

LAWYERS' PRACTICE AND IDEALS
A COMPARATIVE VIEW

Chapter Four
THE ROLES, FUNCTIONS, AND ACTIVITIES OF
LAWYERS IN THE SO-CALLED
GERMAN LAW GROUP

Wolfgang Wiegand

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ACTIVITIES OF LAWYERS IN THE
SO-CALLED GERMAN LAW GROUP

Wolfgang Wiegand*

In this paper I discuss the functions and activities of lawyers in the late twentieth century. The focus is on Germany but consideration is also given to Austria and Switzerland and other areas included in the so-called Deutscher Rechtskreis (verbally translated as "German Law Circle," here referred to as "German Law Group."¹ The restriction to the German Law Group on one hand and the extension over the borders of Germany on the

*Wolfgang Wiegand is a Professor of Civil, Commercial, and Banking Law at the University of Bern (Switzerland), Director of the Institute for Civil Law, and Director of the Institute for Banking Law.

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¹I will not go into detail about the modern trend toward the creation of a European common law, whether through unifying legislation or through the creation of a new class of European lawyers (that will result in a unification of law by legal education). For a discussion of this trend, see the works of Helmut Coing and Hein Kötz (Germany), Ewoud Hondius (Netherlands), and François Ost and Mark van Hoecke (Belgium), all cited in Axel Flessner, *Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung*, 56 *RABELSZEITSCHRIFT (RABELSZ)* 243, 244 nn. 2-3 (1992). See also Lawrence Meir Friedman & Gunther Teubner, *Legal Education and Legal Integration: European Hopes and American Experience*, in 1 *INTEGRATION THROUGH LAW: METHODS, TOOLS, AND INSTITUTIONS*, bk. 3, 345 (Mauro Cappelletti et al. eds., 1986).

other hand is necessary because I first will show that there is a correlation between the concept of law or the legal system and the legal profession.

I therefore start with an outline of the development of the concept of law on the Continent, which is interlaced with the development of the University system on one hand and the administrative and judicial system on the other. In the second part of the paper I discuss how a combination of all these factors and elements in the nineteenth century formed the basic conditions for the status of the legal profession in the twentieth century. In its third part I describe both the legal education and the types of careers for which it prepares law students. Then traditional role models and activities of lawyers are described and analyzed. Finally, I show that from the end of World War II and accelerating through the 1980s, a fundamental change of legal style took place which gradually changed the mentality and the activities of the people who practice law. Therefore, I present some conclusions about the changing roles and functions of lawyers.

TERMINOLOGY

Before discussing the roles and functions of lawyers we first need to clarify the terms we use. The term "lawyer" in this context refers to all members of the legal profession. The reason for doing this is twofold. On one hand the roles and functions of the different types of lawyers can be analyzed only in light of the historical background. This background is the same for all the people who are called "Jurist" in German terminology. The word "jurist" was first used in German language at the beginning of the fourteenth century; it can be found in the so-called "Lehrdichtung" (verbally translated "educational poems").² At that time the term "jurist" characterized a specific profession (a "Berufsbild" as WIEACKER calls it³). It did not stand for everybody involved in legal affairs and specifically did not include those people who were working as laymen in a court, as judges, or as attorneys of the old fashion in the traditional German system. Instead "jurist" stands for all those people who are — as I will refer to from now on — learned lawyers, a term derived from the notion "gelehrtes Recht — droit savant." The term "jurist" was used for people who had studied at Italian or French universities and therefore were academically trained lawyers. Before I try to

²FRANZ WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZET* 118 (2nd ed. 1967).

³Id.

explain in detail why it is so important to understand the background of this notion, I would like to point out that when the word "jurist" appeared first in the German language to refer to a profession, it did not include everyone working in the judicial system but a specific class or status which up until today we call "die Juristen" or "der Juristenstand" in German.

"LEARNED LAW" AND "LEARNED LAWYERS"

The origin of lawyers as a social group or class evolved out of a social-cultural process that probably started in the middle of the eleventh century in the cities of northern Italy. This was not a coincidence but the result of political and economic developments in that region. These powerful cities had a permanent and ever-increasing demand for public servants as "syndici/defensores," "notarii," and "advocati." Those people were educated and trained in schools where they were taught the "septem artes liberales," which consisted of inter alia logic, dialectic, and grammar. The most famous and for the European legal culture most important school was that of Bologna, founded in 1088.⁴ It was here that teachers started to work with the methods and techniques of the "artes" on the text of Roman law which had been "rediscovered" in the middle of the eleventh century.⁵ The result of the use of scholastic methods on legal texts is generally considered to be the beginning of the European jurisprudence.⁶ Wieacker explains this development as follows: "The application of the scholastic method on the text of

⁴Bologna is the source and base of the continental and, to a partial extent, the English legal traditions. Many also see Bologna as the source of future European law. As Geoffrey P. Wilson states: "Wir sollten ihnen [den Juristen] sagen, dass das Mekka für Europäisches Recht, wenn es ein solches geben sollte, weder in Brüssel noch in Luxemburg zu finden ist. Das Mekka liegt in Bologna. Und dass wir wohl, wenn wir unseren Weg wiederfinden möchten, nach Bologna gehen sollten." Geoffrey P. Wilson, *Nationale Souveränität und Rechtskultur. Grossbritannien als Sonderfall?*, in *EUROPÄISCHE INTEGRATION UND NATIONALE RECHTSKULTUREN* 365 (Christian Tomuschat et al. eds., 1995).

