CONCRETIZATION OF LAW AND STATUTORY INTERPRETATION*

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In a modern legal system, statutory interpretation figures significantly in reaching the broad aim of legal concretization of social and economic policy. For most legal disputes judges can rely on statutes in order to decide the case at hand. However, their reliance on statutes requires clarification of the meaning of the pertinent provisions. Regardless of whether one characterizes this legal clarification as "construction," "interpretation" or "concretization,"[1] and regardless of

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* Revised version of the inaugural lecture held by the author on May 27, 1993 at the Faculty of Law at Heidelberg University, Germany. The original version of this article has been published under the title *Konkretisierung des Rechts und Auslegung der Gesetze* in 119 ARCHIV DES ÖFFENTLICHEN RECHTS 1 (1994). It is reprinted by permission of the publisher. I would like to thank Donald Kommers (Notre Dame Law School) and James Herget (University of Houston Law Center) for generous help in translating and revising the original Article.

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1. The terms are used synonymously here.

whether one considers the result of this task as merely "commentary on the law" or as "law" itself,[2] two conclusions seem certain. First, in a democratic legal system with separation of powers, the courts must respect the legislative concretization of the law. What the legislature ordains is binding for judicial interpretation, unless law of a higher order, such as the constitution, or European Union law, is being violated. Second, while separation-of-powers standards dictate that the legal powers of the legislature and the judiciary are distinct and differ from each other, both are meant to concretize law so that it attains its highest aims and values. Thus, an adequate understanding of the legal methods of concretization requires consideration of these legal aims, as well as the special nature of the hierarchy of legislative and judicial activity.

Parts I-III of this Article elucidate these general considerations, and Parts IV-VI develop a four-tiered scheme of statutory interpretation capable of addressing, through the use of internal differentiations, many or most of the interpretive perspectives that courts and lawyers in fact use when construing legal provisions. The overall purpose of the first three and the last three parts is to point out the interconnections among the primary goals of a modern legal order and the main methods of statutory interpretation. The ideas expressed in this Article have been developed largely in the light of German law, although there are occasional citations to American cases and authorities. One could erroneously argue that the ideas proposed here are relevant only to jurisdictions deriving from the civil law tradition—a tradition that pays much attention to the internal consistency of the legislative rules enacted and thus has difficulties in adequately reflecting upon what "really" enters into the formulation and interpretation of law. Although this argument in some instances, perhaps even many instances, is correct, it by no means holds automatically. As this Article seeks to demonstrate, an emphasis on systematization and construction can successfully integrate a realist approach to understanding law. It can address the moral aspirations of a legal order as

2. In the view of a civil law jurisdiction, such as the German legal order, one can distinguish between general legal provisions that function as binding "law," and their interpretation or concretization with regard to specific cases that function as mere "gloss on the law" that is not a source of binding legal command. However, if one starts out with a concept of binding law that also includes specific judicial decisions, as does the common law tradition, then "law" covers both legislative and judicial decisions. The latter position will appeal especially to realist schools of law that emphasize the meaning of "law" for citizens striving to receive what they think they deserve by right, because this entitlement can only be determined in the specific case. In both common law and civil law systems, conscientious attorneys will concentrate on the specific gloss a rule has gained in its development.

well. Thus, the Article also presents an *integration theory* of law which, it is hoped, can illuminate some venerable ideas that retain their vitality.[3]

I. THE COMMON GOOD AS PURPOSE OF LAW

The purpose of law, it is often said, consists in the realization of the common good. Viewed in this light, constitutions can best be understood as specifications of the common good with regard to governmental organs, functions and powers.[4] The concept of the common good is highly abstract, but its understanding is enhanced considerably when it is divided into three elements or functions of the legal order: legal certainty, legitimacy, and practicality.[5] In slightly different words, one could also say that the legal system should be consonant with the principles of practical reason or practical rationality.[6]

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3. As to American advocates of integration theories of law, see, e.g., W. FRIEDMANN, LEGAL THEORY ch. 5 (5th ed. 1967); Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779 (1988). As to my own attempts to formulate such a theory, see Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks From a German Point of View*, 42 AM. J. COMP. L. 395 (1994) [hereinafter Brugger, *Legal Interpretation*]. The present Article presupposes section III of Brugger, *Legal Interpretation*, (exploring four anthropological perspectives behind the methods of statutory interpretation) as a starting point, adds, as a second level of integration theory, the elements of the common good as main goals of modern legal orders, and refines the methods of interpretation proposed in the earlier article. The refinement becomes clear when contrasting Table 2 of the present Article with Table 3 in the annex which is reproduced from the 1994 article. As to a refinement of the level of anthropological aspects within an integration theory of law, see Winfried Brugger, *Das anthropologische Kreuz der Entscheidung*, *in* 36 JURISTISCHE SCHULUNG 674 (1996).

4. *See* Josef Isensee, *Gemeinwohl und Staatsaufgaben im Verfassungsstaat*, *in* 3 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND § 57 (Josef Isensee & Paul Kirchhof eds., 1988). One can without difficulty construe the term "general Welfare" in the preamble to the United States Constitution as encompassing not only material well-being, but also all the other goals mentioned in the preamble plus other legitimate governmental goals which the organs established in the Constitution choose to pursue within their respective areas of power. U.S. CONST. preamble.

5. In German jurisprudential treatises, usually the "idea of law" is distinguished from its highest goals, purposes or values. According to the prevailing opinion, the latter comprise justice, legal certainty and practicality. *See* HEINRICH HENKEL, EINFÜHRUNG IN DIE RECHTSPHILOSOPHIE §§ 33-35 (2d ed. 1977); FRANZ BYDLINSKI, JURISTISCHE METHODENLEHRE UND RECHTSBEGRIFF 290-99, 317-69 (2d ed. 1991); HERMANN HILL, EINFÜHRUNG IN DIE GESETZGEBUNGSLEHRE 14-15 (1982). The interpretation advocated in the present Article closely, but not totally, follows this terminology. Here, the common good is viewed as the idea of law, and its three main components are given additional meanings beyond those found in the literature cited above.

6. The concept of practical reason is used by the German Federal Constitutional Court. 34 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 269, 287 (F.R.G. 1973). "The judicial decision [in case of a gap] fills this gap according to the standards of practical reasoning and the 'community's well established general concepts of justice.'" *Id.* at 338 (author's translation) (quoting 9 BVerfGE 338, 349 (F.R.G. 1959)). Practical reasoning or practical rationality are also prominently used in Robert Alexy's discourse theory of law. *See* ROBERT

This principle includes as components formal rationality, material rationality, and instrumental rationality.[7] For a visual representation to be further explained in the text to follow, see Table 1 ("Elements of the Common Good").

Table 1: Elements of the Common Good

1. Legal Certainty (formal rationality, legal coherence)	**2. Legitimacy** (material rationality, ethical coherence)	**3. Practicality** (instrumental rationality, empirical coherence)
a) certainty of meaning b) certainty of obedience to law c) stability d) clear institutional responsibilities	a) good provisions b) just provisions	a) validity of empirical assumptions; analysis of interests affected b) means-end efficiency; analysis of consequences; unintended consequences c) consideration of "nature," structure of sphere of life
(emphasized in legal positivism)	(emphasized in legal idealism)	(emphasized in legal realism)

ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION (Ruth Adler et al. trans., 1989) [hereinafter ALEXY, THEORY]; ROBERT ALEXY, *Idee und Struktur eines vernünftigen Rechtssystems*, *in* BEIHEFT 44 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 30 (1991) [hereinafter Alexy, *Idee*]; *see also* JOSEF ESSER, VORVERSTÄNDNIS UND METHODENWAHL IN DER RECHTSFINDUNG 15, 23-24 (2d ed. 1972) (hermeneutical analysis of the jurisprudence actually applied by German civil courts); MARTIN KRIELE, THEORIE DER RECHTSGEWINNUNG chs. 6, 7, especially at 161, 169, 182-94 (2d ed. 1976) (analysis of the relevance of precedent in German and American jurisprudence).

7. These three terms follow the sociology of Max Weber. Disregarding occasional variations in Weber's definition of the terms, one can sum them up as follows: Formal rationality deals with predictability made possible by the systematic organization of a sphere of life, which in turn allows for certainty of planning and action. To that extent, formal rationality is also means-end rational. *See* MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT 44, 94, 128, 166, 174, 505 (5th ed. 1972). Material, or substantive, rationality deals with the ideal requirements asked from a system of action—here, the legal system. Among these requirements, according to Weber, are "ethical imperatives or utilitarian or other rules of practicability or political maxims." *Id.* at 397 (author's translation). See also *id.* at 45 for further discussion of material rationality. As Weber defined instrumental rationality, "[a]ction is rationally oriented to a system of discrete individual ends (zweckrational) when the end, the means, and the secondary results [Nebenfolgen] are all rationally taken into account and weighed." MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 117 (A.M. Henderson & Talcott Parsons trans., Free Press 1964) [hereinafter WEBER, THEORY OF SOCIAL AND ECONOMIC ORGANIZATION]. This definition shows that instrumental rationality or means-end rationality (as it shall be referred to in this Article) can be divided up into two parts: One part is the analysis of means, ends, and intended and unintended consequences with regard to a fixed end. The fixation of the end belongs to the sphere of material rationality. Thus, to the extent that various ends are compared to each other in the means-end analysis, material rationality and instrumental rationality are intertwined.

The Realization of the Common Good
1. on the level of every particular case
2. on the level of legal rules and principles
3. on the level of spheres of life

A. Legal Certainty

Legal norms help establish certainty (above all) in four respects[8]:

a) *Certainty of Meaning*: Legal rules specify the rights and duties of natural persons, legal persons and governmental organs. Specification of this kind presupposes accessibility and comprehensibility of pertinent norms. Consistency among the norms themselves is a minimum requisite: They should not contradict each other. If they do so, there must be a rule, *e.g.*, a supremacy clause, available to decide which of the competing provisions governs. Even better still than consistency are harmony and unity in the sense of mutual compatibility and support among the pertinent norms. The meaning of a pertinent provision may be found by interpreting its terms alone, or, if need be, in conjunction with other, related norms, and by construing the relevant rule(s) with a view to the wider context provided by the governing principle(s) of the specific field of law.

b) *Certainty of Obedience to Law*: Each legal system must assure that the law of the land, insofar as it establishes rights and duties, at least in most cases, is being followed and, if necessary, enforced. Increasing disrespect for the law presents a considerable practical problem for the legal system. This problem may even endanger the *Positivität des Rechts*, the positivity of law. From a sociological point of view, "law" does not exist if legal provisions suffer wide-spread noncompliance.

c) *Stable Norms*: Legal certainty is also brought about by stable laws valid over a long enough period to become anchored in the customs and legal traditions of the population. To the extent that new decisions have to be made in order to accommodate change, these new decrees should clearly and explicitly set forth the manner in which they differ from the previous order.

d) *Clear Institutional Responsibilities*: Legal certainty is further promoted by clearly delineating the powers of legal concretization of the branches of government. When it is clear, for instance, how the

8. The following exposition of the elements of the common good brings out important aspects of these three terms without claiming to be exhaustive.

legislative and the judicial powers of concretization relate to each other, the people and the affected state bodies can adapt accordingly.

Legal certainty in this broad sense bears a *normative*, an *empirical*, a *temporal* and a *functional component*. The undisturbed interaction among these components leads towards a *consistent legal order*. Inasmuch as the individual elements supplement one another and work toward the fulfillment of the objective at hand, one can speak of *internal coherence* in the legal system.[9] Positivity of law stresses the importance of the two first mentioned elements—certainty of meaning and certainty of obedience to law. Along with the two additional elements of stable norms and clear jurisdiction, certainty of meaning and law forms an institutional context characterized by the terms certainty and predictability. *Legal positivism* identifies and defends these last terms as its central values.[10]

B. Legitimacy

Besides compelling actions, legal norms also implicitly or explicitly appeal to voluntary civil obedience. They aim at social integration and consensus. However, these goals may be achieved only when as many citizens as possible come to regard state regulations and their application in specific cases as legitimate. Legitimacy can be transmitted through the process of governmental law-making, and in particular through the democratic participation of the citizenry. Viewed in isolation from substantive considerations, this route of justification leads to faith in legality: This faith is understood as a belief that legislative enactments are legitimate purely because they have been

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9. What is meant here by coherence is a constructive correlation of individual systems elements in the sense of mutual reinforcement in the performance of given objectives. The notion of consistency is weaker insofar as it simply presupposes no contradictions between legal norms and tasks. For further references and refinements on the concept of coherence, see MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 44-47 (1988); Klaus Günther, *Ein normativer Begriff der Kohärenz*, 20 RECHTSTHEORIE 163, 163-64 (1989); Robert Alexy, *Juristische Begründung, System und Kohärenz*, *in* RECHTSDOGMATIK UND PRAKTISCHE VERNUNFT 95, 96-97 (Okko Behrends et al. eds., 1990); Delf Buchwald, *Die canones der Auslegung und rationale juristische Begründung*, *in* 79 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 16, 30, 39-40 (1993).

