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THOMAS M.J. MÖLLERS

Professor of Civil Law – University of Augsburg

LEGAL THINKING CONSEQUENCES FOR THE ROLE OF LEGAL METHODS IN LEGAL TRAINING

1. – 1.1. – Across the world, German legal training has an excellent reputation.[1] The case technique, necessitating a transfer, is an excellent way to train aspiring lawyers to engage in a clear line of thought, and in precision. Such transfer largely requires less specific knowledge but instead knowledge of the interplay of norms, of the system, of a subject area. This systematic thinking regarding codification is also missing, for in-

[1] E. HILGENDORF, 'Die Juristischen Fakultäten in Deutschland und die jüngsten Universitätsreformen', in E. Hilgendorf and F. Eckert (eds), *Subsidiarität – Sicherheit – Solidarität. Festgabe für Franz-Ludwig Knemeyer zum 75. Geburtstag* (Würzburg: Ergon Verlag 2012), p. (559) at 561.

stance, among Anglo-American lawyers. However, nothing is ever so good that there is no room for improvement.

The reform of law studies has been a continuous theme over the last hundred years.[2] In fact, not every lawyer's submission is so concise to make it it a pure joy to read. For the subsequent professional practice – the jump into the deep end – lawyers must be able to solve new cases that have not been decided before. The applicable law provides an important pointer in this regard. With respect to content, purpose and meaning of the First State Examination in Law, Section 16 of the Bavarian Training and Examination Code for Lawyers (*Bayerische Ausbildungs– und Prüfungsordnung für Juristen*, BayJAPO) provides: "Overview of the law, legal understanding and ability of methodical work should be in the foreground of the task and performance evaluation"[3]. The hypothesis of this article is simple and is as follows: Legal methodology is the key to good legal training and vice versa. Legal training that spares the legal methods is deficient. Legal methods are also vital for a harmonised Europe. In numerous decisions, the Court of Justice of the European Union has developed important cornerstones into a European methodology of law – with regard to the priority of application and the vertical third-party effect of directives, or in the horizontal relationship with citizens. Methodological divergence contradicts the internal market and the idea of legal harmonisation when a judgment of the European Court leads to different decisions in the different Member States, because it depends, for example, on the extent to which the limits of national law are drawn to ensure that the law complies with the directive. The following article highlights the role of legal methodology in Germany[4] and makes suggestions for improvements in legal education.

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[2] See the historical overviews contained in various expert reports drafted by the Association of German Jurists (DJT), for instance D. OEHLER, 'In welcher Weise empfiehlt es sich die Ausbildung der Juristen zu reformieren?', in Ständige Deputation des Deutschen Juristentages (ed.), *Verhandlungen des 48. Deutschen Juristentages* (München: C.H. Beck 1970), pp. E 17 et seqq.; H-D. HENSEN-W. KRAMER, 'Welche Maßnahmen empfehlen sich zur Verkürzung und Straffung der Juristenausbildung?', in Ständige Deputation des Deutschen Juristentages (ed.), *Verhandlungen des 58. Deutschen Juristentages* (München: C.H. Beck 1990), pp. F 19 et seqq., as well as the authors in fn. 49.

[3] Section 16(2) sentence 2, Bavarian Training and Examination Code for Lawyers (*Bayerische Ausbildungs– und Prüfungsordnung für Juristen*, BayJAPO) of 13 October 2003, GVBl. (Bayerisches Gesetz– und Verordnungsblatt) 1990, pp. 397 et seqq. Similar also Section 2(2) of the North Rhine-Westphalian Training Code for Lawyers (*Juristenausbildungsgesetz Nordrhein-Westfahlen*, JAG NRW) of 11 March 2003, GV. NRW. (*Gesetz– und Verordnungsblatt Nordrhein-Westfalen*) 2003, pp. 310 et seqq. Similarly, the German Judiciary Act (*Deutsches Richtergesetz*, DRiG) requires the acquisition of the "methodology of legal science", sec. 5a para. 2 s. 3 DRiG.

[4] With individual evidence regarding the law in Austria and Switzerland, see the recent publication in Special Issue 3, 83 RabelsZ (*Rabels Zeitschrift für ausländisches und internationales Privatrecht*) 2019, pp. 242-

1.2. – In German law schools, legal reasoning is offered as a basic subject in the third semester and is by no means compulsory. The impression frequently prevails that it is a theory-laden matter of purely academic interest. The major works on legal methodology were written by Karl Larenz, Wolfgang Fikentscher and Franz Bydlinski [5] more than 50 years ago and were not yet able to adequately trace modern trends such as European law. Is methodology in an existential crisis? Three developments seem to suggest this: Rüthers makes the following accusation against judges today: "Methodical arguments, if present at all, usually serve only as a façade to camouflage the preconceived outcome with a rational decision-making process." [6] This means that legal methods can be used to assert anything and everything; they are superfluous in reality. The discussion is of decisions taken according to *one's own prior understanding*. [7] A second accusation is: The impression of subjectivity of interpretation in the sense of "anything goes" [8] is also said to be shown by virtue of the fact that the courts have made selective use, in terms of outcomes, of certain historical or grammatical, systematic or teleological arguments. [9] This accusation made at the prevailing practice seems to be confirmed when, for example, the Swiss Federal Court speaks explicitly of a "*pragmatic plurality of methods*". [10] Grüneberg wrote in a former edition of the famous *Palandt* commentary on the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) that, when faced with new questions, the judge

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397, with contributions from Reinhard Zimmermann (Germany), Gregor Christandl (Italy), Corjo Jansen (Netherlands), Gerhard Dannemann (England), Hans Petter Graver (Norway) and Gabriele Koziol (Japan).

[5] K. LARENZ, *Methodenlehre der Rechtswissenschaft* (Berlin: Springer-Verlag, 6th edn 1991); W. FIKENTSCHER, *Methoden des Rechts in vergleichender Darstellung*, vol. V (Tübingen: Mohr Siebeck 1977); F. BYDLINSKI, *Juristische Methodenlehre und Rechtsbegriff* (Wien: Springer-Verlag, 2nd edn 1991).

[6] In the same vein, B. RÜTHERS, 'Methodenrealismus in Jurisprudenz und Justiz', *JZ (JuristenZeitung)* 2006, p. (53) at 54.

[7] H-G. GADAMER, *Wahrheit und Methode* (Tübingen: Mohr Siebeck, 6th edn 1990), pp. 281 et seqq. and 296 et seqq.; W. HASSEMER, *Tatbestand und Typus* (Köln: Carl Heymanns Verlag 1968), pp. 107 et seq.; J. ESSER, *Vorverständnis und Methodenwahl in der Rechtsfindung* (Frankfurt am Main: Athenäum Verlag 1970), pp. 139 et seqq. and 149 et seqq.

[8] P. FEYERABEND, *Against Method* (London: New Left Books 1975), pp. 23 et seqq.

[9] J. ESSER, *Vorverständnis und Methodenwahl in der Rechtsfindung* (Frankfurt am Main: Athenäum Verlag 1970), pp. 139 et seqq. and 149 et seqq.

[10] For instance Schweizer Bundesgericht 7 September 2012, 2C_237/2011, 138 II *BGE (Entscheidungen des Schweizerischen Bundesgerichts)*, p. (440) at 453. The Federal Constitutional Court (*Bundesverfassungsgericht,* BVerfG) formulated this in somewhat similar words, namely stating (words translated from the original German) that, in the interpretation, 'all conventional interpretation methods [help] in coordinated justification. No single one of them has unconditional priority over any other', BVerfG (Bundesverfassungsgericht) 20 March 2002, 2 BvR 794/95, 105 *BVerfGE* (*Entscheidungen des Bundesverfassungsgerichts)*, p. (135) at 157. See also fn. 190.

often does not know – and indeed does not need to know – whether the problem should be solved by interpretation or by development of the law.[11] He goes on to state: "The judge may thus differentiate and supplement the law in the context of *ratio legis* and of the value judgment contained in the Basic Law (*Grundgesetz*, GG), even if there is no concrete proof of a gap."[12] This goes hand in hand with the circumstance that pretexts are frequently relied on in the judgment, such as by referring to "justice" or to the "nature of things".[13]

Finally, postmodern methodology designates the creation of precedents by means of deduction as the keeping up of appearances.[14] In those cases in which the law is ambiguous or silent, the courts are said to decide not on the basis of law and justice, but creatively by virtue of the authority granted to them by the State. Carl Schmitt coined the term "*decisionism*"[15] to describe this. Accordingly, any court ruling has an "element of pure decision that cannot be derived from the content of the norm. […] The point [of a decision] is not overwhelming reasoning, but decision by authoritarian elimination of doubt."[16] Therefore, the law no longer forms the standard for the ruling, but an uncontrollable, or nearly uncontrollable, power of the judge exercising sovereign power to rule *ex officio*. Rules on legal methodology are consequently superfluous according to the doctrine of decisionism because, in cases that are not clearly defined, the judge ultimately decides on the way they rule.

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[11] The original quote reads as follows in the abridged language of the short commentary by Palandt: '*Der vor neue Fragen gestellte Richter weiß häuf nicht u braucht auch nicht zu wissen, ob das Problem dch Auslegg od dch RFortbildg zu lösen ist. […] Der Richter darf das Gesetz iR der ratio legis u der WertEntsch des GG auch ohne konkreten Nachw einer Lücke ausdifferenzieren u ergänzen'*, see C. GRÜNEBERG, in Palandt, *Bürgerliches Gesetzbuch* (München: C.H. Beck, 78th edn 2019), Einleitung paras. 56 et seq.

[12] See fn. 11.

[13] In detail A. KAUFMANN, *Analogie und 'Natur der Sache'* (Heidelberg: C.F. Müller, 2nd edn 1982); F. MÜLLER, *Normstruktur und Normativität* (Berlin: Duncker & Humblot 1966), pp. 94 et seqq.; C-W. CANARIS, *Die Feststellung von Lücken im Gesetz* (Berlin: Duncker & Humblot, 2nd edn 1983), p. 100.

[14] R. HEGENBARTH, *Juristische Hermeneutik und linguistische Pragmatik* (Königstein im Taunus: Athenäum Verlag 1982), pp. 195 and 199: 'The starting point of a renewed methodology must be the realization that it is considerably less frequently possible to provide reasoning for the judicial ruling by means of textual methods of interpretation is than is generally believed.' In the same vein U. NEUMANN, 'Juristische Methodenlehre und Theorie der juristischen Argumentation', 32 *RT (Rechtstheorie)* 2001, p. (239) at 242.

[15] Lat. *decidere*: literally 'to cut off', translated by analogy as 'to decide' or 'to rule'.

[16] C. SCHMITT, *Der Hüter der Verfassung* (Tübingen: Mohr Siebeck 1931), pp. 45 et seq.; concurring A. FISCHER-LESCANO-R. CHRISTENSEN, 'Auctoritatis Interpositio', 44 *STAAT (Der Staat)* 2005, pp. 213 et seqq.

1.3. – The above views which place into perspective the meaningfulness of methodology must be opposed. Since Montesquieu, the modern state under the rule of law has known both, the separation and the interlinking of powers.[17] Legal methodology is constitutionally established today as a theory of legitimation. A guiding thought is the limitation of lawyers'power, and that of judges in particular. This idea can be played through in two variants. It applies, firstly, within the relationship between the judiciary and the legislature. The judge is bound by law and justice in accordance with Articles 20(3) and 97(1) of the Basic Law (GG). The supremacy of the law applies to both, the judiciary and the administration.[18] The topos of the "primary responsibility of the legislature" is applicable.[19] It is generally incumbent on Parliament to decide on the material objective.[20] Secondly, legal methodology imposes on judges an obligation vis-à-vis the citizen. The principle of legality, as an expression of the principle of the rule of law in criminal law, states that there may be no punishment without a basis in law (*nullum crimen, nulla poena sine lege*).[21] However, this principle may only add practical clout if judges are obliged to state reasons for their rulings. This obligation to state reasons limits judges'arbitrary behaviour towards the citizen. It also follows from the constitutionally entrenched, millennia-old principle of *audiatur et altera pars*.[22] The court must take the considerations of both sides into account and include them in its considerations.[23] Consequently, the duty to consider and deliberate also entails a constitutional duty to state reasons.[24] This ensures a deliberative decision in court.[25] The person concerned can only

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[17] MONTESQUIEU, *De l'esprit des lois*, vol. 11 (Geneve: Barrillot & Fils 1748), chapter 6: 'There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.'

[18] H. SCHULZE-FIELITZ, in H. Dreier (ed.), *Grundgesetz Kommentar* (Tübingen: Mohr Siebeck, 3rd edn 2015), art. 20 (Rechtsstaat) para. 101 with further references.

[19] BVerfG 11 November 1999, 2 BvF 2/98, 101 *BVerfGE*, pp. (158) at 217 et seq.; G. HERMES, 'Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit', in 61 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (Berlin: De Gruyter 2002), p. (119) at 129.

