

Dipl.-Rpfl. Thomas K a p p l,
President of the ASSOCIATION OF RECHTSPFLEGER
OF THE FEDERAL JUSTICE
and Senior Court Officer at the Federal Patent Court,
Munich, Germany

- I. The development of the profession
- II. Qualification to perform Rechtspfleger's position
- III. Selection of candidates for the Rechtspfleger's position
- IV. Way of appointment and dismissal of a Rechtspfleger
- V. The position of Rechtspfleger
- VI. The extent of the activity of Rechtspfleger in the different judicial agendas
- VII. The relationship between the Rechtspfleger and judges (highest career)
- VIII. The relationship between the Rechtspfleger and court secretaries
(registrars = middle career)
- IX. Further education of Rechtspfleger (In-service Training)
- X. Membership of Rechtspfleger in professional associations
- XI. European Rechtspfleger

I. The development of the profession

Rechtspfleger is an expression of a legal profession in Germany which cannot be translated into another language. For that reason I am going to use the expression Rechtspfleger in my report. The profession of Rechtspfleger can be described as follows:

*Senior court official, competent in certain judicial
decisions and jurisdiction, especially matters
of non-contentious jurisdiction.*

The job description of the Rechtspfleger, as we find it today in the administration of justice in Germany, is the result of a development which started in the beginning of the last century.

In 1877 many activities of the jurisdiction over non-contentious matters were transferred to judges, like:

- matters relating to guardian and ward;
- matters relating to probate;
- registration of land titles;
- commercial registration;
- registration of co-operatives;
- registration of associations;
- registration of ships;
- registration of aircrafts;
- authentications.

The transfer caused an overstrain on the judges. The judges could no longer perform matters in civil and criminal proceedings carefully. They had to be discharged of matters of non-contentious jurisdiction.

Since 1909 the activities of judges have been transferred to the Rechtspfleger, first by administrative orders later by the law of Rechtspfleger of 1957, 1969 and 1970.

The Rechtspfleger now carries out these tasks independently and only bound by law, (§ 9 Law of Rechtspfleger).

II. Qualification to perform Rechtspfleger's position

To become a Rechtspfleger one have to study at the university for applied science for three years which is laid down by § 2 Law of Rechtspfleger. This institution is a professional school where students do their law studies. During this education the students are appointed for temporary civil servants. They are not employees and do not get a contract of employment. They already get a salary as subsistence allowance of 860 Euro per month. The education is divided into a theoretical and practical part. The theoretical studies take 24 months and the practical training takes 12 months at the courts.

The theoretical studies are divided into two parts; each takes 12 months.

Lessons of the first part:

Subjects	Lessons
Civil Code - law of contract	79
Law of obligations	77
Property law over movable	27
Property law over immovable	77
Flat property and apartment ownership	16
Hereditary building right	10
Covering operation and hedge transaction	38
Family law	49
Law of guardianship	76
Law of succession	115
Code of the proceeding of voluntary jurisdiction	21
Law of Rechtspfleger	12
Land Registration Code	73
Code of Civil Proceeding	60
Law of court fees	40
Federal Code of Lawyer's Fees	25
Computer lessons	120
Study groups	156
Exams	80
Discussion about the exams	12
Computer test	1
Total	<hr/> 1155

Lessons of the second part:

Subjects	Lessons
Public law, constitutional law, administrative law	70
Law of obligations	37
Covering operation, hedge transaction	21
Code of Civil Proceeding	12
Commercial law, corporation and partnership law	68
Registration law	41
Negotiable instruments law	22
Execution law	99
Law on compulsory sale of real property, aircraft and ships	84
Insolvency law	86
Criminal law	21
Code of criminal proceeding	38
Law of execution of criminal sentences	34
Law of court fees	40
International private law, European Community law	31
Flat property and apartment ownership	11
Study groups	216
Exams	80
Discussions about the exams	12
Total	<hr/> 1023

To study at these professional schools of higher education, which is an university for applied science, it is necessary to pass the final examination at secondary school (Abitur, Matura, baccalauréat). In Germany there are eight universities for applied science for Rechtspfleger:

Berlin:	for Berlin and Brandenburg
Hildesheim:	for Niedersachsen, Bremen, Hamburg, Schleswig-Holstein and Sachsen-Anhalt
Bad-Münstereifel:	for Nordrhein-Westfalen
Rothenburg:	for Hessen and Thüringen

Schwetzingen:	for Baden-Württemberg, Rheinland-Pfalz and Saarland,
Starnberg:	for Bayern
Meißen:	for Sachsen
Güstrow:	for Mecklenburg-Vorpommern

III. Selection of candidates for the Rechtspfleger's position

Candidates have to apply to the Ministry of Justice of the Federal State or to the Higher Regional Court (as in Bavaria). The Federal States are competent in the course of study for Rechtspfleger. The Federal Ministry of Justice in Berlin is only competent in the legislation, also for the Law of Rechtspfleger. The Ministries of Justice of the Federal States enact the regulations for the course of study for Rechtspfleger at the professional schools of higher education.

