Nordic and Germanic Legal Methods

Nordic and Germanic Legal Methods

Contributions to a Dialogue between Different Legal Cultures, with a Main Focus on Norway and Germany

edited by

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Foreword

Legal method has several meanings. This book emphasises how courts and other decision makers solve a case, how the facts of the case lead them to their decision.

In Europe, the major difference is between the common law method on the one hand and the method of the civil law countries of the Continent on the other. The civil lawyer has learned to find the law through deduction from principles and rules established in statutes, while the common lawyer has learned to achieve the same through analysis of previously decided cases. In the common law, we see how the experience gained from a case can become a rule, and we see how the scope and operation of the rule is tried and refined again and again in subsequent cases.

Nevertheless, a study of the civil law methods reveals considerable similarities with the common law methods. Also here the law is developed through cases. The difference is that the statute is generally the starting point, but through their interpretation of the statutory provisions, the courts develop rules, and in so doing, they also take earlier court decisions into consideration.

But even within the civil law systems there are differences between the methods adopted.This book will show the reader the differences between the methods adopted by the Nordic systems of Denmark, Finland, Norway and Sweden as well as the Germanic systems of Germany, Austria and Switzerland. At the same time, it will also show the similarities, and goes on to seek an explanation of the observed variations.

Are there features in the legal mentality that have led to differences in method? Has the fact that, unlike the Germanic countries, the Nordic countries have no codes influenced the legal mentality and the method? Have the codes led to a greater reliance on legal concepts whereas the Nordic courts have been influenced by the disrespect of legal concepts, the *Unbegrifflichkeit*, of the Nordic doctrine? To what extent have various and changing legal philosophies had any impact on the methods adopted? Has for instance the Nordic legal realism influenced the courts' approach to finding out what the law is, and has it done so in a way different from the German *Interessenjurisprudenz?*

Like the ancient Nordic law, the ancient Germanic law is said to have been unwritten and inarticulate. The courts relied on the experience and intuition of the judge or the law speaker. Due among other things to the lack of political unity within the German territories, this approach gave rise to several legal problems which did not arise to the same extent in the Nordic countries. This was one of the reasons why in the middle ages the more articulate written Roman law penetrated German law and became *das gemeine Recht*. Roman law never had the same in-

fluence on the Nordic legal systems, partly due to the scarcity of trained lawyers among the judges of the Nordic countries at that time. Are there reminiscences of this difference in the methods of the courts? Do Nordic courts rely more on their experience and intuition than the courts of the present Germanic systems?

This book, I believe is the first to present an in-depth analysis of the legal methods of the two legal families, the Germanic and the Nordic. This is an achievement that is to be welcomed.

Ole Lando
Professor emeritus at the Law Department
of the Copenhagen Business School

Preface

In this era of globalisation and internationalisation, a better understanding between the subjects of different legal systems is becoming crucial. This applies both for legal scientists in their quest to resolve legal problems as well as for legal practitioners dealing with concrete cases. Finding the correct legal provision or other source of law is only half the job. At the same time, the legal method, which explains what to do with these materials once they have been identified, is difficult to access for foreign lawyers, as we have both experienced in our own research. Our efforts to make sense of the legal argumentation of another country led to plans for a series of articles comparing the legal methods of our native legal orders, namely, Norway and Germany.

Jørn Øyrehagen Sunde, who is the head of the research group for legal cultures at the University of Bergen Faculty of law, invited us to use this group as a platform to organise a workshop in November 2011, exploring the historical background of the two legal orders. The idea for an anthology was born on this workshop, and Jørn Sunde deserves our thanks for his continued encouragement and support throughout the project. As our research progressed, the question arose whether the similarities and differences we identified between Norway and Germany were also present between, for example, Germany and Sweden, or Norway and Austria. Financial support from the E.On Ruhrgas foundation enabled us to involve the other Scandinavian and Germanic legal systems in a second workshop a year later.

We would like to thank both the workshop contributors and the other participants for the interesting and fruitful discussions. Although we have found the answer to many of our initial questions, these discussions have revealed further interesting topics which also ought to be explored in order to ease the communication between legal orders. This book is a first step in this direction, and we would like to thank the many persons and institutions who contributed to its completion. The book is published with the financial support of the Norwegian Research Council, and a special thanks goes to Robert Uerpmann-Wittzak who conducted a peer review in order to enable us to apply. The Faculty of Law at the University of Bergen provided the funding for a native proof reader in order to ensure the quality of the language in the book. Finally, our thanks also to those of our colleagues, friends and aquaintances in Norway and abroad whose input has enriched our work, as well as to our research assistants, Julius Berg Kaasin and Magnus Brekke Svanberg.

