

Michigan Law Review

Volume 36 | Issue 1

1937

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Recommended Citation

Stefan Riesenfeld, *A COMPARISON OF CONTINENTAL AND AMERICAN LEGAL EDUCATION*, 36 MICH. L. REV. 31 (1937).

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A COMPARISON OF CONTINENTAL AND AMERICAN LEGAL EDUCATION

*Stefan Riesenfeld**

LEGAL education in the United States has become more and more a part of university education and the activity of the American university law school is a matter which invites comparison with the law schools of foreign universities. This is true particularly because the system of university legal education has recently also become a "problem" in this country. In 1930 Abraham Flexner¹ published his instructive, but possibly not altogether unbiased, book on universities in which he pictured American, English and German universities. The author gave all his attention to the teaching of science, however, and did not discuss law schools, because he felt he was not familiar with the subject.²

In the following pages an attempt is made to give some account of legal education in European universities, particularly in Germany and Italy, based on the personal experience of the writer. But, of course, in order to evaluate and to understand better the activity of these law schools, they must be considered in connection with the legal education as a whole, with their aims and their traditions, and, last but not least, in connection with the legal system and its administration.

I

THE GENERAL CURRICULUM OF A CONTINENTAL LAWYER

In order to understand the activity of a continental law school it is worth while first to contemplate the whole educational curriculum of a man who wants to become a judge, a prosecutor (district attorney) or a practicing attorney.

He gets the first part of his legal education in a law school, which in every case is a university law school. There are no law schools in Germany or Italy or, so far as the writer knows, in most of the other

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¹ FLEXNER, *UNIVERSITIES, AMERICAN, ENGLISH, GERMAN* (1930).

² Cf. *op. cit.*, p. 29, note 10.

continental European states which are not departments, or rather "faculties," as they are called, of universities.³ In Germany all universities are state universities. They were formerly under the administration of the different federate states and are now under the administration of the Reichswissenschaftsminister (federal minister of science). In Italy there is one Catholic university at Milan and two or three "free universities" established by cities or provinces and not by the state. In France there are four Catholic universities, and in the state universities of Besançon and Clermont the departments of law are not state controlled but are so-called *facultés libres*.⁴ All the other Italian and French universities are state universities which possess law departments under state control.

Before entering the university the young man must have graduated from a high school. In Germany and Italy high schools are either maintained or supervised by the state. The types of high school vary from country to country, and often, as in Germany, different types exist within a single country. In some the instruction in classics is emphasized; in others the sciences are put in the foreground with only a small amount of Latin or perhaps only modern languages being taught. Until recently Germany required the future law student to have a knowledge of some Latin, which he was allowed to obtain during his first year in the university in case he graduated from a high school without instruction in the classics. In Italy a law student must have graduated from a "liceo" with instruction in the classics (*Matura classica*).

The average age of graduation from high school is eighteen. In Germany the average entrance age into high school after grammar school is nine years; in Italy ten years.⁵ The education which a young

³ There are twenty-four universities in Germany: Berlin, Bonn, Breslau, Erlangen, Frankfurt, Freiburg, Giessen, Göttingen, Greifswald, Halle, Hamburg, Heidelberg, Jena, Kiel, Köln, Königsberg, Leipzig, Marburg, München, Münster, Rostock, Tübingen, Würzburg. Italy likewise has twenty-four universities: Bari, Bologna, Cagliari, Camerino, Catania, Ferrara, Firenze, Genova, Macerata, Messina, Milano, Modena, Napoli, Padova, Palermo, Pavia, Perugia, Pisa, Roma, Sassari, Siena, Torino, Urbino, and the Catholic University *Sacro Cuore* in Milan.

⁴ The French state universities with law schools are Aix, Algiers, Besançon, Bordeaux, Caen-Rouen (two departments of law), Clermont, Dijon, Grenoble, Lille, Lyon, Montpellier, Nancy, Paris, Poitiers, Rennes, Strassbourg, Toulouse; besides there are Catholic universities with law schools in Angers, Lille, Lyons and Paris. And there are in Limoges and Marseilles law schools which are apparently not connected with universities.

⁵ In Germany the young man spends nine years in the *Humanistisches Gymnasium* (with instruction in Greek and Latin) or in the *Realgymnasium* (with instruction in

man has received when he graduates from high school corresponds to the amount of knowledge which the American student has acquired by the end of his sophomore year in college. American universities usually allow junior standing to German high school graduates who have a sufficient knowledge of English.

There is no separation between college and graduate years in continental universities. The university is composed of "faculties." Usually there are four in Germany: medicine, philosophy and natural sciences, theology, and law.⁶ Some universities have more faculties. In Italy usually there are three: law, medicine and letters. Having graduated from high school, the student registers as a student of one of these faculties. That does not mean that he cannot take courses in other departments if he pleases; but his study is subjected to the control of the dean of his faculty.

The length of time required for the study of law varies. In Italy four years are required; in Germany the minimum is three years; in Austria, also, three years are required. France likewise requires three years.

During this time the student in Italy is required to take oral examinations at the end of each academic year. In France examinations consisting of an oral and a written part must be taken at the end of each year.⁷ In Germany there is only one examination after the first year or the third semester; this is a recent introduction made by Prussia, in 1930, and the practice is still changing.

After the university years the curriculum becomes different in the several countries. In Germany at the end of the period required for study in the university, and when the student believes that he possesses the knowledge expected of him, he applies for permission to take the first state examination, the so-called *Referendarexamen*. This examination is given by a commission formed at the different appellate courts (*Oberlandesgerichte*) in Germany.⁸ It is not considered as a compre-

Latin) or in the *Oberrealschule* (only modern languages). In Italy he spends five years in the "Ginnasio" and three years in the "Liceo" (with instruction in classics).

⁶ Cf. FLEXNER, *UNIVERSITIES, AMERICAN, ENGLISH, GERMAN* 327, 317 (1930).

⁷ See Allémes, "The System of Legal Education in France," [1929] *JOURNAL OF THE SOCIETY OF PUBLIC TEACHERS OF LAW* 36-39.

