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Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy?

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Legal Certainty: A European Alternative to American Legal Indeterminacy?

James R. Maxeiner*

Americans are resigned to a high level of legal indeterminacy. This Article shows that Europeans do not accept legal indeterminacy and instead have made legal certainty a general principle of their law. This Article uses the example of the German legal system to show how German legal methods strive to realize this general European principle. It suggests that these methods are opportunities for Americans to develop their own system to reduce legal indeterminacy and to increase legal certainty.

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Americans—at least American lawyers—are resigned to a high level of legal indeterminacy. Legal indeterminacy means that the law does not always determine the answer to a legal question. According to the strongest version of the “indeterminacy thesis,” known as “radical indeterminacy,” law is always indefinite and never certain, any decision is legally justifiable in any case, and law is nothing more than politics by another name.¹ While few American lawyers subscribe to radical indeterminacy, most probably agree with Professors Jules Coleman and Brian Leiter that “[o]nly ordinary citizens, some jurisprudes, and first-year law students have a working conception of law as determinate.”² The aphorism “we are all realists now” reveals legal indeterminacy as the working conception of American lawyers generally.³ Professor Michael C. Dorf poignantly points out the disturbing result: “[i]f the application of a rule requires deliberation about its meaning, then the rule cannot be a guide to action in the way that a commitment to the rule of law appears to require.”⁴

Legal indeterminacy may govern Americans, but it is not acceptable to Europeans. *Legal certainty*—not legal indeterminacy—is a guiding principle of European legal systems. It “requires that all law [must] be sufficiently precise to allow the person—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”⁵

1. For two articles summarizing and challenging the “radical indeterminacy” argument, see Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). See also Lawrence B. Solum, *Indeterminacy*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 488 (Dennis Patterson ed., 1996).

2. Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 579 n.54 (1993); cf. Anthony D’Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1, 7 (1983); Gordon A. Christenson, *Uncertainty in Law and Its Negation: Reflections*, 54 U. CIN. L. REV. 347, 349 (1985).

3. Stephen A. Smith, *Taking Law Seriously*, 50 U. TORONTO L.J. 241, 247 (2000) (“[A]n unstated working assumption of most legal academics is that judicial explanations of a judgment tell us little if anything about why a case was decided as it was.”); see also Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 399–400 (1999) (noting much the same for the public at large).

4. Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 877 (2003); see also Coleman & Leiter, *supra* note 2, at 582; Richard A. Epstein, *Some Doubts on Constitutional Indeterminacy*, 19 HARV. J.L. & PUB. POL’Y 363, 363 (1996).

5. Korchuganova v. Russia, No. 75039/01, Judgment, ¶ 47 (Eur. Ct. H.R. June 8, 2006), <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/> (search “HUDOC” for “Application Number 75039/01; then follow hyperlink to download).

The term legal certainty is not unknown in America.⁶ But more than seventy-five years ago it was ridiculed and now is no longer used in serious discourse about law.⁷ In the United States, legal certainty is seen to be an infantile longing. It is a childhood myth that one gets over, just as one gets over one's belief in Santa Claus or in the Wizard of Oz.⁸ Americans who know only their own legal system may assume that that is just the way legal systems are. Americans do not engage in serious scholarly study of legal certainty as Europeans do.⁹

In an earlier article, I contended that the high level of legal indeterminacy in America is a product of specific American choices of legal methods.¹⁰ It is wrong, I wrote, to generalize from American experiences and to assume that high levels of legal indeterminacy are inevitable.¹¹ Other systems can, and do, perform better. Examining how those systems implement their law might suggest ways to reduce legal indeterminacy in our law. This is the beginning of such an examination.¹²

6. Already in 1820 Justice Story used the term. Joseph Story, *On Chancery Jurisdiction*, 11 N. AM. REV. 140, 157 (1820). To be sure, more frequently the term appears in the descriptive sense of certainty of proof.

7. Jerome Frank is the person most generally credited with its demise. JEROME FRANK, *LAW AND THE MODERN MIND* 5-6 (6th prtg. Jan. 1949). See generally Julius Paul, *Jerome Frank's Attack on the "Myth" of Legal Certainty*, 36 NEB. L. REV. 547 (1957). But already Holmes identified in the logical method of law a "longing for certainty" that is "illusory." O.W. Holmes, *Supreme Judicial Court of Mass., The Path of the Law*, Address at the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 466 (1897) [hereinafter Holmes, *The Path of the Law*]; see also Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 7 (1894) [hereinafter Holmes, *Privilege*].

8. E.g., Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 63.

9. One can hardly imagine holding a conference on legal certainty in the United States such as was recently held in Great Britain. See Soc'y of Legal Scholars, *Legal Certainty Conference 15/16 September 2006*, <http://www.legalscholars.ac.uk/text/paper.cfm?no=49> (last visited Jan. 11, 2007). Equally difficult to imagine are up-and-coming young scholars basing their academic prospects on writing 350+ page "tenure" books on legal certainty. See, e.g., ANDREAS VON ARNAULD, *RECHTSSICHERHEIT: PERSPEKTIVISCHE ANNÄHERUNGEN AN EINE IDÉE DIRECTRICE DES RECHTS* (2006); Patricia Popelier, *Legal Certainty and Principles of Proper Law Making*, 2 EUR. J.L. REFORM 321, 321 (2000) (summarizing PATRICIA POPELIER, *RECHTSZEKERHEID ALS BEGINSEL VAN BEHOORLIJKE REGELGEVING* (1997)); JUHA RAITIO, *THE PRINCIPLE OF LEGAL CERTAINTY IN EC LAW* (2003).

10. James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U.L. REV. 517, 517-18, 520 (2006).

11. *Id.* at 520.

12. In other words, I am following here two of the most basic and traditional grounds for comparative law: perspective on one's own system and ideas for its improvement. See HERMANN VON MANGOLDT, *GESCHRIEBENE VERFASSUNG UND RECHTSSICHERHEIT IN DEN VEREINIGTEN STAATEN VON AMERIKA*, at v (1934) (study of legal certainty in America at the beginning of the Nazi dictatorship by a liberal professor who later was involved in drafting the postwar German constitution and author of what is still one of the leading commentaries on that constitution).

Part I of this Article shows that most or all major European legal systems have the principle of *legal certainty*. Europeans do not accept *legal indeterminacy* as a working assumption. Part II examines how that general principle serves as a guide for the implementation of law in one EU Member State, the Federal Republic of Germany. Finally, Part III makes comparative observations between legal indeterminacy in the United States and legal certainty in Europe and Germany. At the outset, it is helpful to clarify what this Article does *not* do: it does not contend that any legal system in Europe has achieved absolute certainty. It does not argue that such an achievement is either possible or desirable. It does not claim that the American legal system can or should adopt any of the specific methods used in European systems to enhance legal certainty. Its more modest goal is to dispel American resignation that present levels of indeterminacy in American law are inevitable and insurmountable.

I. LEGAL CERTAINTY IN EUROPE

A. *Legal Certainty and the Formal Rule of Law*

Legal certainty is a “general principle” of the jurisprudence of the European Court of Justice (ECJ) and a guiding idea of many, if not all, of the legal systems of the European Union’s Member States.¹³ It is similarly a general principle of the jurisprudence of the European Court of Human Rights (ECHR), whose jurisdiction includes not only all EU Member States, but almost all other states in Europe.¹⁴ The principle of legal certainty as discussed in Europe (and elsewhere¹⁵) is closely related

13. The Member States of the European Union are Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. European Union: Delegation of the Eur. Comm’n to the U.S., The Member States, <http://www.eurunion.org/states/offices.htm> (last visited Jan. 20, 2007).

14. For an example of the ECHR applying the principle of legal certainty to the internal proceedings of a non-EU state, see *Neofitta v. Russia*, No. 3311/06, Judgment (Eur. Ct. H.R. Apr. 12, 2007), <http://www.thegovernmentsays.com/cache/170977.html>. In addition to the twenty-seven Member States of the European Union, the Council of Europe has nineteen other Member States: Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Iceland, Liechtenstein, Macedonia, Moldova, Monaco, Norway, the Russian Federation, San Marino, Serbia, Switzerland, Turkey, and Ukraine. Belarus and Montenegro are candidates for membership. Canada, the Holy See, Japan, Mexico, and the United States have observer status. Council of Eur., The Council of Europe’s Member States, http://www.coe.int/T/e/com/about_coe/member_states/default.asp (last visited Jan. 11, 2007).

15. For example, the principle of legal certainty is used in Australia and Japan. See JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* 93 (1998); Kellinde Turcotte, *Why Legal Flexibility Is Not a Threat to Either the Common Law System of England and Australia or the Civil Law*

to the principles of law discussed in the United States as the formal rule of law.¹⁶ The formal rule of law is distinguished from what is called the substantive rule of law. While the latter includes social, political, or economic goals, and thus can be quite controversial, the former consists purely of legal principles that direct and limit the making and application of substantive law generally and is subject to greater consensus as to meaning.¹⁷ The essential elements of the formal rule of law are:¹⁸ laws should be validly made and publicly promulgated, of general application, stable, clear in meaning, consistent, and prospective.¹⁹ In this sense it imposes requirements on the application of law including:²⁰ law application should be impartial; provide parties who are sanctioned an opportunity to be heard; and deliver predictable, consistent decisions in individual cases.²¹

These requirements help law fulfill an ordering role. They make voluntary compliance with law possible. They mean that law can guide those subject to it. They protect persons subject to the law from the arbitrary use of the power to make and apply law. When the rule of law is safeguarded, when legal certainty is accorded, subjects can rely on the law and can foresee application of state power. They secure and safeguard personal autonomy.²²

System of France in the Twenty-first Century, 1 HANSE L. RÉV. 190, 191 (2005), available at <http://www.hanselawreview.org>.

16. László Sólyom, *Introduction to the Decisions of the Constitutional Court of the Republic of Hungary*, in LÁSZLÓ SÓLYOM & GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT 1, 6 (2000) (“[W]hen the establishment of the formal rule of law over politics was the greatest order of the day, this principle was practically equated with the principle of legal certainty.”); see also Popelier, *supra* note 9, at 325-27; RAITIO, *supra* note 9, at 127.

17. On formal theories of the rule of law generally, see BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91-101 (2004). On substantive theories of the rule of law generally, see *id.* at 102-13.

18. See, e.g., D. Neil MacCormick, *Der Rechtsstaat und die rule of law*, JURISTENZEITUNG 65, 67 (1984); Randall Peerenboom, *A Government of Laws: Democracy, Rule of Law and Administrative Law Reform in the PRC*, 12 J. CONTEMP. CHINA 45, 51 (2003).

19. These requirements are found in: LON L. FULLER, THE MORALITY OF LAW 33-94 (rev. ed. 1969); NEIL MACCORMICK, QUESTIONING SOVEREIGNTY 45 (1999); David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 318 (2003) (referring to a “minimalist” rule of law); MacCormick, *supra* note 18, at 68; Peerenboom, *supra* note 18, at 51 (contrasting a “thick” rule of law with a “thin” one); Robert S. Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1693-95 (1999).

20. FULLER, *supra* note 19, at 81-91 (referring to “congruence”).

21. Here no attempt is made at a comprehensive inventory of the requirements of a formal rule of law. For such an inventory, see Summers, *supra* note 19, at 1693-95.

22. See Otto Rudolf Kissel, *Gedanken zur Rechtssicherheit*, in ROMAN HERZOG ET AL., GESETZ UND RICHTERSPRUCH IN DER VERFASSUNGSORDNUNG DER BUNDESREPUBLIK

Protection of the rule of law in this formal sense, however, only assures the integrity and the regularity of the application of legal rules as such; it does not assure that rules serve either justice or the general welfare. A state might be governed by the rule of law, yet not be democratic;²³ it might be unjust, ineffective, or morally bankrupt.²⁴

Demands for clarity, consistency, and predictability conflict with the ability to generalize in rules. There is, as the German legal philosopher Gustav Radbruch explained, an antimony among justice, public policy, and legal certainty. "Legal certainty demands positivity, yet positive law claims to be valid without regard to its justice or expediency [i.e., public policy or purposiveness]."²⁵ But Radbruch did not see in legal certainty an absolute value. Instead, he observed that it "takes a curious middle place between the other two values . . . because it is required not only for the public benefit but also for justice."²⁶ These conflicts have long been recognized by American common lawyers as well;²⁷ they were at the heart of nineteenth century codification controversy.²⁸ They are not resolvable. Every legal system must balance these three competing components. Complete legal certainty is neither possible nor desirable.

B. *General Principles of European Union Law*

Legal certainty is a general principle of EU law.²⁹ It is one of only a handful of such principles that the ECJ has so recognized. Among the most important, other such principles are: (1) proportionality, (2) equal treatment and nondiscrimination, (3) protection of fundamental rights,

DEUTSCHLAND 15, 17 (1990); Peerenboom, *supra* note 18, at 53; Summers, *supra* note 19, at 1704-05.

23. See, e.g., WOLFGANG FIKENTSCHER, *DEMOKRATIE: EINE EINFÜHRUNG* 51 (1993).

24. See Summers, *supra* note 19, at 1707.

25. Gustav Radbruch, *Legal Philosophy*, in 4 20TH CENTURY LEGAL PHILOSOPHY SERIES: THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN pt. II, § 9, at 109 (Kurt Wilk trans., 1950). For extended discussions of this antimony, with emphasis on the tension between justice and legal certainty, see VON ARNAULD, *supra* note 9, ch. 8.

26. See Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, in SÜDDEUTSCHE JURISTENZEITUNG 105 (1946), reprinted in GUSTAV RADBRUCH, *RECHTSPHILOSOPHIE* 339, 345 (8th ed. 1973) (translated as Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law (1946)*, 26 OXFORD J. LEGAL STUD. 1, 6 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 2006) [hereinafter Radbruch, *Statutory Lawlessness*]).

27. See, e.g., Holmes, *Privilege*, *supra* note 7, at 7; Story, *supra* note 6, at 156.

28. See Maxeiner, *supra* note 10, at 530-31.

29. LEONARD JASON-LLOYD & SUKHWINDER BAJWA, *THE LEGAL FRAMEWORK OF THE EUROPEAN UNION* 5 (1997).

and (4) right to hearing and defense.³⁰ The ECJ gives the principle of legal certainty considerable importance in its case law and has referred to legal certainty in many hundreds of decisions.³¹

European jurists distinguish the general principles from specific rules much in the same way that common-law jurists following Professor Ronald Dworkin distinguish principles from rules. General principles, unlike specific rules, do not usually require one specific answer, but instead provide a direction and a justification for answers.³² General principles set out fundamental propositions of law that support specific legal norms.³³

The ECJ derives general principles from two sources: the rule of law as understood in the EU Member States and the “essential characteristics” of the European Union’s legal order itself.³⁴ French and German understandings of the rule of law, in particular the German ideal of the rule-of-law state (*Rechtsstaat*), have been particularly influential in the development of the general principles.³⁵ The English understanding of the rule of law has had less importance.³⁶ This is explained in part by the peculiar orientation of English rule-of-law thinking and in part by history:³⁷ the ECJ operated for more than twenty years before the United Kingdom and other countries joined France, Germany, Italy, and the Benelux countries in the common market.

While the ECJ looks to the laws of the Member States to find general principles, it does not limit itself to principles already accepted in every Member State. It can, and does, recognize principles that vary in whether and how they are found in the laws of the Member States.³⁸

30. ANTHONY ARNULL, *THE GENERAL PRINCIPLES OF EEC LAW AND THE INDIVIDUAL* 3-5 (1990) (not discussing fundamental rights); JASON-LLOYD & BAJWA, *supra* note 29, at 5-7; TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 6 (2d ed. 2006); JOHN A. USHER, *GENERAL PRINCIPLES OF EC LAW* 1-9 (1998) (discussing the development of general principles). As the cited references make clear, the exact delineation and enumeration of the principles is not uniform. The general principles “underlie all areas of [EU] activity, and show very clearly the extent to which there is mutual influence between [EU] law and the national legal systems of the Member States.” USHER, *supra*, at ix.

31. See USHER, *supra* note 30, at 52, 65.

32. TRIDIMAS, *supra* note 30, at 1-2; see RAITIO, *supra* note 9, at 267-304; John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*, 27 AUSTRALIAN J. LEGAL PHIL. 47, 50 (2002).

33. See TRIDIMAS, *supra* note 30, at 1.

34. *Id.* at 4.

35. See *id.* at 23-25; Popelier, *supra* note 9, at 325-26.

36. See TRIDIMAS, *supra* note 30, at 25.

37. *Id.*

38. *Id.* at 5-6.

The ECJ places the general principles on the same plane as the constitutional treaties of the European Union itself. It has relied on general principles since its earliest days in the 1950s. At first, it used the principles chiefly as aids to interpretation and for gap-filling in the new European legal order. Soon, however, it began relying on the general principles as grounds for review of EU action and for damages against the European Union. Beginning in the 1980s, the ECJ began to hold that the principles apply not only to EU laws and institutions, but also to the laws and institutions of the Member States. Because the general principles apply Union-wide, they modify law in the Member States and promote harmonization. In this way, the general principles have found acceptance, even in legal systems that did not originally include them.³⁹

The influence of the general principles is growing not only within but also outside of the European Union. The ECHR, which is not subject to the ECJ, now applies them as part of its own jurisprudence.⁴⁰ Its jurisdiction extends beyond the European Union to all members of the Council of Europe, and thus to countries such as Russia and Turkey.

C. *Legal Certainty as a General Principle of European Law*

Legal certainty as a general principle of European law requires, above all, that those subject to the law must know what the law is so that they can abide by it and plan their lives accordingly.⁴¹ It requires that: (1) laws and decisions must be made public; (2) laws and decisions must be definite and clear; (3) decisions of courts must be binding; (4) limitations on retroactivity of laws and decisions must be imposed; and (5) legitimate expectations must be protected.⁴² Court decisions limiting retroactivity and the protection of legitimate expectations have

39. This paragraph is based on chapter 1 of TRIDIMAS, *supra* note 30. Along with the ECJ, other EU institutions promote application of the general principles, including legal certainty. See, e.g., P. Nikiforos Diamandouros, European Ombudsman, The European Ombudsman Speech: Respect for Fundamental and Human Rights by the European Administration: Standards and Remedies (June 6, 2005), available at <http://www.ombudsman.europa.eu/speeches/en/2005-06-06.htm>.

40. See VON ARNAULD, *supra* note 9, ch. 7.III (noting that the ECHR did not always incorporate the general principles). Recent cases frequently refer to general principles, such as legal certainty. For the rule of general principles in the ECHR's jurisprudence, see Michele de Salvia, *La place de la notion de sécurité juridique dans la jurisprudence de la Cour européenne des droits de l'homme*, 11 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 93, 94 (2001).

41. TRIDIMAS, *supra* note 30, at 242.

42. See VON ARNAULD, *supra* note 9, ch. 7.II (giving numerous citations to decisions of the ECJ).

been particularly common.⁴³ In the development of the EU general principle of legal certainty, the corresponding German concept of legal certainty (*Rechtssicherheit*) has so overshadowed the influence of concepts from other systems that Germans ask if legal certainty is a German “phenomenon” and the French wonder if legal certainty, even in their own country, might be an import.⁴⁴

It is beyond the scope of this Article to discuss the development and details of the general principle of legal certainty in EU law. Detailed descriptions of the general principle itself are available elsewhere.⁴⁵ The purpose of this Article is to demonstrate that American resignation to the inevitability of legal indeterminacy is misplaced and that alternatives exist. To do that, it is important to show the general principle of legal certainty in operation.

While one could examine the implementation of the general principle of legal certainty in the European Union’s legal system, that system is still very much in development. Further, directly binding EU law accounts for only a small percentage of all EU law and a still smaller percentage of all law in Europe. Most EU law takes the form of “directives,” i.e., framework laws, that instruct Member States how to create their own laws. Directives are binding as to the results to be achieved, but leave to each Member State “the choice of form and methods.”⁴⁶ Form and methods are still largely national forms and methods. Thus, when it comes to implementation of law, the European Union still consists of twenty-seven legal systems. Consequently, comparative study of the implementation of legal certainty in the European Union should address legal certainty in specific Member States.

Legal certainty is an established principle in all of the founding Member States of the European Union, i.e., the Benelux countries,⁴⁷

43. See TRIDIMAS, *supra* note 30, at 252-97; USHER, *supra* note 30, at 52-71. So much so in the case of protecting legitimate expectations that it is sometimes considered a principle apart from the principle of legal certainty.

