so in all cases. Where the lawyer is appointed by the court to serve as an indigent litigant's attorney, he will likewise be paid under a statutory fee tariff; but this is a slightly different, more moderate tariff. It is, you might say, a "pauper's tariff." But even this "pauper's tariff," although lower than the ordinary fee, is still sufficiently substantial so that the great majority of lawyers in Germany are not only willing but quite anxious to take the cases of indigent litigants. It is relatively rare that a German lawyer will refuse to put his name on the list of those who accept such appointments.

There are, of course, obvious weaknesses to the system I have described. The one weakness that has been much commented on is that the whole scheme applies only to litigated matters. A client who simply wants a document drawn, or who seeks advice in a non-litigated affair, cannot avail himself of the scheme. But while this is a weakness, it is a weakness easily remedied. In the British *judicare* system, this defect was remedied in 1972;<sup>3</sup> and in Germany the situation has been ameliorated—in part on a local level—by action of the bar associations, whose

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2. See R. SCHLESINGER, *supra* note 1, at 280-82.

3. See Pollock, *The English Legal Aid System*, in M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* 343-53 (1975).

members make their services available to indigent persons for drafting documents and giving advice in non-litigated matters.

One must recognize, on the other hand, that the system has elements of strength. One such element is that whatever the system offers to the indigent is a matter of right, and indeed, as the West German Constitutional Court has held, of constitutional right. Another advantage of the German-type *judicare* system is that it truly puts the indigent litigant on a par, on a footing of genuine equality, with the wealthy litigant. The indigent has substantially the same right to choose his lawyer that the wealthy person has.

Yet another element of strength is the extraordinarily low cost of the German system. According to the best available figures, the cost of this system, although it is utilized by a very large number of indigent litigants, comes to approximately ten or eleven cents per person per year.<sup>4</sup> Contrast that with the figure mentioned by Dean Bamberger, who said that if we wanted to provide legal services for all of our poor, it would cost us \$500 million per year—which, if I figure correctly, is about \$2.50 per capita.

What are the lessons in this for us? Before going into that, I should like to make a general comparative-law observation: Whenever we study a specific legal institution in a foreign country, and observe its shape and its implications, we are apt to gain a widened perspective in looking at our own problems. In the light of such perspective, we may well be able to improve our own system, but usually such improvement cannot be attained by simply imitating the foreign institution. We cannot normally expect to be successful if we take a specific, isolated foreign institution like legal aid out of the foreign context and transplant it into our own system. The biological analogy is obvious. It is a very tricky matter to take an organ out of one person's body and transplant it into the body of another. The organ in the new body either will not work at all, or it may work in ways somewhat different from the ones you had expected. And so it is with legal institutions.

There are several reasons why we could not simply take the German legal aid institution and transplant it in the United States. One is the important role played in the administration of the German scheme by the courts. I doubt very much that our courts, and especially the clerks of our courts, would be prepared to assume this additional burden.

Another reason such a transplantation would be infeasible is the cost difference. I do not think that we could possibly expect a similar *judicare* system here to work as inexpensively as it does in Germany. In order to appreciate and understand this cost difference, one has to keep

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4. See Klauser & Riegert, *supra* note 1, at 598-99.

several points in mind. First, a statutory fee system makes it relatively easy to fix the "pauper's tariff" on a lower level than the regular tariff, and yet to prevent it from becoming absurdly low and hence unattractive.

Second, across the board (except in cases involving very large amounts) the fees of German lawyers tend to be more moderate than ours, even though there is not much difference between the two countries with respect to the general cost of living. Why are the services of German lawyers cheaper? One of the reasons is that in a codified legal system it usually requires much less time-consuming research to find the answer to a question of law. The fact that German lawyers, as compared to their American brethren, spend less time on research, enables them to be somewhat more moderate in their demands for fees. Moreover, in most civil law countries, and especially in Germany, the whole system of civil procedure is shaped in such a way that many of the tasks which in our system must be performed by attorneys, are there performed by the court.<sup>5</sup> From the attorney's standpoint, this too makes it less time-consuming to handle a case. Thus, a German lawyer can handle a much larger number of cases than his American counterpart, reducing the proportion of overhead expenses to be borne by each individual client. This makes it possible for German lawyers to accept a "pauper's tariff" which by our standards is quite modest.

Third, in Germany, as in all continental countries (and in England), the victorious party routinely recovers attorneys' fees from his vanquished opponent. This loser-pays-all system significantly increases the willingness of attorneys to represent indigent clients. It injects an attractive contingent element into their compensation, in spite of the fact that a contingent fee *agreement* is illegal in Germany. A German attorney who takes an indigent client's case can be sure that he will, at a minimum, get the fee provided by the "pauper's tariff;" but if he wins, as normally he will expect to do, he will recover his fee from the defeated opponent in the amount of the regular statutory fee rather than the "pauper's tariff." This expectation of recovering a full-size fee from the vanquished opponent is, of course, one of the main reasons why German lawyers are willing, and sometimes indeed anxious, to serve as participants in a judicare system which limits payments from public funds to the modest sums available under the "pauper's tariff."

