CHARTING THE DIVIDE BETWEEN COMMON AND CIVIL LAW

THOMAS LUNDMARK

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INTRODUCTION

This book offers an in-depth comparison of the actors (lawyers, judges, and lay judges and jurors) and of certain linguistic, philosophical, and methodological features of four jurisdictions: Germany, Sweden, England and Wales, and the United States. The approach taken is to compare these jurisdictions on the basis of their languages, their conceptions of law, their primary actors, and their methods of dealing with legal rules.

Much of the material presented here consists of groundbreaking original research. However, the book is primarily intended for use as a classroom text. Consequently, the first chapter provides an overview of the discipline of comparative law. Due to its relatively recent recognition, few academic disciplines are plagued with as much self-doubt as comparative law. These "growing pains" are presented here in the context of the historical role and recognition of comparative law as an independent discipline. While 19th century academics looked for common roots, the generation that followed saw the field of comparative law more as an experimental laboratory in which to search for the "best" law. More recently, the post-World War I enthusiasm for international cooperation and common solutions was replaced after World War II by a more sober goal: the comparative study of legal traditions and cultures. That is the primary goal of this book. A secondary goal is to make predictions about what developments might be expected in the future.

The four jurisdictions were chosen primarily because of the author's familiarity with them. Nevertheless, they are important for other reasons. Many lawyers feel the need to familiarize themselves with the American and English (and Welsh) legal systems because of the role that American and English law play in today's world, especially in the world of business. How similar are the two legal systems? Germany, which boasts the third strongest economy on earth, is also significant because of its geographic and political position in Europe, including in Eastern Europe. In addition, Germany, with its *Bürgerliches Gesetzbuch* or Civil Code, constitutes one of the classic exemplars of jurisdictions in the "civilian" tradition of continental European law.

Standard texts on comparative law often place both Germany and Sweden in the civilian tradition,[1] although some Nordic scholars insist that Sweden belongs

[1] *E.g.,* Peter de Cruz, Comparative Law in a Changing World 266 (3d ed. 2007).

to a separate, Nordic tradition.[2] Standard texts invariably lump England and Wales and the United States together as belonging to the common law tradition.

Are these labels of any use?

The second chapter is devoted to the topic of comparative legal linguistics. Reviewing the most recent literature in the field, the chapter also explores the question of whether there is anything peculiar to the German language, such as its relative preference for nouns over verbs, that can account for the popularity of conceptualism (*Begriffsjurisprudenz*) in Germany and the question of whether there is anything peculiar to the English language which can account for the length of many English language contracts. The chapter ends with an original study by the author on the effect of language on legal predictability.

A number of authors have recently expressed concern about the dearth of scholarship on comparative legal philosophy or jurisprudence. To begin addressing this concern, the third chapter of this book presents the preliminary results of the author's rudimentary research on how lawyers in these four jurisdictions conceive of the law. Is it true, as some have hypothesized, that common lawyers see themselves in the natural law tradition while continental European lawyers are legal positivists? In researching this question by the use of surveys, the author uncovered important differences in the way lawyers in these four jurisdictions perceive of certain aspects of their legal system, particularly the extent to which they view their law as being autonomous from other fields of human endeavor.

The middle three chapters of the book contain side-by-side comparisons among certain key legal actors: lawyers, judges, and lay judges and jurors. Each of these three chapters begins with a historical overview before turning its attention to the lawyers' profession, judges and judiciaries, and the institutional use of lay judges and jurors. Is the legal training given lawyers in these jurisdictions basically the same? How do the roles of lawyers compare? Are the judiciaries in the four jurisdictions roughly comparable? If so, by what measures? Are juries used in Germany and Sweden, or is their use restricted to common law jurisdictions? Do any of the jurisdictions employ lay judges, such as justices of the peace? If so, what justifications are cited in these jurisdictions for including lay people, including jurors, in judicial decision making?

The final three chapters of the book closely examine the methodologies employed in all four jurisdictions in conjunction with legal rules. Beginning with Chapter 7 on legal reasoning, the author examines the commonly held belief that civilian jurists reason by deduction whereas their common law counterparts rely on analogy. By using concrete examples from the four jurisdictions, the author is able to present a unique and authoritative exposition of this profoundly important topic. Chapter 8 treats statutes and statutory construction. Here again, it is the historical background that inspires most of the insights into understanding of the role of statutory law in each of the four jurisdictions. After determining that all

[2] Michael Bogdan, Komparativ rättskunskap 81–82 (2d ed. 2007).

four jurisdictions basically recognize three methods of statutory construction, the author presents the results of his research which suggests that each of the three European jurisdictions has a preference for a different method of statutory construction. Once again, the author compares the practices in the four jurisdictions in order to shed light on the validity of the civil law–common law division.

The final chapter—on judicial precedents—also begins with a historical introduction before presenting the most important statutes regarding precedential effect. Two jurisdictions—Germany and the United Kingdom—have statutes which require inferior courts to adhere to the precedents of an appellate court, so-called vertical precedential effect. Further, there are statutes in Germany and Sweden which prohibit chambers of appellate courts from departing from the precedents of the other chambers. These are examples of a statutorily mandated horizontal precedential effect. Chapter 9 ends by presenting the results of another original study—this one of the case decisions of the German Federal Constitutional Court and of the United States Supreme Court—to determine how respectful the two courts are of their own precedents, and how political the two courts are in overruling their precedents.

Finally, this book ends with a conclusion in which the strands of subjects which are examined in the various chapters are pulled together, and in which the author returns to the question of the usefulness of separating these four jurisdictions into two or more traditions or families.

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PART ONE

General Topics

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1

The Discipline of Comparative Law

This book represents an exercise in comparative law. What is comparative law? Konrad Zweigert and Hein Kötz, the authors of a classic textbook on comparative law, describe comparative law simply as "an intellectual activity with law as its object and comparison as its process."[3] They observe that comparative legal study helps to deepen our belief in the existence of a unitary sense of justice, and points to the universality of legal science and the transcendent values of law. Basil Markesinis sounds a similar note when he argues that we must try to overcome obstacles of terminology and classification in order to show that foreign law is not very different from ours but only appears to be so.[4] Jerome Hall concurred with these observers when he stated that comparative analysis of law is concerned with the delineation of differences against a background of similarities.[5]

These and other authors mention three interconnected elements when defining the discipline of comparative law: law, comparison, and purpose. Summarizing what these authors have written, one might say that comparative law entails a purposeful analysis of different laws or legal systems (defined below) by the use of one or more approaches. In other words, the discipline of comparative law requires at least one purpose or goal of study (the Why), it requires at least one approach to the study (the How), and it requires at least two subjects or fields of study (laws and legal systems, the What).

The term *legal system* deserves definition, particularly because it is found in the title of this book. It also needs definition because, though it is often employed by others, it is seldom defined, leaving readers to guess at the authors' meanings. In this book the term legal system, when employed by the author, means (1) all behavioral legal rules in force in a jurisdiction, (2) all institutional rules that provide for the establishment and administration of legal institutions (including their methodologies, such as their methods of interpretation and their respect

[3] Konrad Zweigert and Hein Kötz, An Introduction to Comparative Law 2 (Tony Weir, trans., 3d ed. 1998).

[4] Basil S. Markesinis, *The Destructive and Constructive Role of the Comparative Lawyer*, 57 Rabels Zeitschrift für ausländisches und internationales Privatrecht 443 (1993).

[5] Jerome Hall, Comparative Law and Social Theory 48–49 (1963).

for administrative practice and precedents), plus (3) all of the people involved in making, interpreting, and applying the legal rules, including lawyers. Behavioral and institutional legal rules are often referred to as norms.[6] The people involved in making, interpreting, and applying the norms are sometimes referred to as officials.

Perhaps this is also an appropriate place to mention that the author does not distinguish in this book between the *methods* of comparative legal study and its *approaches*. Both are referred to by the author as *approaches*. Most authors seem to use the terms interchangeably to refer exclusively to the means (the How) of comparative legal studies. However, the two terms might be better understood as constituting the means merely to determine the subject of study (the What), nothing more. Thus, as elaborated below, some comparative lawyers might choose to study the legal institution of adoption in two jurisdictions. This type of analysis is a kind of rule-based method of comparison. Comparative lawyers who choose broad fields of study, like legal traditions and cultures, might refer to their approaches as the traditional method or the cultural method, for example. Yet what this means is that they have chosen historical or cultural aspects, rather than, for example, normative and institutional aspects, for their comparisons.

Many students are disappointed to learn that the field of comparative law does not possess a collection of methods, practices, procedures, and rules on how to conduct comparative legal studies. The author, who has a university degree in comparative literature, can sympathize with them. These students were obviously expecting a more sophisticated methodology than can actually be delivered by the discipline of comparative legal analysis. In part to forestall this disappointment, but also in the interest of consistency and clarity of presentation, the author prefers the humbler word *approach* over *method*.

The three elements of comparative study—the purpose (the Why), the approach (the How), and the subject (the What)—are also interconnected in the sense that they are self-referential: the purpose of any particular study will influence the subject of the study, which will in turn influence the approach or approaches to be employed. The three elements—purpose, subject, and approach—are therefore impossible to separate in practice. Consequently, the discussion which follows will try to separate the elements for ease of analysis, but will necessarily mix them to some extent so as not to conceal their interconnectedness. After discussing these elements separately, the discussion will turn to one active field of study in comparative law: the classification of jurisdictions into families and other groups. Finally, the author will suggest a number of approaches for possible future taxonomic studies.

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[6] The term *norm* employed in this book is a legal rule which prescribes or permits certain human behavior. As such, it includes the (1) behavioral rules and the (2) institutional rules referred to in the definition of legal system.

None of these topics can be dealt with comprehensively in the scope of one small book. The discussions which follow should consequently be understood as an introductory in nature.

Before discussing possible purposes, approaches, and subjects of comparison, it might be useful to consider how comparative law is used. While the terms use and purpose are often used interchangeably, *use* is arguably broader because it does not imply that the user be aware that he or she is dabbling in comparative legal studies. The following section also mentions the misuses and abuses of comparative law, many of which are unintended. By separating the discussion of uses from the discussion of purposes, it is hoped that the purposes of comparative legal study will allow themselves to be specified with greater precision.

A. The Uses (Misuses, and Abuses) of Comparative Law

The great English legal historian Frederic William Maitland maintained that legal historical research could not be conducted without resort to comparative law: "History involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history."[7] Yet the inherent benefits which flow from a study of comparative law, and the uses to which comparative law can be put, are not recognized by all commentators. In Montesquieu's opinion it was only in the most exceptional cases that the studies of one country's institutions could serve those of another at all.[8] A judge on the U.S. Supreme Court has characterized the use of foreign views in interpreting U.S. constitutional rights as "meaningless."[9]

Still others contend that one need not examine the uses to which comparative law is put. Rodolfo Sacco for example has said that "the use to which scientific ideas are put affects neither their definition of a science nor the validity of its conclusions"[10] and that "like other sciences, comparative law remains a science as long as it acquires knowledge and regardless of whether or not the knowledge is put to any further use." Even if one accepts that comparative law does indeed have worthwhile uses, as Sacco and the majority of commentators do, there are often very substantial obstacles which must be overcome before a person can embark on a comparative study. For attaining even minimal competence in a foreign legal system demands a great deal of time and effort, and often requires learning a new

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[7] 1 Frederic William Maitland, The Collected Papers of Frederic William Maitland 488 (1911).

[8] Montesquieu, The Spirit of Laws, ch. 3, bk. 1 (David Wallace Carrithers, ed., Univ. Cal. Press 1977) (1748).

[9] Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J, dissenting).

[10] Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 Am. J. Comp. L. 1, 4 (1991).

language. Even once competence is reached, the burden of keeping up to date with new developments in various foreign legal systems remains.

Zweigert and Kötz describe four particular practical benefits of comparative law: an aid to the legislator, a tool of construction or aid to courts in interpreting statutes, a component of the curriculum of universities, and a contribution to the systematic unification of law and the development of a private law common to the whole of Europe.[11] As will be seen below, alongside his explanation of an alternative threefold classification of the general purposes of comparative law, the author will explain into which general purpose these practical benefits fall. However, the use of comparative law as a significant practical benefit to university education ought not to be viewed as a separate purpose at all, but rather as a necessary prerequisite to being able to use comparative law. On this basis, the author will not seek to subsume this practical benefit into one of the three general purposes.

Another prominent comparative lawyer, René David, groups the "present usefulness of comparative law" as he describes it under three heads: its relevance in historical and philosophical legal research; its significance to understanding and improving domestic law; and its contribution to the development of international relations by promoting understanding of foreign peoples.[12] As to the first use, the contribution of comparative law to historical and philosophical legal research, David refers to the usefulness of comparative law in pointing out the variations that exist in the very concept of law itself. More detail will be afforded to the concept of law (or conception of law as referred to by the author) in a later chapter on comparative jurisprudence. From a logical point of view, the greater the number of legal systems studied, the broader and more comprehensive the philosophy of law which could result from such a study. Indeed it has been contended by other writers, for example George Whitecross Paton, that it is impossible to conceive of the very existence of jurisprudence without comparative law, on the basis that all schools of jurisprudence rely on comparative methodology.[13]

As to the second use, improving domestic law, David contends that legislators have always made use of comparative law in issuing legislation and in its practical improvement. He refers to the examples of the English cheque, the German limited liability company, and the Swedish matrimonial property regime of participation in acquests as examples of institutions that have been used as models in the development of legislation in other countries.[14] Bernhard Grossfeld also provides a list of examples of legislators adopting foreign concepts. Among these examples are the concept of income tax, which originated in England but was later borrowed

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[11] Zweigert and Kötz, *supra* note 3, at 16.

[12] René David and John E. C. Brierley, Major Legal Systems in the World Today: An Introduction into the Comparative Study of Law 4 (3d ed. 1985).

[13] G. W. Paton, A Textbook of Jurisprudence 41 (4th ed. 1972).

[14] David and Brierley, *supra* note 12, at 7.

by German legislators; the doctrine of proper allowances for connected enterprises, which derives from the Internal Revenue Code of the United States but has been adopted into German law; German cartel law, which is largely inspired by Austrian antitrust law; and the Prussian Company Law of 1843, which was partly based upon the French Commercial Code of 1807.[15]

Yet David suggests that it is the third use of comparative law, namely the development of international relations, which is predominant.[16] He argues that the establishment of successful international relations depends on an understanding of laws in different countries and an appreciation of the thinking and outlook of one's counterparts in these countries, and that this understanding and appreciation are greatly assisted by the study of comparative law.

The author suggests that comparative law has five main uses, and examines these uses in order: private international law (that is, conflicts of law); the making of law; the interpretation and application of the law; the confluence of the law and the development of general common principles; and finally the unification of the law.[17]

The first use takes the form of assistance in resolving cases with international elements, in other words, the application of comparative law in the realm of private international law. It has been suggested by Mathias Reimann that comparative law plays three principle roles with respect to private international law.[18] First, it permits a comparative examination of domestic and of foreign laws of conflicts. Second, it provides a platform for the development of private international law by assisting lawmakers in devising new conflicts rules through their newly acquired knowledge about existing materials and options. Third, it assists in the application of private international law by helping decision-makers to operate the conflict rules. As the reader is probably aware, at the core of private international law are conflict rules which are constructed at a domestic level and are applied first to determine whether that particular state has jurisdiction to hear a dispute with a foreign element and second to determine which national law the dispute is subject to. Yet the conflict rules can and do differ in different countries. David argues that a principal task for comparativists is to end this current state of affairs which results in international relations being subject to different systems and rules in different countries. He points out that this leads to uncertainty about the end result of litigation and to the perverse result that different solutions are established with respect to the same problem depending on the country in which

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[15] Bernhard Grossfeld, The Strength and Weakness of Comparative Law ch. 3 (Tony Weir trans., 1990).

[16] David and Brierley, *supra* note 12, at 8.

[17] *See generally* Dagmar Coester-Waltjen & Gerald Mäsch, Übungen in Internationalem Privatrecht und Rechtsvergleichung (3d ed. 2008).

[18] Mathias Reimann, *Private International Law*, *in* The Oxford Handbook of Comparative Law 1363, 1366 (Mathias Reimann and Reinhard Zimmerman, eds., 2008).

the dispute is heard in.[19] The role of comparative law in private international law is also highlighted by Zweigert and Kötz. Indeed they argue that the approaches to private international law are essentially those of comparative law, which in turn makes comparative law indispensable.[20]

The second use of comparative law identified by the author is in making the law. Otto Kahn-Freud identified three different uses of comparative law in this context of making domestic law.[21] The first use is in the international unification of law. The second use is in giving domestic legal effect to a social change shared by the foreign country and one's own country. The third use identified is the promotion at home of social change which a foreign law is designed to express or promote. It is Kahn-Freud's second use to which the author refers in this paragraph. As will be demonstrated below in the section on purposes, comparative law is relied upon in all of the jurisdictions studied here, either directly by national legislators in making or amending law or indirectly via reliance on comparative law by special law commissions whose role it is to suggest amendments or enactment of laws to the legislators.

The third use of comparative law identified by the author is its assistance in the interpretation and application of the law. This is not to say that the interpretation given by a foreign law to a concept, or that even the foreign law itself, is to be applied in the face of an expressly conflicting national law. Clearly, in the absence of accession by that legal system to a superior law, this would infringe respect for duly enacted national law. However, Zweigert and Kötz suggest that comparative law plays a role when the construction of a rule is doubtful or where there is a gap in the law.[22] This opinion is also held by de Cruz, who points out that comparative law is used by courts and in the judicial process to fill in gaps in legislation or in case law by providing background and origin to legal rules and concepts that have been adopted from other jurisdictions or in cases that are not covered by an express legal rule.[23] As far as the interpretation of adopted concepts is concerned, although the majority of people would not deny that there are parts in almost every legal system in the world which have been borrowed from another legal system, the role of comparative law in this process may sometimes be forgotten. For in order to use the adopted concept correctly in its newly adopted legal system, it is first necessary to understand this concept, and this is only possible by understanding of the concept in its native context.

The fourth use of comparative law is reflected in the slow confluence of national laws towards general common principles both at a European and to a certain extent at the international level. Basil Markesinis examines European law and concludes that a convergence is taking place in relation to the sources of law,

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[19] *See* David Kennedy, *The Methods and the Politics*, *in* Comparative Legal Studies: Traditions and Transitions 345 (Pierre Legrand and Roderick Munday, ed., 2003).

[20] Zweigert and Kötz, *supra* note 3, at 6.

[21] Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 Mod. L. Rev. 1, 2 (1974).

[22] Zweigert and Kötz, *supra* note 3, at 18.

[23] de Cruz, *supra* note 1, at 21.

procedural matters, drafting techniques, and judicial views.[24] De Cruz refers to the practice of the judges of the European Court of Justice (ECJ), now the Court of Justice for the European Union (CJEU), who are bound to draw upon their own experiences as lawyers within the different member states.[25] As a result, principles drawn from all of the European member states are reflected in the law that is applied in the central European court. For example, cases before the ECJ have resorted to the French administrative law concept of *acte clair* in determining when it is necessary for a domestic court to make a reference to the ECJ under Article 177 Treaty of Rome.[26] The circle of convergence then completes itself when national courts in the various member states take into account the jurisprudence of the ECJ in reaching decisions at a national level.

The fifth use, closely related to confluence towards general principles, lies in the unification of the law. Unification is significant to the extent that it reduces or even removes discrepancies between different legal systems and, accordingly, makes international legal business easier and more certain. Substantial unification has also occurred in recent decades in significant areas of public international law such as the law of war, human rights law, and environmental law. Zweigert and Kötz argue that what is needed to make European unification possible is a body of legal literature which presents the different areas of law from a European perspective, and does not focus on any particular legal system. The aim of the exercise is not to stop at simply ascertaining the rules or comparing them with a view to improving national law, but rather to promote European private law as a subject for research and teaching.[27] They argue that comparative law must go beyond national systems to provide a comparative basis on which to develop a system of law for all of Europe.[28] David also supports an international unification of law, arguing that it is probably easier and more practical to reach international agreement on substantive legal rules as they appear in cases with an international element rather than to attempt to unify the many different conflict rules at the national level.[29] Both Zweigert and Kötz and David are of the opinion that the harmonization implicit

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[24] Basil Markesinis, *Learning from Europe and Learning in Europe*, *in* The Gradual Convergence Foreign Ideas, Foreign Influences and European Law on the Eve of the 21st Century 1, 30 (1994). On convergence *see also* Reinhard Zimmermann, *Der europäische Charakter des englischen Rechts, in* 1 Zeitschrift für Europäisches Privatrecht (ZeuP) 4 (1993). Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 Mod. L. Rev. 269 n. 35 (1995) (arguing that the differences arising between the common law and civil law *mentalités*, discussed below, at the epistemological level are irreducible). *See* 12 Ulrich Drobnig and Konrad Zweigert, International Encyclopedia of Comparative Law 4 (1981) (perhaps a better term than convergence would be confluence).

[25] de Cruz, *supra* note 1, at 21.

[26] *See e.g.*, Case 283/81, CILFIT Srl v. Ministry of Health, 1982 E.C.R. 3415.

[27] Zweigert and Kötz, *supra* note 3, at 30.

[28] *Id.* at 29.

[29] 2 René David, The International Unification of Private Law, International Encyclopaedia of Comparative Law: Legal Systems of the World, Their Comparison and Unification (1972).

in international unification cannot be carried out without the help of comparative law. For without a preparatory study of comparative law, the points of disagreement and agreement between different legal systems would not be discovered, let alone permit a suitable solution to be devised. Yet the use of comparative law does not stop merely at the effort to produce a unified law or laws. For comparative law has a further significant role to play in the interpretation of these unified laws. As Zweigert and Kötz have pointed out, when a judge is seeking to apply a unified law, he must look to the foreign law rules which form the basis of the law, take account of how foreign courts have applied this law, and fill any gaps with principles drawn from all the relevant national legal systems.[30]

Before moving on to the next section, a word or two should be said about misuses and abuses of comparative law. One misuse might be ascribed to poor scholarship. As eloquently illustrated by Kahn-Freund in his classic article "On Uses and Misuses of Comparative Law,"[31] the degree to which any pattern of law can be used outside the environment of its origin depends on sociological and political factors that are sometimes poorly understood. The wholesale importation of foreign law into one's own legal system may bring unintended results.

Also, a number of activists and scholars have criticized what might be referred to as the abuse of comparative law for colonial and imperialistic purposes. Critical and third-world scholars lament that comparative law scholarship tends to reflect a normative preference for the laws and legal system of the observer. In extreme cases, foreign laws, institutions, and customs are perceived to be less advanced, less efficient, less fair, or even primitive in the eyes of the foreign observer, leading to an attitude that has been condemned as missionary.[32] However well-intentioned they might be, all efforts at legal civilization and harmonization by definition result in the partial or total eradication of endemic local legal culture, leading to a loss in diversity that would be universally denounced if legal systems were considered to be plant or animal species or vanishing languages.[33]

B. The Purposes of Comparative Law

As the definitions of comparative law quoted at the beginning of this chapter illustrate, one's understanding of what constitutes comparative law is tightly bound up with what one perceives to be the purpose or purposes of comparative study. The author further believes that it is only by reference to the purposes that one may

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[30] Zweigert and Kötz, *supra* note 3, at 21.

[31] O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 Mod. L. Rev. 1, 1–27 (1974).

[32] *See* Leslye Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision*, 47 Case W. Res. L. Rev. 275, 275 (1997).

[33] *Compare* 3 Immanuel Maurice Wallerstein, Geopolitics and Geoculture: Essays on the Changing World-System 196 (1991).

criticize the approaches to comparative law. The approaches to comparative law will be considered below. The reader ought to be forewarned that these purposes are often ascribed different descriptions by different authors, which may lead to confusion. Therefore the author will outline the purposes as identified by leading comparative lawyers and then seek to subsume these various purposes into a workable threefold classification.

According to H.C. Gutteridge,[34] the first noteworthy modern attempts to articulate the aims of comparative law were made by Saleilles and Lambert at the International Congress of Comparative Law held in Paris in 1900. Saleilles considered comparative law to constitute a tool for ascertaining the principles which are common to all civilized systems of law. This view later found expression in Article 38 of the Statute of the Permanent Court of International Justice, now the International Court of Justice, which directed the court to apply, among other rules, "the general principles of law recognised by civilised nations." Lambert agreed in part with Saleilles, for he advocated using comparative law to create standardized international rules for communities that had attained the same level of civilization. But Lambert also recognized that comparative studies could help in identifying the causes which underlie the origin, development, and extinction of legal institutions. In other words, he realized that comparative law could make a valuable contribution to legal history.

In contemporary times, Zweigert and Kötz state that the principal aim of comparative law, as of all sciences, is knowledge.[35] They point out that the study of several different legal systems must provide inevitably for a greater range of "model solutions" for preventing or resolving social conflict than from the study of one single legal system. Those who critically study comparative law have therefore, theoretically, the opportunity to find better solutions to legal problems. This view is supported by Henry Walter Ehrmann, who remarks that "only the analysis of a variety of legal cultures will recognize what is accidental rather than necessary, what is permanent rather than changeable in legal norms and agencies, and what characterizes the beliefs underlying both. The law of a single culture will take for granted the ethical theory on which it is grounded."[36]

In addition to knowledge, Zweigert and Kötz recognize the following more pragmatic and utilitarian purposes of comparative law: dissolving unconsidered national prejudices, furthering understanding of different societies and cultures of the world, serving as a useful tool for law reform in developing countries, and furthering the development of domestic legal systems through the critical attitude which comparative law engenders.[37]

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[34] H. C. Gutteridge, Comparative Law: An Introduction to the Comparative Method of Legal Study & Research 6 (1946).

[35] Zweigert and Kötz, *supra* note 3, at 15.

[36] Henry Walter Ehrmann, Comparative Legal Cultures 8 (1976).

[37] Zweigert and Kötz, *supra* note 3, at 16.

It is the author's belief that the various purposes identified above, and other similar purposes identified by other writers, may be grouped into three general purposes, or reasons, why one ought to study comparative law: the improvement of one's own law, including international law, and its application; harmonization or uniformity; and the search for universal commonalities and, of course, differences.[38] It is suggested that the attainment of knowledge may be regarded as a necessary element towards the fulfillment of the other purposes, or be relegated to the general search for differences and commonalities.[39] This standpoint is consistent with the widely held opinion that knowledge alone is not thought sufficient to justify the existence of any particular discipline.[40] Of course, the knowledge thereby gained may find application in the other two categories.

Turning to the first general purpose—improvement of the law and its application—there is nothing novel in espousing this purpose; indeed, the use of comparative law while drafting new legislation can be traced back to as early as 450 BC, when the drafters of the Twelve Tables were influenced by visits to foreign cities.[41] In England, the role of studying foreign legal systems when drafting or amending laws now falls to the English Law Commission, which has a statutory responsibility to "obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions."[42] In Germany, this function is carried out by the ministry of justice, while in America, the American Law Institute, for example, resorts to comparative law in drafting the *Restatements of Law*.[43] The influence and role of comparative law in improving laws is undeniable.

Yet, how does a study of comparative law achieve the goal of improving the law and the application of the law? At a basic level, a study of comparative law expands knowledge generally, through the contrasts and wider range of information it provides, and permits a better understanding of law. Further, one is exposed to a whole new dimension of legal systems and different thinking methodologies. This exposure broadens the understanding of one's own legal order, rules, and concepts and the broader philosophical, historical, and sociological perspectives they reflect. This exposure also promotes a critical analysis of one's own legal system. This critical analysis permits recognition of how or in what ways the domestic legal system is flawed or could be improved.

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[38] On the importance of differences, see Richard Hyland, "Babel: A She'ur," 11 Cardozo L. Rev. 1585, 1585 (1990).

[39] This last purpose is sometimes undeservedly dismissed as legal tourism.

[40] H. Patrick Glenn, *Aims of Comparative Law*, *in* Elgar Encyclopedia of Comparative Law 57, 59 (Jan M. Smits, ed., 2006).

[41] Jan M. Smits, *Comparative Law and its Influence on National Legal Systems*, *in* The Oxford Handbook of Comparative Law 513 (Mathias Reimann and Reinhard Zimmerman, eds., 2006).

[42] Law Commissions Act, 1965, c.22, § 3(1)(f) (Eng.).

[43] Eric Stein, *Uses, Misuses and Nonuses of Comparative Law*, 72 Nw. U. L. Rev. 198, 210 (1977). *See generally* Nils Jansen, The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective 92–93 (2010).

The author would place two of the practical benefits of comparative law identified by Zweigert and Kötz—namely assistance to the legislator and assistance to the courts—under the general purpose of improvement of the law.

The second general purpose of harmonization ought to be regarded as an equally worthwhile goal to pursue. Harmonization of national laws improves legal predictability and accordingly legal certainty. To the extent that people are able to contract, trade, and enter into relations with people from other states in a predictable and certain environment, harmonization will foster both international relations and stability and economic growth and prosperity. And the benefits in the area of human rights, for example, are undeniable.

The harmonizing aspect of comparative law is highly visible in European courts, to take just one example, for both the Court of Justice for the European Union and the European Court of Human Rights draw heavily on the domestic law of the member states in reaching their decisions. The International Court of Justice is even required by its organic statute to consider the general principles of law as expressly recognized by civilized nations when deciding disputes in accordance with international law.[44] The International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts are another example of harmonization through comparative law. The influence of comparative law in the drafting of these principles is reflected in the fact that three prominent comparativists, René David, Tudor Popescu, and Clive Smitthoff, were selected to draft the initial chapters. Another product of harmonization are the Principles of European Contract Law which apply as general rules of contract law either where the parties have incorporated these principles into their contract or have agreed that the contract is to be governed by them. The common core approach to comparative legal studies, which is sketched below, also can be seen as belonging to this group.

A further example of harmonization of national laws might also be reflected to a certain extent in the codification of *lex mercatoria* on an international scale via various Model Codes.[45] Although these Model Codes lack the binding force of treaties, they are likely to produce successful harmonized national laws in the future as a result of their inherent flexibility.

The author would place the fourth practical benefit of comparative law referred to by Zweigert and Kötz, namely its contribution to the systematic unification of

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[44] Statute of the International Court of Justice, art. 38., June 26, 1945, 3 Bevans 1179, 59 Stat. 1055.

[45] For examples the United Nations Convention on Contracts for the International Sale of Goods (CISG) (1980) produced by UNICATRAL (United Nations Commission on International Trade Law) or the Model Law on Leasing (2008) produced by UNIDROIT (International Institute for the Unification of Private Law). For a critical analysis of the success of harmonization via international conventions, see Paul B. Stephan, *The Futility of Unification and Harmonization in International Law*, 39 Va. J. Int'l L. 743 (1999).

law, and the development of a private law common to the whole of Europe, under his second general purpose.

To this point, the author has introduced the dual purposes of improvement and harmonization. These two purposes are incidentally reflected in the activities of various organizations founded around the world to study comparative law. One notable organization is the International Academy of Comparative Law, which was founded in The Hague in 1924.[46] The purposes of the Academy are stated to be "to concern itself with historical aspects of comparative law . . . and with the improvement of the laws of various countries of the world . . . by conquering differences and harmonizing them." Every two years the Academy hosts an International Congress of Comparative Law, at which around 30 topics from all legal disciplines are debated, current problems examined, and the results published in General Reports. The most recent congress was held in Washington, DC from 25 July to 1 August 2010.

Moving on to the third general purpose, of identifying universals (and differences), this may be understood as encompassing the academic and philosophical endeavors which are so frequently undertaken in relation to comparative law. According to David, it was in relation to legal history, the philosophy of law, and general legal theory that comparative law was first recognized in the nineteenth century as having importance.[47] During that period it became popular to trace the origin of law to primitive tribal custom and to contrast these customs with the laws of more advanced legal civilizations. Indeed, as a result of this trend, the University of Oxford established its first chair in "historical and comparative jurisprudence" in 1831. A prime example of this purpose of comparative legal study is the legal transplant school, founded by Watson, which focuses on the mechanism of borrowings between legal systems. This school is discussed in more detail later in this chapter.

In relation to the contribution of comparative law to legal philosophy, a study of comparative law highlights the existence and features of different conceptions of law. The author reflects upon a few of these different conceptions in the chapter on comparative jurisprudence. At the very least, the greater number of legal systems and laws studied, and their similarities and differences examined, the richer and broader the philosophy of law which will likely emerge. Comparative law therefore has an invaluable role to play in the realm of jurisprudence.[48]

Finally, the three general categories of purposes identified by the author–improvement of one's own law and its application, harmonization or uniformity, and search for universals (and differences)—are broad enough to encompass the

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[46] International Academy of Comparative Law, http://www.iuscomparatum.org/141_p_11311/home.html.

[47] David and Brierley, *supra* note 12, at 4.

[48] *See generally* Geoffrey Samuel, *Comparative Law and Jurisprudence*, 47 Int'l & Comp. L. Q. 817, 817 (1998).

five uses of comparative law that were identified above. The uses of comparative law in private international law (that is, conflicts of laws) and in the interpretation and application of domestic law fit into the first category: the improvement of one's own law and its application. The same could be said for the use of making law, although this use might also in any particular case be subsumed under the purpose of convergence and harmonization. One might also classify the two remaining uses identified above—the development of general common principles and the unification of the law—under either the second (harmonization) or third (universalization) purpose.

C. Some Approaches to Comparative Legal Studies

While the uses of comparative law are basically incontestable, and while the purposes of comparative legal studies are, with few exceptions, noncontroversial, the same cannot be said for the approaches to comparative legal analysis, which are often hotly debated in the academic literature. Yet, according to one observer, these debates about the *comparative method*, as it is usually denominated, fail to identify, much less explain, what approach or approaches are being used.[49] The following discussion seeks to remedy this perceived deficit, if only in part.

This section summarizes some of the various approaches employed in comparative legal research, providing examples of these approaches to the reader. The presentation ends by embracing the approach employed in this book, akin to that advocated by John Henry Merryman and Pierre Legrand,[50] which also compares the traditions and cultures of people in the legal system (defined above). This approach entails examining the actors and institutions, as well as the defining philosophical, structural, and methodological elements of a legal system. While this approach is not directly employable for all of the uses and purposes of comparative law that are identified above, it is submitted that no legal term, concept, norm, institution, or body of norms can be fully understood for purposes of comparison without resort to its endemic legal system, philosophy, culture, and tradition.

Early comparativists are sometimes criticized today for limiting their comparisons to legal terms and rules. This rule-based approach, according to current thinking, is overly simplistic for failing to focus on the policies behind the rules, or in other words, their functions. This criticism is one of the main motivations for the development of the functional approach to comparative legal studies. Other comparative lawyers, most prominently Merryman, criticize the functional

[49] *See* Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 Iowa L. Rev. 1025, 1025 (1999).

[50] Among Legrand's numerous articles on this topic, see especially Legrand, *supra* note 24, at 269 n. 35.

approach for being too narrow. They advocate so-called macro-comparisons of legal traditions and legal cultures, defined below.

At this juncture it might be useful to describe functionality briefly. In doing so, the author will also explain why the reader will not find the functional approach among the approaches listed and discussed below.

According to Zweigert and Kötz,[51] functionality is "the basic methodological principle of all comparative law." This is true because function, in most senses of the word,[52] means purpose; and law is about purpose.

Stated somewhat simplistically, the functional approach as presented by Zweigert and Kötz begins with the identification of a concrete problem. The comparative lawyer must pose the problem in purely functional terms without regard to the terms and concepts of his or her own legal system. Then the researcher should look to the foreign legal system to see how it resolves the same problem. Under the leadership of Zweigert and Kötz, functionality has grown to be the most influential program for comparative legal research.

As detailed by Ralf Michaels in his chapter entitled "The Functional Method of Comparative Law" in *The Oxford Handbook of Comparative Law*, there is not one functional approach to comparative law, but many. Furthermore, these functional approaches themselves serve at least seven different functions: understanding legal rules and institutions, achieving comparability, emphasizing similarity, building systems, determining the better law, preparing for legal unification, and providing tools for the critique of law.[53]

As noted above, various criticisms have been leveled at functionality, including the criticism of Merryman and others that functionality makes no room for culture. Michaels rejects most of these criticisms, including that regarding culture. Nothing about functionality forces the comparative lawyer to ignore legal culture. Explanations other than use of the functional approach must be sought for a researcher's failure to appreciate the role of culture. Nevertheless, Michaels admits that there are at least a few respects in which functionality is of little or no help. It cannot shed light on ultimate truths, assuming they exist, or provide a fundamental critique of law. That task falls within the ambit of jurisprudence (legal philosophy), which can also be employed comparatively. Functionality is of little help in evaluating proper purposes. That is more the domain of legal theory, including law and economics, which can be employed comparatively. Functionality provides little assistance, according to Michaels, in critiquing one's own law, including shedding light on political governance projects. Yet comparative legal analysis may help by giving one an outside perspective on one's own law and legal system.

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[51] Zweigert and Kötz, *supra* note 3, at 34.

[52] Unintended results, for example, are not purposes, but they might nevertheless constitute functions.

[53] Ralf Michaels, *The Functional Method of Comparative Law*, *in* The Oxford Handbook of Comparative Law 363 (Mathias Reimann and Reinhard Zimmerman, eds., 2008).

Michaels admits that functionality is unable to account for tensions within legal systems. These fall more into the realm of the historical and political sciences, both of which can be enhanced by comparison to other jurisdictions. Michaels also states that functionality provides no means to conceptualize the interdependence of legal systems and societies.[54] This endeavor, too, seems to fall more into the realm of legal philosophy or even of international law and sociology, all of which can be enriched by comparative studies.

Rudolf Schlesinger also pointed out that the functional approach cannot, at least readily, shed light on the history, mores, ethics, and philosophy of any particular jurisdiction,[55] as that is not the main focus of the functional approach. Other methods must be resorted to for these and other purposes. But these and other observations and criticisms should not be understood to eviscerate the core insight of functionality, that is, that laws and legal systems serve purposes (functions); that these functions very often find expression in other ways in different legal systems; and, even if they do not do so, that fact too is of interest. Indeed, the functional approach is the workhorse of all of the micro-approaches identified below because all micro-approaches are focused to a considerable extent on norms (legal rules) which by definition serve one or more purposes or functions.

As suggested at the outset of this chapter, the uses and purposes of comparative legal analysis are basically two ways of expressing the same thing. The approaches to comparative legal analysis, on the other hand, constitute a separate aspect of comparative analysis. That being said, the approaches to comparative legal study are closely intertwined with their uses and purposes. Sometimes the approaches and purposes are self-referencing to the point of being self-determining. For example, if the purpose of any particular comparative study is to harmonize the rules of a particular area of law between two jurisdictions, then the most important approach of comparison will most likely be norm comparison; yet it must not be forgotten that the norms are embedded in a legal and cultural context that will certainly differ in one or more respects from the context of a similar norm in the comparer's domestic legal order.

There are many ways or approaches to conducting comparative legal studies, yet there is no consensus on what these approaches are, or how they should be described, much less on how the studies pursuant to these approaches should be conducted in practice. The reason is that comparative legal studies act as an interface for communication between people from different legal cultures and with different collective identities, what Legrand terms *mentalités*.[56] The following discussion must therefore be understood merely as an effort to bring some order

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[54] *Id.* at 380.

[55] *See* Rudolf B. Schlesinger, Formation of Contracts: A Study of the Common Core of Legal Systems 32 (1968).

[56] Legrand, *supra* note 24, at 269 n. 35, 272–73.

to the naming and description of some, but by no means all, of the more popular approaches employed in comparative legal studies.

Many authors, including Zweigert and Kötz, and Max Rheinstein,[57] distinguish between macro- and micro-comparative approaches. Those who write of macro-comparisons often mean the studies of legal families and the Grand Systèmes approach of René David with its emphasis on taxonomies.[58] But the term is also applied to refer to comparisons of legal systems, such as those attempted in this book, and major aspects of those systems. As the enquiry becomes narrower, one usually leaves at some point the realm of macro-comparison and enters that of micro-comparison. It is here that particular aspects of the legal systems are compared. In most cases, legal rules and institutions are compared. One way of thinking of this demarcation is that the macro-approaches place people, particularly legal actors, in the foreground, while the micro-approaches emphasize rules and practices. Yet even here the comparative lawyer must not lose sight of the role of non-normative, macro features of legal systems, what Sacco refers to as *legal formants*, discussed below. A proper understanding of foreign or domestic law requires an appreciation for both the rules and practices as well as the wider cultural, philosophical, and other contexts of the rules and practices.

As suggested above, there can be no clear demarcation between macro- and micro-approaches to comparative legal studies. The demarcation suggested here is to include all predominately rule-based approaches in the micro-category, and to assign all other approaches to the macro-category. Thus, the micro-category includes the comparison of legal terms, concepts, norms (legal rules), the sources of rules, institutions, and bodies of norms. Included in the macro-category are comparisons of legal organizations, legal systems, *mentalités*, styles, legal philosophies, legal traditions, and legal cultures.

Readers should bear in mind that this list of approaches is incomplete and that the descriptions of the approaches are simply sketches of the salient features.

1. MICRO- OR RULE-BASED COMPARISONS

The following discussion distinguishes between comparisons based on legal terms, concepts, norms (legal rules), institutions, and bodies of norms. As such, it moves from the specific to the general. This should not be understood to imply that approaches lower in the hierarchy have lower value than those placed more highly. All of these approaches have value as long as one bears the legal context (see macro-comparisons) in mind.

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[57] Max Rheinstein, Einführung in die Rechtsvergleichung 31 (von Borries ed., 2d ed. 1987); Zweigert & Kötz, Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts 4 (3rd ed. 1996).

[58] William Twining, Globalisation and Legal Theory 178 (2000).

No one would contend that legal rules alone constitute the whole of the law. Nevertheless, they are indispensable to any legal order. The existence of a body of legal rules is what distinguishes a legal order from other societal constructs.

a. Comparison of Legal Terms

From a linguistic standpoint, legal rules or norms are constructed from legal terms. The legal term is consequently the smallest building block of any body of norms. A legal term does not necessarily consist of one word; indeed, two or more words are common. Consider, for example, the legal terms (used by English-speaking jurisdictions) *ratio decidendi*, real property, and stay of execution, to list only three.

In comparative law, how does one know which terms to compare? Ordinarily, the comparativist proceeds from the standpoint of his or her own jurisdiction and consequently has a problem or a question or a research agenda in mind. In other words, the search for the comparable term or terms is often determined by the language and legal culture of the person conducting the study. However, if the study is conducted by researchers from different legal cultures, or if the researcher is, for example, aiming to harmonize or standardize the law on any particular topic, then he or she is likely to have a cluster of domestic and foreign terms at the ready.

While this process sounds simple, it is by no means simplistic. Also, although simply comparing the meanings of foreign legal terms with domestic legal terms is often disparaged by academics,[59] it is perhaps the most widely used approach for making sense of foreign law in legal practice and in litigation. Does a criminal conviction in Germany for denying the holocaust, which is a crime there, constitute conviction for a felony under the laws of Nebraska, with the result that the person loses her right to carry a firearm or to vote? In a contract dispute in England subject to German law, how is the concept of *Treu und Glauben* to be translated and applied? In a probate case in Germany, how should one translate the German *Verzicht* into Spanish so that a Spaniard who is named in the will can relinquish her right to take under the will? How is a Swedish judge to know what the English word *heir* means for purposes of a probate dispute litigated in Sweden under Canadian law? Does the English term *marriage* have the same meaning as *Eheschließung* in German? The answer to all of these questions can only begin (but should not end) by comparing the foreign terms to domestic ones.

Comparison of legal terms is also the approach used, if only tacitly, by interpreters of foreign languages and by translators of foreign legal texts. Translators are faced with the daunting task of rendering foreign communication understandable to a domestic reader, and the only tools at their disposal are words which they string together to form sentences. As the German-born anthropologist and linguist Edward Sapir wrote in 1929: "No two languages are ever sufficiently similar to be considered as representing the same social reality. The worlds in which

[59] *E.g.,* Samuel, *supra* note 48, at 825–27.

different societies live are distinct worlds, not merely the same world with different labels."[60] Applied to legal translation, this means that perfectly exact legal translations are impossible.[61] In addition to the fact that the legal worlds of laws and institutions differ around the world, there are also sometimes considerable regional and national differences in how lawyers and the public at large think about law. Some of these differences are dealt with in the chapter on comparative jurisprudence.

While perfect legal translation is impossible, this does not mean that legal translations should not be made. Indeed, it is necessary to do so in every case in which the jurisdictions being compared employ different languages. In writing a German–English law dictionary,[62] the author became keenly aware of the non-uniformity of usage among speakers of both German and English. The differences between usages in legal English were, as one might expect, greater than in German for the simple reason that there are so many different jurisdictions which employ English. The same legal term sometimes does not have the same meaning in Scotland as it does in England. And the same is true of the American states, not to mention differences between countries. Accordingly, it is often even necessary to translate legal terms between jurisdictions which speak the same language.

b. Comparison of Legal Concepts

If one examines the comparative legal literature near the beginning of the last century, one finds that much emphasis was placed on legal terms called concepts. While it is clear, in many cases at least, that the authors are referring to a term in the limited sense of its denotation, that is, its dictionary meaning, the word *concept* was and still is sometimes used in a broader sense. It is in this broader sense that the word concept is used in this discussion, although elsewhere it is sometimes used synonymously with term.

As with legal terms, legal concepts may consist of more than one word. But unlike a legal term, a legal concept for purposes of this discussion means something more than the dictionary denotation of a legal term. Rather, concept can mean something more abstract. For example, the word *freedom* is a legal term with certain denotations in various contexts. But, according to some, freedom is also a concept that captures reflections or emanations from all the various imaginable usages of the term freedom and any similar terms, like liberty or right.

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[60] Edward Sapir, *The Status of Linguistics as a Science* (1929), *reprinted in* Selected Writings of Edward Sapir in Language, Culture, and Personality 207, 209 (David G. Mandelbaum ed., 1985).

[61] Rodolfo Sacco, *One Hundred Years of Comparative Law*, Tul. L. Rev. 1159, 1173 (2001); Thomas Lundmark, *Über die grundlegende Unmöglichkeit, ein juristisches Wörterbuch mit der Zielsprache Englisch zu erstellen: Plädoyer für eine Rechtsenzyklopädie*, *in* Recht und Übersetzen 59 (de Groot and Schulze, eds., 1999).

[62] Thomas Lundmark, Talking Law Dictionary (2005).

This definition might seem quaint today; but, as will be described in the chapters on legal reasoning and on comparative jurisprudence, this kind of definition, known as conceptualism, was in vogue during the late 19th century. Comparative jurists also took part in this movement. At the time, a number of them sought to discover abstract notions underlying all systems of law that could be utilized to build up a common system of jurisprudence.[63] This endeavor is an example of a universalist approach, much like that followed by some legal anthropologists.[64]

c. Comparison of Norms

The term *norm* adopted in this book is a legal rule which prescribes or permits certain human behavior. For example, section 211 of the German Criminal Code contains a rule prohibiting murder: "A murderer shall be sentenced to life imprisonment." Comparison of norms is perhaps the most common sort of comparative legal study with the possible exception of the use of comparative law in private international law.

From a linguistic standpoint, a norm must contain at least two terms: one describing a behavior and the other attaching some legal consequence to it, even if that consequence is merely to allow or prohibit the behavior. Thought of in this way, comparison of norms is another, more complicated, form of comparison of legal terms.

Notice that the second component of a norm—its consequence—may sometimes be inferred from the context. Consider the traffic signs "Stop," "Merge," and "Yield" (or "Give Way"), or the sign "No Guns! [or else the person will not be admitted]"

A norm is a norm whether it is very narrow in scope or very broad in scope. "Do Good" and "Do No Evil" are both very broad in scope, yet they are still norms according to this definition, assuming they fulfill the requirement of possessing the quality of law. In other words, what some legal theorists call principles (for example, "No one should profit from her wrongdoing") are also norms according to the definition employed here.

Norms can also be very simple or very complex. A simple norm might be, "Every person shall file a tax return by the first of April of each year." A more complicated norm might be an income tax regulation with intricate definitions which only a specialist could comprehend.

Comparing norms is subject to all of the hazards of comparing legal terms discussed above. But comparing norms also raises a problem that is not likely to arise when comparing legal terms, and which is not as readily visible when the

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[63] Gutteridge, *supra* note 34, at 18 (even Gutteridge, writing in 1946, while he also mentions rules and institutions, gives concepts a prominent role in what he terms his process of comparison). For a modern variant, see Oliver Brand, *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, 32 Brook. J. Int'l L. 404, 404 (2007).

[64] *See* Wolfgang Fikentscher, Modes of Thought xxiv (2d ed. 2004).

object of comparison is merely a legal term: What if there are norms that serve similar functions, but they use different terminology?

In recent times, this problem was first confronted by Rabel and his associates in preparing their monumental survey of the domestic sales laws of the world. Rabel hypothesized that if the research were to concentrate on the solutions to practical problems rather than on comparing formal law, then it should be possible to find common ground for the unification of the law of international commerce.[65] Rheinstein, who collaborated with Rabel, suggested that this functionalist approach to law be applied generally to the entire comparative legal process.[66]

d. Comparison of Sources of Rules

The discussion to this point has tacitly assumed that only legal rules are deserving of comparative legal study. After all, this is a book on the academic discipline of comparative law. However, one of the missions of comparative law is to chart the frontiers of the law, for they change with the society being studied. As products of a Western legal education, most of the comparative lawyers who publish in English, German, and Swedish take for granted that law, or at least authentic law or "law properly so called," to borrow a phrase from the positivist John Austin, originates from, or at least must be legitimized by, the state. This also holds true for lawyers in the common law tradition where judge-made law is considered to be a legitimate source of law. For judges are also officials of the state. (See the chapter on comparative jurisprudence.)

But even Western lawyers should ask themselves why it is that Sunday-closing laws or laws prohibiting the ritual slaughter of animals or the wearing of religious symbols like crucifixes or head scarves; or laws requiring that people stand, bow, or even wear a wig when a judge enters the courtroom are considered secular whereas observing halal or kosher dietary laws or observing the Sabbath by the wearing of a yarmulke or kippah are considered religious. The answer is quite simply that we in the West equate law with the state. If some (authorized) state agency or official has announced or ratified a rule, we call it a legal rule. Until the particular rule has been legitimated in this way, it might be considered to be a religious or other practice, but not law.[67]

This is true regardless of how rigorously the rule is adhered to by members of the populace, and even regardless of whether these members realize that the particular rule has never been legitimated by a state agency or official. For that is exactly how customary law is usually defined: a practice that people accept as law (*opinio juris*). Official sanction is not required. Customary law plays a very large

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[65] 1 Ernst Rabel, Das Recht des Warenkaufs 533 (1936).

[66] Rheinstein, *supra* note 57, at 248–50.

[67] *See generally* Harold J. Berman, *Comparative Law and Religion*, *in* The Oxford Handbook of Comparative Law 739 (Mathias Reimann and Reinhard Zimmerman, eds., 2008) (on the difficulty if not impossibility of separating law from religion).

role, for example, in indigenous populations within larger jurisdictions[68] and also in major parts of the world, including Africa.[69]

In the trades, the law might similarly be found in the rules of a particular trade organization. Social, business, religious, or other organizations may have formal or informal arrangements that might meet the functional definition of law in any particular jurisdiction. The list of places to look for the What of comparative legal studies is long, and the particular rule can often only be teased out with difficulty. Nevertheless, an accurate representation of both foreign and domestic law requires that these additional sources also be considered along with sources, such as statutes, regulations, case decisions, and administrative practice, that are usually consulted by Western comparative lawyers.

e. Comparison of Legal Institutions

Unfortunately for this section, legal English does not differentiate between two vaguely related but legally separate phenomena, both of which are referred to as institutions. The more common use of the word *institution* is to refer to a legal organization or public facility, such as for the treatment of persons with mental deficiencies. However, there is a second usage which is also relevant to comparative law. According to this usage, institution also denotes a significant practice, relationship, or organization within society, such as the institution of marriage, slavery, or property.

Legal institutions in this sense of the word consist at their core of a collection of legal terms and norms, and perhaps also concepts, on a narrow and distinct topic. From a practical standpoint, legal institutions are even harder to compare than norms; for the collection of norms will likely not be coterminous in the jurisdictions studied because the institutions will not be understood in the same way in the different jurisdictions. Hence functional analysis is needed here as well.

f. Comparison of Bodies of Norms

The discussion so far began with legal terms, which might be thought of as the simplest "building blocks" of the law, and progressed along via concepts, norms, and sources of rules to legal institutions, which are (usually smaller) collections of norms. Without abandoning norms as the basic subject of comparison, it is possible to collect norms together into a larger group than a legal institution. That is what is meant here by body of norms.[70] The norms to be compared are typically

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[68] Bradford Morse, *Indigenous Law and State Legal Systems: Conflict and Compatibility*, *in* Indigenous Law and the State 101–20 (B.W. Morse and G.R. Woodman, eds., 1987).

[69] *See generally* Manfred O. Hinz, *Traditional Governance and African Customary Law: Comparative Observations from a Namibian Perspective*, *in* Human Rights and the Rule of Law in Namibia 59 (N. Horn and A. Bösl, eds., 2008); T.W. Bennett, *Comparative Law and African Customary Law*, in The Oxford Handbook of Comparative Law (Mathias Reimann and Reinhard Zimmerman, eds., 2008).

[70] The author prefers the term *body of norms* because it implies that the norms are interconnected functionally or in some other way, unlike the word *collection*, which might even be a whimsical assortment.

drawn from some body of substantive law. The coverage of a given comparison is usually quite narrow, such as the right of female teachers to wear religious head scarves in public schools. This approach to comparative law is very popular among academics. In addition, many if not most theses and dissertations written in the area of comparative law employ this approach.

Because this approach is rule-based, functionality will necessarily play an important role in selecting the norms for comparison and in comparing them. The good studies among these will pay special attention to considerations which are not rule-based, such as those that are mentioned below under macro-comparisons; for these considerations can sometimes have a decisive effect, for example, on how the rules are followed, interpreted, and applied.

Once again the reader should be reminded that no one who undertakes a comparison of legal terms, concepts, norms, institutions, or body of norms should do so without consideration of the cultural context in all of the systems studied. The following part looks at various ways of defining and understanding this context.

The common core project led by Rudolf Schlesinger regarding the formation of contracts is an outstanding example of this approach.[71] Nine prominent scholars analyzed sources, styles, and techniques of several legal systems to produce a comparison of the actual results derived from a series of factual situations.[72] An even more ambitious common core project has been underway in Trento since 1993. The purpose of the project is to describe the commonalities and differences in the private law (that is, civil law) of the European member states. According to the Internet site for the Common Core of European Private Law Project, the project has already spawned 12 books.[73] The most interesting aspect of this project for purposes of the present discussion is that, in addition to the analysis of legal norms, the authors of the various reports also take institutional and cultural aspects into consideration. Cultural aspects are here treated under the heading macro-comparisons, which follows.

2. MACRO-COMPARISONS

Included in the macro-category are comparisons of legal organizations, systems, philosophies, traditions, and cultures in addition to a long list of other approaches that cannot be dealt with here for reasons of space. For example, the *Oxford Handbook of Comparative Law,* Part II, "Approaches to Comparative Law," contains chapters on "comparative law and . . . " these other subjects: comparative knowledge, comparative legal traditions, mixed legal systems, influence on national legal systems, the Europeanization of private law, globalization, Islamic

[71] 1–2 Rudolf B. Schlesinger, Formation of Contracts: A Study of the Common Core of Legal Systems (1968).

[72] *Id.* at 31–34.

[73] The Common Core of European Private Law, http://www.common-core.org.

(Middle Eastern) legal culture, African customary law, language, legal culture, religion, legal history, sociolegal studies, critical legal studies, and economic analysis of law.

Of these approaches, the most popular if not the most influential are the approaches regarding legal traditions and legal cultures. Discussion of these two approaches will be deferred to the section below on classifications in comparative law. Beforehand, a few words will be said about legal organizations, legal systems, *mentalités*, juristic styles, legal philosophies, legal traditions, and legal cultures.

a. Comparison of Legal Organizations

Legal organizations, also known as legal institutions in English, are, of course, made up of people; but these are all people bound by a structure of law. In other words, the people in legal organizations are subject to norms. They are subject to the organic norms, such as a constitutional document or unwritten constitution, under which their organization was created; the regulations enacted by the public body (another organization) charged with the oversight of the organization; and their own internal rules. In addition, anyone who has worked in a legal organization can testify that each organization has its own ways of doing things, which is sometimes referred to as administrative practice.

The researcher seeking to compare legal organizations consequently must not only look at the norms which structure and control the workings of the organization, but also at the informal administrative practice. In addition, the researcher must pay close attention to the qualities and qualifications of the people who staff the organizations.

Legal organizations which have been subject to a great amount of comparative study include legislatures, governments, the judiciaries, and the bars of various jurisdictions. For example, this book devotes an entire chapter each to lawyers and judges.

b. Comparison of Legal Systems

As with most of the terms in this introductory chapter, understandings of the term *legal system* vary widely. German legal theorists such as Werner Krawietz generally describe a legal system (*Rechtssystem*) as a collection of norms, including those constituting legal organizations.[74] On the other hand, academics in England include topics on judicial reasoning and the legal profession in course books on the English legal system.[75] In other cases, the term legal system might be understood to mean merely a collection of norms regulating behavior.

In this book, the term legal system is employed as it is in England to mean the main components and actors which make up a functioning government, including legislatures, judges, executives, administrative agencies, and main actors in

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[74] Werner Krawietz, Recht als Regelsystem (1984).

[75] *E.g.,* G. Slapper and D. Kelly, The English Legal System (8th ed. 2006).

addition to the norms that constitute organizations and regulate the behavior of all people inside and outside the organizations.

All approaches to comparative legal study have shortcomings, even the systematic approach employed in this book. The authors of a course book on comparative law in the United States write: "An exclusively expository and 'systematic' discussion of foreign law, moreover, would be bound to stress surface differences in system and terminology; only an inquiry into actual results reached in response to concrete fact situations will show that those surface differences hide an amazingly large area of agreement among various legal systems, certainly among those belonging to the civil and common law orbits."[76]

c. Comparison of *Mentalités*

Building on the work of the anthropologist Lucien Lévy-Brühl,[77] Legrand contends that lawyers in each culture possess a "collective mental programme" which contains the "assumptions, attitudes, aspirations, attitudes, aspirations and antipathies" that constitute the "deep structures of legal rationality." This mind-set, according to Legrand, influences legal reasoning, the significance of systematization, the character of rules, and role of facts, and the meanings of rights.[78]

The notion of *mentalité* seems to overlap somewhat with the discussions of styles and legal philosophies which follow.

d. Comparison of Juristic Styles

Zweigert and Kötz identify style as one of the most important factors in identifying whole groups of legal systems. The crucial factors proposed by Zweigert and Kötz which determine a jurisdiction's style are (1) historical background; (2) distinctive mode of legal thinking; (3) certain legal institutions, such as the concept of agency, the (4) sources of law; and the (5) ideology, by which they mean "a religious or political conception of how social or economic life should be organized."[79] They note that the question of sources of law is of minor importance for comparative law generally and for the theory of legal families in particular. Further, they remark that the final factor—ideology—is not helpful in distinguishing among the various Western legal systems, presumably those of Germany, Sweden, England and Wales, and the United States, which are the focus of this book. "[H]ere other criteria must be sought."[80]

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[76] Rudolf B. Schlesinger, et al., Comparative Law: Cases, Texts, Materials vii (5th ed. 1988).

[77] Lucien Lévy-Bruhl, How Natives Think (Lilian A. Clare, trans., 1926).

[78] John Bell, French Legal Cultures 15 (2001).

[79] Zweigert and Kötz, *supra* note 3, at 68–72. *See also* Léontin-Jean Constantinesco, *Über den Stil der "Stiltheorie" der Rechtsvergleichung*, 78 Zeitschrift für Vergleichende Rechtswissenschaft 154, 154 (1979).

[80] Zweigert and Kötz, *supra* note 3 at 72.

Markesinis employs the term *style* more formally to refer, for example, to how judgments are written, and particularly for whom. Style, he writes, is the image of character. "In the judicial context it can, I believe, tell the careful observer a great deal about the judicial process, the judge, and the real issues confronting him in a legal dispute."[81] Style is essentially about presentation and ways of doing things, a superstructure, rather than something which defines the task at hand; hence his discussion of the style of judgments.

John Bell takes the concept of juridical style in another direction. "I would want to go further and look at mentality and style as ways of describing more deeply rooted activities. The existence of particular styles of presentation may serve as evidence of difference in either a deep level of legal thought, or different traditions about how legal argumentation is presented. It can serve as an indicator that there is a different culture in operation."[82]

e. Comparison of Legal Philosophies

This book devotes an entire chapter to legal philosophy or jurisprudence, as it is generally known in English. Consequently, only a few general remarks will be made here.

Legal philosophers have long looked for foreign inspiration as part of their own jurisprudential efforts in order to determine the importance and universality of jurisprudential problems, to find concrete illustrations of abstract theories, and to test the validity of general hypotheses against the realities of more than one legal system.[83] Yet, notwithstanding the obvious importance of jurisprudential studies to the discipline of comparative law, a review by Ewald published in 1995 uncovered very few comparativists who had devoted their attention to jurisprudential aspects of the discipline.[84] William Ewald writes in another article that comparative lawyers have paid "scant attention to legal philosophy."[85] To rectify this state of affairs, Ewald argues that one if not the only aim of comparative legal studies should be to understand the principles and ideas that lie behind the foreign legal system. Defining law as applied moral philosophy, Ewald opines that the central task of comparative law should be "to interpret and make sense of the world's variety of such applied moral philosophies." Further: "[F]or the purposes

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[81] Basil S. Markesinis, Foreign Law and Comparative Methodology: A Subject and a Thesis 127 (1997).

[82] Bell, *supra* note 78, at 17.

[83] Schlesinger, et al., *supra* note 76, at 42.

[84] William Ewald, *Comparative Jurisprudence (I): What Was It like to Try a Rat?*, 143 U. PA. L. Rev. 1889, 1982, 2105 (1995). Ewald's article is criticized in Joachim Zekoll, *Kant and Comparative Law: Some Reflections on a Reform Effort*, 70 Tul. L. Rev. 2719 (1996).

[85] William Ewald, *The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats,"* 46 Am. J. Comp. L. 701 (1998). For answers to the question why comparativists have never developed comparative legal theory as a central area of their concern, see Geoffrey Samuel, *supra* note 48, at 817. *See also* the thoughtful review article Legrand, *supra* note 24, at 262.

of comparative law, law is best viewed . . . as a kind of conscious mental activity, and above all as the record of the attempts, by jurists, in light of their conception of law, to arrive at the correct answers to legal questions."[86]

Is law (merely) applied moral philosophy? Most readers might answer, "At least in part." Others might consider all of law to be distinct from morality. Should the central task of comparative law be the interpretation of the variety of such moral philosophies? Most readers would probably agree that such interpretation should be at least one of many tasks.

Does law exist outside and beyond human beings? Some legal philosophers and practicing lawyers think so. They contend, or at least believe, sometimes unconsciously, that the law is a set of norms, definitions, and organizations. While they, of course, admit that law is made by people, administered by people, and applied to people—Who could deny this?—they insist that law nevertheless has an existence of its own and, as such, is deserving of academic study on its own, without regard to how it is perceived by people inside the system.

Whether one agrees with the proposition in the preceding paragraph on the separate existence of law or not, does law, once created, totally disentangle itself from politics? In other words, even though law is made in a political process, is the law thus created politically neutral, that is, autonomous? Some lawyers and legal philosophers believe this to be the case.

Is the existence of an organization like a state a precondition to the existence of law, or are states just actors in a wider field of law makers?

Is law, no matter how created, ever perfectly ascertainable? Or is law always "in the eye of the beholder," changing, as it were, depending on who is viewing it? And even if one can perfectly ascertain what the law is on any particular point, can law ever be neutrally applied? Or is the application dependent upon the people applying it?

Does immoral law exist? Were the anti-Semitic racial laws of National Socialist Germany really law? Or were they merely the repressive policies of a totalitarian regime?

And, finally, do lawyers in different countries answer these questions differently?

This book cannot hope to provide a definitive answer to any of the questions posed above except for the last one: Do lawyers in different countries answer these questions differently? The answer to this question is yes. One finds some variation among lawyers, legal theorists, and legal philosophers from the four jurisdictions studied for this book: Germany, Sweden, England, and the United States. There is sometimes wide variation among the lawyers within any one of the jurisdictions; but there is also variation that seems to be attributable to the particular jurisdictions.

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[86] Ewald, *supra* note 84, at 1948–49.

Some of these questions will be delved into more deeply in the chapter on comparative jurisprudence. But it is worth reminding the reader at this point that it would be simplistic to suggest that all of the lawyers in any particular jurisdiction view the law, or even the answers to these questions, in the same fashion. That being said, it is true that a great number of observers of foreign legal systems have concluded that foreign lawyers think differently. From examining many of these instances, and from talking to perhaps a score of people who have made this observation, the author believes that what they are talking about is that foreign lawyers often perceive the law differently. These differences in perceptions do not necessarily mean that the norms, definitions, and legal organizations are different. In fact, the norms and institutions are often essentially identical. Nevertheless, the foreign observer finds differences which he or she explains by saying that the people think differently.

If it is true that lawyers in the various jurisdictions tend to think differently as a group, then this phenomenon would be a proper subject for comparative legal study for all of the reasons set out at the beginning of this chapter. If one aims to improve one's own law, including international law, and its application, then one might, for example, want to consider adopting foreign perceptions of the law. If one wishes to harmonize the law between two or more jurisdictions, one must consider the fact that the law might be perceived differently in these jurisdictions. Finally, in one's search for universal commonalities, the comparative researcher will find much that is common among the jurisdictions of the world, in addition to much that is different, in people's understanding of the law.

f. Comparison of Legal Traditions

Explicitly denying a taxonomic objective, the main proponent of the legal traditions approach, H. Patrick Glenn, explains that the concept of tradition is simply that of received normative information. "Western theory of tradition," he writes, "teaches that all tradition is normative, that is, that it provides a model, drawn from the past, as to how one should act."[87] Legal traditions therefore are the shared inheritance of legally normative information. Any particular jurisdiction may have inherited its information from any number of sources. As such, "legal traditions are largely self-identifying and need not answer to taxonomic requirements of providing the best means of understanding and structuring legal systems." Perhaps as a consequence, the boundaries of legal traditions are "fuzzy" and cannot be artificially "fixed" by scientifically defined criteria.[88]

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[87] H. Patrick Glenn, Legal Traditions of the World: Sustainable Diversity in Law 366 (4th ed. 2010).