10. *See* PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY 50 (1992) ("The most striking feature of positivism is a *quest for determinacy* . . . . The *precise* meaning, the *operational* indicator, the *definite* objective—these are the watchwords of a positivist program."); *see also* H.L.A. HART, THE CONCEPT OF LAW 224 (1961); Jan M. Broekman, *The Minimum Content of Positivism*, 16 RECHTSTHEORIE 349, 355-56, 363 (1985) and the role of formal rationality in the context of the ideal of legal certainty, as explained *supra* note 6.

passed by competent lawmakers using the proper democratic procedures and with the support of the necessary majority.[11]

The institutionalization and proceduralization of the question of legitimacy, which form the foundation of the positivist view of the law discussed under part I.1., are important. However, they should by no means detract from claims for legitimacy in a substantive way. Laws exist to realize goals which can be justified as necessary, desirable or at least defensible within the framework of the collective ethos of the particular community. Put somewhat differently, laws aim not only at internal legal coherence but also at *ethical* or *moral coherence.*

The democratic structure of the political process offers a necessary rationale for this criterion: Everyone should have a say in formulating the norms that regulate the behavior of all citizens. But the democratic guarantee may turn out to be insufficient: Not only can the king do wrong, the majority can as well. That is why we have to understand legitimacy also in substantive terms. To be legitimate, legislative acts must not only be promulgated in a democratic way; the citizens must also be able to make sense of the acts in terms of material justice and the good of the community at large. Otherwise, the respective minorities may view the laws only as arbitrary acts imposed by force on them. In sum, legislative enactments claim to be both good and just regulations, striving to define and implement desirable policies in a way that complies with principles of justice and fairness.[12] Legal

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11. For the belief in legality, see WEBER, THEORY OF SOCIAL AND ECONOMIC ORGANIZATION, *supra* note 7, at 131 ("To-day the most usual basis of legitimacy is the belief in legality, the readiness to conform with rules which are formally correct and have been imposed by accepted procedure.").

12. The differentiation between just and good legal provisions points to disputes between liberalism and communitarianism as to the primacy of either the right or the good. *See, e.g.*, STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS (1992). We need not decide this matter here. What the exposition wants to say is that both elements belong to the sphere of legitimacy. For the differentiation of policy and principle, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22-31 (1978). For example, the reunification of Germany was an important and, in the (old) preamble of the Constitution, even constitutionally secured goal of West German politics. It has not solely or primarily been a problem of justice. To work for German reunification has been "good politics," and politicians tried to reach this goal with more or less successful "good policies." In the actual process of reunification since 1989, however, a huge array of problems of justice developed: How much money for reconstruction do West Germans owe their Eastern brothers and sisters? What about expropriations after World War II which led to expectations by the new home owners that they would be able to keep their property, as compared to claims of the then-expropriated owners to get their land and houses back?

philosophies that place these two aspects of law and legitimacy in sharp relief belong to the field of *legal idealism*.[13]

C. Practicality

A sound understanding of the role of practicality in a legal system is gained by seeing it in contrast to and as a supplement of the other two guidelines to achieve the common good, *i.e.*, certainty and legitimacy. Legal certainty gears its attention predominantly towards the inner structure of an established legal order. Thus, its main emphasis, as constructively as possible, lies in the interaction of governmental institutions, purposes and norms: Whatever the commands of the law, they shall be followed and implemented! Legitimacy describes the ideal requirements which ensure that the legal system receives the respect, voluntary obedience, and commitment of the citizens. Consequently, legitimacy, by appealing to the pertinent ethical values of a political community, seeks to unite legal and ethical coherence. Formal and material rational decisions of that kind are nevertheless only supportive of the common good when they also consider the structure of that reality which is to be ordered. As the German Federal Constitutional Court correctly observes, "the norm is constantly placed in the context of the social conditions and sociopolitical notions, upon which it is supposed to have an effect; possibly, their content can and has to change with them."[14] Each legal provision refers to a certain aspect of reality that it

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13. Within this field are all theories of natural law or practical reasoning insofar as they emphasize the named aspects of legitimacy. Modern German theories of practical legal reasoning, however, aim at a combination of all three elements of the common good with varied emphasis. *See* the studies by Alexy, Kriele and Esser, *supra* note 6. One should also note that modern constitutions often incorporate important concretizations of the good and the just. The German Constitution (called *Grundgesetz*, which translates as "basic law") with its former reference to achieving reunification and with its continuing appeal to such values as human dignity, freedom, equality, *see* GRUNDGESETZ [CONSTITUTION] [GG] arts. 1-3 (F.R.G.), and to the ideals of the rule of law, democracy, federalism, republicanism and the social welfare state, *see* GG art. 20, § 1 and art., 28 § 1, is a representative example thereof. If a constitution engages in that kind of incorporation of public values, legal positivism turns idealistic, and legal idealism transforms itself into positive law. Or, with reference to the postulate of coherence, *see* discussion *supra* note 9, in the range of such a constitution, legal coherence blends into ethical/moral coherence.

14. 34 BVerfGE 269, 288 (F.R.G. 1973) (author's translation). For a thorough discussion of this topic, see FRIEDRICH MÜLLER, JURISTISCHE METHODIK 74 (5th ed. 1993) (discussing the difference between the text of the norm, the area covered by this text—*Normbereich* and its surrounding life sphere—or *Sachbereich*). The same point was recently made by the U.S. Supreme Court in Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 316, 114 S. Ct. 2268, 2279 (1994) (quoting Hoffman Estates, 455 U.S. 489, 498 (1982). "Rules governing international multijurisdictional income allocation have an inescapable imprecision given the complexity of the subject matter. Mindful that rules against vagueness are not 'mechanically applied' but depend, in

intends to regulate. Accounting for the facts of this reality, therefore, is a prerequisite for a rational, functional, practical solution of the problem that leads to the formulation and ensuing interpretation of the legal provision.[15]

Practicality comprises mainly the following criteria: (a) Legal decisions are to be based upon an appropriate assessment of the particular area of reality, or sphere of life, and the affected interests. (b) The preconditions and consequences of legal regulations are to be taken into consideration; in other words, their costs and benefits are to be assessed, as far as possible, within specific domains as well as within society as a whole, and from economic, legal, and ethical viewpoints. (c) Effectiveness also constantly requires an appropriate consideration of the guiding ideals of the social areas in which legal intervention is intended.[16] Theories emphasizing these criteria belong to the school of *legal realism*.[17]

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their application, on 'the nature of the enactment.'" Here the court makes use of an argument regarding the *Natur der Sache*, i.e., the nature/structure of the respective field of life/action that clearly covers problems of practicality. Although I am not aware of American treatises elucidating the notion of *Natur der Sache* (although it need not, the notion seems to carry too much metaphysical baggage), the U.S. Supreme Court often talks about the "nature" of a constitution, federalism etc. *See, e.g.*, Chief Justice John Marshall in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[The Constitution's] nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves . . . . [W]e must never forget that it is a *constitution* we are expounding.").

15. Sometimes legal texts mention this aspect. *See, e.g.*, GG art. 29, § 1 (regarding modification of state boundaries) ("Boundaries may be modified to ensure that the Länder [states], by virtue of their size and capacity, can effectively perform their functions. Due regard shall be given to regional, historical and cultural ties, economic expediency and the requirements of regional policy and planning.") (author's translation). See also the reference to effectiveness as a reason why the technical aspects of telecommunication in a federal state must be regulated on the national level, *in* 12 BVerfGE 205 (F.R.G. 1961), *reprinted in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 79-84 (1989).

16. As to (c), see *supra* note 14 on *Natur der Sache*. Elements (a) to (c) are mainly discussed in treatises dealing with the rationality of the legislative process. Of course, as the sources cited in note 14 illustrate, they can also become relevant in the process of interpretation of legal provisions or in the formulation of judicial doctrines. *See also* PETER NOLL, GESETZGEBUNGSLEHRE 63-163 (1973); HILL, *supra* note 5, at 62-82; BYDLINSKI, *supra* note 5, at 330-35.

17. While the term "legal realism" can be understood in a broad or narrow sense, the usage considered here relates to a common tenet of all schools of legal realism. This common element is criticism of other schools of legal thought that emphasize what is written or what ideally should govern legal decision making, instead of paying attention to what really enters into these decisions. It has to be noted, though, that legal realists sometimes succumb to ideology themselves if they deny from the outset the possibility that sometimes written rules or social ideals in fact guide legal decisions. *See* FRIEDMANN, *supra* note 3, at 302 ("It is also recognised by some if not all realists that realist jurisprudence, forming part of a sociological approach to law, is not a substitute for but a supplement to analytical, historical and ethical jurisprudence.").

Effectiveness in the above sense indicates a rational application of means to established goals. A flexible and realistic ends-means analysis, however, should not only pay attention to the best means; it should reserve some flexibility with regard to the goals to be achieved. If one then adds the postulate that, institutionally speaking, the best-equipped legal organs should specify means and ends, one has formulated the core of *legal pragmatism*[18]: Competent bodies are to choose the most functional and, from both legal and ethical standpoints, most acceptable solutions to problems.

Notably, the terminology and subject matter of the common good overlap in part, depending on how far the definitions are stretched. It may be said that a law proving uncertain in meaning and observance is impractical or that it lacks legitimacy.[19] One can plausibly hold the opinion that a legal decision based on a misrepresentation of facts or misjudgment of the structure of a social area of life is not only impractical but unjust.[20] However, the subject matter of the term "common good," as explained so far, as well as the consequent refinement of the concept with regard to its application, are more important than consensus of all authors on the precise location of the line with regard to the three constituent elements of the common good.

As far as *levels of application* are concerned, a rational legal system at least implicitly claims that certainty, legitimacy and practicability should be sought in the whole construction of law. Such construction includes the following levels: (1) the decision made in the *particular case*; (2) the pertinent legal *rule(s) and principle(s)* governing

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18. Pragmatism in this encompassing sense should be understood as a theory of the common good that refers to the systemic qualities of a modern legal order, as well as to its idealistic underpinnings and its real-world context. Pragmatism tries to arrive at the highest degree of consistency and coherence possible. *See, e.g.,* PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 84-86 (1978). All positivist, idealist and realist theories of law that try to achieve some balance between the three elements of the common good can be called pragmatic in this sense. This, with various differences in details and emphasis, is the case with the theories expounded by the authors cited in note 6. It is also correct to count W. Friedmann among the integrationists, despite his narrower understanding of pragmatism, FRIEDMANN, *supra* note 3, at 31.

19. Max Weber explicitly evokes this connection via the criterion of predictability. *See* sources cited *supra* note 7.

20. *See* BYDLINSKI, *supra* note 5, at 353; 4 WOLFGANG FIKENTSCHER, METHODEN DES RECHTS 188-92 (1977). When dealing with concepts so highly abstract as the ones discussed here, partial overlap or disparity in the definitional coverage proposed by different authors cannot be avoided. However, they do not contradict the position advocated here: the usefulness of analyzing the common good along the lines of the three elements explicated in the text. Parallels to this definitional "combination theory" of relevant factors in the field of judicial interpretation will be discussed later on in the text.

resolution of particular cases; (3) the relationship of specific cases, rules and principles to the surrounding *sphere of life* or *social structure* in which they operate.

The particular character of any legal order or theory can be analyzed in terms of the importance assigned to the three elements of the common good and to these levels of decisionmaking. Generally speaking, the emphasis in a common law country tends to rely, in decreasing order, on factors 1, 2, 3, whereas the opposite holds for a civil law country. However, both kinds of systems have to include all of these factors, to some degree, so as to avoid painting a one-sided picture of the legal world.[21] Thus, ignoring the specific circumstances of a case probably will lead to impractical and unjust constructions of the applicable law. Cases are not understood adequately if they only take "material" from preordained law waiting to be "discovered" and objectively applied by judges. If one overlooks this fact, then one ends up with one or the other variant of *Begriffsjurisprudenz*, conceptual or mechanical jurisprudence.[22] By contrast, if one assumes that "law" can adequately be stated merely by formulating narrow rules governing a limited number of cases, then one loses sight of the wider reach of a legal order which should appeal to the ideals of consistency and coherence writ large,[23] that is, certainty, legitimacy and practicality on the level of rules, principles and spheres of life.

Hence, all legal orders should take into account the facts of a problem or a case, the governing legal rules, the pertinent guiding principles, and the sphere of life which the legal order seeks to regulate.[24] These spheres of life can differ greatly in their "make-up," as witnessed by the state's regulation of family life, higher education, the military, social welfare systems, and economic organizations. The direction, method, and degree of governmental regulation must differ accordingly.

