

THE DIDACTIC TURN OF GERMAN LEGAL METHODOLOGY

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

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

Keywords: *legal theory, legal methodology, legal education, legal decision-making, multi-level and multi-actorial decision-system, interpretive tools in civil law as well as in common law system, convergence of civil law and common law systems, application of laws, judicial decision-making and legislature, mandatory courses in legal methodology and legal theory, legal learning by practical experience, legal clinic, SASLA (Students Advise Students in Legal Affairs).*

Introduction

The problems discussed here are not new and it seems insofar that “there is nothing new under the sun”¹.

Aristotle argued 350 B.C. “that all law is universal but about some things it is not possible to make a universal statement which shall be correct”².

Plato (427 – 347 B. C.) was the opinion that legal decisions are based on law and sense of justice.³

Blaise Pascal emphasized in the 17th century the “logique du coeur”⁴; John Locke underlined in the same century the importance of prejudice by decision-making⁵; and in 1799 Immanuel Kant still spoke of the “*intuitive* Understanding”⁶.

The German novel writer Jean Paul demonstrated at the beginning of 19th century with the words “Delphic legal cave” the ambiguity of legal norms.⁷

In 1905 Emil Lask described “the inherent connection of legal meaning and real base in the individual case”⁸; Ludwig Bendix stressed 1927 the “irrational elements” of judicial-decision making⁹; Hans Kelsen accentuated 1934 the legal decision-making process as mixture of knowledge and will of the respective legal decision-maker.¹⁰

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

1 The Bible, Ecclesiastes 1, 9.

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

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

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

5 John Locke, 1690, volume I, chapter XIII: “It is not easy for the mind to put off those confused notions and prejudices it has imbibed from custom, inadvertency, and common conversation.” David Hume, 1757, section IX, meant: “Biases from prejudice, education, passion, party, &c. hang more upon one mind than another.”

6 Immanuel Kant, 1799, § 77, emphasis in original; see to the intuitive understanding Eckart Förster, 2003, p. 112.

7 Jean Paul, 1804–1805, p. 613.

8 Emil Lask, 1907, p. 308: “Verschlingung von rechtlicher Bedeutung und realem Substrat im Einzelfall.”

9 Ludwig Bendix, 1927.

10 Hans Kelsen, 1934, p. 7.

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

That the proposals in this paper are imperfect answers to the unsatisfactory situation may be regrettable; however, it is the best way we can go in the right direction.

Because we have no terminology in the sense of established terms concerning the here discussed subjects of “Recht” (law), “Rechtswissenschaft” (jurisprudence¹¹), “Rechtsdogmatik” (legal doctrine), or “Rechtsmethodik” (legal methodics), it is necessary to clarify what contents are used by the respective terms:

“Law” I use for the applicable legal rules, “jurisprudence” for the legal science in a broader sense¹²; “legal doctrine” refers to that part of jurisprudence that focuses immediately on applicable law¹³; legal methodology means the toolbox for finding the legal rules, interpreting, updating, and correcting them.

1. Concept of Legal Methodology

Legal methodology – sometimes also: judicial methodology or legal skilled crafts¹⁴ – means the instruments for finding the legal rules and explaining their meaning.

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

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

Although sometimes legal methodology includes law-making, law-finding, and law-applying¹⁷ the following remarks are restricted to law-finding and law-applying. Regarding law-making in Germany has been developed a special branch of jurisprudence, Gesetzgebungslehre (legistics), in the last years,¹⁸ that examines other problems than the here discussed.

11 To other expressions see Andreas Funke, 2011, nr. 3.

12 Cf. Suri Ratnapala, 2009, p. 3.

13 Cf. Kye Il Lee, 2010, p. 158.

14 Christoph Möllers, 2008, p. 78, describes legal methodology as “juristisches Handwerk“ (legal skilled crafts).

15 Ulf Linderfalk, 2007, p. 13.

16 Cf. Christoph Safferling, 2007.

17 Hans Paul Prümmer, 1986, p. 16 et seq.; James R. Maxeiner, 2008, p. 43.

18 Cf. Ulrich Karpen, 2008; Bundesministerium der Justiz (ed.), 2008.

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

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

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

2. Starting Points

2.1. Historical Landmarks of Development of Legal Methodology²⁹

(1) Whereas during the Roman Empire and in the middle age equity was the target of interpretation, in the 17th and 18th centuries interpretation should clarify the will of legislature.

19 Cf. another opinion by Christof Bernhart, 2008, p. 63; regrettably Bernhart does not take the necessary measures.

20 See Marcus Beiner, 2009.

21 Cf. Marcus Beiner, 2009, p. 12: “Sinn-Produktion”.

22 Georg Wilhelm Friedrich Hegel, 1821, § 227.

23 Cf. Kye Il Lee, 2010, p. 227, notes that only in the very concrete practice the content of legal norms will be determined and the facts of the case are constructed under legal aspects; situation and norm are interpreted interactively; law is only law in action.

24 Karl Engisch, 1963, p. 15; see to the hermeneutic circle fundamentally Hans-Georg Gadamer, 1990, p. 270.

25 Klaus F. Röhl/ Hans Christian Röhl, 2008, p. 116 f.

26 Hans Küng, 2009, p. 25.

27 Christoph Möllers, 2006, nr. 23: The application of a norm affects the future meaning of the norm.

28 Nikolaj Fischer/ Gregor Kuntze-Kaufhold, 2008, p. 10; Walter Grasnack, 2010b, p. 50, criticizes harshly the “complete failure“ of legal methodology.

29 The following observations are based on Günter Hager, 2009, p. 14.

(2) In the 19th century in context with the system of codification the so called *Begriffsjurisprudenz* (analytical jurisprudence) became more important parallel to the idea of objectivity of decision-making by eliminating subject factors in this process.³⁰

(3) However, in the same century starting by Rudolf von Jhering's (1818 – 1892) “*Der Zweck im Recht*”³¹ under the heading “*Interessenjurisprudenz* (jurisprudence of interests) interpretation sought primarily the intention/ purpose of the norm.

(4) This approach together with the legislative trend to broad and general formulations as well as general clauses³² opened ideologies the entrance to legal decision-making process.

(5) Under the regime of National Socialism the main goal of legal methodology was to find out “leader’s will” and “ethnic values”.³³

(6) Today we note a

- variety of interpretation tools
- lack of priority of certain interpretation tools – exceptional the method of conformity³⁴ with higher law
- practical irrelevance of the literal rule for interpretation
- judicial activism rather than judicial self-restraint.³⁵

2.2. The Idea of Codification and the Legal Reservation

The basic idea of codification is that legislature – parliament as well as king or another ruler – creates by codification a complete system³⁶ regulating all current and future legal problems.³⁷ Important codifications in Europe were the General State Laws for the Prussian States (1794), the French Napoleonic Code (1804), the Civil Code of Austria (1811), and the German Civil Code (1900).

Consistently legislators declared that the courts, allegedly, simply apply the norms and – for example – Frederick II, Prussian king from 1740 to 1786, forbade judges to interpret the above mentioned State Laws.³⁸

30 Cf. Helmut Lethen, 2010.

31 Rudolf von Jhering, 1877.

32 Cf. Franz Neumann, 1937, p. 38.

33 Cf. Fabian Wittreck, p. 49.

34 Cf. Heiko Sauer, 2011, nr. 33: “Konformauslegung”.

35 Juliano Zaiden Benvindo, 2010, p. XVI, emphasizes a “strong activism”; in the public discussion is often forgotten that is not only a problem of judiciary but of public administration too.

36 Today this theory comes back in the concept of Ronald Dworkin (Raymond Wacks, 2006, p. 41).

37 Cf. the description of the perfect codification by Max Weber, 1922, p. 396.

38 Section 45 Introduction to the General State Laws for the Prussian States: If the judge is unsecure to the meaning of the law he has to report his doubt to the Law-Commission. (“Findet der Richter den eigentlichen Sinn des Gesetzes zweifelhaft so muss er ... seine Zweifel der Gesetzcommission anzeigen.“) - http://www.smixx.de/ra/Links_F-R/PrALR/PrALR_Einleitung.pdf [August 10, 2009]; cf. Jonathan Swift, 1726, Part II *A voyage to Brobdingnag*, Chapter VII: “(A)nd to write a comment upon any law, is a capital crime.”

How little today³⁹ we understand codes as exactly designed systems reveals the title of a new book of Christian Neuwirth: *Through the jungle of statutes*.⁴⁰

However, in Germany the rule of law contains first at all the primacy of legality⁴¹. In the fields of criminal and public administration law⁴² a fundamental element of this rule of law⁴³ is the principle of subjection to the law (the necessity of legal authorization/legal reservation) that obliges administration and courts to interfere with citizen's rights upon statutory authorization only.

For criminal law Art. 103 para. 3 German Basic Law (Grundgesetz, GG) explicitly formulates: "An act may be punished only if it was defined by a law as a criminal offence before the act was committed."

For Public administration this principle is interpreted from Art. 20 para. 3 GG.

This principle forbids constructing a base for authority transcending the wording of the respective statutory law⁴⁴ – neither by analogous application of the law⁴⁵ nor by correction the legal defect. But the boundaries between interpretation and updating the law are flexible⁴⁶ even more when the Federal High Court of Justice (Bundesgerichtshof, BGH) uses the concept of "corrective interpretation".⁴⁷

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

2.3. Necessity of Legal Methodology

Law provides neither for individuals nor for social or economic actors certainty or predictability. Although Germany has a basically well-developed, stable, and sophisticated legal system we observe the overall poor quality of the legislation which is commonly recognized as complicated, contradictory, and unclear⁵⁰.

39 But see the critics on the idea of legal system by Georg Jellinek, 1914, p. 353 "The false dogma of the closed legal system ..." (Translation: H. P. P.).

40 Christian Neuwirth, 2009.

41 James J. Spigelmann, 2008, p. 29, uses the concept "principle of legality"; consenting Michael Nierhaus, 1996, p. 82 f., this principle is divided into principle of the precedence of the law and the principle of subjection to the law.

42 The situation in civil law cf. by Hans Christoph Grigoleit, 2008, p. 72; Hans-Joachim Koch, 2010, p. 17 fn. 17

43 Albert Venn Dicey, 2914, Part II, *The Rule of Law*.

44 Hans Peter Bull/ Veith Mehde, 2009, nr. 550.

45 Cf. Guy Beaucamp, 2009.

46 Günter Hirsch, 2009, p. 254.

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

48 Cf. M. Foucault, 1996, p. 416 f.

49 Cf. Ralf Dahrendorf, 1968/1971, p. 257.

50 Ulrich Karpen, 2009, estimates that about 50% of German federal laws are incorrect or difficult to understand.

Here is not the space for an extensive discussion of this problem but we take the result as starting point to the following considerations: Even the best designed law establishes only a framework within the unavoidable dispute has been decided.⁵¹ The philosopher Odo Marquardt developed the thesis that humanities and hermeneutics⁵² based on the assumption of impossibility of clear texts or signs: Any text can be interpreted at least in two senses.⁵³

We can summarize it by the words of William Simon: “The issue of interpretation arises from the fact that legal norms cannot be applied to specific cases without some exercise of judgement. The text of legal norms contains gaps, vaguenesses, ambiguities, and contradictions that must be filled, clarified, and reconciled in order to bring them to bear on specific cases.”⁵⁴

In addition we point out, as already Aristotle mentioned⁵⁵, that it is impossible to predict the future.