[88] H. Patrick Glenn, *Legal Families and Legal Translations, in* The Oxford Handbook of Comparative Law 425 (Mathias Reimann and Reinhard Zimmerman, eds., 2008). *See generally* H. Patrick Glenn, Legal Traditions of the World: Sustainable Diversity in Law (4th ed. 2010).

g. Comparison of Legal Cultures

The author agrees with John Bell that tradition is only a part, though an important part, of culture.[89] Culture also encompasses organizations, systems, *mentalités*, juristic styles, and philosophies. One might therefore say that culture in comparative law is synonymous with the category of macro-comparisons as used here. Consequently, one is faced with having to identify which aspects of culture are relevant for study. As such, the identification of legal cultural components mirrors the identification of crucial factors of juristic style, discussed above. For example, Franz Wieacker[90] ascertained three *essential constants* of European legal culture: its personalism, intellectualism, and legalism. Personalism, according to Wieacker, is characterized by self-determination as well as individual responsibility. By intellectualism Wieacker means the "peculiar way in which the phenomenon of law is understood" including "the formal ordering of legal science" and the conceptual and systematic articulation of "specific demands on justice in the form of a general ideal of justice." By legalism he means not merely the law-making monopoly of the state, but also "the need to base decisions about social relationships and conflicts on a general rule of law, whose validity and acceptance does not depend on any extrinsic (moral, social, or political) value or purpose."

Wieacker's article had been translated into English by Edgar Bodenheimer, who provided the following footnote attempting to explain what Wieacker meant by the remark that the validity and acceptance of law in Europe "does not depend on any extrinsic (moral, social, or political) value or purpose:"

> What Wieacker appears to have in mind is that positive legal norms (which form the primary basis of judicial decisions) possess a certain degree of independence from the surrounding social and economic conditions. Their autonomy (which, as Wieacker concedes, is partial only) furnishes some guarantee that lawsuits will be decided, not on the basis of irrational sentiments or purely subjective beliefs, but on the authority of sources that impart to the judicial process some measure of objectivity, detachment, and predictability.[91]

D. Classifications in Comparative Law

The process of classification is an age-old human endeavor. Early humans classified plants according to their desirability for human consumption. Classification also holds a special place in the Western scientific world. The Swedish botanist Carl

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[89] Bell, *supra* note 78, at 6.

[90] Franz Wieacker, *Foundations of European Legal Culture*, 38 Am. J. Comp. L. 1, 1 (E. Bodenheimer, trans., 1990).

[91] *Id.* at 23 n. 28. *See generally* Roger Cotterrell, *Comparative Law and Legal Culture*, *in* The Oxford Handbook of Comparative Law 709 (Mathias Reimann and Reinhard Zimmerman, eds., 2008).

Linnaeus, for example, succeeded in classifying the observable world into three kingdoms: animal, vegetable, and mineral. Linnaeus divided the vegetable world, that is, the world of plants, into orders and classes according to a *systema sexuale*. Without the benefit of genetic studies, he correctly inferred that plants could most accurately be identified by their reproductive organs, that is, flowers.

In the common law tradition, Henry de Bracton and William Blackstone are known for their systematizations of English law. The former's *De Legibus et Consuetudinibus Angliae* (On the Laws and Customs of England) was heavily influenced by the division of the law in Justinian's Institutes. The latter's seminal work, *Commentaries on the Laws of England*, is famously divided into four books: rights of persons, rights of things, private wrongs, and public wrongs. On the European continent, the German Samuel von Pufendorf, who later became a law professor in Sweden, published a systematization of the teachings of natural and international law.

These and other systematizers have discerned patterns in nature and in law that have increased our knowledge of our world. Might it be possible to systematize the law even further, and in doing so increase our knowledge of foreign legal systems?

As illustrated in the chapter on comparative jurisprudence, there have been many attempts to classify law and to construct systems from these classifications. Every reader will be familiar with the demarcation, for example, between domestic (municipal) and international law, between formal (adjective or procedural) and substantive law, and so on. What then about the laws or legal systems of various cultures and countries? Might they also be susceptible to scientific classification? The following discussion will describe and criticize some of the most well-known attempts to do just this. However, before doing so, some thought will be given to the role that language plays in these attempts.

1. LANGUAGE AS A MODEL FOR CLASSIFICATIONS IN LAW

Whether consciously or subconsciously, many modern attempts at classifying in comparative law have taken language as their model. As will be explored in depth in the next chapter, jurists have always recognized the importance of language to the law, leading many to notice the connection between the language spoken and the legal culture. Is it just a coincidence, for example, that people who speak French, such as those in France, Québec, and (at one time) Louisiana, all have legal systems with striking similarities? Or take English: does the fact that the majority population in any given jurisdiction speaks English mean that the jurisdiction belongs to the English common law tradition?[92] In other words, are English speakers preordained—or damned—by their language to be common lawyers?

[92] George P. Fletcher, Basic Concepts of Legal Thought 5–6 (1996).

Drawing parallels from linguistics, some linguists might answer the question affirmatively. The geneticist Luigi Luca Cavalli-Sforza and his followers have found a remarkable correspondence between one's genetic family tree and the language one speaks.[93] The correlation is explained in part by so-called vertical transmission of language from parents to their children, which is said to be very similar to genetic transmission.[94] Language is not the only aspect of culture that is transmitted vertically in this way: in research that might be of particular interest to jurists, other studies have shown that parents also have a strong influence on the transmission of political opinions and religion to their children.[95] Could these studies in comparative genetics and linguistics be used as a model for studies in comparative law? This question will be dealt with in more depth in the chapter on language and comparative law.

The model of language transmission discussed in the foregoing paragraph will be referred to here as the genetic model. The sometimes tacit assumption of this model is that the vast majority of people on the face of the earth cannot escape their genetic predisposition when it comes to the language they speak. This notion came under attack recently in *Empires of the Word*, an extremely erudite book by the linguist Nicholas Ostler. Ostler takes issue with the genetic model. In doing so, he provides one example after another of vast numbers of people throughout history who have abandoned their mother (genetic) tongue in favor of a foreign one. The Americas provide a graphic contemporary example. Even among the descendents of indigenous peoples, relatively few people can be found who still speak the language of their ancestors; and the same is true for the millions of descendents of settlers from other continents, most of whom now speak a language that would have been incomprehensible to their grandparents. For this type of dispersion, one needs a term other than genetic. It will be referred to here as the cultural model.

Independent of the linguistic debate between the adherents to the genetic model and those to the cultural model, other linguists have been involved in an exercise which parallels the efforts of comparative jurists to classify the world's legal systems. These linguists, who include Merritt Ruhlen,[96] have recently succeeded in a grandiose task, comparable in some ways to the mapping of the human genome: they have classified every known language spoken today into a system, and in doing so have identified features of a primordial or proto-language which must have been spoken by the ancestors of all of the people living in the world today. Might such a feat be possible for law?

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[93] Luigi Luca Cavalli-Sforza et al., The History and Geography of Human Genes (1994).

[94] Nicholas Ostler, Empires of the Word: A Language History of the World 381 (2006).

[95] *Id.*

[96] Merritt Ruhlen, The Origin of Language: Tracing the Evolution of the Mother Tongue (1994).

2. LEGAL FAMILIES

Before answering the question posed at the end of the last paragraph, let us briefly sketch the attempts by lawyers over the past century to organize the world's legal systems into categories similar to families of languages. One early attempt in 1905 was that of Esmein,[97] who posited that history, geography, religion, and race were the decisive features of a legal family. Employing an analogy to botany, these features might be thought of as Linnaeus's flowers. On the basis of these features, Esmein identified five legal families: Roman, German, Anglo-Saxon, Slavic, and Islamic. Asia and Africa were simply excluded.[98] The reader will notice that the legal families identified by Esmein correspond quite closely to linguistic families.

A more inclusive system was posited by Georges Sauser-Hall in 1913.[99] Sauser-Hall divided the world's legal systems into four families: Indo-European, Semitic, Asian, and that of the uncultured (barbarous) peoples. We should not be offended today by the word *barbarous* because it was the usage of the time, and was meant to signify peoples who were not considered to be civilized or cultured to such an extent that they had formed nation states. One might also today take offense at the word *civilized*, but it is still used in Article 38 of the Statute of the International Court of Justice in the phrase "civilized nations," which carries the negative implication that some nations are uncivilized.

A more differentiated approach, at least from a European standpoint, was taken in 1951 by Arminjon, Nolde, and Wolff; but notice that these scholars merely added an additional family of Hindi, subdivided Sauser-Hall's designation of a European legal family into subgroups, and omitted the Asian legal family altogether. These scholars' groupings are as follows: French, German, Scandinavian, English, Russian, Islamic, and Hindi. Ostensibly, these groupings were based on an analysis of history and culture, but one suspects that the only criterion that carried any substantial weight was that of language. Most other classifications to date have followed roughly the classification into these same basic families.[100]

In the classifications listed so far, the reader will notice that common law or English deserves its own family. Is this because common law, like the English language, is incomprehensible to others, such as to French-speaking lawyers? If so, how could it be that French-speaking lawyers at the University Ottawa are being taught common law in French? In other words, there must be some other explanation for why English common law deserves a separate classification.

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[97] A. Esmein, *Le Droit Comparé et Enseignement du Droit*, *in* 1 Congrès International de Droit Comparé 451 (1905).

[98] Jaakko Husa, *Legal Families*, *in* Elgar Encyclopedia of Comparative Law 382 (Jan M. Smits, ed., 2006).

[99] *Id.* at 395.

[100] Husa, *supra* note 98, at 386–87 (discussing Schnitzer, David, and Zweigert and Kötz).

Let us look at the criteria mentioned so far for classifying legal systems into families and ask ourselves why the researchers selected precisely these criteria for making their selections. Esmein ostensibly considered race, religion, history, and geography to identify his five families: Roman, German, Anglo-Saxon, Slavic, and Islamic. On the basis of race as it was then understood, the Germanic and Anglo-Saxon families should probably have been combined into one family; for at the time it was generally believed that Englishmen were Germanic, although recent genetic studies have shown them to be predominantly Celtic.[101] Similarly, a distinction on the basis of religion would not have justified separating Poland (in the Slavic family), for example, from Western Europe. Turning to the criterion of history, is the history of France so radically different from that of Germany as to deserve classification into an entirely different family? If so, then should not the Netherlands be put in the Roman family, and not in the Germanic, as the Netherlands were under Spanish and French domination for long periods of time? The final criterion—geography—looks suspicious: one suspects that it was added as a criterion so that England and Ireland could be grouped with Australia, New Zealand, the United States, and Canada. Finally, using Esmein's categories (race, religion, history, and geography) might compel one to classify Québec as a common law jurisdiction because Québec has more of Esmein's features in common with common law Canada than with France. Yet, a more immediate question for purposes of this book is the following: why does Esmein seem intent on separating France, England, and Germany into separate families?

Passing over the study by Sauser-Hall (who grouped Germany, England, and Sweden together), if one examines the criteria used by Arminjon, Nolde, and Wolff to identify legal families, one will notice that they added the following criteria to Esmein's list: legal sources, legal technique, legal terms and concepts, and legal culture. Applying these criteria together with the criteria previously employed by Esmein, results in Arminjon, Nolde, and Wolff identifying seven families: French, German, Scandinavian, English, Russian, Islamic, and Hindu. Jaakko Husa suspects that language played the central role in making these classifications. While the author agrees, there is a more elemental question: why are legal sources (that is, sources of law) considered to be a determining factor? Does this criterion really make much difference? Zweigert and Kötz opine that it does not.[102] The author suspects that this factor was included so that the authors could justify separating the common law world from continental Europe, as was actually done in the study, relying in part on the supposed fact that, while continental Europe only recognizes one source of law (statute, or statute and custom), England has two (statute and judge-made law, perhaps in addition to custom). If the authors of the study had chosen not to include sources of law as a criterion for classification, it seems likely

[101] Bryan Sykes, Saxons, Vikings, and Celts: The Genetic Roots of Britain and Ireland (2006).

[102] Zweigert and Kötz, *supra* note 3, at 71.

that England would have been classified with Germany or perhaps even France, a result which the authors apparently wanted to avoid. Unfortunately for the persuasiveness of the legal families of Arminjon, Nolde, and Wolff, it will be shown in another chapter of this book that Sweden, England, and to a large extent Germany basically agree that judge-made law is a source of law; they differ only in their definitions of what is judge-made law and their estimations of the relative importance of this particular source of law.

The criteria employed by David and by Zweigert and Kötz in making the classifications are, as mentioned above, generally consistent with those of Esmein and of Arminjon, Nolde, and Wolff: all three retain the classification of England (and the common law world) into a separate family.

Perhaps it should be noted at this point that, at least from an English point of view, continental European law after the Reception of Roman Law (Reception) was always considered to be separate and distinct from the English legal tradition, as well as being perceived as dangerous. History shows that the British Parliament continually rejected royal attempts to emulate the continental Reception of Roman law primarily by characterizing the Roman law as something completely foreign to English law. Roman law was closely affiliated with the Roman Catholic Church, and with the Pope. Roman law contained a dangerous and foreign *Grundnorm*: "The will of the prince has the force of law."[103] This did not sit well with most of the powerful men in the realm, among them the barons who had convinced King John to the contrary in 1215 and insisted that he reduce the official limits on his power to writing in the Magna Carta. The civil law, as it was called then and now, was so academic that it had to be taught at university, unlike the practical English law that could be taught by practitioners at the Inns of Court. Some lawyers did, indeed, study civil law, most notably those going into service with the Church, those wishing to practice equity law, and those, like William Blackstone, pursuing an academic career. Nevertheless, most lawyers were hostile to the foreign civil law. In contrast to their European counterparts, English lawyers had at their disposal a highly developed system of law that was uniform throughout England, so that there was no need to impose uniformity by codification.[104]

One example of the hostility toward civil (continental European) law is seen in the Declaration of Independence of 13 British colonies in North America. In their list of grievances, the Americans charged King George III among other things with the following:

> For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries

[103] Ulpian: "What pleases the prince has the force of law." (*Quod principi placuit legis habet vigorem*) and "The sovereign is not bound by the laws." (*Princeps legibus solutus est*).

[104] R. C. van Caenegem, The Birth of the English Common Law 89–92 (1988).

> so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies.

Why was civil law treated with such animosity? Does this animosity arise out of the criteria mentioned by the comparativists above, that is, race, religion, history, geography, legal sources, legal terms and concepts, and legal culture? Let us examine the elements in this list in order. First the racial element: were those who opposed the civil law all anti-French? This cannot be supported; indeed, a great many of them had French ancestors and respected French culture. Neither did they belong to a different religion. Until Henry VIII was declared head of the English Church in 1534, the prevailing religion was Roman Catholicism. (Of course, after that date, most ideas and institutions associated with the Roman Catholic Church were suspect.) Geography was also not a serious concern, as the British were able to turn back every invasion, including that by the Spanish Armada in 1588. The English also had no particular concern about the designation of legal sources, at least in theory; rather, they were concerned with encroaching absolutism, which implied a much stronger legislative rule on behalf of the king as opposed to that of parliament and the judges. Nor can it seriously be argued that there was any serious objection to legal terms, concepts, and culture in the abstract. Nevertheless, English parliamentarians and judges were extremely protective of their independence and authority, and consequently resisted efforts to continentalize their legal system. Indeed, the British who objected to the Reception knew very little for the most part about Roman legal concepts and culture other than the precept that the king was always right and that professors, rather than practitioners, would henceforth be teaching law. In short, in reviewing the criteria selected by comparativists to classify law into separate families, one suspects that they have accepted the objections of the British towards the acceptance of civil law at face value; or, even worse, that they have overlooked the real political and constitutional differences that lay at the heart of the Reception debates centuries ago, but which have been largely eclipsed by democratic developments on the European continent.

If this criticism is correct, then the more recent attempts to retain basically the same families but to style them cultures or traditions are also destined to fail if they have as their goal the classification of legal systems of the world into taxonomy akin to Linnaeus's taxonomy of plants.

Classifying legal systems into families has attracted widespread criticism, much of it deserved. One classification that deserves criticism is the consignment of East Asian legal systems to a single family with supposed common characteristics. According to Andrew Harding, the only characteristic that unites these jurisdictions is geography.[105] Harding takes his criticism of legal families further: they tell us nothing, he writes, about legal systems except as to their general style and

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[105] Andrew Harding, *Global Doctrine and Local Knowledge: Law in South East Asia*, 51 Int'l & Comp. L. Q. 35, 49 (2002).

method. Dismissing attempts to classify jurisdictions into taxonomy as reductionism, Harding instead advocates immersion into the legal culture:

> [W]e need to shed our jurists' cloaks, equip ourselves with thick notebooks, inverse ourselves in context, and acquire as much local knowledge as possible. We are not obliged to embrace the entire globe with some kind of neat doctrine. We will find many and growing similarities between these legal systems, but also many similarities with legal systems outside the region. . . . Comparative law does not need compartments; it needs profound understanding of local doctrine and global doctrine.[106]

This is not to be interpreted in any way as a criticism of the outstanding work done by H. Patrick Glenn,[107] Reinhard Zimmermann,[108] and others to highlight the cultural similarities and differences among various jurisdictions. Even the general classification into families and traditions has its place, primarily as a starting point for further studies. Nevertheless, this author wishes to join the criticism of Harding and others that these classifications—especially the one between common law and civil law—have the undesirable effect, unintended by these authors, of convincing students in particular that there are deep-seated and far-reaching differences, and minimal similarities, between these families or traditions. Yet, as this book will show, there are striking similarities between the legal systems of Germany, Sweden, England and Wales, and the United States and there are differences that do not fit neatly into the received common law/civil law matrix.

Students and others who are convinced that the differences are foundational are likely to fall into the trap of thinking that any kind of European, much less international legal integration is an exercise in futility. Yet history attests to the opposite. Indeed, both the civil law and common law traditions are amalgamations. This has been perhaps most elegantly illustrated by the work of Zimmermann and others on so-called mixed jurisdictions, including Scotland and South Africa.[109] If the integration of legal families or traditions were impossible, then these mixed jurisdictions would not exist, and yet they do.

One classic definition of a mixed jurisdiction was formulated by F. P. Walton as "legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law."[110] William Tetley has identified 13 political units (countries or their political subdivisions) which satisfy this definition:

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[106] *Id.*

[107] Glenn, *supra* note 88.

[108] E.g., Reinhard Zimmermann, *Characteristic Aspects of German Legal Culture*, *in* Introduction to German Law (Mathias Reimann and Joachim Zekoll, eds., 2005).

[109] Reinhard Zimmerman, et al., Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa (2005); Reinhard Zimmerman and D. P. Visser, Southern Cross: Civil Law and Common Law in South Africa (1996).

[110] Frederick Parker Walton, The Scope and Interpretation of the Civil Code of Lower Canada (1907).

Louisiana, Québec, St. Lucia, Puerto Rico, South Africa, Zimbabwe (formerly Southern Rhodesia), Botswana, Lesotho, Swaziland, Namibia, the Philippines, Sri Lanka (formerly Ceylon), and Scotland.[111]

In a recent review of the academic literature on mixed jurisdictions for *The Oxford Handbook of Comparative Law*, Jacques du Plessis draws six lessons from the experiences in mixed jurisdictions. First, mixed jurisdictions should be accepted for what they are, rather than be relegated to the common law or civil law traditions. Second, the experience in mixed jurisdictions shows that, while legal transplants inevitably change in the process of transplantation, they are often accompanied by aspects of the donor's legal culture. Third, mixed jurisdictions illustrate the role of the judiciary, with the assistance of academics, in gradually incorporating and adapting foreign law. Fourth, the process of borrowing in mixed jurisdictions does not invariably lead to improvement of the law. Fifth, the processes employed in mixed jurisdictions can be instructive for the development of a unified European private law. Sixth, language can play a crucial role in the initial process of reception of foreign law.[112]

3. SOME SUGGESTIONS FOR POSSIBLE TAXONOMIC STUDIES

Having criticized the methodologies of others, collegiality and good academic practice demand that the author state whether the exercise of classifying legal systems is indeed futile and, if not, what methods, other than those tried to date, should be used to classify them.

The first question is much easier to answer than the second, although neither answer is likely to be fully satisfactory to the critical reader. First, the endeavor to classify legal systems might well turn out to be futile, depending on what one determines after carrying out various studies. Indeed, John Langbein has written that the taxonomic orientation has largely spent itself.[113] To the second question, the approach to classification should either be bottom-up, top-down, or a comparison of the middle, paying particular attention to legal transplants.

a. Bottom-up Approach

The bottom-up approach suggested here has not, at least to the author's knowledge, been employed on a large scale in comparative legal studies. The idea behind this approach is that if one can identify the most salient behavioral norms of any particular legal system, then one could stack them together like bricks and build a

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[111] William Tetley, *Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified) (Part I)* 4 Unif. L. Rev. 591, 591 (1999).

[112] Jacques du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, *in* The Oxford Handbook of Comparative Law pp. 510–11 (Mathias Reimann and Reinhard Zimmerman, eds., 2006).

[113] John Langbein, *The Influence of Comparative Procedure in the United States*, 43 Am. J. Comp. L. 545, 547 (1995).

legal system that might then be compared on a brick-by-brick basis with another legal system while looking for patterns. The source of the norms would arguably be irrelevant; in any event, the source would depend on one's definition of law. One would begin by adopting a workable definition of law, a legal system, and a norm. Let us consider these three elements in reverse order.

One possible definition of a norm is the following: a rule that contains law. A rule might be defined as a statement which prescribes or permits certain human behavior. Setting aside the question of what law means in this definition, a legal system might be defined as the collective total of all norms in a particular jurisdiction, plus all of the individuals involved in making, interpreting, and applying the norms, who are here referred to as officials. For the purpose of the bottom-up approach, the researcher should include norms regulating legal institutions.

Comparativists and others usually define legal system in terms of jurisdiction, that is, a geographical area within which a particular governmental power may be exercised. Thus, England and Wales form one legal jurisdiction because they share a court system with the same supreme court. Scotland is part of the same legal jurisdiction as England and Wales for some matters, and it is its own jurisdiction for other matters. Similar problems are confronted in the United States with the several states and the various territories belonging to the United States, such as Puerto Rico.

Without going into detail, it should be noted that such a definition of jurisdiction is Eurocentric because it assumes that governmental authority is synonymous with jurisdiction and with a legal system. As many commentators have pointed out, most notably Glenn, this assumption means that a number of recognizable legal hierarchies, or at least hierarchies which appear to have legal elements, will be excluded from the definition of jurisdiction or legal system because they are not united by a sovereign governmental authority.[114] The Eurocentric bias can also be seen in the fact that, in Europe at least, governmental authority resides in states, and most of these are nation states in the sense that their populations essentially all belong to one nation or people with one universal or nearly universal language, while this is not the case for North and South America and much of the rest of the world. In order to conduct the bottom-up studies visualized by the author, the persons conducting the studies should adopt a definition of legal system that includes rules and also the people (officials) in other authoritative positions and institutions beyond those associated directly with the state.

The final definition that would be necessary before embarking on a bottom-up comparison is a definition of law, at least for purposes of the study, because without defining law, one cannot differentiate a norm from a cultural, religious, or other societal rule, such differentiation (assuming this is possible) being desirable if one wished to restrict the study to behavioral norms and norms involving officials. As discussed in more detail in the chapter on comparative jurisprudence,

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[114] Glenn, *supra* note 88, at 435.

the question of the meaning of law has been largely ignored in the vast majority of studies and publications by comparative lawyers. While this is unfortunate, it is perfectly understandable because most academics tend to limit their studies to jurisdictions with basically similar conceptions of what the law is; or they compare an area of substantive or procedural law which is clearly considered law in both jurisdictions; or they simply employ their own conception of law unconsciously. John Reitz cautions that "one must be on guard against the natural tendency to use without reflection the ideals of one's own system as the normative measure for systems that may not accept the ideal."[115]

b. Top-down Approach

Many comparativists and lawyers in general believe that law, politics, religion, cultural mores such as politeness, are autonomous, that is, while they may influence each other, they are basically discreet. Further, they believe that this basic autonomy is a universal phenomenon that exists in all cultures. As discussed in the chapter on jurisprudence, this is at least a debatable proposition. While it might be difficult to do so, it is by no means meaningless to try to separate norms from religious rules and from the rules of politics, etiquette, politeness, etc. Indeed this separation is necessary unless one wants to try to compare all rules of every type in two or more societies.

Ugo Mattei divides societal forms into three main groups, which he calls patterns, depending on the source of the dominant rules that affect individual behavior. These sources are politics, law, and philosophical or religious tradition. A division between politics and law might at first glance appear confusing: after all, is not law the result of a political process? This confusion might be attributable to a failure to understand how Mattei employs the terms. Let us look at each term in order, beginning with rules that are dominant in what he calls the philosophical or religious tradition.

The transcendental philosophical or religious tradition is, according to Mattei, characterized by rules, for example, which stem from a hegemonic pattern of law in which the individual's internal dimension and societal dimension are not separated.[116] The rules of these philosophical and religious societies are often very local in character, and mediators and other wise men are often called upon to resolve disputes. According to Mattei, religious and philosophical rules tend to emphasize duties rather than rights, and place a high value on harmony and on the importance of a homogeneous population as a means of preserving social structure. Religious and philosophical rules in this pattern of law are said to reflect a strongly hierarchical view of society in which a high level of discretion is conferred upon decision-makers. Mattei also calls this religious or philosophical

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[115] John C. Reitz, *How to Do Comparative Law*, 46 Am. J. Comp. L. 617, 623 (1998).

[116] Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal System*, 45 Am. J. Comp. L. 5, 36 (1997).

pattern of law "the oriental view of law." Not surprisingly, this family, if one may call it such, consists of countries in which Islam, Hinduism, and Confucianism are the dominant religions.

In contrast, rules in a political tradition, although originating with the state, often do not bind governmental officials, who in effect are a law unto themselves. The institutional rules in the political tradition are weak: what really seems to matter are one's position in the political hierarchy and one's access to political power, including the power of the police. It perhaps goes without saying that, where this pattern of law predominates, the law in the hands of the powerful has little in common with religious, moral, and other social orders. Mattei, of course, is describing socialist states, such as North Korea, as well as former socialist states in transition, and developing states, such as those in Africa.

Mattei's final grouping consists of professional law systems. This family includes those jurisdictions subject to what is usually referred to as the rule of law. In these jurisdictions, law is said to be the main mechanism for resolving disputes, and the state and state actors are subject to law. In addition, law is largely secularized, independent from religion, morality, and other social norms. Mattei is here describing what most people would refer to as Western democracies.

In short, Mattei has undertaken, in a general way, to make a comparison by what is referred to here as the top-down approach. To summarize his method, he tacitly identified various rules (the elements) from a large number of jurisdictions, collected them into systems, and then compared and contrasted these systems on the basis of one criterion: the dominant source of their rules. Other similar studies could be undertaken by identifying not one or even five criteria on which to base a comparison, but perhaps 100 or more. The criteria might include those examined in this book: language, jurisprudence, lawyers, judges, lay judges and juries, legal reasoning, statutes, judicial precedents, plus other normative elements (various crimes, contract issues, family and inheritance law, separation of powers, administrative law, environmental law, etc.) and cultural elements (orality, nationalism, communalism, dispute resolution, social and religious culture, etc.).

This kind of research would be particularly difficult for those comparativists who tend to fixate their research on low-incidence norms like punitive damages and the death penalty while overlooking norms with far wider application. Having identified these norms, one would have to conduct research to assess how well the norms are accepted, enforced, and abided by in the jurisdictions under study. Only then would one be in a position to compare the two (or more) jurisdictions under study and draw preliminary conclusions about their interrelatedness for purposes of classifying.

One would also have to consider the institutional side of the legal system, that is, the people (the officials) involved in legal organizations and at the norms by which these organizations are managed. Again, one would have to decide which organizations and organizational norms to study. In any large legal culture, certain functions traditionally thought of as legal are assigned to different organizations: law makers, administrators, judges, and enforcers. Since a large number of

these people, especially those in positions of authority, will have legal educations, it would be wise to pay particular attention to them, and to how they think and operate in their particular environments; for, as illustrated in the chapter on comparative jurisprudence, one might well find significant differences. When it comes to organizational norms, one must take care in choosing which aspects to study and the weight given to organizations, like the jury, which do not have any obvious counterparts in one of the other jurisdictions under study.

Whether comparing micro-elements or macro-elements, one could add any number of legal systems to this matrix by comparing each one on the basis of the same criteria. Under both the micro- and the macro-approach, the legal systems under study might show striking similarities in some areas, such as constitutional law, and striking differences in other areas, such as family law. This type of comparison would enable a much more realistic and nuanced assessment of the jurisdictions under study. One would likely not end up with families in the traditional, genetic sense suggested by many of the previous attempts at classification; instead, one would find extended legal families, so to speak: those including foreign spouses and adopted children, divorces, remarriages, and extended families, rather than the genetic families. One would also find parallel developments that were home grown in two or more systems.

c. Comparison at the Middle, including Legal Transplants

The third approach advocated here for the classification into families is to look at the historical origins of various norms, legal institutions, concepts, and other ideas as practiced by Allan Watson and his followers, while at the same time including related norms, legal institutions, concepts, and other ideas which were not transplanted.

The intrinsic value of conducting research on legal transplants has sometimes been met with skepticism.[117] Much of the debate over legal transplants hinges upon what one means by transplantation. If, on the one hand, one envisions legal transplantation as being similar to the transplantation of a plant or even of a human organ, then one would imagine that the transplanted norm, institution, concept, or idea would retain its original identity, characteristics, and functions. If thought of in this way, then legal transplants are obviously impossible because, unlike plants and organs, legal norms, institutions, concepts, and ideas that are transplanted into a foreign legal culture will assume new identities, characteristics, and functions. As critics of legal transplants correctly point out, transplantation in this organic sense of the term cannot take place. To this extent, transplantation is perhaps a poor terminological choice because it implies a process akin to botanical or biological transplantation. Consequently, Esin Örücü proposes speaking in terms of legal transpositions.[118]

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[117] *E.g.,* Pierre Legrand, *The Impossibility of Legal Transplants*, 4 Maastricht J. Eur. & Comp. L. 111, 111 (1997).

[118] Esin Örücü, *Law as Transposition*, 51 ICLQ 205, 205 (2005).

A better term might have been drawn from cultural phenomena such as religion, music, or language rather than from biology or botany. Linguists, for example, use the term *borrowing* to denote the importation of words or phrases from one language into another. Linguists realize that borrowed words and phrases do not necessarily retain their original forms, characteristics, and functions when they are absorbed into a foreign language. The process of linguistic borrowing, and the change in meaning that often accompanies it, can be seen on the following examples, one from Swedish, one from German, and two from English. *Ombudsman* is a Scandinavian word meaning representative, which in Sweden is used in the sense of a public official appointed to investigate citizens' complaints. In English-speaking countries, it is used to denote a person employed by any institution, whether public or private, to investigate complaints against the institution. Based on the author's searches in dictionaries and online databases, the term is seldom used in German, suggesting that its function, or the function of the institution of the ombudsman, is quite different. Every English speaker is probably familiar with the German word *Kindergarten*, which has long since been anglicized to kindergarten and which generally refers to a school or class for children, usually three to six years old. In German, the word seems to be losing ground to the term *Kindertagesstätte*, often shortened to *Kita*, which literally means children's-day-site. Two final examples from English: rather than coining a new German word for the new technology of cellular or mobile telephones, Germans employ the English word *Handy* to refer to a cellular or mobile telephone, even though the word does not have this meaning in English. Similarly, Germans use the English term *public viewing* to refer to the projection of sporting events onto large, outdoor screens for viewing by a wider public, whereas this usage cannot be found in any leading English dictionary; rather, the term more commonly denotes the display of the coffin at a funeral. Other comparisons and insights drawn from linguistic studies will be featured in the chapter on comparative legal linguistics.

Space does not permit the presentation of further arguments that have been marshaled against the legal transplants school. At the risk of trivializing these arguments, it would do an injustice to the scholars engaged in legal transplant research if we did not mention some of their many achievements. One prominent example is Andrew Harding, whose field of study is the South East Asian region. Harding concludes that virtually all law in the region has been transplanted in some way. He notes that both the existing law and the transplanted law transform beyond their original form: "each interacts not just with the other, but with the evolving social context which they both share."[119] Harding finds no evidence that one kind of law, such as commercial, criminal, or constitutional law, is more readily transplanted than another. Further, his research has uncovered numerous examples of failed transplants, such as the attempts in Malaysia and Singapore to import the institution of the English jury.[120]

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[119] Harding, *supra* note 105, at 45.

[120] *Id.*

4. ON USING LANGUAGE AS A TOOL FOR CLASSIFICATION

In most of the examples of classification mentioned in this chapter, language played a, if not the, predominant role in the classification. While language is undoubtedly important, if not extremely so, there are also other cultural models that might be employed. Before reviewing a number of these, we will first look at some of the weaknesses of using language as a model for the classification of legal systems into families or other classifications.

While language, like law, is largely if not exclusively a creation of culture, there are a number of characteristics of language, language-borrowing, and second-language acquisition that hamper attempts to group legal systems into various families by the same methods used to classify languages into families. While only a few of these difficulties can be mentioned here, owing to limitation of space, they should serve at least to call into question the ready use of language as a central point of comparison in trying to identify legal families.

Some linguists believe that, by a generous estimate, about half the world's population is bilingual; but bilingual people rarely enjoy equal competence in two or more languages.[121] Law cannot be understood in the same way, particularly because, unlike language, very few people learn the "language of law" in the same sense that they learn the language that they use for general communication. Even when English lawyers needed to learn Law French to present their cases in the common law courts, they did not learn the legal language and the art of oral argument in the same way that they learned their mother tongue. Furthermore, comparatively few people are trained in the law to the extent that they are trained in a language. This means, for our purposes, that lawyers can be bilegal more profoundly than they can be bilingual.

From research on second-language acquisition, and from our own personal experience, we know that it is virtually impossible for the learner of a second language to reach the same level of proficiency as a comparably educated native speaker. Yet this is not the case for proficiency in law. One finds a great number of lawyers who do not have the background language of their jurisdiction as their mother tongue, yet they compete on an equal basis with native speakers of the background language. Of the jurisdictions studied here, the United Kingdom and the United States have historically had much higher levels of immigration than Germany and Sweden. If having a mother tongue other than English were a serious handicap to learning the law, then one would not expect to find non-native English speakers excelling in the legal profession in the United States and the United Kingdom. Yet the contrary is true: one finds these non-native speakers on some of the highest courts, at the best universities, and among the most successful practitioners in public and private practice.

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[121] Suzanne Romaine, Bilingualism 8–9, 21 (2d ed. 1995).

Finally, borrowing from one language to another, while common, often results in importing a term or phrase that retains its foreign sound. This is less noticeable in present-day English, which prides itself in its non-English vocabulary, which vastly outnumbers its reservoir of native English terms.[122] However, even in English, most people use two syllables to pronounce the French word *forte* when used to mean "a thing at which someone excels," even though it is pronounced with only one syllable in French. The reason might be that speakers recognize the word as a foreign word and therefore think that it should sound foreign, or perhaps the French word is confused with the Italian word *forte* which means strong or loud in music. Whatever the reason, foreign words usually look—and more importantly sound—foreign in another language. Their spelling or pronunciations are constant reminders that these words are nonnative.

This can, of course, be the case with foreign legal terms and ideas as well. Take the English word *franchising*, which in German is capitalized to *Franchising*. This term both looks and sounds foreign to the native German speaker. However, the law shows readiness to import foreign concepts and adopt these concepts into domestic law. Few Germans, for example, realize that their federal constitutional court was roughly modeled on the U.S. Supreme Court or that the compulsory statutory share of inheritance to certain persons, *Pflichtteil*, under probate law, is of Roman origin. In short, legal concepts and terms may be likened to potatoes; for most people in the United States, the United Kingdom, Germany, and Sweden might consider the potato to be part of their national cuisine, forgetting that it was introduced to Europe from South America in 1536 and that Europeans who brought the potato to North America.

Notwithstanding the analogy to the potato, the author is not suggesting that comparativists abandon language in favor of botany in their attempts to classify legal systems into families. Language is without question an extremely important aspect of legal culture.

The linguist Nicholas Ostler notes that the closest parallels to English among other languages that have achieved world status are Chinese and Malay. English, like Chinese and Malay, has subject–verb–object word order and very little in the way of verb or noun inflexion. Words are simple. Stringing words together produces complex senses.[123] In short, English may be popular partly because it is relatively easy to learn. Is this something that the English language has in common with the common law and its methodology? Is the common law method popular in part because it is relatively easy to learn? Or is it a fact that the common law is only taught that way, that is, as a method to find the law rather than as a vast quantity of substantive and adjective (or procedural) law?

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[122] Thomas Finkenstaedt and Dieter Wolff, Ordered Profusion: Studies in Dictionaries and the English Lexicon (1973).

[123] Ostler, *supra* note 94, at 476.

The author also suggests that researchers turn to other cultural phenomena, such as music and religion, in their efforts to understand and classify. Most religions are understood to be and are propagated to a great extent independent of the language or languages with which they were originally identified. And, while it is a fact that most religious people adopt the religion of their parents, it is much easier to adopt a new or second religion than it is to attain the same proficiency in another language. Consequently, studies on the spread of religions might shed more light on the spread of law than do studies on the spread of languages.

The following interesting book should be mentioned in this vein, *The Evolution of the Law and Politics of Water,* by Joseph W. Dellapenna and Joyeeta Gupta, who identify 192 different national systems of water law.[124] The authors found seven major forces by which principles of water law have diffused throughout the world: the spread of civilizations, the spread of religion, the impact of conquest and colonialization, the codification of legal principles, the rise of epistemic communities, the influence of environmentalism, and the second wave of globalization. In a chapter entitled "Islamic Law and the Politics of Water," Thomas Naff traces the historical spread of water law through the religion of Islam. Nowadays, even though water law has been largely secularized, at least two fundamental Sharia concepts pertaining to water remain intact: that water is a free community property (*mubah*) and that communal rights (*musha*) are protected.[125] Sharia, he writes, "provides the basis for understanding the attitudes of Muslim farmers and legislators towards rights and access to water, whether water should be treated as an economic good or be taxed, who has prior rights or ownership, how much may be given to downstream users, what are the limitations of use, etc."[126]

Without pretending to be exhaustive of the potential comparisons between law and religion, it is hoped that further investigations will be done on the spread of laws and legal systems by using the techniques, methodologies, and insights employed in studying the spread of religions. In particular, these studies must also address the role of religion in both spreading the law and in understanding the law of Western democracies; for only then can one make a fair comparison.

Summary

Comparative law entails the analysis of different laws or legal systems by the use of one or more approaches. The purposes or goals of comparative legal study are referred to here as the Why. The methods or approaches to comparative legal study

[124] Joseph W. Dellapenna and Joyeeta Gupta, The Evolution of the Law and Politics of Water 10 (2009).

[125] *Id.* at 48.

[126] *Id.* at 49.

are referred to here as the How, and the subjects or fields of study are referred to here as the What. This chapter adopts a definition of the term legal system as meaning (1) all behavioral legal rules in force in the jurisdiction; (2) all institutional rules that provide for the establishment and administration of legal institutions (including their methodologies); plus (3) all of the people involved in making, interpreting, and applying the legal rules, who are sometimes referred to as officials.

Before discussing the goals, methods, and fields of study, this first chapter reviews some of the literature on the uses and abuses of comparative law. The author identifies five basic fields in which comparative legal analysis is applied. These areas are private international law (that is, conflicts of law); the making of law; the interpretation and application of law; the confluence of the law and the development of general common principles; and, finally, in the unification of the law. The discussion also briefly mentions some of the abuses of comparative law, in particular, its abuse for colonial and imperialistic purposes.

The author identifies three general purposes for the study of comparative law: the improvement of one's own law, including international law, and its application; harmonization or uniformity; and the search for universal commonalities and differences.

There are many approaches to conducting comparative legal studies because the discipline of comparative law acts as an interface for communication between people from different legal cultures and with different collective identities. The means of communication involved in this interface are as numerous as the people involved in the communication want them to be.

The discussion on the approaches to comparative law seeks to summarize and classify some of the most important approaches that are employed by comparative legal scholars. The discussion begins with a brief description of functionality, which Zweigert and Kötz call "the basic methodological principle of all comparative law." Although the functional approach has been criticized by many, these criticisms do not undercut the core insight of functionality, that is, that laws and legal systems serve purposes (functions); that these functions very often find expression in other ways in different legal systems; and, even if they do not do so, then that fact too is of interest.

Following the practice of other comparativists, the author divides the approaches into two general groups: micro-approaches, which focus to a considerable extent on legal rules, and macro-approaches, which are concerned with the cultural context of these rules. Said simply, micro-comparisons emphasize rules and practices; macro-comparisons emphasize people, particularly officials (legal actors). A proper understanding of foreign or domestic law requires, of course, an appreciation for both the rules and practices as well as for the wider cultural, philosophical, and other contexts of the rules and practices.

The author identifies six basic micro- or rule-based comparative approaches: comparison of legal terms; comparison of legal concepts; comparison of norms;

comparison of sources of norms; comparison of legal institutions; and comparison of bodies of norms. A legal term is the smallest component of any legal norm and consequently of any body of norms. (The terms norm and body of norms are defined below.) The term *legal concept* is employed to mean something more than the dictionary denotation of the legal term. More accurately, a legal concept refers to all usages of the term and similar terms in all conceivable connotations.[127] The definition of the term *norm* adopted in this book is a legal rule which prescribes or permits certain human behavior, including institutional norms. Consequently, a norm must contain at least two legal terms: one describing a behavior and the other attaching some legal consequence to it. The comparison of sources of norms looks at the notions and mechanisms in any society for determining the validity of norms. By *legal institution* is meant a significant practice, relationship, or organization within legal society, such as the institution of marriage, slavery, or property. The final rule-based comparative approach discussed here is the comparison of bodies of norms. These are collections of norms that are larger than the collections making up any legal institution. Usually the norms under study are selected from some body of substantive law, such as the right to wear religious headscarves in public schools or elsewhere.

The discussion in this chapter also covers seven approaches as examples of macro-comparisons. These are the comparison of: legal organizations; legal systems; *mentalités*; juristic styles; legal philosophies; legal traditions; and legal cultures. Legal organizations, also known as legal institutions in English, are made up of people bound by a structure of law. In addition to the organic norms establishing and regulating organizations, organizations have their own unique informal administrative practice which is often highly dependent on the qualities and qualifications of the people who staff the organization. The term legal system is defined at the beginning of this summary.

Lawyers in each culture are said to possess a collective mental program which contains "assumptions, attitudes, aspirations and antipathies" that constitute the "deep structures of legal rationality." This is how the term *mentalité* is employed in this book. The comparison of juristic styles looks at factors which the individual researcher believes to be crucial. Zweigert and Kötz, for example, identify (1) historical development, (2) distinctive mode legal thinking, (3) certain legal institutions, (4) sources of law, and the (5) ideology, meaning "a religious or political conception of how social or economic life should be organized."

This book devotes an entire chapter to legal philosophy or jurisprudence. A great number of observers of foreign legal systems have concluded that foreign lawyers "think differently." Often this means that foreign lawyers perceive of the

[127] As noted in the second chapter on comparative linguistics, the underlying assumption of conceptualism is that legal terms are labels for distinct, identifiable, reoccurring, and stable elements and structures (e.g., relationships) found in (or imposed on) society.

law differently. Some lawyers see law as applied moral philosophy. Others claim that law need not necessarily have anything whatever to do with morality: law has an existence separate and apart from moral philosophy. Some lawyers view their law as being politically neutral, that is, autonomous, while others think that all law is political. These and other questions are addressed in the chapter on comparative jurisprudence.

The main proponent of the legal traditions approach to comparative legal studies, H. Patrick Glenn, explains that the concept of tradition is simply that of received normative information, broadly defined. The final approach discussed in this chapter is that of comparing legal cultures. Legal culture in comparative law is synonymous with the category of macro-comparisons as used in this book. Legal culture encompasses everything that influences the making, interpretation, and application of norms, including those things not necessarily thought of as belonging to the realm of law.

The last part of this chapter looks at classifications and comparative law. It begins with a discussion of the use of language by various scholars in their attempts to classify various jurisdictions into groups. There are two basic models of language transmission which might be applied to the transmission of law and legal culture. The first of these is referred to as the genetic model because the transmission is from parents to their children. The second model is the cultural model by which large populations of people have in effect traded in the language of their parents for a different language. The subject of language and comparative law will be returned to in the second chapter.

Comparative lawyers have been systematizing legal systems into families for over 100 years. The literature that is reviewed in this chapter is European in origin, and the distinctions made by the authors are also typically European. All of the studies reviewed, except one, place England and Germany in separate families. Often this placement seems to be based on language. In other studies, it seems that the determining factor is that common law systems accept judge-made law as a source of law.

The chapter concludes with three suggestions for possible future taxonomic studies: the bottom-up approach; the top-down approach; and the comparison at the middle, including legal transplants. The bottom-up approach would entail a large-scale study of the most salient aspects, including norms, from two or more jurisdictions. After identifying these aspects, they would be compared on a one-to-one basis with their (functional) equivalents or differences, looking for patterns.

The top-down approach might involve collecting perhaps 100 of the most commonly employed behavioral and institutional norms from across all fields of law, regardless of source, and then comparing these norms with norms from another legal society based on preselected criteria, including the content of the norms as well as their cultural element. The third approach advocated here for

classification to families would be to look at the historical origins of various norms, legal institutions, concepts, and other ideas as practiced by Allan Watson and his followers in the so-called legal transplant school, which might more accurately be referred to as the legal transposition school. In conclusion, the author suggests that legal researchers turn to other cultural phenomena, such as music and religion, in aid of their efforts at understanding how law in all its forms is spread, and in aid of their efforts to understand and classify legal systems.

2

Comparative Legal Linguistics

In his book *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis*, Peter Goodrich writes, "Despite the glaringly obvious fact that both legal theory and legal practice are, and have always been, heavily dependent upon the tools of rhetorical and linguistic analysis, no coherent or systematic account of the relationship of law to language has ever been achieved."[128] That was the case in 1987 when Goodrich's book was published, and it is still the case today even though research in the area has boomed in recent years. A bibliography published in 2003 lists over 3000 publications in the area of law, language, and communication.[129] However, if the reader is looking for a "systematic account of the relationship of law to language," it will not be found in this book either; rather, this book will examine in this part only a few of the publications which have particular relevance to comparative legal studies, especially those in the field of legal linguistics, which is defined in the following paragraph. A great many other relevant publications cannot be delved into due to space restraints. The second part of this chapter uses a comparative approach to assess the importance of language to predictability, an important jurisprudential function of law.

Linguistics is the study of language. Sometimes it is defined as the study of natural or ordinary language to distinguish it from the study of artificial languages like those used in computer programming. Traditionally, linguists have often focused their attention on the structure (grammar) and meaning (semantics) of natural language. The field of linguistics is not, however, by any means restricted to structure and semantics. Sociolinguistics, for example, examines language in relation to various social structures. Psycholinguistics explores the representation and function of language in the mind. Evolutionary linguistics concerns itself with the origins of language, and historical linguistics with language change. One branch of historical linguistics, comparative linguistics, is concerned with comparing languages to establish their historical relatedness.[130] Legal linguistics, of course, is used

[128] Peter Goodrich, Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis 1 (1987).

[129] Theo Bungarten and Jan Engberg, Recht und Sprache: eine internationale Bibliographie in juristischer und linguistischer Fachsystematik (2003).

[130] Frederic P. Miller et al., Comparative Linguistics (2009).

to describe all linguistic endeavors which have legal language as their field of study. The field of legal linguists is also often referred to in English as language and law.

A. Legal Linguistics

As suggested by the large number of publications, the field of language and law covers a wide range of disciplines. According to a recent, groundbreaking book by Heikki E. S. Mattila entitled *Comparative Legal Linguistics*, the disciplines connected with legal linguistics include, among a number of other disciplines, (1) legal science, (2) language law, and (3) comparative law. Before describing these disciplines, perhaps it would first be necessary to define what is meant by "comparative legal linguistics." Mattila defines comparative legal linguistics simply as the examination of the development, characteristics, and usage of legal language between two or more legal systems.[131] Many studies encountered in the field of comparative legal linguistics are concerned with legal terminology, syntax, and meaning (semantics). According to studies in the area of comparative legal linguistics, all legal language seems to share certain characteristics. For example, legal language generally displays a preference for complex syntactical structures; nominal (that is for nouns) expression over verbal; and archaic linguistic features, which are said to lend solemnity to the law.[132]

Definitions are in order for the terms (1) legal science, (2) language law, and (3) comparative law, which are all subdisciplines connected with legal linguistics. According to Mattila, a legal science examination of the development, characteristics, and usage means the study of legal concepts. To the linguist, and to some legal theorists, concepts are something different from terms. Concepts are said to be ideas or the mental representations of objects that are described by words known as *terms*. Thus, one can have a mental idea or picture of a book without immediately assigning a word like *book* (English), *Buch* (German), or *bok* (Swedish) to the idea. The picture or concept of a book is probably quite similar across all three of those languages. Yet do legal concepts similarly remain the same across languages and legal cultures? It would be tempting to think that they might. Some legal theorists believe this to be the case, and some studies suggest that evolutionary processes have instilled humans with certain traits, such as a sense of justice. Respect for some form of private property seems also to be a universal trait, and all people seem to favor freedom over slavery. Nevertheless, is this and other anecdotal evidence sufficient enough to enable one to posit the existence of universal concepts like contract, democracy, and liberty? Do *liberté, égalité, fraternité* mean the same in France as they do in Germany, England, Sweden, and the United States? And do they mean the same today as they did in the 18th century? A study recently

[131] Heikki E. S. Mattila, Comparative Legal Linguistics 11 (2006).
[132] *Id.* at 14.

presented in Germany found that many words like freedom, equality, democracy, and justice mean different things in different languages and cultures. For example justice is usually understood in England to refer to justice in the sense of legal institutions, whereas Germans tend to employ the word *Gerechtigkeit* to refer to fairness and equality.[133] Comparative linguistic studies might one day help clarify this point. Perhaps comparative legal linguists will one day prove that there are as many concepts of justice, property, freedom, slavery, contract, democracy, liberty, equality, and fraternity as there are individuals. However, even if that is the case, one would expect a significant overlap between the individual conceptions, at least within homogeneous populations.

Mattila also writes that legal linguistics is closely connected to what he calls *language law*, that is, law regarding language. By this he means statutory and constitutional provisions which guarantee the right to speak one's mother tongue, laws which dictate the use of a particular language, laws which are intended to protect the language in other ways, and similar legislation.

While the vast majority of research in legal linguistics focuses on a single language, it is also possible to study two or more legal languages side by side. This is what Mattila has in mind when he speaks of comparative legal linguistics, which is coincidentally the title of his book. According to Mattila, comparative legal linguistics is one of the factors, if not the most important factor, in dividing legal systems into families and subfamilies.[134] Legal translation is also a very important topic of research in comparative legal linguistics.[135] Further, and of particular germaneness to this book, are Mattila's chapters on legal German and legal English, which will be discussed in the following sections. Unfortunately for the coverage of this book, Mattila does not include a chapter on legal Swedish in the English translation of his book, which Mattila wrote in Finnish.

1. THE HISTORY OF LEGAL GERMAN

Legal documents from 13th century Germany show that the customary laws of the Germanic peoples were expressed in Latin, which was the written language of the Church at the time. German judges, however, always used the vernacular in court. The Reception of Roman Law (Reception), which is discussed in the chapter on statutes, brought with it the establishment of universities and the training of lawyers in legal Latin. Facilitated by the fact that there was no common German language, Latin remained the language of the written law for centuries. This Latinization in turn triggered a countermovement which saw the publication

[133] Ute Schönfelder, *Welche Sprache spricht Europa?* Informationsdienst Wissenschaft (Sept. 1, 2010), http://idw-online.de/pages/de/news384597.

[134] Mattila, *supra* note 131, at 16.

[135] *See generally* Michael Bogdan, Comparative Law 50–51 (1994) and the extensive publications of Gerard-René de Groot, including Recht en Vertalen II (1993).

of law books in the vernacular. By the early 16th century, criminal statutes and accompanying legal commentaries were also being written primarily in German. Eventually, over the course of the 17th and 18th centuries, at the same time that legal German was adopting a large number of loan words from French, German eventually displaced Latin as the language of the law.[136] Latin expressions today are found mostly in the criminal law.

The codification known as the *Allgemeines Landrecht für die preußischen Staaten*, which was enacted in 1794, standardized and promoted legal German. Although the *Allgemeines Landrecht* only applied by its terms within the jurisdiction of Prussia, it inspired other German-language codifications, such as the *Allgemeines Bürgerliches Gesetzbuch* (general civil code) which was adopted in Austria in 1811. Of particular interest is the fact that only a very small number of words in the *Allgemeines Landrecht* were of foreign origin. Indeed the number was under 1%, which corresponds to the percentage of foreign legal terms in use in Germany during the 20th century.[137] The paucity of foreign terms in the *Allgemeines Landrecht* was no accident. The *Allgemeines Landrecht* was intended to be read by citizens in everyday language that they could understand.

Germany became a world power within a few decades after its unification in 1871. The accompanying nationalist sentiment also extended to the German language. For example, between the years 1886 in 1893, some 1,300 technical terms were Germanized. By the time the German Civil Code was enacted in 1900, legal German had been almost completely purged of foreign terminology.

2. THE HISTORY OF LEGAL ENGLISH

While legal German is almost entirely devoid of foreign words, in legal English, foreign words dominate. For historical reasons discussed below, the most important linguistic source of English legal terminology is French, followed by Latin. English terms are in a distinct minority.[138]

This was not always the case. When the Normans invaded England in 1066, they found systems of local courts which did business in their local vernacular. The Normans introduced the practice of using Latin, the language of the Roman Catholic Church, for formal documents and records, although occasional royal orders were issued in what is now called Old English. The language of the king's court and council, on the other hand, was French; for this was the language spoken by the upper class. What today would be called legislation was often written in French rather than Latin.

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[136] Mattila, *supra* note 131, at 165.

[137] *See* 3 Peter von Polenz, Deutsche Sprachwissenschaft vom Spätalter bis zur Gegenwart 486–87 (1999).

[138] Unless otherwise noted, the following history is based on John H. Baker, The Common Law Tradition: Lawyers, Books and the Law ch. 14 (2000).

Henry II (who reigned 1150–1189) extended the jurisdiction of his royal courts by sending out French-speaking members of his council to serve as judges throughout England. The law they applied was universal, that is, common law, called *lex communis* in Latin and *commune lei* in Norman French, which was the language of the judges and most of the parties who appeared before them. The Anglo-Saxon dialects spoken by most subjects almost ceased to have a literary history. However, English was enriched with a second vocabulary of Norman words. At the same time it lost its formality of inflections and terminations, and became simpler and more flexible in structure. Norman French, the tongue of the court, the aristocracy, the schools, the lawyers, and judges, continued to draw its inspiration from the Continent until the loss of Normandy in 1204.

While French was the working language of the courts and the lawyers who traveled with the courts, the academic language was Latin. One of the King's judges, Ranulf de Glanvill, who died in 1190, commissioned a *Tractatus de legibus et consuetudinibus regni Angliae (Treatise on the Laws and Customs of the Kingdom of England)*. This, the first serious book on the common law, was written in Latin. The "laws and customs" described are influenced by Roman law, but English in substance. Glanvill's treatise remained the standard textbook of English law until the publication of *De Legibus et Consuetudinibus Angliae (The Laws and Customs of England)* by Henry de Bracton in about 1235. This treatise draws on cases, which Bracton comments upon; but there was no sense that the decisions of the judges in earlier cases were in any way binding on later judges other than by the power of their observation and logic. Bracton's treatise, like Glanvill's treatise, was written in Latin. The Magna Carta, signed by King John in 1215, was also of course written in Latin. The language of Oxford University, founded in 1187, was also Latin. Nevertheless, French was still the language of the ruling class and of oral pleading in the King's courts.

Bracton's preoccupation with cases contributed to the publication of the Year Books, which began in 1268, the year of Bracton's death. The Year Books, which were published until 1535, contained unofficial, verbatim reports of legal proceedings in important cases. Basically, the reports contain condensed statements of the arguments of the barristers, the so-called sergeants at law, as well as the decision and reasoning of the judge. While the early reports were in Latin, the French language was used to record most of the 20,000 cases recorded in the Year Books. Cut off from the Continent—Henry II had banned English students from attending the University of Paris in 1167—the vocabulary of the Law French used in the King's courts became mostly settled.

The plague or Black Death struck England in 1348–1350, and killed one-third to one-half of the population, reducing it to less than three million people. The plague did not pass over the French speakers. As most of them were living in London, where the plague was at its worst, they probably suffered higher losses than the English-speaking people living in the countryside. Shortly thereafter, in 1356, the opening of parliament was conducted in English instead of French.

English began replacing Latin at schools, but not at Oxford and Cambridge. The death knell of Law French was sounded by the passage of the Statute of Pleading in 1362: henceforth all cases in court should be pleaded, showed, defended, answered, debated, and judged in the English tongue. The statute, however, is itself written in French, not English; however, it would take centuries before English completely replaced Law French. While English did make immediate inroads after 1362, oral French continued to be used for formal pleading in court until 1731.[139]

The first textbook devoted to English real property law, *Les tenures*, was published by Thomas de Littleton in 1481. The English translation appeared in the years 1514–1533, during the time that Thomas More was presumably lecturing at the Inns of Court.[140] Thomas More published his *Utopia* in 1516 in Latin, presumably so that it would reach an academic audience, perhaps also academics abroad. Geoffrey Chaucer, who is believed to have been a lawyer, had already proved that there was a market for popular books in the English language by publishing *The Canterbury Tales* in 1387. William Shakespeare's poems, sonnets, and plays were published at the beginning of the 17th century, but he did not become popular until the 18th century. Far more popular during the 17th century was the *King James Bible*, first published in 1611. Latin lost its place in English academic publishing about 100 years later. Isaac Newton published *Principia Mathematica* in Latin in 1687, but turned to English in 1704 for his book *Opticks*.

Considering that French was the language of the common law courts through most of their life, it should not surprise us that most English legal terms in use today are of French origin. Latin is the second most important language from which legal terms were taken. Latin remained the language of record of the common law courts in England until 1731, but it had ceased 500 years before that to be the language of legal writing and discussion.[141] As court orders were in Latin, many procedural terms today are still of Latin origin. As English gained ground on French and Latin, English terms were often doubled or coupled. Here is but a partial list from Mellinkoff's *The Language of the Law*,[142] showing the derivation of the words in parentheses:

acknowledge and confess (E; F)
act and deed (F or L; E)
breaking and entering (E; F)
deem and consider (E; F)
final and conclusive (F; L)
fit and proper (E; F)
free and clear (E; F)

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[139] *Id.* at 241.
[140] *Id.* at 4.
[141] *Id.* at 229, 232.
[142] David Mellinkoff, The Language of the Law 122 (1963).

give, devise, and bequeath (E; F; E)
goods and chattels (E; F)
had and received (E; F)
keep and maintain (E; F)
maintenance and upkeep (F; E)
made and provided (E; L)
mind and memory (E; F)
new and novel (E; F)
pardon and forgive (F; E)
peace and quiet (F; L)
right, title, and interest (E; E; F)
save and except (F; L)
shun and avoid (E; F)
will and testament (E; L)
lieu of, in place of, instead of, in substitution of (F; F; E; F or L)

3. CHARACTERISTICS OF LEGAL GERMAN

Mattila begins his discussion of the characteristics of legal German by noting that German is considered to be exceptionally rich in legal terms in comparison with other languages. Unfortunately, the source cited by Mattila to support this proposition merely states that the French legal language is poor by comparison to German in this regard.[143] While it may well be true that German possesses more legal terms than French or even English, it would be desirable to have more objective support for this proposition; for, as discussed below, the answer to the question of which jurisdiction has more legal terms may well be nothing more than a reflection of how one defines *legal term*.

Mattila explains this "wealth of terms" by reference to two phenomena, one linguistic and one juristic, observable in German. First, he writes, the Germanic language tradition in general, and not just the legal language tradition, is "wordy." If Mattila is talking about German's preference for nouns over verbs, this is a well-documented phenomenon. Witness the German proclivity, discussed below, of forming new words by adding prefixes, such as *ab*, *über*, and *vor*, and by running words together without hyphens, resulting in new coinages like *Adhäsionsverfahren*, by which the procedure for awarding compensation in criminal actions is called. Where German uses a compound word, like *Strafsache* and *Gewaltenteilung*, English will ordinarily require two or more terms to express the same concept. Thus, *Strafsache* can usually be rendered into English as "criminal

[143] Bernhard Bergmans, *L'enseignement d'une terminologie juridique étrangère comme mode d'approche du droit comparé: l'exemple de l'allemand*, 39 Revue internationale de droit comparé (1987), *citing* Henri Capitant, Vocabulaire juridique 7 (1930): "[N]otre langue juridique est pauvre, surtout si on la compare à la langue juridique allemande."

case" and *Gewaltenteilung* as "separation of powers." Legal German also regularly turns verbs into nouns, as in the following examples: *Vergehen, Verhalten, Einkommen, Überholen,* and *Rechtsempfinden*.

The German preoccupation with nouns is instilled at an early age. While school teachers of English in England, Wales, and the United States are admonishing their pupils to fortify their writing by utilizing descriptive verbs, their German counterparts are stressing the use of the most descriptive noun. The written language of German accords special status to nouns. First, the German language allots every noun one of three genders: masculine, feminine, or neuter. (There are two genders in Swedish.) English genders were abandoned centuries ago. Second, German nouns are capitalized when written. When it comes to verbs, writers of English are advised to avoid use of the passive voice, which tends to marginalize the importance of verbs. By contrast, there is no stigma attached to the use of the passive voice in Germany.

The phenomena mentioned here—adding prefixes to words, running words together, turning verbs into nouns, seeking the most descriptive noun, assigning genders to nouns, and capitalizing them—are some of the factors which combine to make German legal writing very rich in nouns relative to verbs. However, this does not necessarily mean that legal German has more legal terms. That measurement depends, as stated above, on how one defines a legal term.

It is perhaps obvious that verbs like the English words allege, demur, traverse, deny, admit, execute, exonerate, and vest, as well as their German equivalents, should be included in any list of legal verbs. Yet should not any list of English legal terms be expanded to include criminal case and the separation of powers doctrine, which were mentioned above? In addition, should not any list of American legal terms include such word combinations as "to plead the Fifth Amendment" also (asserting one's right to remain silent) and also the truncated "to plead the Fifth"? If so, what about "to plead to the charge" and the hundreds if not thousands of common law and statutory rights that can be pleaded? Further, what is the distinction between legal terms and nonlegal terms? All these questions must be answered before one could conduct a study to try to determine which of the two languages has more legal terms. In asserting that German has more legal terms than some other language or languages, perhaps Mattila merely means to say that German has more legal terms than many languages because it has more terms in its general language vocabulary. However, if this is what he means, then one might expect that he or someone else would opine that English would have even more legal terms because English is considered by many to have an even larger vocabulary.

The second reason cited by Mattila to explain why he believes German has more legal terms than some other language or languages is that German legal thinking is based on a conceptual analysis. Such analysis "requires a large number of clearly distinguishable expressions." Two sentences later Mattila writes: "the generic term *Verstoß* ['violation (of the law)'] covers 49 [!] detailed terms,

distinguished by the degree of culpability of the perpetrator and by the character of the rule violated."[144] Let us look at the role of conceptual analysis in this regard.

Conceptual analysis, or any other type of analysis for that matter, cannot, of course, induce jurists to create 49 categories that do not exist in the law. That is not what Mattila means. Rather, what Mattila is talking about might be described as a systematic occupation or even preoccupation with legal terminology, perhaps at the expense of other values (see chapter on comparative jurisprudence). This type of analysis might be thought of as having five steps which are discussed in the following paragraphs. These are (1) identifying, (2) labeling, (3) defining, (4) generalizing, and (5) using terms.

Before discussing these five steps, it should be mentioned that conceptual analysis does not depend on the source of the rules from which the terms are drawn: they might be drawn from cases, from statutes, or from some other source, such as by the use of a style of deductive reasoning from concepts observed in nature and society (see the chapter on legal reasoning). This caution is mentioned here because the style of conceptual analysis used in Germany looks basically to statute law for the source of terms while a similar movement in the United States known as conceptualism, which is discussed more fully in the chapter on comparative jurisprudence, looked basically to case law and to the U.S. Constitution for the terms. Regardless of the source of the rule from which the terms are drawn, conceptualists, as they will be referred to here, begin by identifying legal terms.

The conceptualist tradition is stronger in Germany than in Sweden, England, or the United States. It is especially conspicuous in discussions concerning the German Civil Code (*Bürgerliches Gesetzbuch*). However, the conceptualist approach is not confined to Germany or even to the German language. To illustrate this, the author will employ an example from California to show that conceptualism can also be employed in a common law jurisdiction. Further, even though California, like a number of other American states, has a civil code, let us select an example from criminal law to show that the process of conceptual analysis—identifying, labeling, defining, generalizing (known as systematizing in Germany), and using legal terms—can be employed in every area of the law.

The first step in conceptual analysis is to identify a legal term. Consider California Penal Code section 67, which prohibits the bribery of an officer of the State of California: "Every person who gives or offers any bribe to any executive officer in this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in the state prison for two, three or four years, and is disqualified from holding any office in this state." Notice that this statute contains numerous terms: person, gives, offers, gives or offers, bribe, executive officer, and so on.

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[144] Mattila, *supra* note 131, at 174.

This provision itself might be referred to in various ways. Practitioners are likely to refer to this provision geographically as section 67 of the California Penal Code or functionally as the prohibition against bribery of state officers. The conceptualist, on the other hand, would probably prefer the descriptive moniker "official bribery." Once so labeled, the conceptualist will proceed to define the terms *official* and *bribery*. Assume the conceptualist starts with the term official. In German, one would say that fashioning a definition is an abstract task, which means that the conceptualist need not be overly concerned with history, context, purpose, and the like, although he or she will certainly feel free to consult the legislative history, for example, or compare usages of the same or similar terms in dictionaries, treatises, and other statutes, or even in philosophy. This is what Mattila means by "detailed terms." To restate Mattila, this kind of labeling of legal terms seems to thrive in the climate of conceptualism.

