



# ELFA NEWSLETTER

European Law Faculties Association  
Issue February 2011

## Contents

- I. President's Letter
- II. ELFA at the AALS
- III. Invited Authors

### **The Role of Practice in Legal Education**

HERIBERT HIRTE and SEBASTIAN  
MOCK

---

## President's Letter



Dear ELFA Members,  
Dear Deans and Colleagues,

it is my pleasure, in the capacity of the  
President of the ELFA Board, to update  
you about our recent activities.

### **1. Meetings of the Board**

The New Board of ELFA elected during the last General Assembly for the term 2010-2011 is composed by members representing law faculties from six European countries : Jacek Petzel (University of Warsaw – President) , Manuel Bermejo Castrillo (University Carlos III Madrid – First Vice-President), Hans Van Houtte (Catholic University of Leuven, Treasurer), Anne Klebes-Pelissier (University of Strasbourg – Vice President), Reiner Schulze (University of Münster - Vice-President) and Haluk Kabaalioglu (Yeditepe University – Vice President). Ms Helena Ferro de Gouveia carries on her duties as the ELFA Secretary.

The Board has meet three times since the last annual Conference. Two meetings were organized in Germany (Berlin, 23–24 April and Bonn, 30 June – 1 July), and the third one took place in Florence, 14–15 October 2010.

In my previous President's Newsletter I already informed about the problems discussed in Berlin and in Bonn. Our meeting in Florence was chiefly devoted to the organization of the Annual Conference in Warsaw. We approved the topic of the conference and created the preparations schedule. We also discussed the possibility of future cooperation with SEELS (South East Europe Law Schools Network) and SEALS (South East American Law Schools Organization).



## 2. Warsaw Conference

I do hope that we will soon meet at our Annual Conference in Warsaw. The Assembly, hosted by the University of Warsaw will happen from the 24th to the 26th of February held at Warsaw. Contrary to the previous practice, this Conference will be not devoted to the problems of teaching of law, implementing Bologna process at the law faculties, or similar issues. We would rather like to debate functioning of the higher education as a whole, hence the topic chosen for the meeting is *New Challenges to Law Faculties: Governance, Autonomy, Finance*. All these three factors are crucial for good functioning of the system of higher education and therefore the Board has decided to devote our main plenary session to them.

One expects the future to bring about important challenges. We may foresee that the budget cuts in the sphere of science and education, happening all over Europe, with the notable exception of Germany, will lead to relative pauperization of university teachers. In some countries the salaries of our colleagues have already been cut up to 10 %. Also the rise of study fees have caused troubles – leading to massive students protests on the streets of London. We need therefore to reflect upon the system of financing of the higher education in Europe. Financial issues are closely connected to the question of good governing and autonomy of our Universities and Faculties. All these points seem way much more important than the concern for the proper functioning of the ECTS system.

Additionally we have decided to give to our conferences a scientific dimension. First time in the history of ELFA meetings,

there will be panels devoted to scientific debate on civil, law, public and criminal law. We have resolved that this approach should be continued in the future.



The University of Warsaw

## 3. Membership

At the moment, our organization gathers about 200 law faculties from 40 countries (ranging from Armenia to the U.K). It is more than ever. We have sent over 250 invitation letters to law faculties which are still not yet members of ELFA. This action has produced some results: we are pleased to welcome in our Organisation the Law Faculties of the University of Florence, Universidade de Lisboa, Kadir Has University of Istanbul, State University Higher School of Economics Moscow, International School of Law and Business in Vilnius, of the University of Opole as well as Faculty of Law of Banja Luka. The Board has also determined that during the Warsaw meeting the faculties that are our members for more than two years would receive the **ELFA membership certificates**.

## 4. Finances

The financial situation of ELFA is more stable than it used to be in the past biennium. Already in the last Newsletter we informed you that ELFA had to reimburse to the European Commission the sum of 45.000 Euro received within the

framework of the Grant Agreement 1999-1023. (Thematic Network Project ). The project has never been completed due to poor management, yet some money have been distributed among several universities: we could not receive them back.

As you may learn from our Financial Report right now we have at our disposal the sum of 175.000 € Its portion 120.000 € is a locked deposit. Our costs are produced chiefly by the functioning of the secretariat and stationary (new leaflets, envelops, certificates). Some money has also been used for the Annual Meeting and meetings of the Board.

## 5. ECTS Experts

There are still law faculties in Europe that have not adopted ECTS system yet. As Bologna system is going to be implemented in the Russian Federation, Ukraine and also in south-eastern European countries, the Board has resolved to create a list of ECTS experts to aid the law faculties with this issue. In order to do so we will create list of experts. All of you who would like to be among them, are kindly requested to register during the conference.

## 6. EJLE (European Journal of Legal Education)

*European Journal of Legal Education* is now published only electronically. Yet, we are sorry to notice that there are hardly any submissions for publication. We would like therefore, to encourage you to send us articles dealing with legal education to keep the *Journal* alive. In the future, the Board will probably contemplate to have also the printed version of EJLE. It will depend on our financial situation as we estimate the costs resulting there from to be about 8000 €



**The Board of ELFA in Berlin.**  
Manuel Bermejo, Haluk Kabaalioglu, Jacek Petzel, Reiner Schulze, Anne Klebes-Pelissier, Helena Ferro de Gouveia. Missing Hans van Houtte.

## 7. External Affairs

Prof. Manuel Bermejo, our first vice President, attended the meeting of American Law Schools Association (AALS) in San Francisco in January 2011. We have resolved to keep a good contact with this organization. We have also decided, mainly due to the high costs, not to participate at the meeting of World Organization of Law Schools of which ELFA is an associate member. SEALS Organization from the United States has recently suggested cooperation with ELFA. The Board has decided to meet their representatives in Istanbul during the scientific conference organized by Yeditepe University. We are also going to cooperate with SEELS (South East Europe Law Schools Network) – the organization uniting 11 law faculties from Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia. The aim of the organization is to implement Bologna system at the law faculties in this region. We will meet their representatives in Warsaw before the conference.

## 8. Election to the Board

At our conference in Warsaw two of the members of the Board, i.e. the President Jacek Petzel and Treasurer Hans van Houte, will leave it. Anyone who would like to join the Board to fill in these vacancies is kindly requested to inform the Board about her or his intent. Please bear in mind that during our last Board meeting we decided to reduce the number of the Board Members to 5. This proposition will be submitted to your approval during the AGM. Shall it be accepted, there will only be one Board Member to be elected.