44. VON ARNAULD, *supra* note 9, ch. 7.I. *But see* USHER, *supra* note 30, at 65 (“This is a principle so general that it cannot really be ascribed to any particular national source.”).

45. See, e.g., VON ARNAULD, *supra* note 9, ch. 7.II; RAITIO, *supra* note 9.

46. Consolidated Version of the Treaty Establishing the European Community, art. 249, Dec. 24, 2002, 2002 O.J. (C 325) 132 [hereinafter EC Treaty]. See generally MARTIN GEBAUER & THOMAS WIEDMANN, ZIVILRECHT UNTER EUROPÄISCHEM EINFLUSS, DIE RICHTLINIENKONFORME AUSLEGUNG DES BGB UND ANDERER GESETZE—ERLÄUTERUNG DER WICHTIGSTEN EG-VERORDNUNGEN 97 (2005); SACHA PRECHAL, DIRECTIVES IN EC LAW (2d ed. 2005).

47. Legal certainty is known as *rechtszekerheid* in the Benelux countries. See POPELIER, *supra* note 9, at 107; M.E. STORME ET AL., VERTROUWENSBEGINSSEL EN RECHTSZEKERHEID IN BELGIË (1997); J.B.M. VRANKEN ET AL., VERTROUWENSBEGINSSEL EN RECHTSZEKERHEID IN NEDERLAND (1997); Popelier, *supra* note 9, at 321.

France,⁴⁸ Germany,⁴⁹ and Italy,⁵⁰ in all of the larger accession states, i.e., United Kingdom,⁵¹ Spain,⁵² Poland,⁵³ and probably in most or all of the smaller accession states,⁵⁴ i.e., Denmark, Sweden,⁵⁵ Finland,⁵⁶ Estonia, Latvia, Lithuania,⁵⁷ the Czech Republic,⁵⁸ Slovakia, Austria, Hungary,⁵⁹ Slovenia, Greece, Cyprus, Malta, Portugal, Ireland, Romania, and Bulgaria. It is recognized increasingly in Council of Europe states that are not members of the European Union.⁶⁰ Most states recognize the principle through court decisions and academic commentaries, but Spain explicitly guarantees legal certainty in its constitution.⁶¹

D. Implementing Legal Certainty Through Legal Methods

Recognizing a principle, of course, does not mean realizing it. This Article is concerned with what Jan Michiel Otto has nicely called “real legal certainty,” i.e., whether the general principle of legal certainty actually contributes to its realization.⁶²

48. Legal certainty is known as *sécurité juridique* in France. See VON ARNAULD, *supra* note 9, ch. 7.IV.1.

49. Legal certainty is known as *Rechtssicherheit* in Germany. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 30, 2003, 107 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 395 (416) (F.R.G.); *infra* Part II.

50. Legal certainty is known as *certezza del diritto* in Italy. See VON ARNAULD, *supra* note 9, ch. 7.IV.3; STEFANO BERTEA, *CERTEZZA DEL DIRITTO E ARGOMENTAZIONE GIURIDICA* (2002); FLAVIO LOPEZ DE OÑATE, *LA CERTEZZA DEL DIRITTO* (1968).

51. See Soc’y Legal Scholars, *supra* note 9.

52. Legal certainty is known as *la seguridad jurídica* in Spain. See VON ARNAULD, *supra* note 9, ch. 7.IV.2.

53. Legal certainty is known as *do obowiązujucego prawa* in Poland. See VON ARNAULD, *supra* note 9, ch. 7.IV.5.

54. I say probably because I have not researched the laws of these Member States, except as specifically noted.

55. Legal certainty is known as *rättssäkerhet* in Sweden. See RAITIO, *supra* note 9, at 127 (citing ALEKSANDER PECZENIK, *VAD ÄR RÄTT? OM DEMOKRATI, RÄTTSSÄKERHET, ETIK OCH JURIDISK ARGUMENTATION* (1995)).

56. Legal certainty is known as *oikeusvarmuuden periaate* in Finland. See RAITIO, *supra* note 9, at 126.

57. See Tadas Klimas & Jurate Vaiciukaite, *Incorporation of International Agreements into the Law of Lithuania*, 4 FLA. COASTAL L.J. 195, 201 n.12 (2003) (referring to VALENTINAS MIKELÉNAS ET AL., *LIETUVOS RESPUBLIKOS CIVILINIO KODEKSO: KOMENTARAS* (2001)).

58. See Slovak Restitution Decision, čj. 215/1994, Judgment (Ústavní soud České republiky (US) (Constitutional Court) June 8, 1995) (Czech Rep.), http://test.concourt.cz/angl_verze/doc/4-215-94.html.

59. See Sólyom, *supra* note 16, at 38-39.

60. See generally Council of Eur., Venice Comm’n, Presentation, http://www.venice.coe.int/site/main/presentation_E.asp (last visited Mar. 13, 2007).

61. Constitución [C.E.] art. 9, para. 3 (Spain).

62. Jan Michiel Otto, *Toward an Analytical Framework: Real Legal Certainty and Its Explanatory Factors*, in *IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA* 23, 25 (Jianfu Chen et al. eds., 2002). Otto defines real legal certainty as

As I suggested in my earlier article on legal indeterminacy, one way to determine whether a legal system delivers on its rule-of-law promises is to consider how it implements those requirements throughout its legal methods. More important than occasional appellate decisions is the everyday situation, and not just the everyday in the courthouse.⁶³ How well does law guide those subject to it?

Legal methods are the principal means by which law content is made clear and by which law application is made predictable.⁶⁴ Broadly speaking, legal methods are those devices used to apply abstract legal rules to factual situations in order to decide concrete cases.⁶⁵ Legal methods as the means to decide concrete cases include, in a broad sense, creating as well as implementing legal rules.⁶⁶ This Article considers these methods under three rubrics: *law making*, *law finding*, and *law applying*.⁶⁷ It also considers conflicts and coordination among rules within one jurisdiction.

It is beyond the scope of this Article and would exceed the competence of this author to examine the legal methods in all twenty-seven Member States. Instead, this Article considers legal certainty and legal methods in only one Member State, Germany. Consideration of other Member States in the future is desirable.

the chances that in a given situation:

- there are clear, consistent and accessible legal rules, issued or acknowledged by or on behalf of the state;
- the government institutions apply these rules consistently and themselves comply with them;
- most citizens in principle conform to such rules;
- in the course of dispute settlement, independent and impartial judges apply such rules consistently; and
- their judicial decisions are actually put into practice.

Id.

63. See Maxeiner, *supra* note 10, at 526; see also Summers, *supra* note 19, at 1691 n.2.

64. Discussions of legal methods *qua* legal methods often focus on handling precedents and construing statutes. See, e.g., Robert Alexy & Ralf Dreier, *Statutory Interpretation in the Federal Republic of Germany*, in INTERPRETING STATUTES: A COMPARATIVE STUDY 73 (D. Neil MacCormick & Robert S. Summers eds., 1991); INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997).

65. See 1 WOLFGANG FIKENTSCHER, *METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG* 13-15 (1975).

66. Cf. JAN SCHAPP, *HAUPTPROBLEME DER JURISTISCHEN METHODENLEHRE* (1983). Schapp relates statute, case, and judicial decision. Starting from the "case," he then proceeds to look at the legislative decision of the case, the judicial decision of the case, the teaching of statutory construction, and legal doctrine. *Id.*

67. See Maxeiner, *supra* note 10.

There are sound reasons to choose Germany for the first examination. Germany by population is the largest of the EU Member States. It is also an original Member State. Of all legal systems in Europe, its legal system has had the greatest influence on development of the EU general principle of legal certainty.⁶⁸ Finally, Germany is a particularly good choice for reference to the American system, because both Germany and the United States are federal states.

II. LEGAL CERTAINTY IN GERMANY

A. *Legal Certainty as a Guiding Idea of German Legal Methods*

The subtitle of Professor Andreas von Arnould's recent book analyzing legal certainty in German and European law reveals his thesis: legal certainty is an "*idée-directrice*" or "*Leitgedanke*," that is, a guiding idea or leitmotiv, to be found in every modern legal system.⁶⁹ The extent and the manner in which it is incorporated into positive law varies from legal system to legal system, but its realization is essential to the realization of individual autonomy.⁷⁰

Professor von Arnould shows that legal certainty⁷¹ is a principle of constitutional rank in Germany.⁷² He shows that legal certainty permeates German law, even though, by itself, it is discussed surprisingly little.⁷³ Legal certainty's importance derives less from providing an independent basis for reviewing a decision (its sub-principles provide that basis) and more from being an omnipresent guiding idea protecting personal autonomy. Long before individual decisions are reached, legal certainty is a consideration in *how* those decisions will be made.

68. TRIDIMAS, *supra* note 30, at 23-25.

69. VON ARNAULD, *supra* note 9, ch. 9.I-II. Maurice Hauriou used the concept of *idée-directrice* in Maurice Hauriou, *Theory of the Institution and the Foundation: A Study in Social Vitalism*, in 8 20TH CENTURY LEGAL PHILOSOPHY SERIES: THE FRENCH INSTITUTIONALISTS 93 (Albert Broderick ed., Mary Welling trans., 1970) (first published in French in 1925). According to Hauriou, the directing idea of an institution is not to be confused with its end or with its function: the directing idea is interior to the institution while end and function are exterior. *Id.* at 101.

70. VON ARNAULD, *supra* note 9, ch. 9.II, VI.

71. The German term for legal certainty is "*Rechtssicherheit*." That term is routinely translated as legal certainty, but more than does its English translation, the German term "*Sicherheit*" suggests security or reliability as well as certainty. This brings it still closer in meaning to the formal rule of law discussed in the United States. The German term includes both certainty of "orientation" and of "realization." See JAMES MAXEINER, *POLICY AND METHODS IN GERMAN AND AMERICAN ANTI-TRUST LAW: A COMPARATIVE STUDY* 10-14 (1986).

72. VON ARNAULD, *supra* note 9, ch. 9.II-III.1 (discussing also the debate as to its particular source).

73. *See id.*

German legal methods implement that guiding idea. Nearly a century ago, Ludwig Bendix noted the close connection between legal certainty and legal methods: “[t]he concept of legal certainty is a central concept of [our] inherited legal methods, in which all have grown up. . . . It is the air in which all jurists have learned to breathe.”⁷⁴

The prevailing German view of legal methods is that norms, i.e., rules, are applied syllogistically to the case at hand.⁷⁵ The factual case is subsumed under the applicable law. The goal of legal process is a legally justified decision.⁷⁶ This act of subsumption (in German, *Subsumtion*) is intended to produce a decision according to the law. Its logical method responds to the desire for certainty.⁷⁷

For generations, legal methods have been a topic of scholarly interest in Germany. The deficiencies of subsumption as a description of what *all* judges do *all* the time are well recognized. Professor Roman Herzog, who served both as President of the Federal Constitutional Court and as President of Germany, pointed out the problem:

The popular perception is that the legislature issues or rather “gives” general and abstract rules, to which the judge in deciding the individual case referred to him is not only bound, but which are so clear, unmistakable and complete, that he needs only apply or “carry them out” without any individual creativity. In a metaphor repeated thousands of times, Montesquieu opined that the judge is only the “mouthpiece of the statute” I will not further address here, what could have led a man so experienced in practice to such fundamental mistakes. . . .

The accuracy of [my] thesis is apparent to anyone who has ever only once interpreted a legal norm and applied it to a concrete case.⁷⁸

74. LUDWIG BENDIX, *DAS PROBLEM DER RECHTSSICHERHEIT: ZUR EINFÜHRUNG DES RELATIVISMUS IN DIE RECHTSANWENDUNGSLEHRE* 2 (1914) (author's translation) (“Der Begriff der Rechtssicherheit ist der Zentralbegriff der überlieferten Methode, in der alle die groß geworden sind, die diese Methode jetzt bekämpfen, er ist gleichsam die Luft, in der alle Juristen atmen gelernt haben.”).

75. See 3 FIKENTSCHER, *supra* note 65, at 638 (1976).

76. OSKAR HARTWIEG & HANS ALBRECHT HESSE, *DIE ENTSCHEIDUNG IM ZIVILPROZESS: EIN STUDIENBUCH ÜBER METHODE, RECHTSGEFÜHL UND ROUTINE IN GUTACHTEN UND URTEIL* 59 (1981) (“Das Ziel richterlicher Arbeit ist die rechtlich begründete Entscheidung.”).

77. Cf. Holmes, *The Path of the Law*, *supra* note 7, at 466 (“And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form.”).

78. Roman Herzog, *Gesetzgeber und Richter—Zwei Legalitätsquellen?*, in *GESETZ UND RICHTERSPRUCH IN DER VERFASSUNGSORDNUNG DER BUNDESREPUBLIK DEUTSCHLAND* 5, 5-6 (1990) (author's translation) (“Die landläufige Vorstellung geht meist dahin, daß der Gesetzgeber generelle und abstrakte Regeln erläßt bzw. ‚gibt‘, an die der Richter bei der Entscheidung des ihm

The ideal of perfect legal certainty is mistaken, Professor Herzog explained, because it presupposes three conditions that legislators can never meet: (1) they must foresee and judge all possible cases; (2) they must be able to classify abstractly all such cases so that none is overlooked; and (3) they must use a language so precise that it permits bringing all the cases identified in (2) within the judgment of (1).⁷⁹

Knowledge of the deficiencies of subsumption has not led to its abandonment. While numerous alternatives have been considered, it is firmly entrenched as the method actually used. Improving that method, rather than denying its existence, is the practical direction of modern German law. Improvement means clearer rules, when possible, and conscious delegation of value-oriented decisions, when not possible. When a value-oriented decision must be delegated, there should be clarity as to whether the decision is to be based on equity or on policy.⁸⁰ Subsumption is recognized not to be simple and not to explain all cases. Yet it remains the way that the vast majority of all cases are decided. As the late Professor Arthur Kaufmann observed, adherents of subsumption are like smokers: they still do it, but it is no longer as pleasant.⁸¹

The German structure of legal methods—systematic norms applied syllogistically—promotes legal certainty. It does not, cannot, and should not achieve complete legal certainty. But it serves the guidance function of the rule of law by paying attention to the needs of the subjects of the law, who, through their self-application of the law, account for 99.99% or more of all applications of law.⁸² The structure of German methods avoids fixation on decisions of appellate courts. It responds to the popular understanding of law as rules supplied by the legislature and applied neutrally by courts and administrators. This is the popular perception of law in the United States and the United Kingdom,⁸³ as well

unterbreiteten Einzelfalles nicht nur gebunden ist, sondern die so klar, unmißverständlich und vollständig sind, daß er sie ohne jede eigene Gestaltungsmöglichkeit nur anzuwenden bzw. zu, vollziehen' braucht. Der Richter sei nur der ‚Mund des Gesetzes‘, meinte Montesquieu in einer tausendmal zitierten Wendung Ich will hier nicht weiter untersuchen, was einen so in der Praxis erfahrenen Mann zu so grundlegenden Irrtümern veranlaßt haben könnte. . . . Die Richtigkeit dieser These liegt vor jedermanns Augen, der auch nur einmal eine Rechtsnorm ausgelegt und sie gar auf einen konkreten Fall angewandt hat.”)

79. *Id.* at 6.

80. *See, e.g.,* MAXEINER, *supra* note 71, at 12.

81. ARTHUR KAUFMANN, DAS VERFAHREN DER RECHTSGEWINNUNG: EINE RATIONALE ANALYSE 2-6, 29-30 (1999).

82. *See* Maxeiner, *supra* note 10, at 524.

83. *See* Patrick S. Atiyah, *Lawyers and Rules: Some Anglo-American Comparisons*, 37 Sw. L.J. 545, 548 (1983).

as in Germany and France.⁸⁴ The balance of this Article shows many instances in which German legal methods promote legal certainty.

B. Law Making

1. Norm Orientation and Legal Certainty

In Germany, the statute—*das Gesetz*—is *the* fundamental concept of all law.⁸⁵ It is *the* central category of legal thinking.⁸⁶ It is *the* primary source of German law.⁸⁷ It is *the* basis for legal certainty.⁸⁸ Among statutes, the national code has first place.⁸⁹ Statutes are at the heart of German legal education.⁹⁰

The rule of law consists of statutes. Where an American would say, we have “a rule of law, not of men,” a German would say, “statutes, not men, govern.”⁹¹ The statute is a legal norm.⁹² It is a rule of law.⁹³ The content of a statute is a “norm sentence.”⁹⁴ The norm sentence is an abstract rule of general applicability. It says that for a generally described state of facts (*Tatbestand*), a certain legal result applies.⁹⁵ The legal rule thus takes the form of a syllogism: whenever *Tatbestand* (T) is realized in a concrete factual situation, then a certain legal result (R)

84. See Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 82 (2001).

85. WALTER LEISNER, *KRISE DES GESETZES: DIE AUFLÖSUNG DES NORMENSTAATES* 13 (2001) (“Das Gesetz—Grundbegriff allen Rechts.”).

86. *Id.* at 5.

87. *Id.* at 13 (“Das Gesetz ist nicht nur ein Bereich des Rechts, es ist dessen primärer Ausdruck.”); HANS SCHNEIDER, *GESETZGEBUNG: EIN LEHRBUCH* 1 (3d ed. 2004) (“Das parlamentarisch beschlossene Gesetz bildet in der Bundesrepublik Deutschland den Hauptbestandteil des geltenden Rechts.”); cf. 1 KONRAD COSACK, *LEHRBUCH DES BÜRGERLICHEN RECHTS* 5 (7th ed. 1922).

88. Kissel, *supra* note 22, at 17 (“Gesetze sind die Basis der Rechtssicherheit.”).

89. Cf. 1 COSACK, *supra* note 87, at 7.

90. Cf. HANS-MARTIN PAWLOWSKI, *EINFÜHRUNG IN DIE JURISTISCHE METHODENLEHRE: EIN STUDIENBUCH ZU DEN GRUNDLAGENFÄCHERN RECHTSPHILOSOPHIE UND RECHTSSTOIZIOLOGIE* 55 (2d ed. 2000) (“Juristen haben Rechtswissenschaft studiert; sie befassen sich in ihrem Studium vornehmlich mit den staatlichen Gesetzen . . . Die vorherrschenden Vorstellungen gehen daher auch davon aus, daß Gegenstand der Rechtswissenschaft Gesetze seien und daß das Geschäft der rechtswissenschaftlich ausgebildeten Juristen vornehmlich in der Anwendung von Gesetzen bestehe.”).

91. LEISNER, *supra* note 85, at 5 (“Nicht Menschen herrschen—Gesetze gelten.”).

92. *EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCH [EGBGB]* [Preamble to Civil Code] Aug. 18, 1896, REICHSGESETZBLATT [RGBL] 604, as amended, art. 2 (“Gesetz im Sinne des Bürgerlichen Gesetzbuchs und dieses Gesetzes ist jede Rechtsnorm.”).

93. 1 COSACK, *supra* note 87, at 5, 20 (referring to “Rechtsregeln” and “Gesetzesregeln”).

94. 1 LUDWIG ENNECERUS & HANS CARL NIPPERDEY, *ALLGEMEINER TEIL DES BÜRGERLICH RECHTS: EIN LEHRBUCH* 146 (14th ed. 1952) (*Rechtssatz*).

95. *Id.* at 146 (*Rechtsfolge*).

applies. This is the major premise. The minor premise is that this particular factual situation (S) fulfills the requirements of *Tatbestand* (T), that is, it is a case of T. The conclusion then logically follows that for the factual situation S, legal consequence R applies. Schematically:

$$\begin{array}{ll} T \rightarrow R & \text{(For T—that is, for every case T—R applies)} \\ \underline{S = T} & \text{(S is a case of T)} \\ S \rightarrow R & \text{(For S, R applies).}^{96} \end{array}$$

The legal method of German law is based on norms and norm-thinking, that is, norm sentences are applied to particular cases.⁹⁷

Taken together, rules form an abstract legal order that governs all behavior. “The legal order is a structure of ought-norms. The idea of their message is not to describe facts, but to prescribe conduct.”⁹⁸ This objective order is contrasted with subjective rights of individual subjects. The expression “objective right” designates the legal order that applies to all. In contrast to that, one terms subjective right the right that pertains to an individual against another or to an object.⁹⁹ The legal order forms a unity.¹⁰⁰ The norms are interrelated. Taken together, they form a system.¹⁰¹ While it may be that the ideal cannot be realized, the goal is a system organized as if a single plan governed. Different laws should

96. KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 261 (5th ed. 1983).

97. 3 FIKENTSCHER, *supra* note 65, at 638. This is not so far from the popular perception of law in America. It is said that American law students come to law school with this idea in mind. It is the job of the law school to “un-learn” this mentality. See Curran, *supra* note 84, at 82 (“Perhaps the most frequently expressed complaint on the part of beginning law students in the United States is that their professors don’t tell them what the law is. This discomfort stems from their not yet having ‘un-learned’ their still civil-law mentality, imported from the domain of their prior life experience and prior intellectual training, from their still equating law with immutable governing principles that, once learned, should, they believe, serve to solve and resolve all questions of law. They enter law school committed to the concept that law school will teach them the discrete guiding principles that resolve all legal disputes. This conception of law does not tally with the common law, however. Common-law legal education in the United States thus begins a process of teaching law students to ‘un-learn’ this approach when thinking of legal issues, to reconceptualize law as a process of argumentation, as a body of cases which form a point of departure for reasoning by analogy and distinction.”).