This process of defining terms is thought by many to be a uniquely academic activity. Practitioners, like judges, so the thinking goes, have neither the time, the ability, nor the inclination to undertake the extensive studies necessary for this purpose. As one of the author's colleagues once remarked, judges were not as good at university as professors were. Said somewhat more respectfully, judges are trapped in their own casuistry, meaning having to decide cases: accordingly, they cannot be expected to see the forest for the trees. This kind of thinking is more commonly found in Germany than in England, where judges often were very good students, and where senior judges, at least, are seen as having a tremendous amount of experience that no academic can match, as well as having access to the assistance of some of the finest lawyers in the land.

No matter who it is that is doing the defining, the definitions are considered by some to have an ascendant quality that is equal to more than the sum of the various usages of the term. There is a sense in which the conceptualist definer is describing something bigger than a mere legal term. He or she is defining a concept. The usage of the word *concept* is similar to the usage in linguistics, where it is used to refer to the mental understanding of the word by any individual, the picture of the word in the individual's mind. However, legal conceptualists sometimes go further and claim that their definition describes not the concept of any one individual, but rather the concept (or correct concept) for all lawyers. This is the usage of conceptualism that seems to some to move beyond science into the realm of metaphysics. It is reminiscent of the kind of idealism which contends that that which we perceive, such as a horse, is a mere projection or expression of the ideal of a horse.

The next step in the process of legal conceptualism being described here is generalizing. This means that the term or concept of *official* is deemed to be employable throughout the law. The concept of official as employed in section 67 of the California Penal Code is the same as that employed, for example, in sections 69, 70, and 830.11. If properly drawn, the definition should be employable in civil, constitutional, and administrative law as well. This is true even for the

conceptualist who does not believe that he or she has defined the ideal official in the sense of the ideal horse in the example given above. To the conceptualist, legal concepts have a certain integrity that must be respected.

The final step in the process of conceptual analysis described here—using the concept—is the one that is most striking to the nonconceptualist: when the judge or lawyer has a case concerning whether or not someone is an official, he or she will automatically turn to the definition of the concept of official found, for example, in a leading commentary. The nonconceptualist would tend to look at the statute more narrowly, to look at the use of the word "official" in its context, to look for similar applications of the statute, perhaps even to its legislative history, and consider the expressed or underlying purpose or purposes of the particular statute, all things that the conceptualist need not do and must not do, for doing so would threaten the integrity of the concept. The conceptualist appreciates the harmony, consistency, and systematic nature of his or her approach; the nonconceptualist refers to that approach dismissively as "mechanical jurisprudence."

This discussion has employed legal terms conterminously with distinctions in the law. As pointed out above, all distinctions in the law can be described by a geographical reference to their "legal coordinates," that is, where they can be found in the law, whether that is in a statute, a case decision, or elsewhere. If a finer distinction is needed, the geographical reference can be enhanced to refer, for example, to a subsection or even to a particular term. Many comparativists correctly report that Germans bestow descriptive labels on many of the distinctions in their law. While the author can confirm this practice, he has no means of assessing whether German lawyers engage in it substantially more than English, Swedish, and American lawyers do. However, assuming for the sake of argument that German lawyers label legal distinctions with descriptive terms at a rate 10 times that of English lawyers, doing so would not increase the complexity of German law relative to English law: it would merely mean that German lawyers had two ways of navigating their way to the relevant distinction—by means of the geographical coordinates of the distinction and a second, descriptive term. It is hard to see what effect this phenomenon alone would have on the practice or understanding of the law; however one thing is certain: it does not increase the complexity of the underlying law. By way of example, the English language seems to have more words for roads, streets, and ways than German does, but this fact, if true, does not increase the number or variety of roads, streets, and ways.

Putting aside the marginal increase in terms that would result if German lawyers were to assign descriptive terms to more distinctions than other lawyers, and all other things being equal as well, a system of rules with more legal terms will have more distinctions and consequently have a higher degree of regulatory complexity. This is true, as stated above, because a difference between any two terms must be accompanied by a difference of some consequence in the law. If there is not a difference—a so-called distinction without a difference—then the distinction will eventually die out for lack of use. In this case, the term itself might still be

found in an outdated dictionary, but the term will have no role to play in the contemporary system of rules. For example, the author's professor of real estate law, Stefan A. Riesenfeld, told his students that they should consider themselves lucky. He had been forced as a law student in California in the 1930s to read Taltarum's case in the original Norman French. The report of that case from 1472 in the Year Books is indeed in what is now usually called Law French. Although quite a number of terms contained in the report are still understandable to a present-day English-speaking lawyer, the majority of them have fallen out of use.

The conceptualist approach described above can reduce the complexity of a system of rules in at least one way. That occurs when a general-purpose term or concept is generalized as described in the fourth step above. A good example of such generalization (referred to as *Systematisierung* in German) can be found in Volume I of the five-volume German Civil Code.[145] This volume (*Buch* in German) bears the title, "General Part" (*allgemeiner Teil*). This volume is considered to constitute one of the proudest achievements of German legal academia. While the other four volumes—which cover obligations, property, family law, and succession—brim, for the most part, with detailed rules which find very specific application, the general provisions contained in Volume I (sections 1–240) are, as the term implies, intended to be applied generally throughout the entire German Civil Code.

The 240 sections contained in Volume I are grouped into seven divisions: (1) persons; (2) things and animals; (3) legal transactions (including capacity to contract, declaration of intent, contract, conditions and specification of time, agency and authority, and consent and ratification); (4) periods of time and fixed dates; (5) limitation of actions; (6) exercise of rights, self-defense, and self-help; and (7) provision of security. The 89 sections found in the division regarding (1) persons regulate, for example, natural persons and legal persons. The provisions concerning natural persons regulate their legal capacity, minority, residence, and naming, and provide definitions of the terms consumer (*Verbraucher*) and entrepreneur (*Unternehmer*). The provisions on legal persons concern noncommercial associations as well as registered associations, foundations, and legal persons under public law.

As stated above, if the general provisions of the German Civil Code are applied consistently to all transactions arising under the Code, then such a system of German legal rules will be somewhat less complex when compared to a system of rules in a hypothetical jurisdiction which employs, for example, different definitions of legal capacity depending upon the particular transaction.

What does it mean if one jurisdiction has more legal terms (defined broadly to mean legally consequential distinctions) than another? Assuming that none of the legal terms in the two hypothetical jurisdictions are antiquated, then if one jurisdiction has more legal terms—that is, it makes more legally consequential distinctions—then either (1) that system's regulations reach "deeper" into the

[145] General provisions are also found in the German Penal Code (*Strafgesetzbuch*), the German Code of Social Law (*Sozialgesetzbuch)*, and many other codes.

subject-matter being regulated in the sense of creating a denser, more detail-oriented regulatory scheme, (2) that system's regulations spread "wider" or "broader" into new subject-matters, or (3) both of the former are true. Consequently, if legal German employs a greater number of legal terms relative to other languages, this is not due to the wordiness of German or German lawyers' reliance on conceptualism[146]; rather, that linguistic difference is a manifestation of the density (describing the phenomenon "more deeply") and/or the breadth of legal regulation in Germany.

Mattila also perceives wordiness in the common law tradition; but there he attributes the verbosity to the (1) antiquity of the common law and (2) fact that the common law is based on case law, "so that distinctions between situations are exceptionally fine." The first explanation has already been dealt with: antiquity only contributes to wordiness if the ancient words still have some function today. As to the second reason, it may well be that English common law makes "exceptionally fine" distinctions between situations; but the case law system cannot be given credit for this any more than conceptual analysis can create distinctions that are not already to be found in the law. German judges also make "exceptionally fine" distinctions in their case law even though they ordinarily use statutes as their point of departure. As discussed in the chapter on statutes, German judges put glosses on statutory terms, make fine distinctions between factual details, and extend statutes by analogy. From the observations of the author, German judges are just as concerned as their English-speaking brethren with protecting the legal rights of individuals and with doing justice in the individual case. The decisions written by appellate judges in Germany, which are often quite lengthy, are scrutinized carefully by experts in the field who report upon them in legal journals, and incorporate them into commentaries that every lawyer keeps within easy reach. These commentaries reveal a density of judicial fine-tuning and distinction-making that would rival anything produced in the so-called case law world of the common law.

Which language has more legal terms, German or English? The author knows of no study tending to prove that either has more than the other. Nor has the author been able to determine the answer himself. The question of which language, English or German, has more legal terms presented itself recurrently during the author's labors on his *Talking Law Dictionary*. The dictionary is bidirectional: it contains translations from German to English and from English to German. It might interest the reader to know that the German to English direction of the dictionary lists more terms than in the English–German direction. Does this mean that German has more legal terms than English?

English and German legal terms for the *Talking Law Dictionary* were primarily gleaned from the indexes of books in German and English on similar subject-matter areas and from law dictionaries in the respective languages. Concerning

[146] For the sake of clarity it must be stated that the author does not understand Mattila necessarily to be contending this.

the indexes, the author often found the practice of indexing to be more rigorous in the books in German, but some books have no index whatsoever. The English-language books all tend to have indexes, but they are, on the whole, fairly short. For reasons discussed below, this finding should not be taken to mean that English-language authors can necessarily get away with smaller legal vocabularies than their German-language counterparts.

In the process of wading through these dictionaries, the author confirmed what Mattila has also observed, that is, a German penchant for cementing words together to coin a new term which would be expressed by two or more words (but which retains its status as a legal term) in English. Thus, the English "action for eviction" becomes *Räumungsklage*. A person with secret knowledge of another's crime is a *Mitwisser*. A petition to appoint a conservator is an *Entmündigungsantrag*. A definition of a term is a *Begriffsbestimmung*.

In compiling the list of German terms for the *Talking Law Dictionary*, the author found that the phenomenon of nounization in German led to the inclusion of a not insignificant number of German terms that have no equivalent on the English side of the dictionary. Consider the following terms from the German side of the author's dictionary. All of them contain the word *Vollmacht*, which can, depending on the context, mean "agency, authority, authorization, full power, proxy, or power of attorney." Only those marked with an asterisk are to be found on the English side of the dictionary:

*Anscheinsvollmacht **
*Duldungsvollmacht **
Handlungsvollmacht
Prozessvollmacht
*Rechtsscheinsvollmacht **
*Scheinvollmacht **
Spezialvollmacht
*Stimmrechtsvollmacht **
Überschreitung der Vollmacht
Universalvollmacht
*Untervollmacht **
Verhandlungsvollmacht
*Vollmacht **
Vollmacht; jemand::: erteilen
*Vollmacht; mit::: versehen **
*Vollmacht, vermutete **
Vollmachtgeber
vollmachtlos
Vollmachtsinhaber
Vollmachtsüberschreitung
Vollmachtsumfang

Vollmachtsurkunde
Widerruf der Vollmacht
Zeichnungsvollmacht

The English equivalents to these terms are not likely to be found in an English law dictionary because they are combinations of terms that are found elsewhere in the dictionary. It perhaps should be noted that all of the German compounds can be taken apart and the words used separately with no loss in meaning. To cite just one example of many, *Vollmachtsumfang*, which means scope of authorization, can also be rendered as *Umfang der Vollmacht* with no loss or variation in meaning. The fusing of the words that make up a legal term does not create a new legal term: it is merely another way of saying the same thing.

4. CHARACTERISTICS OF LEGAL ENGLISH

As explained above, most English legal terms are of French or Latin origin. This does not mean, however, that the English adopted French and Roman law; rather, French and Latin terms were employed to describe English legal concepts and relationships.

Is it possible that the use of these two languages for so many centuries has some lingering effect on the legal English in use today? Peter Tiersma concludes that Latin still influences the sentence structure in some legal phrases, and also in the use of double negatives, which is typically Latin.[147] Tiersma mentions a jury instruction from California as an example of the latter effect: "Innocent misrepresentation is not uncommon." Mattila also cites the use of legal pronouns such as "aforesaid" and "said" as examples of the abiding influence of Latin. These words, which can still be found, are direct translations of the Latin words *predictus* and *dictus*. Their use is traceable to the medieval practice in England of writing the word *quidam* (a certain) before the person or thing when it is first mentioned in a text, and thereafter using the words *predictus*, *dictus*, or *idem* (the same) to refer back to the person or thing.[148]

Mattila also notes that Law French did more for the English legal language than supply the majority of its terms. The common endings *ee* and *er* or *or* are a result of usages in Law French. Law French universally adopted the ending *ee* to denote the person who is the addressee of a legal transaction. The ending *er* or *or* is still used to denote the addressor, as in: trustor/trustee, vendor/vendee, and mortgagor/mortgagee. Also traceable to the influence of Law French is the placement of an adjective after the noun, something that was foreign to the English language. The following are examples of terms still in use that are constructed in that way: account payable, attorney general, court martial, fee simple, and letters patent.[149]

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[147] Peter Tiersma, Legal Language 66 (2000).
[148] Mattila, *supra* note 131, at 231.
[149] *Id.* at 232.

Mattila and others also comment upon the verbosity of English legal documents. However, some of the explanations provided appear to the author to be quite speculative, such as the supposed influence of the case law system. Mattila's argument seems to be that, because case decisions are longer than statutes, it must take more words to state the law in case decisions than in statutes, and that, consequently, it must take more words to apply case law than it does to apply statute law. As will be explained in the chapter on precedents, this is a common misunderstanding of case law. It is not the case itself which constitutes law; rather, it is the legal rule (called a *ratio* or holding) that is articulated and applied in the case which constitutes law. As will be shown in the chapter on legal reasoning, judicially created rules are indistinguishable from statutory rules.

Perhaps Mattila is referring to the oral tradition of the common law, where lawyers and judges delivered, and often still deliver, their pleadings, arguments, and judgments orally and not in writing. Indeed, the writing of a judgment is, quite literally, a formality: it is subject to correction if it does not conform to the judgment that the judge proclaimed orally. Testimony is usually oral and not written, as it is on the continent. Lawyers in Germany are seldom allowed to address the highest appellate courts orally, whereas in the common law world, lawyers almost always enjoy such a right. Oral presentations, whether by lawyers or witnesses, are almost necessarily longer than written presentations because they take on the form of a conversation with the person or persons being addressed. No good advocate, for example, will willingly stop talking and sit down if he or she senses that the judge does not understand the advocate's position. Length in oral presentations also indicates weight and importance. As for statutes, these are ordinarily drafted by lawyers schooled in this oral tradition, in which judges are generalists, not specialists, and who are bound to resort to their own common law (in the sense of judge-made law) unless the statute clearly applies to the case before them. Thus the drafters must "carve out" chunks of fabric of the finely woven common law and supply a suitable statutory "patch."

Mattila also notes that "[c]ontracts prepared by English and American lawyers are normally sizeable."[150] While the author agrees that this is often the case, he does not consider the usual explanations for this verbosity to be very persuasive. Accordingly, this part addresses this topic in more depth.

First, the evidence that common law contracts are longer than their continental counterparts is mostly anecdotal. In a typical case, such as the one cited by Mattila, a continentally trained lawyer will receive an Anglo-American contract for review and express surprise at its length. In fact, many Anglo-American contracts are longer than their continental counterparts. However, there are many instances in which this is not the case. For example, in the author's experience in moving from California to Germany, he was struck by the sheer number of written

[150] *Id.* at 236. The Finnish original at page 461 states that these contracts are sometimes (*joskus*) very lengthy.

contracts in Germany. Although the author was employed as a law clerk, as a lawyer, and in five other nonlegal capacities, the only written employment contracts he had before coming to Germany were the one-page letters confirming that he would be teaching law classes at various law schools in San Diego.[151] In Germany, by contrast, every position the author has held, from Fulbright scholar, Fulbright professor, lecturer at two German universities, and as a university professor, has involved an employment contract, some of which were quite lengthy. Even student research assistants at German universities have formal, written contracts. The situation is the same in housing rentals: the author had only one written lease agreement before moving to Germany, where every tenancy is reduced to writing. When the author practiced law in California, it was not necessary for clients to give lawyers written consent to file an action: an oral instruction sufficed. German contracts are also often very long compared to their counterparts, at least those in California. Contracts between authors and publishers are typically much longer in Germany than is the case in the United States. When someone buys a house in Germany, he or she signs a contract that covers a dozen pages, whereas a comparable contract in California is barely two pages long.

Nevertheless, as the author's research has shown, some Anglo-American contracts are in fact much longer than a typical contract would be in, for example, Germany. To learn why this is so, the author analyzed a number of the major contracts of publicly traded corporations in the United States. By law, these corporations are required to file all major contracts with the U.S. Securities and Exchange Commission. His research ascertained that these contracts consisted of three parts of increasing length: contract recitals and signatures, descriptions of the business terms, and standard definitions and boilerplate. In one typical contract of 4,054 words in length, 213 words were required for the recitals and signatures, 552 words detailed the business terms, and, most strikingly, a full 3,289 words were devoted to standard definitions and boilerplate.[152]

The author identified four reasons for the verbosity of these particular contracts: (1) the limitation of remedies for breach of contract to compensatory damages; (2) the informal, oral tradition of the common law business and legal culture; (3) jurisdictional diversity in the common law world; and (4) a level of legal practice manifesting a preference for the private structuring of one's affairs. These will be discussed in order.

Unlike in Germany, where an order for specific performance is the preferred and the usual remedy in an action for breach of contract, in the common law world, an order for specific performance of a contract is the exception. Ordinarily, such an order will only be granted in cases, such as those involving the sale of unique property, in which money is considered to be an inadequate remedy. Because real

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[151] The only real purpose of the contracts was apparently to confirm that the author would be receiving very little compensation.

[152] *See generally* Thomas Lundmark, *Verbose Contracts*, 49 Am. J. Comp. L. 121, 121 (2001).

property is considered unique in the common law world, cases involving the sale of real property form the classic cases in which the remedy of specific performance is generally available. The easy availability of specific performance in such cases is part of the reason that real estate purchase and sale agreements in the common law world are short by European standards. That easy availability is also part of the reason that real estate contracts do not contain much boilerplate.

In the vast majority of common law contract cases, the aggrieved party must content itself with a monetary award calculated to compensate for the loss suffered. Thus, for example, if the seller refuses to perform, the buyer must ordinarily find a replacement product and sue the seller for the difference in price, if any, plus compensation for any special costs that were incurred as a direct result of the delay, assuming these were reasonably foreseeable. Punitive damages are not available. Further, so-called *in terrorem* clauses—those designed to frighten parties into performance—are considered to constitute penalties and are therefore generally unenforceable.[153] In order for the aggrieved party to prove a loss, it must first show what performance would have been required of the breaching party under the contract. To provide for this eventuality, the prudent lawyer will include in the contract detailed specifications regarding the performance expected from each party.

Before proceeding to the next reason for apparently greater verbiage in legal English, it is worthwhile to ask why an award of compensatory damages instead of performance is the sole remedy in most contract actions in the common law world. The answer is basically political. The jurisdictions of the common law world share similar laissez-faire economic policies which can be said to reflect a preference for the private structuring of one's affairs. This is the political policy behind the refusal of common law judges to remake the contract for the parties. It is thought that the state, in the person of the judge, should not meddle in private affairs. One historical reason for the hesitancy of common law judges to intrude into private matters, a reason that persists to this day, is that common law jurisdictions have very few judges compared to continental European jurisdictions. This phenomenon, together with a preference for private autonomy, also partially explains the high percentage of settlements of civil actions in common law jurisdictions. These topics will be returned to in the chapters on lawyers and judges.

The second reason for the verbosity of some common law contracts has already been suggested: the informal, oral tradition of the common law business and legal cultures. As the late Tony Weir wrote so eloquently in his monograph *Wise Men's Counters*,[154] the common law tradition is strikingly oral in character compared to that of continental Europe. Written judgments are very short, usually only containing the order of final disposition of the action. The reasons for

[153] This often prompts the parties to draft carefully worded provisions for the payment of liquidated damages for delay at various stages of a multistage contract.

[154] Tony Weir, Wise Men's Counters (1998).

the judges' decisions are given orally, although the practice has changed in many appellate courts over the past decade. Evidence in court is mostly presented orally, which is not the case in continental Europe. Indeed, if the authenticity of a document, such as a written contract, is in dispute, the party seeking to prove the document's authenticity must call witnesses to testify orally to this fact in common law jurisdictions. Although the list goes on and on, one remarkable difference between Germany and common law jurisdictions is that parties to an action are ordinarily not allowed to give evidence in Germany.[155] In the common law world, it would be very rare indeed for a party not to give oral evidence in a civil case.

Examples of the informal tradition of the common law are numerous, so only four will be mentioned here. First, universities in the United States, the United Kingdom, Australia, and New Zealand often participate in cooperative programs based on oral conversations alone, although formality is creeping into these arrangements. Second, written residential leases were, until recently, a rarity in California and in most of the United States. In California, if there is a written lease, it merely repeats the language from the California Civil Code, which is quite detailed and from which the landlord cannot vary to the disadvantage of the tenant. If a dispute arises between a landlord and tenant, both are allowed to testify; and, in the author's experience as a judge pro tempore, judges frequently believe the tenant over the landlord. Third, written employment contracts are rare throughout the United States even today. This is partially because most employees serve at will, although the general practice is to give people two weeks' notice. However, quite frequently an employer will promise a good employee that she or he may remain "as long as you do a good job." This oral representation often has the legal consequence of prohibiting the employer not to fire the employee without cause.

The fourth example, and the most pertinent one to the current discussion, is that formal, that is, written personal property sales contracts are very rare. Indeed, German law requires hundreds of different contracts, including prenuptial agreements, to be not only in writing but also to be drafted and signed by a specialized lawyer called a notary. In the common law tradition, by contrast, there are very few contracts that must be in writing to be enforceable. Contracts concerning an interest in real property form a classic exception to this rule, but consumer-protection legislation in the last decades has increased the exceptions. It should also be pointed out that, when a common law statute does require some formality, often this does not mean that the agreement must be reduced in its entirety to writing. For example, in the United States, contracts between merchants for the purchase

[155] This is due to judicial development of exceptions to Code of Civil Procedure § 445. *See generally* Dagmar Dreymüller, Der Zeugenbeweis im Zivilprozess im Common Law und im deutschen Recht: Eine rechtsvergleichende Betrachtung der Ausgestaltung und des Wertes des Zeugenbeweises im englischen und im deutschen Zivilprozess mit Hinweisen auf das US-amerikanische Recht (2000).

and sale of goods must ordinarily be evidenced by some writing referred to as a "memorandum." But the statute requiring this formality, and the case law construing the statute, both make clear that very little evidence is needed that a contract exists: an unsigned notation on any company's letterhead can suffice.

In Germany, memorialization of every contract is the rule. Even though one can often find exceptions, the failure to obtain a signed document containing the basic terms of the contract can lead to one's inability to prove that a contract was even entered into. Parties ordinarily cannot even testify (that is, give evidence) at their own trials. Oral testimony of any kind in commercial litigation is rare.

The third reason for verbosity of written contracts in the United States is jurisdictional diversity. There are 50 different states in the United States in addition to Puerto Rico and various territories. As there is virtually no federal law in the area of civil (private) law, all contract law is basically state, and not federal, law. That being the case, the state courts are the final interpreters of that law. The California Supreme Court is the final interpreter of California state law, the New York Court of Appeals is the final interpreter of New York state law, and so on. Although many people believe that the U.S. Supreme Court plays a role in unifying state contract law, it can only do so in the unlikely event that federal law, such as federal constitutional law, is involved; for example, if a provision of a contract violated constitutional rights. Further, there is no national bar association that licenses attorneys for a federal bar (the American Bar Association is a professional organization, and admittance to the federal bar is supervised solely by the individual federal courts). State bar licensing rules in the various states outlaw the unauthorized practice of their states' law. A lawyer admitted to practice law in the State of California, for example, is not authorized to practice law in the adjoining State of Nevada or in any other state, even if he or she is admitted to practice before the federal courts of the other state or to practice before the U.S. Supreme Court. To draw a parallel, English, Swedish, and California lawyers are not entitled to practice law in Germany.

Nevertheless, interstate business in the United States is very common. As mentioned above, much of it operates on an informal basis: the writings, if any, exchanged by the parties are short and contain for the most part only business terms. Consequently, only in exceptional cases will a person doing business with an out-of-state company ask for a formal contract to be reviewed by a lawyer in the person's home state.

When this does happen, the person's lawyer is put into a difficult position. Technically, the lawyer is not allowed to express an opinion on the law of another state in a situation that would constitute the unauthorized practice of law in that state. In addition, without having studied the law of that state, the lawyer cannot be sure what the law is in that state on any given point. On the other hand, both the client and the lawyer would like to avoid the expense and delay of retaining a New York lawyer, let us assume, whom the client probably does not know, for something the client views as an inconvenient formality of doing business.

The solution to this predicament is for the New York business to incorporate the basic provisions of the contract law of New York into the contract so that the client's lawyer can quickly convince himself or herself that it is basically the same as the law in the lawyer's home jurisdiction. The lawyer might not even feel the need to read these provisions word-for-word, although he or she might want to pay attention, for example, to the force majeure clause to see whether labor strikes will excuse a delay in performance. Once the contract has been signed and should there be a delay in performance, the client can consult the contract to see what the consequences should be in the same way that a tenant might consult a written residential lease agreement. These so-called boilerplate provisions are seldom negotiated, for that is not their purpose. Their purpose is to enable the out-of-state lawyer to become comfortable enough with the law of New York to be able to tell his or her client that, in the opinion of the lawyer, there is only a very low risk of entering into the contract without having the contract reviewed by a New York lawyer. While some people might contend that this constitutes the unauthorized practice of New York law, this type of advice is routinely rendered by lawyers in every state of the United States. It is also routinely rendered by lawyers in international transactions, even by those who complain about the extensive clauses reciting standard definitions and boilerplate.

This brings us to the business terms and to the fourth reason for the relative verbosity of some Anglo-American contracts: the level of legal practice in the common law world manifests a preference for the private structuring of one's affairs. Said another way, the common law world essentially leaves it to the parties to structure their business transactions and extricate themselves from the transactions should they wish to do so. It is not the role of the state to tell the parties how to conduct their business.

The 34-page license agreement that the author chose for the purposes of this study consists primarily not of standard definitions and boilerplate (which accounts for 4,661 words) but rather of business terms (7,708 words or 62% of the contract, excluding the recitals and signature page).[156] Of course this is a license agreement and not an agreement for the purchase and sale of some simple item. In such a case, one would not expect to find so many business terms. Yet how does it happen in the field of business that a contract would have so many business terms?

Part of the answer lies in the intensity of legal practice in the common law business world, where legal representation tends to be all or nothing: either the company has a lawyer, perhaps an in-house lawyer, whom the company always consults or, at the other extreme, the company will only consult a lawyer in exceptional cases. Exceptional cases are those that are very important to the client, usually because they involve a great amount of money in the client's eyes or because they are central to the survival of the client's business.

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[156] Lundmark, *supra* note 152, at 121.

It is often crucial to the client whether or not the client's breach, or the breach of the other contracting party, will enable the nonbreaching party to terminate the contract, or whether the client must suffer any delay and only be entitled to damages directly and foreseeably arising from that delay. Provisions of contracts that are so crucial that their breach allows the nonbreaching party immediately to terminate that contract are known as contractual conditions. Contractual provisions regarding performance which are not conditions are referred to as promises or covenants. Because the remedy of specific performance will in most cases not be available (see discussion above), the party who is depending on prompt performance for the survival of his or her business is likely to want every provision in the contract regarding the other party's performance to be denominated a condition. The other party, typically a much larger company, will prefer to keep the contract alive and only face the threat of having to pay damages arising from its delay in performance. The lawyers involved will likely spend a considerable amount of time negotiating the clauses in any contract which calls for many kinds of performance. It should probably also be mentioned that, since this intense involvement of the lawyer will be unusually costly for the client, it is in the interest of the lawyer to produce more pages of contract terms rather than fewer.

Why does one find this special kind and intensity of legal practice in common law jurisdictions and less so elsewhere? Is it fear of a protracted legal battle? In part the answer is yes. People in English-speaking countries, in the author's opinion, tend to view their state and its institutions with more suspicion and distrust than do people living in Germany and Sweden. It is almost as if Britons, Americans, and other English-speaking people prefer not to entrust judges or even legislators with defining and deciding whether they have been acting properly in accordance with the state's understanding of bona fides, *Treu und Glauben*, proper performance of contracts, and so forth. Britons and Americans also seem to place a relatively high value on private, individual solutions to their problems. They seem to demand more control over the organization of their affairs, including the resolution of their disputes. In the author's opinion, they seem to place less stock in the communitarian uniformity that is so highly valued in Sweden and Germany. Perhaps as a consequence, Germans and Swedes resign themselves more quickly to the futility of influencing bureaucracies and bureaucratic judges. Although one can only speculate, perhaps this "legal resignation" is symptomatic of a legal society in which the state and its organs enjoy more respect.

Before leaving this discussion, it would be useful to address two explanations proposed by other observers on why Anglo-American contracts tend to be so long. One alleged explanation is that the substantive law is less predictable in England and the United States than it is, for example, on the European continent. Another alleged explanation is that there are no standard contract provisions in England and the United States. These two will be discussed in order.

Whether or not the commercial contract law of England or New York, for example, is less definite than that of Germany, Sweden, or Italy is not a question

that the author is qualified to answer. But if German contract law is so certain and predictable, where does one find the German law on performance contingencies or on business terms? The answer is that these are not to be found in the statute or in other law any more than they are to be found in the statutory or case law of, for example, California. Further, two examples, one from the United States and one from the United Kingdom, suggest that uncertainty in the substantive law cannot explain the presence of those aspects of Anglo-American contracts that make them so long: boilerplate, performance contingencies, and the specification of business terms. Beginning with the United States, contracts for the sale of personal property (goods) are for the most part governed by detailed legislation, virtually identical in all American states, that reflects the Uniform Commercial Code. While there are small differences between the states, the author has never found a contract that recites one of these (very few) clauses that is different; rather, the boilerplate recites law that in fact is the same in every state.

England is known for its refusal to interpret contracts according to "good faith" or *Treu und Glauben,* as is done (at least to some extent) by German judges. The requirement of good faith gives German judges more discretion in interpreting contractual terms than English judges enjoy. In giving German judges more discretion, it allows them (at least in theory) to read nuances or terms into an agreement, or even to disregard a provision that the judge finds to be unfair under the circumstances. This leads to less certainty in the application of the law, since judges and lawyers alike disagree about these things.[157] If it were true that contracts are longer because the law is uncertain, one would expect that the elasticity inherent in the doctrine of good faith would cause the parties to specify more of the contractual terms in an attempt to limit the judges' discretion and, therefore, make the legal relationship less ambiguous and, consequently, more predictable. However, just the opposite is true: contracts in England are often longer, even though English courts do not embrace the doctrine of good faith. In other words, certainty of the law does not necessarily lead to shorter contracts.

As to standard contract provisions, in order for the existence of standard contract provisions to lead to shorter contracts, they must either be legally required or, if not, they must be generally accepted and followed. If a contract incorporates standard conditions by reference, then the contract that is drafted by the lawyer will indeed be shorter, but part of the contract—the standard provisions—will be found elsewhere. In other words, standard provisions do not make the contract shorter; rather, they are "hidden boilerplate."

One might ask why there are not more standard contract provisions in common law jurisdictions. Standard contractual terms require for their formation a certain critical mass of legal homogeneity, and this mass is lacking in the diverse jurisdictions belonging to the common law legal family. The legal homogeneity in

[157] It must be remembered that predictability is also supplied by other factors in any legal system or culture. Some of these are discussed below.

Germany may also be a reflection of the relative homogeneity of a society in which conformity and predictability in law (*Rechtssicherheit*) enjoy relatively more status than individualism and doing justice in the individual case (*Einzelfallgerechtigkeit*). (See the discussion in the chapter on comparative jurisprudence.)

In summary, the detail seen in Anglo-American contracts, at least contracts of sale, is fundamentally attributable to four factors: (1) an unresponsive, cumbersome dispute resolution practice; (2) an oral, informal business climate and tradition; (3) jurisdictional diversity; and (4) a preference for private/individual, rather than public/communitarian, structuring of one's affairs.

What of the future? As Anglo-American companies and their lawyers gain experience with formal contracts, one would expect those contracts to become shorter, at least through the use of standard conditions. However, in international business, more and more controversies are being submitted to arbitration. Although international arbitrators can certainly be expected to respect and enforce standard contractual conditions, these arbitrators will have to earn the trust of companies and their counsel before these parties will abandon their practice of contract specificity. To the extent that specificity and verbosity are caused by the involvement of lawyers in the negotiation of contractual clauses, one may expect these clauses to remain long, or to become even longer. In light of the uncertainties in future developments, it can be expected that Anglo-American sales contracts will remain lengthy, and that continental European contracts will continue to grow more detailed.

B. Language and Legal Predictability

The following discussion will seek to compare two hypothetical legal systems to determine whose rules are the more predictable. In doing so, the author hopes to shed light on the role of language in at least one aspect of the law, that of its predictability. However, it is hoped that the discussion will also elucidate other aspects of the role of language in law. The term *predictable* is used here in the same sense as determinable and certain. In consonance with the terminology employed in the chapter on legal reasoning, this discussion will use a narrow definition of the term "legal rule" to include only those rules which proscribe or permit certain human behavior.

The predictability of the law is considered to be one of the law's most treasured virtues, particularly but not exclusively in Germany. Predictability enables people to structure their lives and their affairs, including their legal affairs. Legal predictability promotes a sense of freedom by informing people of the boundaries of their freedom so that they do not need to live in the shadow of ambiguous laws. Legal predictability implies an absence of arbitrariness, which in turn promotes respect for legal institutions, including that of the legislature. Legal predictability can thus be seen as implicit in the concept of justice, so to speak.

Predictability in law does, however, come at a cost. Legal predictability discourages people from questioning and testing the boundaries of the law. It can lead to acquiescence, lack of interest, and even resignation. Legal predictability means an absence of flexibility; at some point it admits of no exceptions. Legal predictability necessarily means that certain factors that are personal to the individual must be ignored. Individual justice might sometimes need to be sacrificed to protect certainty in the law.

As developed more fully in the chapter on comparative jurisprudence, peoples' general conceptions of the law differ; and lawyers in different jurisdictions tend to share the same general conceptions. At least this is true for the four jurisdictions studied here, and there is no reason to suspect that the effect is confined to these four. For example, lawyers in any jurisdiction will tend to agree on how autonomous the law is and the proper sources of their law. For purposes of this discussion, it does not matter what conception of law is dominant in the two hypothetical jurisdictions. It does not matter whether the lawyers view their law as autonomous or not. It does not matter whether they embrace or reject the notion that immoral law is not really law. Nor does it matter which sources of law are recognized in the hypothetical jurisdictions that will be compared. One of the hypothetical jurisdictions might, for example, consider judge-made law to be a primary source of law, while the other jurisdiction might only recognize legislative law as being legitimate.

However, one major—and artificial—assumption must be made: that the breadth of law in both jurisdictions is the same. By breadth is meant how much of society is subject to legal regulation in the two hypothetical jurisdictions. This assumption is artificial because it is highly unlikely that any two jurisdictions actually regulate in exactly the same areas. Even two very similar American states, like Minnesota and North Dakota, might differ in whether they regulate the sale of farmland, for example. Differences in the coverage or breadth of the law among different jurisdictions of Europe are even greater than among the American states. Some European jurisdictions regulate the naming of children but have no minimum-wage laws. In other jurisdictions, it is the other way around. Some European countries regulate who can call themselves a psychiatrist. Others, like Switzerland, do not. One European country regulates what is a religion or a church, another does not. In short, different aspects of life are regulated in different jurisdictions. The coverage or breadth of regulation is consequently not uniform, but it must be assumed to be so in order for us to be able to conduct the thought experiment that is described below.

For purposes of this comparison, it is also essential to distill the concept of legal system down to a narrow definition. Accordingly, for purposes of this discussion, the term legal system will be split into two terms. The first term, referred to here as a system of rules, refers to all of the legal rules regulating behavior in the jurisdiction. (This view of the law is often identified with legal positivism.) Incidentally, the German word *Rechtssystem* is ordinarily used in this sense, although usage of the term does vary somewhat among authors.

The reader will notice that this narrow definition of legal system (as consisting merely of a system of behavioral rules) is not the definition of legal system employed elsewhere in this book. Elsewhere in this book, the term legal system refers to a system of rules, plus the institutions, methodologies, languages, legal philosophies, traditions, and culture of any particular jurisdiction. The narrow definition of a system of rules overlaps to some extent with the wider definition of legal system. For example, the methodology and jurisprudence (that is, the legal philosophy) will influence how the rules in any system of rules are selected and applied. To the extent that these influences can be articulated as legal rules, they also should be understood, for purposes of this hypothetical comparison, to belong to the system of rules. If these influences cannot be distilled into rules, then they will remain outside our hypothetical systems of rules.

What the author is trying to do by defining a hypothetical system of rules is to create a vision of the law as separate and distinct from people. This is, admittedly, very hard for some people, including the author, to do. How can one take people out of the law? The answer for purposes of this exercise is that we are not taking people out of the law; rather, we are taking the law (in the sense of a system of rules) out of the people.

This exercise, of course, assumes that rules can influence the behavior of those who apply them. This assumption incidentally underlies all discussions regarding choosing the applicable rule and applying it correctly. Yet this is certainly more than a mere assumption. Does anyone seriously believe that rules have absolutely no influence whatsoever on the behavior of those who apply them? H.L.A. Hart pointed out that even the so-called rule skeptics do not go this far, for they show respect for the rule that appoints judges to preside over certain disputes.[158] The question, then, should not be whether, but to what extent legal rules influence behavior.

Having reduced "the law" for purposes of this comparison to "legal rules regulating behavior," the author would like the reader to think of this system of rules as rows and columns of open-ended boxes stacked against one wall of a square room. These boxes, which are stacked from floor to ceiling and from wall-to-wall, signify the rules in hypothetical Jurisdiction A. Imagine that the opposite wall of the room is covered in the same way, but by 10 times as many boxes. This is hypothetical Jurisdiction B. Now imagine two judges, one schooled in the law of Jurisdiction A and one schooled in the law of Jurisdiction B. Other than this one difference, the two judges are identical in every way, including in their schooling, experience, intelligence, values, and temperaments.

Imagine that a messenger enters the room and hands Judge A and Judge B identical files containing all imaginable facts relating to a dispute. The judges' job is to place the file in the box representing the correct legal rule that should be used to decide the dispute in their respective jurisdiction. If need be, the judges can

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[158] Herbert Lionel Adolphus Hart, The Concept of Law 136 (1961).

copy the file and place the copies in more than one box. The procedure is repeated. The factual patterns sometimes have major differences; sometimes there are only small differences; and sometimes the factual patterns are identical in all respects except the names of the parties.

We would expect the judges to have the most difficulty with close cases. Should a particular file be placed in box 998 or in box 999 whose rules are very similar? When it comes to close cases, will not Judge B be faced with difficult decisions 10 times more often than Judge A? All other things being equal, does this mean that the law of Jurisdiction A must be more predictable than the law of Jurisdiction B? If so, then having big boxes, that is, fewer rules, enhances predictability.

This method of securing legal predictability comes with a price. The law in a Jurisdiction A makes far fewer distinctions between cases than the law in Jurisdiction B. Jurisdiction A is consequently less geared toward producing justice in individual cases. However, one can also say that, in refusing to make fine distinctions between cases which are basically the same, a system with fewer rules places more emphasis on equality than one with highly individualized rules.

The author's students, who are almost all studying to be lawyers in Germany, do not like what they see as the implication of this thought experiment, that is, that German law, which places a high value on predictability, must be sacrificing individual justice by doing so. However, this is not necessarily the case: there is another way of improving predictability, one which might be called the German way, in honor of the author's students.

It was said above that the definition of a legal system as a system of rules is artificial because it takes the law out of the people. Consequently, this thought experiment assumes that the judges in the two jurisdictions are perfectly comparable in every way. It is necessary to make this admittedly artificial assumption in order to be able to say something about legal rules in the abstract. However, legal rules are never interpreted in the abstract. They are only ascertained and applied by real people (referred to here as judges) to real people, not hypothetical people. What is the result if Judge B in the above experiment has more training than Judge A? What is the outcome if Judge B is only responsible for some of the boxes on the wall, in other words, what if the wall is divided into discrete sections for specialized judges? What if Judge B decides 10 times more cases than Judge A and consequently has much more experience? What if Judge B started working as a judge at a younger age than Judge A and consequently has more general work experience? What if Judge B works in a large bureaucracy with a large bureaucratic memory that might be consulted? What if Judge B enjoys ready access to all of the previous decisions in Jurisdiction B in similar cases? What if Judge B can count on the assistance of academics and practicing lawyers to review his or her decisions, or even to assist in making them? What if the procedural law in Jurisdiction B makes generous provision for appellate review to correct Judge B's mistakes? What if Judge B shares the values of a legal culture that places a premium on predictability? All of these factors, and probably many more, such as cultural uniformity, play a role

in making German law predictable. In other words, reducing the legal system to its rules tells only part of the story about what the law is and how a legal system works. That is the main reason why the author prefers Lewis Kornhauser's definition of a legal system as consisting of both a legal order (described in this book as a system of rules) and a legal regime, which Kornhauser describes as the institutions that create, execute, and apply the legal order, including the individuals who comprise these institutions.[159]

Having conducted the thought experiment, let us focus on the role, if any, played by language in promoting legal predictability. Based on the discussion above, those people who wish to make the law more predictable must confine their efforts to two provinces: (1) the rules themselves and (2) the persons involved in ascertaining and applying the rules. For the sake of simplicity, the following discussion will refer to ascertaining and applying the law as interpreting the law.

The thought experiment above employed hypothetical judges, yet judges form only a small number of the people who are involved in interpreting the law. Officials in administrative agencies greatly outnumber judges and probably are more involved than judges in the interpretation of the law. In fact, the list of potential interpreters of the law might include practically every adult member of society at some time or another. Legislatures and others realize this, and so they sometimes undertake to make the laws easier to understand. Witness the influence of the plain-language movement of the past half century.

The *Gesellschaft für deutsche Sprache* (German Language Society) has reviewed and edited proposed federal legislation in Germany since 1966 with a view toward making statutes more understandable. Unfortunately, however, the office has only one full-time employee.[160] There were also efforts during the 1930s in Germany to draft a People's Civil Code (*Volksgesetzbuch*) to rewrite the German Civil Code, in part to simplify the language, but these efforts never came to fruition.[161]

The plain-language movement in Sweden can be dated at least as far back as 1976, when the Swedish government appointed a linguist to a cabinet position with the task of modernizing the language of laws and ordinances. In 1993 the government appointed a Plain Swedish Group which today consists of three judges, two linguists, two information managers, and two political scientists. It is said that over half of all Swedish governmental authorities are involved in plain language projects.[162]

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[159] Lewis A. Kornhauser, *A World Apart? An Essay on the Autonomy of the Law*, 78 B.U. L. Rev. 747, 749 (1998).

[160] Barbara Wieners-Horst, *Germany: Editing in the German Parliament* (Emma Wagner trans.), 47 Clarity 12, 12 (2002).

[161] *See* Michael Stolleis, *Volksgesetzbuch*, *in* 5 Handwörterbuch zur deutschen Rechtsgeschichte, pt. 36, col. 990–92 (Adalbert Erler & Ekkehard Kaufmann eds., 1993).

[162] Barbro Ehrenberg-Sundin, *The Swedish Government Promotes Clear Drafting*, 47 Clarity 3, 3 (2002).

In the United Kingdom, the Renton Report criticized convoluted drafting in British statutes in 1975 and recommended improving the explanatory materials which accompany statutes.[163] A plain-English policy for government forms, adopted in the United Kingdom in 1982, has resulted in improvements being made to many thousands of forms. An ambitious, ongoing project in the United Kingdom is the redrafting of direct tax legislation to make it clearer and easier to use, without changing the law.[164] Further, all English lawyers are familiar with the efforts of Lord Woolf, the former Lord Chief Justice, to avoid the use of Latin terms. He also rewrote the English Supreme Court Rules in plain language.[165]

The United Kingdom, Germany, and Sweden have enacted the European Directive on Unfair Terms in Consumer Contracts into domestic law. The regulations state that a standard term must be expressed in "plain, intelligible language."

In the United States, the First National City Bank (now Citibank) of New York developed a short and succinct form of promissory note for consumer loans in 1975.[166] A federal law was passed the same year requiring that consumer warranties be written in "simple and readily understood language."[167] A law in place in the State of New York since 1978 requires that all residential leases and consumer contracts be "[w]ritten in a clear and coherent manner using words with common and everyday meanings. . . ."[168] Today some 35 of the 50 American states have laws or regulations requiring easy-to-read life insurance policies.[169] There have also been examples in the United States of plain-language legislative drafting, such as the recent redrafting of the Federal Rules of Civil Procedure and of Article 9 of the Uniform Commercial Code.[170]

With the exception of laws regulating consumer contracts, most of these efforts are aimed at making the law more accessible to those people who are in the business of interpreting the law. These businesses or professions include those of accountants, tax advisors, judges, lawyers, administrative personnel, and the police and other enforcement agents, such as animal-control and child-protective officers. As shorthand, this discussion will refer to all these people as "officials" even though many of them are not on the public payroll.

Before discussing what might be done to improve the ability of officials to interpret the law more predictably, let us first return to the system of rules: What might be done, other than reducing the number of rules, to make any system of rules provide more predictable results? What about systematizing the law? All four

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[163] Michèle M. Asprey, Plain Language for Lawyers 14 (3d ed. 2003).

[164] *Id.* at 16.

[165] *See generally* John Gray, Lawyers' Latin: A Vade-Mecum 14–19 (2002).

[166] Asprey, *supra* note 163, at 1.

[167] Magnuson-Moss Consumer Product Warranty Act, 15 U.S.C. § 2301 (1975).

[168] N.Y. G.O.B. Law § 5-702 (1977).

[169] Asprey, *supra* note 163, at 2–3.

[170] Steven O. Weise, *Plain English Comes to the Uniform Commercial Code*, 42 Clarity 20, 20 (1998).

of the jurisdictions studied here do this for all modern legislation, such as for income, family, environmental law, and administrative law. All four jurisdictions also systematize the rules within their codes, and provide extensive indexes.

Anticipating somewhat the treatment of judge-made law below, it can be observed that officials in Germany, and to a lesser extent in Sweden, almost always anchor their findings on the law in a statute. In Germany these references are sometimes so far-fetched and implausible that the official, usually a judge, openly admits that the statute is being applied by analogy to a factual situation which the statute was never intended to cover. In other words, these judges engage in a practice akin to legal fictions (see the chapter on statutes and their interpretation). In the United States, all federal law is either constitutional or statutory law. When judges encounter what Germans would call a gap in the law, they do not resort to the fiction of an analogy but rather call their pronouncements common law; but it is the same thing: judicial law-making beyond the reach of statutory law. The statutory law in some American states, such as Louisiana and California, is so broad that virtually all court decisions can be tied to a statute. Even so, the California courts are not in the habit of referencing the statute in every decision, which might give someone the incorrect impression that there is no statutory law on the subject. In England and in most American states, contract law is mostly uncodified (that is, not based on statute). Trade disputes are regulated by statute in England, the United States, and Sweden. However, the subject of labor disputes (*Arbeitskampfrecht*) is regulated solely of judge-made law in Germany. Tort law is basically judge-made in all four jurisdictions, because there are very few statutes, and those that do exist are vague.

What of arranging the codes into a system? Such an arrangement would probably not be necessary for most officials, as they will already know which codes and statutes to consult. Nevertheless, in England and Wales, the United States, Germany, and Sweden, laws are generally systematized into the categories criminal, civil (called private law in Germany and Sweden), and public law, which includes constitutional and administrative law. In the United States lawyers usually speak in terms of criminal, civil, and constitutional law. In Germany one can buy hardcover or loose-leaf volumes from private publishing houses containing most of the statutory law in two major categories: (1) civil and criminal law together and (2) public law. The first volume of the two-volume *Schönfelder* includes the texts of more than 100 laws (statutes and regulations). While most of the laws are in the area of civil law, 10 of the most important criminal laws are also included. The volume concludes with an index covering over 150 pages. The second volume covers over 3,200 pages. The index to the second volume of *Schönfelder* is 72 pages long. *Sartorius* is the classic collection of federal constitutional and administrative legislation. It fills three volumes of similar size as *Schönfelder*. For the main statutory and regulatory law from any of the 16 states, one must consult collections such as the one-volume collection for Northrhine-Westphalia. The laws within each volume are grouped by subject. The 14 groupings in the first volume of *Schönfelder*,

for example, include insurance law, patent and trademark law, and employment law.

On the topic of systemization, what do English and American lawyers do with their judge-made law? The answer is that they systematize it along with statute law, which is not the case in Germany when it comes to the law regarding labor disputes (*Arbeitskampfrecht*). Typical for the common law world, *Halsbury's Laws of England* systematizes the judge-made law on every topic. This encyclopedia covers over 56 volumes and is also available online. *Halsbury's Statutes* serves the same function for statute law. Officials in California often use the 66-volume *Witkin Summary of California Law*, but the legal encyclopedia *California Jurisprudence* is also popular. Both are available online. Another approach that officials in California use to find the law is to consult one of the 29 codes directly. The material in these codes is arranged systematically, and the published versions include detailed key-word indexes. In summary, the inclusion of judge-made law need not—and in the case of California and England probably does not—necessarily make the system of rules less predictable.

Having addressed the issue of systematization, how would one go about improving the predictability of the rules themselves? Specifically, what if one were to express the rules in a different language, would that promote the predictability of the law? What, for example, if the language of international law were Latin rather than English? Is Latin more legally predictable than English?

In attempting to answer this question, we should remind ourselves that we are talking at this point about the rules themselves and not about the officials who are charged with ascertaining and applying the rules. They will be discussed later. At this juncture the question is: is the language of Latin inherently, for example, more logical, which might lead to more predictable results if it were used as a universal legal language? The popular myth that Latin is a logical language was discredited by linguists years ago, yet it still persists in many circles.[171] If not Latin, then maybe German should be the language of philosophy and the law. After all, Martin Heidegger once remarked, "When the French begin to think, they speak German."[172]

Employing the German language as an example, is it logical to assign genders (masculine, feminine, and neuter) more or less haphazardly to inanimate objects? Is it logical to place the verbs so often at the end of the sentence rather than next to the subject of the sentence? Some other languages do this, but they are in a minority. Logic itself cannot provide an answer to these questions. But even if German is

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[171] David Crystal, The Cambridge Encyclopedia of Language 6 (2d ed. 1997): "A belief that some languages are intrinsically superior to others is widespread, but it has no basis in linguistic fact." *Compare* Anthony Lodge, *French is a Logical Language*, *in* Language Myths 33 (Laurie Bauer and Peter Trudgill, eds., 1998).

[172] Martin Heidegger, *Nur noch ein Gott kann uns retten*, Der Spiegel, May 31, 1976, at 193–219.

in fact more logical than English in some way, why would drafting the law in one of these languages make the application of the law more predictable?

Perhaps, then, the only aspect of the German language—or Latin for that matter—that might influence the predictability of a system of rules is German's relative paucity of words compared to English. The *Shorter Oxford Dictionary*, 3d ed., contains 80,000 words. The *Oxford English Dictionary*, 2d edition, contains 250,000. Webster's *Third New International Dictionary* contains 450,000 words. According to the home page of the Oxford English Dictionary, "It seems quite probable that English has more words than most comparable world languages."[173] Going back to the thought experiment above, does the fact that German has fewer words than English mean that the German legal system has fewer "boxes" than any English-language legal system, making German law more predictable than the law of any English-speaking jurisdiction?

A popular German author who is also a law professor once asked the author, "If the English language really has so many words, then why aren't people using them?" The answer to that question, according to linguists, is that educated native speakers of major languages from around the world have approximately the same ability to communicate regardless of their mother tongue.[174] Where the English author might turn to archaic or rarely used English words, the German author would use a foreign word. The English author will be praised for having a large vocabulary; the German author will be praised for having knowledge of foreign languages. The phenomenon is the same, but in the case of the German author, the foreign word is not considered part of the German language.[175]

To this point we have concluded that there are at least three strategies of making a system of rules more predictable: (1) reducing the number of rules, (2) systematizing the rules, and (3) providing an index. Let us now turn to the second component of our legal system: the people. The focus here, as stated above, will be on those people involved in ascertaining and applying the law, the so-called officials. Rather than addressing the myriad things that might improve officials' ability to interpret the law in a predictable manner, this discussion will address only the potential effect of the language they speak.

Although the discussion to this point has focused on the predictability of the law, most of the arguments apply to other qualities of the law as well, including

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[173] Of course this conclusion is highly dependent upon how one defines *word*. *See* Crystal, *supra* note 171, at 82.

[174] Crystal, *supra* note 171, at 82 *et seq.*

[175] Lest a linguist should criticize the author at this juncture, it should be mentioned that all written language consists exclusively of words and rules, both of which communicate meaning. Thus a language like German may use more rules and fewer words than a language like English to convey the same meaning. *See generally* Steven Pinker, Words and Rules: The Ingredients of Language (2000). In this case the German speaker's vocabulary must be "topped up" with an amount representing the information communicated solely via rules. The author believes that the amount will be comparatively small relative to English and will not likely affect the analysis above.

notions of justice, quality, humanity, and so on. However, in order to do justice to the topic of language, the discussion in this part will focus exclusively on language, which admittedly is only one part of any legal culture.

The question posed is this: does the fact that officials speak German, Swedish, or English have any effect on how they interpret[176] the law? The thesis that language affects the way that people view the world, and even the way that they think, is often referred to as the linguistic relativity hypothesis or as the Whorf-Sapir hypothesis, after the linguists who popularized it. However, the idea is not new. The claim that language to some extent determines the way one thinks was made throughout the 18th and 19th century. Indeed, Ludwig Wittgenstein wrote: "The limits of my language mean the limits of my world."[177]

George Fletcher, a keen observer of the relationship between law and language, has pointed out that German, like French, does not have a single word for the English word law. Instead it uses two: *Gesetz* and *Recht*. Fletcher remarks that Germans use the term *Gesetz* to express the idea of laws enacted by a legislative body, and they use the word *Recht* to denote a higher notion of law which is sound in principle.[178]

Swedish, on the other hand, has a single word: *lag*. Both the English and the Swedish word for law find their origin in the same Old Norse word *lag*, one of the few Scandinavian words that have found their way into the English legal vocabulary.[179] Does this mean that speakers of Swedish and of English share a conception of the law that is different from that of speakers of German and French? Or perhaps the facts of the world change, or are perceived to change, depending upon the language in which they are described.[180]

One recent study found that nouns and verbs are encoded in different areas of the brain.[181] When an English-language text is rendered into German, it usually loses verbs and gains nouns. How this affects the way speakers of German or English think, or even whether or not this has an effect, is not known. But if there is an effect, and even if it is very small, would this mean that translating law from English to German will cause the law to be understood and applied differently because the translation will likely have more nouns than the original? Are English speakers mentally weaker than German speakers when it comes to legal nouns

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[176] The word *interpretation* is used, as it is above, as shorthand for ascertaining and applying the law.

[177] Ludwig Wittgenstein, Tractatus Logico-Philosophicus: Logisch-philosophische Abhandlung § 5.6 (1922).

[178] Fletcher, *supra* note 92, at 12.

[179] Mellinkoff, *supra* note 142, at 52. The plural of *lag*, according to Mellinkoff, was probably *lagu*.

[180] Jürgen Habermas claims that what we regard as fact is determined by consensus, and that this process of fact-finding is dependent upon language. *See* 1 Jürgen Habermas, The Theory of Communicative Action: Reason and the Rationalization of Society (1984).

[181] Anna Mestres-Missé et al., *Neural Differences in the Mapping of Verb and Noun Concepts onto Novel Words*, 49 Neuroimage 2826, 2826–35 (2010).

because the brains of English speakers are less versed in parsing nouns? Perhaps further research will shed light on this topic.

Fletcher has also pointed out that no matter where one finds the common law at work, in Canada, India, or Hong Kong, the people using it are using the English language. No Anglophone culture, he writes provocatively, has successfully adopted and nourished any other system of law.[182] Is any society which speaks English predestined—or damned—to accept the English common law? This has relevance to Europeanization. Are the English and the Irish linguistically incapable of accepting a continental style of law? If this is the case, must Germany and France, among others countries, at some point accept the common law if they wish to continue the process of Europeanization? Or are speakers of German and French also linguistically incapable of leaving their legal tradition?

Fletcher's observation on how the common law system has spread with the English language almost like an appendage (or perhaps a parasite?), seemingly staunching the ability to adopt any other legal system, suggests a cause-and-effect relationship. Might it be the other way around, that is, that it is the common law system that is sometimes spreading, bringing English in its tow? That seems very unlikely, considering that it is relatively hard to get reliable information on the workings of the common law legal system in any but a few major world languages. As mentioned in the first chapter, the eminent linguist Nicholas Ostler, after reviewing five millennia of the spread of world languages, discerns two basic qualities that account for the spread of language: prestige and learnabilty. In the case of languages, prestige is associated with wealth, practical wisdom, enjoyment, and spiritual Enlightenment. Modern English has grown in worldwide importance because it has, at various times and places, offered all of these things. For those jurisdictions, like India and a number of African nations, who employ English as an official or de facto official language, it is likely that people adopted the English legal system because it too was associated with wealth (in terms of business opportunities) and practical wisdom. Perhaps more intriguing for law is Ostler's observation that learnability plays a role in the spread of languages. Learnability is of little importance to native speakers of the language, but it is for those who consciously study and learn a language, either through daily exposure or through formal instruction. When a language is spreading into new territory, people will find it easier to learn if the new language is structurally similar to the old language of the population to which the new language is spreading.[183]

Might it be that the common law system is relatively easy to learn? For example, it might be that the common law system is understood more as a method than as a body of knowledge. It might be much easier to learn a method of finding and using the law than it is to gain knowledge of a large body of legal rules. While it

[182] George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 Am. J. Comp. L. 683, 698 (1998); Fletcher, *supra* note 92, at 5.

[183] Ostler, *supra* note 94, at 552–56.

has been suggested to the author on numerous occasions that English or American law is much easier to learn than German law, the author has never been able to understand exactly what these people mean; nor have these people been able to explain what they mean to the author's satisfaction. One of the author's professors, Stefan Riesenfeld, studied law in Germany, Italy, and California. He enjoyed telling his students, "The last time was the easiest." Is that perhaps what people mean—that learning a second law is easier than learning the first?

Even assuming that the common law method, taught alone without the substantive and adjective (procedural) law that comes with it, is 10 times easier to learn than German law and its method, it is still very unlikely that this fact alone would account for one jurisdiction choosing a given kind of law over another. Considering the example of the Reception of Roman Law (Reception), was it ever suggested that one reason for the Reception was the ease with which one could learn Roman law? Similarly, the ease or difficulty of learning the law of another jurisdiction is not likely to be a substantial factor in determining the law of any particular jurisdiction.

That being said, there is a realm of the law—international arbitration—where common law seems to serve as a kind of default or compromise law among businesses and lawyers from a large number of jurisdictions. One obvious reason for this fact is the major roles that English and English-speaking businesses play in the world today. In most of the world, English is the language of international commerce which will turn to arbitration when disputes arise. Another important reason is the very large number of lawyers who have at least some knowledge of the common law, either because they have been introduced to it in their home jurisdictions, or because they have studied, often for a year, in a common law jurisdiction, which in turn was made possible by their knowledge of the English language. Yet it might also be true that the real or perceived relative ease of entering into the common law method might play a role in the spread of the English common law, at least in international contracting and dispute resolution.

The linguist Roman Jakobson had the intriguing insight that languages differ in what they force the speaker to reveal. As pointed out by another linguist, Guy Deutscher, it is practically impossible to tell someone in German about a person with whom one had dinner without revealing the person's sex.[184] Native English speakers, like the author, often have trouble observing the German distinction between the familiar *Du* and the formal *Sie* forms of address. Although the informal practice among young people in Germany is different, in business and public life, the *Du* form is reserved for family members and close friends; everyone else is addressed using the polite form. Accordingly, unless one is exceptionally facile at

[184] Guy Deutscher, Through the Language Glass: Why the World Looks Different in Other Languages 151 (2010). Roman Jakobson specifically rejects the influences of language on "strictly cognitive activities." *Id*. at 269. Steven Pinker also believes that the psychology of English speakers and German speakers is the same. Pinker, *supra* note 175, at 255.

avoiding the distinction between *Du* and *Sie*, one is forced in any conversation to keep people at a formal distance unless one is willing to suggest that they address each other with the familiar *Du*. Whether or not one finds this distinction good or bad is not the question here. Rather, does having to make this distinction—does having to keep people at a polite linguistic distance—cause German officials to treat people less humanely because the people to whom the law applies do not belong to the official's close friends and family members? Or does it have perhaps the opposite effect of causing them to treat people more politely and therefore more humanely? Or does it have no effect whatsoever?[185]

Fletcher's observation above about the words for law in German provides an example that is perhaps less far-fetched. As stated above, in order to talk about the law in German, one must ordinarily speak either about *Gesetz* or *Recht* or both. The German language forces the speaker to think about the distinction. Does this mean that, when speaking German, one "thinks differently"? Lamenting the fact that students of the law were no longer learning Law French, the English barrister Roger North KC wrote in 1824, "[T]he Law is scarce expressible properly in English."[186] Have English lawyers since then changed the way in which they think because they no longer express English law in Law French? These are questions that, in the author's opinion, deserve to be addressed more empirically in the future.

Summary

So much has been and is being published on the topic of law and language in the English language alone that it would be impossible to read, much less summarize, everything. While the topic of comparative law and language is somewhat narrower, the magnitude of the literature on the topic is nevertheless daunting. Consequently, this chapter could only present a few of the studies and insights which have been published.

Much has been written on the topic of legal translation. While articles and books on this subject are often devoted to translation between specific languages, there are a number of broad-based studies by G.R. de Groot and others that could not be presented here for reasons of space. Rather, the coverage of this chapter on language and comparative law had to be limited to comparative legal linguistics and language and legal predictability.

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[185] At one time speakers of English also made a distinction between the familiar *thou* and the polite *ye* which became the present-day *you*. In the author's youth, God was still addressed in the Lord's Prayer with the familiar *thou*. Not meaning to sound blasphemous, did this change in the form of address make God less familiar to speakers of English by forcing them to keep God at a polite linguistic distance? In Sweden, use of the polite form of address *ni* has waned dramatically in the author's lifetime.

[186] Roger North, A Discourse on the Study of the Laws 13 (1824).

The discussion of comparative legal linguistics centered on the groundbreaking book by Heikki E.S. Mattila by that title. Tracing the history of legal German and legal English, one should not be surprised to see the influence of Latin on both legal languages. Latin was the language of the Church, of scholars, and of the universities. Latin remained the language of record in the common law courts until the early 18th century and to this day, most procedural terms employed in the English and American courts are of Latin origin. In Germany, Latin gained prominence in legal circles with the Reception of Roman law. However, Latin began losing ground to German in the 16th century. German terms were literally substituted for Latin terms. Today, Latin words and Latin-based words form only a very small part of German legal vocabulary. Almost all German terms are "home grown." The Latin, or rather Roman, influence lives on, however, behind the German terminology and in other ways, such as in the conception of the state, the secularization of law, the exclusivity of the codification of law, and the academic character of the understanding of law.

In England and the United States, the most important source for legal terminology is the French language. Baker estimates that most English legal terms are of French origin. However, this does not mean that French law dominated English life. On the contrary, Law French was used simply for English legislation, law, and legal institutions. The Norman French influence can still be felt, for example, in the centralization of power and in the doctrine of parliamentary supremacy.

German legal practice tends more toward conceptualism, a topic which will be returned to in the chapter on comparative jurisprudence, than do the legal practices of Sweden, England, and the United States. The underlying assumption of conceptualism is that legal terms are labels for distinct, identifiable, reoccurring, and stable elements and structures (for example, relationships) found in (or imposed on) society. The term "concept" is understood by conceptualists therefore not to refer to the bare legal term, but rather to these elements and structures themselves.

Nothing peculiar to the German language, such as its relative preference for nouns over verbs, can account for the phenomenon of conceptualism. Rather, as will be explored in more depth in the chapter on comparative jurisprudence, conceptualization results from, and is reinforced by, a view of law as existing independent of other factors, including politics. In a word, conceptualists tend to see law as being autonomous. This view is part of a conception of separation of powers which believes that judges and lawyers should refrain from any political activity.

Just as there is nothing peculiar to the German language which can account for conceptualism, there is nothing peculiar to the English language to account for the length of many English language contracts. By identifying the provisions of certain contracts that account for their length, the author was able to show that their length was attributable primarily to four factors, none of which is inherent to the English language. These reasons are (1) a cumbersome dispute resolution process, (2) an informal business tradition, (3) jurisdictional diversity, and (4) a

preference in England and the United States for the private structuring of one's affairs.

In the section on language and legal predictability, the author sought to show that the choice of language alone cannot affect legal predictability. Rather, legal predictability can only be increased by lowering the density of legal rules or, alternatively, by training the people who write, interpret, and apply the rules to act in concert.

3

Comparative Jurisprudence

The topic of this chapter—comparative jurisprudence—is particularly affected by the problem that besets so much of the literature addressing and surrounding comparative law. This problem, which was already raised in the chapter on language and comparative law, is quite simply that legal terms including jurisprudence mean different things to different people. The problem is especially acute if those people speak different languages.

In order to understand what is meant by the phrase "jurisprudence in comparative law," it is necessary to consider the meanings of both jurisprudence and comparative. The word *comparative* is perhaps less problematic to define. The act of comparison presupposes at least two objects which can be the subject of comparison.[187] Further, the objects must share some quality that makes them comparable while at the same time displaying some other quality that is different. Although it may sound paradoxical, comparison is only possible between objects that are similar and different. Perhaps it goes without saying that the objects that comparativists routinely compare readily meet these requirements of comparability.

The word jurisprudence, however, is more troublesome. To begin with, it has at least three usages in legal English. A quite modern usage, and one that appears to be growing in popularity, is a reference to court decisions, especially to the decisions of courts in civilian legal systems. This usage is often found in the literature discussing, for example, the case law of the Court of Justice of the European Union.[188] For purposes of clarity it should be noted that the word jurisprudence is not employed to mean case law at any point in this book. Another usage of jurisprudence, one that might seem archaic today, is a reference to law in general. Most usages of the word in this sense are dated. Consequently, the school of jurisprudence, such as existed at the University of California, Berkeley, and Columbia University, are now known as schools of law.

