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Private Lawyers in Contemporary Society: Germany

Haimo Schack*

I. THE LEGAL PROFESSION IN GENERAL

*"The first thing we do, let's kill all the lawyers."*¹

Shakespeare made this famous proposition aimed at medieval English lawyers. Their German colleagues have not been held in much higher social esteem during the last few centuries. Martin Luther thought of lawyers as bad Christians ("Juristen sind böse Christen") and the Prussian King Frederick II shared the common perception that lawyers earn their living from other people's misfortunes.²

Nevertheless, in a society witnessing increasingly complex transactions on domestic and international levels, an ever-growing need for legal services exists. These services are provided by several distinct professions³ which account for about 135,000 lawyers in a population of sixty-two million in West Germany.⁴

The integration of the former German Democratic Republic into the Federal Republic of Germany has been difficult. Due to the communists' contempt for the law, East Germany employed a much smaller number of lawyers, only 3,775 lawyers in a society of 16.4 million. There were twenty-three lawyers in East Germany in contrast to 123.4 lawyers in West Germany for every 100,000 inhabitants.⁵ Soon, however, the legal atmosphere in the eastern part of the country will be completely assimilated. Because reliable statistics for the former German Democratic Republic are scarce and difficult to compare and as the dynamic transformation period is of high political interest but negligible value from a

* LL.M. (Berkeley/USA), University of Bielefeld. The author wishes to thank his research assistant Marion Baston for her valuable help in tracing out much of the data.

¹ WILLIAM SHAKESPEARE, HENRY VI, act 4, sc. 2.

² Cf. G. HARTSTANG, DER DEUTSCHE RECHTSANWALT, RECHTSSTELLUNG UND FUNKTION IN VERGANGENHEIT UND GEGENWART 17 (1986).

³ See *infra* text accompanying notes 7-30.

⁴ The estimate for 1973 was 74,000. See H. Kötz, *The Role and Functions of the Legal Professions in the Federal Republic of Germany*, in XI DEUTSCHE LANDESREFERATE ZUM PRIVATRECHT UND HANDELSRECHT, 69-71 (Internationaler Kongreß für Rechtsvergleichung Caracas 1982).

⁵ In this comparison "lawyers" comprise only judges, public prosecutors, attorneys, and notaries (as of 1989).

comparatist's viewpoint, this report will concentrate on the actual situation in West Germany. The figures are from January 1, 1990 if not otherwise indicated.⁶

A. *The Different Professions*

The legal profession, defined as sharing an academic legal education, is divided into clear-cut professions with a relatively small degree of permeability. Most visible in the public sector are the 17,627 *judges*⁷ serving at the 911 West German state and federal courts of different jurisdictions.⁸ The number of judges is steadily increasing.⁹ The same is true for the 3,759 *public prosecutors* (Staatsanwälte).¹⁰ Traditionally the local, state, and federal governments prefer to employ jurists as *civil servants*. Their number may be roughly estimated at 35,000. However, the former "jurists' monopoly" in public administration has somewhat faded since the importance of expert knowledge has outweighed general capabilities in many fields.¹¹

Today the bulk of law graduates enters private practice. In 1990, the total number of *attorneys*¹² admitted to the bar was 56,638 compared with 22,882 twenty years ago.¹³ Limited in number are the 1,014 *notaries* (1989)¹⁴ who perform public functions in drawing up public records in addition to counselling.¹⁵ Large numbers of jurists (Wirtschaftsjuristen) are employed by industrial and commercial firms (approx. 15,000), banks (approx. 2,000), and insurance companies (over 4,000) as managers, clerks or in-house counsel.¹⁶ Nearly one-third of

⁶ These and some other data are taken from STATISTISCHES JAHRBUCH 1990 FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (Statistisches Bundesamt, ed., 1990 and older editions). As to East Germany see *infra* text accompanying notes 42-46.

⁷ As of 1989.

⁸ Their profession is governed by the German Statute on Judges, DRiG Deutsches Richtergesetz of April 19, 1972, BGBl. I at 713 (1972), as amended.

⁹ 1985: 17,031; 1975: 14,054; 1965: 12,247.

¹⁰ 1989: 3,646; 1975: 2,999; 1965: 2,392.

¹¹ See W. Leisner, *Das Juristenmonopol in der öffentlichen Verwaltung*, in JURIST UND STANDESBEWUßTSEIN 53, 55 (P. Eisenmann & B. Rill eds., 1987); N. VON NIEDING, BERUFSSCHANCEN FÜR JURISTEN 91-92 (3d ed. 1986).

¹² The profession is governed by the Federal Statute on Attorneys, BRAO (Bundesrechtsanwaltsordnung) of August 1, 1959, BgBl. I at 565 (1959)(amended).

¹³ For details on the evolution see *infra* text accompanying notes 75-83.

¹⁴ 1985: 900; 1975: 901; 1965: 744. In addition, in some parts of the country there are 7,710 attorneys also admitted as notaries (Anwaltsnotare) included in the attorneys figure above.

¹⁵ Their profession is governed by the Federal Statute on Notaries, BNotO (Bundesnotarordnung) of February 24, 1961 BGBl. I at 98 (1961), amended recently by the statute of January 29, 1991, BGBl. I at 150 (1991).

¹⁶ See M. HARTMANN, JURISTEN IN DER WIRTSCHAFT, EINE ELITE IM WANDEL 36, 74,

those employed as in-house counsel are also admitted to the bar.¹⁷ These so-called *syndic attorneys* (Syndikusanwälte) are prohibited from representing their employer before the court¹⁸ in order to avoid a possible conflict of interest. However, doubts remain as to whether the *syndic attorney* as an employee really enjoys the independence required by BRAO I §§ 1, 2 for the free profession of an attorney.¹⁹

The intense competition among the more than 6,000 annual entrants²⁰ to the legal professions has left a growing number unemployed²¹ or seeking other non-legal positions.

Closely related is the profession of *public accountant* ("Wirtschaftsprüfer" and "vereidigter Buchprüfer") who must pass a special exam in addition to legal or economic university study and practical experience of at least five years.²² Of the profession's 6,881 members 388 are attorneys.²³ Partly overlapping is the profession of *tax consultant* ("Steuerberater") with 39,997 members.²⁴ Some are attorneys, although a legal or economic university education is not mandatory.²⁵

The following occupations do not require an academic education. After a legal training of three years, the *Rechtspfleger* assists the judge on a broad range of civil (and a few criminal) matters, most of them technical in nature, such as registers or taxation of costs.²⁶ In contrast

107 (1990). Here again, in many areas the relative number and influence of jurists declines as they are displaced by other professions, especially by economists. *See id.* at 32.

