§ 3 Methodological approach

- see for the broad spectrum of legal methods in *legal practice* **Diagram 2**
- see also for the even broader spectrum of legel methods in *legal science* the **special material** from the course Methodology of Legal Research and Writing, Yogyakarta 2023

I. Jurisprudence of concepts, jurisprudence of interests and jurisprudence of values [Begriffsjurisprudenz, Interessenjurisprudenz & Wertungsjurisprudenz]

- three contrasting basic approaches that altogether, often alternating, determine the German way of dealing with the law
- *jurisprudence of concepts:* an approach developed in the 19th century, understanding the legal order as a closed system of concepts that need to be defined, analysed and set into correct context with each other in complex conceptual pyramids
  - an approach focusing strongly on legal terms and concepts, logic and a high degree of abstraction
  - still vivid insofar as lawyers still love to focus on legal concepts and their interrelationships
- *jurisprudence of interests:* an approach developed in the early 20th century, understanding legal norms as decisions by the legislator to pacify certain conflicts of interests in society
  - an antithesis to the jurisprudence of concepts focusing on and evaluating the conflicting interests
  - helpful for the understanding of many Civil Code provisions
- *jurisprudence of values:* an approach of the 20th century focusing on the value judgements of the legislator, in particular the fundamental constitutional values
  - today the most influential approach
  - explains well the practice of interpreting private law in the light of the fundamental rights

II. Legal interpretation

- see Diagram 2, B.I.
- the most important activity of any lawyer
- includes *defining and delimiting legal terms* and identifying important case groups
- there is no hierarchy between the various methods of legal interpretation, but the choice must be transparent and reasoned
- in practice, often the teleological interpretation prevails, and not always can German jurists resist the temptation to present their own political idea as the purpose of the law...

III. Subsumption

- see Diagram 2, B.II.
- only applies to *rules*, not to principles (which must be concretised and balanced with others in the indiv. case)
- needs to be done transparently, precisely and individually for every single legal prerequisite of the norm and of other norms to which the norm refers

IV. Analogy

- see Diagram 2, B.III.
- must be strictly distinguished from legal interpretation
- only in case of sound reasons for a *(1.) regulatory gap*, which is *(2.) unintended*, and a *(3.) comparable constellation of interests*
- are you sure that you can exclude an argumentum e contrario?

V. Other legal methods

- much more important and multifaceted in legal science than in legal practice
- esp. *economic analysis of law* for an impact-orientated (or at least *also* impact-orientated) interpretation or application of a legal norm

(Datei: Slide 3 (GermanPrivateLaw))