

THE DIDACTIC TURN OF GERMAN LEGAL METHODOLOGY

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Abstract. *We note an increasing consciousness of weakness of legal methodology taught to law students today: The students get neither real idea nor feeling of legal decision-making as mixture of legal matters, issue of facts, personal inputs, diverging interests, and the interplay with other actors.*

For minimize these defects it is necessary that law students learn in legal studies the following points: (1) Legal decision-making is a special kind of decision-making and is embedded in all problems of this process. (2) Jurisprudence is a hybrid science: It deals with facts of issue as well with legal matter. (3) Jurisprudence will be understood as transnational science and requires greater cooperation between law schools all over the world. (4) Legal education should focus on general principles and legal tools rather than on detailed rules. (5) Legal theory should demonstrate students our lack of understanding legal decision-making. (6) A realistic legal methodology has to take into account the impossibility of absolute certainty of the correctness of legal decision. (7) It is important to point out that analysis of facts of the case as crucial part of legal methodology requires teaching systems to introduce students in the respective techniques in practice like case studies, projects as well as legal clinics or SASLA-system.

Keywords: *legal theory, legal methodology, legal education, legal decision-making, multi-level and multi-actorial decision-system, interpretive tools in civil law as well as in*

common law system, convergence of civil law and common law systems, application of laws, judicial decision-making and legislature, mandatory courses in legal methodology and legal theory, legal learning by practical experience, legal clinic, SASLA (Students Advise Students in Legal Affairs).

Introduction

The problems discussed here are not new and it seems insofar that “there is nothing new under the sun”¹. Aristotle argued 350 B.C. “that all law is universal but about some things it is not possible to make a universal statement which shall be correct”². Plato (427 – 347 B. C.) was the opinion that legal decisions are based on law and sense of justice.³ Blaise Pascal emphasized in the 17th century the “logique du coeur”⁴; John Locke underlined in the same century the importance of prejudice by decision-making⁵; and in 1799 Immanuel Kant still spoke of the “*intuitive Understanding*”⁶. The German novel writer Jean Paul demonstrated at the beginning of 19th century with the words “Delphic legal cave” the ambiguity of legal norms.⁷ In 1905 Emil Lask described “the inherent connection of legal meaning and real base in the individual case”⁸; Ludwig Bendix stressed 1927 the “irrational elements” of judicial-decision making⁹; Hans Kelsen accentuated 1934 the legal decision-making process as mixture of knowledge and will of the respective legal decision-maker.¹⁰

This article therefore focuses on old problems and tries to solve them by changing the solutions point of view from legal methodology to legal education. Especially it wants to acquaint law students with legal decision-making process as it actually is;

1 *The Bible*, Ecclesiastes 1, 9.

2 Aristotle, 350 B.C., Book V Chapter 10; in the same direction shows this quotation of Cornelius Tacitus (55–117), 115–117, Book 3, nr. 69: “Laws are ordained to meet facts, inasmuch as the future is uncertain.”

3 Plato, The sixth letter, 350 B.C., in: The same, vol. 3, p. 716 f.

4 Blaise Pascal, 1670, nr. 277: “The heart has its reasons, which reason does not know.”

5 John Locke, 1690, volume I, chapter XIII: “It is not easy for the mind to put off those confused notions and prejudices it has imbibed from custom, inadvertency, and common conversation.” Hume, D. An Enquiry concerning Human Understanding, 1777, section IX, meant: “Biases from prejudice, education, passion, party, &c. hang more upon one mind than another.”

6 Kant, I. *Kritik der Urteilskraft*. 3. ed. (1799). In: *Werke in sechs Bände*. 1998, volume V, § 77, emphasis in original; see to the intuitive understanding Förster, E. Hegel in Jena. In: *Das Interesse des Denkens: Hegel aus heutiger Sicht*. Welsch, W.; Vieweg, K. (eds.). Munich: Wilhelm Fink, 2003, p. 112.

7 Jean Paul, *Fliegeljahre* (1804–1805). In: *Werke in zwölf Bänden*. Miller, N. 1975, volume 3, p. 613.

8 Lask, E. *Rechtsphilosophie*, 1907. In: Windelband, W. (ed.). *Die Philosophie im Beginn des 20. Jahrhunderts. Festschrift für Kuno Fischer*. 2nd ed. Heidelberg: Winter Verlag, p. 308: “Verschlingung von rechtlicher Bedeutung und realem Substrat im Einzelfall.”

9 Bendix, L. *Die irrationalen Kräfte der zivilrichterlichen Urteilstätigkeit. Aufgrund des 110. Bandes der Entscheidungen des Reichsgerichts*. Breslau: Schletter'sche Buchhandlung (Franck & Weigert) A. Kurtze, 1927.

10 Kelsen, H. *Reine Rechtslehre* (1934), cited according to student's edition by Matthias Jestaedt, 2008, p. 7.

thus the students will have the intellectual resources for making better legal decision disclosing the real decision-making-elements.

That the proposals in this paper are imperfect answers to the unsatisfactory situation may be regrettable; however, it is the best way we can go in the right direction. Because we have no terminology in the sense of established terms concerning the here discussed subjects of “Recht” (law), “Rechtswissenschaft” (jurisprudence¹¹), “Rechtsdogmatik” (legal doctrine), or “Rechtsmethodik” (legal methodics), it is necessary to clarify what contents are used by the respective terms: “Law” I use for the applicable legal rules, “jurisprudence” for the legal science in a broader sense¹²; “legal doctrine” refers to that part of jurisprudence that focuses immediately on applicable law¹³; legal methodology means the toolbox for finding the legal rules, interpreting, updating, and correcting them.

1. Concept of Legal Methodology

Legal methodology – sometimes also: judicial methodology or legal skilled crafts¹⁴ – means the instruments for finding the legal rules and explaining their meaning. Legal methodology does not concern itself with the principles, doctrines, and law in a specific field or in all. Although concerning Germany actually doesn’t exist a theory of interpretation of law as integral component of the written law – neither at national, supranational nor international level – we must consider that “in Jurisprudence, the concept of method is closely related to that of legal sources”¹⁵; despite the absence of an explicit statement of legal system on legal methodology the latter depends on the former.

Legal methodology is not identical with the tool-box of lawyers, for tool-box of lawyers means often not only methodological instruments but also technical tools such as data management software, database, commentary or legal writing including legal citation.¹⁶

Although sometimes legal methodology includes law-making, law-finding, and law-applying¹⁷ the following remarks are restricted to law-finding and law-applying.

11 To other expressions see Funke, A. *Rechtstheorie*. In: Krüper, J. (ed.). *Grundlagen des Rechts*. Frankfurt am Main: Klostermann, 2011.

12 Cf. Ratnapala, S. *Jurisprudence*. Cambridge University Press, 2009, p. 3.

13 Cf. Lee, K. I. *Die Struktur der juristischen Entscheidung aus konstruktivistischer Sicht*. Mohr Siebeck, 2010, p. 158.

14 Christoph Möllers describes legal methodology as “juristisches Handwerk“ (legal skilled crafts) (Möllers, Ch. *Methoden*. In: Hoffmann-Riem, W.; Schmidt-Aßmann, E.; Voßkuhle, A. (eds.). *Grundlagen des Verwaltungsrechts*. München: C.H. Beck, 2006, p. 78).

15 Linderfalk, U. *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*. Springer, 2007, p. 13.

16 Cf. Safferling, Ch. *Legal tools*, 2007 [interactive]. [accessed 12-06-2009]. <<http://www.icwc.de/index.php?id=75&L=5>>.

17 Prümm, H. P. *Juristische Methodik*. Herford, Maximilian, 1986, p. 16 *et seq.*; Maxeiner, J. R. *Integrating Practical Training and Professional Education*. In: Klabbers, J.; Sellers, M. (eds.). *The Internationalization of Law and Legal Education*. Dordrecht: Springer, 2008, p. 43.

Regarding law-making in Germany has been developed a special branch of jurisprudence, *Gesetzgebungslehre* (legistics), in the last years,¹⁸ that examines other problems than the here discussed.

Generally legal methodology in Germany does comprise neither facts-finding nor analysis of the facts.¹⁹ In Germany jurisprudence has been understood as humanity²⁰; thus subject of legal methodology is law as “product of human spirit”,²¹ not the (daily life’s) facts. Insofar the position of Georg Friedrich Wilhelm Hegel is consequent that facts-finding as such it is not a judicial task.²²

That is the state of legal methodology still today although we know that not only the respective norm steers finding and analysis of the facts and vice versa the facts of the case steer finding as well as interpretation of norms that makes facts-finding, against Hegel, very well to a legal problem²³. Karl Engisch (1899-1999), even today a famous German legal methodologist, spoke of the view going back and forth from norm to facts, from word to deed and the other way round.²⁴ We can describe this operation as a kind of hermeneutic circle.²⁵ This circle is a universal phenomenon concerning application of legal, religious, and moral norms – and the theologian Hans Küng describes the connection between moral norms and facts as follows: “A norm without a concrete situation is empty. In turn a concrete situation without norm is blind. Decision-making needs both norm and concrete situation.”²⁶

The understanding of the interpreter influences the reading of the text²⁷ as well as finding the facts; the understanding of the text influences the analysis of the facts – and the other way round. But the German jurisprudence is leaving more and more the connection to its social conditions and results.²⁸

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- 18 Cf. Karpen, U. *Gesetzgebungslehre - neu evaluiert/ Legistics - freshly evaluated*. 2 ed. Baden-Baden: Nomos, 2008; Karpen, U. Recension of: Bundesministerium der Justiz 2008. *DVBl*. 2009.
- 19 Cf. another opinion by Christof Bernhart (Bernhart, C. *Regeln der Jurisprudenz: Die Grundsätze und Methoden der Rechtswissenschaft als professionelle Standards*. Berlin: Duncker & Humblot GmbH, 2008, p. 63); regrettably Bernhart does not take the necessary measures.
- 20 See Beiner, M. *Humanities. Was Geisteswissenschaft macht, und was sie ausmacht*. Berlin: Berlin University Press, 2009.
- 21 Cf. *Ibid.*, p. 12: “Sinn-Produktion”.
- 22 Hegel, G. W. F. *Elements of the Philosophy of Right or Natural Law and Political Science in outline (1821)*. Kitchener, 2001, § 227.
- 23 Cf. Lee, K. I., *supra* note 13, p. 227, notes that only in the very concrete practice the content of legal norms will be determined and the facts of the case are constructed under legal aspects; situation and norm are interpreted interactively; law is only law in action.
- 24 Engisch, K. *Logische Studien zur Gesetzesanwendung*. 3 ed. Heidelberg: Winter, 1963, p. 15; see to the hermeneutic circle fundamentally Gadamer, H.-G. *Hermeneutik I. Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik*. 6th ed. Tübingen: J.C.B. Mohr, 1990, p. 270.
- 25 Röhl, K. F.; Röhl, H. Ch. *Allgemeine Rechtslehre: Ein Lehrbuch*. 3rd ed. Köln, München: Heymann, 2008, p. 116 f.
- 26 Küng, H. “Erfolg rechtfertigt gar nichts”. *Die Zeit*. December 30, 2009, p. 25.
- 27 Möllers, Ch., *supra* note 14, nr. 23: The application of a norm affects the future meaning of the norm.
- 28 Fischer, N.; Kuntze-Kaufhold, G. “Hören, Sehen, Sprechen” – Schlüsselqualifikationen im Studium der Rechtswissenschaften, 2008 [interactive]. [accessed 01-09-2009]. <https://web.uni-frankfurt.de/fb/fb01/w_inst/zentrum_sq/ueber_Uns/Veroeffentlichungen/AufsatzSchlüsselqualifikationen-NFKK.pdf>, p. 10; Walter Grasnack criticizes harshly the “complete failure“ of legal methodology (Grasnack, W. *Pater Brown und die Kamele. Myops*. 2010, 9: 50).

2. Starting Points

2.1. Historical Landmarks of Development of Legal Methodology²⁹

- (1) Whereas during the Roman Empire and in the middle age equity was the target of interpretation, in the 17th and 18th centuries interpretation should clarify the will of legislature.
- (2) In the 19th century in context with the system of codification the so called Begriffsjurisprudenz (analytical jurisprudence) became more important parallel to the idea of objectivity of decision-making by eliminating subject factors in this process.³⁰
- (3) However, in the same century starting by Rudolf von Jhering's (1818–1892) "Der Zweck im Recht"³¹ under the heading "Interessenjurisprudenz (jurisprudence of interests) interpretation sought primarily the intention/ purpose of the norm.
- (4) This approach together with the legislative trend to broad and general formulations as well as general clauses³² opened ideologies the entrance to legal decision-making process.
- (5) Under the regime of National Socialism the main goal of legal methodology was to find out "leader's will" and "ethnic values".³³
- (6) Today we note a
 - variety of interpretation tools;
 - lack of priority of certain interpretation tools – exceptional the method of conformity³⁴ with higher law;
 - practical irrelevance of the literal rule for interpretation;
 - judicial activism rather than judicial self-restraint.³⁵

2.2. The Idea of Codification and the Legal Reservation

The basic idea of codification is that legislature – parliament as well as king or another ruler – creates by codification a complete system³⁶ regulating all current and

29 The following observations are based on Günter Hager (Hager, G. *Rechtsmethoden in Europa*. Mohr Siebeck GmbH & Co. K, 2009, p. 14).

30 Cf. Lethen, H. Das Ideal des Ganzkörperstahlhelms. *Die Zeit*. September 30, 2010.

31 Von Jhering, R. Der Zweck im Recht (1877–1883). In: Der Geist des Rechts. Breitkopf und Härtel, 1965.

32 Cf. Neumann, F. Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft (1937). In: Neumann, F. *Demokratischer und autoritärer Staat*. Wien: Europa Verlag, 1967, p. 38.

33 Cf. Wittreck, F. *Nationalsozialistische Rechtslehre und Naturrecht*. Tübingen: Mohr (Siebeck), 2008, p. 49.

34 Cf. Sauer, H. Juristische Methodenlehre. In: Krüper, J. (ed.). *Grundlagen des Rechts*. Baden-Baden: Nomos, 2011, nr. 33: "Konformauslegung".

35 Juliano Zaiden Benvindo emphasizes a "strong activism" (Zaiden Benvindo, J. *On the Limits of Legal Rationality Balancing and Judicial Activism in Deconstruction*, Springer, 2010, p. XVI; in the public discussion is often forgotten that is not only a problem of judiciary but of public administration too.