⁵See HANS SCHLOSSER, *GRUNDZÜGE DER NEUEREN PRIVATRECHTSGESCHICHTE* 31 (8th ed. 1996). See generally HERMANN LANGE, *DIE ANFÄNGE DER MODERNEN RECHTSWISSENSCHAFT. BOLOGNA UND DAS FRÜHE MITTELALTER* (1993); MAURIZIO LUPOI, *ALLE RADICI DEL MONDO GIURIDICO EUROPEO* (1994).

⁶An immense and ever-increasing literature on medieval universities and medieval law analyzes the origins and importance of the development of European jurisprudence. The principal work in German is Helmut Coing, *Die juristische Fakultät und ihr Lehrprogramm*, in *1 HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN*

Roman law created a autonomous jurisprudence and the class of jurists which forever gave State and Society in Europe a new face.⁷ On the Continent speaking about a "lawyer" from then on meant that the person had studied law at one of the Italian or later French universities. This was actually mostly Roman law, complemented by parts of canon law and filled up with pieces of local rules and customs. More important than the substance itself was the way it was presented to the students. The teachers at the universities had become law professors, applying scholastic methods to the whole body of law, and the students learned how to apply law in a "scientific" way. A common stock of legal institutions, rules, and concepts as well as a common academic language⁸ were instrumental in this education. That is why this law is called "learned law" (gelehrtes Recht — droit savant), and the lawyers were therefore "learned lawyers."⁹

THE DISSEMINATION OF LEARNED LAW AND LEARNED LAWYERS

This style and method of teaching soon spread over the Alps to France, where in the southern parts universities in the Italian style were founded. They further developed the Italian method and especially strengthened the systematic approach to law: the French jurists were called *doctores ultramontani*.¹⁰

PRIVATRECHTSGESCHICHTE 39, 57 (Helmut Coing ed., 1973) [hereinafter HANDBUCH]. C.f. David S. Clark, *The Medieval Origins of Modern Legal Education: Between Church and State*, 35 AM. J. COMP. L. 653, 672-5 (1987).

⁷WIEACKER, *supra* note 5, at 43. The most influential factors in this new perception were the "source of law" doctrine and the "theory of statutes," which were developed in the thirteenth and fourteenth centuries. See WOLFGANG WIEGAND, *STUDIEN ZUR RECHTSANWENDUNGSLEHRE DER REZEPTIONSZEIT passim* (1997).

⁸Latin as *lingua franca*.

⁹Franz Wieacker called this a "revolution of the clerks," which "did not provide a legal metaphysics . . . but a general consensus-building pragmatic ideology, which rested as much on the group identity, the solidarity, and the mentality of the jurists as on a common grammar of concepts and methods." Franz Wieacker, *Historical Models for the Unification of European Law*, in *PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS: Festschrift for Robert S. Summers* 297, 303 (Werner Krawietz et al. eds., 1994).

¹⁰For more details on the importance and influence of the development of continental legal education, see Helmut Coing, *supra* note 9, at 39. See also GERHARD OTTE, *DIALEKTIK UND JURISPRUDENZ: UNTERSUCHUNGEN ZUR METHODE DER GLOSSATOREN I* (1971).

In Germany, universities and more specifically law schools (*Rechtsfakultäten*) following the Italian and French model were founded in the fourteenth and fifteenth Centuries.¹¹ In this period — in German legal history called the Reception of Roman Law — both “learned law” and “learned lawyers” emerged in Germany, based on the same methods and elements as in Italy and France. At this time the term “Jurist” came to signify persons educated at the new law schools, and from then on “Juristen” in Germany was the class or social group of university-trained and educated lawyers — “learned lawyers” in the sense of this paper.

THE NATIONALIZATION

The pattern described above prevailed until the nineteenth century. The countries of western and central Europe had a homogeneous legal science and a uniform legal class, based on the same legal sources and a nearly identical education at the universities.¹² At the beginning of the nineteenth century several factors changed this pattern, in part because the French Revolution and growing nationalism initiated strong movements toward national codifications in all European countries. At the same time a new concept of universities was formulated by the brothers Humboldt.¹³ In Germany this led to a reformation of the curriculum, which increasingly turned away from Roman sources of law to German national laws. This development came to an end when, starting in the 1870s after unification of the German territories, the judiciary and the administration had to adapt to a new form of state. In this process several laws had been introduced regu-

¹¹The first university in the German Reich was founded by Emperor Charles IV in Prague in 1348. This university was followed by one in Vienna in 1365, one in Heidelberg in 1385, one in Köln in 1388, one in Erfurt in 1392, and one in Leipzig in 1409.

