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GERMAN LAWYERS-TRAINING AND FUNCTIONS

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GERMAN LAWYERS—TRAINING AND FUNCTIONS*—Before Hitler, Germany took justifiable pride in the quality of its judiciary, its bar and its legally trained officials. Germany was a country where special training for civil, military, business, and professional functions was highly developed and where special qualifications were highly esteemed. The solid quality of all legal personnel was merely a consequence and manifestation in one sphere of a general stress on expertness which characterized all aspects of German life. The high standards of bench, bar and other legal personnel have, however, been largely broken down by the Hitler regime. This result has not ensued from an open change of standards; the formal requirements of training and fitness have been left practically as they always were. The primary agency of demoralization has been the extra-legal activity of the Nazi-party organization. This organization has constantly interfered with state activities and personnel as one phase of its dominating influence on all walks of life. It has proceeded by intimidation or any other necessary means; it has introduced arbitrary and deliberately unfair ends into the enforcement of law. The effects could hardly be other than the destruction of the integrity of law administration and the honesty and morale of legal personnel. Despite these far-reaching evils, however, it can be believed that the Nazis have not destroyed all sense of decency in Germany. Rather it is to be hoped that, with the ouster and discrediting of the Nazis, sound legal policies and sound standards of fitness, efficiency and honesty will be revived. For this reason, as well as the fact that American lawyers expect to follow and to participate in the work of reconstruction in Germany, it seems worth while to describe the training and functions of German legal personnel. We shall refer to both training and functions in present terms as we do regard the picture here developed as the established German system.¹

Basic Training

Legally trained persons in Germany fall into six groups; these correspond to six specialized careers: legal scholars, judges, prosecutors,

*The material of this comment is taken from a series of lectures on the German Legal System developed by the authors as background in the law of military occupation for the Judge Advocate General's School of the United States Army in Ann Arbor.

¹The provisions concerning judges and prosecutors are laid down in the Gerichtsverfassungsgesetz (GVG), the court organization act, which in its main features has been in force since October 1, 1879. The status of attorneys is regulated by the Reichs-Rechtsanwaltsordnung (RRAO) of February 21, 1936, and that of Notars in the Reichsnotarordnung (RNotO) of February 13, 1937, the former replacing an older federal law, and the latter various state statutes. The training of judges, prosecutors, notaries, and lawyers is now uniformly governed by the Justizausbildungsordnung (JAusbO), regulations concerning the training of legal personnel, issued by the Reich Minister of Justice on January 4, 1939.

attorneys and notaries, administrative officials, business advisers. The basic training of all these groups is the same. It consists of two parts. *First*, there is the *pre-legal* training, represented by the completion of a secondary school. This is substantially the equivalent of our junior college; in other words, the equivalent of a high school course plus two years of college. There are three types of such secondary schools, any one of which may be chosen by the pre-legal student; one emphasizes the classics, requiring nine years of Latin and six years of Greek for graduation; a second puts more emphasis on modern languages; and a third puts chief emphasis on the sciences. At the conclusion of his course in a secondary school a student must take a state examination called the *Abiturientenexamen*. Having passed this examination he is ready to enter the university and embark on the *second* part of his preparation, the legal training proper.² This consists of at least six semesters of work at a university. Most of the courses are given by lecture, but in recent decades an increasing emphasis has been put on the discussion of legal problems (*Praktika*) and the writing of briefs and opinions. At the conclusion of his university work the legal student takes his first legal examination.³ This covers the full three years of work. If he passes this examination which in its various parts extends over about four months, he becomes a *Referendar*; he is then ready to embark on his practical preparation for one or more of the six careers above mentioned.

Legal Scholars

The most characteristic feature of all branches of the legal profession is the thorough preparation which is required. This fact justifies us in mentioning first the preparation of those who give academic instruction in law. Every law teacher is a thoroughly trained legal scholar. After he completes his university course and passes the *Referendar* examination, he must obtain his doctor's degree by completing a thesis which is an original contribution to scholarship. Thereafter he ordinarily will spend three years or more in completing another thesis which he submits in order to be admitted to a university faculty as an instructor (*Dozent*). His advancement in academic life depends on his scholarly productions and on his success as a teacher. Most German professors have written many articles and one or more treatises.

The group of legal scholars is small, probably not over three hundred for the whole of Germany.⁴ But its influence has been enormous

² However the Nazis have introduced a number of other conditions and obstacles which are operative at this point—to wit, the obligation to devote six months to labor service and to serve two years in the army, as well as a system of selecting those persons who in the eyes of the authorities are "fitted" for higher training.

³ The candidate must use his own judgment as to when he has become sufficiently grounded to take the examination; he is only allowed two trials.

