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Legal Methodology in Germany

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A. INTRODUCTION

"Method" means the way to reach a certain goal, and that goal, in the field of law, is the determination, the correct understanding, and the application of the law.[1] As with all academic disciplines, the existence of a method is a central feature of the character of law as a "scholarly", or "scientific", endeavour.[2] Jan Schröder has, therefore, given the title *Recht als Wissenschaft* (Law as Science) to his book on the history of legal methodology.[3] Law is, at least according to the prevailing opinion in Germany, the object of an autonomous body of scholarship with a normative claim (as from the early nineteenth century we thus refer to a "legal science" [*Rechtswissenschaft*] in Germany) and its own characteristic canon of methods.[4] That canon of methods is itself the object of academic scholarship; we thus refer to a legal methodology.[5] According to § 5a of the German Act on the Judiciary (*Deutsches Richtergesetz*) the "methods of legal science" (*rechtswissenschaftliche Methoden*) are among the obligatory subjects within the legal curriculum and, as a result, are also part of what students are required to know when they sit for the first legal examination (*Erste juristische Prüfung*).[6] Corresponding provisions can be found in the statutes and regulations of the individual German *Länder* concerning legal training. Most German law faculties (around two-thirds of them) therefore offer special courses on legal methodology; occasionally, legal methodology is part and parcel of a course on

1 On the subject of legal methodology, cf S Martens, *Methodenlehre des Unionsrechts* (2013) at 9-91.

2 For a different view, see J Lennartz, *Dogmatik als Methode* (2017) at 11.

3 J Schröder, *Recht als Wissenschaft*, 3rd edn, 2 vols (2020).

4 S Vogenauer, "Legal scholarship", in J Basedow, K J Hopt, and R Zimmermann (eds), *Max Planck Encyclopedia of European Private Law* (*MaxEuP*) (2012) at 1076-1081. Before the 19th century, the terms used were *Rechtsgelehrtheit* or *iuris prudentia*. On the tradition of "learned law" (*gelehrtes Recht*) in continental European law, which extends back to Roman law, cf N Jansen, "Ius commune", and R Zimmermann, "Roman law", both in *MaxEuP* at 1006-1010 and at 1487-1491, respectively.

5 Seminal for Germany since the 1960s is K Larenz, *Methodenlehre der Rechtswissenschaft*, 1st edn (1960), 6th edn (1991).

6 "The method is the factor guiding the legal training of lawyers": J Schapp, "Die juristische Methode als der Weg zum Verstehen und Anwenden des Rechts", in idem, *Methodenlehre und System des Rechts* (2009) at 187-202, 187. The first legal examination is, like the second one (which concludes the "preparatory service" and is the prerequisite for admission to legal practice), a *state* examination (even though it concludes a law student's *university* training). On the German legal education regime, see R Zimmermann, "Characteristic Aspects of German Legal Culture", in G Wagner and J Zekoll (eds), *Introduction to German Law*, 3rd edn (2018) at 1-55, 36-43.

legal theory. The existence of this academic discipline, taught by law faculties, is reflected in a rich body of textbook literature. – That, in rough outline, is the point of departure for Germany.

In other legal systems[7] it can be difficult to find a linguistic equivalent even for a concept as basic and as obvious in Germany as the term *Rechtswissenschaft*. Thus, in England "legal science" is an artificial term which would not normally be used to describe what a legal academic does. That does not mean that something akin to *Rechtswissenschaft* would not exist in England (or, for that matter, other common law jurisdictions),[8] or that there would be no awareness of a methodical way of proceeding. But we do not find an independent discipline entitled "legal methodology". English lawyers rather devote their attention to the two central sources of law, and they thus deal with the doctrine of judicial precedent on the one hand,[9] and statutory interpretation on the other.[10] The situation seems to be similar in Scotland.[11] The late Günter Hager subdivided his comparative discussion entitled *Rechtsmethoden in Europa* (Legal Methods in Europe) along the same lines;[12] the "Bielefeld Circle", too, published, first, a volume dealing with the interpretation of statutes, and subsequently another one on judicial precedent.[13] In the United States not only faith in "legal science" but also the appreciation for a canon of legal methods appears to have been lost. Even the

7 Comparative overview concerning legal sources and legal methods in S Vogenauer, "Sources of Law and Legal Method in Comparative Law", in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn 2019) at 877-901. A detailed account can be found in the monumental work by W Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, 5 vols (1975-1977).

8 Cf recently M Flohr, *Rechtsdogmatik in England* (2017).

9 Cf especially R Cross and J W Harris, *Precedent in English Law*, 4th edn (1991), as well as J Bell, "Sources of Law", in A S Burrows (ed), *English Private Law*, 3rd edn (2013) at paras 1.01-1.100; Z Bankowski, D N MacCormick, and G Marshall, "Precedent in the United Kingdom", in D N MacCormick and R S Summers (eds), *Interpreting Precedents – A Comparative Study* (1997) at 315-354. For an overview of judicial decision-making, see M Dyson, "Judicial Decision-Making in England and Wales", in J Basedow, H Fleischer, and R Zimmermann (eds), *Legislators, Judges, and Professors* (2016) at 97-150.

10 F A R Bennion, *Statutory Interpretation*, 5th edn (2008); Bell (n 9) at paras 1.25-1.60; Z Bankowski and D N MacCormick, "Statutory Interpretation in the United Kingdom", in D N MacCormick and R S Summers (eds), *Interpreting Statutes – A Comparative Study* (1991) at 359-406; S Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent* (2001) at 665-1252; R Cross, *Statutory Interpretation*, 3rd edn (1995). A Statute Law Society has been publishing the Statute Law Review since 1980.

11 See, for example, R B Ferguson, "Legislation", in *The Laws of Scotland: Stair Memorial Encyclopedia* vol 22 (1987) at paras 101-246; G Maher and T Smith, "Judicial Precedent" in *The Laws of Scotland: Stair Memorial Encyclopedia* vol 22 (1987) at paras 247-354; W M Gloag and R C Henderson, *The Law of Scotland*, 14th edn, by H L Macqueen, Lord Eassie (2017) at 15-43.

12 G Hager, *Rechtsmethoden in Europa* (2009) ch 2 and 3.

13 MacCormick and Summers (eds), *Interpreting Statutes* (n 10); *idem* (eds), Interpreting Precedents (n 9). The *Max Planck Encyclopedia of European Private Law* (n 4) also contains entries on "Precedent, Rule of" and "Interpretation of Statutes, History of" (both by S Vogenauer), but no entry on "Methodology".

term "legal method" or "legal methodology" is regarded as ambiguous and laden with inappropriate connotations: the lack of a legal method (and consequently of a legal methodology) is, according to Aditi Bagchi, characteristic of US law, thus reflecting two peculiar elements of US legal culture: its pragmatism and its plurality.[14] In France, too, where there definitely is a "legal science" (*la doctrine*), it is reduced to a comparatively subordinate position. It reflects the significance of the case law of the highest courts in the country, and of their specific style of legal reasoning, that law students in France are trained (or perhaps rather: drilled) in the art of writing *commentaires d'arrêt*. An independent discipline of legal methodology does not exist.[15] Thus, until about twenty years ago, there was only one pertinent textbook; it appeared in 2001 and has, for quite some time, not seen a second edition.[16] Not until 2014 was it joined by the publication of a further work.[17]

Whereas codified civilian law systems traditionally have greater experience than common law jurisdictions when it comes to matters of statutory interpretation, common law systems have tended to generate a more developed and refined approach to the handling of precedent, for example via the distinction drawn between a case's *ratio decidendi* and *obiter dictum*, and judicial methods of "avoiding" precedents, such as overruling and distinguishing.[18] In both civilian and common law legal systems there is of course a need for a scholarly approach based on a refined methodology. Statutes are an increasing source of law in common law legal systems.[19] Meanwhile in German law today there are a range of areas strongly rooted in case law[20] that could arguably benefit from a reflection on the approaches to precedent developed by common law jurisdictions.

The existence of these kinds of differences makes it appear appealing to devote some attention to the comparative examination of the topic of "legal

14 A Bagchi, "On the Very Idea of Legal Methodology", in Basedow, Fleischer, and Zimmermann (eds), *Legislators, Judges, and Professors* (n 9) at 193-208.

15 J Borghetti, "Legal Methodology and the Role of Professors in France", in Basedow, Fleischer and Zimmermann (eds), *Legislators, Judges, and Professors* (n 9) at 209-222.

16 J Bergel, *Méthodologie juridique* (2001). Today, however, a 3rd edn (2018), is available. In 2016 Borghetti (n 15) at 211, still commented: "This obvious lack of commercial success should not be interpreted as an indication of the book's intrinsic qualities, but rather offers another illustration of the lack of interest in the subject of legal methodology."

17 V Champeil-Desplats, *Méthodologies du droit et des sciences du droit* (2014).

18 Cf above at n 9. See also E Levi, *An Introduction to Legal Reasoning* (1950); G Lamond, "Precedent and Analogy in Legal Reasoning" in N Zalta (ed), *Stanford Encyclopedia of Philosophy*, available at https://plato.stanford.edu/entries/legal-reas-prec; L Alexander and E Sherwin, *Advanced Introduction to Legal Reasoning* (2021).

19 See, for example, Bell (n 9) at 15, who observes: "Statutes and other enactments are the most substantial part of English law."

20 See Zimmermann (n 6) at 20-23.

methodology". That happened at a symposium organized by the Hamburg Max Planck Institute. Papers were devoted to Italian and Dutch law (two legal systems occupying an interesting position in between the German and French traditions of legal thinking), and to legal systems representing the "Anglo-American", Nordic and Far Eastern legal families.[21] In view of the fact that "legal methodology" seems to be, above all, a German topic, the present article will be devoted to an overview of the pertinent discussion in Germany.[22] However, six more general, initial observations appear to be in order.

B. CLARIFICATION AND DELIMITATION

(1) German-speaking countries

What will be said here applies similarly to Austria and Switzerland (and possibly also to Greece). Wolfgang Fikentscher, to that sense, correctly refers to the "legal methodology of the central European legal circle".[23] There are, of course, certain differences among the German-speaking countries but, all in all, these differences are of a rather subordinate character.[24] Both in the Swiss and Austrian civil codes we find statutory rules of a methodological nature[25] (for example, the well-known Art 1 of the Swiss Civil Code (ZGB) on how to deal with gaps in the positive law;[26] in Austria four rules on the subject of interpretation and two more on custom [*Gewohnheiten*] and judicial pronouncements [*richterliche*

21 See G Christandl, "Juristische Methodenlehre in Italien oder: kurze Geschichte der italienischen Zivilrechtswissenschaft ab dem 19. Jahrhundert" (2019) 83 *RabelsZ* 288; C Jansen, "The Methodology of Dutch Private Law from the Nineteenth Century Onwards" (2019) 83 RabelsZ 316; G Dannemann, "Juristische Methodenlehre in England", (2019) 83 RabelsZ 330; H P Graver, "Teaching Legal Method in Norway" (2019) 83 RabelsZ 346; and G Koziol, "Juristische Methodenlehre in Japan" (2019) 83 RabelsZ 361. An earlier symposium in 2010 was dedicated to the topic of European methodology; see Holger Fleischer, "Europäische Methodenlehre: Stand und Perspektiven" (2011) 75 RabelsZ 700; more recently, see K Riesenhuber (ed), *European Legal Methodology*, 2nd edn (2021), and the work by S Martens mentioned in n 1.

22 In the original, German version, it was part of the symposium just mentioned; see (2019) 83 RabelsZ 241.

23 W Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, vol III (1976) 637-792.

24 P Oberhammer, "Kleine Differenzen – Vergleichende Beobachtungen zur zivilistischen Methode in Deutschland, Österreich und der Schweiz", (2014) 214 Archiv für die civilistische Praxis 155; cf generally U Kischel, *Comparative Law* (transl by A Hammel, 2019) at 517-524.

25 See C Wendehorst, "Methodennormen in kontinentaleuropäischen Kodifikationen", (2011) 75 RabelsZ 730-763; Oberhammer, (2014) 214 Archiv für die civilistische Praxis 155, at 179-181. Cf generally Vogenauer (n 7) at 886-890; Oliver Unger, "Art. 1:106 (1)" in N Jansen and R Zimmerman (eds), *Commentaries on European Contract Laws* (2018) no 4-7.

26 Fikentscher (n 23), speaks, with regard to this rule, of a "more liberal tradition" in Switzerland concerning the sources of law; cf also K Zweigert and H Kötz, *An Introduction to Comparative Law*, 3rd edn (1998) at 176, who note their admiration and approval of this brilliantly formulated rule.

Aussprüche])[27] which have no counterpart in the German Civil Code (BGB). But the practical significance of these rules is, on the whole, small.[28] In Austria the notion of a flexible system (*bewegliches System*) has played a considerable role since the days of Walter Wilburg.[29] But it has also found adherents in Germany.[30] In Switzerland, of course, European Union law has a different significance from that in Germany or Austria; thus, for example, Ernst Kramer's textbook on legal methodology contains a section on "specific problems concerning the interpretation of Community private law to which Swiss law has been autonomously aligned".[31] Certain striking differences in language, legal technique, composition, and level of abstraction between the three German-language civil codes,[32] or the fact that in Germany much more legal literature is generated and many more Supreme Court judgments are handed down than in Switzerland and Austria,[33] find (perhaps surprisingly) little reflection in the methodology of the three jurisdictions.[34] Just as the textbooks on legal methodology by the Austrian author Franz Bydlinski[35] and the Swiss/Austrian author Ernst A. Kramer (the latter work predominantly relating to Switzerland)[36]

27 § 7 ABGB (on gap-filling and referring to the natural principles of law [*natürliche Rechtsgrundsätze]*) is considered especially progressive: Zweigert and Kötz, *Comparative Law* (n 26) at 160, 163.

28 Wendehorst (n 21) at 761; cf also Oberhammer (n 24) at 179: "A difference in methodology to German law does not follow from this".

29 W Wilburg, *Entwicklung eines beweglichen Systems im bürgerlichen Recht* (1950); see further, eg, F Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (1982) at 529-543 (Bydlinski, by the way, dedicated his work to Walter Wilburg); and, most recently, H Koziol, "Das bewegliche System: Die goldene Mitte für Gesetzgebung und Dogmatik", (2017) 3 Austrian LJ 160-182; S Paas, *Das bewegliche System: Zur Karriere einer juristischen* Denkfigur (2021).

30 A Flessner, "Bewegliches System und Bereicherungsrecht", in F Bydlinski, H Krejci et al. (eds), *Das bewegliche System im geltenden und künftigen Recht* (1986) 159-176; T M J Möllers, *Juristische Methodenlehre*, 4th edn (2021) at 307-323. According to R Seinecke, "Methode und Zivilrecht bei Claus-Wilhelm Canaris", in J Rückert and R Seinecke (eds), *Methodik des Zivilrechts von Savigny bis Teubner*, 3rd edn (2017) at 386-423, 403-406, the flexible system is a core element of the methodology of Canaris, a pupil of Karl Larenz, who must be regarded as one of the most influential private law theorists and doctrinalists of the past decades in Germany. Franz Reimer refers to a "flexible system of methods": "Vielfalt und Einheit juristischer Methoden", in *Festschrift für Jan Schapp* (2010) 431-444 at 440.

31 E A Kramer, *Juristische Methodenlehre*, 6th edn (2019) 347-358.

32 Zweigert and Kötz, *Comparative Law* (n 26) at 143-148, 160-166, 171-178; Oberhammer (n 24) at 160-162.

33 See Oberhammer (n 24) at 168-173.

34 The "problem of quantity" may be related to the fact that for Austrian and Swiss (but not German) courts, comparative law constitutes "a quite common argument", with such comparison referring "in Austria almost exclusively and in Switzerland predominantly" to German law: Oberhammer (n 24) at 178. Oberhammer rightly underscores, in this context, that it makes a considerable difference whether a judge maintains regular contact with at least one foreign legal system or "never in his life has gazed beyond the edge of the German world".