¹²HELMUT COING, 2 *EUROPÄISCHES PRIVATRECHT* 1 (1989): “Die Länder West — und Mitteleuropas hatten . . . eine einheitliche Rechtswissenschaft und — mit Ausnahme von England — einen einheitlich geformten Juristenstand. . . . Diese Tatsache hatte ein einheitliches europäisches Recht entstehen lassen, das *Ius commune*, dessen Autorität auf derjenigen der Rechtswissenschaft, nicht auf staatlichen Grenzen beruhte.”

¹³Wilhelm Freiherr von Humboldt (1767-1835) was the head of the Prussian Ministry of Education. He formulated the structures of the University of Berlin (Humboldt University) and was one of the leaders of the neohumanist school. His brother Alexander (1769-1859) was an important natural scientist.

lating the qualifications and preconditions for admission to the different careers in the legal profession.

The common base for lawyers and legal science in continental Europe had disappeared. In Germany, Austria, and Switzerland, however, legal education was still based on the methods and style that had been developed in Bologna, and this style still characterizes the continental lawyer.¹⁴ The development which I described as the beginning of the European legal tradition is dominated and characterized by one fact: it is the law. The professors in Bologna discussed the words and the meanings (and sometimes mistakes) of the law, but they always discussed its interpretation and application of the code (i.e., the "Corpus Iuris" of Justinian and later the "decretum" of Gratian and the "decretales" of the popes).¹⁵ This tendency in juridical education was intensified when in Germany (and in other European states) the great codes were put into force.¹⁶

¹⁴David S. Clark has shown that some aspects of modern legal education in the United States were also derived from German ideas. Nineteenth-century German legal education was attractive for American students in two ways: as general education and as the best professional preparation for a gentleman lawyer. See David S. Clark, *Tracing the Roots of American Legal Education: A Nineteenth-Century German Connection*, in 51 *RabelsZ* 313, 320 (1987).

¹⁵The Bolognese approach to law was completely different from the Anglo-American one. The learning process was based on a fixed curriculum, which was already well established by the middle of the thirteenth century. See Helmut Coing, *European Common Law: Historical Foundations*, in *NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE* 32 (Mauro Cappelletti ed., 1978).

¹⁶Following the German adoption of the codes, the continental legal method was even more oriented toward the application of codes and statutes than it had been previously. The Anglo-American legal method focused on case law.

Lawyers education and careers

University 4-6 years
"first" state examination

legal departments of insurance companies, banks, etc. or/and career as executive officer	"apprenticeship" 2 years at courts, law offices, administrative authorities "second" state examination					
	<i>public service</i>			<i>"legal advising"</i>		
	local state or federal administration	judiciary		lawyer (Rechtsanwalt)		notary public
		state attorney prosecutor etc.	judge in the different branches of jurisdiction	"in house lawyers" legal departments of major firms or associatoinis	law offices practicing self employed or as employee in larger firms	different structures self employed or state employed. In some regions at the same time lawyer and notary public

LEGAL EDUCATION AND TRADITIONAL LEGAL PROFESSIONS¹⁷

In Germany one needs an academic education¹⁸ to practice in any legal profession.¹⁹ The studies last four to six years²⁰ with an examination at the end which is called "Referendarexamen" (first state examination) and is fixed on substantive law. The education of future lawyers is still focused on the legal text, and its interpretation and application. Even in the discussion of cases or when analyzing decisions of the higher courts, the question asked is not how a case should be decided but how the court has applied the law. One could say that the whole education is concentrated on the application of law. Thus one could assume that German legal studies are judge-oriented, that is the skills and techniques the students learn are those of future judges. This is no coincidence but a consequence of the tradition I described above. Hence all types of lawyers gain the qualifications for holding a judicial post. Paragraphs 5 and 5a-d the Richtergesetz²¹ (German Judge Act) specify the qualifications for holding a judicial office and the preconditions a person has to fulfill. The Richtergesetz demands that first one has to study law at a university and pass the first state examination. Then one has to go through a "two-year preparatory service" with practical training at various legal institutions (courts, administrations, law offices). This is followed by the so-called second state examination (substantive and procedural law), which can be compared to the bar exam in the Anglo-Saxon world.

It is most significant that this qualification for the judicial career is the same for all other careers in the German legal profession. That means that if one applies for admission to the bar, one has to have the qualification of §5 of the Richtergesetz, and the same applies to becoming a public notary or

¹⁷See the diagram titled "Lawyers' Education and Careers" which follows this paper.

¹⁸See, e.g., Wolfgang Grunsky, *Juristenausbildung in Deutschland (Educational training of judges and lawyers)*, in *ANWALTSBERUF UND RICHTERBERUF IN DER HEUTIGEN GESELLSCHAFT (ROLE AND ORGANISATION OF JUDGES AND LAWYERS IN CONTEMPORARY SOCIETIES)* 209 (Peter Gilles ed., 1991).

¹⁹A formal education is also necessary for entry into the legal profession in Austria and Switzerland.

²⁰The amount of time required for obtaining an education is, in comparison to other systems in the international community, extremely long and is therefore the object of critical attacks.

