

Estudios de Derecho en Alemania - una historia interminable (o no?) teoría de la resistencia a cambiar

Legal Education in Germany – an ever (never?) ending story of resistance to change

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Resumen

La enseñanza del Derecho en Alemania ha sido una historia de cambio - cambios de menor importancia se han ocurrido más frecuentemente; en los últimos cuarenta años, el lapso de tiempo que he vivido como estudiante de derecho y abogado, cada tres a diez años. Eso significa que ha habido reacciones a las demandas de las presiones de modernización del mercado, o la crítica sin por ello modificar el sistema. Las principales características y la estructura de la educación jurídica siguen siendo los mismos.

En los últimos años la presión por la reforma ha ganado en velocidad.

En lo que sigue voy a explicar por qué ha sido importante para las autoridades legales adherirse a los sistemas tradicionales, cuáles son sus puntos fuertes, y por lo que sólo puede ser cambiado marginalmente.

Palabras clave

Estudios de Derecho, reforma, sistema tradicional.

Abstract

Legal education in Germany has been a story of change – minor changes have occurred frequently; in the past forty years, the time span I have lived through as a law student and lawyer, every three to ten years. That means that there have been reactions to demands for modernisation, market pressures or criticism without however changing the system. The main characteristics and structure of legal education have remained the same.

In the past years the pressure for reform has gained in speed.

In what follows I will explain why it has been important to legal authorities to stick to the traditional system, what its strengths are, and why it may only be marginally changed.

Key words

Legal education; reform; traditional system.

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1. The system of legal education in Germany¹

1.1 The Concept of *Einheitsjurist* (uniform jurist)

For about a hundred and thirty years, academic lawyers in Germany, judges, public prosecutors, notaries, practising lawyers (*Rechtsanwälte*), lawyers in the higher civil service and a good part of company lawyers have gone through the same dual phase legal training, studying law at university first, followed by a practical training organised by the appeal courts, each phase ending in a state examination set up by the state ministries of justice. This is unique in Germany: all other university studies – except for teachers - end with university examinations. After the second state examination the young lawyers are *Volljuristen* (fully-fledged jurists). (Schultz, 1980; Blankenburg, Schultz 1995) In spite of the length of training in the past decades only a minor percentage have contented themselves with the first examination and given up after it.

The second state examination gives the qualification to hold judicial office² and is the prerequisite for the admission to the *profession* of *Rechtsanwalt*³ and as lawyers to the higher civil service⁴. Thus the German system of legal education is and has been strictly judge centered. The standard is set by the German Judiciary Act.

¹ Comp. <http://www.europaeische-juristenausbildung.de/Laender/deutschland.htm>

² §§ 5 ff German Judiciary Act – *Deutsches Richtergesetz* - DRiG

³ § 4 Federal Regulation for Lawyers – *Bundesrechtsanwaltsordnung* - BRAO

⁴ §§ 7 and 9 Federal and State Acts on Civil Servants – *Bundesbeamtengesetz* – BBG and comparable regulations in the *Landesbeamtengesetze* – LBG

The 8 – 10 year long legal education, which is at the same time an intensive process of socialisation, has led to the German construct or concept of *Einheitsjurist* which constituted the backbone not only to the administration of justice but also to the German bureaucracy, and after the second world war to the democratic political system guaranteeing the legalistic culture of the German *Rechtsstaat*. This strong position of lawyers in the state, all areas of political life and also the economy - leading positions wherever tended to be in the hands of lawyers - created the notion of *Juristenmonopol* (lawyers' monopoly). (Dahrendorf; Hartmann)

1.2 Legal education and training today

The contents of legal education are regulated in Acts on Legal Education of the sixteen federal states, the 43 law faculties in German universities orienting their offer of lectures, seminars and courses towards the given prerequisites, but meanwhile also developing special profiles.

The law states that students should study for 4 years (8 semesters). About six months for the first examination have to be added. Varying from federal state to federal state in the examination students have to write six or seven test papers⁵ in 5 hours for each, set at the place of the courts of appeal. In most of them the candidates have to give a solution to a case in a very formal way of arguing called "*Gutachten*" (opinion), a technique which is in the heart of training and teaching at university. When the students have passed the written part they have to sit through a one day oral examination. The examiners are mainly law professors, judges, some public prosecutors and (few) other practitioners. The exam is called *Referendar examen* and the young lawyers who have passed it may call themselves: *Referendar* (*Referendarin* as the female form).

The two year practical training (*Referendarzeit*) is organised by the appeal courts. Till 1992 the young lawyers got the status of a civil servant, since they are employees in the civil service.⁶ The change had been considered necessary due to the EG-regulations on freedom of establishment and related decisions of the European Court of Justice. Non German nationals could not be made civil servants but had to get the possibility to do the practical training which is – as described - not only needed for public functions but also for admission as a lawyer - for which German nationality is no prerequisite. As this change occurred at a time of a rapid rise in the number of *Referendare*, the federal states used the occasion to change the system of subsidy which meant a substantial reduction in the monthly allowance the young lawyers get.

The practical training consists of specified placements in trial courts, a public prosecutor's office, a local government authority, and an *Anwalt's* practice. Till July 2003 only

⁵ Till 2007 in most federal states students had to write a thesis on a case in a time span of four or six weeks and only three, four or five test papers. Due to enhanced plagiarism facilitated by modern media the thesis had lost its predictive value of students' qualification.