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21. For a comprehensive analysis of the interplay of case, rule/norm, principle, and system both with regard to case law and code law systems, see JOSEF ESSER, GRUNDSATZ UND NORM IN DER RICHTERLICHEN FORTBILDUNG DES PRIVATRECHTS 171, 239 (4th ed. 1990).

22. On *Begriffsjurisprudenz*, *see* KOMMERS, *supra* note 15, at 46, 54; JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 483 (1994).

23. *See* EISENBERG, *supra* note 9, at 44-47.

24. In jurisprudential writings, this demanding ideal is characterized, for example, as responsive law, *see* NONET & SELZNICK, *supra* note 18, ch. 4, as well-ordered society, *see* JOHN RAWLS, A THEORY OF JUSTICE chs. I 1, IV 1 (1971), and as a rational legal order, *see* ALEXY, *supra* note 6; KRIELE, *supra* note 6; Günther, *supra* note 9; Buchwald, *supra* note 9.

Once one has gained an understanding of these guiding ideas, then the demands of a well-ordered, functioning, modern legal system should become clear. The "right decision" on both the legislative and the judicial level can be characterized as a decision putting into effect the three ideals of the common good in the best possible way. Obviously, the legal system characterized herein is highly aspirational, and actual legal orders can only approximate it. But these guidelines must be kept in mind, because *any legal criticism* springs from the view that one or several of these goals have been missed by the resolution of a case, or by the formulation or interpretation of a legal rule or principle.

So far, we have elucidated the distinctiveness and the relatedness of certainty, legitimacy and practicality as constituent elements of the common good which forms the all-encompassing goal of the legal order. Thus, although one can and should distinguish these three elements, in practice the *combination* and *integration* of these elements, as far as possible, leads to a well-ordered society. In the parts addressing goals and methods of judicial interpretation in the latter part of this Article, we will encounter similar analyses and prescriptions for combining and integrating all relevant goals and methods. Before we address interpretation of legal provisions in more detail, though, the respective powers of concretization or interpretation of law under the separation-of-powers scheme should briefly be sketched.

II. POWERS TO CONCRETIZE LAW

All governmental bodies are meant to contribute to the realization of the common good through consideration of the requirements of certainty, legitimacy, and practicability. This theme underlies the establishment of governmental bodies, powers, and limits on these powers in the constitution and in statutes. Setting up a positive, written legal order in the modern, Western sense also implies that not all governmental organs fulfill the same functions in the process of concretization of law. The focus of attention varies according to the separation-of-powers principle, as understood and (mostly) written down in the constitution of a given country.[25] Accordingly, the legislature has to enact laws; administrative organs may legislate only if this power has been delegated to them by the first branch of government. Apart from the areas of delegated powers, the executive branch of government, along with the citizens, must apply and observe the law.

25. *See, e.g.*, U.S. CONST. arts. I, II and III; GG art. 1, § 3, and art. 20, § 2.

In the context of this Article, the most important aspect of separation-of-powers doctrine is the distinction between *legislative concretization* and the ensuing *judicial concretization of law*, that is, between legislation and statutory interpretation. Legislative acts alone do not necessarily determine legal concretization. Administrative law, legal custom, and case law also figure in the concretization.[26] However, legislative regulations are by far the most important sources of binding legal rules. By forming a compulsory "behavioral program," legislative regulations condition the binding law that the administration and the courts must apply by relating pertinent legal rules and principles to cases ripe for decision.[27] From the constitutional point of view, a division between the enactment and the interpretation, or between macro and micro levels, is a consequence of the separation of powers. From the functional point of view, the division reflects the greater democratic legitimacy of the legislature, as compared with the administration and the judiciary,[28] and its greater qualification for solving problems at the macro level and for forming a consensus, or at least a basic level of acceptability, among the citizenry.

Differences among legislative, executive, and adjudicative activity inform the interpretive process in various respects. First, the lawmaker's primary task on both the constitutional and the statutory level is to concretize the common good by enacting clear and legitimate regulations that work in the sphere of life they are intended to govern. The American constitution says the same thing by mentioning some (but not all) criteria that should guide governmental action—justice, tranquility, defense, welfare, liberty—, in enacting and executing laws. It is fair to theorize that the framers of the United States Constitution, in establishing a separation-of-powers scheme, expected it both to avert tyranny (another aspect of legitimacy, justice and liberty) and to

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26. As to the binding nature of precedent in a code law country like Germany, see *supra* note 2.

27. *See supra* notes 6, 18, and 24; *see also* NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN 242-48 (2d ed. 1975). Luhmann describes the particular functions of political recruitment, legislative programming, administrative adaptation to specific cases, and judicial control from the point of view of systems theory. Luhmann, *supra*; Alexy, *supra* note 6; Rawls, *supra* note 24; and Nonet & Selznick, *supra* note 18, present partly differing views with regard to the understanding of the constituent features of the modern state and their relationship to the common good. This is not the place to comment on the different approaches of systems theory, discourse theory, contractarian theory, and evolutionary theory, respectively.

28. This is true for Germany, where neither the chancellor nor the judges are appointed through a direct democratic vote. In the United States, this statement has to be relativized in so far as members of the executive and the judiciary are elected by the citizenry, such as the President of the U.S. and many state judges.

contribute to the efficient performance of government's legitimate tasks.[29] The same observation holds for the German Constitution. As a modern and more comprehensive constitution than that of the U.S., it includes many more substantive goals to guide legitimate state action. The German Constitution also sets up a complex system of checks and balances to attribute and at the same time delimit governmental power to organs which can be expected to best perform the various purposes of a modern legal system.

Second, legislative decisions have to be respected and carried out by those bodies that are applying law. For the executive and the judicial branches, the legislative program forms the framework, or input, for their concretization of law. Judicial "interpretation" can, and must, forge links between what is said and willed by the lawmaker. Law-applying bodies must interpret what has been said and willed by the law makers in light of the three encompassing legal purposes, as concretized by constitutional law. If necessary, the law-applying bodies must complement or change the legislative act to conform therewith. Under this view, the term "law" seems to have two interconnected meanings: what is enacted by the appropriate lawmaker, and what every positive enactment is supposed to concretize, *i.e.*, *Recht, jus,* in the sense of positive law viewed in the light of the overriding goals of the legal order—certainty, legitimacy, and practicality—as set up in the constitution. The German Constitution makes exactly this point in art. 20, sec. 3: The legislature shall be bound by the constitutional order, the executive and the judiciary shall be bound by statutory law and *Recht*, LAW. "*Die Gesetzgebung ist an die*

29. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."); *see also* ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 12 (3d ed. 1990) ("[T]he delegation doctrine's objective of dividing the responsibilities of government to provide checks on abuses of power must be counterbalanced by the need for effective government."). I hope that my use of the phrase "concretization of law" on the levels reaching from (1) the common good, (2) the constitution, (3) statutory law and (4) lower levels of lawmaking to (5) application and interpretation of legal rules in particular cases makes clear that this is not at all about deducing objectively right decisions from the highest principles imaginable. Concretizing law means taking into account many pertinent aspects at the same time. In order to be able to understand how many aspects can enter the picture, one needs intellectual tools that allow one to differentiate while at the same time keeping the whole picture in mind. I hope that the ideas presented here can help in pursuing this goal.

verfassungsmässige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden."[30]

Still another perspective accompanies statutory interpretation by the judiciary. The binding decrees of the lawmaker consist of both what is said and willed at the moment of the statute's enactment, and all later amendments and other statutes, in their original and amended forms. The binding law thus comprises the valid legal system as a whole, which in most cases contains enactments of different epochs and constitutions as well as many different legislative bodies![31] Even though the whole legal system is not relevant in every case, the resolution of a case may depend upon several legal provisions dating from different periods. The provisions may spring from divergent motives and purposes, or may rest upon outdated ideas of legitimacy and practicality. In these cases as well, the courts must examine all pertinent legal provisions to understand the will of the lawmakers and to interpret the provisions in light of legitimacy and practicality.

Under these circumstances, the special place of statutory interpretation by the courts can be characterized as follows: Against the backdrop of joint responsibility for the common good in the sense of deciding upon legitimate and practicable legal provisions in a predictable manner, the particular *lawmakers are entitled to the power of primary concretization*. Based on their constitutional powers and within constitutional guidelines, their declarations of intention are prima facie binding on the judges. The courts are obliged to think through the legislative program in light of certainty, legitimacy and practicality; to apply it to cases that are actually about to be decided; and to bring it in line with the enactments of former lawmakers. This exercise entails securing the consistency and coherence of the legal system. *The courts*

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30. The English language has no word that makes this distinction between *Gesetz* and *Recht*, *lex* and *jus*, clear. The translation of the German Constitution published by the Press and Information Office of the Federal Government translates *Recht* in Art. 20, § 3, as justice, *Gerechtigkeit*. In my view, however, justice is not the only goal that even in the act of enacting a constitution is presupposed. Certainty and practicality should also be mentioned as elements of *Recht*, law writ large. For lack of an appropriate English word for this idea, I choose the capitalization of the word "law."

31. One might say that the United States, in contrast to Germany, has had only one constitution in the last 200 years. From a purely textual point of view, that is correct. From a more substantive, functional point of view, though, the American legal order has gone through several clearly distinguishable stages that one can characterize as stages of substantially different "constitutions;" for example, before and after the Civil War, before and after the advent of the modern administrative state, and before and after the Warren Court.

bear primary responsibility for adjudicating and adjusting competing legal provisions.

There is yet another aspect to the problem: Even though the lawmakers acting here and now are, in most circumstances, motivated by a need to resolve specific problems at hand, the norms they finally adopt usually will affect cases beyond the scope of the immediate circumstances considered at the time of enactment. If possible, these cases should also be solved in a predictable, just, and practical manner. The courts provide certainty of meaning by elucidating legislative purposes and legal concepts and doctrines. The courts lend stability to the legal system by respecting, whenever possible, their own decisions and by deciding parallel cases in a similar manner. They provide for change when, in the course of deciding cases, a line of precedents or the construction of a statute leads to unjust and impracticable results. Should a new statement of rights and responsibilities within the confines of binding law become necessary, the judiciary should then, in a timely fashion, define the new state of the law on which affected parties can base their behavior in a predictable way.

Furthermore, even though the lawmakers acting in the present should consider the compatibility of their current regulation with former legislative acts, a failure optimally to achieve this consistency and coherence in time and content does not automatically result in a verdict of unconstitutionality, if the regulation is challenged before a constitutional court. If the lawmakers can base their act on a power-enabling clause, or if they maintain the appropriate procedures and do not violate substantive constitutional commands, the regulation is legally valid even though it may be in conflict with legislative enactments from former times and other legislative bodies. If tensions should arise, then the lawmakers are entitled to intervene. Practically, though, legislative intervention to relieve tensions does not occur very often. Rather, under the division of labor and because of the scarcity of time, it is at least defensible to entrust the resolution of such problematic cases, as a rule, to the proper courts. Then, these courts, within the framework of judicial hierarchy, legislative purpose, and constitutional guidelines, are to arrive at a legally certain, tolerable and practical solution. In practice, this is the prevalent approach. Thus, delegation of powers to concretize law is practiced

among legisla-ture, government and administration, and between the legislature and the judiciary.[32]

Finally, the following needs to be stated: Not every clear-cut legislative command or judicial decision leads to a legitimate and practical result. In a pluralistic society, the legitimacy of many legal decisions will be contested, and issues of practicality can arise at any time. Tension among the three elements of the common good becomes most pronounced in extreme cases. One need only think of a legal system which suppresses certain races and consequently enforces its discriminatory policies with its legal system and through its legal bodies. Here the legal order would be certain and predictable, but it would be unjust.[33] The question of whether the applied means of oppression serve the pre-determined goal depends on the circumstances at hand. At any rate, this is not a problem of certainty of meaning or substantive legitimacy. This example demonstrates that the question whether any state action supports the common good needs to be answered by assessing its consequences with regard to all its constituent parts—certainty, legitimacy, and practicality.

However, identifying only the possibility of clashes among these three elements would be short-sighted. One can also identify circumstances in which goals of certainty, legitimacy, and practicability complement and strengthen each other. For example, this mutual reinforcement may appear in the unanimous support that separation-of-powers schemes enjoy in modern societies, despite problems with regard to details of implementation. As specified in many modern constitutions, the Western model of checks and balances has turned out to represent important aspects of legitimacy, *i.e.*, integration of democracy and liberty as well as workability. The doctrine of precedent also illustrates the

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32. Certain macro competences are handed over by the legislature to the administration. Sometimes, however, the legislature opts to regulate by enacting a private bill, e.g. *ein Einzelfallgesetz*. Unless a constitutional barrier exists, lawmakers are allowed to take care of specific cases and to direct the micro level of public life. Their legitimacy rests upon their status of being the democratically elected representatives of the people.

