

§ 5 German legal methodology

I. Not a distinct national methodology but an advanced and influential manifestation of continental-European legal methodology

- deeply rooted in the continental-European legal tradition
- not a specific German legal methodology but a German manifestation of continental-European legal methodology
- has inspired young lawyers and researchers from all over Europe and later also from Asia in their postgraduate, doctoral and postdoctoral studies
 - they brought it to their home country and enriched legal methodology there
 - they reflected on it critically from the perspective of their own background, pointed out to deficits that German colleagues would not see and thus contributed to its improvement
- German universities, scholars & courts active in all major legal debates in Europe
 - contributing considerably to the *emergence of a European legal culture* in the wake of European integration in the last 30 to 40 years

II. Distinction between legal principles and rules

- a common fundamental distinction between *two different types of legal norms*
 - according to a rather broad consensus among legal scholars
- *rules* are those legal norms that link a specific, precisely determined legal consequence to a specific prerequisite (often following the classical pattern of "if ... then")
 - example: criminal offences in the criminal code
 - they are applied by *subsumption*
- *principles* are legal norms that only bind to an abstractly formulated objective
 - examples: principle of rule of law, principle of good faith, fundamental rights
 - they cannot be applied by subsumption but must be *concretised* in the individual case with regard to all specific circumstances, often by *balancing* them with conflicting other principles
- the details are highly controversial
 - according to ROBERT ALEXY AND OTHERS, legal principles need to be *optimised*
 - OTHER SCHOLARS see a *scope* for concretisation
 - the discussion has spread throughout Europe and has a significant practical impact, esp. in the area of fundamental rights
 - note that it is not possible anymore to write a doctoral thesis on fundamental rights - in any country - without discussing the fact & consequences of fund. rights as principles!

III. Distinction between requirements and legal consequences of the legal norm

- a fundamental distinction between the two sides of a classical legal norm
 - of a rule following the classical pattern of "if ... then"
- legal doctrinal distinction between the *factual preconditions* required in the provision [Tatbestandsmerkmale] and the *legal consequences* [Rechtsfolgen] ordered in the provision
- distinction of different kinds of factual preconditions in certain norms in certain areas of law
 - e.g. positive and negative preconditions (facts that must exist/not exist)
 - e.g. objective and subjective elements of criminal offences
- in administrative court proceedings full judicial control with regard to the factual preconditions but limited control of discretion granted as legal consequence by the relevant norm

IV. Special consideration for human and fundamental rights and constitutional principles

- the *primacy of the Constitution* taken seriously: constitutional rights and principles enshrined in the Basic Law for the Federal Republic of Germany of 1949 unfold a strong influence on the ordinary law - in theory and in practice and in all fields of law
- *fundamental rights are directly binding law* (art. 1(3) BL)
 - consequently, all *ordinary law must be interpreted and applied strictly in line (in conformity)* with them so that conflicts are avoided
 - courts must refer ordinary laws they consider unconstitutional to the Federal Constitutional Court for concrete constitutional review (cf. art. 100(1) BL)
 - constitutional complaints of citizens have caused the Federal Constitutional Court to annul numerous court decisions, even of the Federal Court of Justice, for fund. rights violation

V. The broad spectrum of legal methods

1) The broad spectrum of legal methods in legal practice

- the legal methods of the legal practitioner in his/her daily work
- see Diagram 1

2) The even broader spectrum of legal methods in legal science

- the legal methods to gain a deeper understanding of the law and develop suggestions for its improvement
- see special material from the course Methodology of Legal Research and Writing, Yogyakarta 2023

VI. In particular: legal interpretation

- see Diagram 1
- problem: *Constitutional change through reinterpretation?* Demonstrated by the example of the right to protection of marriage and family (art. 6(1) BL)
 - The term "*family*" is a social, not technical term and thus open to changes. Today it is understood in a broader sense than in the past, including *patchwork families*.
 - In contrast, the term "*marriage*" is a technical term. In 1949, when the Basic Law was made, there was not doubt that only a man and a woman could "marry". However, in a modern constitution of 2024, due to the changes in society, "marriage" would be understood as covering *same-sex marriage* too. Can the term in art. 6(1) BL be reinterpreted?
 - Practical consequence: Does the introduction of same-sex marriage or rather its prevention require an amendment of the provisions on marriage in an old constitution?

VII. In particular: analogy

- see Diagram 1

VIII. In particular: the advanced techniques of practical legal case-solving

- a sophisticated but also demanding, quasi-scientific, strictly logical and methodological approach to solve practical legal cases from an objective perspective
- requires a clear, logically and dogmatically consistent line of thoughts, a consistent structure, a precise analysis of the facts and question of the case and sophisticated legal reasoning at the right place within the case solution
- allows to identify easily the deficits in the reasoning of others

IX. Judicial further development of law

1) Phenomenon and legitimacy

- in the complicated and fast-changing modern civilisation and society, the laws cannot cover in their wording all new emerging problems and case constellations
- the legal provisions are often confined to take basic decisions, provide a legal framework and determine the direction, but *leave specific legal questions to the courts* who will answer them by way of judicial further development of law
- this is inevitable because all legal issues raised must be decided but the legislator does not have the resources to work on all of them in time
- besides, judicial further development of law can be necessary to *avoid loopholes* or *ensure the operability and practical effect* of the existing law

2) Main areas

- constitutional law: concretisation of constitutional principles, derivation of new fundamental rights, fundamental rights doctrine

Example: the Census Act decision of the German Federal Constitutional Court of 1983 (BVerfGE 65, 1)

- "discovery" of a fundamental right to informational self-determination (data protection right) in the Basic Law of 1949, derived from art. 2(1) read together with art. 1(1) BL.
- background: the need for a fund. right of data protection - even under a constitution that is older than the first computers

- administrative law: constant adaptation of classical concepts like "public security and order" to new developments in society
- private law: continuous development of essential legal concepts, such as "in bona fide/good faith" [Treu und Glauben], "common decency/boni mores" [gute Sitten] or "unfair commercial practices" [unlautere geschäftliche Handlungen]
- see also outside German law the extensive judicial further development of law by the European Court of Justice

3) Common methods

- creative interpretation of indefinite legal concepts in written norms
- creative interpretation of several norms read together, leading to the "discovery" of new rights and principles
- in some cases also creation of unwritten legal institutions that integrate well with the written law

4) Limits

- still controversially discussed
- only "*further developing*" of the existing law, consistently within its lines and concepts, *not making of new law*
- further development of, not against the existing written law
- no "correction" of the law by the judge