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[187] *See generally* Catherine Valcke, *Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems*, 52 Am. J. Comp. L. 713, 713 (2004).

[188] The Court of Justice of the European Union uses the English terminology "case-law," and not jurisprudence, on its English-language homepage: Court of Justice of the European Union [CURIA], http://curia.europa.eu/jcms/jcms/j_6/.

The third and most prevalent usage of the word jurisprudence in legal English refers to legal philosophy and sometimes legal theory. It is by reference to this third meaning that the word jurisprudence is employed in this chapter and throughout this book.

The terms legal philosophy and legal theory are often used interchangeably. However, many scholars define legal theory as a subdiscipline of legal philosophy. For example, in Germany, contemplation on the various theories of justice is routinely seen to belong to the discipline of legal philosophy and not to legal theory. However, for purposes of this chapter the distinction is irrelevant.[189]

This chapter is not about how the four jurisdictions here studied—Germany, Sweden, England, and the United States—define legal philosophy, or even directly about what is taught in lectures on legal philosophy. Instead, this chapter focuses on how lawyers in these jurisdictions view their own law and legal systems. This chapter will attempt to produce a legal-philosophical profile of the average lawyer in each jurisdiction by reference to five basic questions about his or her understanding of law. The questions revolve around the following issues: (1) How do lawyers in these jurisdictions conceive of the law "as such"? Is it, for example, so completely autonomous from politics that the judicial activity of applying the law can be seen as apolitical or, at the other extreme, is the law hereby another form of politics? (2) Is law a tightly woven web of rules that regulate virtually all legal-societal conduct, or does the law contain more gaps than it does rules? (3) Is the law on any particular point simple to find or, on the other hand, are the provisions so nebulous, and so badly ordered, that the process of looking for the law resembles palm-reading? (4) Is the application of the law a predictable process, or is it merely a mechanism for the rich and powerful to manipulate the masses? (5) Does morality have any relevance whatsoever in the modern world of law?

It is the author's belief that there exists a large, influential group of like-minded lawyers in each of the legal systems here studied who share basic beliefs on these and other questions, and who set the legal-philosophical tone for their legal system. The author also believes, as illustrated below, that this philosophical tone (that is, the way lawyers view the law) reflects, and to a certain extent influences, the way law is studied and applied in these jurisdictions.

The author is by no means the first person to make these claims: the observations and insights of some of the previous authors will be discussed later on in this chapter. Notwithstanding this fact, the author may well be the first to have conducted surveys in order to judge how lawyers in each of the jurisdictions studied think about these issues.

Before describing the responses to these survey questions and the conclusions the author draws from them, it would be useful to outline three conceptions of law that are mentioned in the discussion of the responses to the survey questions.

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[189] Those wishing to pursue this matter and others in English are encouraged to consult this outstanding book: James E. Herget, Contemporary German Legal Philosophy (1996).

A. Three Conceptions of Law

Before beginning, it might be appropriate to explain why the following philosophical positions or schools are referred to here as conceptions. The word concept might have appealed more to English speakers, especially those who are familiar with H.L.A. Hart's *The Concept of Law*. Yet for many people, the word *concept* in this sense might easily be confused with the use of the word *term*. Consequently, when referring to a philosophical school or view of the legal world, this book will employ the word conception in place of concept.

By confining the following discussion to only three conceptions or schools, the author is necessarily doing an injustice to other schools and philosophies of law. This is unfortunate but necessary, in that the short discussion that follows can barely do justice to the three conceptions here presented, much less to any additional ones.[190] With this proviso in mind, the following discussion will address three of the schools of thought that are influential in legal academic circles. These are, in the order discussed below, legal positivism, natural law, and legal realism.

Before beginning, the reader should be aware that none of these schools of thought possess a single, unified theory which all adherents of that school would support. While there is often a dominant view or fundamental tenet which attracts majority support, these too are subject to competing interpretation and criticism from within their own school of thought. Due to restrictions on space, and recognizing that this book is not a book devoted exclusively to legal philosophy, the author will restrict himself to an explication of what he considers to be the main tenets of each school of thought. This ought not to be viewed as the only possible explication; nor should it be understood to constitute the author's favoritism toward any of these conceptions or toward any other conceptions.

1. LEGAL POSITIVISM

Legal positivism, referred to here simply as positivism, owes its name to one of its two major theses, that is, that law is posited. By posited, it is meant that law is created by some human act. This might at first seem obvious; but in defining law in this way, early positivists were trying to distinguish themselves from scholars who viewed law as a social phenomenon that might be determined or found by the astute observer, usually a judge.

A simple example will suffice to illustrate this difference in standpoint. Assume that two business people have a dispute about whether the seller has performed his end of the bargain properly. In order to end the dispute, the buyer sends the seller a check

[190] For further information on other schools of thought, the reader is referred to Michael D. A. Freeman and Baron Dennis Lloyd Lloyd of Hampstead, Lloyd's Introduction to Jurisprudence (8th ed. 2008).

marked "in satisfaction of all claims." The seller, also wishing to end the dispute, signs and deposits the check. Both the buyer and the seller believe that the buyer has waived all rights to demand further performance, and both the buyer and the seller believe that the seller has waived all rights for further payment. They base their belief on the practice of buyers and sellers in the business community in which they conduct business, and that practice uniformly holds that the act of accepting and depositing a check under such circumstances extinguishes all further rights between the parties.

To the positivist, however, the dispute is not necessarily resolved. What people believe the law to be is not necessarily what the law is. Despite the fact that every single business person in that particular business community believes that the law is so, and despite the fact that all of them have acted on this assumption for years, this particular practice or business custom is not law unless someone in a position of authority—say a professional organization or a court—announces or posits it to be so.

It might be useful to think of positivists as creationists: law does not crawl up out of the sea, sprout wings by some evolutionary process, and begin to fly like a pterodactyl. Rather, a rule can only be considered to be "law properly so called," as the positivist John Austin described it, if that rule has been declared, decided, practiced, or tolerated by some person or persons in authority. Law needs a creator or creators, and these must be identifiable human beings. In the example above, the relevant people in authority in that jurisdiction might well recognize customary business practice as law and therefore conclude the rights of both parties have accordingly been extinguished. Yet those in authority need not do so. They may, if they choose, adopt a rule to the opposite effect. Indeed, these creators of the law might adopt any other rule which they choose to adopt in their capacity as the legal authority in their jurisdiction. As long as the rule is formally valid, it is law. The leading critic of legal positivism, Ronald Dworkin, refers to this requirement of formal validity, perhaps somewhat mockingly, as the "pedigree thesis" of positivism: if the person in authority says that it is law, then it is law.

To summarize the description of legal positivism to this point, the legal positivist puts the emphasis on creating or positing law by a person or institution (both referred to hereafter as institution) who is authorized to do so. This generally means that the pronouncements of this institution are habitually obeyed by the population which it governs. Perhaps the population obeys the rules out of respect for the institution. Perhaps people obey out of fear. Or perhaps they obey simply out of tradition and habit. Whatever the reason for their obedience, it is irrelevant: all that counts is the observable fact of general adherence to the rules pronounced by the authorized institution.

The second distinguishing feature of most if not all theories of positivism can be thought of as a corollary or even as a necessary consequence of the first: the content of the rule is irrelevant to its validity. Law is, according to the positivist, content-neutral. As the leading German-language positivist, Hans Kelsen, put it, "any desired content can be law." Accordingly, under this definition of law, any illogical, silly, contradictory, counterproductive, or capricious rule can be law. By

the same token, law can consist of rules that are discriminatory, racist, blasphemous, vulgar, anti-democratic, sexist, Communist, Buddhist, and Papist. With apologies to Gertrude Stein, most legal positivists believe that a rule is a rule is a rule. Since the content of any rule is, according to positivism, irrelevant to its validity, then it cannot logically make any difference to the validity of the rule if the rule is considered by some or even all of the population to be unethical, to be immoral, or to violate human rights. This is known as the "separation thesis." Whether or not the populace accepts the particular rule as valid is a question wholly separate from the question of the rule's validity as law.

The development of modern legal positivism on the European continent is usually traced to the fall of absolutism and the rise of Enlightenment thinking. It is easy to imagine why the age of absolutism, where "might makes right," would provide fertile ground for a legal philosophy that eschews considerations of morality; but the role of the Enlightenment might not be obvious at first glance. Indeed, would one not expect just the opposite, that is, that the Enlightenment thinkers would seek to promote human rights at every turn? In fact, the Enlightenment thinkers did indeed promote human rights; but they viewed their activity in this regard as being political and therefore subjective. They understood law, on the other hand, as being something objective and empirical. In other words, they viewed law as a science, much like physics or mathematics.

One should not conclude a discussion of legal positivism without mentioning the various attempts to deal with the question of morality in a positivistic view of the law. Perhaps the most well-known attempt is that known as the Radbruch formula. According to Gustav Radbruch, not all law that is formally valid is deserving of the nomenclature law. Some laws, such as some of those promulgated by the National Socialists, are so unjust that people, including judges and other officials, have a positive duty to disobey them. After Germany's defeat in 1945, Radbruch wrote, "Where justice is not even aimed at, where equality is deliberately disavowed in the enactment of a positive law, then the law is not simply 'false law'; it has no claim at all to legal status."

2. NATURAL LAW

Thomas Jefferson wrote in the U.S. Declaration of Independence, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Did Jefferson actually believe that God the Creator had conferred unalienable rights on people? Or did he see himself as the "creator of law" in the sense discussed above under Legal Positivism? If he held the former belief, as every historian agrees, then Jefferson was a natural lawyer.

There are probably more natural law theories than there are theories of legal positivism. Consequently, the discussion below can only sketch a few of the features of some of these theories.

Most natural lawyers would agree with the proposition that immoral law is not law at all. In other words, they would disagree with the "separation thesis" of legal positivism. In doing so, many, if not most, natural lawyers do not emphasize the creation of law; rather, their focus is on people's acceptance of law. If the rule is immoral, it will not be accepted by the population. Although many or even all people might adhere to such a rule, they will not be doing so willingly, but rather out of fear. Inducing people to do something out of fear, according to natural lawyers, is what gangsters and bank robbers do. Consequently, if people comply with a rule—even if they routinely do so—out of fear, then the rule is not a legal rule; rather, it is a threat. No one considers the words "Put your hands up or I'll shoot" to be a legal rule notwithstanding the fact that all people to whom this command is directed would probably obey it, assuming the speaker had a gun. To be a rule of law, according to natural lawyers, any pronouncement must be accepted as legitimate by the population; and to be considered legitimate, the rule must at least satisfy mankind's minimal standards of morality.

Positivists often use the example of the Nuremberg Laws to attack the position of the natural lawyers. Nowadays everyone would agree that the Nuremberg Laws, which deprived Jews in Germany of many fundamental rights, were immoral. Were these laws nevertheless law despite their obvious anti-Semitism and inequality? The natural lawyer might respond in one of three ways. First, he or she might argue that the Nuremberg Laws were not really law because people did not accept them as being legitimate; they only followed the laws out of fear. A second argument might be that the German populace did indeed consider the Nuremberg Laws to be legitimate, but only after they had been brainwashed by anti-Semitic propaganda. Brainwashing is morally equivalent to being forced at gunpoint to do something. Consequently, the Nuremburg Laws were not really law. Third, the natural lawyer might argue that, while the vast majority of Germans welcomed the law, that fact only proves that they too were all gangsters, bank robbers, and outlaws who disregarded mankind's minimal standards of morality.[191] According to all three arguments, the Nuremburg Laws never rose to the level of true law. They were, in effect, mere pronouncements of gangsters.

As can be seen from the second and third arguments in the foregoing paragraph, natural lawyers do not contend that human beings are perfect. However, they do contend that human beings have an innate sense of justice. Only those rules which are compatible with this sense of justice deserve to be called law. Thus, for the natural lawyer, the failure of one nation's ruling elite to ratify a convention protecting the rights of children or women, for example, does not mean that the children and women in that country do not have such rights. It merely means that their rights are being denied them by governmental gangsters.

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[191] Thinking along these lines was the justification for the Nuremburg Trials, which led to the conviction and execution of Germans for waging a war of aggression and for crimes against humanity. *See generally* Telford Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir (1992).

Long identified with religion, especially Roman Catholicism, natural law has enjoyed a resurrection of sorts in recent years as a result of brain studies that suggest that people,[192] and even monkeys,[193] possess an innate sense of justice. Whether this innate sense of justice will support the philosophical precepts of natural law[194] remains to be seen.

3. LEGAL REALISM

Legal realism is sometimes considered to be a school of jurisprudence separate from legal positivism and natural law.[195] Whether or not it is accurate to call legal realism a legal philosophical school is open to serious debate.[196] Nevertheless, legal realism has had a significant impact on legal thinking in the United States and Sweden, making it germane to this comparative study of the jurisprudence of those jurisdictions.

There are two recognized strands of legal realism, demarcated geographically: the American and the Scandinavian. As pointed out by Torben Spaak, both the leading American legal realists and the leading Scandinavian legal realists thought of themselves as trying to paint a realistic picture of the law and of legal phenomena. However, they differed in the choice of their subject of study and also in their philosophical ambitions. Whereas the Americans primarily focused on the study of adjudication, the Scandinavians were more interested in the analysis of fundamental legal concepts.[197] Both groups of legal realists might be described as legal positivists to the extent that they believe that law is created by human beings. However, as will be clear after considering their core beliefs, they do not necessarily accept the positivists' separability thesis.

In general, the following can be said about most legal realists. First, they are rule-skeptics. As such, they stress the inherent indeterminacy of law, no matter how detailed it is laid down. Consequently, they view the choice and application of law as being ultimately subjective in nature. Second, the movement of legal realism employs interdisciplinary approaches to law, notably anthropology, sociology, and economics. According to legal realists, law cannot be understood in

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[192] Daria Knoch et al., *Diminishing Reciprocal Fairness by Disrupting the Right Prefrontal Cortex*, 314 Science 829, 829–32 (2006).

[193] David Whitehouse, *Monkeys Show Sense of Justice* BBC News (Sept. 17, 2003, 6:39 PM), http://news.bbc.co.uk/2/hi/science/nature/3116678.stm.

[194] *See generally* John Rawls, A Theory of Justice 434 (1971).

[195] *See* Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 Ethics 278, 278–301 (2001).

[196] Torben Spaak, *Naturalism in Scandinavian and American Realism: Similarities and Differences*, Uppsala-Minnesota Colloquium: Law, Culture and Values 33 (Mattias Dahlberg ed., 2009). On the definition of schools of jurisprudence *see* Michael S. Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism*, 69 Cornell L. Rev. 988, 988 (1984).

[197] Spaak, *supra* note 196, at 33; *see generally* Alf Ross, Towards a Realistic Jurisprudence: A Criticism of the Dualism in Law (Annie Fausbøll trans., 1946).

an autonomous vacuum: law can only be understood as law in action, and this means paying due attention to law's sociological, political, economic, and even psychological aspects. Third, as a consequence of the second proposition, legal realists advocate empirical approaches to law. The focus of their empiricism, at least in the United States, is often the courtroom, where they analyze case decisions so that they can make accurate predictions about what the law is in practice. For example, one prominent American legal realist, Karl Llewellyn, wrote a book (incidentally in German) summarizing the most important case law of the state of New York so that the reader could glean the prevalent social, economic, and political mores that influence the development of judicial law in that jurisdiction. Finally, legal realists are instrumentalists. They see the practice of law as a political exercise, and they champion (for the most part) progressive approaches to the interpretation of both statute law and case law in order to adjust the law to a rapidly changing society. As such, they are always open to arguments of justice and morality.

The American legal realist movement spawned a number of other movements. The most prominent in the United States is critical legal studies. Even though it is not generally recognized as a school of jurisprudence, the movement has been influential there and in the United Kingdom, and has spawned the related movements of critical race theory, feminist theory, and law and economics.

The critical legal studies movement and the American legal realist movement share much in common. The adherents of the critical legal studies movement agree with the American legal realists that law is to a large extent indeterminate. They also agree that law and politics cannot be separated. Finally, and most critically, members of this movement contend that law is merely a mechanism employed by the wealthy and powerful to protect the status quo and to increase their wealth and power. As pessimistic legal realists, they are quick to admit that much of the law is oppressive, unfair, and even immoral. Consequently, some "crits," as followers of this movement are known, contend that critical legal studies may be thought of as a form of legal positivism.

B. Evaluating the Jurisdictions

The main question to be addressed in this chapter is the following: How do lawyers in the jurisdictions here studied perceive the law in their respective jurisdictions? This question is usually referred to in legal theoretical circles as defining one's concept or conception of law. However, the question is also commonly encountered in conversations about how lawyers think, which is not to be confused with how they reason. (Legal reasoning is discussed in the chapter by that name.) How lawyers perceive the law, either individually or collectively, is, in the author's opinion, a significant component of any legal system, remembering that the term legal system is used in this book to include legal actors.

Before beginning the discussion, it must be said at the very outset that no one can know for sure what conception of law is ascribed to by lawyers in any particular jurisdiction. Perhaps there are as many conceptions as there are lawyers. Perhaps it can never be known. Yet even if every individual lawyer answered differently, would one not expect many of the disagreements to be quite small so that one would find some degree of agreement? And would one not expect to find more agreement among the lawyers of one jurisdiction than among the collective of lawyers of all four jurisdictions here studied?

In order to test this assumption, the author attempts in this chapter to make an educated guess about how lawyers from the various jurisdictions perceive their own law. The main part of the assessment is the personal judgment of the author, based on his observations over the past three decades, as to how lawyers in each jurisdiction think about five features of their legal system. In other words, the author has made educated predictions about which conception of law is dominant in each of the four jurisdictions studied here. To try to make these predictions less subjective, the author sent out identical questionnaires that asked questions about the same five features. The questionnaires were sent to lawyers (mostly law professors) in these jurisdictions. The author's predictions (supported by the answers to the questionnaires) are then plotted on various spectrums to take account of the gradual differences between the lawyers' conceptions of law.

It should be emphasized that there is a wide range of questions regarding legal conceptions that might be explored. Let one question from the author's personal experience, explored indirectly below, serve as an example. A number of English and American lawyers with substantial professional or personal acquaintance with Germany have remarked to the author through the years that German lawyers approach the law differently in one respect: whereas the common lawyer asks, "Does something in the law prohibit a certain activity?" The German lawyer asks, "Does something in the law allow a certain activity?"[198] All of the speakers remarked or implied that this seemed to be a basic difference in the way common lawyers and German lawyers think. More precisely, this would mean that the analysis of the legality of a certain activity has a different default position in Germany than in England, Wales, and the United States. In England, Wales, and the United States it would seem that there is a presumption of lawfulness whereas in Germany there is a presumption of unlawfulness. Following this presumption further means that the common lawyer who fails after reasonable diligence to find a legal prohibition against any activity would likely tell his or her client, "I cannot find any reason in the law why you may not legally undertake this activity." In contrast, the German lawyer who fails after reasonable diligence to find any law permitting the activity would tell the client, "I cannot find any reason in the law allowing you to undertake

[198] *See* James A. Hart and Dieter Schultze-Zeu, U.S. Business and Today's Germany: A Guide for Corporate Executives and Attorneys 64 (1995).

this activity." The implication is that the German lawyer will tend to caution against undertaking an activity in more circumstances than the common lawyer.

Is it true that common lawyers and German lawyers have a different point of departure when judging the legality of planned action? The author has no way of knowing. It might be that all of the anecdotes and observations witnessed by the common lawyers who reported to the author are unrepresentative or unreliable. This is not as unlikely as it sounds. In fact, it is actually quite common for people who have heard an observation from someone else (1) to pass it off unconsciously as their own or (2) to ignore or unconsciously filter out instances that conflict with the observation and accordingly only pay attention to the instances that illustrate the observation.[199]

Nevertheless, the suggestion that German lawyers might tend to be more cautious than common lawyers in circumstances where the law is not clear is intriguing. Assuming it is true, it might mean any number of things. If the culture or mind-set or mentality of German lawyers is to caution against action that is not expressly allowed, one might find that there is more legislation and administrative and judicial materials that focus on regulating new areas of human endeavor, such as telephone and Internet marketing, financial instruments, and vehicles with unconventional power sources. One might also find fewer German businesses involved in cutting-edge but legally questionable transactions. Both of these predictions assume, of course, that the intensity of legal consulting and the adherence to legal advice are the same in Germany, England, Wales, and the United States. But this need not be true. It might be the case, for example, that Germans seek advice more, or that they ignore advice more.

This would be an interesting topic to investigate by accumulating data from interviews, surveys, and statistics. However, like all such empirical research, including the surveys discussed below, the results will not rise to the level of scientific proof because there is no way to design and conduct a convincing experiment to test the thesis. Nevertheless, the research might offer insights on how to design legislative and other strategies to educate the public and perhaps harmonize the way advice is articulated.

The material collated in the questionnaires corresponds to the following five questions with polar positions which were posed in the questionnaire: (1) do lawyers in their jurisdiction see law as totally autonomous, or do they see it as interdisciplinary; (2) do they consider their law to be complete or incomplete; (3) do they consider it to be easy to determine which law to apply, or do they consider their law to be basically indeterminable; (4) does their legal system favor legal certainty, or is it more likely to sacrifice legal certainty in favor of doing individual justice; (5) do they consider their law to be intrinsically amoral, or do they think that morality supersedes law? The lawyers' answers to these questions provide

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[199] *See generally* Christopher Chabris and Daniel Simons, The Invisible Gorilla: And Other Ways Our Intuitions Deceive Us (2010).

particles of evidence as to how the lawyers in each jurisdiction perceive their legal system. In other words, their answers, and the observations of the author, provide particularized evidence from which we can extrapolate conclusions as to the conceptions of law in the respective jurisdictions.

The author decided to conduct the surveys because he too has observed differences in how lawyers from Germany, Sweden, England, and the United States think, that is, how they perceive their law. The author has also slowly become aware of how his own perceptions affect his study and teaching. The questions were in part designed to shed light on whether any lawyers deserve the epithet positivist. As described above, a legal positivist is one who believes that law is content-neutral: if properly enacted or otherwise legitimated, it is law regardless of content. Question 5, regarding morality, was designed to probe a potential difference between Germany and the supposedly more natural-law oriented common law world, represented here by England and the United States. *Positivist* is, however, also sometimes used dismissively to refer to what Oliver Wendell Holmes, Jr. in 1897 called "the black-letter man . . . of the present."[200] While Holmes was not suggesting that the black-letter man conceived of law as being content-neutral, he was stating that the black-letter man had no need for economics, which would likely mean that the black-letter man considered the law to be as being autonomous. The purpose of Question 1 was to try to ascertain which lawyers have the narrowest view of the law in this regard. Question 2 was inspired by the remarks, referred to above, that German lawyers ask, "Is this activity permitted?" This approach, if true, might imply that they assume that everything of a legal nature is regulated in their country, meaning that they would likely agree with the thesis in Question 2. The two remaining questions target the perceived certainty of the law. All of the various aspects and features that enhance or detract from legal certainty cannot be examined in any questionnaire, much less a questionnaire with only five questions. Consequently the author limited the questionnaire to the ease of finding the law (Question 3) and to one troublesome aspect of the inflexibility that comes with legal certainty: a loss of the ability to make exceptions with an attendant loss of individual justice.

To help in this extrapolation and comparison, the answers and observations will be plotted along five spectrums consisting of five theses and five antitheses. The plotting of any jurisdiction was determined, as stated above, on the basis of the author's observations alongside the ratings of the lawyers participating in the survey on a scale from 1 to 5, with 1 meaning "total agreement with the thesis," and 5 meaning "total agreement with the antithesis." For example, to judge whether lawyers believe that the law in their jurisdiction is readily determinable, they were asked to rate their jurisdiction on the basis of the following thesis and antithesis:

Thesis: as to any particular factual situation, there is one and only one applicable norm; it is possible in every case to identify this norm with absolute certainty.

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[200] Oliver Wendell Holmes, The Path of the Law 457 (1897).

Antithesis: one can never be certain which norm to apply to any particular factual situation, or even know if there is such a norm; deciding which norm to apply is totally arbitrary.

In addition to the responses from the surveys, the author has fashioned predictions about a hypothetical legal system that might totally conform to the individual thesis under discussion, and another hypothetical legal system that might totally conform to its antithesis. These predictions are not meant to be exhaustive; nor are the predictions intended to describe the practice in any particular jurisdiction. Rather, they are offered as additional features to assist in ascertaining and comparing how lawyers in various jurisdictions perceive their own law and legal systems.

Perhaps it should be pointed out that the questions for the questionnaire were selected by the author, and that the author's observations do not necessarily comport with those of the respondents to the survey. (Where this is the case it will be noted in the text.) One explanation for this is that it is difficult for all of us to describe what we believe in; and some people seem to be better at doing this than others. Another explanation is that people might perceive their law in the same way, but describe their perception differently. This second problem is exacerbated by the problem of translation, discussed in the chapter on comparative legal linguistics. Finally, these five theses are of a general nature, leaving much room for interpretation. Indeed, sometimes the answers varied widely among lawyers from the same jurisdiction.

After the jurisdictions have been analyzed, plotted, and compared in this manner, the discussion will ask whether, and to what extent, the conception of law of each jurisdiction might be described in terms of three general theories of law: natural law, legal positivism, and legal realism. Finally, observations will be made about the relevance of the answers for future Europeanization and globalization.

The theses and antitheses chosen by the author for this study are as follows:

I. Autonomous versus interdisciplinary
   - Thesis I: law is a discipline unto itself; no outside influences can or should be tolerated.
   - Antithesis I: law is inseparable from politics, economics, psychology, religion, and other influences on everyday life; consequently, these other influences must be considered in every application of the law.

II. Complete versus incomplete
   - Thesis II: law is perfectly complete in and of itself; there is no reason for judges and others to fill lacuna as there are not any; everything of a legal nature is regulated.
   - Antithesis II: the legal system has more gaps than it does law; judges have to make up the law as they go along; very little if anything is regulated by law.

III. Determinable versus indeterminable
- Thesis III: as to any particular factual situation there is one then only one applicable norm; it is possible in every case to identify this norm with absolute certainty.
- Antithesis III: one can never be certain which norm to apply, or even know if there is such a norm; determining which norm to apply is totally arbitrary.

IV. Predictability of the law versus individual justice
- Thesis IV: it is absolutely essential that the application of law be predictable; exceptions cannot be tolerated.
- Antithesis IV: individual justice must be maintained at all costs; exceptions must be made whenever necessary to reach a just result.

V. Formality versus morality
- Thesis V: in a democratic state, all law is by definition moral; law must not be second-guessed by those who believe they are above the law.
- Antithesis V: law without morality is an affront to humanity; no one may shirk his moral responsibility by resorting to legal arguments.

1. IS LAW AUTONOMOUS OR INTERDISCIPLINARY?

If law is autonomous, then it is a discipline unto itself. It might even be a science unto itself, much in the same way that the science of mathematics can be seen as separate and distinct from the science of chemistry.[201] Leaving aside the question of whether or not law is understood to be a science in this sense of the word, if law is understood to be totally autonomous, then it must be seen as something distinct from politics, economics, psychology, religion, and other disciplines.[202]

A conception of law that perceives law as being autonomous, if it is dominant in any particular jurisdiction, might be predicted to produce a number of characteristics in the way that law is learned and applied.

In a hypothetical jurisdiction with an extreme conception of legal autonomy, one might expect that legal education would be hostile to foreign concepts and terminology. One might expect that, to become a lawyer, one would only be required to study law, and not other subjects. One might also expect to find no foreign-trained lawyers teaching at universities and law schools in such a jurisdiction.

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[201] Lewis Kornhauser uses the term *normative autonomy* to describe this claim. Kornhauser, *supra* note 159, at 747. *See also* Richard O. Lempert, *The Autonomy of Law: Two Visions Compared*, *in* Autopoietic Law: A New Approach to Law and Society 152 (Gunther Teubner, ed., 1988).

[202] Lempert and Sanders define autonomy as the "ability of a legal system to act independently of other sources of power and authority in social life." Richard O. Lempert and Joseph Sanders, An Invitation to Law and Social Science: Deserts, Disputes and Distribution 401 (1986).

Further, one might expect that students and academics do not study or conduct research outside their jurisdiction and their field of law.

Turning to the way in which law is applied, in this hypothetical jurisdiction, one might expect to find that those applying the law (which in this discussion includes those who interpret the law) limit their search to the field of law for solutions to legal problems. In other words, the legal system is closed to all outside influences. The following characteristics might be expected of lawyers who consider their legal system to be so closed. First, they might be expected to attach more importance to legal texts than lawyers at the other end of the spectrum (discussed in the following paragraph). They might be expected to be more formalistic in their approach to the law. They might also be expected to assist their legal system in remaining autonomous by extending those rules that are seen as politically neutral, to cover new situations rather than to require litigants to go through the political process of amending or creating statutes in order to redress grievances. By the same token, one might predict that lawyers in such a closed jurisdiction would fill perceived gaps in the law by applying existing legal norms by analogy. The reasoning would be that judges would be applying the existing legal rule in a bureaucratically judicial, and consequently politically neutral, manner.

At the other end of the hypothetical spectrum one would expect to find a jurisdiction of people with a nebulous conception of law. This nebulous conception of law might well include politics, economics, psychology, religion, etc., on the basis that law cannot, according to these people, be disentangled from other aspects of society. This interdisciplinary conception of law would probably be accompanied and recognizable by some of the following characteristics in the way law is taught and applied.

In teaching the law, those who hold an interdisciplinary conception of law would more likely be open to foreign concepts and terminology and to study subjects in addition to law. One might expect them to hire foreign-trained academics and to study abroad. When it comes to applying the law, they might be expected to look outside it, for example, to politics and economics, to assist them in applying it. One might expect such lawyers to construe legal texts in a more general fashion in a style which might be described as substantive rather than formalistic. One might expect these lawyers to be able to generate rules spontaneously, even from outside their existing legal systems, because the frontiers of their legal systems are fluid. As a result of this inherent flexibility, and their willingness to import norms from other disciplines, one might also expect lawyers with an interdisciplinary conception of the law to avoid applying statutes by analogy, as this would be unnecessary.

In the following discussion, each of the four jurisdictions under study here—Germany, Sweden, England and Wales, and the United States—will be described in a general fashion based on the eight pairs of predictions, four of which concern how lawyers learn the law, and four of which concern how they apply it. At the conclusion of each description, the jurisdiction will be rated on a scale of 1 to 5 on whether it is seen as totally autonomous (1) or interdisciplinary (5). Finally, this rating will be compared with the ratings of those who responded to the survey for that jurisdiction.

a. Germany

So far as acceptance of foreign concepts and terminology is concerned, Germany imports very little non-German terminology, although German law does occasionally incorporate foreign legal institutions. If one pages through a leading German law dictionary such as *Creifelds Rechtswörterbuch*, one would have difficulty finding words that are not of German, or sometimes Latin, origin. The letter *c* is a good place to look since words from a Germanic origin do not begin with this letter. And, indeed, one finds *carry back*, *carry forward*, *Car-sharing*, *Cashflow*, *Copyright*, and *Corporate Governance* along with a couple of French terms (for example, *Corps diplomatique* and *Courtage*) and a large number of Latin terms. A number of these terms, such as *Car-sharing* and *Cashflow*, would probably not even qualify as legal terms. In short, there are very few legal terms beginning with the letter *c*. Other foreign, non-Latin legal terms include *Franchisevertrag* (franchising contract), *Leasingvertrag*, *Fonds*, *Depotgeschäft* (investment portfolio management), and *Boykott*. The area of law in which one finds the most foreign words is, predictably, public international law. Here one finds, for example, *ordre public*. However, even in this area, foreign terminology is extremely rare.

When foreign legal concepts or institutions are adopted into German law, the general practice is to translate foreign terms into German. Consequently, it is often difficult to trace legal transplants into German law.[203]

In Germany, it is very unusual for law students to study a subject other than law. There are no economics professors, for example, in German law faculties, although law and economics courses are sometimes offered as an elective. Interdisciplinary research is rare, although it is being encouraged by the government and increasing substantially, for example in areas such as medical ethics and in religion and the law. There are almost no foreign academics in German law faculties, and the few that exist almost all exclusively teach their own foreign law and/or international law. Studying abroad is quite common for German law students. Although there are no reliable national statistics for lawyers, the recent history at the author's university, the University of Münster, shows that about 10% of law students spend at least one semester studying law at a foreign university, and that about 5% (many of whom are the same as in the original 10%) obtain a foreign law degree, usually an English-language LLM. It is also quite common for university law professors to have studied abroad and to spend a sabbatical at a foreign university.

In terms of the application of law, it is uncommon for German lawyers to look outside the law for answers to legal questions. Economic arguments rarely feature in judicial decisions in Germany. Arguments to policy are also rare, and arguments that are considered political in nature are frowned upon.[204] In applying

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[203] Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 BYU L. Rev. 1813, 1813 (2009).

[204] *See generally* Kristoffel Grechenig and Martin Gelter, *The Transatlantic Divergence in the Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 Hastings Int'l & Comp. L. Rev.

the law, German lawyers lean heavily on legal texts. There is great emphasis placed on the legal terms in a statute, and legal reasoning often strikes an outsider as formalistic in that it appears that the person is not being forthright in identifying the real reasons for construing the statute in the way chosen. One can also observe a marked tendency to apply statutes by analogy. This is a phenomenon seldom seen in England, Wales, and the United States where judges can fall back on common law (in the sense of judge-made law) in deciding cases which fall outside the language of existing statute law. While one might criticize the use of statutes by analogy as an intrusion on the province of the legislature, this criticism could also be directed against judges in England and the United States who sometimes choose to chisel and mould common law doctrines rather than await action by their legislatures. The striking difference in Germany, which will be examined more thoroughly in the chapter on statutory interpretation, is that German judges apparently feel obliged to employ a statute from another area of law by analogy and that, in justifying their decisions to do so, they do not resort to political, economic, policy, or other arguments; they limit their arguments to those arguments generally accepted as legal. The impression they give is that the application of the law to the new factual situation is a neutral, nonpolitical process.

A similar phenomenon in Germany can be seen in the so-called teleological interpretation of statutes. As will be discussed in more detail in the chapter on statutory interpretation, this style of statutory construction is resorted to when the facts as presented to the court do not fit neatly into the text of any available statute. When applying this method of statutory interpretation, judges are, by definition, going beyond the text of the statute in order to apply it to factual situations which in many or most cases were not contemplated by the drafters of the legislation. It is striking to an outsider who examines examples of teleological interpretation that German judges almost always avoid including policy arguments in their justifications for extending the statute; rather, they simply announce that the application of the statute to the case at bench is indicated by resort to the purposes which the statute was intended to serve. In doing so, they avoid reciting policy and other arguments and thereby give the impression that they see the law as autonomous from politics, policy, and other human concerns.

The discussion above has considered eight different criteria which were used to judge whether German lawyers perceive their legal system as being totally autonomous from other disciplines such as politics, policy, and religion, or whether they consider it to be totally interdisciplinary. On a scale of 1 to 5, with 1 meaning totally autonomous and 5 meaning totally interdisciplinary, the author would rate Germany at 2; in other words, very near to belief in complete autonomy.

This rate is basically consistent with the results of an informal survey conducted by the author of German legal philosophers at the 42 law faculties in

295, 302 (2008); Christian Kirchner, *The Difficult Reception of Law and Economics in Germany*, 11 Int'l Rev. L. & Econ. 277, 285 (1991).

Germany. By email, the author asked the members to give their personal opinion on how the average German lawyer, whether working in practice, in academia, or in the judiciary, perceives the autonomy of law in Germany. Of the respondents, 90% rated Germany at levels 1 and 2; the remainder at level 3.

b. The United States of America

The following discussion will employ for the United States the same criteria that were used to rate the autonomy of German, Swedish, and English law, as understood by lawyers in these jurisdictions. Given the size of its population, the United States is probably less homogeneous than, for example, Sweden is. While this makes rating the United States more difficult, difficulty alone cannot justify failing to try to assess where, on the spectrum from (1) totally autonomous to (5) totally interdisciplinary, American lawyers perceive their legal system.

American legal language is not very open to foreign legal concepts and terminology. This holds true even for states like California that have a marital property law, known as community property, that is traceable to Mexican law. Among the American states (that is, excluding Puerto Rico and the territories), the only state's law that contains substantial non-English, non-Latin vocabulary is Louisiana, whose Civil Code was fashioned after the French *Code civil*. Perusing *Black's Law Dictionary*, one finds a very large number of non-English, non-Latin foreign words, but these are almost all words from Law French, which merely reflects the historical fact that English law for centuries was described predominantly in the French language; but the law was English, not French. Of course, most of the legal terms in the United States come from English law and in this sense, American lawyers are more English than English lawyers, because English lawyers use more French terms from European law and other sources. Thus, one does not find the expression *traveaux préparatoires* in *Black's Law Dictionary* even though this is the accepted English term for the use of legislative history by the courts.[205] As one might expect, there are many Latin terms; but there are very few German and Swedish terms, to name just two foreign jurisdictions. Owing to the fact that section 2-302 of the Uniform Commercial Code was inspired by the concepts of *Treu und Glauben* in German law, one might expect to find these German terms in the dictionary, but they are not there.

Unlike the other jurisdictions covered in this book, the United States is unique in requiring almost all lawyers to have studied a subject other than law before becoming a lawyer. This requirement of American law schools is quite new from a historical perspective. The American Bar Association started requiring three years of college as a condition of law school accreditation in 1952. By the 1960s, a four-year college degree had become the norm at almost all U.S. law schools. Before then, lawyers were not required to study any subject other than law in the United States, although many did so.

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[205] Lawyers in the United States employ the term almost exclusively in the context of treaties.

Foreign-trained academics are quite common in American law schools. However, unlike their counterparts in Germany and in Sweden, they are almost exclusively foreigners. A review by the author of the teaching faculties of dozens of American law schools suggests that it is uncommon for American-trained faculty members to have studied law in a foreign country. In addition, for those who have studied in a foreign country, the countries most favored seem to be the United Kingdom and Ireland. Nevertheless, there appears to be a significant number of academics at American law schools who obtained nearly all of their legal training abroad, perhaps obtaining an LLM in an English-speaking country before beginning teaching and researching in the United States. In contrast to Germany, one finds these academics teaching traditional American law subjects in addition to international law, comparative law, and other subjects where foreign legal training is not ordinarily perceived as a disadvantage. One other phenomenon that is even more pronounced in England and Wales is the number of foreign academics from common law jurisdictions in American law schools. Judging from his review of homepages, and from the author's personal observations over the past decades, these academics seem to be entrusted with teaching all traditional common law subjects and do not tend to teach exclusively foreign subjects, such as European law.

One striking development in American academia in the last decades is the number of American law professors who have a degree in another subject. Preferred subjects tend to be history and economics, but one also finds substantial numbers of law professors with degrees, including doctorates, in medicine, English, and philosophy. This is a development which is seldom seen in the other jurisdictions studied, and suggests very strongly that those in charge of the curricula at American law schools do not perceive their law as autonomous but rather as interdisciplinary.

As far as studying abroad is concerned, from the author's observations over the past decades, it is quite unusual for American law students to study abroad. Indeed, if they do study abroad, it is usually in a program offered by an American law school, such as the University of San Diego, which teaches law courses in foreign venues. Nevertheless, many of the courses offered in such programs are international or foreign in their focus. The percentage of students involved in these programs is small, and their exposure to foreign law is fairly negligible.

Turning to the application of law in the United States, and in contrast to the impression created by the interdisciplinary composition of the teaching staff at American law schools, it is generally quite uncommon to look outside the law for assistance in deciding legal issues. However, in the last few decades, economics has been resorted to, to some extent, at least in court decisions involving business transactions. In addition, one should not underestimate the influence of public policy arguments, whether they proceed from politics, sociology, economics, or other disciplines. As might be expected, this phenomenon is more observable in that kind of judge-made law which develops beyond statutes, but it is also seen

in statutory and constitutional interpretation. Indeed the Brandeis brief,[206] which addresses the social and political ramifications of a proposed court decision, is generally described in very positive tones in the United States; but it is unknown and probably unthinkable in the other jurisdictions studied here.

As will be discussed in the chapter on statutory interpretation, American judges appear to be less concerned with the text of statutes (and probably of contracts) than the judges in the other jurisdictions here studied. The courts in California are known for expansively constructing some legislation, and for ignoring other statutes that they consider to be outdated. Some of the provisions of the California Civil Code, for example, have been judicially construed almost beyond recognition, or even ignored. While many people condemn this practice as judicial activism, others defend it with the argument that the Civil Code, which was enacted in 1872, was in effect a snapshot of the common law as it existed in the 19th century and that no one, least of all the California Legislature, intended that it would bind judges to the strict words of the text regardless of what were to transpire in the decades after its enactment. Indeed, the Civil Code itself in section 4 states: "The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

Of course, California may not in this respect be representative of legal practice elsewhere in the United States. However, one does find that courts in a number of American states have developed, for example, nonstatutory remedies for injuries caused by defective products and for emotional injuries caused by egregious acts. Such developments are, of course, consistent with the tradition of law-making associated with the common law tradition. However, in contrast to German courts, which have developed similar remedies in these and similar areas, the courts in the United States employ policy and other arguments which German judges would dismiss as being nonlegal. It is therefore because of both the common law tradition and the fact that law is seen as interdisciplinary and political that American judges do not ordinarily resort to analogies from statutes when developing the law.

To help in assessing whether American lawyers perceive of their legal system as being autonomous and, if not, how interdisciplinary they consider it to be, the author sent the same questionnaire to the members of the American section of the International Association for Philosophy of Law and Social Philosophy that was sent to the members of the German, Swedish, and British sections. The answers of these members coincide generally with the impression of the author, which is that, if any of the jurisdictions in the study deserves to be rated 5 on a scale of interdisciplinarity, it is the United States.

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[206] A form of appellate brief which includes an analysis of the economic and social impacts of a decision.

c. Sweden

As a country of only nine million inhabitants, one might expect Sweden to be more open to foreign concepts and terminology than the other countries examined here. Indeed, that seems to be the case, at least from the author's observations. This observation, however, is difficult to justify. For example, the Swedish legal dictionary *Juridikens termer*[207] and others do not contain a significant number of foreign legal terms. One does, however, find a number of legal words borrowed directly from English. The English word *law* incidentally is not included in these words, as it descends from the Old Norse word *lag*. English legal terms which have found their way into this law dictionary include the following: *check*, *vandalism*, *accept*, *copyright*, *holdingbolag* (holding company), *franchising*, and *negotiabel*. One finds also, as would be expected, words from French and Latin origin. It should be added that many of the Swedish legal terms are quite similar to their German equivalents. While the German and Swedish languages are quite closely related, the similarities could also be due to the fact that, for many decades, it was popular for would-be academics in Sweden to finish off their legal educations by studying in Germany.

Law students in Sweden, as do law students in Germany and England and Wales, only study law, and not other subjects. Almost all Swedish law professors received their basic legal training in Sweden, but there are often academics on Swedish law faculties from non-Swedish backgrounds. There are also a substantial number of foreign academics teaching law at Swedish universities. Sometimes, as is to be expected, they specialize in international, comparative, and European law. However, it is also fairly common to find foreign academics teaching traditional Swedish law courses. It does not appear to be particularly common for Swedish law students to study abroad. However, as can be seen from the profiles on their homepages, Swedish academics very often have spent time studying, researching, and even teaching at foreign universities.[208]

When it comes to applying the law, Swedish judges seem receptive to economic analysis and policy arguments. They tend to show respect for legal texts, particularly statutes. Their respect extends to legislative documents, to which they will turn when construing statutes for which legislative history is available. When it comes to statutory interpretation, which is discussed in more detail in a later chapter, Swedish judges are not known to stretch the meanings of words as much as their German counterparts. One reason is probably that Swedish judges can, if necessary, have recourse to judge-made law. Finally, and somewhat contradictorily, Swedish judges do occasionally apply statutes by analogy, which might suggest that they see their legal system as basically autonomous.

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[207] Sture Bergström et al., Juridikens termer (9th ed. 2002).

[208] *See generally* Anthony R. Welch, The Professoriate: Profile of a Profession (2005), and sources cited.

As with the other jurisdictions in this study, the author sent out questionnaires by email to members of the Swedish section of the International Association for Philosophy of Law and Social Philosophy. While the number of responses was not great, the responses received generally corroborate the author's judgment; on a scale of 1 to 5, with 1 meaning totally autonomous and 5 meaning totally interdisciplinary, Swedish lawyers see themselves in the middle, that is, at 3.

d. England and Wales

Employing the same criteria for England and Wales as were used for the other jurisdictions here studied, it appears that this jurisdiction is most open to foreign concepts, in particular in the field of European law. The United Kingdom has implemented a great number of measures from the European Union in addition to adopting the European Convention on Human Rights into domestic law. While most English law students study only law at university, many of the courses are quite policy-oriented, rather than strictly legal. In their tutorials and other examinations, English students are often expected to discuss the social, political, and other ramifications of law, regardless of the source. One finds quite a large percentage of foreign-trained academics in England and Wales, probably the highest percentage in any of the four jurisdictions here studied. While many of them come from common law jurisdictions, perhaps the greater number come from other European countries, which of course also includes Ireland. It is also quite common to have foreign academics teach traditional English legal subjects. From the author's review of the websites of various law departments in England and Wales, and from his personal observations, it does not seem very common for English-trained academics to have studied abroad, much less to have obtained a foreign law degree. Advanced degrees in other disciplines, like economics and history, are also rare.

Nor are English and Welsh law students known for their willingness to study law at foreign universities. In the Europe-wide Erasmus-Socrates Programme, British law students travel much more rarely to Germany and Sweden than German and Swedish law students travel to the United Kingdom. For example, while 4,340 German and law students traveled to the United Kingdom in 2008–2009, only 1972 students from the United Kingdom traveled to either Germany or Sweden in the same time period.[209]

In the application of law, British academics are known worldwide for their empirical research, which commonly involves interdisciplinary study. While English judges are known for their textual approach to statutory interpretation (see the chapter on statutory interpretation), the judgments of the higher courts, especially those applying the common (judge-made) law, are replete with policy arguments that in some cases reveal the personal preferences of the judges.

[209] ANNEX02SM – Outgoing and Incoming Erasmus Student Mobility in 2008/2009 http://ec.europa.eu/education/erasmus/doc/stat/table109.pdf.

German observers are struck by the willingness of English judges to stray beyond the narrow confines of the law, at least as the law is understood by Germans. Thus Tony Weir, in a brilliant monograph defending the English legal tradition of orality, took a German professor to task for criticizing Lord Denning for making favorable remarks about cricket in a judgment. Lord Denning's remarks, including "In summertime village cricket is the delight of everyone," were "malicious (*Bosheiten*)," according to the professor. Weir asked rhetorically, "Would it be better if Lord Denning had concealed his views under depersonalized language?"[210] As is consistent with the common law tradition, the most senior members of British the judiciary do sometimes develop their own legal rules when necessary to do justice in any particular case. The neighbour principle of *Donoghue v. Stevenson*[211] is one example. As might be expected, applying statutes by analogy is practically unheard of in England for the simple reason that to do so is unnecessary.

In order to help locate England and Wales on the autonomous-versus-interdisciplinary spectrum, the author conducted the same email survey used in Germany, Sweden, and the United States. The results of this survey generally support the author's opinion that England and Wales deserve a score of 4, meaning that only one jurisdiction—the United States—might be considered to be more interdisciplinary in its understanding of law. Sweden, it will be remembered, scored 3 on the scale, and Germany 2, meaning that Germans are most likely to view their law as autonomous from other disciplines, including politics. This finding will be particularly relevant when discussing the question inherent in Thesis V: is morality a necessary component of law?

2. IS LAW COMPLETE OR INCOMPLETE?

If the first pair of theses and antitheses presented above—autonomous versus interdisciplinary—might be thought of as how wide lawyers in any particular jurisdiction perceive their law to be, then the question presented in this part might be thought of as how deep they perceive their law to be. Is law in their jurisdiction perceived to be perfectly complete in and of itself, or are there gaps in the law that need to be filled? Is everything of a legal nature already regulated in the legal system, or are most things left unregulated?

In terms of learning the law, if the first thesis is true, that is, that the legal system is complete, then those who apply (or interpret) the law need not add to or subtract from it; for the answer to every legal question can be found in the law, assuming one knows where to look for it. If law is perceived as being complete, then one might expect to find various characteristics which might include the features identified in the following paragraph on how one learns the law and how one applies it.

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[210] Weir, *supra* note 154, at 19.

[211] *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L).

If law is seen as being complete, then it is conceivable that people, especially well-trained judges, may be able to master the entire law. Therefore one might expect to find long periods being devoted to the study of law so that substantial numbers of lawyers might learn it in its completeness. If law is complete, one might expect students to spend most of their time and effort in learning the law, rather than in practicing how to apply it, because one cannot be expected to apply law until one can find and define it properly. If law is perceived as complete, one might expect the curriculum to be standardized; for every lawyer should be expected to know all of the basics. Finally, if law is considered to be complete, one might expect to find an educational system that places great emphasis on teaching students to find the right legal rule to apply.

When it comes to applying the law, one might expect to find the following characteristics in a legal system that considers its law to be totally complete. First, one would see little reason to look outside the law for assistance in applying the law. (See discussion above on whether the law is autonomous.) In a legal system that is complete, we might expect to find great respect for legal texts, and that these will be few in number; for it is only in authoritative texts that one can be sure to have found the proper legal rule, and the existence of many authoritative texts would be an oxymoron in such a hypothetical legal system. If law is seen as being complete, one might expect judges and jurists to extend the law or to apply it by analogy to those few cases in which they find that the law is not quite complete; in other words, one might expect judges to complete imperfect law to reach the desired perfection. While this last prediction might seem circular to some, it is quite possible that jurists who regard their law as complete will believe that, by extending the law slightly, they are not themselves really extending the law, much less making it; for the law must by definition hold an answer to all legal questions. One might say that they see themselves as discovering the law in its completeness, not making it.[212]

If, on the other hand, law is thought of as basically incomplete, that is, as a "work in progress," then one might expect to find all or some of the following characteristics in how the law is learned and applied. Students would not be required to study law for very long because there would not be much law for them to learn. Students might need to fill their time at university by practicing how to apply the law, especially the application of broader principles, because these will have to be resorted to more often; and, when they get into practice, students will be involved in working on the "law in progress." If law in a particular jurisdiction is viewed as incomplete, then one might expect to find that only very few courses would be prescribed in law school, or perhaps that all courses would be elective in nature. In studying law, one might expect that students would learn that, at least in many cases, there is no "right" rule to apply, so that they would have to fall

[212] This thinking prevailed for centuries in the common law, and is still prevalent. *See e.g.*, Fletcher, *supra* note 92, at 686 (recognizing this thinking in Dworkin's jurisprudence).

back on a "default list" of general principles and notions like "reasonable," "just," or "equitable."

Further, if law in any jurisdiction is seen as being incomplete, one might expect to find certain characteristics in the application of the law. For example, there would probably be no stigma attached to looking for solutions to legal problems outside the law. In fact, such a system might even welcome these incursions. (See the discussion above on whether law is perceived to be autonomous or interdisciplinary.) In applying the law, legal texts might be regarded with less respect because they would be vague and incomplete; one could not be sure that these texts contain the proper law. If lawyers perceive their legal system as incomplete, they might well feel the need to extend rules to fit new factual situations; or, on the other hand, they might use policy and other arguments to decide legal issues rather than having to resort to the "legalistic" use of statutory analogies.

Beginning with Germany, the following discussion will look at each of the jurisdictions here studied and will try to assess whether lawyers in that jurisdiction perceive their law as being (1) totally complete at the one extreme or (2) hopelessly incomplete at the other. As might be predicted, all of the jurisdictions will land somewhere between these two extremes.

a. Germany

Of the jurisdictions here studied, Germany has the longest formal training period for lawyers. The university training typically takes four years. Thereafter candidates have to complete two years of practical training supervised by the courts. Even though they receive a nominal salary during their years of practical training, and even though they are able to make court appearances on their own, they are not entitled to practice law on their own until they have passed two examinations, one following their university studies and the other following their practical training.

Both in their studies at university and particularly during their practical training, there is great emphasis on learning the black-letter law and on learning to apply the law to a great number of cases. Until recently, the curriculum was very standardized. However, it was recently relaxed to allow students to specialize for one year at university. During both university studies and during their practical training, there is also great emphasis placed on finding the right law and on applying it correctly. The legal instruction at university and during their practical training, in other words, assumes that there is a right answer to most, if not to all, legal questions.

In applying the law, German judges and jurists have little need to look outside the law for inspiration. (See the discussion above on the autonomy of law.) There is great respect for legal texts, both statutes and commentaries. German courts, as described in the chapter on statutory construction, are likely to extend laws by interpreting them in a teleological fashion. They are also willing to apply statutes by analogy, which extends them even further. Both phenomena suggest that they

are convinced (or that they are trying to show) that they are merely doing the will of the legislature on a matter where the legislature failed to express its will clearly, that the law (in the sense of the expressed will of the legislature) is complete, even in those areas in which they find gaps.

On a scale of 1 to 5, with 1 meaning that the legal system is perfectly complete and 5 meaning that it is hopelessly incomplete, the author would place Germany at 3, meaning that most German lawyers perceive their legal system as being quite deep. This rating is corroborated by the responses to the survey mentioned above.

b. The United States of America

Of the jurisdictions here studied, the United States has either the shortest period of academic study of law or the longest, depending on whether one considers the law student's first university degree to be part of his or her legal training. The vast majority of law students do not have a specifically law-related bachelor's degree, although many of them have a degree in political science, which is certainly relevant to constitutional law, and some of them have a degree in pre-law studies. Although they are not required to do so, most students take a bar review course before sitting the bar examination. These courses typically have a duration of two months.

At law school in the United States, much emphasis is placed on applying the law in an activity often described as "thinking like a lawyer." In general, this means learning to be an advocate. The professional training offered at law schools also tends to teach skills that are necessary for an advocate rather than for a judge or academic. This is particularly true of the moot court practice classes. In these and other classes, the emphasis is not on finding the proper law, but rather on applying the law to a factual situation that may be decided in more than one fashion. In other words, students are taught that there is not always a right answer to every legal issue. While finding the applicable law is an important part of their education, instruction often involves hypothetical factual patterns in which one or more legal rules might provide the rule of decision. In such an environment, new and creative arguments, including policy-oriented arguments, are accorded much respect.

The first-year courses at most law schools are prescribed, but students are generally free to choose the courses they study in the second and third years. Most students tend to take courses on subjects that are also subjects on the bar examination in the state in which they hope to practice. Even though this custom does, in effect, lead to some standardization, academic legal training of lawyers in the United States is probably the least standardized of the four jurisdictions here studied.

In applying the law, there is no stigma in the United States in looking for guidance outside of what has traditionally been considered as the frontiers of the law. (See the discussion above on autonomy of the law.) Legal texts are not entitled to the same respect in the United States as they are, for example, in Germany. Neither

is it common to extend statutes to factual systems that lie substantially beyond the text of the statute. While statutes are not applied by analogy, there are frequent appeals to notions such as reason, equity, and fairness.

These and other factors suggest to the author that most American lawyers do not view their legal system as being particularly complete. The email survey that was conducted essentially supports this observation. Consequently the United States will be given a score of 4 on a scale of completeness (1) versus incompleteness (5).

c. Sweden

As described in the chapter on lawyers, advocates and judges in Sweden have a relatively long period of study. Much of that study is devoted to the application of the law, and the instruction at university is more policy-oriented than is the case in Germany. The academic curriculum is standardized, leaving little room for specialization. From conversations with law students and professors, it seems that there is considerable emphasis on reaching the right result. In this respect, at least, legal instruction in Sweden tends to resemble German instruction more than American.

In applying the law, Swedish judges often go outside the law. While they do have great respect for texts, they appear to be looking for a personal approach while applying the law. This pattern is also suggested by their readiness to consider legislative history. While they seem to show some flexibility in extending statutes, the author's impression is that Swedish judges are more textual than teleological in their approach to statutory interpretation. While they do apply some statutes by analogy, the practice of doing so is not widespread.

Considering all of these factors, and having polled various individuals as well as the members of the International Association for Philosophy of Law and Social Philosophy in Sweden, the author would place Sweden at roughly 3 on a scale of completeness (1) versus incompleteness (5).

d. England and Wales

England and Wales generally require a minimum of three years of university law studies before one can enroll on a one-year legal practice or bar vocational course. The instruction at both university and on the professional courses places much emphasis on applying the law. In doing so, the approach seems to be more policy-oriented than the legal instruction in Germany. (See the discussion above on autonomy.) The curriculum is standardized, at least in the legal practice and bar vocational courses, and there is considerable emphasis on finding the right result. In this respect, at least, the instruction in England and Wales seems to resemble that in Germany more than in the United States.

In applying the law, it is quite common for higher courts to find inspiration outside the law; but this is very unusual in daily legal practice before the lower courts. English lawyers display great respect for legal texts, particularly statutes.

As discussed in more detail in the chapter on the interpretation of statutes, English courts tend to read statutes literally lest those lawyers be seen as usurping the law-making power of parliament. By the same token, it is unusual for English courts to extend the law teleologically or purposively; purposive interpretation is reserved for European law. (See chapter on statutory interpretation.) Finally, as mentioned above, it is basically unheard of to apply statutes by analogy in England and Wales; courts do not need to do so because they can always fall back on the common law if necessary.

The author conducted an email study in the United Kingdom among members of the British section of the International Association for Philosophy of Law and Social Philosophy as well as various lecturers in jurisprudence. The responses received by the author tend to support placing England at the level 2 on a scale of whether they perceive their law as being totally complete (1) versus hopelessly incomplete (5).

3. DETERMINABLE VERSUS INDETERMINABLE

Thesis III: as to any particular factual situation there is one and only one applicable norm; it is possible in every case to identify this norm with absolute certainty.

Antithesis III: one can never be certain which norm to apply, or even know if there is such a norm; the decision as to which norm to apply is totally arbitrary.

The first two pairs of propositions—autonomy and completeness of the law—concerned the contours of the law as it is understood in the jurisdictions under study. As was stated above, the question of law's autonomy can be thought of as how wide the law is perceived to be in a particular jurisdiction, while the question of completeness can be thought of as the depth of the law in that particular jurisdiction. The present discussion does not concern the contours of the law but rather one of its qualities, that is, its determinability.

The autonomy (width) and completeness (depth) can also, of course, influence the determinability of law. When the discipline of law is understood to be narrow, then there will be a smaller field in which to conduct a search for the applicable rule or rules. On the other hand, if the law is considered to be deep, then more "spade work" will be required to find the applicable rule. This being said, the answers to the author's email surveys show that lawyers in the jurisdictions here studied do have an opinion on how determinable the law of their jurisdiction is. And the surveys also show that these opinions vary depending on jurisdiction.

If jurists in any particular jurisdiction believe that their law is readily determinable, one might expect to find the following characteristics in that jurisdiction's approach to the study and application of law. First, in the context of studying law in such a jurisdiction, one might expect that students would be taught that there are very few sources of the law; for if the law of the particular jurisdiction recognizes more sources, there must also be a rule which regulates which sources to consult and in which order, and what to do in the case of disagreement; all this

will create another level of indeterminacy and new chances for error. In a jurisdiction whose lawyers believe their law to be readily determinable, if that jurisdiction recognizes more than one source of law, one might expect to find clear hierarchies within the various sources of law. In such a jurisdiction, one would expect students to be taught that the law has some permanence; for if the law changes rapidly, the lawyer will have more difficulty keeping up with changes in the law. In such a jurisdiction one might also expect to find reliable, accurate, and up-to-date secondary literature, such as encyclopedias and commentaries. In such a jurisdiction one might expect that lawyers would be taught that there is only one right rule to apply to any factual situation.

In a jurisdiction which believes its law to be readily determinable, one might also expect certain features in the application of law. For example, one might expect that the jurisdiction favors the textual interpretation of legal rules because this approach would leave less room for interpretation and consequently raise the expected level of predictability. One might expect lawyers in such a jurisdiction to stress deduction, which is considered to be the most reliable and therefore the most predictable method of interpretation. In a jurisdiction in which jurists believe that their law is readily determinable, one might expect them to apply the law mechanically, mathematically, or formalistically. Finally, in such a jurisdiction one might expect lawyers to reject all emotionality; for emotionality is intrinsically personal and subjective and therefore unpredictable.

In the discussion that follows, each of the jurisdictions here studied will be examined to see to what extent they comply with the author's predictions regarding hypothetical jurisdictions whose lawyers, on the one hand, perceive their laws to be readily determinable and those, on the other hand, whose lawyers consider their jurisdiction's laws to be indeterminable.

a. Germany

Traditionally, German law students have been taught that there are only two sources of law: statute law and customary law. Many people have criticized the inclusion of customary law, but it is resorted to so frequently, especially in commercial law, that it is hard to ignore this phenomenon without calling it a source of law in its own right. It follows that the next question then arises: who is it that determines whether any particular custom should be given the force of law? The answer, of course, is that judges are usually the ones called upon to make this determination. The inclusion of custom as a source of law might be seen as elevating judges to the level of legislators. This view of the role of judges in recognizing custom prompts some German scholars to consider judge-made law to be a third source of law (in addition to statutory law and custom). Another reason for including judge-made law as a source of law in its own right is that a number of areas of German law consist almost entirely of judge-made law: the law regarding industrial disputes is one such example. For these and other reasons, most German theorists today consider judge-made law to be a source of law. However, what theorists write and what

students and lawyers believe are two different things. From the author's experience in teaching legal theory in Germany, most German students do not consider judge-made law to be a source of law.

German jurists, including both law students and law graduates, perceive law in terms of a strict hierarchy of norms, beginning with the basic human rights of the Basic Law, the German constitution, and then descending down through, for example, statute law, regulations, ordinances, custom, and judge-made law.

It is also the case that Germans believe that their law has a certain permanence. Indeed permanence is one of the fundamental ideas behind a continental European codification. A continental codification is thought to contain ideal legal institutions and structures with lasting if not everlasting qualities. The author is reminded of a lecture given by one professorial candidate who insisted that the integrity of the German Civil Code, the *Bürgerliches Gesetzbuch*, was of such supreme importance that the code itself should never be amended. The author was also struck by the responses from practitioners when provisions of the *Bürgerliches Gesetzbuch* regarding the law of obligations were amended in 2003. These amendments were necessary in part to bring the text into conformity with European law and the judicial construction of the law. In other words, many of the amendments merely codified the law as it was already being applied by the courts. German academics produced a great number of popular articles criticizing the amendments on various grounds, including the argument that the amendments violated the integrity of the *Bürgerliches Gesetzbuch*. It is believed that these reactions indicate a basic conviction on behalf of German jurists that their law has a distinctly enduring quality.

Finally, in studying law, one is taught in Germany that there is only one right rule to apply to any particular factual situation. This is a very striking phenomenon to an outsider who is used to a legal culture which looks favorably on novel approaches. This phenomenon also causes difficulties in teaching American constitutional law to German students who are schooled in the one-right-rule school of legal thinking. Many students are shocked to learn, for example, that many prominent cases can be properly decided either under the equal protection clause, which protects certain discrete groups, or under the due process clause, which protects fundamental constitutional rights.

In applying the law in Germany, the belief that there is only one right rule contributes to the phenomenon in which German lawyers describe the search for the right rule as a deductive process. This search for the one applicable rule—the *Normsuche* in German—resembles the search for the applicable rule or rules in any other jurisdiction. One starts with a factual situation and a context, such as criminal law, and looks for similar factual situations. (See the chapter on legal reasoning.) Having found these, one examines commentaries and court decisions to find which rules have been used in similar cases. According to the author's research, neither Swedish, English, nor American academics describe the initial *Normsuche* analysis as being a deductive process, yet the process is often described

as deductive in Germany. Of course, having identified one or more rules of possible application, one applies each one deductively to the factual situation at hand to see if the application of the rule provides a justifiable result. This second process is referred to as deduction in all four of the jurisdictions studied.

In testing the application of the rule or rules that one has found, German students are taught to use the syllogism. The syllogism necessarily forces the student to focus on the terminology of the rule. Consequently, the application of the rule to the facts has a certain formalistic quality, most evident when German jurists apply statements of the law that they have found in commentaries. Rather than describing these statements as statements of the law, it is more accurate to call them restatements of the law; for, in commenting on the law, the commentators are in effect fleshing it out to make its application easier. This is achieved by extracting the holdings (or ratios) from leading case decisions and inserting these into their commentaries. These holdings necessarily include various factual components in the form of words that the one applying the law in Germany will apply more or less formalistically to the facts of the case at hand by using the syllogism. In other words, this style of application of the law is very fact-oriented, terminological, and formalistic, qualities that correspond closely to what most people consider to be a literal or textual interpretation of statutes. Yet in this situation, the person is not applying a statute but rather a reinstatement or concretization of the statute that has been lifted from a leading commentary.

In Germany there is usually one leading commentary in most fields which will always be consulted if more than one commentary is consulted. This, of course, also adds to the perceived determinability of German law. Finally, German jurists unanimously reject appeals to emotion: they prefer to perceive their activity as being scientific in the sense of being mathematical and devoid of emotion.

Adding all of these factors together, it seems to the author that most German jurists consider their law to be readily determinable. This impression of the author is also supported by the responses to the email survey. Consequently, Germany is rated level 2 on a scale of readily determinable (1) versus wholly indeterminable (5). This is consistent with the results of the email survey mentioned above.

b. The United States of America

Lawyers in the United States perceive their law as having various sources. As will be discussed below in the last section on morality and law, most American lawyers probably would recognize morality as a distinct source of law; and practically all of them consider morality to be an indispensable aspect of law. This makes the organization of law into hierarchies extremely difficult. This is not to say that American lawyers believe that, for example, state statutory law is superior to state or federal constitutional law; rather, they recognize that constitutional and statute law are the results of human endeavors, that the interpretation of law is personal in nature, and that, in many cases, what the law "is" at any point is largely attributable to who is charged with deciding what the law is. This perception of the law and

legal process is undoubtedly largely due to the influence of the legal realist school of thought, discussed at the outset of this chapter.