33. Some authors would even deny that such a system is a "legal order," or *Rechtsordnung*. Rather, they would say that this is an *Unrechtsordnung or Nichtrechtsordnung*, an unjust legal order or no legal order at all that, consequently, cannot bind its citizens and agents. Positivists, of course, would criticize that view. In Germany, this problem usually is discussed using the so-called Radbruch formula (developed by the famous German jurist Gustav Radbruch after World War II): Unjust law is "law," as long as the degree of injustice does not reach proportions that are totally unbearable. *See* Ralf Dreier, *Some Remarks on the Concept of Law*, *in* PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS 109, 115-16 (Werner Krawietz ed., 1994).

complementary character of certainty, legitimacy, and practicality. The significance and worthiness of *stare decisis* lie in the fact that the doctrine enhances legal certainty in the sense of predictability, and thus also promotes a rational use of means. At the same time it also aims at legitimacy in the sense of morally equal treatment for all citizens.[34]

In conclusion: The criteria of certainty, legitimacy and practicality are obligatory guidelines for legislatures and courts. However, the functional division of the powers to concretize law and the practical conditions of the modern regulatory state impose on the courts a special responsibility in conserving or restoring the legal, moral, and social consistency and coherence with regard to the rules they interpret. Courts are also in a particularly appropriate position to judge the effects of abstract regulations in the individual case. Thus, the courts enrich the understanding of predictability, legitimacy and practicality beyond what was considered at the time of the enactment of the pertinent legal provision. One should, however, not forget that a well-ordered legal system must also allocate the power of broad regulations of whole areas of life to legislatures, not courts.

III. THE IDEAL SITUATION AND THE REAL SITUATION IN THE PROCESS OF CONCRETIZING LAW

Taking the three elements of the common good as central in all legal decisions, one can distinguish an ideal, unproblematic version of the concretization of law from its real, problematic version.

A. The Ideal Situation

On a hypothetical level, one can imagine a state of affairs where an omniscient and benevolent lawmaker passes only regulations that are clear, good, just, and efficient. In this hypothetical state, angel-like human beings would closely follow these laws in both typical and atypical cases. In this scenario, the common good is absolutely accomplished, and if circumstances change, the lawmaker will take care of it again as described above. Ideally, the omniscient lawmaker's process of passing the law would take account of all conceivable

34. *See* CHRISTOPH VON METTENHEIM, RECHT UND RATIONALITÄT 62-73 (1984); EISENBERG, *supra* note 9, at 47-49. As for the role of precedent in German law, *see supra* note 2. *See also infra* note 41 on requirements of justiciability.

problems that might arise in applying the law.[35] Courts would no longer be needed to resolve legal disputes, and lawyers would become superfluous! The lawmaker's subjective will would coincide with the objective will of the law, if one understands this objective will as accomplishing the common good through predictable, legitimate and workable legal provisions enacted to resolve social problems. There would be no gaps between the meaning of a statute at the moment of its enactment and its meaning for the present.

B. The Real Situation

Unfortunately, the real world does not mirror the ideal described above. In practice, situations can be characterized as problems precisely because they constitute deviations from the three ideals of certainty, legitimacy and practicality. Most of these problems fall under one of the following six headings:

(1) *Uncertainty and Gaps:* (a) Sometimes lawmakers do not take into consideration all relevant aspects of a problem. (b) Even if lawmakers take account of all relevant aspects of a problem, the necessity of using terms and phrases produces uncertainty, as readers of the enacted text may have different understandings of the context or the problem. Further, (c), even though the lawmakers have considered all present cases in enacting the regulation, new circumstances arise to create fresh cases which fall under the provision. (d) It could also be the case that the rule regulates so abstractly (for example, through formulating only a legal principle rather than a concrete rule) that considerable uncertainty surrounds the solution of cases within its scope. These instances can be regarded as constituting "gaps" in the broader sense.[36] In any case, these

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35. Günther, *supra* note 9, at 181, uses a similar notion of the "ideal of a perfect norm." This ideal of a perfect norm means that "its validity and adequacy would exactly then be identical, when we could justify its general observance in any single case of application possible." (author's translation). This is of course impossible for us, since the case itself might reveal new aspects of what the common good requires or is based upon. *See supra* notes 2, 16, 21 and *infra* notes 72, 74.

36. This is a gap only if one posits that its functional opposite is a legal rule in the sense of a dense and clear command. If, however, law "exists" already where at least one vague principle is relevant to the solution of the problem (and this principle need not be explicitly stated—it can be thought of as implied by some other legal provisions), then, realistically, there are no more gaps in the legal world. This is true because all legal problems have something to do with such guiding maxims of the constitution as liberty, equality, justice, and dignity. This also means that, in principle, every political and social dispute can be brought before courts, because at least these overriding constitutional principles are—somehow—relevant to the resolution of these problems. *See also infra* note 88.

instances produce problems of legal certainty when the lawmaker provides the courts too few concrete instructions.

(2) *Inconsistency:* (a) Legal regulations may sometimes produce different results when they are actually applied. Taken by itself, each result is certain; yet taken as a whole, the results contradict each other and lead to uncertain decisions. (b) Conflicts can also arise between a solution in accordance with the common good as understood by the interpreter in the case at hand, and the solution required by application of the pertinent legal rule which, in the interpreter's view, would lead to an illegitimate or impractical result. (c) Additionally, in the interpretation of a legal provision, conflicts emerge among the interpretive horizons of certainty, legitimacy and practicality. Such a conflict could arise, for example, when an open-ended legal principle of justice and fairness is construed by judges so expansively that a majority of the population concludes that the results are unacceptable.[37] (d) There could also be a dispute about how to interpret a single pertinent principle. If, for example, a general liberty clause is to be construed, shall liberty mean traditional ordered liberty, or maximum freedom of choice for every individual?

(3) *Original Illegitimacy and Impracticality:* While the instances mentioned under (1) and (2) occur occasionally in human experience, original illegitimacy and impracticality of legal provisions come up much less frequently, at least when democratic legislatures respect the powers, procedures and substantive guidelines of the constitution. But, such cases do happen, as in modern Western states where constitutional courts at times declare recently enacted legal norms unconstitutional. Such declarations of unconstitutionality refer to failures in competence and procedure, but also constitute substantive reprimands against injustice and arbitrariness. Constitutional rights are a prominent instrument of protection against specific dangers of unjust and arbitrary state action.[38]

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37. The same, of course, can also happen when a clear rule of law leads to such results. For example, Art. 16, § 2, of the German Constitution, until 1993, provided for an unrestricted right of asylum for every person persecuted for political reasons. This led in the early nineties to an annual number of 400,000 to 500,000 persons coming into Germany claiming a right of asylum, a number of refugees that, according to the majority of the population, could not be sustained. After long, intense and hostile discussions this article was amended and restricted. The underlying problem was that in the world we now live in, any such absolute right leads to consequences—huge numbers of refugees—that overstrain the resources of any single country.

38. Violations of constitutional rights can arise, for example, when a statute infringing upon a constitutional right is too vague—then the pertinent vagueness doctrine represents considerations of the value of legal certainty. Violations can also arise when empirical assumptions are wrong: In German constitutional law, every governmental infringement upon a constitutional right must be in

(4) *Subsequent Illegitimacy and Impracticality through Change*: Though an enacted norm may be legitimate and practical upon its enactment, changes in human activity regulated by the norm (for example, dangers to privacy arise outside the home once telecommunication is used for conversation) or changes in the moral consciousness of the people (for example, with regard to classes of "suspect classifications") of which the lawmakers took no account, may render the norm illegitimate and impractical. Courts, then, in basing their decisions upon the pertinent legal concept (such as privacy or equality), in fact rely upon ideals of practicality and legitimacy to strike down a legal provision or to give it a different meaning. These cases center upon the concept of *Bedeutungswandel der Norm*, *i.e.*, semantic change of the norm. This term means that a gap has appeared between the original meaning of a law upon enactment, and its current meaning in light of the central ideas of legitimacy and practicality.

(5) *Flexibility and Rigidity of the Legal System in the Face of Change:* The last point leads to another difficulty concerning the legislative concretization of the elements of the common good, and it thus paves the way to difficulties for adjudication. In terms of ideal-types, lawmakers can follow two opposing strategies in their legislative technique.[39] First, they can make minimal use of relatively abstract words. Their main emphasis would then be on specific legal rules, on *Konditionalprogramme*, or conditional programs.[40] This law-making technique produces a high (but not an absolute) degree of certainty. At the same time, however, specificity of a rule may impede its adaptability to social change. Should such a change occur and should the lawmakers remain passive, the judiciary would confront clear, but at the same time, illegitimate and impractical instructions.

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accord with the principle of proportionality, and one of the elements of proportionality is *Geeignetheit*—the means chosen by the government to accomplish the public interest that, in turn, justifies impinging upon the individual right, must empirically be able to further that public interest. Most of the violations of constitutional rights, though, result from a wrong—*i.e.*, illegitimate—weighing of private versus public interests on the substantive level.

39. See H.L.A. Hart, *supra* note 10, at 121, for the distinction of legislation and precedent. Legislation, according to Hart, makes maximum use of general classifying words, while precedent makes minimal use of the same. *Id.* But even within legislative provisions, one can and should distinguish between specific rules and abstract principles. *Id.* at 127-28. In German jurisprudence, more emphasis is put on this distinction under the title of "rule model" and "principle model" of law. *See* Alexy, *Idee, supra* note 6, at 40-43; *see also* JAN-REINARD SIECKMANN, REGELMODELLE UND PRINZIPIENMODELLE DES RECHTS 15-18 (1990).

40. Niklas Luhmann, in his systems theory, distinguishes between "conditional programs" and "purposive programs" in law. *See supra* note 27, at 130. This distinction roughly equals the difference between rules and principles as explained in note 39, *supra*, and in the text.

Second, lawmakers can rely heavily upon abstract norms. This reliance implies a broad use of *Zweckprogramme*, purposive programs, general clauses and principles. Principles do not readily specify the conditions of their application (as do *Konditionalprogramme*, or legal rules, in the technical sense). Principles are open to flexible interpretation in the sense that their direction and emphasis may change. Thanks to such flexibility, they assure optimum adaptability to social change and allow the courts to adapt untimely regulations to new insights concerning legitimacy and practicality. However, gains in flexibility may come at the expense of legal uncertainty. In these cases, the lawmakers have not given a specific instruction, so some uncertainty prevails until judicial concretization takes place. Experience has shown that this concretization can take a long time, and one can debate whether the ultimate decision of the highest court is legitimate and practical.

(6) *The Lawmaker Taking Action or Remaining Passive:* According to the principle of separation of powers, the duty of the legislative body would be to take action when there is a need for a regulation which either arises for the first time or reappears because of a change in social conditions. The legislative duty is to instruct the administration, the citizens, and the courts on the legally proper way of doing things. This instruction does not, however, happen very often, because the parliament is overburdened, or factionalized, or consciously leaves to the judiciary the solution of such delicate questions. Under the latter option, the judiciary cannot escape deciding a case where a permissible claim has been submitted and there are applicable legal standards.[41] In such situations, the courts cannot avoid recourse to abstract legal concepts, like open-ended constitutional or statutory principles, in order to concretize their decision with regard to the ideals of certainty, legitimacy, and practicality.

It is important to keep the following in mind: Even if the lawmakers work very efficiently, that is, they reach the optimal solution

41. The doctrinal distinction of (1) checking the admissibility of a lawsuit before (2) deciding on the merits of the case is a good example of the analytical usefulness of the notion of the common good advocated here. Stating the requirements of admissibility in legislative enactments such as civil, administrative, and criminal procedural acts leads to legal certainty. Setting up different, specialized branches of judiciaries, as is done in Germany, enhances the quality of adjudication and thus supports practicality. The number of requirements that the legislature, and also the judges themselves, set up before the judiciary decides on the merits of a case should be such that frivolous claims can be eliminated in order to save money—again a requirement of practicality. All other lawsuits should be decided—a requirement not only of the ideal of the rule of law, but also of legitimacy, justice and fairness.

of a problem despite time limitations and limited insight and planning, problems of interpretation will always arise. Any linguistic formulation may lead to ambiguities or misunderstandings in subsequent construction or interpretation. Parliament rarely envisions all situations that may fall under a generally formulated legal provision. It is still harder to anticipate future circumstances that will lead to application of a provision. Even if the lawmakers regulate optimally by, for example, concretizing pertinent principles through specific regulations and even including standard illustrations of application, their elaborate regulations may still be too narrow or too broad.[42] Furthermore, the lawmakers cannot be expected to see and consider all connections between the new norm and the existing legal system in its full complexity. Additionally, conflicts between justice in the individual case and general appropriateness, as well as between certainty, legitimacy, and practicality are permanent features of the legal order. Finally, subsequent change in the real-world conditions of a legal norm is not completely predictable, and, because of the permanent burden upon the legislature, one cannot expect legislators to act immediately every time such action is necessary.

