〈講　演〉

ドイツ法文化とその担い手

（2002年度愛知大学法学会講演会講演録）

クリストファー・ベーアマン
大　川　四　郎［訳注］

(1)　はじめに

2002年12月6日（金曜日）に，本学三好校舎の001教室を使い，法学会主催のもとに，クリストファー・ベーアマン氏による講演を開催した。まず，講演前に御本人からお寄せいただいた履歴書をもとに，講演者であるベーアマン氏について御紹介しておきたい。

クリストファー・ハインリッヒ・ヨーゼフ・マリア・ベーアマン（Christopher Heinrich Joseph Maria Beermann）氏は1967年7月26日にドイツ連邦共和国ヴェストファリア州ミュンスター市の弁護士の家庭に生まれた。1978年から1987年まで同州オストベーベルンにある私立カトリック系ヨハンネウム・シュロス・ローブルク・ギムナジウムに学び，特にラテン語と歴史とを修めた。

1987年から1992年までヴェストファリア州立ミュンスター大学法学部に学生登録をし，ホルツハウザー教授のもとでドイツ法史とヨーロッパ法史を，クピッシュ教授のもとでローマ法を専攻した。

1992年11月に第1回国家試験を受験した後，1995年までドルトムント地方

裁判所で修習生として民事裁判，同じくドルトムント地方検察庁で検察実務，ベルクカーメン市役所とゲルゼンキルヘン行政裁判所で行政実務，を経験した。更には，イスラエルのテルアビブ市で弁護士実務をも経験した。

1995年7月に第2回国家試験を受験した後，ヴェストファリア州デュッセルドルフに所在のドイツ連邦司法省で修習を受ける。1995年10月からは同州テルグテ市で民事事件では売買，賃貸借，銀行，不法行為，親族，相続を，行政事件では建物建築法，環境法を専門とする弁護士として活動。1996年からは財産，相続，会社を専門とする公証人としても活動。

1995年9月からは母校ミュンスター大学法学部で，ハインツ・ホルツハウザー教授の指導の下に，ドイツ法史，ヨーロッパ法史，カノン法各分野にまたがる研究領域で博士号請求論文の執筆に取組む。具体的には，古典期ローマ法に始まり，ゲルマン法，カノン法，普通法学説，パンデクテン学説を経て，ドイツ民法典第866条，第1029条に至るまでの占有と制限物権との法的関係の変遷史をテーマとした。2000年7月の口頭試問に最優秀の成績で合格し，法学博士号を取得。

2000年4月1日より2003年3月31日まで新潟大学法学部でドイツ法とヨーロッパ法担当の助教授として勤務。2003年4月1日からは故郷ミュンスターにもどり，父上の弁護士事務所で法実務に従事しておられる。

氏の主たる研究対象は占有権がカノン法からの影響を受けながら歴史的にどのような変遷を経て来たかという点である。来日されてからの氏は，ドイツで高まっている日本法への関心を背景に，ヨーロッパ大陸法からの強い影響を受けてきた日本法の歴史的発展の過程，に興味を抱いておられる。

日本国内の関連する学会にも精力的に参加され，学会報告をも発表しておられる。2002年6月に北海道大学で開催された法制史学会の懇親会の折に筆者が初めてベーアマン氏にお会いしたのを奇縁として，同年12月に愛知大学での講演をお引受下さることとなった次第である。

筆者が担当している「法制史Ⅱ」講義時間内を利用しての講演となったため，前半の講演は法制史に関連する内容でのお話をお願いした。後半では，現在我が国で法科大学院設置が進められて法曹養成問題に関心が集まっていることか

ら，ドイツにおける法学教育システムを内容とするお話をお願いした。

以下に掲げるのは，この時の講演会原稿（英文）である。「ドイツ法文化の根幹としてのローマ・カノン法」の内容は，ドイツ法制史の専門家やドイツ人法学部生には常識的なものであるが，本学学会員には未知の知識が多いのではないかと筆者は判断し，ベーアマン氏の御諒承を得た上で，本文に下線をほどこし若干の訳注を付した。「ドイツにおける法学教育システム」は，原稿執筆中にドイツに一字帰国して，幾つかのデータを氏が調査・確認されたものだけに，2002年12月時点では最新の資料を駆使してまとめられたドイツ法学教育事情である。（文責，大川四郎。2003年4月30日）

(2) 「ドイツ法文化の根幹としてのローマ・カノン法」

Roman-Canon Law as the Basis of the German Legal Culture[1]

Dr. Christopher Beermann, Rechtsanwalt,
Associate Professor (Niigata University)

I. Introduction

The subject of this lecture is the relationship between Roman law and Germany or, more accurately, Roman law and canon law as the basis of German legal culture. In order to avoid misunderstandings I must stress that I am not giving a lecture on Roman law as the basis of the actual German legal system. The German civil code is, like its (non-identical) twin, the Japanese civil code, predominantly based on Roman law, at least on the interpretation of Roman law by the pandect-science (***Pandek-***

1 This article is based on a lecture held at Aichi University (Nagoya) on December 6th 2002. I am very grateful to Ms. Joanna Farrands (Bristol University) for correcting my draft (any faults that remain are mine alone) and to Prof. Dr. Okawa (Aichi University) for suggesting this lecture and inviting me.

tistik)訳注(1) of the nineteenth century.[2] However, the phenomenon of pandect-science in Germany is unthinkable without centuries old legal traditions based on the ancient Roman law of ***Justinian***'s code訳注(2).[3] Another, often neglected aspect of the origins of the German legal culture is the influence of canon law, the legal system developed by the catholic church, especially since the 12th century.

I will try to summarize the roots of the modern German legal culture. And at the beginning of our contemporary legal culture is the recognition of ***Justinian***'s code as effective law in the old German empire. This process is generally known as the Reception (***Rezeption***)訳注(3).[4] The above mentioned legal system resulting from the Reception is called the common law ("***ius commune***" in Latin, "***gemeines Recht***" in German)訳注(4).[5]

訳注(1) 「パンデクテン法学」のこと。隣国フランスのナポレオン民法典をしのぐものを編纂しようと，19 世紀ドイツの民法学者らは総力を挙げて「ローマ法大全」の最重要部分である学説彙纂（パンデクタエ）の諸法文を抽象化して，後のドイツ民法典（BGB）の学説的基盤を築き上げた。このことにちなみ，19 世紀のドイツ私法学を「パンデクテン法学」と総称する。

2 Comp. Marutschke, Einführung in das japanische Recht (1999), pp.87-99.

訳注(2) 「ローマ法大全」のことである。

3 On behalf of this great emperor of the East-Roman Empire this code, the corpus iuris civilis, was compiled in 534 AD. Comp. Stein, Roman law in European history (1999), pp.32-37.

訳注(3) 「継受」と訳す。或る法文化を違う土壌の法文化地に移植することである。明治開国後の我が国での西洋法導入は典型的な「継受」である。また，近年，我が国からインドシナ諸国への法整備支援活動も広い意味での「継受」と考えてよい。

4 Kunkel/Schermaier, Römische Rechtsgeschichte, 13th ed., p.234; Stein, p.88.

訳注(4) 「普通法」（ラテン語では「ユス・コムーネ」，ドイツ語では「ゲマイネス・レヒト」）と訳している。中世から 19 世紀に至るまでドイツ語圏は各ラント（領邦諸国家）に分裂しており，法源も分裂していた。個々のラント国内においても法源状態は未成文化のままであったから，そのような欠陥を補うために，ローマ法が共通の法として機能した。

5 The English expression "common law" is (like its German counterpart) a direct translation of the Latin term "ius commune". Of course, there is no identity whatsoever with the English legal system known as the common law. To avoid confusion I use the Latin expression "ius commune".

Development, institutions, practice and theory of the ***ius commune*** were (and recently are again)[6] subject of thorough investigation.[7] Still, the period before the Reception proper (***Vollrezeption***)訳注(5), the time before the sixteenth century, remains a kind of stepchild of legal history.[8] Normally, this period is called the early reception (***Frührezeption***)訳注(6).[9] On the one side, this scientific neglect is not surprising. The early reception lies in the dark of history, sources are rare or not yet systematically registered. On the other side, lack of interest and research are astonishing because the period before 1500 was decisive for the foundation of the German legal culture and the modern German legal system. Therefore, it might be of interest to cast a quick glance at this time.

The German emperors regarded themselves as the direct and legitimate successors of the emperors of the ancient Roman Empire. The fact that this empire fell centuries earlier in the turmoil of the Germanic migrations was ignored. This perception was the soil for the so-called ***Lotharian legend***訳注(7). According to this legend the twelfth-century Emperor ***Lothar*** was persuaded by ***Irnerius***訳注(8) (the most prominent scholar rediscovering

6 Comp. Zimmermann, Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit, Juristenzeitung 1992, p.8; the same, Europa und das römische Recht, Archiv fur die civilistische Praxis, vol. 202 (2002), pp. 243-316; Mohnhaupt, Europäische Rechtsgeschichte und Europäische Einigung, in: Recht, Idee, Geschichte, ed. Lück et. alt. (2000), pp.657-679.

7 Comp. Coing, Europäisches Privatrecht, 2 vol., 1985.

訳注(5) 「本継受」と訳されている。

8 Trusen, Anfänge des gelehrten Rechts in Deutschland (1962), is still regarded as the standard work concerning the times before the 15th century (comp. Kunkel/Schermaier, p.316). This study owes much to Trusen's work.