Candidates have to submit the certificate of the school leaving examination at grammar school needed for entry to higher education (Abitur-certificate). They also have to pass an entrance examination which is held by the Ministry of Justice of the Federal State or by the Higher Regional Court (Oberlandesgericht). In Bavaria the entrance examination is held by a special institution, called State Examination Office. The entrance examination is held for all candidates who want to become an official in any field, like justice or department with responsibility for fiscal matters or the administration of the State etc. On the basis of the result the Ministry of Justice will choose the applicants and appoint them as a temporary civil-servant to study at the professional school for higher education. Each Federal State will appoint only as many candidates as Rechtspfleger will be needed at the end of the course of study.

The entrance examination includes a written and a oral part and contains questions on different subjects like general knowledge, historical knowledge, the German language and maths to check the capability of logical thinking.

IV. Way of appointment and dismissal of a Rechtspfleger

After passing the examination successfully the students get the academic degree "Diplom-Rechtspfleger" and they have now the authority to perform all duties of Rechtspfleger which are laid down by the Law of Rechtspfleger. They will be appointed as civil servants (official) on probation. The probation lasts for two and a half years. At the age of 27 the civil servant on probation will be appointed to an official "for life". If someone

is appointed to an official "for life", he usually cannot be dismissed. An official "for life" can only be dismissed,

- a) if he refuses to take the official oath, or
- b) if he is a member of Parliament at the time of his appointment, the position is incompatible with the membership of Parliament and he does not resign his seat after a period which was set by the Ministry of Justice, or
- c) if he moves into a foreign country without any permission of the Ministry of Justice, or
- f) if he is not a citizen of Germany or of a memberstate of the European Union, or
- g) if he is appointed by another employer, or
- h) if he wants to be dismissed.

He also can be dismissed because of a serious disciplinary penalty.

V. The position of Rechtspfleger

1. As a civil servant (official)

During the practise of his profession the Rechtspfleger is a civil servant, an official of the higher career. In Germany there are four careers which are

- lower career (constable of court),
- middle career (registrar, competent in keeping the files and the registration and making the records of the civil and criminal proceedings),
- higher career (Rechtspfleger and administrative official),
- highest career (judge and administrative official).

An official can refer to all rights laid down by the Federal Law of Officers. These rights are for instance:

- The social security getting from the employer (State), like support for the costs for medical treatment of himself and of his family, maternity leave, vacation for upbringing children without being dismissed and losing the position of an official "for life", part-time work, job-sharing;
- Promotion; he begins his career as a Justizinspektor and can be promoted to Justizoberinspektor, Justizamtmann, Justizamtsrat and Justizoberamtsrat;
- Salary; the amount of the salary depends on the step which the Rechtspfleger has reached. A Rechtspfleger, not married, earns at the beginning of his career a gross income of 2100 Euro per month, at the end of his career a gross

income of 4100 Euro;

- Using the name of his position like Justizinspektor, Justizoberinspektor, Justizamtmann, Justizamtsrat, Justizoberamtsrat. He uses the name of his position only as an administrative official. As a Rechtspfleger, if he will perform tasks of jurisdiction as an independent institution of jurisdiction, he uses the name of his function, which is "Rechtspfleger" as it is laid down by the Law of Rechtspfleger.
- Vacations; the length of the vacations depends on the age of the official,
 - up to the age of 29: 26 days, Saturday and Sunday not included,
 - from the age of 30 to 39: 29 days,
 - from the age of 40: 30 days.
 Additional he may get special vacations for wedding, birth of a child, death of a child or spouse, participation on meetings of the professional association, if he is a functionary.
- inspection of the personal file;
- getting references. The references are important for promotion.