[20] W. FLUME, 'Richter und Recht', in Ständige Deputation des Deutschen Juristentages (ed.), *Verhandlungen des 46. Deutschen Juristentages* (München: C.H. Beck 1966), p. K 18.

[21] Its basic ideas can be found today not only in Article 103(2) of the Basic Law (GG) and Section 1 of the Criminal Code (*Strafgesetzbuch* – StGB), but also in supranational regulations such as Article 7 of the European Convention on Human Rights (ECHR) or Article 49(1) of the European Charter of Fundamental Rights (CFR).

[22] A. WACKE, 'Audiatur et altera pars', in M.J. Schermaier-Z. Végh (eds), *Ars boni et aequi, Festschrift Waldstein* (Stuttgart: Franz Steiner Verlag 1993), pp. 369 et seqq.

[23] H. SCHULZE-FIELITZ, in H. Dreier (ed.), *Grundgesetz Kommentar* (Tübingen: Mohr Siebeck, 2nd edn 2008), art. 103 I paras 20 and 60 et seqq.

judge whether their submission has been considered if the ruling is reasoned.

If it wishes to be current, legal methodology must take account of the objections just mentioned. Legal thinking and legal methods run in parallel: they require an ability to approach previously unknown problems, to identify the problem, to develop solutions, and to finally and convincingly present which of the various solutions is the most legally appropriate. It does not suffice to memorise disputes by heart.[26] A good lawyer must be able to develop their own disputes and defend their own views against counterarguments. The goal of legal methodology, as a theory of argumentation and legal reasoning, is therefore to make decisions rationally comprehensible and thus verifiable.[27] Legal reasoning seeks to give students and practitioners the legal tools to structure their own argumentation and to raise the level of reasoning of the statements. Firstly, legal methods aim at legal certainty because they serve to predict judicial adjudication.[28] Secondly, the obligation to state reasons compels the decision-making bodies to exercise self-regulation. Thirdly, it broadens the decision's ability to achieve consensus. Fourthly, and finally, it makes it easier for the concerned party to accept the result.[29] It is intended to systematise, objectivise and ultimately control the creation of precedents. Where does legal training require optimisation? The ability of methodical work and legal thinking is presented below in four areas that lawyers should master in order to solve cases: the facts and the law, the canon of interpretation and its further development, the argumentative figures for dealing with European law, and the boundaries on the permissible development of the law.

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[24] BVerfG 17 May 1983, 2 BvR 731/80, 64 *BVerfGE*, pp. 135 and 143 et seqq.; BVerfG 15 February 1992, 2 BvR 207/92, *InfAuslR (Informationsbrief Ausländerrecht)* 1992, p. 300 headnote 1.

[25] H. STEINBERGER, *Konzeption und Grenzen freiheitlicher Demokratie* (Berlin: Springer-Verlag 1974), p. 265; H. SCHULZE-FIELITZ, in H. Dreier (ed.), *Grundgesetz Kommentar* (Tübingen: Mohr Siebeck, 2nd edn 2008), art. 103 I, para. 12.

[26] W. HASSEMER-F. KÜBLER, 'Welche Maßnahmen empfehlen sich zur Verkürzung und Straffung der Juristenausbildung?', in Ständige Deputation des Deutschen Juristentages (ed.), *Verhandlungen des 58. Deutschen Juristentages* (München: C.H. Beck 1990), p. E 33: 'The blind reproduction of legal rules and terms is an enemy of legal thinking, and therefore burdens all subjects and legal professions.'

[27] J. ESSER, 'Möglichkeiten und Grenzen des dogmatischen Denkens im modernen Zivilrecht', 172 *AcP (Archiv für die civilistische Praxis)* 1972, p. (97) at 113.

[28] R. ALEXY, *Theorie der juristischen Argumentation* (Frankfurt am Main: Suhrkamp Verlag, 7th edn 2012), pp. 326 et seq.; B. RÜTHERS-C. FISCHER-A. BIRK, *Rechtstheorie* (München: C.H. Beck, 10th edn 2018), para. 651.

[29] BVerfG 14 February 1973, 1 BvR 112/65, 34 *BVerfGE*, p. (269) at 287 – *Soraya*: 'its ruling must be based on rational argumentation.' See T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 13 para. 19.

2. – 2.1. – Legal training seems simple at first glance: The student has a solid set of facts, plus the law. In order to combine these two components, they learn to subsume – that is to subordinate the particular to the general.[30] This leads to an answer to the question of whether the facts satisfy the criteria defined in the respective legal norm that is relevant to the particular case.[31] Syllogism is known worldwide: It contains a major premise, a minor premise and a final conclusion.[32] Subsumption presents itself in terms of legal logic as the "final proceedings" by combining the two components of major premise and minor premise. Subsumption seeks to verify whether all constituent elements of a norm are covered by information contained in the facts. Precise subsumption by itself is naturally often difficult enough for law students. However, subsequent legal practice is clearly more complex than a one-sided complete set of facts.[33] Two examples are worth noting. Lawyers, judges and administrative officials need to understand the facts in a first step. Determination of the facts is the first crucial step of judicial adjudication in practice. The legal appraisal is often simple, but the facts are difficult to determine. For example, if your Egyptair flight to Ireland returning from a vacation in Egypt is delayed and you would like to claim compensation, you first need all the relevant facts. If the airline objects that the delay was caused by *force majeure* due to a sandstorm, the lawyer must determine whether this objection is correct.

The legal solution in a second step is actually more complex if different legal solutions emerge: Engisch shaped the image of *Hin-und Herwandern des Blickes* (wandering back and forth between the facts and the norm): "The major premise is important as regards what is relevant for the concrete facts of the case, and the concrete facts of the case are relevant for the major premise."[34] It is thus necessary to move between the facts of

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[30] K. LARENZ, *Methodenlehre der Rechtswissenschaft* (Berlin: Springer-Verlag, 6th edn 1991), p. 271; derogating: K. ENGISCH, *Einführung in das juristische Denken* (D. Otto & T. Würtenberger (eds); Stuttgart: Kohlhammer, 11th edn 2010), pp. 104 et seqq. and 123 et seq.

[31] In the same vein already I. KANT, *Kritik der reinen Vernunft* (Riga: Hartknoch, 2nd edn 1787), quoted from the *Akademie-Ausgabe*, vol. III (Königlich Preußische Akademie der Wissenschaften (ed.); Berlin: Reimer 1911), p. 131: 'If understanding is at all explained as the capacity of the rules, then the power of judgment is the ability to *subsume* under rules, that is to distinguish whether or not something is subject to a given rule (*casus datae legis*).'

[32] K.J. VANDEVELDE, *Thinking Like a Lawyer* (Boulder: Westview Press, 2nd edn 2011), p. 93.

[33] Previously critical W. HASSEMER-F. KÜBLER, 'Welche Maßnahmen empfehlen sich zur Verkürzung und Straffung der Juristenausbildung?', in Ständige Deputation des Deutschen Juristentages (ed.), *Verhandlungen des 58. Deutschen Juristentages* (München: C.H. Beck 1990), pp. E 30 et seq.

[34] K. ENGISCH, *Logische Studien zur Gesetzesanwendung* (Heidelberg: Winter Verlag, 3rd edn 1963), p. 15; concurring for instance M. KRIELE, *Theorie der Rechtsgewinnung* (Berlin: Duncker & Humblot, 2nd edn 1976), p. 197; J. ESSER, *Vorverständnis und Methodenwahl in der Rechtsfindung* (Frankfurt am Main: Athen-

the case and the constituent facts of the norm. This back-and-forth movement does not lead bring one back to the starting point (that would be a circular argument), but brings the understanding up to a new level.[35] It helps legal practitioners to process the facts in legal terms, and shows vividly that the facts and the law interlock in judicial adjudication. If a woman is bitten by a dog that she wants to pet, further details about the facts are needed in order to examine claims for compensation and to solve the case correctly.[36] If the woman knew that the dog bites, this would constitute contributory negligence (Section 254 of the Civil Code, BGB). If it is a guide dog, this is classified as a working animal for which the animal keeper is not liable under Section 833 sentence 2 of the Civil Code. Further questions for the development of a conclusive legal solution are: Did the woman suffer a loss of earnings? Exactly what kind of pain did she suffer?

2.2. – And it becomes more complex still: Law students solve cases in their training largely with the law. Legal principles that are binding on legal practitioners are recognised as a source of law.[37] Laws and legal ordinances are referred to as primary sources of law. But legal practitioners use all forms of sources of legal knowledge for the facts in order to be able to work out an appropriate legal solution. Before the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) legally appraises a case, it develops a "standards section"[38] and describes the normative range.[39] The legal doctrine of the individual, fundamental, rights-related provision is processed in textbook fashion in the standards section, using the previous case law.[40] The Federal Constitutional Court elabo-

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äum Verlag, 2nd edn 1972), p. 79; M. PAVČNIK, 'Das "Hin– und Herwandern des Blickes"', 39 *RT* 2008, pp. 557 et seqq.; P. MASTRONARDI, *Juristisches Denken* (Bern: Haupt Verlag, 2nd edn 2003), paras 677 et seqq.

[35] K. LARENZ, *Methodenlehre der Rechtswissenschaft* (Berlin: Springer-Verlag, 6th edn 1991), p. 206.

[36] K. LARENZ, *Methodenlehre der Rechtswissenschaft* (Berlin: Springer-Verlag, 6th edn 1991), pp. 279 et seqq.; also incorporated by F. REIMER, *Juristische Methodenlehre* (Baden-Baden: Nomos, 2nd edn 2020), paras 93 et seqq. The facts put forward by Karl Larenz are further added to here.

[37] B. RÜTHERS-C. FISCHER-A. BIRK, *Rechtstheorie* (München: C.H. Beck, 10th edn 2018), para. 217.

[38] This in contrast to the 'subsumption section' of the reasoning of the judgment.

[39] According to Friedrich Müller, the 'normative range is formed by those concrete *de facto* circumstances (real data) which are needed in order to subsume under a legal provision (programme of norms) which have *already been made precise by means of interpretation or substantiation*, and which hence are rightly made the foundation for the ruling. Cf. on this in detail F. MÜLLER-R. CHRISTENSEN, *Juristische Methodik*, vol. I (Berlin: Duncker & Humblot, 11th edn 2013), paras 16, 235a, 281.

[40] M. JESTAEDT, 'Phänomen Bundesverfassungsgericht. Was das Gericht zu dem macht, was es ist', in M. Jestaedt, O. Lepsius, C. Möllers & C. Schönberger (eds), *Das entgrenzte Gericht* (Berlin: Suhrkamp 2011), pp. (77) at 110 et seqq. and 135 et seqq.

rates the facts by permitting the parties to speak, but also by affording societal associations and groups the opportunity to submit statements. In addition, secondary sources of law and sources of legal knowledge must be included – such as previous rulings of German courts, foreign rulings and the voices of legal literature, as well as accessible statistics.[41]

The current discussion about a general ban on wearing the burqa in public vividly shows how complicated it is to form a norm range. The Basic Law (GG) stipulates freedom of religion in Article 4(1) of the Basic Law. However, one will hardly be able to justify the solution from the wording alone. Before the scope of the freedom of religion and other fundamental rights is examined in legal terms, the facts which are then needed for the development of the norm range, such as in the review of proportionality, need to be supplemented. Empirically one will perhaps still determine how many women wear the burqa in Germany, and what public opinion thinks about a burqa ban. The Qur'an only mentions the veil in one place,[42] but explicitly does not oblige anyone to wear a burqa. There are various veils for Muslim women that reveal their faces.[43] What is the Quran's stance on the veil? The Quran only speaks of chimâr[44] and it is controversial whether this even means veil.[45] Even monks and nuns in Christian monasteries and nunneries wear formal clothing that partly covers the hair. In addition, one will look for precedents – that is earlier rulings on similar cases, such as the rulings on the crucifix and the headscarf[46] – and then argue using the comparative case method.[47]

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[41] B-O. BRYDE, 'Tatsachenfeststellungen und soziale Wirklichkeit in der Rechtsprechung des Bundesverfassungsgerichts', in P. Badura & H. Dreier (eds), *Festschrift 50 Jahre Bundesverfassungsgericht*, vol. 1 (Tübingen: Mohr Siebeck 2001), pp. (533) at 536 et seq. The relevant legal norms (at A.I.), the history of the proceedings (A.II.), the legal statements of those concerned (A.III.), and where appropriate also the results of the taking of evidence and of other parties that are entitled to make a statement (A.IV.), are typically mentioned, see E. BENDA-E. KLEIN-O. KLEIN, *Verfassungsprozessrecht* (Heidelberg: C.F. Müller, 3rd edn 2012), para. 362; for instance BVerfG 27 January 2015, 1 BvR 471/10, 1 BvR 1181/10, 138 *BVerfGE*, pp. 296 et seqq. – *Headscarf II*.