⁶ §14 Abs.1 Satz HS 1 *Beamtenrechtsrahmengesetz* – BRRG, most federal states have chosen this way, only in few of them the young lawyers still become civil servants and only the non Germans an extra status.

a minimum of four months in an *Anwalt*'s practice was required. This has risen since to a minimum of 9 months – the maximum being 13 months.⁷

In spite of the endless discussions about a reform of legal education, the training still emphasizes the technical skills needed in the judiciary, in particular the composition of preparatory opinions and judgments. Throughout the 20th century this judge centred system of legal education had been criticized as it did not prepare the other lawyers for their professional tasks, but it was never really changed. Only in recent years has advocacy training, such as the drafting of documents, been reinforced. Examination papers testing the practical qualities of *Anwälte* now form part of the second examination which however mainly demands to write judgments on cases. Examination panels again mainly consist of judges, public prosecutors, and civil servants, whose experience shapes the examination.⁸ Examination requirements are defined broadly in sec. 3-5 of the Federal Statute on Judges (*Deutsches Richtergesetz - DRiG*), and in more detail in the Legal Education Acts of the federal states.

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1.3 Contents and Methods of Legal Education

There are no proper curricula or syllabuses, which means: competence oriented definitions of teaching aims and objectives with a description of the learning process, applied methods and organizational structures. Study and examination orders and study plans restrict themselves mainly to the contents which are taught and the formal requirements stated by the Legal Education Acts.⁹ The “black box” of the teaching and learning process in law has not yet been opened.

At university mass lectures in a lecture hall are still the rule, complemented by so-called colloquia and seminars, as in the old days. Visual aids and other modern techniques of structuring and illustrating knowledge are still rather the exception than the rule. (Schultz 2003 c)

In the centre of legal education at universities stands

- The knowledge of positive law (material and procedural law)
- Its application to cases, which is the testing of whether a case or an element of a case fits a legal rule. This is called “*Subsumtion*” often demanding an interpretation of the rule and its wording with a look to prejudice and the value system as contained in the constitution and developed in the judgments of the Federal Constitutional Court

⁷ *Gesetz zur Reform der Juristenausbildung* v. 11.07.2002, BGBl I, 2592. The implementation of this act varies slightly from federal state to federal state. For Northrhine-Westphalia comp. *Juristenausbildungsgesetz – JAG – NRW* of 11.03.2003, GV.NRW. p. 135, comp. <http://de.wikipedia.org/wiki/Rechtsreferendar>

⁸ In 1984 in Northrhine-Westphalia, only 9 of 235 (predominantly male) examiners in the second state examination were advocates. In 2010 this number had risen to 60 of 323 examiners (including 4 solo-notaries), with 64 of the total (16,4 %) women.

⁹ Comp. e.g. *Studien- und Prüfungsordnung der Rechtswissenschaftlichen Fakultät für den Studiengang Rechtswissenschaft der Universität zu Köln* idF vom 1. April 2006, http://www.uni-koeln.de/jur-fak/www/download/studpro_010406.pdf und *Studienplan (erstellt auf der Grundlage der Studien- und Prüfungsordnung vom 29.09.2005)* http://www.uni-koeln.de/jur-fak/www/download/studpro_290905_studienplan.pdf

(*Bundesverfassungsgericht* in Karlsruhe). This rather pragmatic technique is the German version of a continental legal tradition influenced by Roman law. Legal education is thus producing technicians of law. Legal history, legal philosophy, sociology of law, even a systematic knowledge of methodology very much take a backseat and gender questions are left aside. (Schultz 2006)¹⁰

There is some emphasis on political questions, mainly in teaching constitutional law, and growing importance is given to economic issues.

In university teaching these cases are mainly made up, during the practical training “real” cases are used and also procedural questions have to be solved.¹¹

A double deficit has always been a target for complaints: A gap between university teaching and examination requirements and a theory – practice gap between teaching and the requirements of legal practice. This has led to the German institution of private coaches (*Repetitor*) who prepare students for the first state examination. These tutors offer a systematic, limited programme concentrating on case solving techniques.¹² The best preparation for an examination is writing as many opinions on test cases as possible under examination conditions in so-called *Klausurenkurse*, up to 100 and more. Also *Referendare* attend *Repetitor*-courses or use at least cramming books.

In 2003 coming into effect 2005 an intermediate examination was introduced to give students an early feedback whether they will be successful or not. This was rather a cosmetic adaptation than a real change: As the faculties refused to take an additional workload, the students simply have to present their assignments for the basic courses in the three main subjects: civil, criminal and public law and pass an additional test paper.

1.4 Drop-out and failure

During legal education considerable pressure is exerted on students by rigid marking of tests and examinations. This is part of the so-called “hidden” curriculum (Schütte): It works as a mechanism to keep the candidates on edge, and fills them with a sense of elation once they have survived the ordeal - hence the proverbial arrogance on the part of lawyers. The drop-out rate is almost 50% during university studies. About 10%

¹⁰ Comp. Schultz, Ulrike: A Gender Curriculum for Teaching Law. The online version is in the process of being updated:

http://www.netzwerk-frauenforschung.de/download/teil_i_bestandsaufnahme.pdf

http://www.netzwerk-frauenforschung.de/download/teil_ii_handlungsempfehlungen.pdf

An English version of the Gender Curriculum for Teaching Law is available from the author and will also be put online.

¹¹ In administrative law the procedural questions are always linked to the questions of substantive law. Therefore they have also be dealt with in the cases at university.