¹⁷ *See* W. Kolvenbach, *Die Tätigkeit der Syndikusanwälte im Unternehmen und ihre Zusammenarbeit mit frei praktizierenden Anwälten*, JZ, 1979, at 458; W. Kolvenbach, *Die Rechtsstellung der Syndikusanwälte in der Europäischen Gemeinschaft*, ANWBL., 1987, at 211.

¹⁸ *See* BRAO § 46.

¹⁹ *See* BRAO § 7 Nr. 8. For a review of case law see K. JESSNITZER, *BUNDESRECHTSANWALTSORDNUNG* 23 (5th ed. 1990).

²⁰ 1989: 6,631; 1980: 4,123; 1970: 2,758; 1960: 2,173. *See* statistics in BRAK-MITT., 1990, at 152.

²¹ As of June 30, 1990, the Bundesanstalt für Arbeit reported 5,411 lawyers seeking employment. The number of women was 2,124 (39.3%).

²² *See* BRAO § 8. *Wirtschaftsprüferordnung* of November 5, 1975, BGBl. I at 2803 (1975) (amended).

²³ Statistics as of 1988 from H. JENKIS, *DIE WIRTSCHAFTSPRÜFER IM KONFLIKT ZWISCHEN PRÜFUNG UND BERATUNG* 74 (1989). The figure for 1989 is 8,175.

²⁴ As of 1989. The numbers are rising fast; see statistics in K. P. WINTERS, *DER RECHTSANWALTSMARKT, CHANCEN, RISIKEN UND ZUKÜNFTIGE ENTWICKLUNG* 14 (1990).

²⁵ *See* Steuerberatungsgesetz of November 4, 1975 § 36, BGBl. I at 2735 (1975), amended by the statute of December 13, 1990, BGBl. I at 2756 (1990).

²⁶ *See* RPflG (Rechtspflegergesetz) §§ 3, 20, November 5, 1969, BGBl. I at 2065, as amended 1969. RPflG sets out the necessary qualifications in section 2. *See also* RECHTSSTELLUNG UND AUFGABEN DER RECHTSPFLEGER/GREFFIERS (Europäische Union der Rechtspfleger, 2d ed. 1989).

to the judge, the *Rechtspfleger* does not enjoy judicial independence.²⁷ In 1989 there were 10,718 *Rechtspfleger*; 3,332 (31.1%) of them were women. Assisting the attorney or notary in his/her daily office work are about 100,000 clerks (*Rechtsanwaltsgehilfen*) who must apprentice for three years.²⁸ In addition, the *Rechtsbeistand* requires a special license and may in some cases perform the work of an attorney.²⁹ They number about 8,000.³⁰

B. Legal Education

The German legal profession employs uniform legal education ("Einheitsjurist"). The traditional education consists of two parts, each closing with an examination administered by the state. Having finished secondary school with the "Abiture" at age eighteen (or older), law students³¹ obtain a university education of at least three-and-one-half years,³² the average in fact exceeding five years. The success rate in the first state examination is about seventy-five percent,³³ but many law students drop out earlier. After theoretical education, practical training of two-and-one-half years is required. For several months at a time the trainee, a temporary civil servant ("Referendar"), works *inter alia* with a judge, a public prosecutor, and an attorney, in the public administration, and at an institution of the individual's choice. At the time of the second state examination³⁴ the average entrant to the legal profession is 30.25 years old.

Compared to other European countries, German legal education has often been criticized as too time-consuming.³⁵ However, after the sec-

²⁷ Compare DRiG § 25 with RPflG §§ 5, 9.

²⁸ Ninety-eight-and-four-tenths percent of the 25,412 apprentices (1990) are female.

²⁹ Regulated in the Statute on Legal Counselling, RBerG (Rechtsberatungsgesetz) of December 13, 1935, RGBI. I at 1478, (1935) (amended), with special regulations. See also ZPO III (Code of Civil Procedure) § 157: Prozeßagenten. RBerG § 1 II requires reliability, personal aptitude, and some legal knowledge. See also R. ALTENHOFF ET AL., RECHTSBERATUNGSGESETZ 67, 235-238 (9th ed. 1991).

³⁰ One of the few known data is the number of 1,077 (1984) *Rechtsbeistände* in Nordrhein-Westfalen (1965: 559). See also BUNDESTAGSDRUCKSACHE, 10/5317, at 18.

³¹ In winter 1988-89, the total enrollment at West German law faculties was 84,667. Forty-one-and-three-tenths percent (34,983) of the law students were female, compared to 25.2% in winter 1975-76. The number of first-year law students in 1988: 12,466; 1980: 14,446; 1970: 6,703; 1960: 3,173. Data from BRAK-MITT., 1990, at 152.

³² See DRiG § 5. The details are found in state statutes which differ only slightly from each other.

³³ 1989: 8,020 (74.8%); 1982: 5,592. JuS (JURISTISCHE SCHULUNG), 1990, at 863 and 1983, at 646.

³⁴ The success rate is almost 90%; 1989: 6,631 (88.9%); 1982: 5,149.

³⁵ See J. Staats, *Die Juristenausbildung in den Mitgliedstaaten der EG*, DRiZ

ond state examination the German lawyer ("Volljurist") may apply for any of the legal professions - attorney, prosecutor, or judge - without any further preparatory service. At the moment there is much debate³⁶ on how to shorten legal education, possibly through some kind of integration of its theoretical and practical parts.³⁷ The principal aggravating problem relates to ever-growing demands on students, facing rapidly evolving important fields of law, such as European, private international, and comparative law, or environmental and public economic law. The legislature and law faculties experience difficulty in deciding where to shift the emphasis at the expense of the traditional curriculum.