[42] Qur'an 3rd verse 24:30-31.

[43] Such as the hijab, the al-amira, the chimar, the chador and even full body veils that also completely cover the face and only leave the eyes uncovered (niqab), or even also require that there be a grid here too (burqa).

[44] The 3rd verse 24:31 of the Qu'ran reads: "And tell the believing women to lower their gaze and guard their private parts (furûg) and not expose their adornment (zinat) except that which [necessarily] appears thereof and to wrap [a portion of] their headcovers over their chests and not to expose their adornment except to their husbands […]."

[45] Thus, it is stressed that the verse does not explicitly mention hair and the woman may decide herself what is necessary. See on this discussion, for example, *www.sistersinislam.org.my/news.php?item.604.120.*

[46] BVerfG 27 January 2015, 1 BvR 471/10, 1 BvR 1181/10, 138 *BVerfGE*, pp. 296 et seqq. – *Headscarf II*; BVerfG 16 May 1995, 1 BvR 1087/91, 93 *BVerfGE*, p.p (1) at 18 et seqq. – *Crucifix*.

[47] A comparative perspective shows that the European Court of Human Rights had to decide on the le-

2.3. – During their studies, students do not elaborate the facts. In Germany, until the First State Examination they usually receive a fixed set of facts from a person setting the exam.[48] The stronger interlocking of science and practice is a requirement that is more than a hundred years old.[49] This should be reformed, for example, in lawyer-orientated events at the universities[50], by expanding internships to a whole semester, or in extending clerkships by six months[51]. Not only the State, but lawyers too, would have to provide the resources to improve the status quo. Earlier contact with practitioners would certainly be motivating for students or clerks, given that real life takes place in practice.[52] This is the advantage of legal training in the USA and the UK: it is common practice that students in their first and second year work for a law firm during the summer break to establish contacts and gain hands-on experience.

3. – 3.1. – Equipped with this prior understanding, the actual work with the law begins. Later on, working on simple cases does not require legal methodology and it is probably not even necessary to consult the law. But this is not the task of law studies. Law studies are intended to prepare prospective lawyers for cases in which the legal situation is not clear and they have to think out of the box (the "hard cases").[53] This means that the workload increases along with complexity. The crowning glory of a lawyer cer-

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gality of the French law that prohibited the burqa in public, cf. ECtHR 1 July 2014, 43835/11, ECLI:CE:ECHR:2014:0701JUD004383511, *S.A.S. v. France.*

[48] Highly critical with regard to one-sided training for instance J. WOLF, 'Die unterschätzte Bedeutung des Sachverhalts in Juristenausbildung und Rechtswissenschaft', in H. Butzer-M. Kaltenborn-W. Meyer (eds), *Organisation und Verfahren im sozialen Rechtsstaat, Festschrift Schnapp* (Berlin: Duncker & Humblot 2008), pp. 873 et seqq.

[49] E. ZITELMANN, 'Was not tut!', 9 *DJZ (Deutsche Juristen-Zeitung)* 1909, p. 505; in the same vein D. OEHLER, 'In welcher Weise empfiehlt es sich die Ausbildung der Juristen zu reformieren?', in Ständige Deputation des Deutschen Juristentages (ed.), *Verhandlungen des 48. Deutschen Juristentages* (München: C.H. Beck 1970), pp. E 46 et seq; W. HASSEMER-F. KÜBLER, 'Welche Maßnahmen empfehlen sich zur Verkürzung und Straffung der Juristenausbildung?', in Ständige Deputation des Deutschen Juristentages (ed.), *Verhandlungen des 58. Deutschen Juristentages* (München: C.H. Beck 1990), p. E 84.

[50] S. BARTON-F. JOST-M. LINDEMANN-T. SCHUMACHER, *Anwaltsorientierung im rechtswissenschaftlichen Studium* (Hamburg: Dr. Kovač Verlag 2000); D. MATTHEUS-C. TEICHMANN, 'Anwaltsorientierte Arbeitsgemeinschaften', 7 *JuS (Juristische Schulung)* 2003, pp. 633 et seqq.

[51] For example, the German Bar Association offered a 12-month additional training course.

[52] In the same vein already H-D. HENSEN-W. KRAMER, 'Welche Maßnahmen empfehlen sich zur Verkürzung und Straffung der Juristenausbildung?', in Ständige Deputation des Deutschen Juristentages (ed.), *Verhandlungen des 58. Deutschen Juristentages* (München: C.H. Beck 1990), p. F 37.

[53] R. DWORKIN, *Taking Rights Seriously* (Cambridge: Harvard University Press 1977), p. 81.

tainly includes the solution of more complex cases in which simply reading the legal text does not suffice. Students must learn how to handle such situations in order to find a legally convincing solution. In the legal interpretation, von Savigny's four types of interpretation are taught in their further development by von Jhering: the distinction between wording, system, history and telos of a norm.[54] The canons of interpretation have found their way into the law of many countries[55] and are also used by the Court of Justice of the European Union.[56]

However, some colleagues consider it "outdated", and the "progress of knowledge is slight",[57] – for instance, because the teleological interpretation is considered circular and superfluous.[58] Moreover, the four interpretive canons fail in the area of undetermined legal terms and general clauses. It is true that legal statements frequently only claim, but do not prove, the meaning and purpose of a norm. The grammatical, systematic and historical interpretation are based directly on the norm and the law. Without such a point of reference the teleological interpretations ask for the only "intellectually established factor of the purpose of the norm".[59] The search for the meaning therefore has no independent original point of reference. It therefore has to be designed in two stages, because initially it is only a premise. It is an assertion of purpose which therefore must be de-

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[54] F.C. VON SAVIGNY, *System des heutigen Römischen Rechts*, vol. I (Berlin: Veit & Company 1840), pp. 213 et seqq.; R. VON JHERING, *Der Zweck im Recht*, vol. 1 (Leipzig: Breitkopf & Härtel, 2nd edn 1884), pp. VIII and 435 et seqq.; on this R. MÜLLER-ERZBACH, 'Die Relativität der Begriffe und ihre Begrenzung durch den Zweck des Gesetzes', 61 *JhJ (Jherings Jahrbücher der Dogmatik des bürgerlichen Rechts)* 1912, pp. (343) at 377 et seqq.

[55] E.g. art. 3 no. 1 Código Civil.

[56] ECJ 3 October 2013, C-583/11 P, ECLI:EU:C:2013:625, *Inuit Tapiriit Kanatami et al. v. European Parliament and Council of the European Union*, para. 50; ECJ 27 November 2012, C-370/12, ECLI:EU:C:2012:756, *Thomas Pringle v. Government of Ireland et al.*, para. 135.

[57] F. BYDLINSKI, *Juristische Methodenlehre und Rechtsbegriff* (Wien: Springer-Verlag, 2nd edn 1991), p. 437: 'Even though some would like to hold onto it, the "canon" is thus out of date.' Similar also B. RÜTHERS-C. FISCHER-A. BIRK, *Rechtstheorie* (München: C.H. Beck, 10th edn 2018), para. 703: the 'progress of knowledge […] is slight'.

[58] For constitutional law already E. FORSTHOFF, *Zur Problematik der Verfassungsauslegung* (Stuttgart: Kohlhammer 1961), p. 39. In general terms R.D. HERZBERG, 'Kritik der telelogischen Gesetzesauslegung', *NJW* (*Neue Juristische Wochenschrift)* 1990, pp. 2525 et seqq.; R.D. HERZBERG, 'Die ratio legis als Schlüssel zum Gesetzesverständnis? – Eine Skizze und Kritik der überkommenden Auslegungsmethodik', *JuS* 2005, pp. (1) at 3 et seq.

[59] M. MORLOK, 'Die vier Auslegungsmethoden – was sonst?', in G. Gabriel & R. Gröschner (eds), *Subsumtion* (Tübingen: Mohr Siebeck 2012), p. (179) at 191; M. SACHS, in M. Sachs (ed.), *Grundgesetz* (München: C.H. Beck, 8th edn 2018), Einführung para. 43.

fended with arguments to develop the consequences for the interpretation.[60] This can be referred to as a telos that is immanent in the system of norms.[61] If an outdoor swimming pool prohibits dogs, then this will especially apply to cheetahs (hypothesis) – for instance, to reduce the objective danger for bathers, to allow people to bathe without fear, or to protect hygiene (the telos as a premise).[62] This simple case however becomes less clear if a bather wants to bring a hamster or shrew to the pool. The comparability of the two cases must then be reasoned or rejected on the basis of valuations.[63] The search for the telos is therefore only a premise which must be reinforced by further arguments.[64] The teleological interpretation is thus not superfluous but merely requires further arguments. The search for the telos is complemented by logical, interest-based[65] and impact-based arguments. The decisive factor is frequently an "interpretation from within the inherent system of the legal order which, in addition to the valuations codified in the law, embraces the general legal principles that can be gained inductively from positive law."[66] Considerations that focus on the consequences can complement the valuations of the law. Impact-based considerations can complement the valuations of the law. This includes, for instance, the *argumentum ad absurdum*[67] – the avoidance liability or the normative force of the factual.

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[60] M. MORLOK, 'Die vier Auslegungsmethoden – was sonst?', in G. Gabriel & R. Gröschner (eds), *Subsumtion* (Tübingen: Mohr Siebeck 2012), p. (179) at 204. One conclusion that is drawn is the further development of the law by analogy or teleological reduction in order to achieve the purpose of the norm.

[61] J.F. LINDNER, *Theorie der Grundrechtsdogmatik* (Tübingen: Mohr Siebeck 2005), pp. 160 et seqq. Previously already K. STERN, *Das Staatsrecht der Bundesrepublik Deutschland*, vol. III/2 (München: C.H. Beck 1994), p. 1663.

[62] M. MORLOK, 'Die vier Auslegungsmethoden – was sonst?', in G. Gabriel & R. Gröschner (eds), *Subsumtion* (Tübingen: Mohr Siebeck 2012), p. (179) at 191.

[63] In detail on legal analogy and on teleological reduction see T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 6 paras 81 et seqq.

[64] F. MÜLLER-R. CHRISTENSEN, *Juristische Methodik*, vol. II (Berlin: Duncker & Humblot, 3rd edn 2012), para. 103; S.E.A. MARTENS, *Methodenlehre des Unionsrechts* (Tübingen: Mohr Siebeck 2013), pp. 457 and 461.

[65] In the same vein E.E. OTT, *Juristische Methode in der Sackgasse?* (Zürich: Orell Füssli Verlag 2006), pp. 62 et seqq.

[66] Comprehensively T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapters 5 and 6; C. HÖPFNER-B. RÜTHERS, 'Grundlagen einer europäischen Methodenlehre', 209 *AcP* 2009, pp. 1 and 7 et seq, who do not however wish to make this subject to teleological interpretation.

[67] Anglo-American law is familiar with this argument as well, see W. BLACKSTONE, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon 1765), p. 60; N. MACCORMICK, *Legal Reasoning and Legal Theory* (Oxford: Clarendon, 2nd edn 1994), pp. 108 et seqq.; K.J. VANDEVELDE, *Thinking Like a Lawyer* (Boulder: Westview Press, 2nd edn 2011), p. 39.

As the economic analysis of the law is impact-based, it reveals economically effective solutions. Yet, these considerations are only helpful if economic considerations concur with the valuations of the Constitution and other laws. The strict liability of Section 1 of the Product Liability Act (*Produkthaftungsgesetz* – ProdHaftG) forces manufacturers – not the potentially injured party – to take precautions because they are liable for damage whatever the case. In the case of negligence under Section 823(1) of the Civil Code (BGB), the aggrieved party may, in case of doubt, invoke the absence of fault. However, the potentially injured party should have an interest that the damage does not occur and should therefore prevent damage. Both principles are not pareto optimal,[68] because the other side fails to take measures to avoid damage. The optimal position would be strict liability with fault elements or negligence with risk elements. Such an alternative can already be found *de lege lata* in the defence of contributory negligence under Section 254 of the Civil Code (or in conjunction with Section 6(1) of the Product Liability Act) and the duty to mitigate damages. In 1969, the Federal Court of Justice (BGH) had already introduced negligence with risk elements in the fowl pest decision by way of development of the law for producers. The claimant often cannot prove whether the breach of duty was due to negligence. Therefore, the burden of proof is reversed, and it is presumed that the producer's breach of duty of care was due to fault.[69] This means that the injuring party must act carefully in order to avoid liability. However, the injuring party may exculpate itself, which is why the potentially injured party also has to take due care.[70]

3.2.1. – The term *Konkretisierung* (substantiation) has been developed in public law and is used as a method when working with fundamental rights. In the substantiation process, the lawyer is required to 'perform a greater degree of specification'[71] because the wording does not directly permit subsumption. The concept can also be used in pri-

[68] A rule is Pareto optimal, and therefore preferable, if no individual can be better off without another individual being worse off at the same time, cf. V. PARETO, *Cours d'économie politique* (Lausanne: F. Rouge 1896, 1897).