In all these circumstances, legislative concretization of the goals of the common good is insufficient to achieve the aim of legal certainty,[43] or the common good may lead to conflicts with the goals of legitimacy and practicality. Then, inevitably, the need arises for a judicial construction/interpretation/concretization[44] in a way that transcends the legislative plan with regard to the three elements of the common good. Further, much effort is required in the interpretive process when the legislature has not expressed its intention with optimal clarity. Judges here confront a great number of gaps, contradictions, and irrational or illegitimate decisions. Judges may also have to glean legal rules from abstract principles because legislators have been impelled by the delicate

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42. *See* HILL, *supra* note 5, at 108-13.

43. As mentioned *supra* note 36, the use of the term "gap" in the law depends upon whether one expects law to cover cases and problems rather specifically (then a lot of gaps exist) or rather vaguely (then gaps more or less disappear). A gap in either case leads to a *Formulierungslücke*. In German jurisprudence, the term gap often is used with an additional meaning. It is considered to be a *Wertungslücke*, a gap of valuing, if the norm that covers the resolution of a case is viewed by the interpreter as being unjust or irrational. What is meant by that is the lawmakers made an unjust or irrational judgment when they enacted the norm. *See* KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 366-404 (6th ed. 1991); REINHOLD ZIPPELIUS, JURISTISCHE METHODENLEHRE 58-59 (6th ed. 1994).

44. In the context of the discussion as presented here, all these terms are being used synonymously. *See supra* note 1. There are other contexts in which distinguishing between these terms makes sense. *See infra* note 47 and the distinction between legislative and legal concretization, *supra* § II.

nature of social problems to ignore their duty of formulating binding solutions. In such cases, judges bear a heavy burden because they cannot refrain from deciding admissible claims that have been submitted. Of course, this burden of acting as substitute legislator can also excite a certain aesthetic pleasure once one has become accustomed to this exercise of power.

IV. GOALS OF INTERPRETATION

The methodological literature in Germany adheres to the generally held view that the twin goals of interpretation are to establish the subjective will of the legislature and the objective will of the law.[45] This combination theory appears against the background of the premises given in Parts I and II, and derives its persuasive power from the incongruence of ideal and real concretization of law as discussed in Part III.

Each time a court finds one or several deficiencies with regard to the overriding goal of achieving the common good calling for judicial resolution, *a step must be taken from an analysis of the subjective will of the lawmaker towards a creative construction of the objective will of the law.* This objective will, or rather, this normative, fictitious will as objectified by the courts,[46] entails an obligation to better balance certainty, legitimacy, and practicality. The distance between what was then intended and what now, from the judicial point of view, is considered objectively rational or coherent, depends on the view taken

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45. *See* KLAUS STERN, I STAATSRECHT 124-25 (2d ed. 1984); LARENZ, *supra* note 43, at 316-26; ZIPPELIUS, *supra* note 43, at 18-21. "It is the goal of interpretation to elucidate the thoughts of the legislature in a way that can muster consensus." *Id.* at 39 (author's translation). There are some authors who opt for the primacy of the objective will of the law but these authors then point out that in trying to establish this objective will, the will of the framers of the law has to be taken into account too. See also the integrative nature of the following citation by the Federal Constitutional Court: "What is crucial for the interpretation of a law is the will of the legislature as it is objectively transformed by the enacted law." 79 BVerfGE 106, 121 (F.R.G. 1988) (author's translation).

46. The "objective will" of a law is, as has already been noted, always a subjective judicial construction of that law in light of its present-day reasonableness, as seen by the interpreter while elucidating the law's purposes. The preferred method of interpretation, then, is teleological or purposive. It is used, as will be explained later, to broaden, affirm or narrow the scope of the pertinent norm or law. In my view, much speaks for the thesis that the subjective will of a legislature, at least sometimes, is easier and more objectively detected and described than the subjective musings of judges in constructing the objective will of the law. *See* FRANZ-JÜRGEN SÄCKER, *Introduction*, *in* I MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH Rd.Nrn. (margin nos.) 65, 90-91, 94, 115, at 25-26, 33-35, 39-40 (2d ed. 1984); HELMUT COING, GRUNDZÜGE DER RECHTSPHILOSOPHIE 284 (5th ed. 1993).

with regard to legislative versus adjudicative powers as briefly sketched in Part II.[47]

V. METHODS OF INTERPRETATION

In analyzing the process of interpretation, it is helpful to differentiate between the *goals* and the *methods* of legal construction. It is also useful to distinguish pertinent methods of interpretation from *logical conclusions*.[48] Once a judge[49] has reached a result in the case at hand, using the appropriate goals and methods of interpretation, this result then will be couched in one of the so-called logical conclusions. These conclusions may consist, for example, of the choice of a restrictive or extensive interpretation of the pertinent norm, of an analogy, or an *argumentum a majore ad minus*, *a minore ad majus*, *argumentum e contrario*, or *argumentum ad absurdum*.[50] These intellectual tools do not come with a user's manual indicating when and how to apply them—for example, whether to choose the same, a narrower or a wider reading of a norm. Hence, their application needs to be directed from some other point of evaluation. This other position is provided by, or at least formulated in terms of,[51] the methods of interpretation and the goals of interpretation reflected therein.

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47. Here, discussing the width of the gap that a judge can bridge in order to modernize former concretizations of the common good, it is useful to distinguish the terms construction, interpretation, and concretization. In German jurisprudence, the terms *Auslegung* (construction) and *Interpretation* are usually confined to the exposition of what the framers of the law wanted and/or what the chosen text says, within the outer meaning the respective words can have in everyday discourse (*Wortlautgrenze*). Such interpretations still move *intra legem*, they still construe the *ratio legis*, the plan of the law. Once one crosses this border, *Rechtsfortbildung*, creative concretization takes the place of *Auslegung*. Such concretizations which go beyond what was said and willed by the lawmaker, are *contra legem* but claim to be *intra jus*—they claim to concretize the common good as the ultimate goal of any legal order. *See* LARENZ, *supra* note 43, at 366, 413-29.

48. On these three levels, *see* 1 HANS J. WOLFF & OTTO BACHOF, VERWALTUNGSRECHT 160-64 (9th ed. 1974); PALANDT, BÜRGERLICHES GESETZBUCH, Intro., §§ VI 3 a-d (52d ed. 1993). *See also* BYDLINSKI, *supra* note 5, at 428-500; LARENZ, *supra* note 43, at 318-65, 381-404; SÄCKER, *supra* note 48, nn.105-38; COING, *supra* note 48, at 268-69, 272, 279 (goals), 265-73 (methods), 283-84 (logical conclusions).

49. The analysis of legal interpretation offered here centers around the judge's work. I choose this focus in order to be able to address problems of separation of powers. This last aspect is of no concern to practitioners working for private clients. Their perspective is fighting for the client's interest, not for results as "right" as possible. If one keeps this difference in mind, it is easy to see that most of what I say about statutory interpretation also holds for practitioners.

50. On these forms of conclusion, see *supra* note 50; ALEXY, THEORY, *supra* note 6, at 279.

51. At this point, it is not necessary to discuss the degree to which interpretive judgments also, or sometimes maybe even primarily, represent political and moral convictions of the judge which then are hidden behind technical tools of the trade. *See supra* note 48; *infra* note 82. *See,*

As mentioned earlier, the prevailing method of interpretation is that of combination theory. Combination theory requires respect for both the subjective will of the legislature and the objective will of the law, once it is enacted. As preceding parts have already suggested, this latter requirement is best understood as an appeal to attend to the requirements of the common good, as concretized in the rules and principles of law and morality, and in the goal of practicality. The effort to combine subjectivity and objectivity in the interpretive process is supplemented by the maxim to use all relevant methods of construction; no single method should be excluded from the outset. German literature on legal methods is full of suggestions about how to weigh the relevant methods in a more detailed and hierarchical way than the weak combination precept supposes. These more stringent theories of interpretation, however, have not been embraced by a majority of legal practitioners or the courts.[52] For the most part, practitioners and courts do not wish to be bound by anything stronger than the weak combination theory that simply tells them to use all appropriate methods. The question then arises: Which are the appropriate methods?

Most scholars and practitioners agree on the seminal character of the so-called *classical canon of interpretation*, which according to (but partly also going beyond) Carl Friedrich von Savigny[53] encompasses grammatical (also called textual, semantic), systematic (contextual, structural), historical and teleological (purposive) interpretation.[54] This canon, however, is considered by some authors to be positivist or in need of supplementation. According to these critics, the canon is positivist in the sense that it is applied with a view to deducing objectively right decisions from pre-existing legal material; and the canon needs

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e.g., Brugger, *Legal Interpretation*, *supra* note 3, at 406-11; G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 256-57 (1976) ("[Cardozo's] theory of the proper exercise of the judicial function candidly admitted that on many occasions a judge found himself free to shape the course of the law, yet might choose to mask that freedom of choice in the traditional techniques and canons of his profession.").

52. This resistance, in a way, is already expressed in the title "combination theory" which implies at least some flexibility. For characterizations of the use of these methods as combination theory, *see* 1 WOLFF & BACHOF, *supra* note 48, at 161, 163; STERN, *supra* note 45, at 126; LARENZ, *supra* note 43, at 345-46; BYDLINSKI, *supra* note 5, at 553-71; COING, *supra* note 46, at 271.

53. C.F.v. SAVIGNY, I DAS SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS § 33 (1840), especially at 213014., *reprinted in* Brugger, *supra* note 3, at 396. Savigny tended to restrict the teleological method to elucidating what actually was willed by the legislature.

54. *See* PALANDT, *supra* note 48, Intro., § VI 3 b ("Authoritative for the interpretation are the meaning of the word, the contextual meaning, the genesis and the purpose of the norm."); BYDLINSKI, *supra* note 5, at 437; SÄCKER, *supra* note 46, nn.118-130; KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND nn.53-54 (19th ed. 1993).

supplementation to the extent that this canon is considered too lean and/or too inappropriate for certain legal subject matters, such as constitutional law.[55] The therapy then offered usually consists of a proposal for supplementing these four methods, for example, by way of adding special methods of constitutional interpretation.[56]

In contrast with such conclusions, the following suggestion for systematization of the classical canon of interpretation claims that the four methods, if understood in an appropriately refined way, can cover many more modes of interpretation than previously thought possible. Indeed, I think that almost all modes of interpretation proposed by modern theorists or practitioners can be subsumed in the classic canon of interpretation, although this presumption would be hard to prove. The main characteristic of my attempt at systematization in contrast to other proposals is that, instead of *externally adding* new interpretive methods to the classic canon, I shall propose an *internal differentiation* of that canon which, in my view, covers a lot of ground. If that thesis turns out to be correct, then one could say that the classical canon of interpretation deserves to be called the modern canon of interpretation. The following table illustrates my explanation of the reformulated classical canon of interpretation.

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55. Both components of this critique are aptly summarized in HESSE, *supra* note 54, at note 51-59. Hesse states: "According to its claim, interpretation [according to the classical, positivist understanding]—including constitutional interpretation—in principle consists of the mere analysis of and obedience to a preexistent (objective or subjective) will, which by means of those methods can be determined with objective certainty and without referring to the problem at hand." *Id.* at note 53 (author's translation). "The restriction of the 'traditional rules of interpretation' misjudges the goal of constitutional interpretation; disregarding the inner structure and the contingencies of the interpretive process most of the time, it can only deficiently cope with the task of reasonable interpretation on the basis of fixed principles." *Id.* at note 59 (author's translation). Therefore, Hesse suggests supplementing specific methods of constitutional interpretation—paying attention in the interpretive process to constitutional unity, practical concordance, functional correctness, integrative effect, and the normative power of the constitution. *Id.* at notes 70-76. For a criticism of Hesse's position, see Brugger, *Legal Interpretation*, *supra* note 3, at 398-400, and *infra* sec. VI.

56. *See* HESSE, *supra* note 54; *see also* WOLFF & BACHOF, *supra* note 48, at 161-62 (grammatical, logical, historical, genetic, comparative, teleological interpretation); STERN, *supra* note 45, at 124-27 (adding special methods of constitutional interpretation); Ralf Dreier, *Introduction*, *in* PROBLEME DER VERFASSUNGSINTERPRETATION 13, 25 (Ralf Dreier & Friedrich Schwegmann eds., 1976); KLAUS ADOMEIT, NORMLOGIK-METHODENLEHRE-RECHTSPOLITOLOGIE 144-50, 167-68 (1986) (12-step-model for judicial law-finding); Alfons Gern, *Die Rangfolge der Auslegungsmethoden von Rechtsnormen,* 80 VERWALTUNGSARCHIV 415, 416-21 (1989) (adding the topical method to the four classical perspectives).