⁸ A ordinance of September 13, 1934 (*Reichsgesetzblatt I*, 831) provides for the establishment of twenty-two such commissions for the first examination. It may be noted that formerly, when the administration of justice was a matter within the power of the different German states, the procedure of the first state examination varied. In Prussia the procedure now adopted by the Reich was observed, while in Bavaria, Mecklenburg, Württemberg, Hessen, and Saxony the examination was given by mem-

hensive examination terminating university instruction, but as an entrance examination for admission to the judiciary of the Reich. Therefore, its procedure, prerequisites, etc., are not regulated by the federal Minister of Science but by the Minister of Justice. The law study in the university itself, however, is regulated by an ordinance of the federal Minister of Science of January 18, 1935. This ordinance takes care that the requirements of the Minister of Justice are carried out.

Beginning with the first examination, the training is regulated by a general statute, the so-called "Justizausbildungsordnung" of July 22, 1934,⁹ which consists of three parts dealing respectively with the first state examination, the preparatory service, and the second (great) examination. The statute provides in great detail for the prerequisites for admission to the first examination. In addition to proof of citizenship, purity of race, political trustworthiness, etc., the prerequisites include evidence that the student has signed up for certain courses given at the university and taken part with success in written exercises, about which more will be said later.

The examining commission (Justizprüfungsamt) is composed of judges, public prosecutors, practicing attorneys, professors of law, high public officers in the civil service who have legal training, and other men outstanding in scholarly or economic activities. They are appointed by the Minister of Justice. The activity of this commission is supervised by a central board, the Reichsprüfungsamt. A group of five commissioners actually participate in each examination, the individual members of this group changing for each examination. It is, however, provided that the chairman must be a judge or public prosecutor, and that of the other members two must be professors of law, one a judge or public prosecutor or practicing attorney, and the fifth may belong to any class of the commission.¹⁰ The chairman is usually the presiding judge of one of the departments of the appellate court.

bers of the law faculties under assistance of a state commissioner. Cf. Schmidt, "Juristische Ausbildung," 3 *HANDWÖRTERBUCH DER RECHTSWISSENSCHAFT* 404 at 417 (1927).

⁹ A statute of February 16, 1934, placed the administration of justice under the Reich, whereas formerly the federate States (called Länder) regulated this subject matter by themselves and only the supreme court was a federal court. With the transfer of the administration of justice to the Reich in 1934 it became necessary to enact a new law relative to legal training. This need was satisfied by the above-mentioned statute. It is supplemented by three ordinances of the Minister of Justice—September 13, 1934, October 8, 1934, and November 1, 1934 (R. G. Bl. I, 831, 915, 1104).

¹⁰ Cf. §§ 8 and 14 of the Statute of July 22, 1934.

The examination consists of three parts:

(1) An elaborate written discussion of a case involving rather complicated problems of law, which the candidate has three weeks to decide with the aid of all available materials, such as reports, textbooks, commentaries, etc.

(2) Written examinations given under the supervision of a judge in a court room, covering legal history, which is compulsory, and diversified topics of law, such as private law or business law, civil procedure, bankruptcy or criminal law, constitutional or administrative law. This examination corresponds in general to American law school "finals," except that the candidate may use unannotated codes and may devote an entire five-hour day to the examination of one topic, mostly to one case.

(3) An oral examination testing the legal grasp and general education of the candidate (section 14 of the statute). The commission examines four candidates together for about five hours.

The marks which the candidate receives are standardized by statute, and unless a complaint is made to the central committee of examination or the Reichs Ministry of Justice they are binding. An unsuccessful candidate may try a second time, but no more.

A successful candidate enters the so-called "preparatory service" in the judiciary where he remains for three years. This "preparatory service" is intended to instruct the young man, who is now a "public officer," called "Referendar," in the tasks of a lawyer, judge, and prosecutor. During this period the Referendar is expected to be occupied with tasks which serve his education rather than with routine legal tasks. Still it often happens that a judge uses his Referendar to diminish his own work.

For the first eight months the Referendar is attached to a court of first instance in a rural community or small township (*kleines Amtsgericht*); for five months, to a court of first instance in a city, hearing more important cases and also appeals from county courts (*Landgericht*); for three months, to the office of the district attorney (*Staatsanwalt*); for five months, to a lawyer; for four months, to a lower court of smaller claims in a city (*grosses Amtsgericht*); and for four months, to an appellate court (*Oberlandesgericht*). For the remaining seven months the Referendar is attached to a municipal administration or the general administration of the interior.¹¹ All his work

¹¹Cf. Ordinance of October 8, 1934 (R. G. Bl. I, 915), and of April 13, 1935 (R. G. Bl. I, 545).

during this period is graded by the respective lawyers, prosecuting attorneys, judges, or public officers. The marks he gets are counted in the final examination. In addition to this regular routine work the Referendar takes theoretical courses given in an informal way by judges, lawyers, etc., under the general supervision of the chief justices of the appellate courts. Before the present regime Referendars generally received no pay; they could get some financial aid from the government in exceptional cases. The new government has promised to give some remuneration, but the writer does not know whether or not this plan has been carried out.

This system offers, as one can easily see, the advantage of a thorough training in all matters with which lawyers, judges, and prosecutors are concerned. The Referendar gets acquainted with the life of a county judge and his close connection with the rural community. He sees the rush of work in the overburdened metropolitan courts. He sees the point of view with which a prosecutor handles a case, and how the case is tried by the learned and lay judges who form the bench in criminal cases. He sees and experiences the handling of difficult appellate cases and learns about the activities of a lawyer in his office and in the court room. This experience is two-fold: he learns a good deal about judicial routine, and also about personal relations in the courts. A good Referendar and an interested judge may form a very helpful "team." The Referendar actually takes part in the activities of the courts. He drafts orders which the judge corrects and signs; he may examine witnesses under the supervision of the judge; he writes discussions of cases, which form the basis of the deliberation of that division of the court to which he is attached; he takes notes of the proceedings; he is heard in the deliberation of the judges, and he writes some opinions which are corrected and signed by the court.

Of course, not all judges are good instructors. Some regard the Referendar, whom they must instruct, as a nuisance, and try to get rid of him by occupying him with useless things. Others are lazy and depend too much on the Referendar, overburdening him and not imparting real instruction. But on the whole it can be said that the system, which has undergone few changes in the past sixty-five years,¹² has had commendable success.¹³

¹² In Prussia the Referendary system in its modern form goes back to a law of 1869. Cf. Hoormann, *Referendar*," *HANDWÖRTERBUCH DER RECHTSWISSENSCHAFT*, 765 at 766 (1927).