The officials have also to carry out their duties which are:

- Loyalty to the political system,
- loyalty to their employer (State),
- duty to perform all tasks in the best manner,
- duty to carry out the instructions of the superior - that does not count for performing tasks of jurisdiction,
- duty of impeccable character and behaviour
- duty of living nearby the job.

2. As a Rechtspfleger (independent institution of jurisdiction)

The activities of the Rechtspfleger are regulated by the law of Rechtspfleger. These tasks must be handled only by a Rechtspfleger. Therefore every court of first instance, the Labour Court and even the Federal Patent Court must have a property constituted Rechtspfleger. Usually several Rechtspflegers work at every court. At the beginning of each year the competences of the Rechtspflegers have to be regulated by the assignment of business. During the year it is only possible to change the assignment for important reasons. The substitutions of those Rechtspflegers who are not able to handle a certain case must be also regulated. This is the principle of the legal judge.

The decisions of Rechtspflegers cannot be appealed by a petition for administrative review because in this case the Rechtspfleger is not an official who is bound by instructions of an superior. The decisions of the Rechtspfleger can only be contested by an appeal to the next instance, because the Rechtspfleger is an independent institution of jurisdiction and only bound by law (§ 9 Law of Rechtspfleger).

VI. The extent of the activity of Rechtspfleger in the different judicial agendas

1. As a civil servant (administrative official)

About ten per cent of the German Rechtspfleger are working at the administrative authority of the courts and at the Ministries of Justice of the Federal States and at the Federal Ministry of Justice in Berlin. In carrying out these duties the Rechtspfleger are administrative officials and they are bound by instructions of the superior. There are different kinds of functions, for instance:

- head of section at the administrative section of the Higher Regional Courts or at the Ministries of Justice of the Federal States, competent in personal matters like staff recruitment, personnel management or head of budget section; etc;
- court manager, responsible for administrative supervision of the registrars and other staff;
- auditor.

At each regional court there is an auditor. He is the representative of the state treasury. He gives instructions for the taxation of costs and supervises the officials who have to fix the costs of justice.

2. As a Rechtspfleger (independent institution of jurisdiction)

The main tasks of the Rechtspfleger, which are regulated in the law of Rechtspfleger, are:

a) Jurisdiction over non-contentious matters

- matters relating to guardian and ward;
- matters relating to probate;
- registration of land titles;

- commercial registration;
- registration of co-operatives;
- registration of associations;
- registration of ships;
- registration of aircrafts;
- authentications.

b) Civil cases

- summary proceedings on an order to pay debts;
- judicial sale and sequestration of real estate;
- proceedings in bankruptcy and insolvency;
- taxation of costs of the lawyers;
- changing of judgement for support for children;
- judicial enforcement;
- protection from judicial enforcement;

c) Criminal cases

- execution of a sentence;
- suspend the execution of a sentence of pecuniary penalty.

d) Description of the tasks

aa) Local court

- *guardianship court and family court*

The tasks of the Rechtspfleger at the guardianship court are extensive. Judges decide only on divorces and adoptions at the family court. The Rechtspfleger decides on matters of property management of legitimate and non-legitimate children. If the property management is put into danger by the parents, the Rechtspfleger will revoke the parents' power of property management. The Rechtspfleger also decides on matters of parental custody of legitimate and non-legitimate children. If the parents want to make a contract with their children, the Rechtspfleger has to revoke the parental custody because of conflict of interests between the parents and the children. He also has to appoint another person as guardian or special curator. A special curator shall be

appointed to represent persons who are subject to parental care or guardianship in matters in which the parents or general guardian may not act for the child.

The Rechtspfleger decrees nearly all guardianships and curatorships which are necessary for orphans. He selects and appoints guardians and curators. He has to control and to supervise their management and to give advices to them. If guardians or the curators do not manage their tasks well, the Rechtspfleger has to dismiss them. For certain contracts, especially for contracts in respect of real estate, guardians need a permission by the guardianship court which is given by the Rechtspfleger. The Rechtspfleger checks the reports on activities and the rendering of accounts. He also fixes the remuneration for guardians or for curators.

The Rechtspfleger also appoints a curator for persons who are absent and are not able to perform a legal act.