Jacek Petzel  
President of the Board



The Board at the University of Florence

## ELFA at AALS Conference



Manuel Bermejo with H. Reese Hansen

The Annual Meeting of the Association of American Law Schools took place in San Francisco (California) from January 5th to 8th, 2011, thus continuing a long series of these meetings which began in the year 1900 and have continued until today practically uninterrupted. The general title of the meeting this year was Core Educational Values. Guideposts for the Pursuit of Excellence in Challenging Times. More than 3600 participants attended this year's conference, representing universities in the United States and from many other parts of the world.

Manuel A. Bermejo, member of the ELFA Board of Directors, attended the conference representing ELFA. Dr. Bermejo had the opportunity to participate in the main institutional events as well as taking part in the extensive offering of conferences, seminars and other activities included in the program. It should be mentioned that he was honored by an invitation to attend as distinguished guest the main event of the Conference, the Association of American Law Schools Luncheon, and the meeting organized for

representatives of universities outside the United States.

During these activities, Manuel A. Bermejo had the opportunity to converse and exchange opinions and proposals to initiate or intensify cooperation with the president of AALS, H. Reese Hansen, the president-elect, Michael A. Olivas, and the Executive Director, Susan Westerberg Prager, and representatives of other associations and organizations with similar or complementary objectives to those of ELFA like the American Bar Association, the International Association of Law Schools and the Canadian Association of Law Teachers. We hope that these conversations will soon result in further avenues of cooperation.



**Plenary Session of the Conference**



## The Role of Practice in Legal Education

**HERIBERT HIRTE and SEBASTIAN MOCK**

### I. General Structure of Legal Education

*1. How many law schools are there in your country, and what are the requirements, if any, for accreditation or licensing of law schools?*

In the beginning of 2009 there were 43 law schools in Germany among which there was only one private law school.<sup>1</sup> At present one additional (private) law school is going to be established.

Generally the laws of the German federal states (“Länder”) and not federal law govern the public universities due to the fact that the German constitution contains

---

<sup>1</sup> See *Deutscher Juristen-Fakultätentag, Gesamtstatistik des 89. Deutschen Juristen-Fakultätentages 2009 für das akademische Jahr 01.10.2005–30.09.2008, 2009*, available at <[www.djft.de/gesamtstatistik89.pdf](http://www.djft.de/gesamtstatistik89.pdf)>.

20 Heribert Hirte/Sebastian Mock

an exclusive authority concerning education for the German Länder (see Art. 72 subs. 3 no. 6 of the German constitution [Grundgesetz]). As a consequence the German Länder determine whether a public university may be established. Additionally the German Länder have the authority to recognize non-public institutions as a university. This authority is based on legislation that – in the public interest – requires a permit for the setup of educational facilities like schools, kindergardens – and universities. The requirements they set are generally:

- guarantee of academic freedom for the lecturers;
- admission only of students that could also be admitted at a public university;
- teaching by fulltime professors;
- teaching and exams have to be equal to the requirements for public law schools;
- sustainable financial constitution of the law school;
- guarantee of a considerable economic and legal safety of the lecturers.

These general laws do not contain specific regulation as to the content of the curriculum. Such guidelines may, however, result from specific laws pertaining to the education in a specific field, particularly if public interest is involved (e.g. in health care professions). In the (theoretical) case of non compliance the university could be ordered not to issue any exam certificates. Regarding legal education, these general requirements, typically set up by the respective Länder laws and their Departments of Culture and/or Education, are being complemented by Federal and state legislation governing the necessary content of legal education for all universities, the latter being governed by the respective Departments of Justice. Law, therefore, is the only field in which the supervisory authority regarding the universities is split between two governmental departments. The federal

framework law, so far, is the “Deutsches Richtergesetz” (German Judges Law)<sup>2</sup> that establishes the prerequisites for the first examination (“Erste Juristische Prüfung”), an examination taken in part by state authorities (70%), and in part regarding the elective courses by the universities (30%) (see also the more detailed answer to Question 6).<sup>3</sup> Registration for the first examination requires four years (eight semesters) of studies at a law school (of which two years [four semesters] have to be in Germany) (§ 5a subs. 1 Deutsches Richtergesetz). However, admission to the exams can be granted when the student studies less than four but more than two years at a law school when she/he passed all necessary exams at the law school. Whether or not to take the university or the elective part first, is not set by federal law; the law’s idea certainly is to take the (more general) state part first, but most students try to pass the two parts in the opposite order. Passing the exam, opens the way to the “Referendariat” which after two years (§ 5b subs. 1 Deutsches Richtergesetz) enables to take the second state exam. This exam attests the “ability to sit as a judge” (Befähigung zum Richteramt) which includes the possibility to be permitted to practice law as an attorney (see also the answers to Question 8). The participation in the Referendariat is mandatory in order to exercise any of the regulated legal professions and cannot be substituted by other public or specific legal services.

---

<sup>2</sup> See <http://bundesrecht.juris.de/drjg/BJNR016650961.html>.

<sup>3</sup> Until 2003, the examination was completely taken by the state authorities and thus labelled “Erste Juristische Staatsprüfung” (First Legal State Examination).  
*The Role of Practice in Legal Education 21*

2. *What are the approximate costs of legal education in your country, estimated either by year or across the course of law school study? If costs differ significantly between public and private law schools, please indicate how.*

Due to the fact that public law schools are mainly governed by the law of the German Länder and not by federal law there are considerable differences between the public law schools concerning tuitions. So far only six German Länder (Baden-Württemberg, Bavaria, Hamburg, Lower Saxony, North Rhine-Westphalia and Saarland) introduced tuitions for studying at a public university. The tuition for attending law school is between 300 and 500 € per semester (typically tuition in the Länder is equal regardless of the field of study).

The number of semesters absolutely necessary to obtain the first law degree is four semesters (§ 5a subs. 1 Deutsches Richtergesetz). In average law students in Germany need approximately eleven semesters to be prepared to register for the first examination costing a total amount between 3.300 € and 5.500 €. Eleven German Länder (Berlin, Brandenburg, Bremen, Hesse, Mecklenburg-Western Pomerania, Rhineland-Palatinate, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia) however refused to introduce tuitions or exempted the first course of studies from tuitions. In these German Länder there is no tuition.