¹³ Cf. Mechlenburg, "Training of the 'Referendar' in Germany," 39 *A. B. A. REP.* 908 (1914). And see Kocourek, "Relief for the Appellate Courts: the Refer-

After these three years the Referendar applies for permission to take the second (great) state examination. This is given by a central board for the whole Reich, the Reichsprüfungsamt, located in Berlin, with branches in Munich, Stuttgart, Hamburg, Dresden and Düsseldorf.¹⁴

The examination begins with a practical case, which the candidate has to discuss thoroughly and for which he has to draft the decision and the opinion as though he were the judge. He has three weeks time for this assignment. Then he writes five papers under supervision, one of which must concern problems arising in the general administration. Then follows an oral examination given by a commission of four (usually high judges and officers in the department of justice), during which the candidate must orally discuss a case, the files of which are given him three days beforehand. In case of failure the candidate may repeat the examination once after having repeated one installment of the preparatory service. There is, however, no appeal from the decision.

After having passed this examination, the Referendar gets the title of Assessor and automatically quits the judiciary, to which he belonged during the preparatory service. This is an innovation by virtue of a law of March 20, 1935. The Assessor now has a choice. (1) He is entitled to be admitted to the bar without further requirements. The bars are local. He applies to one and must be admitted unless there are certain reasons which make him inadmissible, as criminal convictions in the meantime, etc. (2) He may choose to enter the career of a judge or prosecuting attorney, both of which are state careers under the disciplinary control of the Minister of Justice. In this case he applies to the Minister and is accepted for a trial of one year, during which time he must prove that he is fit for the career. If he succeeds, he becomes appointed as "Gerichtsassessor," and starts his career as judge or public prosecutor.¹⁵ He is not appointed for life, but he has the chance to become a regular judge with life tenure in case of a vacancy. In the

endary System," 7 J. AM. JUD. SOC. 122 (1923); the author, however, is mistaken in note 12, confusing Referendar and Reporter. The Reporter is the associate judge who reports the case and evidence in the collegium in the deliberation. The Referendar assists the Reporter and gives for the sake of exercise an additional report; but he is not the Reporter. Professor Kocourek errs as a whole if he believes that the Referendar is of great help to the court. He is that only in exceptional cases.

¹⁴ Ordinance of February 27, 1935 (R. G. Bl. I, 342).

¹⁵ See Ordinances of March 20, 1935 (R. G. Bl. I, 391), March 29, 1935 (R. G. Bl. I, 487), June 26, 1935 (R. G. Bl. I, 812).

meantime he exercises the functions of a judge or district attorney "pro tem." The system of appointment and promotion of judges and public prosecutors has undergone so many and such rapid changes lately that it is impossible to give an accurate description in this connection.

In Italy the picture is different. The student must take a final examination at the end of the four years in the university; the examination consists of the writing of a doctor's thesis in law and an oral examination given by the law faculty. If the candidate passes, he is a Doctor of Jurisprudence.¹⁶ If he wants to become a judge, he may take the examinations given by the Minister of Justice, which vary for the position of lower court judge (pretore) and judge in appellate courts. If he wants to practice law, he must work for two years in a lawyer's office and then take an examination given by the appellate courts. If he passes, he becomes a "procuratore" and may practice in the lower courts. After three years' practice as procuratore he may take another examination which gives him the rank of an "avvocato" and the right to appear before every court, including the supreme court in Rome.

The judges who have been successful in the competitive examination must go through a period of trial, which is shorter for the "pretori" than for the judges in the tribunali and the corti d' appello. The details of these examinations are not known to the writer.

The other departments of government also use men trained in the law, both in Germany and Italy. Particularly in Germany most of the public officials who are engaged in the administration of the interior, of taxes, of municipalities, etc., are men who have gone through the education described above. They are taken into these positions on their application after having passed the second (great) state examination.¹⁷

¹⁶ In France there are two degrees. The professional degree is the "Licentiate of Laws," which is obtained at the end of the law course and which is required for admission to practice or appointment as judge. Besides, there exists the degree of doctor of law, which is a higher degree of mere academic character. Cf. Allémes, "The System of Legal Education in France," [1929] JOURNAL OF THE SOCIETY OF PUBLIC TEACHERS OF LAW 39.

¹⁷ There was another way to get into those positions in Germany, particularly in Prussia. The Department of the Interior or of Government trained the young men who chose this career after graduation from law school and passing the first state examination in a way similar to that of the Department of Justice. This category of law-school graduates in preparatory governmental service was called "Regierungsreferendar." The training was pursued at one of the eighteen Prussian district departments of government. But this training has fallen into disuse. After 1926 only a few Referendars were admitted in Prussia and in 1930 the whole training was abolished. See Hoorman, "Referendar," HANDWÖRTERBUCH DER RECHTSWISSENSCHAFT, 765 at 767 (1927), and Stier-Somlo, "Juristische Ausbildung," 7 *ibid.* 203 at 205

II

THE CONTINENTAL LAW SCHOOL EDUCATION

With this brief outline of the curriculum of a lawyer or judge as a whole, and of the role played in it by the university law school, the foundation is laid for a discussion of the law school education in more detail.

A. *The Law Student*

In the first place, who are the students? It has been mentioned before that they are young men about eighteen years of age. Why do these young men go to law school? What are they training for? They do not all want to become lawyers or judges. The whole mass of future governmental officials, who must possess the legal training outlined above, are studying in the departments of law. Besides these men, who are the great majority, to be sure, there is still another group, the future economists and accountants who want to have some knowledge of law. There are only a few separate schools for scientific (academic) business training, comparable to the business school of American universities. The majority study "economics"; this is done, in general, wholly or at least partially in the law departments in Germany, because apart from Berlin and a few other universities, the faculties of law and economics are united in "Rechts-und Staatswissenschaften." But even where this is not the case the students of economics participate in the law courses. Still another group is formed by those young men who want to become business men and have some knowledge of law and political science; and finally some go there to get the social benefits of a doctor's degree.