¹² In spite of intensive efforts of the law faculties to offer tutorials, more than 90% of students in Northrhine-Westfalia attended courses by Repetitoren or at least used their cramming books and their *Klausurenkurse*. In other federal states about 80%. Comp. [Umfrage in Zusammenarbeit mit den Landesjustizprüfungsämtern zum Besuch eines kommerziellen Repetitoriums zur Examensvorbereitung](http://www.dift.de/), <http://www.dift.de/> Weitere Themen

of the young Referendare do not go on to the practical training¹³, and the failure rate at the second, the qualifying examination is about 15%. The failure rate in the first examination has been fairly stable over the past 20 years, the failure rate in the second has slightly risen. It is interesting to note that the rates went down right after reunification of East and West Germany in 1990 when the new federal states showed a marked demand for lawyers, which however was soon saturated and the failure rates went up again. Women fare less well in the first examination than their male colleagues, a rather stable 3 – 4% more of the women who take the examination fail than of the men, which is interesting to note, as women do better than men at school and in other university examinations; there are no statistically relevant differences in the results of the second examination.¹⁴ It is difficult to explain this effect. The written papers are submitted anonymously. There may be a discriminatory effect due to the inclusion of law professors in the oral part of the first examination who seem to be less rational and reliable as examiners than practitioners.¹⁵ Also more men than women get the higher marks (1, 2 and 3 plus) and this in both examinations.

Table 1: Failure rate in legal state examinations

	First exam.		Second exam.	
	men and women %	women %	men and women %	women %
1985	28,4	32,5	10,9	11,1
1991*	22,1	25,6	9,9	9,7
1995	27,2	29,8	11,0	10,7
2005	27,0	29,3 (m: 24,5)	14,7	14,5
2007	32,3	33,9 (m: 30,4)	18,1	17,7

Data: Federal statistics

Since 2007 the examination system has changed. Now students have to take an examination for the special subject at their university. This accounts for 30% of the overall result. The other part is still the state examination. As the marks given by the university teachers are comparably high and differ enormously¹⁶, the marking in the state part has become very rigid obviously to make up for the “soft” part which in a sense is devaluated by this practice. The marks are also kept separate. If a student fails the state part the highest marks in the special subject will not help.

Considering the failure quota women fare better in the university part but much less good – here the gender gap has deepened - in the state part which finally is relevant

¹³ In the fifties and sixties of the 20th century this number was higher, partly due to very low subsidies but also due to adequate job perspectives. With the growing number and the competition of the fully fledged lawyers on the market, it was recommended to take the second examination and it became almost the rule. <http://www.djft.de/>

¹⁴ Women seem to do slightly better than men.

¹⁵ My experience from offering a seminar for examiners in the second examination is that they are very homogeneous in their marking. This stands in contradiction to the always uttered opinion that examinations are unjust and volatile.

¹⁶ For students the question is whether they choose a subject they are really interested in or maybe the teacher with the high marks.

for the passing of what is now called the First Legal Examination. This marking practice seems to belong to the secret mechanisms which secure stabile results.

	men and women	women	men and women	women
2008	univ. part 5,7 state part 25,8	4,9 (m: 6,4) 29,2 (m: 22,1)	16,7	16,3 (m: 17,2)
2009	univ. part 5,7 state part 29,3	5,4 (m: 6,1) 32,6 (m: 25,5)	16,0	16,3 (m: 15,6)

Examinations clearly serve as a rite de passage, initiation rituals (Schüler-Springorum 2001, Kvale 1972). Final oral examinations have been described as a “conformity test”, i.e. a test to see whether the candidate’s thought processes fit the appropriate pattern of “perceiving, thinking and judging”. (Portele/ Schütte, 1983, 32; Schütte, 1982). As sec. 47 of the Northrhine-Westphalian Legal Training Act (*Juristenausbildungsgesetz*, JAG) states:

(1) The second state examination in law is to verify whether candidates (*Referendarinnen* and *Referendare*) have met the examination objectives (§39) and whether their subject and general knowledge and abilities, their practical skills, and *the overall impression created by their personality* [my italics, US] warrant the award of the qualification admitting them to judicial and to higher general administrative office. It also has to take into account that the qualification for judicial office is a prerequisite for admission to the legal profession or the appointment as notary.¹⁷

1.5 Social effects of legal education

As already mentioned, it takes all in all almost 8 to 10 years to finish legal education. In 2009 the average time of study till the first examination was 10.7 semester (median 11). As a rule, a few months up to two years (varying from federal state to federal state) are then spent waiting for a training place as a *Referendar* for the two years of practical training.

The long time span lawyers spend – and suffer - together can be described as a welding process creating a strong identity as a lawyer, lasting for life. The effects are an effective socialization in tune with the qualities expected from civil servants as well as a strong *esprit de corps*.

Another homogenizing factor is social background: German jurists traditionally come from a middle and upper middle class background with a clear overrepresentation of parents in the civil service.¹⁸

¹⁷ Although the act has been reformed in 2003 this regulation has remained unaltered.

¹⁸ Heldrich/Schmidtchen (1982) 252. This represents the only quantitative research on the social background of law students so far. My own experience from teaching *Referendare* gives me the impression that nothing much has changed.

Access to a legal career is strongly determined by examination grades. A top mark (*Prädikat*, also called *Staatsnote*) opens the door to a career in the judiciary or civil service and is also requested by top law firms, but is achieved by fewer than 15% of candidates. Intriguingly, the *Prädikat* includes the grade “fully satisfactory” which is unique to law studies. In the first examination it is achieved by approx. 12%, “very good” and “good” are awarded to fewer than 3%; approx. 27% get the degree “satisfactory”, and 30% a mere pass, app. 27% fail as already shown. In spite of the lower failure rate in the second examination, the distribution across the good grades is similarly low, approx. 35% get a sufficient or a mere pass. The statistics in the past few years (2001 – 2005) have been remarkably stable.