98. REINHOLD ZIPPELIUS, *EINFÜHRUNG IN DIE JURISTISCHE METHODENLEHRE* 12 (3d ed. 1980) (author’s translation).

99. 1 FIKENTSCHER, *supra* note 65, at 1; cf. KARL ENGISCH, *EINFÜHRUNG IN DAS JURISTISCHE DENKEN* 24 (7th ed. 1977).

100. See generally KARL ENGISCH, *DIE EINHEIT DER RECHTSORDNUNG* (Wissenschaftliche Buchgesellschaft 1987) (1935).

101. See generally CLAUS-WILHELM CANARIS, *SYSTEMDENKEN UND SYSTEMBEGRIFF IN DER JURISPRUDENZ: ENTWICKELT AM BEISPIEL DES DEUTSCHEN PRIVATRECHTS* (1969).

mesh with each other—none should command contrary action. Inconsistency among norms should be avoided.¹⁰²

a. Benefits for Legal Certainty of Viewing Law as a System of Rules

Because rules are the focus of law, the German version of the rule of law can and does give priority to fulfillment of the guidance function of legal certainty.

In a rule-of-law state, statutes govern. Because one cannot know perfect justice, statutes determine what shall be treated as legally right.¹⁰³ In the era of the adoption of the national codes, the statute was thought identical to justice. The statute only need concern itself with equal treatment under the law. That the statute itself was not so much a statement of a shared conception of justice as a resolution of conflicting social interests reached by those who made it did not diminish its legitimacy as justice. Today, statutes are not thought to be identical to justice.¹⁰⁴ But because they state what shall be treated as just, or at least as legal, it is important that their content be clear and consistent and that their application be sure and predictable.¹⁰⁵

In German understanding, in a democracy, statutes are followed, or at least tolerated, only if consistent with ideas of justice. Formal adoption by parliament is not enough. Every statute, therefore, must have a minimum connection to justice. At the very least, it must not contradict basic ideas of justice.¹⁰⁶ Because statutes are binding on the executive and the judiciary, it is essential that they mirror justice in substance and application as much as reasonably possible.

Norm orientation promotes legal certainty by valuing more definite rules. From the perspective of people subject to rules, norm orientation demands relatively precise definition of the prerequisites for application of a particular rule.¹⁰⁷ In the text below, I discuss how norm orientation

102. PETER RAISCH, JURISTISCHE METHODEN: VOM ANTIKEN ROM BIS ZUR GEGENWART 148-49 (1995) (*Normspaltung*).

103. MAX RÜMELIN, DIE RECHTSSICHERHEIT 3 (1924).

104. See Josef Esser, *Gesetzesrationalität im Kodifikationszeitalter und heute*, in 100 JAHRE OBERSTE DEUTSCHE JUSTIZBEHÖRDE: VOM REICHSJUSTIZAMT ZUM BUNDESMINISTERIUM DER JUSTIZ 13, 20-21 (1977).

105. See JAN SCHAPP, METHODENLEHRE DES ZIVILRECHTS 8 (1998).

106. BVerfG Apr. 15, 1980, 54 BVerfGE 53 (67-68) (F.R.G.) (noting that statutes may not contradict basic ideas of justice); SCHNEIDER, *supra* note 87, at 37 (noting that not all statutes directly implicate justice, since some are concerned only with establishing a particular order, e.g., driving on the right).

107. For an example comparing American imprecision with German precision in setting out prerequisites, see James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic*

facilitates predictability and review of rule application through legal procedures.

System orientation promotes legal certainty by reducing conflicts among rules. When rules are made, lawmakers pay close attention to the place of the new rules in the existing system. As I discuss below, system orientation in law making facilitates law finding and contributes to rule coordination among different lawmakers.

The German approach to law making as norm-creation has additional benefits, both for practical legal certainty in more certain application of rules and, ironically, for flexibility in rule application. These benefits flow from a more precise structure of decision making. The benefits are: (1) identification of legal results, (2) identification of decision makers where formal decisions are required, (3) explicit granting of flexibility to decision makers through indefinite legal concepts, and (4) explicit grants of discretion.

1. *Identification of Legal Results.* People subject to rules are necessarily concerned with the consequences of those rules. Rules that impose fines or damages retrospectively, or even criminal sanctions, are much more threatening and disruptive for planning than rules that merely authorize prohibitions with future effect. Rules in German law closely tie specific results to specific prerequisites. They can limit policy application to prospective effect.¹⁰⁸ This permits increasing practical determinacy without necessarily reducing rule flexibility deemed desirable to deal with an uncertain future.

2. *Identification of Decision Makers.* Even in the best of circumstances, some rules are indefinite. Indefinite rules need not necessarily produce legal indeterminacy if their application is nonetheless predictable. Predictability is enhanced when the behavior of people allowed to invoke the rules and the behavior of those officials charged with applying the rules are predictable. Higher predictability is possible when *who* may invoke and who will apply the rules are known beforehand. If that information is known, even relatively indefinite rules

Age: European Alternatives, 28 YALE J. INT'L L. 109, 142, 155, 172-73, 175 (2003) [hereinafter Maxeiner, *Standard-Terms Contracting*] (comparing treatment of improper contract terms in German and American law, how American law mixes "procedural" and "substantive," while German law strictly separates the two). For a similar example in criminal law, compare James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 800-01 (1977), with James R. Maxeiner, *Constitutionalizing Forfeiture Law—The German Example*, 27 AM. J. COMP. L. 635, 660-61, 663 (1979) (examining where American law mixes "remedial" and "punitive" forfeiture of instrumentalities of crime).

108. See MAXEINER, *supra* note 71, at 58.

may take on a definiteness in application that their indefinite language would not suggest. This is yet another way in which practical determinacy can be increased with limited or no effect on the flexibility of rule application. German norms take this approach.¹⁰⁹ Legal certainty in Germany makes prior identification of deciding judges a constitutional requirement. Under Article 101(1) of the German constitution (Basic Law), no one may have his or her "statutory judge" taken away.¹¹⁰ Which judge will decide any given case must be determined beforehand on the basis of statute and other laws (e.g., an annual court plan for division of duties.)¹¹¹

3. *Indefinite Legal Concepts.* German statutes use indefinite legal concepts in so-called general clauses to take into account the many sides of life that do not lend themselves to definition in clearly defined concepts. By using general clauses, legislation need not be fragmentary, but can be gap free.¹¹² While indefinite legal concepts threaten legal certainty, different techniques are used to counter that threat. General clauses do not permit judges simply to decide what they think is "fair" or in the "general welfare."¹¹³ Instead, case groups develop in an almost common-law manner.¹¹⁴ Only where there are no prior decisions do

109. See *id.* ch. 7.

110. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Federal Constitution] art. 101(1) (F.R.G.).

111. Cf. JOACHIM HENKEL, ENGLAND: RECHTSSTAAT OHNE „GESETZLICHEN RICHTER“ (1971). Predictability of decision, as such, was not the origin of the requirement. Rather, the purpose was to prevent the government from creating a special tribunal or engaging a friendly one to decide a matter.

112. ENGISCH, *supra* note 99, at 124. German indefinite legal concepts are best known in the United States through two general clauses of the German Civil Code, sections 138 and 242, which have become part of American law through adoption in the Uniform Commercial Code (U.C.C.). BÜRGERLICHES GESETZBUCH [BGB] [Civil Code] Aug. 18, 1896, RGB/ 195, as amended, §§ 138, 242. Section 138 prohibits transactions that are against "good morals" (*guten Sitten*), *id.* § 138; its U.C.C. counterpart is section 2-302, which permits nonenforcement of "unconscionable" contracts or terms. U.C.C. § 2-302 (2004). Section 242 requires performance of contracts in "good faith," BGB § 242; its U.C.C. counterpart is section 1-304 (formerly section 1-203). U.C.C. § 1-304. For the origin of section 2-302, see Maxeiner, *Standard-Terms Contracting*, *supra* note 107, at 116-17. For the origin of section 1-304, see E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 TUL. J. INT'L & COMP. L. 47, 52 (1994).

113. See Franz Wieacker, *Zur rechtstheoretischen Präzisierung des § 242 BGB*, in 2 AUSGEWÄHLTE SCHRIFTEN 195, 203 (1983).

114. See, e.g., PALANDT, BÜRGERLICHES GESETZBUCH §§ 138, 242 (41st ed. 1982); 1 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH: ALLGEMEINER TEIL (§§ 1-240), AGB-GESETZ § 138 (Franz Jürgen Säcker ed., 3d ed. 1993) [hereinafter 1 MÜNCHENER KOMMENTAR].

judges have some freedom in reaching new solutions.¹¹⁵ Sometimes the legislature notes the development of these case groups and enacts them into law or introduces its own groups of cases.¹¹⁶ Some indefinite clauses are merely descriptive, that is, they relate to objects and events in the physical world, such as darkness; they are empirical. Other general clauses are normative and require a valuing, such as what constitutes “good faith” or “good morals.” Whether and just how these indefinite concepts are binding is controversial. I have discussed that question elsewhere.¹¹⁷

4. *Discretion.* Sometimes statutes deliberately do not bind decision makers to one correct decision, but leave decision makers discretion to reach their own decisions based on their own responsibility and independent choice. It is used to permit a purposeful and just decision in the individual case.¹¹⁸ What is probably the prevailing view in Germany holds that discretion is appropriate only on the legal result, but not on the *Tatbestand* side of the legal norm. That is, discretion in choice of action is appropriate, but not in determination of the prerequisites for action. This distinction marks a difference between indefinite legal concepts and discretion: the former leaves room for judgment in the prerequisites of action, while the latter provides for freedom of action.¹¹⁹ I have discussed elsewhere the different types of discretion and their control.¹²⁰

b. Indefinite Concepts Contrasted with Discretion

While German statutes use both indefinite concepts and grants of discretion to deal with future events that cannot be fully foreseen, they use them differently. While they may freely grant discretion to administrative authorities to make policy decisions, they eschew giving

115. Wieacker, *supra* note 113, at 203. Wieacker also notes that section 242 looks to issues of individual justice and not to general welfare (policy). *Id.* at 196; *cf.* MAXEINER, *supra* note 71, at 122.

116. *See* Maxeiner, *Standard-Terms*, *supra* note 107, at 141-56, 177-82.

117. *See* MAXEINER, *supra* note 71, at 12.

118. *See* ALLGEMEINES VERWALTUNGSRECHT § 12 II 2 (Hans-Uwe Erichsen & Wolfgang Martens eds., 6th ed. 1984).

119. *See id.*; 1 HANS J. WOLFF & OTTO BACHOF, VERWALTUNGSRECHT: EIN STUDIENBUCH § 31 II (9th ed. 1974). Bachof uses this distinction to mark the division between room for judgment (*Beurteilungsspielraum*) and discretion. *See* Otto Bachof, *Beurteilungsspielraum, Ermessen und Unbestimmter Rechtsbegriff*, 1955 JURISTENZEITUNG 97, *reprinted in* OTTO BACHOF, WEGE ZUM RECHTSSTAAT 157 (1979). *See* also the criticisms of ENGISCH, *supra* note 99, at 119 (“It is often only a question of legislative technique, whether discretion concepts are built into the *Tatbestand* or the legal consequence.” (author’s translation)); and of HANS-JOACHIM KOCH, UNBESTIMMTE RECHTSBEGRIFFE UND ERMESSENERMÄCHTIGUNGEN IM VERWALTUNGSRECHT 172-73 (1979).

120. *See* MAXEINER, *supra* note 71, at 41-44, 86-89.

discretion to judges for such decisions. They do assign judges decisions that require them to make value judgments in individual cases. Administrative authorities may make policy-oriented decisions upon their own responsibility; they may choose on the basis of current and local interests among several possibilities. This freedom is acceptable because administrative authorities are politically accountable. Where statutes do not bind administrative authorities, they are nonetheless obligated to exercise their freedom of choice in the public interest. Relaxation of binding to statute for judicial decisions, on the other hand, is preferably limited to situations where necessary to permit judges to do justice in individual cases. Judges are not politically accountable; they are guaranteed independence to permit them to do justice.¹²¹ The German legal system uses rules in this way to depoliticize certain decisions. It attempts to separate legal questions from political ones. A legal question should be subject to resolution without having to value public interest, because the valuing of public interest is a peculiarly political task.¹²²

2. Process of Law Making and Legal Certainty

In Germany, special attention is given to assure the realization of legal certainty in the statutes that are adopted. Central to the creation of such rules is the rationality of their creation, i.e., their wording, their content, and the procedure of their drafting.¹²³ The drafting of legislation is closely controlled. Article 76(1) of the Basic Law provides that the federal government, the upper house as an institution (*Bundesrat*), and members of the lower house (*Bundestag*) may introduce bills in the federal parliament.¹²⁴ A commonplace in the United States—that a third party drafts a law and finds a lone legislator to introduce it in the legislature—cannot happen in Germany. Under the long-standing rules of the federal parliament, introduction of a bill requires the support of at least five percent of the legislators (presently thirty-one members).¹²⁵ The minimum number corresponds to the threshold for a political party to

121. WOLFF & BACHOF, *supra* note 119, §§ 19 II, 28-30; *see also* 1 ERNST FORSTHOFF, LEHRBUCH DES VERWALTUNGSRECHTS 119 (10th ed. 1973); Eduard Picker, *Richterrecht und Richterrechtsetzung*, 39 JURISTENZEITUNG 153 (1984).

122. *See generally* MAXEINER, *supra* note 71, at 122 (noting, *inter alia*, that generally in German antitrust law, questions relating to judgments of what is "competition" and what is an appropriate level of competition are decided by administrative authorities that are politically accountable, and not by the ordinary courts, which are not subject to political control).

123. Karl-Peter Sommermann, *Legislative Process and Rationality*, in LAW REFORM AND LAW DRAFTING 35 (2d ed. 1994); *cf.* Esser, *supra* note 104, at 20-21.

124. GG art. 76(1).

125. German Bundestag, Adoption of Legislation, http://www.bundestag.de/htdocs_e/parliament/function/legislation/passage.html (last visited Apr. 15, 2007).

have a place in the legislature. In fact, however, most bills (about two-thirds) are introduced by the federal government itself.¹²⁶

The *Bundesministerium der Justiz* (Federal Ministry of Justice) has an important role in all federal government legislative drafting. Indeed, it is predominantly an institution for drafting legislation. It has very limited administrative responsibilities.¹²⁷ Demonstrative of this is the fact that the Federal Ministry of Justice has only about 722 employees.¹²⁸ The Bavarian State Ministry of Justice, in contrast, has nearly 19,000 employees, and it is the ministry for only one of sixteen states.¹²⁹

In practice, drafts of legislation come from the ministries rather than from groups of legislators because the ministries have the necessary expertise.¹³⁰ Government draft legislation emerges out of a process of drafting and vetting that precedes the introduction of bills in the parliament. The detailed procedures are set out in the *Gemeinsame Geschäftsordnung der Bundesministerien* (Common Ministerial Rules of Procedure).¹³¹ The ministerial officials charged with actual drafting should already have knowledge of the subject area of the bill and of relevant existing legislation.¹³² The Common Ministerial Rules of Procedure tell them how to go about presenting a legislative proposal to the government cabinet for possible submission to parliament.¹³³ A legislative proposal consists of a draft statute, a formal justification for the statute, and a cover sheet overview.¹³⁴ The justification is to set out, among other matters, the goals and reasons for the draft statute, the particular facts and the research on which the draft rests, what

126. RUPERT SCHICK & HERMANN J. SCHREINER, *DIE GESETZGEBUNG DES BUNDES* (17th ed. 2003), available at <http://www.webarchiv/bundestag.de/archive/2005/0113/bic/gesge/01gesgeb1.html>; accord SCHNEIDER, *supra* note 87, at 61-62; Sommermann, *supra* note 123, at 38-39.

127. Its responsibilities include the administration of the Federal Constitutional Court, the other relatively few federal courts, and the relatively small federal prosecutor's office. See FEDERAL MINISTRY OF JUSTICE, *TASKS AND ORGANISATION OF THE FEDERAL MINISTRY OF JUSTICE* 3-4 (2006), available at http://www.bmj.bund.de/files/-/1335/infobroschure_englisch.pdf.

128. *Id.* at 12.

129. Justiz in Bayern, *Das Bayerische Staatsministerium der Justiz*, <http://www.justiz.bayern.de/ministerium/ministerium> (last visited Mar. 13, 2007). Its legislative duties are few, but its administrative duties are many. It has about 14,000 employees in the courts and prosecution, 4500 in prison administration, and 175 in central administration. *Id.*

130. SCHNEIDER, *supra* note 87, at 62.

131. GEMEINSAME GESCHÄFTSORDNUNG DER BUNDESMINISTERIEN (Bundesministerium des Innern ed., 2006), available at http://www.staat-modern.de/Anlage/original_1096884/Gemeinsame-Geschaeftsordnung-der-Bundesministerium-GGO.pdf [hereinafter GGO] (translated in part in the then-applicable version as *Excerpt of the Common Ministerial Rules of Procedure, Special Part (GGOI)*, in *LAW REFORM AND LAW DRAFTING*, *supra* note 123, at 85).

132. SCHNEIDER, *supra* note 87, at 65.

133. *Id.*

134. *Id.*

alternatives exist, and what the consequences and costs would be if the draft were adopted.¹³⁵

The Common Ministerial Rules of Procedure give no indication as to when it is appropriate to propose new legislation. Equally consistent with the Common Ministerial Rules of Procedure are those initiatives directed at reforming existing law and those aimed at creating new law. The Common Ministerial Rules of Procedure have relatively little to say about work preliminary to drafting. Before beginning work, the office of the head of government, i.e., the chancellor's office, is to be informed of the preparation of the proposal. The chancellor's office is to be regularly informed of the proposal's progress.¹³⁶ If interests of state or local governments are affected by the proposal, they are to be informed of the anticipated proposal, and their views are to be obtained before beginning work.¹³⁷ In the event that the proposal is opposed by one or more other ministries, extensive preliminary work is not to begin without the approval of the cabinet.¹³⁸ Comparative law studies commonly precede major legislation.¹³⁹

Early in the drafting process and well before a final draft proposal is submitted to the cabinet for consideration, the drafting ministry is to obtain the participation of all affected ministries. It is to submit the draft¹⁴⁰ to the Federal Ministry of Justice and to the Federal Ministry of the Interior so that they can review the draft for compliance with the Basic Law.¹⁴¹ The Federal Ministry of Justice is also to conduct a general review of the draft both for its legal language and for its place in the legal system.¹⁴² The draft proposal is then circulated to affected state and local governments (the latter through their associations), and the chancellor's office is informed of their participation.¹⁴³ As appropriate, the draft also may be circulated to experts and associations for comment, in which case the legislature is to be notified of the circulation.¹⁴⁴ In some instances, for

135. GGO §§ 43-44.

136. *Id.* § 40.

137. *Id.* § 41. Local governments are informed and are given the opportunity to express their views through their national associations. *Id.*

138. *Id.* § 45(5).

139. RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW: CASES—TEXT-MATERIALS* 14-15 (6th ed. 1998).

140. Drafts must also comply with requirements of the Federal Ministry of the Interior and the Federal Ministry of Justice set out in their respective handbooks. GGO § 42(3)-(4). With respect to the latter, see *infra* text accompanying notes 156-157.

141. GGO § 45.

142. *Id.* § 46(1) ("Zur Prüfung in rechtssystematischer und rechtsförmlicher Hinsicht").

143. *Id.* § 47.