36 Today this theory comes back in the concept of Ronald Dworkin (Wacks, R. *Philosophy of law. A very short introduction*. Oxford University Press, 2006, p. 41).

future legal problems.³⁷ Important codifications in Europe were the General State Laws for the Prussian States (1794), the French Napoleonic Code (1804) the Civil Code of Austria (1811), and the German Civil Code (1900). Consistently legislators declared that the courts, allegedly, simply apply the norms and – for example – Frederick II, Prussian king from 1740 to 1786, forbade judges to interpret the above mentioned State Laws.³⁸ How little today³⁹ we understand codes as exactly designed systems reveals the title of a new book of Christian Neuwirth: *Through the jungle of statutes*.⁴⁰

However, in Germany the rule of law contains first at all the primacy of legality⁴¹. In the fields of criminal and public administration law⁴² a fundamental element of this rule of law⁴³ is the principle of subjection to the law (the necessity of legal authorization/legal reservation) that obliges administration and courts to interfere with citizen's rights upon statutory authorization only. For criminal law Art. 103 para. 3 German Basic Law (Grundgesetz, GG) explicitly formulates: "An act may be punished only if it was defined by a law as a criminal offence before the act was committed." For Public administration this principle is interpreted from Art. 20 para. 3 GG. This principle forbids constructing a base for authority transcending the wording of the respective statutory law⁴⁴ – neither by analogous application of the law⁴⁵ nor by correction the legal defect. But the boundaries between interpretation and updating the law are flexible⁴⁶ even more

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- 37 Cf. the description of the perfect codification by Max Weber (Weber, M. *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie* (1922). 5th ed. Tübingen: Mohr, 1972, p. 396).
- 38 Section 45 Introduction to the General State Laws for the Prussian States: If the judge is unsure to the meaning of the law he has to report his doubt to the Law-Commission. ("Findet der Richter den eigentlichen Sinn des Gesetzes zweifelhaft so muss er ... seine Zweifel der Gesetzcommission anzeigen.") [interactive]. [accessed 10-08-2009]. <http://www.smixx.de/ra/Links_F-R/PrALR/PrALR_Einleitung.pdf>; cf. Swift, J. Gulliver's travel into several remote nations of the world (1726) [interactive]. [accessed 06-09-2009]. <<http://www.jaffebros.com/lee/gulliver/contents.html>>, Part II A voyage to Brobdingnag, Chapter VII: "(A) nd to write a comment upon any law, is a capital crime."
- 39 But see the critics on the idea of legal system by Georg Jellinek (Jellinek, G. *Allgemeine Staatslehre* (1914). 5 ed. Berlin, 1929, p. 353) "The false dogma of the closed legal system ..." (Translation: H. P. P.).
- 40 Neuwirth, Ch. *Durch den Dschungel der Gesetze: Reiseführer für die österreichische Verfassung*. Wien-Graz-Klagenfurt: Molden Verlag, 2009.
- 41 Spigelmann, J. J. *The Common Law Bill of Rights. First lecture in the 2008 Mcpherson Lectures*, 2008, p. 29, uses the concept "principle of legality"; consenting Michael Nierhaus, this principle is divided into principle of the precedence of the law and the principle of subjection to the law (Nierhaus, M. *Administrative Law*. In: Ebke, W. F.; Finkin, M. W. (eds.). *Introduction to German Law*. The Hague: Kluwer, 1996, p. 82 f.).
- 42 The situation in civil law cf. by Hans Christoph Grigoleit (Grigoleit, H. Ch. *Anforderungen des Privatrechts an die Rechtstheorie*. In: Jestaedt, M.; Lepsius, O. (eds.). *Rechtswissenschaftstheorie*. Mohr Siebeck GmbH & Co. K., 2008, p. 72); Koch, H.-J. *Methoden zum Recht. Ausgewählte Beiträge aus drei Jahrzehnten*. Baden-Baden: Nomos, 2010, p. 17.
- 43 Dicey, A. V. *Introduction to the Study of the Law of the Constitution*, 1914 [interactive]. [accessed 01-22-2010]. <http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=1714&layout=html>, Part II, The Rule of Law.
- 44 Bull, H. P.; Mehde, V. *Allgemeines Verwaltungsrecht mit Verwaltungslehre*. 8. ed. Heidelberg: Müller, 2009, nr. 550.
- 45 Cf. Beaucamp, G. Zum Analogieverbot im öffentlichen Recht. *Archiv des Öffentlichen Rechts*. 2009, 134(1).
- 46 Hirsch, G. Weder Diener des Gesetzes, noch Komponist. *ZRP*. 2009, 8: 254.

when the Federal High Court of Justice (Bundesgerichtshof, BGH) uses the concept of “corrective interpretation”.⁴⁷

Based on the scientific ideal of mathematization⁴⁸ even today the observation of Ralf Dahrendorf in 1969 is valid that a “casuistic” argumentation has a critical undertone meanwhile a “dogmatic” result is a sign of correct legal decision-making.⁴⁹

2.3. Necessity of Legal Methodology

Law provides neither for individuals nor for social or economic actors certainty or predictability. Although Germany has a basically well-developed, stable, and sophisticated legal system we observe the overall poor quality of the legislation which is commonly recognized as complicated, contradictory, and unclear.⁵⁰ Here is not the space for an extensive discussion of this problem but we take the result as starting point to the following considerations: Even the best designed law establishes only a framework within the unavoidable dispute has been decided.⁵¹ The philosopher Odo Marquard developed the thesis that humanities and hermeneutics⁵² based on the assumption of impossibility of clear texts or signs: Any text can be interpreted at least in two senses.⁵³ We can summarize it by the words of William Simon: “The issue of interpretation arises from the fact that legal norms cannot be applied to specific cases without some exercise of judgement. The text of legal norms contains gaps, vaguenesses, ambiguities, and contradictions that must be filled, clarified, and reconciled in order to bring them to bear on specific cases.”⁵⁴ In addition we point out, as already Aristotle mentioned⁵⁵, that it is impossible to predict the future.

2.4. The Level of Academic Teaching Legal Methodology

In most legal textbooks students read that legal decision-making is divided into the following steps:⁵⁶

1) Analysis of the facts of the case;

47 BGH – StB 21/10 – December 7, 2010, NJW 2011, 690(691); see below 4.10.

48 Cf. Foucault, M. *Die Ordnung der Dinge* (1966). In: *Die Hauptwerke*. Frankfurt am Main: Suhrkamp, 2008, p. 416 f.

49 Cf. Dahrendorf, R. *Gesellschaft und Demokratie in Deutschland*. München, 1968/1971, p. 257.

50 Ulrich Karpen estimates that about 50% of German federal laws are incorrect or difficult to understand (Karpen, U., *supra* note 18).

51 Wacks, R., *supra* note 36, p. 27.

52 To the legal hermeneutics see Gadamer, H.-G., *supra* note 24, p. 330 ff.

53 Marquard, O. *Zukunft braucht Herkunft. Philosophische Essays*. Stuttgart, 2003, p. 84 f., 179.

54 Simon, W. H. *The practice of justice. A theory of lawyers' ethics*. Harvard University Press, 1998, p. 37; Rufino, A. *Mediative Law: How to mediate Justice in the global Age*. In: Callies, G.-P.; Fischer-Lescano, A.; Wielsch, D.; Zumbansen, P. (eds.). *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag*. Berlin: De Gruyter, 2009, p. 149: “(T)he hyper production of rules corresponds their inadequacy to solve matters caused by social complexity.”

55 *Supra* note 2.

56 Cf. Sauer, H., *supra* note 34, nr. 7; for Australia: Milne, S.; Tucker, K. *A practical guide to legal research*. Lawbook Co, 2008, p. 2 f.

2) Finding (a) and interpretation (b) the law;

3) Conclusion in the sense of syllogism.

(1) Analysis of the facts of the case really does not play a role in the academic legal training; and consistently the appropriate tools are not part of legal methodology. Although since long time we know the influence of facts to the decision. Still in 1912 Carl Schmitt wrote: “The interpretations of norms by jurisprudence and by judge are very different, especially why the judge has to decide the specific case.”⁵⁷ That is one reason because Wolfgang Hoffmann-Riem divides the norm into the Rechtsstoffbereich (the legal material in the narrow sense) and the Realbereich (real sector of the norm).⁵⁸

(2a) Finding the relevant norm is – so the most textbooks – steered by three principles, which regulate directly the relations between norms as well as indirectly the process of finding the required norm:⁵⁹

- Lex superior derogat legi inferiori.
- Lex specialis derogat legi generali.
- Lex posterior derogat legi priori.⁶⁰

In reality never one norm alone answers the legal question; instead one has to construct a so called decision-norm from several legal norms.⁶¹ The construction⁶² of such decision-norm we can sketch in the following kind:

Answer-norm⁶³
 + Helping norms⁶⁴
 + Counter norms⁶⁵
 = Decision-norm

(2b) According to this plan it is necessary to interpret the wording of the respective statutory law. The analysis of the meaning of a word or a concept within a rule should occur regarding the model developed by Friedrich Carl von Savigny (1779-1861), a

57 Schmitt, C. *Gesetz und Urteil* (1912). 2nd ed. Oxford: Oxford University Press, 2009, p. 58 (Translation: H. P. P.); see the vividly formulation of Richard A. Posner (Posner, R. A. *How judges think*. Harvard University Press, 2008, p. 204): “Judges are not law professors”.

58 Hoffmann-Riem, W. Sozialwissenschaftlich belebte Rechtsanwendung. In: Damm, R.; Heermann, P. W.; Veil, R. (eds.). *Festschrift für Thomas Raiser zum 70. Geburtstag am 20. Februar 2005*. Berlin, 2005, p. 523–525.

59 Cf. Engisch, K. *Einführung in das juristische Denken*. 8 ed. München: Beck, 1983, p. 163.

60 But later general statute should not alter specific words in earlier statute (Twining, W.; Miers, D. *How to do things with rules. A primer of interpretation*. 5th ed. Cambridge University Press, 2010, p. 247).

61 Cf. Prümm, H. P. *Einführung in die Rechtsphilosophie – Rechtstheorie und Rechtsethik*. Berlin: Fhvr, 2008, p. 37.

62 Cf. Hassold, G. Rechtsfindung durch Konstruktion. AcP. 1981, 181; Lee, K. I., *supra* note 13.

63 Base of claim or of interference.

64 For example: Legal definition, fiction or reference.

65 For example: Time limitation, estoppels.

famous German professor of Roman law and Prussian secretary. He listed four starting points of “Auslegung”⁶⁶ (interpretation of the wording):⁶⁷

- Literal meaning of the words or of the grammatical structure of the sentence;
- Legal history of the rule;
- Systematic context of the law⁶⁸ system;
- Intent or purpose of the rule respective the objective goal of the norm.⁶⁹

The most textbooks of the respective subjects of law⁷⁰ teach law students the above mentioned four-leaved cloverleaf of methodological interpretation⁷¹ although themselves⁷² and the experts count until seven legal interpretation methods.⁷³ Sometimes the authors are different in the same book: Whereas Matthias Pechstein and Carola Drechsler count five interpretation tools,⁷⁴ Karl Riesenhuber lists some pages later in the same book only the four classic methods.⁷⁵

66 In this context it is very remarkable that Friedrich Carl von Savigny, initially, used the word “Interpretation” instead “Auslegung” (Huber, U. Savignys Lehre von der Auslegung der Gesetze in heutiger Sicht. *JZ*. 2003, 1: 3) and “translated” interpretation to “reconstruction” (Christian Baldus, 2010, nr. 57); Rainer Maria Kiesow, 2010, p. 589, uses in the same sentence the words “Verstehen”, “Auslegung” and “Interpretation” for the same procedure; pleading for changing “Auslegung” by “Interpretation” as one tool to overcome the interpretive routine, Hans Paul Prümmer, 2009, p. 210.

67 Zimmermann, R. An Introduction to German Legal Culture. In: Ebke, W. F.; Finkin, M. W. (eds.). *Introduction to German Law*. The Hague: Kluwer, 1996, p. 20.

68 That should not be confused with “Law in context”; confer this concept by Bottomley, S.; Bronitt, S. *Law in context*. 3rd ed. Annandale, N.S.W.: Federation Press, 2006.

69 Von Savigny, F. C. *System des heutigen römischen Rechts*. Volume 1 (1840), reprint 1981, p. 213–214; cf. Blackstone, W. *Commentaries on the Laws of England*. Introduction [interactive]. [27-07-2009]. <http://avalon.law.yale.edu/18th_century/blackstone_intro.asp#2>, Section the second, who listed five methods: (1) Usual meaning of words, (2) context of the words, (3) subject matter of the law, (4) effect and consequence of the interpretation – absurd meaning must be avoided, and (5) the reason and spirit of the law.

70 Private law see: Köhler, H. *BGB Allgemeiner Teil*. 31 ed. München, 2007, § 4 nr. 14; Criminal law see: Wessels, J.; Beulke, W. *Strafrecht Allgemeiner Teil*. 36th ed. Heidelberg: Müller, 2006, nr. 57; Public administration law see: Bull, H. P.; Mehde, V., *supra* note 44, nr. 538.

71 This restriction of interpretation tools we find not only in dogmatic case books; Wank, R. *Die Auslegung von Gesetzen*. 4th ed. Köln, München: Heymann, 2008, p. 107 f., lists in his case book of legal interpretation in the “survey of location of methodology in framework of case method” only the classic four methods too.

72 See *Wolffgang, H.-M. (ed.). Öffentliches Recht und Europarecht*. 5th ed. NWB Verlag, 2010, p. VII: “II Klassische Auslegungsmethoden I. Der Vierer-Kanon ... III Weitere Auslegungskriterien“.

73 Dreier, R. *Recht – Moral – Ideologie: Studien zur Rechtslehre*. Suhrkamp, 1981, p. 114, lists the grammatical, logical, genetic, historical, systematic, comparative, and teleological elements of interpretation. Starck, Ch. *Verfassungen. Entstehung, Auslegung, Wirkungen und Sicherung*. Mohr Siebeck, 2009, p. 126, mentions for constitutional interpretation beside the classic methods the “practical concordance” as well as “functional correctness”. Christian Kirchner lists in the context of EU-law the economic interpretation tool (nr. 5), the dynamic interpretation-method (nr. 20), and the institutional-economic interpretation-method (nr. 59) (Kirchner, Ch. Die ökonomische Theorie. In: Riesenhuber, K. (ed.). *Europäische Methodenlehre (European Legal Reasoning)*. Berlin, New York: Walter de Gruyter, 2010). Two other practically important elements of interpretation are the so called “h.M.” (prevailing opinion) - cf. Pilniok, A. “h.M.” ist keine Argument – Überlegungen zum rechtswissenschaftlichen Argumentieren für Studierende in den Anfangssemestern. *JuS*. 2009 - and “std. Rspr.” (case law).

74 Pechstein, M.; Drechsler, C. Die Auslegung und Fortbildung des Primärrechts, In: Riesenhuber, K. (ed.). *Europäische Methodenlehre. Handbuch für Ausbildung und Praxis*. 2nd ed. Baden-Baden: Nomos, 2010, nr. 17 ff.

75 Riesenhuber, K. (ed.). *Europäische Methodenlehre. Handbuch für Ausbildung und Praxis*. 2nd ed. Baden-Baden: Nomos, 2010, nr. 13 ff.

While German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) in 1960 started of the assumption of only four legal interpretation tools⁷⁶, this court accepted in 1996 at least five interpretation tools.⁷⁷ The discovery of the interpretation instrument “in the light of present-day conditions”⁷⁸ by the European Court of Human Rights (ECtHR) speaks for more than four methods too. The use of “soft law ... as inspiration and interpretation-help” by the courts⁷⁹ is another example that von Savigny’s cloverleaf does not reflect the interpretive reality. Although we see at the methodological level a “farewell” to the classic canon of interpretation tools the most textbook-authors use the concept of “Auslegungskanon” - and “Kanon” in German language means “guide line” or “general standard”.⁸⁰ We can summarize up with Jochen Bung that the practical methods are “a setting of methodological standards that cannot be comprehended by the guidelines of classic interpretation”.⁸¹

But the gap between methodological theory and dogmatic practice is growing even more using the methods that exceeds the wording of the norm. If reading down the norm does not reach a practicable or reasonable result⁸², neither by reducing the scope of the words nor by interpreting the words in a broad sense, legal methodology offers other instruments for a legal decision-basis:⁸³

- Filling of statutory gaps;
- Correcting legal defects.

In these constellations legal decision will be made without or against the wording of statutory law because an interpretation, that “must always be text based”⁸⁴, is not longer possible.⁸⁵ These methods are exclusive exceptions that can be only justified when they are inevitable. Unfortunately the legal decision-makers often hide these methods by claiming their procedure as interpretation the wording instead overruling it.⁸⁶

76 BVerfG, 2 BvL 11/59, 11/60, May 17, 1960, E 11, 126 (130).

77 BVerfG, 1 BvL 44, 48/92, October 15, 1996, E 95, 64 (93).

78 ECtHR, 5856/72, April 25, 1978, *Tyner v. UK*, nr. 31.

79 Küpper, H. Das soft law der europäischen Organisationen. *JZ*. 2010.

80 “Kanon” [interactive]. [accessed 18-05-2010]. <<http://de.wikipedia.org/wiki/Kanon>>; Thomas Schipperges translates “Kanon” by “scale” or “authentic order” (Schipperges, T. *Musik und Bibel. Band 1: Altes Testament*. Bärenreiter, 2009, p. 12).

81 Bung, J. New Approaches to Legal Methodology. *Ancilla Iuris*. 2007, 2: 80.

82 Cf. to this topos just at the beginning of Modern Times (Schröder, J. *Rechtswissenschaft in der Neuzeit. Geschichte, Theorie, Methode. Ausgewählte Aufsätze 1976–2009*. Mohr Siebeck, 2010, p. 84).

83 The discovery of distinction between these tools by Gottlieb Hufeland in 1815 presents Jan Schröder (Schröder, J., *supra* note 82, p. 93 ff).

84 Spigelmann, J. J. The Poet’s Rich Resource: Issues in Statutory Interpretation, 2001 [interactive]. [accessed 30-07-2009]. <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_070801>; see Itzcovich, G. The Interpretation of Community Law by the European Court of Justice. *GLJ*. 2009, 10(5): 539.

85 In regard to common law Geoffrey Robertson distinguishes “interpret and develop the law” (Robertson, G. *The Justice Game*. London: Vintage, 1999, p. 20).