訳注(6) 「初期継受」と暫定的に訳しておく。

9 Eisenhardt, Deutsche Rechtsgeschichte, 2nd ed. (1995), p.99.

訳注(7) 「ロタール伝説」。神聖ローマ皇帝ロタールがボローニャ法学校の法学教師イルネリウスの献策に基づき，ローマ法大全を帝国領内で適用することを命じた，とするもの。

訳注(8) イルネリウス（Guarnerius Wernerius Irnerius, 1050?-1130?）はボローニャ法学校において註釈学派の始祖として，ローマ法大全の学問的再発見に貢献したとされる。

Justinian's law) to adopt the Roman laws as his own.[10] Though this tale was exploded by ***Hermann Conring***訳注(9) as early as 1643[11] the conviction that imperial legislation was the main factor of the Reception remained widespread. However, the formula *"the reception of Roman law took place because it was imperial law"* is more than just a simplification. It twists the facts.[12]

The "***Reception***" is part of a process of rationalization in Western Europe. It is identical with the rationalization of the German legal culture, the transition of law based on oral legend to written law, of legal tradition to legal abstraction.[13] But it was neither a reception from above nor "***in complexu***" (all at once)訳注(10),[14] despite the important year of 1495. At this time the emperor established a reformed procedure for the supreme court of the Holy Roman Empire (***Reichskammergericht***)訳注(11). The judges had to decide "*ac-*

10 Comp. Stein, p.91.

訳注(9) (ヘルマン・コーンリング (Hermann Cornring, 1606-1681) は医師であったが，主として歴史家，政治学者として活躍した。文献学の知識を基にした歴史学的研究により，「ロタール伝説」には全く根拠がないことを実証した。初めてドイツの法制度史に関わる重要問題を実証的に究明したという点から，元来は法学者ではないとはいえ，現在ではドイツ法制史の創始者として位置づけられている（クラインハイヤー・シュレーダー共編小林孝輔監訳『ドイツ法学者事典』，学陽書房，1983年，pp.58-60 に所収の項目「ヘルマン・コーンリング」を参照。また，勝田有恒「コーンリングにおけるゲルマニスティクの成立」論文（河上倫逸編『ドイツ近代の意識と社会』，ミネルヴァ書房，1987年，pp.12-23 に所収）がある)。

11 In his book "De origine iuris Germanici"; comp. Eisenhardt, p.167.

12 Comp. Wieacker, Privatrechtsgeschichte der Neuzeit (1952), p.65, is of the opinion that this sentence is "dangerous and inaccurate". Trusen (p.8) calls this formulation the "Troian Horse of the history of the Reception".

13 Trusen, p.3.

訳注(10) 「包括的」と訳されている。通常，ドイツにおけるローマ法の「包括的継受」(Rezeption in complexu) という決り文句の中の一部となっている。

14 Trusen, p.240.

訳注(11) 「帝室裁判所」と訳されている。神聖ローマ帝国時代に，東方からのオスマントルコからの軍事的脅威に備えて体制内補強を図るという目的から，帝国領内の法的紛争を解決するために，「帝室裁判所規則」によって 1495 年に設置された最高裁判所。しかし，所在地はフランクフルト，ウォルムス，ニュルンベルク，と転々し，ついに首府ウィーンに置かれることはなかった（勝田有恒「帝室裁判所規則」，『久保正幡先生還暦記念　西洋法制史料選　Ⅲ（近世・近代)』，創文社，1979 年，pp.16-29 に所収)。

cording to the common law of the empire ..."訳注(12).[15] It is important to notice that this act was not the sudden start of this development called Reception. It was more the end of an evolution we can call the early Reception of Roman law: *"These events were decisive, but they are connected with a long development. Their importance should not be overestimated."*[16]

So, what happened in the decades and centuries before the Reception proper of Roman law that was finally successful in changing the German legal culture and system after 1500? What do we know about the period of the early Reception before 1500? Is it possible and necessary to answer these questions?[17] Or is it unavoidable to conclude that the Reception was a *"mysterious event", "basically inexplicable"*[18] and consequently to omit this historical problem?[19]

訳注(12) 「帝室裁判所規則」の中の条文にしばしば見られる文言である。争われている事案が起こった地域に適用可能な法源（条例，特別法）があればこれを優先して適用するけれども，不明確な場合には，ここにあるように「(神聖ローマ）帝国の共通法（ローマ法＝一般法）に従って」判決が出された。結果的には，当時の地域慣習法は成文化もされていなければ，大学法学部でも学問的な対象とはされていなかったため，この「帝室裁判所規則」を媒介にして，ローマ法の「包括的継受」がドイツ語文化圏において進むこととなった。また，ここから，「特別法は一般法に優先する」との原則が確立した。

15 Stein, p.91; Hattenhauer, Europäische Rechtsgeschichte, 3rd ed. (1999), p.358.

16 Trusen, p.236.

17 Kunkel, Quellen zur neueren Privatrechtsgeschichte Deutschlands, ed. Kunkel, Thieme, Beyerle, vol. I, 1: Ältere Stadtrechtsreformationen (1936), p.XI: "The Reception is the crucial point (Angelpunkt) of the history of private law in modern times. One of the most urgent tasks of present times is its research and interpretation."

18 Krause, Kaiserrecht und Rezeption, Abhandlung der Heidelberger Akademie, phil. hist. kl., 1. Abh. (1952), p.13; comp. Dahm, Zur Rezeption des römisch-italienischen Rechts, 2nd ed. (1955), p.7.

19 Koschaker, Europa und das römische Recht, 1st ed. (1947), p.124: "This development (the Reception, C.B.) is probably important for German legal historians. But this problem is only of subordinate importance for the practical lawyer (who is finally the subject of legal research) because he has to interpret the law according to the necessities of his time." This statement stands, by the way, in a strange contrast to Koschaker's ideas and hopes expressed in the same book (p.352).

Ⅱ. The church and Roman law

The contribution of clerical lawyers to the Reception of Roman law was stronger than originally assumed.[20] Churchmen started to apply Roman law long before secular courts adopted these rules. The law of the church, canon law, *"became the bridge Roman law used to pass easily to Germany."*[21] However, in legal history this influence was underestimated for a long time. Church law was regarded as a kind of opposite to Roman law. The simple principle that the Roman church lived according to Roman law (***ecclesia romana vivit secundum legem romanam***)[訳注(13)22] was not always taken into account. But there was never a real antagonism between the church and Roman law.[23] Such an antagonism could not exist in medieval thinking: The middle ages did not think in opposites. Any antithesis could be neutralized by a synthesis.[24] The ***ius utrumque***[訳注(14)] was the double manifestation of the single law.[25]

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20 Trusen, p.11; Landau, Der Einfluß des kanonischen Rechts auf die europäische Rechtskultur, in: Europäische Rechts- und Verfassungsgeschichte. Ergebnisse und Perspektiven der Forschung. Herausgegeben von R. Schulze. Schriften zur Europäischen Rechts-und Verfassungsgeschichte vol. 3 (1991), p.39; Schlosser, Grundzüge der neueren Privatrechtsgeschichte, 8th ed. (1996), p.57.

21 Moddermann, Die Rezeption des römischen Rechts, translated and ed. K. Schulz (1875), p.44. This picture is quite often used. Kroeschell (Deutsche Rechtsgeschichte, vol. 2, 8th ed. (1992), p.92) and Stölzel (Die Entwicklung des gelehrten Richterthums in deutschen Territorien, vol. 1, p.412) also call canon law a „bridge" (comp. also Wieacker, p.52, pp.54, p.85, and Trusen, p.22).

訳注03 「エククレジア・ロマーナ・ヴィーヴィト・セクンドウム・レゲム・ロマーナ」と読む。直前に英文訳が付されているように，「ローマ教会はローマ法に基いて規律されている」という意味である。

22 Brundage, Medieval Canon Law (1995), p.111; Eisenhardt, p.94.

23 Hattenhauer, p.279; Trusen, pp.14/15.

24 Mitteis, Die Deutsche Königswahl (1938), p.17.

訳注04 「ユス・ウトルムクエ」と読み，「両法」（ローマ法と教会法）を意味する。

25 Schlosser, p.54; Stein, p.52; Trusen, p.22.

Though both laws formed two different legal areas (***iurisprudentiae provinciae***)[訳注(15)] theoretically and were formally separated by special courses of studies and exams, both legal systems were inextricably linked by legal practice:[26] *"While canon law went ahead, it pulled Roman law. Because churchmen knew and applied both laws ... it permeated into the life of the citizens. Even though authorities of both laws were involved in mutual disputes in medieval thinking law was regarded as a unity protected by God. And both legal bodies supported their validity because they formed together the "**ius utrumque**".*[27]

In the legal realm canon law was theoretically and practically the first expression and the most powerful stimulating factor of this occidental process of rationalization.[28] The application of written instead of oral traditions of rules, positivism and legal security,[29] law as a profession and science, were inventions of the church. In practice, canon law was applied whenever it could provide for the *"effective and fairer rule"*, i.e. the written one. Roman law, too, was not an uncertain customary law, but regarded as a model of rationality. Roman law helped to fill gaps in the developing system of canon law.[30] Thus, this principle of subsidiarity[訳注(16)] became a tool

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訳注(15) 「ユリスプルデンチィアエ・プロヴィンチィアェ」と読み，「個別法領域」を意味する。

26 Pietro Rebuffi stated (Schlosser, p.54): "Ius canonicum et civile sunt adeo connexa, ut unum sine altero vix intelligi possit."

27 Stinzing, Geschichte der populären Literatur des römisch-kanonischen Rechts in Deutschland am Ende des fünfzehnten und im Anfang des sechzehnten Jahrhunderts, (1867), reprinted 1959, p.6.

28 Max Weber (Rechtssoziologie, ed. Winckelmann (1960), pp.236-239) was the first one to realize this great contribution of canon law to European history.

29 Landau, pp.42-47.

30 Brundage, p.112.

訳注(16) 「条例理論」と訳されている。都市の慣習法源（条例）を優先し，ローマ・カノン法源を補助的に適用するが，条例が不明確な場合に補助法源であるローマ・カノン法源を適用する，という考え方。実際には，都市での条例が不明確であるため，この原則により，結果的にはローマ・カノン法の適用が拡大していった。この点については，佐々木有司「中世ローマ法学」（碧海純一・伊藤正巳・村上淳一他共編『法学史』，東京大学出版会，1976年，pp.77-116，特にpp.104-105）を参照。

for lawyers of Canon law to replace traditional German law by Roman and canon law.[31]

Ⅲ. The impact of the private law activity of ecclesiastical courts

Ecclesiastical courts were not only competent to decide on spiritual matters or matters closely connected with spiritual subjects (***causae spirituals resp. causae spiritualibus annexae***)[訳注(17)], like marriage, last will[訳注(18)] and testament[訳注(19)], tithes (***Zehnte***)[訳注(20)], prebends/sinecures (***Pfründe***)[訳注(21)]. This competence extended to contracts confirmed by oath and usury of all kind[訳注(22)]. They decided, from our point of view, purely secular disputes as soon as the religious concept of sin became involved (***ratione peccati***)[訳注(23)].[33] Moreover, the church claimed a special personal competence (***ratione personae***)[訳注(24)] for persons needing a higher degree of protection like poor peo-

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31 Trusen, p.25.