2.4. The Level of Academic Teaching Legal Methodology

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

- (1) Analysis of the facts of the case
- (2) Finding (a) and interpretation (b) the law
- (3) Conclusion in the sense of syllogism.

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

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

- Lex superior derogat legi inferiori.

51 Raymond Wacks, 2006, p. 27.

52 To the legal hermeneutics see Hans-Georg Gadamer, 1990, p. 330 ff.

53 Odo Marquardt, 2003, p. 84 f., 179.

54 William H. Simon, 1998, p. 37; Annamaria Rufino, 2009, p. 149: “(T)he hyper production of rules corresponds their inadequacy to solve matters caused by social complexity.”

55 *Supra* note 2.

56 Cf. Heiko Sauer, 2011, nr. 7; for Australia: Sue Milne/ Kay Tucker, 2008, p. 2 f.

57 Carl Schmitt, 1912, p. 58 (Translation: H. P. P.); see the vividly formulation of Richard A. Posner, 2008, p. 204: “Judges are not law professors”.

58 Wolfgang Hoffmann-Riem, 2005, p. 523–525.

59 Cf. Karl Engisch, 1983, p. 163.

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

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

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

(2b) According to this plan it is necessary to interpret the wording of the respective statutory law. The analysis of the meaning of a word or a concept within a rule should occur regarding the model developed by Friedrich Carl von Savigny (1779–1861), a famous German professor of Roman law and Prussian secretary. He listed four starting points of “Auslegung”⁶⁶ (interpretation of the wording):⁶⁷

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

The most textbooks of the respective subjects of law^{70, 71, 72} teach law students the above mentioned four-leaved cloverleaf of methodological interpretation⁷³ although

60 But later general statute should not alter specific words in earlier statute (William Twining/ David Miers, 2010, p. 247).

61 Cf. Hans Paul Prümm, 2008, p. 37.

62 Cf. Gerhard Hassold, 1981; Kuye Il Lee, 2010.

63 Base of claim or of interference.

64 For example: Legal definition, fiction or reference.

65 For example: Time limitation, estoppels.

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

67 Reinhard Zimmermann, 1996, p. 20.

68 That should not be confused with “Law in context”; confer this concept by Stephen Bottomley/ Simon Bronitt, 2006.

69 Friedrich Carl von Savigny, 1840, p. 213-214; cf. William Blackstone, 1758, Section the second, who listed five methods: (1) Usual meaning of words, (2) context of the words, (3) subject matter of the law, (4) effect and consequence of the interpretation – absurd meaning must be avoided, and (5) the reason and spirit of the law.

70 Private law see: Helmut Köhler, 2007, § 4 nr. 14.

71 Criminal law see: Johannes Wessels/ Werner Beulke, 2006, nr. 57.

72 Public administration law see: Hans Peter Bull/ Veith Mehde, 2009, nr. 538.

73 This restriction of interpretation tools we find not only in dogmatic case books; Rolf Wank, 2008, p. 107 f.,

themselves⁷⁴ and the experts count until seven legal interpretation methods.⁷⁵ Sometimes the authors are different in the same book: Whereas Matthias Pechstein and Carola Drechsler count five interpretation tools,⁷⁶ Karl Riesenhuber lists some pages later in the same book only the four classic methods.⁷⁷

While German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) in 1960 started of the assumption of only four legal interpretation tools⁷⁸, this court accepted in 1996 at least five interpretation tools.⁷⁹

The discovery of the interpretation instrument “in the light of present-day conditions”⁸⁰ by the European Court of Human Rights (ECtHR) speaks for more than four methods too.

The use of “soft law ... as inspiration and interpretation-help” by the courts⁸¹ is another example that von Savigny’s cloverleaf does not reflect the interpretive reality.

Although we see at the methodological level a “farewell” to the classic canon of interpretation tools the most textbook-authors use the concept of “Auslegungskanon” - and “Kanon” in German language means “guide line” or “general standard”.⁸² We can summarize up with Jochen Bung that the practical methods are “a setting of methodological standards that cannot be comprehended by the guidelines of classic interpretation”.⁸³

But the gap between methodological theory and dogmatic practice is growing even more using the methods that exceeds the wording of the norm. If reading down the norm does not reach a practicable or reasonable result⁸⁴, neither by reducing the scope of the words nor by interpreting the words in a broad sense, legal methodology offers other instruments for a legal decision-basis:⁸⁵

lists in his case book of legal interpretation in the “survey of location of methodology in framework of case method” only the classic four methods too.

74 See Hans-Michael Wolfgang (ed.), 2010, p. VII: “II Klassische Auslegungsmethoden 1. Der Vierer-Kanon ... III Weitere Auslegungskriterien“.

75 Ralf Dreier, 1981, p. 114, lists the grammatical, logical, genetic, historical, systematic, comparative, and teleological elements of interpretation. Christian Starck, 2009, p. 126, mentions for constitutional interpretation beside the classic methods the “practical concordance” as well as “functional correctness”. Christian Kirchner, 2010, list in the context of EU-law the economic interpretation tool (nr. 5), the dynamic interpretation-method (nr. 20), and the institutional-economic interpretation-method (59). Two other practically important elements of interpretation are the so called “h.M.” (prevailing opinion) - cf. Arne Pilniok, 2009 - and “std. Rspr.” (case law).

76 Matthias Pechstein/ Carola Drechsler, 2010, nr. 17 ff.

77 Karl Riesenhuber, 2010, nr. 13 ff.

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

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

80 ECtHR, 5856/72, April 25, 1978, *Tyrrer v. UK*, nr. 31.

81 Herbert Küpper, 2010.

82 Kanon [interactive]. [accessed on 18-05-2010]. <<http://de.wikipedia.org/wiki/Kanon>>; Thomas Schipperges, 2009, p. 12, translates “Kanon” by “scale” or “authentic order”.

83 Jochen Bung, 2007, p. 80.

84 Cf. to this topos just at the beginning of Modern Times Jan Schröder, 2010, p. 84.

85 The discovery of distinction between these tools by Gottlieb Hufeland in 1815 presents Jan Schröder, 2010, p. 93 ff.

- Filling of statutory gaps
- Correcting legal defects.

In these constellations legal decision will be made without or against the wording of statutory law because an interpretation, that “must always be text based”⁸⁶, is not longer possible.⁸⁷ These methods are exclusive exceptions that can be only justified when they are inevitable.

Unfortunately the legal decision-makers often hide these methods by claiming their procedure as interpretation the wording instead overruling it.⁸⁸

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

They describe application of law, both the process and its result, as analytic-deductive derivation⁸⁹. Law students learn that legal decision-making is primarily a logical process⁹⁰, a quasi-mathematical application⁹¹, particularly in form of subsumption or the so called “Justizsyllogismus” (a special form of syllogism or syllogistic)⁹² containing two premises and a conclusion:

- | | |
|--------------------------|--|
| • First/ major premise: | A person who commits the crime of murder is liable to imprisonment for life. ⁹³ |
| • Second/ minor premise: | M murdered F. |
| • Conclusion/ result: | M gets life imprisonment. |

86 James J. Spigelmann, 2001; see Giulio Itzcovich, 2009, p. 539.

87 In regard to common law Geoffrey Robertson, 2009, p. 20, distinguishes “interpret and develop the law”.

88 A Berlin agency created the method of the “gap filling interpretation”, cited by Hans Paul Prümm, 2002, p. 13; the BGH spoke in 2010 of “corrective interpretation”, *supra* note 47.

89 This logical-systematic view of application of norms is not only a German phenomenon. The example of Christopher Columbus Langdell (1826 – 1906), Dean of Harvard Law School in 1870, shows the same phenomenon in U.S.: “Law as a science is a body of fundamental principles and of deductions drawn therefrom in reference to the right ordering of social conduct ... (t)he intellect in deriving legitimate deductions from the principles follows the legitimate process of logic, over which the will has no control, and which are always and everywhere the same, whatever may be the subject of investigation.” (cited by Claudio Grossman, 2008, p. 25.). Michael Sinclair, 2007, p. 282, “translates” this position of Langdell this way: “One synthesizes the relevant principles and deduces the solution to a problem.” At the beginning of the 20th century in US the legal realism and in Germany the Freirechtsschule fought against this partial point of view; the importance of the will of the legal decision-maker by interpreting and applying norms underlines Peter Römer, 2009, p. 50.

90 Cf. Egon Schneider/ Friedrich E. Schnapp, 2006;

91 Geoffrey Robertson, 1990, p. x, speaks of “slot machine jurisprudence”.

92 Ingeborg Puppe, 2008, p. 119.

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

This is an ideal-type of syllogism; it does not describe the real way as facts and norms are inherently connected.⁹⁴ In reality the above mentioned steps (1 to 3) are inherently connected and also the attempt of syllogism leads back to a new interpretation-trial and so on – and in this process the respective decision-maker plays a very important role.

We should note that the idea of government of laws and not of men⁹⁵ may be an attractive political program but it describes the reality just as little as the famous sentence of Montesquieu of the judge as mouth of law.⁹⁶ The reason for spreading the illusion of “legal logic” lays perhaps in two aspects, which Hans Kelsen mentioned already in 1929: Producing in the public the feeling of legal certainty, on the one hand, and, on the other hand, developing in the judges the awareness of strictly bondage by law⁹⁷. But the “legal logic” is associative rather than linear and, consistently, we can summarize this section by Oliver Wendell Holmes, Jr.: “The life of the law has not been logic: it has been experience.”⁹⁸

2.5. First Interim Results

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

- Finding the facts of the case⁹⁹
- Connection between finding the facts of the case and interpretation/ application of norms¹⁰⁰
- Connection between interpretation and application of norms¹⁰¹

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

94 In this context it is interesting that Leonardo Bruni d’Arezzo, 1405, wrote of “the knowledge of realities – facts and principles –”.

95 Constitution of Massachusetts, 1780, Part the First, Art. XXX [interactive]. [accessed on 02-01-2009]. <<http://www.nhinet.org/ccs/docs/ma-1780.htm>>; about 2500 year earlier Aristotle, 350 B.C., Book V Chapter 6, wrote: “(W)e do not allow a man to rule, but rational principle ...”. H. L. A. Hart, 1997, p. 12, describes this program as “fiction”.

96 Charles-Louis de Secondat Montesquieu, 1748, book 11, chapter 6.

97 Hans Kelsen, 1929, p. 1726.

98 Oliver Wendell Holmes, Jr., 1881, p. 1; M. Foucault, 1966, noticed generally in contrast to the above (fn. 48) mentioned mathematization the counterconcept of “demathematization” of humanities (p. 420); Günter Hirsch, former president of the BGH, formulates expressis verbis: “Interpretation of law is no mathematics” (Günter Hirsch, 2009); and last but not least see in this context the Roman-Latin proverb: “Judex not calculat.”

99 Georg Bitter/ Tilman Rauhut, 2009, p. 290; Fritjof Haft, 2009, 204 ff.; but see Sue Milne/ Kay Tucker, 2008, p. 2: “The identification of the relevant facts, as distinct from the irrelevant facts, is an important skill.”