The most positive feature of German uniform legal education is that it provides the jurist with the analytical skills needed to quickly and successfully grasp and adapt to the special problems confronted later in practice. The university lays the theoretical groundwork and requires the student to constantly apply his knowledge to practical cases he or she must solve during written university and state exams. It may be true that this kind of education overemphasizes ex-post assessment of legal situations from a judge's perspective and neglects developing attorney's skills in negotiation and in avoiding conflicts.³⁸ Since the majority of graduates enter private practice,³⁹ this will add to the students' workload.

C. Mobility Between the Legal Professions

Once a German lawyer has found a position, he tends to remain with it. Very little exchange occurs between the different legal professions. Career tracks are separated from the start,⁴⁰ cross entrants are rare, and not at all welcome by colleagues. In Germany a successful attorney certainly would not want to, and after a certain age (thirty-five years) does not even possess the opportunity to become a judge or a civil servant. Exchanges usually occur only between judges and public

(DEUTSCHE RICHTERZEITUNG) at 193 (1990) (data for all EC member states).

³⁶ See *Welche Maßnahmen empfehlen sich - auch im Hinblick auf den Wettbewerb zwischen Juristen aus den EG-Staaten - zur Verkürzung und Straffung der Juristenausbildung?* DJT (DEUTSCHE RICHTERZEITUNG) 1990; W. Hadding, NJW, 1990, at 1873; H. Palm, *Gedanken zum Einheitsjuristen*, JZ, 1990, at 609; R. Wassermann, NJW, 1990, at 1877; D. Willoweit & B. Großfeld, *Juristen für Europa*, JZ, 1990, at 605.

³⁷ One experiment with the "Einstufige Juristenausbildung" was canceled in 1984 although this integrated education (e.g. in Bielefeld from 1973-1991) was undisputedly very successful insofar as the candidates in the final state examination have been on average 2.75 years younger than their traditionally educated colleagues. See H. Weber, JuS, 1989, at 678).

³⁸ See H. Kötz, *Juristenausbildung und Anwaltsberuf*, ANWBL., 1988, at 320.

³⁹ Less than 5% get the chance to become a judge or public prosecutor.

⁴⁰ Except for appointment to the highest constitutional courts.

prosecutors in the early stages of careers. Most of the other exchanges are involuntary, for example, in case a probationary judge is appointed for life.⁴¹

D. *The Situation in the Former German Democratic Republic*

The situation in East Germany before the unification was markedly different. In 1989 there were 1,493 judges, 1,237 public prosecutors, 592 attorneys, and 453 notaries.⁴² Most surprising is the high number of prosecutors (with additional functions in civil cases) compared to the relatively tiny fraction of attorneys. Attorney prestige and income was by far the highest of the East German legal profession. Since the revolution, the number of attorneys has risen sharply to about 1,500 in October 1990. This trend will continue. Requirements in the eastern part of the country will be about 5,000 judges, 1,000 prosecutors, and 3,000 Rechtspfleger.⁴³

Judicial transformation will not be easy. Western constitutional principles of separation of powers and judicial independence were unknown in East Germany; the judge was subject to the political will.⁴⁴ Moreover, loyalty to the communist party was more important than professional qualifications.⁴⁵ This was mirrored in the university education of the 1,600 East German law students. More than twenty percent of their four-year study was devoted to communist theory, in contrast to less than ten percent for the whole civil law.⁴⁶

II. THE JUDICIARY

With 17,627 judges (1989), the West German judiciary is large by any standard, especially in comparison to England or the United States.⁴⁷ The reasons are numerous. It is not that Germany is an overly litigious society. Rather, much of the pre-trial preparation rests on the shoulders of the judge who has no master or magistrate to assist. Fur-

⁴¹ See *infra* text accompanying notes 48-49.

⁴² The female numbers are 747 (50.0%), 350 (28.3%), 135 (22.8%), and 284 (62.7%) respectively. Data are from STATISTISCHES JAHRBUCH 1990 DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK (1990).

⁴³ The principal function of the former 900 "Gerichtsssekretäre" was that of a bailiff.

⁴⁴ K. Pleyer, *Richter und Rechtsprechung in der DDR*, in INNERDEUTSCHE RECHTSBEZIEHUNGEN 51 (Deutsche Richterakademie Heidelberg ed. 1988).

⁴⁵ J. Richter, *Nach dem Umbruch in der DDR, Die Situation in der Justiz*, DRIZ, 1990, at 111.

⁴⁶ 6.1% for "Wirtschaftsjuristen" and 9.4% for "Justizjuristen," respectively. GRÜNEBERG, JURISTENAUSBILDUNG IN DER DDR 295-97 (1990).

⁴⁷ See H. SCHACK, EINFÜHRUNG IN DAS US-AMERIKANISCHE ZIVILPROZESSRECHT (198-8); Kötz, *supra* note 4, at 73.

thermore, many attorneys leave it to the judge to sort out the superfluous and redundant from the important and contested parts of the extensive pleadings. Finally, almost all actions filed go to trial, even in the court of first resort, conducted before a panel of three judges.

A. Recruitment and Promotion

Usually judges are initially appointed at a young age for a probationary period of three to four years,⁴⁸ immediately after the second state examination. Accordingly, it should not come as a surprise that 11.9% of the German judges are thirty-five years or younger and that only 33.6% are over fifty.⁴⁹ The judiciary offers a civil service type of career. It is not the culmination of a successful legal career out of court as it is in the United States or England. Today the judiciary selects from the best applicants who generally covet the profession's security, independence, and social prestige, and are satisfied with moderate pay.

Parallel to the law student population, the number of women in the judiciary is rising fast, from 4.1% in 1965 (498 out of 12,247 judges) to 17.6% in 1989 (3,109 out of 17,627 judges). Moreover, 36.6% of the probationary judges are women.⁵⁰ Only 559 judges, mostly women, have chosen part-time employment.⁵¹

Judicial appointment decisions are made by the executive branch, most often the Minister of Justice. Some states require the consent of a Committee on Judicial Appointments,⁵² composed of members of parliament, judges, and members of the bar. Special selection provisions exist for the highest federal⁵³ and constitutional courts.⁵⁴ Except for the highest posts in the judiciary, political views do not impact the process.⁵⁵

The Minister of Justice, on advice from the Committee of Judges, makes the most critical decisions regarding promotion to presiding judge

⁴⁸ See § 22 DRiG. At the end of this period appointment for life is denied in very singular cases only.

