CURRENT METHODOLOGICAL TENDENCIES IN GERMAN COURT DECISION-MAKING

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I - PREVAILING PRACTICE

In Germany neither the legislator nor jurisduction prescribes the judge methodical rules how to interprete statutes or other norms. The Federal Constitutional Court has merely mentioned the external limits of the judges authority of interpretation and laid down that courts have "to take into account fundamental constitutional standards and values in the process of interpreting" subconstitutional laws espacially general clauses".

The methodical practice of jurisdiction is based on a historically contingent process of legal development. I take legal development as a mutuel effecting of decision making, legal dogmatics and legal theory in temporal sequence.

Legal development is no homegeneous process in reference to the whole legal system. For reasons of differentiation each type of law (that means all types of Civil, Penal or Public Law) is subject to an evolution of its own. The dogmatical and theoretical context of a norme influences the way of interpretation.

General rules for interpretation do not exist.

1 - EVALUATIVE JURISPRUDENCE

The Civil Law Courts decision making is dominated by the so-called Wertungsjurisprudenz which I will further on refer to as "Evaluative Jurisprudence" which stems from the conceptually-orientated jurisprudence and the interest-orientated jurisprudence.

Evaluative Jurisprudence primarily sticks to the literal meaning of the statutes ; additionally it requires the reflection of the conflicting purposes of the litigants as well as the purposes behind the statutes. This purposes are to be deduced from intentions of the parliamentary legislator and from the social functions of the particular statute. The Evaluative Jurisprudence (contrary to theories of natural law)

does not postulate distinct values. It refers to evaluative activities to the evaluation of the judge.

a - Interpretation consists of the determination of the *aim* of interpretation and the application of the method. Both elements have to be regarded separately. The concept of the aim of interpretation is discussed controversely. The main conflicting positions are the Subjective and the Objective Theory. While it is the purpose of the Subjective Theory to detect/to determine the legislator's intention behind the statutory norm (for this reason it is also called Theory of Intention), the aim of the Objective Theory is to determine an objective meaning by repressing the subjective elements.

Historical intentions are only to be taken into account in cases of doubt.

b - The method of interpretation is the sytematical process of achieving the aim of interpretation.

The prevailing method within German jurisdiction orients itself by the famous canon of interpretation with has its origin in the theoretical conception of C.F.v. Savigny :
1) Semiotic Interpretation,
2) Systemic Interpretation,
3) Genetic and Historical Interpretation and
4) Teleological Interpretation.

2 - DIFFERENCES IN CONSTITUTIONAL LAW

German Constitutional Law is mainly codified in the German constitution (Grundgesetz). This means that interpretation of Constitutional Law is interpretation of a statute.

The Evaluative Jurisprudence, which follows the above mentioned classical method is not suitable to convey a satisfactory interpretation of constitutional norms. This is due to the following two facts :

1 - Constitutional norms are mainly expressed in general clauses (Article 1 Section 1 Constitution : "Die Würde des Menschen ist unantastbar". - Human dignity is untouchable).

This makes an interpretation restricted to the wording ineffective.

Unlike in Civil Law the Semiotic interpretation of constitutional norms is merely suitable to determine the external margins of a legal concept, but not its core.

2 - The second reason is the relatively short time of historical existence of Constitutional Law.

The difficulties result of the thesis mentioned at the very beginning : Consistency and effectivity of juridicial methodics depend on the development of a certain field of law. This field of law is itself influenced by legal dogmatics, legal theory and practice of decision making.

From the time of creation of Constitutional Law jurisprudence has not yet succeeded in creating such theoretically founded legal dogmatics of commun acceptance, as it did in Civil Law. This leads to a certain vagueness of the criteria of interpretation. That's why so many extra-legal standards and evaluations influence the decisions about constitutional questions.

In the context Constitutional Law is sometimes said to be susceptible to ideological attitudes.

To oppose these tendencies jurisdiction and jurisprudence developed some principles of how to interprete Constitutional Law. A very important principle, which is under constant political disussion, is the so-called juridical self-restraint. It means the limit to juridical interpretation in regard to the separation of powers if the interpretation leads a conclusion which only the legislator is competent/entitled upon. The judge is not entitled to put himself in the place of the law-making parliament.

It is evident that this principle is subject to serious political controversies, as it was the case in the decision of the Federal Constitutional Court on the subject of abortion in 1975 (Court Decision Vol 39, pp. 1 ff.) and as it is to be expected on its recent liberalisation. The same is to be said of the statutory demand of preferential recruiting of women into the public service or the decriminalisation of drug abuse.

II - APROXIMATION OF LAWS

A further modification of methodical practice, which is to be expected and had partly already begun, stems from the current tendencies of national and supranational approximation of laws.

1 - GERMAN-GERMAN APPROXIMATION

Various statutory prescriptions of the former GDR have been taken over into the Federal Legal System on grounds of the process of the German Reunification and have this "survived" the state which promoted them into validity.

How are these rules to be interpreted ?

This question is still unsolved in both jurisdiction and jurisprudence. An interpretation in conformity with former GDR-laws cannot serously be taken into account. The interpretation of "socialistic statutory norms" had to follow principles of the Eastern German Communist Party and alone by their understanding of "Marxist-Leninistic-Principles". This would not only contradict to the binding force of constitutional values for the judge, as it is construed by the Federal Constitutional Court, but it would also be incompatible with the judicial freedom of choice for methods of interpretation.

On the other hand this norms cannot be treated as if they had been proper norms of the Federal Republic forever, for it cannot be refused that wording, creation, history and the original aim of these rules are not founded on Federal German Law. On the opposite, they are based on principles of a system regarded as unjust.

A possible approach to solve this dilemma might be in a modified or even in a peculiar mode of interpretation, a method sui generis.

This may mean that in the light of the classical canon of interpretation the relation of these norms to former GDR-laws is taken into account, but only as far as it doesn't contradict the Federal Constitution.

2 - SUPRANATIONAL APPROXIMATION

New requirements towards the statutory interpretation arise from the approximation of laws of Member States of the European Community (EEC).

Particular questions according interpretation rise from the Directives enacted by the European Commission. These Directives are not valid on principle ; they oblige the national legislator to enact according norms. Futhermore the current jurisdiction of the European Court of Justice obliges national courts to interprete national norms in the light of the wording and the purpose of the Directives.

The asked-for interpretation leads to a remarkable modification of the existing practices of decision making : It is out of doubt that the national legislator has entitled EEC-Institutions to enact legal norms. It may on the other hand be doubted whether these Institutions have also been entitled to enact rules of interpretation of national norms.

These questions and questions alike are subject of current methodological controversies.