In any case, additionally to the eventual tuition fees all public universities charge a fee for administration, self-government of the university and for public transport.<sup>4</sup> This administrative fee deviates between the universities

---

<sup>4</sup> Which then allows unlimited use of all means of public transportation, simply by being a student.

(50 € to 300 € per semester).

The so far only existing private law schools charge a tuition of 3.300 € per trimester summing up to 39.600 € for twelve trimesters recommended to register for the first examination.<sup>5</sup>

### *3. What are the requirements for entry into law school in your country?*

*Is there an entrance exam, either nationally or by certain schools?*

The general requirement for entry into law school is only the *Abitur* which is the final graduation exam pupils take at the end of their (higher) secondary education and as a part of this (approximately 35% of all Germans reach this grade). Until recently the applications for studying at a public law school were administered by a special state authority (*Zentralstelle für die Vergabe von Studienplätzen – ZVS*) which not only administered the applications but also assigned the students to each law school without any influence by the individual law school. Due to the decreasing number of students in relation to the capacity at the universities available in the last couple of years<sup>6</sup> legal studies have been excluded from this procedure.

This trend can be referred to a general decrease in the interest to study law compared to an outstanding high number of students in last 20 years.

The reason for the general lack of further requirements for the entry into law schools can be seen in the rather regulated German school system. All

---

<sup>5</sup> See

<[www.lawschool.de/faq\\_forum.html?&L=0bls-cd](http://www.lawschool.de/faq_forum.html?&L=0bls-cd)>.

22 Heribert Hirte/Sebastian Mock

<sup>6</sup> The main reasons for this development seem to be a slight reduction of the German population, coupled with an enormous increase of the number of universities in the 1970ies and once again after re-unification in the 1990ies.

school degrees are governed by the laws of the German Länder which are generally the same to a large extent (the key parts of the school curriculum are subject to agreements among the Länder, governed by the [German] “Conference of Departments of Culture” [“Kultusministerkonferenz” – KMK]). Consequently almost all issues of education in schools are more or less regulated in the same way in all parts of Germany providing generally a high level of comparability of the pupils from all regions of Germany as well an obligation of all states to recognize other states’ school leaving examinations.

The only existing private law school (Bucerius Law School, Hamburg) has an additional written and an oral entrance exam. The public law schools so far do not have such exams but consider in the applications besides the grades of the *Abitur* also other aspects like extracurricular activities or special language skills usually obtained abroad.

### *4. How many students graduate from law schools in your country in any given year, and how many lawyers do you estimate to be licensed to practice law in your country at this time?*

In 2007 in Germany 8.759 students graduated with the first examination. In 2008 the number decreased to 6.366. Additionally 500 students having a different major than law graduated from law schools.

At the same time 142.830 (2007) and 146.910 (2008) lawyers were licensed as attorneys in Germany.<sup>7</sup> This number does not reflect the lawyers in

---

<sup>7</sup> See the official statistics of the Federal German Bar (Bundesrechtsanwaltskammer) <[www.brak.de/seiten/pdf/Statistiken/2009/Entwicklung.pdf](http://www.brak.de/seiten/pdf/Statistiken/2009/Entwicklung.pdf)>.

*The Role of Practice in Legal Education* 23

public services or working in-house on whom no data is available.<sup>8</sup>

In any event, the number of lawyers in private practice has increased dramatically throughout the last years, which is one of the driving factors for a continuous reform of legal education in Germany.

*5. What is the standard course of study for law school students in your country – number of years of study and educational level that must be attained in order to enter law school?*

German law generally requires the “maturity” exam (“Reifeprüfung” or “Abitur”)- as the official degree of the (higher) secondary education – as a prerequisite to enter a university. Due to the fact that education is not governed by federal law but by law of the German Länder there are some differences among the German Länder regarding the way to reach the Abitur. However, the majority of the German Länder require twelve – some still require thirteen – school years and a final exam for the Abitur. The number and the content of the courses for the Abitur are governed by the laws of the German Länder but are in fact largely harmonized on the basis of treaties among the German Länder providing in exchange mutual recognition of other states’ Abitur exams.

*6. Are there general requirements for graduation from law school, and who imposes these requirements?*

Legal education in Germany is governed by federal law and the law of the German Länder. Federal law (mainly the “Deutsches Richtergesetz” – see

---

<sup>8</sup> Those are, however, not a new phenomenon in Germany; differently *Wilson*, Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education, German Law Journal, Vol. 10, No. 7, p. 823, 835 (2009).

24 *Heribert Hirte/Sebastian Mock*

answer to question 1) sets the general requirements for the studying of law as the subjects of the courses and the general structure of the studies. The details are governed by the law of the sixteen German Länder which however in fact harmonized their regulations to a large extent. They leave some room to the individual universities mainly regarding the establishment and content of elective courses. The requirements set by federal law are:

- division of the studies in mandatory and elective courses;
- mandatory courses in civil, public, criminal and procedural law including legal methods and the philosophical, historical and social basics of law;
- participation of at least one foreign language course focussing on legal terminology;
- consideration of the abilities necessary for working as a judge, legal counsel or in public administration especially mediation, communication and rhetoric;
- participation in at least three months of legal internships.

Additionally one has to repeat that the universities themselves are responsible only for the exams in the elective courses (see answer to Question 1). The exams in the mandatory courses are organized by special state exam administrative agencies (Justizprüfungsämter) which are usually part of the Courts of Appeals. Due to the fact that each of the German Länder has only one state exam administrative agency the students from all the universities in this German Land take the same exam and are administered uniformly. On some occasions, even the respective state agencies of *different* states agree to pass out the same exam to their candidates, thus maintaining a high degree of comparability of law degrees even across state borders.