Bergen, 26. November 2014 Ingvill Helland and Sören Koch

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Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch
ACJL	American Journal of Comparative Law
AcP	Archiv für die civilistische Praxis
AfP	Archiv für Presserecht
AöR	Archiv des öffentlichen Rechts
BBL	Bundesblatt
BG	Bundesgericht
BGB	Bürgerliches Gesetzbuch
BGBl	Bundesgesetzblatt
BGE	Bundesgerichtsentscheid
BGH	Bundesgerichtshof
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BL	Basic Law
BV	Bundesverfassung
BVerfG	Bundesverfassungsgericht
BVerfGE	Bundesverfassungsgerichtsentscheidungen
BVerfGG	Bundesverfassungsgerichtsgesetz
cf.	confer
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJEU	Court of Justice of the European Union
CLP	Current Legal Problems
CUP	Cambridge University Press
DCFR	Draft Common Frame of Reference
e.g.	*exempli gratia*, for example
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
Ecolex	ecolex – Fachzeitschrift für Wirtschaftsrecht
ECR	European Court Reports
ECtHR	European Court of Human Rights
eds.	editors
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuche
EJC	Electronic Journal of Comparative Law
EEA	European Economic Area
EHRR	European Human Rights Reports
ERPL	European Review of Private Law
ESL	European sales law
et al.	and others
FC	Federal Constitution
FCC	Federal Constitutional Court

f.	and the following (singular)
ff.	and the following (pages, paragraphs etc.)
Fi.	Finnish
fn.	footnote
GG	Grundgesetz für die Bundesrepublik Deutschland
Grl.	Grunnloven
HL	House of Lords
IATE	Interactive Terminology for Europe
ibid.	in the same place
ICLQ	International and Comparative Law Quarterly
I.CON	International Journal of Constitutional Law
idem	the same
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
IPRG	Gesetz über das Internationale Privatrecht
JBl	Juristische Blätter
JbRR	Jahrbuch für Rechtssoziologie und Rechtstheorie
JuS	Juristische Schulung
JV	Jussens Venner
JZ	Juristenzeitung
LoR	Lov og Rett
Mich. L. Rev.	Michigan Law Review
mn.	marginal note
MRL	Menneskerettsloven
ND	Nordic Maritime Cases Law Report
NILR	Netherlands International Law Review
NJA	Nyt Juridiskt Arkiv
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift –Rechtsprechungsreport
NL	Norske Lov
No.	Norwegian
NOU	Norsk Offentlig Utredning
NZ	Österreichische Notariatszeitung
OGH	Oberster Gerichtshof
OJ	Official Journal
ÖJZ	Österreichische Juristen-Zeitung
OLG	Oberlandesgericht
OR	Obligationenrecht
ot.prp.	Odelstingsproposision
OUP	Oxford University Press
para.	paragraph
PECL	Principles of European Contract Law
PETL	Principles of European Tort Law
QB	Queens Bench
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rev. crit. DIP	Revue critique de droit international privé
Rt.	Norsk Retstidende
SGA	Sale of Goods Act
SJZ	Schweizerische Juristenzeitung

StGB	Strafgesetzbuch
TEU	Treaties of the European Union
TfE	Tidsskrift for Erstatningsrett
TFEU	Treaty for the Functioning of the European Union
TfR	Tidsskrift for Rettsvitenskap
UFR	Ugeskrift for Retsvæsen
UK	United Kingdom
UNIDROIT	International Institute for the Unification of Private Law
VfSlg	Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofes, Neue Folge
viz.	*videlicet*, namely
WZB	Wissenschaftszentrum Berlin für Sozialforschung
YPIL	Yearbook Private International Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZEuP	Zeitschrift für Europäisches Privatrecht
ZGB	Zivilgesetzbuch
ZNR	Zeitschrift für neuere Rechtsgeschichte
ZRG GA	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Germanistische Abteilung
ZRG RA	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung
ZRP	Zeitschrift für Rechtspolitik
ZRph	Zeitschrift für Rechtsphilosophie
ZSR	Zentrum für Sozialrecht
ZVglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft
ZZP	Zeitschrift für Zivilprozess
ZÖR	Zeitschrift für öffentliches Recht

Historical Conditions for the Contemporary Understanding of Legal Method in Germany*

Hans-Peter Haferkamp

As is generally known, legal methodology unfolds in a conflict of three crucial actors: the legislative, the judiciary and legal science. The goal is to determine their contribution to national law making. German and Norwegian lawyers concur that the separation of powers is neither fit to describe legal reality nor sufficient as a political goal. In Norwegian doctrine, an emphasis is put on the prerogative of legislation, yet de facto and also mainly de jure the right to refine a concrete legal rule according to the case is left to the judge. As a result, legal methodology's main purpose is to describe the process of decision making by judges. This, as it seems to me, is the core aspect of Eckhoff's book.[1]