100 There is not even a word of this problem by Brian Valerius, 2009; probably the strict separation between the factual and the normative side of legal decision-making as well as the hide of the first aspect in the legal academic education are results of the German Idealism in the 18. and 19. centuries.

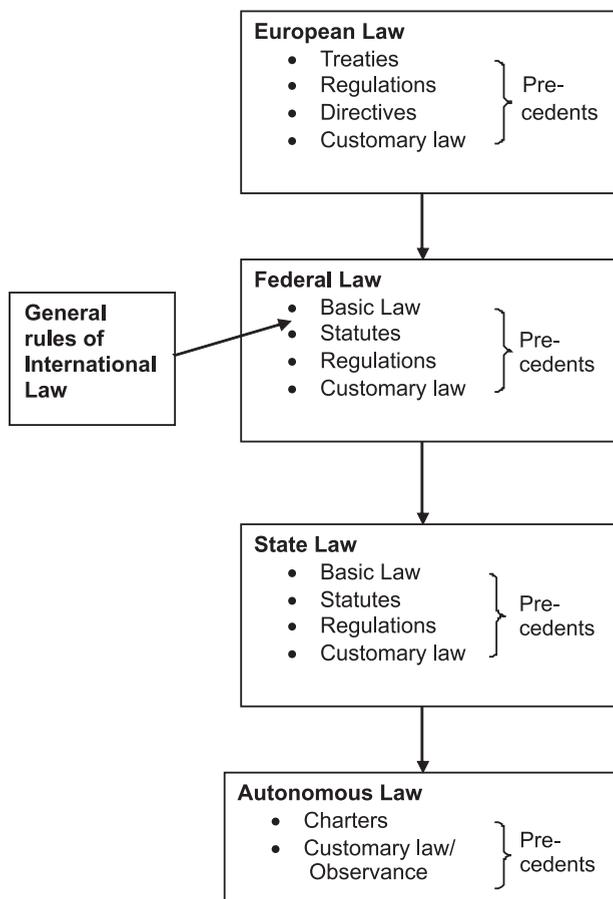
101 But cf. ECJ, Joint Cases C-28/62, C-29/62, C-30/62, March 27, 1963, *Da Costa en Schaake v. Administratie der Belastingen* [interactive]. [accessed on 20-03-2011]. <<http://eur-lex.europa.eu/en/index.htm>>, p. 38: “When it gives an interpretation of the Treaty in a specific action pending before a national court, the Court limits itself to *deducing the meaning* of the Community rules from the wording and spirit of the Treaty, it being left to the national court to *apply* in the particular case the rules which are thus interpreted.” (Emphasis: H. P. P.)

3. New Developments

In the following I present the most important new developments in German legal methodology. Other authors may point out other lines of modern design of legal methodology; from my point of view as professor of public law at the Berlin Law School (BLS) as well as chair of German Law Teachers Association (Vereinigung Deutscher Rechtslehrender, VDRL)¹⁰² I refer the following experiences.

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

Perhaps in former times legal decision-making depended on local or national rules only but today legal decision-making is polycentric decision-making¹⁰³. For example a local decision-maker has to take into account these norm-steps¹⁰⁴:



102 See under vdr1.eu [accessed on 01-04-2011].

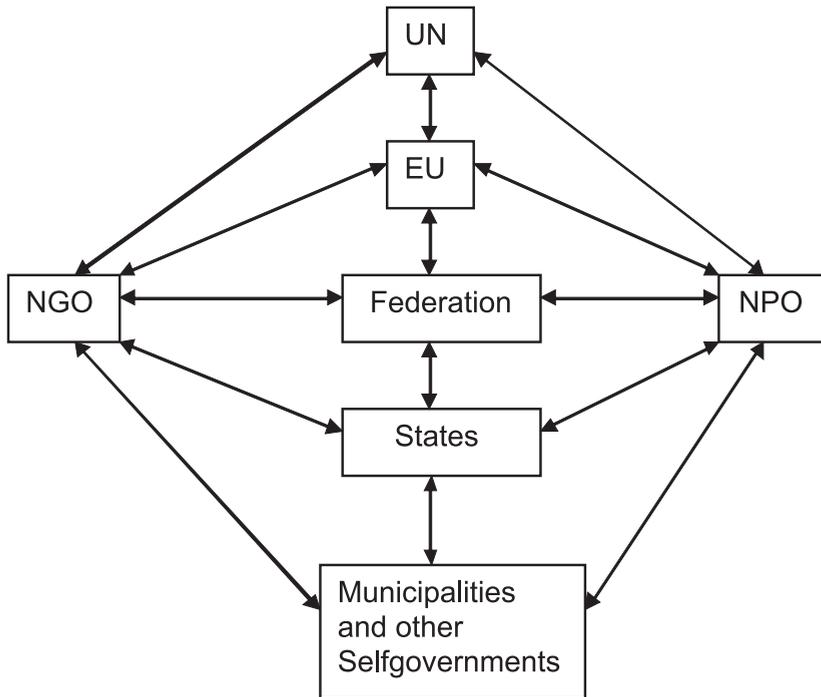
103 Cf. Ivar Alvik/ Marius Emberland/ Christoffer C. Eriksen, 2007.

104 Cf. for the common law system the “ladder” by Robert S. Summers, 2009, p. 170.

In the conflict between lower and higher law the lower law is invalid or inapplicable.

In practical application of law it is insofar impossible to separate from each other the national and the supranational law. The following example may demonstrate this: By forbidding women the armed service in the German army the former Art. 12 para. 4 GG conflicted with the higher-ranking European principle of equal treatment men and women as regards access to employment and was inapplicable.¹⁰⁵

The above mentioned “ladder” points out the vertical steps only; a look at the horizontal dispersion of decision’s elements leads to a wider sketch of a multi-level and multi-actorial¹⁰⁶ decision-system¹⁰⁷:



All these kinds of regulations penetrate each other and influence the legal decision-making process.¹⁰⁸

105 ECJ, C-285/98, January 11, 2000 [interactive]. [accessed on 20-03-2011]. <<http://eur-lex.europa.eu/en/index.htm>>.

106 Kye Il Lee, 2010, p. 258, mentions the “interactional dimension of legal practice”. (Translation: H. P. P.).

107 Hans Paul Prüm, 2007 (a), p. 75.

108 Derek McKee 2010, p. 577.

3.2. Decision-Theory

In our context we describe decision-theory as analyzing the process by which inputs are converted into outputs. The legal decision-making theory understands legal norms in sense of decision-ruling programs.¹⁰⁹ Therefore a legal-decision making institution such as public administration is called “information factory”.

3.2.1. Preliminary Remarks

Still today we have an inadequate understanding of the ensemble of formal and informal legal communication by application of law. The judgement although guided by theoretical and practical knowledge in the end is embedded in the inner centre of human being.¹¹⁰ The application of norms is not a determinate, however, a decision-made process.¹¹¹ According to Thomas Nagel we presumably will never know all circumstances of decision-making¹¹²; it will remain at least a secret process. In other words, we can not assume “rational choice”; however we must start from “bounded rationality”.¹¹³ That is not as bad as it seems because we remember John Stuart Mill: “There is no such thing as absolute certainty, but there is assurance sufficient for the purposes of daily human life.”¹¹⁴

But it is very important to deepen and spread our knowledge of decision-making, on the one hand, and to explain law students the agnosticism of legal decision-making, on the other hand. Only in this way the current law students will make their legal decisions more rational than the today’s legal decision-makers.

Today many decision-makers describe the application of law in a very formal sense. That is consistent with the following description by Lawrence M. Friedman¹¹⁵: “If you ask judges what they do and how they decide cases, they are still likely to tell a rather old-fashioned tale. They will say that they search conscientiously for the law, and that they are guided by existing law.” As confirmation of this sentence may serve the following quote of Justice Owen Josephus Roberts¹¹⁶: “When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”

109 Claudius Franzius, 2006, nr. 43.

110 Lucien Braun, 2009, p. 102.

111 Christof Bernhart, 2008, p. 22; Werner Thieme, 1995.

112 Thomas Nagel, 1987, p. 52; Alessandro Ferrara, 2009, p. 49, means that we will never get full knowledge of the mental condition of other persons.

113 Cf. Herbert A. Simon, 1982; Juliano Zaiden Benvindo, 2010, part III.

114 John Stuart Mill, 1859, Chapter 2.

115 Lawrence M. Friedman, 1998, p. 104.

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

But these sentences are “descriptions” of a black box. Of course, “(t)housands of cases are handled every day in court that a clerk could dispatch or a well-made machine”¹¹⁷, but there are so much not routine cases (hard cases) that need a hard legal decision-making. Neither we know all elements in the process of legal decision-making nor can we analyse all relations between different elements during this process. The decision-theory cannot explain all details of this hard legal decision-making; however, it can lead to a better understanding of this process.¹¹⁸

3.2.2. Details

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

(1) The description of legal decision-making as logical-systematic application of norms shortens basically the real legal decision-making process. The description of jurisprudence by Max Weber as “science that notes the results of legal thinking in accordance with logical as well conventional schemes,”¹¹⁹ does not reflect the reality.

However, the legislature itself does not follow this logical-systematic mode. We see that in legal terms such “discretion” or “balancing”. By applying¹²⁰ these concepts legal decision-makers are invited to consider so much of interests that legislature does not define the result. It obliges legal decision-makers only to take into account the influence of proportionality¹²¹ or to weighing up fairly the interests involved¹²² to avoid mistakes; consistently, by avoiding these mistakes the respective legal-decision can hardly be successfully attacked.¹²³

One can demonstrate that by the exercise of discretion. Discretion actually is not legal-defined; however, different laws list categories of errors of discretion that make the respective decision unlawful.¹²⁴ The easiest way to explain the diverse kinds of misuses of discretion is a comparison between exercise of discretion and football match.¹²⁵

117 Lawrence M. Friedman, 1998, p. 94.

118 Thorsten Siegel, 2009, p. 45.

119 Max Weber, 1919, p. 1030.

120 Kent Greenawalt, 2004, p. 269, underlines in this context the difference between interpretation and application; see also Christoph Möllers. 2009, fn. 8.

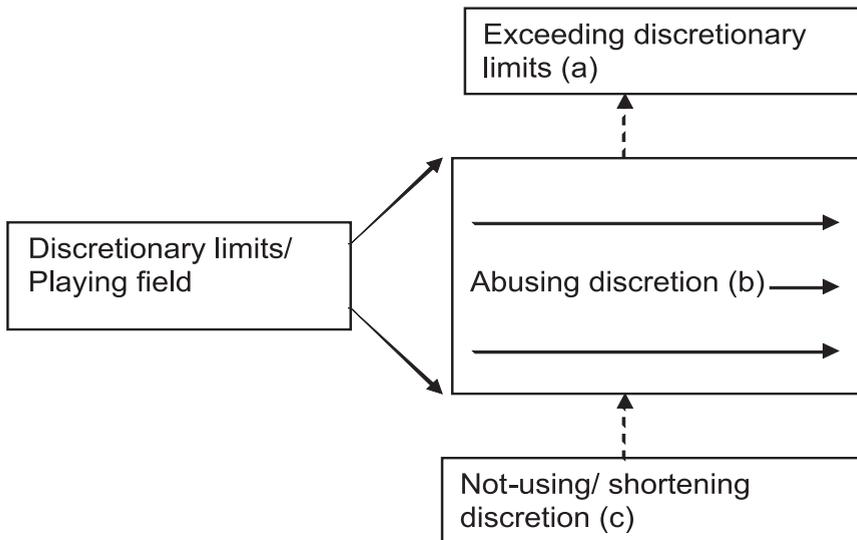
121 Cf. Juan Antonio Garcia Amado, 2009.