While American lawyers probably believe that there are certain unchanging legal principles, they also perceive law to be evolving rather than static. The California Civil Code can serve as an example. In contrast to the German Civil Code, the *Bürgerliches Gesetzbuch*, the California Civil Code was never regarded as having any particular permanence. In a series of articles published shortly after the enactment of the California Civil Code, a professor from the University of California, Berkeley, suggested that the provisions of the California Civil Code should be seen as snapshots of the common law as it was understood when the Code was drafted. Lawyers and judges were not bound by the literal provisions of the Civil Code as this would interfere with the natural and necessary evolution of the common law.[213]

While there are secondary legal sources in the United States, particularly encyclopedias, treatises, and practice books, these usually do little more than collect the relevant cases from the courts of one state or from any number of states, place them in a comparative context, and occasionally suggest how they might be extended to novel factual situations. Even the leading works by Williston, Corbin, White and Summers, and Witkin (for California) seldom possess the authority of German commentaries. This is due to a number of reasons, some of which are discussed in the chapter on the use of precedents. One reason of particular importance to the present discussion is the fact that, unlike in Germany, there are very few decisions of higher courts in the United States and therefore the commentators have very little judicial material with which to flesh out their commentaries. Further, the United States only has a centralized court for federal law (including federal constitutional law); and federal law has very little if any application to substantive criminal[214] and civil (private) law, including contract, tort, family, real property, and most other areas of law, with the result that it is the highest court of the particular state that is the final court to which one can appeal. The substantive law in these traditional areas of state jurisdiction also varies, sometimes substantially. As a consequence, the decisions of the courts of one state often have no relevance at all to the statutory or decisional law of another state. In Germany, by contrast, private law and criminal law, as well as almost all other areas of statute law, are federal and not state (*Land*) law, and the federal courts are the final arbiters on the meaning of this law. Consequently, the decisions of all of the courts in all of

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[213] Arvo Van Alstyne, Civil Code: Official California Civil Code Classification (1954); Maurice E. Harrison, *The First Half Century of the California Civil Code*, 10 Calif. L. Rev. 185, 185 (1922).

[214] The law of criminal procedure, and to a much lesser extent substantive criminal law, has been largely federalized by decisions of the federal courts based on the Fourth, Fifth, and Sixth Amendments to the US Constitution. These rulings are applicable to the states, in almost all cases, through the doctrine of selective incorporation.

the states (*Länder*) have direct relevance to the law of all the other states because, unlike in the United States, all the courts are literally applying the same law.

Finally, when it comes to teaching law, students in the United States are usually taught that there may be any number of rules, including rules from morality and from other sources, which might conceivably apply to hypothetical cases that professors discuss with their students. In the author's experience, new lawyers in the United States, having just left law school, tend to believe during their first few years of practice that many if not most factual situations are amenable to solution according to any number of rules. The reason for this is undoubtedly the style of teaching and examination that law schools use. In both arenas students are often presented with cases which have not yet been resolved or for which there are any number of "right" answers.

Once these lawyers have been in practice for a number of years, they come to realize that law is much more determinable than they thought as students; but they do not seem to abandon their core belief that law is more dependent on who is deciding the case than on what "the law" actually states. In other words, they tend to believe that the literal wording of statutes, contracts, and other instruments is just a starting point for analysis and argument, rather than being directly operative in itself. Consequently, deduction is not used very often in legal discourse in the United States; if the word *deduction* is used, often it is used dismissively to describe the opposing party's naive attempt to cloud the issue by suggesting that it is amenable to pure logical resolution. Indeed, anyone who suggested that the applicable law can be determined by mathematical processes would probably be subjected to open ridicule.

Having considered all of these features, the author suspects that most lawyers in the United States perceive their law as being essentially indeterminable in that it depends on interpretation. Consequently, the author would rate the United States at 4 on a scale of 1 for readily determinable and 5 for completely indeterminable.

c. England and Wales

Unlike their counterparts in the United States, English law students are given an introductory course on the English legal system, and they are taught that there are various sources of law which are generally three in number: statute, case law, and custom. This is, of course, in part due to the understanding of the constitutional role of parliament as the supreme lawgiver. Even today, British judges are not entitled to find that an individual's rights as protected by the European Convention on Human Rights have been violated by statute; rather, the judge is obligated by law to apply the law as written, but may make a declaration of incompatibility with the convention, and this declaration will at some point be addressed by a committee of parliament.

While parliamentary law can be amended, even retroactively, at any time, judge-made law is seen as being slowed in its development by the doctrine of *stare decisis*. According to the British understanding of this doctrine, only the judges of

the Supreme Court of the United Kingdom may overrule their previous decisions, and this they do very infrequently. The Court of Appeal (the most superior court in the United Kingdom after the Supreme Court), by contrast, is expected to stand by its former decisions until they are either overruled by the Supreme Court or changed by statute.

In terms of secondary literature, *Halsbury's Laws of England* is a popular tool for finding relevant case law. However, it is the case law that will be considered by the lawyer or cited to the court and not what the author in the commentary has said about the case. Sometimes the authors of *Halsbury's* will look to other jurisdictions, generally other common law jurisdictions, to supplement their writings. In such cases, one might indeed cite *Halsbury's* to a court, at least to give due credit to the author for having found a potentially persuasive precedent. The citation to *Halsbury's* may be entitled to more persuasive force if the particular chapter was written by a prominent jurist, particularly by a prominent judge.

English law students tend to be taught that there is one right rule for application to any particular factual situation. From conversations with English lawyers, this seems especially to be the case on the legal practice course, which is the course which prepares one to become a solicitor.

When it comes to applying the law, it is the author's impression that English lawyers are less likely than German lawyers to believe that there is one right rule for every case. Nevertheless, at least in the field of contract law, English lawyers are virtually unanimous in their opinion that English contract law is the most readily determinable law in the world. Lord Falconer of Thoroton, the Lord Chancellor of the United Kingdom in 2005, remarked, "[T]he English common law of contract . . . provides predictability of outcome, legal certainty, and fairness. It is clear and built upon well-founded principles, such as the ability to require exact performance and the absence of any general duty of good faith."[215]

When it comes to statutory interpretation, which is examined in more detail in the chapter devoted to that topic, English judges tend to be quite literal in their application of statutes, thus increasing the potential determinability of statute law. This appears to be less true when it comes to the application of rules from case decisions. As discussed in the chapter on legal precedents, English lawyers tend to apply a historical method to the interpretation of case decisions.

In the author's experience, English lawyers do not use the word "deduction" very often, nor do they pride themselves in being scientific, mathematical, or excessively logical. On the contrary, they seem to regard themselves as people who are open to serving individual justice in any particular case. (See the discussion on this topic below.) This impression is supported by the results of the email survey conducted by the author.

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[215] Opening Speech for European Contract Law Conference (Sept. 26, 2005), http://www.dca.gov.uk/speeches/2005/lc150905.htm.

After considering all of the above factors, the author would place England and Wales at level 2 on a scale of 1 for readily determinable and 5 for completely indeterminable. In other words, the English perceive their law as being determinable in the vast majority of cases.

d. Sweden

In university classes and textbooks, Swedish law students are taught that the sources of law are not to be understood as being in a hierarchical structure. Rather, the sources are meant to cooperate rather than to compete.[216] Swedish students are encouraged to rely on secondary literature, but especially upon legal doctrine and case law, which suggests a belief in the determinability of law. From conversations with students and professors, it is the author's impression that Swedish lawyers generally believe that there is only one proper rule to apply to any particular factual situation, even though they may not be taught this explicitly.

When it comes to applying the law, great attention is paid to the particular factual situation in which the legal question or questions arise. This suggests that Swedish lawyers and judges do not apply the law formalistically; rather, they give the impression of trying to reach a just, rather than a legalistic, resolution to any given factual conflict. In their judicial decisions and legal writing, Swedish lawyers do not appear to place particular emphasis on deductive or logical methodologies, nor do they rely with any frequency on the syllogism. On the other hand, emotionalism in the law is frowned upon.

Considering all of these factors, as well as the results of the email survey, the author would rate Sweden at level 3 on a scale of 1 for readily determinable and at level 5 for indeterminable law.

4. PREDICTABILITY OF THE LAW VERSUS INDIVIDUAL JUSTICE

Once the applicable rule or rules have been found, how certain is it that the lawyer will apply them correctly? This is, of course, a separate task from finding the rule (*Normsuche*), but there is at least one fundamental principle that unites both tasks: namely, predictability in the law.

How important is the value of legal certainty or predictability in any particular jurisdiction? If the value placed on legal predictability is very high, then predictability must necessarily come at some cost to another element or feature of the legal system at hand. Opponents of predictability would say that it comes at the cost of individual justice. While it is of course possible to think of other antitheses, the following discussion will try to judge how the lawyers of the four jurisdictions studied here perceive their legal system when it comes to balancing predictability (1) with individual justice (5).

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[216] Sandström, Marie, *The Swedish Model: Three Aspects of Legal Methodology*, *in* Liber Amicorum Csaba Varga 475–84 (P. Takacs et al., ed., 2008).

Thesis IV: it is absolutely essential that the application of law be predictable; exceptions cannot be tolerated.

Antithesis IV: individual justice must be maintained at all costs; exceptions must be made whenever necessary to reach a just result.

If legal predictability deserves the highest protection in any hypothetical legal system, one might find that lawyers in that jurisdiction share a number of basic assumptions about certainty in the application of norms. The existence of these shared assumptions might be traced back to the legal instruction in their respective jurisdictions. If the lawyers of a certain jurisdiction share these assumptions, then one might well find certain features in common about how they go about applying their law.

If lawyers perceive their law as being predictable in its application, one might expect to find that their education stresses that there is only one right answer to every legal question. One might also expect that the legal education places great emphasis on learning to apply the law correctly. One might also expect that the instruction places emphasis on scientific methods such as deduction or even mathematics. Further, one might expect that a legal system that places a high value on predictability would exclude from consideration any arguments that are not strictly legal (see the discussion on autonomy in law). Finally, in teaching the law in such a legal system, one would expect to find little tolerance for failing to come to the right answer. Law students who cannot find the correct answer to at least the most common legal situations should not pass their examinations and be permitted to progress further with their legal careers.

In a legal system that places a high value on certainty in the application of the law, one would expect to find up-to-date secondary literature such as encyclopedias and commentaries that provide numerous concrete examples; for certainty can be increased if the person applying the law is given a greater number of concrete applications with which to compare the case at hand. One might also expect to find in such a jurisdiction that legal rules are applied quite literally if not formalistically; and one might expect that they would use detailed restatements of rules from secondary sources. As in the preceding section, in a jurisdiction which values certainty in the application of the law, one would expect lawyers to perceive their task as being scientific, logical, mathematical, or even mechanical, and most definitely not emotional.

On the other hand, if individual justice deserves high protection in a hypothetical jurisdiction, one might expect to find the following features in the teaching and practice of law. In terms of education, one would expect the education to stress a rainbow of right answers, and to teach students to be advocates who will examine every case from all angles. One might expect the legal education to encourage creative thinking, or so-called thinking outside the box. One might also expect the legal education in such a jurisdiction to emphasize other fields of study such as economics, sociology, psychology, and politics. Finally, one might expect that the legal education would pay attention to exceptional cases, to the intricacies in the law, and to doing justice in the individual case even when it is difficult to fit the "just answer" into the applicable law.

When it comes to applying the law in a jurisdiction that values individual justice over certainty, one might expect secondary authorities to be less helpful. More useful would be broad, principal-based arguments, and arguments based on venerable authorities. One might expect to find that statutes are considered to be mere guidelines rather than dispositive statements of the law. The interpretation of statutes in such a jurisdiction might well be based on policy in addition to being based on any other factors such as those mentioned above in the section regarding the autonomy of the law. One might also expect to find that lawyers accept the proposition that thinking is only disguised emotion. The legal motto of such a jurisdiction might be "Follow your heart."

a. Germany

The discussion here for Germany and for the other jurisdictions generally follows the discussion above under III: determinable versus indeterminable. As stated there, legal instruction in Germany does indeed stress that there is only one right answer, at least for criminal law and much of private law. However, this is much less the case for public law. Students who study law at a university in Germany literally study legal science (*Rechtswissenschaft*), and there is much in the education which stresses the scientific nature of the discipline. As examined in the first part above (autonomy of the law), German legal theorists, although not all German jurists, often regard the law as being autonomous from other disciplines. This autonomy helps limit the range of arguments considered acceptable to German legal discourse and accordingly can be seen as tending to make German law more certain in its application. Finally, when it comes to German legal instruction, there is a tendency not to allow exceptions to legal rules; for if one were to do so, one would be violating the principle of equality in addition to playing havoc with predictability in the law.

In the context of the application of law in Germany, Germany has reliable, accurate, and up-to-date secondary materials. And while German courts do not limit themselves to the texts of statutes, there is a marked tendency to apply the rules found in commentaries in a literal fashion. Deduction and the syllogism pervade German education and even practice. Appeals to emotion are derided as sentimental.

In estimating how most German jurists perceive their legal system when it comes to predictability of the law versus individual justice, the author would place Germany near the extreme end of the scale: Germany would rate a 2 for legal predictability on a scale of 1 for legal predictability through 5 for individual justice. The respondents to the email survey mentioned above disagree somewhat they rated the thinking of German lawyers in this regard closer to 3 than to 2.

b. The United States of America

The instruction at American law schools, in contrast to the instruction at German universities, stresses that there may be many or even no right answer to any legal question. Creative thinking, pushing the envelope, and influencing judicial policymaking are viewed positively, as is the importation of facts and ideas from

other disciplines. The Brandeis brief, which attempts to bring learning from many sources to bear on the legal question at hand, is well-respected, at least among law professors. Finally, in American legal education, it is common to use arguments from equity and morality.

In applying the law, secondary authorities are accorded much less weight than case law in the United States. While statutes take precedence over the common law, all judges at all levels of the state and federal courts in the United States are invested with the power to declare statutes unconstitutional, although that power is not exercised very frequently. Perhaps for this same reason, there is at least a tendency to view statutes as mere guidelines. It is quite common to employ policy arguments when construing statutes. Such arguments are directed at applying statutes beyond their literal terms; and in making these arguments, lawyers will include political, economic, social, and other considerations to influence the court to construe the statute in the desired direction. Emotion definitely plays a subordinate role in juridical argumentation; but nevertheless, as the author was told by the dean of his law school during first-year orientation, "As young lawyers you must learn to run your gut through your head."

When considering these and other factors, the author would place the United States at level 4 on a scale of 1 (legal predictability) to 5 (individual justice). The responses to the email survey generally support this placement.

c. England and Wales

English legal instruction, particularly on the legal practice course, does place considerable emphasis on learning how to apply the law correctly; but it probably places more emphasis on learning the law itself. The methodology of applying the law is not considered to be scientific in any way, although there is some suggestion of a mathematical quality in the application of rules to facts. As noted above under autonomy, English legal instruction is open to other fields; and English lawyers and judges do describe themselves as being willing to make some exceptions in order to do justice in the individual case.

Secondary literature is important in England and Wales, but it is mostly used to find the applicable statute or case law. The method of statutory interpretation tends to be quite literal, at least compared to the other jurisdictions here studied. Although legal reasoning is not considered to be mathematical, there is considerable stress placed on logic and being reasonable in legal reasoning. Emotion is tolerated, but only when directed towards juries, where it cannot be avoided.

Considering these and other factors, the author would place England at level 4 on a scale of 1 (legal predictability) to 5 (individual justice). This placement is also generally consistent with the responses received from the author's email survey.

d. Sweden

With respect to legal studies in Sweden, there seems to be more emphasis on learning and knowing the law than on the application of law to the facts. Swedes

do refer to their law departments as being scientific, terminology that was borrowed from Germany. However, unlike in Germany, Swedish jurists are quite willing to consider facts and arguments from disciplines other than law. The author's impression is that Swedish lawyers, while placing great emphasis on the facts of individual cases, see themselves as sticklers in applying the law; if they tolerated exceptions, they would violate notions of equality.

Secondary materials play an important role in the application of the law in Sweden. Concerning the construction of statutes, it seems that judges are willing to go beyond a literal reading of the statute if this is justified by the circumstances. As noted above in the section on determinability, Swedish jurists do not often use the terminology of deduction and subsumption, but they do value unemotional applications of the law.

Considering the above and the results of the informal email survey, the author would place Sweden at level 3, suggesting that Swedish jurists see their jurisdiction as protecting legal predictability and individual justice equally.

5. FORMALITY VERSUS MORALITY

If law can be thought of as being autonomous from physics, chemistry, and other subjects, then it is conceivable that law is also autonomous from morality. If one takes an extreme view of the autonomous nature of law, the law might be understood to be autonomous even from subjects that most people would consider to be clearly and closely related to law, such as economics, politics, and sociology. In this school of thinking, morality might well play a part in these related subjects as it plays a constitutive part in the creation of law; but the law that is thus created—law "as such" or law "in essence" or law "properly so called"—is law whether or not it is moral. Said another way, while law is the instrument of legislators, and one hopes that legislators will employ this instrument for moral purposes, this will not always be the case; yet the law they create will be law nevertheless in any case, for law is content-neutral. According to Kelsen, "Law can have any content one chooses."[217]

The following discussion addresses to what extent the four jurisdictions here studied—Germany, Sweden, England, and the United States—agree with the following thesis and antithesis:

Thesis V: in a democratic state, all law is by definition moral; law must not be second-guessed by those who believe they are above the law.

Antithesis V: law without morality is an affront to humanity; no one may shirk his moral responsibility by resorting to legal arguments.

If jurists in any particular jurisdiction understand the law in accordance with Thesis V, then one might expect to find certain features in the way law is taught

[217] Hans Kelsen, Reine Rechtslehre. Mit einem Anhang: Das Problem der Gerechtigkeit 201 (2d ed. 1960).

and practiced. One might expect the following: that moral theories of justice would not be taught and that the word *morality* might not even be mentioned, at least in mainstream courses. One might expect to find great emphasis on formalistic, legalistic approaches to the law, as these can be seen to be neutral on morality. One might expect that the legal education would avoid morally or politically charged debates and concentrate on settled law. Further, one might expect that students would be taught that judges cannot, or at least should not, make law; for doing so would violate their role in applying law in a morally neutral manner.

When it comes to the practice and application of the law, one might find the following features in a jurisdiction which perceives law as belonging to a realm beyond morality: one might expect not to find moral arguments being made to justify how the law should be applied in any particular case. By the same token one might expect to find that emotional arguments are considered taboo because emotions belong in the political, lawmaking chambers of parliament, not in the politically and morally neutral halls of justice. For the same reason one might expect to see judges extending the reach of legislation quite generously. As mentioned in the sections above, extending statutes can give the impression that judges are acting neutrally.[218] Finally, one might expect to find that judges apply statutes by analogy to unregulated fields of human endeavor because this too can be seen as formal and policy-neutral rather than as political and moral law-making.

At the other end of the spectrum, one might find a jurisdiction that holds that while some laws may be amoral, that is, morally neutral, any law which is morally reprehensible is not law at all. In a jurisdiction whose lawyers believe that morally reprehensible norms are not law at all, one might expect to find that moral theories of justice would form an integral part of the legal education of every student. One might expect to find substantive, policy-oriented, even legislative approaches to law being taught. One might expect to find morally and politically charged debates going on in seminars, with less emphasis on settled law. One might expect to find that students are taught that judges as well as legislators make law.

When it comes to the practice and application of the law, one might expect to find one or more of several features in a jurisdiction which considers that the day-to-day practice of law goes hand-in-hand with living a moral life. One might expect to find moral or equitable arguments being used to justify the application or nonapplication of law to specific facts. One might expect that emotional pleas would occasionally find acceptance. One might expect to see judges construing statutes as they see fit in line with moral values. One might also expect judges to engage openly in judicial law making beyond statutory frontiers.

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[218] The contrary position, which is set out in the paragraph which follows, is that judges in such cases are in fact engaging in judicial law-making; and law-making by its nature cannot be politically neutral.

a. Germany

Concerning the teaching of law in Germany, moral theories of law are generally avoided. Even the subject of jurisprudence is split in Germany between legal philosophy and legal theory, and it is generally only in legal philosophy that one will hear a discussion of the moral theories of various legal philosophers. Indeed, there is some sentiment among legal scholars in Germany that theories of morality should be taught in the philosophy department and not in the law department because they are not legal in nature but rather intrinsically political and, of course, moral. Because these classes are not mandatory, if law students do not take a class in legal philosophy or legal theory, it is likely that the only legal philosopher they know will be Radbruch, who was a positivist (see the discussion of Radbruch below).

As has been mentioned above, legal instruction in Germany tends to be formalistic and legalistic as opposed to being substantive and policy-oriented. The discussion of statutes and their application concentrates on the terms of the statute (conceptualism) with little or no discussion as to whether the statute is right or wrong from any standpoint that is external to (what is perceived to be) the law. Moral topics are avoided in lectures as being political. One does find them being made, however, in international law and to a considerably lesser extent in lectures on constitutional law. Yet in both fields the word "morality" is not likely to be used; rather, the same ideas are usually expressed in terms of ethical values or human rights. Students learn that judges should not make law. The usual reason for this admonition is that doing so would violate the doctrine of separation of powers. In this context it is also pointed out that judges are institutionally ill-equipped to legislate in any democratic sense. Another reason offered is that the objectivity and neutrality of judges would suffer if they were put in the position of having to make law.

In legal practice, such as in the argumentation and justification of judicial decisions, moral arguments as such are almost never found in Germany. The sole exception seems to be the use of the Radbruch Formula, quoted below; and here the discussion is restricted to the few cases in which this formula has been invoked by the highest courts of the Federal Republic of Germany. Appeals to emotion are not to be found: emotional arguments are considered sentimental and unscientific. German judges tend to be generous with statutory construction and with applying statutes by analogy. Both of these activities might be seen as ways of obscuring the law-making activity of judges behind a veil of legalistic reasoning.

Considering these and other factors, one might be tempted to place Germany at Kelsen's end of the spectrum, that is, level 1. That rating would certainly be consistent with the 2 that German lawyers scored above on the question of the autonomy of law (Question 1). Further, almost all of the students in the author's classes rate their own thinking on the question of morality (Question 5) at level 1. This all suggests that the vast majority of German lawyers would agree with the following thesis: law can have any content one chooses; law must not be second-guessed by those who believe they are above the law. However, the responses of the

legal philosophers at the law faculties polled by email by the author tell a different story. Their answers to Question 5 break down roughly as follows: 1 (10%), 2 (20%), 3 (20%), 4 (60%), and 5 (0%). If the German legal philosophers are right in their assessment of the attitudes of German lawyers, then German lawyers share a belief that law is very strongly autonomous until questions of morality arise.

b. The United States of America

At American law schools, justice theories are taught, but they are not central to the curriculum. On the other hand, equity is commonly mentioned, and appeals to equity are common. Law-teaching in the United States aspires to be relevant to social issues, but this is only the case in some classes. In most first-year law courses, for example, this is not the case. Rather, one finds discussions of social issues for the most part confined to classes on constitutional law and international human rights law. In all subjects there is much emphasis on judge-made law, whether common law or statutory construction; and political arguments are used to defend and to criticize judicial developments in both of these areas.

In applying the law, one finds both moral and equitable arguments, but policy-oriented arguments are much more common. Indeed they are routinely employed by the appellate courts. One example is *Escola v. Coco-Cola Bottling Company*.[219] Another case, also from California, is *Sindell v. Abbott Laboratories*.[220] Both cases discuss risk-spreading and other considerations ordinarily heard in the political arena, not in the courtroom. Emotional pleas, while tolerated, are seen as a sign of weakness in one's case. Lawyers are sometimes taught: "If you have the law on your side, pound on the law; if you have the facts on your side, pound on the facts; if you have neither, pound on the table." American judges tend to be fairly generous in construing statutes, and they are known in some states, particularly in California, for developing the common law beyond the statute law, as in the case of product liability.

Considering these and other factors and the answers to the informal survey conducted by the author, the author rates the United States at level 5: "law without morality is an affront to humanity."

c. England and Wales

In England, moral theories are not foundational to the legal education. Even though Joseph Raz and H. L. A. Hart are popular, they seem to be popular because they are positivists. Whereas equitable arguments in American law schools can be very popular, in England, equity is mostly used in the sense of equitable remedies. While politics are indeed a part of the legal curriculum in England, they are discussed as attributes of democratic government, not as part of the province of the courts, which for the most part are viewed as apolitical. Students are taught that,

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[219] Escola v. Coco-Cola Bottling Co. of Fresno, 150 P.2d 436 (1944).

[220] *E.g.,* Sindell v. Abbott Laboratories, 607 P.2d 924 (1980) (imposing market share liability).

while judges do make law, they do so incrementally and under the (usually tacit) supervision of parliament. The doctrine of *stare decisis* also is seen as a laudable means of diminishing the political (and therefore moral) role of the courts.

When it comes to the application of the law, moral arguments are sometimes used before the highest courts. Appeals to emotion are discouraged because they are perceived to indicate weakness in the party's case, or a total lack of arguments that appeal to reason. English courts are not generous with statutory construction; rather they apply statutes quite literally. In developing the common law, they seldom employ arguments to morality. Further, as mentioned above, the development of the common law is seen as evolutionary and incremental in addition to being constrained by the doctrine of *stare decisis*. Consequently, morality need not play a role.

All things considered, including the informal email survey conducted by the author, he would place England and Wales at level 2, meaning that English lawyers for the most part see their legal system as having an existence independent of morality.

d. Sweden

One consequence of the legal realism movement in Scandinavia, discussed at the outset of this chapter, is an emphasis on individual responsibility. Due to this emphasis, and because the approach to law is more substantive than legalistic, one finds policy-oriented teaching and writing at Swedish universities, particularly in the realm of international law, which is a required course. Jurisprudence, which includes coverage of morality and law, is also a required course at some universities, such as Uppsala. While judges are seen as neutral and subservient to the legislature, Swedish judges also develop their own law in areas not covered by legislation.

As in Germany and England, moral arguments are seldom used in legal decisions, and appeals to emotion are rare or nonexistent. While statutory construction is quite narrow, at least when compared to Germany, Swedish judges can fall back on judge-made law where necessary to do justice in the individual case.

Considering these and other features as well as the result of the informal email survey conducted by the author, the author would place Sweden at level 3 on a scale from 1 through 5 with 5 being "law without morality is an affront to humanity."

Summary

As stated at the outset of this chapter, the five questions that were discussed above are by no means intended to be an all-encompassing litmus test for establishing how lawyers in these four jurisdictions perceive their law. Rather, the questions were chosen because the author suspected that the answers to the questions would vary among the four jurisdictions studied. The responses have shown this prediction to have been accurate on the whole.

As will be reiterated below, the reader should remember that neither the answers of the respondents nor the observations of the author were geared toward ascertaining just how complete the law in any jurisdiction is. Rather, this study has attempted merely to discern the perceptions of lawyers in each of the jurisdictions. The author will now attempt to evaluate the above observations and conclusions, beginning with the middle questions (2–4) before turning to questions 1 and 5.

There were only marginal differences between the jurisdictions on the subject matter of the second question, which asked whether they see their law as completely covering every area that is regulated or, on the other hand, whether there are gaps in the law. While the respondents in Germany tended to rate their law as fairly complete and all-encompassing, those in Sweden, England, and the United States rated their law as being perceived to be quite incomplete. The differences between the latter three jurisdictions are negligible according to the responses to the survey. The author's impression, which is not necessarily supported by the responses, is that Swedish lawyers see their law as somewhat more all-encompassing than lawyers in England and Wales and in the United States.

The third question asked about the probability of identifying the correct rule to apply to any particular set of facts. Here again, the German respondents were the most confident in their ability to identify the correct law, while the Americans were the most pessimistic. The author suspects that the difference is to a large extent attributable to the lingering effects of rule skepticism of the legal realist movement which swept through the United States and Sweden during the last century. This is discussed in more detail below.

The fourth question sought to probe how predictable the respondents in the various jurisdictions view their law to be. In other words, the question focuses on the application of law to the particular facts at hand. The underlying notion is this: a general willingness to make exceptions from rules in order to afford justice in an individual case comes at a cost, and that cost manifests itself in a loss of legal certainty. Once again, Germany is placed at the higher end of the spectrum by claiming to adhere more strictly to rules. The responses in the other jurisdictions surveyed—England and Wales, Sweden, and the United States—gave more credence to doing individual justice.

The starkest disagreement was found in the answers to questions 1 and 5, especially to question 1. As the reader will recall, question 1 asked whether lawyers perceive their law as autonomous or, on the other hand, whether they consider it to be interdisciplinary. Question 5 asked if a law is still law regardless of its content or whether, on the other hand, immoral law cannot be law. All of the Germans who responded to question 1 of the questionnaire rated their law at levels 1 and 2 meaning that law is understood in Germany as being something separate and distinct from politics. To describe this belief in another way: even though law was created by people to strike a balance between political and other values, the law that was thereby created is politically neutral. If one conceives of law in this way, one would be tempted to view the application of the law as a more or less mechanical

exercise. In fact, many Germans do indeed view their judiciary as apolitical and consequently politically independent because the process of applying the law does not necessarily involve the consideration of policy on the part of the judges: the judge in applying and interpreting the law is acting in a politically neutral way because the policy judgments are already contained in the statutory norms.

This view of the law is apparent in Germany from the manner in which judges draft their judgments. The almost total absence of policy arguments in the judgments of German courts, even in the judgments of the German Federal Constitutional Court, is striking from the standpoint of a common lawyer. Even decisions on controversial and political topics such as abortion are written very formalistically, which gives the impression that the judges are operating in a political vacuum. By the same token, the German lawyer is often shocked by the personal and political nature of decisions of common-law judges.

The view that law is autonomous is generally associated with legal positivism, which employs a formal definition of law.[221] In its extreme conception, the complete autonomy of law would mean that law is completely content-neutral and consequently that law is law regardless of whether its content is moral. This separation between the quality of law as law and its content is supported by the responses of the author's students to question 5, which indicate their belief that their law is completely content-neutral. However, this does not mean that all or even most German lawyers would agree that lawyers and judges must leave their consciences at home when they go to the courthouse. The German legal philosophers, it will be remembered, rated the thinking of German lawyers at level 4, indicating that law is not content-neutral when it comes to immoral law. As one of these academics wrote in response to the author's questionnaire, most German lawyers agree with the Radbruch formula:

> Where justice is not even striven for, where equality, which is at the core of justice, is consciously disregarded when drafting positive law, then the law is not merely 'wrong law', rather it completely loses its status as law. For one cannot define law, even positive law, otherwise than as order and legislation that have as their determined purpose the service of justice.

At the other end of the spectrum on the questions of the autonomy of law and its content-neutrality is the United States. Whereas the German respondents consistently rated their lawyers' view of the legal system as autonomous, and the student respondents in Germany rated their legal system as content-neutral, the responses in the United States were reversed: almost all of the respondents answered with a 4 or 5 to both questions 1 and 5. This phenomenon is probably traceable to the strength of the natural law tradition in the United States and to the impact of the legal realism movement there, particularly the effect it had on

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[221] *See* Kornhauser, *supra* note 159, at 758. On the crucial importance of formalism to autonomous legal thinking, *see* Lempert and Sanders, *supra* note 202, at 410.

how law is taught. In contrast, as will be illustrated below, the realist movement in Germany failed to make any lasting changes in the way German lawyers view the autonomy of the law. When it comes to the autonomy of the law, it appears that German lawyers today view the law much in the same way that they did at the beginning of the last century.

As described by Kristoffel Grechenig and Martin Gelter in an excellent article,[222] legal scholarship in Germany and the United States developed along parallel lines until the early 20th century. To explain this apparent coincidence, it should be remembered that American legal academic scholarship in the 19th century was still in its infancy. Legal education was much more practice-oriented, and less academic, than it is in the United States today. For academic inspiration, many American and English academics, such as the English legal philosopher John Austin, turned to the long and established German academic tradition. What they found in Germany was that law was considered to be a science. To this day, law departments at German universities are still styled legal scientific faculties.

Three important principles of German legal science as understood at that time were first, that law is a separate and distinct discipline, much like mathematics, and consequently must be cleansed of influences from other disciplines; second, that law consists of concepts that can be discerned, defined, and applied in logical, deductive processes (*Begriffsjurisprudenz*); and, third, that private law is separate from public law and as such is politically neutral. These principles found their highest expression in the drafting of the *Bürgerliches Gesetzbuch* or German Civil Code.

The drafting of this monumental work is described by Karl Larenz[223] and others as the result of a logical process of deducing specific norms from a pyramid of carefully chiseled concepts which the drafters had previously arranged into a pyramid. In labeling the process of legislative drafting "deductive," Larenz is impliedly laying claim to the political philosophy of Plato, who expected the legislator to establish a detailed code that would remain valid for all time with little possibility of change. According to Plato, the thinking process employed in drafting this code would be one of deduction from the principles of natural law. Thus the narrow rule "Do not kill" could be deduced from the more general natural law principle "Do harm to no man." As the German Civil Code was understood to be the product of a logical process, it was seen as consisting of pure concepts that were politically neutral in content. Furthermore, the application of the law was understood to be a politically neutral process, as the German Civil Code was to be applied by means of the deductive process of the syllogism.

The comparable school of jurisprudence in the United States is ordinarily referred to as conceptualism although it is sometimes, often dismissively, called

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[222] Grechenig and Gelter, *supra* note 204, at 295.

[223] *E.g.,* Karl Larenz, Methodenlehre der Rechtswissenschaft 20 (6th ed. 1991).

formalism. According to Roscoe Pound, conceptualist theories hold that there are legal concepts involved in the very idea of justice and that these legal concepts contain potentially an exact rule for every case to be reached by an absolute process of logical deduction.[224] The main proponent of the conceptualist movement was Christopher Columbus Langdell, who as dean of Harvard Law School introduced the case method of instruction. As mentioned in the chapter on legal reasoning, Langdell and his followers were engaged in ordering all legal norms into a conceptual framework resembling a pyramid, with a few axiomatic principles at the apex, and the more precise and numerous rules at the base. In this regard, their efforts corresponded to those of their German counterparts. Yet the Langdellian system of norms was never codified; rather, it was used as an educational aid to train lawyers to reach logical conclusions to legal problems based on the rules gleaned from case decisions in much the same way that German lawyers were trained to reach logical conclusions based on the rules codified in the German Civil Code. To help complete and refine the conceptual framework, judges, particularly those on the U.S. Supreme Court, also took to deducing specific rules from constitutionally protected rights in liberty, private property, and contract. In short, the Langdellian academic exercise roughly resembled the deductive drafting of the German Civil Code.

Over the past 100 years, however, conceptualism has been so thoroughly discredited that it is hard for most American lawyers to believe that it constituted the dominant understanding of law at any time in American history. Most historians credit Oliver Wendell Holmes, Jr. with launching the attack that would eventually prove fatal.

As stated above, Langdell claimed that a legal rule could be logically deduced from concepts without consideration of the justice or injustice likely to flow from the rule. In other words, Langdell, like the German theorists of his age, sought to construct a system of rules that were neutral in the sense of being devoid of political and other value judgments, such as subjective justice.[225] The most famous example of Langdell's approach is his position regarding the mailbox rule. Langdell began with the concept of contract and, using logic, was able to conclude, contrary to the common law rule, that an acceptance of an offer is effective only upon receipt, not posting.[226] Langdell was not merely collecting and systematizing the ratios of case decisions. Rather, he was deducing the correct rule, sometimes in spite of what the cases held.

Reasoning deductively that the concept of contract required an offer and acceptance, Langdell went on to reason that an acceptance of an offer contains an

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[224] Roscoe Pound, *Juristic Science and the Law*, 31 Harv. L. Rev. 1047, 1048 (1918).

[225] Stephen M. Feldman, American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage 94–95 (2000).

[226] Christopher Columbus Langdell, A Summary of the Law of Contracts 18–21 (2d ed. 1880).

implicit counter-offer. Then, reasoning that "communication to the offeree is the essence of every offer," he went on to conclude, as a matter of deductive logic, that an acceptance cannot be become effective—and the original offer be accepted—until the posted acceptance was actually received. To Langdell's way of thinking, this conclusion was logically inescapable. Realizing that, in doing so, he was contradicting case law which favored the posting rule, Langdell added this remark: the fact that the rule he had deduced would lead to injustice or practical absurdities was totally irrelevant.[227]

Holmes dismissed Langdell as a theologian, implying that he was divining concepts and rules out of thin air and asking people to accept them on faith alone. In so doing, Holmes was anticipating the objections of the Scandinavian legal realists, whose declared goal was to remove metaphysics from the law and replace it with realism.[228] For his part, Holmes argued that academics and judges should admit that neither the posting rule nor the acceptance rule could be deduced by any logical process; rather, those claiming to deduce the rule were actually partaking in value-laden legislating. Since this is often inescapable, the academics and judges who must devise a rule, either as a proposed statute or as case law, must consider business practice and convenience just as one would expect a legislator to do.[229]

Two very interesting articles which address the failure of the law and economics movement to make inroads in Germany also shed light on why German and American lawyers have generally opposing views on the issues of the autonomy and content-neutrality of law. Noting that the conception of law in the 19th century in both the United States and Germany was quite similar, Kristoffel Grechenig and Martin Gelter identify two major historical factors which caused American lawyers to break with the conceptualist tradition. First, utilitarianism—specifically, the idea that judge-made law should be subject to constant utilitarian improvement—gained widespread acceptance in the United States, but not in Germany, where efforts were directed toward improving the democratic legitimacy and progressive agenda of the legislature. Accordingly, it was felt in Germany that judicial arguments should be confined to legal concepts and statutory language. Second, the legal realist movement in the United States discredited what has become known as classical legal thought. In German-speaking countries, a similar movement, the short-lived Free Law School (*Freirechtsschule*) of legal thought, had a similar agenda, but it failed to displace the formal doctrinal approach to law.[230] Consequently, German legal argument, including judicial reasoning, still resembles the conceptualist practice of avoiding all reference to nonlegal sources; for doing so would offend the traditional notion of separation of powers.

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[227] Feldman, *supra* note 225, at 95.

[228] *See* Heikki Pihlajamäki, *Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared*, 52 Am. J. Comp. L. 469, 469 (2004).

[229] Feldman, *supra* note 225, at 108. The process of demystifying conceptualism and the accompanying belief in the autonomy of law was one that covered decades.

[230] Grechenig and Gelter, *supra* note 204, at 302.

Following this same line of analysis, Christian Kirchner opines that German judges restrict their arguments to those within the boundaries of traditional legal reasoning in order to preserve their autonomy *vis-à-vis* the legislature. It is in the self-interest of the courts in Germany, according to Kirchner, to couch their factual law-making judgments in the garb of traditional argumentation and in so doing not allow value judgments and policy arguments to enter into their discourse. Even judges on the higher courts would risk losing their legitimacy as interpreters of the law if they were to be seen as partaking in the political process.[231] Kirchner describes the phenomenon in Germany as follows:

> So long as the legislature or the constitutional court does not intervene, courts are free to invent new legal rules and doctrines. But if one analyzes such developments, one can see that courts in their reasoning remain within the boundaries of traditional legal concepts. Even if they invent new legal rules, they try to disguise those inventions behind the veil of analogies to existent legal norms or the meaning and goals of the statute at stake. They do not invoke external values or consideration of public policy.[232]

Albert A. Ehrenzweig wrote in 1971 that the alleged preference of the civil law for positivism in contrast to the common law's allegiance to natural law was an oversimplification.[233] That is also the conclusion reached in this chapter, at least if the defining feature of positivism is its insistence on the separation thesis, that is, insisting that immoral law can nevertheless be law.[234] Yet the term *positivism*, like so many others in this book, means different things to different people. Indeed, John H. Merryman writes that all Western states are positivistic.[235] Merryman employs the term *state positivism* to denote the identification of the state as being the unique source of law. If this is how one defines positivism, then all four of the jurisdictions here studied are positivist.

It should be recognized that the analysis undertaken in this chapter, which is based on rudimentary data and is admittedly preliminary, disclosed that lawyers in the four jurisdictions see certain aspects of their jurisdictions differently, particularly the aspect of autonomy of the legal system. This does not tell us, of course, whether the aspects are in fact different. Consequently, the author has failed to identify "some metric against which to measure the degree of normative or systemic autonomy of adjudication, legislation, or administrative regulation with a particular legal system," as called for by Kornhauser.[236] However, this is not what

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[231] Kirchner, *supra* note 204, at 285.

[232] *Id.* at 284–85.

[233] Albert A. Ehrenzweig, Psychoanalytic Jurisprudence: on Ethics, Aesthetics, and "Law" 133 (1971), *criticizing* Frederick H. Lawson, A Common Lawyer Looks at the Civil Law: Five Lectures Delivered at the University of Michigan, November 16–19, 20 and 65 (1955).

[234] Robert Alexy, Begriff und Geltung des Rechts 15 (2d ed. 1994).

[235] John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 20 (2d ed. 1985).

[236] Kornhauser, *supra* note 159, at 52.

the author set out to do; rather, the purpose was to begin a discussion about how lawyers in these jurisdictions view aspects of their own law and legal system, and how these views affect and in turn are reinforced by these aspects.

As will be explored more deeply in the chapters on legal reasoning, on statutes, and on judicial precedents, some of the apparent differences encountered in these areas are at least in part attributable to how lawyers in these jurisdictions understand their legal systems and their role in it. Specifically, whether or not one views the law and legal system as being autonomous affects where one will look for the law, how one will argue about the law, how one will justify conclusions about the law, and many other legal activities. Whether one's view on law's autonomy will actually affect how the law is applied is a fascinating question that deserves, like everything else in the chapter, further study.

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PART TWO

Legal Actors

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Lawyers

This chapter compares the jurist's profession in Germany, England and Wales, Sweden, and the United States. It concentrates on the profession of the lawyer: judges are dealt with in the following chapter.

This chapter is divided into four sections. It aims to facilitate comparison within the European and North American legal area and also considers whether it is possible to regard Sweden as a bridge between Germany, England and Wales, and the United States. In this sense, the first three sections form the basis of a comparison and the fourth section discusses the significance of the findings in the context of the processes of Europeanization and globalization.

A. Historical Development

1. GERMANY

The German system of law has been influenced by various elements of Roman law as well as by the role of the Roman legal methodology. Accordingly, the roots of the lawyer's profession as it is known in Germany today can be traced back to the Reception of Roman Law (Reception). Since the 13th century, ecclesiastical courts in Germany applied Roman law; they also had jurisdiction over temporal matters such as marriage, wills, and obligations made under oath. In Germany, the dissolution of the central power of the monarch, the increasing fragmentation of law and the sovereignty of the individual national states served to promote the Reception. From a historical point of view, therefore, the lack of a uniform German law made the adoption of an already existing self-contained legal system appear a natural development. As the European states began to codify their private law in the early modern era, it was always the *Corpus iuris civilis*, a collection of Roman law undertaken by the Emperor Justinian (529–534), which they used as a basis for their work. Roman law therefore formed the basis of the legal systems of continental Europe.[237]

[237] Franz Wieacker, Privatrechtsgeschichte der Neuzeit 4 (1967).

Beginning in the 12th century, Germans became accustomed to traveling to Italy to study Roman law, mainly at the legal schools in Bologna and Modena. The education offered by these institutions was considered vital; for many years, there were no universities in Germany and those universities that were eventually founded were poorly equipped. Scholars returned to Germany as well educated and highly regarded lawyers, and the knowledge they had acquired contributed to the creation of a German legal system.[238]

Even in the 8th century, parties were represented before the court by a person known as the common procurator (*gemeiner Prokurator*). He was appointed by the court at the request of a party and represented the interests of the court rather than the parties. As a result, his role was to facilitate the administration of justice. Any legal expert with "some genuine knowledge of the law" could occupy this position. It was an honorary position and therefore unpaid, which reflected the general, moral duty to see justice done.[239] In time, the role of the general procurator developed until he appeared in court to represent the interests of the parties. From the 13th and 14th century, the procurator was paid by the parties, which resulted in a certain amount of dependency. The procurator thus developed into being an agent of a party.[240]

Alongside the progressive reception of Roman and canon law in Germany, the profession of a legally educated advocate (*Advokat*) developed alongside that of the procurator. His role was to advise the parties outside the court (that is, he did not appear before the court himself). The work he performed was considered of little importance and he usually did the preparatory work for a procurator.[241]

The *Reichskammergerichtsordnung,* from 1495, heralded an official distinction between the advocate and procurators: the latter performed the legal work and provided advice outside the courts whereas the advocate represented the parties at the court proceedings and also provided advice outside the court.[242] There was a limit on the number of procurators and because admission to this profession was controlled by the courts, procurators were bound locally to a specific court.[243]

In some parts of Germany (for example, Hamburg and Lübeck), the division continued to exist into the 19th century.[244] However, the advocate's role was largely

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[238] Michael G. Martinek, *Der Rechtskulturschock*, Juristische Schulung (JuS) 92, 94 (1984); Gerhard Hartstang, Der deutsche Rechtsanwalt: Rechtsstellung und Funktion in Vergangenheit und Gegenwart 11 (1986); Paul Koschaker, Europa und das römische Recht (3d ed. 1996).

[239] Erich Döring, Geschichte der deutschen Rechtspflege seit 1500 121 (1953); Hartstang, *supra* note 238, at 10; Rolf Schneider, Der Rechtsanwalt, ein unabhängiges Organ der Rechtspflege 28, 30 (1976).

[240] Hartstang, *supra* note 238, at 11; Schneider, *supra* note 239, at 30.

[241] Hartstang, *supra* note 238, at 13.

[242] *Id.*; Jan Krämer, *Neue Juristische Wochenschrift (NJW)* 2313 (1995).

[243] Wolf Bernhard Von Schweinitz, Rechtsberatung durch Juristen und Nichtjuristen insbesondere durch Wirtschaftsprüfer 24 (1975).

[244] *Id.* at 25.

a foreign element in the German legal system[245] and the distinction between the advocate and procurator which characterized Roman and canon law was not adopted. Eventually, both professions were amalgamated and a single professional model adopted, namely the advocate, referred to below by the term *Rechtsanwalt,* plural: *Rechtsanwälte*.[246]

The influence of lawyers grew during the era of absolutism because the absolute monarch could not exercise the three powers of the state alone and so entrusted this task to his faithful servants, who in many cases were trained lawyers. Nevertheless, lawyers were also regarded as troublemakers and a potential threat to political peace and stability. Therefore, attempts were made to nationalize the independent profession of the lawyer in order to improve the quality of justice and, crucially, to place him under the control of the ruling monarch.[247]

In 1781, Friedrich II ordered that advocates in Prussia were to be elected by so-called Justice Commissars and paid by the state.[248] The role of these officials was to assist the judge in establishing the truth.[249] As a result, the independent profession of the advocate was abolished.[250] The Prussian Court Organization Ordinance (*die Preußische Gerichts-Organisations-Verordnung)* of 1849 granted the Justice Commissars the title of *Rechtsanwalt* (sometimes shortened to *Anwalt*), a term which was adopted throughout Germany.[251]

The policy of nationalization was met by protests by the parties and resistance amongst advocates. From 1893 they were once again able to practice as independent representatives of the parties although they continued to be subject to the disciplinary power of the courts.[252] At the start of the 19th century there were increasing calls for a free advocacy with the aim of complete independence from the state.[253] The first law societies were subsequently founded with the aim of enforcing the interests of advocates more effectively.[254]

With the founding of the German Empire in 1871 statutes were passed that applied throughout the imperial territory and soon there were calls for a uniform regulation of the lawyer's profession. The German Lawyers' Association (*Deutscher*

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[245] *Id.* at 34.

[246] Döring, *supra* note 239, at 122; Krämer, *supra* note 242, at 2313; Markus B. Rick, Die verfassungsrechtliche Stellung des Rechtsanwalts 34 (1998).

[247] Hartstang, *supra* note 238, at 17; Dietrich Rüschemeyer, Juristen in Deutschland und in den USA 140 (1976).

[248] Felix Busse, Anwaltsblatt (AnwBl) 130, 131 (2001); Volker Römermann and Wolfgang Hartung, Anwaltliches Berufsrecht 11 mn. 4 (2002).

[249] Krämer, *supra* note 242, at 2313; Busse, *supra* note 248, at 130 and 131.

[250] Krämer, *supra* note 242, at 2313; especially extensive: Christian Grahl, Die Abschaffung der Advokatur unter Friedrich dem Grossen (1994).

[251] Hartstang, *supra* note 238, at 18.

[252] Wolfgang Hartung, *Monatsschrift für Deutsches Recht (MDR)* 1301, 1302 (1999).

[253] Hartstang, *supra* note 238, at 19; Hartung, *supra* note 253, at 1301 (1302).

[254] Rüschemeyer, *supra* note 247, at 165.

Anwaltsverein) was created on August 25, 1871 (and still exists today), and its first task was to create an Ordinance Regulating *Rechtsanwälte* (*Rechtsanwaltsordnung* or RAO) for the German Empire. This legislation was passed in 1878 and imposed for the first time concrete admission requirements, thereby anchoring the independence of the association from the state, and court.[255] As a result, lawyers were no longer servants of the state and the division between advocates and procurators was finally abolished, resulting in a single legal representative.[256] Nevertheless, the lawyer's profession was not completely independent from the state system of legal administration.

The RAO applied until 1939, when it was replaced by the *Reichsanwaltsordnung* (Imperial Ordinance Regulating *Rechtsanwälte*). Under National Socialist rule, *Rechtsanwälte* were prevented from representing parties independently. Instead, they were required to serve the national Legal Service.[257] Admission to the legal profession was decided by the Imperial Minister for Justice and the *Bund Nationalsozialistischer Deutscher Juristen* (Federation of National Socialist German Lawyers).[258] As a result, numerous *Rechtsanwälte* were prevented from practicing. The German Law Society was dissolved in 1933 and replaced by the *Reichsrechtsanwaltskammer* (Imperial Society of *Rechtsanwälte*) which became the central instrument of the National Socialists' legal administration.[259]

Following the end of National Socialist rule in 1945, the 1878 Ordinance was re-applied until the *Bundesrechtsanwaltsordnung* (Federal Ordinance Regulating Lawyers or BRAO) entered into force on August 1, 1959.[260]

Section 1 of BRAO describes the profession of the *Rechtsanwalt* as an independent organ of legal administration. This provision linked a statutorily anchored independence of the profession with its residual traditional proximity to the state.[261] Alongside representing their clients' interests, the *Rechtsanwalt* also played an important role in court proceedings.[262] The professional model of the *Rechtsanwalt* was primarily influenced by the fact-finding function which forms the central task of lawyers.

However, the ordinance was soon considered outdated because it was too narrow and did not reflect a modern service-based society. When the

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[255] Fritz Ostler, Die deutschen Rechtsanwälte 1871–1971 11 (2d ed. 1982).

[256] Hartstang, *supra* note 238, at 23.

[257] Hartstang, *supra* note 238, at 46; Schneider, *supra* note 239, at 42.

[258] Erwin Noack, Kommentar zur Reichs Rechtsanwaltsordnung § 15 (2d ed. 1937).

[259] Ostler, *supra* note 255, at 231.

[260] Redeker, Neue Juristische Wochenschrift (NJW) 1241, 1242 (1995); Hartstang, *supra* note 238, at 52.

[261] Rinken, Einführung in das juristische Studium: Juristenausbildung und Juristenpraxis im Verfassungsstaat 70 (3d ed. 1996).

[262] Wilhelm E. Feuerich and Dag Weyland, Bundesrechtsanwaltsordnung § 1 mn. 6f (2008).

Federal Constitutional Court declared the *Bundesrechtsanwaltsordnung* to be unconstitutional,[263] a reform of the lawyers' profession was undertaken in 1994.[264]

Since then, the profession of the *Rechtsanwalt* no longer focuses on judicial activities but has been expanded to include other functions such as the creation of legal relationships, avoidance of conflict, and mediation.[265]

The education of *Rechtsanwälte* (which is still geared toward producing judges) and the division of the state degree resulted from developments in Prussia during the 18th century.[266] At this time, the study of law culminated in an examination held by the faculty and which was a pre-condition to practicing as an advocate.[267] In the mid18th century, Prussia introduced a practical training stage supervised by the state which led to a second examination known as the assessor examination.[268] The nationalization of legal education was a by-product of absolutism, according to which lawyers were servants of the state and prohibited from practicing as independent advocates.[269]

The *Gerichtsverfassungsgesetz* (Judicial Constitution Act) of 27 of January 1877 finally established the two-stage legal education (i.e., university degree and practical training) throughout the empire and required two state examinations to be passed. The driving concept was to create a civil servant who was scientifically trained, followed humanistic ideals, and was conscious of his public duty. From this emerged the ideal of a general lawyer who could be placed anywhere in the state apparatus. This historical development engendered traits and an educational ideal still seen today.

2. ENGLAND AND WALES

In the early 13th century, the legal profession in England merely consisted of privately educated lawyers who were privately commissioned. It is therefore more accurate to date the origins of the profession at the mid 13th century. At this time, a variety of men earned their living as advocates and their activities were regulated by the Statute of Westminster of 1275. Ch. 29 of this statute expressly declared that deception by a lawyer was a criminal offense.[270] The judge himself exercised direct control over this new profession by selecting lawyers, having them swear an oath,

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[263] BVerfGE 78, 287–331 (1993).

[264] Redeker, *Freiheit der Advokatur—heute*, Neue Juristische Wochenschrift (NJW) 2610 (1987); Eberhard Haas, Anwaltsberuf im Wandel: Vortrag gehalten vor der Juristischen Gesellschaft Mittelfranken zu Nürnberg e. V. am 27 17 (1998).

[265] *Cf.* § 1 Abs. 3 BRAO.

[266] Hattenhauer, *Juristenausbildung—Geschichte und Probleme*, Juristische Schulung (JuS) 513, 514 (1989).

[267] Messerschmidt, Berufsbild und Ausbildung des Advokaten im 17. bis 19. Jahrhundert, Deutsches Anwaltsblatt (dAnwBl) 124, 131 (1989).

[268] Rinken, *supra* note 261, at 124, 131.

[269] Döring, *supra* note 239, at 115.

[270] John H. Baker, An Introduction to English Legal History 156 (4th ed. 2002).

and, if necessary, subjecting them to disciplinary measures. These lawyers were the precursors of the modern-day barristers and were "officers of the court." They were the leading members of the legal profession from whose ranks judges were also selected.[271]

The main task of these trial lawyers was to present and defend the complaint as well as represent the interests of their (usually private) clients by a fair presentation of the facts and a plea for a just decision.

In the 14th century a number of trial lawyers (known as sergeants at law) from the Common Bench (the most important court in England at the time) established a guild. Their standing was so high that an official ceremony was held to admit new members in which the king himself participated. In the 16th century, when the obligation of a written accusation was introduced, the sergeants had to compete with other lawyers (known as apprentices) who acted before other courts.[272] Whereas the sergeants and the judges lived in their own houses, apprentices usually lived together in halls of residence (so-called inns). From around 1350, some of these halls offered a legal education. At the beginning of the 15th century, four of the twenty halls of residence had become very important: Lincoln's Inn, Inner Temple, Middle Temple, and Gray's Inn. These four inns of court were collectively known as the Third University of England and educated around the same number of students as Cambridge University.[273]

The education in the inns of court lasted approximately seven years and consisted of lectures, moots, and visits to courts. The subject of the lectures was primarily statute law, but common law was studied as well. After successfully concluding their studies, graduates were designated barristers at law. After 10 years of professional experience, the barrister could become a bencher and act as a trainer himself.[274]

The term solicitor was first used in the 15th century. The tasks of a solicitor were to support the court proceedings and provide legal advice. Initially, such services were offered by young apprentices. Yet, as the demand for barristers' services increased and barristers themselves became more specialized, their services developed into an independent branch of the profession which was supervised by the Court of Chancery. By the 18th century at the latest, the solicitors' profession also enjoyed a high standing.[275]

According to historians, there were a number of reasons why a Reception of Roman law did not take place in England. There had been a long tradition of teaching Roman law (and, up until the Reformation, canon law) at Oxford and

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[271] *Id.* at 157.

[272] *Id.* at 158.

[273] Wilfred R. Prest, The Inns of Court under Elizabeth I and the Early Stuarts 115, 1590–1640 (1972).

[274] *Id.* at 161; John H. Baker, The Third University of England: the Inns of Court and the Common-Law Tradition (1990).

[275] *Id.* at 163.

Cambridge, but the universities were not responsible for educating lawyers and judges. This was the task of the inns of court. Of course, English law was highly developed owing to the early development of a central jurisdiction in London (in contrast to the European continent) and the system of common law (i.e., law of general application). Therefore, the conditions which led to the Reception of Roman law on the European continent did not exist in England. In addition, many high-ranking Englishmen were afraid that a Reception would entail a certain dependency on the pope, the Roman-Germanic empire, and an all-powerful ruler as the supreme law-making authority. By contrast, the common law had been developed by judges sympathetic to parliament and thereby perpetuated the class system.

Thus, the absence of a Reception in England is due in part to the absence of absolutism. England was characterized by a distribution of temporal power relationships. Another reason was the Act of Supremacy in 1534, which parliament enacted when Henry VIII separated from Rome. Two later kings, James and Charles, failed in their attempts to rule without the assent of parliament; the latter king even paid for his failure with his life. Although Oxford and Cambridge are among the oldest universities in Europe, they were probably the last universities in Europe to teach national law.[276] Until the 18th century they offered Roman and canon law but not English law. In addition, the official language was Latin and not the Law French of the courts.[277] Dr. William Blackstone (for further details see the chapter on comparative jurisprudence) only began to hold lectures on English law at Oxford University in 1753, and even at this time, the students who visited his lectures were mostly clerics and wealthy individuals who were merely interested in an introduction to law. His successors in Oxford and the professors at Cambridge University and the University of London had little success in attracting students for the study of law. When the barristers finally introduced a final examination in 1872, candidates turned to specialized instructors in order to prepare themselves for it. It was only at the turn of the century that an increasing number of students took up the study of law at Oxford and Cambridge universities. Before 1950, most English and Welsh lawyers were either not university graduates at all, or they had read subjects other than law.[278]

3. SWEDEN

Historically, Swedish lawyers were employees of the state. The first Swedish lawyers were educated at the University of Uppsala (1477), which created a chair for Swedish law as early as 1620.[279] When Lund University was founded in 1668, two

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[276] *Id.* At 170.

[277] Olaf Pedersen, *Tradition and Innovation*, *in* 2 A History of the University in Europe 456 (Hilde de Ridder-Symoens and Walter Rüegg, eds. 1996).

[278] Baker, *supra* note 274, at 170 *et seq.*

[279] Stig Strömholm, An Introduction to Swedish Law 32–35 (2d ed. 1988).

chairs were created for legal studies: one for Roman and the other for Swedish law. [280] Despite the facts that Roman law was taught at Swedish universities, and Swedish law students, unlike English law students, actually studied law at university, there was no Reception of Roman law in Sweden. The first national legal code (parts of which are still in force), was issued in 1734. Shortly afterwards, in 1749, a court councilor's examination (*hovrättsexamen*) was introduced as an admission requirement for the civil service.[281]

The era of absolutism, if one can call it that, in Sweden under King Karl XI and his son Karl XII lasted only a few years (1680–1719) before the official state apparatus, which ruled the state in the absence of the king, declared Sweden to be a parliamentary state. The subsequent king, Gustav III, declared himself to be an "enlightened absolute monarch" and issued a constitution in 1772 with popular support. Angered at the loss of their power in the new state, the nobility in 1809 forced Gustav III to abdicate in favor of a childless uncle.[282]

Some historians claim that absolutism in Sweden never achieved the level it did in Germany. This is explained *inter alia* by the fact that there was a peaceful handover of power rather than a struggle for power. In addition, there was no general belief that the right to govern reflected divine authority, so the ruler's legitimacy was questioned by many, especially by the nobility. These historical events may be seen as pragmatic responses to the problems of the time, such as the nobility's abuse of bureaucracy in their own interests. With the agreement of the various orders in society (knights, clerics, citizens, and farmers), the administration and judges, the latter of which were members of the aristocracy, were completely subjugated to the executive.[283]

Despite the fact that advocates were mentioned in a statute as early as 1615, an organized legal profession only emerged in 1887. It was in this year that the Swedish Bar Association (*Sveriges advokatsamfund*) was founded in order to improve the system of justice and the standing of lawyers.[284]

4. THE UNITED STATES OF AMERICA

Most of the early lawyers in the North American colonies had been sent by Great Britain to assist in the administration of the colonies.[285] Nevertheless, many colonists, especially those from southern colonies, were trained at the Inns of Court in London. According to one report, 115 North American colonists were called to

[280] 1 Lunds Universitet et al., Lunds Universitets Historia: 1668–1709 36 (1968).

[281] Strömholm, *supra* note 279, at 32–35.

[282] *Id*. at 24.

[283] *See* Kjell Å. Modéer, Den Svenska Domarkulturen 56 (1954).

[284] Holger Wiklund, *Sveriges Advokatsamfund 75år*, Tidskrift för Sveriges advokatsamfund 122 (1962).

[285] Lawrence M. Friedman, A History of American Law 52–56 (3d ed. 2005).

the bar by the Inns between 1760 and 1776.[286] Colonists also had the opportunity of gaining admission to the profession by working as an apprentice in a lawyer's office. Many lawyers also studied at colleges in the colonies. The lectures were on general, academic topics rather than on practical topics necessary to gain admission to the bar. Nevertheless, by attending lectures one could generally reduce the time one had to spend as an apprentice. For example, some New York counties required only three years of work as an apprentice for college graduates as opposed to seven for nongraduates.[287] The first professorship in American law was established by William and Mary College in 1779 and was held by a Virginia appellate judge and classical scholar.[288]

The apprenticeships, which were often paid for by the students, sometimes developed into private schools. The first was the Litchfield Law School in Litchfield, Connecticut, established in 1784. By the time it closed in 1833, it had educated over 1,000 students including two vice-presidents, 101 U.S. congressmen, 28 U.S. senators, six cabinet members, three justices of the U.S. Supreme Court, 14 governors, and 13 chief justices of state supreme courts. After visiting the United States in the 1830s, Alexis de Tocqueville wrote, "If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich . . . but that it occupies the judicial bench and the bar."[289] Upon the publication of Blackstone's *Commentaries* in the colonies in 1771 and 1772, these became the most popular legal text for self-study.[290]

Private law schools started affiliating with universities in the United States in the early 19th century. The relationship between the two institutions was basically nominal and allowed law schools to award university degrees. Yet shortly thereafter, the anti-intellectual populist movement associated with President Andrew Jackson resulted in a lowering of standards for admission to the practice of law. Thus, while 14 out of 19 jurisdictions required an apprenticeship for admission to the bar in 1800, by 1860 the number had been reduced to nine out of 39. Toward the middle of the 19th century, there were fewer than 10 law schools affiliated with universities.[291]

Despite the Jacksonian backlash, law schools slowly began replacing apprenticeships as the most popular means of gaining legal training. Towards the end of the 19th century, the number of law schools expanded dramatically. While there were only 61 law schools in 1890, the number had increased to 102

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[286] Charles Warren, A History of the American Bar 188 (1911).

[287] Robert Bocking Stevens, Law School: Legal Education in America from the 1850s to the 1980s 4 (1983).

[288] Friedman, *supra* note 285, at 240.

[289] 1 Alexis de Tocquville, Democracy in America 355 (John Canfield Spencer ed., Henry Reeve trans., 1864).

[290] 1 Steve Sheppard, The History of Legal Education in the United States: Commentaries and Primary Sources 9–12 (1999).

[291] Stevens, *supra* note 287, at 5–8.

by 1900. By 1920 there were 146.[292] This era also witnessed an expansion in the length of study. Whereas law studies in the late 19th century generally consisted of a one-year course of study at an independent law school,[293] by the middle of the 20th century the three-year, university-based legal education had become dominant.[294]

B. Modern Legal Education

1. GERMANY

Legal education at German universities is unusual (if not unique) since it is focused on preparation for the first state exam. This is followed by a two-year period of practical training, (that is, the *Referendariat)* and concludes with the second state exam. Germany is characterized by a single education of all legal professions, regardless of whether one intends to practice as a legal advisor (*Justiziar*), judge, state prosecutor or lawyer. Legal education aims to produce the generalist jurist (*Einheitsjurist*).[295]

Following a basic primary education, German school children follow different educational branches from the age of 10. Those with good exam grades attend a *Gymnasium* (preparatory school or college-preparatory high school), whose final examinations grant admission to universities. In the past, German children concluded their schooling with the *Abitur* at the age of 19. Recently, the time spent at the *Gymnasium* was shortened by a year with the result that the *Abitur* is now earned at an average age of 18. The number of *Abitur* candidates varies greatly from city to city, and the actual figure can lie between 10 and 50 percent of all school pupils. The *Gymnasium* teaches German, mathematics, physics, chemistry, geography, biology, art, music, sport religion, history and sociology. This is complemented by at least two languages of which one is almost invariably English. In their last year at the *Gymnasium* pupils sit the *Abitur,* which consists of written and oral examinations. With very few exceptions, admission to a law degree is dependent on students passing this examination. Grades range from 1.0 (the highest mark) and 4.0 (the lowest mark). Grades between 4.0 and 3.0 are regarded as insufficient. A grade below 4.0 is a fail. About one-quarter of the German population and 42 percent of people 20 to 24 years of age have earned the *Abitur*. In 2007,

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[292] Alfred Zantzinger Reed, Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States with Some Account of Conditions in England and Canada 445 (1921).

[293] Friedman, *supra* note 287, at 466.

[294] Reed, *supra* note 292, at 83–128.

[295] Carl Creifelds, Rechtswörterbuch 747 (18th ed. 2010); Günther Schmidt-Räntsch, *Kommentar zum deutschen Richtergesetz*, Bundestag 7, §§ 5, mn. 11, 10/1108; Casper, *Anmerkungen zu der Ausbildung der Juristen in der Bundesrepublik und den Vereinigten Staaten*, Zeitschrift für Rechtspolitik (ZRP) 116, 116 (1984).