訳注(17) 「カウサエ・スピリチュアーレス，レスペクティーベ，カウサエ・スピリチュアリーブス・アネクサエ」と読み，「それぞれ信仰上の様々な諸課題に関係した諸問題」を意味する。

訳注(18) 遺言。

訳注(19) 遺書。

訳注(20) 「十分の一税」。中世ヨーロッパにおいて，庶民は収入の十分の一を最寄の教会に税として納入することとされた。

訳注(21) 「教会聖職禄」。教会の正当な権限の保有者によって，教会財産からの一定の収入を永続的に受領する権利を付加された教会職（ウルリッヒ・シュトッツ著増淵静四郎・淵倫彦共訳『私有教会・教会法史』，創文社，1972年，p.124，註(27)）。

訳注(22) This competence extended to ... usury of all kind. と続く。中世ヨーロッパにおいて利息付金銭貸借は禁じられていた。しかし，当の教会自体がその違反者であり，その特権を隠れ蓑にして事実上，「あらゆる種類の高利貸し」をしていた（リチャード・ヘンリー・トーニー著越智武臣訳『宗教と資本主義の隆盛（上・下）』，岩波文庫，1956-1959年刊）。

訳注(23) 「ラチィオーネー・ペッカーティー」と読み，「（信仰上の）罪を原因として」という趣旨である。要するに，カトリック教会が教会法で禁止していることに違反している場合に，教会裁判所での審理にかけられる時の理由に該当する。

33 Eisenhardt, pp.94; Trusen, pp.34; Brundage, pp.75; Stein, p.52.

訳注(24) 「ラチィオーネー・ペルソーナエ」と読み，ここでは教会裁判所が特に考慮しなければならなかった「人的管轄」を意味する。

ple, widows, orphans (***personae miserabiles***)[訳注(25)], as well as for Jews. Jews were, like non-Christians, not bound by canon law but by Roman law:[34] *"Practically any kind of private law could enter the ecclesiastical panel and be judged according to ecclesiastical standards."*[35]

But it was primarily through, the high number of marriage litigation[訳注(26)] (esp. proceedings concerning the formation of marriage) that people below the upper classes came in touch with professional legal procedure and Roman-canon law and thus became used to the new legal system.[36]

Official documents, too, were an important factor of transmitting Roman law into the German legal culture.[37] The growing impact of voluntary jurisdiction, namely public notaries, led to an increase of sealed documents since the 13th century. In this area the church had a kind of monopoly position. Accordingly, strong ecclesiastical influence is evident.[38]

The extended competence claimed by the church is not the only explanation for its influence. Ecclesiastical courts also attracted parties[訳注(27)] because they were more effective than secular courts. Their power to execute decisions was stronger because convicted persons were under the threat of ecclesiastical punishment, like the excommunication banning Christians from the community of the church and therefore holding out the prospect

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訳注㉕ 「ペルソーナエ・ミゼラビーレス」と読み，「憐れなる人々」というのが直訳であるが，直前に「貧窮者，寡婦，孤児」と列挙されているように社会的弱者のことである。

34 Trusen, pp.40/41.

35 Nörr, Die kanonistische Literatur, in: Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, ed. Coing, vol. 1 (1973), p.365.

訳注㉖ 中世ヨーロッパでは，婚姻の成立・解消に際して，多額の財貨が移動したことが背景にある。

36 Landau, p.56.

37 Wieacker, p.88.

38 Eisenhardt, p.106; Trusen, pp.42, 63, 66; Redlich, Die Privaturkunden des Mittelalters, Handbuch der mittelalterlichen und neueren Geschichte IV, Urkundenlehre 3 (1911), p.175.

訳注㉗ 紛争の両当事者。

of eternal suffering in hell[訳注(28)].[39] When a debtor refused to obey such a judgement the court could suspend the whole parish or municipality from (religious) service.[40] In the profoundly religious medieval society such penalties were probably more frightening than physical abuse. Moreover, parties had practical reasons to prefer church jurisdiction to secular courts. Ecclesiastical courts used more rational means of proof (like testimony of a witness instead of the ancient method of compurgation, i.e. oath-helping[訳注(29)])[41] and permitted representation[訳注(30)] (which was very important for busy merchants). They were less expensive because the looser had to pay for the whole proceeding. Stages of appeal were clearly organized.[42] And finally, execution of judgements was not restricted to the boundaries of principalities. The church was everywhere.[43]

Although original concepts of Roman law increasingly came into use, transformation of old and creation of new law by canonists remains an extended field of research. It happened that at first canonical and Roman legal language served to describe originally German legal institutions.[44] In this disguise some German customary law survived for centuries, but was hardly recognizable as non-classical Roman law.[45] Consequently, it did not

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訳注㉘　教会から破門（excommunication）されると，キリスト教徒としては認められなくなり，死後の世界では煉獄の苦しみを受ける，とされた（ジャック・ル・ゴフ著渡辺香利夫訳『煉獄の誕生』，法政大学出版社，1988年）。

39　Schlosser, p.36.

40　Hattenhauer, pp.334.

訳注㉙　免責宣誓。

41　Stein, p.89.

訳注㉚　陳情。

42　Landau, pp.48/49.

43　Trusen, p.42.

44　Trusen, p.67.

45　A famous example is the medieval treatment of feudal relationships of lord and vassal: Ownership of land was divided between lord (dominium directum) and vassal (dominium utile) despite the fact that the Roman notion of dominium was indivisible (Stein, pp.62, 81). Another example presents the legal possession (quasi possessio) being in its most elaborated manifestations even an original invention of canon law (Landau, p.55; Beermann, Besitzschutz und Eigenmacht bei beschränkten dinglichen Rechten (2000), pp.19, p.29).

come as a surprise when secular courts adopted the procedure according to canon law together with material concepts of canon-Roman law. The Reception was anything but an "inexplicable mystery".[46]

Ⅳ. The impact of notaries

Even more than today documents produced by notaries were of unconditional probative force in an age of widespread illiteracy. Who was in the possession of legal documents attested by a notary had an almost irrefutable position against any counterclaim. Thus notaries[訳注(31)] became an important factor in the legal culture of late medieval times.[47] German notaries became an additional source for introducing Roman law because they were in most cases members of the clergy.[48] The close relationship between canon law as the primary law of the church and Roman law has already been mentioned above. Notaries could therefore serve as another medium to introduce Roman law. Moreover, notaries appointed by the church had the reputation of being better educated than those with imperial authority.[49] Notarial recording played an important role in most areas of civil law, like proxy (power of agency)[訳注(32)], wills, purchases, donations, clauses of re-

46 Dahm, p.7.

訳注(31) 公証人のことである。日本では，裁判官，検事，弁護士を引退した法曹資格者が，法廷には立たないが，公正証書（公正証書遺言等々）を作成したり，会社設立に際しての定款に認証を与えるなどの業務を公証人役場で行なう。これに対して，ヨーロッパでは，公証人は，たしかに法廷には立たないものの，裁判官，検事，弁護士と並んで，れっきとした法曹である。法的文書の作成に関わるため，庶民にとっては，弁護士よりも身近な法律専門職である。我が国での司法書士の権限を強くしたものと言えよう。公証人制度と法律学との関係については，次の文献を参照。久保正幡「公証人と法律学の歴史」論文（「公証法学」第2号，1973年，日本公証法学会，pp.1-24）。

47 The ars notariae (art of notaries) was even one of the first legal subjects becoming independent from traditional teachings in the early years of Bologna university. Comp. Schlosser, pp.32, 51.

48 Schlosser, p.57.

49 Trusen, pp.69, pp.75, pp.85.

訳注(32) 代理権。

nunciation[訳注(33)].[50] In this area, too, churchmen were the right persons to prepare the adoption not only of written court procedure but also of Roman-canon law.[51]

V. The impact of universities

In contrast to traditional Germanic-court organization Roman-canon procedure required learned jurists.[52] Judges at ecclesiastical courts, called officials, became the first judges with a legal education in Germany.[53] The universities in Italy and France took the responsibility to train the future lawyers of the church. Because officials had to apply civil law in their courts and in ecclesiastical administration, studies of Roman law (***legistische Studien***)[訳注(34)] became an essential part of this education.[54] The clergy brought this branch of scientific education to central Europe and laid the foundation of Roman law scholarship in Germany, not humanism of the late 15th century, as it was later assumed.[55] Only a few decades after a law degree became a requirement for practicing as a judge in church courts, about 190 students from German-speaking areas visited the most famous faculty of law, Bologna in northern Italy. The huge majority of

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訳注33　（遺言執行者の）権利放棄承認書。

50　Schlosser, pp.32; Trusen, p.91. Renunciations were quite common elements of notarial documents used as waivers of possible objections or legal remedies according to Roman-canon law (comp. Schlosser, p.32).

51　Stölzel, Die Entwicklung der gelehrten Rechtsprechung, untersucht aufgrund der Akten des Brandenburger Schöppenstuhls, vol. 1 (1901), p.177.

52　According to the synods of Rouen (1231) and Tours (1236); comp. Brundage, p.65; Trusen, p.102.

53　Landau, p.48.

訳注34　ローマ法の学習（法律学を修めること）。

54　Brundage, pp.64; Stinzing, p.3.

55　Besides the universities, schools at monasteries and cathedrals, too, played an important role in this development, even though they probably produced only a kind of superficial knowledge (Trusen, pp.116/117).

students were churchmen.[56] It is evident that German territories had a great demand of educated lawyers even already in the late 13th century. ***Koschaker***訳注(35)'s assertion that students went to Bologna not for practical reasons but only to satisfy a kind of romantic longing, i.e. to learn the law of the ***Imperium Romanum***訳注(36), is anachronistic.[57] This spiritual movement, known as humanism, i.e. the idea to restore the ancient Roman Empire combined with new educational urge (***Bildungstrieb***)訳注(37), emerged only about 200 years later. Pure practical reasons made German students study Roman and canon law in Italy.[58]

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56 Wieacker, pp.84: The proportion was ten to one.