[69] BGH 26 November 1968, VI ZR 212/66, 51 *BGHZ* (*Entscheidungssammlung des Bundesgerichtshofes in Zivilsachen)*, pp. (91) at 105 et seqq. – *Fowl pest.*

[70] M. ADAMS, *Ökonomische Analyse der Gefährdungs– und Verschuldenshaftung* (Heidelberg: R. v. Decker Verlag 1985), pp. 51 and 114 et seqq. and 266.

[71] M. MORLOK, 'Die vier Auslegungsmethoden – was sonst?', in G. Gabriel & R. Gröschner (eds), *Subsumtion* (Tübingen: Mohr Siebeck 2012), p. (179) at 206.

vate law and criminal law when working with general clauses. General clauses are terms that are highly abstract and that have *no clear conceptual core.* A subsumption of the facts under the constituent elements of the case is therefore no longer possible.[72] Substantiation expresses that, in addition to the above-mentioned interpretative figures, further methodical steps are necessary before a subsumption of the facts can be achieved.[73] The method of substantiation thus goes beyond the interpretation canons[74] and should follow on from interpretation as a second step.[75] Methodologically, substantiation is more challenging than pure interpretation, as it is more difficult for the user of the law to develop a comprehensible sequence of checks without clear constituent elements. Not only students have great difficulty substantiating acts contrary to public policy (*Sittenwidrigkeit*) under Section 138(1) of the Civil Code (BGB) or human dignity (*Menschenwürde*) under Article 1(1) of the Basic Law (GG). In part, interpretation and substantiation are regarded as opposites – interpretation would be the definition of given content, substantiation the creative filling of something that is fixed only in principle. Thus substantiation can take on elements of creativity.[76] Therefore, after the traditional interpretation concepts have been applied, it makes sense to introduce substantiation as another interim step.

Topic is a procedure for the "procurement of meaningful hypotheses".[77] As sub-items of the topic, topoi[78] are rhetorical starting points of argumentation.[79] They are flashes of

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[72] A. OHLY, 'Generalklausel und Richterrecht', 201 *AcP* 2001, p. (1) at 5; R. WEBER, 'Einige Gedanken zur Konkretisierung von Generalklauseln durch Fallgruppen', 192 *AcP* 1992, p. (516) at 524.

[73] K. HESSE, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Heidelberg: C.F. Müller, 20th edn 1999), para. 59.

[74] Differing view W. BRUGGER, 'Konkretisierung des Rechts und Auslegung der Gesetze', 119 *AöR (Archiv des öffentlichen Rechts)* 1994, p. (1) at 2, who uses the terms as synonyms.

[75] In part, interpretation and substantiation are regarded as opposites – interpretation would be the definition of given content, substantiation the creative filling of something that is fixed only in principle, see E-W. BÖCKENFÖRDE, *Staat, Verfassung, Demokratie* (Frankfurt am Main: Suhrkamp Verlag, 2nd edn 1992), pp. 159 and 186 et seq; H. HUBER, 'Die Bedeutung der Grundrechte für die sozialen Beziehungen unter den Rechtsgenossen', 74 *ZSR-NF (Zeitschrift für schweizerisches Recht, Neue Folge)* 1955, p. (173) at 201.

[76] E-W. BÖCKENFÖRDE, *Staat, Verfassung, Demokratie* (Frankfurt am Main: Suhrkamp Verlag, 2nd edn 1992), pp. 159 and 186 et seq; K. HESSE, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Heidelberg: C.F. Müller, 20th edn 1999), para. 60: 'creative act'; P. LERCHE, 'Facetten der Konkretisierung von Verfassungsrecht', in I. Koller, J. Hager, M. Junker, R. Singer & J. Neuner (eds), *Einheit und Folgerichtigkeit im Juristischen Denken* (München: C.H. Beck 1998), p. (7) at 16: 'creative design'.

[77] M. KRIELE, *Theorie der Rechtsgewinnung* (Berlin: Duncker & Humblot, 2nd edn 1976), p. 148.

[78] Topos, plural: *Topoi*, means literally 'local knowledge'.

[79] In the same vein already T. VIEHWEG, *Topik und Jurisprudenz* (München: C.H. Beck, 5th edn 1974),

inspiration that lawyers gather in a brainstorming session before incorporating them into their argumentation. What is required is a normatively-bound topical procedure.[80] The flexible system has met with approval in tort law.[81] Wilburg based non-contractual liability on four criteria which must be weighed against each other in a flexible system.[82] In order to be able to strike a better balance between the interests of the injured and those of the actor, von Bar also developed four criteria for a flexible system on the basis of this. They comprise a duty to control risks in the creation or maintenance of a risk (source), the reasonableness of risk control, the benefit from the source of risk, and the protection of legitimate expectation of the affected party[83] or of the recognisability of the risk.[84] These are attribution criteria similar to a constituent element (*tatbestandsähnliche Zurechnungsgründe*),[85] which can thus justify or exclude liability. The attribution criteria for obligations under the tort law of Section 823(1) of the Civil Code (BGB) can be shown by the following case: Must an innkeeper secure a cellar door situated next to the toilets when there is a steep staircase behind the cellar door? Can guests claim compensation if they fall down the stairs? Within the scope of a flexible system, several criteria speak in favour of affirming a breach of duty. By serving alcohol to the

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p. 111: contemporary rhetorical argumentation theory; J. ESSER, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (Tübingen: Mohr Siebeck 1956), pp. 44 et seqq.

[80] In the same vein K. HESSE, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Heidelberg: C.F. Müller, 20th edn 1999), paras 67 et seqq.

[81] E. DEUTSCH, 'Die Elemente des Schadensrechts und das Bewegliche System', in F. Bydlinski, H. Krejci, B. Schilcher & V. Steininger (eds), *Das Bewegliche System im geltenden und künftigen Recht* (Wien: Verlag Österreich 1986), pp. 43 et seqq.; H. KOZIOL, 'Bewegliches System und Gefährdungshaftung', in F. Bydlinski, H. Krejci, B. Schilcher & V. Steininger (eds), *Das Bewegliche System im geltenden und künftigen Recht* (Wien: Verlag Österreich 1986), pp. 51 et seqq.; C. VON BAR, 'Zur Bedeutung des Beweglichen Systems für die Dogmatik der Verkehrspflichten', in F. Bydlinski, H. Krejci, B. Schilcher & V. Steininger (eds), *Das Bewegliche System im geltenden und künftigen Recht* (Wien: Verlag Österreich 1986), p. (63) at 72.

[82] W. WILBURG, 'Zusammenspiel der Kräfte im Aufbau des Schuldrechts', 163 *AcP* 1964, p. 346.

[83] C. VON BAR, 'Zur Bedeutung des Beweglichen Systems für die Dogmatik der Verkehrspflichten', in F. Bydlinski-H. Krejci-B. Schilcher-V. Steininger (eds), *Das Bewegliche System im geltenden und künftigen Recht* (Wien: Verlag Österreich 1986), p. (63) at 69; similarly previously, C. VON BAR, *Verkehrspflichten* (Köln: Carl Heymanns Verlag 1980), pp. 113 et seqq. These have been further specified, see K. LARENZ-C-W. CANARIS, *Lehrbuch des Schuldrechts, Besonderer Teil*, vol. II/2 (München: C.H. Beck, 13th edn 1994), pp. 412 et seqq.

[84] See T.M.J. MÖLLERS, *Rechtsgüterschutz im Umwelt– und Haftungsrecht* (Tübingen: Mohr Siebeck 1996), p. 293.

[85] K. LARENZ-C-W. CANARIS, *Lehrbuch des Schuldrechts, Besonderer Teil*, vol. II/2 (München: C.H. Beck, 13th edn 1994), p. 412.

guests, the host creates a source of danger. The innkeeper draws an advantage in the form of revenues from the serving of alcohol. The danger of guests falling down the basement stairs is obvious to the innkeeper in that, as a result of alcohol consumption, he must reckon with reduced attention but also curiosity on the part of the guests. It is not difficult for the host to control the danger by locking the cellar door. It is questionable to what extent the element of legitimate expectations is fulfilled. After all, everyone is responsible for their own well-being. Nevertheless, especially in restaurants where alcohol is served, guests can be confident that there are no unexpected dangers hidden in the rooms that are open to the public. This means that the innkeeper has a duty to ensure safety and is therefore liable for damages. [86]

3.2.2. – Reasoning from case to case [87] permits substantiation by the courts.

The comparative case method was already known under Roman law. [88] It reasons from the specific to the specific. It establishes the link between one case and another, in the context of interpretation and substantiation. [89] In practice, no two cases are completely identical. Where there is partial equality of cases, the comparative case method corresponds methodically to the individual analogy – except that it does not take place at the legal level, but at the factual level. [90] In the case of inequality, the comparative case method corresponds to teleological reduction, which narrows the scope of application. [91] As in the case of individual analogy or teleological reduction, the question is whether the facts to be assessed are partially equal to or inequitable with the previous law. It is therefore a question of equal treatment of substantially equal cases and unequal treatment of

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[86] According to BGH 9 February 1988, VI ZR 48/87, *NJW* 1988, pp. 1588 et seq. – *Innkeeper*.

[87] E.H. LEVI, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press 1949), p. 1.

[88] Iul. D. 1,3,12: *Is qui iurisdictioni praeest ad similia proecedere atque ita ius dicere debet*. – Then anyone responsible for the legislation must proceed to establish an analogous rule and accordingly dispense justice; differing view R. ZIPPELIUS, *Juristische Methodenlehre* (München: C.H. Beck, 11th edn 2012), p. 59.

[89] F. BYDLINSKI, *Juristische Methodenlehre und Rechtsbegriff* (Wien: Springer-Verlag, 2nd edn 1991), pp. 548 et seqq.; J. SCHAPP, *Hauptprobleme der juristischen Methodenlehre* (Tübingen: Mohr Siebeck 1983), pp. 64 et seq; R. ZIPPELIUS, *Juristische Methodenlehre* (München: C.H. Beck, 11th edn 2012), pp. 58 et seqq.

[90] A. OHLY, 'Generalklausel und Richterrecht', 201 *AcP* 2001, p. (1) at 43.

[91] A. OHLY, 'Generalklausel und Richterrecht', 201 *AcP* 2001, p. (1) at 43; similarly, K. LANGENBUCHER, *Die Entwicklung und Auslegung von Richterrecht* (München: C.H. Beck 1996), p. 99.

substantially unequal cases.[92] For this purpose, there must be a comparison of the facts and the values.[93] The starting point is the normal case method: it is therefore necessary to ask which cases are usually covered by the norm. *In concreto*, it is also possible to search for similarities between decided cases and the new case. First of all, one must identify the value that is inherent in both cases. The facts and interests must therefore have the same value in both cases.[94] In this respect, one can also speak of an analogous application of a precedent.[95] For comparing the partial equality of the new case with earlier cases, the similarity argument (*Ähnlichkeitsargument*), the *a fortiori* conclusion (*Erst-Recht-Schluss*) and the circumvention argument (*Umgehungsargument*) can be used, and for the inequality the reverse conclusion (*Umkehrschluss*) and *argumentum ad absurdum* can be used. Finally, it must be ensured that the remaining differences are not of such a nature as to justify unequal treatment. In academic teaching, but also in US-American court hearings, it is common not only to fall back on previously decided cases, but also to form hypothetical cases for argumentation purposes.[96]

In part, it is also argued that the comparative case method does not infer the specific from the specific, but a comparison moment (*tertium comparationis*) – a rule that can be generalised.[97] This would initially abstract a general thought from the specific, already decided case (induction). Subsequently, a conclusion would then be drawn from this general thought to another specific matter, the new facts to be decided (deduction). Initially, just the two cases are compared. Here the reasoning from the specific to the specific is more convincing. Only in a second step does one have the opportunity to refer to several cases, to compare them and to search for a moment of comparison or a legal concept that can be generalised. As a generalisable rule, the *tertium comparationis* is more likely to succeed if different lines of case law exist which then (inductively) enable a cer-

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[92] R. ZIPPELIUS, *Juristische Methodenlehre* (München: C.H. Beck, 11th edn 2012), p. 58.

[93] J. VOGEL, *Juristische Methodik* (Berlin: De Gruyter 1998), p. 166.

[94] A. OHLY, 'Generalklausel und Richterrecht', 201 *AcP* 2001, p. (1) at 43.

[95] A. OHLY, *Richterrecht und Generalklausel im Recht des unlauteren Wettbewerbs* (Köln: Carl Heymanns Verlag 1997), p. 110; J. VOGEL, *Juristische Methodik* (Berlin: De Gruyter 1998), p. 167, speaking of reversed distinguishing.

[96] K.J. VANDEVELDE, *Thinking Like a Lawyer* (Boulder: Westview Press, 2nd edn 2011), p. 302.