The first examination (as well as – to a minor extent – the second state examination) is the decisive bottle neck compensating the easy way to enter law school (see answer to Question 5). A failing rate of 30% (for the part of the exam taken by the state authorities) is standard, and it can go up to 40% in some states or universities.<sup>9</sup> The part of the exam taken by the universities has a lower failing rate which is approximately 6% only. The high failing rate in the first examination is coupled with a relatively high drop out rate during the studies which is now at approximately 16% but which also decreased since the last reform of legal education from previously as high as 27%. The main reason for this decrease is probably the higher number of mandatory class room tests which during the studies which are necessary in order to register for the first examination. At several universities students have to pass a certain number of exams within a certain number of semesters in order to pass an intermediate exam (Zwischenprüfung) which is then the prerequisite for further studies at the law school. The intermediate exam was introduced in order to limit the number of students failing at the first examination by sorting them out already at the intermediate exam. Nevertheless, the high failing rates in law schools as well as the high drop out rates have been a concern for the federal and state legislatures for many years. The failure rate of individual class room tests is usually not documented by law schools, but it can reach even higher figures than that of the overall failing rate. The fact that the first examination is the key controlling element of the access to the (= all) legal professions explains the German resistance to an

<sup>9</sup> See *Ministry of Justice*, Official Statistics for Legal Education of the Ministry of Justice of 2007, available at <[www.bmj.bund.de/files/-/3503/Ausbildungsstatistik%202007.pdf](http://www.bmj.bund.de/files/-/3503/Ausbildungsstatistik%202007.pdf)>. *The Role of Practice in Legal Education* 25

introduction of the Bologna scheme – if it is combined with *university* exams only at the end of the circles.<sup>10</sup> Particularly the bar fears that this will cause an even higher number of attorneys with no possibility to restrict their access to the bar for reasons of lack of need; for, according to the prevailing interpretation of the German Constitution's Article 12 (the Freedom to choose a profession [Berufsfreiheit]), quantitative restrictions to access a specific profession are unconstitutional.<sup>11</sup>

*7. How much of the law school curriculum is mandatory, and how much consists of optional elective courses that permit students to choose? Who decides the proportion of mandatory versus elective courses at any given law school?*

The German legal system is based on the distinction between mandatory and elective courses (see already answer to question 1). Although federal law determines this structure of legal studies it does not determine the exact number of courses for both parts. This is only determined by the German Länder. Federal law however states that in the first examination as the first legal degree the mandatory courses constitute a portion of 70% and the elective courses constitute 30% of the final grade.

<sup>10</sup> See also *Hirte*, „Bologna“ und die deutsche Juristenausbildung – Zu den Schwierigkeiten Deutschlands bei der Übernahme des Bachelor-/Master-Modells in die Rechtswissenschaft –, *ZSR* (Zeitschrift für Schweizerisches Recht) 2008 I, p. 253, 255; *Hirte/Mock*, *EJLE* (European Journal of Legal Education) 2006, 141.

<sup>11</sup> German Constitutional Court as of 5 September 1972 – 1 BvR 518/62, BVerfGE 33, 125 = NJW 1972, 1504; see also (partially critical about this position) *Hirte/Mock*, *JuS* – Beilage 12/2005, p. 1, 13. 26 *Heribert Hirte/Sebastian Mock*

The subjects of mandatory courses have to be the fundamental questions of civil law, criminal law, public law, procedural law including also the respective European law related questions and the methodical, philosophical, historical and social implications (§ 5a subs. 2 Deutsches Richtergesetz). Nevertheless the concrete content of these mandatory courses is defined by the laws of the German Länder which are more or less identical.

These regulations do not state an exact number of courses but refer to a specific content to be taught in the courses. Consequently law schools are free to structure the courses as long as all aspects of the respective subject are taught.

The German Länder – and also the individual universities – cannot change this structure of the final grade and usually adopt their legal education regulations in a way that the proportion which is attributed to the elective courses in the first examination (30%) is also reflected in the curriculum.<sup>12</sup>

*8. What additional requirements are imposed by law, rule or regulation, before or after graduation from law school, and prior to licensure as a practicing attorney? Is there an examination for entry into the bar, and if so, who administers it? Briefly describe the bar examination, particularly if it contains any component that measures practice skills, ethics or values, as discussed below. What percentage of aspirants pass the bar examination each time it is administered?*

---

<sup>12</sup> To get an idea of what is being offered, have a look at the list of classes which were offered at the University of Hamburg's Law Faculty in the summer term 2009 <<http://studium.jura.uni-hamburg.de/vorlesungsv/KVVS0Se2009.pdf>>, the elective courses being presented from p. 15 in the list.

The German legal education system consists of a rather theoretical part being in the responsibility of the universities and a rather practical part being in the responsibility of the Courts of Appeals. This structure is set by federal law but left to the German Länder to govern the further details.

In order to practice law after graduation from law school students have to undergo a practical training (Referendariat) which is organized by the several Courts of Appeals (Oberlandesgerichte) for a period of two years; during this time they get the official status of a legal trainee (Referendar) and they are paid as public employees.<sup>13</sup> Within these two years the legal trainees have to work for a prosecutor or criminal law judge, a civil law judge, at an administrative authority (each at least for three months) and for a licensed lawyer<sup>14</sup> for nine months (§ 5b subs. 4 Deutsches Richtergesetz).<sup>15</sup> Additionally the Courts of Appeals hold courses for the legal trainees focussing especially on procedural aspects of civil, criminal and administrative law. The practitioners teaching them are mostly selected on the basis of their pedagogical qualities and do not necessarily teach worse

---

<sup>13</sup> Until a few years ago, they even enjoyed the status of a civil servant, which was abolished mainly for cost reasons; in any case, they are not “exploited”, as assumed by Wilson, German Law Journal, Vol. 10, No. 7, p. 823, 833 (2009).

<sup>14</sup> State law can also provide the opportunity to substitute three months of the training with a stage at a notary, a business entity or an association as long as a sufficient level of training on legal counseling is guaranteed.

<sup>15</sup> Wilson, German Law Journal, Vol. 10, No. 7, p. 823, 833 (2009) referring to a period of only four months bases his considerations on the legal situation of a couple of years ago.

than law school professors.<sup>16</sup> During these two years legal trainees only assist lawyers, judges etc. but do not have – apart from minor exemptions – the right to render legal services or to appear before court on their own. Although historically the main purpose of the training was to train judges nowadays the overwhelming majority become lawyers afterwards.<sup>17</sup> At the end of the two years the students have to take another (second) state exam being organized by the Courts of Appeals consisting of eight written exams (five hours each) on criminal, civil and administrative cases. In the written exams the legal trainees have to deliver ‘real’ court decisions, written submission of a lawyer or decisions from administrative authorities. On average around 80% of the legal trainees pass the exam which can only be taken twice.<sup>18</sup> The Referendariat shares the key characteristics of clinical legal education as they were set out recently by *Richard Wilson*.<sup>19</sup> It is a “training on

---

<sup>16</sup> Differently *Wilson*, German Law Journal, Vol. 10, No. 7, p. 823, 833 (2009).  
*The Role of Practice in Legal Education* 27

<sup>17</sup> This fact has completely changed the German legal professoriate throughout the last years and has begun to change legal education, too, also for a while; still based on the former situation *Wilson*, German Law Journal, Vol. 10, No. 7, p. 823, 831 (2009).