144. *Id.* § 48(2).

example labor legislation, statutes require consultation with affected groups.¹⁴⁵

Thus, by the time a proposal reaches the cabinet, it has already been the subject of much review. If the cabinet adopts the proposal, it then submits it as a "government draft" to both houses of the legislature. The procedures before the *Bundesrat* need not be discussed here. Before the *Bundestag*, the draft statute, now a bill in American terminology, must go through three readings. Upon introduction, the bill is read and then referred to a particular committee. The committee may, but need not, hold its meetings in public and may, but need not, invite affected parties to testify. The committee then makes its recommendations to adopt or reject the bill as written or to adopt it with amendments that it recommends. It then returns the bill to the floor for a second reading. Usually, the *Bundestag* follows the recommendations of the committee, because the makeup of the committee mirrors the legislature itself. On the floor, individual legislators may propose amendments in writing. To have a reasonable chance of success, they must call for specific changes in words, sentences, paragraphs, or other particulars of the bill. If no changes are made to the bill, the *Bundestag* may proceed immediately to the third and final reading. If there are changes, the process is repeated with the changes, the bill is read a third time, and then voted up or down. Amendments proposed at the third reading serve largely to make political points.¹⁴⁶

The result of this procedure is that the parliament usually makes only a few changes in the text of the government drafts.¹⁴⁷ Because the government drafts are usually well-drafted technically, legal certainty should be enhanced. Last-minute compromises that produce incomprehensible statutory language¹⁴⁸ presumably occur infrequently in Germany. But there is an obvious cost in a diminution of democratic participation in law making. In defense of the German approach, it is argued that the mere possibility that the legislature, above all through its committees, will engage in a searching examination of the bill is sufficient to assure high quality and moderate drafting.¹⁴⁹ That may be,

145. SCHNEIDER, *supra* note 87, at 70-72.

146. This paragraph is based on *id.* at 80-89.

147. *Id.* at 93 ("Das Parlament ist Gesetzgelber, aber nicht Gesetzesmacher [i.e., the parliament is the giver of statutes, but not the maker of statutes].").

148. Cf. Peter M. Goodloe, *Simplification—A Federal Legislative Perspective*, 105 DICK. L. REV. 247, 249 (2001).

149. Thomas Ellwein, *Gesetzgebung, Regierung, Verwaltung*, in HANDBUCH DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 1093, 1105 (Ernst Benda et al. eds., 1983); SCHNEIDER, *supra* note 87, at 93.

but the procedure tends to relegate participation in creating legislation to the predraft stage.

According to a recent report commissioned by the European Union, "better statutes" are an integral part of the European Union's "goal of becoming the most competitive and dynamic knowledge-based economy in the world."¹⁵⁰ The report, after setting out common principles for legislation,¹⁵¹ details recommended practices in two principal parts. One part consists of recommended practices for legislation generally;¹⁵² another part consists of matters peculiar to the European Union.¹⁵³ The report is another sign of the increase in Europe and Germany in recent years in the craft of drafting statutes. Since about 1980, there has been a relatively extensive scholarship on the science of statutory drafting (*Gesetzgebungslehre*).¹⁵⁴ Indeed, a society and journal devoted to the subject are now each about two decades old.¹⁵⁵ The practice of drafting is aided by a 240 page guide issued by the Federal Ministry of Justice that is now in its second edition.¹⁵⁶ Government drafts of legislation are

150. DER MANDELKERN-BERICHT AUF DEM WEG ZU BESSEREN GESETZEN: ABSCHLUSSBERICHT 7 (2002), available at http://www.staat-modern.de/Anlage/original_548848/Moderner-Staat-Moderne-Verwaltung-Der-Mandelkern-Bericht-Auf-dem-Weg-zu-besseren-Gesetzen.pdf (translated as MANDELKERN GROUP ON BETTER REGULATION: FINAL REPORT 9 (2002), available at <http://www.nnr.se/pdf/Mandelkern.pdf>). It is suggestive of a different understanding of statutes in Germany than in English-speaking countries that, where the English version of the report refers to regulation, the German version speaks of statutes (*Gesetze*) or legislating (*Rechtssetzung*). See *id.*

151. MANDELKERN GROUP ON BETTER REGULATION: FINAL REPORT, *supra* note 150, at 9-10 (listing the common principles for legislation: necessity, proportionality, subsidiarity, transparency, accountability, accessibility, and simplicity).

152. *Id.* at 11-53.

153. *Id.* at 55-71.

154. See, e.g., GESETZGEBUNG: KRITISCHE ÜBERLEGUNGEN ZUR GESETZGEBUNGSLEHRE UND GESETZGEBUNGSTECHNIK (Günther Winkler & Bernd Schilcher eds., 1981) [hereinafter GESETZGEBUNG]; GESETZGEBUNGSLEHRE-GRUNDLAGEN-ZUGÄNGE-ANWENDUNG (Waldemar Schreckenberger ed., 1986); GESETZGEBUNG UND RECHTSKULTUR: INTERNATIONALES SYMPOSION SALZBURG 1986 (Heinz Schäffer ed., 1987); METHODIK DER GESETZGEBUNG: LEGISTISCHE RICHTLINIEN IN THEORIE UND PRAXIS (Theo Öhlinger ed., 1982) [hereinafter METHODIK DER GESETZGEBUNG (Öhlinger)]; PETER NOLL, GESETZGEBUNGSLEHRE (1973); SCHNEIDER, *supra* note 87; STUDIEN ZU EINER THEORIE DER GESETZGEBUNG 1982 (Harald Kindermann ed., 1982); THEORIE UND METHODEN DER GESETZGEBUNG: KOLLOQUIUM DER DEUTSCHEN UND SCHWEDISCHEN GESELLSCHAFTEN FÜR RECHTSVERGLEICHUNG IN FREIBURG VOM 28-31 MÄRZ 1982 (1983).

155. See GUNNAR FOLKE SCHUPPERT, GUTE GESETZGEBUNG: BAUSTEINE EINER KRITISCHEN GESETZGEBUNGSLEHRE (special issue of 18 ZEITSCHRIFT FÜR GESETZGEBUNG (2004)). *Zeitschrift für Gesetzgebung* has been published since 1985. See also ZUM GEGENWÄRTIGEN STAND DER GESETZGEBUNG IN DER BUNDESREPUBLIK DEUTSCHLAND: ZEHN JAHRE "DEUTSCHE GESELLSCHAFT FÜR GESETZGEBUNG"—ZEHN JAHRE ZEITSCHRIFT FÜR GESETZGEBUNG (Ulrich Karpen ed., 1998).

156. BUNDESMINISTERIUM DER JUSTIZ, HANDBUCH DER RECHTSFÖRMELICHKEIT (2d ed. 1999). For excerpts of similar directions used in Austria and Switzerland, see GESETZGEBUNG,

required to follow it.¹⁵⁷ Of course, creating clear and authoritative rules is only the first step toward applying rules to concrete cases and giving subjects guidance in law. The next Subpart addresses law finding.

C. Law Finding

Law finding (*Rechtsfindung*) in Germany includes statutory interpretation and, where there is no applicable statute, law creation through judicial decision (*Rechtsschöpfung* or *Rechtsfortbildung*).¹⁵⁸

1. Law Finding Generally

Finding the applicable rule is ordinarily not a major issue in Germany. This is so notwithstanding an “inflation of statutes” and an “unending flood of norms.”¹⁵⁹ It is so notwithstanding an increase in publication of court decisions through specialty periodicals and Internet distribution. It is so notwithstanding increased integration of the European Union and the resulting EU regulations and directives that affect German law. The problems seen with the flood of rules are significant challenges to legal certainty. Critics complain of reduced continuity and increased complexity of statutes. They see instability reducing the stature of statutes among the citizenry generally and contributing to a transfer of responsibility for the law to specialists.¹⁶⁰ But finding rules remains manageable. Explanations include: minimal federal system conflicts, national codes and systematic legislation, and judicial responsibility for law finding.

a. Minimal Federal System Rule Conflicts

As discussed below, there are relatively few instances in which laws of different jurisdictions apply and conflict. Legislation seeks to resolve issues of conflict before enactment and enforcement. Usually, either

supra note 154, at 223-84. For a discussion of the role of such directives in legislation, see METHODIK DER GESETZGEBUNG (Öhlinger), *supra* note 154.

157. GGO § 42(4).

158. Fikentscher, in his six-section description of the prevailing approach to legal methods in Germany, devotes a section to each (“*Auslegung der Rechtssätze*” and “*Rechtsfortbildung*”). 3 FIKENTSCHER, *supra* note 65, at 657, 701 (1976). Larenz, in the six chapters of his systematic part, likewise allocates a chapter to each (“*Die Auslegung der Gesetze*” and “*Methoden richterlichen Rechtsfortbildung*”). LARENZ, *supra* note 96, chs. 4-5.

159. LEISNER, *supra* note 85, at 124-25 (speaking of “*Gesetzesinflation*” and “*Unendliche Normflut*”).

160. See, e.g., *id.* at 123-24 (referring to “*Unbeständigkeit*” leading to “*Verlust der Gesetzeskraft*”).

federal law or the law of a particular state applies. This is true not only for laws issued by Germany's federal and state governments, it is also true as between German and EU law. Most EU law takes the form of directives, which are effective only as implemented through national legislation.¹⁶¹

National codes cover civil law (obligations, property, family and inheritance law), commercial law, criminal law, criminal procedure, and civil procedure. These codes are very stable. They play the preeminent roles in the areas they govern. Even where they do not specifically apply, they provide the bedrock on which further analysis rests.¹⁶² They are supplemented by other important national statutes, e.g., those dealing with antitrust. Standards of legislation remain relatively high. The rules fit together, if not seamlessly, at least without major inconsistencies.

This system is enhanced by a system of legal publishing that increases content clarity and application predictability. Every code and most major statutes have systematic, privately made commentaries.¹⁶³ These commentaries set out the statutory provisions. But unlike the annotated codes of the United States, which merely provide additional materials for lawyers to review, the German code commentaries do much more than that: they systematically discuss the statutory provisions, their purposes, and their implications. They review interpretative questions that have arisen or may arise under statutes. They report how courts and scholars have addressed those issues. Some commentaries are written by the drafters of the laws themselves.¹⁶⁴ Some have continued for more than a century and are regularly updated by scholars and practitioners in the field.¹⁶⁵ Some enjoy enormous authority and can be readily relied on for their interpretation of the law. Huge, multivolume "large" commentaries treat just about every issue that might arise. Some one-volume commentaries consist of more than 3000 oversized octavo pages.¹⁶⁶ Almost all lawyers own or have ready access to these "short"

161. EC Treaty, *supra* note 46, art. 249.

162. Cf. George P. Fletcher, *Three Nearly Sacred Books in Western Law*, 54 *ARK. L. REV.* 1, 12 (2001) (describing the French *Code civil* as the "framework and the starting off point" for dealing with issues of private law).

163. See, e.g., PETER ULMER ET AL., *AGB-GESETZ: KOMMENTAR ZUM GESETZ ZUR REGELUNG DES RECHTS DER ALLGEMEINEN GESCHÄFTSBEDINGUNGEN* (9th ed. 2001).

164. See, e.g., *id.*

165. See, e.g., J. VON STAUDINGERS, *KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN—100 JAHRE BGB—100 JAHRE STAUDINGER—BEITRÄGE ZUM SYMPOSIUM VOM 18.-20. JUNI 1998 IN MÜNCHEN* (Micheael Martinek & Patrick L. Sellier eds., 1999).

166. The leading "short" commentary to the German Civil Code, known as the "*Palandt*" after its first editor—now long deceased—is in its sixty-sixth edition (2006). It has 2901 pages of

commentaries. Within a few minutes, generalist lawyers can provide reasonably reliable answers to a wide range of legal questions outside their fields. Common-law observers have long been amazed by this phenomenon.

b. *Iura novit curia*

Another reason that finding the law is considerably easier in Germany than in the United States is because in German litigation, judges—not lawyers—have the responsibility for finding the law. The principle *iura novit curia* applies. Lawyers present the facts to judges; judges apply the law (*da mihi factum, dabo tibi jus*). To facilitate judges' familiarity with the law, they specialize. Not only are there separate civil, criminal, administrative, labor, tax, patent, and social courts, within those courts there is also a division of labor. Cases under one type of statute are assigned to particular panels of judges, while those under another are assigned to different panels. As a result, judges are likely to be familiar with the legal issues applicable to a case.

Because courts are responsible for knowing the law, lawyers who bring cases need not be experts in the field to evaluate cases¹⁶⁷—they need know just enough to confirm that their clients have reasonable cases. Lawyers can be bystanders while courts consider what law to apply. Courts develop the legal theories on which their judgments are based. Normally these are straightforward. Where there is more than one possibly applicable claim, courts are required to consider the facts under all potentially applicable statutes. The constitutional right to be heard guaranteed by Article 103(1) of the Basic Law precludes courts from resting their decisions on law of which they have not made parties aware. If a party disputes the law to be applied, or proposes application

small type and uses a set of abbreviated words all its own. It weighs in at 2565 grams, or close to six pounds. It is, however, outweighed by its code of civil procedure counterpart, the "*Baumbach*," in its sixty-fifth edition (2006) at 3030 pages and 2742 grams. See <http://www.buchhandel.de> (search "*Palandt*" and "*Baumbach Zivilprozessordnung*") (last visited Jan. 26, 2007).

167. F.A. Mann, *Fusion of the Legal Professions?*, 93 L.Q. REV. 367, 370 (1977). Lawyers themselves must still know the law. The costs of research into what the law is cannot be recovered from a losing party. No. 12 W 113/02, 22 O 589/97, Judgment (Oberlandesgericht Frankfurt am Main [OLG] [Court of Appeals Frankfurt] Aug. 5, 2002) (F.R.G.), <http://web2.justiz.hessen.de/migration/rechtsp.nsf/bynoteid/C3C61B4837ED3F88C1256D7F003C9D31?Opendocument>.

of other laws, a court must in its decision of the case deal with the arguments raised by the parties.¹⁶⁸

Application of the doctrine of *iura novit curia* increases predictability of law application. A party confronted with potential litigation can have a greater level of confidence that the law that the party believes applies actually will be applied. On the other hand, judges who are specialized by statute, who are considered bound by statute, and whose promotion depends upon confidence in their judging ability, are not quick to accept counsel's suggestions to innovate in finding legal claims.

2. Statutory Interpretation and Binding to Statute

A lawyer in Germany is apt to think first of statutes as the legal limit on judicial or administrative decision. Binding the state authority to statutes is a central element in the German ideal of the rule-of-law state. It is explicitly adopted in Article 20 of the Basic Law: the executive and the administration of justice are bound to "statute and justice."¹⁶⁹ Its practical implementation is a central task of modern German theory of legal method.

The ideal of the rule-of-law state is usually traced to the reaction to the so-called "cabinet justice" of the absolutist monarchs of the eighteenth century. The Enlightenment brought demands for a fully clear and predictable legal system, which would eliminate all arbitrariness (or cabinet interference) from the application of law. Statutory interpretation seemed to threaten this ideal. Strict binding of the judge to the statute became the goal, while elimination of all judicial creativity became a sought-after by-product. The Prussian General Law of 1794 (*Allgemeines Landrecht* (ALR)) used over 19,000 paragraphs to try to answer every conceivable contingency.¹⁷⁰ Its judges were to apply the law to the facts mechanically—to subsume the individual case under the appropriate statutory provision and to serve as the "mouthpiece" or as the "slave" of

168. BVerfG, Oct. 14, 1998, docket number 2 BvR 205/91, para. 8, available at <http://www.bverfg.de/>; cf. WOLFGANG GRUNSKY, GRUNDLAGEN DES VERFAHRENSRECHTS: EINE VERGLEICHENDE DARSTELLUNG VON ZPO, FGG, VWGO, FGO, SGG 233-34 (2d ed. 1974).

169. GG art. 20 (author's translation).

170. Reinhard Zimmermann, *Statuta Sunt Stricte Interpretanda? Statutes and the Common Law: A Continental Perspective*, 56 CAMBRIDGE L.J. 315, 325 (1997) (characterizing the ALR as "the last great attempt to enact a piece of legislation designed to provide an exhaustive regulation, down to the most intimate detail and the finest differentiation").

the statute.¹⁷¹ The ALR forbade judges to interpret it and directed them to refer questions of interpretation to a special legislative commission.¹⁷²

The ALR failed in its attempt to deny all judicial creativity;¹⁷³ Prussian judges were soon released to interpret the law. The modern history of German theory of legal methods begins here¹⁷⁴ and often seems to be a struggle between effectuating a binding of judges to statutes and avoiding the negative effects of excessive binding. By the nineteenth century, the concept of strict binding of judges to statutes was already shaken and given up as *the* ideal.¹⁷⁵ Germany went from a prohibition of interpretation to a prescription for interpretation.¹⁷⁶

Much of the theory of German statutory construction is similar to American theory.¹⁷⁷ As in the United States, there are canons of interpretation. As in the United States, there are different theories of interpretation, e.g., objective theories of various types and subjective theories of different ilk.¹⁷⁸ In Germany, the prevailing view is that, while the subjective will of the legislature is to be taken into account, the

171. See WILHELM EBEL, *GESCHICHTE DER GESETZGEBUNG IN DEUTSCHLAND* 78-79 (1958); ENGISCH, *supra* note 99, at 106-07; O.A. Germann, *Rechtssicherheit*, in O.A. GERMANN, *METHODISCHE GRUNDFRAGEN* 54, 57 (1946); O.A. GERMANN, *PROBLEME UND METHODEN DER RECHTSFINDUNG* 281 (1965) [hereinafter GERMANN, *PROBLEME*]; REGINA OGOREK, *RICHTERKÖNIG ODER SUBSUMPTIONSAUTOMAT? ZUR JUSTIZTHEORIE IM 19. JAHRHUNDERT* (1986). An analogous conception of the judge's role appeared in the United States in the late nineteenth century and was sharply attacked in the twentieth century as "mechanical jurisprudence," "the phonograph theory," or as formalism. See MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER* 112-14 (1933); ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 137-39 (1982).

172. *ALLGEMEINES LANDRECHT FÜR DIE PREUßISCHEN STAATEN VON 1794*, at 58 (Hans Hattenhauer ed., 2d ed. 1994) [hereinafter ALR] (Einleitung § 46: "Bey Entscheidungen streitiger Rechtsfälle darf der Richter den Gesetzen keinen andern Sinn beylegen, als welcher aus den Worten, und dem Zusammenhange derselben, in Beziehung auf den streitigen Gegenstand, oder aus dem nächsten unzweifelhaften Grunde des Gesetzes, deutlich erhellt." Einleitung § 47: "Findet der Richter den eigentlichen Sinn des Gesetzes zweifelhaft, so muß er, ohne die prozeßführenden Parteyen zu benennen, seine Zweifel der Gesetzcomißion anzeigen, und auf deren Beurtheilung antragen.").

173. Zimmermann, *supra* note 170, at 325-26.

174. Wolfgang Fikentscher (with Kant) & Karl Larenz (with Savigny) begin their historical surveys of German legal methods at the turn of the nineteenth century. See 3 FIKENTSCHER, *supra* note 65, at 13 (1976); LARENZ, *supra* note 96, at 11; see also GOTTFRIED DIETZE, *KANT UND DER RECHTSSTAAT* 46-48 (1982).

175. ENGISCH, *supra* note 99, at 107; see also GERMANN, *PROBLEME*, *supra* note 171, at 282.

176. Günter Hirsch, President of the Federal Supreme Court, Address at the Bucerius Law School, *Der Richter im Spannungsverhältnis von Erster und Dritter Gewalt* (Oct. 1, 2003), in *DIE ZEIT*, No. 41, 2003, available at http://zeus.zeit.de/text/reden/bildung_und_kultur/hirsch_bis ("Vom Auslegungsverbot zum Auslegungsgebot").

177. Robert Alexy & Ralf Dreier, *Statutory Interpretation in the Federal Republic of Germany*, in *INTERPRETING STATUTES*, *supra* note 64, at 73, 82-91.

178. See generally 3 FIKENTSCHER, *supra* note 65, at 13 (discussing various theories).

objective will determines the interpretation. The classic view of Savigny is the preferred approach: the judge is to look to the "concept inherent in the statute."¹⁷⁹ Professor Reinhard Zimmermann states the principal guides:

On the Continent we have managed to shake off the self-imposed fetters of a literalist approach to statutory interpretation. German courts and legal writers are guided, today, by the four elements of interpretation as analysed particularly clearly by Friedrich Carl von Savigny: they take account of (1) the literal meaning of the words or the grammatical structure of a sentence, (2) the legislative history, (3) the systematic context and (4) the design, or purpose, of a legal rule.¹⁸⁰

Such is the similarity of these guides to American canons that one may wonder whether results for certainty of statutory interpretation should not likewise be similar. Indeed, the principal difference between the two approaches seems to be that American canons are more numerous and are more likely to be seen themselves to be binding. Space does not allow further consideration here of comparative statutory interpretation; reference may be made to efforts already made in that direction. Here, however, mention can be made of how legal methods can contribute to legal certainty in connection with statutory interpretation.

