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## LEGAL EDUCATION IN GERMANY

Legal education at German universities is unusual if not unique in its concentration on preparing students for the so-called first state examination, which is explained below. The two-year internship known as the *Referendariat* will also be described, as will the second state examination, which follows completion of the *Referendariat*.

Before describing the admission process at universities and legal education offered there, it might be useful for the reader to consider a list of themes that will appear in the following discussion. These themes, or "forces", were at work in motivating the recent reform of German legal education, and they are likely to crop up in future discussions.

One of the most important forces at work in Germany affecting the legal education is the Europeanization and globalisation of the law. Not only do Germans in all walks of life have more contact, for trade and other purposes, with European and other countries, but one also can discern a certain Europeanization of the law in many areas. In fact, European law is (still) taught as a separate course, implying that European law is separate and distinct from the national law ordinarily taught at German universities. But this is changing. European law has been incorporated into the domestic law of Germany in many areas, ranging from consumer protection to employment law. Globalisation of the law is seen most clearly in the area of international trade, but international public law has played, and will continue to play, an increasing role in German legal education.

There has been a marked increase in the non-German population of Germany in recent years. The largest ethnic group are the Turkish Germans, although there are also large contingents of other minorities. One other significant, but diffuse, group are those people of German ancestry whose families emigrated to Eastern Europe and Asia, particularly to the areas of the former Soviet Union, which collapsed in 1991. Since then, over 3 million so-called *Spätaussiedler* have immigrated to Germany and been granted German citizenship. Despite their German ancestry, many of these new citizens have

East European or even Asian names, and few of them have German as their mother tongue.

Until the early 1990s, the 2.6 million people of Turkish ancestry living in Germany were, along with millions of members of other minority groups, prevented from becoming German citizens simply because Turkey and most countries in Eastern Europe, Africa, and South America had no procedure for expatriation. For if an applicant for German citizenship could not prove that he or she had been expatriated by his former state, he could not be granted German citizenship. Due to this Catch-22, studying law was not particularly attractive for these non-citizen immigrants because much of the job market, including positions in the civil service, was closed to them. Amendment of the immigration laws caused a sudden increase in the number of non-German students who chose law as their major. At one university students of Turkish background make up almost a third of the law student population.

Because of a lack of state financial support, German law faculties, which until recently were all state-run, responded quite slowly to the digital revolution. Only recently have they obtained access to online commentaries and collections of legal periodicals and case law. Today all universities accord their students internet access, and all the legal faculties have access to data banks in German law over and above those that are not available for free over the internet. A number of universities, including Münster, grant students access to Westlaw and/or Lexis. The style of lecture is traditional. While many of the younger law professors use PowerPoint in their classes, most rely exclusively on overhead slides or upon the textbook (*Lehrbuch*) that they have often written themselves. Students do not prepare for class. Rather, they take copious notes and study from these notes, from the texts recommended by the professor, and from commercially available outlines, such as those offered by Alpmann Schmidt, the publisher of this guide.

The one privately run law school, the Bucerius Law School which is described in more detail below, has challenged German academic thinking about the content of the legal curriculum as well as about teaching methods. The state-centred, positivistic approach to law, with its strict interpretation of sources of law, is slowly giving way to a realisation that law in the globalized world is seldom codified. The 26,000 judges in Germany have been unable to handle the increase in litigation, with the result that far more cases than before are settled by the parties or in arbitration. In some jurisdictions "only" 30% of civil cases go through to trial, and this number is steadily decreasing as parties to international contracts decide to take their disputes directly to

international arbitrators. Bucerius recognised this trend and designed its curriculum accordingly, offering courses in alternative dispute resolution, arbitration, etc. The traditional, state-run universities have been slow to act, owing in part to lack of state funding. Bucerius has also recognised that most of the negotiation and contracting on an international level in Europe is conducted in English, not German, and accordingly requires that students spend one term (see below) at an English-language law school. A number of state-run universities, including Münster, have instituted programs in foreign law taught in the foreign language (see below). These programs, though quite popular, are not mandatory.

