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A COMPARISON OF LEGAL EDUCATION IN THE UNITED STATES AND WEST GERMANY

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In recent years we have witnessed evidence of student unrest and dissatisfaction in many universities, both in the United States and in many, if not most, foreign countries. In some instances those enrolled in a course of legal study have been in the front ranks of the students protesting the quality of their education and the methods used in endeavoring to provide a well rounded legal education.

When comparing legal education in West Germany and the United States, one must initially recognize that there is a difference in the philosophy in the two countries as to the study of law and the purpose and objectives of a law school. In general we find in American universities a greater interest in teaching students the practical problems a lawyer encounters in every day practice than in West Germany. The German universities appear to be more concerned with legal philosophy than those in the United States.

The students in both countries are striving for changes in the system under which they are studying. Students in each country appear to be critical of the system under which they are studying and appear to be seeking modification so that their system will more nearly approach the system that is presently enjoyed in the other country. That is to say, the German law student complains that many of the courses offered in the German universities are more theoretical than practical. Many of the law students studying in the United States insist that too much time is spent in teaching "know-how" as distinguished from the reason for the rule of law.

Recognizing that most readers of this article are in a general way familiar with the general concepts applicable to legal educa-

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tion in the United States, the authors of this article will not dwell on the subject of legal education in the United States, but will devote their attention to legal education in West Germany. The reader may make his own determination as to the merits of each system and whether the best of each may be combined to improve the overall quality of legal education in both countries.

Except for the practice of law in the Federal Courts in the United States, the United States Government has not, and possibly may not, concern itself with the qualifications one must possess to practice law in states of the United States.

The federal law of the Federal Republic of Germany determines the requirements one must satisfy in order to qualify as a judge any place in Germany. When one satisfies these requirements, he likewise satisfies the requirement to be a lawyer. It appears that the West German legal education system is directed toward educating persons to be judges and who may incidentally become lawyers, while in the United States our law schools are interested in educating persons to be lawyers who may incidentally become judges.

The laws of the Federal Republic of Germany establish the following minimum requirements which must be satisfied as a condition precedent to be becoming a lawyer.¹ First, one must study law in a university for not less than three and one half years. Second, one must pass the first of two state-administered examinations. Third, the lawyer-to-be must spend at least two and one half years in various courts and offices in Germany receiving practical instruction in the workings of the office and the courts. Fourth, one must then satisfactorily complete the second state-administered examination. Each of the German states is authorized to prescribe additional requirements.

By providing certain minimum national requirements with respect to admission to the bar, the Federal Republic of Germany has assured a rather uniform educational standard for members of the legal profession. When one is authorized to practice law in Germany, he is attached in fact to a court, and is not permitted to practice law in civil cases in courts of another German state. However, if one should relocate to another state in the Federal Republic of Germany, he need not be re-examined, but becomes attached to the

¹ § 5 Deutsches Richtergesetz of the 8th of September 1961 (BGBl I p. 1665) and of the 18th of August 1965 (BGBl I p.89).

court in the state to which he moves. While the state-administered examinations are administered by each of the German states, they are, in effect, effective for all states in Germany.

It is clear that there are two distinct steps in educating a German lawyer. The first step is the formal education in one or more German universities and the second step is the period of practical instruction between the first and second state examination. The latter is in the nature of on the job training where the lawyer-to-be is afforded the opportunity to observe the day to day operations of the office or court. In providing the two steps in the legal education process, one studying law is afforded the opportunity to learn under the legal thinkers and also under the tutorage of those who must resolve the day to day legal problems. The German lawyer has been exposed to both the theoretical and practical approach to the practice of the law.

Legal Education in the German University

Colleges, apart from a university as we have them in the United States, are not found in the German educational system. Institutions of higher education in Germany are called universities. To qualify for admission to a German university a student must present to the university a certificate showing that he has successfully completed the public school system. This normally requires not less than thirteen years. When one enrolls in a German university to study law he does so without having had any prior education other than the public school education. His first exposure to higher education is in the law school. As the policy of the German government is to make available to every person who has finished the public school system an opportunity to attend one of the twenty-odd German universities, the university may not look behind his certificate from the public system to determine his aptitude or qualifications.

There is normally no required curriculum in the German university for those studying law. If a student wishes, he may take a particular course of law in any semester. For example, he may enroll in a course in criminal law in any semester that he is at the university. The faculty of law often makes recommendations as to the course of study and the order in which courses should be taken, but the ultimate decision rests entirely with the student. This is a part of the student's academic freedom.

Each student in a German law school keeps a study book in which he records the courses in which he in each semester has enrolled. The fact that he has enrolled in a course in no way means that he has actually attended the lectures offered in the courses. The study book is important to the student when he applies for permission to take the first of two state examinations to demonstrate that he has at least been permitted to attend lectures in the subjects listed in his study book and has been enrolled for the study of law for three and one half years.