122 Section 1 para. 7 Federal Building Act (Bundesbaugesetz, BauGB): By drawing development plans and zoning plans for utilization real estates within communities “public and private interests should be fairly weighed up each other and against each other”.

123 Edwin Czerwick/ Wolfgang H. Lorig/ Erhard Treutner, 2009, p. 251; already 1903 Hugo Preuß, 1903, p. 220, commented that insofar discretion is free and its legal control is essentially excluded; see recently Norbert Wimmer, 2010.

124 Cf. section 114 Code of Administrative Court Procedure (Verwaltungsgerichtsordnung, VwGO): “Insofar as the administrative authority is empowered to act in its discretion the court shall also examine whether the administrative act or the refusal or omission of the administrative act is unlawful because the statutory limits of discretion have been overstepped or discretion has been used in a manner not corresponding to the purpose of the empowerment.”

125 Developed by Hans Paul Prümm, 1998, p. 70 et seq.



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

If public administration avoids these three categories of misuses of discretion any legal decision is irrefutable by legal remedies.

This demonstrates that legislature itself accepts the impossibility of strictly steering legal decision-making by rules, for example by granting open spaces for public administration.¹²⁶

(2) Harry W. Arthurs underlines “the optic in which (the lawyers) view legal issues, the scope and focus of their legal imaginations”¹²⁷ as important intrinsic prerequisites of legal decision-making. We must start of legal decision-makers as they really are and not as they should be.

First at all we must accept that persons are necessarily and substantially involved in any hermeneutic process.

Elements in the person of the decision-makers themselves could be the input of their feeling and temperament, preconception¹²⁸, prejudice¹²⁹, political or religious background and attitude, the academic training of decision-makers, their current

126 Cf. William Twining/ David Miers, 2010, p. 145 ff.

127 Harry W. Arthurs, 2009, p. 632.

128 Cf. Josef Esser, 1972.

129 Ulrich Schnabel, 2010: “We always see reality through the lenses of our prejudices.” (Translation: H. P. P.).

situation¹³⁰, the influence of the participants of the process preparing decision, their expectations, the will¹³¹ to achieve a certain result, and so on.¹³²

An example of my own former judicial practice may illustrate this: “For the adoption of a child, the consent of parents is necessary” (section 1747 para. 1 German civil code [Bürgerliches Gesetzbuch, BGB]); under certain circumstances the court can substitute the consent of a parent (section 1748 BGB). We assume that a child lives one year in a family that wants to adopt it. The child’s mother uses drugs, works as prostitute and didn’t care the child two years ago. Does anyone really deny that a judge catholic crowd up in a well shaped family replace the consent of the mother rather than a judge from a single household?

One cannot eliminate personal elements in decision-making either regarding objects or concerning methods.¹³³ And in this respect it is noteworthy that recently Christian Tomuschat discovers in the decisions of BVerfG more and more the specific characteristic of the individual judges.¹³⁴

(3) The third category of extra-legal elements influencing the legal decision-making Wolfgang Hoffmann-Riem calls “bridge-concepts”.¹³⁵ Bridge-concepts are express gateways for other sciences, assumptions¹³⁶ or non-legal values. Such references of extra-legal elements (non-legal meanings) to the legal system are exemplary “efficiency” (economic concept), “morality” (ethic concept), or “building standards” (technological concept).

Because many legal problems are connected to non-legal fields the respective non-legal fields become therefore legal relevance. This includes inherently the impact of extra-legal elements in the legal decision-making process.

(4) Not only legal concepts and legal values but also non-legal concepts and non-legal values are changing from time to time. In the 1950ies the BGH defined morality by the morality of the Catholic Church.¹³⁷ Because today the majority of German population is not longer a member of the Catholic Church and a large minority of German population

130 It is very remarkable that a German judge, an Italian crime author, an Australian novelist, and a French essayist describe this situation by similar sentences: Geert W. Mackenroth, (former) chair of the German Judges Association, 2002, p. 181: “Perhaps a judgment depends on the judge got up on the wrong side of the bed.” (Translation: H. P. P.); Leonardo Sciascia, 2003, p. 28: “The application of law depends on the quality of coffee drunken by the man of the law” (Translation: H. P. P.); Ethel C. Pedley, 1920, p. 65: “(A) nd whether they (the jury, H. P. P.) find you guilty or not, will depend on they are tired, or hungry, and feel cross”; cf. Michel de Montaigne, 1582, p. 281 f.: The decision of a judge depends on his gout, jealousy or trouble.

131 On the importance of will by legal decision-making see Peter Römer, 2009, p. 50.

132 See Lars Klöhn/ Ekkehard Stephan, 2009, p. 80 f; Carl von Clausewitz underlines the last point in his description of the methods of the military science, 1832, p. 65 ff.

133 Odo Marquard, 2003, p. 174 f.; Norbert Wimmer, 2010, p. 436 f.

134 Christian Tomuschat, 2010.

135 Wolfgang Hoffmann-Riem, 2004, p. 61 et seq.

136 See the distinction between the lawyers who came of age intellectually in the 19-sixties, on the one hand, and, the other hand, ones who came of age in the 19-nineties by Harry W. Arthurs, 2009, C.

137 Cf. Fabian Wittreck, 2008, p. 2.

believe in Allah we can translate morality not longer as catholic morality but as secular morality only.

This process Bernd Rüthers demonstrated more than 30 years ago exemplary regarding the word “Ehe” (marriage) in the “Ehegesetz” (Marriage Act) enacted by the German parliament in 1938.¹³⁸ This statutory law was into force during the Nazi-regime, the socialist regime of the German Democratic Republic, and the capitalistic regime of the German Federal Republic. Influenced by the different political opinions the word “marriage” was interpreted as

- institution promoting the national community in the national-socialist area¹³⁹
- basically insoluble institution (in the sense of the catholic perception of marriage as sacrament) by the BGH¹⁴⁰
- institution educating children in sense of the socialist community.¹⁴¹

This example shows at the same time that legal system is by no means a strict autopoietic, self-perpetuating system¹⁴² because there is an intense coupling of legal system and other systems such as economics, politics, sports, and so on.¹⁴³

(5) More and more we become familiar with the aspect of the “wisdom of feelings”.¹⁴⁴ In our context it will say that by researching the real legal decision-making process we understand the importance of intuition of “right or wrong” both for the selection of the respective interpretation tools and for the result of the process too.¹⁴⁵

(6) The last aspect leads to the distinction between “Herstellung” (discovery) and “Darstellung” (justification) of decisions.¹⁴⁶ We know that justification of a decision is not congruent with discovery of this one.¹⁴⁷ Legal decision-makers must try to show the persons affected by their decisions how they found the decision; they must explain the way from the facts of the case and the law to the legal decision representing the valid reasons for any such decision¹⁴⁸.

138 Bernd Rüthers, 1973.

139 Bernd Rüthers, 1973, p. 404 et seq., quoting RG, October 13, 1939, Z 158, 268.

140 Bernd Rüthers, 1973, p. 411 et seq., quoting BGH, IV ZR 71/55, June 18, 1955, Z 18, 13.

141 Christian Fischer, 2008, p. 19, quoting OGZ (DDR) 1, 72, December 1, 1950.

142 See to this construction Gunther Teubner, 1989.

143 See to autopoiesis as “gradualized concept” Gunther Teubner, 1989, p. 43.

144 Cf. Gerald Traufetter, 2007; Stefan Klein, 2004, p., 33: “Scholars discover the intuition” (Translation: H. P. P.); see also Blaise Pascal, fn. 4 and Immanuel Kant, fn. 6.

145 See Peter Stegmaier, 2009, p. 92, 295

146 Cf. Kye Il Lee, 2010, p. 236; this distinction is not new, cf. J. Schröder, 2010, p. 7, referring to Philipp Melanchthon.

147 Cf. Ulfrid Neumann, 2008, p. 236; Csaba Varga, 2009, p. 179: “(T)he logic of how one arrives at a decision differs from the logic of how one subsequently justifies the same decision.”

148 Cf. Christof Bernhart, 2008, p. 25; on p. 102 Christof Bernhart claims the identification of all reasons leading to the decision – however, that is impossible.

3.3. Methodical Specifications vs. Key Qualifications

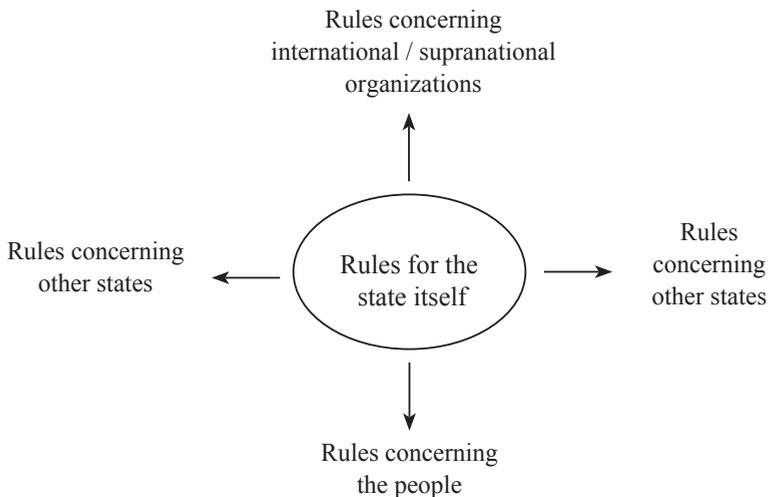
Whereas legal methodology seems to be the comprehensive toolbox for whole legal doctrine we note recently more and more specific legal methodologies¹⁴⁹ e.g. special methodologies interpreting constitution¹⁵⁰, private law¹⁵¹, or public administration law¹⁵².

The reason for developing special methodologies should be the necessity of the inclusion of specific real problems of the respective real field into the interpretation and application of the field-specific norms. This results of the wrong approach that legal methodology in principle excludes the questions of the facts. However, the opposite is necessary and correct: The real facts and problems are inherently part of the legal decision-making; thus it is not necessary to develop and introduce specific legal methodologies. That is the actual reason why Kent Greenawalt means for example “(v) irtually every problem about statutory interpretation also comes up in constitutional interpretation”.¹⁵³ In other words, we do not need special legal methodologies.

The other way round, because specific knowledge becomes obsolete very fasten the only successful way training law students sustainably for the future is to acquaint them key skills¹⁵⁴; and the legal methodology for legal professionals is the most important of these.

3.4. Constitutionalization

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



149 Cf. Matthias Jahn, 2008, p. 175: fragmentation of methodology.

150 Cf. Ekkehart Stein/ Götz Frank, 2004, § 6: Methodology of application the constitution.

151 Cf. Georg Bitter/ Tilman Rauhut, 2009.

152 Cf. Eberhard Schmidt-Aßmann/ Wolfgang Hoffmann-Riem (eds.), 2004.

153 Kent Greenawalt, 2004, p. 289; similar Melissa Castan, 2008, p. 25: “The principles underlying constitutional interpretation are not very different from those underlying the interpretation of ordinary statutes.”