⁴⁹ Figures are for 1989. Because of the very few openings in the last years the age structure has shifted considerably. In 1979 the percentage of judges 35 and younger was 23.2% and 24.3% were over 50.

⁵⁰ 469 out of 1,280 (1989).

⁵¹ 534 female and 25 male judges out of 17,627 (1989).

⁵² "Richterwahlausschuß." See GG art. 98 § IV, BGBI. I at 1, amended (1949); P. Marqua, *Die Richterwahl in Bund und Ländern*, DRiZ, 1989, at 225.

⁵³ See GG art. 95 § II.

⁵⁴ See, e.g., Federal Constitutional Court, BVerfGG (Bundesverfassungsgesetz) § 5, December 12, 1985, BGBI. I at 2229, amended (1985).

⁵⁵ Judges may belong to a political party, but must show restraint in order not to impair the public's confidence in their independence. See DRiG § 39.

or higher court positions.⁵⁶ Seniority and merit are vital with the latter being permanently evaluated by the candidate's presiding judge. This may de facto create some dependence in the associate or subordinate judge's mind and to some extent account for the conformism typical for judges who are, except for the Federal Constitutional Court, not allowed to publish separate or dissenting opinions.⁵⁷ As observed by Professor Kötzt, "a judicial career does not appeal to the most forceful, outspoken and ambitious personalities."⁵⁸ German judges⁵⁹ still tend to be quite conservative, intent on safeguarding individual constitutional rights, but don't see themselves as agents for social change which is for the legislature to bring about.

B. Continuing Education

Some continuing education takes place at the state level (especially for probationary judges). In addition, every year since 1973, about ten percent of the German judges and prosecutors attend courses on a voluntary basis on a broad range of general and special subjects at the Deutsche Richterakademie in Trier.⁶⁰

Currently, special education in East Germany is provided through lectures and short courses of several weeks to the East German judges⁶¹ to acquaint them with the West German law they are bound to apply since October 3, 1990.

III. THE ATTORNEYS

A. Admission

Every year about 4,000 new attorneys are admitted to the bar, bringing the total to 56,638 as of January 1, 1990. The department of justice has no control over admission quotas;⁶² no barrier against the overpopulation of lawyers exists.⁶³ Membership in the local bar associ-

⁵⁶ "Präsidentialrat." See DRiG I § 75.

⁵⁷ See DRiG § 43 and BVerfGG II § 30.

⁵⁸ Kötzt, *supra* note 4, at 72.

⁵⁹ As to their social background compare A. HELDRICH & G. SCHMIDTCHEN, GERECHTIGKEIT ALS BERUF 190 (1982) (analyzing a social study of 1978). See also D. RUESCHEMEYER, LAWYERS AND THEIR SOCIETY, A COMPARATIVE STUDY OF THE LEGAL PROFESSIONAL IN GERMANY AND IN THE UNITED STATES 94 (1973) [German translation under the title JURISTEN IN DEUTSCHLAND UND IN DEN USA 90 (1976)].

⁶⁰ See W. Schmidt-Hieber, *Die Fortbildung der Richter und Staatsanwälte in der BR Deutschland*, in AUSBILDUNG UND WEITERBILDUNG DER JURISTEN IN DEUTSCHLAND UND SCHWEDEN 89-98 (U. Blaurock ed. 1986).

⁶¹ See J. Thomas, *Auf dem Weg zur Rechtseinheit*, DRiZ, 1990, at 267.

⁶² See BRAO §§ 6.

⁶³ The exception being the BGH (Bundesgerichtshof) where only a limited number of

ation at the Court of Appeals level is compulsory. The bar as the profession's self-governing body exerts disciplinary control and through its umbrella organization, the Bundesrechtsanwaltskammer [BRAK], influences the rules of professional conduct.⁶⁴ In contrast, the Deutscher Anwaltverein [DAV] is an unofficial pressure group that assists its members and propagandizes a professional policy generally much less conservative than the BRAK.⁶⁵ Some important long-standing restrictions have become the subject of a heated debate recently. The *localization* principle requires that every attorney be admitted to one⁶⁶ ordinary court.⁶⁷ The attorney is allowed to plead in civil actions only before this court.⁶⁸ The argument usually proffered that this facilitates attorney communication with the court and clients⁶⁹ is not very convincing,⁷⁰ as no similar restriction exists in criminal cases or before administrative courts.

The attorney must maintain an office and take residence in the district of the court to which he/she is admitted.⁷¹ Consequently, an attorney in civil matters cannot offer all his/her services on a nationwide basis. Branch offices are forbidden.⁷² These restrictions seem outmoded

attorneys (1990: 26) is allowed to practice. Cf. BRAO § 164. Notaries, too, are admitted only according to local needs. BNotO § 4.

⁶⁴ See 177 BRAO § 92. The BRAK may state the general opinion on the exercise of the profession, but BRAO II § 177 Nr. 2 does not enable the BRAK to prescribe professional duties in implementation of BRAO § 43. Compare the famous decisions of BVerfG, July 14, 1987, 76 BVerfGE Entscheidungen des Bundesverfassungsgerichts 171, 187-88, and 196; NJW, 1988, at 191, 194 (with comments from R. Zuck, NJW, 1988, at 175 and J. Pietzcker, NJW, 1988, at 513), reported by F. Wooldridge, 39 INT. & COMP. L. Q. 683 (1990).

⁶⁵ Compare the harsh criticism of M. Kleine-Cosack, *Werbeverbotslockerung für Rechtsanwälte*, ZIP (ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT), 1990, at 1534, 1538.

⁶⁶ "Singularzulassung." Only a few states allow a "Simultanzulassung" at a court of first resort (Landgericht [LG]) and at the Court of Appeals (Oberlandesgericht [OLG]). See BRAO § 226.

⁶⁷ BRAO § 18. Cf. E. Schumann, *Die Befreiung der Rechtsanwaltschaft von Obrigkeitlichen Schranken*, NJW 1990, at 2089, 2090-91; W. Kewenig, *Das Recht der rechtsberatenden Berufe*, JZ, 1990, at 782, 785-86; DAV, ANWBL. BEILAGE, 4/1990, at 14. Pro: Beiheft, BRAK-MITT., August 1990.

⁶⁸ See ZPO ("Postulationsfähigkeit") § 78. See also *infra* text accompanying notes 106-108.