Another fact must be noted in this connection. The German universities and most of the Italian universities have no special departments for "political science." All that is taught in the departments of government or political science of the American colleges or universities is taught in the faculties of law of the German and of most of the Italian universities. Political theory (which is called "General Theory of the State" on the continent) and international law are law courses, and one who wants to specialize in these fields must register as a law student; and, if he wants a doctor's degree, he must acquaint himself with other law courses given in these departments.

This lack of special departments for political science, and the small number of state business schools of high standard, and finally the uni-

(1931). The writer does not know whether the Hitler government has reverted to this system of training.

fication of economics and law, explain the huge number of students registered in and attending courses of the faculty of law. The number of students registered in the faculties of law amounts to between a third and a half of all students registered in the universities. To be sure, it must be kept in mind that courses in engineering are given in separate institutions (so-called Technische Hochschulen). Thus the number of law students in a German university, apart from Berlin, varies between four hundred and two thousand, according to the size of the university. In Berlin the number is several thousand. In the university of Paris the number of law students is still higher, probably the highest of any law school of the world, and in Italy the situation is similar.

But this does not mean that any of the law courses are as elementary as undergraduate courses in economics or political science of American colleges. One must bear in mind that the student entering a continental university has junior standing measured by the standard of the greater American universities. The student receives the doctor's degree, after having completed his course, if he writes a satisfactory thesis. The course in law is really legal training, even though, of course, it is important that the men who are going to practice the legal profession get some further practical training thereafter. This will be clear if the law courses are considered somewhat more specifically.

B. *The Scope of the University Legal Training*

I. *The Curriculum*

The questions of great importance are what is taught and how it is taught. Of course, the character of the legal system is of importance to the content of the courses; but one must not overrate the difference between the general aspect of the continental system and the law in the Anglo-American countries, apart from its codified nature.

The law is divided, generally speaking, into private law and public law.¹⁸ The branches of public law are constitutional law, administrative law, law of taxation, criminal procedure, criminal law, civil procedure, international law, and ecclesiastical law. As branches of private law are counted business law and ordinary civil law (contracts, property, family, and inheritance law), insurance law, bills and notes,

¹⁸ Since the national-socialist government has taken over power, this distinction has been abolished officially. The division made was developed from the pre-national-socialistic jurisprudence and is still accepted in France and Italy.

patent law, labor law, private international law, etc. These are the fields generally covered, apart from legal history and legal philosophy.

The course takes at least three years in Germany (but is often prolonged by the student, and in 1930 the Prussian ministry of education considered seven semesters to be the normal length), three years in France and four years in Italy. The Italian courses are about the same as the German. The academic year is divided in Germany into semesters, whereas in Italy there are year courses. In Germany¹⁹ the student takes, in general, in the first semester a course in history of Roman law and a course in history of German law, both describing the development of the ancient legal systems; an introductory course giving a short survey of the whole field of contemporary law; a course in institutions of Roman law in its classical period, covering contracts, family law, property law and inheritance law; a course covering the general theory of the state; and a course in economics. Sometimes some of these courses are taken in the second semester. On the background so gained, the study of the body of law presently in force is begun in the second semester.

The student has much choice in arranging the progress of his training. He may take first private law courses and later public law, or vice versa. But the faculties recommend a certain plan, and in general the students follow it. Thus, before the national socialist revolution, the student in the second semester usually took a course covering the general part of the civil law, a single course in contracts and torts, a course in criminal law, and another course in economics, which may be examined in the first state examination, in the second semester. In the later years he took property law, family law, inheritance law, and constitutional law, business law, civil procedure part 1, criminal procedure, then administrative law, international law, labor law, civil procedure part 2 (including bankruptcy), patent law, bills and notes, insurance law, legal philosophy, etc. Since the national-socialistic reorganization some changes have been made. The general part of civil law is no longer taught separately; "Peasant Law" is added.

It is noticeable that business law includes commercial partnerships, business corporations and mercantile sales, but excludes the law of bills and notes, which forms the content of a separate course. Most of

¹⁹ The best comprehensive article in the German language on the scope and problems of legal education in Germany before the national-socialistic reforms is Schmidt, "Juristische Ausbildung," 3 *HANDWÖRTERBUCH DER RECHTSWISSENSCHAFT* 404 (1927); Stier-Somlo, "Juristische Ausbildung," 7 *ibid.* 203 (1931).

the courses are four hours per week: thus contracts, general part of civil law (which is now omitted by the new study order), constitutional law, administrative law, criminal law, and inheritance law have this time allotted to them. Two hours per week are in general given to the courses in bills and notes, patent law, legal philosophy, private international law; three hours for family and inheritance law; but all this varies from university to university.

All courses are lecture courses. They are complemented by what are called "exercises" and seminars. Both are compulsory in Germany, but exercises and seminars are rare in Italy. In France they are more common, but optional.²⁰ The exercises are courses in which the students are required to decide actual or hypothetical cases. The professor dictates a problem case to the students or assigns one from collections of problem cases, and the students have two or three weeks to hand in a paper discussing the case on the basis of all the material available (textbooks, reports, commentaries). Then the professor grades the papers, gives them back and discusses the cases in special afternoon classes, called "exercises," which are in general held once a week in two consecutive hours for every field of law. Thus there are exercises in commercial law, in civil law for beginners, and in civil law for more mature students, in civil procedure, in constitutional law, in criminal law and in administrative law, and in Roman or German law. In these "exercises" other cases not covered by the papers are also discussed.

For the first state examination in Germany it is necessary that the student should have participated in five different kinds of exercises, one of which must be in the field of public law; for the rest the student has the choice.

Finally there are seminars. Here, only a limited number of students are admitted by the professors, students who have shown special interest and outstanding work in a field. Thus there are seminars in criminal law, commercial law, international law, etc.

The class work of a student is about twenty-four hours a week, being consequently considerably greater than in an American law school. The outside work is mostly dedicated to the exercises, in preparing and writing up the decisions of the problem cases. Much work is also done by good students for seminar reports.