35 Bydlinski, *Methodenlehre* (n 29).

36 Kramer, *Methodenlehre* (n 31) Preface; cf also 51 f.

rely, as a matter of course, on German legal literature, these works in turn have to be consulted in the German discussion.

(2) Methodology in theory and in practice

It must be emphasized, moreover, that this essay deals with legal methodology as it is taught and restated in legal literature rather than practised. How German courts and legal writers actually proceed when they apply and develop the law is quite a different question. It is not without reason that attention is drawn to the fact that books on legal methodology are not very frequently consulted, even by legal academics.[37] In spite of what is stated in the statutes and regulations on legal training mentioned above, there appear to be a number of law faculties in Germany (around one-third of them) in which courses on legal methodology are not, or not regularly, offered. One reason for this somewhat sobering observation lies in the fact that something quite different enjoys pride of place in the teaching of the core subjects of private law, public law, and criminal law in the German law faculties: the highly formalized art of writing legal opinions in order to provide solutions to ever-new case scenarios (*Gutachtenstil*) and, in conjunction with it, of structuring those opinions according to the *claims* potentially available (*Anspruchsaufbau*).[38] "The [...] method that is taught at German universities is in reality that of solving cases according to the technique of claim-orientation."[39] The position actually prevailing in the German law faculties, therefore, is not all that dissimilar from the one in France.[40] The legal training on offer is not so much inspired by a general legal methodology, but rather oriented towards the teaching of one specific task to which very rigorous rules apply: it is just that this task in Germany is writing an opinion "solving the case at hand" while in France it is the *commentaire d'arrêt*. Helmut Koziol, too, observes from the external position of "brotherly vicinity" an amazing contradiction between legal methodology and how the courts actually proceed in reaching their judgments:

37 Oberhammer (n 24) at 165; Lennartz, *Dogmatik* (n 2) at 6-8, 181.

38 See D Medicus and J Petersen, *Bürgerliches Recht: Eine nach Anspruchsgrundlagen geordnete Darstellung zur Examensvorbereitung*, 26th edn (2017). This corresponds to my own experience. Reading Larenz on methodology was an important part of my legal education, but what was paramount for the First Legal State Examination was working through Medicus' book (at that time 6th edn, 1973) several times.

39 Oberhammer (n 24) at 173. This point is also emphasized in Zimmermann (n 6) at 40 f. J Vogel, *Juristische Methodik* (1998) at 10, stresses that legal methodology is not an instruction in case solution technique. Interestingly, by contrast, F Reimer, *Juristische Methodenlehre* 2nd edn (2020) offers "guidelines for writing opinions on case scenarios" in Appendix I of his book. In Jan Schapp's book *Methodenlehre des Zivilrechts* (1998), an entire chapter (of a total of seven chapters) is devoted to the doctrine of claims ("Lehre vom Anspruch"): at 38-63.

40 See above, A.

on the one hand, great "timidity in applying a legal rule to a situation not covered by its wording even if that application would be in line with the spirit of the rule" and, on the other hand, the initiation of "legal developments that clearly go against the law, as a result of which fundamental decisions taken by the lawmaker are unscrupulously pushed aside".[41]

(3) Framework model of legal methodology

Legal scholarship is characterized by a steady process of differentiation and specialization.[42] The various legal subdisciplines develop their own structures, concepts, and horizons; and the pertinent specialized discourses increasingly tend to isolate themselves from one another. The question of whether this path leads from a plurality of discourses to a plurality of methodologies may therefore well be asked.[43] There are indeed subdisciplinary specificities. For the field of criminal law these are, above all, the limitations imposed on developing the law by the principle of *nulla poena sine lege* and the prohibition of using an *argumentum per analogiam*.[44] Tax lawyers take the notion of an "economic perspective" to be a central principle guiding the application of the law; and labour lawyers sometimes refer to a "socially responsible application of the law".[45] "Concretization" and the balancing of principles play a particularly important role in the field of constitutional law.[46]

The question of whether company law, with the marked tendency of its protagonists to engage in audacious acts of developing the law, displays methodological peculiarities when compared to general private law gave rise to a lively discussion at the conference of the Association of University Teachers in Private Law (*Zivilrechtslehrervereinigung*) in Würzburg in 2013. In his paper

41 H Koziol, "Glanz und Elend der deutschen Zivilrechtsdogmatik: Das deutsche Zivilrecht als Vorbild für Europa?', (2012) 212 *Archiv* für die civilistische Praxis 1 at 55. See Oberhammer (n 24) at 175, noting that, by contrast, Austrian lawyers focus on their goal from the outset and "then reach it on a path that seems linear but is in reality continuously crooked". – On fundamental doubts regarding the realistic nature of legal methodology, cf Kramer, *Juristische Methodenlehre* (n 31) at 53-58; Bydlinski, *Methodenlehre at* 140-175.

42 Cf "Die juristischen Bücher des Jahres – Eine Leseempfehlung", [2014] Neue Juristiche Wochenschrift 3466-3469, 3466; Lennartz, *Dogmatik* (n 2) at 8-10 ("It may be sensible to speak of different methods").

43 Cf, eg, Schapp, *Methodenlehre* (n 39) at 1; P O Mülbert, "Einheit der Methodenlehre? – Allgemeines Zivilrecht und Gesellschaftsrecht im Vergleich', (2014) 214 Archiv für die civilistische Praxis 188 at 196; Reimer (n 30) at 431: "Are we not faced with a plurality of methods, or, more precisely, a syncretism of methods, as a result of which method is actually given up?"

44 Cf Vogenauer (n 10) at 111 f; Th Möllers (n 30) at 139-144.

45 On the last two points, Bydlinski (n 29) 596 f; cf Reimer (n 30) 435 f; Vogenauer, *Auslegung von Gesetzen* (n 10) at 113-115.

46 Cf H Dreier, "Art. 20 (Einführung)" in idem, *Grundgesetz: Kommentar*, vol II, 3rd edn (2015) no 12; Reimer, *Methodenlehre* (n 39) at 236-241; cf below, IV.10.

delivered on that occasion, Peter Mülbert did not really give an affirmative or negative answer to the question. Instead, he stated that in the field of company law hardly any methodological discourse exists: as long as there is unanimity about the parameters according to which the problems arising in legal practice have to be assessed, Mülbert argued, legal methodology is of subordinate importance.[47] Thus, essentially, we seem to be dealing here with a particularly blatant discrepancy between general legal methodology and the application of the law in actual practice, which was mentioned in the previous section of this article. It is a matter of speculation why the courts in the field of company law are to such a remarkable extent, and without any apparent methodological qualms, inclined to establish new rules of law. The comparatively fragmentary character of company law[48] has been mentioned in this context, as have the particularly close coordination between the Second Senate of the Federal Supreme Court (responsible for company law disputes) and legal academia (or rather, certain particularly prominent representatives of legal academia),[49] and the atypicality of the legal forms of companies.[50] A specific set of legal methods relating to company law does not, however, appear to exist. This confirms Franz Bydlinski's contention of the existence of a framework model of legal methodology, with private law as its prototype,[51] which may be modified for individual fields (criminal law), or within which certain arguments may in other fields be accentuated (tax law)[52] – or which may even largely be ignored without being replaced by an alternative model (company law). The following discussion relates primarily to the core areas of private law.[53]

47 Mülbert (n 43) at 299.

48 Mülbert (n 43) at 217 f.

49 See L Klöhn, W H Roth and G Wagner in the discussion of Mülbert's lecture: (2014) 214 Archiv für die civilistische Praxis 301 at 304-306; cf also W Goette, "Dialog zwischen Rechtswissenschaft und Rechtsprechung in Deutschland am Beispiel des Gesellschaftsrechts", (2013) 77 RabelsZ 309; Mülbert (n 43) at 291-293. Klöhn points to additional particularities of the company law discourse, while Wagner refers to the "massive disadvantages" connected with the proximity of legal academia to certain Senates of the Federal Supreme Court.

50 Mentioned by H P Westermann in the discussion of Mülbert's lecture (n 43) at 304. Westermann otherwise names legal regression ("Rechtsrückbildung") as a special characteristic of company law.

51 Most of today's popular works of legal methodology have indeed been written by professors of private law (Kramer, Pawlowski, Rüthers/Fischer/Birk, Larenz/Canaris, Möllers, Bydlinski, Fikentscher, Schapp); they are supplemented by works of specialists in public law (Zippelius, Reimer, Alexy, Müller/Christensen) and criminal law (Vogel). Koch and Rüßmann's "juristische Begründungslehre" (doctrine of legal reasoning) offers the rare example of a collaboration between a professor of public law and of private law. My own recollection is that in earlier times legal theory and legal methodology used to be taught primarily by professors of criminal law.

52 Bydlinski, *Methodenlehre* (n 29) at 593-597. Reimer (n 30) at 441-444, also affirms that there is a deeper-lying unity within the plurality of methods.

53 The conference of the Association of University Teachers in Private Law (*Zivilrechtslehrervereinigung*) in Würzburg in September 2013 was dedicated to the topic of methods of private law: G Wagner and

(4) *Rechtsdogmatik*

Rechtsdogmatik (a term for which the best approximation may be "legal doctrine" or "doctrinal legal thinking") is often regarded as the essential and characteristic core of legal scholarship in Germany;[54] it is usually described as an approach by means of which the positive law is to be, and can be, intellectually penetrated, structured, and ordered so as to guide lawyers and thus facilitate and rationalize the solution of the problems arising in legal practice.[55] This raises the question of the relationship between legal methodology and *Rechtsdogmatik*. In the current textbooks, that relationship is determined in very different ways.[56] While Bydlinski commences his work entitled *Juristische Methodenlehre und Rechtsbegriff* (Legal Methodology and the Concept of Law) with an extensive discussion of *Rechtsdogmatik*[57] – which he takes to be legal scholarship in the true sense of the word[58] – and while Hans-Martin Pawlowski's *Methodenlehre für Juristen* (Methodology for Lawyers) culminates in a theory of *Rechtsdogmatik*,[59] in other works the topic is marginalized and mentioned in a variety of different contexts: Larenz refers to it under the heading of "value-oriented thinking in legal scholarship",[60] Vogel regards it as the result of "systematic interpretations" of statutory rules,[61] and Kramer mentions it within the framework of a historical account of conceptual legal thinking.[62] Rüthers, Fischer, and Birk do not

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R Zimmermann, "Vorwort: Methoden des Privatrechts", (2014) 214 Archiv für die civilistische Praxis 1. By contrast, the theory of rules and methodology by F Müller and R Christensen, *Juristische Methodik*, 11th edn (2013), also refers to the area of constitutional law. Müller and Christensen at 9 start from the hypothesis that legal methodology can be advanced through better-developed methodologies of the major fields of law.)

54 M Jestaedt, "Wissenschaft im Recht: Rechtsdogmatik im Wissenschaftsvergleich", [2014] JuristenZeitung 1 at 4.

55 See the summarizing statement by C Bumke, *Rechtsdogmatik* (2017) 1, with a wealth of references from the literature. Since then J Ipsen, "Rechtsdogmatik und Rechtsmethodik", in M Borowski, S L Paulson, and J Sieckmann (eds), *Rechtsphilosophie und Grundrechtstheorie – Robert Alexys System* (2017) at 225-238 ("Rechtsdogmatik can therefore be defined as the quintessence of the doctrines of the existing law": 226); cf further, in the same volume, the essay by N Jansen, "Der Richtigkeitsanspruch der Privatrechtsdogmatik", at 697-718.

56 "A connection [in the first edn (2017): demarcation] of *Rechtsdogmatik* and legal methodology is only rarely attempted": Th Möllers, *Methodenlehre* (n 30) at 329. For Möllers himself, *Rechtsdogmatik* and legal methodology are different disciplines (at 441: "Legal methodology, but also Rechtsdogmatik [...]") with partially (?) identical tasks (at 552: "Rechtsdogmatik and legal methodology want to rationalize the process of discussing, finding, and creating the law"), which are to be conceived as two overlapping circles (at 352).

57 Bydlinski, *Methodenlehre* (n 29) at 3-108.

58 Bydlinski, *Methodenlehre* (n 29) at 8.

59 H Pawlowski, *Methodenlehre für Juristen* (3rd edn 1999) at 330-420.

60 Larenz, *Methodenlehre* (n 5) at 224-229 (in addition, there is a section with the title "Niklas Luhmann's propositions concerning Rechtsdogmatik", at 229-234).

61 Vogel, *Methodik* (n 39) at 123 f.

62 Kramer, *Methodenlehre* (n 31) at 192-194.

deal with *Rechtsdogmatik* as part of their discussion of how to apply the law but rather when they explore the question of whether legal scholarship is a "science" (Wissenschaft).[63] For Thomas Möllers, legal methodology employs *Rechtsdogmatik* when it falls back on general principles.[64]

While *Rechtsdogmatik* thus leads a marginal existence in a number of instructional books on legal methodology,[65] the remainder of German legal literature is witnessing a veritable renaissance of reflections on it: whether as a substitute for the traditional "legal method" in reaction to the inadequacies of the latter,[66] or because it is of such fundamental importance to the distinctive character of German *Rechtswissenschaft*.[67] Two of the most recent pertinent works do not place *Rechtsdogmatik* in a specific relationship to methodology but clearly treat it as a more significant phenomenon, both practically and theoretically. For the late Martin Flohr, *Rechtsdogmatik* lies at the heart of engagement with law in Germany, which is indicated, according to Flohr, by the fact that the term *Rechtsdogmatik* is frequently used as a synonym for scholarly legal activity as a whole.[68] For Christian Bumke, the tasks of *Rechtsdogmatik* (generating order, applying and creating the law, ensuring the learnability and manageability of the legal material, and storing normative empirical knowledge), while being in part identical with the themes pertinent to legal methodology,

63 B Rüthers, C Fischer, and A Birk, *Rechtstheorie mit Juristischer Methodenlehre* (9th edn 2016) at 198-208 (under the somewhat enigmatic heading "Rechtswissenschaft – Jurisprudenz – Rechtsdogmatik"). The preceding overview is taken from R Zimmermann and G Wagner, "Vorwort: Perspektiven des Privatrechts", (2016) 216 Archiv für die civilistische Praxis 1 at 1 f.

64 Th Möllers, *Methodenlehre* (n 30) at 329. Conversely, however, *Rechtsdogmatik* also makes use of the traditional *canones* of interpretation (at 330).

65 The index to R Zippelius, *Juristische Methodenlehre* (11th edn 2012), lacks any entry on *Dogmatik* or *Rechtsdogmatik*.

66 Cf the analysis by M Jestaedt, "'Öffentliches Recht' als wissenschaftliche Disziplin", in C Engel and W Schön (eds), *Das Proprium der Rechtswissenschaft* (2007) at 241-281, 254.