Table 2: Methods of Interpretation

I. textual interpretation 'what is specifically said'	1. legal usage	a) statutory definitions b) legal fictions c) judicial doctrines
	2. professional usage	
	3. general usage	
II. contextual interpretation 'what is said in context'	1. substantive context	a) narrow context b) broad context
	2. functional, institutional context	a) legislature b) executive c) judiciary
	3. real-world context	a) case b) rule c) system, sphere of life
III. historical interpretation 'what was willed'	1. historical interpretation in the genuine sense	a) factual interpretation then - now b) ideational interpretation then - now
	2. genetic interpretation	a) factual interpretation then - now b) ideational interpretation then - now
IV. teleological interpretation 'what is the purpose'	1. legal certainty	a) case level b) norm level
	2. legitimacy	a) case level b) norm level } aa) freedom, bb) equality, cc) dignity
	3. practicality	a) case level b) norm level } dd) wealth, ee) . . .

A. Textual Interpretation

Textual interpretation is the semantic, linguistic, and grammatical analysis of a legal provision pertinent for the resolution of a legal problem. For example, in abortion cases, a crucial interpretive problem turns on whether the term "life" includes unborn life. Finding the pertinent legal provision in a lawsuit depends on the kind of claim the plaintiff is making. This can be, for example, an individual asserting a claim for damages, a public authority filing a prosecution, or a

governmental organ making a claim of unconstitutionality against another state organ. Depending on the particular "question" the lawsuit poses, one has to find the legal provision that "answers" the pertinent question in the sense that it tells the plaintiff what it takes to legally substantiate the claim. Hence German jurisprudence sometimes calls this pertinent provision the "answering provision" (or answering provisions—in the plural because they may include several causes of action). Perhaps all the conditions prerequisite to validation of a claim will not appear in a single provision. Often, the process of interpretation must bring together several provisions which in the aggregate define the requirements for a successful claim. For example, to understand a particular term in the norm to be construed, one has to take into account the definition of this term provided for in some other (definitional) norm.[57] Perhaps a basically sound claim can be frustrated or defeated by other provisions that validate counter-claims and defenses against the kind of claim raised in the original lawsuit. So, "the complete pertinent norm" which is the object of textual, grammatical, or linguistic interpretation, might include several legal provisions that only in the aggregate specify what is required for a successful claim of damages, criminal responsibility, or unconstitu-tionality et cetera. In sum, textual interpretation refers to what is pertinently and specifically said by the law concerning the legal problem to be solved.[58]

Special attention should be paid to the possibilities of variation within the relevant linguistic usage—including legal usage, other professional usage or the popular vernacular. In anticipation of the following discussion of other methods of interpretation, one can say that these three classes of usage are listed in hierarchical order, so that, in case of doubt, the legal usage prevails. Legal usage of relevant terms tends ordinarily to be the most reliable in taking into account the lawmaker's declaration of intention, as well as the relevant legal and real-world context of such declaration. In other words: only the legal usage of a pertinent norm or term in general can assure coverage of textual, contextual, historical, and purposive aspects of interpretation, and can

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57. One illustration: Some of the constitutional rights in the German Constitution are reserved for Germans. But who is a German? This interpretive question is answered in Art. 116 of the Constitution which states that "[u]nless otherwise provided in a law a German within the meaning of this Basic Law is anybody who possesses . . ." and then gives a list of specifications. GG art. 116 (author's translation).

58. For a detailed discussion, see ZIPPELIUS, *supra* note 43, at 25-33. *See generally* LARENZ, *supra* note 43, at 250-64.

assure that the norm supports certainty, legitimacy, and practicality to the greatest degree possible.

When lawmakers rely upon terms from professionalized scientific and technical areas of life, the terms usually reflect technological expertise. The lawmaker's reliance on technical vocabulary, in turn, enhances the means-end oriented rationality of the law, as well as the certainty incorporated in professional languages. However, in these cases as well, one often implicitly finds the predominance of legal interpretation. By locating professional terms within the overall regulatory scheme, which can only be appropriately identified by legal organs, the legal organs must have the last word with regard to the reliability and appropriateness of the incorporated technical language. This evaluation of reliability is a delicate task: The interpreter must rely on the expertise of nonlegal actors and the appropriateness of non-legal terms and phrases, and at the same time the interpreter must assure that this "foreign information" fits the overall regulatory scheme of the law and serves the broader goals of certainty, legitimacy and practicality. A way to combine the two worlds of legal and extra-legal expertise is to attribute to the technical term or norm a presumption of correctness which, if need arises, can be rebutted. A second way to assure that all relevant real-world information is included in the formulation of a rule as well as that the purpose of the rule receives the attention it deserves is that in the process of drafting the rules, the responsible body is made up not only of legal organs but also of competent and neutral professional specialists.[59]

Ideally, the language of the law should be shaped by the general understanding of language. Legitimacy in terms of integration and consensus of the population at large can only be reached through use of language that everyone can understand. The real, and correspondingly the legal, world, however, have in the meantime become so complex that from the point of view of effectiveness and certainty (here meaning that the pertinent areas of action and organization are appropriately differentiated and identified), everyday usage often has to be subordinated to legal usage. Thus, a citizen can no longer be certain in all cases that his or her understanding of the pertinent word or norm is the valid one. One also has to consider the possibility that a professional linguistic usage no longer matches the communication of non-

59. *See* KLAUS STERN, III-1 STAATSRECHT 1279-83, 1484-86 (1988); Jürgen Salzwedel, *Umweltschutz, in* III HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND § 85 nn.24-25 (Josef Isensee & Paul Kirchhof eds., 1988).

professionals.[60] Areas where the use of everyday language is still of great significance include, for example, parts of the criminal law essential to the everyday lives of the citizens, as well as the constitutional rights embodied in the constitution.

In many situations, however, legal usage prevails because it comprises and influences meanings of professional or technical terms in a norm. This is true even in such classical areas as civil or criminal law which, at least to some extent, contain a highly technical, artificial language, shaped by legal definitions, legal fictions, and doctrinal concepts.[61]

B. Contextual Interpretation

In the terminology of the prevailing methodology in German jurisprudence, contextual interpretation is called systematic interpretation.[62] Under this approach, ambiguous words are eliminated by reference to other related provisions or concepts in which the same word or term appears. For example, if, in the abortion question, one has to determine whether the term "life" in the constitution comprises unborn human life, one can search for the meaning of "life" in other legal texts to discover what protection "life" has received on the constitutional level. The main goal of contextual interpretation usually is the furtherance of the consistency and coherence of all relevant legal norms, that is, legal certainty. If possible, legal terms or concepts should have consistent meanings in all the places where they are being used. At the very least, their meanings should not conflict! To the extent that social values are represented by these norms, legitimacy is also furthered.

Uniformity of meaning for legal terms, though, can be counteracted if the institutional or real-world contexts in which the respective term operates differ. If these differences are substantial, it can become necessary to give the same term a varied meaning and override

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60. *See* HANS SCHNEIDER, GESETZGEBUNG, n.455 (2d ed. 1991) ("The intelligibility of a law grows proportionally, among those who actually are concerned, to the degree the legislature employs their specific language. It is not a rare fact that this leads to the words being replaced by mathematical, chemical, physical formulas or symbols.") (author's translation).

61. *See* U. DIEDERICHSEN, DIE BGB-KLAUSUR 143, 179 (7th ed. 1988) (illustrating these ideas and providing examples).

62. *See supra* note 50.

the certainty-of-meaning aspect of the legal order in order to create or preserve the right institutional or factual "fit."[63]

Notably, the interpreter has several options when using this method, and these can lead to different results. Ultimately, the interpreter is free to regard the narrower or the broader context as decisive. The narrow context would include the phrases, paragraphs and articles/sections surrounding the provision to be construed. The broader context would include all legal provisions that are valid within the particular legal order and in some manner concern the problem to be solved or to the term or concept used in the pertinent norm.[64] Indeed, the range of norms to be considered can extend beyond the sphere of binding legal norms in a nation state. If related norms or concepts occur in foreign legal orders, then these foreign precepts arguably can assist discovery of a solution on the national level. The authority of such foreign precepts, of course, is persuasive, not binding.[65] This suggests that the "comparative method," although often cited as a method of interpretation in addition to the classical canon of statutory construction,[66] constitutes a subcategory of contextual interpretation.

The *context surrounding the pertinent text*, however, is not limited to the *substantive context of the norms establishing rights and duties for citizens*. The context also includes the *institutional and functional context—the sharing of powers in concretizing law*, notably between the legislature and the judiciary, as provided by the legal system as a whole and by the constitution in particular, and as briefly sketched in Part II. These interpretive powers must be related to each other as consistently and coherently as possible. That is, all governmental organs should conceive of their respective powers to concretize law in a way that remains as faithful as possible to the provisions that grant these powers,

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63. One illustration: The term *Gesetz*, law, is used many times in the German Constitution, but it is far away from conveying only one meaning. *Cf.* 1 WOLFF & BACHOF, *supra* note 48, at 120 (analyzing four different meanings of the same word).

64. See by way of illustration the struggle between the "positivist," the "functionalist" and the "rights-oriented" schools in interpreting the freedom-to-broadcast clause in Art. 5, § 1, of the German Constitution, as discussed in WINFRIED BRUGGER, RUNDFUNKFREIHEIT UND VERFASSUNGSINTERPRETATION (1991).

65. The Anglo-American differentiation between binding and persuasive authority is helpful here. *See* DIETER BLUMENWITZ, EINFÜHRUNG IN DAS ANGLO-AMERIKANISCHE RECHT 28 (4th ed. 1990). Even though this distinction in Anglo-American jurisprudence is mainly used to differentiate the degree of bindingness of judicial decisions within the same national system, it can be easily used in a transnational context as well. As far as English decisions on common law are concerned, the American legal system indeed allows according persuasiveness to these "foreign" decisions.

66. *See, e.g.,* 1 WOLFF & BACHOF, *supra* note 48, at 161-62.

that assures the maximum integrative effect for their decisions, and that does not frustrate requirements of efficiency.[67] Upon closer examination, these goals are analogous to the double objective of separation-of-power concerns—*i.e.*, preventing tyranny (that is, securing legitimacy) and, at the same time, providing for efficient state action.[68] The goals also have found apt expression in the political question doctrine as expounded by Justice Brennan in *Baker v. Carr*.[69] If a collision of institutional powers is unavoidable, as sometimes happens between legislatures and (constitutional) courts in states that constitutionally protect individual rights against governmental infringements, then this collision should also be resolved by doctrines of judicial review that, on the whole, provide for optimal balancing of the goals mentioned.[70] Put more generally, if collisions among governmental actors are predictable, the legal order should anticipate them clearly and appropriately, and, indeed, the texts of many modern constitutions tend explicitly to resolve such collisions.[71]

Finally, a third part of the context of the legal provision is its *factual basis—the facts or the human action or the sphere of life regulated by the provision.* For reasons of practicality, judges should start with accurate empirical data, and should consider the conditions and consequences of their decisions. Failure to heed these maxims will lead to impractical and perhaps illegitimate solutions.[72] A judge should consider such real-life implications for the case to be decided, as well as the area of life involved and the legal system as a whole. For example, a

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67. It has been noted in section III that often tensions arise between these goals, so there are cases in which trade-offs are unavoidable.

68. *See supra* note 29.

69. See Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.").

70. For a comparison of the German and American doctrines of judicial review, see Winfried Brugger, *Verfassungsstabilität durch Verfassungsgerichtsbarkeit? Beobachtungen aus deutsch-amerikanischer Sicht*, 4 STAATSWISSENSCHAFTEN UND STAATSPRAXIS 319 (1993).

71. *See*, *e.g.*, GG arts. 30, 31, 70, 83, 92 (regarding the relationship between the federation and the states), art. 1, § 3, art. 20, §§ 2 and 3 (regarding separation of powers), and art. 95, § 3 and art. 100 (regarding consistency between decisions of the high federal courts).