訳注(35) パウル・コシャッカー（Paul Koschaker, 1879-1951）はオーストリア生れでドイツ語圏のグラーツ，プラハ，ライプチッヒ，ベルリンの諸大学法学部でローマ法，楔形文字法の研究・教育に従事した。ゲルマン民族の絶対的優越性を標榜するナチス・ドイツの下ではローマ法研究が困難となり，コシャッカーはトルコに移ることを余儀なくされた。なぜならば，優秀なゲルマン人のドイツ法がゲルマン人よりも劣るラテン人のローマ法からの影響を受けていたとなれば，ナチスの教義に反するからである。ナチス政権からの圧力に抗しながら困難な状況の中で，『ローマ法の危機とローマ法学』（„Die Krise des römoischen Rechts und die romanistische Rechtswissenschaft", 1938）や，名著『ヨーロッパとローマ法』（„Europa und das römische Recht", 1947）を著し，ローマ法がドイツを含めた全ヨーロッパ文明の根底となっていることを切々と語っている。コシャッカーについては，久保正幡「コシャッカー教授逝く」（国家学会雑誌第65巻第4号，1951年，pp.107-113）を参照。

訳注(36) Imperium Romanun とは「インペリウム・ロマーヌム」と読み，「（神聖）ローマ帝国」のことである。「神聖ローマ帝国」とはハプスブルク朝下でのドイツ語圏を総称する国家であり，古代ローマ帝国に連続するものではない。古代ローマ帝国の「ローマ」が持っていた普遍性にあやかり，国名に冠したに過ぎない。だが，神聖ローマ帝国は自らが古代ローマ帝国の後継者であることを標榜することにより，国内にローマ法大全を現行法として導入することに成功したのである。

57 Comp. Trusen, p.107.

訳注(37) 教育上の要請。

58 Trusen, p.108. It was impossible to study both laws completely separated form each other (see above). The authority of Roman law derived from the pope (not directly from Justinian as Koschaker presumed; comp. Huguccio). Even later when the first universities in German speaking areas were founded most professors were teachers of Roman (civil) law and Canon law simultaneously (Trusen, pp.111).

VI. The impact of literary aids

At the same time as court proceeding became a matter of scientific education, literary aids for notaries and officials like formularies (***Formelsammlungen***) or phrase books (***Formularbücher***)[訳注(38)], and nutshells of Roman law came into use.[59] Only those lawyers able to understand Latin could apply such literature. Outside the clergy knowledge of Latin was anything but widespread. It took a long time until the new law found its way into the life of citizens despite the language barrier: *"Enormously slow detailed work was necessary to prepare and open the way for the reception of the foreign laws,"* ***Seckel***[訳注(39)] wrote.[60] The difficulties of language are probably the main reason that the Reception cannot be described completely as a popular movement.[61] ***Ott***[訳注(40)] was closer to the truth: *"Those works, full of materials, scooping from sources of canon and Roman law, were the treasure trove of legal knowledge for clerical lawyers. From there formularies and phrase books invaded other groups of population who never had access to the sophisticated writings of the glossators. This surprising success was due to the shorter form and clear method to handle this volumi-*

訳注(38) 「方式書集成」（書式集のこと）または「法律用語集」。中世ドイツの裁判実務で援用された法規範または法律用語はローマ法から借用したラテン語であった。

59 Stein, p.89; Trusen, pp.125.

訳注(39) エミール・ゼッケル（Emil Seckel, 1864-1924）はドイツの中世ローマ法学者。ベルリン大学（現在のフンボルト大学）総長をつとめている。数多くの著作があるが，特に"Handlexicon zu den Quellen des Römischen Rechts"がある。現在，彼の蔵書の一部が東北大学附属図書館に所蔵されている。

60 Seckel, Beiträge zur Geschichte beider Rechte im Mittelalter, vol. 1: Zur Geschichte der populären Literatur des römisch-kanonischen Rechts (1898), p.474.

61 Stinzing (see above) explained the Reception in this way, but as a German writing in 1867 he was in all probability ideologically prejudiced.

訳注(40) ベーアマン氏が本稿を執筆するにあたり参照したというカノン法史研究者のヴィンフレード・トルーゼンによる二次文献によれば，H.F.Ott というドイツ人法制史家のことらしい。

nous and difficult material."[62]

Ⅶ. The impact of the practice of penance

Since the Lateran council in 1215 the practice of penance increasingly became a subject of legal interest. E. g. it was regulated that a confession of committed sins was necessary at least once a year. If this rule was violated, the perpetrator was seriously punished[訳注(41)].[63] Priests (who were in charge to hear confessions and to grant absolutions[訳注(42)]) and confessors were in need of detailed advice. Handbooks, compiled by legally trained authors,

62 Ott, Das Eindringen des kanonischen Rechts, seine Lehre und wissenschaftliche Pflege in Böhmen und Mähren während des Mittelalters, Zeitschrift der Savigny-Stiftung fur Rechtsgeschichte (ZRG), Kanonistische Abteilung, vol. 34 (1913), p.44.

訳注(41) 1215年の第4回ラテラノ公会議第21条（グレゴリウス教皇令集第5巻第38章第12条）には，「総てキリスト教徒であって，男女の性別を問わず，長年にわたり（魂の）逡巡（＝迷い）を経て来たる者は，自らの総ての罪につき，少なくとも1年に1度は管区聖職者に単独で真摯に告解をすべきである。（中略）さもなければ，当該逡巡者が健常者であれば，教会への立入りが差止められるべきであり，他方，臨終の床にある者であれば，その死後，キリスト教徒としての埋葬をしてやってはならない。（中略）しかしながら，聖職者は以下の点に配慮すべきである。すなわち，死者にとっては医師とも言うべき態様でもって，（聖職者は）葡萄酒と香油とを死者が負っている様々な精神的な傷に注ぎ，懺悔する信者および彼が犯した（戒律違反に関わる）罪との置かれた様々な状況について検討すべきである。そして，死の床にある者の魂を救済するために，様々な状況証拠を援用することにより，その個々の状況ごとに，瀕死の信者にいかなる助言を与えるべきか，かつ，いかなる種類の救済をその信者に適用すべきか，を（聖職者は）慎重に検討すべきである」(Cf., c. 12, X. V, 38, in "Corpus Iuris Canonici", reprint edition of Emil Friedberg by The Lawbook Exchange of 2000, New Jersey (U.S.A.), vol.II cols., 887-888.) と規定されている。キリスト教教会により禁じられたことを犯した場合には，「宗教上の罪」として少なくとも1年に1度は聖職者に懺悔（penance＝贖罪）することが義務づけられており，これへの違反者（perpetrator）は教会から制裁を受けた。ラテラノ公会議をも含めて，カトリック教会の公会議一般については H・イェディン著梅津尚志・出崎澄男共訳『公会議史』（南窓社，1986年刊）を参照。

63 Schulte, Geschichte der Quellen und Literatur des canonischen Rechts, vol. 2 (1877), p.525; Trusen, p.135.

訳注(42) 赦罪。

provided for this guidance. These books, called ***penitentials*** or ***summa***[訳注(43)] became, in effect, a new source of law. They did not only treat typical religious sins, sexual offenses, etc., but also any kind of misconduct concerning all categories of canon and Roman law, like ordinary commercial transactions[訳注(44)].[64] Because in this profoundly religious society everybody did anything to save their souls from eternal damnation[訳注(45)], this kind of literature gained an immense popularity. In fact, penitential books became the bestsellers of the late middle ages and early modern times. The "***Summa Angelica***", burned by Martin Luther in 1520 as "*more than devilish*", appeared in innumerable handwritings and printed editions[訳注(46)].[65] The influence of ***penitentials*** on the reception of Roman law was certainly enormous. The church did not cover all aspects of life with their own rules (***canones***)[訳注(47)]. Whenever a specific rule did not exist, principles of Roman

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訳注43 「告解書」または「(告解) 集成」。

訳注44 「告解書」に従って聖職者が処理すべき一般信者からの懺悔の内容には，狭義の意味での「宗教上の罪」(戒律に背いたこと) にはじまり，性犯罪 (現代的に言えばセクハラのことか？)，カノン法とローマ法上によっても不法とされる諸行為，(教会の戒律に違反する) 商取引 (例えば，利息付金銭貸借，等々) が含まれた。

64 Brundage, pp.25; Trusen, pp.135, 142.

訳注45 教会の教えに従わなければ，死後の世界において，未来永劫，救われないこと。キリスト教信仰では，人間は死んでからも復活すると考えられているから，「死後，未来永劫にわたって救われない」と教会により宣告されることは，死罪以上の苦痛を意味した。

訳注46 "Summa Angelica"とは便宜的に「天界集成」とでも訳しておく。腐敗したカトリック教会を批判し，宗教改革を起したマルティン・ルターが1520年にローマ教皇庁からの破門状と共に教会法上の様々な書物を衆人監視のもとに焼き捨てたことは有名な話である。当時の教会法は，信仰的要素をうしなって，組織としての教会を維持肥大化させるための規則集と化してしまっていた。

65 Trusen, p.143.

訳注47 「カノーン」(κανών) とは，ギリシア語で「規範」を意味する。古代ローマ帝国末期，パレスチナで起こったキリスト教信仰はヨーロッパに伝わるまでに小アジアのギリシア文化圏を経由した。この時に，新約聖書の諸写本が当時の標準ギリシア語である「コイネー」で書かれたことから，キリスト教の重要な用語はギリシア語来歴のものが多い (ジョン・ボウカー編著荒井献・池田裕・井谷嘉男共訳『聖書百科全書』，三省堂，2000年，p.246)。

law had to fill the gap. Thus, at first priests became familiar with Roman law. Then via confession and religious advise people came in touch with the new legal system.