67 R Stürner, "Die Zivilrechtswissenschaft und ihre Methodik – zu rechtsanwendungsbezogen und zu wenig grundlagenorientiert?", (2014) 214 Archiv für die civilistische Praxis 7 at 10 f. Stürner begins his analysis of the current state of legal methodology with an extensive section (at 10-26) on the significance of doctrine ("Dogmatik"), before addressing in a much shorter section (at 26-29) the conflict over methods of interpretation. Cf also Bumke, *Rechtsdogmatik* (n 55) book jacket: "Rechtsdogmatik shapes legal scholarship"; Lennartz, *Dogmatik* (n 2) at 181: "Dogmatik is the designation of what lawyers do". N Jansen, "Rechtsdogmatik im Zivilrecht", in *Enzyklopädie zur Rechtsphilosophie* (available at *http://www.enzyklopaedie-rechtsphilosophie.net/component/content/article/19-beitraege/98-rechtsdogmatik-im-zivilrecht*), rightly points out that other languages such as English have no direct parallel to the German concept of *Rechtsdogmatik*; nevertheless, in substance there is doctrinal thinking also in other countries, as was recently demonstrated for England by Flohr, *Rechtsdogmatik* (n 8). According to Stürner at 11, *Rechtsdogmatik* is a valid expression of every rational engagement with human justice, regardless of the specificities of a given legal culture.

68 Flohr, *Rechtsdogmatik* (n 8) at 34, cf also, eg, 39 ("doctrinal method"). Flohr's comparative work begins with an in-depth chapter on *Rechtsdogmatik* in Germany (at 27-69).

actually go far beyond it.[69] Another recent work understands *Rechtsdogmatik* as German lawyers' specific method of applying the law.[70]

For purposes of the present essay, *Rechtsdogmatik* is understood as the outcome of the methodical application of the law: as a finely tuned system (*Feinsystematik*) of legal tenets that "express the law while at the same time providing a conceptual and intellectual framework for legal discourse."[71] For its part, this system facilitates the application and development of the law and thus eases the burden of those having to apply the law by rendering unnecessary the constant recourse to the considerations underlying the legal system. It also facilitates new legal conclusions,[72] and is in this regard a productive element of law.[73] *Rechtsdogmatik* in this sense will remain outside the scope of what follows.

(5) Foundations in intellectual history

The foundations of German legal methodology in intellectual history also lie largely outside the scope of the present essay. Its starting point is widely held[74] to have been the quixotic *Begriffsjurisprudenz* of the nineteenth century, which pursued a programme of an appropriation of the legal legacy of the Roman jurists, and strove for the logical derivation of new concepts and legal rules from the existing legal material, believing in system and formal order.[75] (The early) Rudolf von Jhering, Georg Friedrich Puchta, and Bernhard Windscheid

69 Bumke, *Rechtsdogmatik* (n 55) at 113.

70 Lennartz, *Dogmatik* (n 2) at 111-179.

71 N Jansen, "Dogmatik, Erkenntnis und Theorie im europäischen Privatrecht", (2005) 13 ZEuP 750 at 755. Stürner (n 67) at 11 uses the term "fine-grained systematics" (*Feinsystematik*) in the sense of a "layer" in between legal rules and casuistry. *Rechtsdogmatik* thus designates the product of an activity, but can also concern the activity itself; cf Jansen (n 67) no 2. On *Rechtsdogmatik* as an activity, cf, eg, *H Kötz*, "Rechtsvergleichung und Rechtsdogmatik", in K Schmidt (ed), *Rechtsdogmatik und Rechtspolitik* (1990) 75-89 at 78.

72 Jansen (n 71) at 755.

73 Cf Flohr, *Rechtsdogmatik* (n 8) at 27.

74 This widespread perception is based particularly on the master narrative of F Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd edn (1967) parts V and VI. On many points, a revisionist perspective is gaining ground today; for an overview, see J Rückert, "Die Schlachtrufe im Methodenkampf – Ein historischer Überblick", in Rückert and Seinecke (eds), *Methodik des Zivilrechts* (n 30) at 541-608; J Schröder, *Recht als Wissenschaft* (n 3) third and fourth parts; further references hereinafter. On the emergence of the modern methodological paradigm, see recently also Lennartz, *Dogmatik* (n 2) at 12-41; a historical overview beginning with (secularized) Natural law of the early modern era is offered in Jansen (n 55). On the keyword "master narrative" in relation to Wieacker, cf, eg, M Auer, *Der privatrechtliche Diskurs der Moderne* (2014) 1; cf also V Winkler, *Der Kampf gegen die Rechtswissenschaft* (2014); on which see the book review by R Zimmermann, (2015) 79 RabelsZ 686.

75 *Begriffsjurisprudenz*, which is generally associated with pandectist legal scholarship, arose out of the German Historical School; see now H Haferkamp, *Die Historische Rechtsschule* (2018); cf also the overview by T Rüfner, "Historische Rechtsschule", in *MaxEuP* (n 4) at 830-835.

have frequently been identified as the key exponents of this view, constituting an internal perspective of the law.[76] But (the later) Rudolf von Jhering also criticized this perspective by underscoring that "the purpose is the creator of the entire law; [and] that there is no legal rule which does not owe its origin to a purpose, i.e., to a practical motive".[77] Jhering thus firmly perceived law as a social phenomenon – that is, he observed it from the outside, so to speak. He thereby paved the way for two schools of thought, one of which soon petered out, while the other became the mainstream of legal theory. The one was the *Freirechtslehre* or 'Free-law-school' (represented particularly by Eugen Ehrlich, Hermann Kantorowicz, and Ernst Fuchs), which appeared to abandon the precept that judges are bound by the law and to call into question the scientific character of the law;[78] the other was the *Interessenjurisprudenz* ("jurisprudence of interests"), founded by Philipp Heck.[79] Heck understood statutes as "resultants of the interests of a material, national, religious, and ethical kind that confront one another in every legal community and wrestle for recognition".[80] For Heck, it was the task of the judge, for each specific case that was to be decided, to concretize "in intelligent obedience" (*in denkendem Gehorsam*) the conflict of interests that had been decided abstractly by the law.[81] Today, by contrast, it is emphasized that certain *evaluations*, which are to be taken into account in the interpretation and development of the law, underlie every legal provision.[82] What is thus called the jurisprudence of evaluations (*Wertungsjurisprudenz*) can be understood as a

76 The conventional images had been revised by H Haferkamp, *Georg Friedrich Puchta und die "Begriffsjurisprudenz"* (2004); N Jansen and M Reimann, "Begriff und Zweck in der Jurisprudenz", (2018) 26 ZEuP 88; and U Falk, *Ein Gelehrter wie Windscheid: Erkundungen auf den Feldern der sogenannten Begriffsjurisprudenz*, 2nd edn (1999); cf further the contributions by H Haferkamp (on Puchta), R Seinecke (on Jhering) and J Rückert (on Windscheid), in Rückert and Seinecke (eds), *Methodik des Zivilrechts* (n 30) at 96-120, 148-176, 121-147; additionally, see J Rückert, "Windscheid – verehrt, verstoßen, vergessen, rätselhaft?", [2017] JuristenZeitung at 662.

77 R von Jhering, *Law as a Means to an End*, trans. by I Husik (1913) liv.

78 For a fundamental reassessment, see M Auer, "Der Kampf um die Wissenschaftlichkeit der Rechtswissenschaft – Zum 75. Todestag von H Kantorowicz", (2015) 23 ZEuP 772.

79 H Schoppmeyer, *Juristische Methode als Lebensaufgabe: Leben, Werk und Wirkungsgeschichte Philipp Hecks* (2001); M Auer, "Methodenkritik und Interessenjurisprudenz: Philipp Heck zum 150. Geburtstag", (2008) 16 ZEuP 517; J Manegold, "Methode und Zivilrecht bei Philipp Heck (1858-1943)", in Rückert and Seinecke (eds), *Methodik des Zivilrechts* (n 26) 177-202. Rückert (n 74) considers the jurisprudence of interests as probably the most consequential reorientation in the modern history of methodology.

80 P Heck, "Gesetzesauslegung und Interessenjurisprudenz", (1914) 112 Archiv für die civilistische Praxis 1 at 17. In this insight he saw the essence of his jurisprudence of interests.

81 Heck (n 80) at 20.

82 Cf, eg, Larenz, *Methodenlehre* (n 5) at 119-125 ("… today nearly undisputed and recognized particularly by the courts"). For the development, cf J Petersen, *Von der Interessenjurisprudenz zur Wertungsjurisprudenz* (2001).

contemporary offshot of the *Interessenjurisprudenz* and, on the whole, underlies the study of private law in Germany today.

(6) The core of legal methodology

Lectures and textbooks on legal methodology can vary greatly in their content. The course of lectures which I myself attended as a second-semester student at the University of Hamburg in the winter of 1972–73 began with "preliminary considerations on the doctrine of concepts", then addressed topics such as the "social relatedness of understanding and tradition" or "system and wholeness", before finally delving into the concept of gaps in the law as well as objective and subjective theories of interpretation. Much went over our heads. Today, too, the tailoring of what is offered as "legal methodology" varies. Kramer, for example, opens his textbook with a chapter asking "What does it mean to study 'legal methodology' and to what end do we do so?",[83] (Larenz-)Canaris with a "general characterization of legal scholarship",[84] Bydlinski (as mentioned above) with remarks on "Rechtsdogmatik in general",[85] Zippelius with a chapter on "the concept and function of law",[86] Hans-Martin Pawlowski with an entire book dedicated to the "theory of legal rules",[87] Vogel with a first chapter on "facts and law",[88] and Th Möllers with a section on "legal methodology as a doctrine of reasoning and providing legitimacy".[89] Hans-Joachim Koch and Helmut Rüßmann have presented a "doctrine of legal reasoning", Robert Alexy a "theory of legal argumentation", and Martin Kriele a "theory of finding the law". In so doing, all of them address the "core problem of legal methodology".[90] In detail as well, much – some would say almost everything – is disputed or unsettled. Against this background it is remarkable that the aforementioned foundations in intellectual history are specifically addressed only in some of the general methodological textbooks – primarily in those by Bydlinski, Larenz, and

83 Kramer, *Methodenlehre* (n 31) at 39-62; cf also Reimer, *Methodenlehre* (n 39) at 23-53.

84 K Larenz and C-W Canaris, *Methodenlehre der Rechtswissenschaft* (3rd edn 1995) at 11-69. This book is a student edition of "Methodenlehre der Rechtswissenschaft" by *Karl Larenz* (n 5), and contains the systematic section of the latter work.

85 Bydlinski, *Methodenlehre* (n 29) at 3-108.

86 Zippelius, *Methodenlehre* (n 65) at 1-21.

87 Pawlowski, *Methodenlehre* (n 59) at 1-181.

88 Vogel, *Methodik* (n 39) at 1-35.

89 Th Möllers, *Methodenlehre* (n 30) at 1-41.

90 R Alexy, *Theorie der juristischen Argumentation* (3rd edn 1996) at 2; cf also H J Koch and H Rüßmann, *Juristische Begründungslehre* (1982) at 2; M Kriele, *Theorie der Rechtsgewinnung* (1967) at 21-23 (relating specifically to constitutional law and its method).

Rüthers/Fischer/Birk[91] and, particularly extensively, Fikentscher.[92] Otherwise, these foundations are mentioned, if at all, only in relatively scant references in the context of remarks on the relevance of the purpose of the law within the process of interpretation.[93]

Thus, German lawyers cannot on the whole be said to be able to base their work on a uniform, generally recognized methodology. "The problem of methodology", according to Rüthers, Fischer, and Birk,[94] "is one of the most neglected of the foundational questions of German judicial practice and legal scholarship." This is bound up with persistent self-doubts regarding the scientific nature of legal scholarship, as well as with equally persistent attempts to reaffirm the specificity of legal scholarship.[95]

Nonetheless, a comparison of the current works on legal methodology reveals an array of issues and topics that are central to the discussion and that therefore shape, or perhaps rather, should shape, the intellectual horizon of German lawyers – recalling that they are, under § 5a of the German Judiciary Act, to be familiar with "the methods of legal science". It is these central topics that will be discussed in the present essay, thus providing a backdrop for assessing the similarities and differences of legal methodologies in other jurisdictions. The focus will be on problems of the application and development of the law: they form the core of what is understood as "legal methodology" in Germany.[96]

91 In the second part of his *Juristischen Methodenlehre* (n 29), Bydlinski addresses methodological mainstreams, and in the third part sceptical counter-movements. Larenz dedicates the entire first (historical-critical) part of his "Methodenlehre" to the topic of "Legal Theory and Methodology in Germany since Savigny"; this part is not included in the student edition of Larenz and Canaris (n 84). Rüthers, Fischer, and Birk call their work "Rechtstheorie" (legal theory), with the phrase "mit Juristischer Methodenlehre" (with legal methodology) appended in small print. The discussion of the methodological mainstreams is part of a chapter that appears under the (somewhat unhappily chosen) heading "validity of the law" and precedes the chapter on the "application of the law" (= legal methodology). On the movements described by Bydlinski as sceptical counter-movements, cf Rückert (n 74) at 574-603.

92 Fikentscher, *Methoden* (n 23) ch 19-27.

93 See, eg, Kramer, *Methodenlehre* (n 31) at 182-194; Th Möllers, *Methodenlehre* (n 30) at 177-180; cf also Vogenauer, *Auslegung von Gesetzen* (n 10) at 215-218. In his introduction, Pawlowski (n 59) very briefly mentions (at 2-6) *Begriffsjurisprudenz*, *Interessenjurisprudenz* and *Wertungsjurisprudenz* under the heading "Tasks of legal methodology for lawyers" and then refers to these approaches only sporadically: see, especially, under subsumption model (at 68-72) and analogy model (at 215-217). Vogel (n 39) at 2, expressly chooses not to include any discussion of methodological theories as such; Schapp and Zippelius do not have any comment on the matter.

94 Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 399.

95 Cf especially: Engel and Schön (eds), *Das Proprium der Rechtswissenschaft* (n 66); also, eg, M Jestaedt and O Lepsius (eds), *Rechtswissenschaftstheorie* (2008); E Hilgendorf and H Schulze-Fielitz (eds), *Selbstreflexion der Rechtswissenschaft* (2015). Flohr, *Rechtsdogmatik* (n 8) 32, regarding this as symptom of a crisis.

96 See also, eg, Lennartz, *Dogmatik* (n 2) at 5, 72-95, for whom this perception forms the starting point for his critical analysis.

C. THE INTERPRETATION OF STATUTES

(1) The scope of possible meanings of a word and the *canones* of interpretation

Since the advent of the major codifications of private law, statutes have been considered as the main source of the law in the German-speaking countries.[97] All methodological textbooks thus extensively deal with the interpretation of statutes.[98] The section on the interpretation of statutes is traditionally followed by a separate one on "methods of judicial development of the law" (Larenz/Canaris), "supplementary development of the law" (Bydlinski), "judge-made" law (Kramer), or "applying the law where there are gaps" and "judicial deviations from the statute" (Rüthers/Fischer/Birk).[99] According to the prevailing view, interpretation is limited by the scope of possible meanings of the words used in the rule that is to be interpreted.[100] To be sure, it is often pointed out that interpretation and development of the law merge into one another and are not entirely distinct from each other. Larenz/Canaris thus understand the development of the law as a continuation of the process of interpretation,[101] Bydlinski refers to the "partial structural-logical concordance of thought processes".[102]

The application of the law within the scope of possible meanings of the words used in a legal provision is not infrequently termed "simple"[103] or

97 Cf, eg, A Metzger, "Sources of European Private Law", in *MaxEuP* (n 4) at 1577-1581, 1577 f. J Schröder, *Recht als Wissenschaft* vol I (n 3) at 205, notes that for jurists as early as the late 17th and 18th centuries, who conceived of all of law as the command and will of a legislature, the statute was "the predominant source of law". In the Historical School, it lost that primacy and was integrated into the theory of the emergence of law from the consciousness of the people.