154 See Ralf Brinktrine/ Hendrik Schneider, 2008; Reiner Ponschab, Reiner/ Adrian Schweizer (eds.), 2008.

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

(1) The constitution influences especially the interpretation and application of general clauses. In an early decision the BVerfG claimed the influence of constitution by interpreting general clauses.¹⁵⁵

On this way, the public constitution influences not only the non-constitutional public law but the private law too (third-party effect of the basic rights).¹⁵⁶ For example section 765a para. 1 Code of Civil Procedure (Zivilprozessordnung, ZPO) enables the courts to suspend the enforcement of a judicial decision if the enforcement would be “under special circumstances a social hardship to the culprit”. According to “the right to life” (Art. 2 para. 2 GG) the courts have applied cases of danger of suicide of the culprit as “social hardship”; consistently an enforcement decree of the respective judicial decision could not be realized.¹⁵⁷

(2) The regulation of the relations between governing institutions (legislation, administration, and jurisdiction) and those who are governed by them (people, enterprises) lead to a special legal method, the so-called “verfassungskonforme Auslegung” (interpretation in agreement with constitution): From several meanings of a wording the legal decision-maker has to choose this one conformal with the constitution.¹⁵⁸ This method prevents at the same time the declaration of incompatibility of the non-constitutional law with the constitution.

By these methods constitution and BVerfG become very influential to the non-constitutional law and the other courts because any “wrong” interpretation of non-constitutional law is automatically a violation of constitution.¹⁵⁹

These influences are inherently connected with two dangers: On the one hand, the trivialization of human rights¹⁶⁰ does not force the influence of the constitution on the long run; however, it can weaken the constitution.¹⁶¹ On the other hand, the influence of the constitution to application of non-constitutional law increases the uncertainty of legal decision-making:¹⁶² In the Mephisto-case was the main question whether the privacy-right of the German actor Gustav Gründgens weighed more than the freedom of publication of Klaus Mann¹⁶³. In this question the six judges of BVerfG voted tie: three to three.¹⁶⁴ This shows that even the highest judges could not solve by a majority decision the case-specific balance problem between two basic rights.

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

156 Kay Hailbronner/ Hans-Peter Hummel, 1996, p. 67.

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

158 BVerfG, 1 BvL 104/52, May 7, 153, E 2, 266 (282); Andreas Voßkuhle, 2000.

159 Klaus F. Röhl/ Hans Christian Röhl, 2008, p. 670.

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

161 Klaus F. Röhl/ Hans Christian Röhl, 2008, p. 672.

162 Günter Hager, 2009, p. 239.

163 Klaus Mann, 1936.

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

3.5. Supranationalization

Supranationalization means that the EU Member States created an organization that includes all branches of government (legislation, administration, and jurisdiction) and created partially its own law.¹⁶⁵ In the conflict between national and supranational law the national law is not invalid but inapplicable.

The strongest supranational influence on the German legal methodology comes from the European Court of Justice (ECJ).¹⁶⁶

In the case “Brasserie du Pêcheur” the ECJ made the following legal-methodical comment:¹⁶⁷ “Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article 164¹⁶⁸ of the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.”

In other words: The ECJ does not use a special national legal methodology; it creates its own original European legal methodology by these principles:¹⁶⁹

- The act-clair-doctrine of the ECJ says that concepts with plain meaning free from doubt and clear may not be interpreted.¹⁷⁰
- The “effet utile” demands to prefer this meaning of a norm that achieves in the best way the common target of EU.¹⁷¹
- Interpretation and updating the domestic law¹⁷² compatible with the European law means that under several possible meanings of national norms that concept is valid what is compatible with the European law.
- No acceptance of limits of interpretation by wording (body of word) of European law because all member languages are equally valid.¹⁷³

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

166 Cf. Konrad Walter, 2009.

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

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

169 See Giulio Itzcovich, 2009.

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

171 BVerfG 2 BvR 2134, 2159/92, October 12, 1993, Maastricht, E 89, 155 (210); ECJ, C-6/90, November 19, 1991, Frankovich, nr. 33: “The full effectiveness of Community rules”; cf. Sibyllle Seyr, 2007.

172 Cf. Clemens Höpfner, 2009; Martin Weber, 2010.

173 ECJ, C-283/81, October 6, 1982, CILFIT, nr. 18 et seq.: “(I)t must be borne in mind that community

- Preferential treatment of the teleological method.¹⁷⁴
- Ensuring the uniform application of Community law by the national courts¹⁷⁵
- Principally, no recognition of filling of gap method because the supranational law has (allegedly) resolved all conceivable problems.¹⁷⁶

For example in *Lawrie Blum* ECJ interpreted the concept “public service” of Art. 39 para. 4 ECT¹⁷⁷ in a narrower sense than the German courts and opened the British *Lawrie Blum* the door to the German civil service,¹⁷⁸ which accepted until this decision only German applicants. By this way ECJ strengthened the influence of the ECT. In the consequence legal scholars are thinking more and more about a European legal methodology.¹⁷⁹

Here we observe between the ECJ and the EU Member States structurally the same problems as, below mentioned¹⁸⁰, between the national courts and the national parliaments: The more dynamic the interpretation of the ECJ as guardian of the European integration process the more it restricts the sovereignty of the EU Member States.¹⁸¹

3.6. Internationalization

More and more law becomes international or global¹⁸². Primarily, political reasons, economic integration, technological based communications bring national laws and legal systems into closer contact.¹⁸³

At a first glance Art. 31 para. 1 of the Vienna Convention seems to be relevant in this context. It provides “(a) treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” But these interpretation rules are relevant only for

legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of community law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in community law and in the law of the various Member States. Finally, every provision of community law must be placed in its context and interpreted in the light of the provisions of community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.”

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

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

176 BVerfG, 2 BvR 687/85, April 8, 1987, E 75, 223 (243); Joachim Wieland, 2009, p. 1843.

177 Today Art. 45 para. 4 TFEU.

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

179 Cf. Karl Riesenhuber, 2010; Thomas Ritter, 2010.

180 Cf. 3.10.

181 Joachim Wieland, 2009, p. 1843; Karl-Heinz Ladeur, 2009, p. 1359 fn. 11; cf. Günther H. Roth/ Peter Hilpold (eds.), 2008, too.

182 See Harry W. Arthurs, 2009; Simon Chesterman, 2009.

183 Cf. Jan Klabbers/ Mortimer Sellers (eds.), 2008.

interpretation of international treaties¹⁸⁴ actually not for interpretation of national rules under the aspects of international law. Since there is an important exemption of this principle for Germany:

The most important international influence to the German legal methodology has been developed by the ECtHR. Although the judgments of ECtHR do not bind the German legal decision-makers as strong as the judgments of the ECJ¹⁸⁵ the methodological statements of ECtHR influence the legal decision-making in Germany too.

For the German legal methodology it is important that the ECtHR follows primarily the methodology of common law system because its judgements are based only on the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

In the case *Dorothea Vogt* for example ECtHR decided according to Art. 10 and 11 ECHR active membership in a communist party does not fail to comply with “duty of political loyalty” in sense of section 61 para. 2 Lower Saxony Civil Service Act.¹⁸⁶

Similar to the ECJ the ECtHR prefers the teleological or dynamic interpretation method as “living instrument ... must be interpreted in the light of present day conditions.”¹⁸⁷

3.7. Pre-Effect of Norms not Still Enacted

More and more norms yet formulated but not enacted will be treated quasi as orderly proclaimed norms. The famous example of such soft law was the Charter of Fundamental Rights of the European Union. Even at the time when the Charter was formulated and published¹⁸⁸ but not enacted the administrative and judicial practice followed this draft of Charter as an already enacted law¹⁸⁹.

3.8. Feminization/ Genderization

In the last time a feminist jurisprudence¹⁹⁰ is developing its own approach to legal methodology. Lena Foljanty and Ulrike Lembke point out that especially the historical interpretation method can promote rather the man dominated interest than the interest of women.¹⁹¹

184 Cf. PCIJ, Case of the S.S. “Lotus” (France v. Turkey), PCIJ Ser. A, No. 10 (1927), September 7, 1927, p. 18: “International law governs relations between independent States”; look Ulf Linderfalk, 2007.

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

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

187 ECtHR, 5856/72, April 25, 1978, *Tyrrer v. UK*, nr. 31.

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

189 Cf. Hans-Werner Rengeling/ Peter Szczekalla, 2004, p. VII.

190 Cf. Lena Foljanty/ Ulrike Lembke (eds.), 2006.

191 Lena Foljanty/ Ulrike Lembke (eds.), 2006, p. 22.

Others claim the inclusion of reality in the legal decision-making process by checking whether a gender-neutral formulation in law has the same real results to men and women.¹⁹²

3.9. Impacts of Methodology of Common Law

3.9.1. Preliminary Remarks

Comparative law means “broaden and improve . . . national laws and legal institutions through comparison” with other legal systems.¹⁹³ This becomes more important the more globalization takes place.

Comparative law is an accepted legal method¹⁹⁴ and Peter Häberle called them the “fifth legal interpretation tool”.¹⁹⁵

At the homepage of the Deans of Australian law schools one can read: “In a civil law system the law consists of codes and executive decrees. Opinions of judges . . . are persuasive only.”¹⁹⁶ That may be a good description for a survey but it does not cover the reality. For demonstrate the real power of courts in Germany here a quotation of the Federal Administrative Court (Bundesverwaltungsgericht, BVerwG): “An administrative act is invalid if it is created by agency by false application of statutory law. False is an application than if the interpretation of law is not correct. The correct interpretation will be mediated by the highest courts; their opinions are substantial for the agencies.”¹⁹⁷ The BVerfG confirmed this opinion¹⁹⁸ and consistently the BGH ruled liability for damages of public agencies if they decide without knowledge of the newest (relevant) precedents.¹⁹⁹

Klaus F. Röhl and Hans Christian Röhl point out that the so called “Leitsätze”²⁰⁰ (syllabus’, guiding principles, or head notes) of the judgements of higher courts often are formulated in the same manner as norms; consistently the authors call them judge-

192 Cf. Michael Wrase, 2006, p. 87 et seq.

193 Mortimer Sellers, 2008, p. 1.

194 Christoph Möllers, 2006, nr. 40.

195 Peter Häberle, 1989, p. 915 et seq.

196 Studying Law in Australia [interactive]. [accessed on 07-07-2009]. <<http://www.cald.asn.au/slia/Australia.htm>>.

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

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

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

200 Recently Wilhelm Schluckebier, ZRP 2010, p. 270, judge of the BVerfG, underlined that BGH “has given guidelines by interpretation”.

made law²⁰¹ that has to be interpreted for their parts as norms²⁰². In this respect it is noteworthy that the Imperial Court (Reichsgericht, RG) formulated the judicial cores of its decisions as questions²⁰³, the BGH put them in front of its published judgments as “Leitsätze” (syllabus’), and recently Meinrad Handstanger called them “Rechtssätze” (legal rules).²⁰⁴

Günter Hager notes that the jurisdiction handles leading cases as source of law.²⁰⁵

In the area of civil law, as it works in the continental-European countries, subject of legal methodology should be primarily written enactments by parliament (statutes) or agencies of the executive branch (orders) not developed by courts.²⁰⁶ However, for example the most used interpretation tool of the ECJ is the self reference.²⁰⁷

That is the reason why e.g. German law students must study not only codes and statutes but also judicial precedents.²⁰⁸ The (future) practitioners need knowledge of the legislation as well as the decisions of the courts. But there is in the German academic legal training no systematic introduction into the toolbox for finding and interpreting precedents.