If one considers the field covered, one of the striking differences

²⁰ Cf. Allémes, "The System of Legal Education in France," [1929] JOURNAL OF THE SOCIETY OF PUBLIC TEACHERS OF LAW 38.

between American and continental legal training is that on the Continent usually the whole field of law is covered. It does not happen that a student goes out of law school without having had taxation, or administrative law, or suretyship or agency. On the other hand, the courses are somewhat less detailed than in the United States. Contracts are, for instance, treated together with torts and quasi-contracts as the law of obligations; in some schools four hours per week and in some six. If six hours, then the course is often divided into "general law of obligations" and "special contracts" (sales, loans, landlord-tenant, services, etc.). Torts, particularly, is much less intensely treated than in the United States. Business law embraces commercial sales, partnerships and corporations, in one semester; property covers real and personal property in four weekly hours for a semester; suretyship is covered in the field of contracts; agency in the general part of civil law, where capacity, necessity of forms, associations, statutes of limitations, etc., are treated. Greater details are given, of course, in exercises.

Readers unfamiliar with civil law will doubtless be puzzled by the names and arrangement of some of the topics mentioned above. There are, of course, considerable differences, inherent in the legal systems themselves, between the classification of legal institution, under civil and under the common law. Moreover the systematic arrangement in the codes affects the arrangement for purposes of instruction in civil law countries. For example, in the courses on commercial law chiefly the topics embraced by the code of commercial law are covered, and therefore the law concerning bills and notes, which is regulated by a special statute, is taught separately. Furthermore, commercial law is on the continent a more or less distinct system which regulates legal transactions involving merchants.²¹ Commercial partnerships and commercial corporations follow their special rules laid down in the commercial code. Another example is the treatment of landlord and tenant in the course on contracts, because a lease does not confer an estate in real property under civil law. No attempt has been made in this paper to explain the content of the specific courses given in continental law schools with reference to these differences of classification. To do so adequately would require another article of considerable length.

²¹ Cf. the remarks of the writer in his review of Nussbaum's *Deutsches Internationales Privatrecht*, 3 *CHI. L. REV.* 153 at 154, 155 (1935).

2. *The Method of Instruction*

The method of teaching is determined by various facts: by the number of students, by the division of courses into instruction by way of lecture and exercises, by the nature of the legal system, as code law, and by the fact that real practical training is not expected from the law school.

The courses are given in a form which is in America styled the "lecture system." The famous "casebook method" is not applied. The reasons for the difference in method will be dealt with below. But it may be mentioned here that one of the factors determining the preference for the lecture method is the huge number of students. Discussion of cases with students, as the chief form of instruction, would be unprofitable. The students in the back rows would not get much out of a discussion between the professor and students in the front row. On the other hand, the legal system and the whole approach to the settlement of legal disputes may also be a factor which makes the lecture method appear preferable. Finally the academic form is traditionally the lecture, and the students would resent the daily assignment as an encroachment upon their academic freedom. But one ought to be careful not to get a wrong notion of this method. It does not signify by any means that the courses are given in a completely abstract form.

To be sure, there is a tendency toward methodical and systematic treatment. The professor tries to develop methodically the particular field of law he teaches. This is necessary apart from the pedagogic point of view because of the fact that the German codes are very systematic bodies of legal rules. But one must not believe that the difference is so very great. The present writer has attended American law school courses which, in their form, differed only in degree from the method a German or Italian professor of law applies. After all, one must keep in mind that what is taught is "law," rules of human conduct regulative of life in society, not some kind of religion or magic art. It is true, the codification makes a difference; the system of the code fixes the route. But nevertheless, what counts is the working of the rule, of the code section, its application in practice by the courts. Furthermore in continental law as in American law, the framework of the codes is filled out with rules developed in and from decided cases.²² All this, of course, the continental professor recognizes.

²² See the instructive article of Professor Deák, "The Place of the 'Case' in the Common Law and the Civil Law," 8 TUL. L. REV. 337 (1934).

Thus, for example, in a course on property, the teacher would begin by defining property, and distinguishing it from other rights, such as contractual rights, personal rights, etc., on the one hand and from possession on the other. He would then turn to the elements of possession, of the different situations which constitute possession in the eyes of the law, would expound the rules concerning protection of possession, and outline their scope and their function. Then he would turn to the content of property, describe the objects of property, distinguish real and personal (immovable and movable) property, discuss the rules of acquisition, limitation and loss, etc. But he would constantly illustrate his lecture by simple cases in point, partly hypothetical, partly actual. He would refer to court decisions involving the issues in question, and criticize them as sound or fallacious, too strict or too liberal.

The main difference seems to consist in the fact that the rules of law are not developed from the cases, but from the code sections or the principles underlying the code sections, and the cases are alluded to more as illustrative than as the source of the rule. But since the construction of the rule, its real life, is derived from cases, even though hypothetical only, the student gets the rule not abstractly but as a working agency, tied up with corresponding factual situations.

Of course, much depends upon the professor. He may be satisfied to give a dry and lifeless system of legal concepts and rules, but the modern trend is the other way. In Italy the professors are more inclined to abstract teaching. The attendance of students, which is optional, is, therefore, not very regular.

A most important factor in German legal education is the so-called "exercise." Here the groups are usually smaller. The average student, who generally does not prepare for the lectures, will almost always be prepared for the exercises, because he has written up his case on the basis of more or less all of the available material, and turned it in to the professor. Thus, he is ready to participate in a discussion of the case, which discussion corresponds approximately with that in an American law school class, with the difference that the student who has not been put through the amount of daily assignments required in America is much better prepared to discuss and defend the decision he has given in the case.

The most advanced part of continental legal education is the seminar. Here a selected number of outstanding mature students are admitted and discuss with the professor and other members of the seminar more difficult and fundamental questions of law on the basis of written reports or "term papers."

While the attendance in the lecture courses is not controlled, and students quite often miss class, preferring to read the material covered in a text book (particularly if the professor is a bad teacher, dull or annoying), the attendance of exercises is more regular. Since the written papers are graded, and must be written in order to get a certificate of attendance, most of the students do their work carefully.

The whole trend of continental law school education appears more academic and less practical, at least less technical, than that in American law schools. Good professors try to avoid everything that resembles the "trade school spirit." The law is presented as an historically developed body of rules of human conduct, covering, in more or less well considered and elaborate detail, all types of human activity. This has the effect that not seldom the professor loses himself in theoretical speculations which are important only to him, and do not interest the student, and which are particularly boring because there is little contact between class and professor by reason of the lecture method. Thus the legal issues seem much more abstract, and sometimes the students get the impression that mere theoretical philosophy is being taught to them, the real implications of which vanish from their eyes. But this is by no means the rule, and almost never occurs in the exercises.