98 Cf, eg, Larenz and Canaris, *Methodenlehre* (n 84) ch 4; Bydlinski, *Methodenlehre* (n 29) Book 3 Part 2; Fikentscher, *Methoden* (n 23) ch 29, III; Koch and Rüßmann, *Begründungslehre* (n 90) §§ 16-20; Kramer, *Methodenlehre* (n 31) II; Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) § 22; Reimer, *Methodenlehre* (n 39) C; Th Möllers, *Methodenlehre* (n 30) § 4; J Schröder, *Recht als Wissenschaft* (n 3) at 349-377.

99 Cf also Fikentscher, *Methoden* (n 23) at 701; Hager, *Rechtsmethoden* (n 12) at 309 ("Development of the Law"); J Schröder, *Recht als Wissenschaft* vol I (n 3) at 377 ("The Limits of interpretation: Finding the law outside of the Statute"); Cf generally also Vogenauer, *Auslegung von Gesetzen* (n 10) at 141-146.

100 Cf, eg, Larenz and Canaris, *Methodenlehre* (n 84) at 145, 187; Bydlinski, *Methodenlehre* (n 29) at 468; J Neuner, *Die Rechtsfortbildung contra legem*, 2nd edn (2005) at 90-103; this is expressly opposed by Reimer, *Methodenlehre* (n 39) at 253 (on the ground that the text of a rule is thereby given an exaggerated weight vis-à-vis the rule itself).

101 Larenz and Canaris, *Methodenlehre* (n 84) at 187.

102 Bydlinski, *Methodenlehre* (n 29) at 468. Cf also Kramer, *Methodenlehre* (n 31) at 206 (blurred distinctions between interpretation and development of the law); Vogel, *Methodik* (n 39) at 133 (structurally identical); Th Möllers, *Methodenlehre* (n 30) at 130 f (steps in the process of adjudication that merge into one another); Reimer, *Methodenlehre* (n 39) at 252 (not sharply to be delimited); cf also the analysis in Vogenauer, *Auslegung von Gesetzen* (n 10) at 142-146.

103 Larenz and Canaris, *Methodenlehre* (n 84) at 187.

"real"[104] interpretation, or interpretation in a narrow or "strict"[105] sense. In this context, four *canones* of interpretation play a central role, for which the section on "principles of interpretation" in Friedrich Carl von Savigny's "System of Contemporary Roman Law" provides the historical point of reference.[106] There, Savigny had drawn a distinction between the grammatical, logical, historical, and systematic element.[107] This has been turned into today's partially identical subdivision of grammatical, systematic, historical, and ("objective"-)teleological interpretation.[108]

(2) Grammatical and systematic interpretation

The wording of a rule usually provides the starting point for the process of interpretation.[109] General language usage may play a role here, as may specialist legal usage.[110] In principle, every legal rule requires interpretation;[111] a doctrine of sens clair or "Eindeutigkeitsregel" is very widely rejected in German legal scholarship.[112] The distinction between the core and "halo" in the attribution of meaning (*Bedeutungskern/Bedeutungshof*), as introduced by Philipp Heck,[113] is regarded as helpful, as is the associated division of cases into the categories

104 Kramer (n 31) at 205; Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 451 ("interpretation truly speaking").

105 Zippelius, *Methodenlehre* (n 65) at 51. Similarly, the glossators distinguished between interpretation in the proper sense and in a broader sense. The *interpretatio declarativa* was a part of the former, while *interpretatio extensiva* and *restrictiva* were part of the latter; see below, IV.1, at n. 181.

106 Cf, eg, Larenz and Canaris, *Methodenlehre* (n 84) at 140; Kramer, *Methodenlehre* (n 31) at 66.

107 F C von Savigny, *System des heutigen Römischen Rechts*, vol I (1840) at 212-216. From a present-day perspective, see Kriele, *Rechtsgewinnung* (n 90) at 67-84; J Rückert, "Methode und Zivilrecht beim Klassiker Savigny (1779-1861)", in Rückert and Seinecke (eds), *Methodik des Zivilrechts* (n 30) at 53-95; cf also Vogenauer, *Auslegung von Gesetzen* (n 10) at 438-457; J Schröder (n 3) at 228 f, 230-238.

108 Cf, eg, J Schröder, *Recht als Wissenschaft* vol I (n 3) at 356-374; Fikentscher, *Methoden* (n 23) at 668-681; Larenz and Canaris, *Methodenlehre* (n 84) at 141-159; Bydlinski, *Methodenlehre* (n 29) at 141-159, 436-461; Alexy, *Argumentation* (n 90) at 268-307; idem, "Juristische Interpretation", in idem, *Recht, Vernunft, Diskurs: Studien zur Rechtsphilosophie* (1995) at 84-89; and see the advice by J Rückert and R Seinecke, "Zwölf Methodenregeln für den Ernstfall", in Rückert and Seinecke (eds), *Methodik des Zivilrechts* (n 30) at 39–51, 43 f.

109 Cf, eg, Larenz and Canaris, *Methodenlehre* (n 84) at 141; Kramer, *Methodenlehre* (n 31) at 67. Generally on the relationship between meanings in everyday language and specialist language, see T Kuntz, "Die Grenze zwischen Auslegung und Rechtsfortbildung aus sprachphilosophischer Perspektive", (2015) 215 Archiv für die civilistische Praxis 387 at 392-405.

110 Cf, eg, Larenz and Canaris, *Methodenlehre* (n 84) at 141-145; Bydlinski, *Methodenlehre* (n 29) at 437-442; Kramer, *Methodenlehre* (n 31) at 97-99; Vogenauer, *Auslegung von Gesetzen* (n 10) at 30.

111 Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 453.

112 Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 453 f; Kramer, *Methodenlehre* (n 31) at 88; Vogenauer, *Auslegung von Gesetzen* (n 10) at 51-54.

113 Heck (n 80) at 46, 173; cf today, eg, Bydlinski, *Methodenlehre* (n 29) at 118 f, 437 f.

of "clearly to be subsumed", "clearly to be excluded", and "doubtful".[114] The dependence of the meaning on context is also emphasized.[115]

The interpretation of the words used in a statute is thus closely related to the systematic interpretation, ie to recognition of the fact that legal rules are to be understood through their position and function within the regulatory framework of a statute or of the legal order as a whole.[116] In the context of systematic interpretation, certain types of argument are discussed, especially the argument from the opposite (*argumentum e contrario*) and the "even more so" argument (*argumentum a fortiori*),[117] as well as precepts such as those which hold that in cases of doubt, an interpretation preserving the effect of the rule is to be chosen,[118] or that exceptions are to be interpreted narrowly.[119] In addition, there are the rules of *lex posterior derogat legi priori* and *lex specialis derogat legi generali*[120] for cases where rules collide. But there is also the overarching consideration of the "unity of the legal system" as an ideal to be pursued not only by lawmakers but also by those who apply the law.[121] The hierarchical structure of the legal system is to be taken into account, which means, among other things, that lower-ranking law is to be interpreted in accordance with (positive) higher-ranking law. Within the area of national law, the imperative to interpret rules of private law in conformity with the constitution can be placed into the intellectual context of the systematic interpretation.[122] But there is also

114 Koch and Rüßmann, *Begründungslehre* (n 90) at 194-201; cf also, eg, Kramer, *Methodenlehre* (n 31) at 68-74; Vogenauer, *Auslegung von Gesetzen* (n 10) at 54. By contrast, see Kuntz (n 109) at 448 f.

115 Cf, eg, Larenz and Canaris, *Methodenlehre* (n 84) at 145, 148; Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 459; Martens, *Methodenlehre* (n 1) at 332 f; R Zimmermann, "Text und Kontext", (2014) 78 RabelsZ 315 at 325.

116 On systematic interpretation, see Larenz and Canaris, *Methodenlehre* (n 84) at 145-149; Bydlinski, *Methodenlehre* (n 29) at 442-448; Zippelius, *Methodenlehre* (n 65) at 43-47; Vogenauer, *Auslegung von Gesetzen* (n 10) at 33-43; and see the monograph by C Höpfner, *Die systemkonforme Auslegung* (2008).

117 Vogel, *Methodik* (n 39) at 121; Reimer, *Methodenlehre* (n 39) at 161-164. Others ascribe these arguments to the area of development of the law, or gap-filling: Larenz and Canaris *Methodenlehre* (n 84) at 208-210; Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 550 f; Kramer, *Methodenlehre* (n 31) at 234-241; Th Möllers, *Methodenlehre* (n 30) at 253-255 (under the heading "simple forms of development of the law").

118 Bydlinski, *Methodenlehre* (n 29) at 444 f; Kramer, *Methodenlehre* (n 31) at 123-125.

119 This precept of interpretation (which goes back to the maxim "singularia non sunt extendenda"; see K Muscheler, "Singularia non sunt extendenda", in *Festschrift für Heinrich Wilhelm Kruse* (2001) at 135-160) is, however, predominantly rejected: Bydlinski, *Methodenlehre* (n 29) at 440; Kramer, *Methodenlehre* (n 31) a 241-245; cf also Vogenauer, *Auslegung von Gesetzen* (n 10) at 66 f.

120 Bydlinski, *Methodenlehre* (n 29) at 465 (*lex specialis* rule); Kramer, *Methodenlehre* (n 31) at 125-130; Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 480-482.

121 Cf, eg, Kramer, *Methodenlehre* (n 31) at 99-103; Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 483-485.

122 See Kramer, *Methodenlehre* (n 31) at 116-122; Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 475 f; Vogenauer, *Auslegung von Gesetzen* (n 10) 35-37; Höpfner, *Auslegung* (n 116) at 171-216.

transnational law, which is to be taken into account in the interpretation of the national law. Particularly noteworthy here is the interpretation in conformity with European Union law, the interpretation in conformity with directives enacted by the European legislature playing an especially important role in the practical application of German private law in view of its many rules based on European directives.[123]

(3) Historical interpretation

Historical interpretation is, on the one hand, a matter of ascertaining the will of the historical lawmaker as precisely as possible. Legislative materials (*travaux préparatoires*) play a key role in this context.[124] On the other hand, previous rules or the position prevailing in the *ius commune* prior to the enactment of the rule at hand, that is the doctrinal history at large, can help to understand a rule.[125] Occasionally these two dimensions are referred to as genetic and historical (broadly speaking) interpretation.[126] That terminological distinction should not lead, however, to the erroneous belief that these two dimensions can neatly be separated from one another. The doctrinal background is of very considerable significance for the assessment of the specific profile of the decision taken by the legislator: What approaches were available to the latter for the regulatory problem with which he was confronted? Which of these approaches did he choose, and for what reason? In many cases, such questions cannot be answered solely by means of recourse to the legislative materials.[127]

The imperative of interpretation in conformity with the constitution is understood as an independent criterion by Larenz and Canaris, *Methodenlehre* (n 84) at 159-163; Th Möllers, *Methodenlehre* (n 30) at 149, 414-418 ("… in view of its preeminent significance"); Reimer, *Methodenlehre* (n 39) 281-287. Bydlinski, *Methodenlehre* (n 29) at 455-457, sees in this a variety of the systematic-teleological interpretation.

123 See, eg, Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 477-480; Höpfner, *Auslegung* (n 116) at 249-320; Hager, *Rechtsmethoden* (n 12) at 249-282. Interpretation in conformity with public international law can also be mentioned; cf, eg, Vogenauer, *Auslegung von Gesetzen* (n 10) at 37-41; Höpfner, *Auslegung* (n 116) at 349-378.

124 See the contributions to H Fleischer (ed), *Mysterium "Gesetzesmaterialien"* (2013); T Frieling, *Gesetzesmaterialien und Wille des Gesetzgebers* (2017); cf also Zimmermann (n 115) at 316-324.

125 Also emphasized by Kramer, *Methodenlehre* (n 31) at 158 f.

126 Alexy, *Argumentation* (n 90) at 291-295; Reimer, *Methodenlehre* (n 39) at 171-175. The terminology concerning what is here referred to as historical interpretation in a broad sense is inconsistent. The view adopted here is shared by Vogel; differently (historical interpretation in a narrow sense) Reimer and Möllers. Larenz and Canaris *Methodenlehre* (n 84) at 149-153 and Bydlinski, *Methodenlehre* (n 29) at 449-453, focus entirely on the regulatory intention of the purposes pursued, and ideas envisaged, by the historical legislature.

127 Cf already Zimmermann (n 115) at 324-327. M Schmoeckel, J Rückert, and R Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol I (2003), vol II (2007), vol III (2013), offer assistance

(4) "Objective"-teleological interpretation

The "objective"-teleological interpretation is especially popular in Germany; not infrequently, it is regarded as a veritable silver bullet to attain appropriate results.[128] Teleological interpretation seeks to be guided by the spirit and purpose of a legal provision, by the *ratio legis*. That *ratio legis* is determined, quite independently of what the persons or bodies involved in the act of legislation may have thought, by what, at the time when a specific case has to be decided, seems to be reasonable, or objectively required within the framework of the legal system as a whole, to the person taking that decision.[129] Obviously, a specific risk is connected with the "objective"-teleological interpretation, as pointed out by Rüthers, Fischer, and Birk in drastic terms: "Whoever purports to interpret 'objectively' deceives himself and others because he does not interpret, but rather reads into a rule whatever suits his subjective notions of how a specific problem is to be regulated".[130] Connected with this is a deeply rooted and at times acrimonious, controversy – haunted by the ghosts of Germany's past[131] – concerning the subjective and objective theories of

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regarding the main codification of German private law. See also S Meier, "Historisch-kritisches Kommentieren am Beispiel des HKK", (2011) 19 ZEuP 537.

128 Cf, eg, J Schröder, *Recht als Wissenschaft* vol I (n 3) at 369; Vogel, *Methodik* (n 39) at 124 ("... is often regarded as pinnacle of the interpretation").

129 Cf Alexy, *Argumentation* (n 90) at 296: The interpreter refers to purposes that are reasonable or objectively necessary within the applicable legal system; and these are the purposes "that would be determined by decision-makers on the basis of rational argumentation within the applicable legal system". Objectivists in this sense are, for example, Larenz and Canaris, *Methodenlehre* (n 84) at 153-159 (what must be determined is the "rule appropriate to the matter to be decided", of which it has to be assumed that the statute in question aims to achieve it), and Bydlinski, *Methodenlehre* (n 29) at 453-455.

130 Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 513; cf also Reimer, *Methodenlehre* (n 39) at 178 ("... permanent temptation to read into the rule one's own value perceptions or one's own perception of the value perception of the legislature").

131 This alludes to the "indefinite interpretation" during the Nazi era; on which see the seminal work by B Rüthers, *Die unbegrenzte Auslegung*, 1st edn (1968); 8th edn (2017). Rüthers sees here ominous continuities between the methodological practice before 1945 and the methodology after 1945, symbolized in the person of Karl Larenz and his academic pupils, especially C-W Canaris, whom he attacks unusually severely in his essay "Personenbilder und Geschichtsbilder – Wege der Umdeutung der Geschichte" [2011] JuristenZeitung 593. See the rejoinder of C-W Canaris, "'Falsches Geschichtsbild von der Rechtsperversion im Nationalsozialismus' durch ein Porträt von Karl Larenz?" [2011] JuristenZeitung 879. The controversy, in which the doctrine of (objective) teleological interpretation plays a significant role, was occasioned by the contribution by C-W Canaris, "Karl Larenz (1903-1993)", in S Grundmann and K Riesenhuber (eds), *Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler*, vol II (2010) 263-307. In Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 4, a student of Canaris (Marietta Auer) is also placed in this continuity; cf also B Rüthers, "Verfälschte Geschichtsbilder deutscher Juristen? – Zu den 'Erinnerungskulturen' in Jurisprudenz und Justiz" (2016) *Neue Juristische Wochenschrift* 1068 at 1070 f.

interpretation.[132] While the subjective theory focuses on the will of the historical legislature, for exponents of the objective theory the will of the historical legislature is merely a more or less interesting piece of information. In a much-cited phrase, adherents of the objective theory presume that a statute can be wiser than its draftsmen[133] and can thus take on an existence that is quite independent of the conceptions of these draftsmen. The "objective" theory informs, in the wake of Larenz' influential textbook, the prevailing legal doctrine and probably also what is done in legal practice.[134]

It is questionable, however, whether the labels for the two theories are happily chosen,[135] as the intention pursued by the historical legislature is a considerably more objective piece of information – it can be established by legal research – than a hypostatized "will of the statute". The former approach thus entails a gain in rationality in that the judge is bound to become aware of the discrepancy between what a lawmaker has once expressed and has wanted to express, and what is to be understood today by the words or phrases chosen back then: a discrepancy which the judge is called upon to bridge by providing convincing arguments. He must therefore reveal the reasons why he intends to develop the law, and that requires a conscientious reconstruction of the starting point for that development. At least concerning that starting point, the "subjective" theory deserves to be supported;[136] the teleological interpretation clearly moves into the realm of the development of the law.[137]

132 Cf, eg, the discussions in Fikentscher, *Methoden* (n 23) 662-668; Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 493-510; Kramer, *Methodenlehre* (n 31) at 135-171; Reimer, *Methodenlehre* (n 39) at 125-133, 175-185.