Statutory interpretation in Germany takes place against a backdrop of norm orientation. As already discussed, a norm consists of stated prerequisites for a stated legal consequence. Norm orientation has at least two salutary effects for legal certainty in statutory interpretation. First, norm orientation means that statutes as norms have existence

179. The view of the President of the Federal Supreme Court is instructive:

Nach ständiger Rechtsprechung ist der Wille des Gesetzgebers zwar als ein wesentlicher Aspekt bei der Auslegung zu berücksichtigen, hat jedoch im Kollisionsfall objektiv-teleologischen Kriterien zu weichen. Maßgebend für die Interpretation eines Gesetzes ist der in ihm zum Ausdruck kommende objektivierte Wille des Gesetzgebers. Es gilt immer noch die klassische Definition von Savigny, nach der Auslegung, "die Rekonstruktion des dem Gesetz innewohnenden Gedankens" ist, wobei es ihm nicht um subjektive Vorstellungen der am Gesetzgebungsverfahren Beteiligten ging, sondern um das, was diese im Allgemeininteresse denken mußten. Es geht also nicht darum, was sich der "Gesetzgeber"—wer immer das auch sein mag—beim Erlaß des Gesetzes "gedacht hat," sondern darum, was er vernünftigerweise gewollt haben sollte.

Hirsch, *supra* note 176.

180. Zimmermann, *supra* note 170, at 320 (citing 1 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 206 (1840) (translated as SYSTEM OF THE ROMAN LAW (William Holloway trans., 1979) (1867))). Zimmermann notes that around this "nucleus" are suggested historical and EU-harmonizing interpretations observing the importance of the Basic Law. But it is the teleological argument that is encountered most frequently. *Id.*

independent of the cases that they determine. Judges who apply them should not interpret them out of existence, but should contribute to their faithful construction as rules to be applied in future cases. Second, norm orientation permits uncertainties of statutory interpretation in the prerequisites for action to be moderated by practical certainty in clear identification of what a norm's legal consequences are and through clear designation of who may invoke the norm. Norm orientation permits a structuring of the process of statutory interpretation.

a. Statutory Norms Have Importance of Their Own Apart from Decision of Individual Cases

It is the responsibility of judges charged with interpreting norms to honor them and to make them precise and functional. Common lawyers often criticize civilian judges for thinking first of norms and only secondarily of decisions in individual cases. But giving attention to statutes as norms applicable in the future can pay big dividends in fulfilling their guidance function. Binding to statute requires that judges not decide contrary to statute. This does not mean judges are blindly bound; they are bound, not to the mere words of the statute, but to its "sense and purpose." Finding this limit is the task of statutory interpretation.¹⁸¹ Judges are to look first to the language of statutes themselves and not to decisions applying statutes for their interpretation. In the United States, where interpretations of statutes receive binding force, judges look first to those decisions and only secondarily to the statutes themselves. The guiding force of statutes is diminished. That German judges look first to statutory language does not mean that they ignore prior judicial interpretations.

Honoring statutes as norms means that German judges should not rely on legislative history to turn statutory language upside down. To be sure, in doubtful cases they do look to legislative materials to determine the intention of the historic legislature and to identify the purpose of the statute.¹⁸² The types of materials that they most often consult are competing drafts, the comments of the reviewing committee, and the official justifications that accompanied the drafts.¹⁸³ Since the drafting process is more tightly controlled than in the United States, judges' use of legislative history is less problematic.

181. I ENNECCERUS & NIPPERDEY, *supra* note 94, at 194.

182. LARENZ, *supra* note 96, at 313-19.

183. *Id.* at 316.

b. Statutory Interpretation Is Made Practically More Predictable Through Institutional Organization

Where statutory language is indefinite, practical legal certainty may be attained by making the probable interpretation predictable. This is more often the case when those charged with interpreting the statutes are clearly identified. The German legal system uses norm orientation to concentrate interpretation of particular statutes with particular judges. In Germany, judges are not usually interpreting statutes for the first time. German judges are specialized. Not only are there separate courts for civil and criminal matters, there are also separate administrative, labor, fiscal, social welfare, and intellectual property courts. This means that the judges doing the interpretation are interpreting statutes with which they are usually already familiar. This is all the more so, because within these very courts the judges specialize further in specific panels. Thus, for example, a group of criminal law judges will decide most of the cases relating to certain specific types of crimes. In some areas of the law that are especially prone to variant interpretation and yet are of particular importance, e.g., antitrust law, the principle of concentration is carried still further and all matters of a particular type will be assigned to a particular court within the state. Moreover, in order to assure consistent interpretation and application, courts are sometimes permitted, and other times required, to refer questions of interpretation to other courts. The best known of these referrals are referrals to the Federal Constitutional Court and to the ECJ. But referrals are possible within Germany among lower level courts as well.

3. Judicial Law Making

Even the ALR, which tried to provide a gap-free legal order that anticipated every eventuality, acknowledged that it might not cover everything. The ALR provided that if a judge found no statute that would decide the case before him, he should decide the case according to the general principles of the ALR, by analogy to other statutes, and through using his own best judgment.¹⁸⁴ That is not to say, however, that this code, which prohibited its own interpretation,¹⁸⁵ was ready to endorse case law; quite the contrary was true. The very next part of the ALR provided that

184. ALR, *supra* note 172, at 59 (Einleitung § 49: "Findet der Richter kein Gesetz, welches zur Entscheidung des streitigen Falles dienen könnte, so muß er zwar nach den in dem Gesetzbuche angenommenen allgemeinen Grundsätzen, und nach den wegen ähnlicher Fälle vorhandnen Verordnungen, seiner besten Einsicht gemäß erkennen.").

185. *See supra* text accompanying notes 170-172.

the judge who had to decide such a case was required to notify the head of the judicial branch of this deficiency in the statutes.¹⁸⁶ The following three sections of the law provided legislative procedures for remedying this deficiency.¹⁸⁷

Long ago, the German legal system abandoned the ideal of a gap-free statutory legal order. In the mid-1960s, the annual report of the Federal Supreme Court explicitly acknowledged that law in practice had always been a mixture of statutory and case law. There was no question *whether* there was case law, there was only a question of its *extent*.¹⁸⁸

The Federal Constitutional Court has recognized that, while a case for a gap-free legal order would well suit the requirement of legal certainty, practically the goal is unattainable.¹⁸⁹ Within the existing framework of statutes, judges may and do fill gaps. “The judicial decision then fills this gap according to the standards of practical reason and the ‘community’s well-founded general ideas of justice.’”¹⁹⁰ The court held that such “creative law finding” had always been consistent with the Basic Law.¹⁹¹

While there is a broad consensus that gap-filling is permissible, how gap-filling should be implemented is controversial.¹⁹² Even basic issues, such as whether gaps occur often or rarely, or whether judicial development of law (*richterliche Rechtsfortbildung*) is qualitatively different from or an extension of statutory construction, are debated.¹⁹³

186. ALR, *supra* note 172, at 59 (Einleitung § 50: “Er muß aber zugleich diesen vermeintlichen Mangel der Gesetze dem Chef der Justiz so fort anzeigen.”).

187. *Id.* Section 51 provided, in the interest of legal certainty, that whatever action was taken to remedy the deficiency could not affect the case that had raised the issue. Section 52 prescribed obtaining an expert report on the deficiency before raising the issue with the statute commission. *Id.*

188. *Quoted in* Franz Jürgen Säcker, *Einleitung*, in 1 MÜNCHENER KOMMENTAR, *supra* note 114, at 28 (citation omitted).

189. BVerfG Feb. 14, 1973, 34 BVerfGE 269 (287) (F.R.G.) (“Soraya”) (“[D]ie grundsätzliche Lückenlosigkeit der positiven staatlichen Rechtsordnung [ist] ein Zustand, der als prinzipielles Postulat der Rechtssicherheit vertretbar, aber praktisch unerreichbar ist.”).

190. *Id.*, translated in Alexy & Dreier, *supra* note 177, at 80.

191. BVerfGE 34, 269 (287).

192. Alexy & Dreier, *supra* note 177, at 80.

193. See KAUFMANN, *supra* note 81, at 8 (defending his view that the difference is gradual rather than that there are two kinds); LARENZ, *supra* note 96, at 351 (seeing a continuum); PAWLOWSKI, *supra* note 90, at 58, 61 (observing at the former page that gaps occur frequently and on the latter discussing the position that there is a sharp difference between statutory interpretation and judicial law development); Bernd Rüthers, *Demokratischer Rechtsstaat oder oligarchischer Richterstaat?*, 57 JURISTENZEITUNG 365, 366 (2002) (insisting that there must be a strict separation between the two); Zimmermann, *supra* note 170, at 320-21 (“[The teleological argument], usually, determines whether a legal rule may be restricted or extended beyond its wording, or whether it may be applied *per analogiam*. Whether these later forms of legal reasoning may still be classified as ‘interpretation,’ or whether we have to refer to ‘judicial

Particularly brisant is whether judicial law development can develop law that is contrary to statutes. After an initial decision that seemed to permit such decisions, the Federal Constitutional Court stepped back and signaled a more restrictive view.¹⁹⁴ For present purposes, it is sufficient to sketch the problem of judicial development of law.

Pure judicial development of law is problematic because it calls into question the legitimacy of the law thus created. This is the reason it is argued that there should be a strict separation between construction and application of existing law on the one hand and judicial development of new law on the other. Judges are constitutionally bound to law and statute. They are "servants" of the statutes. Where there is an applicable norm that the judge is called upon to construe, the judge is strictly bound to the statutory norm and is to apply the statute without regard to personal feelings. When there are no applicable norms, how are judges to decide? If one answers, as article 1(II) of the Swiss civil code seems to, that judges should decide as the legislature, then they become "substitute legislators" and the "lords" of the legal system.¹⁹⁵ Judges are not, however, it is argued, well suited for this role. Judges do not have the resources and other means to understand and deal with social problems like a legislature does. Judges do not have political legitimacy to make policy decisions.¹⁹⁶ The Federal Supreme Court recently signaled its discomfort with extensive judicial legislation.¹⁹⁷ For all of these reasons,

development of the law' is a disputed though practically irrelevant question."). The discussion is usually carried on in the terms of the difference between applying law (*Rechtsanwendung*) and judicial law development (*richterliche Rechtsfortbildung*).

194. See Alexy & Dreier, *supra* note 177, at 80-81; HANS-JOACHIM KOCH & HELMUT RÜBMAN, JURISTISCHE BEGRÜNDUNGSLEHRE 254-57 (1982). Compare BVerfG 34, 269, with BVerfG Oct. 11, 1978, 49 BVerfGE 304 (F.R.G.). The issue is distinct from that posed by the Nazi dictatorship, i.e. "statutory injustice" (*gesetzliches Unrecht*). See Radbruch, *Statutory Lawlessness*, *supra* note 26, at 1-7; ENGISCH, *supra* note 99, at 175. Binding to statute alone ("statute is statute" (*Gesetz ist Gesetz*)) demanded correction. Legal certainty could not be an absolute value that would override all interests of justice. Accordingly, Article 20 of the Basic Law binds the government not to statute (*Gesetz*) alone, but to "statute and justice" (*Gesetz und Recht*). GG art. 20. The Federal Constitutional Court has given Radbruch's cautious resolution of the problem recognition: "positive law, secured by statute and state authority, has priority, even if in content it is unjust and impractical [*unzweckmäßig*], unless the contradiction between the positive statute and justice reaches such an intolerable degree, that the statute must give way to justice as 'false law' [*unrichtiges Recht*]." BVerfG Dec. 18, 1953, 3 BVerfGE 225 (232) (F.R.G.) (author's translation).

195. Rütters, *supra* note 193, at 366.

196. PAWLOWSKI, *supra* note 90, at 64-65.

197. See, e.g., Bundesgerichtshof, Großer Senat für Strafsachen [BGH Gr. Sen. St.] [Federal Court of Justice en banc panel to resolve conflicts among the Senate for criminal cases] Mar. 3, 2005, 50 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHS] 41 (64) (F.R.G.). The Great Senate of the Federal Supreme Court appealed to the German legislature

at the very least, it is argued, there should be clear distinction made between two very different functions.¹⁹⁸ If judges are to be called upon to make law, then, it is argued, the equity of the individual case is the indispensable and only workable direction.¹⁹⁹

This kind of judicial development of the law is generally thought to be a rare exception and is held quite apart from the usual application of the law.²⁰⁰ Far more common are the decisions that fill out indefinite legal concepts discussed above. While an American looking at these kinds of decisions would see case law at work, a German can more readily assimilate such decisions to statutory interpretation.

Finding rules is only an intermediate step on the way to applying rules to concrete cases and giving subjects guidance in law. The next Subpart addresses applying law to facts.

D. Law Applying

1. Syllogistic Law Application and Judgment Writing

The classic syllogistic law application model is the heart of law applying in Germany.²⁰¹ It has been for well over a century. The legal rule is the major premise, the facts are the minor premise, and the judicial decision is the logical conclusion.²⁰² In German, carrying out the syllogistic law application is known as *Relationstechnik* (relationship technique) or *Urteilstechnik* (judgment technique). Here it is referred to as judgment writing.²⁰³ Judgment writing should not be confused with

to provide rules to govern the growing practice of defense/prosecution agreements in criminal cases: "It is primarily the task of the legislature to determine the fundamental questions of the structuring of criminal procedure." *Id.* (author's translation) ("Es ist primär Aufgabe des Gesetzgebers, die grundsätzlichen Fragen der Gestaltung des Strafverfahrens . . . festzulegen.").

198. Rüthers, *supra* note 193, at 366.

199. Josef Esser, *Not und Gefahren des Revisionsrechts*, 17 JURISTENZEITUNG 513 (1962), reprinted in ZUR PROBLEMATIK DER HÖCHSTRICHTERLICHEN ENTSCHEIDUNG 162, 168 (Gerd Rollecke ed., 1982).

200. KAUFMANN, *supra* note 81, at 12.

201. LARENZ, *supra* note 96, at 150.

202. FRIEDRICH DAUBENSPECK, REFERAT, VOTUM UND URTEIL. EINE ANLEITUNG FÜR PRAKTISCHE JURISTEN IM VORBEREITUNGSDIENST 1 (11th ed. 1911) ("[Das richterliche Urteil] beruht auf einem logischen Schluß, dessen Obersatz die Kenntnis des Rechts, dessen Untersatz die Kenntnis der Tatsachen bildet. Der Schlußsatz (die Konklusion) ist der unmittelbar die Entscheidung gebende Akt."). This book appeared in its first edition in 1884. In 2003 it appeared in its thirty-third edition as WINFRIED SCHUSCHKE ET AL., BERICHT, GUTACHTEN UND URTEIL (33d ed. 2003). See HARTWIEG & HESSE, *supra* note 76, at 17 (dating the origin of *Relationstechnik* between 1852 and 1884).

203. The choice of a term to translate *Relationstechnik* and *Urteilstechnik* is not easy. A literal translation of "relation technique" would not be very meaningful. "Judgment technique"

writing appellate opinions that determine points of law. The key aspect of the *Relationstechnik* or *Urteilstechnik* is the role of the judgment in relating the facts to the law.

The classic model has been remarkably resilient. It has long been subject to criticism. It is no longer seen by itself as a sufficient explanation for all law application. Indeed, it is said that it no longer has claim to being the centerpiece of law application. Yet, it dominates instruction and practice.²⁰⁴ This dominance is by default. No competing theory better describes and prescribes what German judges actually do in ordinary cases, i.e., apply law to facts.²⁰⁵ Oddly, the German theoretical discussions about the difficulties of this process seem better known in the United States than the day-to-day functioning of the judgment technique. The former has received some attention in English-language literature;²⁰⁶ the latter, almost none.²⁰⁷ While the German system relies on syllogistic law application, no reasonable jurist believes that such law application is mechanical or always certain.

a. Judgment Writing: Its Role in Legal Education and Its Importance for the Legal System

Judgment writing is an essential part of every lawyer's education. It is taught primarily in the practical training period that follows university education in law. The ministries of justice of the several states admit the

and "judgment method" were considered, but technique is a word not used much in the American legal vocabulary, while the word "method" is perhaps too widely used. "Judicial Writing" is commonly used, but on examination, most often it is used in conjunction with opinions of appellate courts. Hopefully "judgment writing" is sufficient to emphasize the role of the judgment in applying the law to the facts.

204. KAUFMANN, *supra* note 81, at 2-6, 29-30 (reviewing recent criticisms).

205. SCHAPP, *supra* note 66, at 1; *see also* HARTWIEG & HESSE, *supra* note 76; PAWLOWSKI, *supra* note 90, at 55; HANS-MARTIN PAWLOWSKI, *METHODENLEHRE FÜR JURISTEN: THEORIE DER NORM UND DES GESETZES: EIN LEHRBUCH* 205 (2d ed. 1981) ("[Man kann] sich bei der Rechtsanwendung in einer Reihe ‚klarer‘ Fälle durchaus mit einer subsumierenden Auslegung einzelner Gesetze begnügen.").

206. *See, e.g.*, JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* ch. 5 (William Rehg trans., 1996) (Indeterminacy of Law and the Rationality of Adjudication).

207. To the author's knowledge, until 2004, the only work was Walter O. Weyrauch, *The Art of Drafting Judgments: A Modified German Case Method*, 9 J. LEGAL EDUC. 311 (1957). *See also* Christoph Engel, *The Impact of Representation Norms on the Quality of Judicial Decisions* 16 (Max Planck Inst. for Research on Collective Goods, Working Paper No. 2004/13, 2004), available at http://www.mpp-rdg.mpg.de/pdf_dat/2004_13online.pdf; Lutz-Christian Wolff, *Structured Problem Solving: German Methodology from a Comparative Perspective*, 14 LEGAL EDUC. REV. 19 (2003-2004), available at http://www.ler.edu.au/pdf/volumes/ler_vol14_1_2003_04.pdf.

students who passed the bar exam (about two-thirds) into a practical training program that lasts about two years. While details vary from state to state, the first year usually consists of a mixture of group course work and apprenticeship with a particular judge. Unlike the university, where the large lecture dominates instruction, classes are relatively small. The teachers are judges from the courts.²⁰⁸ In the university, classic syllogistic law application is taught, but based on uncontested facts²⁰⁹ and not judgment writing based on contested facts.²¹⁰

The importance of judgment writing for the German legal system as a whole is substantial. While it is a technique of judging, it is a technique that is taught to all German lawyers. In order to become a lawyer in Germany, one must be qualified as a judge, and without a relatively solid knowledge of judgment writing, one will not be able to pass the qualifying exam.²¹¹ This means that every German lawyer is accustomed to applying law in this fashion. Here, only its outline will be discussed; a more far-reaching investigation must await another day.

b. Nature and Purpose of a Judgment

“A German judgment is supposed to appear as an act of an impartial as well as impersonal public authority furnishing the official and objective interpretation rather than personalized opinions of the individual deciding justices. . . . The typical German judgment . . .

208. This description is based, in part, on one such program in which the author participated. The judge who gave the courses authored a number of books on the subject. He has since been promoted to the Bavarian Constitutional Court.

209. Wolfgang Fikentscher, *The Evolutionary and Cultural Origins of Heuristics That Influence Lawmaking*, in *HEURISTICS AND THE LAW* 207, 216-19 (G. Gigerenzer & C. Engel eds., 2006) (In the university students learn the “non-litigious opinion style” and in the internship period the “litigious opinion style” (*Stil des unstreitigen Gutachtens* and *Stil des streitigen Gutachtens*, respectively). Interns learn to handle cases with varying sets of facts and subject to different claims, objections, replications, etc. They put the many different relevant nonlitigious opinions into one litigious opinion from which they then extract a judgment: “[T]he judge renders a decision, a judgment, and this decision is the litigious opinion turned upside down: The decision *begins* with the outcome, *continues* with the legal rules that support the claims, objections, rejoinders, and duplicas, etc., and *ends* with the subsumptions. The sequence is presented claim by claim, objection by objection, rejoinder by rejoinder, duplica by duplica, etc., the whole judgment being arranged by claims. By contrast, as has been said, the nonlitigious opinion *starts* with an open question (Could the plaintiff have this claim?), *continues* with the subsumption, and *ends* with a conclusion.”).