432,500 pupils passed the *Abitur*.[296] Of this number, 13,857 chose to commence legal studies in the winter and summer semesters with the aim of passing the first state exam. However, the number of law students has been declining for years.[297]

The German government suspended military conscription in 2011. Before then, the great majority of young men were forced to complete military or civil service.[298]

There are currently 45 universities in Germany with a law faculty. In all federal states, applications are made directly to the university of preference. One consideration when allocating places is whether the applicant's place of residence is near to the university. Since the majority of applicants are accepted by the university in their vicinity, German universities have a pronounced regional accent, with 90 percent of all students usually coming from nearby. This is one of the reasons why Germany does not have any universities comparable to Oxford, Cambridge, Harvard, or Yale.[299]

Nevertheless, there are also differences between German universities. Some of them accept almost every student whereas others demand a higher average grade due to the fact that they are more popular. At such universities only half or fewer of applicants are successful.[300] At the University of Münster, where the author teaches, there were over 5,000 applicants in 2011 for only 500 places. In the mid 1970s the German Federal Constitutional Court decided that inadequate *Abitur* grades did not justify applicants being denied places at state universities if the universities had sufficient space to accept more students. As a result, even students with a poor *Abitur* grade are able to take up legal studies. The situation is different with subjects such as medicine or biology for which universities successfully convinced the judges that forcing teaching departments to absorb more students would lead to a decline in teaching standards. Curiously, the judges did not demand that the states increase teaching resources. Instead, a limit on the places for these subjects was introduced. The inability of universities to reject potential law candidates on the basis of poor grades led, on the one hand (contrary to the wishes of university administrations) to the employment of additional teaching staff because there was a fear that they would have to accept more students. On the other hand, competition universities started to compete for good students from other regions.[301]

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[296] Heribert Hirte and Sebastian Mock, The Role of Practice in Legal Education, http://www.djft.de/Hirte_Mock.pdf.

[297] *See* Gesamtstatistik des 89. Deutschen Juristen-Fakultätentages 2009 für das akademische Jahr 01.10.2007—30.09.2008, http://www.djft.de/gesamtstatistik89.pdf.

[298] *Wehrpflicht soll zum 1. Juli ausgesetzt werden*, Frankfurter Allgemeine, 22 November 2010, http://www.faz.net/aktuell/politik/inland/bundeswehr-wehrpflicht-soll-zum-1-juli-ausgesetzt-werden-1577622.html.

[299] According to the dean's office of law at Westfälische Wilhelms-Universität Münster.

[300] *See* CHE-ranking of faculties of law in Germany, at http://ranking.zeit.de/che2011/de/quickranking/show?esb=5&ab=3&hstyp=1&left_f1=82&left_f2=23.

[301] Bundesverwaltungsgericht (BVerfG), 33, 303 (Numerus Clausus I); Bundesverwaltungsgericht (BVerfG) 43, 291 (Numerus Clausus II).

Law is one of the largest university subjects at German universities.[302] In recent years it has become popular to combine law as a second subject with main stream subjects such as business or politics, and this trend has resulted in a proliferation of new courses.[303] However, such second-subject courses are usually no more than introductory, and merely provide an overview of the legal system. The students of these courses are generally separated from those studying law as a main subject, and graduates cannot later pursue a traditional career as a lawyer. The situation is different, however, in relation to business law students. This degree is awarded by universities of applied sciences and offers the possibility to be employed as a jurist.[304] However, it is not possible to act as a solicitor or be employed in the civil service.

Many business lawyers work as legal advisors or corporate lawyers. They draft contracts, negotiate business deals, act as consultants, or work for official departments. A business law course lasts six semesters (that is, three years) and graduates are awarded the degree of *Diplom-Wirtschaftsjuristen* or Bachelor of Laws. Some graduates then take a master's course at an English law school. The admission to a university of applied sciences is not limited to those with an *Abitur,* with the result that the academic standard is somewhat lower than at a university. In addition, universities are now also starting to grant a bachelor's degree after two years, similar to the duration of studies at a university of applied sciences. However, there are still considerable differences between the two institutions. In 2006, 1,600 students commenced legal studies at universities of applied sciences.[305]

The content of legal study depends on the federal state in question, and it also varies from university to university. Every law student begins with a basic course of studies intended to impart general basic knowledge and comprised of mandatory subjects. How the course is run depends on the federal state and varies from university to university. However, each law student starts with an introductory course which covers the core areas of civil law, criminal law, public law, and procedural law, with reference to European law, methods of legal practice, as well as philosophical, historical, and social foundations. This introductory stage lasts four semesters and is concluded with what is termed the intermediate examination (*Zwischenprüfung*), although the requirements are determined by the individual universities and State Examination Offices (*Landesprüfungsämter*). The final grade on the intermediate examination is based on the average marks achieved in the question papers and extended essays which make up the intermediate exam.

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[302] 1 Christa Berg, Handbuch der deutschen Bildungsgeschichte 198 (1996).

[303] See courses of study that are offered by the faculties of law 2009, compilation of the German Jurist Faculty Day, at http://www.djft.de.

[304] Norbert Von Nieding, Berufsmöglichkeiten und Berufsaussichten für Juristen 10 (1986).

[305] Datenreport 2006—Zahlen und Fakten über die Bundesrepublik Deutschland, http://www.bpb.de/presse/U1V0CX,0,Neu%3A_Datenreport_2006_Zahlen_und_Fakten_%FCber_die_Bundesrepublik_Deutschland.html.

That exam does not represent a stand-alone qualification, although some faculties regard it as equivalent to a bachelor's degree. The introductory study and intermediate examination is followed by a specialized area of study which takes two semesters. This expands upon and deepens understanding of the compulsory subjects and introduces interdisciplinary and international points of reference. Depending on the university, students can specialize in individual subjects such as advanced business law, criminology, constitutional law and international private or public law. At this stage, students write papers and attend a seminar where they prepare an extended essay. The tests held at the specialist stage result in an average grade which accounts for 30 percent of the overall grade of the first state examination. The students thus conclude the university stage of their legal education.[306]

During the first six semesters of the law course, students complete clerkships during the semester breaks. Students must also pass one law class in a foreign language or a law-related language class. Today, some faculties offer foreign language training in specific subjects (for example, Münster, Passau, Trier), which usually takes place over four semesters and provides students with insights into foreign legal systems as well as language skill training. Students are also required to attend a class on soft skills. This includes training in rhetoric or presentation, debating courses or similar skills.[307]

Although legal education in Germany begins with university studies, this does not mean that the curriculum or methods of instruction are academic in the sense of having to do with general or liberal rather than technical or vocational education. In fact, with the exception of a few required classes in the area of general legal studies (the student can choose from legal history, philosophy, theory, sociology, and so on), the instruction consists almost entirely of a presentation of the most important statutory codifications and how they should rightly be interpreted. In other words, students are being prepared for the First State Examination, discussed below, which tests students almost exclusively on their knowledge of black-letter law and their ability to apply it correctly. This dogmatic (as it is referred to in German) emphasis is seen in the topics and content of the lectures that students attend, and in which they must pass written examinations. Beginning law students will attend classes on the discrete parts of the German Civil Code: the general part, the law of obligations, property law, family law, and the law of succession. Other classes will cover the material in the Penal Code, administrative statutes on various topics, and the German basic law. In these and other substantive law classes, the students are taught the law, which means the rules, and how to apply them correctly. How the statute came into being, that

[306] *See* Deutsches Richtergesetz (DRiG) § 5a; further arrangements are made according to the education and training regulations of each particular federal state.

[307] *See* Deutsches Richtergesetz (DRiG) § 5a ¶3;Wolfgang Däubler, *Verhandeln und Gestalten: Der Kern der neuen Schlüsselqualifikationen*, Juristische Schulung (JuS) Schriftenreihe (2003); Volker Römermann et al., Schlüsselqualifikationen für Jurastudium, Examen und Beruf (2003).

is, its legislative history, is seldom discussed. Curiously for a common lawyer, even the German Civil Code, a product of the 19th century, is taught with little or no historical background. The late Lord Rodger of the Supreme Court of the United Kingdom remarked shortly before his death in an address in Münster that, with the passage of the German Civil Code in 1900, everything that went before was suddenly relegated to the realm of legal history. To learn about it, students now have to take a class in legal history. Upon being told about this phenomenon, Professor Zenon Bankowski at the University of Edinburgh shook his head knowingly. He has noticed this many times before. "In Germany, it is as if 'the law' was, is, and ever shall be," he remarked. This dogmatic approach to teaching, which is, in some sense, like the instruction expected at a trade school, leaves little room for questioning the law. And in fact, with the exception of the classes on constitutional and human rights, there are few if any discussions about why a particular rule is the way it is, or whether the rule should be changed. Such discussions are said to belong in the political arena. This separation of law from history and politics is even the more remarkable when one considers that a very large percentage of the rules that are taught—in some classes most of them—are rules gleaned from case law. Nevertheless, when one knows of this phenomenon, it should come as no surprise that German students and legal philosophers responding to the author's survey (see the chapter on comparative jurisprudence) were most likely to say that they thought of law as being something that is separate and apart from its content.

Despite completing the specialist phase, students at most universities have still not achieved a university degree, and the Bologna Process of harmonizing academic degrees has not changed this situation. Legal studies are still geared towards the state examinations. Only few universities award the degree of Diploma in Legal Studies (*Diplomjurist*) but only following the successful completion of the judicial state examination which follows their university studies.[308] Following the conclusion of the specialist phase, students usually spend two semesters revising for the first state examination. In order to prepare, most students attend a private repetitorium (*Repetitorium*). These crammer institutions generally offer one-year courses which review all the materials for the examination and train participants in the art of writing exams. Law faculties also offer their own university repetitoriums although the majority of students still prefer to attend private institutions. Taking into account the courses and materials, the preparatory year costs between 700 and 4,000 Euros.

Students sit the first state examination at Judicial Examination Centers (*Justizprüfungsämter*). This examination includes six papers on six days, of which three relate to private law, two to public law, and one to criminal law. Following

[308] 116 Entscheidungen des Bundesverwaltungsgerichts (BVerwG) 49 (Feb. 22, 2002). Some students take the judicial part of the state examination before their year of specialization at university.

the written stage, there is an oral exam taken by groups of four to six candidates. Besides answering questions, the candidate also has to hold a presentation. While most examiners are judges, they may also be professors, lawyers, or state prosecutors.[309] Grades range from 0 to 18 points, 18 being the highest. All those with an average grade of 9 to 18 points have passed "with distinction" (*Prädikatsexamen),* a result which is considered "fully satisfactory." Grades from 11.5 points are regarded as good, those with more than 14.0 points and more as very good. The examination is passed with a minimum of 4 points. Should the candidate fail, he or she can re-sit the examination once.[310]

Pass rates of the first examination vary: it is presently 66 percent at universities in Saxony, 90 percent at Münster University, and 100 percent at the Bucerius Law School. The federal average is 71 percent.[311] The average grades also vary between the individual Federal States. Whereas only 11 percent of students achieve first-class grades in Saxony-Anhalt, Hamburg boasts a rate of 35 percent. On average, 21 percent of students in Germany achieve this grade. The only private university in Germany where it is possible to study law is at present the Bucerius Law School in Hamburg, founded in 2000, although another private law school is in the planning stages. Bucerius is one of the faculties where students graduate with a bachelor of laws after a three-year course.[312] It has an annual intake of 110 students, in stark contrast to Münster University which admits 600 to 700 students each year (generally 400 in the autumn and 300 in the spring). Bucerius divides its academic year into three semesters. One trimester must be completed at an English-speaking law school.[313] The graduates of the Bucerius Law School obtain comparatively very good grades.[314]

Once they have passed the first state examinations, students at law faculties and universities can study for the title of Dr. jur. This is not possible at the schools of applied sciences. As a rule, universities require doctoral candidates to have achieved the grade "fully satisfactory" (*vollbefriedigend*, which means 9.0 points or better) in the first state examinations. Doctoral candidates usually write a dissertation of around 150 to 250 pages in length: there are no accompanying courses.

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[309] *See* Deutsches Richtergesetz (DRiG) § 5d par. 2; Hattenhauer, *Juristenausbildung—Geschiche und Probleme*, Juristische Schulung (JuS), 513, 519 (1989).

[310] *See* Deutsches Richtergesetz (DRiG) § 5d par. 5 p. 1.

[311] *See* education statistics by the German Federal Ministry of Justice.

[312] *See* Bucerius Law School, http://besten.welt.de/Die-besten-Privatunis-Deutschland/Bucerius-Law-School; Vergleichsstatistik der Examensergebnissen zwischen den Studierenden der Bucerius Law School und den Studierenden an der Fakultät Rechtswissenschaft der Universität Hamburg, http://www.elbelaw.de/blawg/wp-content/uploads/2007/11/kleine-anfrage-bls-uni.pdf.

[313] *See* Ingo Von Münch, Legal Education and the Legal Profession in Germany 82 *et seq.* (2002).

[314] *See* Bucerius Law School, http://besten.welt.de/Die-besten-Privatunis-Deutschland/Bucerius-Law-School; Vergleichsstatistik der Examensergebnissen zwischen den Studierenden der Bucerius Law School und den Studierenden an der Fakultät Rechtswissenschaft der Universität Hamburg, http://www.elbelaw.de/blawg/wp-content/uploads/2007/11/kleine-anfrage-bls-uni.pdf.

On average, the dissertation takes one year of full-time research and writing. The dissertation is graded by two professors at the candidate's university. There is no external control, as in England and Wales. Following this, there is a general oral examination on the German legal system (the *Rigorosum*) or a public defense of the dissertation. The number of doctoral candidates differs according to the university. In Münster, as high as one sixth of the students, that is, over 100, achieve the doctorate in each academic year; at the law faculty in Munich (which is just as big), only half this number do so.

After the first state examination (and, possibly, the doctoral thesis), students embark on a two-year preparatory service which represents the practical stage of legal education (the *Referendariat*). The *Referendar* (trainee) has placements at an ordinary civil court (five months), an ordinary criminal court or state prosecution department (three months), a solicitor's firm (10 months) as well as a placement of his choice (three months). Once he has completed the *Referendariat*, the student sits the second state examination. This consists of eight written exams which test the candidate's knowledge acquired during the compulsory placements and an oral exam which tests overall knowledge. This second examination is designated the *Assessor* examination and concludes the legal education in Germany.[315]

Three developments have taken place over the last few years. On the one hand, some universities have introduced student fees ranging from 250 to 500 Euros per semester, which are earmarked solely for improving teaching resources. On the other hand, changes have been made to the course curriculum to the effect that much more attention is being paid to teaching foreign languages, soft skills, and specialization. The third development can be seen in the growing internationalization of law, with European law and international business law assuming greater prominence. The former subject is still taught as a stand-alone course but its influence is being increasingly recognized in national legal subjects.

German legal education is often described as being geared toward the office of a judge rather than the profession of a *Rechtsanwalt*,[316] an approach which reflects in part a positivistic understanding of law (see the chapter on comparative jurisprudence). Legal education is heavily influenced by academia and contains, in particular, the historical and systematic framework as well as the scientific foundations of law.[317] Law is not so much questioned and discussed as applied on the basis of abstract and analytical reasoning. Law students are expected to know the law and apply it correctly. They are less concerned with finding the solution which appears most reasonable in light of the facts. In conclusion, one can say that the

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[315] *See* Deutsches Richtergesetz (DRiG) §§ 5b, 5d ¶3.

[316] Gerd Roellecke, *Erziehung zum Bürokraten?—Zur Tradition der deutschen Juristenausbildung*, Juristische Schulung (JuS) 337 (1990); Gerhard Commichau, Juristische Schulung (JuS) 858, 859 (1982); Wolfgang Grunsky, *Juristenausbildung in Deutschland*, *in* Anwaltsberuf in der Heutigen Gesellschaft 223 (Peter Gilles, ed., 1991); Hattenhauer, *Juristenausbildung—Geschiche und Probleme*, Juristische Schulung (JuS) 513, 518 (1989).

[317] Grunsky, *supra* note 316, at 213.

original purpose of legal education in Germany (i.e., the creation of a civil servant with a scientific education, who is led by humanistic ideals and conscious of his public duty) still characterizes legal education today.

2. ENGLAND AND WALES

The English or Welsh law student concludes his schooling at the age of 18 with the A-level examinations. Thereafter, he applies for a place at a university, and most applicants are successful even if they do not manage to obtain a place at their preferred university. In 2006, almost 16,000 Britons applied for a place at a law school and 11,000 of them were successful.[318] The course of studies generally lasts three years or nine terms, during which some courses are compulsory. Most students choose a course which leads to a qualifying degree (i.e., the university degree is recognized by the Law Society). In order to attain this degree, students must complete courses in certain compulsory subjects (termed foundations of legal knowledge). These are public law (including constitutional law, administrative law, and human rights), the law of the European Union (EU), criminal law, obligations (including contract, restitution, and tort), property law, equity, and the law of trusts. Depending on the range of courses offered by the respective universities, students can specialize somewhat. During the academic year, students write extended essays which are graded. At the end of the year final examinations are held. These sometimes require students to solve problems but otherwise the questions require the students to discuss the relevant subject usually by critically appraising a statement. At Oxford, all the exams occur at the end of the final year of study.

In 2006, almost 13,000 law students in England and Wales (including foreign students) graduated.[319] At state universities in England students paid a maximum of £ 3,000 per annum. There is only one private university in England, namely Buckingham University. There it is possible to complete an LL.B. degree within two years, at least if the student can afford the annual fees of £ 7,500. One peculiarity of the British system of legal education is the possibility of complementing a bachelor's degree attained in a different discipline with a one-year course of legal studies. The graduate diploma in legal studies (GDL) is a conversion course which grants admission to the Legal Practice Course (see below). The fees for participating in the GDL range from £ 6,000 to £ 9,000.

The holder of an English bachelor of laws or GDL does not have a degree that qualifies him to practice as a solicitor, even if he is a lawyer in the broadest sense of the word. If he wishes to practice,, he is required to choose between the profession of a solicitor or barrister. If he wishes to practice as a barrister, he must apply for membership at an Inn of Court and a place at a one year Bar Vocational Course, where

[318] The Law Society, Trends in the Solicitors' Profession: Annual Statistical Report 2007 29 (2007).

[319] *Id.* at 31.

he must pay course fees between £ 8,600 to £ 12,500 (unless he receives a grant). Once he has successfully completed these courses, he can then apply for a one-year pupilage (similar to a traineeship) under the auspices of an experienced barrister or at the Crown Prosecution Service.[320] In 2006, there were 3,227 applications for the 1,932 places available on the bar vocational courses; 1,425 students completed the course successfully and were called to the bar by their respective Inns of Court. However, there were only pupilages for 417 graduates of the bar vocational courses. Considering that completion of the pupilage is a condition for practicing independently as a barrister,[321] competition is very fierce. Even after completing legal education as a barrister, there is no guarantee that one will find work as a barrister because most are self-employed, with a small number of barristers employed in private companies as legal counsel. The majority of barristers band together in so-called chambers in order to keep their overheads to a minimum. According to statistics, in 2008 there were approximately 13,000 self-employed barristers, including Queen's Counsel, and only 3,000 employed barristers.[322]

The professional branch of the solicitors is larger in terms of numbers. In 2007, there were 108,000 practicing solicitors.[323] To qualify, postgraduates apply for membership in the Law Society as well as a place on the legal practice course (LPC). This is currently offered by 36 universities and law schools[324] and costs around £ 6,500 to £ 11,000. The content of the LPC consists of lectures on legal theory and skills such as drafting and negotiating. The course lasts one academic year and concludes with a single final exam under the auspices of the Law Society, which ensures a high and uniform standard.[325] In 2007 over 11,000 students registered at the Law Society, 63 percent of whom were women.[326] In the previous year, almost 10,000 students took part on a legal practice course, 6,000 of whom were successful.[327] Following the successful completion of the legal practice course, the candidate must then work for two years as a trainee solicitor, during which time he is trained by the law firm in accordance with a training contract stipulated by the Law Society.[328] In addition, he attends a professional skills course which teaches other practical skills such as accounts, personnel administration, and business management.[329] Upon

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[320] Adam Kramer, Bewigged and Bewildered?: A Guide to Becoming a Barrister in England and Wales 23 (2007)

[321] http://www.barcouncil.org.uk/assets/documents/Bar%20Barometer,%20March%202011.pdf.

[322] The Bar Standards Board, http://www.barstandardsboard.org.uk.

[323] The Law Society, *supra* note 318, at 2.

[324] Solicitors Regulation Authority, www.sra.org.uk.

[325] Solicitors Regulation Authority, The Legal Practice Course: What You Are Expected to Know Before You Start (2007).

[326] The Law Society, *supra* note 318, at 33.

[327] *Id.* at 35.

[328] *Id.* at 37.

[329] Solicitors Regulation Authority, You and Your Training Contract: What You Need to Know (2006).

completion of the two year-traineeship at a law firm in accordance with the training contract, the candidate qualifies as a solicitor and is admitted to the roll.

3. SWEDEN

The legal candidate examination (*juris kandidatexamen*, renamed *juristexamen* in 2007) is the law degree necessary for admission as a judge (*domare*), state prosecutor (*åklagare*), or advocate (*advokat*). The exam can only be taken upon the successful completion of a university law course which is offered by a total of six universities: Gothenburg, Lund, Stockholm, Umeå, Uppsala, and Örebro. The university course lasts nine semesters and includes a thesis or dissertation, sometimes referred to in English as a master's thesis. (The successful law graduate or *Jur. kand.* generally refers to the degree in English as a master's degree or LLM.) Two-thirds of the lectures are of an introductory nature and compulsory.[330] During the course of study, the students generally do not concentrate on the technical application of law or on how to solve cases.[331] Law is a very popular subject. Despite limits on admissions, 1,600 students enroll for a law degree each year,[332] and the majority successfully complete their studies.

Following graduation from university, the best graduates (approximately 30 percent) are offered the opportunity of starting a training course at a court (see the chapter on judges) which lasts five years. Participants have to pass this stage if they intend to practice as a judge or prosecutor[333] or to become a member of the Swedish Bar Association (*Sveriges advokatsamfund*), which requires their members to have completed the judicial course of study. During the five years of training, the students spend at least three years training at the firm of a self-employed advocate or lawyer (one can also practice as a lawyer without the title *advokat*). The candidate must then attend a special preparatory course for the advocates' examination. Once the candidate has passed this exam, the professional body has to decide if the candidate is suitable to practice and only then may he call himself an *advokat*.[334]

4. THE UNITED STATES OF AMERICA

The vast majority of American lawyers today have graduated from law school, which means that they have passed a three-year course of study.

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[330] Bernard Michael Ortwein II, *The Swedish Legal System: An Introduction*, 13 Ind. Int'l & Comp. L. Rev. 405, 437 (2003).

[331] Volker Tönsfeldt, *Vieles ist unkomplizierter—Im Land des Öffentlichkeitsprinzips*, Anwalt das Magazin 8–9 (2001).

[332] Email from Bengt Lundell, Prefekt, Jurisdika fakulteten vid Lunds universitet, (July 26, 2008).

[333] Högskoleverket, Rätt Juristutbildning? Utvärdering av Juristutbildningar 10, 21 (2000).

[334] The Swedish Bar Association, *Some Salient Features of the Legal Profession in Sweden*, 46 Mar. & Transp. L. 2, 6 (2004).

As of 2010, there were 200 institutions approved by the American Bar Association to offer professional law degrees. The ABA, which is a private organization, was established in 1878 and promptly began to establish minimum standards for institutions offering courses of legal studies. Of these, 199 confer the professional law degree, the juris doctor or JD.

Almost all candidates who are admitted to American law schools in JD programs have already earned a bachelor's degree in some subject other than law, although a small number have a bachelor's degree in legal studies or pre-law studies, which are intended to help prepare the graduate for law school. Almost all academic courses which lead to the bachelor's degree require a full four years of study, and well over half of the students require more than four years to complete the degree. (Technically, ABA standards require only three years of study, not a degree.) Popular areas of study for the bachelor's degree are political science, economics, and business administration, although graduates with a degree in any subject—even comparative literature and music—satisfy the minimum requirements, and their applications will generally be considered, particularly if the candidate had a high grade point average (GPA).

The other major prerequisite for admission to a JD program is taking the Law School Aptitude Test (LSAT). This is not a test that one either passes or fails; rather, the better one's score, the more likely one is to be accepted at law school. One's score on the LSAT and one's GPA are the two factors that are most important to law school admissions committees. Other factors include, in no particular order, race, ethnic background, sex, experience, other accomplishments, community service, recommendations, personal motivation, and one's residence. This last factor—residence—is particularly relevant for public universities, which charge lower rates of tuition fees (so-called in-state tuition) to residents of their own states. Generally, in-state rates are less than half of out-of-state rates. Some controversy has broken out over public universities which have allegedly favored out-of-state applicants over in-state applicants because out-of-state students pay substantially more money to the law school.

The following figures on the costs of tuition and other fees at law schools and universities are reported as medians and as arithmetic means. The median is the amount that most students pay; half pay more and half pay less. The arithmetic mean is the result reached by dividing the total amount paid by the number of students who paid. The arithmetic mean can sometimes be substantially higher than the median. It should not be forgotten than the amount charged for tuition and other fees varies widely by institution. In general, the highest tuition fees (which term includes other fees) are found in New York City and New England, whereas the lowest fees are found in the South and in the Middle West.

The median annual tuition and other fees for public law schools was $15,621 for residents in 2008. Nonresidents paid a median amount of $26,435 annually. Some two-thirds of students attended private law schools, where the median paid for tuition and fees totaled $33,985 annually in 2008. Traditionally, scholarships in

the form of fee reductions are offered to about 20 percent of the in-coming students. These are students either with excellent academic credentials or classifications as "needy" (those who come from financially disadvantaged backgrounds). However, even these students might be among those who borrow money under federal programs to cover the costs of tuition fees and living expenses. The large majority (about 85 percent) of law students borrow money on favorable terms to finance their law school educations. The average (arithmetic mean, not median) amount borrowed for those graduating in 2008 for all three years of law school was $59,324 for those attending public law schools and $91,506 for those attending private law schools.[335]

College tuition and other fees are somewhat lower. Students at public universities in 2008–09 paid an average (arithmetic mean) of $7,567 annually in tuition and other fees. At private universities they paid an average (arithmetic mean) of $21,685. As the large majority studied at public universities, the overall average was $8,941.[336]

Most law schools require students to take certain classes in their first year of studies. Traditionally, these usually include six of the following seven subjects: criminal law, tort law, contract law, real property law, civil procedure, constitutional law, and moot court/legal writing. With the exception of a class in professional responsibility and of a paper course in which the student must write a substantial research paper, the remaining two years of courses are generally elective, which means that the student can select those he or she finds most interesting or most useful. However, most students choose courses which correspond to subject matter areas that are tested on the bar examination of the state in which they plan to practice.

Most but not all courses are taught using case decisions. The idea behind this method, which was introduced by Christopher Columbus Langdell 150 years ago, is that students should learn by the example of the judges and should enter into a hypothetical dialogue with the author or authors of the judicial opinions, much as they would do if they were representing a client before an appellate court. While students are learning to be advocates, they are also at the same time learning that the decision of the judge on a point of law is not absolutely predetermined by statute or case law; rather, the judges, at least at the appellate level, often exercise considerable discretion. This style of teaching also imparts a sense of the law as being in an evolutionary process rather than as being static or carved in stone. Recent American law school graduates often think that there are two sides to every legal argument; but, entering the practice of law, they quickly learn that perhaps 90 percent of the legal questions with which they are confronted are amenable to only one solution.

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[335] Legal Education Statistics from ABA-Approved Law Schools, www.abanet.org/legaled/statistics/stats.html.

[336] http://nces.ed.gov/programs/digest/d09/tables/dt09_334.asp.

While the correctness or even justice of judicial and even legislative decisions is questioned in law school classes and on law school examinations, the American law student at major law schools is most definitely not being prepared for the rule-oriented task of passing the bar examination. In fact, the bar examination is looked at as a mere formality at law schools like Berkeley, Chicago, Columbia, Harvard, Michigan, New York University, Pennsylvania, Stanford, Virginia, and Yale, where 90 percent of their graduates usually pass the bar examination the first time they take it. (This suggests that the criteria which were most important for being admitted to a major law school—excellent undergraduate grade point average and LSAT scores—also generally predict success on the bar examination.) At other law schools, particularly at non-ABA-approved ones, the instruction is geared much more toward training students to pass the bar examination in the state in which the law school is located.

The bar examinations, which are set separately for each state, concentrate on testing whether applicants know and can apply the black-letter law. The multistate examination, which is required in 48 of the 50 states and lasts one day, is an extreme example of rule-oriented testing. It is a multiple-choice examination. The candidate is presented with 200 factual settings for which he or she must choose the correct rule or solution. Candidates are also required to discuss factual patterns when writing answers to the (often) two days of essay questions.

In California, the bar examination consists of a three-day (18 hours in total) written test given twice a year. No statutes or other outside materials of any kind are allowed to be used. There are three parts: essays, performance tests, and multistate bar questions. The essays are six in number and might cover any of the areas on the multistate examination (see below) in addition to civil procedure, California community property, business associations, professional responsibility, remedies, and California wills and trusts law. There are two performance tests. Candidates for these tests are provided with a hypothetical client's file, certain legal authorities, and a memorandum asking them to analyze the facts and law and to write, for example, a legal memorandum to another lawyer, a trial brief, a memorandum to a judge, a client letter, a letter to opposing counsel, or a case plan. The multistate bar examination consists of 200 multiple choice questions covering contracts, property, torts, constitutional law, criminal law, criminal procedure, and evidence.[337]

Bar passage rates vary considerably by state. Four states (Oklahoma, Montana, Minnesota, and Kansas) have traditional bar passage rates of 90 to 100 percent. At the other end of the spectrum, three states have bar passage rates below 70 percent: West Virginia (66 percent), California (65 percent), and Wyoming (62 percent).[338]

Passage rates vary greatly depending upon the law school that the candidate attended. Graduates of law schools that are not approved by the ABA fare much

[337] The State Bar of California, Future Lawyers, http://admissions.calbar.ca.gov/.

[338] Internet Legal Research Group, http://www.ilrg.com/rankings/law/index.php/1/desc/StateOverall/2009 (six-year average).

worse. According to statistics from the State Bar of California, which is one of the 20 states that allow graduates of law schools that are not approved by the ABA to take their bar examination, 46 percent of graduates of ABA approved law schools passed the California bar examination in February 2010, but only 18 percent of those who had graduated from law schools that have not been approved by the ABA. In July 2009, the figures were 67 percent and 19 percent respectively.[339]

Once admitted to the bar of an American state, a lawyer may apply to one or more federal judicial districts for admission for practice before the federal courts. However, this admission does not entitle one to practice state law in the state in which the federal court is located: admission to the bar of one American state does not entitle a lawyer to practice the law of another state, much less of two or more states. To do so, the lawyer must obtain a waiver or else pass the bar examination in that state unless the state offers reciprocity of admission to the lawyers of another state. Once admitted to practice before the courts of one American state, the out-of-state or foreign lawyer might qualify to take an examination for practicing lawyers from other states, which is not as demanding as the general bar examination. However, this is still a substantial hurdle, so that very few American lawyers, statistically speaking, are admitted to the bars of more than one state. Sometimes out-of-state lawyers can be admitted to practice *pro hac vice* for one particular case; however, they almost always have an in-state lawyer to assist them.

C. The Legal Profession

1. GERMANY

In Germany, there is still the belief that the *Einheitsjurist* (or general lawyer) is best qualified not only for the office of judge but also for all other legal activities, including government service. Accordingly, the profession of *Rechtsanwalt* (i.e., solicitor) still plays a subordinate role in terms of German legal education.[340] Despite this fact, it is increasingly influencing the practice of law and the proportion of graduates opting to practice as *Rechtsanwälte* nowadays amounts to approximately 80 percent of the law graduates.[341] Their number has more than doubled in the last decades and continues to rise. In accordance with section 4 Var. 1 *Bundesrechtsanwaltsordnung*, admittance to the lawyer's profession depends on applicants being qualified to act as a judge in accordance with the *Deutsches Richtergesetz* (Judges Act). Alternatively, the applicants can satisfy

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[339] The State Bar of California, Examinations, http://admissions.calbar.ca.gov/Examinations/Statistics.aspx.

[340] Mathias Reimann, *"Rechtskulturschock" beim Studium in den USA*, Juristische Schulung (JuS) 282, 284 (1994); Holger Volks, Anwaltliche Berufsrollen und anwaltliche Berufsarbeit in der Industriegesellschaft 323 (1974).

[341] Martin Henssler, *Grundlagen des US-amerikanischen Berufsrechts der Rechtsanwälte*, Anwaltsblatt (AnwBl) 557, 566 (2002).

the membership requirements of the *Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland* (Law on the Activity of European Lawyers in Germany) of 9 March 2000 (section 4 Var. 2 BRAO). This act implemented the European Establishment Directive taking into account earlier directives facilitating the free provision of services of lawyers and the recognition of university diplomas. Now lawyers from all EU member states can perform the same activities as a German *Rechtsanwalt* and, after three years, attain the title of *Rechtsanwalt*. There are no limits on the numbers admitted and a refusal is only possible in specific situations.[342]

The current *Bundesrechtsanwaltsordnung* (Federal Code of Conduct for *Rechtsanwälte*) from 1958 is derived from the old *Reichsrechtsanwaltsordnung* (Imperial Code of Conduct) of 1878. The profession of *Rechtsanwalt* in Germany has traditionally enjoyed a high standing.[343] Until recently, the *Rechtsanwalt* was considered an extension of the court rather than as an advisor and mediator. Traditionally, the *Rechtsanwalt's* main task was to represent his client at court civil proceedings. This reflected his historical image as a civil servant and legal administrator and was also how German *Rechtsanwälte* regarded themselves. Here, two parties stand before the court and oppose each other on an equal footing. The *Rechtsanwalt* must represent his client's interests when discussing the case and inspecting the files as well as in oral proceedings and in written pleadings. He is responsible for managing court cases, submitting evidence, suggesting witnesses and supporting the judge in finding and applying the law. In many German courts, representation by a *Rechtsanwalt* is compulsory (*Anwaltszwang*), ensuring that proceedings are conducted properly.[344] Besides representing the parties at proceedings, the provision of general legal advice has steadily risen in importance. People in Germany are subject to legal rules and obligations in all aspects of life and a *Rechtsanwalt* meets the need for legal advice this engenders. Legal advice can also facilitate settlement, thereby avoiding conflicts and court cases. Indeed, many *Rechtsanwälte* are gradually coming to realize that they play a greater role as advisors and mediators than as lawyers submitting cases to court.[345] In addition, the number of admitted *Rechtsanwälte* in Germany has risen dramatically in recent years.[346]

The breadth of legal consultancy depends in part on the legal areas the *Rechtsanwalt* specializes in. The professional title of *Fachanwalt* ("specialist lawyer") denotes specialization in any number of legal areas: labor law, planning and construction law, wills and probate, family law, industrial patent law, trade and company law, information technology law, insolvency, medical law, landlord and

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[342] *See* Bundesrechtsanwaltsordnung (BRAO) §§ 7, 14.

[343] Adolf Weissler, Geschichte der deutschen Rechtsanwaltschaft 436 (1905).

[344] Hartstang, *supra* note 238, at 91.

[345] Helmut Redeker, *Datenschutz und Mandantenschutz in der Anwaltskanzlei*, Anwaltsblatt (AnwBl) 503, 505 (1996).

[346] Bundesrechtsanwaltskammer, Entwicklung der Zahl zugelassener Rechtsanwälte von 1950 bis 2009 *available at* http://www.brak.de.

tenant, leasing and residential property law, social law, tax law, criminal law, transport and freight-forwarding law, copyright and media law, transport law, insurance law and administrative law. Growing competition and establishment of large law firms are leading to a more business-oriented approach with the result that *Rechtsanwälte* are regarding themselves in a more entrepreneurial light.[347] Today, many *Rechtsanwälte* no longer act on a self-employed basis but are employed as corporate counsel in the legal departments of large firms.

The notary is not to be confused with the specialist lawyer: he is an independent public officer whose main function is to certify legal transactions of all kinds as well as to verify signatures. [348] The notary does not act as a member of an independent profession and does not form part of the judicial system. According to the German Federal Constitutional Court, the entire professional activity of a notary is of a public legal nature and thereby forms an exception to the other professions which provide legal advice.[349] The notary drafts legal instruments and official deeds which serve to recognize and guarantee the private rights of citizens. One peculiarity of the notary's invoice and official deeds is that the claims they enshrine are immediately executable without requiring a court judgment.[350] The central activity of the notary involves legal transactions with specific formalities, particularly transfers of land, the certification of wills, marriage contracts, acknowledgements of paternity as well as the founding of all types of companies. The legal advice provided by a notary is limited to clarifying and explaining the legal transactions he certifies so that he can record the intent of the participating parties in the deed.[351] All other types of contracts and documents without special formal requirements are drafted and negotiated by *Rechtsanwälte*. Sometimes, *Rechtsanwälte* are even responsible for drafting the notarial deed.

In the case of disputes between contracting parties it is the *Rechtsanwalt* and not the notary who often plays an important role in mediation. As in the other countries which form the subject of this study, the official role of the German *Rechtsanwalt* in civil proceedings begins with submitting the complaint to the court. Thereby, the plaintiff establishes the framework for the legal dispute. Once the court has set a time limit for the defendant's response, it orders the delivery of the writ of summons to the defendant. If the presiding or single judge dispenses with written preliminary proceedings (§ 272 II ZPO), a date for the oral proceedings will be set (§ 272 II ZPO). A conciliation session will take place prior to oral proceedings and if this proves unsuccessful in all respects (§ 278 ZPO), oral proceedings will take place immediately afterwards (§ 279 ZPO). At oral proceedings

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[347] Benten, Wa(h)re Beratung, Die Kanzlei 59 (2000); Ruhmann, Juristische Schulung (JuS) 90 (1997).

[348] *See* § 1 Bundesnotarordnung (BNotO).

[349] BVerfGE 17, 371, 377 (1964); BVerfGE 17, 381, 386 (1964).

[350] *See* Zivilprozessordnung (ZPO) § 794 par. 1 no. 5.

[351] Dieter Huhn and Hans-Joachim von Schuckmann, Beurkundungsgesetz und Dienstordnung für Notare 254 (4th ed. 2003).

the judge decides which documents are relevant to the decision and the witnesses who are to be heard. This latter task is performed by the judge himself. However, according to usual practice, the judge permits the parties' *Rechtsanwälte* to ask witnesses questions directly (s § 397 ZPO). Despite the fact that the parties are "masters of proceedings," the court still has to ensure that the parties submit relevant applications to the court in civil proceedings (§ 139 I 2 ZPO). In addition, the parties are only expected to present the facts. In this respect, the principle of *jura novit curia* (i.e. the court knows the law) applies. The parties can present legal arguments but this is not necessary (§ 137 II ZPO).

2. ENGLAND AND WALES

Generally speaking, the role of an English jurist resembles that of his German counterpart—with two important differences. First, England does not recognize the profession of notary in the German sense, and lawyers or judges perform his duties. Lawyers (usually a solicitor) are responsible for drawing up documents such as property transfers, contracts and nuptial agreements. However, they are not immediately executable and always require a court judgment. Unlike in Germany, where these tasks are performed by a notary, in England judges are responsible for procedures such as paternity suits. There are indeed "Notaries Public" in England but they are not comparable with German notaries. They must be admitted either as barristers or solicitors and normally have completed three additional courses (Roman law/civil law, IPR and notarial practice). However, their role is only to certify documents, mainly in relation to business matters abroad. According to the Notaries Society, there are currently 1000 Notaries Public in England and Wales.[352]

The second difference is more important and relates to the role of the lawyer in judicial proceedings. Whereas German judges have to ensure that the parties explain all relevant facts, submit relevant applications and display a firm knowledge of German law (in accordance with § 139 ZPO), this is not the case in England and other common law countries. In England, the task of the lawyer (usually a barrister) is to present the evidence and interrogate witnesses. In addition, he supports the judge in finding and applying the law since the latter (unlike his German counterpart) is not presumed to know the entire law which may apply to the case. This difference in the proceedings of the trial is often described using the terms "adversarial" versus "inquisitorial" procedures.[353] However, this is an unfortunate choice of words because proceedings are just as adversarial in Germany and the word—*inquisitorial* alludes to the Spanish Inquisition (at least in England). However, it cannot be denied that—from the German point of view—English barristers perform judicial functions which would be better performed by an unbiased judge and, secondly, that German judges—from an English point of view—exhibit their

[352] The Notaries Society, http://www.thenotariessociety.org.uk/.

[353] Zweigert and Kötz, *supra* note 3, at 268.

impartiality by assuming the role of a trial lawyer. However, before one passes judgment on either system, it must be remembered that both enjoy a high level of acceptance in their respective countries.

Considering that English lawyers have to perform a wider range of tasks at court proceedings than their German colleagues, one naturally assumes that there would be a far greater need for lawyers to lead proceedings. However, this is not necessarily true because of the difficulties in comparing the numbers of lawyers. This is due to many reasons, three of which are mentioned here. First, the term *Rechtsanwalt* does not correlate to the English term "lawyer." According to the Oxford English Dictionary, the term *lawyer* simply refers to someone who knows the law (i.e., he is therefore a member of the legal profession). Therefore, according to normal English usage, anyone who has studied law can be termed a lawyer even if he has not been admitted as a barrister or solicitor. This can be explained by the fact that the designation "lawyer" is not legally protected so that, for example, many academics fall within its scope. The German term *Rechtsanwalt* on the other hand is far narrower and only refers to persons who have been admitted to the *Rechtsanwaltschaft*. The English term *lawyer* is therefore comparable to the generally applicable German term *Jurist*. However, in Germany, the term *Jurist* is mostly used to denote someone who has passed the second state examination (*Assessor-Examen*); in other words, a *Volljurist*. Recently, some German universities have started to award the title *Diplom-Jurist* upon the passing the examinations relating to practical training (*Referendar-Examen*). In addition, there is the degree of *Wirtschafts-Jurist* (see above) who, at least in North-Rhine Westphalia, are not permitted to hold themselves out as jurists. However, in terms of numbers, they are of little importance.

Another reason why there may be more lawyers per capita in some common law countries than in Germany is that it is relatively common in common-law countries for a trained jurist or even an admitted solicitor to practice a different profession. This is partly due to the higher standard of education in these countries in comparison to Germany. A third reason for the higher number of lawyers is that English lawyers play a more important role than their German colleagues in mediating disputes, which the next chapter on judges discusses in detail. The German State of North-Rhine Westphalia, for example, is proud of the fact that 70 percent of civil cases (including mediation procedures) result in a settlement because this relieves the judges' workload.[354] Therefore, judges bear exclusive responsibility for only 30 percent of civil cases which are decided by court judgment. In England, on the other hand, the number of civil judgments (that is, of cases which cannot be classified as criminal or administrative in nature) barely amount to three percent.[355] With the help of the lawyers, judges are spared the remaining 97 percent.

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[354] http://www.justiz.nrw.de/Gerichte_Behoerden/ordentliche_gerichte/Zivilgericht/Einzelverfahren/Zivilprozess/index.php#11.

[355] Patrick S. Atiyah and Robert S. Summers, Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions

Logically, this would have to mean that fewer judges are needed in England than in Germany, (an assumption verified in the next chapter). On the other hand, if the mediation of legal disputes by lawyers were to take more time and therefore be less efficient than a straightforward court judgment, one would ultimately need more legal personnel (a judge plus a lawyer), in order to dispense with the same number of disputes. However, even bearing such considerations in mind, it is not possible to reconcile the results of the two studies in the following graph.

Author	Germany	England & Wales	USA
Benno Heussen, *Spezialisierung, Internationisierung und die Faszination der großen Zahlen—Trends und Entwicklungen im europäischen Anwaltsberuf*, The European Legal Forum 2-2002, Eng. Ed., p. 101 (residents per *Rechtsanwalt*)	683	500	281
Ray August, The Mythical Kingdom of Lawyers, American Bar Association Journal p. 22 (1992) (residents per lawyer)	294 (excl. GDR)	588	357

3. SWEDEN

The advocates Tendorf and Sandberg divide the activities of a Swedish advocate or jurist into seven categories:[356] legal advisors in private matters (especially in relation to family, property and tax law); legal advisors for commercial companies; representatives before courts and authorities; mediators; administrators; trustees as well as administrators and executors of wills; and, finally, legal experts who render opinions on legal matters.

There are 4,400 advocates in Sweden today with its population of nine million, and of this number 18 percent are women. In addition, there are 1,100 assistant lawyers (*biträdande jurister*) who are employed by advocates.[357] One reason for the relatively small number of advocates is the fact that under Swedish law they may only practice in a self-employed capacity or work for other advocates. In a normal employed relationship with a nonadvocate, the advocate could therefore find himself in a conflict of interest.[358] Owing to this principle, for example, state prosecutors are excluded from membership.[359] Another reason for the comparatively

46 (1987); Marc Galanter and Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1339 (1994).

[356] Thomas Tendorf and Lars Sandberg, *Sweden*, *in* Professional Liability of Lawyers 213 (Dennis Campbell and Christian T. Campbell, eds., 1995).

[357] The Swedish Bar Association, Some Salient Features of the Legal Profession in Sweden 5, *available at* http://www.advokatsamfundet.se/Documents/Advokatsamfundet_eng/From%20Scandinavian%20Studies%20of%20Law.pdf.

[358] The Swedish Bar Association, Some Salient Features of the Legal Profession in Sweden 1, *available at* http://www.advokatsamfundet.se/Documents/Advokatsamfundet_eng/From%20Scandinavian%20Studies%20of%20Law.pdf.

[359] The Swedish Bar Association, Some Salient Features of the Legal Profession in Sweden 5, *available at* http://www.advokatsamfundet.se/Documents/Advokatsamfundet_eng/From%20Scandinavian%20Studies%20of%20Law.pdf.

small number of advocates is almost certainly due to the fact that Swedish law recognizes only few formal requirements. Sweden does not have an equivalent of Germany's notary profession and jurists do not necessarily play a role in property transactions.[360] The hourly rates of advocates also explain why people are less likely to obtain legal advice. In 2001, the hourly rate for legal advice amounted to SEK 1121 to SEK 3000 (130–340 Euros). In the case of divorce and related legal questions, legal aid is only granted in exceptional cases.[361] The lack of a fees ordinance comparable to the German Law Governing Attorneys' Fees (*Rechtsanwaltsvergütungsgesetz*) is explained by the fact that court proceedings in Sweden demand far more of the lawyers' time than in Germany. Unlike in Germany, a reference to documents is insufficient. Instead, the trial lawyer plays an important role in court proceedings, which can sometimes last several days.[362]

Theoretically, any natural person can represent another before court, although this is seldom the case in practice and almost unheard of in criminal trials. Despite the fact that representation by a lawyer is not compulsory, the accused is almost always represented by an advocate.[363] In addition, there are jurists who work as lawyers on an independent basis who have not been admitted as advocates. The nonadvocate or aspiring advocate advertises his firm as a law office (*juridisk byrå*) instead of a firm of advocates (*advokatbyrå)*.[364] A search of the *Yellow Pages*[365] using the latter term as well as its plural form resulted in over 3000 hits. On the other hand, a search using the keyword *juridisk byrå* and its plural form resulted in only 900 hits. Upon inspection, the majority of entries under *juridiska byråer* (the plural form) appear to refer to legal departments of banks, insurance companies, and other companies. All practicing jurists (whether advocates or not) are nevertheless subject to the same rules governing liability.[366]

According to a study carried out in 1999, there were approximately 21,500 persons working in Sweden who held a law degree. About 8000 of them held positions of employment not strictly legal in nature. Of these, approximately half occupied positions which required legal qualifications. Scarcely half of all persons with a law degree were employed in the civil service. A large number of the remaining jurists were employed in the firms of advocates or non-advocate lawyers

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[360] The Swedish Bar Association, Some Salient Features of the Legal Profession in Sweden 6, *available at* http://www.advokatsamfundet.se/Documents/Advokatsamfundet_eng/From%20Scandinavian%20Studies%20of%20Law.pdf.

[361] Tönsfeldt, *supra* note 331, at 8–9.

[362] Ralf Ek, *Die schwedische Anwaltschaft*, Zeitschrift für europäisches Privatrecht (ZeuP) 187, 190 (2001).

[363] The Swedish Bar Association, Some Salient Features of the Legal Profession in Sweden 1, *available at* http://www.advokatsamfundet.se/Documents/Advokatsamfundet_eng/From%20Scandinavian%20Studies%20of%20Law.pdf.

[364] Tendorf and Sandberg, *supra* note 356, at 212.

[365] The Yellow Pages, http://gulasidorna.eniro.se.

[366] Tendorf and Sandberg, *supra* note 356, at 212, 223.

(approximately 5,500) and many (approximately 3,000) had found employment in the private sector. In addition, jurists also work at banks and insurance companies (in fact there are almost 1,900 legally trained persons employed in this sector) as well as charities and trade organizations—although these employ the smallest proportion of legally educated workers (approx. 700).[367]

According to statistics, around 25 percent of advocates work in firms with two to three partners and a further quarter work on their own.[368] If there are generalists, they are more likely to be found in smaller cities because the work performed by lawyers is becoming increasingly specialized. Even the so-called "lone warriors" are frequently finding that they have to specialize. In response to surveys, almost 60 percent of advocates have commercial law as their main area of activity and 36 percent criminal law. The high percentage of advocates who specialize exclusively in commercial law is probably due to the fact that economic interests predominate amongst clients. The advocate who specializes for example only in family law or inheritance law is a rarity. Sweden does not recognize the title of a specialist lawyer, a role enjoying increasing popularity in Germany. More and more advocates are finding work in large law firms: two of the largest law firms in Sweden have more than 300 advocates.[369]

4. THE UNITED STATES OF AMERICA

The American states have what is known as a unified or fused legal profession, that is, they do not differentiate between barristers and solicitors: a member of the bar is entitled to perform all aspects of the legal profession, from advising clients to drafting wills and deeds and appearing for clients in court. That being said, the legal practice in cities of any size is specialized. Two basic specializations are those between office lawyers and courtroom lawyers (often referred to as business lawyers and litigators, respectively) and between criminal lawyers and civil, that is noncriminal, lawyers. Within these three areas of specialization—advisory work, civil litigation, and criminal practice—one finds further specializations. California led the nation in introducing legal certification programs which offered attorneys the opportunity to demonstrate competence and experience in one or more of 11 areas of law practice: Admiralty, Appellate (Civil or Criminal), Bankruptcy, Criminal, Estate Planning/Trusts/Probate, Family Law, Franchise, Immigration, Legal Malpractice, Tax, and Workers' Compensation.

As noted by de Tocqueville 150 years ago, and as still true today, lawyers form the highest political class; the American aristocracy occupies the judicial bench and

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[367] Högskoleverket, *supra* note 333, at 25–28.

[368] Ralf Ek, *supra* note 362, at 189–90.

[369] The Swedish Bar Association, Some Salient Features of the Legal Profession in Sweden 6, *available at* http://www.advokatsamfundet.se/Documents/Advokatsamfundet_eng/From%20Scandinavian%20Studies%20of%20Law.pdf.

the bar. Just considering the present administration, President Obama graduated from Harvard Law School, and his cabinet includes Hillary Clinton (Yale) as secretary of state, Eric Holder (Columbia) as attorney-general, Joe Biden (Syracuse) as vice-president, and Leon Panetta (Santa Clara) as secretary of defense. Over half of America's federal senators practiced law. This, of course, is not unusual in western democracies. In Germany, one-third of the *Bundestag*'s members are lawyers. In France, nine of Nicolas Sarkozy's first cabinet of 16 were lawyers or law graduates, including the president, the prime minister, and the finance minister, who was an ex-chairman of Baker & McKenzie, an American law firm.

Most American lawyers are not in politics; rather, they are in private practice. In fact, 75 percent of them are in private practice, 70 percent in firms of five or fewer. Eight percent are in-house counsel, that is, they work as an employee for a business. Another 8 percent are in public practice, 3 percent are judges, one percent teach law, one percent are employed in the public interest arena, and 4 percent are involved in other endeavors with legal implications. Statistically, the jobs in private practice are remunerated the most generously, according to a 2007 study of median salaries of lawyers nine months after graduation. Private practice paid a median of $108,500, while businesses paid only $69,100. Government employment offered a median annual salary of $50,000. Academic posts and judicial clerkships followed closely with $48,000. On average, the medial salary of all law school graduates who were employed within nine months of graduation from law school was $68,500 in 2007.[370]

One fairly recent phenomenon is the growth of large global law firms. In 1949 there were only five law firms with more than 50 lawyers in the United States, but by the year 2000, there were 150 firms with more than 250 lawyers, 57 with more than 500 lawyers, and seven with more than 1,000 lawyers. Baker & McKenzie had 3,300 lawyers in 2005. With the growth in size of law firms has come a growth in the intensity of legal advice and involvement on behalf of the American lawyer. American lawyers are expected nowadays to write contracts that keep their clients out of court and free from judicial interference. They spend hours if not days drafting detailed contracts that specify the agreed performance and the remedies for failure to perform with the intent of leaving less room (in the eyes of the business persons involved) for the courts to rewrite the contract to fit the court's understanding of what a fair result would be. More than ever, American lawyers are expected to obtain detailed knowledge of the deal and put it into writing. Further, they are expected to "draft around" legal problems and create specific, one-shot solutions. Often they are called in to oversee the performance of the contract.

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[370] United States Dept. of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, 2010–11 ed., *available at* http://www.bls.gov/oco/ocos053.htm.

Summary

During the middle ages there was no general model of the European jurist; instead, the historical development of the legal profession proceeded differently in Germany, England and Sweden. That said, Sweden's legal development resembles Germany's more than England's. At the time of the Reception of Roman law (Reception) in Germany, Sweden was still a poor country, lightly populated, and with a weak central government. It lacked the critical mass of wealthy families needed to send their sons to study law far from home, and then to receive and develop it when they returned. Instead jurists concentrated on Swedish common law and canon law. By contrast, Norman England had a highly developed legal profession (considering the standards of the time) especially as London itself was the center of government and commerce. Moreover, the English jurist avoided the university route which was more suited to those wishing a career in the church or civil service. He preferred the Inns of Court which were organized privately and where courses were offered by practicing lawyers and judges rather than academics.

In terms of legal philosophy, the fact that Sweden and England did not receive Roman law may have influenced the mentality of the modern jurists (which is the subject of the chapter on comparative jurisprudence). The influences of these historical developments can still be found in the modern legal education systems of the three countries—even in England where a legal education at university level has only existed on a large scale since the middle of the last century. In the United States, academic training of lawyers started somewhat earlier, but there, as in England and Wales, the emphasis is on training lawyers, not civil servants. That said, legal education in Germany remains rule-oriented and rather stale whereas legal education in England is more practical and socio-political in nature.

The predominant model of an educated jurist in England is that of the private barrister or solicitor, who uses his skills in the private sector. This demands not only versatility but also specialization. On the other hand, the German educational system follows the model of training for the civil service, regardless of whether the candidate wishes to become a civil servant, academic, public prosecutor, judge, business lawyer, or *Notar*, to name just a few of the myriad professions that German law graduates choose. General rather than specialized knowledge is thought to make a better impression on future employers.

Uniformity is also reflected at the practical training stage in Germany which follows university education and which contrasts with the greater specialization found in the United States and in England and Wales where the legal profession is (still?) separated. The two systems of education (that is, practical training and university education) in England are geared towards the private market. In Germany, however, the practical training ends in a single examination which is geared towards selecting good civil servants and, in particular, judges. Sweden's university education is comparatively long in duration but thereafter does not require

graduates to complete practical training before they can practice as lawyers. In fact, one can practice as a lawyer even if one has not studied at all (although this is only viable in smaller communities and only if there are no educated jurists around who can compete). The interesting and unique aspect of legal education in Sweden is the training program which has highly competitive entrance requirements. Only around 30 percent of law graduates have the opportunity to work at court and only those who complete this additional stage of training may work as a judge or state prosecutor. It is also interesting that elite jurists (*advokater*) profit from this state education in their later professional lives.

The United States is unique in requiring its would-be lawyers to study some other subject for at least three years—and almost all have a four-year bachelor's degree—before even beginning their law studies. With this in mind, it should come as no surprise that United States lawyers are the least likely of the lawyers surveyed to see the law as being autonomous from politics and morality. (See the chapter on comparative jurisprudence.)

It is not possible to say which of these four models of legal education is most suitable for the future. Rather, all four appear to possess admirable and less admirable characteristics and there is no reason to claim that the jurists of one of these three countries do their job better or worse than the others in any particular respect. Nevertheless, there are some differences in the activities of the jurists in these four jurisdictions. The most obvious is the prominent role given to the barrister or attorney in English and American court proceedings. As will be discussed in the chapter on judges, from a German point of view, this role of the private lawyer also includes judicial activities such as the selection and examination of witnesses and legal research. Germany also has a profession which is not found in England, the United States, and Sweden, namely that of the civilian notary (*Notar*). The fact that England and Sweden are able to function without notaries suggests that this profession is not strictly necessary. On the other hand, if the notary's profession were abolished, his functions would have to be performed by others. It is conceivable that the function would be taken over by the state (as in Sweden) or privatized (as in England and Wales and in the United States). However, one must not forget that there are very few notaries in Germany, at least compared to the number of barristers in England and Wales. The future of the barrister's profession is intimately bound up with the future of the judge and courts. This subject will be examined in the chapter on judges.

An English or Welsh barrister or solicitor is not automatically qualified to practice in Scotland and Northern Ireland. Neither is an American lawyer admitted in one of the American states automatically qualified to practice in any of the other American states, although he or she will generally be allowed to practice before the federal courts on matters of federal law. In this regard the United Kingdom and the United States are a microcosm of Europe, where the bars are controlled locally. There does not seem at present to be a move in the direction of a national bar in either the United Kingdom or the United States.

The future of the legal profession in Sweden, Germany, and England and Wales is heavily influenced by the EU and Court of Justice of the European Union[371] owing to their jurisdiction in matters relating to competition and the internal market. During the 1960s, the Council of Bars and Law Societies of Europe (CCBE) was established to represent the shared interests of European lawyers. The CCBE collects statistics on the numbers of European lawyers who are resident in foreign countries within Europe and in this way profits from the protected right of lawyers to move freely within the member states.[372] However, as soon as that lawyer moves to another member state, he is subject to the national professional, statutory, and administrative rules governing the lawyer's profession in that "foreign" member state.[373] The German Act Governing the Activities of European Lawyers in Germany (*Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland* or EuRAG) is a good example of the admissions procedure of the countries under investigation. According to § 11 (1) sentence 1 EuRAG, those who can prove they have been practicing effectively and regularly as an established European lawyer in Germany in the field of German law (including European law) for at least three years can be admitted as a German *Rechtsanwalt*.

According to the statistics of the CCBE in 2009, 146,910 *Rechtsanwälte* were admitted in Germany, 297 of whom were from other European countries. In England and Wales, 139,789 lawyers were admitted, of whom 327 were foreign EU lawyers. In Sweden, of the 4,503 *advokater* who were admitted, only 14 were from other European countries.[374] (Interestingly, only Swedish *advokater* enjoy the protection of European Community law; not all practicing jurists do so.[375]) The relative modesty of these figures points to the fact that a national legal education is practically a mandatory requirement to practice as a lawyer in any of these jurisdictions. Despite the lack of research into the activities of foreign lawyers, conversations that the author has had with many of them both in Germany and England indicate that the foreign lawyer is seen as a go-between in relation to the host and home country, and he or she is rarely viewed as an independent legal advisor or lawyer in the host country. This is because a deep-rooted knowledge of the national legal system is an absolute necessity, even for legal specialists in labor and competition law, areas which are strongly influenced by European law.

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[371] E.g., European Court of Justice, Nov. 13, 2003 C-313/01 Morgenbesser; European Court of Justice, Jan. 29, 2009 C-311/06 Consiglio Nazionale degli Ingegneri.

[372] Lawyers' Services Directive (1977) (77/249); Lawyers' Establishment Directive (1998) (98/5); Recognition of Professional Qualifications Directive (2005) (2005/36); Directive on Services in the Internal Market (2006) (2006/123).

[373] Art. 6 Abs. (1) directive for the simplification of the lawyer's profession (Rechtsanwalt) in a different member state than from where the qualification was acquired (98/5/EG).

[374] *See* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/2010_Table_of_Lawyer1_1313141496.pdf.

[375] Art. 1 par. (2), directive for the simplification of the lawyer's profession (Rechtsanwalt) in a different member state than from where the qualification was acquired (98/5/EG).

The fact that so few Europeans have been admitted in other European countries is unsurprising because, in comparison to his national counterpart, the foreign lawyer lacks a well-grounded, thorough education in domestic law. At least in the more demanding subjects, he can only catch up—if at all—by hard work and experience. In the countries which form the subject of this study, a foreign legal education will therefore not replace the national one—at least for the foreseeable future. Of course, it is conceivable that future legal systems and systems of legal education can be structured in such a way that European and American jurists with sufficient linguistic skills could profit from admission and the freedom to practice in greater numbers (as is the case with doctors, for example). However, such a development currently appears a long way off.

The only development that, in the author's opinion, might take place in the next few decades is that private arbitral institutions establish training and certification requirements that would supplement the licensing requirement of the states. It might be possible in the future, for example, to learn law at one of these institutions the way lawyers used to read law at the Inns of Court.

5

Judges and Judiciaries

This chapter provides an overview over certain aspects of the judicial profession and of the judiciary in the four jurisdictions examined in this book, namely Germany, Sweden, England and Wales, and the United States.

The first part treats the history of the judicial profession in all four jurisdictions. This is followed by an overview of the present court structure in each jurisdiction and by a description of the methods of judicial selection and training as well as of the responsibilities of a modern-day judge in each of the jurisdictions.

A. Historical Development

The modern function, role, and legal position of judges in Germany, England and Wales, Sweden, and the United States has resulted from historical changes in power structures and state. The key to understanding the status of judges therefore lies in the countries' historical developments.

1. GERMANY

Although even the earliest Germanic societies administered law, it was only after the Reception of Roman law (Reception) that a judicial profession emerged. The rediscovery of the Digests in Italy in the 11th century led eventually to the adoption of Roman law in the form of the *Corpus Iuris Civilis* throughout the Empire.[376]

During the era of absolutism, judges were appointed by the landowners: they were subject to their authority and could be replaced at any time. Since the landlord also acted as supreme judge, he could intervene in proceedings and make decisions and transfer cases to ad hoc commissions.[377]

Christian Wolff described judges at the time as "wholly dependent on the highest territorial authority due to the fact that the latter has the power to appoint

[376] Roellecke, *supra* note 316, at 337 *et seq.*

[377] Schmidt-Räntsch, *supra* note 295, Teil B Einleitung, para. 2; Jürgen Thomas, Richterrecht 1 (1986).

and depose of them"[378] and reflected the absolutist form of state of the time. The clearest example of this was the Prussian King Frederick the Great's firing of the judges of the supreme courts in 1779. The catalyst for this decision was the trial of Arnold the miller.[379] Forced to pay rent on his watermill, Arnold complained that the neighboring town council had deprived him of his water supply. His original action failed, as did his appeal, but the king believed that the miller's legal rights had been infringed and personally intervened in the case. On 1 January 1780, he issued a decree passing judgment on the case. Friedrich II may have had his way in this case, but the critical reaction it engendered only served to promote the idea of an independent judicial system.[380]

The judge's role in modern society has been forged by the theories of John Locke and Montesquieu. In his most famous work, *Two Treatises of Government* of 1689, Locke called for the legislative and executive powers to be separated. Although he did not consider the judiciary to be an independent power, Locke provided the basis for Montesquieu's theory of the separation of the three powers, the purpose of which was to protect the citizens. Owing to this doctrine as well as the Revolution of 1789, France became the first European country to separate the judiciary, monarch, and members of parliament.

Fearing similar revolutionary developments, German landowners also implemented these constitutional concepts. Towards the end of the 18th century they increasingly gave up the office of supreme judge and refused to change or quash court judgments. This led to the emergence of a *de facto judicial* independence (that is, not enshrined in statute). Nevertheless, those judgments of the Prussian criminal trials imposing severe penal sanctions still required the landowners' formal approval before they could be executed.[381]

On the other hand, the personal independence of judges did not automatically accompany these developments because he could be dismissed at any time. Only at the beginning of the 19th century did individual states incorporate the personal independence of the judiciary in their constitutions, one example being Prussia in 1848. This meant that judges were no longer mere servants of the state, bound to carry out its orders. Statutes also entrenched the judges' position by only permitting judges to be dismissed under certain circumstances.[382]

Later constitutions, such as the draft Constitution of St. Paul's Church (*Paulskirchenverfassung*) in Frankfurt of 1849, the Prussian Constitution of 1850,

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[378] Schmidt-Räntsch, *supra* note 295, at ¶2, *citing* Christian Wolff, Vernünftige Gedanken von dem gesellschaftlichen Leben des Menschen und insonderheit dem gemeinen Wesen 477 (4th ed. 1736).

[379] *See* Malte Diesselhorst, Die Prozesse des Müllers Arnold und das Eingreifen Friedrich des Grossen (1984).

[380] Thomas, *supra* note 377, at 1; *see also* Eberhard Schmidt, Einführung in die Geschichte der deutschen Strafrechtspflege 276 (3d ed. 1995).

[381] Thomas, *supra* note 377, at 2.

[382] Schmidt-Räntsch, *supra* note 295, at 40.

the Weimar Constitution of 1919, and the Basic Law of 1949, incorporated the provisions in the 1848 Prussian Constitution relating to judicial independence almost word-for-word. However, Article 104 of the Weimar Constitution still restricted personal independence to the ordinary courts.[383] It was only in 1949 that Article 97 of the Basic Law extended the principle of personal independence to the judiciary as a general principle.[384]

During the National Socialist era, the German Act Governing State Officials (*Deutsches Beamtengesetz*) of 1937 made it possible for judges to be forced into retirement on "political or racial" grounds without legal proceedings. Judges had the same status as state officials, and so they could be subject to formal disciplinary proceedings to be decided by the executive. Judges were therefore divested of their independence and reduced to little more than functionaries of the National Socialist regime. The act of the Imperial Parliament of 26 April 1942 appointed Adolf Hitler as Supreme President of Courts of the German Empire. He could, according to that act, "dismiss judges without any regard for their legitimate rights" and "in the absence of any prescribed procedures."[385] During National Socialist rule, therefore, judicial independence and the division of powers were suspended.[386]

The entry into force of the Basic Law on 23 May 1949 granted the judges personal independence, but their legal relationships continued to be regulated in piecemeal fashion until 1961, when the German Act Regulating the Judiciary (*Deutscher Richtergesetz*) was enacted.[387] This statute uniformly regulated the judiciary at both the federal and state levels and thereby created an autonomous bureaucracy which existed alongside officials and those performing military service. German judges achieved a personal independence commensurate with that of their English counterparts in terms of the functions they perform.[388]

After 1945, the constitution of individual states and the Basic Law re-established the independence of the judiciary. It became possible for judges to scrutinize each legal act of the legislature and administration to ensure it was legal (Article 19 (4), Article 100 (1) GG). The wide range of powers and the extension of judicial independence to all courts represented just one of a series of important reforms motivated by the experience under National Socialism.