[97] K.J. VANDEVELDE, *Thinking Like a Lawyer* (Boulder: Westview Press, 2nd edn 2011), pp. 93 et seqq.; previously, K. LANGENBUCHER, *Die Entwicklung und Auslegung von Richterrecht* (München: C.H. Beck 1996), p. 76, with reference to C.A. ALLEN, *Law in the Making* (Oxford: Clarendon, 7th edn 1964), p. 270, and UK Court of Appeal, *Re Hallett's Estate*, (1880) 13 *Ch. D. (Chancery Division)*, p. (696) at 712: 'The only use of authorities, or decided cases, is the establishment of some principle which the Judge can follow out in deciding the case before him.'

tain level of abstraction.[98] There is a need for a kind of systematic interpretation of the case law, which comprises not only the linear decision-making chains, but which also encompasses the entire material case law in case of doubt.[99] The general legal rule thus concretises the indefinite legal concept. It claims to be valid, and serves to deduce and justify subsumption.[100] The analogy, the combination of induction and deduction, can lead to a generally valid legal rule that goes beyond direct comparison with another case. Once this has been achieved, future cases can be solved more easily than before, because it is no longer necessary to justify the similarity, but only to prove that the new case falls under the general rule of law.

Here again, an illustrative example can be found of what falls under the undefined legal concept of damage. The Federal Court of Justice has consistently held that there is a pecuniary loss if a damaged motor vehicle cannot be used.[101] The loss of usability has been commercialised as pecuniary loss. For a fur coat damaged by a third party, there is no commercialised compensation for the loss of use.[102] Can an injured party claim damages if a swimming pool cannot be used? Using the comparative case method, the Federal Court of Justice (BGH) rejected a claim for damages due to the lack of possibility of using a private swimming pool[103] and separated this 'hobby' from the apartment, the house, the rental car or the failure of Internet access.[104] The Grand Senate restricted the claim due to the loss of the opportunity of use and, as a legal principle capable of generalisation, demanded economic goods of general, central importance for the standard of living, so that the self-economic standard of living is typically dependent on its constant availability.[105]

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[98] W. FIKENTSCHER, *Methoden des Rechts in vergleichender Darstellung*, vol. II (Tübingen: Mohr Siebeck 1975), p. 101 speaks of chains of precedents and of a 'choice between two lines of authority'.

[99] J. VOGEL, *Juristische Methodik* (Berlin: De Gruyter 1998), p. 164.

[100] J. VOGEL, *Juristische Methodik* (Berlin: De Gruyter 1998), p. 162. The same applies to Anglo-American law, K.J. VANDEVELDE, *Thinking Like a Lawyer* (Boulder: Westview Press, 2nd edn 2011), p. 127.

[101] BGH 30 September 1963, III ZR 137/62, 40 *BGHZ*, pp. (345) at 348 et seqq.

[102] BGH 12 February 1975, VIII ZR 131/73, 63 *BGHZ*, p. (393) at 398 – *Fur coat*.

[103] BGH 24 January 2013, III ZR 98/12, 196 *BGHZ*, p. 101 paras 9 et seqq. – *Internet access*.

[104] BGH 28 February 1980, VII ZR 183/79, 76 *BGHZ*, p. (179) at 187 – *Swimming pools*.

[105] BGH 9 July 1986, GSZ 1/86, 98 *BGHZ*, pp. (212) at 220 et seqq.

3.3. – Individual analogies or teleological reduction may well occur in the German State Examination in law, but many students are unable to reason these argumentative figures in greater detail.[106] Anglo-American lawyers work with precedents and form general legal principles as rules from large numbers of rulings. German law students are not very familiar with this method of substantiation, because they are more focused on interpreting the code. This also has to do with the fact that the previously prevailing view denied that judgments were a source of law under the civil law system because they did not exercise any binding effect on everyone.[107] Judgments are however in my view secondary sources of law,[108] which lead to an obligation to address the matter and to a subsidiary obligation to comply.[109] Prospective lawyers are much too infrequently taught how to work through a whole chain of decisions and summarise them to form generalisable rules. This could be the starting point for seminars and private study. Oral exams would also provide a suitable opportunity to develop legal-dogmatic questions and legal principles of individual legal areas on a case-by-case basis.

4. – 4.1. – More than sixty years ago, treaties created a separate legal system in Europe with a supranational effect. The law in Germany is increasingly influenced by European law, both directly and indirectly. This applies to the EC Treaty (today: TEU and TFEU) and to European fundamental rights, as well as to regulations and directives as secondary European Union law.[110] The German Civil Code (BGB) has been European-

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[106] Tests in the State Examination could certainly focus more frequently on an unknown problem and not simply race ahead by testing for countless claims. This plea is addressed to the university lecturers, as it is generally they who set the tasks to be examined.

[107] K. LARENZ, *Methodenlehre der Rechtswissenschaft* (Berlin: Springer-Verlag, 6th edn 1991), p. 432; E. PICKER, 'Richterrecht oder Rechtsdogmatik – Alternativen der Rechtsgewinnung', *JZ* 1988, pp. 62 and 72 et seq.

[108] On this definition cf. T.M.J. MÖLLERS, 'Sekundäre Rechtsquellen', in J-H. Bauer-M. Kort-T.M.J. Möllers-B. Sandmann (eds), *Festschrift für Herbert Buchner* (München: C.H. Beck 2009), pp. 649 et seqq.

[109] In the same vein already F. BYDLINSKI, *Juristische Methodenlehre und Rechtsbegriff* (Wien: Springer-Verlag, 2nd edn 1991), p. 510; F. BYDLINSKI, 'Richterrecht über Richterrecht', in C-W. Canaris-A. Heldrich (eds), *50 Jahre Bundesgerichtshof*, vol. 1 (München: C.H. Beck 2000), pp. 3 et seqq.; E.A. KRAMER, *Juristische Methodenlehre* (Bern: Stämpfli Verlag/C.H. Beck/MANZ, 5th edn 2016), p. 258.

[110] In a speech in 1988, Jacques Delors, back then President of the European Commission, emphasised, that more than 50% of all national laws today originate from European law and in fact as many as 80% when it comes to economic law, cf. European Commission (ed.), *Bulletin of the European Communities*, nos. 7/8 (1988), p. 111.

ised through numerous consumer protection directives.[111] In accordance with Article 4 sentence 3 of the TEU, "the Member States shall take any appropriate measures […] to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union". The duty is referred to as the principle of loyal cooperation or as the duty of cooperation.[112] The national judge is always simultaneously a judge of the European Union.[113] The ECJ's words are clear on this subject: "In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law."[114] If a court acts in violation of EU law, public liability for judicial injustice based on the claim of state liability under EU law is conceivable.[115]

4.2. – Lawyers therefore pay a price for European unification: The multi-level system of European law[116] necessitates a complex multi-level analysis. The hierarchy of law requires lower-ranking law to be disregarded. These considerations exist on the European level as well. In a chain of decisions, the ECJ invented uncodified principles to render European law more powerful and effective. The European treaties are higher-ranking than the law of the Member States, and under certain conditions take direct effect (principle of direct effect).[117] This applies to regulations and directives as well if they bind

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[111] T.M.J. MÖLLERS, 'Europäische Richtlinien zum Bürgerlichen Recht', *JZ* 2002, pp. 121 et seqq.; M. SCHMIDT-KESSEL, 'Zahlungszeit (§§ 269 bis 271 BGB) und Verzug (§§ 280 Abs. 1 und 2, 286, 288 BGB)', in M. Gebauer-T. Wiedmann (eds), *Zivilrecht unter europäischem Einfluss* (Stuttgart: Boorberg, 2nd edn 2010), pp. 143 et seqq.

[112] Article 4(3) sub-clause 1 of the TEU. R. STREINZ, in R. STREINZ (ed.), *EUV/AEUV Kommentar* (München: C.H. Beck, 2nd edn 2012), art. 4 EUV paras 30 et seqq.

[113] I. PERNICE, 'Die Dritte Gewalt im europäischen Verfassungsverbund', *EuR (Zeitschrift Europarecht)* 1996, p. (27) at 33; M. ZULEEG, 'Die Rolle der rechtsprechenden Gewalt in der europäischen Integration', *JZ* 1994, p. (1) at 2; T.M.J. MÖLLERS, *The Role Of Law in European Integration* (New York: Nova Science Publishers 2003), p. 82.

[114] ECJ 8 March 2011, Opinion 1/09, ECLI:EU:C:2011:123, paras 66 et seqq.

[115] T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 12 paras 118 et seqq.

[116] 'Multilevel system', cf. O. REMIEN, 'Einheit, Mehrstufigkeit und Flexibilität im europäischen Privat– und Wirtschaftsrecht', 62 *RabelsZ* 1998, p. (627) at 630; I. PERNICE, 'Multilevel Constitutionalism and the treaty of Amsterdam: European Constitution-making revisited?', 36 *Common Mkt. L. Rev. (Common Market Law Review)* 1999, pp. 703 et seqq.

[117] ECJ 5 February 1963, C-26/62, ECLI:EU:C:1963:1, *van Gend & Loos v. Netherlands Inland Reve-*

the State – the principle of vertical effect[118]. This is clarified by the *Quelle* ruling that examined consumer goods purchases:[119] In a first step, the legal practitioner encounters the national norm and has to ask if it has a connection with European Union law. Then, European law must be interpreted. Therefore, the Consumer Goods Directive must be interpreted. Thirdly, it may be necessary to interpret secondary law in the light of primary law. Fourthly, the national law (i.e. the German norms) must be examined. Is there a conflict, according to the findings from the first two steps, between national and European law and thus a precedence of application? Can the national law be interpreted against the wording in accordance with the directive? Fifthly, and finally, what happens if the interpretation is excessive and beyond the scope of the Directive?[120] Again, all of this is perfectly feasible if the national legislature makes the ECJ's stipulations a law as it has recently done in the *Tiles* Case with Section 439 of the Civil Code (BGB) new version.[121] Until then however, legal practitioners are on their own.

Then it becomes really difficult, and it now appears that a true solution of the case can no longer work without the relevant European interpretation concepts. The power of the primary European law, European fundamental rights and fundamental freedoms, as well as European regulations, remains unclear. The precedence of application forces the national provision to be ignored here. However, before a norm can be declared incompatible with the higher-ranking European law and deemed inapplicable due to the precedence of application, the national norm must be interpreted in conformity with primary law – even though the ECJ understands *interprétation* to mean not only interpretation but also as development of the law.[122] The boundary of permissible development of the

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nue Administration, paras 7, 25 et seq; P. CRAIG-G. DE BÚRCA, *EU Law* (Oxford: Oxford University Press, 6th edn 2015), pp. 185 et seq.; in detail, L. WOODS-P. WATSON-M. COSTA, *Steiner & Woods EU Law* (Oxford: Oxford University Press, 13th edn 2017), pp. 114 et seqq.

[118] ECJ 4 December 1974, C-41/74, ECLI:EU:C:1974:133, *van Duyn v. Home Office*, para. 12; ECJ 5 April 1979, C-148/78, ECLI:EU:C:1979:110, *Pubblico Ministero v. Ratti*, para. 21; ECJ 19 January 1982, C-8/81, ECLI:EU:C:1982:7, *Becker v. Finanzamt Münster-Innenstadt*; ECJ 12 July 1990, C-188/89, ECLI:EU:C:1990:313, *Foster et al. v. British Gas plc.*, para. 20.

[119] For an overview T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 12 para. 102.

[120] T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter. 12 para. 90 with further references.

[121] Act […] amending Liability for Defects under Sales Law (*Gesetz* […] *zur Änderung der kaufrechtlichen Mängelhaftung*) […] of 28 April 2017, *BGBl.* I *(Bundesgesetzblatt)*, pp. 969 et seq.

[122] ECJ 4 July 2006, C-212/04, ECLI:EU:C:2006:443, *Konstantinos Adeneler et al. v. Ellinikos Organismos Galaktos (ELOG)*, paras 110 et seq. See also BGH 26 November 2008, VIII ZR 200/05, 179 *BGHZ*, p. 27 para. 21 – *Quelle*; U. BABUSIAUX, *Die richtlinienkonforme Auslegung im deutschen und französischen*

law that is in *conformity with primary law* remains unclear. European law may therefore oblige the user of the law to no longer apply certain elements of the law. One example is the claim for the reimbursement of unjustified subsidies under Article 48 of the Bavarian Administrative Procedure Act (*Bayerisches Verwaltungsverfahrensgesetz*, BayVwVfG). Here the ECJ has "trimmed to size" the national standard to a large extent, since several factual criteria must be ignored at once. The provision of Article 48 BayVwVfG is not modified with regard to the limitation period under subsection 4. Also, the objections that the aid has already been used up (Article 48(2) sentences 1 and 2 BayVwVfG) or that the recipient is no longer enriched (Article 49a(2) BayVwfG) are superimposed by the European principle of *effet utile* and are therefore not applicable. [123]

In 2002, the German legislature integrated several European directives on consumer protection into the Civil Code. Because a word-identical translation was made only rarely, these regulations have led to numerous problems. After the ECJ had rejected a horizontal third-party effect of the directives, it also developed an obligation to *interpret national law in conformity with the directive* in accordance with the requirements of the European Directive. The terms vary in English. Besides the *principle of indirect effect,* [124] the terms *principle of harmonious interpretation* [125] or *principle of consistent interpretation* [126] are being used. Interpretation in conformity with the directive requires national law to be interpreted as far as possible in such a way as to achieve the objectives of the directive. This obligation covers *all national law*, not just the law transposing the directive. [127] Ultimately, great uncertainty prevails about when and where the *contra*

Zivilrecht (Baden-Baden: Nomos 2007), pp. 137 et seq; T.M.J. MÖLLERS, 'Doppelte Rechtsfortbildung contra legem?', *EuR* 1998, p. (20) at 44; C-W. CANARIS, 'Die richtlinienkonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre', in H. Koziol-P. Rummel (eds), *Im Dienste der Gerechtigkeit, Festschrift Bydlinski* (Wien: Springer-Verlag 2002), pp. 47 and 81.