#### *Admission to the study of law*

When they are about 10 years old, children in Germany who are considered college material, are transferred to a college preparatory school called a *Gymnasium* for the remainder of their schooling. In the past, pupils at the *Gymnasium* took their school-leaving examination (*Abitur*) at the age of 19, but this was recently reduced to 18 years of age. The percentage of school children referred to a *Gymnasium* differs widely by city and community, ranging from below 10% to over 50% in some communities. *Gymnasium* pupils take classes in German, Mathematics, Physics, Chemistry, Geography, Biology, Arts, Music, Physical Education, Religion, History, and Social Studies. They are also required to study at least two foreign languages, one of which is almost always English. Many grade schools also now have foreign language programs, usually in English, so that all graduates of a *Gymnasium* have a decent background in English, even if some of them have difficulty speaking the language. In the final year of *Gymnasium* students prepare to take the written and oral school-leaving exam, or *Abitur*, generally a prerequisite to the study of law at a university. The *Abitur* grade-point-average (*Durchschnittsnote*) consists of grades in various subject areas in which the pupil feels most confident. Some subjects, for example, History or German, are considered easier than others, such as Chemistry and Physics. In addition, the grading varies considerably throughout Germany. Grade inflation may account for the phenomenon that virtually no one fails the *Abitur*. The highest mark given is 1.0 and the lowest 4.0. Grades between 3.0 and 4.0 are considered quite poor. However, one should not lose sight of the fact that fewer than one quarter of the young people in Germany leave school with an *Abitur*, making holders of the *Abitur* a relatively select group. For 2005, 270,000 pupils earned the *Abitur*

of which 21,000 chose law as their major at a university. The number of students choosing law has been declining in recent years.

Most males complete their compulsory military or civilian service directly following the *Abitur*. Although this compulsory service is referred to as compulsive *military* service, in fact a large majority opt to work as civilians in hospitals, schools, and the like. Because of this compulsory service, the young men who enter university are generally one year older than the women.

There are 45 universities at present in Germany offering full-time law courses preparatory to the first state examination. To apply one of these 45 public universities, a prospective student sends an application form with his or her *Abitur* GPA, place of residence, and list of preferred universities to a central agency. This agency mechanically assigns students to the first university on their list if that student has an *Abitur* GPA in the "one" category or lives near the university. Because the student who lives near a university is, with few exceptions, more or less automatically admitted to that university, German universities are all basically regional, drawing 90% of their students from the surrounding area. This fact goes a long way toward explaining why there are no Oxford, Cambridge, Harvard, or Yale universities in Germany. Nevertheless, certain state universities are more attractive than others and tend therefore to be more selective in the students that are referred to them. For example, while at some universities every student who applies is admitted, only about half of the students who apply to Münster are admitted.

In the mid 1970s the German Federal Constitutional Court, in a line of decisions reminiscent of *Brown v Board of Education* in the United States, decided that poor *Abitur* grades could not justify excluding applicants from a state university if the university still had classroom capacity for more students. Furthermore, the question of how much capacity the universities had was one reviewable by the administrative courts. As a result of these cases, students with very low *Abitur* GPAs are allowed to study at university. However, they are not admitted to study medicine and biology as the universities have been able to convince the courts that the teaching facilities in these fields of study cannot accommodate more students. The judges have stopped short of ordering the states to make more equipment and facilities available and, as a consequence, these two fields of study have what is known as a *Numerus Clausus*. One side effect of this judicial intervention into university education has been an unwillingness of university administrators to increase their teaching staffs for fear that they will be required to accept more students.

Another side effect is that state universities began competing for good students outside their regions.

To this point the discussion has only addressed the study of law as one's major at a university. In recent years it has become popular to study law as a minor with, for example, business or political science as a major. Ordinarily, as is the case in Münster, these students are taught in classes that are separate from the full-time law students, and the classes that they are taught are introductory in nature and not perceived as potential encroachments on the legal profession. That is not the case with the so-called *Wirtschaftsjurist* or "business lawyer". The *Wirtschaftsjurist* is a graduate of an institution of higher education called a *Fachhochschule*, which is similar to a polytechnic. A number of these *Fachhochschulen* (plural form) offer courses in business law for students who hope to find work as a business lawyer, but only as an employee, not a principal, as the degree does not qualify one for admission to practise as a *Rechtsanwalt* (attorney). Many *Wirtschaftsjuristen* (plural form) work as in-house counsel. There they draft contracts, negotiate deals, and advise their employer on day-to-day operations, including employment law. Some *Wirtschaftsjuristen*, along with graduates of administrative colleges, work for public agencies and in that capacity appear before court representing their agency even though they are not admitted to the practice of law.