In the totalitarian, centralist system of the former German Democratic Republic (GDR), the legal system served to enforce socialist justice and political

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[383] *Id.*

[384] *See generally* Eduard Kern, Geschichte des Gerichtsverfassungsrechts (1954); Hans D. Jarass & Bodo Pieroth, Grundgesetz Kommentar Art. 97 (10th ed. 2009).

[385] Schmidt-Räntsch, *supra* note 295, at 41. The statute can found at *Rechtsanzeiger* No. 97, April 27, 1942 and *Reichsgesetzblatt*, 247.

[386] Werner Schmidt-Hieber & Rudolf Wassermann, Justiz und Recht. Festschrift aus Anlass des 10jährigen Bestehens der Deutschen Richterakademie in Trier 23 (1983).

[387] Schmidt-Räntsch, *supra* note 295, Part B, Introduction, ¶7.

[388] Saltanat Khorrami, Das Einstellungs- und Beförderungsverfahren englischer und deutscher Richter: Auswirkungen auf die richterliche Unabhängigkeit 147 (2005).

aims. Similar to their counterparts in the National Socialist state, laws played a secondary role with the GDR judges being bound first and foremost to the dictates of the ruling Social Unity Party of Germany (SED).

The court system in the former GDR had three levels. The Supreme Court (*Oberstes Gericht*) formed part of the People's Assembly (*Volkskammer*) with the District Court (*Kreisgericht*) and Regional Court (*Bezirksgericht*) as subordinate courts.[389] The Supreme Court was elected by the People's Assembly and resembled a political rather than a judicial organ.[390]

All judges were elected for five years (that is, the period of office for the elected People's Assembly). Judicial independence should have been guaranteed by Article 96 I of the GDR Constitution but this principle was restricted by certain provisions of the constitution itself. According to Article 96 (1) sentence 1 GDR Constitution, judges were not only bound by laws but also the rulings of the People's Assembly. In addition, the Ministry of Justice controlled the promotion of judges, which depended on a judge's willingness to "toe the line."[391]

In order to study law in the GDR, one had to pass a test of suitability as early as the 11th class. The allocation of a place was determined mainly by the political outlook and moral character of the candidate.[392] Law was studied in Berlin, Jena, Leipzig, and Halle; and divided into *Justiz* (legal studies) and economics. The former subject was all that was needed to qualify as a judge, state prosecutor, notary, or lawyer.[393]

As a rule, legal studies lasted four years, after which graduates were awarded the degree of *Diplomjurist*.[394]

The most important subject in the GDR's law degree program was Marxist-Leninist theory, which took up approximately one-third of the whole course. Students who chose the profession of judge would spend their final year undergoing training at the Regional Courts. Following this educational phase, an extended essay was written on court practice and thereafter candidates could be nominated for judicial office.[395]

After German Re-unification, judges of the former GDR were subject to a review before the Judicial Selection Committees (*Richterwahlausschüsse*). As a

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[389] Hermann Weber, *Ehemalige DDR-Richter als Richter im geeinten Deutschland?—Materialien zur Orientierung bei der Beantwortung einer schwierigen Frage*, Neue Juristische Wochenschrift (NJW) 449, 454 (1991).

[390] Georg Brunner, Einführung in das Recht der DDR 65 (1975).

[391] Claudette Adelaida, *Die Unabhängigkeit des Richters* der *DDR,* Deutsche Richterzeitung (DRiZ) 11, 13 (1981).

[392] Harald Dörig, Juristenausbildung, der *DDR,* Juristische Ausbildung (JA) 218–19 (1990).

[393] Dirk Brust, Die Übernahme ehemaliger DDR-Richter in ein bundesdeutsches Richterverhältnis 41 (1994).

[394] Dörig, supra note 392, at 218.

[395] Deutschland. DDR. Ministerium für Hoch- und Fachschulwesen, Studienplan für die Grundstudienrichtung Rechtswissenschaft zur Ausbildung an Universitäten und Hochschulen der DDR (3d ed. 1982).

result of this procedure almost half of former GDR judges were allowed to continue their judicial careers in the Federal Republic of Germany.[396]

2. ENGLAND AND WALES

a. Common Law Courts

The history of common law is closely related to the history of the royal judges since in the first century following the Norman Conquest of 1066 a judge's ruling was widely regarded as synonymous with the law. During the reign of Henry II (1154–1189), judges were sent to represent the king beyond his court. At this time, the judge's most important tasks were to maintain the peace and decide on cases relating to property and easements. They also performed a valuable financial service too because the fines and seizures ordered in criminal cases represented important sources of revenue.[397] Even if the king's justice involved great financial expense, it had the considerable advantage over local courts that judgments issued by the King's Bench were binding throughout England.[398]

The first Anglo-Norman representative of the king was the *justiciarius*, who resembled the king's second in command due to the fact that he had authority over all affairs of the state including the resolution of disputes. In 1166 Henry II sent two members of his court through his territory with the main task of enforcing his new inheritance law. Later, 20 to 30 *justiciae errantes* were appointed for this purpose who were divided into six circuits (that is, regions). The permanent headquarters of these judges was the King's Court (*curia regis*), being the seat of government. This period also saw the establishment of a permanent court in London; according to clause 17 of the Magna Carta (1215), common pleas, (that is, court cases unrelated to the king) were to be dealt with at a specific location rather than the king's residence, which could move throughout the realm. [399]

In 1234 two local courts were established for matters which did not involve the sovereign: the King's Bench (*coram rege*) and Common Bench (*coram de banco*). From the outset, these courts were run by professional jurists and supported by professional lawyers. The Common Bench (also called Common Pleas) played the far more important role in the development of common law. Proceedings before this court were recorded in the Year Books (see the chapter on lawyers), whereas it was not until the 16th century that the decisions of other courts were reported. Both courts were located at Westminster Hall until 1882, when the Common Bench was abolished by the Judicature Acts.[400] Today, the King's or Queen's Bench forms a division of the High Court (see below).

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[396] Diemut Majer, ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP), 171–72 (1991); Peter Caesar, *Wiederaufbau der Gerichtsbarkeit nach 1945*, Neue Juristische Wochenschrift (NJW) 1246, 1250 (1995).

[397] Baker, *supra* note 270, at 13.

[398] *Id.*

[399] *Id.* at 15 & 233.

[400] *Id.* at 19 & 37.

b. Chancery

Starting with the Magna Carta a growing number of laws were passed which ensured that the individual could not be deprived of his life, freedom, and property rights without the "due process of law" (that is, proper court proceedings). This meant that the king could not create any new courts or enforcement authorities,[401] a rule that served to safeguard the exclusive jurisdiction of the common law courts. For example, Chief Justice Coke, who passed judgment on the case of *Prohibitions del Roy*,[402] declared that the king had no right to interfere in the administration of justice.

However, an exception to this basic principle was made for those cases where common law courts could not find a solution which ensured justice for all. In such cases, complaints were often made of failings in the common law trial (for example, because the jury had been influenced by the status of the opposing party) and the aggrieved party turned to the king (sometimes even before the trial had started) who then forwarded the case to his chancellor. Two examples illustrate the way the chancellor's office augmented the common law court. According to law, certain contracts were required to be in writing. Without a written document the complainant would automatically lose his case before the court. Second, there were cases of complainants who had paid off their debts but could not produce the original debt agreement. In the event that an unscrupulous debtor decided to commence proceedings against the debtor, the latter could appeal to the chancellor who was bound by his conscience rather than by law and statute. Later, this system came to be known as equity. Over the centuries, the office of chancellor assumed exclusive jurisdiction for example, trusts and mortgages. Common law did not recognize such arrangements as forming part of its property law because it did not provide that an owner could hold his property solely for the benefit of a third party (that is, beneficial owner). The chancellor also decided questions relating to the king's property since the common law courts also lacked the necessary jurisdiction to do so. If an individual refused to recognize the chancellor's ruling he would run the risk of imprisonment. Up until the 17th century, the Chancellor was usually a bishop with a degree in Roman or canon law. There were rare cases of common law jurists being appointed such as Sir Thomas More, who held the post from 1529–1533, and who was a bencher in Lincoln's Inn.[403]

During the 17th century, the chancellor's reasoning of judgments served to clothe his conscience with legal characteristics. At the beginning, his reasons were very abstract. The author of the first book on equity in 1727 succeeded in subsuming the whole law under 14 principles.[404] In later years, the Court of Equity

[401] *Id.* at 97.
[402] Prohibitions del Roy, (1607) 77 Eng. Rep. 1342; 12 Co. Rep. 63.
[403] Baker, *supra* note 270, at 101–110.
[404] *Id.* at 111.

developed a more detailed practice of *stare decisis* which resembled that of the common-law courts (see the chapter on judicial precedents).

Ultimately, the Court of Equity was a victim of its own success. The court became so popular that in the 17th and 18th century between 10,000 and 20,000 proceedings were pending and it was sometimes 30 years before a judgment was entered. In addition, overworked employees could be bribed with exorbitant trial fees in order to give priority to certain cases. This was because they did not earn any salary themselves but lived solely from the fees. Drafters were paid for each written page and developed ever larger handwriting.[405] A further problem was that parties often presented their matter before both courts—law and equity—despite the legal principle (laid down in the *Earl of Oxford's Case* in 1615) that in cases of conflict equity was to take precedence over common law.

After reforms implemented at the beginning of the 19th century proved unsatisfactory, the Supreme Court of Judicature Acts (1875) fused the Court of Chancery with the three common law courts. All courts were restructured to create a single, hierarchical system which was presided over by the newly created High Court of Justice. Since this time, the principles and rules of equity have been applied on a general basis.

3. SWEDEN

Before 1700, the role of a judge was primarily performed by members of the nobility without any legal qualifications. In rural areas, nobles often sat with free citizens in a *ting* in order to decide cases and make administrative decisions. Over centuries, this *ting* developed into the *nämnd*.[406] Beginning with a statute of 1734, the king appointed legally trained judges rather than the nobility to judicial office, and from 1749 forward, candidates for judicial office were required to study law at one of Sweden's two universities (Uppsala and Lund).[407] The courts' jurisdiction reflected society's status system. Accordingly, priests were to be tried by the church and not state courts. Nobles had the privilege of being judged directly by the Svea Court of Appeal (*Svea hovrätt*) in Stockholm. In other cases, this court served as an appeals court in order to ensure equality within the centralized state and thereby its authority.[408]

The division between the cities and country meant that judges of the Crown administered justice in rural areas through a *nämnd* together with 12 highly regarded farmers. The cities, on the other hand, operated a system which had been strongly influenced by the municipal courts in Germany.[409] Since the 13th century

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[405] *Id.* at 112.

[406] Christian Diesen, Lekmän som Domare 108 (1996). The *nämd* is discussed in more detail in the chapter on Lay Judges and Juries, *infra*.

[407] Kjell Modéer, Juridiska yrkesroller i ett rättshistorisk perspektiv 7 (1989).

[408] Diesen, *supra* note 406, at 115.

[409] *Id.* at 116.

there had been municipal courts which had consisted of at least 12 members, elected by the citizenry of the cities themselves, who decided disputes with the mayor acting as president.

Two different court procedures quickly emerged. Straightforward cases were presented at the marketplace to three citizens who were selected for this purpose. A court in the town council represented the appeals instance for such cases and was also the trial court for more important cases. This court consisted of the mayor and 12 citizens. The codification of 1734 ordained that only a trained jurist could be appointed president.[410] The 19th century saw the development of the modern tradition of a trained judge (a state official) representing the Crown and State.

4. THE UNITED STATES OF AMERICA

While many people both inside and outside the United States think that the U.S. Supreme Court has jurisdiction to review all of the decisions of the state courts, this is not true: the U.S. Supreme Court can only review the decisions of the state courts when these decisions involve federal law. In the area of criminal law, especially criminal procedure, the U.S. Supreme Court has federalized much of the law by applying federal constitutional principles, particularly the due process clause of the 14th Amendment, to state-court prosecutions. For all other areas of law, what are generally referred to as civil law, the U.S. Supreme Court only has jurisdiction to review state court decisions involving federal statutes or federal constitutional rights. However, because there are very few constitutional rights that bear on civil law, and because cases involving both state and federal civil law are usually litigated in the federal courts, the opportunity for review by the U.S. Supreme Court of state court decisions based solely on state civil law is very low. Further, there is no ability for review of the decisions of the courts of one state by the courts of another state, even if the former courts applied the law of the second state in their decision. In other words, the court systems of the states are extremely independent.

The appointment process for all federal judges, which is delineated in the U.S. Constitution, can be found below. The U.S. Constitution requires the formation of one U.S. Supreme Court, and grants congress the power to provide for inferior courts, which it has done. The size of the U.S. Supreme Court is also within the control of the congress. The Judiciary Act of 1869 set the size of the court at nine judges, which is still the case today. In the century before 1869, the number of seats on the court had ranged from five to 10.

The appointment of judges was a burning political issue after the 13 former British colonies in North America which made up the original United States of America won their independence from Great Britain. Lawrence M. Friedman reminds us that the American statesmen of the time were not naive: "They knew

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[410] *Id.*

it mattered what judges believed and who they were." The judges that most people had known under British rule were biased: biased, of course, in favor of the Crown; biased in favor of creditors; biased in favor of the rich.[411]

Historically, judges had been appointed from above; but American democrats thought they should have more say in the selection of judges. According to Friedman, Vermont was the first state to give voters the right to choose "judges of the inferior court of common pleas." Various other states allowed voters to decide who should serve on the trial courts. Ohio followed a different route: there all judges were appointed for a term of seven years by the general assembly (the legislature).

The movement to allow the electorate to select judges rather than to appoint them was supported by two major political arguments. The first argument was democratic and progressive in nature: all law proceeds from the people; the people want to be assured that the law is interpreted and applied in accordance with their wishes; therefore the people should vote on the election and retention of judges. The second argument was also democratic, but more realistic or even cynical: if we let the politicians decide who should be judges, then that will be an invitation for them to appoint their friends and political cronies who will still be on the bench decades after the politicians who appointed them are gone.

By the end of the 19th century, most American state court judges were subject to election. However, the elective system did not bring the progress the reformers had sought, nor cause the harm that the opponents had feared. Part of the reason was that elections were not as partisan as many expected. In addition, almost all sitting judges won reelection.[412] By the year 1900, most judges got their seats by appointment to a judgeship vacated by a judge retiring or dying.[413] Following appointment, the judge would have to face the electorate at the next election, which the vast majority of judges won. Because state judgeships had accordingly become appointive rather than elective offices, the Missouri plan was introduced in 1940 to end what Friedman styles "the electoral charade." According to this model, judicial candidates are vetted by a panel consisting of lawyers appointed by the local bar, the chief justice of the state's supreme court, and lay members appointed by the governor of the state. The panel certifies three potential appointees whenever a judicial position becomes open. The governor may only appoint from this pre-approved list. The person appointed serves one year on the bench before the appointment is put on the ballot in a retention election where voters can only vote yes or no. While this procedure virtually assures the election of the appointed judge, it does have the advantage of being a transparent process which requires approval by the electorate.

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[411] Lawrence M. Friedman, A History of American Law 124 (2d ed. 1985).

[412] *Id.* at 371 *et seq.*

[413] *Id.* at 690 et seq.

According to the homepage of the National Center for State Courts,[414] the 50 American states employ five different methods in appointing judges:

- 5 select judges by appointment without a nominating commission
- 15 choose judges through merit selection with a nominating committee
- 8 choose judges through partisan election
- 13 choose judges through nonpartisan election
- 9 choose judges through merit selection combined with other methods

Over one-quarter of the population of the United States, and, for political, social, and economic reasons, considerably more than one-quarter of the judges, can be found in three states: California, Texas, and New York. California appoints its judges according to a modified version of the Missouri plan. Judges in Texas are elected for six-year terms. In New York, judges of the Court of Appeals and the Appellate Division of the Supreme Court are appointed on recommendation of a nominating commission. The judges of the Trial Term of the Supreme Court are elected for 14-year terms, and those of the county court for 10-year terms.

Another break with the British tradition was the introduction of joint opinions on behalf of all the judges on appellate courts rather than seriatim (separate) speeches or opinions of each.[415] Lord Mansfield had tried to introduce the practice in England but failed. Chief Justice John Marshall succeeded, although the last few decades have seen a return by the U.S. Supreme Court of the practice of the judges delivering separate opinions.

B. Court Structure

1. GERMANY

The court structure in the Federal Republic of Germany is described in Article 95 (1) GG. Accordingly, German court jurisdiction is divided into five separate courts. In this respect, a distinction is drawn between ordinary court jurisdiction and specialist jurisdiction.

a. Ordinary Jurisdiction

Ordinary jurisdiction includes civil and criminal cases as well as noncontentious matters. There are four ordinary courts. Article 95 (1) GG states that the Federal Supreme Court (*Bundesgerichtshof* or BGH) is the supreme court of the federation within the ordinary jurisdiction.

The Federal Constitutional Court (*Bundesverfassungsgericht*) does not represent an additional judicial hierarchy. It reviews court decisions in light of

[414] National Center for State Courts, www.ncsc.org.

[415] Friedman, *supra* note 411, at 134.

constitutional complaints and represents neither a superior appeals court nor a superior finder of fact. Its power to review the judgments of other courts is limited to ascertaining whether the previous court decision complies with constitutional law.

The other courts are listed in section 12 of Law Regulating the Constitution of the Courts (*Gerichtsverfassungsgesetz* or GVG). Besides the BGH, the other ordinary courts of the Federal Republic are the Superior State Court (*Oberlandesgericht*), the State Court (*Landgericht*), and the Local Court (*Amtsgericht*). The last three are subject to the jurisdiction of individual German states

To summarize, therefore, the ordinary jurisdiction consists of the:

- Federal Court
- Superior State Court
- State Court
- Local Court

In accordance with section 13 GVG, the ordinary courts deal with all criminal matters because they have exclusive jurisdiction over the administration of criminal justice. In addition, ordinary courts deal with all civil disputes (*Zivilsachen*) and noncontentious matters (particularly those relating to the land registry, registration, guardianship, administration of estates, civil status, or residential property).

Criminal and civil cases are first tried at the Local or State Courts, the jurisdiction being determined by the value of the claim or seriousness of the offense (section 74 GVG). Concerning civil jurisdiction, all cases up to a value of € 5,000 are heard by the Local Court (section 23 no. 1 GVG). Family Courts can also be set up at the Local Court in accordance with section 23 GVG and have jurisdiction over all cases relating to family matters (mainly marital disputes, right of custody, maintenance, access rights, or civil partnership agreements). As with leaseholds or living accommodation, the value of the claim is irrelevant.

In criminal cases, the Local Court's jurisdiction extends to proceedings involving the imposition of fines or sentences no longer than two years (section 24 GVG). Capital offenses and other important criminal cases are heard by the State Court directly.

At Local Courts, civil cases are decided by a single judge and criminal cases by a presiding judge of the Local Court with two lay people (*Schöffen*). The state prosecutor can apply to have the case heard by two judges and two lay people. There is usually no obligation to be represented by a lawyer in this respect. At State Courts, civil cases are decided by panels (*Kammer*) consisting of three judges. If the case in question is trade related, then it is decided by judges specializing in trade law (*Handelsrichter*) who are not professional judges.

As far as criminal matters are concerned, a distinction is made between large and small criminal panels (*Strafkammer*). The former consist of three professional judges and two lay people and the latter of three professional judges and two lay people. The Superior State Courts have senates which consist of three professional

judges in relation to both civil and criminal matters. The Federal Court generally decides cases with five and the Federal Constitutional Court with three or eight professional judges.

b. Specialist Jurisdiction

Specialist jurisdiction is made up of courts which decide cases relating to labor, social matters, finance, and administration.

I. LABOR MATTERS

There are three courts which exercise jurisdiction over cases relating to employment matters. The Federal Labor Court (*Bundesarbeitsgericht*) is the supreme court and is located in Erfurt. According to section 1 of the Code Regulating the Labor Court (*Arbeitsgerichtsgesetzbuch*), the State Labor Courts (*Landesarbeitsgericht*), and Labor Courts (*Arbeitsgericht*) are the subordinate courts.

In accordance with sections 2, 2a, and 2 of the Code Regulating the Labor Court, these courts decide civil disputes between parties to collective bargaining agreements or between employees and employers (that is, arising from an employment contract). They also have jurisdiction over industrial relations and codecision procedures.

The panels of Labor Courts and State Labor Courts feature one professional judge and two honorary judges. The latter are appointed to the post for a period of five years usually on the recommendation of unions and employer associations.

II. SOCIAL MATTERS

There are also three courts which hear cases relating to social matters. At the top is the Federal Social Court (*Bundessozialgericht*) in Kassel. In addition, there are the State Social Courts (*Landessozialgerichte*) and Social Courts (*Sozialgerichte*). Social courts decide cases involving issues relating to public law where the parties are in a master-servant relationship. Therefore, such cases usually concern social security, the promotion of employment, care for victims of war or the law regulating doctors on medical insurance plans (*Kassenarztrecht*). At first instance, a single professional and two honorary judges sit together. Proceedings before the social courts are free.

III. TAX MATTERS

There are only two courts which have authority to decide cases concerning taxes: the Federal Fiscal Court (*Bundesfinanzhof*) in Munich and the Fiscal Courts (*Finanzgericht*)—the former being the supreme court. Fiscal courts also decide disputes involving public law and are responsible for disputes involving taxation at the federal level that is administered by the federal or state fiscal authorities. Usually, an appeals procedure must be exhausted before a complaint can be raised.

IV. ADMINISTRATIVE MATTERS

There are three courts which deal with administrative matters. These are the Federal Administrative Court (*Bundesverwaltungsgericht*) in Leipzig, the Superior Administrative Courts (*Oberverwaltungsgerichte* or *Verwaltungsgerichtshöfe*), and the Administrative Courts (*Verwaltungsgerichte*). These courts also decide matters involving public law. In accordance with section 40 of the Code Regulating the Administrative Court (*Verwaltungsgerichtsordnung*) it has a catch-all jurisdiction. Administrative courts therefore hear all public law disputes which are not heard by the social or fiscal courts. As a result, administrative courts have to deal with a wide range of tasks, the most important of which include cases relating to passports, foreigners and asylum seekers, student grants, and housing benefits or public order law as well as school, higher education and examinations, businesses and hotel services, officials and judges, military or civil service.

The administrative court sits as a panel of three professional and two honorary judges. The panel may decide that a single judge may preside over straightforward cases (section 6 VwGO). Unlike the administrative courts where judgments are passed by panels, judgments at the Superior Administrative Courts are passed by senates whose composition depends on the federal state in question. Senates predominantly consist of three professional judges and two honorary judges (that is, the same as the panels of administrative courts).

The Federal Administrative Court also consists of senates with a presiding judge and between four to seven other judges depending on the case in question.

As a rule, an official review procedure must be exhausted before an appeal can be made against an administrative ruling before the courts. In cases of urgency, the administrative courts can also grant preliminary judicial relief owing to their jurisdiction over public law disputes.

2. ENGLAND AND WALES

a. Tribunals

According to the Tribunals, Courts and Enforcement Act 2007, which regulated all of the many different types of tribunals in England for the first time, the arbitrators in tribunals form part of the judiciary in the United Kingdom and therefore enjoy judicial impartiality. During the business year 2007–2008, 28 tribunals dealt with almost 550,000 cases: the three most important tribunals were the Social Security and Child Support Appeals (SSCA), the Employment Tribunal (ET) and the Asylum and Immigration Tribunal (AIT) which accounted for almost 90 percent of the total number of cases.[416] Tribunals employ 407 judicial officers. Following an internal investigation by the tribunal itself, the plaintiff can proceed to the Court

[416] Tribunals Service, Reforming, Improving, Delivering: Annual Report and Accounts 2007–08 12, 73 (2008).

of Appeal of England and Wales, the Court of Appeal in Northern Ireland or the Court of Session in Scotland.

b. Magistrates' Court

There are two trial courts in the English legal system: the Magistrates' Court and the Crown Court. Ninety-five percent of all petty offenses are dealt with before the former court, which represents approximately two million cases a year.[417] However, these cases are not very serious in nature (see below). At the Magistrates' Court, three lay judges (justices of the peace) decide cases. There are around 30,000 lay judges in England and Wales, and they are advised by 1,800 legally trained judicial employees (court clerks). In Inner London, however, most cases at the Magistrates' Court are heard by one professional judge sitting alone (District Judge). There are 419 District Judges (known as stipendiary magistrates before 2000) and in other districts they only hear complex and sensitive cases.[418] A Magistrates' Court can impose a maximum sentence of six months imprisonment and a £ 5,000 fine. It can also award victims compensation up to £ 5,000. In some cases, these punishments may appear too lenient, whereupon the Magistrates' Court can refer the case to the Crown Court for sentencing (a procedure known as "committal to the Crown Court for sentence"). The Crown Court also hears appeals against convictions from the Magistrates' Court.[419]

The history of the involvement of lay judges (magistrates, justices of the peace or JPs) can be traced back to the Justices of the Peace Act 1361.[420] Originally, they not only judged petty criminal offenses but also performed policing and administrative functions. By 1849 at the latest, however, they only acted as judges. In 1878, their jurisdiction over criminal matters was extended to some family matters (primarily in relation to maintenance and support). In 1908, their jurisdiction was also extended to crimes committed by juveniles.[421]

English lay judges work on a voluntary basis. They do not earn any salary but they can claim the costs incurred by the office. By law, the employer must release the JP from his position without pay so that he may perform his function as a JP (which amounts to at least 26 half-days each year). However, many employers choose not to reduce their pay.[422]

Whereas half of all magistrates are female, minorities are underrepresented: 94 percent of magistrates are white. Their age ranges from a minimum of 18 to a

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[417] John Bell, Judiciaries within Europe: A Comparative Review, 330 (2006).

[418] Department for Constitutional Affairs, Judicial Statistics (Revised) England and Wales for the Year 2005, 131, tbl 10 (2006).

[419] HM Courts and Tribunal Services, www.hmcourts-service.gov.uk.

[420] Bell, *supra* note 417, at 329.

[421] S. H. Bailey et al., Smith, Bailey and Gunn on the Modern English Legal System 64–70 (4th ed. 2002).

[422] Department for Constitutional Affairs, Serving as a Magistrate: A Detailed Guide to the Role of JP, http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/@crime/documents/digitalasset/dg_071396.pdf.

maximum of 70 (64 at the time of appointment): In 2004, 35 percent of magistrates were over 60 and only 4 percent under 40. In other words, the majority of magistrates are between 50 and 60 years of age. At least a quarter of them are already retired. Depending on the judicial district (there are currently 360), between 60 and 80 percent of magistrates are self-employed or hold managerial positions; these figures are two to four times higher than the societal average.[423]

Magistrates are selected by committee following a formal application procedure and interview. Their names are then submitted to the Lord Chancellor for selection. The selection procedure takes into account the political affiliation of the applicants in order to ensure that the political spectrum is reflected as accurately as possible. However, the Conservatives have traditionally been under-represented.[424] Police, public order officials (traffic wardens) and members of the armed forces as well as their relatives are excluded from acting as magistrates.

c. County Court

The County Court is responsible for civil cases including insolvency actions up to a value of £ 50,000 and for the majority of divorce proceedings. This court was created by the County Courts Act 1846 and, generally speaking, all civil law disputes and divorce proceedings are heard before the 216 County Courts in England and Wales. Only the most complex civil cases are excluded from the court's jurisdiction. Even if it is not an independent court, the "small claims track" is often referred to as the "Small Claims Court." Here, cases involving claims of less than £ 5,000 are heard by a District Judge in an informal mediation procedure. In 2005, 47,500 small claims were dealt with.[425] There were also 52,000 fast-track matters involving claims between £ 5,000 and £ 15,000. These and the remaining cases (multi-track cases) are heard either by District Judges, Recorders, or even by the Queen's Bench Division of the High Court—even if the High Court judges are really a Recorder or a designated Circuit Judge.[426] Appeals from the County Court are generally heard by a Circuit Judge.

The County Court is the most important civil court in England and Wales. In 2006, there were more than two million civil cases (excluding family disputes) pending before one County Court of which 67,000 were insolvency applications. In addition, the County Court has exclusive jurisdiction over divorce proceedings: in 2006 there were approximately 150,000 such cases.[427]

At the County Court, Recorders (see below) perform the lion's share of the Circuit Judge's work. Although the Circuit Judge is an official title, there are no

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[423] Bell, *supra* note 417, at 330.

[424] *Id.* at 332.

[425] Department for Constitutional Affairs, Judicial Statistics (Revised) England and Wales for the Year 2005, at 43–50 (2006).

[426] Bell, *supra* note 417, at. 306.

[427] Department for Constitutional Affairs, Judicial Statistics (Revised) England and Wales for the Year 2005, at 51 *et seq.*, tbl. 5.5 at p. 90 (2006).

circuit courts as such. Rather, the Circuit Judge operates in one of seven regions (previously known as circuits). Even if a large proportion of Circuit Judges work at the County Courts, many of them are assigned to the criminal Crown Courts since Circuit Judges have a broad jurisdiction and range of tasks. Some serve as judges in the specialized Division for Technology and Construction of the High Court and some even help out at the Court of Appeal.[428]

As of April 2009, there were 640 Circuit Judges in England and Wales.[429] The District Judges and Circuit Judges are termed junior judges as opposed to the senior judges of the High Court, Court of Appeal, and Supreme Court of the United Kingdom.

d. Crown Court

The Crown Court was created in 1971 by the Courts Act. Terminologically, it should be pointed out that there is only one Crown Court which is currently spread over 92 centers throughout England and Wales. The Central Criminal Court in London has achieved particular fame and is better known by its colloquial name, the Old Bailey.

The jurisdiction of the Crown Court depends on the gravity of the offense: those which are less serious (summary offenses) are heard before the Magistrates' Court, whereas serious offenses (for example, murder, manslaughter, rape or grievous bodily harm) fall within the jurisdiction of the Crown Court. Even in these cases, however, there is a preliminary examination of the case before the Magistrates' Court. At this stage, the court establishes whether the Crown Prosecution Service has sufficient evidence in order to justify a jury trial. Offenses triable either way can be heard before both courts. The accused can insist on having a jury trial at the Crown Court. If he does not so insist, the Magistrates' Court will decide according to certain guidelines whether the trial will take place before the Crown Court or Magistrates' Court.

In 2005, the Crown Court dealt with almost 76,000 criminal cases in the first instance, in which the accused admitted committing the offense in 49,000 cases (60 percent). In the remaining 27,000 cases, two thirds of the accused who pled not guilty to all charges were acquitted by the jury.[430] Committal to the Crown Court for sentence accounted for a further 32,000 cases. There were also 13,000 appeals from the Magistrates' Court.[431] In the latter two cases, two justices of the peace sit with a Crown Court Judge (that is, either a High Court Judge, a Circuit Judge, or a Recorder, who is a part-time judge) on the bench. The criminal proceedings at the

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[428] Department for Constitutional Affairs, Judicial Statistics (Revised) England and Wales for the Year 2007, 43, 50, 113, 156, 158 & 162 (2008).

[429] Department for Constitutional Affairs, Judicial Statistics (Revised) England and Wales for the Year 2006 at 156 (200).

[430] Department of Constitutional Affairs, *supra* note 418 at 89, tbl. 6.9.

[431] *Id.* at 84, tbl. 6.1.

Crown Court as a trial court take place before a professional judge and a jury of 12 persons who are chosen at random. Legal questions are decided by the judge and questions of fact by the jury.[432]

Since 1 January 2008, jurists with at least seven years experience working as a barrister or solicitor before a court can be appointed to the voluntary office of Recorder by the Lord Chancellor. There are currently 1,400 Recorders.[433] High Court judges have traditionally been appointed from the ranks of Recorders owing to the valuable experience this position provides. Candidates are leading barristers and nowadays solicitors (although this is seldom the case). Those who are Queen's Counsel are nowadays assessed by means of a transparent interview process.[434] This is because the appointment as a High Court Judge is practically the highest judicial office and the greatest distinction a jurist can be awarded. Only few are ever promoted to the Court of Appeal or the Supreme Court. Recorders are usually deployed at the Crown Court, although sometimes they help out with civil cases at the County Court.

e. High Court of Justice

The High Court of Justice is both a trial court and court of appeal for both civil and criminal cases.[435] The High Court is based at the Royal Courts of Justice on The Strand, in central London. It has District Registries all across England and Wales and virtually all proceedings in the High Court may be issued and heard at a district registry. Judges of the High Court are allocated to one of three divisions, although with their agreement they can be deployed to other divisions if necessary. At civil trials, the High Court Judge almost always sits alone.

The Chancery Division has jurisdiction over property law, trusts, inheritance disputes, company law, insolvency law and tax law. The Patents Court which was established in 1977 also forms part of the Chancery Division.[436] The Queen's Bench Division (or King's Bench Division, depending on the ruling monarch) has two tasks. It hears a wide range of contract and personal injury cases at first instance. The Commercial Court hears commercial law cases and the Admiralty Court hears cases involving maritime law. Both of these courts are located in the Queen's Bench Division. As an appeals instance the High Court of Justice also decides cases involving criminal and administrative law. Finally, there is the Family Division which decides on important matters at first instance (that is, whether the construction of a hospital can go ahead or whether Siamese twins can be separated against the wishes of the parents). On the other hand, the Family Division also hears appeals from the Magistrates' Court.

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[432] HM Courts & Tribunal Service, www.hmcourts-service.gov.uk.

[433] Department for Constitutional Affairs, Judicial Statistics (Revised) England and Wales for the Year 2005 tbl. 10.1 at 131 (2006).

[434] Bell, *supra* note 417, at 304.

[435] Bailey et al., *supra* note 421, at 106.

[436] *Id.* at 108, 110.

f. Court of Appeal of England and Wales

The Court of Appeal has two departments, the Civil Division and Criminal Division. The latter primarily decides appeals from the Crown Court. The appeal against a guilty verdict is heard by an uneven number of judges in an appeals chamber or bench which is constituted specially for the case. The chamber consists of at least three judges. In other cases, the hearing is presided over by only two judges. Individual judges only have the power to decide applications for release on bail, leave to appeal and other routine matters.[437]

The Civil Division hears appeals from the High Court of Justice, the County Courts and some Tribunals. If the leave to appeal concerns a second appeal (for example, if the appeal is from the High Court), the Court of Appeal will only grant leave to appeal if it concerns either an important principle or question of practical importance or if there are compelling reasons for doing so.[438]

In 2006, almost 7,000 applications for leave to appeal were made to the Civil Division. Almost 5,000 were decided by a single judge who permitted the appeal in almost 1,500 cases. In cases where the judge refused leave to appeal another 1,312 applications were made to the Full Court of which 562 were successful.[439] In 2007, the Civil Division processed 1,200 cases. Almost as many cases (that is, 300 each) were appeals against rulings of County Courts and Asylum and Immigration Tribunals. However, the majority of cases (almost 500) came from the High Court.[440]

Since there are only 38 judges (Lords Justices) at the Court of Appeal, they need the help of the 109 High Court Judges in order to cope with the large numbers of applications (especially in relation to civil law). In the Civil Division, most cases are decided by the Court of Appeal judges. In the Criminal Division on the other hand, one Court of Appeal judge sits with one or usually two judges from the High Court.[441]

g. Supreme Court of the United Kingdom

The Supreme Court of the United Kingdom (formerly the House of Lords) was created in 2009 and hears appeals from six different divisions: the Court of Appeal; sometimes directly from the High Court of Justice; Court of Session, the highest civil court in Scotland; from the Court of Appeal in Northern Ireland; sometimes directly from the High Court of Justice in Northern Ireland and from the Courts Martial Appeal Court (that is, military court). In accordance with the

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[437] *Id.* at 116.

[438] *Id.* at 118.

[439] Department for Constitutional Affairs, Judicial Statistics (Revised) England and Wales for the Year 2005 at 13 & 21, tbl. 1.6 (2008).

[440] *Id.* at 23, tbl. 1.8.

[441] Department for Constitutional Affairs, Judicial Statistics (Revised) England and Wales for the Year 2006 at 157 & 161 (2007).

Constitutional Reform Act 2005, the House of Lords (Supreme Court) was also given jurisdiction to decide devolution issues of the Northern Ireland Executive, the Scottish government and the Welsh Assembly.

In 2006, the House of Lords only decided 94 cases. According to the court, all the cases concerned arguable legal questions of general importance. Applications for leave to appeal are decided by an Appeal Committee which consists of three judges. In 2006, there were 219 applications, down from 2005 when there were 240. If the Appeal Committee decides to allow the application, the case will be heard by a bench of five (and, in unusually important cases, seven or even nine) Supreme Court Justices (formerly known as Lords of Appeal in Ordinary or Law Lords). In most cases, the bench withdraws for deliberations following a two-day hearing.[442] A large proportion of the decided cases (that is, 63 of 94) came from the Civil Division of the Court of Appeal; by contrast only 13 cases were referred to the House of Lords from the Criminal Division of the same court. During this period, the House of Lords only decided six criminal cases from the High Court as well as 10 cases from the Court of Session in Scotland and two from the Court of Appeal in Northern Ireland.[443] Even if the cases in 2006 reveal a focus on human rights or international law, the House of Lords also decided cases relating to administration, commerce, labor rights, family matters, tax or obligations.[444]

Although at the beginning, the incumbent Law Lords were appointed the first justices of the Supreme Court, justices are now selected by a selection committee consisting of the president and deputy president of the court and a member of the judicial selection committee for England and Wales, Scotland, and Northern Ireland. While new appointees are no longer members of the House of Lords, it is planned that they should receive the courtesy title Lord.

3. SWEDEN

a. Special Courts

Besides the ordinary courts and administrative courts, Sweden has four special courts which play a very important role in terms of numbers. Three of these courts perform tasks outside the ordinary and administrative jurisdictions. These are the Labor Court (*Arbetsdomstolen*), the Market Court (*Marknadsdomstolen*) and the Office for Leasehold and Property Matters (*Hyres- och arrendenämnden*). The fourth special court is the Patent Court (*Patentbesvärsrätten*) and appeals against its rulings are heard by the Administrative Court of Justice (*Regeringsrätten*, renamed *Högsta domstolen* in 2011).

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[442] *Id.* at 12.

[443] Department for Constitutional Affairs, Judicial Statistics (Revised) England and Wales for the Year 2005 at 19, tbl. 1.4 (2006).

[444] *Id.* at 20, tbl. 1.5.

The Labor Court hears cases involving tariff agreements. It is a court of both first and last instance as well as an appeals court for judgments of the Regional Court (*Tingsrätt*) in cases where it shares jurisdiction with the latter. All members (*ledamot*) of the Labor Court, professors and representatives are appointed by the government and represent three interest groups: the judiciary, employers and employees. The internet website of the Swedish Labor Court lists 25 members in total.[445] In most cases, seven judges preside over the proceedings and three "neutral members" (professional judges) always sit with one or two representatives of the employers and employees.[446] In 2007, the Labor Court decided a total of 383 cases: 268 in its capacity as a court of first and last instance and 115 as an appeals court for judgments passed by the Regional Court.[447]

The market court hears cases relating to cartel and competition law and thereby functions as the court of final appeal. The court consists of seven members (excluding representatives) who are appointed by the government. Only the president, vice-president and an additional member are required to be legally qualified and have judicial experience. The other members are experts from trade and industry. During 2007, the Market Court decided only 48 cases.[448]

The Office for Leaseholds and Property Matters (*Hyres- och arrendenämnden*) performs advisory and judicial functions. Appeals against its judgments are referred to the Svea Court of Appeal (*Svea hovrätt*) in Stockholm.

The eight offices employ between 24 and 30 jurists who pass judgment on the case with an honorary judge who is a landlord or tenant. In 2007, the office decided almost 25,000 disputes.[449]

The Patent Court, which also reviews decisions of the Agricultural Ministry under the Act on Floral Species, consists of ten judges, five of whom are legally qualified; the other judges hold technical qualifications. From 2003 to 2007, just over 2,000 cases were pending at the Patent Court. Appeals against its decisions are heard by the Administrative Court of Justice (*Regeringsrätten*, renamed *Högsta domstolen* in 2011), which heard 104 appeals during the same period.[450]

b. Ordinary Jurisdiction

The first instance of the ordinary courts is the Regional Court (*tingsrätt*), which is found in 53 different locations. In 2007, there were 606 judges (*ordinarie och icke ordinarie domare*) who performed judicial functions in these courts as their main activity and 562 probationary judges (*notarier*), who decided simpler cases sitting alone. In addition, there were 5,200 honorary judges without legal qualifications

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[445] Arbetsdomstolen, www.arbetsdomstolen.se.

[446] *Id.*

[447] *Id.*

[448] Marknadsdomstolen, Årsredovisning Budgetåret 2007, tbl. 1.3.2.1.

[449] Domstolverket, Domstolsstatistik tbl. 3.1. (2007).

[450] Patentbesvärsrätten, Årsredovisning 2007.

who were appointed by local authorities for a period of four years: these judges are often reappointed (see chapter on lay judges and the jury).[451] In practice, the participation of honorary judges (*nämnd*) is limited to criminal cases. Civil cases are usually decided by a single judge sitting alone.[452]

If a professional judge hears a criminal case involving petty offenses or serious offenses at the lower end of the scale at first instance with a *nämnd*, three honorary judges will sit with him. If the accused is faced with a custodial sentence of more than two years four or five honorary judges will decide the case together with the professional judge.[453] Even if the rules on voting give the professional judge an advantage by allowing him to be the first to state his position, the honorary judges have the right to outvote the former because the votes are weighted equally.[454] In order to prevent such a situation occurring in family matters, the panel in such cases consists of three professional and two honorary judges.[455]

The trial courts exercising ordinary jurisdiction decide disputes in civil and criminal law and settle undisputed matter involving land registry, inheritance and custody. 36 percent of the 65,000 civil cases which were pending in 2007 at the ordinary courts resulted in proceedings, and judgment was passed in 41 percent of them. The *nämnd* was involved in only 2.8 percent of civil law cases.[456] By contrast, of the 74,000 criminal cases which were heard in 2007, 77 percent resulted in a judgment. In stark contrast to civil law cases (in which the *nämnd* is only involved in a minimum of cases), 76 percent of criminal cases were decided with the *nämnd*.[457]

Some exceptions notwithstanding, the disappointed party at first instance has the right to appeal against the judgment before one of the six regional appeal courts (*hovrätt*). In 2007, there were a total of 330 judges sitting at these courts as a main occupation (*ordinarie och icke ordinarie domare*), two trainee judges (*notarier*) and 650 honorary judges.[458] At courts of appeal, the panel hearing criminal and family cases consists of two honorary judges and three professional judges.[459]

Since 1 November 2008, the constitution of panels has been regulated by new legislation (*2. kap. Rättegångsbalken*). In criminal cases, the panel at appeal courts consists of two honorary judges and three professional judges as before. In civil cases, however, the constitution of the appeal court depends on the constitution of

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[451] Domstolverket, Domstolsstatistik (2007).

[452] *Id.* at 8; Bell, *supra* note 417, at 236.

[453] Bell, *supra* note 417, at 284.

[454] Domstolverket, Domstolsstatistik 8 (2007).

[455] Bell, *supra* note 417, at 287; Henrik Lindblom, *Procedure*, *in* An Introduction to Swedish Law 123 (Stig Strömholm ed., 2d ed. 1988).

[456] Domstolverket, Domstolsstatistik tbl. 1.1, 1.6. (2007).

[457] *Id.* at tab. 1.1, 1.7.

[458] *Id.*

[459] *Id.* at 9.

the trial court. If the bench at first instance consists of less than three professional judges then, on appeal, the case will be heard by three professional judges. If the case has already been heard by three professional judges at first instance, the appeal will be heard by four professional judges. However, there are exceptions to this rule.

Statistics show that the Swedish appeal courts dealt with 22,000 cases in 2007. As with the trial courts, considerably fewer civil law cases (12.7 percent) than criminal cases (at 64 percent) were decided by a *nämnd*.[460]

The Supreme Court (*Högsta domstol*) in Stockholm consists of 45 professional judges. However, of these only 16 judges appointed by the government are entitled to enter judgment.[461] The other 29 judges act as general lawyers and support the court, for example, by producing legal opinions and closing submissions. Questions of jurisdiction are usually decided by a single judge and sometimes by three. Generally, there are panels of five or (in rare cases) seven judges at the Supreme Court. Simple cases are heard by a panel of three judges.[462] If a panel wishes to depart from an earlier decision of the Supreme Court, the large plenum consisting of all 16 judges appointed by the government or, alternatively, the smaller plenum of nine judges is convened.[463] According to the annual statistics, the Supreme Court decided 5,000 cases in 2007. However, an application for a hearing was only granted in 172 cases.[464]

c. Administrative Jurisdiction

Another court of appeal situated in Stockholm is the Supreme Administrative Court (*regeringsrätten*, renamed *Högsta domstolen* in 2011), which hears appeals from the four regional Superior Administrative Courts (*kammarrätter*). The Supreme Administrative Court consists of 19 judges who each have the right to pass judgment. As with the Supreme Court of Justice, other judges also perform a supportive role. The administrative courts enjoy a broad jurisdiction which includes not only planning law, the law on asylum and aliens but also legal disputes relating to the protection of the environment and animals. In addition, they decide cases relating to taxation and welfare law, parental custody rights, European Union (EU) law and the revocation of driving licenses.[465] In 2007, the Supreme Administrative Court heard more than 9,000 cases. Approximately 2,800 of these cases were related to tax and another 2300 to social security. An application for a hearing was granted in only 181 cases.[466]

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[460] *Id.* at tab. 1.1, 1.8, and 1.10.

[461] *Id.*

[462] Regeringskansliet, The Swedish Judicial System—A Brief Presentation, 13 (2007).

[463] Domstolverket, Domstolsstatistik 9 (2007).

[464] *Id.* at tbl. 1.13.

[465] Regeringskansliet, The Swedish Judicial System—A Brief Presentation 22 *et seq.* (2007).

[466] *Id.* at tbl. 2.7, tbl. 2.8.

In 2004, the four Superior Administrative Courts (*kammarrätterna*) in Sweden had altogether 214 full-time judges and approx. 350 honorary judges. These courts dealt with 25,000 cases during 2007, 3000 of which following a hearing.[467]

The 23 regional courts of first instance (*länsrätt*, renamed *förvaltningsrätt* in 2010) had 237 full-time and 2100 honorary judges. In 2007 they dealt with 120,000 cases. In 48 percent of cases judgment was entered by a single judge and in 52 percent of cases the *nämnd* also participated in proceedings.[468] The 23 *länsrätter* were combined to form 12 *förvaltningsrätter* in 2010.

4. THE UNITED STATES OF AMERICA

There are 51 separate and independent judicial systems in the United States: the system of each of the 50 states plus the federal system. The latter has the U.S. Supreme Court at its head.

First, as to judges, as of 2010, there were 651 active federal district court judges, 166 judges on the federal courts of appeals, and nine judges serving on the U.S. Supreme Court, for a total of 826 active federal judges in the entire United States.[469] This compares with 26,900 judges, magistrate judges, and magistrates employed by the state courts in 2008.[470] This comparison would suggest that 97 percent of the judges in the United States are state judges, and that only three percent are federal judges. These figures are somewhat misleading because the state figures include magistrates (discussed below), and the federal courts do not. Further, federal judges also enjoy the assistance of bankruptcy judges. While neither federal magistrate judges nor the bankruptcy judges enjoy the same independence as federal judges, if one added the number of authorized positions for federal magistrate judges (514) and the number of active bankruptcy judges (338) to the total number of federal judges, one would conclude that 94 percent of American judges were employed by the state governments, and six percent by the federal government.

A comparison of the caseloads of the federal courts compared to those of the state courts also suggests that, in most areas, state law affects far more people than federal law. There were 267,000 civil cases and 71,000 criminal cases filed in the federal district courts in 2008.

In the state courts, by comparison, there were 18.1 million civil and 21.4 million criminal cases filed.[471] If one adds traffic cases (56.3 million), domestic relations (5.7 million), and juvenile proceedings (2.2 million), there were 103.7 million cases filed in the state courts in 2007. According to this comparison, the state courts are saddled with 99 percent of the legal actions filed in the United States.

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[467] *Id.* at tbl. 2.6.

[468] *Id.* at tbl. 2.3.

[469] United States Courts, www.uscourts.gov.

[470] United States Dept. of Labor, Bureau of Labor Statistics, www.bls.gov.

[471] National Center for State Courts, www.ncsconline.org.

Whatever measure is used, it is clear that the vast majority of judicial controversies in the United States end up in the state, and not federal, courts. That being said, the importance of the federal courts should not be underestimated. When it comes to protecting constitutional rights, those who feel that their rights have been violated by state or federal action may bring their actions directly in the federal courts if they wish. The judges of the federal courts are, as discussed below, perhaps the most independent in the world. Federal judges are appointed at a fairly mature age—their average age upon appointment is 49—and they may serve as long as they like: there is no retirement age, and it is extremely difficult to remove them.

Many judges complain that judges' salaries are not commensurate with those offered in the private sector. Federal district court judges earn $169,300, court of appeals judges earn $179,500, and judges of the United States Supreme Court earn $208,100, although the chief justice earns about $9,000 more.[472] State trial court judges' salaries vary widely from state to state. The range reported in 2010 is from $104,000 to $179,000. Intermediate state appellate court judges earn from $105,000 to $205,000, and judges of the highest courts of the states earn between $113,000 and $229,000.[473]

The following discussion will provide an overview of the structure of the federal courts before turning to the courts of the states. The discussion of the states will focus on the courts of California, which are basically representative of the court structures of the other states.[474]

a. The Federal Court System

Unlike the American states, which have courts of general jurisdiction, the federal judiciary, like the federal government as a whole, enjoys jurisdiction only in cases enumerated in the United States Constitution, or in cases where the constitution implies such power, such as the judicial review of the constitutionality of federal legislation and actions by the executive. By definition, cases where the federal courts have express or implied jurisdiction are all cases in which the federal government has some particular interest. For ease of discussion, these instances of federal judicial jurisdiction are usually gathered under two heads: federal question jurisdiction and diversity-of-citizenship jurisdiction. Cases that do not fall under one of these heads of jurisdiction are not justiciable in the federal courts, but they may well be judiciable in the state courts: the courts of the states are not limited by the constraints of Article III.

The federal courts possess federal question jurisdiction over cases or controversies arising under the federal constitution, laws, and treaties; affecting ambassadors and other public ministers and consuls; involving admiralty and maritime

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[472] United States Courts, www.uscourts.gov.

[473] National Center for State Courts, www.ncsc.org.

[474] For information on the appointments process in other states, see National Center for State Courts, at http://www.ncsc.org.

jurisdiction; cases to which the United States is a party; and cases between two or more states. Of the 350,000 cases filed in the United States district courts in 2006, 88,000 were criminal filings. Of the remaining cases, which were all classified as civil filings, about 180,000 cases fell under the federal question jurisdiction of the federal courts, including cases in which the federal government was a party. The cases involving federal questions and the federal government therefore make up over 75 percent of the cases filed in the federal district courts.

The remaining one-quarter of cases filed in the United States district courts are filed under the so-called diversity jurisdiction of the federal courts. These are cases between citizens of different American states, including foreign residents. For these cases there is a minimum amount of money which must be in controversy. Currently the amount in controversy must exceed $75,000.

By definition, the substantive law being applied in cases within the diversity jurisdiction of the federal courts is state, not federal, law. If there is an appeal on a point of law in a diversity case, that appeal is to the federal court of appeals which has jurisdiction. Review by the United States Supreme Court, while technically available, is extremely rare. However, regardless of how the federal courts rule on the state law question or questions involved in diversity cases, their decisions are not binding on the courts of the states because, as mentioned above, it is the highest court of the state, not the federal courts, who are the final arbiters on the meaning of the laws of their state.

The state courts have no jurisdiction over cases of admiralty, bankruptcy, patent, federal copyright, federal securities, and federal antitrust law, but they do have jurisdiction over practically all other legal controversies, even controversies based on federal statutory, treaty, and constitutional law. However, in practice it is much more likely that cases that are substantially based on federal law will be brought in the federal courts. If there is an issue of federal law in a state court action, it is most likely that the issue will be peripheral, or be contained in one of several causes of action where the other causes of action are based on state law.

There are 94 districts in the in the first instance of the federal court systems. In states with low populations, the district covers the entire states. In states with higher populations, there will be two, three, or four different districts. All districts have at least two judges. The largest district is the Southern District of New York, which has 38 judges.

The district courts are also the home of the federal magistrate judges mentioned above. Unlike federal judges, magistrate judges are not life-time appointees of the president; rather, they are hired for an eight-year, renewable term by the judges of the district. Those wishing to be considered are screened by a local committee consisting of lawyers and non-lawyers. The judges must select the magistrates from this list. The magistrates are empowered to decide matters that do not dispose of the case. On dispositive matters, their rulings are only effective upon review and acceptance by a district court judge. If the parties consent, magistrate judges have the authority to try civil cases to judgment, even with a

jury. Responsibility for the ultimate decision resides, however, by the district court judge or judges who supervise the magistrate judge.[475]

b. The California State Courts

With a population of over 38 million, California is not only the most popular American state, it also the state with the largest court system. It has more than 2,000 judicial officers. This number includes 1,630 authorized positions for judges (many of which are vacant) and 392 (in terms of full-time equivalents) commissioners, referees, assigned judges, and temporary judges in the trial courts who together process more than 10 million cases annually.

The commissioners or referees are appointed by the trial courts, that is, the superior courts under the authority of the California Constitution,[476] to perform subordinate judicial duties. Many courts use traffic commissioners or referees to handle aspects of the traffic caseload. A court commissioner or traffic referee has the authority to exercise the same powers and duties as a judge with respect to traffic infractions, but under the supervision of a judge.[477]

At the apex of the judiciary is the California Supreme Court, which received over 9,000 filings during the fiscal year 2008–2009, but has discretion not to hear almost all of them[478] except that it must, according to the California Constitution, hear all cases in which the death penalty has been imposed.[479] Under state law, these cases are automatically appealed to the California Supreme Court.[480] By exercising their discretion not to hear most cases, the court decides only about 100 cases annually. All seven justices sit on every case that is decided. All of the decisions of the California Supreme Court are published in the official reporter, the *California Official Reports.*

Established by a constitutional amendment in 1904, the courts of appeal are California's intermediate courts of review. California has six appellate districts (three of which have multiple divisions) and a total of 105 justices. The same rules that govern the selection of Supreme Court justices apply to those serving on the Courts of Appeal. There were 24,048 filings in the California Courts of Appeal during fiscal year 2008–2009. Cases are decided by three-judge panels. Decisions of the panels, known as opinions, are published in the *California Appellate Reports* if they meet certain criteria. In general, an opinion is published if it establishes a new rule of law, involves a legal issue of continuing public interest, criticizes existing law, or makes a significant contribution to legal literature. During fiscal year 2008–2009, approximately 9 percent of Court of Appeal opinions were certified as meeting the criteria for publication.

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[475] *United States v. Raddatz*, 447 U.S. 667 (1980).

[476] Cal. Const. art. VI, §22

[477] Cal. Gov't Code §§ 72190 & 72401(c).

[478] Proposition 32, 1984 Cal. Stat. A223 (effective May 6, 1985).

[479] Cal. Const., art. VI, §11.

[480] Cal. Penal Code, §1239(b).

Prior to June 1998, California's trial courts consisted of superior and municipal courts, each with its own jurisdiction and with its number of judges fixed by the California Legislature. In 1998, California voters approved a constitutional amendment permitting the judges in each county to unify their superior and municipal courts into a single superior court with jurisdiction over all case types. The goal of court unification was to improve services to the public by consolidating court resources, offering greater flexibility in case assignments, and saving taxpayer dollars. By February 2001, judges in all 58 counties had voted to unify their trial courts. They are all now known as superior courts. Whereas this might imply that there are also "inferior" courts, this is not the case, except when it comes to the small claims courts, which hear cases under $7,500. Yet even these courts are, from an administrative standpoint, part of the superior court.

C. The Selection, Training, and Tasks of Judges

1. GERMANY

a. Training and Selection

To gain admission to the judge's profession in Germany, one must complete a university degree in law, pass the first state exam, and then complete the preparatory training course ending with the second state exam (section 5 (1) DRiG). Thereby, Germany has adopted a uniform education of all persons working in the legal profession, regardless of whether they will later work as a judge, state prosecutor or lawyer. One refers to the legal education of standard jurists (*Einheitsjurist*).[481]

Having passed the first and second state exam, one can be appointed a judge for a probationary period (section 12 Ab. 1 DRiG). Besides the qualification for judicial office (that is, passing both state exams), German citizenship is also a necessary requirement pursuant to Article 116 GG. The applicant must promise to defend the free and democratic order pursuant to the Basic Law and display the necessary social skills (section 9 DRiG). In addition, all ordinary professors of law at German universities are qualified to take up judicial office. (section 7 DRiG). In addition, it is also possible to qualify as a technical judge at the Federal Patent Office (*Bundespatentamt*) by completing of a technical course of studies or a course of studies relating to the natural sciences and acquiring at least five years of practical experience and the necessary legal knowledge.

During their probationary period of three years, the judicial candidates appointed to the ordinary courts undergo training at different posts in order to gain experience in civil and criminal law, by sitting as a single judge and on a panel. Within the first two years of the probation, the judge can be summarily dismissed or moved to a different post (section 22 (1) DRiG). After the third or

[481] See the chapter on lawyers, *supra*.

fourth year he can be dismissed if he proves unsuitable for judicial office (section 22 (2) no.1 DRiG) or if a judicial selection committee rejects his appointment as judge for life or for a limited period. (section 22 (2) no. 2 DRiG).

If one has qualified for judicial office and worked as a judge for at least three years, it is possible to be appointed a judge for life (section10 (1) DRiG). At least five years after starting the probationary period, judges are to be appointed for life (section12 (2) DRiG). Exceptional rules apply here for judges at the Federal Constitutional Court, who are appointed for a 12-year term.

The appointment is made by the award of a certificate which formally recognizes employment as an official of the state (section 17 DRiG). The judge must swear the following oath: "I swear to perform my duties as a judge faithfully according to the Basic Law of the Federal Republic of Germany and the law to the best of my knowledge and conscience without judging the standing of persons and only serving truth and justice (as God is my witness)" (section 38 DRiG).

b. Tasks

In order to ensure that justice is administered objectively and without any undue influence, the judge is recognized as being independent and subject only to the law (section 25 DRiG, Art. 97 I GG). In this context "law" does not only mean the Basic Law and formal legislation issued by the German Parliament but also all provisions of material law enacted by the legislature in accordance with constitutional procedures (that is, legal regulations and autonomous statutes). However, the subordination to the law in this sense is itself subject to a reservation which is only partially expressed in the Basic Law: that is, the judge is only subject to *valid* legal requirements. In the event that an infringement of superior law is established, the Federal Republic of Germany has a comprehensive power to order a judicial review and overrule the law in accordance with Article 100 I GG. This independence ensures that, for example, no one can exert any influence on when an oral hearing is to take place, how it is to be prepared, the evidence which is to be adduced, how the hearing of evidence is to be carried out, whether the submission of the parties is to be considered conclusive or significant, or on the decision that is to be taken. Judicial independence can be seen as the key element of the institutional guarantee of an effective court system based on the rule of law.[482]

Judges serve the Federal Republic or a state (*Land*) and perform their duties on the basis of an employment contract of a special public law and fiduciary nature. If the judge has been appointed for life, he can only be dismissed following impeachment, formal disciplinary proceedings or in the interests of the administration of justice, unless he agrees to the dismissal in writing (section 30 ff. DRiG).

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[482] Edzard Schmidt-Jortzig, Die Einrichtungsgarantien der Verfassung 25, 32 (1979); Edzard Schmidt-Jortzig, *Aufgabe, Stellung und Funktion des Richters im demokratischen Rechtsstaat*, Neue Juristische Wochenschrift (NJW) 2377, 2378 (1991); Jürgen Papier, *Die richterliche Unabhängigkeit und ihre Schranken*, Neue Juristische Wochenschrift (NJW) 1089, 1089 (2001).

This "personal independence" guarantees him protection from summary dismissal, transfer and other forms of interference in his judicial position as well as sufficient remuneration commensurate with his responsibilities. A second aspect of the institutional independence of the judge concerns his functional and organizational autonomy. The courts must be able to go about their daily tasks without getting tangled up in legislation and administrative enforcement. The constitution recognizes this in Article 92 GG, which provides that "the judges alone" are responsible for passing judgments (i.e. not the legislature or the administration). By the same token, judges may not perform any tasks of the legislature or executive (section 4 DRiG). Institutionally, courts are autonomous, strictly separate organs. This serves to promote their independence as an institution. According to Article 20 (2) and (3) GG, the dispensation of justice represents one of the three powers of the Federal Republic. The fact that this function is "entrusted to judges" in accordance with Article 92 GG, coupled with the fact that judges are "independent and only subject to the law" in accordance with Article 97 (1) GG, is regarded as one of the institutional guarantees and the core element of the Federal Republic's structure as a free state based on the rule of law.

In 2008, 20,100 judges were employed in almost 1,100 German courts. Of this number 7200 (36 percent) were women. This means that with a current population of 82 million there is one judge per 4,080 inhabitants.

2. ENGLAND AND WALES

a. Selection

The first royal judges were selected from the nobles of the King's Court. Once the law society had been established, lawyers could also qualify for the position as judge and the first was appointed in 1210. In the 14th century, the rule was established that the judges on the King's Bench and Common Pleas were to be appointed solely from the "Sergeants at Law" and they were not to be members of the nobility. Although the judges were appointed by the sovereign and were also paid, they were politically very independent, seen in the fact that judgments frequently opposed the interests of the king. In Baker's opinion, the reason why judges were so independent lay in their view of the state as a constitutional monarchy in which the king is subject to law. The independence and pro-parliamentary outlook of the judges did not please some monarchs. For example, King James II (who ruled from 1685–1688) dismissed 12 judges in a period of only four years because they refused to grant him the right to repeal Acts. Shortly afterwards, in 1701, parliament passed the Act of Settlement, which enabled judges to be appointed for life.[483]

According to Bell, the selection and appointment of judges in England resembled, until recently, more the election of members to a club than an appointment

[483] Baker, *supra* note 270, at 166–69.

to a job.[484] At the time there were in England only 1000 barristers, 40 senior judges, and 60 County Court judges. Owing to the small numbers involved, all judges knew each other personally. It was not possible to apply for the position of judge. The Lord Chancellor participated personally in the selection of judges and held an interview with each candidate. The leading barristers were generally considered the best candidates for the post. An official application procedure was introduced in 1997 for the High Court and 1994 for subordinate courts.

Viewed in formal terms the requirements for the appointment to the office of judge in England is not high. However, such a position always requires a minimum level of professional experience. The District Judge must have at least five years of professional experience as a barrister or solicitor and two years of experience as a Deputy District Judge.[485] The other judicial positions require professional experience of no less than 10 years. Following a study in 1999, considerably more women (27 percent) than men (16 percent) ceased to act as barriers in the first seven years of their career, a pattern which resulted in considerably more men applying for judicial appointments.[486]

At the beginning of April 2009 the proportion of women holding judicial positions was as follows:

Lord of Appeal in Ordinary	1/12
Lords Justice of Appeal	3/38
High Court Judge	15/109
Circuit Judge	92/640
District Judge (incl. Fam. Div.)	104/444
District Judge (Mag. Ct.)	32/134[487]
Altogether:	247/1.377 (18%)

On 1 January 2008 the Tribunals, Courts and Enforcement Act 2007 entered into force, changing the procedure for judicial appointment in order to promote the diversity of judges. Accordingly, the requirement of a long period of practical experience was reduced and types of professional experience that qualified an applicant for judicial office were expanded. Professional experience as a trial lawyer is no longer the decisive factor. Instead, experience in other functions, such as an arbitrator, mediator, or lecturer will also be taken into consideration.[488]

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[484] Bell, *supra* note 417, at 312.

[485] Tribunals, Courts and Enforcement Act, 2007, at 50.

[486] Bell, *supra* note 417, at 315.

[487] Judiciary of England and Wales, Statistics—Women Judges in Post, www.judiciary.gov.uk.

[488] Tribunals, Courts and Enforcement Act, 2007, at 52.

b. Education

In Bell's view, until 1963, the English training of judges consisted basically of on the job training.

[489]In that year, the first judicial conference on sentencing took place. Since 1979 there has been a Judicial Studies Board which oversees the training of newly appointed judges of the lower courts and offers conferences on current statues (for example, the Children Act 1989 and the Criminal Justice Act 1991) for all judges. The highpoint was arguably the 64 seminars on the recently enacted Human Rights Act 1998 which were attended by 3,680 judges.[490]

In 2009 there were 1,377 judges in England and Wales for a population of 54.4 million. Accordingly, there is one judge for every 39,506 inhabitants.

3. SWEDEN

After successfully completing his degree, the candidate for judicial office will apply for a position as judge for a probationary period (*notarietjänstgöring*). The most important criteria for selection are the university grades, although other qualities such as life and professional experience (for example, in a law firm) are also relevant. The competition for the few vacancies available is fierce: only 30 percent of the applicants finally obtain a training place and in most cases this does not guarantee that they will be appointed a judge. This practical experience (*notarietjänst*) is also required for a position as a state prosecutor.

In the first phase of the two-year judicial training course, trainees attend preparatory courses before they are allowed to perform tasks in the courtroom. After gaining experience they then have the opportunity to sit as a judge in smaller cases. Following this period of basic training, most are nevertheless forced to abandon their ambitions of judicial appointment since there are only sufficient positions available for approximately 40 percent of trainee judges (*notarierna*).[491]

In order to remain at court, one must successfully apply for a temporary position as a probationary judge (*icke ordinarie domare*). The applicants namely hope that after completing some temporary positions, they will eventually be appointed a judge for life (*ordinarie domare*).[492]

Since the government decides appointments to the superior courts (primarily the *Högsta domstolen*), it may happen that lawyers as well as judges will be appointed to this court. In addition, government ministers exhibit a certain preference for judges who have worked in the administration: this is borne out by a

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[489] Bell, *supra* note 417, at 319.

[490] *Id.*

[491] *Id.* at 246; Utbildning för att bli domare, www.domstol.se.

[492] Domstolverket, Sveriges domstolar—Årsredovisning 2007; Bell, *supra* note 417, at 246.

study showing that almost 80 percent of the judges appointed had worked in the administration.[493]

In Sweden there is a ratio of one judge per 6368 inhabitants.