Method of presentation. . . .

Special lectures are offered for the beginning law students during the first semester of their law study to acquaint them with the various areas of the law. The students attending these lectures on Introduction to the Law are divided into small groups, of perhaps fifteen to twenty persons, to meet with one of the professor's assistants to discuss and clarify matters presented in the professor's lectures.

Except for the aforementioned discussions with assistants, the most significant and important part of the legal education in the German university is lectures by the professor, since the student has no opportunity to participate or engage in discussion with the professor. The lectures by the professors are in great depth with relation to the subject matter of the discussion. As in the United States, the professor uses many illustrations. In a few German universities, advanced students may be divided into discussion groups led by one of the professor's assistants, to explore and discuss the matters considered in the professor's lectures.

A unique feature of the examination of German legal students is through the use of "exercises." As will be subsequently discussed in more detail, a student must earn seven certificates in his legal studies in order to qualify for admission to the first of the state examinations.² For a student to earn a certificate in a subject, he must have successfully completed an exercise which is in two parts. The exercise consists of a hypothetical case, much like we find on a typical law school examination in the United States. The student need not, and usually does not, do his exercise in the semester in which he was enrolled in the course, but completes his exercise at

² For instance: § 2 Juristenausbildungsordnung of North-Rhine-Westfalia (JAO) of the 24th of February 1966 (GV NW p.81/SGV NW 315).

some subsequent time as determined by his own desires. The first part of the student's exercise is unsupervised. The student does the exercise wherever he wishes, at his pleasure and convenience, within a period of two or three weeks as fixed by the professor giving the exercise, who may or may not have been the professor whose lectures the student attended. The second part of the exercise is under supervision.

Because of the nature, style and difficulty of the state examinations, the various law schools normally offer a course to students who are about to complete their university career in how to write their state examination and to repeat important matters considered in prior lectures. Such courses are designed to aid the student with his state examination.

In addition to the formal lectures and exercises mentioned previously, the universities offer seminars for students in specific areas of the law. Admission to the seminars, which are limited to about twenty students, is gained by first demonstrating to the professor the quality of the applicant's prior work as evidenced by the grades received on certificates which the applicant has earned. Some students who may have passed their first state examination will enroll in a seminar to better prepare themselves for the writing of a dissertation for the degree of Doctor of Laws. These seminars are conducted on a very high level. The student in addition to participating in the seminars is required to write a paper of some length on the subject of the seminar.

After the student has completed one semester of legal study, he must devote four to six weeks, as determined by the state, in attending proceedings in courts to acquaint himself with the practical problems of litigation and another several weeks in a government office.³ Here the students operate in groups of about fifteen and are aided by judges and lawyers.

It should be noted at that point that one does not receive a degree from a German law school by simply completing a prescribed course of study; it is only the exceptional student who is subsequently permitted to write a dissertation, which, if satisfactory, results in his being awarded a doctor's degree. Otherwise, one does not receive a degree from the university upon the completion of his university study.

³ For instance § 3 JAO.

First State Examination. . . .

The state examination is administered in each of the states of the Federal Republic by the Justizprüfungsamt of the Oberlandesgericht (The highest court in the State). The commission which administers the examination normally consists of four persons. Of this number, a minimum of two professors sit, along with two lawyers and/or judges.⁴

As was earlier mentioned, a student must have enrolled to study law for a minimum of seven semesters in order to be permitted to take the state examination. Some students study law for additional semesters before attempting the state examination.

The subject of the law upon which a student may be examined is determined by the laws of each state in the Federal Republic. For example in the State of North-Rhein-Westfalia the applicant may be examined on the following subject:⁵

- a. Private law, elementary principles of commercial law, corporate law and commercial paper.
- b. Criminal law.
- c. Organization of the courts of the Federal Republic and the individual states and procedure law.
- d. Principles of labor law.
- e. Public law, administrative law and international law.
- f. Principles of Roman Law and the history of German law.

In North-Rhein-Westfalia the examinee must have earned seven certificates in the university before taking the state examination. The law provides that the certificates must have been earned in (a) Elementary Private Law, Elementary Criminal Law, Elementary Public Law and (b) Advanced Criminal Law, Advanced Public Law and Advanced Private Law. (c) One certificate may be from a subject selected by the student.⁶

The first examination consists of two parts, one oral and the other written.⁷ In most of the states of the Federal Republic, the written portion of the examination consists of two parts. The first part calls for the applicant to resolve a particular case to demon-

⁴ § 11 Juristenausbildungsgesetz of North-Rhine-Westfalia (JAG) of the 24th of February 1966 (GW p.78/SGV NW 315).

⁵ § 3 JAG.

⁶ § 2 JAG.