In the areas of common law²⁰⁹, especially in the U.S., the UK, and Australia, primarily the courts develop the law by hard cases²¹⁰ and create their own case law methodology.²¹¹

3.9.2. Convergence of Common Law and Civil Law Systems

Recently Uwe Wesel contrasted common law and civil law systems in the following manner:²¹² “The common law is ... casuistic, case-law; the solution of legal problems is not the logical result of legal driven conclusion similar the continental, especially the German civil law.” It is very remarkable that a German legal professor describes 2010 in this way the different structures of legal decision-making process in the two legal

201 Klaus F. Röhl/ Hans Christian Röhl, 2008, p. 571; similar Hans Christoph Grigoleit, 2008, p. 67; Franz-Joseph Peine, 2009, nr. 163, notes simply: “Judge-made law ... Its existence and legitimacy are accepted.” (Translation: H. P. P.); Kye Il Lee, 2010, p. 123, notes that judicial decisions can even change the legal system.

202 Cf. in this respect Michel de Montaigne, 1582, p. 539: “Interpretation of interpretation” (Translation: H. P. P.) and below fn. 207.

203 Cf. RG, November 28, 1923, Z 107, 78.

204 Meinrad Handstanger, 2009, p. 153; for common law system see Richard A. Posner, 2008, p. 177: “A rule is like a precedent, ...”.

205 Günter Hager, 2009, p. 211.

206 See Günter Hager, 2009, p. 13.

207 Friedrich Müller/ Ralph Christensen, 2003, p. 229; see in this context Carl Schmitt, 1912, p. 82: “The practice justifies itself.” (Translation: H. P. P.).

208 Cf. Jürgen Schwabe, 2004; Matthias Pechstein, 2009; cf. concerning Switzerland Peter Gauch/ Viktor Aepli/ Hubert Stöckli (eds.), 2009.

209 Richard A. Posner, 2008, p. 83: “We must not confuse ‘common law’ with ‘case law’”.

210 See the distinction between hard and soft (easy) cases by William Lucy, 2004, p. 208.

211 See Günter Hager, 2009, p. 86.

212 Uwe Wesel, 2010, nr. 89.

systems. That shows the need to emphasize the convergence of both systems common law and civil law.²¹³

Convergence means the unintentional development of similarities, in contrast to harmonization as intentional reaching of similar procedures or structures.

Of course, care must be taken in extrapolating other legal systems but we can learn from each other: The heading claims that in the area of common law (sometimes case law²¹⁴ or judge-made²¹⁵ law) exist methods interpreting statutes²¹⁶, on the one hand, and that, on the other hand, lawyers in the civil law system are using case law methodology.²¹⁷

The main reasons for this convergence of the different law and methodology systems²¹⁸, despite different law-cultures, are the following:

On the one hand, in the common law systems politicians try to push their ideas and programs by statutory laws enacted by parliaments just like politicians in civil law systems.²¹⁹

On the other hand, no codification can answer all future legal problems; thus the courts must date up the norms in the civil law system similar to the courts in common law areas.

Last but not least ECJ²²⁰ as well ECHR are setting case law; these courts are embedded in treaties-systems concluded by states of civil law and common law systems.

Consistently a trans-systematic legal education is developing “integrate(d) civil and common law perspectives”.²²¹

3.9.3. Details

(1) Because the case law system does not exist in pure form²²² the there legal scholars and legal decision-makers developed statutory interpretation tools too:²²³

213 See Julian Hermida, 2004-05, p. 2 ff.

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

215 Cf. Gerald J. Postema, 2004, p. 588.

216 Cf. Francis Bennion, 2008; the Australian Law Postgraduate Network notes: “In about half of all reported cases in Australia, the courts are required to rule on the meaning of legislation”; <http://www.alpn.edu.au/node/72> [July 7, 2009]; James J. Spigelman, Chief Justice of New South Wales, noted in 2001: “The law of statutory interpretation has become the most important single aspect of legal practice.” Consistently, S. I. Strong, 2006, p. 9 suggests: “When doing legal research, first look to see if any statutes apply.”

217 See Günter Hager, 2009, p. 115; Legal Methods Group, 1997.

218 Similar Catriona Cook/ Robin Creyke/ Robert Geddes/ David Hamer, 2009, p. 6; Robert S. Summers, 2009, p. 4.

219 Cf. John F. Kennedy: “One reason that we give great weight to stare decisis in the area of statutory construction is that Congress is free to change this Courts interpretation of its legislation”; cited by Michael Sinclair, 2007, p. 368.

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

221 Harry W. Arthurs, 2009, D. I.; Bernd J. Hartmann, 2003, p. 310, registers a convergence of German and US legal academic education.

222 Cf. William Twining/ David Miers, 2010, p. 311: “The great majority of reported cases nowadays relate to the interpretation of statutes or other rules in fixed verbal form.”

223 Consenting the Australian Law Postgraduate Network [interactive]. [accessed on 27-07-2009]. <<http://alpn.edu.au/node/72>>, similar Jack Davies/ Robert P. Lawry, 1982, p. 191 et seq as well as Günter Hager, 2009, p. 62; see further principles of interpretation in William Twining/ David Miers, 2010, p. 246 ff.

- The literal rule has the same content as the above mentioned word-method in the German legal methodology.
- The mischief rule instructs legal decision-maker to interpret norms in a manner to prevent “mischiefs”.
- The rule “that the statute must be read as a whole” is corresponding to the systematic interpretation tool in the civil law system.²²⁴
- The purpose approach is comparable to the teleological method in the German legal methodology.²²⁵
- According to the golden rule of interpretation the legal decision-maker has to interpret laws in a manner that avoids obvious absurdities or inconsistencies.²²⁶ In others words, one accepts in both systems the method of consideration of the consequences. This tool is used by the BVerfG for example²²⁷ and explicitly justified by the Federal Supreme Court of Switzerland:²²⁸ “The decision in the case *Miniera* indeed gives a correct interpretation of legal text. However, the practical consequences which arise from its confirmation and the logical application of the new definition of nonprofit economic merit further consideration.”

As in Germany²²⁹, there is except the method of conformity with higher law no priority of any interpretation tool²³⁰; the legal decision-maker has to weigh up the respective interpretation tools by the “global method of statutory interpretation”.²³¹

(2) Since the German legal reality is shaped by case law too the legal decision-makers should be familiar with the methods to find, analyse, understand, follow, distinguish, or overrule the relevant precedents²³² - although “there is no single method of determining the rule for which a given authoritative precedent is an authority.”²³³

A binding precedent or *stare decisis* can be developed solely based on a principle²³⁴ or by constitutional and statutory interpretation.²³⁵

224 Günter Hager, 2009, p. 63.

225 Günter Hager, 2009, p. 71.

226 Cf. for the German law Martina R. Deckert, 1995; Helmut Kramer, 2009, p. 51; similar the fourth interpretation’s method at William Blackstone, *supra* note 69.

227 See Dieter C. Umbach/ Thomas Clemens/ Franz-Wilhelm Dollinger (eds.), 2005, § 78 nr. 47, with further references.

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

229 Christian Walz 2010. p. 486 ff.

230 Robert S. Summers, 2009, p. 263 f.

231 Günter Hager, 2009, p. 71.

232 See Peter Hay, 2005, nr. 19 et seq; Sue Milne/ Kay Tucker, 2008, p. 91: “researching case law”.

233 Herbert Lionel Adolphus Hart, 1997, p. 134.

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

235 Kent Greenawalt, 2004, p. 268 as well as Günter Hager, 2009, p 72 et seq.; to the different types of case law see Alexander Dörrbecker/ Oliver Rothe, 2002, p. 4 et seq.

Ronald Dworkin describes occurrence and effect of precedents this way:²³⁶ “Judges, when they decide particular cases at common law, lay down general rules that are intended to benefit the community in some way. Other judges, deciding later cases, must therefore enforce these rules so that the benefit may be achieved.” We can list the following steps:

At the first step it is necessary to demonstrate students “(f)inding a case when you have incomplete information”.²³⁷

Then follows scrutiny whether the previous case is a precedent (binding authority) or not. One has to distinguish *ratio decidendi*²³⁸ and *obiter dicta*²³⁹ by the well-established standards.²⁴⁰

In the next station one checks the “directly in point”. “Directly in point” is given when legal question and the facts²⁴¹ of the resolved as well as of the pending case are congruent;²⁴² if the cases distinguish²⁴³ there is no reason following the earlier judicial decision.²⁴⁴

Last but not least a precedent is not binding when it is or became wrong.²⁴⁵

In this area of legal methodology we note in Germany a big hole²⁴⁶; thus, on this field, we can learn so much from common law methodology.

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

Recently Bernd Rütters, one of the today most famous German legal methodologist, claimed that courts overrule the parliaments²⁴⁷ by legal methodology leaving more and more the wording (body of text) of the statutes enacted by legislature. The more

236 Ronald Dworkin, 1978, p. 110.

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

238 Reason of deciding or holding the case; see closer William Twining/ David Miers, 2010, p. 305 ff.

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

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

241 See to this point Oliver Lepsius, 2008, p. 44.

242 Cf. Gerald J. Postema, 2004, p. 597.

243 Günter Hager, 2009, p. 93, underlines the relevance of the facts of the case for analysis of *ratio decidendi*.

244 This is nothing more than a comparison between the firm and the case to be decided; cf. in this context René Descartes, (1620 – 1628), p. 69 f., who generally stressed comparison as very important scientific method.

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

246 Similar Christoph Möllers, 2006, nr. 28.

247 The following remarks are valid concerning relationship between public administration and legislation as well as between jurisdiction and norm-setting public administration; cf. in this context Robert French, 2007, p. 29 ff., speaking of rationality administration as “good administrative decision-making”.

extensive the interpretation of the courts the more they limit sovereignty of parliaments. And we note a judicial activism rather than judicial self-restraint.²⁴⁸ On this way courts offend primarily against the separation of powers (checks and balance) and also against the constitution.²⁴⁹ Yet, 1957 René Marcic formulated the thesis: From legislation-government to jurisdiction-government.²⁵⁰ Today, many people assume the BVerfG as the actual German legislature;²⁵¹ Walter Grasnick, a former district attorney, said literally: Judges are “the Lords of the legal system”.²⁵²

That is perhaps one of the reasons why courts often declare a law-updating as “pure” wording-interpretation.²⁵³ The former president of the BGH, Günter Hirsch, pointed out that the courts avoid the assignment of their respective interpretative tools to certain scientific categories.²⁵⁴

No statutory law can determine completely the legal decision²⁵⁵; thus, the further development of legal system is one of the duties of courts.²⁵⁶

Nevertheless, it is very remarkably that in a recent decision of the BVerfG in 2009, concerning the limits of judicial updating the law, three of eight judges did not agree with the result of the majority of the senate with regard to the limits of judicial updating the law; four of eight judges did not agree with the opinion of the five to three majority of the senate.²⁵⁷

Since “questions of legal methodology are questions of power and of constitutional powers”²⁵⁸ we are witness of a very hard current discussion.²⁵⁹

Of course, the legislature cannot anticipate all future problems and also a statute becomes less satisfactory over the years; and language is, at best²⁶⁰, a limited tool. In a democratic system only the parliament has a direct democratic authorization; only this authorization justifies setting general rules in a political democratic process. Setting such rules by other institutions bears the danger of decisionism²⁶¹.