86 A Berlin agency created the method of the “gap filling interpretation”, cited by Prümm, H. P. *Einführung in die Methodik der Rechtsanwendung (juristische Methodik) anhand des EU- und des nationalen deutschen Rechts*. Studienbrief für den postgradualen und weiterbildenden Fernstudiengang Europäisches Verwaltungsmanagement des Fachhochschul-Fernstudienverbundes der Länder Berlin, Brandenburg,

(3) Of course, in Germany exist textbooks of legal methodology for teaching German law students the newest developments in this area and few German law students study these developments. But the most students do not study legal methodology by special textbooks; they become acquainted with legal methodology only by textbooks of legal doctrines: civil, criminal, and public law. The most authors of these books do not refer the newest scientific developments of legal methodology; they show the classic logical-systematic way of application of law:

They describe application of law, both the process and its result, as analytic-deductive derivation⁸⁷. Law students learn that legal decision-making is primarily a logical process⁸⁸, a quasi-mathematical application⁸⁹, particularly in form of subsumption or the so called “Justizsyllogismus” (a special form of syllogism or syllogistic)⁹⁰ containing two premises and a conclusion:

- First/ major premise: A person who commits the crime of murder is liable to imprisonment for life.⁹¹
- Second/ minor premise: M murdered F.
- Conclusion/ result: M gets life imprisonment.

This is an ideal-type of syllogism; it does not describe the real way as facts and norms are inherently connected.⁹² In reality the above mentioned steps (1 to 3) are inherently connected and also the attempt of syllogism leads back to a new interpretation-trial and so on – and in this process the respective decision-maker plays a very important role.

We should note that the idea of government of laws and not of men⁹³ may be an attractive political program but it describes the reality just as little as the famous sentence

Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt, Thüringen, 2002, p. 13; the BGH spoke in 2010 of “corrective interpretation”, *supra* note 47.

87 This logical-systematic view of application of norms is not only a German phenomenon. The example of Christopher Columbus Langdell (1826–1906), Dean of Harvard Law School in 1870, shows the same phenomenon in U.S.: “Law as a science is a body of fundamental principles and of deductions drawn therefrom in reference to the right ordering of social conduct ... (t)he intellect in deriving legitimate deductions from the principles follows the legitimate process of logic, over which the will has no control, and which are always and everywhere the same, whatever may be the subject of investigation.” (cited by Grossman, C. Building the World Community through Legal Education. In: Klabbers, J.; Sellers, M. (eds.). *The Internationalization of Law and Legal Education*. Dordrecht: Springer, 2008, p. 25). Sinclair, M. “translates” this position of Langdell this way: “One synthesizes the relevant principles and deduces the solution to a problem.” (Sinclair, M. Precedent, Super-Precedent. *George Mason Law Review*. 2007, 14: 282). At the beginning of the 20th century in US the legal realism and in Germany the Freirechtsschule fought against this partial point of view; the importance of the will of the legal decision-maker by interpreting and applying norms underlines Peter Römer (Römer, P. *Das Recht der Gesellschaft und der Bundesrepublik Deutschland*. Köln: Dinter, 2009, p. 50).

88 Cf. Schneider, E.; Schnapp, F. E. *Logik für Juristen. Die Grundlagen der Denklehre und der Rechtsanwendung*. 6th ed. München: Vahlen, 2006.

89 Robertson, G., *supra* note 85, p. x, speaks of “slot machine jurisprudence”.

90 Puppe, I. *Kleine Schule des juristischen Denkens*. Stuttgart: UTB, 2008, p. 119.

91 Sect. 19a crimes act 1900 of New South Wales, Australia.

92 In this context it is interesting that Leonardo Bruni d’Arezzo wrote of “the knowledge of realities – facts and principles –“ (Bruni d’Arezzo, L. De Studiis et Litteris (1405) [interactive]. [accessed 28-10-2010]. <<http://history.hanover.edu/texts/bruni.htm>>).

93 Constitution of Massachusetts, 1780, Part the First, Art. XXX [interactive]. [02-01-2009]. <<http://www.nhinet.org/ccs/docs/ma-1780.htm>>; about 2500 year earlier Aristotle, 350 B.C., Book V Chapter 6, wrote:

of Montesquieu of the judge as mouth of law.⁹⁴ The reason for spreading the illusion of “legal logic” lays perhaps in two aspects, which Hans Kelsen mentioned already in 1929: Producing in the public the feeling of legal certainty, on the one hand, and, on the other hand, developing in the judges the awareness of strictly bondage by law⁹⁵. But the “legal logic” is associative rather than linear and, consistently, we can summarize this section by Oliver Wendell Holmes, Jr.: “The life of the law has not been logic: it has been experience.”⁹⁶

2.5. First Interim Results

As interim result we summarize, what law students do not learn in academic lectures:

- Finding the facts of the case⁹⁷
- Connection between finding the facts of the case and interpretation/application of norms⁹⁸
- Connection between interpretation and application of norms⁹⁹

Because we feel that something goes wrong we must pay attention to these matters and discuss new developments of legal methodology in Germany.

3. New Developments

In the following I present the most important new developments in German legal methodology. Other authors may point out other lines of modern design of legal methodology; from my point of view as professor of public law at the Berlin Law School

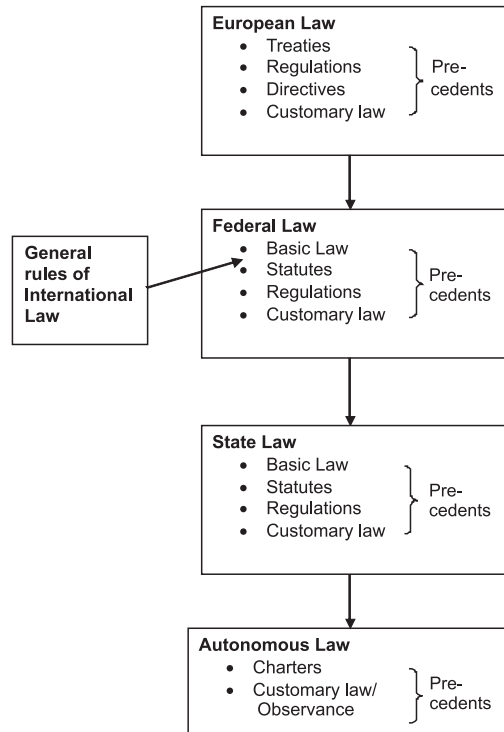
“(W)e do not allow a man to rule, but rational principle ...”. H. L. A. Hart describes this program as “fiction” (Hart, H. L. A. *The Concept of Law*. 2nd ed. Oxford University Press, 1997, p. 12).

- 94 Montesquieu, Ch.-L. de Secondat De L’esprit des lois (1748). In: *Œuvres complètes*. Paris: Gallimard, 1964, book 11, chapter 6.
- 95 Kelsen H. Juristischer Formalismus und Reine Rechtslehre. *JW*. 1929, p. 1726.
- 96 Holmes, O. W. Jr. *The Common Law* (1881). 36 ed. Boston: Little, Brown and Company, 1944, p. 1; M. Foucault noticed generally in contrast to the above mentioned mathematization the counterconcept of “demathematization” of humanities (Foucault, M., *supra* note 48, p. 420); Günter Hirsch, former president of the BGH, formulates expressis verbis: “Interpretation of law is no mathematics” (Hirsch, G., *supra* note 46); and last but not least see in this context the Roman-Latin proverb: “Judex not calculat.”
- 97 Bitter, G.; Rauhut, T. Grundzüge zivilrechtlicher Methodik. *Juristische Schulung*. 2009, p. 290; Haft, F. *Juristische Schreibschule. Anleitung zum strukturierten Schreiben*. Normfall, 2009, p. 204 ff.; but see Milne, S.; Tucker, K., *supra* note 56, p. 2: “The identification of the relevant facts, as distinct from the irrelevant facts, is an important skill.”
- 98 There is not even a word of this problem by Valerius, B. *Einführung in den Gutachtenstil*. 3rd ed. Spring, 2009; probably the strict separation between the factual and the normative side of legal decision-making as well as the hide of the first aspect in the legal academic education are results of the German Idealism in the 18. and 19. centuries.
- 99 But cf. ECJ, Joint Cases C-28/62, C-29/62, C-30/62, March 27, 1963, *Da Costa en Schaake v. Administratie der Belastingen* [interactive]. [accessed 20-93-2011]. <<http://eur-lex.europa.eu/en/index.htm>>, p. 38: “When it gives an interpretation of the Treaty in a specific action pending before a national court, the Court limits itself to *deducing the meaning* of the Community rules from the wording and spirit of the Treaty, it being left to the national court to *apply* in the particular case the rules which are thus interpreted.” (Emphasis: H. P. P.)

(BLS) as well as chair of German Law Teachers Association (Vereinigung Deutscher Rechtslehrer, VDRL)¹⁰⁰ I refer the following experiences.

3.1. Multi-Level and Multi-Actorial Decision-Systems

Perhaps in former times legal decision-making depended on local or national rules only but today legal decision-making is polycentric decision-making¹⁰¹. For example a local decision-maker has to take into account these norm-steps¹⁰²:



In the conflict between lower and higher law the lower law is invalid or inapplicable. In practical application of law it is insofar impossible to separate from each other the national and the supranational law. The following example may demonstrate this: By forbidding women the armed service in the German army the former Art. 12 para. 4

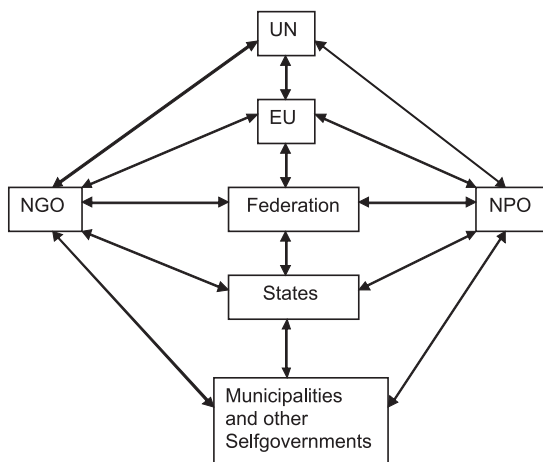
100 See under <www.vdrf.eu>.

101 Cf. Alvik, I.; Emberland, M.; Eriksen, C. C. The New International Law. Polycentric decision-making structures and fragments spheres of law: What implications for new generations of international legal discourse? [interactive]. [accessed 27-07-2009]. <<http://www.jus.uio.no/forskning/grupper/intrel/nil-conference/NIL%20Concept.pdf>>.

102 Cf. for the common law system the "ladder" by Robert S. Summers (Summers, R. S. *Form and function in a legal system. A general study*. Cambridge: Cambridge University Press, 2009, p. 170).

GG conflicted with the higher-ranking European principle of equal treatment men and women as regards access to employment and was inapplicable.¹⁰³

The above mentioned “ladder” points out the vertical steps only; a look at the horizontal dispersion of decision’s elements leads to a wider sketch of a multi-level and multi-actorial¹⁰⁴ decision-system¹⁰⁵:



All these kinds of regulations penetrate each other and influence the legal decision-making process.¹⁰⁶

3.2. Decision-Theory

In our context we describe decision-theory as analyzing the process by which inputs are converted into outputs. The legal decision-making theory understands legal norms in sense of decision-ruling programs.¹⁰⁷ Therefore a legal-decision making institution such as public administration is called “information factory”.

3.2.1. Preliminary Remarks

Still today we have an inadequate understanding of the ensemble of formal and informal legal communication by application of law. The judgement although guided by theoretical and practical knowledge in the end is embedded in the inner centre of human

103 ECJ, C-285/98, January 11, 2000.

104 Lee, K. I., *supra* note 13, p. 258, mentions the “interactional dimension of legal practice”. (Translation: H. P. P.).

105 Prümm, H. P. *Globalisierung und Europäisierung*. apf 2007, p. 75.

106 McKee, D. Review Essay – Emmanuel Melissaris’s Ubiquitous Law: Legal Theory and the Space for Legal Pluralism. *GLJ*. 2010, p. 577.

107 Franzius, C. Modalitäten und Wirkungsfaktoren der Steuerung durch das Recht. In: Hoffmann-Riem, W.; Schmidt-Abmann, E.; Voßkuhle, A. (eds.). *Grundlagen des Verwaltungsrechts*. München: C.H. Beck, 2006, nr. 43.

being.¹⁰⁸ The application of norms is not a determinate, however, a decision-made process.¹⁰⁹ According to Thomas Nagel we presumably will never know all circumstances of decision-making¹¹⁰; it will remain at least a secret process. In other words, we can not assume “rational choice”; however we must start from “bounded rationality”.¹¹¹ That is not as bad as it seems because we remember John Stuart Mill: “There is no such thing as absolute certainty, but there is assurance sufficient for the purposes of daily human life.”¹¹² But it is very important to deepen and spread our knowledge of decision-making, on the one hand, and to explain law students the agnosticism of legal decision-making, on the other hand. Only in this way the current law students will make their legal decisions more rational than the today’s legal decision-makers.

Today many decision-makers describe the application of law in a very formal sense. That is consistent with the following description by Lawrence M. Friedman¹¹³: “If you ask judges what they do and how they decide cases, they are still likely to tell a rather old-fashioned tale. They will say that they search conscientiously for the law, and that they are guided by existing law.” As confirmation of this sentence may serve the following quote of Justice Owen Josephus Roberts¹¹⁴: “When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.” But these sentences are “descriptions” of a black box. Of course, “(t)housands of cases are handled every day in court that a clerk could dispatch or a well-made machine”¹¹⁵, but there are so much not routine cases (hard cases) that need a hard legal decision-making. Neither we know all elements in the process of legal decision-making nor can we analyse all relations between different elements during this process. The decision-theory cannot explain all details of this hard legal decision-making; however, it can lead to a better understanding of this process.¹¹⁶

108 Braun, L. *Bilder der Philosophie*. Darmstadt: WBG (Wissenschaftliche Buchgesellschaft), 2009, p. 102.

109 Bernhart, Ch., *supra* note 19, p. 22; Werner Thieme, 1995.

110 Nagel, T. *What does it all mean? A very short introduction to philosophy*. Oxford University Press, 1987, p. 52; Alessandro Ferrara means that we will never get full knowledge of the mental condition of other persons (Ferrara, A. *Das Gold im Gestein. Verdinglichung und Anerkennung*. In: Forst, R.; Hartmann, M.; Jaeggi, R.; Saar, M. (eds.). *Sozialphilosophie und Kritik*. Frankfurt am Main: Suhrkamp, 2009, p. 49).

111 Cf. Simon, H. A. *Models of bounded rationality* (1982). MIT Press, 1997; Zaiden Benvindo, J., *supra* note 35, part III.

112 Mill, J. S. On liberty (1859) [interactive]. [accessed 20-07-2009]. <http://ebooks.adelaide.edu.au/m/mill/john_stuart/m645o/>, Chapter 2.

113 Friedman, L. M. *American Law. An Introduction*. 2. ed. W. W. Norton & Company, Inc., 1998, p. 104.

114 Judge Roberts in *U.S. v. Butler*, 297 U.S. 1, 62 (1936).

115 Friedman, L. M., *supra* note 113, p. 94.

116 Siegel, T. *Entscheidungsfindung im Verwaltungsverbund. Horizontale Entscheidungsvernetzung und vertikale Entscheidungsstufung im nationalen und europäischen Verwaltungsverbund*. Mohr Siebeck, 2009, p. 45.

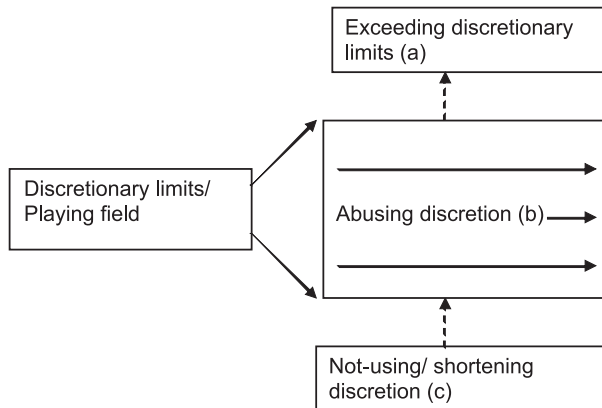
3.2.2. Details

The most important aspects of legal decision-making process can be divided into six categories:

(1) The description of legal decision-making as logical-systematic application of norms shortens basically the real legal decision-making process. The description of jurisprudence by Max Weber as “science that notes the results of legal thinking in accordance with logical as well conventional schemes,¹¹⁷ does not reflect the reality. However, the legislature itself does not follow this logical-systematic mode. We see that in legal terms such “discretion” or “balancing”. By applying¹¹⁸ these concepts legal decision-makers are invited to consider so much of interests that legislature does not define the result. It obliges legal decision-makers only to take into account the influence of proportionality¹¹⁹ or to weighing up fairly the interests involved¹²⁰ to avoid mistakes; consistently, by avoiding these mistakes the respective legal-decision can hardly be successfully attacked.¹²¹ One can demonstrate that by the exercise of discretion. Discretion actually is not legal-defined; however, different laws list categories of errors of discretion that make the respective decision unlawful.¹²² The easiest way to explain the diverse kinds of misuses of discretion is a comparison between exercise of discretion and football match.¹²³

Exceeding (overstepping) discretionary limits means that the football is shot outside the field (a); abusing discretion we can imagine as foul (b); the not-using or shortening discretion will say that the player does not enter the field (c).