⁶⁹ See BVerfG November 8, 1989, NJW, 1990, at 1033.

⁷⁰ See U. Everling, *Welche gesetzlichen Regelungen empfehlen sich für das Recht der rechtsberatenden Berufe, insbesondere im Hinblick auf die Entwicklung in der Europäischen Gemeinschaft?*, in VERHANDLUNGEN DES 58. DEUTSCHEN JURISTENTAGES GUTACHTEN C64 (1990).

⁷¹ "Kanzleipflicht, Residenzpflicht." BRAO §§ 27, 29.

⁷² BRAO § 28. As to supra-regional partnerships, see *infra* text accompanying notes 98-102.

in an era of quick and easy communications. The client must have access to his attorney, but the attorney need not be permanently present in his office. Therefore the only indispensable requirement should be the existence of an office.⁷³ The real motives behind all other restrictions shield the local attorney from unwanted competition.⁷⁴

B. Increases and Competition

1. Numbers

The increase in the number of attorneys has been dramatic - over twenty percent in the last five years alone.⁷⁵ In West Germany there is one attorney for 1,095 inhabitants compared, for instance, to Japan⁷⁶ where the ratio is one to 9,000 or to the United States where one lawyer serves 364 inhabitants.⁷⁷ As supply exceeds demand, life is getting harder for attorneys. Tough competition exists not only from their colleagues but also from neighboring professions which have a sizeable portion of the growing counselling market. Public accountants,⁷⁸ tax consultants,⁷⁹ and management consultants have been quite successful in this respect.⁸⁰ Other competitors include patent agents,⁸¹ architects,⁸² and investment agents.⁸³ However, not all attorneys are feeling the pinch in the same manner because the profession is not homogeneous. The bar attracts some of the brightest lawyers who cope with the situation and enjoy an expanding practice as well as many other lawyers with sparse qualifications who could not find another position.

⁷³ See E. Schumann, NJW, 1990, at 2092-93.

⁷⁴ See *infra* text accompanying notes 98-102.

⁷⁵ 1990: 56,638 (15.1%); 1985: 46,927 (12.0%); 1980: 36,077 (7.6%); 1975: 26,854; 1970: 22,882 (4.5%); 1965: 19,796; 1960: 18,347 (female rate in parentheses).

⁷⁶ With about 14,000 attorneys.

⁷⁷ With 649,000 lawyers (1984); for statistics see R. ABEL, AMERICAN LAWYERS 280 (1989).

⁷⁸ They may give legal advice by way of an annex to their regular activity. See BGH November 4, 1987, NJW, 1988, at 561.

⁷⁹ See *supra* text accompanying note 24.

⁸⁰ There are an estimated 35,000 of them. See WINTERS, *supra* note 24, at 140.

⁸¹ About 900 independent and 400 employed (1988). See E. Steup, *Der Patentanwalt als unabhängiges Organ der Rechtspflege*, in MITTEILUNGEN DER DEUTSCHEN PATENTANWÄLTE 101 (1989).

⁸² See e.g., BVerfG April 4, 1990, ZIP, 1990, at 1619.

⁸³ As to all these competitors see WINTERS, *supra* note 24, at 49, 116.

2. Specialization

One important step in adapting to demands of the legal services market is specialization. Attorneys specialize inside law firms and must hold themselves out as experts to the prospective client looking for a lawyer who has the special knowledge needed. Sharp restrictions on advertising legal services⁸⁴ have so far permitted official recognition of only four types of specialists ("Fachanwälte"): the attorney for tax law (since 1937) and (since 1986) for labor, administrative, and social security law. Until May 14, 1990, the title of a specialist attorney had been conferred by the bar association to an applicant who had proven some special knowledge. Today there are 3,553 specialist attorneys. Most practice tax law.⁸⁵

This practice ceased when the Supreme Court ruled that the Federal Bar Association (BRAK) lacked legal authority to establish and confer such titles.⁸⁶ As an attorney is prohibited from declaring himself publicly an expert in a particular field,⁸⁷ the legislature was called upon to intervene with the Statute of January 29, 1991.⁸⁸ The legislature, however, was at least for the moment unwilling to permit further specializations in criminal, family, economic or European law. Accordingly, the four old types of specialist attorneys corresponding to the separate courts' jurisdictions remain. Further specialization may be highly desirable as it affords attorneys a competitive edge, but the majority of non-specialists probably fear that the public might lose confidence in their general professional ability.

Being an expert requires continuing education,⁸⁹ provided mainly by the Akademie des Deutschen Anwaltvereins. The Akademie offers courses on both special and general subjects such as office organization or data processing.⁹⁰

⁸⁴ See *infra* text accompanying notes 91-96.

⁸⁵ Tax law 2,145 (62, 2.9%); labor law 911 (60, 6.6%); administrative law 307 (10, 3.3%); social security law 190 (31, 16.3%) (total: 163 or 4.6%). Figures as of 1990; female rate in parenthesis. BRAK-MITR., 1990, at 87.

⁸⁶ BGH May 14, 1990, *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, 111 BGHZ; NJW, 1990, at 1719, (applying 76 BVerfGE at 171).

⁸⁷ See BVerfG May 13, 1981, 57 BVerfG, 121, 137-38 ("Fachanwalt für Verwaltungsrecht"); BGH May 14, 1990, NJW, 1990, at 2130 ("Steuerrecht"); OLG Hamm May 8, 1990, NJW, 1990, at 2392 ("Europarecht").

⁸⁸ BGBl. I at 150 (1991), adding BRAO § 42(a).

⁸⁹ See BRAO § 42d.

⁹⁰ Each year about 12,000 attorneys participate in 400 events.

3. Advertising Legal Services

The prohibition of advertising legal services has been a cornerstone of the profession's ethics. Almost anything except a name-plate and telephone directory listing was forbidden and meticulously controlled by the disciplinary courts enforcing the rules of professional conduct.⁹¹ This old fashioned narrow-mindedness⁹² is one factor regarding attorneys' lost terrain to competing professions which do not suffer from similar self-inflicted restrictions.