The education of a *Wirtschaftsjurist* covers six semesters, or three years, and concludes with the granting of a degree of *Diplom-Wirtschaftsjurist* or a Bachelor of Laws degree. Some of these graduates might be interested in doing a master's degree in law at an English-speaking law school. Admission to a *Fachhochschule* is not limited to those pupils with the *Abitur* and, as a result, it is said that the quality is not generally as high as at a university. It is also said that, lacking the *Abitur*, the *Wirtschaftsjurist* is not likely to possess the same knowledge of foreign languages as the university student. This being said, as mentioned below, some universities are already granting a bachelor's degree after only two years of study, often with a curriculum that is quite similar to that offered at *Fachhochschulen*. Although there might be significant differences, at least in general, between the students attending law programs at *Fachhochschulen* and at universities, the curricular differences between these two educational institutions appear to be relatively minor at the Bachelor's level.



### University Legal Education

Legal education at a German university depends somewhat on the state in which the university is located and to an even greater extent on the university itself. Nevertheless, every law student in Germany begins with general law studies. Although these general law studies are designed to be completed in four semesters, some 80% of the students in Münster complete their coursework in three. Students write an examination in each class and the grades are collected and averaged into a GPA on the so-called *Zwischenprüfung*, meaning intermediate examination, but not actually administered as an examination but rather as a compilation of the grades earned in individual classes. A few universities confer the degree of LL.B upon completion of the *Zwischenprüfung*. After the *Zwischenprüfung* comes the so-called *Schwerpunktbereich*, or area of specialisation, which encompasses two semesters. Here one finds some variation among the universities in the areas of specialisation. Münster offers the following areas of specialisation: international law, European law, and international private law (conflicts of law); employment and social welfare law; civil procedure and dispute resolution; media, telecommunications, and internet law; tax law; constitutional and administrative law; criminal law; business and company law. As with the *Zwischenprüfung*, the *Schwerpunktbereich* also ends with a certificate which lists the courses and gives the GPA, often together with the student's relative standing in his or her area of specialization. As discussed below, the grade in the area of specialization becomes part of the grade in the first state examination. After completing the *Schwerpunktbereich*, almost all students spend two additional semesters preparing for the first state examination, as discussed below under *Repetitorium*. Those who pass the first state examination are admitted to the public service internship, lasting two years (*Referendariat*) and ending with the second examination, which qualifies them to be hired as a civil servant, including as a judge.

University legal education in Germany is often described as one intended to train judges and other civil servants, not lawyers. The instruction is also closely affiliated with legal positivistic thinking, specifically with the idea that law is "made" (it has a pedigree) by the legislature. Law is almost always identified with power (the so-called *Machtmonopol des Staates*) and, typical for legal positivism, morality is not ordinarily an issue. The law student endeavors to find what the law is and to apply that law correctly; he or she is much less concerned about what may or may not be reasonable under the circumstances.

Law teaching at a university in Germany is, in a word, academic, set in a historical and systematic framework. Great emphasis is placed on legal vocabulary and on broad, abstract statements of the law. Cases are regularly discussed in class, but they are classic cases used to illustrate that there is a right answer to (most) legal questions. Law is seldom questioned, nor its consequences discussed; rather, it is applied. It might be said that the purpose of the German legal education is to train humanistic, "scientifically" trained, conscientious civil servants.

The classes in the area of general law studies (*Zwischenprüfung*) are offered in criminal, public, and private law, generally in a ratio of 1:2:3 reflecting their relative weight in the state examination (see below). While an examination is written in each class, the grade has little significance for it does not become part of one's overall GPA. Some students spend a semester abroad, usually on the ERASMUS-Socrates program, but in recent years the number of students doing so has been declining. One class in "soft skills" (*Schlüsselqualifikationen*) is required. This requirement can be met by taking a class in debating, negotiation, public speaking, or something of the like. In addition, every student must pass one foreign law class, taught in a foreign language, or a law-based foreign language class. At Münster, for example, this requirement can be met by taking a class in Russian Law, Common Law, French Law, Spanish Law, or Turkish Law.