133 This phrase can be found in O von Bülow, *Gesetz und Richteramt* (1885) 37 ("… the statute is often more intelligent than its author, the code wiser than the legislature"), and in E Wolf and H Schneider, *Gustav Radbruch, Rechtsphilosophie* (1973) 207. For background, see J Schröder, *Recht als Wissenschaft* (n 3) at 349-351 (idealistic variety of the voluntarist concept of law).

134 A controversy was ignited some years ago by a statement of the former president of the Federal Supreme Court that the relationship between legislature and judge is similar to the relationship between composer and pianist: G Hirsch, "Zwischenruf: Der Richter wird's schon richten" (2006) Zeitschrift für Rechtspolitik 161. For comment see, eg, Th Möllers, *Methodenlehre* (n 30) at 233 f. On the methodological theory of the Federal Constitutional Court, cf Rüthers, Fischer, and Birk (n 63) at 494-498.

135 Cf Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 493 ("surprisingly wrongly chosen and misleading designations").

136 See, in particular, Heck (n 80) at 23-40, 59-67; for comment, see Auer (n 79) at 528-531. Along similar lines Reimer, *Methodenlehre* (n 39) 128-133, 175-185; and see Martens, *Methodenlehre* (n 1) at 457-460.

137 This is acknowledged by Larenz and Canaris, *Methodenlehre* (n 84) at 159 ("… in substance nothing else than judicial development of the law"); Vogenauer, *Auslegung* (n 10) at 44 f, 49 f.

(5) Comparative law as a means of interpretation?

The significance of comparative law for the interpretation of statutes is unclear in Germany. Peter Häberle regards it as a fifth criterion for the interpretation alongside the aforementioned four classical criteria,[138] while Konrad Zweigert even considered it to be a universal method of interpretation.[139] At times comparative interpretation is regarded as a form of systematic interpretation,[140] occasionally it is also brought home under the label of the "objective"-teleological interpretation.[141] Some methodologies ignore it entirely,[142] while others at least ascribe to it "an important role in enhancing rationality".[143] The fact that German courts on the whole only rarely cite foreign sources[144] is often regretted, especially in comparative legal literature,[145] but is occasionally also regarded as entirely proper.[146] The particular challenges that comparative argumentation entails are frequently noted.[147]

(6) The hierarchy of the elements of interpretation

One particularly controversial point in German legal methodology is the hierarchy of the above-mentioned criteria of interpretation.[148] There have been repeated attempts to rationalize the application of the *canones* of interpretation at least to some extent[149] by identifying rules of priority,[150] rules on the burden

138 P Häberle, "Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat – Zugleich zur Rechtsvergleichung als 'fünfter' Auslegungsmethode" [1989] *JuristenZeitung* 913 at 916-918; see also Kischel (n 24) at 78 f; and the remarks by Kramer, *Methodenlehre* (n 31) 297-299.

139 K Zweigert, "Rechtsvergleichung als universale Interpretationsmethode" (1949/50) 15 RabelsZ 5.

140 Cf Vogenauer, *Auslegung von Gesetzen* (n 10) at 43.

141 Bydlinski, *Methodenlehre* (n 29) at 461.

142 Kischel (n 24) at 75: "Even national legal methodology does not so much oppose this approach, but most often simply ignore it". Cf however Bydlinski, *Methodenlehre* (n 29) at 385-387, 461-463; Kramer, *Methodenlehre* (n 31) at 297-301 (in the thematic context not of interpretation, but of judge-made law transcending the statute).

143 Reimer, *Methodenlehre* (n 39) 192 f; cf also Jansen (n 55) at 710.

144 Cf, eg, H Kötz, "Der Bundesgerichtshof und die Rechtsvergleichung", in idem, *Undogmatisches* (2005) at 120-135. For Switzerland and Austria, however, cf above, n 34.

145 Cf for example Zweigert and Kötz, *Comparative Law* (n 26) at 19.

146 Kischel (n 24) at 81: "… the lack of recourse to comparative law is in no way regrettable".

147 Bydlinski, *Methodenlehre* (n 29) at 387; Reimer, *Methodenlehre* (n 39) at 192 ("… the process of comparative interpretation can even less be compressed into a few lines than other aspects of interpretation"). Generally on the topic, see J M Smits, "Comparative Law and its Influence on National Legal Systems", in Reimann and Zimmermann (n 7) at 502-523; T Coendet, *Rechtsvergleichende Argumentation* (2012).

148 Martens, *Methodenlehre* (n 1) 499 ("… probably the most controversial problem in the field of methodology").

149 On the hierarchy of the means of interpretation in the early 19th century and in the decades before and after 1900, see J Schröder, *Recht als Wissenschaft* vol I (n 3) at 242 f, 374.

150 C-W Canaris, "Das Rangverhältnis der "klassischen" Auslegungskriterien, demonstriert an Standardproblemen aus dem Zivilrecht", in *Festschrift für Dieter Medicus* (1999) at 25-61, 50-57.

of argumentation,[151] "rules of methodology for problem cases",[152] or rules for a sensible sequence of steps to be taken.[153] But none of these approaches, let alone a fixed catalogue of steps,[154] has, to date, gained general recognition.[155] Above all, there is hardly a trace of any such approach in the decision-making practice of the courts.[156] What prevails instead is a "pragmatic methodological pluralism":[157] the individual elements of interpretation are not subjected to a hierarchical system, but are, in principle, all to be taken into consideration and weighed against one another anew in each individual case. At best there is a prima facie priority of the grammatical interpretation, particularly when the court that is called upon to make a decision considers the wording of the pertinent provision to be clear,[158] whereas otherwise the primacy of the "objective"-teleological interpretation is frequently asserted and is in fact observed in practice.[159] An important reason for the eminent significance of the purpose of the statute in the theory of the application of the law is, as Stefan Vogenauer emphasises,[160] the dominance of the jurisprudence of interests (*Interessenjurisprudenz*) and jurisprudence of evaluations (*Wertungsjurisprudenz*) as the prevalent methodological currents in the twentieth century (leaving aside the legal doctrine prevailing in the era of National Socialism).

In all discussions concerning a possible hierarchy, it should be borne in mind that the elements of interpretation cannot be sharply distinguished from one another.[161] If particular legal language is taken into account, this will often only be apparent from the systematic context of a rule; in order to determine the purpose

151 Alexy, *Argumentation* (n 90) at 305.

152 J Rückert and R Seinecke, "Zwölf Methodenregeln für den Ernstfall", in Rückert and Seinecke (eds), Methodik des Zivilrechts (n 30) at 39-51.

153 Reimer, *Methodenlehre* (n 39) at 200 f; cf also, eg, Th Möllers, *Methodenlehre* (n 30) 539-548, who seeks to distinguish between "six steps to be taken in finding a legal solution" and postulates a number of rules for weighing the elements of interpretation.

154 Kramer, *Methodenlehre* (n 31) at 201-203, attempts to outline at least a rudimentary hierarchy of elements of interpretation. Cf also Bydlinski, *Methodenlehre* (n 29) at 557, according to whom the relative ranking of methods must happen "via the idea of law"; Koch and Rüßmann, *Begründungslehre* (n 90) at 176-184.

155 See also Martens, *Methodenlehre* (n 1) at 499, who also, in this context, points to the problem of the normative grounding of a hierarchy of criteria of interpretation.

156 This is the result of Vogenauer's thorough examination of the hierarchy of the criteria of interpretation in cases of conflict: *Auslegung von Gesetzen* (n 10) at 50-159.

157 See the Swiss Federal Court (BGer 2.10.1996, BGE 123 III 24, 26); in substance the same is true for Germany: Vogenauer, *Auslegung von Gesetzen* (n 10) 151; for Switzerland, see recently F Werro, "The Swiss Federal Tribunal and Its Pragmatic Pluralism" (2017) 12 Journal of Comparative Law 109.

158 Vogenauer, *Auslegung von Gesetzen* (n 10) at 50-108, 152 f.

159 Cf above, at n 128; Vogenauer, *Auslegung von Gesetzen* (n 10) at 154.

160 Vogenauer, *Auslegung von Gesetzen* (n 10) at 213-218.

161 Generally, see Bydlinski, *Methodenlehre* (n 29) at 564; Vogenauer, *Auslegung von Gesetzen* (n 10) at 49 f.

of a provision, the legislative history is of considerable significance (certainly at the outset); and systematic and teleological interpretation often merge almost imperceptibly.[162] On the whole then, it must be stated that there is no generally recognized order of priority among the elements of interpretation.[163]

This insight has, not rarely, led to accusations of arbitrariness and of decisions being taken according to expediency (*Billigkeitsjudikatur*).[164] Gustav Radbruch thus polemically described interpretation as the outcome of its outcome,[165] while Josef Esser took the choice of method to be determined by an advance understanding of the consequences of the choice: historical and grammatical, systematic and teleological elements of interpretation are, according to Esser, employed "extremely arbitrarily, and indeed determined by the result" so as to create the appearance of justifying *lege artis* what is felt to be the right result.[166] Although Esser's criticism has had a lasting impact and has become a part of "the standard repertoire of legal scholarship",[167] the canon of the elements of interpretation remains largely unquestioned.[168] Often, they are considered to be elements of a "flexible system" (*bewegliches System*) in the sense of Walter Wilburg.[169] Interpretation is regarded not as an exercise in calculation but rather as a creative intellectual endeavour, and as with other processes of balancing, a certain amount of discretion is inherent in it.[170] Interpretation is thus considered to lead not necessarily to the right but rather to a defensible result,[171] the

162 For a pointed statement, see Martens, *Methodenlehre* (n 1) at 501: "It is particularly the teleological argument that creates difficulties as far as its relationship with the other elements of interpretation is concerned. This is, not least, due to the fact that the teleological argument has a two-tier structure so that the relevant telos itself has to be found by having recourse to the other elements of interpretation". On the two-tier structure of the teleological argument, see ibid. at 456-462.

163 See, eg, Fikentscher, *Methoden* (n 23) at 684; Larenz and Canaris, *Methodenlehre* (n 84) at 166.

164 See the references in Vogenauer, *Auslegung von Gesetzen* (n 10) at 157 f.

165 G Radbruch, *Einführung in die Rechtswissenschaft* (ed by K Zweigert) 13th edn (1980) at 181. Radbruch continues: "The means of interpretation is chosen only at a time when the result has been reached, in reality the so-called means of interpretation only serves to justify ex post from the text of a rule the result that has already been found in an act of creatively supplementing the text."

166 J Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (1970) at 123. As a result, for Esser (*ibid.* 7), "the scholarship on methodology neither assists the judge nor acts as a check on him" (italicized in the German original).

167 Vogenauer, *Auslegung von Gesetzen* (n 10) at 157.

168 Bydlinski, *Methodenlehre* (n 29) at 554: resignation is unfounded.

169 Canaris (n 150) at 59; Reimer, *Methodenlehre* (n 39) at 200; Th Möllers, *Methodenlehre* (n 30) at 544 f. But see Bydlinski, *Methodenlehre* (n 29) at 554: the lack of hierarchy is a weakness of the traditional methodology.

170 Larenz and Canaris, *Methodenlehre* (n 84) at 166 f; cf also Canaris (n 150) at 58 ("solution by means of balancing").

171 Vogenauer, *Auslegung von Gesetzen* (n 10) 155; cf also, eg, Zippelius, *Methodenlehre* (n 65) at 51 f.

plausibility of which proves itself in legal discourse[172] – or, in the event that convincing arguments against it are brought forward, fails to do so.

D. DEVELOPMENT OF THE LAW

(1) Wide and narrow concept of interpretation

Teleological interpretation extends to the very limits of what is conventionally known as interpretation in Germany, and in some cases reaches beyond those limits. It thus leads into the area of "development of the law" (*Rechtsfortbildung*),[173] which is no longer covered by the wording of the rule to be interpreted.[174] While it has frequently been noted that every attempt to draw a borderline between interpretation and development of the law is condemned to failure,[175] and while in fact the proponents of the prevailing opinion also acknowledge that interpretation and development of the law merge into one another,[176] the distinction is retained nonetheless.[177] It is a peculiarity of German legal methodology,[178] which has meanwhile found its way into a number of international model rules: Art. 1:106 PECL and Art. 1.6 PICC thus speak of "Interpretation and supplementation" (of the Principles), and Art. I.-1:102 DCFR of "Interpretation and development".[179] By contrast, French and English

172 Alexy, *Argumentation* (n 90) at 305.

173 On other terms used in German-speaking countries, cf above, C(1).

174 On this limit of interpretation, see above, n 100. Larenz, *Methodenlehre* (n 5) at 323 justifies it with the argument that, "apart from the possible means of the words of a rule, no other boundary can be found between interpretation and development of the law which supplements and reshapes the statute"; see also Larenz and Canaris, *Methodenlehre* (n 84) 144.

175 See, most recently, from the perspective of the philosophy of language, Kuntz (n 109). According to Kuntz, there are no fixed meanings that exist "before" one begins to read the text of a rule and that could limit the interpretation of its wording. Rather, Kuntz argues, the boundary of the possible meaning constitutes the end of running through the historical, systematic and teleological methods of interpretation. It thus demarcates the area of what constitutes, in traditional terms, interpretation and permissible development of the law. Whatever lies beyond that boundary is, according to Kuntz, illegitimate development of the law. See also, eg, Müller and Christensen, *Methodik* (n 53) at 308-310, who dispense with the distinction between interpretation and development of the law; cf H Schulze-Fielitz, in Dreier *Grundgesetz: Kommentar* (n 46), Art. 20 (Rechtsstaat) no 102 (distinction impossible); Kriele, *Rechtsgewinnung* (n 90) at 221-223.

176 Cf the references above, n 101 and 102.

177 See also Vogenauer, *Auslegung von Gesetzen* (n 10) at 141 f. F C von Savigny, *System des heutigen Römischen Rechts*, vol I (1840) 238, first referred to "development of the law that is distinct from interpretation"; cf also 329 f.: "… the boundary between genuine interpretation and actual development of the law can, however, be very doubtful in individual cases". For comment, see Vogenauer, *Auslegung von Gesetzen* (n 10) at 606-609.

178 Vogenauer (n 10), *Auslegung von Gesetzen* 1280-1282; idem, "Drafting and Interpretation of a European Contract Law Instrument", in G Dannemann and S Vogenauer (eds), *The Common European Sales Law in Context* (2013) at 115 f. ("unique"); Unger (n 25) Art. 1:106 (2) no 1.