In contrast, a distinctive feature of German methodology is the effort not only to describe the judge's work but to bind the judge – though not primarily to the legal texts, as it is frequently suggested. As I would like to point out in the following, the specific German approach contains instead the idea of committing the judge to legal dogma, meaning a specific scientific way of legal reasoning.[2] According to the German understanding of legal method, judicial decisions can be false not only because they are *contra legem*, but also due to flawed reasoning. Up to the present day, legal science has considered itself as a supervisor of the judiciary, while in other European countries, including Norway, it has been deemed mainly as its interpreter. Therefore, up to the present day, Germany has remained the country of legal science. Which historic conditions have led to this particular characteristic? I would like to highlight eight dates that mark formative moments of German methodology: 1140, 1781, 1806, 1871, 1888, 1900, 1918 and 1989.

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* The lecture form was maintained. Literature references are deliberately kept concise.

[1] See the introduction in *Torstein Eckhoff* and *Jan E. Helgesen*, Rettskildelære, 5th ed. Oslo 2001.

[2] Prominent on this: *Josef Esser*, Möglichkeiten und Grenzen des dogmatischen Denkens im modernen Zivilrecht, Archiv für civilistische Praxis, Vol. 172, 1972, pp. 97–130; *Josef Esser*, Dogmatik zwischen Theorie und Praxis, in: Fritz Baur, Josef Esser, Friedrich Kübler and Ernst Steindorff (eds.), Funktionswandel der Privatrechtsinstitutionen. Festschrift für Ludwig Raiser zum 70. Geburtstag, Tübingen 1974, pp. 517–539; this is based on the theory of legal logic, still see *Ulrich Klug*, Juristische Logik, 3rd ed., Berlin 1966; in addition: *Maximilian Herberger* and *Dieter Simon*, Wissenschaftstheorie für Juristen, Frankfurt am Main 1980, p. 17 ff.

Let me begin my retrospect around the year 1140, that is, with Roman law in the design it had received through medieval reception.[3] While antique law was rather a form of case law, medieval jurisprudence, in an attempt to construct consistent legal norms, built comprehensive terms from different specific cases. Law became conceptual, abstract, logical and rational. This scientification of law is certainly a characteristic of all countries which are strongly influenced by Roman law. Nevertheless, no other European state has pursued this scientification as strongly as Germany. This cannot be explained by the reception of Roman law, but by the changes Germany faced in the 19th century.

The first important date is 1781, namely, the release of Kant's *Critique of Pure Reason*. This book radically changed scientific thinking in Germany as a whole. By denying human reasoning the ability to construct a correct legal order based on observations of society, jurisprudence lost its truth claim.[4] Whereas legal science before had been defined as the knowledge of legal norms and the skill to justly apply them, legal scientists now tried to prove that they could comply with Kant's standards of science.[5] From this point onward, law meant only positive legal norms even though this was, according to Hugo[6], an unstable, even coincidental, object of perception. Between 1790 and 1810, *Jurisprudentia* (jurisprudence) became *Jurisscientia* (legal science). Even if the law itself was coincidental and arbitrary, observing the causal principle of reason required describing law as a system, thus as a unity in diversity under a leading principle.[7] Up until 1871, "system" was the crucial criterion for determining scientific scholarship.[8] The often accentuated difference between mechanical and organic systems – between a system of norms constructed by a scientist and a system of norms which builds up its coherence itself (like a plant) – however, played a rather subsidiary role in the development of methodological doctrine. Only Friedrich Julius Stahl tried to portray an organic system.[9] Everyone else agreed that a scientific system of law had to describe a correlation of cause and

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[3] *Peter Stein*, Roman Law in European History, Cambridge 2000, p. 38 ff.

[4] See *Ralf Dreier*, Recht – Moral – Ideologie, Frankfurt am Main 1981, p. 286 ff.

[5] For a fundamental overview of this development see: *Jan Schröder*, Wissenschaftstheorie und Lehre der "praktischen Jurisprudenz" auf deutschen Universitäten an der Wende zum 19. Jahrhundert, Frankfurt am Main 1979, p. 145 ff.

[6] *Gustav Hugo*, Lehrbuch der Juristischen Encyclopädie, 8th ed., Berlin 1835, p. 19: "Alle menschliche Erkenntniß ist entweder … a priori, rein, allgemein, nothwendig, in der (gesunden) Vernunft gegeben, gewisser Maßen angeboren, wissenschaftlich im strengen Sinne des Worts, oder a posteriori, empirisch, nach Zeit und Ort verschieden, zufällig, durch eigene und fremde Erfahrung von ThatSachen zu erlernen, geschichtlich … Nun die RechtsWahrheiten, nähmlich die Juristischen, sind nicht von der ersten Art."