²¹1972 BGBl.I.713 (as amended).

a prosecutor. Both the Bundesrechtsanwaltsordnung (BRAO)²² and the Bundesnotarordnung²³ refer to §5 of the Richtergesetz when they specify the qualifications an applicant has to fulfill to become an attorney or a notary.

To understand the German legal profession it is of *extreme importance to realize that the whole legal education is "judge-centered."* That means that German lawyers learn primarily to apply the law in the way a judge does. Moreover, this qualification is the same for all other legal professions of importance. Therefore, practicing lawyers, notaries, and the jurists in the public services undergo the same education and gain the same qualifications. Even in industry it is common that only jurists are employed who have the qualification to hold a judicial office.²⁴ From all that I draw my first conclusion: *The role model for German jurists is the case deciding judge who applies the law.* German lawyers are not trained like American lawyers in adversarial legal culture, and they learn little about legal consultancy. Although, as I will explain in the last part of this paper, things are changing, this traditional role model still dominates German legal culture. I will try to explain this point when describing the different types of legal professions.

JURISTS IN INDUSTRY

After passing their first examination and holding the title of "Referendar" (in France or Switzerland "Licencée en droit"), a small percentage of law students embark on careers in industry. Only few of them work in a legal department that requires a second state examination. A larger group go into management (competing with economists and MBAs) where traditionally in Germany jurists play an important role. This applies to a greater extent to Switzerland, where the second examination is required only for admission to the bar.²⁵ Therefore about fifty percent of the legal profession have

²²"Federal Code for Lawyers," 1959 BGBl.I.565 (as amended).

²³"Federal Notary Regulation," 1991 BGBl.I.150 (as amended).

²⁴These jurists are the so-called Volljuristen.

²⁵The second examination in Switzerland is a cantonal one and must be passed at one of the twenty-six cantons' courts of appeal. Attorneys are called *Rechtsanwälte*, *Fürsprecher*, *Advokaten*, *avvocati*, or *avocats*, depending on the canton in which they passed their exams. The requirements for becoming an attorney differ from canton to canton, but all of them currently require completion of law school, i.e., a university degree of *licentia-tus/licentiata iuris*. Switzerland has only recently introduced a law that regulates the

only a university education (which is more or less identical with the German one²⁶) when they apply for jobs in industry or in administration. Surprisingly, lawyers in Switzerland can qualify for the judiciary without a second examination.²⁷ In Austria, the system is similar to that in Germany.²⁸

PUBLIC SERVICE

Administrative Authorities

Lawyers have always played a dominant role in the administration of local and state communities. When the "artes" schools were founded in northern Italy, they specialized in educating students for public services. When those schools became law schools, "Jurists" filled most of the more important posts in the public service. After the typical German system of "Beamten-tum"²⁹ (public servant or officer) had evolved, most high-ranking positions in the public service were occupied by jurists. This is still the case in Ger-

problems caused by the diversity of its domestic legal market (*Bundesgesetz über den Binnenmarkt vom 6. Oktober 1995*). According to this law, all bar examinations passed in Switzerland are of equal value. Furthermore, the cantons can no longer place special requirements (such as personal references, or fees) on attorneys coming from other cantons. Noncitizens are still not allowed to practice law as attorneys. What Lalive said in 1982 is still relevant: "It happens rather often, that foreign students pass their university examinations in Switzerland, sometimes up to the doctor's degree. They, however, are not allowed to start their training period [to become attorneys] before they have completed their procedure of naturalization." See Jean-Flavien Lalive, *Switzerland*, in 2 *TRANSNATIONAL LEGAL PRACTICE* 349, 349-50 (Dennis Campbell ed., 1982).

²⁶For further details, see Lalive, *id.*, at 349. See generally Rebecca G. Brunner-Peters, *Switzerland*, in *PROFESSIONAL LIABILITY OF LAWYERS* 232 (Dennis Campbell & Christian T. Campbell eds., 1995); Oscar Vogel, *The Organization and Social Status of Judges and Lawyers in Switzerland*, in *NATIONAL REPORT 7* (1991); Peter Gauch, *Über die Ausbildung der Juristen*, in *RICHTER UND VERFAHRENSRECHT* 123 (1991).

²⁷As for judicial posts, Swiss lawyers are much more similar to American than to German ones. It is not unusual in Switzerland for a lawyer to work in a variety of legal professions during his or her career. A Swiss lawyer, for example, might start working in the public service sector (i.e., cantonal or federal administration) and then become a private practicing attorney or a judge. (In smaller cantons, serving as a judge is often a part-time post for attorneys.)

²⁸For further details, see Eugen Salpius, *Austria*, in 1 *TRANSNATIONAL LEGAL PRACTICE*, *supra* note 25, at 45.

²⁹The civil service.

many, Switzerland, and Austria. People working in that function have no special role model relating to them as lawyers. They apply the law as public servants, and to be a public servant is their function. If any role is attributed to these people, it is that of "Beamtler."³⁰

Judiciary

Lawyers working in the judiciary can be divided into two groups with one thing in common: they are not nominated by political parties or associations nor elected, but are appointed by the authorities after they have applied for a position in the judiciary. In Switzerland, however, the system resembles the American one.³¹

The first group of lawyers work in prosecution. They are attorneys and represent the state as public prosecutors in criminal cases. They are embedded in a hierarchy and are not independent. They are part of the administration and work as public officers or public servants. The attorneys, however, are members of the judiciary working with others in the field of jurisdiction. They work with the judges and the lawyers in court.