Exceptions from the *Prädikat* as entrance ticket to the judiciary were made only in times when graduates were in short supply, that is between 1965 and 1975 when the civil service and the judiciary expanded, and at the beginning of the 1990s in the eastern states after German reunification. In the past few years particularly high marks were needed, right now they are going slightly down again, as a reaction to a decreasing number of absolvents and a higher need for replacement as the additional number of judges and prosecutors who were taken into the judiciary in the 70s are retiring.¹⁹

Year	1st state examen	2 nd state examen
1959	3,153	2,308
1970	3,712	2,758
1980	5,750	4,123
1990	8,127	6,853
1996	12,573	10,689
2000	11,893	10,697
2004	9,655	9,639
2009	9,319	9,347

Table 2: Number of successful candidates in the first and second examination

1.6 History shaping the present

The judge-centredness and state orientation of legal education is rooted in history. (Ebert)

Since 1713, the number of lawyers had been limited in Prussia as a reaction to an early oversupply, and the state had exerted entry and quality controls by setting the examination requirements. In 1781, Frederic the Great, King of Prussia, in his Procedural Code, the *Corpus Juris Fridericianum*, abolished the profession of *Anwalt*. Legal representation in court was prohibited and advocates were replaced by civil servants (*Assistenzräte*) charged with assisting the parties while helping the judges investigate the facts. Former advocates were allowed to work as judicial commissioners (*Justizkommissare*), who were also civil servants, offering advice and representation in non-contentious legal matters and doing notarial work. Although two years later, in 1783, the principle of representation in judicial proceedings was restored, the judicial com-

¹⁹ Although the Judiciary tries to cut back the number of judges again.

missioners who then combined advocacy and notarial functions remained civil servants, appointed by the state and admitted to a court. (Bleek, Weißler)

When the German Empire was created in 1871, Prussia held the hegemony, and the Prussian system of legal education and system of justice strongly influenced the new structures and their regulations in the *Kaiserreich*. (Conrad) The new German Empire was given the right to define the standard of entry to the legal professions by organising the qualifying examinations. Therefore the new imperial regulations for lawyers (1879) as well as those for the judiciary (1879) and the civil service (1873) demanded the two state examinations for admission to each of these fields of occupation. (Gneist, Hartstang, Ostler, Lothar Müller, Schultz 2003b) The introduction of this model was an important homogenizing factor also securing mobility in the new federal system.

In the early years of the German Empire of 1871 there were almost twice as many judges as *Anwälte* which justified the judge-centredness of legal education. After thirty years, on the verge of the first world war, both occupational groups had roughly the same numbers. During the years of the Weimar Republic the number of advocates became double the number of judges. (1933) This ratio remained stable until the late 1970s. However, with the rapid growth of the *Anwaltschaft* in the past three decades the gap has increasingly widened. In 1989, the year before German reunification, there were about three times as many *Anwälte* as judges, by 2000 the ratio had become 5 to 1, mounting to 7 to 1 in 2007.

Table 3: Proportion of judges vs *Anwälte* - Judge-centredness of the German legal system

year	number of judges in the ordinary jurisdiction ²⁰	total number of judges in all jurisdictions ²¹	number of <i>Anwälte</i>	Population (in millions)
1883	7,052		4,342	46,0
1909	9,798		9,608	63,7
1933	10,069		19,200	66,0
1939-1945	2 nd world war			
1959 ²²	8,909		18,214	54,9
1980	12,298	16,657 (1981)	36,077	61,6
1990	Reunification		56, 638	
2000	15,464	20,880	104,067	82,2
2005	15,031	20,395	132,569	82,3
2009	14,811	20,101	150,377	82,3

²⁰ The ordinary (=traditional) jurisdiction comprises civil and criminal matters. The other jurisdictions are for labour law, social law, administrative law (all with three instances), constitutional law and tax law.

²¹ For the early 20th centuries no records of the total number of judges could be found. At that time the specialized jurisdictions were of lesser importance than the 'ordinary jurisdiction' and some of them were only created after the 2nd world war.

²² The new Bundesrepublik Deutschland which gave itself the constitution in 1949 was only about half the size of the Drittes Reich (Germany during the Nazi regime).

The number of judges has remained remarkably stable over time. The first increase was during the affluent “golden 1970s”, when the civil service and state functions were expanded, the second one following German reunification, when additional posts had to be created in the five eastern states to bring them up to West German standards. Until well into the 1970s, about a third of each cohort of law graduates found a position in the judiciary or the civil service. Today this has shrunk to less than 10% (4% judiciary, 6% civil service), while three quarters are admitted as *Anwälte*. (von Seltmann 2003, 227).

This development shows that at least since the eighties the number of practising lawyers increasingly outweighed the number of judges, prosecutors and higher civil servants which finally built up a pressure for adaptation of legal education to the needs of these fields.

2. Reforms in the past thirty years (1970 – 2003)

2.1 Reform in the 70s: anti-positivist

The first reforms in the 1970s however had another focus: as a result of the students rebellion in 1968 a thorough rethinking and revision of the state’s institutions got under way. The values of the post-war German society were questioned and a critical discussion of what had happened in the third empire, during the time of the Nazi-regime, started (*Vergangenheitsbewältigung*). There was a call for new law for new lawyers, to overcome the system of “terrible jurists” (*furchtbare Juristen*, Ingo Müller) who had backed up the felonious regime and passed death penalties in special courts (*Sondergerichte*). The new generation of lawyers for the German democracy should learn about the importance of law in society and its impact on the citizen and adopt a critical view of their role and work. (Kaupen; Lautmann; Wassermann) This demanded a widening of focus and an overcoming of a mere teaching of dogmatics. Lectures and seminars on sociology of law were introduced, basic knowledge of psychology was considered desirable, legal history gained a new importance from a critical perspective, and philosophy of law as a reflection on values. Also a discussion of the methods of teaching arose. Project work and learning in groups were the didactic inventions of the hour.

In 1968 jurists criticized in the so-called Loccumer memorandum the **length of legal education**, keeping young lawyers dependant, not allowing them to make a decent living before their 30th birthday. A reform was demanded oriented at the **requirements of legal practice** no longer clinging to the **model of Einheitsjurist** with its orientation to judicial functions. These three elements considered to be the fundamental impediments to improvements of quality had also been put forward in the decades before. Now they became a constantly recurring chorus which went on for more than thirty years leading to gradual changes without however getting to the roots.