- *Probate court (proceedings on inheritance)*

The Rechtspfleger is competent nearly in all tasks at the probate court. It is only reserved for judges to decide on the issue of the certificate of inheritance in the case of the testate succession. But it is the task of the Rechtspfleger to declare the testate or intestate succession after the death of a person. The heirs must be summoned by Rechtspflegers for opening and reading the will, if one exists. After the death of the testator the probate court is required to open the will in the presence of interested parties and to announce its contents. Any person in possession of a will must deliver it to the probate court immediately upon knowing of the testator's death. If there is no will the Rechtspfleger has to declare the intestate succession. He also has to establish the identity of an heir and to draw up the petition for the issue of the certificate on inheritance in the case of testate and intestate succession. The Rechtspfleger has to decide on the issue of the certificate of inheritance in the case of intestate succession. For the heir the certificate of inheritance is necessary to prove his succession in legal relations. If an heir cannot be found at once a curator of the estate must be appointed by the court. The curatorship of the estate is decreed by the Rechtspfleger. If the estate is in debt the Rechtspfleger will order an administration of the estate. The Rechtspfleger selects the curator or the administrator, checks their management and gives advices to them. In some cases curators or administrators need the permission of the probate court for making a contract. This is issued by the Rechtspfleger.

- Court of land register

The land register is one of the main fields of duties of the Rechtspfleger. The Rechtspfleger decides on the following applications:

- entry into the land registration in the case of acquisition of ownership in real property by purchase, by donation or by succession;
- entry into the land registration of the granting of a permanent dwelling right, of a right of way and other easements;
- entry into the land registration of a mortgage, of a land charge as a security of used credits;
- entry into the land registration of condominiums and of leases.

To acquire real estate in Germany a contract by a notary and the entry into the land registration are necessary. Rechtspflegers have to decide on the entry into the land registration and he has to check whether the contract by a notary has legal effect. The entry in the land registration is done by the court clerks of the middle career.

- Registration court

The commercial register, the registration of co-operatives, of associations, of ships and aircrafts are kept by the registration court.

Sole traders, general commercial partnerships, limited commercial partnerships and closed corporations must be registered in the register. Rechtspflegers decide on the entry. He has to check the contracts by a notary and other requirements for entry into the register. It is only reserved for judges to decide on the first entry of the joint-stock company. Rechtspflegers are competent in all other decisions on the entries.

- Civil court

At the civil court Rechtspflegers are competent in summary proceedings on an order to pay debts. They decide on the issue of the payment order and the writ of execution. The writ of execution is a document justifying the execution like any other judgement for enforcement.

Rechtspflegers are also competent in the judicial call proceeding in the case of loss of a mortgage deed, a savings bank book or other certificates which prove certain rights.

Rechtspflegers have to check whether a party to a lawsuit fulfils the requirements for legal aid. In some cases when legal aid is granted Rechtspflegers have to arrange a judicial settlement.

People with limited means have the possibility of obtaining legal advice and assistance by the court. Rechtspfleger have to decide whether these people will be eligible. They also give them some informations on a point of law, especially concerning the proceedings. They draw up submissions, including lawsuits and petitions.

- Court of jurisdiction over enforcement

At the court of jurisdiction over enforcement Rechtspflegers have to make all decisions. They take in execution all rights, all garnishments and earnings by an attachment order and transfer of garnished claim. They orders the attachment of earnings and wages, the attachment of claims, for instance a mortgage claim, or a claim of a savings bank book, or a claim of an assurance.

An important field of responsibility is the proceeding of forced sale of real estate. Rechtspflegers have to check all claims of the creditors and they have to decide whether a creditor can take part in this proceeding. After hearing an expert they fix the value of the real estate. They manage the proceeding and make all decisions, especially the court order conferring the title to real estate on the purchaser. The purchaser, who makes the highest bid, gets the ownership of the real estate. At the end of this proceeding the Rechtspfleger has to split up the proceeds to the creditors.

During the sequestration and the administration of real estate, the Rechtspfleger has to supervise the administrator, who is appointed by the Rechtspfleger.

The Rechtspfleger also carries out the proceedings in bankruptcy of firms and enterprises. He supervises the administrator in bankruptcy proceedings and checks the administrator's management and work. During the proceeding in bankruptcy of a private person the Rechtspfleger issues an installment plan. He supervises the behaviour of the

debtor, especially whether the debtor is paying the fixed installments to the creditors in time.