In the areas of specialization students must write a term paper, usually written in conjunction with a seminar. An examination is given at the end of each class and the accumulated grade makes up 30% of the grade on the first state examination (see below). Despite the Bologna process, no university degree is ordinarily given upon completion, although there are a few universities in Germany which give their students a Bachelor of Laws degree at this juncture. In the state of North Rhine-Westphalia, where Münster is located, there are five universities (Bielefeld, Bochum, Bonn, Düsseldorf, and Münster) who award the degree *Diplomjurist* to their students, but only after they have passed the first state examination.

The Bucerius Law School, the only private law school in Germany, opened its doors in Hamburg in the year 2000. Bucerius Law School is one of the law faculties that award their students a Bachelor of Laws degree after three years of study. The law school sets its own enrollment at 110 students a year, far smaller than the six to seven hundred enrolled annually at the University of Münster. Bucerius also uses a written and an oral examination to select students from a large applicant pool. The curriculum is divided into ten terms

(*Trimester*), one of which must be spent at an English-language law school. Bucerius also require two, three-month internships, and they provide their students with two terms of preparation for the first state examination. According to reports, most of the students who graduate from Bucerius also end up going to a private *Repetitor* (see below). The cost of this education is presently EUR39,600 or USD51,360 at the present exchange rate. Despite the high fees, Bucerius boasts that they have six applicants for every place in their entering class. Their students have also done extremely well on the first state exam (see below).

Before leaving the subject of university education, a few words should be said about the doctorate in law, *Dr. jur.*, which is awarded by law faculties, including the Bucerius Law School, but not by *Fachhochschulen*. Although some universities are more lenient than others, most universities require a grade of *Prädikat* (see discussion below on first state examination) on the first state examination to be accepted as a doctoral candidate. The doctoral candidate presents herself or himself to a professor and agrees to a dissertation topic which is generally discussed in a dissertation covering 150–250 pages in length. No additional coursework is required. Although doctoral candidates sometimes complete their dissertations in six months, it is more common to spend a year, sometimes longer, depending on whether the doctoral candidate is working part-time. The mode is probably one and a half years.

Upon completion, the dissertation is submitted to the doctoral adviser who writes a review and recommends a grade of *summa cum laude*, *magna cum laude*, *cum laude*, or *rite*. The dissertation and the written analysis of the doctoral advisor are passed on to a second professor, who ordinarily agrees with the assessment of the doctoral advisor. There is no evaluation outside the university. The process ends either, as in Münster, with an oral exam on general German law (*Rigorosum*) or, particularly at small faculties, with a public defense of the dissertation. This step is basically a formality since no one has ever failed the *Rigorosum* or the defense; however, performance in the *Rigorosum* or defense may influence the overall grade. To give the reader some idea of the prevalence of doctorates in Germany, the University of Münster ordinarily awards 100 doctorates annually, although one year it awarded 150. As there are usually over 600 students from Münster who pass the first state exam annually, and since most of the doctoral students will write their dissertations at their home universities, one can conclude that about one in six law graduates, at most, will obtain a doctorate. Munich, which has approximately the same size student body as Münster, awards only 50 doctorates annually.

#### *Study of foreign law*

As mentioned above, all German law students are required to take either a law class taught in a foreign language or a foreign language class that introduces students to foreign legal terminology. The grade is, however, of no consequence. That is not the case for the foreign law programs offered by various universities. Most universities style their program a *fachspezifische Fremdsprachenausbildung*, literally a subject-specific foreign-language course, although one program, that in Jena, is called simply Language and Law. The programs vary dramatically in what they require, with Münster being the most demanding. Münster offers the foreign law program in three languages: English (Common Law), French, and Spanish. To be admitted, students take a computer-based test in which they are presented with three texts in their chosen language in which letters have been removed from individual words. The test-taker's task is to insert the correct letter or letters into the gaps in the texts. A perfect score of 100 is said to be comparable to the skill level of a native speaker. For admission to the foreign law program in Münster, the student must score 70%. According to the language center of the University of Münster, a score of 70% on the computer-based test in Münster, called the C-test, is equivalent to a score of 600 on the written TOEFL, 250 on the computer-based TOEFL, and 100 on the internet TOEFL.