It follows that many features of the German judicare scheme could not be duplicated here without some fairly radical changes in our legal system. To try to transplant the German judicare institution into our legal system, without making the necessary corresponding adjustments,

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5. See R. SCHLESINGER, *supra* note 1, at 304-28, 367.

would be simplistic. Nevertheless, I think a comparative study of the German scheme and of other foreign legal aid schemes contributes a great deal by giving us a broadened perspective in dealing with our own problems in this area. Such a comparative study makes us aware of the fact that there are some countries where, at least in litigated matters, indigent parties truly stand on an equal footing with wealthy litigants. They have the same right to choose any lawyer they wish, and lawyers are substantially as willing to serve an indigent client as they are to serve the rich. That is true equality. And without such true equality no system of legal aid for the poor will—in the long run—prove acceptable in a democratic society.

Salaried staff attorneys working in a legal aid organization may be able and sometimes highly motivated professionals. In certain areas of specialization they may occasionally be superior to the average private practitioner. But so long as the indigent client feels that he is limited in his selection to a "poor man's lawyer," and that the doors of the offices of all other lawyers are closed to him, you cannot expect him to feel that he is on a footing of equality.

In Germany, indigent litigants do feel that there is such equality, and in that sense the German system has been distinctly successful. Speaking in political terms, it appears clear that any politician in present-day West Germany who would propose abolition or substantial weakening of their existing legal aid scheme would gravely endanger his political future.

Observers of the German scene have noted that the system of legal aid prevailing in that country is viewed with approval, not only by the public in general, but also by those whom the system directly affects, i.e., lawyers and their indigent clients. In this connection, it is interesting to note that in a study made in Wisconsin the researchers also found a higher degree of satisfaction expressed by clients who had used the *judicare* system than by those who had to deal with salaried staff attorneys.<sup>6</sup> It is true that—as is so often the case with quantitative studies—the statistical methods used in this Wisconsin study are controversial.<sup>7</sup> But I submit that, regardless of any statistical quibbles, one thing is abundantly clear: the indigent litigant's sense of justice, and indeed anybody's sense of justice, cannot be satisfied unless the indigent party enjoys the same freedom of choice in selecting his attorney as his wealthy opponent.

This does not mean that the salaried-attorney system, which Dean

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6. See Brakel, *Free Legal Services for the Poor — Staffed Offices Versus Judicare: The Client's Evaluation*, 1973 *Wis. L. Rev.* 532.

7. See M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., *supra* note 3, at 167-68.

Bamberger has so eloquently advocated, should be abolished. It is not the point of my remarks to argue against that system. In certain communal circumstances, especially in the so-called ghettos of our big cities, it is likely that the neighborhood clinic and other forms of the salaried-attorney system will continue to prove preferable. But in other communal settings, especially in smaller towns where there are no racial or cultural barriers separating an indigent client from the average private practitioner, the freedom-of-choice argument supporting the judicare idea is apt to outweigh all the arguments made in favor of the staff attorney. My conclusion, therefore, is that the two systems can and should coexist.

Two forms of such coexistence are worth considering. One possibility would be to let a responsible agency, such as the Legal Services Corporation, decide which communities should be served by salaried staff attorneys, and which communities are more suitable for a judicare system.

The other possibility, and the one which I frankly advocate, would be to *let the client decide* whether he prefers a neighborhood clinic or a private lawyer chosen by himself. That such freedom of choice for the poor—choice not only among individual lawyers, but between the two systems of free legal services—is a realistic possibility, has recently been shown in Sweden. Traditionally, the Swedish legal aid system has been a judicare system, not basically different from the German system. In 1973 the Swedes revised the system.<sup>8</sup> They preserved, and indeed strengthened, the old judicare scheme. But as part of the 1973 revision they added a new feature: in addition to a galaxy of private lawyers, every county now has a neighborhood legal clinic staffed by salaried attorneys. And the clever Swedes decided to let the private Bar and the new neighborhood legal clinic compete with each other. Let the client decide! On the part of certain types of clients, and in certain types of cases, there may be a preference for the office staffed by salaried attorneys. Other clients, involved perhaps in other types of disputes, may choose a private attorney under the judicare system. And with commendable toughness the Swedish legislature provided that unless a neighborhood clinic can attract sufficient business to pay its attorneys' salaries and its other expenses from judicare fees earned, it will (after an initial period of state subvention) wither on the vine.<sup>9</sup>

Of all the possible topics of comparative studies in this area of law, the most promising at the present time would be a close look at the Swedish system as revised in 1973. On its face, it seems to meet all the objectives and requirements stressed by Dean Bamberger; and at the

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8. See Muther, *The Reform of Legal Aid in Sweden*, 9 INT'L LAWYER 475 (1975).

9. *Id.*

same time it offers the advantage which I have emphasized, i.e., freedom of choice for the indigent client. A system which seemingly combines so many advantages certainly deserves examination. And, as the new Swedish system now has been in operation for about three years, it should be possible, by on-the-spot study, to profit from the practical experience which the Swedes have gained while working under that system. Somebody ought to be sent there for an intensive six-month field study. For which, Mr. Chairman, I herewith offer my services.

Seriously speaking, I submit that a study of recent Swedish experiences is apt to teach us a great deal. In this country, as today's discussion shows, the great debate between the advocates of staff-attorney clinics and the promoters of judicare schemes poses the most fundamental issue with respect to the delivery of legal services to the disadvantaged. Nothing could be more relevant to that great debate than the experience of a country where the two rival delivery systems have been permitted to coexist and to compete with each other.

Perhaps you will consider me too ardent a promoter of Comparative Law, because as the final conclusion of my comparative discussion I have proposed yet another study. But I am not ashamed of that. The only people who ever stop trying to learn from the experience of others are those who think that they have attained perfection. And in their circle, surely, we do not wish to be included.