However, since July 14, 1987, a fresh wind is blowing after the Federal Constitutional Court brushed aside the Federal Bar Association's rules of professional conduct as lacking legal authority.⁹³ Today these rules implementing the very general norm of BRAO § 43 may only be applied for a transitional period, and only if observance is imperative for administration of justice. Informative advertising is now generally considered permissible.⁹⁴ Ostentatious or deceptive advertising is clearly prohibited.⁹⁵ Hopefully the more liberal practice evolving will not be dampened by the impending revision of the Federal Statute on Attorneys.⁹⁶

C. Evolution of Large Law Firms

The dictates of efficiency and specialization have led to law firms ("Sozietäten") of ever-growing size. Today it is almost impossible for a solo practitioner to render the full service many clients expect. In 1987, 40.4% (1967: 26.5%) of the attorneys practiced in the form of partnerships, most of which were still quite small; only eight percent (1967: 5.4%) of law firms counted five or more attorneys.⁹⁷ Today the largest

⁹¹ "Standesrichtlinien" §§ 2, 3.

⁹² See Kötz, *supra* note 4, at 77. Elsewhere the practice is much more liberal. Cf. M. PRINZ, ANWALTSWERBUNG (1986); U. HOCKE, WERBUNG FÜR ANWALTICHE DIENSTLEISTUNGEN (1989).

⁹³ See *supra* note 63, (protecting the freedom of exercising one's profession, guaranteed in GG I art. 12).

⁹⁴ See e.g., U. Kornblum, *Die anwaltlichen Werbeverbote im Lichte der neuesten Rechtsprechung des BVerfG*, ANWB., 1988, at 361. G. RING, WERBERECHT DER RECHTSANWÄLTE (1990).

⁹⁵ See 76 BVerfGE, at 196, 205. E.g., OLG Karlsruhe June 21, 1990, NJW, 1990, at 3093 (concerning the letter-head of internationally co-operating attorneys).

⁹⁶ The awaited revision of the BRAO is the reason why the BRAO and the BNotO have not been put into force in East Germany. See Unification Treaty of September 23, BGBl. II at 885, 921 (1990); Annex I, ch. III JUSTIZ, A I Nr. 7 and 8, and annex II, at 1156.

⁹⁷ Statistics from A. Braun, BRAK-MITT., 1988, at 239 (making no distinction bet-

local law firms in Germany number about forty to fifty attorneys.

Relaxation of the rules of professional conduct has accelerated the trend to mega-size law firms since July 14, 1987. During the last two years supra-regional partnerships ("überörtliche Sozietäten") have been created; the courts acquiescing provided there is no confusion as to which court the individual partner is admitted.⁹⁸ Formalistically the localization principle and prohibition of branch offices are respected,⁹⁹ but in fact the door is now open for a nationwide practice.

Once the large law firms attracting the best legal talent have established themselves in every economic center, little will be left for the solo practitioner or for smaller partnerships except perhaps countryside practice or small cases of no interest to "big industry." Since the German fee structure¹⁰⁰ does not allow an attorney to survive on small cases alone, the ongoing concentration to more and larger supra-regional law firms creates an existential danger for the majority of attorneys.¹⁰¹

It remains to be seen whether the legislature will attempt to stem the tide and restrict the supra-regional partnership. However, that would worsen the profession's disadvantages in competing with neighboring professions, as well as on the international level. As a compromise, the legislature might uphold both the new supra-regional partnership and the old localization principle.¹⁰² In the long run, however, the profession's transformation from the individual independent attorney to the more or less anonymous service industry cannot be prevented.

Attorneys' partnerships are associations¹⁰³ having no legal personality of their own. Some claim that this is not adequate for a large law

ween partners and employed attorneys): 59.3% of the partnerships counted only two, 22.7% counted three, and 9.9% counted four attorneys (1987).

⁹⁸ See BGH September 18, 1989, 108 BGHZ 290, 294-95; NJW, 1989, at 2890; BGH October 29, 1990, ZIP, 1991, at 33; OLG Nürnberg June 19, 1990, at 2827. See also W. KEWENIG, ÜBERÖRTLICHE ANWALTSSOZIELÄTEN UND GELTENDES RECHT (1989); E. SCHUMANN, DIE ÜBERÖRTLICHE ANWALTSSOZIELÄT (1990); M. HEINTZEN, DIE ÜBERÖRTLICHE RECHTSANWALTSSOZIELÄT (1990); H. Prütting, *Die Zulässigkeit der überörtlichen Anwaltssozietät nach Geltendem Recht*, JZ, 1989, at 705. *Contra* W. Reuerich, *Die überörtliche Anwaltssozietät - Wunschtraum oder zulässige Partnerschaftsform?* ANWB., 1989, at 360.

⁹⁹ BRAO §§ 18, 28. See also *supra* text accompanying notes 66-74.

¹⁰⁰ See *infra* text accompanying notes 109-121.

¹⁰¹ So it is no wonder that not only the BRAK but also 69.9% of the attorneys questioned by the DAV are firmly against permitting the "überörtliche Sozietät." The questionnaire of the DAV is found in ANWB., 1989, at 273.

¹⁰² As the localization principle works against concentration it cannot be regarded as unconstitutional per se (i.e. as violating GG I art.12). Cf. J. PIETZCKER, *DER ANWALTSCHE LOKALISATIONSGRUNDSATZ* (1990).

¹⁰³ BGB § 705.

firm with special interests separate from those of its members¹⁰⁴ and demand the opportunity to incorporate as a private limited company¹⁰⁵ the same way as public accountants and tax consultants. Such a "Rechtsanwalts-gesellschaft" would carry some tax privileges (as well as tax burdens) and allow the attorneys to limit their professional liability to the corporation's assets, including (limited) liability insurance. That would not fit well with the aim of consumer (client) protection and it is hard to imagine attorneys practicing after their law firm went bankrupt. Therefore incorporation of law firms most probably will not be allowed in the future.

D. Protective Measures

In recent years, the wall that once protected the legal profession from outside competition has largely crumbled. The Statute on Legal Counselling intended to reserve the counselling market for attorneys did not succeed in excluding other professions.¹⁰⁶

The attorneys' last domain is representing the client before the courts. In most civil cases, including divorces, the parties are not allowed to self-plead. ZPO section 78 requires each party to hire an attorney ("Anwaltszwang"). As the attorney may plead in civil cases only before the court to which he/she is admitted,¹⁰⁷ the client requires a different attorney for each higher instance. The advantage may be to let the new attorney have a fresh look at the case, but keep up to three attorneys busy on one case. This cost-generating feature will subsist even if the localization principle is abolished.¹⁰⁸

E. Costs

As to costs, the German system may be characterized by two aspects. First, fee shifting occurs to the effect that the loser pays all.¹⁰⁹ Second, detailed regulation of attorneys' fees by statute¹¹⁰ sets forth

¹⁰⁴ For example, in holding property or in the case of members leaving the firm.