210. See Wolfgang Grunsky, *Wert und Unwert der Relationstechnik*, 1972 *JURISTISCHE SCHULUNG* 29, 30 (“[D]er Referendar auf diesem Gebiet von der Universität so gut wie nichts mitbringt.”).

211. *Cf. id.*

strives after the ideal of deductive reasoning."²¹² It is designed to assure that the parties understand the grounds for the court's decision.²¹³ Ideally the judgment will convince the party who loses the lawsuit that that loss is the correct outcome.²¹⁴ At a minimum, the judgment should persuade the loser that the process was rational. Parties affected by the judgment should be enabled rationally to reproduce the grounds for the decision. They should recognize that rational argumentation, not arbitrariness, determined the judgment.²¹⁵ In this way, the parties are guaranteed the constitutional right to equal treatment under the law (Article 3 of the Basic Law) and the constitutional right to be heard (Article 103(1) of the Basic Law).²¹⁶

The judgment also controls the judge.²¹⁷ If the judge fails to subsume the facts of the case under the applicable law properly, the judge's decision is subject to correction on appeal. The judgment demonstrates whether the judge understood the losing party's position; through its impersonal and colorless nature, it demonstrates the judge's neutrality.²¹⁸ In theory, judges should be fungible.²¹⁹

c. Duty of Justification

The German judgment fulfills the duty of the German judge to justify the judge's judgment. The general requirement of German law that a decision to apply government power must be individually justified is especially pronounced in judicial proceedings.²²⁰ Unjustified judgments threaten the rule-of-law state; justified judgments tie the implementation of the law in the individual case to the statute. They

212. Reinhard Zimmermann, *Characteristic Aspects of German Legal Culture*, in *INTRODUCTION TO GERMAN LAW* 1, 26-27 (Mathias Reimann & Joachim Zekoll eds., 2005).

213. ADOLF BAUMBACH ET AL., *ZIVILPROZESSORDNUNG* § 313, margin no. 33 (58th ed. 2000).

214. KURT SCHELLHAMMER, *DIE ARBEITSMETHODE DES ZIVILRICHTERS* 241 (7th ed. 1984).

215. RAISCH, *supra* note 102, at 121.

216. BAUMBACH ET AL., *supra* note 213, § 313, margin no. 33.

217. SCHELLHAMMER, *supra* note 214, at 242.

218. EGON SCHNEIDER, *DER ZIVILRECHTSFALL IN PRÜFUNG UND PRAXIS* 178-79 (7th ed. 1988).

219. KAUFMANN, *supra* note 81, at 35.

220. On the constitutional basis of the duty in judicial proceedings, see JÜRGEN BRÜGGEMANN, *DIE RICHTERLICHE BEGRÜNDUNGSPFLICHT: VERFASSUNGSRECHTLICHE MINDESTANFORDERUNGEN AN DIE BEGRÜNDUNG GERICHTLICHER ENTSCHEIDUNGEN* 165-79 (1971); HARTWIEG & HESSE, *supra* note 76, at 154-55. See also DELF BUCHWALD, *DER BEGRIFF DER RATIONALEN JURISTISCHEN BEGRÜNDUNG: ZUR THEORIE DER JURIDISCHEN VERNUNFT* (1990); UWE KISCHEL, *DIE BEGRÜNDUNG: ZUR ERLÄUTERUNG STAATLICHER ENTSCHEIDUNGEN GEGENÜBER DEM BÜRGER* (2003); KOCH & RÜBMANN, *supra* note 194; JÖRG LÜCKE, *BEGRÜNDUNGSZWANG UND VERFASSUNG* (1987).

establish that application of the law is an impartial application of the general rule to the specific case.²²¹ A deductive justification is said to be essential to the fulfillment of legal certainty.²²² In the law of the European Union, justification is not only a duty drawn from the ECJ's general principles of legal certainty, it is also explicitly stated as an obligation of EU institutions in the treaty establishing the European Union.²²³

The duty of justification is intended to enhance the quality of legal decision. In the first instance, it provides a foundation to review the decision made.²²⁴ Just the knowledge that such a review is possible impels decision makers to self-control.²²⁵ It requires them to base their decisions, or at least the justifications for their decisions, on approved reasons (e.g., the statutory requirements) and not on unapproved ones (e.g., bias and prejudice).²²⁶ It pushes them toward more careful handling of the materials of decision, the fact and law finding, and law applying.²²⁷ Particularly compared to the common-law judge, who oversees a trial as much as reaches a decision, the duty of justification imposes on decision makers the responsibility for the outcome of the procedure.²²⁸

d. Elements of a Judgment

A judgment consists of a caption (*Rubrum*) that identifies the parties and the lawsuit,²²⁹ a statement of the decision made and the relief

221. Paul Kirchhof; *Recht sprechen, nicht Recht verschweigen: Öffentliches Abwägen und Begründen müssen im Zentrum der Rechtskultur bleiben*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 18, 1997, at 11 (“Wenn das Gericht in seinem Urteil nicht mehr erkennbar über gesetzlich Vorgeschiedenes einzelfallbezogen nachdenkt, sondern nur noch den Rechtsstreit autoritativ befriedet, verliert das Urteil seine Prägung durch das Gesetz, der Richterspruch seine Verallgemeinerungsfähigkeit, die Justiz ihre handwerkliche Gediegenheit im unbefangenen nachvollziehbaren Deuten der Gesetzesaussage.”). Kirchhof was then a Justice of the Federal Constitutional Court. Cf. RALPH CHRISTENSEN & HANS KUDLICH, THEORIE RICHTERLICHEN BEGRÜNDENS 19 (2001) (“Mann kann sich durchaus vorstellen, dass der Begründung einer Entscheidung im Rechtsstaat eine zentrale Bedeutung zukommt, die derjenigen des die Entscheidung tragenden Normtextes recht nahe kommen könnte.”).

222. KOCH & RÜBMANN, *supra* note 194, at 114 (“[Die] Rechtssicherheit ist damit nur bei deduktiver Begründungsstruktur erreichbar.”).

223. EC Treaty, *supra* note 46, art. 253.

224. Engel, *supra* note 207, at 16.

225. *Id.*

226. *Id.* at 18-19.

227. *Id.* at 21.

228. *See id.* at 26.

229. The caption consists of: (1) the names of the parties, of their legal representatives, and of their attorneys; (2) the designation of the court and the names of the judges who participated in the decision; and (3) the date of the last oral hearing. ZIVILPROZESSORDNUNG [ZPO] [civil procedure statute] Jan. 30, 1877, RGB/83, as amended, § 313(1), ¶¶ 1-3.

ordered (*Tenor* or *Urteilsformel*), which should be a sufficient direction to court personnel for enforcement of the judgment;²³⁰ the findings of fact (*Tatbestand*);²³¹ and the grounds for the decision (*Entscheidungsgründe*).²³²

The *Tatbestand*, as it appears in a judgment, is a short statement of the parties' legal claims and assertions of fact.²³³ The *Zivilprozeßordnung* (German Code of Civil Procedure) provides: "In the *Tatbestand* the asserted claims and the supporting and defending materials should be concisely presented only in their material content with particular reference to the subject applications. For details of the subject and of the matters in dispute, reference should be made to pleadings, minutes and other documents."²³⁴ From the *Tatbestand*, it should be possible to determine quickly who is seeking what, from whom, on what ground, and to determine which matters are in dispute and which are not.²³⁵ The *Tatbestand* serves as a public record of the oral hearing.²³⁶ It should include: the subject matter of the lawsuit, a sketch of the facts detailed only insofar as necessary to establish clearly the subject of the lawsuit, the evidence offered by the parties, the applications of the parties, relevant history of the lawsuit, and specific references to the file. It should *not* include: facts not necessary to the decision of the case, party statements made in the proceedings that are no longer relevant, legal arguments of the parties, statements of the law, nor normative evaluations of the facts.²³⁷ Silence in the *Tatbestand* is understood to prove that no position was taken on the point.²³⁸

230. *Id.* § 313(I), ¶ 4.

231. *Id.* § 313(I), ¶ 5. *Tatbestand* is difficult to translate without misleading, and so it is left here in the original German. A standard dictionary, LANGENSCHIEDT'S NEW COLLEGE GERMAN DICTIONARY: GERMAN-ENGLISH 525 (Heinz Messinger ed., 1973) gives the following definition of *Tatbestand*: "state of affairs; *jur.* facts *pl.* of the case, constituent facts *pl.*, factual findings; *objektiver (subjektiver)*-physical (mental) element of an offence," and it defines *Tatbestandsmerkmal* as an "element of an offence." As noted in the text, it is used in distinctly different ways in German legal writing. Murray and Stürner translate it as "factual framework." PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 334 (2004).

232. ZPO § 313(I), ¶ 6.

233. *Id.* § 313(II); SCHNEIDER, *supra* note 218, at 186. It has another meaning as the major premise of a rule.

234. ZPO § 313(II) (author's translation) ("Im *Tatbestand* sollen die erhobenen Ansprüche und die dazu vorgebrachten Angriffs- und Verteidigungsmittel unter Hervorhebung der gestellten Anträge nur ihrem wesentlichen Inhalt nach knapp dargestellt werden. Wegen der Einzelheiten des Sach- und Streitstandes soll auf Schriftsätze, Protokolle und andere Unterlagen verwiesen werden.")

235. SCHNEIDER, *supra* note 218, at 185.

236. ZPO § 314.

237. GÜNTHER SCHMITZ ET AL., DIE STATION IN ZIVILSACHEN 90 (6th ed. 2002).

238. *Id.* at 89.

The grounds for the decision justify the relief ordered or other resolution of the case.²³⁹ Matters not relevant to the decision made or the relief ordered do not belong in the grounds for the decision.²⁴⁰ The grounds for decision are to evaluate and subsume the concrete facts of the *Tatbestand* under the abstract elements of the applicable rule.²⁴¹ The German Code of Civil Procedure provides: “The grounds for decision contain a short summary of the consideration on which the decision in factual and legal respects rests.”²⁴² In the normal case it should include the following:

A statement of the result and the claims for relief;

A statement that the complaint states a cause of action (is *schlüssig*);

A statement that the claim is permissible, i.e., satisfies the prerequisites for a lawsuit (e.g., the court has subject matter and personal jurisdiction) (is *zulässig*);

A statement of the facts that satisfy the abstract elements of the applicable rule;

A statement justifying the factual findings necessary for application of the law; and

A statement of which facts are undisputed and which are disputed and an evaluation of the evidence and resolution of the issue with respect to disputed facts relevant to the decision.²⁴³

The law application is normally carried through as follows. First, the grounds for the decision state the conclusion and the applicable rule. Then, for each element of the *Tatbestand* of the applicable rule, insofar as necessary, the grounds for decision clarify the legal definition of the element as it relates to the particular case. This is the place for statutory interpretation, but only to the extent directly relevant to determining whether the facts in the present case fulfill the requirements of the statutory *Tatbestand*. Purely abstract discussions of law have no place in the judgment. Once the legal requirement is clarified, the grounds for decision are to subsume the specific facts found under the identified and clarified rule.²⁴⁴

239. PETER SIEGBURG, *EINFÜHRUNG IN DIE URTEILSTECHNIK* 182 (5th ed. 2003).

240. SCHMITZ ET AL., *supra* note 237, at 98.

241. *Id.*

242. ZPO § 313(III) (author’s translation) (“Die Entscheidungsgründe enthalten eine kurze Zusammenfassung der Erwägungen, auf denen die Entscheidung in tatsächlicher und rechtlicher Hinsicht beruht.”).

243. This is a distillation of the matters dealt with in over a dozen variations of the judgment in SCHMITZ ET AL., *supra* note 237, at 100-02 (author’s translation).

244. *Id.*

Insofar as necessary, the grounds for decision are to clarify the facts relied upon in the application of the rules. No mention of undisputed facts is necessary. The grounds for decision should identify the obvious and conceded facts that it treats as undisputed. For those facts that are disputed, the grounds for decision should evaluate the evidence leading to the findings made. Only if a fact necessary for the judgment remains unproven should the grounds for decision discuss the burden of proof.²⁴⁵

German experience in teaching judgment writing shows that students have great difficulty learning to evaluate evidence.²⁴⁶ Americans who know this and realize that these "students" are highly educated, have all completed four or more years of law school, and have passed the first state bar examination, may question the validity of the premise of the American jury system and of the American system generally that "assessment of evidence involves no special expertise."²⁴⁷

e. Applying the Rule: "Back-and-Forth" in Rule Application

Applying the rule as noted ideally proceeds as a syllogism. The major premise is the *Tatbestand* of the rule. As used with respect to the rule, *Tatbestand* means the legal prerequisites for the application of the legal rule. It consists of one or more elements. When all the elements of the *Tatbestand* are present, then there is a legal consequence. Whether the facts in a particular case fulfill the *Tatbestand* of the rule is the minor premise. When it does, the rule applies. Thus, that decision is the core of the process.²⁴⁸

No longer is it believed that the rule can simply be read from the statute. Instead, it is usually necessary to search the statute for the rules, to compare the rules to the facts, to revisit the statute in light of the facts, and to examine the facts again in light of the rules. This process of going back and forth was identified in the first part of the twentieth century and has since assumed a place in the description of law application.²⁴⁹ Americans who are familiar with the attention the German system gives

245. *Id.*

246. *Id.* at 103 ("Bei der Erstellung der Urteilsentwürfe, die der Referendar in aller Regel schon kurz nach Beginn seiner Ausbildung zu fertigen hat, bereitet erfahrungsgemäß die Beweiswürdigung große Schwierigkeiten.").

247. GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, *AMERICAN CIVIL PROCEDURE: AN INTRODUCTION* 81 (1993) ("[T]he American system rests on the premise that assessment of evidence involves no special expertise.").

248. HARTWIEG & HESSE, *supra* note 76 (*Kernstück*); *see also* PAWLOWSKI, *supra* note 90, at 57 ("Unter Subsumption im engeren Sinne versteht man die Verbindung eines Satzes mit einem individuellen (Urteils-) Sachverhalt.").

249. *See* HARTWIEG & HESSE, *supra* note 76, at 78-79 (*Die Lehre vom Pendelblick*).

to teaching and exercising the application of law to facts will not be inclined to deprecate the task that can be handled by “mere law appliers.”²⁵⁰

f. Decisions Against Law and Discretion

Article 20(3) of the Basic Law provides that the judiciary is bound by “statute and justice.”²⁵¹ Accordingly, a judgment may not be against the law.²⁵² The German legal system approach of an abstract order applied to individual cases seeks to eliminate all but preprogrammed departures from stated legal rules.²⁵³ Rather than permit judges or administrators to depart ad hoc from legal rules, the German ideal is to write the rule in a way that provides for a valuing by the judge or administrator in the individual case. In other words, the rule is to grant a bounded discretion to the judge to make a decision. That decision may be based either on the claims of justice or the needs of public policy in the particular case. When the decision is founded on interests of public policy, it should be subject to political control.

2. Applying Law in Practice—Preparing for and Reviewing the Judgment²⁵⁴

The goal of German civil procedure is a rationally justified judgment²⁵⁵ that is correct as a matter of substantive law.²⁵⁶ To reach that goal requires determination of facts, determination of law, and application of the law to the facts found. The goal reflects that a fundamental function of German civil procedure is a vindication of individual rights.²⁵⁷

250. Quoting JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 247 (1994) (“The typical handbook warns the jury to leave the law to the judge, to accept the judge’s instructions on the law whether they agree with them or not. What is left for the jury to do? . . . There is no room left for jurors to function openly as the conscience of the community . . .”).

251. GG art. 20(3).

252. KOCH & RÜBMANN, *supra* note 194, at 255; *see supra* text accompanying notes 189-194.

253. *See* MAXEINER, *supra* note 71, at 10-14.

254. While syllogistic law applying applies throughout German law, methods vary among civil, criminal, administrative, and other procedures. This study limits its discussion to civil procedure.

255. *See* CHRISTENSEN & KUDLICH, *supra* note 221, at 80-82.

256. MURRAY & STÜRNER, *supra* note 231, at 153.

257. *Id.*

German civil litigation is properly described as adversarial in that the parties control the scope and general conduct of the proceedings.²⁵⁸ But it does not provide for adversarial presentation or discovery of facts. While German civil procedure guarantees a right to be heard, it does not guarantee a day in court to present whatever legal or factual theory a party might wish to present. While the parties have the responsibility for presenting the facts, the judge is responsible for knowing the law.²⁵⁹ The parties may suggest legal grounds, but in the end, the maxim *da mihi factum, dabo tibi ius* (give me the facts, I will give you the law) applies. The role of the judge is decidedly different than that of the referee in American litigation. Where in American litigation the judges oversee how the parties present their cases, in German litigation the parties oversee how the court conducts and decides cases.²⁶⁰

German civil procedure does not encourage parties to make new law or to argue facts in novel ways. Making new law through litigation is not one of its principal purposes.²⁶¹ The automatic award of costs and attorney's fees to the prevailing party makes the litigation risk of trying something new considerably greater than in the United States. In view of the greater role of the judge in conducting proceedings, the parties are more dependent on the patience of the judge in entertaining novel arguments. Moreover, it is in the interest of busy judges to conclude proceedings as quickly as possible. And, because the ultimate decision is made by the judge and not by a separate decision maker, i.e., not by a jury, trying the judge's patience runs greater risks than in the United States, where the ultimate decision is made by an independent jury.

a. The Judgment: The Goal of Civil Procedure

German civil procedure is directed toward reaching a judgment. This keeps the proceedings focused on the application of existing legal rules to the facts of the instant case. At the end of the day, what legitimates the outcome is a rational judgment rather than the presentations in court. The individual elements required by statute to establish a claim are the "spectacles" through which judges view cases. What can be seen through the spectacles matters; everything else is

258. *Id.* at 152.

259. See OTHMAR JAUERNIG, ZIVILPROZESSRECHT § 25(V) (20th ed. 1983); LEO ROSENBERG & KARL HEINZ SCHWAB, ZIVILPROZESSRECHT §§ 78-79 (13th ed. 1981).

260. See, e.g., FRANZ-JOSEF RINSCHKE, PROZESSTAKTIK: SACHGERECHTE VERFAHRENSFÜHRUNG DES RECHTSANWALTS 63 (1987) (noting that when the judge takes minutes of witnesses' testimony—there is no verbatim transcript—the lawyer must "control" the process to make sure the minutes do not lose nuances that may not fit the judges' preconceptions).

261. MURRAY & STÜRNER, *supra* note 231, at 153.

irrelevant.²⁶² Freed from the need to entertain either party presenting a story, the judge can focus on the material points in dispute to find just those facts necessary for the decision.²⁶³ From the beginning to the end of the process, the rules of procedure focus the parties and the court on determining the facts necessary to fulfill the requirements of the applicable rule.

b. Prehearing

Complaint. The plaintiff takes the first step toward commencing a lawsuit by filing a complaint with the court. Only after the court conducts a preliminary review of the complaint for the procedural prerequisites of a lawsuit, and only after the court serves the complaint, does a lawsuit actually begin. Among other matters, the complaint must include “the precise description of the subject matter and of the basis of the asserted claim.”²⁶⁴ Notice pleading, as known in the United States, is not known in Germany. The complaint must include all facts on which the claim rests, not merely what the claim is.²⁶⁵ Moreover, it must state the means of proof that are to prove the factual assertions, i.e., the complaint must be “substantiated.”²⁶⁶ Relevant documents in possession of the plaintiff are appended to the complaint. Documents in the possession of others as well as expected witness testimony are indicated by designation.²⁶⁷ The substantiation must be such that the complaint states the facts so exactly that, based on the information provided, the court could determine that the claimed legal relief should be granted. The degree of substantiation for each fact asserted varies. When a fact is not seriously disputed, it can be stated in general terms. When it is disputed, it must be substantiated precisely. Proffering too little support

262. JOACHIM HRUSCHKA, DIE KONSTITUTION DES RECHTSFALLES: STUDIEN ZUM VERHÄLTNIS VON TATSACHENFESTSTELLUNG UND RECHTSANWENDUNG 22-24 (1965) (“Der Urteiler muß wissen, was er wissen will. . . . Die Tatbestände . . . sind gewissermaßen die Brille, durch die der Richter im weiteren Verlauf der Verhandlung alles betrachtet. Was durch diese Brille nicht gesehen werden kann, ist für den Urteiler irrelevant.”).

263. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 830 (1985) (“[T]he court ranges over the entire case, constantly looking for the jugular—for the issue of law or fact that might dispose of the case.”).

264. ZPO § 253(II), ¶ 2 (author’s translation) (“[D]ie bestimmte Angabe des Gegenstandes und des Grundes des erhobenen Anspruchs.”).