<sup>18</sup> See *Bundesamt für Justiz*, Ausbildungsstatistik 2007 <[www.bmj.bund.de/files/-/3503/Ausbildungsstatistik%202007.pdf](http://www.bmj.bund.de/files/-/3503/Ausbildungsstatistik%202007.pdf)>.

<sup>19</sup> See *Wilson*, German Law Journal, Vol. 10, No. 7, p. 823, 829 (2009). – The key characteristics of the German Referendariat were also described recently in a decision by the European Court of Justice involving the question whether a legal education different from the classically German one grants a right under the fundamental freedoms of the EC Treaty to enter the German Referendariat (answering it in the negative); see ECJ (Case C-345/08 *Krzysztof Peśla* ./ *Justizministerium Mecklenburg-Vorpommern*, NJW 2010, 137).

the job” with a “guide on the side” and involves experiential learning by providing “legal services for real clients”. But unlike the American style clinical legal education, it is not integrated into the University system and, therefore, teaching is not performed by law professors nor does the work give academic credit in its strict sense. Finally, the services rendered during the Referendariat do not primarily focus on the assistance to indigents who otherwise could not afford legal counsel;<sup>20</sup> this is mainly a result of the fact that Germany provides for a broad tax funded legal aid system rendering additional measures by the bar overfluous.<sup>21</sup> Nevertheless, the fact that German law has provided for the integration of practice in legal education already for a long time, explains the “particular resistance”<sup>22</sup> to adopting a system which pursues the same goal – but only in a different way. Finally, after passing the (second) state exam the legal trainee can immediately join the bar (without any further test or exam) or become a judge or prosecutor<sup>23</sup> or work for an administrative authority whereas the

---

<sup>20</sup> See on this aspect *Wilson*, German Law Journal, Vol. 10, No. 7, p. 823, 834 et seq. (2009).

<sup>21</sup> See extensively on this and the interrelationship with other features to facilitate the access to justice *Hirte*, 40 Int'l and Comp. Law Quarterly 91–123 (1991).

<sup>22</sup> Literally *Wilson*, German Law Journal, Vol. 10, No. 7, p. 823, 828 (2009).  
28 *Heribert Hirte/Sebastian Mock*

<sup>23</sup> <sup>23</sup> In Germany judges are usually appointed right after the second state exam although they are usually only 25–30 years old. There is no tradition that judges have to work as lawyers before they become a judge in Germany (“career judges”).

latter does not necessarily require the second state exam. But unlike for joining the bar, becoming a judge or prosecutor requires relatively high marks in the second state examination.

*9. Can you estimate what percentage of law school graduates in your country who go on to enter into the practice of law, not only as advocates, but as prosecutors or in government service? If there are other categories of “lawyers” who engage in law practice, other than those set out here, please describe them.*

In Germany official numbers exist only concerning the amount of lawyers that are licensed. Further statistics on how many students of one year work in the different legal professions do not exist. From a comparative point of law, it is also important to see that those are regarded as “jurists” (“Juristen”) but not as “Rechtsanwälte”, as the second term implies an admission to the bar, which is typically not available to them.

The German legal education system is based on the idea of the so called *Volljurist* meaning to train one kind of lawyer for all legal professions. Passing both state exams therefore is the necessary but also sufficient legal requirement for all legal professions, i.e. the position of a judge, a prosecutor, a lawyer or a notary. According to recent changes of the German law on legal services (“Rechtsdienstleistungsgesetz”)<sup>24</sup> persons without both state exams can advise in certain legal matters which are mainly related to other services rendered. Apart from this, this is however limited

to a very small part of legal services which are:

- gratuitous legal services within families, among neighbours or close friends (*pro bono* work is not included and requires a fully trained lawyer; § 6 Rechtsdienstleistungsgesetz);
- legal services of associations for their members (e.g. trade unions; § 7 Rechtsdienstleistungsgesetz);
- public legal aid (§ 8 Rechtsdienstleistungsgesetz);
- persons specifically registered providing services as
  - debt collection;
  - providing advice on retirement issues;
  - legal services on foreign law (§ 10 Rechtsdienstleistungsgesetz).

Moreover, legal services can be offered by other persons than an attorney if the legal services only constitute a minor aspect of the profession (§ 5 Rechtsdienstleistungsgesetz). This rule applies to instance for car mechanics who give some insurance related advice to their costumers after a traffic accident. It also applies to other (non-legal) experts giving some kind of opinion that also involves legal questions to a minor extent.

*10. Is the professoriate within law schools in your country made up of full or part-time teachers, and in what percentage for each? May law school professors in your country engage in the private practice of law while employed as a professor? Under what circumstances? If law schools in your country do offer “practice” components, as discussed below, are the faculty who teach “practice” courses given status equal to or commensurate with those who teach in the classroom only?*

Professors in German law schools are usually state employed for life time and work on full time positions. Due to this position they are not allowed

---

<sup>24</sup> See [www.rechtsberatungsgesetz.info/gesetzgebung/aktuell.html](http://www.rechtsberatungsgesetz.info/gesetzgebung/aktuell.html).

*The Role of Practice in Legal Education 29*

to work as lawyers or to offer legal services.<sup>25</sup> This rule – which also applies to judges and other state employees and which goes back to the attempt to exclude Jewish law professors from practice during the Third Reich, certainly maintains the separation of theory and practice and is being continuously criticized for that.<sup>26</sup> The German Constitutional Court – and also the European Court of Human Rights<sup>27</sup> –, however, upheld it as constitutional, even in very recent decisions.<sup>28</sup> Law professors can however work part time as a judge or give academic legal opinions provided that such side activity does not exceed 20% of his or her time devoted to the main position. Practitioners are often asked to give classes in areas which are perceived to be outside the central parts of law (i.e. in tax law, accounting law, intellectual property law) or which require practical experience (i.e. drafting of contracts or litigation tactics). They typically only teach on a part time basis, but can become a Professor on an honorary basis by teaching at a law school for several years. Once a practitioner obtains the

<sup>25</sup> See also on this *Wilson*, German Law Journal, Vol. 10, No. 7, p. 823, 838 (2009).