A first step of reform experiments with single phase legal education was a start in integrating theory and practice, and systematically including in the syllabus the so-called “secondary “ or “subsidiary” subjects. (Gierig, Haag, Hoffmann-Riem) Single phase meant that after some time at university students would go into practice for a couple

of months, come back to university, return to practice etc. taking just one examination at the end. Bremen even abolished graded examinations, as they were considered to be an unjust element of suppression.

This introduction of reform models went together with an expansion in the system of education, giving equal chances and more possibilities of higher education to everybody. At the same time it was the starting point for a growing production of lawyers and also the expansion of the judiciary in the 70s and early 80s.

New universities with new law faculties were set up, and these in particular (Bremen, Hamburg II, Hannover, Bielefeld, Augsburg, Trier, Konstanz, Bayreuth) followed the new model. They were small and had a much better staff-student ratio than the traditional faculties²³, but of course the cost of education per student was much higher. In the eighties, following a reform of the act on the judiciary in 1983, they were abolished, allegedly on grounds of cost. (Hassemer, Vögeli, Gutjahr-Löser)

2.2 Reform in the 80s: Reaction to growing hungry hordes of lawyers

The 80s were the beginning of the age of marked change. The growth in numbers of lawyers became tangible, leading to an intensified pressure on the legal market. Cries about a flood of lawyers and hungry hordes of lawyers filled the legal press.²⁴ Over the past 150 years there had been regular peaks and troughs in the supply and demand of lawyers. (Kolbeck) Now there seemed to be an unstoppable upwards move. In the years around the millennium the increase was between 6 and 7%. Last year (2011) it has gone down to 1,58%

Table 4: Total increase in number of *Anwälte*²⁵

Year	<i>Anwälte</i>
1950	12,844
1960	18,347
1970	22,882
1980	36,077
1990	56,638
2000	104,067
2010	153,251
2011	155,679

Also the length of legal education was again criticized, there were complaints that German lawyers were at a competitive disadvantage compared to their colleagues in the other European countries who could be admitted to legal practice as an *Anwalt* years before them. (Ranieri)

²³ Which is about 1:100, comp. <http://www.djft.de/86/gesamtstatistik.pdf>

²⁴ Although the situation was not as bad as deplored. (Hommerich 1988)

²⁵ In 2005 a total of 20.832 *Referendare* were doing the practical training, in 2010 16.667 of whom 54,3% were women.

The practical training which had been 3 ½ years had been shortened to two and a half years in the late sixties, in 1971 for a short period even to two years, after a heated discussion about a loss of quality then set at two and a half years – plus the 6 or more months needed for the examination.

2.3 Reform in the 90s: Reaction to competition: internal and external

The reunification of East and West Germany in 1990 mitigated the pressure in the lawyers' market. The socialist East which adopted the Western system had only had a very small number of *Anwälte*. Brilliant chances for young lawyers arose. Many of them – and also older lawyers – went east. There were also lots of new positions in the judiciary and the civil service. For years the sacred *Staatsnote* was disregarded or only played a minor role for employment.

In the nineties some reforms were tried, but again change happened just at the fringes.

With the growing Europeanization and legal interchange within the European Community the complaint about competition disadvantages due to the length of legal education intensified. As a result in 1992 the so-called *Freischuß* (free shot) was introduced, giving the possibility to have a first go at the first examination after 8 semesters without sanction in case of failure, i.e. without the failure being counted towards the regular two attempts. More than one third of students take the opportunity.²⁶

Also in 1992, the practical training was cut again to two years now including the second examination. This did not necessarily reduce the age of the candidates, as for years many had to wait up to a year and longer for their training place. Since the overall time of legal education is app. 9.5 years.

As a consequence, students and *Referendare* concentrated on the knowledge demanded in the examination – black letter law and dogmatics. The “subsidiary” subjects which had gradually lost in importance in the 1980s were disregarded by the students and almost disappeared from university teaching.

As meanwhile most young lawyers – 70 to 80% – applied for admission as *Anwalt*, it could no longer be denied that legal education at least for them could by no means serve its purpose. As a first reaction, the time spent in a lawyer's office during the practical training was prolonged. Long discussions took place about new models of practical training giving the possibility to specialise for different fields of practice. Favourite was a Y shaped model with a year of shared practical training and a year of specialisation for the judiciary on the one hand and the legal profession on the other. But also a W-model was put forward with more branches of specialisation from the beginning of practical training. The *Anwälte* as well as the judiciary clung desperately to the model of unitary jurist *Einheitsjurist* and their common identity.

²⁶ 37.4% in 2009. The average time of study was 10.7 semesters (incl. repeat players) – median 11.

However, awareness that the centrifugal forces driving the legal occupations apart gained in strength. The first universities started to offer practical skills training for young lawyers on a voluntary basis.²⁷

Meanwhile even the state's seemingly sacrosanct control over legal education started to show signs of being eroded. The first inroad happened in 1993 with the admission and establishment of new diploma programmes of study for commercial lawyers (*Wirtschaftsjuristen*) at *Fachhochschulen*, higher education institutions focusing on the applied sciences and ranking below traditional universities in the higher education hierarchy. (Schmidt) This was the first crack in the German model of *Einheitsjurist*. Although commercial law graduates were not regarded as having equal status with proper law graduates from universities, the simple fact that legal training could take place outside traditional law faculties plus the fact that the *Fachhochschule* set the examination appeared unacceptable to many *Anwälte* who tried to do everything to prevent these new ways of qualification.