[123] BVerwG 17 February 1993, 11 C 47/92, 92 *BVerwGE (Entscheidungen des Bundesverwaltungsgerichtes)*, pp. 81 and 85 et seq. – *Recovery of unlawful aids*; BVerfG 17 February 2000, 2 BvR 1210/98, *NJW* 2000, p. (2015) at 2016 – *Alcan.*

[124] P. CRAIG-G. DE BÚRCA, *EU Law* (Oxford: Oxford University Press, 6th edn 2015), p. 209; L. WOODS-P. WATSON-M. COSTA, *Steiner & Woods EU Law* (Oxford: Oxford University Press, 13th edn 2017), p. 137.

[125] P. CRAIG-G. DE BÚRCA, *EU Law* (Oxford: Oxford University Press, 6th edn 2015), p. 209.

[126] L. WOODS-P. WATSON-M. COSTA, *Steiner & Woods EU Law* (Oxford: Oxford University Press, 13th edn 2017), p. 137; G. BETLEM, 'The Doctrine of Consistent Interpretation – Managing Legal Uncertainty', 22 *Oxford J. Leg. St. (Oxford Journal of Legal Studies)* 2002, p. 397.

[127] ECJ 10 April 1984, C-14/83, ECLI:EU:C:1984:153, *von Colson and Kamann v. North-Rhine Westphalia*; ECJ 10 April 1984, C-79/83, ECLI:EU:C:1984:155, *Harz v. Deutsche Tradax GmbH*; ECJ 13 November 1990, C-106/89, ECLI:EU:C:1990:395, *Marleasing SA v. La Comercial Internacional de Ali-*

legem boundary is reached. [128] It is not yet clear to what extent a development of the law in conformity with the law contrary to the wording of the law or the intention of the legislature is permissible. If the provision's wording is exceeded, this is development of the law under a German understanding and courts are obligated to a greater extent to reason that they are allowed to develop the law and do not rule *contra legem*. [129] In detail, an increasing number of German courts are tending to interpret the interpretation in conformity with the directive very broadly, and even affirm a development of the law in conformity with the directive contrary to the (unambiguous) wording. The *Quelle* ruling made it very clear that – contrary to Section 346(1) and (2) no. 1 in conjunction with Section 439(4) of the Civil Code – the consumer does not have to pay any compensation for use, but may return the used refrigerator to Quelle AG free of charge. [130] The *contra legem* limit must be complied with here, albeit the details are very much the subject of dispute. [131] Impermissible development of the law *contra legem* probably applies if a job applicant who has been discriminated against would like to base their claim to damages for pain and suffering in respect of rights of personality on Section 823(1) of the Civil Code, even without the employer being at fault. Since this would lead to an inconsistency with the principle of fault of tort law, this goes beyond the limits of admissible development of the law. [132]

4.3. – The greatest amount of catching up in legal training is still to be done in the field of European legal methodology. Hardly any students are trained to deal with the au-

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mentacion SA, para. 8; ECJ 14 July 1994, C-91/92, ECLI:EU:C:1994:292, *Paola Faccini Dori v Recreb Srl*, para. 26; ECJ 4 July 2006, C-212/04, ECLI:EU:C:2006:443, *Konstantinos Adeneler et al. v. Ellinikos Organismos Galaktos*, paras 110 et seq.

[128] P. CRAIG-G. DE BÚRCA, *EU Law* (Oxford: Oxford University Press, 6th edn 2015), p. 216: "It would be very difficult to predict the outcome of any litigation since the duty of harmonious interpretation demands that national courts consider all national law in deciding whether compatibility with the provisions of the directive can be attained."

[129] It would be worth considering whether a further principle, the judicial development of the law in conformity with the directive, should be introduced to the English language.

[130] BGH 26 November 2008, VIII ZR 200/05, 179 *BGHZ*, p. (27) at 36 – *Quelle*.

[131] In detail T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 12 paras 55 et seqq.

[132] BAG 5 March 1996, 1 AZR 590/92 (A), 82 *BAGE (Sammlung der Entscheidungen des Bundesarbeitsgerichts)*, p. (211) at 230 – *Kalanke*. Greater detail T.M.J. MÖLLERS, *The Role Of Law in European Integration* (New York: Nova Science Publishers 2003), pp. 82 et seq.

tonomous interpretation that is not only applicable for primary law, but for European law as a whole and therefore also for directives and regulations. European law must be interpreted autonomously – namely independently of the understanding of the national user. [133] If the ECJ demands that action be taken in terms of comparative law, [134] the universities still lack the work tools, such as the possibility to deal comprehensively with relevant databases for comparative work. [135]

5. – 5.1. – The boundaries of development of the law are essential for a liberal legal order. The initial considerations set out above serve as a foundation here. It must be ensured that judges do not abuse their power to make binding decisions against a party. Limitation of power in relation to the other powers and in relation to private parties is therefore the yardstick of permissible or impermissible development of the law. In detail, this means that the judge does not need to test whether a legal solution is the most appropriate, sensible or equitable. [136] They overstep the boundary of the development of the law by arrogating the engagement in positive social design. [137] They become legislating judges. The boundary of permissible development of the law is reached where the judge ignores and eliminates the clear basic concept of the legislature. [138] The concept of "judicial self-restraint" is derived from US law. [139] It means that the courts, in terms of judi-

[133] ECJ 27 January 2005, C-188/03, ECLI:EU:C:2005:59, *Irmtraud Junk v. Wolfgang Kühnel*, para. 29.

[134] BGH 13 November 2001, X ZR 134/00, 149 *BGHZ*, p. (165) at 173; ECJ 5 October 2004, C-397/01 *et al.*, ECLI:EU:C:2004:584, *Bernhard Pfeiffer et al. v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV.*, para. 114; ECJ 13 March 2008, C-383/06 *et al.*, ECLI:EU:C:2008:165, *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening et al. v. Minister van Social Zaken en Werkgelegenheid and Algemene Directie voor de Arbeidsvoorziening*, para. 29 no. 7.

[135] In the same vein already M. LUTTER, 'Die Auslegung angeglichenen Rechts', *JZ* 1992, p. (593) at 604; T.M.J. MÖLLERS, *The Role of Law in European Integration* (New York: Nova Science Publishers 2003), pp. 83 et seq; H. KÖTZ, 'Der Bundesgerichtshof und die Rechtsvergleichung', in A. Heldrich-K.J. Hopt (eds), *50 Jahre Bundesgerichtshof*, vol. 2 (München: C.H. Beck 2000), p. (825) at 831; B. GSELL, 'Zivilrechtsanwendung im Europäischen Mehrebenensystem', 214 *AcP* 2014, pp. (99) at 141 et seqq.

[136] Established case law, for instance BVerfG 17 December 1953, 1 BvR 323/51 *et al.*, 3 *BVerfGE*, p. (162) at 182; BVerfG 26 March 1980, 1 BvR 121/76, 1 BvR 122/76, 54 *BVerfGE*, p. (11) at 26.

[137] See the quote from B. RÜTHERS, 'Fortgesetzter Blindflug oder Methodendämmerung der Justiz? Zur Auslegungspraxis der obersten Bundesgerichte', *JZ* 2008, p. (446) at 448; E. PICKER, 'Richterrecht oder Rechtsdogmatik – Alternativen der Rechtsgewinnung', *JZ* 1988, p. (62) at 71: 'engaging in social engineering'.

[138] R. SCHOLZ, 'Der gesetzgebende Richter', *ZG (Zeitschrift für Gesetzgebung)* 2012, pp. 105 et seqq.

[139] US Supreme Court 6 January 1936, *United States v. Butler et al.*, 297 *U.S. (United States Reports)*, p.

cial self-restraint, exercise restraint in their rulings and thus allow the democratically legitimated legislature a margin of appreciation with regard to important political issues. [140] It is highly controversial whether provisions must be interpreted according to the legislature's intention or the current intention. This controversy exists worldwide – for example, in Germany [141] but also in the USA where the theory of the living constitution stands accused of neglecting the legislature's intention. [142] However, the judge must close gaps in the provisions, [143] so that the current understanding of the provision is determinant. The US Supreme Court stressed this in the decision on the recognition of same-sex marriage. [144] In Germany, however, the legislature solved the issue whether a same-sex partnership must be recognised as a marriage. [145] Eventually, decisions of the democratically legitimised parliament, rather than supreme court rulings, lead to the acceptance of a majority decision. [146]

There is considerable dispute as to when fundamental rights of third parties oppose development of the law: The Second Senate of the German Federal Constitutional Court denies any such relevance. [147] The First Senate already regards a development of the law

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(1) at 79; highly descriptive A. COX, 'The role of the Supreme Court: Judicial activism or Self-Restraint', 47 *Md.L.Rev. (Maryland Law Review)* 1987, pp. 118 et seqq.; R.A. POSNER, 'The rise and fall of Judicial Self-Restraint', 100 *Calif.L.Rev. (California Law Review)* 2012, pp. 519 et seqq.

[140] BVerfG 31 July 1973, 2 BvF 1/73, 36 *BVerfGE*, pp. (1) at 14 et seq. and headnote 2 – *Basic Treaty*; G.F. SCHUPPERT, 'Self-restraints der Rechtsprechung', *DVBl (Deutsches Verwaltungsblatt)* 1988, pp. 1191 et seqq.

[141] In greater detail for the so-called objective and subjective theory, T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 6 paras 60 et seqq.

[142] Critically F.H. EASTERBROOK, 'Some Tasks in Understanding Law Through the Lens of Public Choice', 12 *Int'l Rev. L. & Econ. (International Review of Law and Economics)* 1992, p. 284: '[T]he concept of "an" intent for a person is fictive and for an institution hilarious'.

[143] C.R. SUNSTEIN, 'Interpreting Statutes in the Regulatory State', 103 *Harv. L. Rev. (Harvard Law Review)* 1989, pp. (405) at 421 et seqq.

[144] US Supreme Court 26 June 2015, *Obergefell v. Hodges*, 135 *S.Ct. (Supreme Court Reporter)*, p. (2584) at 2602: 'The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.'

[145] Act introducing the right to marriage for same sex couples (*Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts*) of 20 July 2017, *BGBl.* I, p. 2787.

[146] Far too often, political questions are presented to the Bundesverfassungsgericht (Federal Constitutional Court) for a ruling in Germany, critically W. BRUGGER, *Demokratie, Freiheit, Gleichheit.* (Berlin: Duncker & Humblot 2002), p. 153.

[147] BVerfG 15 January 2009, 2 BvR 2044/07, 122 *BVerfGE*, p. (248) at 286 – *Atrophy of remedies*: "The boundaries emerging from Article 20 para. 2 sentence 2 and para. 3 of the Basic Law for the judicial interpretation of non-constitutional law can therefore not be fundamentally narrower or broader depending on whether the respective interpretation positively or negatively impacts individuals concerned."

as impermissible if it impairs the legal situation of the citizen.[148] In consequence, the First Senate negated a right of information of an alleged father against the mother, based on a legal development of Section 242 of the Civil Code (BGB) because this would be a violation of the mother's right of personality. This can be disputed with good arguments – for instance, that the mother is not vulnerable.[149] Consequently, the Federal Constitutional Court should only exercise a constitutional review if the fundamental rights of the third party have been clearly and seriously violated.[150] Although the legislature did not wish to protect an absolute right of personality under Section 823(1) of the Civil Code when it was promulgated,[151] the Federal Court of Justice recognised such a right in a first step after the Second World War.[152] And although the claim for damages for pain and suffering was limited to the cases regulated by law (see Section 847 of the Civil Code (old version)), in a second step the Federal Court of Justice decided that a violation of this right can trigger a claim for damages for pain and suffering under private law and justified this with the right of personality under Article 2(1) and Article 1(1) of the Basic Law (GG).[153] The Federal Constitutional Court approved such interpretation in conformity with the Constitution (*verfassungskonforme Auslegung*)[154].