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- 117 Weber, M. *Wissenschaft als Beruf* (1919). *Politik und Gesellschaft*. Frankfurt am Main, 2006, p. 1030.
- 118 Kent Greenawalt underlines in this context the difference between interpretation and application (Greenawalt, K. Constitutional and statutory interpretation. In: Coleman, J.; Shapiro, S. (eds.). *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Oxford University Press, 2004, p. 269); see also Möllers, Ch., *supra* note 14.
- 119 Cf. Amado, J. A. G. Abwägungen versus normative Auslegung? Kritik der Anwendung des Verhältnismäßigkeitsprinzips als Mittel juristischer Methodik. *Rechtstheorie*. 2009, 40.
- 120 Section 1 para. 7 Federal Building Act (Bundesbaugesetz, BauGB): By drawing development plans and zoning plans for utilization real estates within communities “public and private interests should be fairly weighed up each other and against each other”.
- 121 Czerwick, E.; Lorig, W. H.; Treutner, E. Demokratische Verwaltung im demokratischen Staat. In: *Die öffentliche Verwaltung in der Demokratie der Bundesrepublik Deutschland*. VS Verlag für Sozialwissenschaften, 2009, p. 251; already 1903 Hugo Preuß commented that insofar discretion is free and its legal control is essentially excluded (Preuß, H. Ein Zukunftsstaatsrecht (1903). In: Preuß, H. *Öffentliches Recht und Rechtsphilosophie im Kaiserreich*. Schefold, D.; Müller, Ch. (eds.). Mohr Siebeck GmbH & Co. K., 2009, p. 220); see recently Wimmer, N. Kontrolldichte – Beobachtungen zum richterlichen Umgang mit Entscheidungsprärogativen. *JZ*. 2010.
- 122 Cf. section 114 Code of Administrative Court Procedure (Verwaltungsgerichtsordnung, VwGO): “Insofar as the administrative authority is empowered to act in its discretion the court shall also examine whether the administrative act or the refusal or omission of the administrative act is unlawful because the statutory limits of discretion have been overstepped or discretion has been used in a manner not corresponding to the purpose of the empowerment.”
- 123 Developed by Hans Paul Prümm (Prümm, H. P. Ermessen. In: Heinrich, P.; Schulz zur Wiesch, J. (eds.). *Wörterbuch der Mikropolitik*. Opladen: Leske und Budrich, 1998, p. 70 *et seq.*)



If public administration avoids these three categories of misuses of discretion any legal decision is irrefutable by legal remedies. This demonstrates that legislature itself accepts the impossibility of strictly steering legal decision-making by rules, for example by granting open spaces for public administration.¹²⁴

(2) Harry W. Arthurs underlines “the optic in which (the lawyers) view legal issues, the scope and focus of their legal imaginations”¹²⁵ as important intrinsic prerequisites of legal decision-making. We must start of legal decision-makers as they really are and not as they should be. First at all we must accept that persons are necessarily and substantially involved in any hermeneutic process. Elements in the person of the decision-makers themselves could be the input of their feeling and temperament, preconception¹²⁶, prejudice¹²⁷, political or religious background and attitude, the academic training of decision-makers, their current situation¹²⁸, the influence of the participants of the process preparing decision, their expectations, the will¹²⁹ to achieve a certain result, and so on.¹³⁰

124 Cf. Twining, W.; Miers, D., *supra* note 60, p. 145 ff.

125 Arthurs, H. W. Law and Learning in an Era of Globalization. *German Law Journal*. 2009, 10(07): 632.

126 Cf. Esser, J. *Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgrundlagen richterlicher Entscheidungsfindung*. Athenäum Verlag, 1972.

127 Schnabel, U. Unterm Mystikhelm. *Die Zeit*. July 15, 2010: “We always see reality through the lenses of our prejudices.” (Translation: H. P. P.).

128 It is very remarkable that a German judge, an Italian crime author, an Australian novelist, and a French essayist describe this situation by similar sentences: Geert W. Mackenroth, (former) chair of the German Judges Association (Mackenroth, G. W. “Da gehen bei den Richtern die gelben Lampen an”. *ZRP*. 2002: 181): “Perhaps a judgment depends on the judge got up on the wrong side of the bed.” (Translation: H. P. P.); Sciascia, L. *Der Tage der Eule*. 3rd ed. Verlag Klaus Wagenbach, 2003, p. 28: “The application of law depends on the quality of coffee drunken by the man of the law” (Translation: H. P. P.); Pedley, E. C. *Dot and the Kangaroo*. Sydney, 1920, p. 65: “(A)nd whether they (the jury, H. P. P.) find you guilty or not, will depend on they are tired, or hungry, and feel cross”; cf. De Montaigne, M. *Essais* (1582). Translated by Hans Stilett. Frankfurt am Main: Eichborn Verlag, 1998, p. 281 f.: The decision of a judge depends on his gout, jealousy or trouble.

129 On the importance of will by legal decision-making see Römer, P., *supra* note 87.

130 See Klöhn, L.; Stephan, E. Psychologische Aspekte der Urteilsbildung bei juristischen Experten. In: Holzwarth, S., et al. (eds.). *Die Unabhängigkeit des Richters: richterliche Entscheidungsfindung in den Blick genommen*. Tübingen: Mohr Siebeck, 2009, p. 80 f; Carl von Clausewitz underlines the last point in his

An example of my own former judicial practice may illustrate this: “For the adoption of a child, the consent of parents is necessary” (section 1747 para. 1 German civil code [Bürgerliches Gesetzbuch, BGB]); under certain circumstances the court can substitute the consent of a parent (section 1748 BGB). We assume that a child lives one year in a family that wants to adopt it. The child’s mother uses drugs, works as prostitute and didn’t care the child two years ago. Does anyone really deny that a judge catholic crowded up in a well shaped family replace the consent of the mother rather than a judge from a single household? One cannot eliminate personal elements in decision-making either regarding objects or concerning methods.¹³¹ And in this respect it is noteworthy that recently Christian Tomuschat discovers in the decisions of BVerfG more and more the specific characteristic of the individual judges.¹³²

(3) The third category of extra-legal elements influencing the legal decision-making Wolfgang Hoffmann-Riem calls “bridge-concepts”.¹³³ Bridge-concepts are express gateways for other sciences, assumptions¹³⁴ or non-legal values. Such references of extra-legal elements (non-legal meanings) to the legal system are exemplary “efficiency” (economic concept), “morality” (ethic concept), or “building standards” (technological concept). Because many legal problems are connected to non-legal fields the respective non-legal fields become therefore legal relevance. This includes inherently the impact of extra-legal elements in the legal decision-making process.

(4) Not only legal concepts and legal values but also non-legal concepts and non-legal values are changing from time to time. In the 1950ies the BGH defined morality by the morality of the Catholic Church.¹³⁵ Because today the majority of German population is not longer a member of the Catholic Church and a large minority of German population believe in Allah we can translate morality not longer as catholic morality but as secular morality only.

This process Bernd Rüthers demonstrated more than 30 years ago exemplary regarding the word “Ehe” (marriage) in the “Ehegesetz” (Marriage Act) enacted by the German parliament in 1938.¹³⁶ This statutory law was into force during the Nazi-regime, the socialist regime of the German Democratic Republic, and the capitalistic regime of the German Federal Republic. Influenced by the different political opinions the word “marriage” was interpreted as:

description of the methods of the military science (Von Clausewitz, C. *Vom Kriege* (1832). London: Penguin Books, 1992, p. 65 ff).

131 Marquard, O., *supra* note 53, p. 174 f.; Wimmer, N., *supra* note 121, p. 436 f.

132 Tomuschat, Ch. Die Karlsruher Republik. *Die Zeit*. May 12, 2010.

133 Hoffmann-Riem, W. Methoden einer anwendungsorientierten Verwaltungsrechtswissenschaft. In: Schmidt-Abmann, E.; Hoffmann-Riem, W. (eds.). *Methoden der Verwaltungsrechtswissenschaft*. Baden-Baden: Nomos, 2004, p. 61 *et seq.*

134 See the distinction between the lawyers who came of age intellectually in the 19-sixties, on the one hand, and, the other hand, ones who came of age in the 19-nineties by Harry W. Arthurs (Arthurs, H. W., *supra* note 125).

135 Cf. Wittreck, F., *supra* note 33, p. 2.

136 Rüthers, B. *Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus*. Frankfurt am Main: Attenäum Fischer Taschenbuch Verlag, 1973.

- institution promoting the national community in the national-socialist area¹³⁷
- basically insoluble institution (in the sense of the catholic perception of marriage as sacrament) by the BGH¹³⁸
- institution educating children in sense of the socialist community.¹³⁹

This example shows at the same time that legal system is by no means a strict autopoietic, self-perpetuating system¹⁴⁰ because there is an intense coupling of legal system and other systems such as economics, politics, sports, and so on.¹⁴¹

(5) More and more we become familiar with the aspect of the “wisdom of feelings”.¹⁴² In our context it will say that by researching the real legal decision-making process we understand the importance of intuition of “right or wrong” both for the selection of the respective interpretation tools and for the result of the process too.¹⁴³

(6) The last aspect leads to the distinction between “Herstellung” (discovery) and “Darstellung” (justification) of decisions.¹⁴⁴ We know that justification of a decision is not congruent with discovery of this one.¹⁴⁵ Legal decision-makers must try to show the persons affected by their decisions how they found the decision; they must explain the way from the facts of the case and the law to the legal decision representing the valid reasons for any such decision¹⁴⁶.

3.3. Methodical Specifications vs. Key Qualifications

Whereas legal methodology seems to be the comprehensive toolbox for whole legal doctrine we note recently more and more specific legal methodologies¹⁴⁷ e.g. special

137 *Ibid.*, p. 404 *et seq.*, quoting RG, October 13, 1939, Z 158, 268.

138 *Ibid.*, p. 411 *et seq.*, quoting BGH, IV ZR 71/55, June 18, 1955, Z 18, 13.

139 Fischer, N.; Kuntze-Kaufhold, G., *supra* note 28, p. 19, quoting OGZ (DDR) 1, 72, December 1, 1950.

140 See to this construction Teubner, G. *Recht als autopoietisches System*. Frankfurt am Maine: Suhrkamp, 1989.

141 See to autopoiesis as “gradualized concept”, *ibid.*, p. 43.

142 Cf. Traufetter, G. *Intuition. Die Weisheit der Gefühle*. Rowohlt, 2007; Klein, S. *Die Glücksformel oder Wie die guten Gefühle entstehen*. 4 ed. Rowohlt, Reinbek, 2004, p. 33: “Scholars discover the intuition” (Translation: H. P. P.); see also Pascal, B., *supra* note 4 and Kant, I., *supra* note 6.

143 See Stegmaier, P. *Wissen, was Recht ist. Richterliche Rechtspraxis aus wissenssoziologisch-ethnografischer Sicht*. Wiesbaden: VS Verlag für Sozialwissenschaften, 2009, p. 92, 295

144 Cf. Lee, K. I., *supra* note 13, p. 236; this distinction is not new, cf. Schröder, J., *supra* note 82, p. 7, referring to Philipp Melanchthon.

145 Cf. Neumann, U. *Theorie der juristischen Argumentation*. In: Brugger, W.; Neumann, U.; Kirste, S. (eds.). *Rechtsphilosophie im 21. Jahrhundert*. Frankfurt am Main: Suhrkamp Verlag, 2008, p. 236; Varga, C. An Investigation into the Nature of the Judicial Process. In: Jakob, R.; Philipps, L.; Schweighofer, E.; Varga, C (eds.). *Auf dem Weg zur Idee der Gerechtigkeit. Gedenkschrift für Ilmar Tammelo*. Münster: Westf, 2009, p. 179: “(T)he logic of how one arrives at a decision differs from the logic of how one subsequently justifies the same decision.”

146 Cf. Bernhart, Ch., *supra* note 19, p. 25; Christof Bernhart claims the identification of all reasons leading to the decision – however, that is impossible (Bernhart, Ch., *supra* note 19, p. 102).

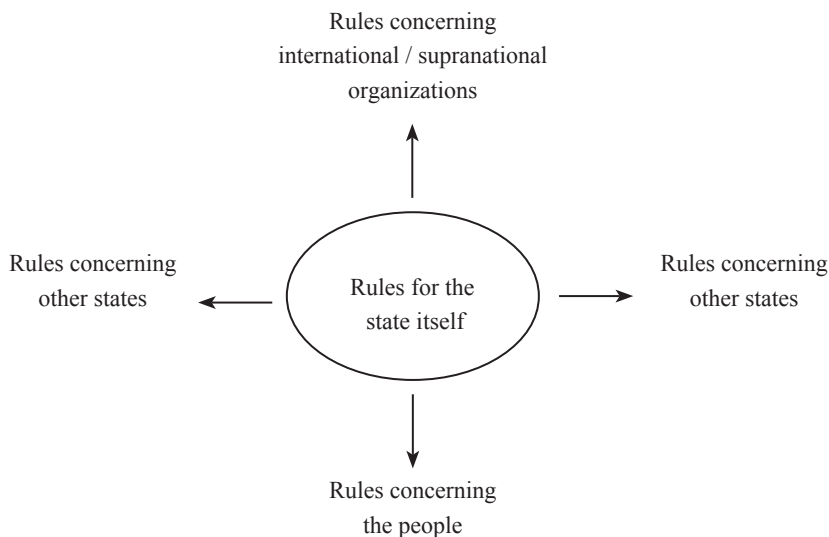
147 Cf. Jahn, M. *Pluralität der Rechtsdiskurse – Sektoralisierung der Methodenlehre*. In: Jestaedt, M.; Lepsius, O. *Rechtswissenschaftstheorie*. Mohr Siebeck GmbH & Co. K, 2008, p. 175: fragmentation of methodology.

methodologies interpreting constitution¹⁴⁸, private law¹⁴⁹, or public administration law¹⁵⁰. The reason for developing special methodologies should be the necessity of the inclusion of specific real problems of the respective real field into the interpretation and applications of the field-specific norms. This results of the wrong approach that legal methodology in principle excludes the questions of the facts. However, the opposite is necessary and correct: The real facts and problems are inherently part of the legal decision-making; thus it is not necessary to develop and introduce specific legal methodologies. That is the actual reason why Kent Greenawalt means for example “(v)irtually every problem about statutory interpretation also comes up in constitutional interpretation”.¹⁵¹ In other words, we do not need special legal methodologies.

The other way round, because specific knowledge becomes obsolete very fasten the only successful way training law students sustainably for the future is to acquaint them key skills¹⁵²; and the legal methodology for legal professionals is the most important of these.

3.4. Constitutionalization

With regard to the structure of a constitution we distinguish the followings basic functions of this one:



148 Cf. Stein, E.; Götz, F. *Staatsrecht*. 19th ed. Mohr Siebeck, 2004, § 6: Methodology of application the constitution.

149 Cf. Bitter, G.; Rauhut, T., *supra* note 97.

150 Cf. Schmidt-Aßmann, E.; Hoffmann-Riem, W. (eds.). *Methoden der Verwaltungsrechtswissenschaft*. Frankfurt am Main: Fischer, 2004.

151 Greenawalt, K., *supra* note 118, p. 289; similar Castan, M. *Constitutional Law*. Pearson Education Australia, 2008, p. 25: “The principles underlying constitutional interpretation are not very different from those underlying the interpretation of ordinary statutes.”

152 See Brinktrine, R.; Schneider, H. *Juristische Schlüsselqualifikationen: Einsatzbereiche - Examensrelevanz-Examenstraining*. Berlin: Springer, 2008; Ponschab, R.; Schweizer, A. (eds.). *Schlüsselqualifikationen: Kommunikation - Mediation - Rhetorik - Verhandlung - Vernehmung*. Köln: Schmidt (Otto), 2008.