The courses are designed to cover the entire field embraced. As a whole, they are much less detailed than American courses. Contracts (at the most, six hours a week for a semester) covers (a) the general field of obligations embracing the formation of contracts, objects of contract, impossibility, performance, breach, rescission for breach, assignment, assumption of debt, damages, form of contracts, causa (i.e., consideration); (b) the special part including the rules on sales, deposits, leases, loans, contract for services, suretyship, ordinary partnership, quasi-contracts, intentional and negligent torts. In property are treated possession, including its acquisition and loss, the forms and protection of possession, transfer of personal property (movables), recovery of personal property, rights and duties of the finder, transfer of real property (immovables), easements, mortgages, pledges, life tenancy (usufruct), etc. In the course on the general part of private law (now omitted) there was given a treatment of the general principles regarding associations, legal capacity, authorization, conditions, statutes of limitation, form of legal transactions, mistake and fraud, etc. Similarly, completeness is attempted in criminal law, procedure, etc. That one would not cover the problem of *res judicata* in a course of civil procedure (as is frequently the case in this country), but would spend much time on service of process would seem impossible on the conti-

ment, even assuming that the practical importance of the rules concerning service may be much greater than the theory of *res judicata*. In general, the analytical difficulties of a legal institution and not its practical importance determine the amount of time dedicated to it. The aim of the university law school is not to give the most useful technical training, but to give the most complete and thorough picture of the basic ideas of the legal system and the difficulties of certain basic legal institutions and concepts, and above all to develop "legal grasp."²³

C. *The Law Teachers*

Any survey of legal education would suffer from a serious deficiency if it were confined to the persons who are instructed, to the fields which are taught, and to the methods of teaching, and did not cover also a characterization of the men who do the teaching.

A German professor of law, until recently, when political changes brought about serious modifications, had to pursue a career which differed somewhat from the usual way of the American law schools and which may be considered first. This career was similar in all faculties of a German university. To be admitted to teach at a German university, to teach in any capacity, in any field, two requirements were necessary: (a) the future teacher must have acquired the doctor's degree in his field, and (b) he had to undergo a second test called "habilitation." The latter could take place a certain period after obtaining the doctor's degree. The candidate had to submit to the faculty a dissertation in his field, being of high scholastic standard and constituting a definite contribution to the field. In general this was done with the encouragement and on the invitation of a professor to whom the candidate was particularly known and who wished to see the candidate a member of his faculty. In the law faculties such a work written for purposes of habilitation consisted in general of a monograph on a certain topic, e.g., on the development and nature of some legal institution.

If the faculty were satisfied from reading the manuscript and the report of the appointed reporters, it invited the candidate to give a lecture before the department on one of several topics which the candidate had to submit. After the lecture some general discussion fol-

²³ Professor Stier-Somlo, 7 *HANDWÖRTERBUCH DER RECHTSWISSENSCHAFT*, "Juristische Ausbildung," 203 at 225, 226 (1931), for instance, greatly emphasizes this aim, objecting vigorously against attempts to treat the law departments as professional schools and to "Americanize" the legal education. See also Schmidt's observation in 3 *ibid.* 404 at 416.

lowed, and if this discussion showed the candidate's ability in scholastic discussion, the faculty decided to apply to the Minister of Education for consent to the candidate's admission into the faculty as a Privatdozent. If the Minister consented, the faculty asked the candidate to give one special lecture to the public, and thereupon the candidate was solemnly declared to be Privatdozent in the faculty of law, in the particular university. Now the "Reichshabilitationsordnung" of December 13, 1934, has brought about a complete change of the system. The Privatdozent is replaced by the Dozent, who is appointed by the federal minister of science (Reichswissenschaftsminister).

A Privatdozent was not a professor. He was a member of the faculty and could give lectures on certain topics, but he was not a regular public officer invested by the state with an official position. But these Privatdozenten were the men from whom usually the professors were selected. If in any faculty a vacancy occurred, the faculty deliberated as to whom they should ask the Minister of Education to appoint. The Minister in general refrained from imposing a man on a faculty; the faculty selected a list and asked the Minister to appoint one from it. The men on the list were usually those Privatdozenten who had obtained a good reputation for scholastic achievements and good success in teaching. Only seldom were "outsiders" proposed for appointment. If the Minister was displeased with the list submitted to him, he could send back the list and ask the faculty to reconsider the matter, sometimes asking them to add the name of some candidate he thought particularly worthy, for one reason or another, to be appointed as professor.

Until recently it seldom happened that the Minister passed over the vote of the faculty and appointed a professor directly, and it was always resented as an infringement of the rights of the faculty.

There were two kinds of professors, the extraordinary professors and the ordinary professors, comparable to the associate and full professors of the American universities. The distinction consisted in the fact that the extraordinary professors had lower academic status and got less salary. The distinction seems now to be abolished.

The universities were complete democratic bodies. The head of the university was the Rector Magnificus, elected for one year by the Academic Senate from among the full professors of the university, being elected each year from a different faculty. He was assisted by a group of professors, likewise elected for one year, called the Academic Senate. Each of the faculties elected every year a dean who admin-

istered current matters; but in all important matters the faculty voted, and particularly in matters of appointments the dean was absolutely bound by the vote of the faculty. Also here great changes have taken place.²⁴ The "leader principle" has been introduced by the *Richtlinien zur Vereinheitlichung der Hochschulverwaltung* of April 1, 1935. The Rector is appointed by the federal minister of science. The faculty may only suggest a man for the post, but the minister is perfectly free in his choice. The Rector is the "leader" of the university. He is the immediate inferior to the minister and responsible only to him. The vice-rector and the deans are appointed by the minister on the proposal of the Rector. The Academic Senate assists the Rector merely in advisory capacity. The faculties are carrying out the scholastic activities of the respective departments. The dean is leader of the faculty. He nominates his representative. The faculty representatives assist the dean in an advisory capacity. Noticeable is it also that the term of office of the Rector is no longer restricted to one year.

In Italy the situation is in many respects similar. But the deans do not change and the admission to become "libero docente" is granted by the Minister of Education by virtue of a competitive examination before a commission formed of professors of special reputation at the ministry in Rome. Thus, the particular faculty does not make the decision, but makes only a recommendation subject to the candidate's passing the test. In France the examination for admission to teach, the *agrégation*, is likewise centralized.