⁴ According to Rheinstein, "In 1932, the number of instructors in the 23 Ger-

in all the Continental countries and particularly in Germany. "While the common law of England and America was essentially shaped by judges, the civil law of the Continent of Europe was built by university professors."^{4a} Not only were all members of the bench and bar trained by such scholars during the last several centuries, but scholars carried on almost alone the work of adapting Roman law to modern conditions. Down to the adoption of the codes it was a common practice in Germany for the superior courts to refer difficult questions to law faculties for their opinion, and the courts in such cases regarded themselves as bound by the opinions received. While this practice has been definitely superseded by a system of judicial review, legal scholars are still asked for expert opinions by courts and lawyers. The several codes which Germany adopted toward the end of the nineteenth century were also largely the work of legal scholars. There is no country in the world where the scholar, and particularly the legal scholar, enjoys the prestige which he enjoys in Germany.

Judges

The candidate who elects to embark on the judicial career must complete a period of not less than three years of practical training after he passes his Referendar examination. This practical training includes work in the inferior and superior courts, work in an attorney's office and work in state and local administrative offices.

At the conclusion of the period of training the candidate takes the second state examination known as the Assessorexamen. When he has passed this examination, the candidate, who is now called an Assessor, has fulfilled all of the formal requirements for judicial office and is eligible for appointment as a judge. However, the number of persons who become Assessors is larger than the number of judicial vacancies. An Assessor's first appointments are temporary and provisional. The Nazis have introduced a probationary period which must be completed before the candidate can be finally appointed to the judiciary. Both the large number of candidates and the period of probation have made it easy for the Nazi government to test "the political reliability" of all

man law faculties was 274, of whom 198 had the rank of full professor, while 16 were extraordinary professors with, and 21 professors without, a budgetary salary, and 39 Privatdozenten. In addition, 58 practitioners (high government officials, judges, and a few lawyers) were engaged in teaching university law courses, 40 of whom were entitled to the rank of honorary professor. The Directory of the Association of American Law Schools lists 947 names (1936-37)." *Law Faculties and Law Schools: A Comparison of Legal Education in the United States and Germany*, 1938 *Wis. L. Rev.* 5 at 10, n. 14. Of course additional groups would now have to be included for Austria and other incorporated subdivisions of the Reich.

^{4a} *Id.* at 6.

judicial appointees, i.e., the degree of their indoctrination with National Socialist ideas.

The final appointment of a judge was, in Imperial Germany and under the Weimer Constitution, an appointment for life. He was removable from office only for cause and only at the conclusion of a judicial hearing; the causes for dismissal were far more limited than for other civil servants. It was also not possible to move a judge from one place to another without his consent. In his judicial activity the judge was subject only to the law, but not to orders from his superiors. The Nazis have for all practical purposes destroyed these guarantees and with them judicial independence.

The number of judges in Germany is relatively large. The figure for all the courts of the Reich has stood in the period from 1915 to 1935 at 9,000 to 10,000 judges, or one judge for 6,000 to 7,000 inhabitants.⁵ These high ratios are accounted for by several facts: the judges, especially in the inferior courts, handle a great deal of work which would under our system be regarded as administrative; much of the business in the inferior courts is handled by the judges without the assistance of attorneys, the court itself acting as adviser to both parties; and judges must spend a not inconsiderable amount of time instructing the Referendars during their apprenticeship.

Prosecutors

The preparation of prosecutors is identical with that of judges. It consists of a minimum of three years of academic training and three years practical training. The candidate chooses between the judicial career and the career as state's attorney when he has attained the status of Assessor. There are similar delays and probationary hurdles to get over before the candidate obtains a permanent appointment. There is no hard and fast line between the judicial career and the career of prosecutor, but as a practical matter incumbents seldom change from one to the other career after they have been permanently appointed. The prosecutor has permanent tenure but must take orders concerning his work from his superiors. He has the status of, and is subject to the disciplinary rules for, executive civil servants.

Attorneys and Notars

The training for legal practice also follows the lines of training for judicial office. The young practitioner, like the state's attorney, pursues a minimum academic study of three years, serves three to four years of apprenticeship, and takes the two major legal examinations already

⁵ Figures are taken from the annual volumes of the Statistisches Jahrbuch für das Deutsche Reich.

mentioned. He spends only six months of his apprenticeship in a law office and the rest in various courts. Indeed one can fairly regard the training given to all lawyers as primarily adapted to fit persons for judicial or prosecuting functions. The result is that all lawyers in Germany have, to a larger extent than they have with us, the official point of view and attitude.

The Nazis have introduced two further requirements which must be satisfied after the candidate has become an Assessor and before he becomes a full-fledged attorney. He must serve one year in the office of an attorney before he is admitted to practice and thereafter he must work for three years as a junior attorney in the office of an established lawyer, at a legally specified salary, before he is permitted to practice independently.

The number of attorneys in Germany is rather small, judged by our standards; there was in 1935 one attorney for 3,483 inhabitants. The ratio of attorneys to judges at that date was slightly less than two to one: 18,712 attorneys, 9,767 judges. Forty years ago the number of judges was actually larger than the number of attorneys. Such ratios, which to us seem strange, are explained by the large amount of administrative and practical service rendered to the public by the judiciary as suggested above and by the fact that many legal advisers, who in this country would be attorneys in the full sense, do not seek admission to the bar in Germany.