[7] *Joachim Rückert*, Heidelberg um 1804, in Joachim Rückert (ed.), Savigny-Studien, Frankfurt am Main 2011, p. 235 ff.

[8] On this development, *Lars Björne*, Deutsche Rechtssysteme im 18. und 19. Jahrhundert, Ebelsbach 1984.

[9] *Friedrich Julius Stahl*, Philosophie des Rechts nach geschichtlicher Ansicht, Bd. II 1, Heidelberg 1833, p. 150 f.; see *Marie Sandström*, Rättsvetenskapens Princip, Stockholm 2004, p. 219 ff.

effect, of individual norms and general principles.[10] In this respect it was not exceptional that Gustav Hugo, a strict follower of Kant's critique of epistemology[11], developed the system of pandects in 1789.[12] Savigny, certainly no Kantian[13] and epistemologically rather a monist, refined it[14], and a mostly unphilosophical[15] scholar like Windscheid employed it as well.[16] Thus, the practical impact of the underlying philosophy on jurisprudence's systematic mission was rather small. This applied to the period from Christian Wolff to Kant and Schelling[17] and even to the time after 1848, when the idealistic philosophy collapsed and natural sciences took over. Causal systems were constructed as so-called "Allgemeine Rechtslehre"[18] but now under a natural scientific point of view.[19] Hence, German law in the 19th century was characterised by the attempt to achieve scientific standards. Science required the presence of a system.

The reason this concept could establish itself so clearly is associated with the second date I will focus on now. The year 1806 marks the end of the Holy Roman Empire of the German Nation. Between 1806 and 1871, Germany was facing the problem of segregation between nation and state.[20] Maintaining legal unity in a nation consisting of several states cannot be achieved by any of the legislators on their own, but is only possible by referring to another authority – in this case, the scientifically constructed system of law. Codifications on the state level therefore meant a decision against legal unity within the nation and in favour of territorial

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[10] *Björne*, fn. 8 p. 112, mentions only Hufeland and Rundhart as exceptions besides Stahl.

[11] *Joachim Rückert*, "… dass dies nicht das Feld war, auf dem er seine Rosen pflücken konnte …" *Gustav Hugo*s Beitrag zur juristisch-philosophischen Grundlagendiskussion nach 1789, in: Ralf Dreier (ed.), Rechtspositivismus und Wertbezug des Rechts. Vorträge der Tagung der Deutschen Sektion der Internationalen Vereinigung der Rechts- und Sozialphilosophie (IVR) in der Bundesrepublik Deutschland, Stuttgart 1990, p. 94 ff.

[12] *Gustav Hugo*, Institutionen des heutigen Römischen Rechts, 1st ed., Göttingen 1789.

[13] See *Joachim Rückert*, Idealismus, Jurisprudenz und Politik bei Friedrich Carl v. Savigny, Ebelsbach 1984, p. 240 ff.

[14] *Joachim Rückert*, Savignys Dogmatik im "System", in: *Rückert*, fn. 7 p. 153 ff.

[15] *Ulrich Falk*, Ein Gelehrter wie Windscheid. Erkundungen auf den Feldern der sogenannten Begriffsjurisprudenz, Frankfurt am Main 1989.

[16] *Bernhard Windscheid*, Lehrbuch des Pandektenrechts, Düsseldorf 1862, 9th ed., edited by Theodor Kipp, Leipzig 1906.

[17] On the development from Wolff to Kant: *Marie Sandström*, Das dogmatische Verfahren als Muster rechtswissenschaftlicher Argumentation, in: Jan Schröder (ed.), Entwicklungen der Methodenlehre in Rechtswissenschaft und Philosophie vom 16. bis zum 18. Jahrhundert, Stuttgart 1998, p. 191 ff.; *Maximilian Herberger*, Dogmatik, Frankfurt am Main 1981, p. 343 ff.; from Kant to Hegel: *Manfred Frank*, Unendliche Annäherung: Die Anfänge der philosophischen Frühromantik, Frankfurt am Main 1997.

[18] *Andreas Funke*, Allgemeine Rechtslehre als juristische Strukturtheorie, Tübingen 2004.

[19] *Hans-Peter Haferkamp*, Neukantianismus und Rechtsnaturalismus, in: Marcel Senn und Dániel Puskás (eds.), Rechtswissenschaft als Kulturwissenschaft?, Stuttgart 2007, p. 105 ff.

[20] On the following see *Hans-Peter Haferkamp*, The Science of Private Law and the State in Nineteenth Century Germany, The American Journal of Comparative Law, Vol. 67, 03/2008, p. 667 ff.

sovereignty. In a double sense, the programme of jurisprudence, evolving around the construction of a "system", became of even greater interest to many jurists now.