This general scheme is followed also by the law faculties. It is required that the candidate have a doctor's degree and write the particular dissertation for the admission as *Privatdozent*. It is not necessary that the candidate be a judge or be admitted to the bar. As a matter of fact, in general the professors have never practised law and have passed only the second state examination; and even this is not universally true. Particularly the specialists in legal history have often done work as a *Referendar* only for a short period.

It is important to know that a full professor is forbidden to practice law in Germany. He is supposed to dedicate all his time to teaching and research. As a result the professors regard themselves as "scholars," more called upon to follow and criticise the general trend of decisions, to advance new constructions of statutory enactments, to propose

²⁴ Cf. K. A. Eckhardt, "Richtlinien zur Vereinheitlichung der Hochschulverwaltung und die Strafordnung für Studenten," [1936] 1 DEUTSCHE RECHTSWISSENSCHAFT 89.

amendments, etc., than to teach the actual technicalities of the daily legal practice. One must guard against overemphasizing this fact. There is only a slight distinction in degree between the "theoretical" attitude of a German, and that of an American, law professor. Furthermore, the German law professor knows exactly what is "going on." Only the real technicalities, such as how a warrant reads or something of that nature, are of no interest to him. The main fact to be emphasized is that, not success in practice, but ability in teaching and the capacity for scientific contribution to the field of law control the selection. Personal relations may be a factor, too, but probably not more than in American universities.

It must be noted that the authority of a university professor seems to be greater on the continent. In particularly difficult problems lawyers ask professors to write them an expert opinion ("Gutachten," *memoria per la verità*) which may be submitted to the courts and is respected by them. Outstanding professors have sometimes a considerable income from this source, which is not considered as "practice." It is not seldom that the supreme court has referred to such opinions submitted to it. Indeed, if difficult questions of legal development are involved, the court itself may ask a professor for his opinion, the professor's compensation being included in the costs.

The writings of the professors have about the same influence as the articles and books of the American professors. But it must be noted that in recent years books which are of immediate help to practitioners (commentaries, form books, etc.) are usually written by practitioners or judges, or often by the men in the Departments of Justice or Interior, etc., who draft the respective statutes.

It has been attempted recently to appoint practitioners as professors of law; but so far as the writer can judge, the attempts, which encountered strong resistance from the faculties,²⁵ have failed to a large degree in Germany. Of course, the opinions are divided on this matter, and there are some outstanding exceptions. In Italy professors are allowed to practice. But in general their attitude is similar to that of the German professors. As a rule it seems to the writer that those Italian professors who have or claim to have good success in practice are not very good teachers, and so of less success and efficiency in teaching than the "mere" academicians. Of course, there are men like Professor Carnelutti in Milan who are outstanding in both fields.

Also disadvantageous, it seems to me, is the German combination

²⁵ Cf. Stier-Somlo, "Juristische Ausbildung," 7 *HANDWÖRTERBUCH DER RECHTSWISSENSCHAFT*, 203 at 204 (1931) (with further references).

of economics and law in one faculty (i.e., one department), which is found in many universities. It was thought that there might be an advantageous cooperation. But experience has shown that the faculties split into two groups, so that the arrangement rather hampers than encourages reciprocal stimulation. The economists have little understanding and less esteem for their brothers learned in law; they ridicule "legal arguments" not only privately but in the very classes. They are not well trained in law and cooperation is certainly no greater than it would be if there were two faculties. There is open warfare if a very brilliant law student gets a poor mark in economics so that his record is spoiled. On the other hand, the law professors are likewise seldom inclined to appreciate the work of the "narrow gauge lawyers," as the students of economics are facetiously labelled.

The situation so far as political science is concerned is different. There is no such thing as independent "political science." Law and political science are completely merged. Comparative government is treated in the course on the general theory of the state, which is given by the professor of constitutional law; municipal government is discussed in administrative law; international relations in international law, etc. Thus the political sciences are presented to the law student "*sub specie juris*." In Italy, in some universities, *scienze politiche* are treated as separate topics.

III

ADVANTAGES AND DISADVANTAGES OF THE CONTINENTAL AND AMERICAN SYSTEMS

The foregoing description of the general curriculum of the lawyer abroad, and of the instruction given in continental law schools, shows how difficult it is to weigh the method of the continental, particularly the German method, of legal education against the American system.

Many factors are influential in creating a diversity:

(1) There is in the first place tradition. It is no surprise that a system of education which deals with a subject matter first taught in the inns of court is different in its trend from a system that goes back to the lecture halls of the medieval jurists in Bologna, Pavia, and Padua, and to the classical "faculties of law" which were an integral part, even the starting point, of these institutions of higher learning and scholarly research which are called universities. In the United States the "law school," even if attached to the university, is termed a "professional school"; in Europe the faculties of law embrace men who claim to be and feel themselves scholars in jurisprudence (in a broad sense) which is deemed to be a (social) science. Something of the

proud introductory words in the *Corpus Juris*, that *jurisprudentia est omnium rerum scientia*, still remains.

(2) The next important factor is the difference in the legal "system"; this is constituted not so much by the often emphasized question as to whether statutory law or judicial legislation, or the greater or lesser effect of a precedent, is of paramount influence, as by the whole "approach." In Europe the whole attitude is more critical, accompanied by less respect for traditional rules. Greater influence is exerted by theoretical, deductive considerations in dealing with legal problems, the effort to rationalize, to work out fundamental principles, to maintain harmony of the whole. The famous battle between the different "schools" in criminal law, or between "conceptualists" (à la Hohfeld) and "free law" partisans, are known also in the United States, and are examples. Nobody on the continent would bother to raise for lengthy discussion each year the question about what the holding of Slade's case really was.

(3) The most important factor making for difference is that on the continent the law school graduate has still a long apprenticeship ahead of him. There he acquires the tools of the trade, so to speak. Thus the aim of the law school is not directly to *train* lawyers, but to give future lawyers and judges a schooling which will enable them to develop a "legal grasp," so as to understand the meaning, application and development of the statutes or the bearing of a decision in connection with others, and to develop powers of analysis and criticism, to learn how to handle legal problems constructively, discussing the pro and con, and how to reach a legal conclusion. All this is done by the combination of instruction through lectures, written exercises and seminars. Actual knowledge of technical details, particularly of procedural matters, is not the aim.

