concerning § 5 V The broad spectrum of legal methodology

Diagram 1
Legal methods in legal practice (overview)

A. Preliminary remarks

- the activities and legal methods of the legal practitioner (the ordinary lawyer) focus on *interpreting and applying the law* and *finding solutions for practical problems* on the basis of the prevailing law
- the activities of a legal scientist also include to gain a deeper understanding of the law (from manifold perspectives) and develop suggestions for its improvement; therefore there is a much *broader spectrum of legal methods in legal science*
- there are differences in legal methodology between common law and continental legal systems, due to the different role of written law and jurisprudence, but they can be less significant in practice than expected
  - example: court decisions, although no "case-law", also play an important role in continental legal practice...

B. Main legal methods

I. Methods of legal interpretation

1) Grammatical (literal) interpretation

- focuses on the *wording* of the norm
- note that the wording sets an absolute *limit* to interpretation!

2) Systematic interpretation

- focuses on the systematic *position* of the provision within a certain part or sub-part of the law or regulation
  - the position often indicates the function and, consequently, the sense of the norm
  - the same legal term may need to be interpreted differently in norms with a different systematic position (e.g. differently in the clause guaranteeing a fundamental right than in that limiting it)
- also aims to avoid inconsistencies in the legal system
- a special kind: the *interpretation of legal provisions in conformity with higher-ranking law* (constitution, human rights, European Union law) to prevent conflicts

3) Historical interpretation

- focuses on the *genesis* of the norm
- important in particular for legal provisions reacting to the failures of their predecessors
- special regard to the explanatory memorandum to the bill and the discussion in the legislative procedure

4) Teleological interpretation

- focuses on the *purpose (ratio legis)* of the norm
- most important method of legal interpretation in practice, requires a deeper understanding of the norm
- jurist must resist temptation to present his own political ideas as purpose of the law (→ difficult for Germans...)
- includes impact-orientated interpretation
  - e.g. avoiding absurd and impractical results, harmful effects and undue hardship
  - e.g. ensuring the *effet utile* (practical effectiveness) of the norm
- can also result in a *teleological reduction*, i.e. not applying a norm, although it would be applicable according to its wording, with regard to its purpose

5) Additional specific methods for constitutional interpretation

a) Interpretation with regard to the *unity of the constitution*

- a holistic approach, understanding the constitution as a homogeneous whole and resolving inconsistencies between individual provisions in its overall context

b) Interpretation according to the principle of *practical concordance*

- a further development of this approach, gently reconciling colliding constitutional norms and values (e.g. the fundamental rights of different citizens) by considerate concretisation and balancing, allowing all of them to unfold under reciprocal limitation as far as possible

6) Only an aid to legal interpretation: comparison of laws

- having regard to the interpretation of a similar norm in a foreign legal order
- cannot be a method of legal interpretation per se, since identical provisions in different legal orders can have a different meaning, due to different historical, ideological or cultural backgrounds
- but often a *source of inspiration* within the teleological (or other kinds of) interpretation

II. Subsumption

- subsuming a factual situation under a legal norm by relating the facts to the legal prerequisites of the norm
- needs to be done individually for every single legal prerequisite of the norm
- congruence of the facts with all legal prerequisites will trigger the legal consequences of the norm

III. Analogy

- application of a legal norm, which offers a suitable solution, to a case not regulated therein but similar to the regulated case (→ analogous application)
- comes into consideration if legislator did not or could not have in mind the given constellation
- presupposes an *unintended regulatory gap* (no conclusive regulation) and a *comparable constellation of interests* - assumes that the legislator would have regulated the case in this way if he had thought of it...
- not possible in criminal law (→ nulla poena sine lege)
- opposite solution: argumentum e contrario

IV. Methods to determine the applicable norm in case of concurrence of laws

- application of the *lex superior rule, lex posterior rule, lex specialis rule*, special rules in criminal law etc.

V. Balancing

- between legally protected interests with regard to a specific situation
- in particular between fundamental rights and public interests but also between private interests - an essential part of the application of the principle of proportionality
- goes often hand in hand with a concretisation of legal principles or values
- determination of the protected interests, compiling of the relevant facts, consideration of all relevant aspects, reasoned balancing decision
- the balancing itself is ultimately a subjective process - here we meet a limit of objectivity in law

VI. The methods and techniques of practical legal case-solving

- a quasi-scientific, strictly logical & methodological approach to solve practical legal cases from an objective perspective - especially highly developed in Germany but adopted in legal education in many other countries
- common in common law systems: the approach to solve practical legal cases from the perspective of one of the parties (→ moot courts)

C. Other legal methods

- note that there are numerous other legal methods in legal science, but few are relevant for legal practice

I. Empirical studies for establishing the existence of customary law

- rare in modern legal systems, since almost everything is regulated in written law
- studies on the required continuous common practice in the population (*consuetodo*)
- studies on the required common opinion that this practice is legally binding (*opinio iuris sive necessitatis*)

II. Comparative methods

- e.g. drawing inspiration from foreign court decisions for answering questions in the own law - common in constitutional law for common issues of fundamental rights or the rule of law

III. Economic analysis of law

- analysis of the existing or potential economic consequences of a certain interpretation or application of a legal norm - usually by microeconomic analysis with special regard to the behavioural consequences

IV. Methods of judicial further developing of law (→ slide 5, IX.)

- only by courts for filling a gap in the law
- "further developing" of the existing law, within its lines and concepts (not making of genuinely new law)
- creative interpretation of indefinite legal concepts, creative interpretation of several norms "read together", introduction of unwritten legal institutions that integrate well with the written law

D. Further reading (selection in English)

- note that there is an abundance of scientific literature on legal methodology in German language

Ginsburg, Jane C.: Legal Methods, 5th edition 2020
Husa, Jaakko; Hoecke, Marc van (editors): Objectivity in Law and Legal Reasoning, 2013
MacCormick, Neil; Summer, Robert S. (editors): Interpreting Statutes. A Comparative Study, 1991
Möllers, Thomas M. J.: Legal Methods. How to work with legal arguments, 2020
Riesenhuber, Karl (editor): European Legal Methodology, 2nd edition 2021
Schmitz, Thomas: Introduction to legal case-solving, course material, Semester 1, 2013/14
Zimmermann, Reinhard: Legal Methodology in Germany, in: Edinburgh Law Review 26 (2022), p. 153 ff.
Zippelius, Reinhold: Introduction to German Legal Methods, 2008

See also, as a classic of legal interpretation, *Friedrich Carl von Savigny*, System of the Modern Roman Law, vol. 1, 1867, sect. XXXIII, p. 171 ff. [German original: System des heutigen Römischen Rechts, vol. 1, 1840, § 33, p. 212 ff.]