265. MURRAY & STÜRNER, *supra* note 231, at 197-98.

266. This is a general requirement for all so-called preparatory submissions generally. ZPO § 130. It applies to complaints through German Code of Civil Procedure section 253(IV).

267. MURRAY & STÜRNER, *supra* note 231, at 197-98.

in the initial complaint is ordinarily not fatal, but good practice is to err by substantiating too much rather than too little.²⁶⁸

Subject Matter of the Controversy. Through its statement of the claim, the complaint determines the scope of the controversy.²⁶⁹ The learning surrounding the subject matter of the controversy is said to be the very basis of modern civil procedure.²⁷⁰ The principle of party control of the proceedings means that the court cannot go beyond the claims asserted (except as the defendant may appropriately raise additional claims). On the other hand, while the facts as stated by the plaintiff should suggest a particular legal basis for the claim, the court is not bound by such suggestions.²⁷¹ Indeed, the court is required to consider all possible legal bases for a claim relating to the facts alleged in the complaint.

Review of Complaint for Permissibility. Before the court is permitted to issue a judgment, it is required to determine that all procedural prerequisites are satisfied. This is called a “test of the claim for permissibility.” Procedural prerequisites are those circumstances the presence (or absence) of which are required in order for a lawsuit to be proper. Examples are personal and subject matter jurisdiction.²⁷² Because any work done on a case in which these requirements are not met is wasted, from the earliest moment—and throughout the case—it is the duty of the judge to review the judge’s own decision of whether the procedural prerequisites have been met.²⁷³ Ordinarily, the court conducts such an initial review even before directing service of the complaint. Should the court have concerns about whether the procedural prerequisites are met, the court is to direct the party concerned to clarify the point.²⁷⁴

268. RINSCHÉ, *supra* note 260, at 37. Rinsché gives an example of when one can plead in general terms and when not: one can plead generally that the parties had a contract, if the agreement is not in dispute. But if the other party disputes whether the parties reached a contract, then the complaint should describe its conclusion in detail. *Id.*

269. GRUNSKY, *supra* note 168, at 26; MURRAY & STÜRNER, *supra* note 231, at 156-57.

270. SCHNEIDER, *supra* note 218, at 266 (noting also that the “*Streitgegenstand*” is one of the most disputed aspects of German civil procedure); see HEINZ THOMAS & HANS PUTZO, ZIVILPROZEBORDNUNG EINLEITUNG II, 5-10 (27th ed. 2005) (this section by Klaus Reichold).

271. EGON SCHNEIDER, DIE KLAGE (2d ed. 2004).

272. Procedural prerequisites are both general (required for all cases) and specific (required only for certain types of cases). They may be positive (those that must be present) or negative (those that must not be present). Related but different are the requirements on whether the parties and their representatives may act in the case, i.e., Prozesshandlungsvoraussetzungen. SCHMITZ ET AL., *supra* note 237, at 12.

273. THOMAS & PUTZO, *supra* note 270, § 253 Vorbem, margin no. 8, at 378.

274. MURRAY & STÜRNER, *supra* note 231, at 210; THOMAS & PUTZO, *supra* note 270, § 253 Vorbem, margin nos. 12-13, at 379. The defendant may also challenge in the answer

The procedural prerequisites of German civil procedure are largely familiar to American lawyers. Five correspond to requirements of the U.S. *Federal Rules of Civil Procedure*, Rule 12(b), nos. (1) to (5): (1) subject matter jurisdiction, (2) personal jurisdiction, (3) venue, (4) process, and (5) service of process.²⁷⁵ However, German civil procedure handles these issues differently than the American system. In American federal civil procedure, these issues are reviewed—ordinarily only upon a party's initial response to service of a complaint—if the defendant requests such a review. In that case, the court, after possibly taking testimony, determines whether the challenged prerequisite is absent. In German civil procedure, on the other hand, the judge checks whether the procedural prerequisites are all present at the outset of the case.

Prehearing Measures. Once the complaint is served, the defendant is required to respond with an answer. The answer is subject to requirements similar to those governing the complaint: it must be true, complete, specific, and substantiated.²⁷⁶ Even before the defendant responds to the complaint, the court determines, based on the nature of the case and the court's own preferences, whether the case will go directly to a so-called early first hearing or first follow written procedures.²⁷⁷ In either case, prior to the first hearing, the court is required to make preparations for the hearing, which may include: (1) directing the parties to supplement their pleadings, (2) directing government authorities to provide information and documents, (3) ordering the personal appearance of the parties, (4) summoning witnesses named by a party to the hearing, and (5) ordering the production of documents or things and making premises and other things available for observation.²⁷⁸

c. Clarifying Issues in Oral Hearings

German court hearings resemble American pretrial conferences more than American trials. They are serious, rather than ceremonial.²⁷⁹ It

whether procedural prerequisites are present. See MURRAY & STÜRNER, *supra* note 231, at 231-32.

275. FED. R. CIV. P. 12(b).

276. See ZPO § 277; MURRAY & STÜRNER, *supra* note 231, at 230.

277. See ZPO §§ 272, 275-276.

278. ZPO §§ 142, 144, 273.

279. See Langbein, *supra* note 263, at 831 ("German civil proceedings have the tone not of the theatre, but of a routine business meeting—serious rather than tense."); Edson R. Sunderland, Book Review, 15 A.B.A.J. 35, 35 (1929) (quoting Pierre LePauille, who expressed "his

is in this atmosphere that judge and counsel and, often, parties meet for the first time. The focus of the meeting is on providing the judge with what the judge needs to write a judgment. It is not, as it might be in an American pretrial conference, focused on preparations for presentation of the parties' stories at a later date. The judge conducts and controls the hearing.²⁸⁰ While the court is in charge, however, the court can work with only that which the parties provide.²⁸¹

Before taking any evidence, the court is required to discuss the case thoroughly with the parties.²⁸² American lawyers would find such discussions very informal. The German Code of Civil Procedure requires that the parties participate fully in this discussion. Section 138 provides:

1. The parties are to give their declarations concerning factual circumstances completely and truthfully.
2. Each party must declare its position with respect to the facts asserted by its opponent.
3. Facts which are not expressly contested are to be treated as admitted, unless the intention to contest them appears from the parties declarations.
4. A declaration of lack of knowledge is allowable only with respect to facts which were neither the party's own action nor the subject of its own observations.²⁸³

In the course of the hearing, the judge discusses with the parties and their counsel their positions on the facts on which the judge will base the judgment. These discussions are *not* evidentiary. They do *not* constitute taking testimony of the parties. They amount to clarification of the factual assertions of the parties that are necessary for the eventual application of the rule to the facts.²⁸⁴

The court's discussion of the facts can obviate the need to take evidence in whole or in part. In the course of the hearing or in the pleadings, should one party admit a fact asserted by the other, there is no

amazement at the ineffective manner in which justice is administered . . . more like a high church ceremony than a business transaction").

280. MURRAY & STÜRNER, *supra* note 231, at 256-59.

281. *Id.* at 253.

282. The 2002 amendments provide that the court is first to discuss the possibility of settlement.

283. ZPO § 138, *translated in* MURRAY & STÜRNER, *supra* note 231, at 159-60.

284. SCHMITZ ET AL., *supra* note 237, at 31 ("Klärung des für die Normsubsumtion benötigten Tatsachenvortrages der Parteien, soweit dazu noch Veranlassung besteht.").

need to prove the fact.²⁸⁵ Moreover, under section 138(3) of the German Code of Civil Procedure, an asserted fact will be treated as admitted if the other party is silent and fails to contest it.²⁸⁶ Under section 138(4), only in limited circumstances can a declaration of lack of knowledge serve to put a matter in dispute.²⁸⁷ Moreover, section 138(2) is interpreted to require that a mere denial of fact is not sufficient to put it in dispute. As a general rule, a party must explicitly contest the fact asserted, and if the fact asserted is known or could be known to the party, then the party must substantiate its contrary contention with facts known to it.²⁸⁸

It is incorrect to liken these hearings either to trial or to discovery.²⁸⁹ Their focus is on identifying fact issues; it is not on uncovering unknown facts nor on proving known ones. The parties' submissions have suggested which statutes are to provide the directions for writing the judgment. The hearings are to identify those material facts and, to the extent possible, bring the parties to agree on them. Evidence to prove those facts is taken only if there is disagreement among the parties with respect to material facts.²⁹⁰ By American measures, the proceedings are highly interactive, comparatively cooperative, and very informal.²⁹¹

d. The Right To Be Heard

Article 103(1) of the Basic Law guarantees parties the right to be heard.²⁹² It requires that the court not decide a case without giving the parties an opportunity to express their views on the issues of law and fact. Among the provisions of the German Code of Civil Procedure that are designed to assure this right, section 139 has a particularly important role. The court has a duty to clarify the parties' positions in terms of the court's intended basis for the decision:

1. The court is to discuss with the parties the relevant facts and issues in dispute from a factual and legal perspective to the extent reasonable and to raise questions. It is to cause the parties timely and completely to declare their positions

285. ZPO § 288, ¶ 1.

286. *Id.* § 138, ¶ 3.

287. *Id.* § 138, ¶ 4.

288. SCHMITZ ET AL., *supra* note 237, at 31.

289. See, e.g., Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a "Better Way": Litigation Alternatives, and Accommodation: Background Paper*, 1989 DUKE L.J. 824, 854 n.109.

290. MURRAY & STÜRNER, *supra* note 231, at 257 n.33.

291. Murray and Stürner describe them at some length. *Id.* at 256-59. It is hard to know what to liken them to in American experience: group work on a crossword puzzle?

292. GG art. 103(1).

concerning all material facts, especially to supplement insufficient references to the relevant facts, to designate the means of proof and to set forth claims based on the facts asserted.

2. The court may base its decision on a claim, other than a minor or auxiliary claim, on a point of fact or law which a party has apparently overlooked or considered insignificant only if the court has called the parties' attention to the point and given opportunity for comment on it. The same provision applies if the court's understanding of a point of fact or law differs from the understanding of both parties.
3. The court is to call attention to the court's inclinations which exist with respect to those points which may be noticed on the court's own motion.
4. Hints and feedback according to this requirement are to be communicated and documented in the record as early as possible. Their rendition can be proven only through the content of the record. Only evidence of forgery of the record can be received to contradict its contents.
5. If a party is not prepared to respond immediately to a judicial request for clarification the court on the motion of the party may set a time limit for further clarification by written argument.²⁹³

This kind of clarification is hardly conceivable unless the court and the parties have a good idea what the applicable legal rule is and what its elements are. German Code of Civil Procedure section 139(2) recognizes this explicitly when it requires that the court call to the parties' attention any legal norm it intends to apply.²⁹⁴

American pretrial proceedings are not without their analogues to these kinds of discussions. Some pretrial conferences engage in these kinds of discussion. Given the focus on each side preparing for its day in court, one could expect that a judge who pushed too hard would be faced with the objection that the judge was usurping the party's right to tell its story. The pretrial discovery mechanisms—particularly the requests to admit, but also written interrogatories and depositions—are intended to permit the same kind of issue narrowing. Without the coercive presence of the judge, and the judge's focus on formulating a judgment rather than presenting a case, they are rarely able to achieve the intended effect.

293. ZPO § 139, translated in MURRAY & STÜRNER, *supra* note 231, at 167-68.

294. *Id.* § 139(2).

Instead, one party endeavors mightily to ask many and wide-ranging questions, while the other party endeavors just as mightily to formulate responses in such a narrow fashion as to be nearly useless.

e. Taking of Evidence

Taking of evidence occurs only if ordered by the court upon request of a party.²⁹⁵ The order of the court is to include identification of the fact in dispute; identification of the means of proof, including the names of witness and experts; and identification of the party seeking the proof.²⁹⁶ The court is to order the taking of evidence only when necessary to convince the court of the truth or untruth of a particular fact that is disputed by the parties and is material to the court's decision of the case.²⁹⁷ Thus, there is no need to prove: undisputed facts,²⁹⁸ facts generally known to the court,²⁹⁹ facts presumed by statute until the contrary is proven,³⁰⁰ favorable facts established by the other party's submissions, disputed main facts established by undisputed facts, disputed facts the truth of which the court is convinced without taking evidence, and facts not necessary for the judgment (e.g., two alternatives for granting relief are allowed and one is already acknowledged).³⁰¹ According to German judges with whom I have spoken, the majority of cases are concluded (by settlement or judgment) without witnesses ever being heard.

f. Review of Judgments—Appeals on Facts and Law

The recent reform of German civil procedure introduced a completely “new conception”³⁰² of the first appeal. Previously, the first appeal anticipated a trial de novo; virtually everything was done anew.³⁰³ The formal parliamentary justification for the reform bill rejected this long-used approach both as uneconomical and as not required by the

295. See ZPO §§ 283, 358. In civil cases, the court does not have authority to call witnesses who have not been nominated by a party. MURRAY & STÜRNER, *supra* note 231, at 264.

296. ZPO § 359.

297. SCHMITZ ET AL., *supra* note 237, at 32.

298. ZPO §§ 138, 288.

299. *Id.* § 291.

300. *Cf. id.* § 292.

301. SCHMITZ ET AL., *supra* note 237, at 32.

302. LUDWIG KROIB, DAS NEUE ZIVILPROZESSRECHT 55 (2001).

303. This was stated explicitly in the old version of ZPO § 525. See MURRAY & STÜRNER, *supra* note 231, at 373.

rule-of-law state.³⁰⁴ According to the justification, the function of review now is "to review the judgment of the first instance for its application of the substantive law as well as the correctness and completeness of the determinations reached and to correct any mistakes."³⁰⁵ Under the new law, the appellate court is required to accept factual findings of the court of first instance "insofar as there is no clear indication of doubt of the correctness or completeness of the fact determinations material to the decision and therefore indication for a new fact determination."³⁰⁶ If there is such doubt, however, the court, as before, may take new testimony and find new facts.³⁰⁷

Whether the reform will materially change the scope of review remains to be seen, but most commentators think that it will not.³⁰⁸ What remains the same after the reform is the appellate court's responsibility for the material correctness of the final judgment. The appellate court is not to search for error by the court below, but rather is to insure that the judgment is correct and, if it is not, to reach the correct judgment itself. Now, however, rather than to conduct the proceedings of the case itself, the court is to review the trial court's factual findings for correctness and to apply the law to the facts as found. By focusing on how the trial court applied the law, these reforms may enhance legal certainty. In any case, other aspects of the reform seek to enhance legal certainty by helping the winner conclude the case sooner. The court is required to review all appeals when initially filed. It is to dismiss, *ex officio*, any appeal that, according to all the members of the court, appears to have no chance of success, raises no legal issue of fundamental importance, imposes a decision for the sake of the development of the law, or requires a uniform interpretation of the law.³⁰⁹

Legal certainty does not always result even when legal decisions are made according to laws that are well-drafted and easily found. Even then, there may be substantial legal indeterminacy that results from governmental structures. American jurists accept with resignation that a necessary product of federalism is substantial legal uncertainty. Yet

304. BTDrucks 14/4722, at 64-65, reprinted in ROLF HANNICH ET AL., ZPO-REFORM: EINFÜHRUNG—TEXTE—MATERIALIEN 314 (2002).

305. *Id.* (author's translation) ("Funktion der Berufung wird es künftig sein, das erstinstanzliche Urteil auf die korrekte Anwendung des materiellen Rechts sowie auf Richtigkeit und Vollständigkeit der getroffenen Feststellungen hin zu überprüfen und etwaige Fehler zu beseitigen.")

306. ZPO § 529(I), ¶ 1, translated in MURRAY & STÜRNER, *supra* note 231, at 373.

307. *See id.* § 529(I), ¶ 2.

308. MURRAY & STÜRNER, *supra* note 231, at 382-83.

309. *See* ZPO § 529(II).

Germany is a federal state where federalism has not undermined the guidance function of the rule of law. The following section considers why.

E. Rule Conflict and Rule Coordination in European Federalism

In the United States, federalism is seen to come at the cost of legal certainty.³¹⁰ Although Germany is a federal state within a still larger federal European Union, federalism is not seen as seriously reducing legal certainty. Only last year, Germany completed a major overhaul of its federal structures without legal uncertainty ever being seen as a part or a problem of those structures.

At the beginning of the nineteenth century, differences among the German states were considerably greater than they were among the American states.³¹¹ Germany consisted of dozens of independent sovereigns—kingdoms, duchies, and principalities. Laws were anything but uniform. The three most important states, Austria, Bavaria, and Prussia, had already codified their civil law. Other states applied the French civil code, originally imposed upon them by Napoleon. Still other states had their own peculiar laws. Upon the defeat of Napoleon, Professor Anton Thibaut of the University of Heidelberg called for the adoption of a single civil code for all of Germany.³¹² Professor Friedrich Carl von Savigny of the University of Berlin, and later Minister of Justice of Prussia, opposed a civil code.³¹³ He argued that the time was not yet ripe.³¹⁴ While no code was adopted then, German unification, first in the form of the North German Customs Union in 1866, and then in the form of a federal state in 1871, led to the adoption of codes.³¹⁵

At the end of the nineteenth century, on January 1, 1900, a civil code for a united Germany (less Austria) entered into force (*Bürgerliches Gesetzbuch* (German Civil Code)).³¹⁶ It replaced dozens of different legal regimes.³¹⁷ Above all, it brought a uniform law for all of Germany

310. Maxeiner, *supra* note 10, at 576.

311. Excepting only slavery.

312. A.F.J. THIBAUT, UEBER DIE NOTHWENDIGKEIT EINES ALLGEMEINEN BÜRGERLICHEN RECHTS FÜR DEUTSCHLAND (1814), *reprinted in* THIBAUT UND SAVIGNY: IHRE PROGRAMMATISCHEN SCHRIFTEN 37-59 (Hans Hattenhauer ed., 2002).

313. FRIEDRICH CARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., 1831).

314. *Id.*

315. Frederic William Maitland, *The Making of the German Civil Code*, in 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 474 (H.A.L. Fisher ed., 1911).

316. BGB.

317. For a list, see MÜNCHENER KOMMENTAR, *supra* note 114, at 8-11.

except Austria.³¹⁸ It proved to be a spectacular success. Across the English Channel, noted legal historian Frederic William Maitland, gave praise: “[The German] has codified the greater part and the most important part of his law; he has set his legal house in order; he has swept away the rubbish into the dustbin; he has striven to make his legal system rational, coherent, modern, worthy of his country and our century.”³¹⁹ The German Civil Code’s underlying social thinking reflected the world of the nineteenth century. Recently refreshed in 2002 through significant revisions, it promises to govern Germany well into the twenty-first century until such time as it is replaced by a civil code for all of Europe.

The continued success of the German Civil Code is in large measure due to the exceptionally strong jurisprudential foundation on which it rests (the *Pandektenwissenschaft*). Its adoption, however, was due to the forces that brought about national unity. Codification came from the top down. When national unity was achieved in 1871, a newly united Germany turned almost immediately to codifying its laws on a national basis. In 1873, the German legislature amended the constitution to give the federal government competence over its civil law.³²⁰ While it was not until 1896 that the legislature agreed on the new civil code, in the meantime it adopted national codes of civil procedure, criminal law, criminal procedure, and commercial law.³²¹

The Basic Law of 1949 as amended through 2006 sets out contemporary Germany’s federal structure. It parallels the United States Constitution in allowing for divided law-making competencies. The federal government is a government of limited powers. Except as provided by the Basic Law, the exercise of government powers and the right to legislate are matters for the states.³²² Where the federal government is competent, its laws are supreme.³²³ The Basic Law again parallels the United States Constitution in the powers it assigns to the federal government. Among parallel powers are: foreign affairs and defense, citizenship, currency, weights and measures, commerce and

318. Maitland, *supra* note 315, at 476-77 (noting that “ever since the sixteenth century, the main force which has made for codification has been a desire for uniform national law” after observing the presence of this “special reason” in Germany).

319. *Id.* at 476. Ironically, Maitland’s address was published in the very month in which Roscoe Pound gave his famous address *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 417 (1906), which echoes some of Maitland’s remarks.

320. 1 MÜNCHENER KOMMENTAR, *supra* note 114, at 7.

321. *Id.*

322. GG arts. 30, 70.

323. *Id.* art. 31.

navigation, postal services and roads, intellectual property rights, and the armed forces.³²⁴

In Germany, unlike in the United States, questions of state competence for legislation and of applicability to particular cases do not entangle the courts and do not materially undermine legal certainty.³²⁵ The German legal system uses a number of devices that contribute to safeguarding legal certainty notwithstanding the divided law-making competencies.