- Taxation of costs

The lawyer's fees are sometimes higher than the amount of the dispute. The judgement only fixes who has to pay the costs. The judgement does not fix the amount of the costs of the lawyer. The lawyer has the possibility to make an application for taxation of the costs. The Rechtspfleger orders the payment and the amount of the costs. This order is a document like a judgement justifying the execution.

bb) Regional Court, Higher Regional Court, Federal Supreme Court

At these courts the Rechtspfleger has to perform tasks in the civil proceedings and the proceeding on fixing the costs of the lawyer.

cc) Federal Patent Court

The functions of the Federal Patent Court include the rendering of decisions on appeal against orders of the patent examiners and of the patent division, trademark division, utility model division and industrial design division of the German Patent and Trademark Office. In this proceeding the Rechtspfleger has to check the formalities required for the appeals. He also decides on petitions on inspecting the proceeding files by a person who is not a party.

dd) Criminal court and public prosecutor's office

It is the duty of the public prosecutor to bring a charge of a crime against the defendant, it is the duty of the judge to decide on the penalty of the accused and it is the duty of the Rechtspfleger to open the execution of the sentence. The Rechtspfleger orders the beginning of the execution, the beginning of the imprisonment. He also fixes the end of the execution.

VII. The relationship between the Rechtspfleger and judges (highest career)

The judge can be an institution of jurisdiction or an official. As the institution of jurisdiction he is independent in his decisions and only bound by law, which is laid down in the German Law of Judges. We can find the same regulation for the Rechtspfleger in the Law of Rechtspfleger. For that reason the Rechtspfleger is also an independent institution of jurisdiction like the judge. The judge is not the superior of the Rechtspfleger. The Rechtspfleger is "the second column of the third power (the judicial power)" beside the judge. The Rechtspfleger is the jurist of voluntary jurisdiction and the judge is jurist of civil and criminal jurisdiction.

On the other hand judges can also be officials at the administrative department of the courts. In this case they are bound by instructions of the superiors, for instance by the presidents of the courts. Judges are officials of the highest career.

VIII. The relationship between the Rechtspfleger and court secretaries (registrars = middle career)

The Rechtspfleger belongs to the higher career. He is the supervisor of the court secretaries (registrars = middle career) who are competent in keeping files and registers and making records of the civil and criminal proceedings.

IX. Further education of Rechtspflegers (In-service Training)

After passing the examination students have achieved the qualification to become Rechtspfleger and to perform all tasks of jurisdiction which are laid down by the Law of Rechtspfleger.

Because of many amendments of the law in-service training has become necessary for judges and Rechtspflegers. It is their duty to attend in-service trainings, which are offered by the Ministries of Justice of the Federal States and of the Federal Ministry of Justice. The participation in in-service trainings however is generally voluntary but can be ordered by the superior.

There are many institutions which offer in-service training, for instance the academies of the Federal States and the Federal Academy in Bonn.

Judges and Rechtspflegers have to observe the jurisdiction of the Federal Supreme Court and of the Higher Regional Courts to avoid appeals against their decisions. Therefore judges and Rechtspflegers read professional magazines with the newest sentences.

In-service training is not necessary for promotion.

X. Membership of Rechtspfleger in professional associations

The professional association for Rechtspfleger in Germany is called "Bund Deutscher Rechtspfleger" (Union of German Rechtspfleger). On the basis of the federal system of Germany there are Rechtspflegers, who are officials of the states, and Rechtspflegers, who are federal officials working at the Federal Courts and at the Federal Ministry of Justice. There are 16 states in Germany. In each state a professional association is founded. These associations and the ASSOCIATION OF RECHTSPFLEGER OF THE FEDERAL JUSTICE are members of the Bund Deutscher Rechtspfleger. About 10.000 of 15.000 Rechtspflegers are organised in these associations.

The duties of the association are:

- co-operation in the development of law and in improvement and correction of jurisdiction
- the representation of professional and social interests and the concerns of the German Rechtspfleger;
- co-operation in the European Union of Rechtspfleger (EUR).

XI. European Rechtspfleger

Following the creation of the Rechtspfleger there are two institutions of jurisdiction in Germany, the judge and the Rechtspfleger. Two columns of the third power (judiciary) have been created; judges are competent in civil and criminal jurisdiction and Rechtspflegers are competent in voluntary jurisdiction.

The European Union of Rechtspfleger has created a model for a European Rechtspfleger which has similar duties as the German Rechtspfleger. It was very difficult to create this model because in many European countries voluntary jurisdiction does not exist at the courts.

An institution which is similar to the German Rechtspfleger can be found in Austria, Estonia, Poland, Czech Republic, Slovenia, Bosnia and Herzegovina.