72. *See supra* section I.3. *See, e.g.*, 45 BVerfGE 187 (F.R.G. 1977) (question of constitutionality of life-long imprisonment). "New insights [into the consequences of life-long imprisonment] may influence, even change . . . the evaluation of this kind of punishment." *Id.* at 227 (author's translation).

beneficial resolution of a conflict in a specific case may do harm if applied to a broad range of cases. The legal "equipment" for "seeing" the real world appears mainly in the law of evidence and the rules of procedure. But there are other aspects as well. If, for example, the government wants to curtail a constitutional right under the German Constitution, the legality of such action depends upon the principle of proportionality. This principle requires, among other things, that the means chosen by the government must empirically be seen to advance the public interest, and the Constitutional Court can ask the government to support this claim with sufficient evidence.[73] The German Constitutional Court sometimes even forces the government to reconsider infringements on constitutional rights if the government's prognoses as to the consequences of its actions turn out to be wrong.[74]

C. Historical Interpretation

In its broadest sense, the historical interpretation of a statute aims at elucidating the will of past lawmakers. There are two variants of historical interpretation.[75] First, if the analysis concentrates on the line of tradition, where the legislative decision is embedded in terms of substance or terminology, for example, when using the terms "equal protection" or "contract," we are dealing with a historical interpretation in the broader sense. In German parlance, this variant is called historical interpretation *im eigentlichen oder engeren Sinn*, in its genuine or narrow sense. Second, if the focus is placed on what the legislature specifically willed when it passed a law or a norm, then the road leads to a "genetic" interpretation.[76] In the first case, historical construction proper, continuity in development of a tradition, appears in the foreground. By contrast, in the second case of a genetic interpretation, the declaration of legislative will—which is often a conviction to change an existing state of affairs—provides the object of analysis and the criterion for legitimacy.

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73. *See supra* note 38; 79 BVerfGE 256, 270-74 (F.R.G. 1989). *See generally* RAINER DECHSLING, DAS VERHÄLTNISMÄßIGKEITSGEBOT (1989).

74. So-called *Nachbesserungspflicht*. *See* 76 BVerfGE 143, 167-68 (F.R.G. 1987); R. Breuer, *Die staatliche Berufsregelung und Berufslenkung, in* VI HANDBUCH DES STAATSRECHTS § 148 nn.14-19 (Josef Isensee & Paul Kirchhof eds., 1989).

75. Both variants, in addition to textual analysis, are mentioned in 4 BVerfGE 387 (F.R.G. 1956): The result of the interpretation "derives from the wording of the provision as well as from its genesis revealing the meaning in connection with the historical development." *Id.* at 407 (author's translation).

76. *See* ALEXY, THEORY, *supra* note 6, at 236.

For both variants of historical interpretation, two more alternatives open up. First, the emphasis can be placed on what was factually intended. Here it is important that the developmental tendencies can really be diagnosed, and that we are identifying actual legislative motives and purposes. Second, however, what ideally, but not empirically, should have been intended can also be the focus of historical interpretation. In such an "ideational" construction, the interpreter places the factual development or legislative will in the normative horizon of the period during which the development or legislative decision took place, which then is concretized in terms of the ideals of certainty, legitimacy, and practicability. What has been factually intended is read, construed, and often corrected in light of the ideals of the common good, as understood in its historical context by the present-day interpreter. It goes without saying that from the perspective of this speculative historical reconstruction, the lawmakers' actual regulation can easily appear to fall short of what they "really" intended to settle.[77]

Whether dealing with the factual or the ideational variant of historical interpretation in its all-encompassing sense, the interpreter still has to choose the temporal link: Should the interpreter focus on what was willed at the historical moment of enactment or on what would be intended by the lawmaker today?[78] As for the latter, this perspective undoubtedly is a bold projection.[79] The boldness of the method does not, however, necessarily prevent the courts from working with it. Though it may not be practical to apply with strict accuracy, it offers the possibility of contributing one's own creative share to the interpretation of the

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77. An example thereof is the description of the objective theory of interpretation by ZIPPELIUS, *supra* note 43, at 46-47, if one places it in historical perspective: "He, who . . . according to the objective theory of interpretation determines the meaning of legislative decisions, will think of the lawmaker in the role of a representative who for reasons of legitimacy has to follow the understanding of justice which holds the possibility of consensus among the majority of the legal community . . .; he will thus interpret the goal and practicality of the legislative decisions in the light of justice." (author's translation). For references to judicial decisions, see ALEXANDER BLANKENAGEL, TRADITION UND VERFASSUNG 127 n.275 (1987). In American constitutional law, it would be interesting to analyze judicial decisions in the race area commenting on the will of the Constitution or the Civil War amendments with regard to whether the courts concentrate on the actual or the ideal will of the framers of the Constitution. See the materials in GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW ch. V A (2d ed. 1991).

78. *See, e.g.,* LARENZ, *supra* note 43, at 317. "If the interpreter bases his construction of a law on the purpose of the actual legislature, but projects their consequences into the present, and reads particular norms of that law in the present-day light, then he already transcends the 'will of the legislature,' if it is understood as an actual historical fact. Then, he understands the law in its inherent rationality [as perceived from the subjective point of view of the interpreter]." *Id.* at 332 (author's translation).

79. *See supra* note 46.

lawmaker[80] who usually has a stronger democratic legitimacy than a judge.

With regard to the goals of interpretation, the historical interpretation in the genuine, tradition-oriented sense tends to be holistic and continuity-centered. Thus, genuine historical interpretation aims for legal certainty in the shape of stability, and appeals implicitly to legitimacy as provided by traditional values; the philosophy of law emphasizing this strand of thought is the historical school of jurisprudence.[81] In contrast, the genetic interpretation emphasizes the goal of legal certainty through legislative declarations of will, even and especially when traditions are to be changed. Philosophies of law centered upon the legitimacy of democratic decisionmaking provide the intellectual background for this interpretive approach.[82]

D. Teleological Interpretation

Implicitly or explicitly, the teleological, or, as it is usually called in the United States, the purposive interpretation forms part of the textual, contextual and historical approaches to statutory construction in the sense that what was said and willed by lawmakers leads to the identification of the purpose of the law or provision. When we analyze the lawmaker's historical will, the teleological reference is evident. In clarifying a provision, this statement also holds true, to the extent that we are confronted with a "purposive legal program." When a "conditional program" needs to be construed,[83] its teleological character is, so to speak, hidden behind the specific requirements for the application of the rule. This character nevertheless exists, and courts should be conscious of the underlying purpose of the provision in the process of construction. If textual, contextual, and historical interpretations lead to the same result, the teleological approach is no longer of original significance, but rather merely confirms that result.

The teleological approach, however, has another, more important dimension that transcends the mere affirmation of the result of the other

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80. *See* ESSER, *supra* note 21, at 176-82; 70 BVerfGE 35, 57, 59-69 (F.R.G. 1985).

81. *See* Berman, *supra* note 3, at 780-81, 788-92.

82. In theories of democratic decisionmaking, there are more majoritarian and more representative variants. For an illustration of a strongly majoritarian approach, see CARL SCHMITT, DER BEGRIFF DES POLITISCHEN (1932) (explaining and endorsing the distinction between friend and enemy in the political process); for a more integrative variant, see JOHN HART ELY, DEMOCRACY AND DISTRUST. A THEORY OF JUDICIAL REVIEW (1980) (attempting to optimize the democratic process with a view to facilitating the representation of minorities).

83. As to this terminology, *see supra* note 40.

three modes of interpretation.[84] This dimension becomes important in cases where, according to the courts, the application of textual, contextual, and historical analysis leads to tensions concerning the three elements of the common good—legal certainty, legitimacy, and practicality. Such tensions arise when the pertinent legal norms present themselves to the interpreter as incomplete, unclear, contradictory, unjust or impractical, and when the textual, contextual, and historical analyses lead to different results. In those cases, as mentioned earlier in Part II.2., the courts apply the teleological approach in a specific, genuine sense. Though text, context and history, then, orient and inform the courts about the meaning of the norm, they no longer determine the result of the interpretation. Cases that historically lead to the formulation of a provision (such as, for example, discrimination against black people) then are merely illustrative, and no longer determinative of the scope of the pertinent provision (such as the Equal Protection Clause). New fields of regulation might be added (such as discrimination against women), and the results are couched in one of the logical forms mentioned earlier. For example, an analogy may be made between the situation of black people and that of women in terms of discrimination. In all such cases, the courts develop a reading of the pertinent provision with regard to one or more of the elements of the common good (which includes, in the discrimination example, a strong version of equal liberty as the guiding idea of legitimacy[85]). Thus the courts judge what formerly was said and willed by lawmakers in the light of the common good as they, the judges, now understand it.[86]

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84. Sometimes this dimension is called "objective-teleological" in contrast to the "subjective-teleological interpretation" characterized here as a historical (genetic) approach. *See* HANS-JOACHIM KOCH & HELMAT RÜßMANN, JURISTISCHE BEGRÜNDUNGSLEHRE 184 (1982). The parallels between the "objective-teleological approach" and the "ideational historical approach" are obvious. As for doubts about the objectivity of this method of interpretation, see *supra* note 46.

85. *See* WINFRIED BRUGGER, GRUNDRECHTE UND VERFASSUNGSGERICHTSBARKEIT IN DEN USA §§ 20-23 (1987) (discussing these cases and the methods used by courts in enlarging the groups of "suspect classifications"). *See generally* WINFRIED BRUGGER, EINFÜHRUNG IN DAS ÖFFENTLICHE RECHT DER USA § 12 (1993) (discussing the court's application of the Equal Protection Clause).

86. A representative citation for this conclusion can be found in the leading commentary on the German Civil Code—PALANDT, *supra* note 48, Intro. n.VI(3)(c) concerning teleological interpretation: "It holds priority over other methods of interpretation . . . . *Ratio legis* comprises the goals to be reached by the norm. But *ratio legis* also is influenced by general considerations of practicality and justice. The norm should be understood as part of a practical and just legal order. If in doubt on the meaning of the norm, alternative meanings and their consequences have to be analyzed. Then the interpreter has to thoroughly assess which of the alternative meanings of the norm is the best in light of practicality and justice and which fits best in the whole context of the legal order . . . . Probably this interpretive process is no longer science but *ars aequi and boni* . . . .

Attention must be paid to the great number of options within the teleological interpretation. These options encompass all elements of the common good as presented under section I. The interpreter thus faces the question of which aspect to emphasize—legal certainty, legitimacy or practicability—and which level of application should be in the forefront—*e.g.*, the resolution of a particular case or a narrow group of cases, the application of more general norms or of the guiding principle(s). If the court does not restrict its construction to what a specific lawmaker actually wanted to regulate or what the language of the norm specifically determines, that is, to legal certainty, the question arises: What exact concept of legitimacy or practicality should be embraced?[87] In the sphere of legitimacy, for example, a whole range of concepts of legitimation opens up which modern societies embrace in their ethos: freedom, equality, dignity, autonomy, welfare for poor people, et cetera. Most, perhaps all, of these values are explicitly or implicitly incorporated into the legal systems of the western world, so that judges need not worry about finding some piece of positive law on which to base their philosophy of the just and good. Chances are good that they will be able to apply at least one principle explicitly set down in their constitution or implicitly accepted or presupposed by the legal community.[88]

This is not to say that it is impossible or undesirable to argue for more order and predictability in the process of using the relevant methods of interpretation,[89] or to further define and refine the notions of the

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It is quite reasonable to characterize this process as judicial decision . . . ["decision" having here the ring of volition, *Dezision*, not of cognition]." (author's translation).

87. H.-P. Schwintowski, *Theorie der juristischen Argumentation*, 4 JURISTISCHE ARBEITSBLÄTTER 102, 104 (1992) is right in stating: "Using teleological interpretation, rational arguments of all kinds can enter legal discourse." (author's translation). For examples of possible criteria of legitimacy in this context, see sources cited *supra* note 7; Buchwald, *supra* note 9, at 25-26 (describing normative theories of decision-making, social choice theories, especially utilitarian and contractarian approaches, along with rules of general practical discourse). A list of common American points of reference in the teleological vein is presented in Brugger, *supra* note 3, at 403. The table used in the article is reprinted here in the appendix as table 3.

88. In the United States Constitution, the principle of respect for human dignity is not explicitly mentioned, as it is in art. 1, § 1, of the German Constitution. This did not prevent the U.S. Supreme Court from referring to the dignity of man in many decisions as a constitutional standard. *Cf.* BRUGGER, GRUNDRECHTE, *supra* note 85, at 120, 258, 308, 325, 328-31. *See also* Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145 (1984) (including citations to lower American courts); *supra* note 36.

89. *See* the detailed proposals by MÜLLER, *supra* note 14, ch. 3; KOCH & RÜßMANN, *supra* note 84, at 176-84; ALEXY, THEORY, *supra* note 6, at 273-86; Buchwald, *supra* note 9, at 29-42. American authors that address these problems include Richard H. Fallon, *A Constructivist*

common good and the goals of interpretation as stages to be considered before or while interpreting legal norms. Detailed canons of statutory construction with stronger prescriptions for weighing and balancing the respective methods should be discussed and can be analyzed within the scope of the methods of interpretation sketched here. The model advocated here is primarily of descriptive and analytical character. The model is based on what courts and practitioners in fact use as methods of interpretation, and systematizes these approaches within the classical German canon of interpretation. One has to remember, though, that until now, all proposals for strict hierarchies of methods of interpretation have met stubborn resistance by courts of law and legal practitioners. The actors prefer to be bound only by the rather weak combination theory that forms the starting point for the discussion presented here, and substantial parts of the scholarly literature argue in the same vein.