Ⅷ. The impact of courts of arbitration

Courts of arbitration[訳注(48)] had a long tradition in the church since Constantine (since 306 AD). Bishops especially established their own courts (***audientia episcopalis***)[訳注(49)] in order to reconcile the antagonists in disputes and to resolve conflicts by mediating between the parties, rather than to impose judgements from on high.[66] Apart from principles of canon law, primarily rules governing the proceeding, these courts began quite early to adopt norms current in Roman civil law for their own purposes.[67] ***Bader*** (one of the most distinguished scholars in this legal area)[訳注(50)] wrote: *"Without any doubt courts of arbitration contributed to the introduction of foreign material law. Long before the official reception (of Roman law) by imperial legislation at the end of the 15th century, Roman law was applied in these courts."*[68]

Ⅸ. The impact of royal and imperial jurisdiction in general

We have seen that the church had a strong impact on the development

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訳注48　調停裁判所。

訳注49　「アウディエンティア・エピスコパリス」と読む。「司教裁判所」と訳されている。

66　Brundage, p.12; Bader, Das Schiedsverfahren in Schwaben vom 12. bis zum ausgehenden 16. Jahrhundert, Diss. Jur. (Freiburg i. Br., 1929), p.16; Stein, p.89.

67　Brundage, p.12; Trusen, pp.154, 157.

訳注50　バーダー（Karl Siegfried Bader, 1905-1998）は現代の代表的な教会法学者。チューリッヒ大学法学部で教会法史を講じ，「サヴィニー財団法制史雑誌（カノン法部門）」（Zeitschrift der Saviny-Stiftung für Rechtsgeschichte Kanonistische Abteilung）の責任編集者の１人であった。「サヴィニー財団法制史雑誌」はこの他に「ローマ法部門」と「ゲルマン法部門」とがあり，いずれも，ドイツの法学界では，法制史研究者に限らず，非常に権威ある学術雑誌である。

68　Bader, p.60.

called early reception. Another interesting question is to what extent the king, respectively the emperor, in his position of supreme judge was a pacesetter of this process. Quite early, starting with the late 12th century, the imperial court (***Hofgericht***)[訳注(51)] began to apply the "written law", i.e. Roman and canon law. But this practice was restricted to certain cases. Only in disputes concerning Italian (the part of the empire where Roman law was already largely adopted at the end of the 12th century) and ecclesiastical matters the imperial court used the new law.[69] In cases concerning the secular sphere of the German speaking part of the Holy Roman Empire imperial judges decided according to traditional German law. An imperial draft bill (***Reichsabschied***)[訳注(52)] of 1342 regulating the subsidiary application of Roman law at the Royal court never came into force. This event only indicates the tendency towards later developments.[70] Finally, this development overtook the imperial court.[71] Ironically, the fragmentation of the empire, the increasing political power of principalities and other territories at the cost of the emperor resulted in the desire for more legal security. The fragmented traditional law became more and more unpopular. People requested a general and equal law, embodied in the Roman law (***ratio scripta***)[訳注(53)] and secured in organized stages of appeal.[72]

X. The impact of personal royal and imperial jurisdiction

Another aspect of this change of legal consciousness was the expectation

訳注51　宮廷裁判所。

69　Trusen, pp.165, pp.171, p.176.

訳注52　「帝国最終決定」と訳されている。

70　Trusen, pp.172, p.178.

71　Trusen, p.178.

訳注53　「ラチオー・スクリプタ」と読み，ローマ法は「書かれた理性」であることを意味している。すなわち，まだ成文化さえもされていないドイツ語圏内の慣習法に比べると，古代のものではあれ，「ローマ法」は古代ローマ帝国を支えた法規範であり，中世ボローニャの法学校以来の解釈の蓄積があるため，その内容には間違いが在り得ないはずだという考えを示している。

72　Comp. Stein, pp.89; Hattenhauer, pp.357; Eisenhardt, p.102, pp.120.

that the king as the supreme judge guaranteed law and order in the empire[73]: *"The king is the common judge over everybody"* (***Sachsenspiegel, Landrecht III, 26 § 1***)訳注(54). Despite the loss of imperial power, displayed in privileges granted to minor sovereigns to withdraw disputes from the cognizance of the royal court (***Evokationsprivilegien***)訳注(55), people still went to the king as an individual to seek justice.[74] The number of actions brought to the personal jurisdiction of the king and emperor even increased while fragmentation of the legal and political order created more difficulties in the execution of decisions, of "*ordinary*" courts.[75] Already with the beginning of the 15th century Roman-canon law procedure was applied as a matter of course in these proceedings.[76] This development is closely connected to a process of institutionalization in the empire, finally leading to the imperial reform in 1495 and the establishment of two supreme courts, the ***Reichskammergericht*** and the ***Reichshofrat***訳注(56).[77]

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73 Eisenhardt, p.106.

訳注54 「(ザクセンシュピーゲル・ラント法) 3・26・1 国王はいたるところ全般共通の裁判官である」(久保正幡・石川武・直居淳共訳『ザクセンシュピーゲル・ラント法』, 創文社, 1977年, p.255)。

訳注55 Evokationspriviligien とは「不移管・不上訴特権」と訳されている。中央集権力に欠けていた神聖ローマ帝国内では, 帝国を構成する各ラントの封建諸侯は自領内での法的紛争を帝国裁判所 (神聖ローマ皇帝が主宰する裁判所) に移管させなくともよいという特権を与えられていた。なぜならば, 裁判を移管させることは莫大な訴訟手数料を徴収されたからである。

74 Lechner, Reichshofgericht und königliches Kammergericht im 15. Jahrhundert, Mitteilungen des Instituts für österreichische Geschichtsforschung, Ergänzungsband 7 (1904), p.25.

75 Another result of this development was the increasing demand of arbitrary jurisdiction (Trusen, p.186).

76 Trusen, pp.189.

訳注56 「帝国宮廷顧問会議」と訳されている。1527年に設置された。

77 Diestelkamp, Quellen und Forschungen zur höchsten Gerichtsbarkeit im alten Reich, ed. Diestelkamp et al., 1, p.XII.

XI. The impact of the royal supreme court (*Königliches Kammergericht*)

Since 1495 the supreme court of the Holy Roman Empire was the ***Reichskammergericht***[訳注(57)]. It had a long tradition before it was reformed and renamed at that time.[78] The year of 1495 marked the court's independence from the king. But already before the interregnum in the late 13th century similar institutions serving as the king's personal court of jurisdiction were known.[79] Although the king had his own discretionary power he was bound to current law, i.e. to Roman law as part of the establishing legal order. To deal with this new law he needed experts. Dominating the profession of educated jurists churchmen became practicing lawyers at court (***Hofjuristen***)[訳注(58)][80]. Now, the parties, too, had to send representatives to the supreme court who were well experienced with Roman-canon procedure.[81] Evidently, the subsidiary applicability of Roman and canon law at this supreme court[訳注(59)] was never doubted.[82] The new court organization of 1495, a milestone in separating the judiciary from the executive and legislative power, i.e. a milestone of judicial independence, was an innovation from

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訳注57) 「帝室裁判所」と訳されている。

78 Eisenhardt, pp.106; Diestelkamp, Vom Königlichen Hofgericht zum Reichskammergericht, in: Dilcher/Diestelkamp (ed.): Recht, Gericht, Genossenschaft und Policey. Symposion für Adalbert Erler, Berlin 1986, p.48.

79 Trusen, p.194, p.197, p.207: While the royal Hofgericht (since 1235) had its own seal, the royal Kammergericht (since 1415) used the royal one. Comp. also Eisenhardt, pp.106.

訳注58) 宮廷における「法実務家」。

80 Schlosser, p.57; Stölzel, pp.34.

81 Trusen, pp. 204: Even before new court rules were set up in 1471 a special admission for lawyers became a requirement.

訳注59) 本稿第2節「教会とローマ法」末尾で前述されているように，各地から上訴されてきた事案は，現地での土着法源が不明確であるために，条例理論により，補助法源であるローマ・カノン法が帝室裁判所でも優先して適用されていったことを意味している。

82 Franklin, De justitiariis curiae imperialis (1860), pp.45.

the point of formal institution.[83] But the rules of procedure and the applied material law remained the same. Therefore, it was a declaration of already existing principles,[84] not the establishment of a new legal order when the reform of 1495 proclaimed: *"The court has to decide according to the common law of the empire and also the proper, worthy and accepted statutes and customs."*訳注(60) 85

XII. The impact of jurists in the service of principalities

In contrast to centralizing powers like France and England late-medieval Germany was only a kind of loose confederation of principalities and free cities訳注(61). But still imperial administration and institutions served as a model. Because the imperial court employed legal experts of Roman-canon law, the princes, too, began to use their skill in the administration and judiciary of the dominions. Since the beginning of the 13th century jurists, in most cases high-ranking members of the clergy, became the most influen-

83 The personal power of royal jurisdiction later passed over to the imperial council (Reichshofrat) in Vienna (Trusen, p.208).

84 Conrad, vol. 2, p.341. Eisenhardt, p.100: "With the reform of 1495 imperial legislation gave only its sanction to an almost entirely completed reception..."

訳注(60) 「帝室裁判所規則第3条　裁判官判決人は，（とくに国王皇帝陛下と神に対して次のことを誓約しなくてはならない。）（中略）帝国普通法に依拠し，各領地および各裁判所の堅実で適切かつ公正な慣習および条例であって，明示されているものも依拠すること」（勝田有恒訳「帝室裁判所規則」，久保正幡先生還暦記念出版準備会編『久保正幡先生還暦記念　西洋法制史料選　Ⅲ』，創文社，1979年，pp.16-17）。

85 Stein (p.91) is not completely correct in this point. Romano-canonical procedure as well as Roman substantive law was not suddenly adopted in 1495. As shown above, the adoption started much earlier and came at a snail's pace.