To complete the foreign law program in Münster, the 200 students admitted annually must take five law classes and four language classes of two classroom hours weekly over a period of four semesters. The law classes, all of which are taught by native English-speaking lawyers, judges, and academics, are the Common Law Legal System, the Common Law of Torts, the Common Law of Contract, Constitutional Law (either British, American, or Australian), and an elective. At present Münster offers as electives courses in the Law of War, Recent Constitutional Developments in the UK and EU, International Business Transactions, International Dispute Resolution, and Company Law. At present, the lecturers include partners from leading global law firms, judges from Australia, from the U.S. federal court, from the European Court of Justice, and from the House of Lords, and professors from the London School of Economics, the University of the West of England, Norwich Law School, Suffolk Law School, Roger Williams University, the University of Lancaster, and the University of Virginia. The classes at the language center, some of which are taught by native English-speakers and some of which, such as legal translating, are taught by Germans, are: Legal Research and Writing, Legal

Translating, Skills for Law (Common Law Legal System), and Conversation and Presentation Skills for Lawyers. In addition, every student must satisfactorily complete a three-week internship in an English-speaking law environment and pass an oral examination. The oral examination and the courses are all graded, so that upon graduation from the program, the student receives a certificate in foreign law with a GPA.

Until recently, it was neither possible nor common for German lawyers to do a Master of Laws degree in Germany; the masters programs at German universities were limited to foreign students. After the introduction of tuition fees, of EUR 2,200 annually, the number of foreign students on the LLM course at the University of Münster dropped to about 30. Many of these foreign students hope to be able to write a dissertation, which is possible if they do very well on the LLM course. For the German students, of the 600 or so students from Münster who pass the first state exam each year, 50 to 100 attend an LLM program, almost all in a common law country. In addition, many German students from other universities are coming to Münster to attend one of three LLM programs offered in Mergers and Acquisitions, Real Estate Law, and International Taxation. The tuition fees for these LLM programs average around EUR14,000 per year.

In 2005 Münster hosted the LLM Fair Europe, the first of its kind in the world. In its initial year, representatives of over 30 international law schools presented their LLM and other academic programs to students from Münster and surrounding universities. In the years since, Münster has limited the number of universities at the fair to ten. In making its selection, Münster considers, among other factors, the location of the university, its reputation for scholarship and teaching, and cost. Through the years, Münster has developed good working relationships with a number of foreign law schools, including the Norwich Law School and the University of the West of England in England, Suffolk University Law School in Boston, the University of Virginia, the University of Connecticut, California Western School of Law in San Diego, La Trobe University in Australia, and the University of Auckland in New Zealand. All of these law schools have cooperated in providing Münster with the criteria that they use in selecting students to enable staff of Münster's LLM Center to pre-select students for recommendation to their programs. Most of the universities have also established scholarship programs, enticing excellent students from Münster and elsewhere in Germany to study there. Münster is always looking for new partners among universities that meet

the high standards and conditions of those universities with which it has an on-going relationship.

#### *First State Examination*

The first state examination is administered by the judicial examination offices (*Justizprüfungsämter*). In order to be admitted to take the examination, the law graduate must present his or her certificate from the *Schwerpunktbereich*, or area of specialization, as well as documentation showing that he or she has completed two, six-week internships, one with a lawyer and one with an administrative agency. The examination itself consists of six written factual situations for the student to discuss: three from private law, two from public law, and one from criminal law. After the written essays have been graded, the students are invited in groups of four to six to be examined by three examiners. Those grading the written examinations and conducting the oral examinations are, in most cases, judges and public prosecutors. All university law professors, and a small number of attorneys, also take part in the examinations, although not always on a regular basis, meaning that the vast majority of examiners are judges and public prosecutors.