179 Unlike eg Art. 7 CISG and Art. 4 CESL; see Unger (n 25) Art. 1:106 (2) no 1.

law are marked by a uniform, broad understanding of interpretation, as is the jurisprudence of the ECJ.[180] This broad concept of interpretation draws on the notions of *interpretatio declarativa*, *restrictiva* and *extensiva* as developed by the medieval glossators and commentators.[181] *Interpretatio extensiva* was supposed to designate the extension of a rule's scope to sets of facts that do not fall within the words used by the rule, while *interpretatio restrictiva* denotes the restriction of a rule's scope although a particular set of facts is indeed covered by the wording of the rule. The broad concept of interpretation thus encompasses what is known in Germany as development of the law. The key question in this context is that of the limits of such development of the law.[182]

(2) Two levels of development of the law

With regard to the development of the law, a distinction is often drawn between two levels: development immanent in the statute and development transcending the statute.[183] The former is a matter of filling gaps in a statute "in intelligent obedience"[184] by having recourse to the evaluations and objectives expressed in the statute. In the other case, the person applying the law goes beyond the scope or "plan"[185] of the statute and can thus no longer refer to its immanent teleology. Rather, he must find an orientation in the legal ideas, principles and evaluations underlying the legal system as a whole. Occasionally reference is therefore made to development of the law *praeter legem* on the one hand, and *extra legem*, albeit *intra ius*, on the other.[186] Here too, the boundary becomes blurred in practice.[187] But even those who do not make such a distinction recognize that the judge

180 Vogenauer, *Auslegung von Gesetzen* (n 10) at 1280-1282.

181 For details, see Vogenauer, *Auslegung von Gesetzen* (n 10) 488-490; J Schröder, *Recht als Wissenschaft* vol I (n 3) at 58-77.

182 Vogenauer explains the German approach as a "historical peculiarity which arose out of the general hostility towards the interpretatio restrictiva and extensiva during the 19th century. It was meant to admit these activities in a narrowly circumscribed way. Since then it has lost its function": S Vogenauer, "Statutory interpretation", in J Smits (ed), *Elgar Encyclopedia of Comparative Law*, 2nd edn (2012) at 826-838, 835 f; cf also idem (n 10) 142, 608 f.

183 Cf, in particular, Larenz and Canaris, *Methodenlehre* (n 84) at189; cf also Kramer, *Methodenlehre* (n 31) at 206-208; Reimer, *Methodenlehre* (n 39) at 253 ("gap filling and supplementation of the law").

184 Above, n 81.

185 Cf Larenz and Canaris, *Methodenlehre* (n 84) at 232.

186 Larenz and Canaris, *Methodenlehre* (n 84) at 189, 232, 252. Kramer, *Methodenlehre* (n 31) 267, uses the term "praeter legem" in a different sense. A Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im europäischen Privatrecht* (2009) is inspired by the Latin terminology for development of the law transcending the statute.

187 Larenz and Canaris, *Methodenlehre* (n 84) at 188.

sometimes may, and indeed must, go beyond the immanent *ratio legis*[188] so as not to violate the prohibition of denial of justice.[189]

(3) Gap-filling

The concept of a "gap" (*Lücke*) is of paramount importance for German legal methodology in the area of development of the law.[190] It refers first and foremost to the level of immanent development of the law where it designates the unintended incompleteness of a statute.[191] "Open" gaps (*offene Lücken*) can be filled by way of analogy,[192] while "concealed" gaps (*verdeckte Lücken*),[193] can be filled by means of teleological reduction.[194] Other forms of argumentation which are pertinent to the area of gap-filling (but sometimes also to that of interpretation)[195] are the *argumentum e contrario*, the teleological extension and the *argumentum a fortiori*.[196]

Reference is sometimes made to a *Rechtslücke* or a *Gebietslücke*[197] if an entire area of law that requires regulation remains legally unregulated. One well-known example of this is the German law relating to industrial disputes, which very largely had to be developed by the Federal Labour Court; another one is marriage and family law after it ceased to be in force in March 1953 as a result of violating Art. 3 (2) of the Basic Law (*Grundgesetz*). The concept of a *Rechtslücke* (ie of an unintended incompleteness not within a statute but within the legal system)

188 Cf, eg, Bydlinski, *Methodenlehre* (n 29) at 481 (focus on "general" or "natural" legal principles; cf § 7 ABGB); Zippelius, *Methodenlehre* (n 65) 53-59 ("supplementation and correction of statutes").

189 See, eg, J Schröder, *Recht als Wissenschaft* vol I (n 3) 310; C-W Canaris, *Die Feststellung von Lücken im Gesetz*, 2nd edn (1983) at 54 f.

190 See, in particular, Canaris, *Feststellung von Lücken* (n 189) passim; on the various types of gaps 139-143; Martens, *Methodenlehre* (n 1) at 505. Today cf, eg, Larenz and Canaris, *Methodenlehre* (n 84) at 191-201; Bydlinski, *Methodenlehre* (n 29) at 472-475. Vogenauer, *Auslegung von Gesetzen* (n 10) at 116, speaks of the Holy Grail of German legal methodology. For a critical perspective, see Koch and Rüßmann, *Begründungslehre* (n 90) at 254; Hager, *Rechtsmethoden* (n 12) at 194. Martens, *Methodenlehre* (n 1) at 505, points out that the notion of gaps in the law is not an invention of modern German legal scholarship, but has long been familiar and is "today probably the subject of discussion in all modern Western legal systems".

191 Larenz and Canaris, *Methodenlehre* (n 84) at 194.

192 On reasoning by analogy see, eg, Larenz and Canaris, *Methodenlehre* (n 84) at 202-210; Bydlinski, *Methodenlehre* (n 29) at 475-477.

193 The term "Ausnahmelücken" (gaps resulting from the failure to permit exceptions) is used by Kramer, *Methodenlehre* (n 31) at 219, 223-225, 250.

194 On teleological reduction see, eg, Larenz and Canaris, *Methodenlehre* (n 84) at 210-216; Bydlinski, *Methodenlehre* (n 29) at 480 f.

195 Cf above, at n 117.

196 Cf, for example, Larenz and Canaris, *Methodenlehre* (n 84) at 208-210, 216-220; Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 550-554.

197 Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 530 f, 554-557; but see Larenz and Canaris (n 84) at 196-198.

is meant to express that the judge is not entirely free in his decision either but must take legislative value judgments into consideration and strive to insert his decision into the overall structure of the legal system.[198]

(4) Development of the law transcending the statute

Other authors take such constellations to constitute a development of the law "transcending the statute".[199] They, too, use the concept of the gap, albeit "in a broader sense".[200] Such a gap is considered to exist if the absence of a legal regulation as "measured by the exigencies of the legal system as a whole",[201] appears as an incompleteness that needs to be remedied. Development of the law (transcending the statute) can then, according to these authors, be legitimized by the requirements of business life, by considering the nature of things, or with regard to general legal principles or legal values.[202] Inspired by § 7 of the Austrian Civil Code,[203] Bydlinski refers to "general" or "natural" legal principles.[204] The invocation of "specifically legal criteria – albeit not necessarily embodied in a statute"[205] means, however, that here too the judge is ultimately to be guided by systematic-teleological considerations; and to the extent that the distinction between interpretation and development of the law is regarded not as a qualitative one, but merely as a matter of degree, the prevailing methodology can also be reconceptualized as a problem of the hierarchy of the elements of interpretation.[206] Other authors consider development of the law transcending the statute or "corrections of a statute" to be legitimate, in particular, when conformity with higher-ranking law, that is, with the Constitution and with European primary and secondary law, can thereby be ensured.[207] In so doing, these authors, too, are focusing on the overall legal system and extend interpretation in conformity with the constitution and with European law[208] into the area of development of the law. Ernst A. Kramer, based on Art. 1 (2)

198 Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 555 f.
199 See Rüthers, Fischer, and Birk (n 63) at 530 who refer to a dispute about words rather than substance.
200 Larenz and Canaris, *Methodenlehre* (n 84) at 198 and, generally, 246.
201 Larenz and Canaris, *Methodenlehre* (n 84) at 246.
202 Larenz and Canaris, *Methodenlehre* (n 84) at 233-245.
203 Cf above, n 27.
204 Bydlinski, *Methodenlehre* (n 29) at 481-496.
205 Larenz and Canaris, *Methodenlehre* (n 84) at 246.
206 Alexy (n 108) at 91; Vogenauer, *Auslegung von Gesetzen* (n 10) at 142-144.
207 Reimer, *Methodenlehre* (n 39) 280-304.
208 Cf above, n 122 f.

of the Swiss Civil Code,[209] goes very far in this regard: for him, development of the law transcending the statute relates to cases where the judge decides *modo legislatoris*.[210] However, Kramer as well identifies certain substantial points of orientation for the judicial decision, including precedent, "tried and tested doctrine", general legal principles, and comparative law.[211]

(5) Methodological questions as constitutional questions

The legitimacy of the development of the law is, certainly in Germany, not least of all a matter of constitutional law – with the Basic Law, however, leaving the judge a great deal of latitude.

> The task of adjudication can necessitate, in particular, bringing to light and implementing the values that are immanent in the constitutional legal order, but are expressed in the statutory texts only imperfectly or not at all, and doing so in an act of evaluative cognition that is not without volitional elements.

That was the view of the Federal Constitutional Court in the famous *Soraya* case,[212] which confirmed the Federal Court of Justice's line of judgments according to which, contrary to § 253 of the German Civil Code, monetary compensation can also be sought for serious violations of the right of personality as a result of which only "immaterial loss" has occurred.[213] Today it is indeed almost universally acknowledged that the development of the law transcending a statute is not only a legitimate task of the courts but can also, in a state adhering to the rule of law, be incumbent upon them.[214] It is, however, also recognized that there are and have to be limits to the judicial development of the law. *Modo legislatoris*, certainly in Germany, a judge is not allowed to decide. An entirely freewheeling determination of the law would contradict the principles of separation of powers and of democracy.[215] Additionally, it is only the judge's

209 "If no rule can be found in the statute [i.e. in this case, the Swiss Civil Code], the judge shall base his decision on customary law and, where that is also lacking, on to the rule which he would establish if he were legislator"; see also above, n 26.

210 Kramer, *Methodenlehre* (n 31) at 267.

211 Kramer, *Methodenlehre* (n 31) at 284-309. In addition, he mentions "extra-legal arguments"; see below, IV.9.

212 BVerfG 14.2.1973-1 BvR 112/65, BVerfGE 34, 269-293, 287.

213 First according to BGH 14.2.1958 – I ZR 151/56, BGHZ 26, 349 ("Herrenreiter").

214 Cf, for example, Schulze-Fielitz (n 175) Art. 20 (Rechtsstaat) no 102.

215 Cf, eg, BVerfG 15.1.2009-2 BvR 2044/07, BVerfGE 122, 248-303, 282; Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) 438 f; K Langenbucher, *Die Entwicklung und Auslegung von Richterrecht* (1996) 23-28; S Vogenauer, "Judge-made Law", in *MaxEuP* (n 4) at 1014-1016, 1014; Lennartz, *Dogmatik* (n 2) at 44-55.

adherence, in principle, to the law that justifies his independence (Art 97 Basic Law). Judges are thus, as is often said, prohibited to decide *contra legem*.[216]

(6) Development of the law *contra legem*

It is not, however, entirely clear at what point a judge oversteps the boundaries to what constitutes a breach of the law,[217] that is an illegitimate use of judicial power. This is because, first, the notion of *contra legem* administration of justice is used in different senses.[218] Is this a matter of disregarding the clear wording of a statute,[219] of contradicting the wording *and* meaning of a legal rule,[220] or of flouting the intention of the historical law maker "as far as it remains reconcilable with the possible meaning of the legal rule at hand or could be asserted by analogy or restriction"?[221] Or would it be better to speak of *contra rationem legis* rather than *contra legem*?[222] Even within the Federal Constitutional Court there is no consensus, which is evident, for example, in the divergent opinions of three judges regarding the decision of the Second Senate on a judgment of the Federal Supreme Court dealing with the possibility of changing the record of a criminal trial after an appeal has been lodged against the decision reached in that trial (the problem is known in Germany by the term *Rügeverkümmerung*).[223] On the other hand, however, adjudication *contra legem* is by a number of authors regarded as permissible under certain circumstances.[224] These circumstances are described by the terms *Rechtsnotstand* (state of emergency for the legal system as such) or *unsittliches Gesetz* (a statute infringing basic precepts of morality). The decision of the Imperial Court of 28 November 1923 regarding the revaluation of certain

216 Larenz and Canaris, *Methodenlehre* (n 84) at 245-252; Bydlinski, *Methodenlehre* (n 29) at 496-500. According to J Schröder, *Recht als Wissenschaft* vol I (n 3) at 392, the question of whether there may be an interpretation *contra legem* was discussed openly in the history of legal methodology only after 1900.

217 Bydlinski, *Methodenlehre* (n 29) at 500, refers to breach of the law as "at least a minor revolution".

218 See Neuner (n 100) at 1 ("… belongs to the most enigmatic concepts of legal methodology").

219 BVerfG 15.1.2009, BVerfGE 122, 248, 283.

220 Schulze-Fielitz (n 175) Art. 20 (Rechtsstaat) no 103; cf also Koch and Rüßmann (n 90) 255.

221 Neuner, *Rechtsfortbildung* (n 100) at 184.

222 See Kramer, *Methodenlehre* (n 31) at 262-264.

223 BVerfG 15.1.2009, BVerfGE 122, at 248, 282: "The Senate fails to appreciate the constitutional limits of judicial law-making". See Christoph Möllers, "Nachvollzug ohne Maßstabbildung: richterliche Rechtsfortbildung in der Rechtsprechung des Bundesverfassungsgerichts" [2009] *JuristenZeitung* 668 ("… the most important utterance on the constitutional limits of judicial development of the law since 'Soraya'").

224 Cf, in particular, Larenz, *Methodenlehre* (n 5) at 426-429; Larenz and Canaris, *Methodenlehre* (n 84) at 250-252; Bydlinski, *Methodenlehre* (n 29) at 496-500. Larenz and Canaris, *Methodenlehre* (n 84) at 252, therefore refine their taxonomy of developments of the law by adding development of the law contra legem alongside development of the law praeter legem and extra legem (cf above, n 186). But see Th Möllers, *Methodenlehre* (n 30) at 476 f.

obligations in view of the hyperinflation prevailing at that time is usually regarded as a quintessential example of a *Rechtsnotstand*.[225] The *unsittliches Gesetz* can be equated with the *unrichtiges Recht* (false law) in terms of the Radbruch formula.[226] It evokes experiences with the perversion of the law during the Nazi era, which are reflected in the statement in Art 20 (3) of the Basic Law that the judiciary is bound by "law and justice".[227] In a democratic state based on the rule of law, the development of the law *contra legem* should constitute "a very rare exception".[228]

(7) On the admissibility of judicial corrections of the law[229]

The aforementioned decision on compensation for immaterial loss in the case of serious violations of the right of personality is often regarded, and approved, as development of the law *praeter legem* (outside of the relevant statute, ie in this case the BGB, but not *contra legem*) in view of values immanent in the constitutional order that the Federal Constitutional Court draws upon.[230] This is not unproblematic: the designation as such as well as the formulaic criteria intended to legitimate the development of the law *praeter legem* (the nature of things, general principles of the law)[231] tend to conceal the extraordinary nature of such a judicial correction of the law.[232] Essentially, we are dealing here with an extension of the so-called "objective" interpretation[233] into the

225 Larenz, *Methodenlehre* (n 5) at 427 f. On the revaluation decision (RGZ 107, 78; differently still RGZ 101, 141), its background, and its consequences, cf, in particular, Bernd Rüthers, *Die unbegrenzte Auslegung* (2012) at 64-90; cf also Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 577 f.