This multi-functionality of constitution causes many problems; under legal-methodological aspects primarily the following:

(1) The constitution influences especially the interpretation and application of general clauses. In an early decision the BVerfG claimed the influence of constitution by interpreting general clauses.¹⁵³ On this way, the public constitution influences not only the non-constitutional public law but the private law too (third-party effect of the basic rights).¹⁵⁴ For example section 765a para. 1 Code of Civil Procedure (Zivilprozessordnung, ZPO) enables the courts to suspend the enforcement of a judicial decision if the enforcement would be “under special circumstances a social hardship to the culprit”. According to “the right to life” (Art. 2 para. 2 GG) the courts have applied cases of danger of suicide of the culprit as “social hardship”; consistently an enforcement decree of the respective judicial decision could not be realized.¹⁵⁵

(2) The regulation of the relations between governing institutions (legislation, administration, and jurisdiction) and those who are governed by them (people, enterprises) lead to a special legal method, the so-called “verfassungskonforme Auslegung” (interpretation in agreement with constitution): From several meanings of a wording the legal decision-maker has to choose this one conformal with the constitution.¹⁵⁶ This method prevents at the same time the declaration of incompatibility of the non-constitutional law with the constitution.

By these methods constitution and BVerfG become very influential to the non-constitutional law and the other courts because any “wrong” interpretation of non-constitutional law is automatically a violation of constitution.¹⁵⁷

These influences are inherently connected with two dangers: On the one hand, the trivialization of human rights¹⁵⁸ does not force the influence of the constitution on the long run; however, it can weaken the constitution.¹⁵⁹ On the other hand, the influence of the constitution to application of non-constitutional law increases the uncertainty of legal decision-making.¹⁶⁰ In the Mephisto-case was the main question whether the privacy-right of the German actor Gustav Gründgens weighed more than the freedom of publication of Klaus Mann¹⁶¹. In this question the six judges of BVerfG voted tie: three to three.¹⁶² This shows that even the highest judges could not solve by a majority decision the case-specific balance problem between two basic rights.

153 BVerfG, 1 BvR 400/51, January 15, 1958, Lüth, E 7, 198 (208): “Interpreting lower norms in the light of basic rights”.

154 Hailbronner, K.; Hummel, P.-H. Constitutional Law. In: Ebke, W. F.; Finkin, M. W. (eds.). *Introduction to German Law*. The Hague: Kluwer, 1996, p. 67.

155 BVerfG, 1 BvR 614/79, October 3, 1979, E 52, 214.

156 BVerfG, 1 BvL 104/52, May 7, 1953, E 2, 266 (282); Voßkuhle, A. *Theorie und Praxis der verfassungskonformen Auslegung von Gesetzen durch Fachgerichte*. Kritische Bestandsaufnahme und Versuch einer Neubestimmung. *AöR* 125. 2000.

157 Röhl, K. F.; Röhl, H. Ch., *supra* note 25, p. 670.

158 BVerfG, 1 BvR 921/85, June 6, 1989, E 80, 137 (168): Dissenting opinion of judge Dieter Grimm.

159 Röhl, K. F.; Röhl, H. Ch., *supra* note 25, p. 672.

160 Hager, G., *supra* note 29, p. 239.

161 Mann, K. *Mephisto. Roman einer Karriere*. Amsterdam, 1936.

162 BVerfG, 1 BvR 435/68, February 24, 1971, Mephisto, E 30, 173 (200).

3.5. Supranationalization

Supranationalization means that the EU Member States created an organization that includes all branches of government (legislation, administration, and jurisdiction) and creates partially its own law.¹⁶³ In the conflict between national and supranational law the national law is not invalid but inapplicable.

The strongest supranational influence on the German legal methodology comes from the European Court of Justice (ECJ).¹⁶⁴ In the case “*Brasserie du Pêcheur*” the ECJ made the following legal-methodical comment:¹⁶⁵ “Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article 164¹⁶⁶ of the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.” In other words: The ECJ does not use a special national legal methodology; it creates its own original European legal methodology by these principles:¹⁶⁷

- The act-clair-doctrine of the ECJ says that concepts with plain meaning free from doubt and clear may not be interpreted.¹⁶⁸
- The “*effet utile*” demands to prefer this meaning of a norm that achieves in the best way the common target of EU.¹⁶⁹
- Interpretation and updating the domestic law¹⁷⁰ compatible with the European law means that under several possible meanings of national norms that concept is valid what is compatible with the European law.

163 ECJ, C-6/64, July 15, 1964, *Costa/E.N.E.L.*: “By contrast with ordinary international treaties, the EEC treaty has created its own legal system ...”; ECJ, C-6/90, November 19, 1991, Frankovich, nr. 31: “It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony.”

164 Cf. Walter, K. *Rechtsfortbildung durch den EuGH – Eine rechtsmethodische Untersuchung ausgehend von der deutschen und französischen Methodenlehre*. Duncker & Humblot, 2009.

165 ECJ, C-46/93, March 5, 1996, nr. 27 (Emphasis: H. P. P.); a civil-law-lawyer asks the question, what is to interpret if the treaty contains no subject of interpretation?

166 In today’s version: Art. 19 para. 1 TEU.

167 See Itzcovich, G., *supra* note 84.

168 ECJ, C-283/81, October 6, 1982, CILFIT, nr. 16: “Finally, the correct application of community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved ...”.

169 BVerfG 2 BvR 2134, 2159/92, October 12, 1993, Maastricht, E 89, 155 (210); ECJ, C-6/90, November 19, 1991, Frankovich, nr. 33: “The full effectiveness of Community rules”; cf. Seyr, S. *Der effet utile in der Rechtsprechung des Europäischen Gerichtshofs*. Duncker & Humblot, 2007.

170 Cf. Höpfer, C. Über Sinn und Unsinn der sogenannten “richtlinienkonformen Rechtsfortbildung”. *JZ*. 2009; Weber, M. *Grenzen EU-rechtskonformer Auslegung und Rechtsfortbildung*. Baden-Baden: Nomos, 2010.

- No acceptance of limits of interpretation by wording (body of word) of European law because all member languages are equally valid.¹⁷¹
- Preferential treatment of the teleological method.¹⁷²
- Ensuring the uniform application of Community law by the national courts¹⁷³
- Principally, no recognition of filling of gap method because the supranational law has (allegedly) resolved all conceivable problems.¹⁷⁴

For example in *Lawrie Blum* ECJ interpreted the concept “public service” of Art. 39 para. 4 ECT¹⁷⁵ in a narrower sense than the German courts and opened the British *Lawrie Blum* the door to the German civil service,¹⁷⁶ which accepted until this decision only German applicants. By this way ECJ strengthened the influence of the ECT. In the consequence legal scholars are thinking more and more about a European legal methodology.¹⁷⁷

Here we observe between the ECJ and the EU Member States structurally the same problems as, below mentioned¹⁷⁸, between the national courts and the national parliaments: The more dynamic the interpretation of the ECJ as guardian of the European integration process the more it restricts the sovereignty of the EU Member States.¹⁷⁹

3.6. Internationalization

More and more law becomes international or global¹⁸⁰. Primarily, political reasons, economic integration, technological based communications bring national laws and legal systems into closer contact.¹⁸¹

171 ECJ, C-283/81, October 6, 1982, *CILFIT*, nr. 18 *et seq.*: “(I)t must be borne in mind that community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of community law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in community law and in the law of the various Member States. Finally, every provision of community law must be placed in its context and interpreted in the light of the provisions of community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.”

172 ECJ, C 6/64, July 15, 1964, *Costa/E.N.E.L.*: “(T)he terms and the spirit of the treaty”.

173 ECJ, C 404/06, April 17, 2008, nr. 22.

174 BVerfG, 2 BvR 687/85, April 8, 1987, E 75, 223 (243); Wieland, J. *Der EuGH im Spannungsverhältnis zwischen Rechtsanwendung und Rechtsgestaltung*. *NJW*. 2009, p. 1843.

175 Today Art. 45 para. 4 TFEU.

176 ECJ, C-66/85, July 3, 1986, *Lawrie Blum*.

177 Cf. Riesenhuber, K. (ed.), *supra* note 75; Ritter, T. *Neue Werteordnung für die Gesetzesauslegung durch den Lissabon-Vertrag*. *NJW*. 2010, 63(16).

178 Cf. 4.10.

179 Wieland, J., *supra* note 174, p. 1843; Ladeur, K.-H. *Europe as Transnational Law – Europe Has to Be Conceived as a Heterarchical Network and Not as a Superstate!* *GLJ*. 2009, 10(1): 1359 fn. 11; cf. Roth, G. H.; Hilpold, P. (eds.). *Der EuGH und die Souveränität der Mitgliedstaaten. Eine kritische Analyse richterlicher Rechtsschöpfung aus ausgewählten Rechtsgebieten*. Wien/Bern/Stuttgart: Linde/Stämpfl/Boorberg, 2008, too.

180 See Arthurs, H. W., *supra* note 125; Chesterman, S. *The Evolution of Legal Education: Internationalization, Transnationalization, Globalization*. *German Law Journal*. 2009, 10: 877–888.

181 Cf. Klabbers, J.; Sellers, M. (eds.). *The Internationalization of Law and Legal Education*. Dordrecht: Springer, 2008.

At a first glance Art. 31 para. 1 of the Vienna Convention seems to be relevant in this context. It provides “(a) treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” But these interpretation rules are relevant only for interpretation of international treaties¹⁸² actually not for interpretation of national rules under the aspects of international law. Since there is an important exemption of this principle for Germany:

The most important international influence to the German legal methodology has been developed by the ECtHR. Although the judgments of ECtHR do not bind the German legal decision-makers as strong as the judgments of the ECJ¹⁸³ the methodological statements of ECtHR influence the legal decision-making in Germany too.

For the German legal methodology it is important that the ECtHR follows primarily the methodology of common law system because its judgements are based only on the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In the case Dorothea Vogt for example ECtHR decided according to Art. 10 and 11 ECHR active membership in a communist party does not fail to comply with “duty of political loyalty” in sense of section 61 para. 2 Lower Saxony Civil Service Act.¹⁸⁴ This decision opened the German public service actually to all EU citizens. Similar to the ECJ the ECtHR prefers the teleological or dynamic interpretation method as “living instrument ... must be interpreted in the light of present day conditions.”¹⁸⁵

3.7. Pre-Effect of Norms not still Enacted

More and more norms yet formulated but not enacted will be treated quasi as orderly proclaimed norms. The famous example of such soft law was the Charter of Fundamental Rights of the European Union. Even at the time when the Charter was formulated and published¹⁸⁶ but not enacted the administrative and judicial practice followed this draft of Charter as an already enacted law¹⁸⁷.

3.8. Feminization/ Genderization

In the last time a feminist jurisprudence¹⁸⁸ is developing its own approach to legal methodology. Lena Foljanty and Ulrike Lembke point out that especially the historical

182 Cf. PCIJ, Case of the S.S. “Lotus” (*France v. Turkey*), PCIJ Ser. A, No. 10 (1927), September 7, 1927, p. 18: “International law governs relations between independent States”; look Linderfalk, U., *supra* note 15.

183 See BVerfG, 1 BvR 3262/07; 1 BvR 402/08, 1 BvR 906/08, October 14, 2004, Görgülü [interactive]. [accessed 02-09-2009]. <http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104.html>, nr. 31 *et seq.*

184 ECtHR, 17851/91, September 26, 1995, *Vogt v. Germany*, nr. 20.

185 ECtHR, 5856/72, April 25, 1978, *Tyler v. UK*, nr. 31.

186 European official journal 2000/C364/01; pay attention that the Charter is published in part C (for Communicatio), not in part L (for Legislatio) of the European official journal.

187 Cf. Rengeling, H.-W.; Szczekalla, P. *Grundrechte in der Europäischen Union. Charta der Grundrechte und Allgemeine Rechtsgrundsätze*. Heymanns, 2004, p. VII.

188 Cf. Foljanty, L.; Lembke, U. (eds.). *Feministische Rechtswissenschaft. Ein Studienbuch*. Baden-Baden: Nomos, 2006.

interpretation method can promote rather the man dominated interest than the interest of women.¹⁸⁹ Others claim the inclusion of reality in the legal decision-making process by checking whether a gender-neutral formulation in law has the same real results to men and women.¹⁹⁰

3.9. Impacts of Methodology of Common Law

3.9.1. Preliminary Remarks

Comparative law means “broaden and improve . . . national laws and legal institutions through comparison” with other legal systems.¹⁹¹ This become the more important the more globalization take place. Comparative law is an accepted legal method¹⁹² and Peter Häberle called them the “fifth legal interpretation tool”.¹⁹³ At the homepage of the Deans of Australian law schools one can read: “In a civil law system the law consists of codes and executive decrees. Opinions of judges . . . are persuasive only.”¹⁹⁴ That may be a good description for a survey but it does not cover the reality. For demonstrate the real power of courts in Germany here a quotation of the Federal Administrative Court (Bundesverwaltungsgericht, BVerwG): “An administrative act is invalid if it is created by agency by false application of statutory law. False is an application than if the interpretation of law is not correct. The correct interpretation will be mediated by the highest courts; their opinions are substantial for the agencies.”¹⁹⁵ The BVerfG confirmed this opinion¹⁹⁶ and consistently the BGH ruled liability for damages of public agencies if they decide without knowledge of the newest (relevant) precedents.¹⁹⁷ Klaus F. Röhl and Hans Christian Röhl point out that the so called “Leitsätze”¹⁹⁸ (syllabus’, guiding

189 Cf. Foljanty, L.; Lembke, U. (eds.). *Feministische Rechtswissenschaft. Ein Studienbuch*. Baden-Baden: Nomos, 2006, p. 22.

190 Cf. Wrase, M. *Gleichheit unter dem Grundgesetz und Antidiskriminierungsrecht*. In: Foljanty, L.; Lembke, U. (eds.). *Feministische Rechtswissenschaft. Ein Studienbuch*. Baden-Baden: Nomos, 2006, p. 87 *et seq.*

191 Klabbers, J.; Sellers, M., *supra* note 181, p. 1.

192 Möllers, Ch., *supra* note 14, nr. 40.

193 Häberle, P. *Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat – Zugleich zur Rechtsvergleichung als “fünfte” Auslegungsmethode*. *Juristenzeitung*. 1989, p. 915 *et seq.*

194 Australia as your study destination [interactive]. [accessed 07-07-2009]. <<http://www.cald.asn.au/slia/Australia.htm>>.

195 BVerwG, IV C 86/ 58, August 30, 1961, E 13, 28 (31): “Der Senat ist der Ansicht, daß die Beurteilung, ob ein Verwaltungsakt als rechtswidrig anzusehen ist, nicht vom Grade des Verstoßes bei der Auslegung des Gesetzes abhängig gemacht werden kann. Rechtswidrig ist derjenige Verwaltungsakt, welcher durch unrichtige Anwendung bestehender Rechtssätze zustande gekommen ist. Unrichtig ist eine Auslegung dann, wenn sie sich nach geläuterter Rechtsansicht als unrichtig erweist. Regelmäßig wird die ‚richtige‘ Erkenntnis durch höchstrichterliche Entscheidungen vermittelt; sie sind für die Behörden die maßgebliche Erkenntnisquelle.“

196 BVerfG, 2 BvR 1440/00, February 20, 2001, NJW 2001, 1121 (1123).

197 BGH, III ZR 207/57, March 23, 1959, Z 30, 19 (22); OVG Münster, VII A 1927/77, March 29, 1979, NJW 1979, 2061 (2063).

198 Recently Schluckebier, W. *Rechtsauslegung, Rechtsfortbildung, Rechtspolitik. Die Rolle des Richters zwischen Gesetz und Recht*. *ZRP*. 2010, Heft: 270, judge of the BVerfG, underlined that BGH “has given guidelines by interpretation”.

principles, or head notes) of the judgements of higher courts often are formulated in the same manner as norms; consistently the authors call them judge-made law¹⁹⁹ that has to be interpreted for their parts as norms²⁰⁰. In this respect it is noteworthy that the Imperial Court (Reichsgericht, RG) formulated the judicial cores of its decisions as questions²⁰¹, the BGH put them in front of its published judgments as “Leitsätze” (syllabus’), and recently Meinrad Handstanger called them “Rechtssätze” (legal rules).²⁰² Günter Hager notes that the jurisdiction handles leading cases as source of law.²⁰³

In the area of civil law, as it works in the continental-European countries, subject of legal methodology should be primarily written enactments by parliament (statutes) or agencies of the executive branch (orders) not developed by courts.²⁰⁴ However, for example the most used interpretation tool of the ECJ is the self reference.²⁰⁵ That is the reason why e.g. German law students must study not only codes and statutes but also judicial precedents.²⁰⁶ The (future) practitioners need knowledge of the legislation as well as the decisions of the courts. But there is in the German academic legal training no systematic introduction into the toolbox for finding and interpreting precedents.