248 See Juliano Zaiden Benvindo, *supra* note 35.

249 Bernd Rüthers, 2008. Because the tone of his essay is unusually in the framework of the reserved juristic language I translate the title: “Continued blind flight or twilight of methodology of the courts? Concerning the practical interpretation by the highest Federal courts”.

250 René Marcic, 1957.

251 Peter Dausend/ Henning Sussebach, 2009, p. 13.

252 Walter Grasnick, 2010b, p. 12.

253 See to this problem *supra* note 88.

254 Günter Hirsch, 2003, III. 3. b); clearer Hans Christoph Grigoleit, 2008, p. 73 et sequitur, describing the permanent practice of courts to avoid disclosure of inconsistency of rules.

255 Christoph Möllers, 2006, nr. 23.

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

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

258 Bernd Rüthers, 2008, p. 447.

259 Cf. Christoph Möllers, 2009; Bernd Rüthers, 2011.

260 Cf. Michel Foucault, 1966, p. 156, citing Anne-Robert-Jacques Turgot, that “the meaning of the words is ‘the safest light, that one can question.’” (Translation: H. P. P.).

261 See the result of decisionism by Carl Schmitt, 1934.

One way to bind jurisdiction closer to legislature could be setting interpretation acts like these ones in Australia.²⁶² This resembles a little the attempt of Justinian (482 to 565) in the sixth century to avoid the problem by “a conclusive statement of the law that required no interpretation”²⁶³. Whether a law needs interpretation or not²⁶⁴, whether a definition settled by parliament is clear or not; these questions will be answered by the respective legal decision-maker not by the norm-setting instance.

3.11. Second Interim Results

At long last it seems that legal methodology is not very successful leading legal decision-making closer to legislature. In this respect it is more than remarkable that in the anthology “Legal philosophy in the 21st century“, edited by a famous German publishing-house for scientific literature, a theorist summarizes the result of his study on the topic “(w)hat lawyers really do” in this way: “You must develop a *sense* for what is right. ... A sense that cannot be described in detail“; he summed up his thoughts: “In the end jurisprudence is aesthetics“.²⁶⁵

I think this is a somewhat poor outcome of this high-level scientific discussion.²⁶⁶ On the one hand, this result of an approach intensive, expensive, and long is pretty much the same that already Friedrich Schleiermacher argued in the first third of 19th century: “Interpretation is an art.”²⁶⁷ On the other hand, it shakes the scientific reputation of jurisprudence.²⁶⁸ Max Weber meant: “The dilettante differs from the expert ... only in lack of firm and reliable work procedure.”²⁶⁹ But what distinguishes academic trained legal decision-makers from dilettantes if we cannot even describe “(w)hat lawyers really do”? How we can claim the scientific character of jurisprudence that may suggest in the end “the rule of thumb”.²⁷⁰ Perhaps in reality “the rule of thumb prevail(s) over formal knowledge”²⁷¹?

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

263 Raymond Wacks, 2008, p. 7.

264 This is perhaps the background of Friedrich Carl von Savigny’s and Friedrich Schleiermacher’s starting point that all texts – alleged clear or unclear – need interpretation; Ulrich Huber, 2003, p. 5.

265 Joachim Lege, 2008, p. 226 (Translation: H. P. P.; emphasis in original).

266 Similar Walter Grasnack, 2010a, p. 53.

267 Friedrich Schleiermacher, 1838, p. 80.

268 To the importance of rationality of legal methodology for the science-quality of jurisprudence cf. Jan Petersen, 2008, p. 41.

269 Max Weber, 1919, p. 1022.

270 Cf. Paul Richli, 2000.

271 Stuart Macintyre, 2009, p. 153.

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

Because the legal methodology is not able to offer a remedy solving these problems even using its best endeavours²⁷² and there is a fundamental ignorance of production of (legal) decisions²⁷³ we must look for help elsewhere.

We start from three basic issues:

- First: The idealistic vision of perfection runs always beyond anything we can achieve.
- Second: We live with the insoluble problem of “no one right answer”.²⁷⁴
- Third: Pragmatism lead us the way to make the most of what is to hand.

The pragmatic response is to develop a better reality orientated education of future generations of legal decision-makers. Thus let’s optimize legal teaching and education. This way does not lead from science to crude practice. In the terminology of Georg Wilhelm Friedrich Hegel we do not teach direct perception instead thought and concept²⁷⁵; we teach students theoretical concept as well as immediate perception. In this respect remembering a sentence of Wolfgang Ernst is very helpful: “For jurisprudence academic teaching is not a subordinate matter, rather a constitutional point.”²⁷⁶

On the other hand, Daniel Saam recently noted that “nobody will doubt that quality of legal education is very important for the operation of rule of law and that legal education will determine legal methodology and vice versa.”²⁷⁷

We can call this pragmatic switch from legal methodology to new teaching instruments the didactic turn of legal teaching.²⁷⁸ In fact we note in the last time in Germany an overall increasing interest to didactic topics in the field of academic legal education.²⁷⁹

272 See this aspect at Claus Luttermann, 2010, p. 3.

273 Wilhelm Schmid, 1998, p. 200.

274 Odo Marquard, 2003, p. 184; Wolfgang Hoffmann-Riem, 2007, p. 648. How hard is to overcome the binary opposition of “right or wrong” demonstrates Günter Hilg, 2010, p. 122: On the one hand, he describes the imagination of the objective right answer as an illusion, on the other hand, he formulates: “Each legal system is an unity that offers only one right answer to an legal question.” (Translation: H. P. P.).

275 Cf. Georg Wilhelm Friedrich Hegel, 1821, Preface.

276 Wolfgang Ernst, 2007, p. 8 (Translation: H. P. P.).

277 Daniel Saam, 2010, p. VIII; it is very interesting that Lars Klöhn/ Ekkehard Stephan, 2009, p. 93 suggest for practicing judges further trainings.

278 Marc Reiß 2010, p. 580, calls it a change of perspective in teaching; Nikolaj Fischer/ Gregor Kuntze-Kaufhold, 2008, p. 18, speak of “paradigm shift“; similar for Ireland: Cf. Marie-Luce Paris/ Donnelly Lawrence, 2010: “A Paradigm Shift to the Practical“.

279 Take, for evidence, the teaching-price for legal professor Rolf Sethe in 2008 (cf. Rolf Sethe, 2008); the Conference of DAAD, Stifterverband für die Deutsche Wissenschaft and HRK: “New Perspectives of Legal Education in Europe“ in Berlin; the conference of University Hamburg “Exzellente Lehre im juristischen Studium: Auf dem Weg zu einer rechtswissenschaftlichen Fachdidaktik“ (cf. Marc Reiß, 2010; Volker Steffahn, 2010); the foundation of the “Vereinigung deutscher Rechtslehrender“ (German Law Teachers Association; *supra* note 102) – the last three events took place in 2010.

4.1. Mandatory Courses in Legal Methodology and Legal Theory

Since there is no way to avoid or to solve the problem of uncertainty of legal decision-making by legal methodology we must look for other paths to minimize the problem at least. However, we must accept and teach it and not dissimulate it; we must “soften the claims of rationality”²⁸⁰.

Within the framework of the Bologna process²⁸¹ study-programs must be modularised and each module has to be examined. Involving the legal academic education in the Bologna process a mandatory module “legal methodology and legal theory” for all law students should show the students the legal methodology, on the one hand, and the real conditions of legal decision-making, on the other hand.

The basic discipline “theory of law” can serve to legal doctrine as critical reflection as well as practical help.²⁸² But this is not first of all the intention of the here suggested idea of a mandatory module. The main background of this suggestion is the following:

The legal methodology, as taught today at German universities, shows hardly relations between legal basic sciences and legal methodology or legal decision-making.²⁸³ The statement of a former student of public administration that she is “free of prejudices” may demonstrate how little²⁸⁴ students learn the real circumstances of legal decision-making; more than 300 years after John Locke’s observation of the inherent prejudices of decision-makers²⁸⁵ a very remarkable opinion.

Learning real circumstances of legal decision-making does not automatically result rationality of legal decision-making but we should remember Don Quixote: “The beginning of health lies in knowing the disease and in the sick man’s willingness to take the medicines which the physician prescribes ...; besides, sinners of discernment are nearer amendment than those who are fools”²⁸⁶.

It will say that the first step to minimize irrationality of legal decision-making²⁸⁷ is to explain future legal decision-makers just this irrationality.²⁸⁸ For example “Auslegung”

280 Thomas Vesting, 2007, p. 126 (Translation: H. P. P.).

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

282 Jürgen Habermas, 1971, p. 63, generally distinguishes sciences in “science in the sense of practical philosophy” and “science in the sense of empirical-analytic procedure” (Translation: H. P. P.).

283 Bernd Hirtz, 2006, p. 85.

284 Oliver Lepsius, 2008, p. 2, talks of the “curricular zero-value of legal theory”.

285 See fn. 5.

286 Miguel de Cervantes, 1615, chapter LX, Of what happened Don Quixote on his way to Barcelona.

287 In this context it is interesting that Helge Dedek, 2010, starts from the Western European tradition of rational legal decision-making (p. 58) and ends with the acknowledgment of the irrational, just myth part of these tradition of rationality (p. 82); to the concept of irrationality of legal decision-making see Agnes Launhardt, 2010, p. 11, 127.

288 Juliano Zaiden Benvindo, 2010, p. XVII, claims the “disclosing the metaphysics that may exist behind the concept of rationality”; cf. Hans Joas, 2010: A realistic point of view makes a successful behaviour more probable.

(interpretation) is more than only “Enthüllung”²⁸⁹ (disclosure/ uncovering) of the content of a wording. If we have explained this irrationality, than we can try to eliminate or minimize undesirable factors of legal decision-making²⁹⁰; perhaps by teaching and learning techniques regulating emotions.²⁹¹

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

How just mentioned, German law students basically learn (only) the classic interpretation tools without relation to the real facts of the case and to real people needing legal advice.

In contrast, the U.S. system offers law students by law clinics the opportunity to learn the interplay of legal questions and facts of issue as well as the influence of real clients to legal decision-making.

In Germany more and more academic teachers note in the last time the lack of legal clinics at law schools.²⁹²

Already, the Romans knew that success of learning depends on *ars* (general knowledge), *ingenium* (individual talent), and *usus* (learning by doing).²⁹³ We know not only that “the meaning of a word is its use in the language”²⁹⁴ but also that practical training is better than abstract learning only. As the result the theory of situated learning claims to bring closer the learn situation to application’s situation²⁹⁵; this is important for teaching law all the more than “law is a participant-orientated discipline.”²⁹⁶

Introducing the legal clinic system in the German legal academic education/ training will not replace the theoretical lectures; however, we want a mixture of theoretical knowledge in legal doctrine, legal history, legal philosophy (theory and ethics), legal methodology and practical skills (creative problem-solving, factual investigation, clear communication, advice, negotiation, litigation, administrative and service²⁹⁷ skills)²⁹⁸.