Reacting to this development traditional law faculties gave candidates the possibility to get a university diploma in law together with their state examination which however remained without any practical importance.²⁸

The points of discussion remained the same:

Should the first state examination be abolished and be partly or fully replaced by a university examination?

Should the practical training be split up for different fields of practice with a specialised qualifying examination at the end arranged by each branch of the profession (so-called *Spartenlösung*)?

2.4 Reform in the new millennium

Discussions did not come to an end. Everybody had agreed that the changing scope of activities in the legal field, the ongoing diversification of legal work, the endlessly growing flood of legislation and relevant judgments, the growing importance of European law and judgments, demanded at least some new adjustment of the structure of legal education.²⁹ The question was, how many changes the system could take before collapsing altogether.

The results of this new round of discussions were laid down in the Act on the Reform of Legal Education³⁰ of July 11th 2002³¹. (Greßmann, Münch)

With regard to university studies one issue was necessarily **specialisation**. Students since have to choose a special subject (*Schwerpunktbereich*). According to the number and specialisation of the chairs, the law faculties offer between 4 and 16 of these subjects. This part is examined at the university and accounts for 30% of the final mark of

²⁷ I set up a program of that kind at my university, and in the mid-nineties when I had to pass it on to the law faculty, I catered for almost 10% of the young lawyers in Germany.

²⁸ <http://www.djft.de/themen/diplomjurist.pdf>

²⁹ Admittedly, even now there is little discussion about curricula and teaching methods.

³⁰ The proper translation is: **lawyers'** education

³¹ BGBl I, 2002, 2592-2594

the first state examination. The setting of compulsory subjects remains under the control of appeal courts. In other words, the state has handed over another segment of its control over legal education, thereby allowing the process of gradual erosion at the fringes to continue.

To demonstrate the intention of departing from the judge-centeredness of legal education, the act explicitly states that the contents of study shall take into account the requirements of judicial **practice** as well as of the practice of government and administration and professional work. That means that teaching and exam papers should not be restricted to writing opinions on cases as in former times but also include e.g. aspects of consultancy.

Another issue was **internationalisation/Europeanization**. To be prepared for the demands of a globalised legal world, students have to give proof of some language skills. The precise nature of the evidence required may vary from university to university and also between the federal states. In practice it need not mean much, although in the past twenty years a growing number of universities have started to offer an additional intensive qualification in law and language, most of them in English and French but also in other languages, even including Japanese.

With a view to **modern** demands of the (legal) labour market, training in **key qualifications** (soft skills) such as negotiation skills, rhetoric, dispute resolution, mediation, interrogation and communication techniques have to be included in the university legal education. There is a wide variety in what the universities offer, up to today the soft skills courses are not an established subject of legal education.

The mentioned intermediate examination after two years shall help to reduce the failure quota in the first examination two years later.

As there seemed to be some uncertainty about the consequences, and as the demanded changes seemed so far reaching, implementation of the reform was delayed by four years, that is from 1st of July 2006 onwards. As shown the faculties have reacted to the act in different ways and some have done their homework only half-heartedly. Also earlier reform efforts in the context of legal education and training have not necessarily been put into practice by university law faculties in the way the legislator had intended.

The practical training in a lawyer's office during the *Referendariat* was extended to nine months for all, and can be up to 13 months. Previously, young lawyers had increasingly been given the option individually to prolong their training in law firms in the elective *stages*³². The act stipulates that lawyers "shall be involved" in the education of the *Referendare* "to an adequate extent". This is rather an appeal to good will than a statutory requirement. For some time however papers have been included in the second examination testing the qualities of *Anwälte*, like the drafting of contracts and written pleadings.

³² It is common to use this French term for the different phases of the *Referendariat* which are partly obligatory and partly elective.

The ink of the signature under the bill was still wet when new discussions about deficits of legal education arose. They went under the catchword: After the reform is before the reform. Which shows that all those who had to take part in the process were somewhat frustrated, maybe exhausted and still without a vision of the solution for the future.

The crucial question remained whether the practical training should be split up for the different fields of practice and a specialized qualifying examination arranged by each branch of the legal profession (the afore-mentioned *Spartenlösung*).

In 2003 the German *Anwalt* Association, DAV, set up a one-year introductory course to practical work, a voluntary specialised qualification to follow on from the second state examination. It built on the experiences of the special skills training offered by my university. It could have become a forerunner of a new type of qualification. Although the different models of practical skills trainings at various universities were well frequented, this course which is meanwhile a master course has so far not proved a success.

3. The Big Bang of Bologna: Revolution instead of reform?

3.1 The transformation of the German system of higher education in the course of the Bologna process

While lawyers continued their endless debates about adjustments and moderate changes, politicians decided in favour of the Bologna process which has proved to require a complete restructuring of the system of higher education in Germany.

What does it mean: the **two cycle system** with the Anglo-American titles of bachelor and master instead of the German Diplom and Magister had to be introduced, with more clearly defined syllabuses, a *numerus clausus* system and more intensive tuition. Students are supposed to complete their studies within a fixed period, although there is as consensus as to whether a bachelor should be done in six or eight semesters and a master in one, one and a half, or two years. Nor is there consensus regarding the question to what extent a bachelor should give a qualification for practice or serve as the basis for further academic study or for specialisation. In tune with the traditional system there is a tendency to see bachelors and masters “consecutively”, that means that masters have to build strictly upon particular bachelors, with less options for choice and openness for special – non traditional, unusual, creative – combinations. The change-over had to be completed by 2008. The cherished German academic “Humboldt ideal” of the intelligent, independent, mature student constructing his/her own curriculum from the variety of courses which are offered is at stake, although this had led to the disproportionately long stay at university and high drop-out quotas. The new, more reliable and predictable system has been despised as *Verschulung*.³³ The big examination after several years of study is replaced by numerous continuous assignments, thereby reducing the impact of the ordeal at the end. In law many felt moved to ask whether this spells the introduction of a ‘lawyer light’.