<sup>26</sup> See especially for academics *Bender*, Restriktive Tendenzen bei der Rechtsanwaltszulassung, NJW 1986, 409 et seq.; see also generally *Feuerich*, Rechtsanwälte im öffentlichen Dienst, MDR 1993, 1141 et seq.

<sup>27</sup> ECHR Case 6213/03 *G.L. v. Germany*, NJW 2007, 3049 et seqq.

<sup>28</sup> Generally Bundesverfassungsgericht (Federal Constitutional Court) case 1 BvR79/85, BVerfGE 87, 287; BVerfG, case 1 BvR 386/88 NJW 1988, 2535; see also recently Constitutional Court Case 1 BvR 893/09, NJW 2009, 3710 et seqq. concerning the denial of an admission of a *Juniorprofessor* as a lawyer. 30 *Heribert Hirte/Sebastian Mock*

status of a Professor on an honorary basis the further lectures are unpaid. Additionally, practitioners can also teach on a contractual basis without becoming an honorary Professor being paid for each lecture or semester on the basis of a contract for services, without being employees (so called “Lehrbeauftragter”). This is very often the case in courses with a strong practical approach (e.g. criminal procedure). Both groups of practitioners are usually not involved in the examination of law students. In the practical training following the law schools (the “Referendariat” – see also the answer to question II.1.) professors are not involved at all. Except for a few weeks of the beginning of the Referendariat, the legal education during this period is organized as “training on the job”: the Referendar is assigned to a specific practitioner who teaches him or her individually and who is not allowed to teach more than two Referendars at a given time. Typically, only one day a week the Referendar has to attend a class of regularly not more than 25–30 persons. These courses the legal trainees have to join are taught by practitioners only depending on the respective stage of the practical training.<sup>29</sup> Teaching typically is only a part time activity for the respective attorneys, judges or other lawyers. All classes are organized by the respective Higher Regional Court administration but are also in part in the responsibility of the respective bar association. As it is regarded as part of the main activity, it is not paid for separately. Judges, however, enjoy a reduction of their case load in order to teach Referendar classes or may take advantage of this activity for their future

<sup>29</sup> There is, however, one minor exemption in case that a law school professor is also a (part time) judge at a Court of Appeals. *The Role of Practice in Legal Education* 3132 *Heribert Hirte/Sebastian Mock*

career. In contrast, practising lawyers are regularly paid, but only on a low level due to the fact that the bar considers the participation in the legal education as an obligation of the profession. In the examination at the end of the practical training law schools professors are not involved either. The second state exam is governed by the German Länder. Generally it consists of eight written exams (usually four on civil law, two on criminal law and two on administrative law), lasting five hours each. In each of the exam the candidate has to work on a file and has to deliver a complete court decision, legal opinion of a lawyer or a statement of claims. These documents have to meet all requirements a respective *real* document has to meet including all formal requirements. In addition, in an oral examination the students have to work on a file and present a recommendation for a court decision in the respective case as if they were presenting this recommendation as a judge in court to other colleagues in a court with a panel consisting of several judges. Both, the written and the oral part of the exam are graded by practicing lawyers, i.e. judges and attorneys; law school professors are not involved in the second state examination. The scope of the exam is to test whether the candidate could work as judge or lawyer immediately after the exam. The exam is based on grades and not on a fail/pass result.

## II. Practice elements within the law school curriculum or otherwise, prior to licensure

*1. "Practice" within law school courses or curricula can encompass many elements. Please describe broadly what courses or elements of courses within your country's law school curricula contain an element of*

*"practice." Please do not limit your answer to legal analysis and reasoning, or to general theories regarding law or legal science. Examples of "practice" include both skills training and methods of instruction. Examples of skills training include the preparation and conduct of interviews with possible or present clients; fact investigation; development of case theory; counseling; selection of expert witnesses; negotiation, mediation or other alternative dispute resolution processes; problem solving; legal research; written or oral communication and persuasion skills; trial or appellate advocacy skills, organization and management of legal work within a law office, etc. Methods of instruction for the teaching of "practice" are generally experiential (the student plans, does and reflects on some lawyering activity), and might include the professor's use of legal or fact pattern problems, simulations, role plays, games, moot courts, structured and supervised internships or externships with practitioners or judges, clinical programs offering legal services to real clients under faculty supervision for credit, etc. If these elements are not present within law school curricula, is there some other required component of preparation for the practice of law, such as a required period of apprenticeship, that assures that the aspiring lawyer will acquire this training prior to becoming a licensed attorney?*

Due to the division of German legal education into a rather theoretical part being the responsibility of the universities and a rather practical part being the responsibility of the Courts of Appeals, the practical legal education hardly takes place at the universities. Nevertheless the teaching of soft skills gained a growing importance within the last years and nowadays

mandatorily offered to a minor extent at German law schools too. This shift in the importance of soft skills in the legal education was caused by the general lack of these abilities after the regular legal education and higher demands of the legal practice on graduates. It has to be noticed, though, that German law, particularly the law of civil procedure, pays a higher attention to written documents than to oral presentations (no “jury system”!). This has been reflected by the weight that our legal education

system attributes to writing rather than oral communication competences so far.<sup>30</sup>

In any event, in the legal traineeship following the first examination practice is the main purpose of the training. The legal trainees have to assist judges, prosecutors and lawyers in the preparation of all kinds of legal documents and are trained to act like fulltime judges, prosecutors or lawyers. In the training the Referendar has to prepare the complete court decisions on her/his own and might also sit as a judge (in civil law) being observed by a professional judge. By working for the prosecution the Referendar also has to work cases and has to appear in court as a prosecutor totally on her/his own and has to fulfil all the duties of a prosecutor. By working for an attorney the Referendar also has to prepare legal documents independently and can also represent the attorney in court which usually happens especially in minor cases quite often. Although all these different elements of legal practice are mandatory in the two year traineeship

period the second state exam itself focuses mainly on the position of a judge or a prosecutor.