In the areas of common law²⁰⁷, especially in the U.S., the UK, and Australia, primarily the courts develop the law by hard cases²⁰⁸ and create their own case law methodology.²⁰⁹

3.9.2. Convergence of Common Law and Civil Law Systems

Recently Uwe Wesel contrasted common law and civil law systems in the following manner:²¹⁰ “The common law is ... casuistic, case-law; the solution of legal problems

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- 199 Röhl, K. F.; Röhl, H. Ch., *supra* note 25, p. 571; similar Grigoleit, H. Ch., *supra* note 42, p. 67; Franz Peine, F.-J. *Allgemeines Verwaltungsrecht*. 9th ed. Heidelberg: C. F. Müller, 2008, nr. 163, notes simply: “Judge-made law ... Its existence and legitimacy are accepted.” (Translation: H. P. P.); Lee, K. I., *supra* note 13, p. 123, notes that judicial decisions can even change the legal system.
- 200 Cf. in this respect De Montaigne, M., *supra* note 128, p. 539: “Interpretation of interpretation” (Translation: H. P. P.) and below fn. 207.
- 201 Cf. RG, November 28, 1923, Z 107, 78.
- 202 Handstanger, M. Zur Anreicherung von Rechtsakten durch Kontextinformation am Beispiel gerichtlicher Entscheidungen. In: Jakob, R.; Philipps, L.; Schweighofer, E.; Varga, C. (eds.). *Auf dem Weg zur Idee der Gerechtigkeit: Gedenkschrift für Ilmar Tammelo*. Münster: Westf, 2009, p. 153; for common law system see Posner, R. A., *supra* note 57, p. 177: “A rule is like a precedent, ...”.
- 203 Hager, G., *supra* note 29, p. 211.
- 204 See *Ibid.*, p. 13.
- 205 Müller, F.; Chistensen, R. *Juristische Methodik Band II Europarecht*. Berlin, 2003, p. 229; see in this context Schmitt, C., *supra* note 57, p. 82: “The practice justifies itself.” (Translation: H. P. P.).
- 206 Cf. Schwabe, J. (ed.). *Entscheidungen des Bundesverfassungsgerichts Studienauswahl (Band 1-109)*. 8th ed. Hamburg, 2004; Pechstein, M. (ed). *Entscheidungen des Europäischen Gerichtshofs*. 5th ed. Mohr Siebeck, 2009; cf. concerning Switzerland Gauch, P.; Aepli, V.; Stöckli, H. (eds.). *Präjudizienbuch OR: Die Rechtsprechung des Bundesgerichts*. 7 ed. Zürich: Schulthess, 2009.
- 207 Posner, R. A., *supra* note 57, p. 83: “We must not confuse ‘common law with ‘case law’.
- 208 See the distinction between hard and soft (easy) cases by Lucy, W. Adjudication. In: Coleman, J.; Shapiro, S. (eds.). *The Oxford Handbook of jurisprudence & philosophy of law*. Oxford University Press, 2004, p. 208.
- 209 See Hager, G., *supra* note 29, p. 86.
- 210 Uwe Wesel, 2010, nr. 89.

is not the logical result of legal driven conclusion similar the continental, especially the German civil law.” It is very remarkable that a German legal professor describes 2010 in this way the different structures of legal decision-making process in the two legal systems. That shows the need to emphasize the convergence of both systems common law and civil law.²¹¹ Convergence means the unintentional development of similarities, in contrast to harmonization as intentional reaching of similar procedures or structures.

Of course, care must be taken in extrapolating other legal systems but we can learn from each other: The heading claims that in the area of common law (sometimes case law²¹² or judge-made²¹³ law) exist methods interpreting statutes²¹⁴, on the one hand, and that, on the other hand, lawyers in the civil law system are using case law methodology.²¹⁵ The main reasons for this convergence of the different law and methodology systems²¹⁶, despite different law-cultures, are the following:

On the one hand, in the common law systems politicians try to push their ideas and programs by statutory laws enacted by parliaments just like politicians in civil law systems.²¹⁷ On the other, hand no codification can answer all future legal problems; thus the courts must date up the norms in the civil law system similar to the courts in common law areas.

Last but not least ECJ²¹⁸ as well ECHR are setting case law; these courts are embedded in treaties-systems concluded by states of civil law and common law systems. Consistently a tans-systematic legal education is developing “integrate(d) civil and common law perspectives”.²¹⁹

211 See Hermida, J. Convergence of civil law and common law contracts in the space field. *UB Law Journal*. 2004-2005, p. 2 ff.

212 ECtHR, 27058/05, December 4, 2008, *Dogru v. France*: “The Court reiterates that, according to its case-law, ...”

213 Cf. Postema, G. J. Philosophy of the Common Law. In: Coleman, J.; Shapiro, S. (eds.) *The Oxford Handbook of jurisprudence & philosophy of law*. Oxford University Press, 2004, p. 588.

214 Cf. Bennion, F. *Statutory interpretation*. London: LexisNexis, 5th ed. 2008; the Australian Law Postgraduate Network notes: “In about half of all reported cases in Australia, the courts are required to rule on the meaning of legislation”; Australian Law Postgraduate Network [interactive]. [accessed 07-07-2009]. <<http://www.alpn.edu.au/node/72>>; James J. Spigelmann, Chief Justice of New South Wales, noted in 2001: “The law of statutory interpretation has become the most important single aspect of legal practice.” (*supra* note 84). Consistently, S. I. Strong suggests: “When doing legal research, first look to see if any statutes apply.” (Strong, S. I. *How to write law essays and exams*. 2nd ed. Oxford University Press, 2006, p. 9).

215 See Hager, G., *supra* note 29, p. 115; Legal Methods Group, 1997.

216 Similar Cook, C.; Creyke, R.; Geddes, R.; Hamer, D. *Laying down the law*. 7 ed. LexisNexis, 2009, p. 6; Summers, R. S., *supra* note 102, p. 4.

217 Cf. John F. Kennedy: “One reason that we give great weight to stare decisis in the area of statutory construction is that Congress is free to change this Courts interpretation of its legislation”; cited by Sinclair, M., *supra* note 87, p. 368.

218 ECJ, C-6/90, November 19, 1991, Frankovich, nr. 17: “Court’s case-law”.

219 Arthurs, H. W., *supra* note 125; Hartmann, B. J. 20 Jahre Rechtskulturschock. *JuS*. 2003, p. 310, registers a convergence of German and US legal academic education.

3.9.3. Details

(1) Because the case law system does not exist in pure form²²⁰ the there legal scholars and legal decision-makers developed statutory interpretation tools too:²²¹

- The literal rule has the same content as the above mentioned word-method in the German legal methodology.
- The mischief rule instructs legal decision-maker to interpret norms in a manner to prevent “mischiefs”.
- The rule “that the statute must be read as a whole” is corresponding to the systematic interpretation tool in the civil law system.²²²
- The purpose approach is comparable to the teleological method in the German legal methodology.²²³
- According to the golden rule of interpretation the legal decision-maker has to interpret laws in a manner that avoids obvious absurdities or inconsistencies.²²⁴ In others words, one accepts in both systems the method of consideration of the consequences. This tool is used by the BVerfG for example²²⁵ and explicitly justified by the Federal Supreme Court of Switzerland: ²²⁶ “The decision in the case Miniera indeed gives a correct interpretation of legal text. However, the practical consequences which arise from its confirmation and the logical application of the new definition of nonprofit economic merit further consideration.”

As in Germany²²⁷, there is except the method of conformity with higher law no priority of any interpretation tool²²⁸; the legal decision-maker has to weigh up the respective interpretation tools by the “global method of statutory interpretation”.²²⁹

(2) Since the German legal reality is shaped by case law too the legal decision-makers should be familiar with the methods to find, analyse, understand, follow,

220 Cf. Twining, W.; Miers, D., *supra* note 60, p. 311: “The great majority of reported cases nowadays relate to the interpretation of statutes or other rules in fixed verbal form.”

221 Consenting the Australian Law Postgraduate Network [interactive]. [accessed 27-07-2009]. <<http://alpn.edu.au/node/72>>; similar Davies, J.; Lawry, R. P. *Institutions and methods of the law: Introductory teaching materials*. West Pub. Co., 1982, p. 191 *et seq* as well as Günter Hager (Hager, G., *supra* note 29, p. 62; see further principles of interpretation in Twining, W.; Miers, D., *supra* note 60, p. 246 ff.

222 Hager, G., *supra* note 29, p. 63.

223 *Ibid.*, p. 71.

224 Cf. for the German law Deckert, M. R. *Folgenorientierung in der Rechtsanwendung*. C.H.Beck, 1995; Kramer, H. Zum Gebrauch und Missbrauch der juristischen methode zur Stabilisierung (nicht nur) totalitärer Systeme. In: Holzwarth, S., *et al.* (eds.). *Die Unabhängigkeit des Richters: richterliche Entscheidungsfindung in den Blick genommen*. Tübingen: Mohr Siebeck, 2009, p. 51; similar the fourth interpretation’s method at Blackstone, W., *supra* note 69.

225 See Umbach, D. C.; Clemens, T.; Dollinger, F.-W. (eds.). *Bundesverfassungsgerichtsgesetz. Mitarbeiterkommentar und Handbuch*. 2. Aufl. Heidelberg, 2005, § 78 nr. 47, with further references.

226 BGE 90 II 333 (336): “La décision rendue en la cause Miniera donne en effet une interprétation exacte du texte légal. En revanche, les conséquences pratiques qui résulteraient de sa confirmation et de l’application logique de la nouvelle définition du but non économique méritent un examen approfondi.”

227 Walz, Ch. Das Ziel der Auslegung und die Rangfolge der Auslegungskriterien. *ZJS*. 2010, p. 486 ff.

228 Summers, R. S., *supra* note 102, p. 263 f.

229 Hager, G., *supra* note 29, p. 71.

distinguish, or overrule the relevant precedents²³⁰ - although “there is no single method of determining the rule for which a given authoritative precedent is an authority.”²³¹

A binding precedent or *stare decisis* can be developed solely based on a principle²³² or by constitutional and statutory interpretation.²³³ Ronald Dworkin describes occurrence and effect of precedents this way:²³⁴ “Judges, when they decide particular cases at common law, lay down general rules that are intended to benefit the community in some way. Other judges, deciding later cases, must therefore enforce these rules so that the benefit may be achieved.” We can list the following steps:

- At the first step it is necessary to demonstrate students “(f)inding a case when you have incomplete information”²³⁵
- Then follows scrutiny whether the previous case is a precedent (binding authority) or not. One has to distinguish *ratio decidendi*²³⁶ and *obiter dicta*²³⁷ by the well-established standards.²³⁸
- In the next station one checks the “directly in point”. “Directly in point” is given when legal question and the facts²³⁹ of the resolved as well as of the pending case are congruent,²⁴⁰ if the cases distinguish²⁴¹ there is no reason following the earlier judicial decision.²⁴²
- Last but not least a precedent is not binding when it is or became wrong.²⁴³

230 See Hay, P. *Law of the United States*. 2nd ed. Verlag C.H. Beck, 2005, nr. 19 *et seq*; Milne, S.; Tucker, K., *supra* note 56, p. 91: “researching case law”.

231 Hart, H. L. A., *supra* note 93, p. 134.

232 Cf. the “invention” of “informational self-determination” in BVerfG, 1 BvR 209, 269, 362, 420, 440, 484/83, December 15, 1983, Volkszählung, E 65, 1.

233 Greenawalt, K., *supra* note 118, p. 268 as well as Günter Hager (Hager, G., *supra* note 29, p. 72 *et seq*); to the different types of case law see Dörrbecker, A.; Rothe, O. *Introduction to the US-American Legal System for German Speaking Lawyers and Law Students*. Vol. 1. Alpmann und Schmdidt, 2002, p. 4 *et seq*.

234 Dworkin, R. *Taking rights seriously*. Harvard University Press, 1978, p. 110.

235 The Australian Law Postgraduate Network [interactive]. [accessed 27-07-2009]. <<http://alpn.edu.au/finding-cases>>.

236 Reason of deciding or holding the case; see closer Twining, W.; Miers, D., *supra* note 60, p. 305 ff.

237 Things said by the way; cf. the fundamental critics of *obiter dicta* actually the constitutional judge Johannes Masing in the judgment of the BVerfG, 1 BvR 3262/07; 1 BvR 402/08, 1 BvR 906/08, July 30, 2008, Rauchverbot, smoking ban [interactive]. [accessed 31-08-2009]. <http://www.bundesverfassungsgericht.de/entscheidungen/rs20080730_1bvr326207.html>, nr. 185.

238 Cf. The Australian Law Postgraduate Network [interactive]. [accessed 27-07-2009]. <<http://alpn.edu.au/node/60>>.

239 See to this point Lepsius, O. *Themen einer Rechtswissenschaftstheorie*. In: Jestaedt, M.; Lepsius, O. (eds.). *Rechtswissenschaftstheorie*. Mohr Siebeck GmbH & Co. K, 2008, p. 44.

240 Cf. Postema, G. J., *supra* note 213, p. 597.

241 Hager, G., *supra* note 29, p. 93, underlines the relevance of the facts of the case for analysis of *ratio decidendi*.

242 This is nothing more than a comparison between the firm and the case to be decided; cf. in this context, R. Regeln zur Ausrichtung der Erkenntniskraft (1622–28) In: *Descartes, selected and presented by Stephan Meier-Oeser*. München: Diederichs, 1997, p. 69 f., who generally stressed comparison as very important scientific method.

243 Cf. the clear statement of the US.SC in *Lawrence v. Texas*, 539 U.S. 558 (2003): “Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”

In this area of legal methodology we note in Germany a big hole²⁴⁴; thus, on this field, we can learn so much from common law methodology.

3.10. Claims to Closer Loyalty of Decision-Making with Legislature

Recently Bernd Rüthers, one of the today most famous German legal methodologist, claimed that courts overrule the parliaments²⁴⁵ by legal methodology leaving more and more the wording (body of text) of the statutes enacted by legislature. The more extensive the interpretation of the courts the more they limit sovereignty of parliaments. And we note a judicial activism rather than judicial self-restraint.²⁴⁶ On this way courts offend primarily against the separation of powers (checks and balance) and also against the constitution.²⁴⁷ Yet, 1957 René Marcic formulated the thesis: From legislation-government to jurisdiction-government.²⁴⁸ Today, many people assume the BVerfG as the actual German legislature;²⁴⁹ Walter Grasnack, a former district attorney, said literally: Judges are “the Lords of the legal system”.²⁵⁰ That is perhaps one of the reasons why courts often declare a law-updating as “pure” wording-interpretation.²⁵¹ The former president of the BGH, Günter Hirsch, pointed out that the courts avoid the assignment of their respective interpretative tools to certain scientific categories.²⁵²

No statutory law can determine completely the legal decision²⁵³; thus, the further development of legal system is one of the duties of courts.²⁵⁴ Nevertheless, it is very remarkably that in a recent decision of the BVerfG in 2009, concerning the limits of judicial updating the law, three of eight judges did not agree with the result of the majority of the senate with regard to the limits of judicial updating the law; four of eight judges did not agree with the opinion of the five to three majority of the senate.²⁵⁵ Since

244 Similar Möllers, Ch., *supra* note 14, nr. 28.

245 The following remarks are valid concerning relationship between public administration and legislation as well as between jurisdiction and norm-setting public administration; cf. in this context Robert French speaking of rationality administration as “good administrative decision-making” (French, R. Administrative law in Australia: Themes and values. In: Groves, M.; Lee, H. P. (eds.). *Australian Administrative Law: Fundamentals, Principles and Doctrines*. New York: Cambridge University Press, 2007, p. 29).

246 See Zaiden Benvindo, J., *supra* note 35.

247 Rüthers, B. Fortgesetzter Blindflug oder Methodendämmerung der Justiz? Zur Auslegungspraxis der obersten Bundesgerichte. *JZ*. 2008. Because the tone of his essay is unusually in the framework of the reserved juristic language I translate the title: “Continued blind flight or twilight of methodology of the courts? Concerning the practical interpretation by the highest Federal courts”.