Where the United States Constitution has little to say about how federal powers are to be shared with the states, the German Basic Law says much. In granting the federal government powers, it catalogues exclusive powers³²⁶ separately from those powers exercised concurrently with the states.³²⁷ It defines what exclusive³²⁸ and what concurrent mean.³²⁹ It provides mechanisms for cooperation among the federal and state governments.³³⁰ The guiding idea of legal certainty is that conflicts between competencies between federal and state governments should not create conflicts of law in law application.³³¹

The Basic Law helps minimize conflicts between state and federal legislation by providing for direct participation of the states in federal legislation that affects them. The *Bundesrat* is composed of representatives of the states. These representatives are not elected by the people, but are appointed by the state governments. Most legislation requires the consent of the *Bundesrat*.³³²

Another way that the Basic Law works to minimize the effect of diverse competencies for legislation and to enhance legal certainty is by making sure that most constitutional issues of competency are decided promptly upon adoption of applicable law. If there are doubts about the compatibility of federal or state law with the Basic Law, the Federal Constitutional Court is to decide the issue upon application of the federal

324. *Id.* arts. 32, 73 (additional provision regarding foreign relations); *id.* art. 87a (armed forces).

325. *Cf.* Maxeiner, *supra* note 10, at 577-80.

326. GG art. 73.

327. *Id.* arts. 74, 74a.

328. *Id.* art. 71.

329. *Id.* art. 72.

330. *Id.* arts. 91a-b.

331. SCHNEIDER, *supra* note 87, at 119 ("Konkurrierende Gesetzgebung bedeutet ja nicht eine Konkurrenz von Bundesund Landesrecht, sondern nur eine Konkurrenz der Gesetzgebungszuständigkeit.").

332. GG arts. 77-78; *see* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 61-63 (1994); REINHOLD ZIPPELIUS, DEUTSCHES STAATSRECHT: EIN STUDIENBUCH § 16, at 114 (29th ed. 1994).

government, of a state government, or of one-third of the members of the *Bundestag*.³³³ There is no case or controversy requirement for what is referred to as “abstract review.”³³⁴ As a practical matter, constitutional issues related to competency for law making usually are decided before a statute ever takes effect. Should issues arise subsequent to legislation taking effect, the Federal Constitutional Court alone is competent to decide to put a statute out of force. Affected parties may petition the Federal Constitutional Court directly or, if a serious issue arises in the course of ordinary litigation, the lower court concerned is to refer the issue to the Federal Constitutional Court.³³⁵ Abstract review and centralization of decisions makes consideration of issues such as federal preemption in ordinary lawsuits and promotion of legal certainty unnecessary.³³⁶

These constitutional provisions do not, however, exhaust the devices by which the German legal system safeguards legal certainty in managing federal and state relations. In German understanding, “the unity of law” interest demands that the competencies and norms of the federal and state governments should mutually support each other. Taken together, they should create an order free of contradictory commands.³³⁷ This means not only that competencies for legislation be clear beforehand, but also that choice of law among federal legislation and that of the various states should not substantially reduce legal certainty.

The national codes (civil code, criminal code, civil procedure, criminal procedure, administrative law, and administrative procedure) and various important federal statutes are the principal German laws. Notwithstanding substantial state competencies to legislate, most important German laws are federal.³³⁸ Subjects of the law and decision makers turn first to the federal law for most questions. While the Basic Law does not mandate the national codes’ preeminence, it does promote

333. GG art. 93(1), ¶ 2.

334. See Alec Stone Sweet, *Why Europe Rejected American Judicial Review: And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2770 (2003).

335. *Id.*

336. See WOLFGANG MÄRZ, BUNDESRECHT BRICHT LANDESRECHT: EINE STAATSRECHTLICHE UNTERSUCHUNG ZU ARTIKEL 31 DES GRUNDGESETZES 108-12, 204 (1989) (noting that Basic Law Article 31 is largely superfluous when the competency rules of Articles 70 *et seq.* are followed); see also SCHNEIDER, *supra* note 87, at 118-24; Council of Europe, Venice Comm’n, *The European Model of Constitutional Review of Legislation*, at Ad C, Doc. No. CDL-JU(2006)016 (Mar. 24, 2006) (prepared by Ján Mazák), available at [http://www.venice.coe.int/docs/2006/CDL-JU\(2006\)016-e.asp](http://www.venice.coe.int/docs/2006/CDL-JU(2006)016-e.asp) (noting that concentrated judicial review provides “the assurance of legal certainty” and “[t]he abstract character of judicial review is also linked to the principle of legal certainty”).

337. ZIPPELIUS, *supra* note 332, § 16, at 114.

338. CURRIE, *supra* note 332, at 61.

harmonized state legislation by granting the federal government the power to adopt framework laws that set out general principles regarding state government civil service, higher education, the press, nature conservation, regional planning, and civil registration.³³⁹ Historically, the state governments have worked closely together in preparation of model statutes and decisions to adopt legislation.³⁴⁰ State competency for legislation has been impacted less by federal legislation than by legislation of the European Union, which often addresses issues assigned to the states.³⁴¹

Yet another way that the Basic Law protects legal certainty is to foreclose purely local legislation. While it guarantees local governments the right to administer their own affairs as provided by statute,³⁴² it does not extend to them any competency for legislation of their own.³⁴³

The German form of federalism thus contributes to legal certainty rather than undermine it. In matters in which a single national law governs, there is no competition among the laws of different states or between state and federal law, and there can be no inconsistencies. In areas where state law applies, there ordinarily is no conflict with federal law, because those issues have been decided already. Conflicts among laws of different states or between state and federal government, such as there are, do not seem to significantly undermine legal certainty.

The success of the German federalism in promoting legal certainty is palpable. The constitutional provision that provides that federal law preempts state law, Article 31 of the Basic Law, finds little application; the vast majority of cases avoid a conflict through preventive allocation of competencies.³⁴⁴ In 2006, Germany made the most extensive revisions to the Basic Law to date in what was referred to as the "Federalism Reform." In anticipation of that reform, a blue ribbon panel composed of members of both houses of parliament, the government, the state legislatures, associations of municipalities, and experts examined the role of federalism in Germany for fourteen months.³⁴⁵ In the hundreds of pages of commission reports and other submissions, nowhere is there any

339. GG art. 75.

340. ZIPPELIUS, *supra* note 332, § 16, at 114.

341. *Id.* § 16, at 115. Basic Law Article 70 limits legislative competency to the federal and state governments. GG art. 70.

342. GG art. 28(2).

343. ZIPPELIUS, *supra* note 332, § 16, at 122.

344. MÄRZ, *supra* note 336, at 204 ("In den weit überwiegenden Fällen befolgt das Grundgesetz eine *präventive* Kollisionsstrategie: es vermeidet Normwidersprüche, um sie nicht zu entscheiden zu müssen.").

345. See Bundesrat, Bundesrat Föderalismusreform I, http://www.bundesrat.de/cln_051/nr_8350/DE/foederalismus/foederalismus-node.html?__nnn=true (last visited Jan. 23, 2007).

significant criticism founded on legal indeterminacy in allocation of legislative authority.³⁴⁶

As already discussed, the states play a key role in the adoption of federal legislation. The strength of the states became quite apparent in recent years when the federal government and the lower house, on the one hand, and most state governments and the upper house, on the other hand, were controlled by opposing coalitions.

German federalism gives the states not only their own legislative competence and important participation in federal legislation, it also gives them *the* central role in the implementation of federal law. The Basic Law provides that "the exercise of governmental powers and the discharge of governmental functions is a matter for the states."³⁴⁷ Ordinarily they do so as matters of their own concern,³⁴⁸ subject only to the supervision of the federal government.³⁴⁹ Sometimes they administer federal law as agents of the federal government.³⁵⁰ In a few limited instances, the federal government itself is responsible for implementation of federal law.³⁵¹ Thus state and federal institutions do not parallel each other as they do in the United States. The states implement both federal and state laws themselves.³⁵² Federal agencies and federal courts operate only at the national level. Insofar as decentralization is a goal of federalism, and if one views decentralization as principally a management issue,³⁵³ then the German system may better accomplish decentralization than does the American system, where federal authorities implement federal legislation.

The German approach to federalism in assigning implementation to state authorities has an additional benefit for legal certainty. In Germany, because there are only state courts in the first instance, litigants cannot

346. *Kommission von Bundestage und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung*. A brief report of its work with links to the submissions is available at http://www.bundesrat.de/cln_051/nn_8350/DE/foederalismus/bundesstaatskommission/drs/drs-node.html?_nnn=true (last visited Jan. 23, 2007).

347. GG art. 30 (author's translation).

348. *Id.* art. 83.

349. *Id.* art. 84.

350. *Id.* art. 85.

351. Basic Law Articles 86 to 90 deal with the administration of specific areas by the federal government (e.g., aviation, federal bank, waterways, and federal highways). *Id.* arts. 86-90.

352. See generally CURRIE, *supra* note 332, ch. 2 (discussing German federalism).

353. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910-11 (1994) ("Decentralization is a managerial concept; it refers to the delegation of centralized authority to subordinate units of either a geographic or a functional character. . . . [T]he main reason to decentralize is to achieve effective management.").

make the mistake of going to the wrong sovereign's court in the first instance.³⁵⁴

Finally, with respect to whether federalism in Germany promotes the diffusion of political power that serves to protect liberties of the people—in addition to the role of states—one now must, of course, acknowledge the role of the European Union. Its importance is now very substantial as quite possibly a more powerful sovereign than either the German federal or state governments. A justice of the Federal Constitutional Court, when posing the provocative question, “Do judges rule the Germans?,” answered: “Yes, but not German judges, judges of the European Union.”³⁵⁵

III. COMPARATIVE OBSERVATIONS:

A. *American Legal Indeterminacy and European Legal Certainty*

Knowledge of the general principle of legal certainty in European law should dispel American resignation that wholesale indeterminacy is an inevitable feature of modern legal systems. Europeans do not accept it. Americans should not either. While some uncertainty is inherent in law, legal systems can and do act to reduce that uncertainty to acceptable levels. Inflexible certainty is not the only alternative to indeterminate flexibility. Workable certainty consistent with sufficient flexibility should be the goal.

If the American legal system is to steer between the Scylla of indeterminate flexibility and the Charybdis of inflexible certainty, it needs to make legal certainty a guiding idea. While legal certainty is not the *only* concern in law, it is an important and legitimate one. Where legal certainty is a guiding idea, it is given serious consideration in the creation and development of legal institutions and methods. Those institutions and methods determine the extent to which legal certainty is realized in the legal system. Thus, every decision about their form is potentially an opportunity to enhance or diminish legal certainty.

354. While litigants may not go to the wrong sovereign's court, they might choose the wrong court in another way. Germany has separate courts for different fields of law, e.g., civil courts, labor courts, social welfare courts, etc. Even here, however, the German system provides for legal certainty. If a litigant goes to the wrong court, that court is directed to decide the jurisdictional issue and send the case to the right court. The court receiving the case must accept it and decide it. It has no opportunity to decide the jurisdictional issue itself and return the case to the sending court. Thus, the ping-pong of different jurisdictions that occasionally happens in the United States cannot happen in Germany.

355. Udo Steiner, *Regieren Richter die Deutschen?*, 54 ANWALTSBLATT 673 (2004) (author's translation).

Examination of German legal methods reveals many opportunities in American law to enhance legal certainty. Few of these opportunities are unfamiliar. Many have been perceived in the past, but were not acted upon, or were acted upon adversely. Here, I conclude by identifying some of those opportunities:³⁵⁶

1. Law Making

Legal rules guide society. They ought to be made with care and in the interest of the population at large. While their substance is debatable politically, their form should be noncontroversial: they should guide those subject to them.

Precise and consistent statutes are a goal of the German legal system. German statutes are written as norms to be applied. Typically, these statutes are definite about the legal results they produce, about who may invoke them, and about what freedom they grant in their application. The most important statutes are codified and provide continuity for the system as a whole.

The seriousness with which the German legal system views rules is reflected in how German statutes are made and by whom. The authority to make statutes is limited and carefully controlled. They are made principally by the ministries of the federal and state governments, under the supervision of their respective cabinets and ministries of justice, and subject to the advice and consent of their respective legislatures.

Precision and consistency are also valued in the American legal system. But statutes remain a stepchild. In the nineteenth-century debate over codification, the thinking often was that there was a binary choice between "unwritten" case law and "written" statute law. Unwritten case law was seen to provide the flexibility needed to deal with changing conditions over time, which was viewed as superior to the supposedly inflexible statutory law. This may still be the prevailing view. But much has happened in the intervening 120-plus years. Welcomed or not, statutory law has displaced case law. The promise of unwritten case law has not been fulfilled. Meanwhile, other legal systems have demonstrated the use of techniques that bring flexibility to written statute law.

The authority to make laws is more widely dispersed and less closely controlled in the American legal system than in the German system. The federal and state legislatures make laws, but so, too, do tens

356. References to the German legal system are substantiated in this Article. Those to the American legal system are substantiated in Maxeiner, *supra* note 10.

of thousands of municipalities and even the electorate itself through ballot initiatives. Usually, the actual drafting is not done by professionals with subject-matter competency, but by individual legislators who are frequently acting at the requests of lobbyists. While Americans have long observed that the American way of legislating is different from that of most European countries, they continue with their old methods and tolerate recurrent lobbying scandals.

2. Law Finding

Rules can guide society only if they are accessible to society at large. Law finding is no less important for legal certainty than is the quality of the laws themselves. For law to be effective, all those affected by law should find the same law. Legal certainty is not promoted if potential plaintiffs and potential defendants have equally valid but different conceptions of the applicable law. The guidance function of law suffers if determining the meaning of law must await judicial intervention.

German law is well-organized. Codes provide the basic background, special statutes provide relative firmament outside the area of codes, and court decisions fill in final details. Code commentaries make all of this law readily accessible. The authoritative rule most often is quickly found.

German judges are charged with finding and interpreting the law. They treat codes and statutes with respect. They are not allowed to decide to the contrary and they take care to decide within the spirit of the statute. They make law, but only as necessary to fill in gaps in the statutes. In litigation, their understanding of the law controls the course of the proceedings.

Finding law in America is difficult. Even in a relatively simple case it can consume much time and cause much expense. Case law is acknowledged to be less convenient than code law. For nearly two centuries Americans have spoken of the deluge, first of cases, then of statutes. The system has responded with more effective ways of finding cases and statutes, but has not answered the most pressing problem: which statute or case is authoritative.

Statutes ought to provide the firm reference points which limit and guide case law. But American judicial treatment of statutes—encouraged in part by the lack of system of those statutes—can turn statutes on their heads. Sensible interpretation and application of statutes may not be realized until there is greater systematization of them. Moreover, judges are not presumed to know the law. Indeed, the *Federal Rules of Civil*

Procedure explicitly grants advocates free license to argue for changes in the law. Thanks to the American cost system, those arguments are largely risk free.

3. Law Applying

A law may be a good one, it may be easily found, but if it is not applied, it is worth little. As we have repeatedly observed, laws are applied principally by those subject to them. Syllogistic law application is what the public expects. It is what the public can understand. It is how the public can apply law to itself. Self-application of laws depends upon the confidence that laws will be applied generally and neutrally.

The German legal system is based on syllogistic law application. It takes care to relate the facts of a case to the law to be applied. German laws are norms and promote self-application. A duty of justification of decisions applies throughout German law and not just in litigation. Justified decisions demonstrate their basis in law. They facilitate judicial review of the substance of the decisions.

German court proceedings are directed toward applying law to facts. From the outset, German litigation is directed toward eventual subsumption of facts under rules—toward a decision according to the law. Plaintiffs must state at the outset on which evidence they intend to rely. From the get go, judges review whether plaintiffs have stated their cases against the defendants. Early on, before taking evidence, judges identify which issues truly are in dispute between the parties and put all other issues aside. Only then do they take evidence, and then only if taking evidence is needed. Before deciding a case, they are to alert all parties of their expected grounds for decision. There should be no surprises. Once a decision is made, they are to explain why they decided as they did. Dissatisfied parties may appeal to a higher court to see if the explanation is based on correct facts and subsumed properly under the right rules.

The American legal system is only partly based on syllogistic law application. Other times it is more interested in permitting parties to tell their stories before judges. Not infrequently, it furnishes a license for investigation more than a rule to be applied. Law of the former sort cannot be applied by one party to itself, but requires the participation of others.

The American legal system only sometimes imposes a duty of justification, both in litigation and elsewhere. Where it is imposed, judges in the United States often decide in a manner dissimilar to that of their German counterparts. But other times, justification is not imposed

and accepts the power of juries or others to make decisions, even if they are contrary to law.

American court proceedings were once concerned only with applying law to facts. In the early nineteenth century, special pleading was supposed to focus lawsuits on a single legal or factual issue in dispute. That focus was largely abandoned when notice pleading was adopted in 1938. The regime then introduced allows the widest latitude to the parties to investigate and tell their stories independent of the law. A right to be heard is an essential part of the rule of law and of legal certainty. But Americans, such as Justice Antonin Scalia, rightly ask whether that right to be heard should include a right to invent defenses.³⁵⁷

B. Rule Conflict and Rule Coordination in Federalism

Federalism has become a wildly popular model since its adoption by the United States in 1789. It is an effective means of governing geographically large and culturally disparate entities. But federalism creates issues for legal certainty. The precise boundaries of competencies between federal and state authorities are political questions inherent in every federal system. Through using multiple governments, federalism threatens legal certainty by potentially exposing subjects of law to conflicting commands. Federalism that honors legal certainty does not expose subjects to such conflicting commands.

The contemporary German legal system is twice a federal system: first the Federal Republic consists of sixteen federal states; and second, the Federal Republic itself is one of twenty-seven Member States of the European Union. While federal-state and German-EU competency questions are hotly debated, they are not productive of great legal indeterminacy.

German legal methods provide for political resolution of issues of federal-state competency before law applies to subjects. The Basic Law makes detailed provision for those divisions. Where it is indefinite, it anticipates judicial review that is efficient and supportive of legal certainty. Judicial review in Germany is abstract: that means that constitutional issues, including decisions of legislative competency, are resolved before laws take effect. Judicial review is concentrated: only the Federal Constitutional Court may take a law out of force. Room for delay in decisions and the possibility for disparate interpretations are commensurately reduced.

357. See Transcript of Oral Argument at 17, *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006) (No. 05-352).

Practical rule consistency from state-to-state among the many states of the Federal Republic and of the European Union is promoted in different ways. In some instances, at both levels, a single nation-wide or union-wide law applies. In other instances, at both levels, states enact their own laws but subject to framework laws or EU directives.

The German legal system also enhances legal certainty by providing that most law, state or federal, is applied by state authorities. The EU legal system follows the same approach and leaves law application largely to national and subnational authorities.

American federalism is not so supportive of legal certainty. The division of competencies between state and federal government are often decided at the expense of litigants in the course of their lawsuits. The United States Constitution provides less direction than the German Basic Law as to how competencies are to be shared and judicial review of these questions is less supportive of rule certainty. American-style judicial review is interpreted to exclude abstract review (as not a case or controversy). Review is unconcentrated, rather than concentrated. The American system perplexes its subjects by presenting them with dual sets of courts and administration.³⁵⁸

Each of these opportunities should be the subject of serious comparative study. Such a comparative study should note how the American method affects legal certainty and what interests besides legal certainty the method accommodates. It should then examine the foreign approach in detail to determine both how it enhances or detracts from legal certainty, as well as how it treats those other interests of concern in the United States.

The current excessive indeterminacy of American law should be of no surprise because we pay so little attention to how we build and operate our legal system. The rules of American law are reminiscent of grandmother's old homestead where everyone in the family—and nary a carpenter nor architect among them—added a wing to suit the latest occupant's need. No wonder no doors close properly, no floors are level with another, the shingles are failing, the house is collapsing, termites infest the structure, and water fills the basement. No one properly looks after it, for everyone thinks that it is someone else's chore. In a modern world, should we not build our legal system with the same care we build and operate our best buildings, not our worst? Should we not build it to function not just for today, but for tomorrow and the day after? Should

358. The United States Supreme Court not long ago took note of the European approach. *See* *Printz v. United States*, 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting).

we not engage professionals to design and build it? What is surprising is that while living in our ramshackle house, we have paid so little attention to how our neighbors live.³⁵⁹

359. See Ernst C. Stiefel & James R. Maxeiner, *Why Are U.S. Lawyers Not Learning from Comparative Law?*, in *THE INTERNATIONAL PRACTICE OF LAW* 213 (Nedim Peter Vogt et al. eds., 1997).