*2. Is there a legal, regulatory or internal administrative regime which mandates, regulates, permits or proscribes practice as part of legal education? If so, please briefly identify it and its major components*

In Germany federal law states – as for the legal education at law schools – the basic structure also for the legal traineeship (see already answers to question I.1). The German Länder only regulate the details for the traineeship and mainly its administrative background. The requirements set by federal law in the Deutsches Richtergesetz (German Judiciary Act) (see above footnote 2) are:

- length of the traineeship (two years);
- number and places for the several stages (civil court, criminal court or prosecutor, administrative authority, lawyer and one optional stage at a place where a proper legal training is guaranteed);<sup>31</sup>
- the length of the stages with minor exemptions.

*3. Practice-related courses are often focused on the teaching of the basic skills necessary to function as a practicing attorney. However, the teaching of “practice” within a law school might also be said to include elements of ethics or professional responsibility, as well as values relating to the practice of law. To what extent do law schools in your country offer courses or components of courses, either required or optional, on ethics or professional responsibility? On promoting justice, fairness and equality*

---

<sup>30</sup> See on the generic competences required by a lawyer *Wilson*, German Law Journal, Vol. 10, No. 7, p. 823, 841 et seq. (2009) (however, without mentioning the key difference regarding oral communication competences).

---

<sup>31</sup> For instance the state of Hamburg requires the trainees to attend nine month of their legal training at an attorney’s office whereas the state of North Rhine-Westphalia requires a ten month’s training there. *The Role of Practice in Legal Education* 33

*within the legal system? On professional obligations to improve the legal profession and to enhance the likelihood that law and legal institutions will do justice? On assuring that the legal profession does not engage in discrimination based on gender, race or ethnicity, religion, sexual orientation, disability or other grounds? If these elements are not present within law school curricula, is there some other required component of preparation for the practice of law, such as a required period of apprenticeship, that assures that the aspiring lawyer will acquire this training prior to becoming a licensed attorney?*

This is the question the authors discussed the most intensively, because it is probably the most complicated to explain to a person with a background in a different legal system: Courses on professional responsibility are not mandatory in German law schools. Students can however choose elective courses in this field. Generally, issues of justice, fairness and equality are contained in all law school courses but especially in constitutional and administrative law. They are taught within these regular courses but hardly addressed specifically. At all German universities there are only four specific courses on professional responsibility.<sup>32</sup> During the legal traineeship following the first examination professional responsibility is an aspect in the legal education but gets hardly addressed within the courses offered by the Courts of Appeals as the responsible authority for the traineeship. Legal trainees are supposed to get familiar

---

32

Information provided by Dr. iur. *Oliver Knöfel*, Assistant at the Faculty of Law of the University of Hamburg.

with these aspects during their stage at a lawyer or a judge. Therefore, especially lawyers are obliged by law to teach the *Referendar* also the aspects of professional responsibility.<sup>33</sup> In addition, aspects of professional responsibility can be an element of the written and the oral part of the second state exam. However, in practice they are hardly addressed due to the fact that the candidates in the second state exam have to deliver *real* legal documents like court decisions or statements of claims (see also the answer to Questions 1). The (traditional) minor importance of the training of professional responsibility in the German legal education has no specific reason and cannot be determined to the last instance. First of law, as a general rule, the legal education in law schools focuses more on the substantive law rather than on procedural law. Apart from this the focus is on specific large codifications, which typically includes the (federal) Code of Civil Procedure, but not the more specific statutes and rules regulating an attorney's work. On the other hand, most infractions of professional rules by attorneys constitute a violation of the obligations of the attorney-client-contract

---

<sup>33</sup> § 59 subs. 1 Federal Lawyers' Act (*Bundesrechtsanwaltsordnung*) states (emphasis added): "A *Rechtsanwalt* should participate to a reasonable degree in the training of *Rechtsanwälte* who have passed their first state examination (*Referendare*). The *Rechtsanwalt* must give the *Referendar* in practical professional training at his/her law practice instruction in the duties of a *Rechtsanwalt*, providing guidance and opportunities to undertake practical work. *The subject of the professional training should particularly be the work of a Rechtsanwalt in and out of court, dealing with clients, professional ethics, rights and duties and the organisation of a law practice*".

<sup>34</sup> *Heribert Hirte/Sebastian Mock*

at the same time. Many of an attorney's obligations, therefore, are being taught as part of the education of the law of services in civil law (which is federal law!). In addition, until 35 years ago the law of professional responsibility was to a large extent only set by the profession itself not having the state legislator involved. This, however, was challenged by many lawyers on the grounds that an interference with the fundamental freedoms of the German Constitution, in particular with the Freedom to choose a profession [Berufsfreiheit] as guaranteed by Art. 12 Grundgesetz ought to be based on a formal state law. In a ruling of 1972 the German Constitutional Court of Justice<sup>34</sup> followed this approach holding that the rules of professional responsibility have to be set by formal state law and not by the professionals themselves; in case the profession wants to set rules on their own, they only can do so on the basis of a statutory authorization specifically permitting the sort, the goal and the extent of regulation it delegates (which are the prerequisites set by Art. 80 of the German Constitution). Only since these decisions professional responsibility is regarded as law. This is consistent with a general reluctance in German law (in part due to historical experiences) vis-à-vis self regulation that only begins to change in the recent past. Finally legal education in German law schools is mostly focusing on the question what the law is and not how to enforce certain rights in practice. This is connected to the fact that the German legal education system traditionally focused on the training of judges. They certainly have to follow professional standards, too. But

---

<sup>34</sup> Constitutional Court of Justice as of 9/5/1972 – 1 BvR 518/62, BVerfGE 33, 125 et seqq.

those are laid down in statutory law, particularly in the Deutsches Richtergesetz. The Criminal Code has only perversion of justice (Rechtsbeugung

– § 339) as a provision being only applicable to judges.<sup>35</sup> And infractions by judges against these provisions are extremely rare and are not – besides popular cases involving well known judges – reported specifically. Consequently, professional responsibility as such is hardly addressed in German legal education. Due to this high influence of state control in the legal education an additional special training on professional responsibility seems to be unnecessary. Moreover the dropout rate and the high failure rate constitute a rather high entrance barrier to practice law forming some kind of election process. Finally also the enforcement of the rules of professional responsibility by clients is supported by the German system of legal aid and by rather rigid criminal law. The most important field, in which the professional rules were directly applied (and still are) are those concerning advertising and competition.<sup>36</sup> Here, the local bars typically tried to sanction young lawyers who attempted to enlarge their market share by innovative advertising and/or marketing strategies which were not in line with the respective (former) professional rules. The Federal Constitutional Court's decision mentioned above curtailed these attempts to a large extent and in the end also extended

---

<sup>35</sup> There are, however, also other provisions being applied to judges as bribery which do not have a specific judge related scope of application.