訳注(61) 神聖ローマ帝国下の後期中世ドイツは，封建諸侯と帝国自由都市とのゆるやかな連合体であった。神聖ローマ皇帝は，この連合体の中から選挙により選出されたに過ぎず，皇帝の名から連想されるような強大な権力を行使することはできなかった。もっとも，後には，ハプスブルク家がその巧みな政略結婚により，事実上，皇帝の地位を世襲するに至った（ミッタイス＝リーベリッヒ著世良晃志郎訳『ドイツ法制史概説』，創文社，1971年，第33章，第41章を参照）。

tial counselors of local rulers.[86] They turned the science of Roman-canon law into practical application: *"Clergy and canon law were the bridge professional judges used to enter the princely government".*[87] According to ***Stölzel***訳注(62) this development was the most important reason for changing the legal system, especially for eliminating traditional courts of customary law (***Schöffengerichte***)訳注(63), a kind of jury system: *"The whole transformation of the old German judiciary is based on the activity of legal experts in the service of the prince. They, i.e. the chancellor (head of the administration) and subordinated civil servants, are successful in gradually taking away legal disputes from the courts of customary law and local laymen. Thus, courts of customary law are left insignificant."*[88]

Legal education was another factor. Besides the already existing universities in the empire (Prague since 1348, Vienna since 1365) local sovereigns founded their own universities (Heidelberg in 1385, Cologne in 1388, Stuttgart in 1482, Leipzig in 1483). Professors of Roman and canon law satisfied the increasing demand of trained judges in the territories.[89] They introduced the new law into the courts and into practical legal life and transformed the traditional legal culture. In 1488 the judge and professor of

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86 Eisenhardt, p.99; Schlosser, p.57. Comp. Trusen, pp.216/217: In Brandenburg permanent employment of churchmen with doctor titles of Bologna University serving in the highest ranks of judiciary and administration has been proved.

87 Stölzel, vol. 1, pp.412; Kroeschell, vol. 2, p.45.

訳注62 シュテルツェル（Adolf Stölzel, 1831-1919）はドイツ・プロイセンの裁判官。著書に『ドイツ語圏における学識法曹の発達』("Die Entwickling des gelehrten Richtertums in deutschen Territorien", 1872）がある。

訳注63 「参審人裁判所」と訳されている。適用される法規範は，ローマ・カノン法のような学識法ではなくて，体系も論理もなく古くからの慣習法であり，審理にあたる裁判官が法学識に欠ける一般人により構成される裁判所のことである。

88 Stölzel, Brandenburg-Preußens Rechtsverwaltung und Rechtsverfassung, 2 vol. (1888), p.118.

89 Trusen, p.214.

law of Ingolstadt University[訳注(64)], ***Gabriel Baumgartner,*** justified a decision based on Roman-canon law: *"The (traditional German) customary law lacks strength and dignity and, moreover, is contradicting common law (**ius commune**) and the order of the Christian church."*[90]

Ⅷ. The impact of municipal jurists

The cities of the empire were ruled by a kind of municipal aristocracy (patricians)[訳注(65)] or by a bishop (episcopal principality)[訳注(66)]. Since the 13th century the cities, too, rationalized their administration and began to employ legal experts.[91] In the 14th century this position became a permanent institution (***syndicus*** or ***Stadtschreiber***)[訳注(67)] and corresponded with the office of chancellor in the principalities.[92] As anywhere else throughout German territories the first municipal legal advisers were men of the clergy and experts of canon law. Later, it occurred more often that the advisers additionally had a special education in Roman law. The academic degree of

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訳注64　インゴルシュタットは南ドイツのバイエルン州の一都市。自然発生的に成立したイタリア・ボローニャ大学に倣って，ヨーロッパ各地の領邦君主により創設された後発総合大学の一つがインゴルシュタット大学である（Vgl., „Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgechichte", herausgegeben von Helmut Coing, Band I (Mittelalter 1100-1500), München, 1973, SS. 44-48.)。現在インゴルシュタット市に所在する大学は 1980 年に創立されたカトリック大学であり，直接の関連はない。

90　Above, p.214.

訳注65　都市貴族。

訳注66　司教。カトリック教会と世俗権力との関係が密接な「司教都市」と呼ばれていた都市では，その都市での教会の最高位者である司教が事実上最高権力者として統治にあたった（ミッタイス＝リーベリッヒ著世良晃志郎訳『ドイツ法制史概説』，創文社，1971 年，pp.391-392)。

91　Above, pp. 223/224.

訳注67　法律顧問。

92　Stölzel, Die Entwicklung des gelehrten Richterthums (loc. cit.), vol. 1, pp. 302. One of the most famous Stadtschreiber was Ulrich Zasius of Freiburg, born in 1461 (comp. Eisenhardt, p.164/165).

"doctor of both laws" (***doctor iuris utriusque***)[訳注(68)] appeared frequently as an adviser's title.[93] The original task to give expert opinions in legal affairs of the city, especially in court proceedings, changed. The opinion became a pleading and court proceedings according to customary law, were transformed into a formal Romano-canonical procedure. In order to compete with ecclesiastical courts, which had long been using this more rationalized, less expensive and more efficient procedure, the cities promoted actively this reformation.[94] In other cities, like the free city of Frankfurt am Main, this change occurred without active legislation or policy, but was initiated by the parties[訳注(69)]. Litigants and their trained advocates introduced the alternative Romano-canonical procedure in order to avoid the old inadequate one.[95] In many cases cities also tried to preserve traditional courts of customary law (***Schöffengerichte***). But these courts were gradually deprived of their former constitution. Before they disappeared in the last decades of the 16th century they had already lost their substance and kept only the semblance of the former court system. The intermediate stage of this evolution was probably close to the following report of a court proceeding: *"The panel of laymen* (***Schöffen***) *retreats seemingly to decide on the judgement, but soon finds the already drafted decision of the municipal adviser* (***Stadtschreiber***) *in the consultation room."*[96]

At the end of this development exclusively professional judges presided

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訳注68 「ドクトル・ユーリス・ウトリウスクエ」と読み，「両法博士」の意味である。「両法」とはローマ法とカノン法のことである。なお，宗教改革によりカトリック教会とカノン法の影響が低下するまでは，中世ヨーロッパの大学法学部での法学博士号は永らく「両法博士号」(doctor utriusque juris) であった。現代でもカトリックの勢力が強い州の法学部から出される学位は「両法博士号」である。

93 Trusen, p. 227.

94 Trusen, p.234.

訳注69 紛争の両当事者。

95 Stein, p.89.

96 Stölzel, Die Entwicklung des gelehrten Richterthums (loc. cit.), vol. 1, p.303.

over municipal courts,[97] finally following the example of higher courts. The reform of the imperial supreme court in 1495 already limited the number of lay judges[訳注(70)]. Half of the judges were obligatorily selected from lawyers graduated from law faculties. Since 1548 the supreme court consisted exclusively of professionals.[98] The sophisticated formalities of Romano-canonical procedure required experts. In the end municipal courts conformed to this development.

XIV. Conclusion and further development

In Germany, Roman law was not received suddenly and completely, but slowly permeated over centuries into legal life. The bridge the new law needed and in fact successfully used was the law of the church, the canon law. Canon law stands at the beginning of this great occidental development we can call rationalization. The Reception in Germany was an important part of this process.

Once Roman law had gained official recognition as the law applicable whenever local customary law seemed to be insufficient, it soon superseded entirely the traditional legal system.[99] But then, the forces originally promoting the reception, ecclesiastical courts and canon law, lost their moment. Secular courts became the new pacemakers of further developments. The ***ius utrumque*** lost its former significance. Natural law took the place

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97 Trusen, pp. 234/235.

訳注(70) 帝室裁判所規則第1条には,「第一には帝室裁判所に聖俗の侯爵伯爵若しくは男爵である裁判官1名および此の帝国国会の助言と意思によってドイツ国民の帝国から選出される16名の判決人を置くものとする。此等の判決人は気高く中庸で素行を良くし,彼等の半数は法を修得しその学識を認定されていなければならないし,他の半数は少なくとも騎士の出身でなければならない」(勝田前掲訳, p.16) と規定されている。これにより,帝室裁判所の裁判官の大半は法律の素養のない素人裁判官 (lay judges) から大学法学部でローマ・カノン法学を修めた学識法曹により占められるに至った。

98 Stein, p.91.

99 Kunkel, Quellen zur neueren Privatrechtsgeschichte (loc. cit.), p.XI.

of canon law. Instead of canon law the rationalized natural law[訳注(71)] served as a corrective of the new science of the ***ius commune,*** the ***usus modernus pandectarum***[訳注(72)].[100] And one of the longest lasting traditions of the German legal culture emerged: The learned jurist became the dominating figure in judiciary and administration.

(3) 「ドイツにおける法曹養成」

The German Legal Education System[101]

Dr. Christopher Beermann, Rechtsanwalt,
Associate Professor (Niigata University)

It is well known that German and Japanese legal education follows the same pattern. Therefore, it is probably not a coincidence that historically both have one thing in common: namely, a mistrust of legal education in

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訳注(71) 訳注者（大川）が2002年度「法制史Ⅱ」講義第4章「近代的民法典の成立まで」の中で論じた「近世理性主義的自然法論」（代表的な論者としては，グロチウス，プーフェンドルフ）のことである。この点について，やや難解であるが，邦語文献としては，F・ヴィーアッカー著鈴木録弥訳『近世私法史――特にドイツにおける発展を考慮して――』（創文社，1961年）の第3部を参照。

訳注(72) 「ウースス・モデルヌス・パンデクタールム」と読み，「パンデクテンの現代的慣用」と訳されている。帝室裁判所規則により，ドイツ語圏各地の裁判所において「一般法」としてのローマ・カノン法が適用され，他方，大学法学部においてローマ・カノン法が講じられ，結果的に学識法（ローマ・カノン法）の源泉となった「学説彙纂」（ユスティニィアヌスの「ローマ法大全」の最重要部分）の知識が近世ドイツにおいて継受（定着）していった現象を示している。なお，「現代的慣用」という訳語が定着してしまっているが，「現代」というと21世紀を我々は連想しがちである。時代的には17世紀ドイツのことなのだから，「パンデクテンの近世的慣用」と訳すべきであろう。

100 Trusen, p.240.

101 This article is based on a lecture held at Aichi University (Nagoya) on December 6th 2002. I am very grateful to Ms. Meg Shovelton (Niigata University) for correcting my draft (any faults that remain are mine alone) and to Prof. Dr. Okawa (Aichi University) for suggesting this lecture and inviting me.

universities. In both countries state authorities closely supervise access to legal professions.[102] Though the numbers are completely different, no one in Germany or in Japan may actively practise a legal profession without passing the first and second state exams. The requirement of sitting state examinations instead of university graduation before becoming a judge, a lawyer or a public prosecutor is almost unique in the world.[103] My task is not to judge whether this system should be preserved or changed. I will simply provide an overview of German legal education and add a few remarks on its recent reforms. But it is interesting to realize that the German like the Japanese system is evidently trying to move university education closer to legal practice.[104]

Since 1879 Germany has had a uniform system of legal education.[105] It is based on the idea that someone finishing his legal education can principally work in any area of the legal profession (Einheitsjurist). Despite strong criticisms this idea has prevailed until today. The aim of university and practical training is still to produce a lawyer capable of becoming acquainted with any kind of unfamiliar legal subject in a relatively short period of time. To guarantee this ideal the education system has one goal: any lawyer must have, potentially, the capability to be a judge.[106] The precondi-

102 Comp. Hattenhauer, Die geistesgeschichtlichen Grundlagen des deutschen Rechts, 4th ed. (1996), pp.342.

103 Kötz, Alte und neue Aufgaben der Rechtsvergleichung, Juristenzeitung (2002), p.258: „...das deutsche System der juristischen Staatsprüfung, mit dem wir nicht nur in Europa, sondern auf der ganzen Welt-mit Ausnahme von Japan und Südkorea- allein stehen." (...the German system of legal state exams, unique not only in Europe, but in the whole world, with the exception of Japan and South-Korea).