(4) Finally, on the continent the students are somewhat younger and have had a somewhat more intensive high school training, but no previous college education in political science, economics, or similar matters.

In all these points the American law school differs more or less vitally. The aims enumerated in (3) are probably also the ends of American law school training, but are not so much emphasized and not so exclusively. The American school *is* a professional school, training people for admission to the bar, that is, people who go out to practice at once. The whole approach and the system must, therefore, have different trends.

But does this exclude any weighing of the two systems against

each other? Certainly not completely; after all, both are systems of legal education, and have more points in common than they have differences.

The Americans quote with pride in the preface to a certain series of case books the complimentary criticism which the late Professor Redlich²⁶ gave to American legal education, concerning the case method. And there is no doubt in the mind of the writer that Professor Redlich has given a very fine analysis of the different aspects and underlying factors of this system. But Professor Redlich wrote his report after two months' observation only, going, moreover, from place to place, not having been really either a teacher or a pupil of an American law school. He wrote it, furthermore, at a time when German legal training was far less intensified than it became after the war. Probably one can still say today, as seems to have been the opinion of Professor Redlich, that neither of the systems is perfect, and that both are probably at least bearably adequate, considering the different aims.

In view of the present writer's experience as a law student in Germany, Italy and the United States for an aggregate of seven years and a half, he is perhaps able to supplement Professor Redlich's observations with a statement of impressions as to what has struck him favorably or unfavorably in the two systems of training. Professor Redlich has pointed to the inherent weakness of the case method²⁷ and also from time to time has referred to the weaknesses of the European systems. His criticisms seem to the writer still true in their fundamental aspects and need only some revision, due to the changes which have since been introduced both in the United States and in Germany and due also to the somewhat closer and longer exposure of the writer to both methods.

(A) The advantage of the case system seems to be that the student plunges right into the ocean of cases; that it is more practical, represents from the very start the true picture of innumerable conflicts among decisions and their bearing on actual controversies as they are settled by the court, and demonstrates what lawyers are doing, at least to some extent, and what the future lawyers have to expect. It drags the student into active cooperation in class work from the very outset because he must be prepared for the classes, and it stimulates discussions. In other words, it prepares the future lawyer. That the

²⁶ THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS (1914).

²⁷ See his report, *supra*, note 26, at 41 ff.

pure lecture system is wholly inadequate for the common-law system seems today to be indisputable. But it is out-of-date for every adequate system of legal education. Probably it always has been. Even the Pandectes are case law!

On the other hand, the German system has some great advantages. It does not make things unnecessarily hard for the student at the start; it is better balanced, so far as the material covered is concerned, because every branch of the law is treated. The continental student is much better trained to present written arguments and to criticize legal propositions in a methodical manner²⁸ than his American colleague. The good student has, furthermore, occasion in the seminars to cooperate with the professor in the study of special problems in a profound manner.

(B) On the other hand both system have their weak points.

(1) The German system is very "academic" in two respects. (a) The student is much less controlled than an American law student. The academic freedom of the student is traditional. (b) The whole training seems much more to tend to educate future supreme court judges, so to speak, than to train practicing lawyers. This academic accent is one of the outstanding features, advantageous and disadvantageous at the same time, according to what one wants to attain.

(2) The American system seems, apart from its slight "provincialism" and extreme narrowness (because of the omission of all not strictly legal topics) to suffer, compared with continental training, from three main disadvantages:

(a) It wastes time. It begins with four college years, which from the standpoint of legal education are in many respects wasted time, because the students learn many things in a superficial form which they go over again in the law school. Moreover, the students sometimes are not trained at all in subjects which they ought to have had before starting their legal studies. The exclusive reading of long cases containing many superfluous things, and often of several cases stating the same rule, is likewise to a certain degree a waste of time. Even though a good teacher will usually omit cases which do not add much, still much useless reading remains. Finally, long class discus-

²⁸ Professor Redlich has in his report (p. 31) called attention to the "specific" (i.e., characteristic) atmosphere of an American law school, developed by the cooperation of the young lawyers. It is certainly an atmosphere which is very desirable. But the same atmosphere exists also in German law schools. The method of giving written problems to be worked out within two or three weeks stimulates cooperation and common arguing about the questions involved. In Italy there is much less of this spirit of mutual stimulation, as a result of the dominating role of the lecture course.

sions which get off the track are often more confusing than clarifying, and are certainly of little pedagogical value, and largely a waste of time. In the second and third year a higher speed without increasing the amount of required reading would, as the writer believes, have a wholesome effect.

(b) The constant reading and briefing of cases becomes extremely monotonous and tiresome. It becomes moreover mechanical (not to speak of the canned brief method); and with all his briefing the student does not find time really to acquaint himself with the rules and their difficulties. The acquired knowledge easily slips away, because it lacks order and coherence.

(c) The system is too little balanced. The student often gets no introduction. He encounters unnecessary obstacles at the start. Some topics are hunted to death, so to speak; others are not taught at all, or are taught in courses that few students take. A survey of the whole is not given. Professor Redlich also has criticized the American method on the ground that "the students never obtain a general picture of the law as a whole, not even a picture which includes only the main features." Only the law review men learn really how to use research material and how to write on legal topics. The very practical training of American law schools remains, in this respect, deplorably inadequate and theoretical. The course in legal research is no remedy. A remedy only to a small degree is the system of moot court trials; but just there the helping hands of the professors are missing in many schools.

This leads to one final observation. The American professors give more time to their students than their European colleagues. But the German universities have more instructors in a broad sense. Particularly the appointment of assistants, usually between five and ten in faculties of average size, is very useful. They are young men who often want to become "Privatdozenten," and therefore to learn how to deal with students, and who dedicate much more time to this activity than the American "readers" (receiving, too, more adequate compensation). They are a useful link between student and professor. They usually correct the papers, which are then looked over by the professors, and have the task of discussing them privately with the students, apart from the class discussion. This contributes to intensified training.

In concluding, a personal remark may be permitted. It is not the purpose of this paper to present a careful study of the problem: for this writer does not feel himself qualified. But it is hoped that these personal impressions may furnish some helpful material for the solution of problems of legal education now being attempted by others.