

Introduction to German Legal Methods

Introduction to German Legal Methods

by

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Comparative Legal Thinking Series

This series is designed to give students and practitioners of law in the English-speaking world an opportunity to see how their counterparts in other legal systems also learn to “think like a lawyer.” Rather than present the legal thinking of other cultures as secondary literature in the third person, this series takes representative, formative and primary works that students in other countries read during their legal education and translates these works for the English language reader. As a result, an English reader from a common law country can attain the unique inside view of the civil law student. We feel that future lawyer skills require more than passing facility with other legal systems through secondary literature, and that this approach of insider comparativism through primary texts is the only acceptable way of knowing the legal minds of one’s partners or opponents in international governance, business, and litigation, or of clients’ expectations from abroad.

The primary audiences for this book are law students and academics in any English-speaking country, particularly those studying Comparative Law, European Law, Civil Legal Systems, Jurisprudence, or Legal Philosophy. With each translation of primary teaching texts, the English-speaking law student may gain the insight of knowing the way in which his or her counterpart in practice from another country has learned the law. This sort of insight is far more valuable to gaining understanding than the mere information that one acquires either by reading only the translations of the laws themselves or English-speakers’ summaries of those laws.

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Foreword

Overstatement is a child of fashion. Methods of thought in jurisprudence thus tend either to overstate the rationality of judicial findings and, in particular, the ability of the logical instrument (following the example of conceptual jurisprudence), or to understate them (following the ideals of *Freirechtslehre*). The following treatise seeks to avoid both approaches.

Pursuant to the principles of separation of powers and legal certainty, it follows that the law sets general norms that are binding upon administration and adjudication. Accordingly, administrative and judicial bodies must determine as a matter of principle, and according to rules of interpretation, what the intent of these norms are; and, in so doing, they must abide by that intent. At the same time, however, consideration must also be given to the principle function of the law in providing just solutions to problems. Therefore, statutory interpretation (interpretation of laws) must strive for fair solutions to problems in line with what is linguistically and logically possible (§§ 3Ib, d; 10 IV). The function of the law in offering solutions capable of attaining consensus to questions of justice can also, however, come into conflict with the strict obligation of the law. That happens when the statute, as interpreted according to the rules of the art, apparently does not satisfy its function in serving justice. When, in such a case, the grounds for doing justice outweigh the grounds for separation of powers and legal certainty—which speak for the strict adherence to the wording of the statute—then supplementing or correcting the statute is necessary (§§ 3Ib; 11).

With all this, the limits of methodical effort become clear. Considerations structured according to interpretation and rules of legal development boil down in the end to nothing more than dissoluble values and areas of leeway in decision-making. In short, the interpretation and development of the law are indeed capable of being rationally structured; however they are not completely capable of being rationally determined. (§§ 3 Ib; 10 VII).

This introduction to method is based on the legal science ideas that I set forth in my *Legal Philosophy* (4th Edition, 2003). The questions dealt with there are, at the very most, only briefly discussed here; this is particularly so as it relates to the basic concept that legal development is carried out in “experimental thought,” in which a continuous attempt is made in finding just and functionally capable solutions to the problems associated with everyday human interaction—solutions which, in an ongoing fashion, are exposed to practical tests and improvements (*id.* at § 11 III).

This treatise also follows the thought, as it relates to its ideas of legitimacy, that the individual whose conscience is governed by reason is the last authority of our sense of justice. On this basis, ideas capable of majority consensus can be obtained and clarified in rational thought. (*id.* at §§ 11 II4; 18 et seq.). Additionally, “legal philosophy” is referred to when it comes to conflicts between law and equity (*id.* at §§ 6; 24) and to some extent systematic and deliberative thought on the solutions of legal problems (*id.* at §§ 38 III; 39).

The beginning student who seeks an initial, general reference pertaining to the steps in which the application of a law to a case is carried out, may begin by reading §§ 6 and 14 of this introduction to method.

I am grateful to Professor Delgado Ocando for bringing this work into the Spanish language. I am also grateful to Dr. Bernhard Schloer and Mr. Roman Kornuta for their translation into Ukrainian. I also wish to once again thank Ms. Brigitte Schulz for her help in proofreading and correction work.

Erlangen, September, 2006
Reinhold Zippelius

Translators' Note

Whenever possible in this text—the first English language translation of Professor Zippelius's treatise—we have relied on previous English translations of German materials when those translations provide the standard for the English version of the German text, or when the translation seemed the most appropriate and authoritative. In particular, when translating sections of the German Civil Code, set forth as examples in the text below, we relied on Simon Goren's translation in *The German Civil Code*, Fred B. Rothman & Co., Littleton, Co (1994). Additionally, when translating specific terms of art or other words and phrases particular to the German legal system, we consulted the excellent translations by Tony Weir of Konrad Zweigert and Hein Kötz's *Introduction to Comparative Law* and Franz Wieacker's *A History of Private Law in Europe*.