The judges are also employed by the state, but they are independent. The independence of the judge is a fundamental rule laid down in the German constitution³² (article 97 of the German Grundgesetz and §25 of the Richtergesetz:³³ "Der Richter ist unabhängig und nur dem Gesetz unterworfen — the judge is independent and only subject to the law). Nevertheless, the judges are part of a hierarchical organization and advance in their careers by promotion, which depends on the rating of a superior judge.³⁴

³⁰See Erhard Blankenburg, *Richter und Rechtsanwälte in den Niederlanden und in den ehemals beiden deutschen Staaten (Organisation and social status of judges and lawyers)*, in ANWALTSBERUF UND RICHTERBERUF IN DER HEUTIGEN GESELLSCHAFT, *supra* note 21, at 121.

³¹One of my colleagues, for example, was vice-director of the Swiss "Bundesamt für Justiz" (Department of Justice) for many years and was responsible for legislation in private law. He was elected as a "Bundesrichter" (judge of the Supreme Court) before becoming a professor of private law at the University of Berne. See *supra* note 27 and accompanying text.

³²GG, article 97.

³³1972 BGBL.I.713 (as amended).

³⁴The system is different in Switzerland, where a judge is usually elected to his or her post. This fact means that a judge must have the support of a political party to have a chance for promotion to a post on the higher court (Court of Appeals). Depending on

But to be a judge means not only to be a public officer or servant, but also to be an independent and autonomous person who settles legal conflicts and is obliged to follow the rules of law.³⁵ This obligation to follow the law or to decide a case by application of the law differs from the role of the Anglo-American judge.³⁶

LEGAL ADVISING

Legal advisers engage in two types of legal practice, which are different by origin but overlap in practice in Germany and Switzerland.

First, we deal with *lawyers in the narrow sense*. Here there is a subdivision. Major companies in all industries have legal departments in which lawyers, some of whom have been admitted to the bar, handle all legal af-

the canton, a candidate for promotion will be elected by the canton's electorate or parliament. Thus if you happen to be in the "wrong" political party at the wrong time, your chances of election or promotion are exceedingly small. For further details see FELIX MATTER, *DER RICHTER UND SEINE AUSWAHL* (1978).

³⁵See Hilmar Fenge, *Unabhängigkeit und Verantwortung von Richtern und Rechtsanwälten (Independence and responsibility of judges and lawyers)*, in *ANWALTSBERUF UND RICHTERBERUF IN DER HEUTIGEN GESELLSCHAFT* 81, *supra* note 21, at 119. Fenge summarizes the independence of judges in Germany as follows:

Personal independence (pointed out by the author) of judges is ensured by the principles of non-removability and non-transferability and moreover by the maintenance of a protected area for the performance of the judicial activity. . . . *Substantive independence* (pointed out by the author) of judges destined to ensure objectivity an authority of judgement includes that no administrative supervision by their judicial superiors can influence the decision-making procedure in any specific case, even if the judicial process is delayed for many years. . . . Personal accountability of judges is recognized only to a small extent. Penal liability is restricted to intentionally committed crimes. Civil liability is only imposed in relation to the State. The judge is liable for a wrong judgement only within the limits of penal liability, in case of any other recovery he is liable for violations of office duties by gross negligence, but always subsidiarily after other possibilities of recovery have been explored.

³⁶For a discussion of Austrian judges, see Josef Kropf, *Richterbestellung und richterliche Unabhängigkeit in Österreich*, in *UNABHÄNGIGKEIT UND BINDUNGEN DES RICHTERS IN DER BUNDESREPUBLIK DEUTSCHLAND, IN ÖSTERREICH UND IN DER SCHWEIZ* 31, (Richard Frank ed., 1990). See also Herbert Spehar, *Die Bindung des österreichischen Richters an Gesetz und Recht*, id., at 45. The circumstances in Switzerland are discussed by Kurt Eichenberger, *Sonderheiten und Schwierigkeiten der richterlichen Unabhängigkeit in der Schweiz*, id., at 57; Franz Hasenböhler, *Richter und Gesetzgeber in der Schweiz*, id., at 83.

fairs. They draft contracts and prepare litigation, especially in the field of arbitration. The public is largely unaware of them because they do not normally appear in courts.³⁷

The "real" lawyers (attorneys) work in law offices. They are admitted to the Bar and follow the rules of the Bundesrechtsanwaltsordnung (BRAO),³⁸ which in its first section describes the function and the profession of a lawyer (Rechtsanwalt): "Der Rechtsanwalt ist ein unabhängiges Organ der Rechtspflege"³⁹ (the lawyer is an independent part of the administration of justice/judicature). This means that the lawyer, like the judge and the prosecutor or attorney of state, is a part of the procedure of jurisdiction. In contrast to the judges and the prosecutors, however, the lawyer is not a public officer: §2 of the Bundesrechtsanwaltsordnung reads: "Der Rechtsanwalt übt einen freien Beruf aus. Seine Tätigkeit ist kein Gewerbe" (The lawyer's is an independent profession. It is not a trade).⁴⁰ This refers to the artes liberales of the Middle Ages.