³³ Guided learning as happens in schools rather than independent study.

The other objectives of the Bologna process are also important but have a less marked impact: easily readable and comparable degrees embedded in the European Credit System – ECTS, promotion of mobility, European cooperation in quality assurance, promotion of the European dimension in curricula and contents.

In due course the German system of professorial appointments is also about to erode. The classical way of qualification was a PhD followed by a habilitation dissertation. This involved a major emphasis on research and an almost total absence of assessment of teaching skills. Appointment to a professorial chair was the result of a “call” (*Ruf*) to another university rather. The average age for a first appointment to a chair was the late thirties/early forties. Now, a tenure track starting from the new position of junior professor has been introduced, but in the appointment procedures researchers/academic teachers with the dual qualification are still preferred. Here too law faculties resist change: They expect their junior professors who have a decent teaching load to do the habilitation parallel, otherwise tenure may be refused. The salary scale has been changed, with new entrants starting from a considerably lower level than before. Intriguingly, and in tune with predictions of gender theory, these changes have gone on hand in hand with the first evidence of promotions of women in the field - which however cannot yet be called a feminization: Up to now only 18.3 % of professors (2009) are women, and this development only happened in the past ten years, in law the number has risen to 16,3 % , but on the most prestigious C 4 chairs there is only a handful of women, and of course women gather at the lower echelons, are more often found within the ranks of junior professors. Women may become the teaching ants of the profession, working in the less prestigious positions, earning less, and having fewer possibilities of enhancing their income through consultancy work. The precise impact of these developments on the system remains to be seen, as women tend to attach less importance to hierarchies and to invest more time and effort in teaching than their male counterparts. (Thornton, Schultz 2003a)

Other parallel changes:

Privatisation: foundation of a few private universities and numerous private “universities of applied sciences” (former polytechnics) mainly in business studies leading to more competition between the institutions, in the field of law the private Gerd Bucerius Law School in Hamburg. This institution is considered to be an elite *Kaderschule* and has attracted high prestige from the very start.

Financial economies: Introduction of **student fees** in most German states and at most universities, ending a tradition of free university studies. It came to light that at least a quarter of German students had been so-called *Parkstudenten* and had registered merely in order to use or rather exploit the social benefits available to university students, such as cheap sickness insurance, cheap tickets for public transport etc. German universities now tend to charge fees of 650 euros per semester, a very modest sum compared to that charged by private institutions. Although Northrhine-Westfalia, the biggest German federal state with as many inhabitants as the Netherlands, has under its new red-green government abolished the study fees again in 2011.

Introduction of **new systems of public governance at universities** leading to profound changes in university administration.

All these developments taken together have had a dramatic impact on Germany's system of higher education.

3.2 In law: Again efforts of resistance to change

For years lawyers in Germany were sure that they had to be exempted from the Bologna process. (Deutscher Juristen-Fakultätentag; Fischer) It seemed inconceivable that their state examinations which gave them a kind of public quality stamp should be abolished. To cite the Bavarian Minister of Justice: "We don't need a reform after the reform, and most certainly not a revolution after the reform. Also in future we want to associate "Bologna" with the city that was the cradle of the science of law (*Rechtswissenschaft*) and not with its devaluation through hasty levelling down (*Gleichmacherei*". (Merk)

The Minister of Justice of Northrhine-Westphalia was more realistic in trying to figure out how the traditional structure and Bologna could be brought together. She suggested a bachelor and a subsequent master of *Rechtspflege* for those who want to go on to a *Referendariat* leading to functions in the judiciary and into practice as an *Anwalt*. Bachelor and Master should take 5 ½ years, the *Referendariat* be abridged to one year in order to stick to the painfully achieved limitation to 6 ½ years of legal education (4 years of study at university plus ½ a year of examination plus 2 years of practical training including the examination).³⁴ In this system it was left open whether there should be a first state examination in addition to the continuing assignments which legal studies in the modern system would demand. This examination after the master might serve as a selection grid and lead to an entrance ticket to the *Referendariat*. But then it has to be taken into account that *Anwälte* had never needed particular marks for their training and admission. Company lawyers and lawyers for public administration would need different masters and at least the former no *Referendariat*. The latter might get a special practical training in government and administration.

The German Lawyers' Association – DAV – was trying to use the Bologna discussion as a vehicle for their particular interest of reducing competition in legal practice:

In 2004, they declared, taking up again the Y-model, that the practical training should be split up into at least 12 months in a paid position in an *Anwalts*-office, and a set of "stages" in other fields. As only those able to get a paid position would be accepted this would mean an entrance control with an unspecified limitation of entrants. So far everybody who passes the first examination has to be given a training place a *Referendar* and is subsidized by the state.

³⁴ Ansprache von Justizministerin Müller-Piepenkötter zur Begrüßung der Teilnehmerinnen und Teilnehmer der konstituierenden Sitzung der Arbeitsgruppe zur Umsetzung des Bologna-Prozesses in der deutschen Juristenausbildung in Berlin, 14.5.2007, http://www.justiz.nrw.de/Presse/reden/14_05_07/index.php

The DAV also declared that they could accept a system without a first state examination³⁵: “We have no fear of university examinations. They would enhance competition between law faculties.” An intended contradiction: More competition here – less there.

And in September 2004 they finally proclaimed that the “*Spartenausbildung*” with a different training for different legal functions was necessary, demanding a two-year intensive training for practice as an *Anwalt* ending in an *Anwaltsexam*.³⁶ At the end of 2006 a draft bill on training of lawyers (*Rechtsanwaltsausbildung*)³⁷ was put forward, with provisions which resemble in its structure the present *Referendarzeit*, and which lays down that the *Anwaltsexamination* should be arranged by the Ministries of Justice as a state examination. So: Where is the change?