(1) Systematisation was the obvious answer to the fragmentation of law in Germany. Many territorial specialties were traced back to homogenous principles by accentuating the common idea. By doing so, the common national core of territorial – for example Prussian – law was emphasized. First and foremost Germanists had high hopes for this method.[21]

(2) The systematic approach was also the expression of jurisprudence's depoliticized claim for scientific scholarship. Thus, a terminology was found which allowed claiming autonomy from politics and religion. This aspect was crucial, especially during the pre-revolutionary period between 1830 and 1848 (*Vormärz*), a time of censorship and persecution of demagogues (Demagogenverfolgung). Thus, arguments arose between "right" and "left Hegelians", not between monarchists and republicans. Law was withdrawn from "state artists", according to Puchta.[22] Thereby, a nation-wide homogenous law was created, which during that time could never have been achieved through political legislation. Jurisprudence saw itself as the trustee of national law. The system was their legitimation.

In order to understand the further development of German legal method, it is now important to note that the rule of legal science (*Pandektism*) soon collapsed after 1871. Already shortly afterwards, Rudolph v. Jhering wrote to Bismarck that he had experienced bad kings and maladministration in his time as a student. Only Emperor Wilhelm as the "unificator" of the Reich had finally given him a reason to trust in state and monarchy and had led him to a "fundamental change in my entire outlook and disposition": "Opposed to the bleak glorification of principles and dead forms, I am now putting my hopes in the blessings of a phenomenal personality."[23] Leading jurists now turned to politics and the idea of codification. Above all, this applied to Bernhard Windscheid, who joined the legislative committee assigned to draft the BGB.[24] Jurisprudence was now looked down upon as being far removed from reality, as masqueraded politics as well as an undemocratic rule of a professo-

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[21] *Kai von Lewinski*, Deutschrechtliche Systembildung im 19. Jahrhundert, Frankfurt am Main 2000, p. 86 ff.; *Frank L. Schäfer*, Juristische Germanistik, Frankfurt am Main 2008, p. 577 ff., 584 ff.

[22] "Staatskünstler", see *Hans-Peter Haferkamp*, Georg Friedrich Puchta und die 'Begriffsjurisprudenz', Frankfurt am Main 2004, p. 434 ff.

[23] Letter to Bismarck of Sept. 15, 1888, in: *Helene Ehrenberg*, Rudolf von Jhering in Briefen an seine Freunde (translated by Dominik A. Thompson), Leipzig 1913, p. 443; *Ulrich Falk*, Von Dienern des Staates und von anderen Richtern. Zum Selbstverständnis der deutschen Richterschaft im 19. Jahrhundert, in: André Gouron et al. (ed.), Europäische und amerikanische Richterleitbilder, Frankfurt am Main 1996, p. 275.

[24] *Werner Schubert*, Windscheid und das Bereicherungsrecht des 1. Entwurfs des BGB, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung (ZRG RA), Vol. 92, 1975, pp. 186–233; *Werner Schubert*, Windscheids Briefe an Planck und seine für Planck bestimmten Stellungnahmen zum Schuldrechtssystem und zum Besitzrecht der 1. BGB-Kommission, ZRG RA, Vol. 95, 1978, pp. 283–326.

rial oligarchy.[25] Leading arguments now came from "realists", and pandectism became "jurisprudence of concepts" (*Begriffsjurisprudenz*) in 1884, when this phrase was first used by Jhering.[26]

The next date marks the year 1888. The first draft of the German Civil Code (BGB) deeply disappointed the optimists who had put their faith in the project during the first years after the foundation of the Reich.[27] Although successful codifications were issued in other fields of law, for instance in criminal law and concerning legal procedure, the disappointment over the first draft of the BGB significantly chilled the German optimism regarding codification. The draft emphasized legal unity and shied away from reform. Additionally, it was released at an unfortunate point in time. In a massive change of political direction, Bismarck shifted from liberal policy to severe state intervention in the form of social reforms imposed by the government in response to the economic crisis (*Gründerkrach*).[28] The BGB, on the other hand, was built on a liberal approach to private law, inspired by pandectism, and therefore gave the impression of being unsocial.[29] This image of the BGB as failed legal policy remained valid throughout the entire 20th century.[30] The legislator was not considered competent to improve this, as the members of the Parliament lacked the intimate knowledge of legal science which was seen as a requirement for the construction of a coherent system of laws. Thus, the BGB was seen by legal science as a threat, not an opportunity.