104 Comp. for the German development, Hommelhoff/Teichmann, Das Jurastudium nach der Ausbildungsreform, Juristische Schulung (2002), pp.839.

105 § 2 Gerichtsverfassungsgesetz (Law Concerning the Organisation of the Court System) vom 27. Januar 1877 (RGBl. pp.41).

106 Since 1961 this is regulated in § § 5-7 Deutsches Richtergesetz (DRiG, Law Concerning Judges).

tion for this qualification is the second or "great" state exam.[107] This is still the gate any practising jurist has to pass through. The whole education of six or seven years is shaped by this ultimate goal.

However, the fact that universities are not directly responsible for examining future lawyers has been subject to criticism for some considerable time.[108] University and exam, legal theory and legal practice are regarded as antagonistic elements. In order to enhance the educational responsibility of universities and their role in, at least, the first state exam, the traditional system has been reformed. Starting on July 1st 2003 this reform will come into force.[109] However, it seems likely this reform will be far from revolutionary[110] and the system will remain largely unchanged. Therefore, although I was educated under the previous system, I still regard myself in a position to describe the current German legal education system and considering it from the perspective of my own experience.

The first thing to point out is that students enter university without an entrance exam.[111] When finishing Gymansium (equivalent to high/grammar school) they are entitled to study at university. German universities

107 This requirement is even older and derived from the Prussian General Court Statute (Allgemeine Gerichtsordnung) of 1793.

108 Kötz, Zeitschrift für europäisches Privatrecht (1996), p.565; the same, Juristenzeitung (2002), p.258; Böckenförde, Juristenzeitung (1997), p.325; Erichsen, Juristische Ausbildung (1998), p.449; Wassermann, Neue Juristische Wochenschrift (2001), p.3685.

109 Concerning the following comp. Grunewald, Ausbildungsziel Anwalt, Neuerungen im Studium, Anwalt-Das Magazin (10/2002), pp.6; Jost, Die Tür ist aufgestoßen, Anwaltsausbildung gewinnt Gestalt, Anwalt-Das Maganzin (10/2002), pp.12.

110 A kind of revolution of the legal education was expected when the first drafts of possible future legislation were published. Comp. Hommelhoff/Teichmann, (see above), pp.841.

111 This is generally the case throughout Germany for almost all subjects. But the access to some faculties, occasionally including some law faculties, is restricted and depends on the school-leaving certificate. It is also said that several law faculties plan to introduce a kind of entrance exam.

are all public universities.[112] In spite of frequent criticism, students do not have to pay university fees.[113] In effect, universities may not reject a student until the capacity of the faculty is exhausted.[114]

This system certainly has great advantages. German students can put all their energy into studying their subject of choice. This contrasts with a system of painful preparation for entrance exams, followed by attendance at university doing the absolute minimum necessary to graduate. They may also enjoy the completely undervalued privilege of attending university for free and thus dedicate their time to serious studies instead of paying their way with part time jobs.

However, the German system certainly has great disadvantages, too. Law faculties in particular, are well known for attracting a huge number of high school graduates who actually have no idea about their future profession. Of course, these graduates are not always the elite of their year. Students leaving university without qualification are, according to my own experience, more numerous in law faculties than in others. The opportunity to study for free is often accompanied by a lack of self-discipline and responsibility.

The weaker aspect of the German system is probably the overcrowding in lectures, seminars and libraries. To come into close contact with professors is very difficult. Active participation in most of the main courses is impos-

112 The only exception concerning legal education is the establishment of a private law faculty in 2000 in Hamburg. Its English name "Bucerius Law School" should probably emphasize modernity (Flessner, Juristische Methode und Europäische Privatrecht, Juristenzeitung (2002), p.22).

113 Some states, like Baden-Würtemberg, recently began to introduce moderate so-called re-registration charges in order to finance administrative expenditures (about 50 Euro, i.e. about 3000¥ per semester). Because lower courts considered this charge as unconstitutional, now the Federal Constitutional Court has to decide. The Federal Government even spoke out in favour of prohibiting university fees. (Frankfurter Allgemeine Zeitung, November 6th 2002 (No.258), p.4).

114 Jarass/Pieroth, Grundgesetz, 5th ed. (2000), Art. 12, No.66-69. "Capacity" is generally interpreted very generously.

sible. Teachers and students feel discouraged by a deficiency in communication. Both tend therefore to confine themselves to the unavoidable duties of teaching and studying. Anonymity is the overriding feature in semesters with 500 or more students. Motivation, too, becomes a problem. I personally remember my relief when entering a seminar on Roman law and finding only two other participants, thus leaving behind the railway-station atmosphere of overpopulated lecture halls. Although already commencing my 4th semester by this stage, for the first time I had the sensation that studying law could potentially be an interesting adventure.

In the various courses of study some details differ from faculty to faculty,[115] but the structure is basically the same throughout Germany. Students have to successfully attend several main courses before obtaining a corresponding certificate. Compulsory subjects are civil law, criminal law and public law.[116] In these areas they have to complete both tests and research papers. Students applying for access to the first state exam then have to submit these certificates to the upper state court in charge of administering the examinations. The envisaged reform, mentioned above, will not affect this aspect of legal education.

Any German law student sitting the exam is aware of the huge gap between university requirements to obtain these certificates and the requirements of judicial authorities for passing the first state exam. It was, and probably still is, quite easy to collect the necessary number of certificates. Generally, students do not even have to concern themselves about the grade, as examiners in the state exam do not regard qualifications gained at the university as equivalent to their own standards of grading (and justifiably so). As a result, theoretically, students who successfully complete

115 Differences are due to the facts that universities are as independent legal subjects (corporate bodies according to public law) enjoying some autonomy and that the single states are competent for educational matters.

116 Besides the "cores" (Kernbereiche) of civil, criminal, public law, compulsory subjects include law of procedure, European law, legal methods, philosophical, historical and sociological fundamentals.

law courses after roughly three years of study formally fulfill all requirements to apply for the state exam. In reality, however, students applying for the state examination without further preparation are considered insane. This situation leads to the most important part of studying law in Germany, the period of additional exam preparation, which takes place, oddly enough, completely outside the university system.

It is a little difficult to explain why the most important, the most expensive, the most time consuming and the most exhausting part of German legal education is neither part of university education nor regulated by law. Having said this, it is practically an institution very closely related to the Anglo-Saxon concept of law schools. In Germany, this system is called the "Repetitorium", something like individual coaching or a private crammer tutorial. Normally, it is lawyers who run this kind of private preparatory school. They charge about 100 to 200 Euro per month, offering up to 20 hours intensive teaching per week. After three years of studying without any real challenges students suddenly have to face the prospect of hard work. They literally have to cram.

Fortunately, law faculties have recently started to respond. Realizing themselves that the traditional way to study is far from ideal in preparing students for exams, they have set up their own special courses of revision and training (especially in written tests). Because personnel and facilities at universities are limited they have also begun to charge for this extra-curricula service.[117] In general however, the vast majority of law students still feel obliged to attend the private crammer school. And still the number of students failing the first state exam is, compared to any other faculty at German universities, considerably high. On average 30% are unsuccessful in their first attempt.[118] This certainly adds additional pressure on students

117 This, at least, was the case at my former university, the Westfälische Wilhelms-Universität in Münster.

118 In 1999 the state with the lowest failure rate was Hesse (18.5%), the state with the highest one was Saxony (45.8%), the overall average was 28.9% (comp. Juristische Ausbildung (2000), p.555).

because the second try is the last one. In order to reduce both this pressure and the number of long-term students, a special regulation was introduced. Now, all German law students have the opportunity of three attempts if they try to pass the exam for the first time before finishing the 8th semester.[119] This regulation has been regarded as a success.[120]

The first state exam consists of written tests, generally in the compulsory subjects, i.e. in civil, criminal and public law.[121] In some states a research paper is also required, additionally. Finally, an oral examination takes place. Because the goal of legal education is "the capability to be a judge", the whole procedure follows a judge's decision-making pattern, i.e. to find a solution to a hypothetical case, just as a judge has to find a solution and pass judgement. In short, candidates have to apply a particular legal technique to the said case (Gutachtentechnik). They must check whether the facts of the given case may justify a claim. Correspondingly, in criminal law they have to check whether a possible perpetrator has fulfilled all the elements of a criminal offence. The law is practically the only tool at their disposal and law codes are the only auxiliary means permitted. In cases where candidates pass a minimum level of grading in the written paper they are admitted to the oral exam. Although the exam is regulated and supervised by the states, not only judges as representatives of state authority, but also professors scrutinize the candidate's knowledge.[122] The participation of professors is a remarkable factor because it guaranteed an

119 So-called free-shot or free-go, regulated in § 5 d DRiG.

120 Comp. the statistics in Juristische Ausbildung (2000), pp.556.

121 The number of tests differs from state to state (see above). In some states candidates have to write three or five (plus a research paper), and in others eight tests are necessary (without a research paper).