<sup>36</sup> For an overview see *Hirte*, Anwaltswerbung, Zulässigkeit, Grenzen und deren verfahrensrechtliche Durchsetzung, ZZZP 116 (2003), p. 135–163.

the freedom for lawyers compared with the situation in the decades before.

*4. Is the provision of legal services by law students – “student practice” – permitted under the law of your country, and if so, under what circumstances?*

Students as such are not allowed to practice law or to offer legal services. Neither are legal trainees generally allowed to practice law but might do so in several minor occasions (see already answer to question 9 of part I.). Nevertheless law students as well as legal trainees can give legal advice on minor legal issues which is however a general rule of law (recently expanded by the reform of the Rechtsberatungsgesetz – see answer to Question 9) and not a law student or legal trainee orientated exception.

*5. Do law schools in your country offer mandatory or optional clinical legal education courses? In this context, “clinical legal education” means a course within the law school, for credit, in which the student provides legal advice or other services to persons who could not otherwise afford counsel. If law schools offer clinical legal education, what is the nature and extent of faculty or practicing lawyer supervision of student work product? Do teachers or students accompany students to court for court appearances or filings? How is credit awarded for participation in a clinical program, and during what year in the course of study is clinic made available or required? Are there prerequisite or co-requisite courses required before enrollment in a clinical program? Is there a prior or parallel seminar conducted in conjunction with participation in a clinical program, and if so, what does that seminar cover?*

Due to the fact that German law students have to participate in the legal traineeship after the first examination in order to become a lawyer legal clinics have no tradition in German law schools and are offered only very seldom.<sup>37</sup> One has to consider that in the Referendariat the Referendar has to spend almost two years in the legal practice. During this time the Referendar has to work as a real lawyer, prosecutor or a judge (see also the answer to Question 1). Consequently the Referendariat cannot be compared with a mere internship. Furthermore, the approach of legal clinics to educate lawyers’ skills was inconsistent with the traditional German legal education focusing on the education of judges rather than of attorneys. This has changed in the last years after the number of students/Referendars becoming judges decreased significantly, increasing on the other hand the need for an education in lawyers’ skills. This led to the requirement under federal law that each student has to attend a class on typical lawyers’ skills (“soft skills”) like negotiation, pleading, legal rhetoric and the like (§ 5a subs. 1 Deutsches Richtergesetz). Federal law leaves it to the state legislature, and those typically leave it to the specific universities how to fulfil this teaching requirement.<sup>38</sup> Legal Clinics are one of the possible „classes“ to be taught here. Regarding the additional purpose of legal clinics to provide legal services

---

<sup>37</sup> On possible reasons see *Wilson*, German Law Journal, Vol. 10, No. 7, p. 823 et seq. (2009) (partly based on a wrong understanding of the German Referendariat).

<sup>38</sup> The State and City of Hamburg, for instance, requires its law schools to consider also the aspects of negotiation, legal rhetoric, mediation and communication in the legal education (see § 1 subs. 2 Hamburg Legal Education Law [Hamburgisches Juristenausbildungsgesetz]).

*pro bono*, one has to note that Germany disposes of a very elaborate system of legal aid (“Prozesskostenhilfe”) providing for a relatively easy and cheap access to justice for everybody, thereby reducing the need for other means to overcome deficits in accessing the justice system.<sup>39</sup>The high degree of state support for the justice system is also reflected by the relatively high number of judges per capita of the population (one judge per approximately 4.000 inhabitants).<sup>40</sup>

*6. Do law schools in your country require or offer internships or externships with a law office, government agency or court, outside of the law school? If so, how are these programs supervised or overseen within the law school? Is there a seminar, either in parallel or separate from internships, to discuss issues arising from the external experience, such as professional role, legal institutions, etc.?*

Although law students have to undertake some internships during their studies at law school of at least three months (§ 5a subs. 3 Deutsches Richtergesetz) the law schools are not involved in the offering or supervision of these internships. The internships usually have to be taken at a court, a prosecutor, an administrative authority, a lawyer, a notary, a company

---

<sup>39</sup> See extensively *Hirte*, Access to the Courts for Indigent Persons: A Comparative Analysis of the Legal Framework in the United Kingdom, United States and Germany, 40 Int’l and Comp. Law Quarterly 91–123 (1991). *The Role of Practice in Legal Education* 37

<sup>40</sup> As of 31/12/2008 there were 20.101 judges in Germany (see the official statistics of the Ministry of Justice as of 31 December 2008, available under <[www.bmj.bund.de/files/-/1196/Gesamtstatistik%20Anzahl%20Richter%20Staatsanw%C3%A4lte%20Vertreter%20des%20oeffentlichen%20Interesses%202008.pdf](http://www.bmj.bund.de/files/-/1196/Gesamtstatistik%20Anzahl%20Richter%20Staatsanw%C3%A4lte%20Vertreter%20des%20oeffentlichen%20Interesses%202008.pdf)>).

38 *Heribert Hirte/Sebastian Mock*

or an association being suitable to give an insight to the legal profession. Unlike during the Referendariat, the students here typically do not work on their own but watch their respective supervisor during his or her legal work.

As these internships form a prerequisite for taking the first examination, it is the regulations of the German Länder that contain detailed requirements for the internships which are monitored by the governmental authority being in charge for the state exams (Prüfungsamt – State Exam Administrative Agency). Law students therefore usually ask for the confirmation by this authority that their internship fulfil the legal requirements. In addition it has to be repeated that the whole training period following the first examination (the “Referendariat”) is devoted to internships (for the content of the Referendariat see the answer to Question 1).

*7. What specialized components of training for the practice of law exist outside of or beyond the required course of law school study, or as an alternative to it, to prepare a student or law school graduate for either the general practice of law, or for a specialized area of practice such as that of a prosecutor or judge? Describe these programs, please, and by whom they are administered.*

See answer to question 3.

## II. Possible future elements of practice in legal education

*If legal education in your country does NOT include an element of practice, please provide an opinion as to whether or not law schools should provide more or less practice-related components, and why.*

Not applicable.