The heyday of methodological debates began after the BGB was promulgated on 1 January 1900, which marks the next important date. Conditions changed drastically. While the pandectists' method had aspired to be the rock in an ocean of legal uncertainty, jurists now strove to ensure freedom from a code which was felt to be too constraining.[31] For a short period between 1890 and 1914, the judge carried the hope of jurisprudence.[32] However, within a very short time, it became ob-

[25] See *Roderich v. Stintzing*, Recht und Macht, Bonn 1879; *Peter Landau*, Die Rechtsquellenlehre in der Deutschen Rechtswissenschaft, Juristische Theoriebildung und Rechtliche Einheit, Stockholm 1993, p. 81 ff.; *Walter Pauly*, Der Methodenwandel im deutschen Spätkonstitutionalismus. Ein Beitrag zu Entwicklung und Gestalt der Wissenschaft vom Öffentlichen Recht im 19. Jahrhundert, Tübingen 1993.

[26] *Rudolf v. Jhering*, Scherz und Ernst in der Jurisprudenz, Leipzig 1884, p. 360.

[27] *Werner Schubert*, Das bürgerliche Gesetzbuch von 1896, in: Herbert Hofmeister (ed.), Kodifikation als Mittel der Politik, Vienna 1986, p. 11 ff.; *Michael John*, Politics and the Law in Late Nineteenth-Century Germany. The Origins of the Civil Code, Oxford 1989.

[28] See *Hans-Ulrich Wehler*, Deutsche Gesellschaftsgeschichte, Vol. III, 1849–1914, Munich 1994, p. 934.

[29] *Tilman Repgen*, Die soziale Aufgabe des Privatrechts, Tübingen 2001; *Dieter Schwab*, Das BGB und seine Kritiker, Zeitschrift für neuere Rechtsgeschichte (ZNR), Vol. 22, 2000, pp. 325–357.

[30] *Joachim Rückert*, Das BGB und seine Prinzipien: Aufgabe, Lösung, Erfolg, in: Mathias Schmoeckel, Joachim Rückert and Reinhard Zimmermann (eds.), Historisch-kritischer Kommentar zum BGB, vor § 1, Tübingen 2003, mn. 91 ff.

[31] *Thomas Honsell*, Historische Argumente im Zivilrecht, Ebelsbach 1982, p. 22 ff.

[32] *Rainer Schröder*, Die Richterschaft am Ende des Zweiten Kaiserreiches unter dem Druck

vious that judges could not live up to these expectations. The free-law-school (*freie Rechtsschule*) which allowed the judge to decide even against the BGB could not establish itself.[33] Neither did the judges want this power nor did science want to hand this power over to them. The true ideal still was not a free judge, but rather a judge working under scientific supervision. The finding of justice was supposed to remain a scientific process. Only this can explain the massive dynamics in methodological doctrine during that time. Almost no one wanted to put the judge in charge. Both judge and legislator were regarded as suspicious, and so jurists expected salvation from science. This is the constant in the history of German methodological doctrine.

The next date is the year 1918. With the end of the German monarchy, there was a concurrent alienation between jurists and parliament. Arguments drawn from Natural Law, which had been pushed aside for a long time, were revived and exploited. Along with the evocation of "life" and "value", the turn to anti-rational arguments began.[34] These concerned *the philosophy of life*, phenomenology and parts of neo-Hegelianism[35] and, later on, the debate about hermeneutics[36] as well as, during the 1970s, neo-Marxist base-and-superstructure-concepts[37] which once again used "reality" to make an argument against the written law. A common factor was the harsh rejection of positivism.[38] But the path to justice could be found neither by working conceptually nor systematically – jurisprudence of concepts remained the enemy.[39] It was still science which was supposed to be the guiding light for the judges, but this science was not rational in nature. The judge was somehow supposed to empathize, feel and evaluate, thereby ensuring just decisions and

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polarer sozialer und politischer Anforderungen, in: Festschrift für Rudolf Gmür zum 70. Geburtstag, Bielefeld 1983, p. 201 ff.; *Rainer Schröder*, Die deutsche Methodendiskussion um die Jahrhundertwende: wissenschaftliche Präzisierungsversuche oder Antworten auf den Funktionswandel von Recht und Justiz, Rechtstheorie, Vol. 19, 1988, pp. 323–367, on p. 323 ff., p. 334 ff.

[33] *Joachim Rückert*, Vom "Freirecht" zur freien "Wertungsjurisprudenz" – eine Geschichte voller Legenden, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (ZRG GA), Vol. 125, 2008, pp. 199–255, on p. 228.

[34] *Oliver Lepsius*, Die gegensatzaufhebende Begriffsbildung. Methodenentwicklungen in der Weimarer Republik und ihr Verhältnis zur Ideologisierung der Rechtswissenschaft unter dem Nationalsozialismus, Munich 1993.

[35] See *Lepsius*, fn. 34 p. 254 ff.

[36] *Monika Frommel*, Die Rezeption der Hermeneutik bei Karl Larenz und Josef Esser, Ebelsbach 1981.