As these two paragraphs indicate, the lawyer plays a special role in the field of jurisdiction, but this is only one part of the lawyer's role, because he or she also represents clients. This aspect is referred to in §3 of the Bundesrechtsanwaltsordnung (BRAO), which reads: "Der Rechtsanwalt ist zder berufene, unabhängige Berater und Vertreter in allen Rechtsangelegenheiten"⁴¹ (the lawyer is the competent and independent⁴² consultant and representative in

³⁷According to ANWALT-UND NOTARVERZEICHNIS 1997 (FACKLER'S "LAWYERS' REGISTER"), there were about 85,000 lawyers in Germany in 1997, and almost twenty percent of them did not work in a legal office. These lawyers were either in-house counsel or held the title of lawyer but did not actually practice law.

³⁸The BRAO was started in 1959 and was completely revised in 1994. Written nonstatutory rules of professional conduct (*Standesrichtlinien*) are set out by the *Bundesrechtsanwaltskammer* (the equivalent of a federal chamber of attorneys, which is referred to as the BRAK). These rules complement the BRAO. The *Standesrichtlinien* do not have the character of binding law, even though certain courts once applied them as if they did. The *Bundesverfassungsgericht* (Federal Constitutional Court) decided in 1987 that such an application was unconstitutional. See BVerfGE 76, 171.

³⁹1959 BGBl.I.565 (as amended).

⁴⁰*Id.*

⁴¹*Id.*

⁴²The independence of an attorney prevents him or her, for example, from agreeing to a "No Win — No Fee" arrangement or from accepting a share of the proceeds of a successful case (*quota litis*). It is equally unacceptable for an attorney to have an interest in his or her client's business or to be paid a commission related to the mandate. For de-

all legal affairs). This second aspect — consultancy and representation of clients — is the one the public has in mind when speaking about lawyers. I would like to stress that according to the rules of the Bundesrechtsanwaltsordnung the lawyer is part of the judicial system. His or her relation to the client is governed by an ordinary contract, but it is also more than that. §3 outlines a constitutional guarantee for the profession of lawyers and also the right of a client to a lawyer and to free choice among lawyers.⁴³

A *notary* (public) plays an important role in the German law group. In the artes schools students were taught the *ars dictandi*. Out of that technique to write diplomas and deeds developed the *ars notaria*. The *notaries* were public servants of cities and other institutions and corporations in the Middle Ages. They were appointed by either a city or a duke, but mostly by the emperor at the Holy Roman Empire of the German Nation. Among the approximately two thousand notaries appointed by the emperor⁴⁴ were some of the most prominent lawyers of all times such as Bartolus,⁴⁵ Baldus,⁴⁶ and Carpzow.⁴⁷ The privilege and the obligation of the notary was to

tails, see Hans-Jürgen Ahrens, *Die Stellung des Rechtsanwalts Berufspflichten und Prozessuale (Fairness /Professional ethics and procedural fairness)*, in ANWALTSBERUF UND RICHTERBERUF IN DER HEUTIGEN GESELLSCHAFT, *supra* note 21, at 19.

⁴³More or less the same principles of independence and liberalness in the legal profession are found in all of Europe. See, e.g., John Leubsdorf, *The Independence of the Bar in France: Learning from Comparative Legal Ethics*, in this volume, page 275. For commentary on Leubsdorf, see Henri Ader, *Important Differences in the Ethic Rules and Professional Ideologies of the U.S. Professions and those in Western European Countries*, in this volume, page 351. For comments on the United Kingdom (especially England), see John K. Toulmin, *Ethical Rules and Professional Ideologies*, in this volume, page 377.

⁴⁴For a discussion of the notaries of this time, see generally GEOFFREY BARRACLOUGH, *PUBLIC NOTARIES AND THE PAPAL CURIA* (1934).

⁴⁵Bartolus of Sassoferrato (1314-1357) earned his doctorate at Bologna, then served as judge, and finally taught at Pisa and Perugia. He authored a monumental commentary on the complete *Corpus Iuris* that had immense authority. For historical confirmation, see Wolfgang Wiegand, *Die privatrechtlichen Rechtsquellen des usus modernus*, in AKTEN DES 26. DEUTSCHEN RECHTSHISTORIKERTAGES 237 (Dieter Simon, ed., 1987).

⁴⁶Baldus de Ubaldis (1327-1400) is known for his *consilia*, or opinions, which resolved many of the conflicts between Roman law and local statutes. See *id.*

⁴⁷Benedikt Carpzow (1595-1666) authored the "*jurisprudentia forensis romano-saxonica*." He was the first person to link the traditional doctrinal approach of the *mos italicus* to the later (so-called) *usus modernus pandectarum*, the modern application of the digest, or even the whole *Corpus Iuris*. See *id.*

certify signatures and to draw up documents. These documents not only gave full proof at the moment but also were proofs after the death of the person who had drawn them up or had had them drawn up.