As previously explained, this combination or integration theory analytically consists of several levels: purposes of law (the three elements of the common good), goals of interpretation (subjective will of lawmaker and objective will of law), and methods of interpretation (canon of four). The prescriptive element comes into play in the postulate: When construing statutory provisions, take all purposes of the legal order, all interpretive goals and maxims into account! I have explained the main elements of the common good and have pointed out that they can support each other or can compete with each other. As to the goals of interpretation, I have suggested that the step from the lawmaker's subjective will to the construction of an objective will of the law becomes inevitable once the interpreter confronts problems arising out of the gap between the "ideal" and the "real" situation of legislative concretization of law, *i.e.*, uncertainty, inconsistency, illegitimacy and impracticality of the provision to be construed in the particular case. As concerns the use of all four methods of statutory construction, we face an easy case when all four methods lead to the same solution; but when the methods point to different solutions, the case becomes more difficult. Then, judges must make choices that are—and should be—informed by the three pillars of the common good. This is a kind of guidance,

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Coherence Theory of Constitutional Interpretation, 100 HARV. L. REV. 1189 (1987); PHILIP BOBBIT, CONSTITUTIONAL INTERPRETATION (1991); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION. RECONCEIVING THE REGULATORY STATE (1990); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION (2d ed. 1995). For a review of the work of some prominent American authors, see Winfried Brugger, *Verfassungsinterpretation in den Vereinigten Staaten von Amerika*, 42 JAHRBUCH DES ÖFFENTLICHEN RECHTS 571 (1994).

although, in intensely disputed cases, not very much guidance is provided, if one thinks in terms of predictability and objectivity as to the ultimate result. Hence, it comes as no surprise that this state of affairs leads to a need to supplement these methodological reflections with institutional considerations about the role of courts in contrast with legislatures. The refined canon of interpretation proposed here takes this dimension into account through use of the method of the institutional context of judicial decisionmaking.

VI. CONCLUSIONS

This last part discusses briefly some conclusions with regard to competing canons of interpretations. The main objective of these competing theories is that they seek to add new methods of interpretation to the classical four methods. As mentioned at the beginning of section V., the approach taken here differs from other theories in the sense that it opts for internal differentiation of the four classical methods of interpretation instead of external addition to the four methods. Once one chooses this perspective, an architecture of variants opens up in which most of the methods used in practice and proposed in legal scholarship can be anchored. Following are some illustrations from German jurisprudence that support this thesis.

Often, instead of the scheme of four interpretive methods, a scheme of seven is suggested. This scheme consists of (1) verbal (grammatical, philological), (2) logical (analyzing the term), (3) historical (genetic), (4) doctrinal (concerning the history of a theory, problem, institution or norm), (5) systematic, (6) comparative, and (7) teleological methods of interpretation.[90] All these methods may fit comfortably into the scheme of four developed here: (1) and (2) belong to the textual interpretation; (5) and (6) to the contextual approach; (3) and (4) to the historical interpretation. Although the basic scheme developed in this Article is simpler than the scheme of seven, its components, at the same time, are more differentiated. For example, doctrinal, theoretical elements are incorporated into both the legal linguistic usage—a variant of the textual interpretation—as well as in the understanding of legitimacy important in the teleological approach.

Often one finds the proposition that the classical canon of four has to be supplemented for particular areas of the law. For example,

90. *See* Dreier, *supra* note 56; *see also* STERN, *supra* note 45; 1 WOLFF & BACHOF, *supra* note 48.

Konrad Hesse, a leading constitutional scholar and former justice of the German constitutional court, suggests the following specific criteria of constitu-tional interpretation: (1) unity of the constitution, (2) practical concordance, (3) functional correctness, (4) integrating effect, and (5) normative power of the constitution.[91] Elements (1) through (3) embody the claims of consistency of the legal system and enhance legal certainty as explained in section I.1.; Hesse's elements (1) through (3) can all be characterized as being contextual. Element (5) also names a contextual problem, inasmuch as the hierarchical structure of the legal system includes the priority of the higher-level norm. Insofar as (4) and (5) appeal to claims for legitimacy of the constitution, they fall within the realm of teleological interpretation.

Hesse regards as beyond the classical methods those arguments of the Federal Constitutional Court in which the Court made reference to (1) "developments dating further back than the immediate genesis of the norm," (2) "principles of functional capacity—*e.g.*, the distribution of powers between the legislature and judiciary," and (3) "attached importance to the facts of the case in determining the content of the norm."[92] All these arguments fall within the reformulated canon of four modes of statutory construction, including constitutional construction. Item (1) falls under the historical interpretation in its genuine sense, items (2) and (3) form part of the contextual analysis, namely in the functional and the real-world contexts.

To the realm of the ideal of legal certainty belong rules of interpretation designed for collisions of norms—the specific law shall supersede the more general law; the more recently enacted law shall supersede the older law; and higher-level law shall take priority before lower-level law.[93] All rules for collisions of norms can be discussed within the field of contextual interpretation. Conflicts among them can only be solved through reference to legitimacy and practicability, or through determination of which element of legal certainty should prevail.

These discussions demonstrate the weaknesses in Hesse's critique that the application of the classical canon of four implies a deductive model for deriving objectively correct decisions.[94] On the contrary, the classical canon of methods proves, in so far as its application is not structured beyond the maxim of combining and integrating all elements,

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91. *See* HESSE, *supra* note 54, at 26-29 nn.70-76.
92. HESSE, *supra* note 54, 23-23 n.58.
93. *See* 1 WOLFF & BACHOF, *supra* note 48, at 164.
94. *See supra* note 55.

to be a flexible tool for argumentation in which all claims of the common good might be identified and related to present-day problems.[95] If this canon should have a disadvantage, it is that it is too open; one could describe it as "topical."[96] This openness, however, reflects the complexity and changeability of our world. The openness results from the high expectations that citizens have for the legal system, as well as from unavoidable conflicts that occur between the state organs in the business of concretizing law. Courts have to decide all cases admissibly brought before them. In view of the ambiguities, complexities, and problems in hard cases, the courts naturally tend to resist being bound too strictly to whatever standard prohibits taking in the whole picture of law, consisting of substantive aspirations, positive determinations, institutional differentiation, and real-world workability.

It is difficult to determine exactly where in the process of resolving a legal dispute, the judicial decision leading to the result is made, since clearly many factors play a role.[97] Perhaps in some cases, a court knows from the beginning what it wants to do. However, the following can be stated: In difficult cases, where not all methods of interpretation point to the same result, the judicial view will usually oscillate among the goals and the methods of interpretation, as governed by the overriding objectives of the legal order at large. Whenever the decision is made, whether before or after looking into the book of law, or while reading and reflecting upon the relevant provisions or the situation at hand, for the affected parties and the audience at large the result and its justification are much more important than the judge's motives. For this reason, this Article has concentrated upon the interconnectedness of the principal goals of law and the methods of interpretation.

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95. When Hesse criticizes the failure of the classical methods of statutory construction, *see supra* note 55, this criticism is valid only for the following point. It is true that there are no solid, fixed principles which could objectively provide right answers. But it is not correct to say that the use of these methods automatically misreads the structure and goal of the interpretive process. Whether this is the case or not depends not so much on these methods, but on the state of mind of the interpreter—whether the interpreter uses the methods in the discovery mode or the interpretive mode. On this point, *see* Brugger, *supra* note 3, at 407 n.27.

96. The topical method directs its attention to whatever in a given situation and under a pertinent legal provision seems to be relevant to the resolution of the problem at hand. It must not be characterized as a method of interpretation to be added to the classical canon of statutory construction, as Gern, *supra* note 56, proposes; rather, it is a necessary component of the flexible character of the classical methods themselves.

97. *See supra* note 57.

This focus allows us to fully address the "context of justification"[98] of making and interpreting law, which provides background for the acceptability of the legal order in general and judicial decisions in particular. Focusing on the context of justification, though, does not hinder paying attention to the "context of discovery" as well. This focus involves the way in which judges in fact arrive at their decisions, even before they defend their decisions in terms of the context of justification presented here, based upon the elements of the common good and the canon of interpretation. The realist approach is important because it helps prevent undue idealizations of the law and the legal process. Hence, the methodological scheme presented here allows for its integration, as the interpretive element "real-world context" and the discussion of the tension between the "ideal world" and the "real world" of lawmaking show.

However, one should not ignore that the context of justification of legal decisions transcends analyses of how judges arrive at their decisions. Legislators as well as judges, whose task of concretizing law we have discussed here, operate within a broad requirement of having to provide reasons for all decisions the legal system takes. Viewed in this light, legislative and judicial concretizations of law and the reasons given for particular decisions are of paramount importance. In the long run, their decisions depend upon the acceptability among all citizens, and the citizenry's understanding of what the common good requires after all.

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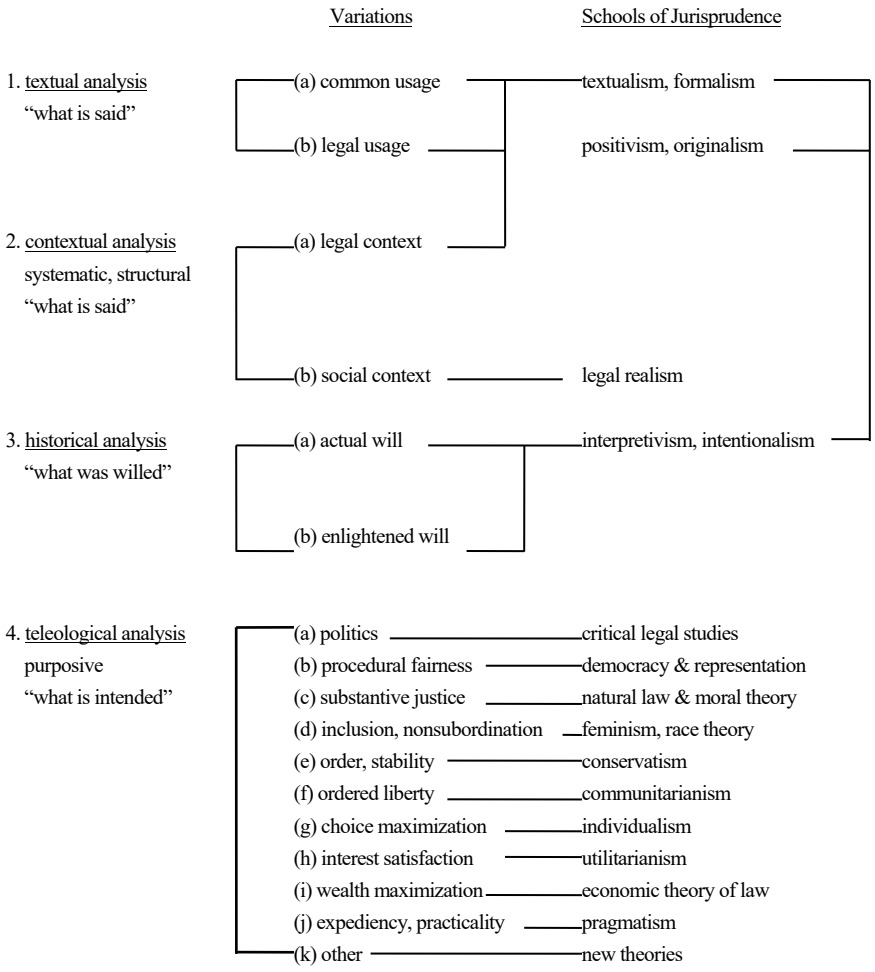
98. As to this terminology borrowed from the philosophy of science, *see* HANS REICHENBACH, EXPERIENCE AND PREDICTION 6 (1938); Martin P. Golding, *A Note on Discovery and Justification in Science and Law*, *in* JUSTIFICATION 124, 138 (J. Roland Pennock & John W. Chapman eds., 1986) ("Conclusions of law . . . have to be supported by justifying reasons . . . . The reasons for the conclusion must . . . be acceptable to [the affected persons and groups] as legitimate grounds of decision . . . . If values enter into a judicial justification, they do not do so as personal predilections. The values must have some purchase on the community to which they are addressed."). In my parlance, that should be read as: They must have some purchase on the concretizations of the common good of the respective community.

APPENDIX

Table 3: Methods of Interpretation and Schools of Jurisprudence[99]



99. Reprinted with permission from Brugger, *Legal Interpretation*, *supra* note 3, at 403.