¹⁰⁵ Best suited would be a *Gesellschaft mit beschränkter Haftung* [GmbH]. DAV, ANW-BL. BEILAGE, 4/1990, *supra* note 67, at 6; Kewenig, *supra* note 67, at 788-89; Schumann, *supra* note 67, at 2095; WINTERS, *supra* note 24, at 182 (advocating a more cautious approach).

¹⁰⁶ See *supra* text accompanying notes 75-83. See also WINTERS, *supra* note 24, at 48.

¹⁰⁷ "Postulationsfähigkeit." See ZPO § 78 and *supra* text accompanying notes 66-67.

¹⁰⁸ In that case, or through a supra-regional law firm, the client may only save the costs of a corresponding attorney.

¹⁰⁹ ZPO § 91. For an account in English, see W. Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37 (1984) (with text of statutes at 84).

¹¹⁰ Federal Statute on Attorneys' Fees, BRAGO (Bundesgebührenordnung für

fees in relation to the amount in dispute regardless of the actual time spent on the case.¹¹¹ The attorney in fact subsidizes the litigation of small claims in exchange for more favorable fees in big cases of clients supposedly in a position to afford higher fees.

Contingent fees, common in the United States,¹¹² are prohibited as contrary to German public policy.¹¹³ Although charging lower than the statutory fees is considered unethical,¹¹⁴ it now seems the prevailing practice of German law firms counselling foreign clients is to charge at an hourly rate (ranging most often between 250 and 600 DM). The resulting fee may be somewhat less predictable than the statutory fee, but seems fairer in the individual case and permits the client to better compare the price of international legal services.

A social state must insure that no one is denied access to justice for lack of financial means. In Germany different legal aid schemes prevail in and out of court.¹¹⁵ Legal aid in court¹¹⁶ is the most important and costly¹¹⁷ form. It grants a delay in payment or excuses the poor party from court costs. This applies to his own, not his adversary's attorney's fees. For out of court counselling, a poor person may apply for legal counselling aid.¹¹⁸ If awarded, the client pays only 20 DM to the attorney of his/her choice (§ 8 BerHG); the remainder is paid by the state. In 1989 the states spent 21.6 million DM for counselling aid alone.¹¹⁹

It has become quite common lately to cover legal expenses through private insurance ("*Rechtsschutzversicherung*").¹²⁰ Regrettably as a

Rechtsanwälte) of July 26, 1957, BGBl. I at 907, amended.

¹¹¹ See BRAGO §§ 11, 31. See also Kötz, *supra* note 4, at 77-78.

¹¹² See SCHACK, *supra* note 47, at 8.

¹¹³ BGH February 28, 1963; 38 BGHZ, at 142.

¹¹⁴ That was a problem especially before the enactment of the BerHG (*infra* note 118). See BGH May 12, 1975, 64 BGHZ 301.

¹¹⁵ For an account in English see H. Hirte, *Access to the Courts for Indigent Persons: A Comparative Analysis of the Legal Framework in the United Kingdom, United States and Germany*, 40 INT. & COMP. L. Q. 91, 112-20 (1991).

¹¹⁶ "Prozeßkostenhilfe," ZPO § 114, amended by the statute of June 13, 1980, BGBl. I, at 977 (1980), awarded by the court itself. See Kötz, *supra* note 4, at 78. In criminal cases the defendant may get a "Pflichtverteidiger," SLPO (Code of Criminal Procedure) § 141.

¹¹⁷ (1987: 387 million DM) Almost the entire amount is employed for civil cases; only a few million DM for proceedings in the administrative courts.

¹¹⁸ See the Statute on Counselling Aid, BerHG (Beratungshilfegesetz) of June 18, 1980, BGBl. I, at 689 (1980).

¹¹⁹ In Bremen, Hamburg, and Berlin 14 BerHG still permits legal counselling by public agencies ("*öffentliche Rechtsberatung*").

¹²⁰ In 1987 this insurance branch took in 2,613 million DM in premiums and spent 1,915 million DM on legal costs. See WINTERS, *supra* note 24, at 34.

side-effect of reduced costs, the parties tend to become more intransigent.¹²¹

VI. FUTURE CHALLENGES

A. *A New Perspective for Attorneys*

The attorneys' main income-generating activity has long shifted from representing clients in court to general counselling. A recent field study revealed that seventy percent of all mandates in civil matters terminate with counselling or negotiation without resort to the courts.¹²² The traditional perception of the law as a forensic profession, however, changes slowly. This is evident by the law school curricula rarely offering courses on drafting documents, dispute prevention, or negotiation and mediation techniques.¹²³ Another proof is that many clients obtain an attorney only if inevitable, often when it is too late.

In order to regain some of the ground lost to other professions,¹²⁴ attorneys should do more to publicly establish themselves as a counselling and mediation profession.¹²⁵ As a collateral benefit some of the pressure from the courts suffering under rising workloads would be reduced. In this respect the growing number of mediation centers¹²⁶ is a two-edged sword. If successful, cases may not enter the court's docket. At the same time easy and inexpensive access to such mediation centers may bypass attorneys who may lose more business than they gain in the end.

B. *Transnational Legal Problems*

In recent years, transnational legal problems have grown tremendously in number and complexity. People have become more mobile as national borders are lowered, not only with regard to the Member States of the European Community, but also to the Middle and Eastern European countries and worldwide. International trade and products liability, transboundary pollution, and environmental protection,¹²⁷ immigration,

¹²¹ This impression is shared only in part. E. BLANKENBURG & J. FIEDLER, *DIE RECHTSSCHUTZVERSICHERUNGEN UND DER STEIGENDE GESCHÄFTSANFALL DER GERICHTE* 96, 113-14 (1981).

¹²² R. WASILEWSKI, *STREITVERHÜTUNG DURCH RECHTSANWÄLTE* (1990); summarized in *BRAK-MITT.*, 1990, at 5, 7.