The essays and the oral examination are graded on a scale of zero to eighteen, with eighteen being the best. Those who score an average of 9.0 to 18.0 points are said to have a *Prädikatsexamen*. Those scoring 9.0 and above are considered "fully satisfactory". Those scoring 11.5 and above are given the score "good", and those scoring 14.0 and above are awarded the grade "very good". There is also the grade of satisfactory (6.0 to 8.99 points) and passing (4.0 to 6.49 points). Passage rates vary widely by university. For example, in Saxony, 59% of the test-takers pass the examination, in Münster 90% of the students pass the examination, and at the Bucerius Law School 100% of the students pass the examination. The average passage rate for all of Germany is 72%. In other words, 28% of those who take the first state exam fail the exam. If they fail, they are generally allowed two further attempts. Thus, in part because of the high failure rate, only 10,000 students out of the 21,000 who started their studies of law actually finish them by passing the first state examination.

The percentage of *Prädikatsexamen* also varies by university and by *Bundesland* (state), with the *Bundesland* Sachsen-Anhalt having the lowest percentage (13%) and the *Bundesland* Hamburg having the highest percentage



(37%). The average for all of Germany is 22%, but a number of law schools have rates in excess of this. In Münster, for example, 25% of the students earn a *Prädikatsexamen* and at the Bucerius Law School the percentage is 96%.

Before sitting the first state exam, almost all students, including those from the Bucerius Law School, take courses taught by a *Repetitor* to help them prepare for the examination. In effect, therefore, going to a *Repetitor* is practically obligatory. The *Repetitorium* is offered by unregulated private companies that teach the students black letter law and exam-writing. Although many law faculties, such as at the University of Münster, offer these courses as well, the courses taught by the universities attract very few students, and usually those students they do attract are also enrolled with a private company. Most students go a *Repetitor* for one year, although some start in their first semester and continue all the way through. Students spend for this instruction anywhere from EUR2,600 to over EUR4,000 for a one-year course and materials.

#### *Referendariat*

A student who passes the first state examination is entitled to be employed by the state as an intern at approximately EUR10,800 (USD14,000 at the present exchange rate) annually. During this two-year internship (*Referendariat*), the stagiaries (*Referendare*, plural form) are supervised by the judicial examination offices as they pass through the so-called stages of their training. The first stage is at the civil court (4 months), then comes the criminal court or prosecutor (4 months), then an administrative agency (4 months), then a private attorney (9 months), and finally an elective, or *Wahlstation* (3 months). While the *Referendar* is working for a court or private attorney, he or she must attend tutorials, usually taught weekly by judges, in preparation for the second state examination.

#### *Second State Examination*

The second examination consists of eight written essay examinations based on factual situations, but it stresses procedural law rather than the substantive law tested in the first state examination. There is also an oral examination which includes analysis of a case file. At this point of one's legal education, it is practically impossible to fail. If one fails the examination, he or she is allowed to retake it. If he or she fails again, a judge is personally assigned to the person

to make sure that he or she passes on the third attempt. Upon passage of the second state examination, the *Referendar* is allowed to refer to himself as *Assessor*.

#### *Summary of Recent Developments in Legal Education*

There are three major developments in legal education that can be seen in the above discussion. First there are certain structural changes: a movement from being selective to being competitive in the school system, also the introduction of tuition fees, although it is uncertain how these fees will be spent. Tuition fees in law are likely to equal approximately EUR300 per semester. Many administrators are concerned that if they use these funds to employ more teaching staff, the courts will just allocate more students to them, negating any beneficial effect. There is also political pressure on the universities to bring their curriculum in line with the *Fachhochschulen*, particularly by granting the students a bachelor of laws degree after the completion of two and a half to three years of study. One also sees more differentiation between universities as they vie to attract students.

There are also curricular changes, particularly the requirement to take classes in foreign law and language and in 'soft skills'. The specialization is also new, and reflects the policy of speeding up the legal education and providing the students with a marketable specialization upon their graduation. The instruction at the university still emphasizes the education of civil servants, and this is also the case with instruction during the *Referendariat*.

The third development is a movement toward internationalization. There is more interest in European and international law, especially international commercial law, and there has been an increase in foreign, minority students studying in Germany, although many of them now have obtained German citizenship. There is also an increased interest in public international law, particularly human rights. And, most importantly for purposes of this LLM guide, there has been a large increase in the interest of students in studying abroad, particularly in common law countries.

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