In Germany the practitioner serves the three general functions which Americans ordinarily expect of an attorney: the trial of cases, the advising of clients, and the drafting of papers and documents. There is no division of function between barristers and solicitors such as one finds in England, France and Italy. But the third function just mentioned, drafting instruments, has a peculiar form and character in Germany because the attorney very often acts in the capacity of Notar.⁶ The Notar is an official common to all the Continental countries.⁷ In Germany he is usually an attorney, although this varies somewhat among the different states. The Notar is authorized to draw up the many public documents which are so common in German law and practice. He must also keep these documents and serve as custodian of other types of instruments. Both in his functions as draftsman and as recorder of instruments he is under the direct supervision of the Amtsgericht (court of first instance) of the district in which he works.

In the sense that the attorney is not subject to the authority of any

⁶ Under the new Reichsnotarordnung the functions of attorney and Notar are for the future to be separated. Law of Feb. 13, 1937.

⁷ One is tempted to call this functionary by the English name, notary; however, his duties and responsibilities are much larger than those of our notary. It seems preferable to retain the German name.

superior, the legal profession in Germany is commonly called a free profession. But in actuality the freedom from control from above is by no means complete, especially under the Nazis. Before Hitler the number of persons who entered on the study of law was many times the number needed to fill the gaps in the profession. The number of persons who are admitted to the universities has been cut down by administrative fiat. At every step through the long process of training it has been possible to eliminate those whose views are not regular from a Nazi viewpoint. This follows because control of admission to the bar is in the hands of the Ministry of Justice. Furthermore, the lawyer can hardly be called free from state control or public obligations. He is always limited regarding the places and courts in which he may practice. His fees for various services, as attorney and as Notar, are fixed by legal regulations. Contingent fees are generally speaking prohibited. He must perform many services for the poor; formerly this had to be done gratis; nowadays it is compensated by the state at rates ranging from one-third to two-thirds of the standard scale of fees. The legal aid work is formally obligatory but as one might expect it is usually assigned by the judges to younger attorneys who need the work, and fees. In his capacity as Notar the attorney must maintain his residence at a specific place. He must keep his records in the manner prescribed by law. He must advise *all* parties (not merely one party) as to the operation of the instruments drawn by him. In short, both in his capacity as an attorney and as a Notar the member of the bar comes close to actualizing the statement, common here as well as in Germany, that the lawyer is an officer of the court. Certainly the lawyer of Germany has much more the character of a public official than he has in this country. His obligations are strictly and rigorously enforced by prospect of disciplinary proceedings and by real threat of civil liabilities for negligence, mistake, or fraud, causing injury to clients or other persons whom he undertakes to serve.

Administrative Officials

A great majority of higher administrative officials throughout Germany are required to have legal training. This training follows lines similar to those of preparation for judicial office except that the period of practical training is spent primarily in work in the administrative branch to which the candidate aspires to become permanently attached. Those higher officials who work in such specialties as education, public health, railroads, agriculture, forestry, etc., do not, of course, have to have legal training. But in all fields of public life thorough academic and practical training was characteristic of the Germany prior to the Nazis.

Business Advisers

In Germany, perhaps more than elsewhere in the world, legal training of various types is taken by those who do not intend to become attorneys, judges, or officials but who do want a knowledge of law by way of preparation for practical life. Some prospective businessmen complete the academic course in law and produce a thesis for a doctor's degree; they do not take either of the state examinations in law. Certain German universities are not too strict in their standards of scholarship and grant doctor's degrees rather readily. A doctor's degree gives a definite social prestige and even the most lenient standards do represent some degree of achievement. Other young men, preparing for business, either take the complete training for judicial office or combine the quest for a doctor's degree with the judicial type of training. Especially those persons who intend to become attorneys (*Syndici*) for particular firms, corporations or business houses, proceed in either of the ways suggested. These men do not intend to become members of the bar; they simply seek the titles of Doctor, Referendar and Assessor for the prestige and training which these titles respectively represent. Their status and activity is substantially similar to "house attorneys" in this country. When the concern to which they are attached becomes involved in litigation or requires the services of experts in particular fields these men call on the proper professional brethren for assistance.

This description of German legal careers and legal training has been justified primarily in terms of immediate interest in the subject. The coming job of reconstruction in Germany is warrant enough for trying to understand the kinds of personnel with which one will have to deal. But it is also proper to suggest that a close factual study of the German scheme in operation might prove useful for ends strictly our own. The problem of preparing lawyers for government careers is one which our curriculum builders are already seriously discussing. Also the problem of apprenticeship for young lawyers is a very real one with us; certainly no satisfactory method has yet been developed for giving to the young lawyer the practical training which he cannot get in the classroom. The two problems are old problems in Germany; an examination of German experiences with differentiated legal careers and with practical training for each career, should yield ample returns in relation to the working out of both these problems here.

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