122 The panel consists of four examiners, two judges (sometimes public prosecutors) and two professors in the ideal case. Normally, they were also in charge of grading the written tests and papers. The oral exam lasts for about five or six hours. After a short consultation behind closed doors the result is immediately pronounced.

active and influential role of law faculties in the first state exam even before the reform of the current system.

As explained above studying, preparation for and the format of the exam will probably remain largely unchanged in spite of the agreed reform next year. The real change, though again far from revolutionary, will affect the part of the university education system and exam, formerly known as the "subject of choice". Under the traditional system students were obliged, in addition to compulsory subjects, to study a specific legal area of their own choice. Thus, students were encouraged to specialize in civil procedure, criminal procedure, labour law, law of associations, etc. early in their legal education. These subjects of choice also played a minor role in state exams.

Under the new reform, subjects of choice have been renamed and now appear as "main areas".[123] The legislator now intends to bring students "into contact with interdisciplinary and international relations".[124] Hopes have been expressed that students will seize the opportunity and start intensive scientific research in their "main areas" during the second phase of studying.[125] Simultaneously, students will have to gain so-called key-qualifications, e.g. the skills of negotiating, conversation, rhetoric, mediation and interrogation[126], but also knowledge of a foreign legal language.[127] The establishment of practical subjects was motivated by the fact that a large majority of law students finally enter the legal profession as

123 „Main area" is a clumsy attempt to translate „Schwerpunktbereiche", § 5 a II 4 DRiG (reformed version). But the legal expression is a little clumsy itself: Whereas "subjects of choice" were the necessary counterpart to "compulsory subjects", "main areas" are clearly not the only major areas of study as long as students still have to study compulsory subjects.

124 Recommendations and report of the Committee for Legal Affairs of the Bundestag (BT-Dr 14/8629) concerning § 5 a II 4 DRiG (reformed version).

125 Hommelhoff/Teichmann, Juristische Schulung (2002), p.840.

126 § 5 a III 1 and § 5 d I 1 DRiG (reformed version).

127 § 5 a II 2 DRiG (reformed version). But language skills are not part of the exam. Students have only to attend "successfully" a corresponding course.

lawyers.[128]

The seriousness of the new regulations is underlined by the one real change in the system of legal education. The "main areas" will become subjects in university exams. The state exam will have to give up its monopoly and law faculties will obtain a direct influence on assessing future lawyers for the first time in centuries.[129] Contributing 30% to the overall grade this influence will be far from negligible.

It would certainly be precipitous to criticize this reform before it has even been tested in reality. However, I do not completely share the widespread optimism.[130] First, faculties are not really prepared to perform their part of the exam technically. The Conference of Law Faculties has already declared that they need either administrative aid from the ministries of justice or additional financial funding in order to set up their own departments in charge of the university exam.[131] I would also be interested to learn how subjects like negotiating, conversation, rhetoric, etc. will be judged from an objective point of view.[132] Moreover, I am convinced that topics like the above mentioned cannot be learned from textbooks. They are more a question of personality or the result of permanent training. There are high expectations that the above mentioned "main areas" together with a growing

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128 Less than 20% of the candidates each year opt for a career as a judge or public prosecutor. Most young jurists become lawyers. Due to grading in the exams a large proportion of those becoming lawyers have no alternative (Freckmann/Wegerich, The German legal system (1999), p.110). Therefore, universities plan to give lawyers teaching posts in order to handle new subjects, like negotiating, mediation, etc. (Jost (see above), p.13).

129 This applies, at least, for former territories of Prussia where the state controlled the access to legal professions since Frederic the Great (comp. Hattenhauer (see above), p.342).

130 Jost (see above), pp.12, 13; Hommelhoff/Teichmann (see above), pp. 839.

131 Hommelhoff/Teichmann (see above), p.841.

132 Grading is always a disputed matter in the legal education. Examination requirements, though legally regulated, evidently vary from examiner to examiner. Arbitrariness is an approach often criticized among law students.

interest in scientific problems will become an important part of the "second phase of studying",[133] i.e. after the fourth or fifth semester. These expectations will have to be lowered. Compulsory subjects will still compose two thirds of the exam as a whole. Even with superior rhetoric skills it is impossible to negotiate, to mediate and to discuss legal matters without a profound knowledge of civil, criminal and public law. As a result, students will continue attending private tutorials after having finished the first phase of studying. They will use this time for preparing the exam. Any other outcome is an illusion maintained only by academic teachers. In addition, hopefully law faculties will not allow their part of the exam to become an easy option for students who are coincidentally gifted with a degree of rhetorical skill, but lack a deeper insight into law. On the other hand, if law faculties take their new duties seriously this part of the exam could be even more demanding than the traditional exam. In this case receiving good marks or even just passing the exam could become more difficult than it is at present.[134] Because this effect is certainly not desirable professors could face a serious dilemma.

The reform also affects the period of legal education following time at university. After passing the first state exam, junior lawyers are still apprentices. A small minority has the chance to write a thesis (Dissertation) and, after sit a pure university examination, to gain the academic title of Doctor of Laws (Dr. jur.). After that, like the vast majority of junior lawyers immediately after the first exam, they too must begin the practical legal training or probationary period (Referendariat). During a period of two years they are trained in several different placements, usually starting at a civil court under the supervision of a judge. After four to six months

133 Hommelhoff/Teichmann (see above), p.840.

134 The grading is very strict. On a scale of seven different marks only 0.1% receive best results ("very good"), about 2.5% are in the second rank ("good"), about 30% (of all candidates, i.e., including the other third who completely fail) get the lowest mark possible without failing the exam ("sufficient"), comp. statistics of 1999 (Juristische Ausbildung (2000), p.555).

they are sent to a public prosecutors office or to a judge competent in criminal matters. The trainees also spend some time in legal departments of public authorities or at administrative courts. Before the second state exam starts they have to practice in a lawyer's office. Simultaneously, they have to take part in a kind of study team with other junior lawyers. On these courses judges, public prosecutors, legal experts from the administration and (sometimes, but probably more often in the future) practising lawyers teach the practical application of their respective areas of law. The instruction also involves written practice tests, the first part of the final state exam. Between this stage and the oral exam candidates are fortunate to have the opportunity of going abroad and spending several months in a foreign law firm, in a German embassy or in a Chamber of Commerce. Unfortunately, only a few take the chance. During the whole preparatory service, junior lawyers are paid by the state though, the income is of course is quite modest.[135]

The second state exam is the last hurdle candidates have to cross to become "Volljuristen"[136], i.e. completely qualified lawyers with the capability to be a judge. This exam is also known under the name "the great exam" to distinguish it from the first one. The format is similar, i.e. candidates have to write between eight and twelve tests in a period of two weeks.[137] This time, in contrast to the first exam, they are not given a set of facts, but have to collect relevant facts from a file for themselves. They then have to draft a judgement, a bill of indictment, an administrative act, a statement of claim, etc. The oral exam follows after four to six months. The panel of examiners consists exclusively of practicing jurists. The first part is a lec-

135 Before 1957 junior lawyers had to finance this period of legal education themselves. Some other privileges were abolished recently, like the position of a public officer, due to decreased budgetary means. Now, they are treated as regular employees of the state.

136 In contrast to the synonym "Assessor" this is not a legal expression.

137 Once again, almost all candidates prepare for this exam by attending a private tutorial (Repetitor).

ture the candidate has to give on a legal case laid down in a file. A question session follows in the second part. Places of examination are always the ministries of justice, not, as in the first exam, the upper state courts (Oberlandesgerichte) or, according to the reform, the universities.

Like the changes concerning university education the reform of the practical legal training period, was prompted by the fact that a large proportion of candidates finally choose (or feel obliged) to become lawyers. The idea is to modify the role model of traditional legal education, the judge, and to put more emphasis on the different tasks lawyers have to fulfill. As a result the reform prolongs the placement of trainees in a lawyer's office from three to nine months.[138]

Provided lawyers take their new responsibilities seriously this is certainly a reasonable change. Instead of using the time to learn legal practice, candidates frequently preferred to prepare for the written exam, which immediately follows the placement. A deeper insight into the lawyer's day-to-day business was difficult to achieve. From this point of view, the reform is long since overdue. Now, the Federal Statute Concerning Lawyers, expressly establishes an obligation to cooperate in legal education by introducing the trainee to the duties of a lawyer, to supervise them and to provide him with the opportunity of engaging in practical legal work.[139]

The reality of the reformed legal education system probably cannot meet the high expectations of its success. This applies especially to changes made in university education. However, the reform does not go far enough in abolishing the most significant principle of current German legal education, the orientation towards judicial practice. Even though two thirds of

138 To the following compare Römermann, Neue Referendarausbildung, Was Anwälte wissen müssen, Anwalt-Das Magazin (10/2000), pp.8. Universities even plan to give lawyers teaching posts in order to handle new subjects, like negotiating, mediation, etc. (Jost (see above), p.13).

139 § 59 BRAO (Bundesrechtsanwaltsordnung). Some serious problems might occur with increasingly active participation, especially concerning the contact with clients (Römermann (see above), p.8).

all candidates become lawyers at the end of their long education, it would be wrong to give up this idea mentioned before. I am afraid that some reformers are led astray by a misunderstanding. They ignore the fact that candidates finally becoming judges were always in the minority. Nevertheless, they conclude that the whole education system must change its direction. According to their view the lawyer, not the judge, is the ideal model for study and practical training. But German legal education never aimed at producing as many judges as possible. The purpose was (and still is) to educate jurists (in the broadest meaning) able to apply law practice (this is actually a matter of course). The proper application of legal rules requires a special kind of logical thinking, a special kind of legal technique. This is expressed by the legal formulation "the capability to be a judge". Of course, lawyers do not pass judgements, but from the very beginning of any legal consultation lawyers have to regard possible consequences. The final consequences in legal life are in effect judicial decisions. In other words, lawyers have, from a slightly different perspective, to think with the brain of a judge.[140] This is the reason for the uniformity of legal education and fortunately, this idea has not fallen into complete oblivion.

140 Comp. also Bull, Von der rechtswissenschaftlichen Fakultät zur Fachhochschule für Rechtskunde?, Juristenzeitung (2002), pp.978/979.