⁷ § 10 JAG.

strate that he is able to analyze a legal problem case in a scientific manner and to resolve the issues with some degree of logic. This portion of the examination is not done under any supervision. The examinee is free to make use of whatever materials that are available. The examinee is normally allowed six weeks in which to complete this portion of examination.⁸

The second part of the written examination is under supervision and consists of analyzing and resolving a specified number of cases. The exact number of cases and the subject matter varies in the different states of the Federal Republic. In those states which do not permit or require the examinee to write an unsupervised portion of the examination, the number of cases presented in the supervised portion of the examination is, of course, greater.

After the written examination, the applicant is subjected to an oral examination which normally lasts five hours, with five or six candidates being examined at one time before the commission.⁹ The purpose of the oral examination is to determine the ability of the applicant to think for himself, to express himself and to conduct himself in the manner and style of a lawyer.¹⁰

In 1968 over four thousand persons took the first examination in the states of Germany, and about eighty-five percent of the applicants passed the examination.

Period Between First and Second Examination. . . .

Having passed the first of the state examinations, the applicant must devote at least two and one half years to learning the practical side of the law. During this period one who has passed the first examination is called a "Referendar," and he receives a small compensation as a civil servant from the state while qualifying for the second examination.

The laws of the Federal Republic provide that the "Referendar" must devote a period of nineteen months in the office of the court, in the prosecuting or state attorney's office and an advocate's office.¹¹ Each of the states of the Federal Republic has the right to determine what portion of the nineteen months will be devoted to work in each of the stated offices.

⁸ For instance: § 6 JAO.

⁹ For instance: § 9 JAO.

¹⁰ § 10 JAG.

¹¹ § 5 Deutsches Richtergesetz.

The "Referendar" must, by federal law, spend nine months in the administrative offices and administrative tribunals. Again, each of the German states may make its own division of this time.

Lastly, the "Referendar" must devote two months to tribunals deciding labor matters or to an office concerned with labor matters, such as a trade union.

At the request of the "Referendar," the state may extend the period for six additional months upon showing that the "Referendar" wishes to study and work in some other office which will aid his legal career.

It is clear that the purpose of the practical training of the "Referendar" is to teach him the practical approach to legal problems and to supplement the theoretical coverage of the university study.

While serving in the office of a court, the "Referendar" assists the judges in analyzing cases and preparing memoranda. While assigned to a lawyer he is given the opportunity to assist the lawyer in research, and in certain instances, to speak before the court. During the period that one is a "Referendar" he is a member of a group under the supervision of a judge or other public official. Once each week the group meets and discusses legal problems, judicial decisions and the judicial process. About once a month the "Referendar" is required to produce some written work. After the "Referendar" has completed his apprenticeship in each office or station, he receives a certificate stating the quality of his work and evaluation of his services.

Second Examination. . . .

The "Referendar" having completed his apprenticeship is now qualified to take the second and final state examination to be a lawyer. The certificates received by the "Referendar" are filed with a state official.

While the first examination is often given in more than one city in a state, the second examination is offered at only one site in each German state. The first examination is administered by the Justizpruefungsamt, a part of the Oberlandesgericht; the second examination is administered by the Landesjustizpruefungsamt, a division of the Ministry of Justice of the state, not of the Federal Republic. It may be noted that professors normally do not serve on the commission giving the examination.

The German Professor. . . .

As a practical matter, for one to become a professor, of law in Germany, he must, even though he has been awarded a doctor's degree, serve several years, as an assistant to a professor. While serving as an assistant to a professor, the assistant engages in research for the professor and in some instances may be permitted to deliver a few lectures.

During the period one is an assistant, and if he wishes to become a professor, he writes a second thesis called a habilitation. The habilitation must evidence the fact that the writer is qualified to engage in research in great depth and to express new ideas and theories relating to the subject of the habilitation. Such a thesis will normally require about two years to complete.

The habilitation thesis is read by at least two professors designated by the faculty of the university, who in turn make a recommendation to the entire faculty as to whether the habilitation should be accepted or rejected.

If the habilitation is approved, the writer submits to the faculty three subjects upon which he is willing and qualified to speak before the entire faculty. The faculty then selects one of the three subjects on which it desires him to speak. After this speech the faculty then determines whether he should be permitted to become a professor. If the faculty looks with favor upon this individual he then is called a *privatdozent*. After being designated a *privatdozent*, he must await a call from another university before being designated a professor with all the rights and privileges that goes with the position of a German university professor.

Summary. . . .

The German academic legal training is not as rigid as in the United States. To be a lawyer in Germany one must serve a period of apprenticeship and is subject to two state examinations. It is far more difficult to become a professor in Germany than in the United States. It is impossible to say with any accuracy which is the better system; however, if we were to combine the better points of each system, our quality of legal education might be greatly improved over that which we now have.