248 Marcic, R. *Vom Gesetzesstaat zum Richterstaat*. Wien: Springer, 1957.

249 Dausend, P.; Sussebach, H. Draußen im Lande. *Die Zeit*. August 6, 2009, p. 13.

250 Grasnack, W., *supra* note 28, p. 12.

251 See to this problem *supra* note 88.

252 Hirsch, G. Der Richter im Spannungsfeld von Erster und Dritter Gewalt, 2003 [interactive]. [accessed 01-09-2010]. <http://www.zeit.de/reden/bildung_und_kultur/hirsch_bls>, III. 3. b); clearer Grigoleit, H. Ch., *supra* note 42, p. 73 *et seq.*, describing the permanent practice of courts to avoid disclosure of inconsistency of rules.

253 Möllers, Ch., *supra* note 14, nr. 23.

254 BVerfG, 2 BvR 2044/07, January 15, 2009 [interactive]. [accessed 21-06-2009]. <http://www.bundesverfassungsgericht.de/entscheidungen/rs20090115_2bvr204407.htm>, nr. 57.

255 Three dissenting votes of judges Andreas Voßkuhle, Lerke Osterloh, Udo Di Fabio, *supra* note 256, nr. 95 *et seq.*, and one concurring vote of judge Michael Gerhardt, *supra* note 256, nr. 146 *et seq.*

“questions of legal methodology are questions of power and of constitutional powers”²⁵⁶ we are witness of a very hard current discussion.²⁵⁷ Of course, the legislature cannot anticipate all future problems and also a statute becomes less satisfactory over the years; and language is, at best²⁵⁸, a limited tool. In a democratic system only the parliament has a direct democratic authorization; only this authorization justifies setting general rules in a political democratic process. Setting such rules by other institutions bears the danger of decisionism²⁵⁹.

One way to bind jurisdiction closer to legislature could be setting interpretation acts like this one in Australia.²⁶⁰ This resembles a little the attempt of Justinian (482 to 565) in the sixth century to avoid the problem by “a conclusive statement of the law that required no interpretation”²⁶¹. Whether a law needs interpretation or not²⁶², whether a definition settled by parliament is clear or not; these questions will be answered by the respective legal decision-maker not by the norm-setting instance.

3.11. Second Interim Results

At long last it seems that legal methodology is not very successful leading legal decision-making closer to legislature. In this respect it is more than remarkable that in the anthology “Legal philosophy in the 21st century“, edited by a famous German publishing-house for scientific literature, a theorist summarizes the result of his study on the topic “(w)hat lawyers really do” in this way: “You must develop a sense for what is right. ... A sense that cannot be described in detail“; he summed up his thoughts: “In the end jurisprudence is aesthetics“.²⁶³

I think this is a somewhat poor outcome of this high-level scientific discussion.²⁶⁴ On the one hand, this result of an approach intensive, expensive, and long is pretty much the same that already Friedrich Schleiermacher argued in the first third of 19th century: “Interpretation is an art.”²⁶⁵ On the other hand, it shakes the scientific reputation of

256 Rüthers, B., *supra* note 247, p. 447.

257 Cf. Möllers, Ch. Nachvollzug ohne Maßstababbildung: richterliche Rechtsfortbildung in der Rechtsprechung des Bundesverfassungsgerichts. Anmerkung zu BVerfG, B. v. 15.01.2009 - 2 BvR 2044/07. *JZ.* 2009; Rüthers, B. Rechtswissenschaft ohne Recht? *MJW.* 2011.

258 Cf. Foucault, M., *supra* note 48, p. 156, citing Anne-Robert-Jacques Turgot, that “the meaning of the words is ‘the safes light, that one can question.’“ (Translation: H. P. P.).

259 See the result of decisionism by Schmitt, C. Der Führer schützt das Recht. *DJZ.* 1934.

260 Listed in Australian Law Postgraduate Network [interactive]. [accessed 27-07-2009]. <<http://www.alpn.edu.au/node/72>>.

261 Wacks, R. *Law. A very short introduction.* Oxford University Press, 2008, p. 7.

262 This is perhaps the background of Friedrich Carl von Savigny’s and Friedrich Schleiermacher’s starting point that all texts – alleged clear or unclear – need interpretation; Huber, U., *supra* note 66, p. 5.

263 Lege, J. Was Juristen wirklich tun. Jurisprudential Realism. In: Brugger, W.; Neumann, U.; Kirste, S. (eds.). *Rechtsphilosophie im 21. Jahrhundert.* Frankfurt am Main: Suhrkamp Verlag, 2008, p. 226 (Translation: H. P. P.; emphasis in original).

264 Similar Grasnick, W. Desaster und Desiderata. *Myops.* 2010, 8: 53.

265 Schleiermacher, F. *Hermeneutik und Kritik* (1838). Frank, M. (ed.). Frankfurt am Main: Suhrkamp, 1977, p. 80.

jurisprudence.²⁶⁶ Max Weber meant: “The dilettante differs from the expert ... only in lack of firm and reliable work procedure.”²⁶⁷ But what distinguishes academic trained legal decision-makers from dilettantes if we cannot even describe “(w)hat lawyers really do”? How we can claim the scientific character of jurisprudence that may suggest in the end “the rule of thumb”.²⁶⁸ Perhaps in reality “the rule of thumb prevail(s) over formal knowledge”²⁶⁹?

4. The Pragmatic Switch from Legal Methodology to New Teaching Instruments – the Didactic Turn

Because the legal methodology is not able to offer a remedy solving these problems even using its best endeavours²⁷⁰ and there is a fundamental ignorance of production of (legal) decisions²⁷¹ we must look for help elsewhere.

We start from three basic issues:

- First: The idealistic vision of perfection runs always beyond anything we can achieve.
- Second: We live with the insoluble problem of “no one right answer”.²⁷²
- Third: Pragmatism lead us the way to make the most of what is to hand.

The pragmatic response is to develop a better reality orientated education of future generations of legal decision-makers. Thus let’s optimize legal teaching and education. This way does not lead from science to crude practice. In the terminology of Georg Wilhelm Friedrich Hegel we do not teach direct perception instead thought and concept²⁷³; we teach students theoretical concept as well as immediate perception. In this respect remembering a sentence of Wolfgang Ernst is very helpful: “For jurisprudence academic teaching is not a subordinate matter, rather a constitutional point.”²⁷⁴ On the other hand, Daniel Saam recently noted that “nobody will doubt that quality of legal

266 To the importance of rationality of legal methodology for the science-quality of jurisprudence cf. Petersen, J. *Max Webers Rechtssoziologie und die juristische Methodenlehre*. Walter de Gruyter, 2008, p. 41.

267 Weber, M., *supra* note 117, p. 1022.

268 Cf. Richli, P. *Interdisziplinäre Daumenregeln für eine faire Rechtsetzung. Ein Beitrag zur Rechtsetzungslehre im liberalen sozialen und ökologisch orientierten Rechtsstaat*. Helbing & Lichtenhahn, 2000.

269 Macintyre, S. *A concise history of Australia*. 3. Aufl. Verlag: Cambridge University Press, 2009, p. 153.

270 See this aspect at Luttermann, Claus: *Juristische Analyse von Ökonomie, Staat und Gesellschaft. ZRP*. 2010, p. 3.

271 Schmid, W. *Philosophie der Lebenskunst. Eine Grundlegung*. Frankfurt am Main: Suhrkamp, 1998, p. 200.

272 Marquard, O., *supra* note 53, p. 184; Hoffmann-Riem, W. *Zwischenschritte zur Modernisierung der Rechtswissenschaft. JZ*. 2007, 62(13): 648. How hard is to overcome the binary opposition of “right or wrong” demonstrates Günter Hilg, 2010, p. 122: On the one hand, he describes the imagination of the objective right answer as an illusion, on the other hand, he formulates: “Every legal system is an unity that offers only one right answer to an legal question.” (Translation: H. P. P.).

273 Cf. Hegel, G. W. F., *supra* note 22, Preface.

274 Ernst, W. *Gelehrtes Recht – Die Jurisprudenz aus der Sicht des Zivilrechtslehrers*. In: Engel, C.; Schön, W. (eds.). *Das Proprium der Rechtswissenschaft*. Tübingen: Mohr Siebeck, 2007, p. 8 (Translation: H. P. P.).

education is very important for the operation of rule of law and that legal education will determine legal methodology and vice versa.”²⁷⁵

We can call this pragmatic switch from legal methodology to new teaching instruments the didactic turn of legal teaching.²⁷⁶ In fact we note in the last time in Germany an overall increasing interest to didactic topics in the field of academic legal education.²⁷⁷

4.1. Mandatory Courses in Legal Methodology and Legal Theory

Since there is no way to avoid or to solve the problem of uncertainty of legal decision-making by legal methodology we must look for other paths to minimize the problem at least. However, we must accept and teach it and not dissimulate it; we must “soften the claims of rationality”²⁷⁸.

Within the framework of the Bologna process²⁷⁹ study-programs must be modularised and every module has to be examined. Involving the legal academic education in the Bologna process a mandatory module “legal methodology and legal theory” for all law students should show the students the legal methodology, on the one hand, and the real conditions of legal decision-making, on the other hand.

The basic discipline “theory of law” can serve to legal doctrine as critical reflection as well as practical help.²⁸⁰ But this is not first of all the intention of the here suggested idea of a mandatory module. The main background of this suggestion is the following: The legal methodology, as taught today at Germans universities, shows hardly relations

275 Saam, D. Vorwort. In: Ischdonat, J. *Die deutsche Juristenausbildung unter dem Einfluss des Bologna-Prozesses. Eine kritische Analyse der aktuellen Reformmodelle*. Optimus Mostafa Verlag, 2010, p. VIII; it is very interesting that Klöhn, L.; Stephan, E. (*supra* note 130, p. 93) suggest for practicing judges further trainings.

276 Reiß, M. Quo vadis Fachdidaktik? Tagungsbericht “Exzellente Lehre im juristischen Studium: Auf dem Weg zu einer rechtswissenschaftlichen Fachdidaktik”. *ZJS*. 2010, 4: 580, calls it a change of perspective in teaching; Fischer, N.; Kuntze-Kaufhold, G., *supra* note 28, p. 18, speak of “paradigm shift”; similar for Ireland: Cf. Paris, M.-L.; Lawrence, D. Legal Education in Ireland: A Paradigm Shift to the Practical. *GLJ*. 2010: “A Paradigm Shift to the Practical”.

277 Take, for evidence, the teaching-price for legal professor Rolf Sethe in 2008 (cf. Sethe, R. Zehn Thesen zu guter Hochschullehre, JZ 2008 [interactive]. [accessed 30-07-2010]. <http://stifterverband.info/wissenschaft_und_hochschule/lehre/ars_legendi/rolf_sethe_zehn_thesen_zu_guter_hochschullehre.pdf>); the Conference of DAAD, Stifterverband für die Deutsche Wissenschaft and HRK: “New Perspectives of Legal Education in Europe” in Berlin; the conference of University Hamburg “Exzellente Lehre im juristischen Studium: Auf dem Weg zu einer rechtswissenschaftlichen Fachdidaktik” (cf. Reiß, M., *supra* note 276; Steffahn, V. Tagungsbericht: “Exzellente Lehre im juristischen Studium: Auf dem Weg zu einer rechtswissenschaftlichen Fachdidaktik“ am 24. und 25. 3. 2010 im Hamburg. *Bucerius Law Journal*. 2010); the foundation of the “Vereinigung deutscher Rechtslehrender” (German Law Teachers Association; *supra* note 102) – the last three events took place in 2010.

278 Vesting, T. *Rechtstheorie*. Beck Juristischer Verlag, 2007, p. 126 (Translation: H. P. P.).

279 Beginning with the Bologna declaration of June 19, 1999 [interactive]. [accessed 03-01-2011]. <http://www.ond.vlaanderen.be/hogeronderwijs/bologna/documents/MDC/BOLOGNA_DECLARATION1.pdf>.

280 Jürgen Habermas generally distinguishes sciences in “science in the sense of practical philosophy” and “science in the sense of empirical-analytic procedure” (Translation: H. P. P.) (Habermas, J. *Theorie und Praxis. Sozialphilosophische Studien*. Frankfurt am Main: Suhrkamp Verlag, 1971, p. 63).

between legal basic sciences and legal methodology or legal decision-making.²⁸¹ The statement of a former student of public administration that she is “free of prejudices” may demonstrate how little²⁸² students learn the real circumstances of legal decision-making; more than 300 years after John Locke’s observation of the inherent prejudices of decision-makers²⁸³ a very remarkable opinion.

Learning real circumstances of legal decision-making does not automatically result rationality of legal decision-making but we should remember Don Quixote: “The beginning of health lies in knowing the disease and in the sick man’s willingness to take the medicines which the physician prescribes ...; besides, sinners of discernment are nearer amendment than those who are fools”.²⁸⁴

It will say that the first step to minimize irrationality of legal decision-making²⁸⁵ is to explain future legal decision-makers just this irrationality.²⁸⁶ For example “Auslegung” (interpretation) is more than only “Enthüllung”²⁸⁷ (disclosure/ uncovering) of the content of a wording. If we have explained this irrationality, than we can try to eliminate or minimize undesirable factors of legal decision-making²⁸⁸ ; perhaps by teaching and learning techniques regulating emotions.²⁸⁹

4.2. Learning by Practical Experience – Bringing Practice in the Law School

How just mentioned, German law students basically learn (only) the classic interpretation tools without relation to the real facts of the case and to real people needing legal advice. In contrast, the U.S. system offers law students by law clinics the opportunity to learn the interplay of legal questions and facts of issue as well as the influence of real clients to legal decision-making. In Germany more and more academic teachers note in the last time the lack of legal clinics at law schools.²⁹⁰

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- 281 Hirtz, B. Vom anwaltlichen Wortgebrauch. In: Soudry, R. (ed.). *Rhetorik – eine interdisziplinäre Einführung*. Heidelberg: C.F.Müller, 2006, p. 85.
- 282 Lepsius, O., *supra* note 239, p. 2, talks of the “curricular zero-value of legal theory”.
- 283 See *supra* note 5.
- 284 De Cervantes, M. *Don Quixote*. Part 2 (1615), translated by John Ormsby, chapter LX, of what happened Don Quixote on his way to Barcelona.
- 285 In this context it is interesting that Helge Dedek starts from the Western European tradition of rational legal decision-making (Dedek, H. Die Schönheit der Vernunft – (Ir-)Rationalität von Rechtswissenschaft in Mittelalter und Moderne. *RW*. 2010, 1(Heft): 58) and ends with the acknowledgment of the irrational, just myth part of these tradition of rationality (p. 82); to the concept of irrationality of legal decision-making see Launhardt, A. *Topik und Rhetorische Rechtstheorie. Eine Untersuchung zur Rezeption und Relevanz der Rechtstheorie Theodor Viehwegs*. P. Lang, 2010, p. 11, 127.
- 286 Juliano Zaiden Benvindo claims the “disclosing the metaphysics hat may exist behind the concept of rationality” (Zaiden Benvindo, J., *supra* note 35, p. XVII); cf. Joas, H. Unterwegs ohne Illusionen. *Die Zeit*. May 12, 2010: A realistic point of view makes a successful behaviour more probable.
- 287 Von Savigny, F. C., *supra* note 69, p. 319, used this word as description of the interpretation-process.
- 288 Cf. this attempt by Dalai Lama. *Der Sinn des Lebens*. Kreuz Verlag, 2009, p. 99.
- 289 Cf. such techniques at *ibid.*, p. 210.
- 290 Bucker, A.; Woodruff, W. A. Clinical Education – eine Option für die deutsche Juristenausbildung? *JuristenZeitung*. 2008, 63(22); Wreesmann, A. K. *Clinical Legal Education. Unentgeltliche Rechtsberatung durch Studenten in den USA und Deutschland*. Verlag Dr. Kovac, 2010.

Already, the Romans knew that success of learning depends on *ars* (general knowledge), *ingenium* (individual talent), and *usus* (learning by doing).²⁹¹ We know not only that “the meaning of a word is its use in the language”²⁹² but also that practical training is better than abstract learning only. As the result the theory of situated learning claims to bring closer the learn situation to application’s situation²⁹³; this is important for teaching law all the more than “law is a participant-orientated discipline.”²⁹⁴

Introducing the legal clinic system in the German legal academic education/ training will not replace the theoretical lectures; however, we want a mixture of theoretical knowledge in legal doctrine, legal history, legal philosophy (theory and ethics), legal methodology and practical skills (creative problem-solving, factual investigation, clear communication, advice, negotiation, litigation, administrative and service²⁹⁵ skills)²⁹⁶.