German scholarly typography uses different conventions than those of English texts. We have changed most to serve the English language reader. One will find that a few necessarily remain, however. For example, like other German authors, Professor Zippelius uses two different font sizes in the main body of his text. The smaller font is used to provide illustrations, examples or deeper background that should not be relegated to footnotes. Also, literature lists and footnotes in the German version do not provide all the information to which the English-language reader might be accustomed. In some places, we have changed the forms of the citations to look more familiar to the English-language reader, but have neither added nor removed information.

While Hein Kötz himself has remarked that Tony Weir's English translation of the *Introduction to Comparative Law* was superior to

the original German, we can only hope to have done justice to Professor Zippelius's fine work.

Pittsburgh, March, 2008

Kirk W. Junker

New York, March, 2008

P. Matthew Roy

Introduction to the English Edition

This book is a translation of Reinhold Zippelius's *Juristische Methodenlehre*, (Munich, C.H. Beck, tenth edition, 2006). The approach of the original German-language volume is to engage an audience of civil (in this case, German) law students with the processes by which one learns the law and reasons in the law, with a special emphasis on the limits and possibilities of one's practice of law based upon that reasoning and those learning methods. As a result, an English reader from a common law country can attain the same unique inside view as that of the civil law student. Thus, to echo the common claim of American legal education when it says that it teaches students to "think like a lawyer," the title of Zippelius's work in English could easily be *Thinking Like a German Lawyer*. We believe that this approach has advantages over works that digest continental-civil law education and summarize it in English. That approach gives one books that are secondary literature whereas the Zippelius text is primary literature. We feel that future lawyer skills require more than passing facility with other legal systems through secondary literature, and that this approach of insider comparativism is the only acceptable way of knowing the legal minds of one's partners in business, opponents in litigation, or clients' expectations from abroad through their primary texts. We chose this volume because of its wide influence in Germany. One can find the original in any German book shop that contains a section for law students. Zippelius has maintained a title in German scholarship that one finds among the nineteenth century works of Friedrich Karl von Savigny (*Juristische Methodenlehre*), and many

of the twentieth century German legal scholars who are included in the works cited herein.

Thus the book provides not only intellectual insight in comparative legal systems, but also equips the practitioner with knowing how the civil lawyer sitting across the table understands law. This translation gives the reader an insider's perspective, in a short format, of the same foundation as the civil lawyer himself or herself, rather than either secondary commentary, or an attempt to cover the details of a particular area of law that all-too-soon become out of date. We piloted several chapters of the English translation at Duquesne University School of Law in a Comparative Law of Europe seminar, and the students clearly recognized the opportunity to see how German students are trained, and found the text to be uniquely helpful in understanding theoretical bases for some German legal practices and ways of legal thinking. Given our goal and purpose, we have left Zippelius's examples and citations to German law in the original form, and only translated the law, rather than looking for English or American examples that might generally illustrate the points. The publisher of the original German version has this to say on the cover:

In order to understand the law, it is essential to understand the methods used in finding the law. Reinhold Zippelius gives us the required knowledge—independent of the philosophical disputes that exist in the law. His treatise seeks to reclaim the law's clarity to the greatest extent possible, while keeping in mind the fundamental task of the law: enabling just solutions to problems.

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The works here are cited only by the publisher's name and date of publication. The literature cited before individual paragraphs and sections throughout the book is cited in the same way.

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Abbreviations

AcP	Archiv für die civilistische Praxis [Archive for Civil Practice]
ARSP	Archiv für Rechts- und Sozialphilosophie [Archive for Legal and Social Philosophy]
BFH	Bundesfinanzhof [Federal Finance Court]
BGB	Bürgerliches Gesetzbuch [Civil Code]
BGH	Bundesgerichtshof [Federal Appeals Court]
BGHSt	Entscheidungen des BGH in Strafsachen [Decisions of the BGH in Criminal Matters]
BGHZ	Entscheidungen des BGH in Zivilsachen [Decision of the BGH in Civil Matters]
BVerfG	Bundesverfassungsgericht [Federal Constitutional Court]
BVerfGE	Entscheidungen des BVerfG [Decisions of the BVerfG]
DÖV	Die öffentliche Verwaltung [Public administration]
DVBl.	Deutsches Verwaltungsblatt [German Administrative Bulletin]
GG	Grundgesetz für die Bundesrepublik Deutschland [Constitution for the Federal Republic of Germany, <i>literally</i> “Basic Law for the Federal Republic of Germany”]
JZ	Juristenzeitung [Lawyers’ Newspaper]
RGSt	Entscheidungen des Reichsgerichts in Strafsachen [Decisions of the Imperial Court in Criminal Matters]
StGB	Strafgesetzbuch [Penal Code]
StPO	Strafprozessordnung [Rules of Criminal Procedure]
VerwArch	Verwaltungsarchiv [Administrative Archive]

ZRP	Zeitschrift für Rechtspolitik [Journal for Legal Politics]
ZZP	Zeitschrift für Zivilprozess [Journal for Civil Litigation]