226 G Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht" [1946] *Süddeutsche Juristenzeitung* 105; idem, *Vorschule der Rechtsphilosophie*, 2nd edn (1959) 33. This formula became topical again in the trials of East German border guards after the reunification of Germany; cf BVerfG 24.10.1996-2 BvR 1851/94, 1852/94, 1875/94, 1853/94, BVerfGE 95, 96; R Alexy, *Der Beschluss des Bundesverfassungsgerichts zu den Tötungen an der innerdeutschen Grenze vom 24. Oktober 1996* (1997). The Radbruch Formula states that "where the discrepancy between the positive law and justice reaches a level so unbearable that legal certainty, as a value safeguarded by the positive law, can no longer be regarded as significant, the positive law has to make way to justice because it is to be considered 'false law'".

227 On the significance of this wording, especially the use of the word *Recht* (law) as opposed to *Gesetz* (statute), cf Neuner, *Rechtsfortbildung* (n 100) at 5-84; Larenz and Canaris, *Methodenlehre* (n 84) at 246 f; Neuner, *Rechtsfortbildung* (n 100) at 5-84.

228 Bydlinski, *Methodenlehre* (n 29) 499; cf also Kramer (n 31) at 265 ("... can in democracies governed by the rule of law not normally be recognized").

229 Heading taken from to Rüthers, Fischer, and Birk (n 63) at 580.

230 Larenz and Canaris (n 84) at 249 f; cf, by contrast, Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 576 f, 582 f.

231 Cf above, n 202, 204.

232 Extremely critical assessment by Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 560-568; Th Möllers, *Methodenlehre* (n 30) at 472 f. ("methodological blind flight").

233 Cf above, C.4.

area of development of the law. From the position of the "subjective" theory of interpretation,[234] and thus from the perspective of the historical legislator, who enacted § 253 of the German Civil Code in 1900, a more spectacular instance of adjudication *contra legem* is scarcely conceivable.

It is advisable to deal openly with this assessment, to be acutely aware of the discrepancy between what the legislature has said in the past and how the provision enacted by it is now supposed to be understood, and then to attempt to find convincing arguments to bridge that discrepancy.[235] Thus, for example, it can be argued that the assumptions underlying the decision of the legislator were erroneous;[236] that the statute is not suitable for achieving the aims pursued by it; that problems not foreseen and not foreseeable at the time when the statute was created have arisen, for which the statute cannot offer a satisfactory answer; that the social or economic conditions have changed since the enactment of the statute; or that the general societal perception and assessment of certain patterns of fact, or patterns of behaviour, have shifted.[237] Likewise, the question of whether the text of a statute was marred by a drafting error can only be resolved through historical analysis; the rectification of such drafting errors appears to be generally regarded as permissible.[238]

On the whole, therefore, where exactly the boundaries of judicial development of the law lie remains unclear.[239] Looking at the practice of the German courts, two points can safely be stated: first, a provision cannot be made to contain anything that the legislature itself would not have been permitted to include in it because it would violate the precepts contained in the Basic Law.[240] And, second, the judiciary may not interfere with the legislature's freedom to address a problem in the way it regards as appropriate by implementing their own preferred policy. The judiciary, in other words, must not engage in considerations of expediency.[241]

(8) Judge-made law

Development of the law is one of the courts' tasks. The decisions taken by them *intra*, *praeter*, or even *contra legem* constitute judge-made law. Although even

234 Cf above, text relating to n 132.

235 Cf above, text relating to n 136.

236 By way of example, see "Die Einrede der Aufrechenbarkeit nach § 770 Abs. 2 BGB: Normwortlaut und Rechtsentwicklung" (1979) *Juristische Rundschau* 495.

237 See also Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) 581-586; Neuner, *Rechtsfortbildung* (n 100) at 139-178; Alexy (n 108) 83; and Zimmermann (n 115) at 326 f.

238 Larenz and Canaris, *Methodenlehre* (n 84) at 219; Kramer, *Methodenlehre* (n 31) at 165-167.

239 Cf also Th Möllers, *Methodenlehre* (n 30) at 471 f.

240 Vogenauer, *Auslegung von Gesetzen* (n 10) at 149.

241 Vogenauer, *Auslegung von Gesetzen* (n 10) at 149 f.

in the nineteenth century self-confident courts such as the Supreme Court of Appeal for the four free cities in Lübeck, the Prussian Supreme Court, and later the Imperial Supreme Court in Commercial Matters as well as the Imperial Court were able to create for themselves "that freedom of movement which is so indispensable to judges" – a freedom that clear-sighted authors such as Bernhard Windscheid were perfectly happy to grant to them[242] – the Historical School did not recognize court practice as an independent source of law.[243] This question became the subject of an increasingly lively debate since the beginning of the twentieth century,[244] in view of the necessity to develop the law, now laid down in a codification: a phenomenon which the American comparativist John P. Dawson dubbed "Germany's case-law revolution".[245] Nevertheless, for a long time the prevailing methodology kept judge-made law "as it were in a semi-legitimate and hence somewhat dim realm"[246] by characterizing court decisions as a mere source of legal knowledge (*Rechtserkenntnisquelle*).[247] All that was supposed to be gathered from them was what *was* actually practised as law, and not what *should* legitimately be practised as law.[248] The situation was considered to be different only when case law turned into customary law as a result of a prolonged and consistent practice.[249]

In the meantime, however, the view has steadily been gaining ground that "genuine" judge-made law cannot only be found in the common law world,

242 B Windscheid and T Kipp, *Lehrbuch des Pandektenrechts*, 9th edn (1906) § 28, note 4; Falk, *Gelehrter wie Windscheid* (n 76); R Ogorek, *Richterkönig oder Subsumtionsautomat? – Zur Justiztheorie im 19. Jahrhundert* (1986); U Müßig, "Geschichte des Richterrechts und der Präjudizienbindung auf dem europäischen Kontinent" (2006) 28 *Zeitschrift für neuere Rechtsgeschichte* 79.

243 J Schröder, *Recht als Wissenschaft* vol I (n 3) at 202. In the view of Savigny and his adherents, general customary law "was nearly always jurists' law") (*ibid.* 198). On the doctrine of "law created by scholarship", cf *ibid.* 201 f.

244 J Schröder, *Recht als Wissenschaft* vol I (n 3) at 309-314 ("The most striking change in the doctrine of legal sources around and after 1900 was the ascent of judge-made law to an independent source of law" – initially, however, binding only for the specific case at hand, ie without establishing precedent).

245 J P Dawson, *The Oracles of the Law* (1968) at 432-502. On the development, see also R Zimmermann, "Das Bürgerliche Gesetzbuch und die Entwicklung des Bürgerlichen Rechts", in Schmoeckel, Rückert, and Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB* (n 127) at 19.

246 Bydlinski, *Methodenlehre* (n 29) at 502; cf also Vogenauer (n 215) at 1305 ("Legal methodology has only, so far, to a limited extent taken account of the law-making role of the courts. . . . Instead of judge-made law, preference is given to the term 'judicial development of the law', which makes the creative character of adjudication less evident").

247 For a representative statement, see Larenz, *Methodenlehre* (n 5) at 430-432; cf also the overview in Fikentscher, *Methoden* (n 23) § 29 V.

248 C-W Canaris, "Die Stellung der 'UNIDROIT Principles' und der "Principles of European Contract Law" im System der Rechtsquellen", in J Basedow (ed), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (2000) 5-31, 8.

249 Larenz, *Methodenlehre* (n 5) at 433.

but also in continental legal systems such as the German one[250] and that case law (by the highest courts) has to be qualified as a source of legal validity (*Rechtsgeltungsquelle*)[251] which is thus, in principle, binding.[252] Yet judicial decisions are only a *pro tanto* binding source of law, for, unlike statutes, they must be based on comprehensible and sensible reasons; judge-made law, therefore, can always be corrected by means of opposing, better arguments.[253] The same is meant by Bydlinski and Larenz/Canaris, when they describe judge-made law as a "subsidiary" source of law.[254]

The lively discussion on the legal nature of judge-made law is not reflected in an equally intense contemplation on how to deal with judge-made law.[255] In particular, a doctrine of precedent comparable to the English one is lacking. Only some of the more recent works on methodology discuss the meaning of *obiter dicta* and *rationes decidendi*, the role of head notes, the interpretation of court decisions, the concepts of distinguishing and overruling, or the problem of preserving legitimate expectations when judicial practice changes.[256]

250 Bydlinski, *Methodenlehre* (n 29) at 506.

251 Canaris (n 248) at 8.

252 See, in particular, the pioneering works of J Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, 2nd edn (1964) at 132-140, 287-289, and Wolfgang Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, vol IV (1977) at 241-244 (within the framework of the development of his theory of the case rule (Fallnorm); for criticism, see Bydlinski, *Methodenlehre* (n 29) at 515-527); Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 157-167; cf also Canaris (n 248) at 8 f, and the authors cited in nn 253 and 254.

253 Alexy, *Argumentation* (n 90) at 334-341; R Zimmermann and N Jansen, "Quieta Movere: Interpretative Change in a Codified System", in *Essays in Celebration of John Fleming* (1998) at 285-315, 305-307.

254 Larenz and Canaris, *Methodenlehre* (n 84) at 256-258; Bydlinski, *Methodenlehre* (n 29) 504-512.

255 See Stefan Vogenauer, "Precedent, Rule of", in *MaxEuP* (n 4) at 1304-1306, 1305 f, citing in agreement Mary Ann Glendon's observation that this is "the Achilles heel of civil-law methods"; idem (n 7) at 895 ("[On the Continent] lawyers ha[ve] been so busy pondering yet again whether precedent is a binding source of law that they overlooked that even a de facto source which is habitually followed needs to be, and indeed is, applied and interpreted according to certain methodological standards"); idem (n 10) at 226 ("... the approach to interpreting pertinent earlier decisions is reflected neither in practice nor in legal theory"). On the background, see Müßig (n 242) at 79.

256 Vogel, *Methodik* (n 39) at 160-170 (especially: finding and interpreting judge-made law, distinguishing); Reimer, *Methodenlehre* (n 39) at 212-221 with a focus on the interpretation of court decisions; Th Möllers, *Methodenlehre* (n 30) at 96-100, 101-103, 290-299; Martens, *Methodenlehre* (n 1) at 180-193 (primarily on interpretative change and the protection of legitimate expectations; this is also the focus of the essay by Jansen and Zimmermann (n 253). For a detailed discussion, see Kriele, *Rechtsgewinnung* (n 90) at 269-289; Langenbucher, *Entwicklung und Auslegung* (n 215) at 40-62, 63-147; R Alexy and R Dreier, "Precedent in the Federal Republic of Germany", in MacCormick and Summers (n 13) at 17-64.

(9) Taking account of the consequences of a decision

Despite an, at times, intense debate,[257] the normative foundations for taking account of the consequences of a decision in the application and development of the law have, to date, remained unresolved.[258] While the analysis of the practical and empirical consequences[259] of a decision is sometimes considered to be part of the teleological interpretation,[260] others regard "consequence-oriented interpretation" as a discrete "modern element of interpretation"[261] which is said to encompass a number of individual considerations (such as the *argumentum ad absurdum*, the avoidance of undue hardship, or *de minimis non curat lex*).[262] Yet other authors relegate the consideration of the consequences of a decision to the area of development of the law, either exclusively to the development of the law "transcending the statute"[263] or to the development of the law in general.[264] Reimer recommends great caution "both with regard to the possibility of gaining the relevant information by those applying the law and with regard to their role within a process of administration of justice marked by a division of tasks and labour",[265] but he ascribes key importance to impact assessment as a control consideration.[266] This view probably best reflects the experience that once an outcome based on the interpretation of a rule has been reached, courts will often assess whether that outcome appears to be appropriate and reasonable, or fallacious or impractical.[267] In this context, too, the idea is

257 Cf M Deckert, *Folgenorientierung in der Rechtsanwendung* (1995), see also the references in Kramer, *Methodenlehre* (n 31) at 282 f, and Reimer, *Methodenlehre* (n 39) at 180 n 515 (who adds that the discussion has now largely ebbed away). Probably the most prominent opponent of using consequences as a decision-making criterion was Niklas Luhmann; cf Koch and Rüßmann, *Begründungslehre* (n 90) at 233-236; Martens, *Methodenlehre* (n 1) at 478.

258 See Martens, *Methodenlehre* (n 1) at 478, who then (478-493) examines the question for the ECJ.

259 Cf the distinction in Martens, *Methodenlehre* (n 1) at 478.

260 Martens, *Methodenlehre* (n 1) at 491 ("a necessary component of teleological interpretation" – however, only when, as Martens postulates, the consequences are assessed according to purely legal criteria.

261 Th Möllers, *Methodenlehre* (n 30) at 171.

262 Th Möllers, *Methodenlehre* (n 30) at 189-200.

263 Larenz and Canaris, *Methodenlehre* (n 84) at 184 f. ("... courts should then, however, take account of the general economic any social consequences and will actually do so").

264 Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 191, 207 (in view of the fact that all decisions developing the law, even those that merely fill gaps, contain "inescapable elements of volition, that is, of legal policy"). Participation in formulating legal policy also means bearing responsibility for the consequences.

265 Reimer, *Methodenlehre* (n 39) at180.

266 Reimer, *Methodenlehre* (n 39) at 181. Larenz and Canaris, *Methodenlehre* (n 84) at 168-170, in turn, refer to "factors that play a role in determining the interpretation".

267 See Vogenauer, *Auslegung von Gesetzen* (n 10) at 44-48, 136-138 (under the heading of extra-legal standards of assessment. He attributes considerable significance to testing the reasonableness of a decision in legal practice (Reimer speaks of a "teleological control").

helpful[268] of the judge acting "in intelligent obedience" towards the legislature.[269] The judge should thus ensure that the aims of the statute in question, including its intended consequences, are implemented as well as possible. This includes avoiding untenable or unfeasible outcomes.[270] Also when he is evaluating the consequences of a decision,[271] the judge may not bring his own view of the appropriate legal policy to be adopted to bear upon his decision. He has to respect the prerogative of the legislature to determine the purpose of the statute in question.[272]

One particular form of taking the consequences of a decision into account is the question of whether a legal rule complies with the precept of efficiency. Economic analysis, an approach that first established itself in the United States but has, since the 1980s, been increasingly received also in Germany, aims to answer this question.[273] That approach still plays no role in the decisions of the German courts,[274] and in the methodological literature it is addressed only marginally.[275] In the relevant specialist literature, economic analysis is usually conceptualized, first and foremost, as a theory pertinent to legislation.[276] But economic arguments can also find a place in the application and development of the law provided that there is a point of reference for such a process of reception:[277] "If efficiency is among the aims pursued by a lawmaker, the principle of efficiency takes on [. . .] normative force."[278]

268 See also G Wagner, "Privatrechtsdogmatik und ökonomische Analyse", in *Festschrift für Claus-Wilhelm Canaris* (2017) at 281-318, 312.

269 Cf above, at n 81 and 184.

270 Larenz and Canaris, *Methodenlehre* (n 84) at168 f.

271 For the distinction between acquiring the relevant information and assessing the consequences of a decision, see Martens, *Methodenlehre* (n 1) at 480.

272 Cf Vogenauer, *Auslegung von Gesetzen* (n 10) at 149 f.

273 For Germany, see H Schäfer and C Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts*, 4th edn (2005); H Eidenmüller, *Effizienz als Rechtsprinzip: Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts*, 4th edn (2015).