Typically U.S. law schools will be subdivided into:

- Simulations, especially moot courts
- Live clients Clinics
- Externships.²⁹⁷

The Berlin Law School (BLS) started in 2004 the project “Students Advise Students in Legal Affairs” (SASLA). Because during the legal studies at BLS externships are mandatory and we do not train future judges or advocates we prefer the model of live client clinic. But we did not copy the US-model, rather we developed SASLA. The best way to explain the system of SASLA is to present briefly the three steps of SASLA:

(1) *The first conversation*

- *At specified time every week students of the university (clients) have the opportunity to contact SASLA-students in the student information center.*
- *The first meeting with the client is carried out by two SASLA-students.*
- *The client signs a consent form and accepts the conditions of SASLA; SASLA itself is bound to secrecy.*
- *The SASLA-students record general information during the first interview. In addition there is a basic form that is to be filled out by client. In this basic form the most important facts are collected: name of the client, day of the consultation,*

291 Arweiler, A. H. Alles andere als Herrscherlob. Zum Verhältnis von Literatur und Politik in augusteischer Zeit. In: *2000 Jahre Varusschlacht – Imperium*. Stuttgart: LWL Römermuseum Haltern am See, 2009, p. 56.

292 Wittgenstein, L. *Philosophical Investigations*. 2nd ed. Oxford: Blackwell, 1958, Nr. 43.

293 Mandl, H.; Kopp, B.; Dvorak, S. Aktuelle theoretische Ansätze und empirische Befunde im Bereich der Lehr-Lern-Forschung. – Schwerpunkt Erwachsenenbildung – 2004 [interactive]. [accessed 31-08-2009]. <http://www.die-bonn.de/esprid/dokumente/doc-2004/mandl04_01.pdf>, p. 10.

294 Twining, W.; Miers, D., *supra* note 60, p. XV.

295 To service-learning see Jaeger, M.; In der Smitten, S.; Grütmacher, J. *Gutes tun und gutes Lernen: Bürgerschaftliches Element und Service-Learning an Hochschulen*. Hannover: HIS, 2009.

296 Cf. American Bar Association Section of Legal Education and Admissions to the Bar (ed.). *Legal Education and Professional Development. An Educational Continuum. Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*. 1992 (MacCrateReport), Part I Chapter 5 B; Fine, T. M. Reflections on U.S. Law Curricular Reform Part I/II. *German Law Journal*. 2009, 10, B. II.; Maxeiner, J. R., *supra* note 17, p. 42.

297 Bückler, A.; Woodruff, W. A., *supra* note 290, p. 1071.

name of the SASLA-students, register number, the most important points of the legal problem, and so on.

- At last an appointment for the (second) consultation has to be made with the client.
- (2) *Finding solutions within the project*
- On the next project meeting the mentioned SASLA-students present the case to the other project participants.
 - Within the group the case is discussed and tried to be solved; the library and the internet are used for required research.
 - The two SASLA-students work out a written proposal.
 - The project's professor supports the group and has a monitoring function.
 - If the case is solved, the legal advice in the narrow sense follows.
- (3) *Consultation of the client*
- At the appointed time the SASLA-students explain the elaborated legal suggestions for a solution to the client and advise for further procedure.
 - Finally the SASLA-students point out the non-binding character of the legal suggestions.

The advantages of SASLA are obvious:

- In this system students find legal relevant material not only²⁹⁸ in statutes, law reports, legal essays, and textbooks – in printed and digital versions – rather in reality anywhere: fellow students have legal problems while driving car, hiring flats, buying laptops via internet or looking for grants. Thus the SASLA-students experience law as part of daily live.²⁹⁹
- SASLA brings the real environment, the practice, directly into university; it makes in so far superfluous experimental games or virtual reality.³⁰⁰
- The students train not only the communication skills such as listening, asking questions, conducting of negotiations, arguing solution-orientated or presenting proposals for solution; rather, they develop empathy³⁰¹ to the clients which are their fellow students.
- Whereas in a constructed exam it's just the argumentation that counts – not the answer; in reality the result matters only³⁰².

298 But see Christopher Columbus Langdell (1826–1906): "(L)aw is a science, ... and all the available materials of that science are contained in ... books." (cited by Chesterman, S., *supra* note 180).

299 See Arthurs, H. W., *supra* note 125; Holmes, O. W. Jr., *supra* note 96, p. 1. "The life of the law has not been logic: it has been experience."

300 Cf. Horan, J.; Taylor-Sands, M. Bringing the court and mediation into the classroom. *Legal Educational Digest*. 2009, 17(1): 46.

301 Cf. Breithaupt, F. *Kulturen der Empathie*. Frankfurt am Main: Suhrkamp Verlag, 2009; Limbach, J. Bildung und kulturelle Differenz. In: Schlüter, A.; Strohschneider, P. (eds.). *Bildung? 26 Thesen zur Bildung als Herausforderung im 21. Jahrhundert*. Berlin: Berlin-Verl., 2009, p. 85, the former president of the BVerfG, underlines empathy as a central point in future training-programs.

302 See De Montaigne, M., *supra* note 128, p. 285: "I prefer to focus on the outcome rather than on justification." (Translation: H. P. P.)

- The students feel³⁰³ the influence of their intuition³⁰⁴ by looking for statutory and judicial materials as well as interpretation tools; they see the sequence of rational legal making-decision as mere ideal-typical description – not as realistic instruction.
 - Last but not least students learn by practice handling facts and applying abstract rules as well as managing digital databanks of statutes and precedents.³⁰⁵
- The more students train these skills the more they become familiar with them.³⁰⁶

4.3. Transnational Relationships

SASLA developed at Berlin Law School is an adaptation of legal clinic³⁰⁷ as well as legal aid system in U.S.³⁰⁸ So SASLA has a transnational origin. It wants to pass its ideas to other law schools in other countries and to discuss with them the SASLA system hoping to get back new impacts from abroad. Thus in the last two years SASLA made agreements with the faculties of law of the Mykolas Romeris University in Vilnius and the Corvinus University in Budapest as universities in areas of civil law. But contact with law schools in countries of common law can be helpful for German students too; there BLS-students can optimize the skills of interviewing clients³⁰⁹, searching for leading cases³¹⁰, or learning the relevance of the facts of the case for track down the ratio decidendi of the leading case.

4.4. Third Interim Results

(1) In a compulsory module including exam law students should learn legal methodology in a realistic sense with connections to decision-theory that demonstrates the inherent irrationality of legal decision-making process. Acknowledging the boundaries of rational legal decision-making³¹¹ is important; thus students must internalize these boundaries.

(2) The SASLA-System provides students the opportunity “acting with responsibility for clients”.³¹²

303 Lord Goff, cited by Hager, G., *supra* note 29, p. 290, speaks of “an instinctive feeling for the result of that case”.

304 Bernhart, Ch., *supra* note 19, p. 31, calls this the “creative part” of decision making that begins yet by perception of the wording (the same, p. 39).

305 See Muntejewerff, A. ICT in Legal Education. *GLJ*. 2009.

306 Cf. Dalai Lama, *supra* note 288, p. 106: “There is nothing that becomes not easier by increasing familiarity” (Translation: H. P. P.).

307 Grossman, C., *supra* note 87, p. 23, points out that legal clinic system is not mandatory for U.S. law students.

308 Prüm, H. P. *Integration von Legal Aid und Legal Clinic in deutsche Hochschulen: Studierende beraten Studierende in Rechtsangelegenheiten*. apf 2007.

309 Cf. Lauchland, K. A.; Le Brun, M. J. *Legal Interviewing: theory, tactics and techniques*. Butterworths, 1996.

310 Cf. Rebollo, R. One More Look at Shepard’s Citation Service: A Private Law Librarian’s Perspective, 1999 [interactive]. [accessed 06-01-2009]. <<http://www.llrx.com/features/shepards.htm>>.

311 Zaiden Benvindo, J., *supra* note 35, p. XIX.

312 Sullivan, W. M.; Colby, A. Wegner, J. W.; Bond, L.; Shulman, L. S. Summary of the Findings and

(3) The students learn to see legal problems from client's point of view and experience how different interests lead to different attempts of construction of issue of facts as well as looking for and interpretation norms.

(4) The students learn the very importance of the real result of legal decision-making that influences their strategy.

(4) Students learn immediately by team working to handle different points of view because sometimes any SASLA-students do not agree the suggested construction of facts of issue or interpretation of law.

(5) They learn the necessity of more than only legal methods for solving legal problems; this necessary interdisciplinarity influences construction of facts of issue as well of interpretation of law.

(6) The students hear a lot of problems of their fellow students and so they experience directly problems of immigrations, race, lack of money, and so on; in other words: the SASLA-students became acquainted the totally realistic life "that came through the door"³¹³.

(7) All these impressions influence the legal decision-making of the SASLA-students. So they experience immediately by practice that "humans are not 'rational utility maximizers' but infinitely varied in preferences and decision-making styles, shaped by culture, experience and choice, and their perspectives on 'performance' are inherently subjective."³¹⁴

Conclusions and a Glance into the Future

We note in Germany an increasing consciousness of weakness of the legal methodology taught to law students today: The students get neither real idea nor feeling of legal decision-making as mixture of legal matters, issue of facts, personal inputs, personal interests, and the interplay with other actor.³¹⁵

For minimize these defects it is necessary that law students learn and apply in future the following points:³¹⁶

(1) Legal decision-making is a special kind of decision-making and is embedded in all problems of this process: Legal decision-making is a mixture of objective and personal components, whose concrete interplay is almost unknown.

Recommendations from Educating Lawyers: Preparation for the Profession of Law, 2007, (Carnegie Report) [interactive]. [accessed 27-07-2009]. <http://www.carnegiefoundation.org/dynamic/publications/elibrary_pdf_632.pdf>, p. 8; Take notice that due combining of tuition with research in my university SASLA-students take part in legal research too.

313 Kritzer, H. M. The future role of "Law Workers": Rethinking the forms of legal practice and the scope of legal education. *Ariz.L.R.* 2002, 44: 919.

314 Talbot, C. Competing Public Values and Performance. *KPMG International*. 2008, p. 143 (Emphasis: H. P. P.).

315 See the list of elements of a legal decision by Holmes, O. W. Jr., *supra* note 96, p. 1.

316 Cf. Prümm, H. P. Reducing irrationality of legal methodology by realistic description of interpretative tools and teaching the causes of irrationality in legal education. *Jurisprudence*. 2009, 1(115): 211 *et seq.*

(2) Jurisprudence is a hybrid science: It deals with facts of issue as well with legal matter.³¹⁷ The more non-legal elements interfere with legal decision-making the more legal decision-making is changing legal disciplinary to a multi-disciplinary process. That is the reason to understand jurisprudence as humanity³¹⁸ as well as social science³¹⁹ because “law cannot be treated as a discrete set of principles without a context.”³²⁰

(3) Jurisprudence will be understood as transnational science and requires greater cooperation between law schools all over the world and more exchange of staff and students³²¹ for exchange the experiences in the more and more common legal methodology.

(4) Legal education should focus on general principles and legal tools rather than on detailed rules because only these principles and tools make the students ready to discuss and solve future problems.

(5) “Surely, we have a multitude of various principles of interpretation ... but all of them are only a kind of direction indicator. Even at their best, they only tell us: go in this direction.”³²² Often the methods show us the direction to an arguable but not to the one and only right decision.

(6) Legal theory should demonstrate students our lack of understanding legal decision-making; however, it is necessary to disclose the well-known circumstances of legal decision-making³²³ rather than to reduce it to a logical-systematic process.

(7) In a motion picture of Damiano Damiani an old judge recommends a young judge to be convinced of the correctness of his judgment as a catholic priest believes in transubstantiation of bread into the body of Jesus Christ in the consecration. That may be coherent for religious Catholics. A realistic legal methodology has to take into account the impossibility of absolute certainty of the correctness of legal decision. This knowledge of uncertainty of legal decision-making is necessary for training the self-control³²⁴ of the respective legal decision-maker³²⁵ – according to the biblical “Examine yourselves”³²⁶ – and the humility of the legal decision-makers concerning the other partners in this context.³²⁷

317 See McKee, D., *supra* note 106, p. 578: “(L)egal pluralism lays bare the central paradox of law: its dual nature as fact and norm.”

318 That is at long last the result of “Reine Rechtslehre“ of Hans Kelsen, *supra* note 10, p. III.

319 See Hoffmann-Riem, W., *supra* note 272, p. 648.

320 Bottomley, S.; Bronitt, S., *supra* note 68, p. 2.

321 Klabbers, J.; Sellers, M., *supra* note 181, p. 4.

322 Aulis Aarnio, cited by Kramer, E. A. *Juristische Methodenlehre*. 2nd ed. Bern: Stämpfli, 2005, p. 5.

323 Cf. Röhl, K. F. *Allgemeine Rechtslehre: ein Lehrbuch*. C. Heymanns, 2001, p. 151: “Empirical knowledge can influence intensively the practical behaviour.” (Translation: H. P. P.).

324 See in this context Desiderius Erasmus, 1501, Chap. iii: “(T)he first point of wisdom is to know thyself.”

325 Bernd Rütters outlines the very importance of self-control as integrated part of legal decision-making (Rütters, B. *Methodenrealismus in Jurisprudenz und Justiz*. *JZ*. 2006, p. 53); similar Lee, K. I., *supra* note 13, p. 418.

326 *The Bible*, 2 Corinthians 13, 5.

327 Cf. Yves-Marie Morissette defining the core of McGill’s law curriculum as bringing students into “a sustained and humble dialog with otherness” (cited by Arthurs, H. W., *supra* note 125); in the same direction also shows Günter Hager (Hager, G., *supra* note 29, p. 298).

(8) Not only the legal methodology is changing; the methodology of legal education is changing too. In our context it is important to point out that analysis of facts of the case as crucial part of legal methodology requires teaching systems to introduce students in the respective techniques in practice. Such methods of legal education should be – of course beside theoretical studies (history, structure, philosophy [theory and ethics]³²⁸, and values of law³²⁹) – case studies, projects as well as legal clinics or systems like SASLA³³⁰.

We have a long way to go; however, we must start.

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328 Cf. Prümm, H. P., *supra* note 61.

329 See to relationship between rules and values Twining, W.; Miers, D., *supra* note 60, p. 87 ff.

330 Since December 1, 2010, the faculty of law of Leibniz Universität Hannover is offering a similar project [interactive]. [accessed 10-03-2011]. <<http://www.jura.uni-hannover.de/legalclinic.html>>.

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VOKIETIJOS TEISINĖS METODOLOGIJOS DIDAKTINIAI POKYČIAI

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Santrauka. *Vis akivaizdžiau suvokiame pastaruoju metu studentams dėstomos teisinės metodologijos trūkumus. Studentai neįgyja nei supratimo, nei įsisavina teisinių sprendimų priėmimo tvarkos kaip teisinių dalykų, faktinių duomenų, asmeninio požiūrio, interesų skirtingumo ir sąveikos su kitais asmenimis dermės.*

Siekiant sumažinti neigiamus padarinius būtina, kad teisės studentai studijų metu analizuotų šiuos aspektus: 1. Teisinis sprendimų priėmimas yra specialus procesas ir apima visas šiame procese kylančias problemas; 2. Teisės mokslas yra hibridinis mokslas, kuris nagrinėja tiek faktų klausimus, tiek teisinius aspektus; 3. Teisės mokslas suprantamas kaip daugiašalis mokslas, todėl būtinas glaudesnis teisės mokyklų bendradarbiavimas visame pasaulyje; 4. Teisinis mokymas turėtų būti labiau pagrįstas bendraisiais principais ir teisinėmis priemonėmis, o ne detalizuotomis taisyklėmis; 5. Teisės teorija turėtų atskleisti studentams, kad netinkamai suvokiame teisinių sprendimų priėmimo procesą; 6. Realistinė teisinė metodologija turi atsižvelgti į tai, kad nėra įmanomas teisinių sprendimų absoliutus tikrumas ir teisingumas; 7. Svarbu pažymėti, kad bylų faktų analizei, kaip svarbiai teisinės metodologijos daliai, būtina taikyti mokymo sistemas, kurios studentus supažindintų su atitinkamomis praktikoje taikomomis priemonėmis, tokiomis kaip bylų analizė, projektai, teisinės klinikos ar SASLA (angl. Students Advise Students in Legal Affairs; liet. studentai pataria studentams teisiniais klausimais) sistema.

Reikšminiai žodžiai: *teisės teorija, teisinė metodologija, teisinis išsilavinimas, teisinis sprendimų priėmimas, daugiapakopis ir daugiaasmenis sprendimų priėmimas, interpretacinės priemonės kontinentinės ir bendrosios teisės sistemose, teisės taikymas, teisminis sprendimų priėmimas ir teisės aktų leidyba, privalomi teisinės metodologijos ir teisės teorijos kursai, teisės mokymasis per praktinę patirtį, teisinė klinika, SASLA.*

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