This notion of notariat was widespread in continental Europe.⁴⁸ In the nineteenth century the profession was nationalized, but the main functions remained the same. The Bundesnotariatsordnung⁴⁹ describes the German notary public as a person who is an independent bearer of a public office appointed to certify legal matters (conf. §1 of that act. §2 says that notaries are subject only to the provisions of the notary act and that they do not run a trade).

The legal matters notaries deal with are primarily those for which a special "notarial" form is essential. This is the case when the provisions of the substantive law require a special form for validating legal transactions, such as the transfer of ownership of a piece of real estate or the drawing up of a will or the foundation of a company.

The notariat differs greatly both in the Bundesländer (counties) of Germany and in the cantons (counties) of Switzerland. In some places the notary is only a notary and cannot do anything else. Although some notaries are state-employed, most are independent and self-employed. But in parts of Germany and Switzerland the activities of a notary are combined with those of a practicing lawyer (in German called *Anwaltsnotar*). It has always been a matter of dispute whether it is sensible to combine these activities, especially since the most significant and important duty of a notary is to be neutral, which means, looking out for the interests of all parties involved in the legal transaction the notary draws or certifies. Therefore there are strong reasons to question the role of both the *Anwaltsnotar* and the notary as partners in a law firm.⁵⁰

THE LAWYERS IN A STRICTER SENSE (ATTORNEY-RECHTSANWALT)

We have already seen how the legislator determines the role of the lawyer in the German system. We now have to look in detail at what lawyers do in Germany. The same general pattern holds for Switzerland and Austria, and

⁴⁸See Armin Wolf, *Das Öffentliche Notariat*, in 1 HANDBUCH, *supra* note 9, at 505.

⁴⁹1991 BGBl. I.150 (as amended).

⁵⁰See Charles W. Wolfram, "Multi-Disciplinary Partnerships," in *the Law Practice of European and American Lawyers*, in this volume, page 301.

as far as I know also for the Czech and the Slovakian Republic and for Poland and Hungary, which to a certain degree are members of the German law group.⁵¹ German lawyers work in two major areas: litigation and consultancy. The traditional form of conducting the law in Germany included both. The law offices were small, many of them had only one lawyer, a sole practitioner with a secretary, a typist or similar assistance. In that situation it was obvious that the lawyer would work for the client, drawing up contracts, preparing last wills, and handling claims or defending against them. Up to World War II only some major city offices had more than ten lawyers and only a few offices had specialized lawyers.

The relation between the lawyer and the client is ruled by contract law. It is the lawyer's obligation to fight for the interests of the client without regard to the claims of anybody else involved ("Parteilichkeit," i.e., partiality).⁵² To a certain degree this obligation contradicts the duty of the lawyer to be an independent "Organ der Rechtspflege."⁵³ This double role is also reflected in the central provision of the Bundesrechtsanwaltsordnung⁵⁴ which describes the general duty of a lawyer as follows: "Der Rechtsanwalt hat seinen Beruf gewissenhaft auszuüben" (the lawyer has to perform his profession with utmost care and conscientiousness). "Er hat sich innerhalb und ausserhalb des Berufs der Achtung und des Vertrauens, welche die Stellung des Rechtsanwalts erfordert, würdig zu erweisen" (his professional and private conduct have to reflect the esteem and the confidence in which the public holds the position of the lawyer). The somewhat hybrid situation of the German lawyer between working for a client and fulfilling a social and public function makes the lawyer's role in both German judiciary and society problematic.

This situation remained unchanged into the 1980s. During the time when the German economy was growing and trade was becoming internationalized, the law offices grew slowly. The statistics for the 1970s show the

⁵¹Today, of course, these states must first solve the problems that result from the former socialist power and organizational structures. See Sofia Polja Goleva, *Schwierigkeiten bei der Anwendung der westeuropäischen Rechtsmodelle in den osteuropäischen Staaten*, in *EUROPÄISCHE INTEGRATION UND NATIONALE RECHTSKULTUREN*, *supra* note 7, at 57.

⁵²See BENNO HEUSSEN, *UMGANG MIT ANWÄLTEN* (1995). See also Benno Heussen, *Commentaries on Papers from the German Perspective*, in this volume, page 241.

⁵³See Bundesrechtsanwaltsordnung §1, *supra* note 42, and accompanying text.

⁵⁴1959 BGBl.I.565 (as amended).

same picture as they did for many decades before. The large majority of lawyers were solo practitioners. Only thirty per cent of the lawyers entered into partnerships, and of nearly 3,000 partnerships, 2,115 had only two partners and 583 had three partners; in 173 partnerships there were four partners and in 60 partnerships five. Six or more partners were found in only 47 partnerships, and larger offices were established in a few cities such as Hamburg, Frankfurt, and Munich.⁵⁵

Within the last fifteen years however, there has been a dramatic change. Starting with the metropolitan cities, traditional law offices became law firms in the American style. This does not refer to the number of partners, which in comparison to the United States is still small, but to a comparison with earlier times in Germany and Switzerland. More important is that the style of practicing law and the mentality of lawyers have changed. Nowadays firms are structured like American law firms with a high degree of specialization and a steady widening of the fields they cover. It is coincidence but nevertheless symptomatic that I just received a mailshot from a leading Swiss law firm announcing that an economist had entered as a partner. The same is happening with accountants and tax experts.⁵⁶ On the other side, accounting firms are extending their legal departments. Hence in Germany, Switzerland, and Austria there is a change from the law office to the law firm or from traditional practicing of law to law business.