274 Wagner (n 268) at 290. This is the reason why the argument does not appear in the analysis of Vogenauer, *Auslegung von Gesetzen* (n 10).

275 Bydlinski, *Methodenlehre* (n 29) at 331 (who expresses his scepticism by using inverted commas); Kramer, *Methodenlehre* (n 31) at 301-306 (economic considerations lead in many cases to greater rationality "when compared with the traditional invocations of imagined fundamental legal values").

276 Eidenmüller, *Effizienz* (n 273) at 414-449.

277 Zimmermann and Wagner (n 63) at 10.

278 Wagner (n 268) at 318; along the same lines Martens, *Methodenlehre* (n 1) at 103-106, 492 ("The economic efficiency is, therefore, of relevance in the interpretation of a legal rule, if the interpretation of that rule reveals that it pursues that economic goal"); see further, eg, Eidenmüller, *Effizienz* (n 273) at 450-480. Examples for the economic analysis of German court decisions are provided in Hein Kötz/Hans-Bernd Schäfer, *Judex oeconomicus* (2003).

(10) New themes – and old ones

The main features of the methods for applying and developing the law, as they are conceptualized in German-speaking countries, have been outlined over the previous pages. In recent methodological works, additional keywords can sometimes be found. These include, most prominently, *Konkretisierung* (concretization, or substantiation) and, associated with it, *Abwägung* (balancing). Thus, for Reimer, "concretization of the law" means making use of the leeway that is given to those applying the law as a result of being authorized to engage in evaluation: thus, they must deal with indeterminate legal terms or are confronted with a collision of rules that have to be resolved by achieving a practical concordance.[279] In all of these cases, balancing acts (immanent in a rule, or transcending it) must be undertaken. Reimer thus regards balancing as a veritable "cross-cutting challenge" in the application of the law,[280] and for him the economic analysis of the law is a potential aid in that task.[281] He then illustrates his doctrine of concretization primarily with reference to specific terms and concepts requiring value judgments as well as to constitutional principles and instances of judicial discretion.[282] His theory is thus strongly rooted in public law thinking.[283] But Thomas Möllers, who is working in the field of private law, also dedicates considerable space to the topic of "concretization", or, more recently, "concretization and construction".[284] Among other matters, he addresses, under these headings, the "comparative case method", the "flexible system", and "comparative case groups", in the first edition (2017) also "Rechtsdogmatik and general legal principles" and "concretization by means of balancing". All of this constitutes a rather heterogeneous conglomeration of considerations that play, or can play, a role in the process of adjudication; considerable uncertainty prevails, however, as to how they fit into a legal methodology.[285] Some of these topics

279 Reimer, *Methodenlehre* (n 39) at 222-250.

280 Reimer, *Methodenlehre* (n 39) at 225.

281 Reimer, *Methodenlehre* (n 39) at 230-234.

282 Reimer, *Methodenlehre* (n 39) at 236-250.

283 Cf above, at n 46.

284 Th Möllers, *Methodenlehre* (n 30) at 277-394; in the first edn (2017) at 305-408 only "concretization". On the relationship between these two concepts which, according to Möllers, blend into each other and cannot, therefore, sharply be demarcated, see 330 f.

285 Predominantly, concretization and/or balancing are not regarded as independent themes or elements of legal methodology. Thus, eg, Larenz and Canaris, *Methodenlehre* (n 84), address the concretization of general clauses through case-comparison and typification under the heading "value judgments" (at 109-113), and address the balancing of interests when resolving conflicts of principles and rules as part of the section on judicial development of the law (at 223-232). Rückert and Seinecke (n 108) at 49 f, offer the following advice: "Sometimes one has to balance." Given the current state of German legal methodology, perhaps this is indeed all that can be said. As far as legal practice is concerned, it is

would find their place in a doctrine on the formation and the handling of judge-made law,[286] while with regard to others it is unclear what significance can be ascribed to them in a private law methodology,[287] if any.[288]

Thomas Möllers has recently referred again to the doctrine of topical jurisprudence as propagated by Theodor Viehweg;[289] he regards topical thinking and, in connection with it, the doctrine of typology as an essential contribution to "legal creativity" in the development the law.[290] For the most part, however, present-day assessments of topical jurisprudence range from scepticism to rejection:[291] one of the reasons being that it thwarts the notion of a legal *system*.

Concerning the doctrine of legal sources, the question of the significance of judge-made law is at the heart of the discussion today;[292] however, non-legislative codifications such as the Principles of European Contract Law or the UNIDROIT Principles of International Commercial Contracts and, more generally, the phenomenon of "private law without the state" play at most a marginal role in German methodology.[293]

According to the idiosyncratic conception of law of the Historical School, customary law occupied the top of the hierarchy of legal sources.[294] Although even then it was no longer of much practical relevance, it was the object of lively debate until the end of the Weimar Republic.[295] Today, that debate has almost entirely faded away and, as a result, in modern legal methodology it is mentioned only marginally and treated as insignificant.[296] There are a variety of reasons for

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telling that the words balancing and concretization do not appear in the index of Vogenauer, *Auslegung von Gesetzen* (n 10).

286 Cf above, text at n 255.

287 A sophisticated analysis of the debate surrounding the concretization of general clauses in German private law thinking can be found in M Auer, *Materialisierung, Flexibilisierung, Richterfreiheit: Generalklauseln im Spiegel der Antinomien des Privatrechtsdenkens* (2005) at 149-178.

288 In private law, at least, one primarily has to apply rules rather than to optimize principles. The theory of principles, which relates in the first place to the operation of fundamental rights, is in Germany connected with the name R Alexy; cf his *Theorie der Grundrechte* (1985) at 71-157. Cf also N Jansen, "Die Abwägung von Grundrechten" (1997) 36 *Der Staat* 27. Martens, *Methodenlehre* (n 1) 312-318, also has an enlightening discussion of Alexy's model of balancing.

289 T Viehweg, *Topik und Jurisprudenz*, 1st edn (1953); 5th edn (1974).

290 Th Möllers, *Methodenlehre* (n 30) at 533-537.

291 See, eg, Bydlinski, *Methodenlehre* (n 29) at 141-148; *Kramer, Methodenlehre* (n 31) at 318-321.

292 Cf above, D (8).

293 According to Canaris (n 248) at 15-31, we are dealing here with sources of law in so far as the current state of the law can be gathered from them ("Rechtserkenntnisquellen"). Cf also on non-legislative codifications N Jansen, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* (2010).

294 J Schröder, *Recht als Wissenschaft* vol I (n 3) at 198.

295 J Schröder, *Recht als Wissenschaft* vol I (n 3) at 301-309.

296 Cf, eg, Larenz and Canaris, *Methodenlehre* (n 84) at 177; Bydlinski, *Methodenlehre* (n 29) at 214-218. Cf, however, (especially for Union law) Martens, *Methodenlehre* (n 1) at 264-266.

this, including the fact that judge-made law is not only to be recognized as a legal source when it turns into customary law.[297] *Juristenrecht* (jurists' law), in the sense of law that has been developed and is recognized by scholars but not by the body politic is neither an independent nor a customary source of law.[298] Legal scholarship and jurisprudence have traditionally collaborated to establish what we refer to as *Rechtsdogmatik*.[299] But a scholarly doctrine can develop into a legal source only when adopted in judge-made law or implemented by the legislature.

E. GERMAN EXPERIENCES

An overview of legal methodology in Germany would be incomplete if no mention were made of the fact that German lawyers applied and developed the law under five different political systems over the course of the twentieth century.[300] In particular, they did not merely fail to prevent the perversion of the legal system[301] during the Nazi era but indeed actively advanced it. They did so, for one thing, by unapologetically applying statutes drenched in Nazi ideology, such as those targeting Jews and other "racial aliens" *(Fremdrassige)*, and in many cases – in keeping with the spirit of these statutes – interpreting them broadly.[302] Dismay about this prompted a short-lived resurgence of Natural law thinking in the post-war era,[303] and it led to the construction of an effective bogeyman: the tradition, supposedly dating back to the nineteenth century, of a positivism variously described as being devoid of content, sterile, formalistic, or value-free, which was said to have rendered German jurists helpless against injustice clothed in statutory garb.[304]

297 Cf above, text at n 249.

298 But see, concerning the doctrine of the Historical School on the sources of law, J Schröder, *Recht als Wissenschaft* vol I (n 3) at 200-202.

299 See the 2012 symposium at the Hamburg Max Planck Institute on the dialogue between legal scholarship and legal practice: "Dialog zwischen Rechtswissenschaft und Rechtsprechung" (2013) 77 RabelsZ 300. On *Rechtsdogmatik*, cf above, B (4). Vogenauer (n 215) at 1305, notes in this context that legal scholarship today frequently contents itself with accepting the law as developed by the courts and with integrating it into the overall doctrinal system in a way that is compatible with that system.

300 Cf by way of an overview H Haferkamp, "Zur Methodengeschichte unter dem BGB in fünf Systemen" (2014) 214 Archiv für die civilistische Praxis 60.

301 F von Hippel, *Die Perversion von Rechtsordnungen* (1955).

302 See, for example, Jan Schröder, *Recht als Wissenschaft* vol II (n 3) at 16-28.

303 Cf, eg, H Coing, *Die obersten Grundsätze des Rechts: Ein Versuch zur Neubegründung des Naturrechts* (1947). For a detailed analysis of the natural law debates in the post-war era, see L Foljanty, *Recht oder Gesetz: Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit* (2013), cf, eg, at 175-223 (on Coing), 51-66 (on the Radbruch Formula; for which see above, n 226).

304 See Foljanty, *Recht oder Gesetz* (n 303) 19-50 (also containing the keyword of the bogeyman ["*Feindbild*"]). Our assessment of legal scholarship in the 19th century is generally in flux today, see above, n 74-76.

Much more frequently, on the other hand, courts had to make decisions on the basis of statutes originating, before 1933, in the bourgeois era, including the German Civil Code. These statutes, too, were frequently interpreted in the light of *völkisch* legal thought in the Nazi period: for example, by denying tenant protection and stays of execution, or by permitting marriages to be contested for mistake about the spouse's (Jewish) race.[305] Bernd Rüthers coined the term "unlimited interpretation" (*unbegrenzte Auslegung*) to denote the "re-interpretation" of legal concepts in line with the Nazi worldview.[306] Dominant in legal methodology during the Nazi era was the "objective" theory concerning the interpretation of statutes, by means of which already existing legal concepts and rules could best be limited, expanded, or reinterpreted.[307] Philipp Heck attempted to defend the "subjective" theory of interpretation by emphasizing its suitability to ensure legal obedience vis-à-vis the Nazi legislature and implementation of the will of the "Führer",[308] but he was unable to prevent its rejection and the discrediting of his jurisprudence of interests by the proponents of the renovation of the legal system.[309] It was only with the publication of two seminal books by Bernd Rüthers[310] and Michael Stolleis,[311] more than two decades after the end of the Second World War, that a scholarly assessment of the darkest chapter in German legal history began to be undertaken. Since then,

305 J Schröder, *Recht als Wissenschaft* vol II (n 3) at 16-28.

306 See the title of his book cited above, n 225; in this book see, eg, at 216-270 on the way how general clauses were ideologically changed in Nazi judicial practice, at 322-430 on the effects of the new way of thinking on individual doctrines of private law.

307 J Schröder, *Recht als Wissenschaft* vol II (n 3) 17 f; cf also Rüthers, *Die unbegrenzte Auslegung* (n 225) at 183-210. On the dispute over "objective" and "subjective" theories of interpretation, cf above, C(4).

308 P Heck, *Rechtserneuerung und juristische Methodenlehre* (1936) 17 f; cf also J Schröder, *Recht als Wissenschaft* vol II (n 3) 28-30.

309 See Schoppmeyer, *Juristische Methode* (n 79) 183-220; Auer (n 79) at 520: "Heck, who was because of his sympathetic national conservatism blind to the extent of the national socialist state terrorism, attempted to defend himself – an attempt that was doomed to fail in view of the universality and ideological neutrality of the jurisprudence of interest, which discredited it as a völkisch-national method. When Heck died in 1943, he faced the destruction of his life's work".

310 Rüthers himself describes the origin and impact of his pioneering work (a post-doctoral dissertation) in the afterword to the 7th edn (n 225) 477-513; cf also S Seedorf, "Bernd Rüthers – Die 'unbegrenzte Auslegung'", in T Hoeren (ed), *Zivilrechtliche Entdecker* (2001) 317-373.

311 M Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht* (1974). On the reticence of large parts of the elites of the Federal Republic, until the late 1960s, to deal with their own past, see Rüthers, *Die unbegrenzte Auslegung* (n 225) 489-494; M Stolleis, *Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence after 1933 and post-1945* (2001); this is taken up in R Zimmermann, "'Was Heimat hieß, nun heißt es Hölle'", in J Beatson and R Zimmermann (eds), *Jurists Uprooted* (2004) 1 at 68 f.

almost every aspect of the "Nazification" of legal life in Germany and of National Socialist law has been examined.[312]

Legal developments under the second totalitarian system on German soil in the twentieth century, the GDR, have now also been well-scrutinized.[313] The interpretation of statutes seems to have been an unpopular topic in the GDR,[314] presumably because methodological arguments held scarcely any legitimizing value as compared to whether a decision was deemed politically correct.[315] Law became a tool for asserting socialist legality, and adjudication was thus subjected to the principle of partisan application of the law in line with the socialist ideology.[316] Once again, the law was re-interpreted, with legal methodology offering no noteworthy resistance to this process.[317]

Two observations regarding the history of private law methodology in Germany suggest themselves. First, the application of the law under the Basic Law of 1949 is structurally similar to the extent that it is also value-based. Today, however, it is no longer a *völkisch* or socialist worldview that shapes the application of the law; rather the fundamental values of a free and democratic society under the rule of law guide judges in their application of indeterminate legal concepts and in the development of the law. Secondly, historical reflection shows that legal methodology is at most a curb on reinterpretation,[318] but not an insurmountable obstacle to it. Through its many very flexibly deployable levers, it facilitates the relatively smooth implementation of the values recognized in a legal community. Whether these values are those of a free society governed by the rule of law, or of a system of injustice is not a question of methodology. The role of methodology is only to serve; it does not determine whom it serves.[319]

312 Overview in M Stolleis, "Nationalsozialistisches Recht", in *Handwörterbuch zur deutschen Rechtsgeschichte*, vol III^2 (2016) at 1806-1824; Zimmermann (n 311) at 54-59.

313 Cf especially: Zur Zivilrechtskultur der DDR, ed R Schröder, vol I (1999), vol II (2000), vol III (2001); I Markovits, *Gerechtigkeit in Lüritz* (2006); *eadem*, *Diener zweier Herren: DDR-Juristen zwischen Recht und Moral*, 2020; J Schröder, *Recht als Wissenschaft* vol II (n 3) 59-113.

314 J Schröder, *Recht als Wissenschaft* vol II (n 3) 77.

315 Haferkamp (n 300) at 63.

316 J Schröder, *Recht als Wissenschaft* vol II (n 3) 80 f.

317 For a detailed analysis, see cf J Schröder, *Recht als Wissenschaft* vol II (n 3) 81-96. Schröder emphasizes that no GDR author took a purely subjective-historical view of interpretation. The conflict between the will of the legislature and the current exigencies was, according to Schröder, resolved "dialectically", in that the "evolutionistically" conceived will was deduced from present social conditions. But see now Markovits, *Diener zweier Herren* (n 313); according to her, the experience in the GDR shows that lawyers, as craftsmen of the law, are sand rather than oil within the mechanism of injustice.

318 Expression according to Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 602.

319 See also the reflections in Rüthers, Fischer, and Birk, *Rechtstheorie* (n 63) at 600.