In June 2007 the Federal Chamber of *Anwälte* (*Bundesrechtsanwaltskammer*)³⁸, emphasised once again the importance of both state examinations and the model of *Einheitsjurist* and proposed to integrate it into the Bologna criteria with the first state exam after bachelor and master, and the second after the *Referendariat*.³⁹

Two negative trends with a new two-step system were feared:

Inter-state mobility may suffer in the wake of bachelor programmes. Traditionally it had been considered desirable to change university at least once. Due to the system of state examination this was not a problem, but differing bachelor curricula may build hurdles. Internationalisation had always been a feature of legal education. Many – about a quarter of - young lawyers went to do a semester or year of study in the German law programmes in Geneva and Lausanne, or went to other universities in Europe in Erasmus or exchange programmes. And still more *Referendare* took a *stage* abroad. In a new system, other structures facilitating mobility will emerge.

The effects might also be that the feminisation in some fields of law may be stopped. So only about $\frac{3}{4}$ of students go on to a master programme and far fewer women do. Maybe it is only a question of time. The experience of the last decade has been that all in all in the field of law women did not accumulate less academic capital than men.

3.3 Backdoors and loop ways: Bachelors and masters in law

By and by, German law faculties have started to set up bachelor and master programmes leading to university degrees in law, following the universities of applied sciences who had taken the lead. They did and do it **in addition or parallel to the “normal” legal education**. By February 2006, 8 law faculties offered bachelors in law, 4

³⁵ <http://www.anwaltverein.de/03/05/2005/09-05.rtf>

³⁶ <http://www.anwaltverein.de/anwaltausbildung/modell.pdf>

³⁷ <http://www.anwaltverein.de/E-BRAusbiG.pdf>

³⁸ The DAV is a voluntary organization, founded in 1871, uniting 40% of all admitted *Anwälte*, membership to the Chamber of *Anwälte* BRAK, which tends to be more conservative than the liberalist DAV, is compulsory (still, the EU commission is about to change this).

³⁹ Press release 15.06.2007 based on Resolution der 111. BRAK-Hauptversammlung am 20.04.2007 in Speyer, http://www.brak.de/seiten/04_07_19.php

offered a total of 5 subsequent masters.⁴⁰ Meanwhile, their number has increased. Most of them are oriented to commercial law. Some had the purpose to prevent a closing down of law faculties. After reunification in Germany in 1990/91 too many law faculties had been set up in the new federal states. When they were stripped off the right to prepare for the first legal examination, they switched to bachelors and masters, as these only need approval (and finances) from the Ministries of Education and not from the Ministries of Justice.

Already years before the Bologna process, universities had started to offer master programmes purely for purposes of additional qualifications, outside the confines of standard legal education. They were introduced to compete with the law faculties in other countries mainly in the USA, Canada, GB and Australia in the market of further education. These master programmes have to be calculated on a full cost basis and fees have to be charged accordingly. They offer German lawyers the possibility to obtain a master title which at least for practising lawyers is considered as an asset.

Each of the 43 law faculties in the German Association of Law Faculties (*Deutsche Fakultätentag*) has 1 to 4 postgraduate programmes – either masters programmes, or programmes leading to an additional postgraduate qualification.

The “classical” subjects have been: comparative law, international law, criminology. More recent and “modern” are programmes in European law, information/internet law and interdisciplinary programmes (environmental law).

Meanwhile there is a (postmodern) trend to business oriented programmes reacting to presumed needs of the global economy and to (young) lawyers’ hope to get a ticket to making (more) money.

The subjects include:

- LLM
- Comparative Law
- German and European Commercial Law
- European and International Law
- Information/Internet Law
- Intellectual Property Law
- Industrial Property Law
- Tax and Economic Law/Business Law and Taxation
- Mergers and Aquisition
- Real Estate Law
- Insurance Law
- Human Ressources and Labour Law
- Environmental Law and Management
- Crimininology
- Programmes for foreign students/lawyers

⁴⁰ <http://www.djft.de/aktuell/uebersichtbachelor.pdf> No newer data available

4. The end: System winning

So far no change of the “proper” legal education has occurred. In the year 2011 discussions have calmed down. Politicians do no longer demand an adaptation to the Bologna oriented bachelor and master structure. In May 2011 the Conference of the Ministers of Justice has decided to hang on to the existing system, although all other subjects of study have been “bolognarized”.⁴¹ The reform issues of the Act on the Reform of Legal Education of July 11th 2002 have simply been repeated.

To cite from a decision of the *Deutsche Fakultätentag* of 7th and 8th of June 2007⁴²:

“Highest priority in all measures of reform must be given to assure the quality of legal education on an academic basis. An integral component of the academic standard is as a matter of principle to preserve the *Einheitsjurist* and the state examinations for law students, and judges and *Anwälte* respectively. This flows from the state’s responsibility for the administration of justice. [...] The standard period of study must not be prolonged by introducing elements of the Bologna process. Everything else would mean a set-back to German legal education in the European and international competition.

The first state examination remains a requirement for admission to the classical legal occupations. A bachelor alone will not offer sufficient chances in the labour market....”

The *Einheitsjurist* gives, as stated, corporate identity to a whole group of professionals and is a backbone of German society and bureaucracy, an integral part of the German model of *Rechtsstaat*. It depends on the traditional system of legal education. The state examinations are a public stamp of approval assuring (at least in some way) quality. This is why lawyers in Germany cling to it, tooth and nail.

⁴¹ http://www.djft.de/pdf/DJFT_2011_I_End.pdf

⁴² <http://www.djft.de/>

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