[37] See for example *Wolfgang Birke*, Richterliche Rechtsanwendung und gesellschaftliche Auffassungen, Cologne 1968; *Rüdiger Lautmann*, Die Soziologie vor den Toren der Jurisprudenz, Frankfurt am Main 1971; *Spiros Simitis*, Die Bedeutung von System und Dogmatik – dargestellt an rechtsgeschäftlichen Problemen des Massenverkehrs, Archiv für die civilistische Praxis (AcP), Vol. 172, 1972, pp. 131–154.

[38] *Hans-Peter Haferkamp*, Positivism as a concept of legal historians, in: Juridica international. Law Review University of Tartu, Estonia 2010, pp. 100–107.

[39] *Sybille Hofer*, Haarspalten, Wortklauben, Silbenstechen? – 100 Jahre Lehrbücher zum BGB: eine Lebensbilanz, Juristische Schulung (JuS) 1999, pp. 112–117.

forming the written law.[40] The ideal was not a judge as a single person but as a medium between justice and law. In Germany, this phase continued up until the 1980s and also had an impact on the reform of the German law of obligations in the year 2002, which, with its many indefinite terms, could be seen as a victory of the jurisprudence of values (*Wertungsjurisprudenz*).[41]

Many different value systems were brought into opposition to written law. During the Weimar era: diffuse antiliberal concepts[42]; after 1933: racial natural law[43]; after 1945: Christian conservative natural law[44]; after the Lüth-Decision by the Federal Constitutional Court in the year 1958: the values of the German constitution[45]. The emphasis was put on the judge's task to identify – and at the same time produce – values. As of the 1920s, German methodology has been much closer to Norwegian method than it would appear to the external observer. Effectively, during this time, Germany turned into a country of judge-made law. The change in jurists' career goals demonstrates this neatly. Whereas a professorial career was highly desired in 19th century Germany, a position as a judge of the Federal Constitutional Court now marks the aspired high point in a jurist's professional life.[46]

If the signs are not misleading, a rethinking begun in the 1990s. The long heard call for freedom from written law has become quieter. This is a result of the Europeanization of legal order and the formation of autonomous fields of norms, as in the discussion of the Internet as a producer of customary law.[47] Legal order

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[40] *Joachim Rückert*, Abwägung – die juristische Karriere eines unjuristischen Begriffs oder: Normenstrenge und Abwägung im Funktionswandel, in: Nils Jansen and Peter Oestmann (eds.): Gewohnheit. Gebot. Gesetz, Tübingen 2011, p. 181 ff.

[41] See *Rückert*, fn. 33 p. 236 ff.; to the following: *Hans-Peter Haferkamp*, Zur Methodengeschichte unter dem BGB in fünf Systemen, Archiv für die civilistische Praxis (AcP), Vol. 214 (2014), pp. 60–92.

[42] *Joachim Rückert*, Zu Kontinuitäten und Diskontinuitäten in der juristischen Methodendiskussion nach 1945, in: Karl Acham, Knut Wolfgang Nörr and Bertram Schefold (eds.), Erkenntnisgewinne, Erkenntnisverluste. Kontinuitäten und Diskontinuitäten in den Wirtschafts-, Rechts- und Sozialwissenschaften zwischen den 20er und 50er Jahren, Stuttgart 1998, p. 122 ff.

[43] *Fabian Wittrek*, Nationalsozialistische Rechtslehre und Naturrecht: Affinität und Aversion, Tübingen 2008, p. 35 ff.

[44] See *Lena Foljanty*, Recht und Gesetz. Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit, Tübingen 2012.

[45] *Thomas Henne* and *Arne Riedlinger* (eds.), Das Lüth-Urteil aus (rechts)historischer Sicht, Berlin 2005.

[46] *Michael Stolleis*, Zwei Kulturen des öffentliche Rechts auf deutschem Boden nach 1945, in: Julian Krüper and Heiko Sauer (eds.), Staat und Recht in Teilung und Einheit, Tübingen 2011, p. 33 ff.

[47] *Matthias Frühauf*, Zur Legitimation von Gewohnheitsrecht im Zivilrecht unter besonderer Berücksichtigung des Richterrechts, Berlin 2006; *Dietrich Ostertun*, Gewohnheitsrecht in der Europäischen Union. Eine Untersuchung der normativen Geltung und der Funktion von Gewohnheitsrecht im Recht der Europäischen Union, Frankfurt am Main 1996; *Peter Geyer*, Das Verhältnis von Gesetzes- und Gewohnheitsrecht in den privatrechtlichen Kodifikationen, Göttingen 1998; *Eckart Klein* (ed.), Menschenrechtsschutz durch Gewohnheitsrecht, Berlin