AMERICANIZATION

This transformation started in the metropolitan areas and has now reached all parts of Germany, Switzerland, and Austria. There can be no doubt about the reason for this development: it is the globalization and Americanization of the world, including the Americanization of the legal culture. Since I have already analyzed this development in earlier papers,⁵⁷ I will not

⁵⁵See Hein Kötz, *The Role and Functions of the Legal Professions in the Federal Republic of Germany*, in DEUTSCHE LANDESREFERATE ZUM PRIVATRECHT UND HANDELSRECHT 69 (Ulrich Drobnig & Hans-Jürgen Puttfarken eds., 1982).

⁵⁶See the comments of Willam B. Fisch, *Varieties of Professional Independence*, in this volume, page 363.

⁵⁷See, e.g., Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 Am. J. Comp. L. 229 (1991). See also Wolfgang Wiegand, *Americanization of Law - Reception or Convergence?*, in LEGAL CULTURE AND THE LEGAL PROFESSION 137 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996).

reiterate the whole context. I will just give one example. When I researched larger law firms in Zürich in 1987, out of 261 active lawyers, 129 (forty-nine percent) had completed American postgraduate studies. Today this percentage is even higher. The percentage in the 1980s was lower in Germany than in Switzerland but meanwhile comparable figures show in major German law firms.⁵⁸ Studying in the United States not only provides knowledge of American law but also teaches a different approach to law. When these lawyers return to the newly structured law firms in Europe they do not practice law the same way their fathers did. Combined with many other "infiltrations" of American law there is now a change in the style and character of practicing law.

This transformation is not restricted to the German law group but is evident on the whole Continent because it is part of a worldwide process. Therefore, most European countries have redefined their legal frame for practicing lawyers. An example is the French 1990 laws on the legal professions, which have been qualified as "a servile imitation of the American model allowing monetary considerations to prevail over professional ethics."⁵⁹ (Yves-Louis Sage). Also symptomatic for that change are the decisions of the German Supreme Constitutional Court of July 14, 1987,⁶⁰ which held that the traditional rules and canons of professional ethics no longer meet the requirements for a modern understanding of practicing law. Therefore, §43 of the Bundesrechtsanwaltsordnung was supplemented by an additional provision to §43a.⁶¹ As a consequence, the German Lawyers Association drew up new rules of conduct and canons of ethics

⁵⁸Cf. Benno Heussen, *supra* note 45, with the latest figures from FACKLER's "LAWYERS' REGISTER," *supra* note 40, and the BRAK statistics of 1997, in 28 BRAK-MITTEILUNGEN 132 (1997).

⁵⁹Yves-Louis Sage, *The 1990 French Laws on the Legal Professions*, 41 AM. J. COMP. L. 649 (1993).

⁶⁰See 1987 BVerfGE 76, 171, reported at NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1988, 191; 1987 BVerfGE 76, 196, reported at NJW 1988, 194.

⁶¹§43a. Grundpflichten des Rechtsanwalts: (1) Der Rechtsanwalt darf keine Bindungen eingehen, die seine berufliche Unabhängigkeit gefährden. (2) Der Rechtsanwalt ist zur Verschwiegenheit verpflichtet. . . (3) Der Rechtsanwalt darf sich bei seiner Berufsausübung nicht unsachlich verhalten. . . (4) Der Rechtsanwalt darf keine widerstreitenden Interessen vertreten. (5) Der Rechtsanwalt ist bei der Behandlung der ihm anvertrauten Vermögenswerte zu der erforderlichen Sorgfalt verpflichtet. . . (6) Der Rechtsanwalt ist verpflichtet, sich fortzubilden.

which were put in force in March 1997,⁶² but this is only a further step in a development that will continue.

SUMMARY

In the German law group there are several types of legal professions, all of which have in common a university education. The contents of this education are described in §5 of the German Judge Act, and nearly all other legal professions require the same education. Therefore, the German lawyer is totally dominated by the role model of the judge.

- Lawyers working for the government on all levels of the state are, because of their function and role, more "Beamte" than lawyers.
- Practicing lawyers are divided into two groups: attorneys and notaries. The latter are traditionally restricted to certain functions and activities such as certifications and official recording of legal transactions.
- Practicing attorneys work in two fields: consultancy and litigation. Traditionally they work without a partner and in most legal matters.
- The internationalization of the economy and globalization have brought changes in style and mentality strongly influenced by the American legal system. The role and activities of German lawyers have fundamentally changed, a development which will continue for a long time.

⁶²For a summary see M. Kleine-Cosack, *Berufs- und Fachanwaltsordnung für Rechtsanwälte*, NJW 1997, 1257.