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[148] BVerfG 24 February 2015, 1 BvR 472/14, 138 *BVerfGE*, p. 377 paras 42 et seqq. – *Right to information of the pretend father*.

[149] The judgment has been massively criticised in the legal literature, cf. M. SACHS, 'Staatsorganisationsrecht: Verfassungsrechtliche Grenzen richterlicher Rechtsfortbildung', *JuS* 2015, p. (860) at 861; J. NEUNER, 'Die Kontrolle zivilrechtlicher Entscheidungen durch das Bundesverfassungsgericht', *JZ* 2016, p. (435) at 438.

[150] In greater detail T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 11 paras 80 et seqq.

[151] Protokolle der Kommission für die zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuchs, vol. II (Berlin: J. Guttentag 1898), pp. 573 et seq. and 640 et seq; in contrast to sec. 704 (2) of the first draft of a Civil Code. RG (Reichsgericht) 7 November 1908, I 638/07, 69 *RGZ (Entscheidungssammlung des Reichsgerichts in Zivilsachen)*, p. (401) at 403 – *Nietzsche letters*: 'A general subjective personal right unknown to the current private law'; see instructively H. KÖTZ & G. WAGNER, *Deliktsrecht* (München: Verlag Franz Vahlen, 13th edn 2016), pp. 365 et seqq.

[152] BGH 25 May 1954, I ZR 211/53, 13 *BGHZ*, p. (334) at 338 – *Schacht letters*.

[153] BGH 14 February 1958, I ZR 151/56, 26 *BGHZ*, p. (349) at 354 – *Horse rider*; BGH 5 March 1963, VI ZR 55/62, 39 *BGHZ*, pp. (124) at 130 et seqq. – *TV announcer*.

[154] BVerfG 14 February 1973, 1 BvR 112/65, 34 *BVerfGE*, pp. (269) at 281 and 289 et seqq. – *Soraya*: "The legal figure of the general right of personality […] fills loopholes in the protection of personality which remain here despite the acknowledgement of individual rights of personality which had become increasingly tangible over time for a variety of reasons."; BVerfG 27 February 2008, 1 BvR 370/07, 1 BvR 595/07, 120 *BVerfGE*, pp. (274) at 303 et seqq. – *Online searches*.

5.2. – If one accepts these cornerstones, arguments can easily be gathered from the areas set out above that are for and against the permissibility of the development of the law and can be examined in detail. The more arguments dispute development of the law, the more difficult it becomes to justify a permissible development of the law. If, for example, wording, system, legal history or purpose speak against development of the law, it will generally only be affirmed by way of exception in favour of a party whose fundamental rights have been violated (keywords: violation of rights of personality).[155] Compelling binding priority arguments, however, argue in favour of development of the law – such as the interpretation just mentioned that complies with primary law.[156] Section 239 of the Civil Code requires that the valid guarantor has a domestic place of jurisdiction, and the concept of the "country" is to be expanded to cover not only Germany but also all other Member States of the EU via further legal development in conformity with primary law.[157] Conversely, the serious encroachment of fundamental rights and the legitimate expectation of the citizen impose boundaries on the permissible development of the law. The principle of legality[158] and the principles regarding the retroactive effect of judgments[159] concretise this legitimate expectation.

5.3. – Certainly, the precise boundary of permissible development of the law is not always easy to identify. However, development of the law not only occurs when the wording boundary is overstepped but, in one view, actually on a daily basis as part of the substantiation of the law.[160] Thus, any kind of interpretation would be development of the law and a demarcation would be superfluous. The term 'development of the law' should therefore not be used for substantiation, since the lawyer remains within the

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[155] See fn. 154.

[156] See D.II. above.

[157] In detail on this U. EHRICKE, 'Der "taugliche Bürge" gemäß §239 BGB auf dem Prüfstand des Gemeinschaftsrechts', *EWS (Europäisches Wirtschafts– und Steuerrecht)* 1994, pp. 259 et seqq.; OLG Koblenz (Oberlandesgericht Koblenz) 29 March 1995, 2 W 105/95, *RIW (Recht der Internationalen Wirtschaft)* 1995, p. 775 – *Austria*; OLG Hamburg (Oberlandesgericht Hamburg) 4 May 1995, 5 U 118/93, *NJW* 1995, p. (2859) at 2860 – *Sweden*.

[158] BVerfG 24 October 1996, 2 BvR 1851/94 *et al.*, 95 BVerfGE, p. (96) at 133 – *Border Wall Guards*.

[159] T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 3 paras 33 et seqq.

[160] In detail T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 13 paras 20 et seqq.

wording. Substantiation of the law takes place within the wording if the latter is as yet too undetermined. As an exception, the term 'development of the law' must be used for substantiation if the lawyer has to get creative [161] and develops new case groups, intermediate steps or legal principles. Development of the law is therefore possible within the wording limit. [162] The more complicated and less clear the legal situation is, the more comprehensively the lawyer will have to apply the whole canon of legal methods. And the more disputed, but also unexplored, the question is which must be adjudicated, the greater the required effort of justification is. The lawyer must learn to cope with the boundaries of permissible development of the law, as shown by the question of permissible development of the law in conformity with the directive or the development of the law in compliance with the primary law. The statements above made in Palandt alleging that the boundary between interpretation and development of the law does not really matter [163] would hardly sustain before the Federal Constitutional Court or the Court of Justice of the European Union given that they contradict the principles mentioned above on the constitutionally-secured obligation incumbent on judges to provide reasoning. [164] Since the standard commentary on the Civil Code lacks any methodical awareness, it deserves to be thought of as a bit of a "method lemon". For the reasons just mentioned, however, the boundaries of the permissible development of the law should be pointed out and practiced on cases during academic study at law school.

6. – The pluralism of methods mentioned above must be countered by presenting building blocks of a metamethodology, a methodology of legal methodology. [165] Thus, the rationality of legal justification can be significantly improved. Legal theory and reasoning are linked to legal history, legal sociology, legal theory, constitutional theory and legal dogmatics. Legal methodology ultimately aims at an equitable result, which is the

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[161] In detail T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 14 paras 39 et seqq.

[162] On this broader definition of the further development of the law, cf. T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 13 paras 20 et seqq.

[163] See fn. 11 above. In latest edition, too, Grüneberg sticks to his view despite the criticism, see C. GRÜNEBERG, in Palandt, *Bürgerliches Gesetzbuch* (München: C.H. Beck, 79th edn 2020), Einleitung paras 56 et seq.

[164] See A.III. above.

[165] T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 14 paras 85 et seqq.

objective of legal philosophy.[166] Gathering argumentative figures from all these subfields calls for discipline. A sequence of examination steps and a weighting of the arguments are helpful.

6.1 – The examination of legal cases can be rationalised with a six-stage examination sequence:

Step 1: Working with the facts must be the starting point of the examination, because only if the *facts* are complete can the legal solution be developed. Hermeneutics of the facts requires a wandering back and forth between the facts and the norm (*Hin– und Herwandern des Blickes*).[167]

Step 2: Trtaditionally, the judicial adjudication starts with Savigny's *canons of instruction* if the wording is at least determinable.[168] It appears natural to begin with the interpretation of the wording, because it can be assumed that the legislature uses the words in the sense in which they are commonly understood.[169] It is therefore the starting point of ascertaining the meaning.[170]

Step 3: Particularly if the four traditional interpretation concepts do not lead to a clear result, it is important to uncover, unravel, select and weight different goal and value flows.[171] This requires intermediate steps to *concretise* "open" norms.[172] The previous case law, for example, helps with its precedents and with the comparative case method.

Step 4: The hierarchic system taught us that *higher-ranking law* must be included in the examination and may take precedence where appropriate. This can confirm the ascertained results, but may also correct them. The Constitution and European law are the most important sources of law here.

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[166] In detail T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 14 paras 65 et seqq.

[167] Cf. B above.

[168] On relevance and significance, cf. T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 4 paras 39 et seqq.

[169] Similar K. LARENZ, *Methodenlehre der Rechtswissenschaft* (Berlin: Springer-Verlag, 6th edn 1991), p. 320; in the same vein for Anglo-American legal circles N. MACCORMICK, 'Argumentation and Interpretation in Law', 6 *Ratio Juris* 1993, pp. 16 and 22.

[170] A. MEIER-HAYOZ, *Der Richter als Gesetzgeber* (Zürich: Juris-Verlag 1951), p. 42.

[171] A. GERN, 'Die Rangfolge der Auslegungsmethoden von Rechtsnormen', 80 *VerwArch (Verwaltungsarchiv)* 1989, pp. 415 and 419.

[172] T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 11 para. 25.

Step 5: This also leads us to a discussion of the *boundaries of the development of the law.* The legal solution aims to prevent any impermissible development of the law *contra legem*; this interpretation goal must therefore naturally come at the end of the examination. Development of the law *contra legem* is impermissible without exception; this boundary is absolute. [173]

Step 6: Precisely due to the possible abuse of legal methods, as the unjust regime of the Third Reich clearly demonstrated, it is necessary that the methodology prioritises accuracy and justice. [174] The test therefore culminates in a *verification of accuracy*. [175] The judge's ruling is subject to a "normative expectation of accuracy". [176] This goes hand in hand with the realisation that legal rulings cannot always be completely secured but can only be "flanked by a methodical frame". [177] This must be accepted if the ruling is being justified. [178] The more indefinite or unclear the norm applied for the solution or the concrete case is, the more elaborate the reasoning must be. The literature requires minimum standards of rational reasoning, as complete disclosure of the deduction of the final justification, the plausibility of the conclusion and compatibility with normatively secured preferences. [179] The sense of justice, the trained feeling for the law, also comes into play at this point. [180] Justice-related issues must be rationally secured with legal methodical

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[173] B. SCHÜNEMANN, 'Die Gesetzesinterpretation im Schnittfeld von Sprachphilosophie, Staatsverfassung und juristischer Methodenlehre', in G. Kohlmann (ed.), *Festschrift für Ulrich Klug zum 70. Geburtstag*, vol. I (Köln: Deubner Verlag 1983), p. (169) at 185, also presumes that there is a fourth stage of the creation of precedents *contra legem*, but does not explore this in detail.

[174] On this T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 14 paras 68 et seqq.; R. ZIPPELIUS, *Juristische Methodenlehre* (München: C.H. Beck, 11th edn 2012), pp. 47 and 51, calls for the problem to be solved in as equitable a manner as possible when selecting the interpretation arguments.

[175] J. RÜCKERT-R. SEINECKE, 'Zwölf Methodenregeln für den Ernstfall', in J. Rückert-R. Seinecke (eds), *Methodik des Zivilrechts – von Savigny bis Teubner* (Baden-Baden: Nomos, 3rd edn 2017), paras 72 et seqq.

[176] Similar M. MORLOK, 'Die vier Auslegungsmethoden – was sonst?', in G. Gabriel-R. Gröschner (eds), *Subsumtion* (Tübingen: Mohr Siebeck 2012), pp. 189 and 207 et seq.

[177] On the convincing ruling, which is however not the only possible ruling, cf. T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 1 paras 26 et seqq., as well as F. LAUDENKLOS-M. ROHLS-W. WOLF, 'Resümee', in J. Rückert-R. Seinecke (eds), *Methodik des Zivilrechts – von Savigny bis Teubner* (Baden-Baden: Nomos, 3rd edn 2017), paras 1531 and 1549.

[178] See A.III. above. A. FISCHER-LESCANO-R. CHRISTENSEN, 'Auctoritatis Interpositio', 44 *STAAT* 2005, p. (213) at 224; in detail T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 1 paras 59 et seqq.

[179] M. HERDEGEN, 'Verfassungsinterpretation als methodische Disziplin', *JZ* 2004, p. (873) at 877.

[180] On this U. DI FABIO, *Das Recht offener Staaten* (Tübingen: Mohr Siebeck 1998), p. 150.

dogma, and thus made "legally operational". [181] This leaves a grey area: value-based jurisprudence and other methodical approaches must ultimately acknowledge that, at the very end of examination, extra-legal measures of value must relied on in a residual area. [182] This allows a rebuttal of the reproach that a ruling would be handed down according to the preconception and that there was an uncontrolled plurality of methods. All examination steps must be checked at least mentally, but without necessarily having to put them to paper. Only such an overall consideration of the relevant arguments leads to a proper understanding of the norm. [183]

6.2. – Legal reasoning can ultimately be further rationalised through an attempt to weight the various argumentative figures. It is possible to distinguish between four different rules.