has rapidly become more complex and, similar to the time after 1806, the demand for a systematic approach to law has increased accordingly.[48] Especially the *Bundesverfassungsgericht*[49], but also the ECJ, is often criticized in Germany as being autocratic and its jurisprudence is seen as inconsistent. Not coincidentally, the so-called jurisprudence of concepts has become a popular object for historical studies and its horrifying image is being revised.[50] Especially in German public law, a new debate on a subject-specific scientific theory and methodology has gained momentum.[51] In German methodology the focus is shifting, at least partly, back towards solutions which contribute to a rationalization of legal order and finding of justice. Hans Kelsen, one of the most disliked legal philosophers between 1918 and the 1960s[52], is being discussed with renewed intensity.[53]New system models are debated.[54] Following Robert Alexy and Ronald Dworkin[55], *principles* are in particular suggested as a technique of rationalisation.[56] Particularly in regard to private law, its longstanding systematic tradition (which was shaped by legal education) is seen as essential.[57] Not only Germany but also Europe is once again facing the problems of the 19th century. The issue of law without state[58], and along with it some old methodological debates, are reappearing.

2003; *Dirk Hanns Rost*, Rechtswirkungen gleichbleibender Staatspraxis im Verfassungsrecht, Kiel 1996; *Hauke Witthohn*, Gewohnheitsrecht als Eingriffsermächtigung, Baden-Baden 1997.

[48] Cf. merely the Principles of European Contract Law and the Principles of European Tort Law.

[49] *Karl-Heinz Ladeur*, Der Staat gegen die Gesellschaft, Tübingen 2006, p. 346 ff.; *Karl-Heinz Ladeur*, Kritik der Abwägung in der Grundrechtsdogmatik, Tübingen 2004, p. 81 ff.

[50] *Regina Ogorek*, Richterkönig oder Subsumtionsautomat?, Frankfurt am Main 1986; *Ulrich Falk*, Ein Gelehrter wie Windscheid – Erkundungen auf den Feldern der Begriffsjurisprudenz, 2nd ed., Frankfurt am Main 1999; *Haferkamp*, fn. 22 p. 434 ff.

[51] See for example: Andreas Funke and Jörn Lüdemann, Öffentliches Recht und Wissenschaftstheorie, Tübingen 2009.

[52] See *Axel-Johannes Korb*, Kelsens Kritiker, Tübingen 2010; *Ota Weinberger* and *Werner Krawietz* (eds.), Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker, Vienna 1988.

[53] Exemplarily: *Horst Dreier*, Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen, Baden-Baden 1986; *Stanley Paulson* (ed.), Hans Kelsen, Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts, Tübingen 2005.

[54] Cf. for example *Thomas Vesting*, Rechtstheorie, Munich 2007, p. 57 ff.

[55] *Robert Alexy*, Theorie der Grundrechte, Frankfurt am Main 1986, p. 88 ff.

[56] *Martin Borowski*, Grundrechte als Prinzipien, 2nd ed., Baden-Baden 2007; *Jeong Hoon Park*, Rechtsfindung im Verwaltungsrecht: Grundlegung einer Prinzipientheorie des Verwaltungsrechts als Methode der Verwaltungsdogmatik, Berlin 1999; *Jörg Pietsch*, Das Schrankenregime der EU-Grundrechtscharta. Dogmatik und Bewertung auf der Grundlage einer Prinzipientheorie der Rechte, Baden-Baden 2006.

[57] *Wolfgang Ernst*, Gelehrtes Recht – Die Jurisprudenz aus der Sicht des Zivilrechtslehrers, in: Christoph Engel und Wolfgang Schön (eds.), Das Proprium der Rechtswissenschaft, Tübingen 2007, p. 3 ff.

[58] *Nils Jansen* and *Ralf Michaels* (ed.), Beyond the State. Rethinking Private Law, Tübingen 2008.

To sum up:
I pointed out 8 key dates:

1140, the beginning of the scientification of Roman Law.

1781, the turn towards positive law and simultaneously the beginning of legal science (Jurisscientia).

1806, the beginning of national law without a state, independent from throne and altar (as scientific law).

1871, the beginning and 1889, the end of high hopes for a codification in Germany.

1900, the beginning of the major methodological debates aiming at scientifically controlled freedom from legislation.

1918, the beginning of antirational tendencies in German methodological doctrine, a time of massive evaluations and deliberations in jurisprudence. Germany transforms into a state of judge-made law.

Finally, in 1989, the transition to "redogmatization" and the attempt to increasingly bind the judge-made law to dogmatics again.

To put it succinctly: between 1918 and 1989, we Germans were closer to the Norwegian model than we appeared to be from the outside, even though nobody called for completely unconstrained judicial power. Instead, jurists claimed that the judge was able to serve as a medium between justice and "life". The goal of German legal methodology, namely to bind the judge, has accordingly remained constant throughout history. The Method and the substantive law to which the judge was supposed to be bound, on the other hand, has changed from a logical construct into something which ideally should reflect real life. Germany has remained the country of legal science.

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