Typically U.S. law schools will be subdivided into

- Simulations, especially moot courts
- Live clients Clinics
- Externships.²⁹⁹

289 Friedrich Carl von Savigny, 1840, p. 319, used this word as description of the interpretation-process.

290 Cf. this attempt by Dalai Lama, 2009, p. 99.

291 Cf. such techniques at Dalai Lama, 2009, p. 210.

292 Andreas Bucker/ William A. Woodruff, 2008; Ann K. Wreesmann, 2010.

293 Alexander H. Arweiler, 2009, p. 56.

294 Ludwig Wittgenstein, 1958, Nr. 43.

295 Heinz Mandl/ Birgitta Kopp/ Susanne Dvorak, 2004, p. 10.

296 William Twining/ David Miers, 2010, p. XV.

297 To service-learning see Michael Jaeger/ Susanne In der Smitten/ Judith Grützmacher, 2009.

298 Cf. American Bar Association, 1992, (MacCrateReport), Part I Chapter 5 B; Toni M. Fine, 2009, B. II.; James R. Maxeiner, 2008, p. 42.

299 Andreas Bucker/ William A. Woodruff, 2008, p. 1071.

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

(1) The first conversation

At specified time every week students of the university (clients) have the opportunity to contact SASLA-students in the student information center.

The first meeting with the client is carried out by two SASLA-students.

The client signs a consent form and accepts the conditions of SASLA; SASLA itself is bound to secrecy.

The SASLA-students record general information during the first interview. In addition there is a basic form that is to be filled out by client. In this basic form the most important facts are collected: name of the client, day of the consultation, name of the SASLA-students, register number, the most important points of the legal problem, and so on.

At last an appointment for the (second) consultation has to be made with the client.

(2) Finding solutions within the project

On the next project meeting the mentioned SASLA-students present the case to the other project participants.

Within the group the case is discussed and tried to be solved; the library and the internet are used for required research.

The two SASLA-students work out a written proposal.

The project’s professor supports the group and has a monitoring function.

If the case is solved, the legal advice in the narrow sense follows.

(3) Consultation of the client

At the appointed time the SASLA-students explain the elaborated legal suggestions for a solution to the client and advise for further procedure.

Finally the SASLA-students point out the non-binding character of the legal suggestions.

The advantages of SASLA are obvious:

In this system students find legal relevant material not only³⁰⁰ in statutes, law reports, legal essays, and textbooks – in printed and digital versions – rather in reality anywhere: fellow students have legal problems while driving car, hiring flats, buying

300 But see Christopher Columbus Langdell (1826 – 1906): “(L)aw is a science, ... and all the available materials of that science are contained in ... books.” (cited by Simon Chesterman, 2009, fn. 1)

laptops via internet or looking for grants. Thus the SASLA-students experience law as part of daily live.³⁰¹

SASLA brings the real environment, the practice, directly into university; it makes in so far superfluous experimental games or virtual reality.³⁰²

The students train not only the communication skills such as listening, asking questions, conducting of negotiations, arguing solution-orientated or presenting proposals for solution; rather, they develop empathy³⁰³ to the clients which are their fellow students.

Whereas in a constructed exam it's just the argumentation that counts – not the answer; in reality the result matters only³⁰⁴.

The students feel³⁰⁵ the influence of their intuition³⁰⁶ by looking for statutory and judicial materials as well as interpretation tools; they see the sequence of rational legal making-decision as mere ideal-typical description – not as realistic instruction.

Last but not least students learn by practice handling facts and applying abstract rules as well as managing digital databanks of statutes and precedents.³⁰⁷

The more students train these skills the more they become familiar with them.³⁰⁸

4.3. Transnational Relationships

SASLA developed at Berlin Law School is an adaptation of legal clinic³⁰⁹ as well as legal aid system in U.S.³¹⁰ So SASLA has a transnational origin. It wants to pass its ideas to other law schools in other countries and to discuss with them the SASLA system hoping to get back new impacts from abroad. Thus in the last two years SASLA made agreements with the faculties of law of the Mykolas Romeris University in Vilnius and the Corvinus University in Budapest as universities in areas of civil law.

But contact with law schools in countries of common law can be helpful for German students too; there BLS-students can optimize the skills of interviewing clients³¹¹,

301 See Harry W. Arthurs, 2009, D. I., and: Oliver Wendell Holmes, Jr., 1881, p. 1. “The life of the law has not been logic: it has been experience.”

302 Cf. J. Horan/ M. Taylor-Sands, 2009, p. 46.

303 Cf. Fritz Breithaupt, 2009; Jutta Limbach, 2009, p. 85, the former president of the BVerfG, underlines empathy as a central point in future training-programs.

304 See Michel Montaigne, 1582, p. 285: “I prefer to focus on the outcome rather than on justification.” (Translation: H. P. P.)

305 Lord Goff, cited by Günter Hager, 2009, p. 290, speaks of “an instinctive feeling for the result of that case”.

306 Christof Bernhart, 2008, p. 31, calls this the “creative part” of decision making that begins yet by perception of the wording (the same, p. 39).

307 See Antoinette Muntejewerff, 2009.

308 Cf. Dalai Lama, 2009, p. 106: “There is nothing that becomes not easier by increasing familiarity” (Translation: H. P. P.).

309 Claudio Grossman, 2008 p. 23, points out that legal clinic system is not mandatory for U.S. law students.

310 Hans Paul Prümm, 2007 (b).

311 Cf. Kay Alexia Lauchland/ Marlene J. Le Brun, 1996.

searching for leading cases³¹², or learning the relevance of the facts of the case for track down the ratio decidendi of the leading case.

4.4. Third Interim Results

(1) In a compulsory module including exam law students should learn legal methodology in a realistic sense with connections to decision-theory that demonstrates the inherent irrationality of legal decision-making process. Acknowledging the boundaries of rational legal decision-making³¹³ is important; thus students must internalize these boundaries.

(2) The SASLA-System provides students the opportunity “acting with responsibility for clients”.^{314 315}

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

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

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

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

(7) The students hear a lot of problems of their fellow students and so they experience directly problems of immigrations, race, lack of money, and so on; in other words: the SASLA-students became acquainted the totally realistic life “that came through the door”³¹⁶.

(8) All these impressions influence the legal decision-making of the SASLA-students. So they experience immediately by practice that “humans are not ‘rational utility maximizers’ but infinitely varied in preferences and decision-making styles, shaped by culture, experience and choice, and their perspectives on ‘performance’ are *inherently* subjective.”³¹⁷

312 Cf. Robyn Rebollo, 1999.

313 Juliano Zaiden Benvindo, 2010, p. XIX.

314 William M Sullivan, et. al., 2007, p. 8.

315 Take notice that due combining of tuition with research in my university SASLA-students take part in legal research too.

316 Herbert M. Kritzer, 2002, p. 919,

317 Colin Talbot, 2008, p. 143 (Emphasis: H. P. P.)

Conclusions and a Glance into the Future

We note in Germany an increasing consciousness of weakness of the legal methodology taught to law students today: The students get neither real idea nor feeling of legal decision-making as mixture of legal matters, issue of facts, personal inputs, personal interests, and the interplay with other actors.³¹⁸

For minimize these defects it is necessary that law students learn and apply in future the following points:³¹⁹

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

(2) Jurisprudence is a hybrid science: It deals with facts of issue as well with legal matter.³²⁰ The more non-legal elements interfere with legal decision-making the more legal decision-making is changing legal disciplinary to a multi-disciplinary process. That is the reason to understand jurisprudence as humanity³²¹ as well as social science³²² because “law cannot be treated as a discrete set of principles without a context.”³²³

(3) Jurisprudence will be understood as transnational science and requires greater cooperation between law schools all over the world and more exchange of staff and students³²⁴ for exchange the experiences in the more and more common legal methodology.

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

(5) “Surely, we have a multitude of various principles of interpretation ... but all of them are only a kind of direction indicator. Even at their best, they only tell us: go in this direction.”³²⁵ Often the methods show us the direction to an arguable but not to the one and only right decision.

(6) Legal theory should demonstrate students our lack of understanding legal decision-making; however, it is necessary to disclose the well-known circumstances of legal decision-making³²⁶ rather than to reduce it to a logical-systematic process.

318 See the list of elements of a legal decision by Oliver Wendell Holmes, Jr., 1881, p. 1.

319 Cf. Hans Paul Prüm, 2009, p. 211 et seq.

320 See Derek McKee, 2010, p. 578: “(L)egal pluralism lays bare the central paradox of law: its dual nature as fact and norm.”

321 That is at long last the result of “Reine Rechtslehre“ of Hans Kelsen, 1934, p. III.

322 See Wolfgang Hoffmann-Riem, 2007, p. 648.

323 Stephen Bottomley/ Simon Bronitt, 2006, p. 2.

324 Mortimer Sellers, p. 4.

325 Aulis Aarnio, cited by Ernst A. Kramer, 2005, p. 5.

326 Cf. Klaus F. Rühl, 2001, p. 151: “Empirical knowledge can influence intensively the practical behaviour.” (Translation: H. P. P.)

(7) In a motion picture of Damiano Damiani an old judge recommends a young judge to be convinced of the correctness of his judgment as a catholic priest believes in transubstantiation of bread into the body of Jesus Christ in the consecration. That may be coherent for religious Catholics. A realistic legal methodology has to take into account the impossibility of absolute certainty of the correctness of legal decision. This knowledge of uncertainty of legal decision-making is necessary for training the self-control³²⁷ of the respective legal decision-maker³²⁸ – according to the biblical “Examine yourselves”³²⁹ – and the humility of the legal decision-makers concerning the other partners in this context.³³⁰

(8) Not only the legal methodology is changing; the methodology of legal education is changing too. In our context it is important to point out that analysis of facts of the case as crucial part of legal methodology requires teaching systems to introduce students in the respective techniques in practice. Such methods of legal education should be – of course beside theoretical studies (history, structure, philosophy [theory and ethics]³³¹, and values of law³³²) – case studies, projects as well as legal clinics or systems like SASLA³³³.

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

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- 327 See in this context Desiderius Erasmus, 1501, Chap. iii: “(T)he first point of wisdom is to know thyself.”
- 328 Bernd Rüthers, 2006, p. 53, outlines the very importance of self-control as integrated part of legal decision-making; similar Kye Il Lee, 2010, p. 418.
- 329 The Bible, 2 Corinthians 13, 5.
- 330 Cf. Yves-Marie Morissette defining the core of McGill’s law curriculum as bringing students into “a sustained and humble dialog with otherness” (cited by Harry W. Arthurs, 2009, D. I.); in the same direction also shows Günter Hager, 2009, p. 298.
- 331 Cf. Hans Paul Prümm, 2008.
- 332 See to relationship between rules and values William Twining/ David Miers, 2010, p. 87 ff.
- 333 Since December 1, 2010, the faculty of law of Leibniz Universität Hannover is offering a similar project [interactive]. [accessed on 10-03-2009]. <<http://www.jura.uni-hannover.de/legalclinic.html>>.

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VOKIETIJOS TEISINĖS METODOLOGIJOS DIDAKTINIAI POKYČIAI

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

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

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

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