6.2.1. – Legal practitioners must always consider *binding priority rules*. Priority rules prevail in all cases of conflict and lead to a clear legal consequence; they are contingent on a specific result. The "one-right-answer thesis" then exceptionally applies; any contrary view would be incorrect and unjustifiable. A typical example of a imperative, inadmissable development of the law *contra legem* is the principle of legality – namely the limit of wording in criminal law on the basis of the legal principle of *nulla crimen sine lege scripta*. [184] An impermissible development of the law *contra legem* also exists if the development of the law would lead to a serious encroachment of the fundamental rights of the party affected. [185] Conversely, a binding priority rule can force the development of

[181] In the same vein J. ESSER, 'Möglichkeiten und Grenzen des dogmatischen Denkens im modernen Zivilrecht', 172 *AcP* 1972, p. (97) at 113.

[182] F. LAUDENKLOS-M. ROHLS-W. WOLF, 'Resümee', in J. Rückert-R. Seinecke (eds), *Methodik des Zivilrechts – von Savigny bis Teubner* (Baden-Baden: Nomos, 3rd edn 2017), paras 1531 and 1549.

[183] In the same vein prevalent view, amongst others: K. LARENZ, *Methodenlehre der Rechtswissenschaft* (Berlin: Springer-Verlag, 6th edn 1991), pp. 343 et seqq.; D. LOOSCHELDERS-W. ROTH, *Juristische Methodik in der Rechtsanwendung* (Berlin: Duncker & Humblot 1996), p. 193; K. STERN, *Das Staatsrecht der Bundesrepublik Deutschland*, vol. I (München: C.H. Beck, 2nd edn 1984), p. 126; BGH 30 June 1966, KZR 5/65, 46 *BGHZ*, p. (74) at 79 – *Price fixing of records*.

[184] Referred to as an absolute priority in R. ALEXY-R. DREIER, 'Statutory Interpretation in the Federal Republic of Germany', in N. MacCormick-R.S. Summers (eds), *Interpreting Statutes* (Farnham: Ashgate 1991), p. (73) at 95.

[185] BVerfG 11 October 1978, 1 BvR 84/74, 49 *BVerfGE*, p. (304) at 320 – *Expert witness liability*. See E.II. above.

the law. This is the case with development of the law by European law in conformity with primary law. It leads either to derogation – that is to disregard individual constituent elements – or to the direct precedence of application for primary European law which displaces national law in this respect. [186]

6.2.2. – Lawyers will discover that certain arguments are more substantial and lead to a presumptive effect. The *presumption rule* prima facie favours a specific legal solution. Strictly speaking, the fact that the wording of the provision reflects the legislature's intention favours the assumption. [187] In addition, the historical intent of the legislature should take precedence in case of doubt. [188] Finally, the interplay of wording, systematics and the intent of the legislature are of particular importance. These means of interpretation can be traced directly back to the norm setter, while other legal concepts – such as comparative law or empirical arguments – do not necessarily stem from the point of view of the norm setter. [189] Not be underestimated is the previous case law (i.e. precedents) which lead to a presumption effect. The subsidiary obligation to comply is part of the secondary sources of law. The background to this is the consideration of the equality of application of Article 3(1) of the Basic Law (GG). [190] An unchallenged precedent is the starting point, at least for the area of substantiation, which is often also the case in practice. [191] Strong indications also have impact-oriented considerations, such as avoiding inappropriate legal consequences, or the *argumentum ad absurdum*. Whoever wishes to deviate from the consensus or the prevailing opinion bears the burden of proof for

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[186] See D.II. above.

[187] R. ALEXY, *Theorie der juristischen Argumentation* (Frankfurt am Main: Suhrkamp Verlag, 7th edn 2012), pp. 305 et seq.; M. WOLF-J. NEUNER, *Allgemeiner Teil des Bürgerlichen Rechts* (München: C.H. Beck, 11th edn 2016), sec. 4 para. 74; F. REIMER, *Juristische Methodenlehre* (Baden-Baden: Nomos, 2nd edn 2020), para. 701.

[188] See R. ALEXY, *Theorie der Grundrechte* (Frankfurt am Main: Suhrkamp Verlag 1986), p. 305; H-J. KOCH-H. RÜßMANN, *Juristische Begründungslehre* (München: C.H. Beck 1982), pp. 176 et seqq.; M. WÜRDINGER, 'Das Ziel der Gesetzesauslegung – ein juristischer Klassiker und Kernstreit der Methodenlehre', *JuS* 2016, p. (1) at 6.

[189] J.F. LINDNER, *Theorie der Grundrechtsdogmatik* (Tübingen: Mohr Siebeck 2005), p. 158.

[190] BVerfG 6 October 1981, 2 BvR 1290/80, 58 *BVerfGE*, p. (163) at 168 – *Prohibition of arbitrariness*; BVerfG 5 November 1985, 2 BvR 1434/83, 71 *BVerfGE*, pp. (122) at 135 et seq; F. BYDLINSKI, *Juristische Methodenlehre und Rechtsbegriff* (Wien: Springer-Verlag, 2nd edn 1991), p. 81.

[191] J. BRAUN, *Deduktion und Invention* (Tübingen: Mohr Siebeck 2016), p. 263 speaks of a "starting point" for other rules than those of the interpretation of the law.

this.[192] Finally, the interpretation in compliance with the directive and the development of the law in compliance with the directive follow a presumption rule. They particularly do not lead to a compelling priority, though, given that the concepts are limited by boundaries of the national development of the law.[193]

6.2.3. – The person who wishes to rebut a presumption rule bears the burden of argumentation and a duty to substantiate. Foreign judgments are a simple example of such a *burden of argumentation rule*. In principle, foreign judgments are only a (mere) source of legal knowledge because the judgments do not have legal force in the domestic jurisdiction. If the legal practitioner wishes to change something, they bear the burden of argumentation for the proposed amendment.[194] Anyone who advocates deviating from a clear wording, and thus for development of the law, bears the burden of proof.[195] They must demonstrate that there is a gap. The closing of the gap must correspond to the values of the law. The subjective intent must be invalidated – for example, by a change in circumstances or inactivity of the legislature. It has been shown above that the teleological interpretation is more than a separate interpretation phase. It is the interpretation goal and, to that extent, basically the overarching step of judicial adjudication. It is momentous because it invalidates previous interpretive concepts if a different result can be justified more convincingly with the meaning and purpose of the norm. The burden of proof for the derivation of the telos is on the legal practitioner. If the legal practitioner succeeds in proving the telos, they can invalidate other arguments as formal arguments. Then, there are often counter-arguments of the same weight. This results in a relatively weak degree of persuasiveness of these arguments. It is therefore quite suitable to speak of purely formal arguments.[196] Even supposedly logical arguments can thus be deprived

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[192] W. GAST, *Juristische Rhetorik* (Heidelberg: C.F. Müller, 5th edn 2015), paras 439 et seqq.; R. ALEXY-R. DREIER, 'Statutory Interpretation in the Federal Republic of Germany', in N. MacCormick-R.S. Summers (eds), *Interpreting Statutes* (Farnham: Ashgate 1991), p. (73) at 97.

[193] T.M.J. MÖLLERS, *Legal Methods* (München: C.H. Beck/Hart/Nomos 2020), chapter 12 paras 76 et seqq. But different view C-W. CANARIS, 'Die verfassungskonforme Auslegung und Rechtsfortbildung im System der juristischen Methode', in H. Honsell-R. Zäch-F. Hasenböhler-F. Harrer-R. Rhinow (eds), *Privatrecht und Methode. Festschrift Kramer* (Basel: Helbing & Lichtenhahn 2004), pp. 141 and 145.

[194] J. BRAUN, *Deduktion und Invention* (Tübingen: Mohr Siebeck 2016), p. 169.

[195] M. WOLF-J. NEUNER, *Allgemeiner Teil des Bürgerlichen Rechts* (München: C.H. Beck, 11th edn 2016), sec. 4 para. 74.

[196] F.J. SÄCKER, in F.J. Säcker-R. Rixecker-H. Oetker-B. Limperg (eds), *Münchener Kommentar zum*

of any power of persuasion if their reference value is incorrect. This applies, for instance, to the equal-ranking legal concepts of *a fortiori* conclusion and reverse conclusion (*argumentum e contrario*).[197] In summary, the opinion of a dominant position of legal scholars that there is no ranking of legal arguments[198] is not persuasive and incorrect in such a general manner.

6.2.4. – If there is no presumption rule, no rule of burden of argumentation or rules of precedence, the argumentation concepts are pure balancing requirements. Savigny's four interpretation concepts are justified and recognised worldwide. They are not to be rated abstractly higher or lower, but they have a different weight depending on the facts of the case and the norm. Thus it is not always possible to assign an argumentation concept to a certain rule in an abstract way. Thus the wording argument may be strong if the formulation is clear – i.e. if the facts form part of the conceptual core of the constituent element – but weak if it is vague and indefinite. Then only simple comparative sentences apply in the sense of a 'the more ... the better'. The wording argument may be more convincing on one occasion and the teleological argument more convincing on another. Thus, a distinction can be made between the abstract and the concrete weighting of an argument in individual cases. This was presented in the context of balancing legal principles.[199]

6.3. – Hassemer and Kübler wrote almost thirty years ago: "The learning goal does not exhaust in knowledge; the goal must be to instil skills. Good lawyers survey not only

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Bürgerlichen Gesetzbuch (München: C.H. Beck, 8th edn 2018), Einleitung para. 115: 'formal arguments'; similar N. MACCORMICK, 'Argumentation and Interpretation in Law', 6 *Ratio Juris* 1993, p. (16) at 22: 'formalistic'or 'legalistic'.

[197] The decisive point is which regulatory purpose is fundamental to the norm, see above C.I.

[198] See M. KRIELE, *Theorie der Rechtsgewinnung* (Berlin: Duncker & Humblot, 2nd edn 1976), pp. 85 et seqq.; K. ENGISCH, *Einführung in das juristische Denken* (D. Otto-T. Würtenberger (eds); Stuttgart: Kohlhammer, 11th edn 2010), pp. 146 et seqq.; F. BYDLINSKI, *Juristische Methodenlehre und Rechtsbegriff* (Wien: Springer-Verlag, 2nd edn 1991), pp. 553 et seqq.; M. SACHS, in M. Sachs (ed.), *Grundgesetz* (München: C.H. Beck, 8th edn 2018), Einführung para. 39; J. ESSER, *Vorverständnis und Methodenwahl in der Rechtsfindung* (Frankfurt am Main: Athenäum Verlag, 2nd edn 1972), p. 123; W. HASSEMER, 'Juristische Methodenlehre und richterliche Pragmatik', 39 *RT* 2008, pp. (1) at 8 et seq. and 12 et seq.

[199] S. VOGENAUER, *Die Auslegung von Gesetzen in England und auf dem Kontinent* (Tübingen: Mohr Siebeck 2001) distinguishes the ranking among the individual interpretation criteria and the interpretation criteria in the case of conflict.

their own field; they can handle it, move within it; they can "think (and act) legally" […]. Legal thinking does not only require knowledge of a legal-dogmatic institution or of a practical legal institution (from the inside). It is necessary to view them in their historical, theoretical and real conditions (from the outside), to relativise them and to place them into broader contexts."[200] Everyday life in the legal profession is certainly characterised by routine work. The demanding legal work, however, also includes a need to provide answers to unknown questions related to interpersonal life that may arise in areas such as politics and business. Arguments and interests have to be weighed up and disputes discussed. Legal methodology is more than legal work or case technique; it penetrates into ever-deeper layers if the law does not provide (simple) answers. Trusting the legal methodology, a relative certainty can be gained in solving unknown cases,[201] in an ideal case weighed, well-founded, persuasive and satisfactory for all concerned. With its claim to rationality,[202] legal methodology creates trust in the legal ruling and thereby serves the three legal ideas of expediency, legal certainty and justice.[203]

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[200] Translated from thte original German. W. HASSEMER-F. KÜBLER, 'Welche Maßnahmen empfehlen sich zur Verkürzung und Straffung der Juristenausbildung?', in Ständige Deputation des Deutschen Juristentages (ed.), *Verhandlungen des 58. Deutschen Juristentages* (München: C.H. Beck 1990), pp. E 88 et seq. with further references.

[201] K.F. RÖHL-H.C. RÖHL, *Allgemeine Rechtslehre* (Köln: Carl Heymanns Verlag, 3rd edn 2008), p. 609; similar H. KÖTZ, 'Rechtsvergleichung und Rechtsdogmatik', 54 *RabelsZ* 1990, p. (203) at 215: 'whereby legal training should actually be about enabling young people to feel at ease in a situation of legal uncertainty'.

[202] On the objectivisation, systematisation and control function of legal methodology, see A.III. above.

[203] Or in the words of D. Simon: Knowing of methodical dogma may make the law 'heavier, but also more beautiful because it becomes more honest and – should it largely rest in the distant future on the informal compulsion of the better arguments – more convincing and therefore more just'D. SIMON, 'Recht als Rhetorik – Rhetorik als Recht', in D. Grimm-A. Kemmerer-C. Möllers (eds), *Gerüchte vom Recht* (Baden-Baden: Nomos 2015), pp. 201 and 225.