¹²³ See *supra* text accompanying note 38.

¹²⁴ See *supra* text accompanying notes 78-83.

¹²⁵ See *BRAK-MITT.*, 1990, at 10.

¹²⁶ For details see H. Prütting, *Schlichten statt Richten?* *JZ*, 1985, at 261, 265.

¹²⁷ Environmental protection law in general is a special growth area. M. Hartmann estimates that 20-30% of the lawyers employed by industrial firms are working in that field.

binational marriages, and families create numerous problems of private and public international law including those of international civil procedure.¹²⁸

With a strong tendency to regulate legal problems by statute on German, European, and international levels, countries are experiencing the growth of a complex body of law which laypeople and even many lawyers have difficulty understanding. This intransparency of the law is deplorable. As the individual becomes more and more dependent on lawyer's advice, demand for legal services grows. Lawyers can be happy with this situation if they possess the special skills needed to serve the international market.

One precondition is proficiency in foreign languages. Ninety percent of German lawyers speak (or at least understand) English; about thirty percent speak French. Unfortunately some basic knowledge of, and experience in, foreign legal systems is much less common. Legal education is still centered almost exclusively on German national law.¹²⁹ Too many state legislators, law professors, and students have not yet realized changing times. A mandatory course for all law students covers only the basics of public international and European law whereas most students are not even introduced to the basics of private international law,¹³⁰ not to mention comparative law. Of course they are free to pursue these and other special courses, but in fact very few (less than nine percent) have the courage to add these fascinating but difficult subjects to their work load.¹³¹

Nevertheless, today many students seize the opportunity and study abroad in the United States, Switzerland, France, and England. Recently another successful initiative has been started with the ERASMUS program of the EC.¹³² Moreover, young lawyers might gain some experience in a foreign legal system during practical training if they choose (as more than ten percent do) to spend some of the time (three to six months) with a foreign legal institution or law firm.¹³³ In sum, while some lawyers seem quite well-equipped for the challenge of acting on an international market, the majority is not prepared.

See HARTMANN, *supra* note 16, at 53-54.

¹²⁸ See HAIMO SCHACK, *INTERNATIONALES ZIVILVERFAHRENSRECHT* (1991).

¹²⁹ See DRiG § 5a and the implementing state statutes.

¹³⁰ Notable exceptions are the states of Baden-Württemberg and Hessen.

¹³¹ See *supra* text accompanying notes 35-39. For statistics, see P. Burow, *Das Wahlfachstudium*, *JUS*, 1991, at 258, 259.

¹³² *European Community Action Scheme for the Mobility of University Students*, *OFFICIAL JOURNAL OF THE E.C.*, L 166, at 20 (1987).

¹³³ See DRiG I § 5b, 2 Nr. 5 lit. g; K. Vieweg, *Die Auslandswahlstation der Referendare*, *JUS*, 1987, at 1002.

C. *International Cooperation*

Counselling international clients requires quick and easy access to foreign legal expertise. Therefore across the border cooperation between attorneys is vital. Since July 1, 1989, a new institutionalized form of cooperation is available: the European Economic Interest Grouping (EWIV).¹³⁴ Attorneys or law firms may form this organization if at least one partner resides in another EC country. Under this cover, attorneys from Berlin, Brussels, Paris, and London may cooperate, or in another example, attorneys from Berlin, Cologne, Munich, Hamburg, and Brussels. Thus the EWIV not only permits circumvention of the national law's prohibition on branch offices,¹³⁵ but its quality as a juristic person allows for some of the advantages connected with the still prohibited "Rechtsanwaltsgesellschaft."¹³⁶ Moreover, the EWIV acts as a means of legally advertising the law firm's international connections on its letterhead. Some attorneys have already organized as an EWIV, but it remains to be seen whether this form of cooperation will be successful.

D. *The Free Market for Legal Services in the European Community*

One major aim of the European Community is the free market for goods and services, including legal services. Although Article 7 of the EEC Treaty forbids discrimination against citizens of other Member States, until recently competition was excluded because every attorney had to undergo the host State's legal education.¹³⁷ That has changed as EC directives and decisions of the European Court have implemented the principles of freedom of establishment and provision of services.¹³⁸ Today attorneys from other Member States are neither subject to the localization principle or the residence and branch office provisions.¹³⁹ This has led to reverse discrimination of in-state attorneys who still must practice under these restrictions. The "Inländerdiskriminierung" aroused much protest from the bar, but it has been held constitutional, violating neither EEC Treaty I Article 7 nor GG I Article 3.¹⁴⁰ Never-

¹³⁴ EUROPÄISCHE WIRTSCHAFTLICHE INTERESSENVEREINIGUNG. *EC regulation of July 25, 1985*, OFFICIAL JOURNAL OF THE E.C., L 199, at 1 (1985), implemented by the German statute of April 14, 1988, BGBl. I at 514 (1988). See also R. Zuck, *Die EWIV als Instrument anwaltlicher Zusammenarbeit*, NJW, 1990, at 954.

¹³⁵ See *supra* text accompanying notes 71-72, and notes 98-99.

¹³⁶ See *supra* text accompanying notes 103-105.

¹³⁷ See BRAO § 4; SCHACK, *supra* note 128, at 200-203.

¹³⁸ EEC Treaty arts. 52, 59.

¹³⁹ See *supra* text accompanying notes 66-74. BRAO §§ 29a, 207, as added by statute of December 13, 1989, BGBl. I, at 2135 (1989).

¹⁴⁰ BGH September 18, 1989, 108 BGHZ, at 342, 345. See also Everling, *supra* note

theless this will provide the national legislator with a strong incentive for liberalizing the traditional rules of the profession.

For the moment a rather defensive attitude seems to prevail. In the eyes of most German attorneys the fear of foreign competition looks greater than their new chances on the European market.¹⁴¹ Hopefully they will realize in time that free exchange of legal services not only offers export opportunities, but also benefits the international community through cross-fertilization of legal concepts and ideas.

70, at C56. Cf. Prütting, *supra* note 98, at 711-12.

¹⁴¹ As to the latter see A. Kespohl-Willemer, *Der deutsche Anwalt in der EG - rechtliche Rahmenbedingungen und Möglichkeiten*, JZ, 1990, at 28.