4. THE UNITED STATES OF AMERICA

a. Federal Courts

With the exception of diversity jurisdiction discussed below, the federal courts only have jurisdiction over cases involving federal questions. These are cases that are concerned, in whole or in part, with federal law, including federal constitutional law.

While it is difficult to quantify how much of the law in the United States is federal, and how much is state or local, the statistics on the comparative number of judges and on the comparative number of cases filed before the federal courts, on one hand, and the states courts on the other, suggest that over 90 percent of the law in the United States is state, not federal, law.

Article III, section 1 of the U.S. Constitution reads: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." The appointment procedure is found in Article II, section 2, clause 2: "[The president] shall . . . nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. . . . "

All federal district, appeals, and supreme court judges are appointed by the president as so-called Article III judges, which requires that the senate approve the president's selection. Senate confirmation can sometimes be an insurmountable obstacle. Of the 150 nominees to the U.S. Supreme Court that presidents have submitted to the senate through the centuries, the senate has rejected 27 (20 percent). The last nomination to be rejected was Republican Robert Bork, whom the Democratic senate considered too conservative. The effect of the confirmation requirement is even greater that these statistics suggest: contentious nominations are usually withdrawn. Extreme candidates are rarely even considered. This holds true for all federal judicial appointments, not just those to the U.S. Supreme Court.

The phrase in the constitution that the "The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour," means that they can

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[493] Bell, *supra* note 417, at 249.

only be removed by the impeachment procedure. This requires a majority vote of impeachment in the house of representatives, charging the judge with high crimes and misdemeanors, and then a trial and conviction in the senate. Conviction requires a two-thirds' vote. Whereas no president has ever been removed from office by the impeachment process, seven judges have been.

b. The California State Courts

The seven justices of the California Supreme Court are appointed by the Governor from an approved list, confirmed by the Commission on Judicial Appointments, and confirmed by the public at the next general election. A justice also comes before the voters at the end of his or her 12-year term. Because both of these forms of election are retention elections, there is no other candidate on the ballot for the judge's office. The eligibility requirements for appointment to the California Supreme Court are the same for all California judgeships: a person must have been a member of the State Bar of California or a judge of a court in this state for at least 10 years.[494]

Superior court judges serve six-year terms and are elected by county voters on a nonpartisan ballot at a general election. Vacancies are filled through appointment by the California Governor. What this means is that, upon the retirement of a judge, the governor usually appoints a successor who must stand for election. Statistics show that the electorate votes to retain virtually all judges who have been appointed. It can consequently be said that the vast majority of California judges are appointed by the governor from an approved list and confirmed by the Commission on Judicial Appointments

A superior court judge, like other California judges, must have been an attorney admitted to practice law in California or have served as a judge of a court of record in this state for at least 10 years immediately preceding election or appointment.[495]

Removal of state judges in the United States is substantially easier than removal of federal judges. In states where judges stand for election or at least for confirmation, a judge can be removed by voting "no" or, in situations where this is allowed, by voting for another candidate. In other situations, judges can be removed for good cause. Generally, as in California, there is as separate commission which investigates complaints against judges. The supreme court of the state may order the removal or forced retirement of judges. These commissions also have the power to order removal or forced retirement of a judge.[496] Impeachment by the legislature is also usually also available in most states.

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[494] Cal. Const., art. VI, §15.

[495] California Courts, www.courtinfo.ca.gov.

[496] State of California Commission on Judicial Performance, cjp.ca.gov.

Summary

At the beginning of the second millennium it was not possible to identify an autonomous judiciary in any of the countries investigated. Instead, the judiciary was under the control of the person who governed the territories that we today know as states. In most cases, the enactment of laws and their application by way of court judgments were one and the same activity: in their capacity as judges, rulers directly instructed their subjects on how to settle their disputes in accordance with their personal conceptions of law. They (or their small group of appointed representatives) also issued generally applicable decrees (for example, to levy taxes). In this way, nobles and clerics assisted the ruler in accomplishing these tasks in Germany, England and Wales, and Sweden and to a certain extent also assumed the functions in the ruler's name. At this time, there was scarcely any difference between laws and judgments.

A modern judiciary appeared in England only towards the end of the 12th century with the establishment of the Common Bench (*coram de banco*), which was responsible for matters which did not affect the king. In the 13th century in Sweden, municipal courts were introduced which only consisted of citizens and the mayor and not professional judges. Around the same time, German nobles and well-to-do families started to send their sons to Italy, where they studied Roman law. Upon their return they usually obtained a position as a civil servant in one of the German principalities in which they partially or exclusively performed judicial activities in the name of the prince.

Absolutism played a crucial role in subsequent development and continued to do so up to the modern era. Whilst the jurisdiction of the courts in England was initially limited and only gradually extended over the centuries to cover areas such as inheritance and family law, the temporal power of German rulers and, through them, their judges was much broader. In addition, German landowners took personal control of the judiciary. Judges were not to interpret laws but apply them. Even until the mid-19th century, many Prussian judgments required the formal approval of the king before they could be enforced. Some German judges were granted a brief period of independence under the Weimar Constitution only to be degraded again by the Communist government in the East and the National Socialist government in the West until their personal and thereby political independence was legally entrenched in 1949 with the ratification of the Basic Law in the Federal Republic of Germany and in 1990 with the integration of the former German Democratic Republic into the Federal Republic. In England and Wales, judges achieved their independence by 1701 at the latest with the Act of Settlement. However, it could be argued that a politically independent judiciary had already existed for centuries.

Sweden and Germany have comparably large numbers of judges: for every judge there are 4,000 people in Germany and 6,000 in Sweden. By contrast, England and Wales make do with one judge per 44,000 people and the United States with

one judge per 35,000 people. In addition, the office of judge in Germany and Sweden represents an independent career path. As a result, politicians in Sweden and Germany do not decide on the appointment of every single judge but only on appointments to the highest courts. Of course, those are the judges with by far the most influence over the interpretation of statutes and the Basic Law, and the development of case law. German and Swedish judges outside the highest courts are therefore independent of politics to a certain extent. As explained in the chapter on precedents, the judges of the lower courts follow the decisions of the senior judges, who are political appointees.

The selection and training of judges also display some differences. In England and the United States there is the belief that good, well-respected lawyers make the best judges whereas Sweden and Germany prefer to select the best students for judicial office. In this respect, one senses the tradition of case law on the one hand and the law ordained by the ruler on the other.

As dealt with more fully in the chapters on legal reasoning, statutes, and precedents, there are ordinarily only three things courts can do in the exercise of their jurisdiction: (1) reach results in resolving disputes; (2) provide reasons for their results; and (3) announce the rule they are following in resolving the dispute in the way they did. The first thing, resolving disputes, is thought by many to be an apolitical activity in the sense of not being influenced by the politics or other predisposition of the judges or judges. Other people consider this view of the judicial process to be naïve. They point out that, at least when it comes to judicial decisions construing the law (whether statute or case law), judges are presented with a choice. As mentioned in the chapter on statutes, German judges in National Socialist times "construed" the German Civil Code, which allowed for divorce in certain enumerated circumstances such as infidelity, to have an extra circumstance: the Jewishness of one's spouse. Can anyone contend that such judges' construction was not motivated by their politics or other predispositions? These and other decisions by German judges are couched in a bureaucratic language which, according to critics, only serves to conceal the real motivations of the judges. Judges are, according to these critics, "undercover politicians." If one considers how judges in Germany, England and Wales, Sweden, and the United States acted during the last century, one would probably conclude that the German judges had been the most political, at least according to this definition of political.

Nevertheless it must be true—if rules do in fact affect the decisions of the courts—that having more legislatively based rules, that is, statutes, will tend to reduce the opportunities for judges to substitute their own political and other ideas for those of the legislature. This is indeed the path followed in England the United States, where statutes tend to be very detailed. (See chapter on statutes.) However, this is generally not the case in Germany, where statutes tend to be broadly written (often termed "open textured" in English or *abstrakt* in German.)

Assume for the moment that judges should be apolitical. This would mean, assuming it is possible, that judges would pursue in their decisions the political

and other goals of the politicians who have been democratically elected. If this is one's concept of separation of powers, then why should not these same politicians be able to appoint judges of the same political persuasion as their own? This question cannot be adequately treated within the confines of this book, but it is worth noting that all of the jurisdictions here studied involve the political branches of the government—the legislature and executive—in the judicial appointment process. All four of the jurisdictions, in other words, display features that reflect a conception of separation of powers in which the legislature is superior to the judiciary. In fact only two of these jurisdictions—Germany and the United States—allow judges to declare acts of the political branches of the government unconstitutional, that is, invalid. Sweden and the United Kingdom do not.

How do judges in these four jurisdictions understand their role vis-à-vis separation of powers? In the author's observation, the English and American judge does indeed regard himself as subject to parliament or the legislature, but only in the instances where parliament or the legislature have made their will known. In other areas of law he also administers case law in which politics can also play a role. The German judge regards himself as a civil servant who has the task of interpreting the laws. He tries not to let politics interfere with this role and certainly does not create law unless he considers it absolutely necessary where the politicians have not yet acted (see discussion of *Richterrecht* in the chapter on precedents). Arguably, the Swedish judge falls between these two positions which can be explained by the absence of absolutism in Sweden. He too interprets laws like a civil servant but is also free to develop case law in areas not regulated by statute. However, only a few of the highest ranking judges have the opportunity to influence the development of case law because they form only part of a great bureaucratic judicial apparatus.

At first blush it appears that in England and Wales, only the criminal and civil courts are separated. Whilst Sweden has four specialist courts in addition to its ordinary courts (that is, the administrative courts, the Labor Courts, the Market Court, and the Division for Leasehold and Property Matters), only some tribunals in England form part of the ordinary jurisdiction in the German sense (although even here appeals lead to the Court of Appeal). However, appearances prove deceptive because wherever appeals lead, the tribunals play an extremely important role. At the same time, the role of the English Magistrates' Court must not be underestimated.

The judges of the upper courts are divided according to specialization. Accordingly, the High Court of Justice has, for example, three divisions: Chancery, Queen's Bench, and the Family Divisions. Even if the tasks are allocated differently in comparison with the German legal system, the same legal areas are covered in both countries with one exception. The only jurisdiction which England and Wales do not cover in comparison to Germany and the United States is missing in Sweden too, that is, jurisdiction to overturn statutes and executive actions on constitutional grounds. English judges can, at most, declare an act to be incompatible with the European Human Rights Convention, but this does not have any effect on its application to the case in question.

The apparent absence of specialized courts in England and the United States is misleading in another, institutional sense. The bars of these two jurisdictions are very specialized. Specialized lawyers are turned to by clients because their opinions are valued by the judges. Judges in England, and to perhaps a lesser extent in the United States, know the lawyers who appear before them regularly, and recognized both their trustworthiness and their expertise thus, in a complicated real estate case, for example, the two lawyers who present the case will be able to agree on the vast majority of the law and zero in on the legal or factual question in need of resolution. Real estate transactions are no exception: this specialization is found in all areas of law, at least in larger cities. In Germany and Sweden, on the other hand, specialization this intense is not seen as often among members of the bar.

One should remember that important legal decisions are taken in all jurisdictions here studied by multiple judges, often three in number. Owing to the very large number of judges in Germany and Sweden, the three-judge panel is likely to be very well versed in the general area of law in any case that is presented for resolution. One of the three judges assigned to the case will be charged with working up the case and presenting the salient facts and applicable law to the remaining two judges. This judge will be expected to familiarize him- or herself with the court file, to select the witness or witnesses who should be heard, to conduct any necessary legal research, to question the witnesses, and to draft the judgment. The other two judges, who themselves carry a heavy case load, will listen to their colleague's explanation of the case and to the witnesses, if any, and to the arguments of counsel, and, unless they detect a miscarriage of justice, will sign the judgment. They will also have to sign the judgment in Germany in cases where they disagree with the two other judges unless they happen to be judges of the German Federal Constitutional Court, the only judges in Germany with the right to dissent.

Keeping this institutional model of a three-judge court in mind, the common law judge relies on the two advocates to present the opposing positions of the parties. It is the advocates who must familiarize themselves with the court file, select the witness or witnesses who should be heard, conduct any necessary legal research, question the witnesses, and in many cases even draft the judgment once the judge has reached his or her decision. The advocates, in other words, will have more first-hand knowledge of the case, and perhaps even more knowledge of the applicable law, than either of the two additional judges in Sweden or Germany. The judge in England or the United States will (ordinarily) adopt the position of one of the two advocates. If the other advocate detects a miscarriage of justice, he or she will appeal to a higher court. In short, from a functional standpoint, it could be said that English and Welsh advocates (barristers) and American advocates (attorneys) are acting like German and Swedish judges, and that German and Swedish judges are acting like common law advocates. The roles overlap substantially.

With the increasing diversification of international activities within Europe, Member States are co-operating more closely in judicial matters in a practical sense. Of course, the different traditions will ensure that this will not happen overnight

and indeed, in certain areas the scale of the challenge cannot be overstated. Each system is characterized by different histories, training, and tasks. That said, judges are coming into contact ever more frequently with foreign legal systems and, when performing their professional activities, they are themselves bound to the common European law and legislation. Considering all the differences, a speedy and complete harmonization of the judge's profession is nothing more than a utopian vision because in these times of limited public funds it is arguably impossible to expect England and Wales to expand their judiciary by a factor of ten simply to make its system more "continental" in style. By the same token, one cannot expect Germany to make a similarly drastic reduction in the number of its judges.

6

Lay Judges and Juries

This chapter examines the use of lay judges and jurors in the four jurisdictions here studied. Beginning with Germany, it will be seen that lay judges are found in almost all trial courts and even some appellate courts. The institution of the jury which existed for some decades is no longer employed. Sweden has rather more lay judges than Germany, and it also uses the institution of the jury, although its use is quite limited. The courts of England and Wales employ juries for almost all trials on charges of serious crimes. Juries are used very rarely in civil cases. One very interesting and unusual use of lay judges in England and Wales is as justices of the peace. This institution, which is not totally unknown in the United States, is examined in some detail below. Turning to the United States, it will be seen that the use of juries is roughly comparable to their use in England and Wales, with the exception that juries are more often used in civil cases in the United States than in England and Wales. However, civil jury trials are quite rare even in the United States, especially compared to the vast number of criminal jury trials.

The discussion below begins with a historical overview of the use of lay judges and jurors in these four jurisdictions. Following this overview, the discussion will turn to the selection and training of lay judges and jurors in the respective jurisdictions. The third part of this chapter discusses the justifications that are given for continuing the practice of lay judging and having juries hear cases. In the final part of this chapter, the findings will be summarized, conclusions drawn, and predictions made about the future of lay participation in the judiciary.

A. Historical Development

The discussion below begins with Germany before turning to England and Wales, Sweden, and the United States.

1. GERMANY

Germany has a long tradition of involving lay people in the administration of justice, and nowadays lay participation represents an integral part of the court

system.[497] In most specialist courts, honorary judges sit on an equal basis with professional judges. Most honorary judges are considered to be representative of the public and as such have no particular training or experience. This is the case in the administrative and fiscal courts, and also in criminal courts where lay judges are known as *Schöffen*.[498] In the specialized (noncriminal) courts, the lay judges ordinarily have some specialized training or experience. One example is the commercial judge (*Handelsrichter*). This chapter, however, focuses on the role that lay assessors play in criminal proceedings, where lay judges are not expected to have any special knowledge of the matters before them.

Lay participation can be traced back to the old German institution of the *Thing*.[499] Until the Middle Ages the administration of justice lay in the hands of the people,[500] but in the fifth century the ruling elite consolidated their power structures, which led to territorial princes and landed gentry exercising jurisdiction.[501] Owing to the nascent Reception, an increasingly specialized legal education was needed.[502] This led to the application of law gradually becoming the preserve of trained judges and officials who were dependent on the territorial princes. As a result, lay participation steadily declined until it was almost completed eradicated during the era of absolutism.[503]

The detailed court structure created by Charles V in 1532 laid the formal foundations for the participation of honorary lay participation. Lay people were to participate in court proceedings, "applying the law and passing judgments."[504] They were to have a say in both the verdict and sentencing. However, the growing number of academically trained jurists increasingly replaced lay participants and thereby diminished their influence.[505] During the era of absolutism, the court system consisted exclusively of courts with professional judges who were employed as public officials and consequently were dependent on the absolutist ruler for their livelihood.[506] Up until the 19th century, the rulers themselves even

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[497] Bundestag (Bundestagsdrucksache) 15/3111, May 5, 2004, at 1.

[498] As in the system of labor courts (§§ 14ff. ArbGG), in the system of administrative courts (§§1, 19ff. VwGO), in the jurisdiction of the social courts (§§12 I, 33 I, 40 I SGG), in the system of tax courts (§§ 5 par. 3 FGG) and before the Chamber for Commercial matters (§§105ff. GVG). For an extensive explanation, *see* Manfred Wolf & Eduard Kern, Gerichtsverfassungsrecht aller Verfahrenszweige: ein Studienbuch 227f (6th ed. 1987).

[499] Friederike Charlotte Grube, Richter ohne Robe 34f (2005).

[500] Ulrike Benz, Zur Rolle der Laienrichter im Strafprozess 15 (1982).

[501] Albin Eser, *Laienrichter im Strafverfahren*, *in* Vom nationalen zum transnationalen Recht, Symposium der rechtswissenschaftlichen Fakultät der Albert-Ludwigs-Universität Freiburg und der Städtischen Universität Osaka 162 (Karl Kroeschell, ed., 1995).

[502] Vgl. § 1 Reichskammergerichtsordnung (Imperial High Court Code) (1495), half of the observers had to have a doctoral degree in law, see 2 Hermann Conrad, Deutsche Rechtsgeschichte: Ein Lehrbuch 163 (1962).

[503] Helmut Coing, Epochen der Rechtsgeschichte in Deutschland 57 (1976); 1 Hermann Conrad, Deutsche Rechtsgeschichte: Ein Lehrbuch 29 (1962).

[504] Kern, *supra* note 384, at 12.

[505] Benz, *supra* note 500, at 43.

[506] *Id.* at 44.

sometimes passed judgment personally or otherwise interfered in court proceedings. Law was no longer applied *by the people* but *on behalf of the people*. Examples of this can be seen in the interventions of Friedrich Wilhelm the First of Prussia in the trial of the Crown Princes and Frederick the Second of Prussia in the trial of Arnold the Miller.[507]

The emancipation of citizens during the political Enlightenment of the 18th century served to reinvigorate the concept of lay participation. At the time, people assumed that lay assessors were less influenced by authority than professional judges. The participation of lay assessors was also intended to enhance social responsibility and, in an area as sensitive as the administration of justice: it was intended to ensure transparency and popular legitimacy.[508] As a rule, a lay assessor's qualification was not judged by the expert knowledge he possessed nor by the functions he performed but rather by the fact that he represented an Everyman who decided cases alongside professional judges.

After the French Revolution, calls for the separation of powers—a concept elaborated by Montesquieu at the beginning of the 18th century[509]—proved to be successful. In Germany, these events led to reforms in criminal procedure. The influence of the state on the criminal justice system was reduced, and the goals of liberalism and democracy meant an increase in lay participation in the courts.[510] In the mid 19th century, the *Paulskirchenverfassung* (Constitution of the Church of St. Paul) entrenched both the separation of powers and lay participation[511] and granted *Schwurgericht* (literally oath court) jurisdiction over serious crimes as well as over political and press-related offenses. Lay people sat as jurors (*Geschworene)* and were responsible solely for deciding on the guilt or innocence of the accused. Professional judges dealt with questions of procedure and with sentencing. The aim was to make the concept of democracy understandable and tangible. It was assumed that the citizens, from whom the state derived its power, would be best represented in criminal proceedings by lay people. They would also be less susceptible to influence by the ruling elite.

The founding of the German Empire in 1871 led to calls for a national court system. This led to the enactment in 1877 of the Act Governing the Constitution of the Courts (*Gerichtsverfassungsgesetz*), which is still in force. This act, together with other statutes regulating the imperial legal system, stipulated that citizens were to participate in the judicial system in two ways, in the *Schwurgericht* (literally, oath court) and the *Schöffengericht* (literally, lay judge court).[512] In the *Schwurgericht*, professional and lay judges deliberated separately. This reflects

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[507] Kern, *supra* note 384, at 44, 47 *see* chapter on Judges and Judiciaries, *supra*.

[508] *Id.* at 56f.

[509] 1 Montesquieu, De l´ Esprit des Lois 168f (R. Derathé, ed. 1973).

[510] As suggested by Montesquieu, *supra* note 509, at 170.

[511] *See* Paulskirchenverfassung §§ 175 and 181 (1849).

[512] Benz, *supra* note 500, at 51f.

both English and French legal thinking as well as old Germanic law, which drew a distinction between passing a judgment and imposing a sentence.[513] The role of lay people was limited to establishing the guilt or innocence of the accused and considering whether there were any mitigating circumstances. Sentencing was left to the three, or sometimes five, judges who presided over the trial. The *Schwurgericht,* which convened every quarter, was reserved for the more serious offenses. The *Schöffengericht* dealt with criminal offenses of medium severity. In the *Schöffengericht*, lay people were involved in the main proceedings: they could ask questions and had the same voting rights as professional judges. Judgment and sentence were jointly imposed by jurists and lay people presiding together.[514]

The dissolution of the German Empire following the end of the First World War reignited the discussion concerning lay participation. One now assumed that lay citizens were no more resistant against outside influences than judges who had sufficient training and experience to act objectively. The proliferation of statutes and academic legal distinctions also seemed to be too complex for lay people to understand.[515] 1924 saw the reform of the court system named[516] in honor of Emminger, the justice minister at the time.[517] The *Schwurgericht* was abolished[518] and replaced by a large *Schöffengericht* which featured three professional judges and six honorary citizen judges. The citizen members continued to be known as jury members (*Geschworene*) but performed the tasks of the lay judges in the *Schöffengericht*. The designation of the lay judges was changed from *Geschworene* to *Schöffen* in 1972, but, somewhat confusingly, the court today is still often referred to as the *Schwurgericht*.[519]

The Juvenile Court Act (*Jugendgerichtsgesetz*), which was passed as part of the judicial reform of 1924, contained special provisions for criminal proceedings involving juveniles. Besides the usual juvenile courts, the act also called for the establishment of Juvenile Courts with Lay Judges (*Jugendschöffengerichte*). According to section 33(a) of the act in force today, these courts now consist of a professional judge and two lay judges, one male and one female.

During National Socialist rule, the status of lay judges underwent an ideological reevaluation. Lay judges, so it was thought, owed primary allegiance to the

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[513] *Id.* at 46, 54.

[514] *Id.* at 49.

[515] Kern, *supra* note 384, at 185 ff.; Hinrich Rüping, *Funktionen der Laienrichter im Strafverfahren*, Juristische Rundschaue (JR) 269 at 270 (1976).

[516] Die Lex Emminger, Reichsgesetzblatt (RGBl) pt. 1, 15 *et seq.* (1924/2); *see generally* Thomas Vormbaum, 4 Die Lex Emminger, Schriften zur Rechtsgeschichte (1988).

[517] Erich Emminger (1880–1951) was Justice Minister in the German Empire (Reichsjustizminister) from 1923 until Apr. 15, 1924. He was not exactly the father of the act but it at that time it was common practice to name the body of laws after the sitting minister.

[518] Kern, *supra* note 384, at 160ff.

[519] Deutsches Richtergesetz (DRiG) § 45a *amended by* Gesetz zur Änderung der Bezeichnungen der Richter und ehrenamtlichen Richter und der Präsidialverfassung der Gerichte (May 16, 1972), Bundesgesetzblatt (BGBl) 1972 vol. I, 841 (1972).

political pronouncements of the *Volk* rather than the rule of law.[520] Non-Aryans and "enemies of the people" were soon excluded from service as lay judges. This exclusion was later extended to women.[521] With the outbreak of the Second World War, lay participation was greatly restricted and was only maintained at the People's Court of Justice (*Volksgerichtshof*) and the *Führers Senat* (the senate of the leader).[522] In so doing, the National Socialists—like other totalitarian regimes—abandoned liberalism and democracy and instead exploited lay participation as a symbol of legitimacy.[523]

The Basic Law, which was ratified after the Second World War, laid the foundations of a liberal democracy and, in the process, resuscitated the concept of lay participation in the court system on the grounds that it reflected a democratic society based on the rule of law.[524] More specifically, the involvement of lay people was regarded as a necessary extension of the democratic principle and a precondition for judgments *im Namen des Volkes* ("in the name of the people"). The system of lay judges introduced during the Emminger Reform formed the basis of the new system so that, today, lay participation in criminal proceedings is still found in the form of *Schöffen*.[525] The value of the use of these lay judges has been the subject of regular discussion. Despite efforts at reform, the legislator has resisted reducing the role of lay people in the criminal justice system. Today, the use of lay judges is regarded as an integral component of the legal system. Indeed, today there are roughly 37,000 lay judges in Germany.[526]

2. ENGLAND AND WALES

Most people are aware of the English use of juries as finders of fact in serious criminal cases, but fewer realize that lay people play an even greater judicial role England and Wales in the capacity of lay judges known as justices of the peace. Consequently, England and Wales provide for lay participation in the system of the courts in two important ways. The discussion below begins with the lesser known institution, that of justices of the peace, before turning to juries.

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[520] For an extensive explanation of the situation of laypeople during the Nazi era, *see* Walter Böttges, Die Laienbeteiligung in der Strafrechtspflege 52ff (1979).

[521] Amtliche Verordnung des Justizministers, Deutsche Justiz (DJ) no. 342 at 675 (Nov. 13, 1933) under B II in association with Reichsgesetzblatt (RGBl) vol. I at 188 (1933); Hinrich Rüpping, *Funktionen der Laienrichter im Strafverfahren*, Juristische Rundschaue (JR) 269 at 270 (1976); Wilhelm Töwe, Die Auslese der Volksrichter 111 & 114 (1937) ("Mitwirken beim Richten ist Mannessache"—"Taking part in judging is the preserve of the male").

[522] Reichsgesetzblatt (RGBl.) Part I 1939 no. 167, 1658 *et seq.*

[523] Kern, *supra* note 384, at 243.

[524] Bundestagsdrucksache, 15/3191, 2; even in the GDR courts of lay assessor were introduced; for extensive explanation *see* Frohmut Müller, *Ehrenamtliche Richter in der Rechtsordnung der DDR*, 43 Neue Justiz (NJ) 133 *et seq.* (1989).

[525] Eser, *supra* note 501, at 165.

[526] *See* Federal Ministry of Justice (Bundesministerium der Justiz), www.bmj.de/SharedDocs/Downloads/DE/pdfs/schoeffen_insgesamt2009.pdf?__blob=publicationFile.

a. Justices of the Peace

The origins of lay judges or justices of the peace can be traced back to as early as 1200.[527] The post arose from the need to have an effective and fair means of policing and administering public justice in those areas of the country which were situated outside the immediate vicinity (and thus effective jurisdiction) of the royal justices.

This function was initially carried out by sheriffs working in conjunction with locally appointed members of the public, known as hundreds. The hundreds were responsible for establishing the identity of and pursuing the perpetrators of local crimes. Their responsibility for this function was enforced by the threat of personal punishment if the hundreds failed to identify those who committed crimes in their local area. For example, the Statute of Westminster 1285 made people of the hundred answerable for robberies. The day-to-day role of the hundreds therefore revolved around identifying and dealing with those suspected of crimes. Twice yearly the sheriffs would visit each hundred to try the cases on behalf of the crown. This practice took place at a hearing known as a *tourn*.

The combination of hundreds carrying out a police function at the local level, and the sheriffs carrying out their judicial function on a twice yearly basis, eventually broke down. The power of the sheriffs gradually waned and the significance of the tourn itself began to decease. Its decline was cemented after the Magna Carta, which provided that the tourn could no longer try cases of the Crown, but that its jurisdiction was limited to preliminary enquiries before a presentation of the case to the royal justices.

Dissatisfied with the perceived lack of a judicial presence at a local level, private individuals increasingly began to profess to have the power to hold their own tourns and began to describe these hearings as court hearings. The potential for abuse of these systems by powerful private individuals was apparent. In an attempt to regularize this practice the concept of lay judges was established. Initially these judges of the peace were knights who had been appointed to the position of lay judge. They took on an increasingly judicial-like role, employed on special commissions of oyer and terminer and goal delivery.

During the reign of Edward III (1327–1377) the functions of these lay judges were both increased and regularized and they became officially known as justices of the peace. They carried out their functions as a commission from the Crown. As a safeguard against potential abuse or manipulation, the authority given to these individuals was widely distributed and could be revoked at any time. Upon the appointment of a new justice of the peace, the powers of the former justice of the peace automatically expired.

The function of the justices of the peace was twofold: they were charged with keeping the peace and were required to "enquire into, hear, and determine"

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[527] This description is drawn generally from Baker, *supra* note 270, at 24, and sources cited there.

various specified crimes. As part of their function of keeping the peace, the justices of the peace were bestowed with police authority of arrest, detention, and bail in return for a surety. They were also bestowed with power to issue on-the-spot fines in respect of various offenses carried out outside a court but within their view.[528]

In carrying out their second function, namely to "enquire into, hear, and determine" crimes, the justices of the peace inherited the former power of sheriffs to try cases on behalf of the Crown. They tried cases in four annual sessions known as quarter sessions of the peace. The local justices of the peace continued to exercise their judicial functions in these quarter sessions for six centuries, until the sessions were eventually abolished in 1971.

Not only did the justices of the peace exercise both a police and judicial function in their local communities, but they had administrative responsibilities too. For example, they were responsible at a local level for making provision for the poor and orphans, and for maintaining highways and bridges. Many of the administrative and police duties of the justices eventually were carried out in private outside these quarter sessions. Various matters were conducted in so called *petty sessions*, which later transformed into minor courts in which the justices of the peace could exercise summary conviction.

Today, the justices of the peace sit in the magistrates courts, which have the jurisdiction to hear all but the most serious or complex crimes. They are a key part of the criminal justice system, and 97 percent of all cases are heard and completed in these courts.[529]

The concept of the justices of the peace sitting and having authority as a commission still exists today, although the justices of peace sitting together (normally as a trio) are now referred to as a *bench*. Just like in 1200, they are still assigned to a local area—this area was still known as commission area until the introduction of the Courts Act 2003 and is now referred to as a local justice area.

b. Juries

The use of juries evolved in Anglo-Saxon England, when Norman kings used juries as a method of investigating crimes.[530] A jury of accusation was sworn to name suspected perpetrators of crimes who were subsequently produced and tried for their suspected crimes.

In the mid 12th century during the reign of Henry II the assize became a form of jury, although in its early rudimentary form the jurors were actual witnesses rather than impartial adjudicators of the facts. Twelve free and lawful men who

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[528] *E.g.,* Stat 15 Ric. II c.2 gave justices of the peace this ability in respect of the offense of forcible entry.

[529] http://www.justice.gov.uk/about/hmcts/courts.htm.

[530] This description is drawn generally from Baker, *supra* note 270, at 73, and sources cited there.

were mentioned in the writ of venire facias were summoned to "make recognition of the facts." These men were recruited from the locality of the dispute and were expected to know the facts before coming to court. Very little evidence or testimony was heard in court. The chief qualification of each of these men was that he was supposed to know the truth, or at least some of the truth, before he came to court.

While this form of the jury was initially restricted to complaints of a breach of the king's peace, the jury came to be used in indictments of crime once appeals of felony and actions of trespass separated in the 13th century. The influence of the jury as an element in criminal procedure began to increase steadily from this time, an influence furthered significantly by the decision in 1215 by the Roman Catholic Church to abolish ordeals (that is, battles) as a way of settling disputes.

By 1390 it had become an irregularity to allow either party in the trial to communicate with the jurors once they were sworn in. The verdicts of the jurors were liable to be quashed if improper influence between themselves and either party was established.

The Bill for Better Regulation of Juries in 1730 established the impartiality and neutrality of juries. According to the Act the list of those liable for jury service would be posted in each parish and jury panels would be selected by lot (or sortition). This prevented wealthier individuals from effectively bribing the undersheriff whose job was to select jury members.

3. SWEDEN

As already stated in the chapters on the legal profession and on the role of judges, Swedish judges of the early Middle Ages were not jurists. Originally, the role of judging fell to the *ting*, which consisted of all men residing in a particular area.[531] It was not until the 13th century that the jurisdiction of the *ting* was replaced by the local nobleman or his representative together with a committee or *nämnd,* consisting of 12 important landowners.[532] The *nämnd* was elected annually from the ranks of the most important landowners. At first the jurisdiction of the *nämnd* court was limited to criminal matters, but with time it also took on the role of resolving civil controversies.[533] Members of the *nämnd* performed a special evidential function. In contrast to compurgators or witnesses, who were only allowed to testify for the party that called them, the role of the *nämnd* was to establish the truth about what had actually happened. Through the years, the institution of the *nämnd* grew in importance until all cases in Sweden were decided in this manner. By 1442 the *nämnd* had established itself as an integral part of the court system.[534]

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[531] Göran Inger, Svensk rättshistoria 49, 51 (3d ed. 1986).

[532] Diesen, *supra* note 406, at 120f & 383.

[533] Inger, *supra* note 531, at 49–50.

[534] Diesen, *supra* note 406, at 111; Inger, *supra* note 532, at 51.

Between the years 1550 and1650, the *nämnd* even decided disputes regarding questions of law.[535] This was done either with or without the judge, although in the former case the *nämnd* also had the power to override the decision of the judge by simple majority.[536] As the authority and legitimacy of the *nämnd* grew, the chairman of the *nämnd* was referred to as judge (*domare*) whereas the professional judge was reduced to the position of law reader (*lagläsare*).[537]

During the 16th century, the *nämnd* evolved from performing a special type of evidential function to becoming a permanent part of the judicial panel, sitting alongside the judge. At the end of the 17th century, the principle was established that judges must perform their offices personally within the court district and must give up any other occupations they might have. The same period saw the increasing influence of jurists educated at the University of Uppsala, who lobbied for qualified jurists to be appointed in the lower courts as well.[538] Another important development was the introduction of the requirement of written pleadings at the higher courts. The influence of lay judges was further eroded by the establishment of appellate courts at the beginning of the 17th century. The court of appeals in Stockholm (*Svea hovrätt*), for example, was established in 1623. This led to a professionalization of the legal practice and contributed to the increase in authority of the professional judge relative to the members of the *nämnd*. Eventually, the *nämnd* was only empowered to override the decision of the professional judge if the members of the *nämnd* (which varied in size from 7 to 12) were unanimous. This important principle was codified into a statute in 1734.[539] Interestingly, in Finland, which was at one time part of Sweden, it is still the case that a unanimous *nämnd* can override the decision of the professional judge.[540]

In 2002, there were approximately 7,600 *nämnd* members in Sweden. Of this number, over 5,000 were employed at the state courts (*tingsrätt*) and 500 more at the property courts (*fastighetsdomstol*), which constitute part of the state courts. At the regional administrative courts of first instance (*länsrätt*, renamed *förvaltningsrätt* in 2010) there were almost 1,300 lay judges. In addition, over 500 worked on appellate courts (*hovrätt*) and almost 300 at administrative appellate courts (*kammarrätt*).

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[535] Inger, *supra* note 531, at 51.

[536] Wilhelm Uppström, Öfversigt af den svenska processens historia 85 (1884).

[537]1 Jan Eric Almquist, Svensk rättshistoria: efter föreläsningar. Processrättens historia 4f (1968).

[538] *Id.* at 7; Kjell, Å. Modéer, Historiska rättskällor: en introduktion i rättshistoria 122–27 (2d ed. 1997).

[539] Framtidens nämndemän, Statens offentliga utredningar (SOU) 37 (2002); Marius Kohler, Die Entwicklung des schwedischen Zivilprozessrechts 73 (2002); Susanne Mattsson, Nämndemän i tingsrätten 3 (1992); Pertti Myhrberg, Rikos- ja prosessioikeuden kehitys Suomessa 70 (1978).

[540] Hannu Tapani Klami, Merva Hämäläinen, Lawyers and Laymen on the Bench: A Study of Comparative Legal Sociology 13 (1992).

From 1948 the size of the *nämnd* was reduced from 12 to nine for serious cases, and to only three members for less serious offenses.[541] Members of the *nämnd* usually convene 10 times a year for a few days at a time.[542] A study in 1991 showed that *nämnd* members took part in 84 percent of all judgments in criminal matters but only in one percent of civil or family cases at the state courts (*tingsrätt*).[543] At the appeals court exercising ordinary jurisdiction (*hovrätt*) *nämnd* members took part in 61 percent of criminal matters and mere 5 percent of family matters. At the regional (*länsrätt*, renamed *förvaltningsrätt* in 2010) and superior administrative courts (*kammarrätt*) they took part in 46 and 2 percent of cases respectively.[544]

Since 1815, a jury modeled on the English system has been used in cases involving freedom of the press and, since 1991, freedom of speech in general.[545] Until 1999 the selection of these jury members was a political decision taken by local councils, a practice which was invalidated by the European Court of Human Rights (ECHR) in 1994.[546] In this case, Carl G. Holm, the claimant, claimed damages arising from a book which linked him to far right extremism. Its author and the publishing company had openly declared their support for the Swedish Social Democratic Party.[547] The jury, consisting of five social democrats and four representatives from other parties, ruled against the claimant. The ECHR held that the composition of the jury was such that the suspicion of bias could not be ruled out. As a result, the composition of the court contravened Article 6 of the European Convention on Human Rights, which guarantees a right to a fair trial. This Swedish government used the decision as a basis for revising the selection procedure of jury members. At present the selection of *nämnd* members corresponds to the political representation of the members on the local council (as had been the case before the selection procedure was changed in 1975).

The Swedish jury has nine members with six votes required for a verdict.[548] Each year there are approximately 12 cases pending under the Press Freedom Regulation.[549] An investigation carried out from 1970 to 1981 concluded that the jury decided in favor of the complainant in two-thirds of cases.[550] Although parties can waive their right to a jury trial, they rarely do so in practice. As an

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[541] Framtidens nämndemän, Statens offentliga utredningar (SOU) 38 (2002).

[542] 3 Ekelöf, Per Olof et al., Rättegång 133 (7th ed. 2006); *see* Strömholm, *supra* note 279, at 118.

[543] Diesen, *supra* note 406, at 136.

[544] *Id.*

[545] Torbjörn Vallinder, *The Swedish Jury System in Press Cases: An Offspring of the English Trial Jury?*, 8 J. Legal Hist. 190, 202 (1987).

[546] Holm v Schweden, 1994 ECHR. Nr. 279-A.

[547] Torbjörn Vallinder, Nio Edsvurna män, Jury och Tryckfrihet i Sverige 1815–2000 367–82 (2000).

[548] Tryckfrihetsförordningen 12:2.

[549] Vallinder, *supra* note 545, at 215.

[550] Vallinder, *supra* note 545, at 415.

example, over 95 percent of cases under the Press Freedom Regulation result in jury trials.[551]

4. THE UNITED STATES OF AMERICA

As discussed in the chapter on judges, each British colony in North America had its own system of courts. The structures and rules of procedure, though based on English antecedents, sometimes varied considerably.[552] Nevertheless, they all relied heavily on justices of the peace, sometimes called magistrates, modeled on their counterparts in England.

a. Justices of the Peace

The colonial justices of the peace were generally appointees of the governor, who was the king's representative. The justices in turn represented the governor and, through him, the crown, not only in judicial matters, but also in all matters involved local administration of government. Further, unlike their counterparts in England, the colonial justices of the peace also often had jurisdiction over (mostly small) civil as well as criminal cases.[553]

As the population of the colonies grew, the courts in the cities became more professional and specialized; yet those in the rural areas continued to be staffed by justices of the peace with no formal legal training.[554] Indeed, judges with no formal legal education were common throughout the judiciary up to and sometimes after the United States declared themselves independent in 1776.[555]

Once they achieved independence from Great Britain, the former colonies, now states of the United States, proceeded to reform their judicial systems into what they are today. Justices of the peace have, for the most part, been replaced by professional judges. The institution of the nonlawyer justice of the peace does survive in some American states, as discussed below. Apparently, the American states have never tried to copy the present English system of magistrates' courts.

The history of the use of lay judges in the federal court system is somewhat at variance with that of the American states. The history of federal commissioners is told concisely by Leslie G. Foschio in an article from 1999[556] from which the following synopsis is basically drawn.

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[551] Diesen, *supra* note 406, at 323, mn. 59.

[552] Erwin C. Surrency, *The Courts in the American Colonies*, 11 Am. J. of Legal Hist. 347, 347 (1967).

[553] Note, *Law in Colonial New York: The Legal System of 1691*, 80 Harv. L. Rev. 1757, 1762–63 (1967).

[554] Roscoe Pound, Organization of Courts 26–90 (1979).

[555] Francis R. Aumann, The Changing American Legal System: Some Selected Phases 34–40 (1940).

[556] Leslie G. Foschio, *A History of the Development of the Office of United States Commissioner and Magistrate Judge System*, 1999 Fed. Cts. L. Rev. 4, 4 (1999).

The first use of lay personnel to perform judicial functions was a congressional statute passed in 1793 which authorized the federal courts to appoint "one or more discreet persons learned in the law" to conduct bail hearings. The jurisdiction of these commissioners was expanded through the decades. Along with the increase in jurisdiction came an increase in the number of commissioners. By 1878 there were 2,000 federal commissioners. The commissioners were not salaried; rather, they earned fees according to the services they performed. After various abuses of the system, such as the fact that some commissioners earned three times what federal judges earned, came to light, congress in 1896 ordered that commissioners be compensated according to a uniform fee schedule and that they be prohibited from holding other offices, whether state or federal. This law, however, failed to set any minimum qualifications for commissioners. In 1942, half of the commissioners were not trained in the law. As of 1963, the number of commissioners had decreased to 700, and the percentage of nonlawyers had dropped to 30 percent.

The Federal Magistrate's Act of 1968 introduced the modern era of professional U.S. magistrates. Their role in the federal court system is discussed in the chapter on judges.

b. Juries

While lay justices of the peace have been replaced by professional judges in much of the United States, the institution of the jury, at least in major criminal cases, is still universally important. Nevertheless, its importance has waned severely through the centuries.

Juries were used in North America in the earliest British settlements in Massachusetts.[557] Nonetheless, the use of juries was not as well established in the colonies as it was in England. It is said that different colonies had different traditions regarding their use.[558] In Connecticut, the colonial government regulated juries as early as 1643 by specifically allowing nonunanimous verdicts. Two years later a law was passed allowing judges to disregard jury verdicts which were not to the judges' liking. Other colonies lowered, and other raised, the number of jurors from the traditional number 12.[559]

Even before the Declaration of Independence, 12 of the original 13 states had adopted written constitutions, and the only right that they all protected was the right of someone charged with a crime to have his case heard by a jury.[560] The right to trial by jury was so important to the colonists, that one of the grievances listed in the Declaration of Independence is that King George III (but in fact parliament)

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[557] Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England*, 31 Colum. L. Rev. 416, 436 (1931).

[558] Bruce H. Mann, Neighbors and Strangers 75–81 (1987).

[559] Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. Kan. L. Rev. 347, 371 (2003).

[560] Leonard W. Levy, *Bill of Rights*, *in* Essays on the Making of the Constitution 258, 269 (Leonard W. Levy ed., 2d ed. 1987).

had deprived them "of the benefits of trial by jury." The author of the Declaration of Independence, Thomas Jefferson, once wrote, "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."[561]

According to Albert W. Alschuler and Andrew G. Deiss,[562] the popularity of the jury stemmed in large measure from the role that juries had played in resisting what the colonists saw as high-handed English authority. To cite just one example, there probably were no more than two convictions for seditious libel—in other words, criticizing the crown or the royal governor, even if the criticism were true—throughout the colonial period.

The right to jury trial in federal criminal cases is guaranteed in two provisions of the U.S. Constitution: in Article III, section 2 and in the Sixth Amendment, the latter reading: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." The text of Article III, section 2 seems to disallow for the possibility of trial without a jury, that is, with judges as triers of fact: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury."

In the early years of the nation, bench trials, that is trials without a jury, in serious criminal cases were unknown, although guilty pleas were sometimes accepted.[563] In 1874 the Supreme Court of the United States held that a criminal defendant could not "be tried in any other manner than by a jury."[564] However, two parallel developments have led to a drastic reduction in the number of jury trials. The first was the increasing number of guilty pleas. One comprehensive comparison of the number of convictions after confession and of those after trial by jury in the State of New York showed that the rate of convictions after trial by jury relative to guilty pleas fell from a high of 75 percent in 1839, to 10 percent in 1928.[565] Today it is 3 percent.[566] The other development that has led to a reduction in the number of jury trials is the election of the criminal defendant to choose to have a trial without a jury, a so-called bench trial, which the U.S. Supreme Court upheld as constitu-

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[561] Letter to the Abbé Arnoux, July 19, 1789, *in* 15 The Papers of Thomas Jefferson 282, 283 (Julian P. Boyd ed., 1958).

[562] Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 868 (1994).

[563] *Id.* at 867, 922–23.

[564] Insurance Co. v. Morse, 87 U.S. 445, 451 (1874).

[565] Raymond Moley, *The Vanishing Jury*, 2 S. Cal. L. Rev. 97, 108 (1928).

[566] Division of Criminal Justice Services, Criminal Justice Statistical Report, New York State Felony Processing Final Report Indictment through Disposition January—December 2009 19, tbl. 8 (2010), criminaljustice.state.ny.us/pio/annualreport/nys-felony-process-report2009.pdf.

tional, despite what seems to be the clear textual meaning of the Sixth Amendment, in 1930.[567] Although such trials in serious criminal cases are practically unheard of in England and Wales, their numbers have grown in the United States. Nationwide, 95 percent of felony (a felony is generally a crime punishable by imprisonment for more than one year) convictions in the state courts follow guilty pleas, 2 percent follow trial by jury, and 3 percent follow trial by a judge sitting without a jury.[568] In other words, bench trials account for 50 percent more convictions than jury trials.

Civil jury trials are much more uncommon in the United States than criminal jury trials. According to a nationwide survey, only about three percent of real property, tort, and contract cases are disposed of by trial.[569] Of these three small classes of cases that went to trial, two-thirds (18,400 of 26,900) were decided by a jury. Yet, these groups of cases make up virtually the only cases that juries decide in any substantial number. This can be seen from statistics from the State of California. In the fiscal year 2006–2007, a total of 1.3 million civil cases were disposed of by the state courts of California, 217,000 (16.7 percent) by trial, but only 1700 (0.1 percent) after a trial by jury.[570] During the same period there were 6.5 million total criminal dispositions (felonies, misdemeanors, infractions, and parking appeals), resulting in 9,800 criminal jury trials and 198,900 criminal bench trials in the California superior courts.[571]

B. Selection and Training

1. GERMANY

The sections of the Basic Law relating to the judiciary primarily refer to professional judges and do not expressly refer to lay judges. However, it is generally accepted today that Article 92 and the subsequent provisions of the German Basic Law also allow for lay judges.[572] This view was reinforced by the Federal Constitutional Court in its ruling of May 30, 1978, in which it interpreted the Basic Law as impliedly recognizing the participation of lay persons in criminal law proceedings.[573]

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[567] Patton v. United States, 281 U.S. 276, 298–99 (1930).

[568] Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2002*, Bureau of Justice Statistics Bull. (U.S. Dept. of Justice Office of Justice Programs) (Dec. 2004) 8, tab. 9., http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc02.pdf.

[569] Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, Bureau of Justice Statistics Special Report (U.S. Dept. of Justice Office of Justice Programs) Oct. 2008, 1 & 9, http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf.

[570] Judicial Council of California, *2008 Court Statistics Report, Statewide Caseload Trends*, 48, tbl. 5 (2008).

[571] Judicial Council of California, *2008 Court Statistics Report, Statewide Caseload Trends*, 33, tbl. 3 and 115, tab. 7b (2008).

[572] *See* Diana Löhr, Zur Mitwirkung der Laienrichter im Strafprozess 185 (2008); Karlheinz Liekefett, Ehrenamtliche Richter an den deutschen Gerichten 106 (1965) with additional verification.

[573] Neue Juristische Wochenschrift (NJW) 1795 (1978); Bundestagsdrucksache 1 (15/3191).

In accordance with section 1 of the German Law Governing Judges (*Richtergesetz* or DRiG) of July 1, 1962, the German judiciary is made up of professional and honorary judges. Section 44 and subsequent provisions of that statute relate to the class of lay judges. Accordingly, honorary judges enjoy the same degree of independence as professional judges (section 45 I S. 1 DRiG),[574] although this is subject to the proviso that lay judges are not personally (*persönlich*) independent for they do not earn a salary nor are their positions permanent, as is the case with professional judges.[575]Nevertheless, honorary judges can claim expenses such as the costs of traveling or loss of earnings.[576] In addition, unlike professional judges, they do not wear robes.[577]

As a general rule, lay judges have not received any legal training and so their decision making can and should be unbiased in order to support the professional judges.[578] According to § 45a DRiG, honorary judges in criminal proceedings bear the title *Schöffe*.

The Act Governing the Constitution of Courts *(Gerichtsverfassungsgesetz*) establishes the basic principles governing the structure, function and jurisdiction of the civil and criminal courts. The act regulates lay courts (in terms of their constitution, powers, requirements, and procedures) in a separate section. This is considered the constitution of lay judge courts, the *Schöffengerichte*.

Lay judges must be German citizens pursuant to Art. 116 I GG (section 31 sentence 2 GVG). As mentioned above, legal training is not required. The selection and appointment of lay judges were adapted in the 1970s to reflect prevailing social conditions. The minimum age of lay judges was therefore reduced from 30 to 25 and the maximum age limit was raised to 70, although candidates above the age of 65 have a right to refuse to serve if they are called to serve. The maximum period of office was set at 10 years in order to ensure that personnel are changed on a regular basis. A lay judge's period in office was extended to five years, so that they can only be reappointed once. This last reform was introduced by the Act Simplifying the Procedural Provisions Regulating the Selection and Appointment of Honorary Judges (*Gesetz zur Vereinfachung und Vereinheitlichung der Verfahrensvorschriften zur Wahl und Berufung ehrenamtlicher Richter*), which entered into force on 1 January 2005.[579] This provision also prescribes in section 45(a) (I) (a) that no honorary judge should suffer any disadvantage on account of his or her service. Accordingly, employers are required to give their employees time off from work to serve as an honorary judge, and they are not allowed to

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[574] Otto Rudolf Kissel & Herbert Mayer, Gerichtsverfassungsgesetz (GVG): Kommentar, § 31 mn. 4 (2008).

[575] *See* Löhr, *supra* note 572, at 185.

[576] *See* Was Sie über das ehrenamtliche Richteramt wissen sollten, *available at* Justiz-Online, www.justiz.nrw.de.

[577] Liekefett, *supra* note 572, at 103.

[578] *See* Löhr, *supra* note 572, at 185; Liekefett, *supra* note 572, at 2.

[579] Bundesgesetzblatt (BGBl) pt. I, no. 72, 3599 ff. (2004).

terminate an employee's employment contract on account of his or her service as an honorary judge. This protection was enacted in recognition of the important responsibilities exercised by honorary judges, and was intended to give them the respect they deserve for filling this important office.

The selection of lay judges must take account of all segments of the population (sections 36 II sentence 1, 42 II GVG). This cannot always be achieved in practice. For example, in 1997, 12,561 people acted as lay judges in North Rhine Westphalia. Of this number, 29 percent worked in the public sector and 34 percent in the private sector. However, only 5 percent were self-employed, and 9 percent were retired.[580] Only a very few were blue collar workers.[581] This shows that, in reality, not all population groups are equally represented in lay participation. Certain people can be exempted from selection owing to incapacity (section 32 GVG), age (section 32), and professional reasons (section 34).

Every five years, the local authorities must produce a list of candidates for the position of lay judge at the local and state courts.[582] The vote must be by two-thirds' majority of those actually voting, and the vote in favor must be by majority of the overall possible votes (section 36 I sentence 2 GVG). The list is made available for public inspection for a period of one week after existence of the list is publicly announced (section 36 (3) GVG). This gives the public an opportunity to raise any objections. According to statute, the list of candidates must contain at least double the number of lay judges actually required. The minimum number of candidates depends on the size of the locality. A decision of the German Federal Supreme Court (BGH) requires local representatives to make an objective decision on the candidates so that they "ensure by means of an individual pre-selection procedure that experienced persons capable of making a decision are appointed as lay judges."[583] In larger communities, it is becoming more and more difficult to find candidates who are willing to serve. In Frankfurt am Main, for example, selection has even been made randomly by computer.[584]

Once approved by the local authority, the list of candidates is then sent to the competent local court where a judge initiates the procedure for selecting lay judges (sections 38ff). The selection itself is made by the local court's lay judge selection committee. This body consists of a judge of the local court who acts as chairman, an administrative official who has been appointed by the state government, and seven locally selected residents (section 40 GVG). The committee considers any objections and selects lay judges and their alternates by a two-thirds' majority (sections 41, 42, 43 GVG). The lay judges are then entered on a list kept at the

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[580] *See* Deutscher Bundestag 6, http://dip21.bundestag.de/dip21/btd/15/031/1503191.pdf.

[581] *See* Rüping, *supra* note 515, at 270.

[582] § 36 I p. 1 GVG. In juvenile courts the Juvenile Committee of Public Safety (Jugendwohlfahrtsausschuss) that has been established by the Child Protective Services (Jugendamt) takes on this action (§ 35 JGG).

[583] BGHSt 38, 47, Neue Juristische Wochenschrift (NJW) 3034 (1991).

[584] Wolf & Kern, *supra* note 498, at 233.

local or state court (sections 44, 77 I sentence 2 GVG). The judge at the local court decides on the order in which the lay judges will participate in the year's proceedings (section 45 GVG).

Lesser offenses which fall within the jurisdiction of the local criminal court (*Amtsgericht*) are decided by a professional judge sitting alone.[585] Serious or either-way criminal offenses will be decided by a lay court featuring a professional judge and two lay judges. Two additional judges will be recruited for more complex proceedings (that is, an extended lay court). The lay court has the power to impose custodial sentences of between three and four years. The constitution of a lay court differs slightly in relation to offenses committed by minors. According to the Act Regulating the Establishment of the Juvenile Court (*Jugendgerichtsverfassungsgesetz),* the lay court consists of a professional judge and two lay people (a man and woman) in such cases. Appeals are decided by the extended criminal panel of the state court (*Landgericht*) with three professional judges and two lay judges for juvenile matters (*Jugendschöffen).*

As far as the State Court (*Landgericht*) is concerned, a distinction is drawn between the large (*grosse Strafkammer*) and small criminal panel (*kleine Strafkammer*) (cf. sections 73ff. GVG).[586] The former decides those cases at first instance which fall within its jurisdiction according to section 74 I, II GVG. It consists of three professional and two lay judges (cf. section 76 I sentence 1, alternative 1 GVG). At the outset of the proceedings, however, it can also decide that only two (as opposed to three) professional judges will sit (section 76 II GVG). The small criminal panel has jurisdiction over proceedings and decisions concerning the legal remedies of the appeal (section 74 III GVG). It consists of one professional and two lay judges (cf. section 67 I sentence 1 alternative 2 GVG). An additional professional judge must sit in appeals against a judgment of the extended lay court (section 76 III sentence 2 GVG).

Lay judges do not participate in the Superior State Courts (*Oberlandesgerichte*)[587] or the German Federal Supreme Court.[588] These courts deal exclusively with the appraisal of legal questions with the result that the participation of lay judges is not considered to be appropriate.[589]

In the main proceedings, lay judges, as a rule, have the same rights including voting rights, as the professional judges (section 30 I GVG).[590] In particular,

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[585] *See* Benz, *supra* note 500, at 62.

[586] *Id.* at 64.

[587] Neither in the case of the jurisdiction at the first instance, see §§ 120, 122 GVG.

[588] *See* Löhr, *supra* note 572, at 313.

[589] *See* Löhr, *supra* note 572, at 190.

[590] *See* 9 Kurt Tucholsky, Merkblatt für Geschworene, Gesammelte Werke:"Wenn du Geschorener bist, vergewissere dich vor der Sitzung über die Rechte, die du hast: Fragerechte an den Zeugen und so fort . . . Lass dir vom Richter nicht imponieren. Ihr habt für diesen Tag genau die gleichen Rechte."—If you are to serve on the jury, assure yourself about the rights you have: a right to ask questions to the witness and so on . . . do not be impressed by the judge. On this day you have exactly the same rights.

lay judges have the right to ask questions in the main proceedings in accordance with section 240 II of the Criminal Procedure Regulation (*Strafprozessordnung* = StPO), even if this right is somewhat restricted in scope (see section 242 StPO).[591] Outside the main proceedings, professional judges have sole responsibility for the handling of the case (sections 30 II GVG, 33a II JGG, 76 I sentence 2, 77 GVG).[592] Lay judges do not have an automatic right to inspect files. This is the applicable case law today and is intended to ensure that judgments are taken by those present in the courtroom and in reliance on the evidence presented there (*Unmittelbarkeitsgrundsatz*).[593]

Once the evidence has been heard, both the professional judges and lay judges withdraw for deliberations, in which the first aim is to reach a unanimous decision. The presiding judge collects the votes. Owing to the fact that they both have equal voting rights, lay judges can sometimes overrule the proposed decision of the professional judges.[594] In accordance with section 197 sentence 2 GVG, the lay judges announce their decision before the professional judges so as to avoid any suspicion of influence. Section 263 I StPO provides that there must be a two-thirds' majority in the case of any judgment that is against the interests of the accused. This constitutes a departure from the fundamental provision of section 196 I GVG which provides for a mere majority, that is, over 50 percent.

The practical effects of lay judges out-voting the professional judges are examined in four studies carried out by Gerhard Casper and Hans Zeisel which compare the effect of decision making by lay judges in criminal proceedings. The authors investigated a total of 1,023 cases in the *Schöffengerichte* (lay judge courts) and the large criminal panels (*grosse Strafkammer*) in order to ascertain the influence that lay judges have on decisions.[595] In order to arrive at an average, those two researches collected data in Baden-Württemberg, Hamburg, and Hessen.[596] Concerning the question of guilt or innocence, all judges and lay judges agreed in 94 percent of cases before *Schöffengerichte* with differences of opinion arising in the remaining 6 percent. In 1.5 percent of cases, there was evidence that the lay judges influenced the decision, in effect overruling the professional judge.[597] In the one hundred cases examined before the large criminal panels (*grosse Strafkammer)* there were no differences of opinion in 92.5 percent of cases, with only 7.5 percent of cases revealing disagreements between at least one lay judge and at least one professional

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[591] See Gerd Pfeiffer, StPO, GVG Kommentar, § 30 GVG, mn. 1.

[592] Löhr, *supra* note 572, at 210, Christoph Rennig, Entscheidungsfindung durch Schöffen und Berufsrichter 146 (1993).

[593] *See* BGHSt 13, at 73; Schmidt, Juristische Rundschau (JR), at 30 (1961); Terhorst, *Information und Akteneinsicht der Schöffen im Strafprozess*, MDR 809 (1988); B. Atzler, *Das Recht des ehrenamtlichen Richters die Verfahrensakten einzusehen*, Deutsche Richterzeitung (DRiZ) 207 (1991).

[594] Benz, *supra* note 500, at 84.

[595] Gerhard Casper & Hans Zeisel, Der Laienrichter im Strafprozess 11, tbl. 1 (1979).

[596] *Id.* at 31.

[597] *Id.* at 11, tbl. 1 & 77.

judge. In only one percent of cases was it possible to ascertain influence on the decision, that is, where the lay judges sided with one of the professional judges to "overrule" the other professional judge or judges.[598] The potential for influence is statistically greater when professional judges and lay judges are considering what sentence to impose.[599] In a study of 894 cases that went through to sentencing in the *Schöffengerichte* (lay judge courts), there were no disagreements between professional and lay judges in 79 percent of the cases; in the remaining 21 percent of cases, a disagreement arose between at least one lay judge and at least one professional judge regarding sentencing. The lay judges influenced the sentence in 7 percent of cases. Of the 180 cases studied at the large criminal panel (*grosse Strafkammer*), no disagreements arose in 81 percent of cases; of the 19 percent of cases in which there were disagreements, influence could be measured in 3 percent of them.

Ekkehard Klausa also undertook a study of 39 professional judges (of whom 10 were *Jugendrichter*) and 56 lay judges (of whom 19 were *Jugendschöffen*) in order to ascertain how often the lay judges outvoted and consequently overrode the decision of the professionals. Klausa limited his study for the most part to courts in Berlin.[600] However, he also sent out questionnaires to judges chosen at random in Düsseldorf, Hannover, Kassel, and Cologne.[601] Fifty-eight percent of criminal judges and 70 percent of Juvenile Court Judges stated that lay judges had "occasionally" disagreed with them.[602] Over half of lay judges and two-thirds of the lay judges in the juvenile courts reported that they had been involved in cases in which the decision of the lay judges overrode that of the professional judges. It should be noted, however, that this study was conducted by questionnaire, which meant that the respondents were relying on their memories. The study also did not separate the question of sentencing from the guilt phase of deliberations. Further, the study did not differentiate between the direction of the disagreement, that is, whether the lay judges more often voted for conviction than the professional judges did.

2. ENGLAND AND WALES

As stated above, England and Wales have both juries and justices of the peace. Reflecting the discussion above, this section will begin with justices of the peace before turning to juries.

a. Justices of the Peace

The 30,000 justices of the peace in England and Wales are appointed by the Secretary of State and Lord Chancellor on behalf of, and in the name of the

[598] *Id.* at 11, tbl. 1.
[599] *Id.* at 13, tbl. 3.
[600] Ekkehard Klausa, Zur Typologie der ehrenamtlichen Richter 8 (1972).
[601] *Id.* at. 8f.
[602] *Id.* at 77.

queen.[603] Candidates are recommended to the secretary of state and lord chancellor for appointment by local advisory committees. These consist of local people, including some magistrates. In making their recommendations, advisory committees not only consider the personal suitability of candidates, but also the number of vacancies and the need to ensure that the composition of each bench broadly reflects the diversity of the community it serves.[604]

A potential candidate must initially complete an application form available for download at www.magistrates.gov.uk. That form is then checked to ensure that the candidate is eligible. Current members of the police force or candidates for election to any parliament are not eligible, although the lord chancellor retains some discretion. If the candidate is eligible, he or she will be invited to a first interview, and if successful to a second interview. Background checks will be made, and if everything is satisfactory, the advisory committee places its view before the lord chancellor, who will make the appointments. The application process normally takes from six to twelve months.

Candidates must be between the age of 18 and 70, although applications by those aged 65 plus are not generally considered. Successful candidates are required to commit at least 26 half days each year to sitting in court. A half-day sitting typically lasts from 10 A.M. to 1 P.M. or 2 P.M. to 5 P.M.

No legal or even general education is required as part of the selection process. Instead, justices of the peace may be appointed from all walks of life, and are frequently employed full-time elsewhere. Employers are even required by law to grant magistrates a reasonable amount of time off.[605]

Despite the lack of formal selection criteria, the following six qualities are regarded as essential and must be demonstrated in the selection process:[606]

1. Good character: to have personal integrity and enjoy the respect and trust of others.
2. Understanding and communication: to be able to understand documents, identify relevant facts, follow evidence and communicate effectively.
3. Social awareness: to appreciate and accept the rule of law.
4. Maturity and sound temperament: to have an awareness and understanding of people and a sense of fairness.
5. Sound judgment: to be able to think logically, weigh arguments and reach a sound decision.

If appointed, the justice of the peace must swear or affirm that he or she "will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her

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[603] Courts Act, 2003 c. 39 p. 10.

[604] Volunteering as a Magistrate, http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/Becomingamagistrate/index.htm.

[605] Employment Rights Act 1996, §50.

[606] Guidance found on the official website: Volunteering as a Magistrate, http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/Becomingamagistrate/index.htm.

heirs and successors, according to law" and that he or she "will well and truly serve our Sovereign Lady Queen Elizabeth the Second in the office of Justice of the Peace, and will do right to all manner of people after the laws and usages of this realm without fear or favor, affection or ill will."[607]

There is no minimum amount of time for which a magistrate is expected to serve. However, the initial training and appraisal process generally lasts 18 months. Any magistrate who is still serving by the age of 70 is required to retire.[608]

As volunteers, justices of the peace receive no salary for their services. However, they receive a travel and subsistence allowance and may recover financial loss (such as loss of earnings) within specified limits.

It used to be a requirement that justices of the peace live within a 15-mile (24-km) radius of the area they preside over (the commission area) in case they are needed to sign a warrant out of hours. However, commission areas were replaced with local justice areas by the Courts Act 2003,[609] and as a result justices of the peace no longer need to live within 15 miles (24 km), although, in practice, many still do.

A justice of the peace usually hears a case in a panel alongside two other justices of the peace. Each panel has a chairman, who will be the most experienced senior magistrate, and will sit in the middle. In some magistrates courts, a legally qualified justice of the peace (known as a district judge) will sit alone to hear cases. As justices of the peace are not required to have any legal background, they are advised on the law and procedure by qualified clerks or a legal adviser. The clerk normally sits in front of the panel.

All justices of the peace are required to undergo a formal system of training which is supervised by the Judicial Studies Board. Training will be given using a variety of methods, which may include pre-course reading, small-group work, the use of case studies, computer-based training, and CCTV.[610] The initial induction and core training will normally be for the equivalent of three days (18 hours) and may be delivered over a long weekend, in a series of short evening sessions over several weeks, over three separate weekdays, or as a residential course. In addition, the justices are required to undertake a minimum of three court observations and to visit a prison establishment, a young offender institution and a probation service facility.[611] Further training is required before justices of the peace can sit on family or youth panels or the betting and gaming committees.

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[607] Promissory Oaths Act 1868 c 77 p. 4, Schedule Part II.

[608] Courts Act, 2003 c. 39 p. 13.

[609] Courts Act, 2003 c. 39 p. 7.

[610] Courts Act, 2003 c. 39 p. 19, Justices of the Peace (Training and Development) Committee Rules 2009, p. 31.

[611] A guideline about the requirements is available at: http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_072742.pdf.

After a period of about a year, each justice of the peace receives consolidation training. This will normally last for the equivalent of two days (12 hours) and, like the core training described above, may be delivered in a variety of ways.

The justices of the peace are the initial contact for all offenders aged 17 and over who have been charged with an offense in England and Wales. Justices of the peace hear prosecutions for and dispose of summary offenses (for example, common assault and most forms of motoring offenses).[612] In addition they may hear prosecutions for some triable-either-way offenses (for example theft, assault occasioning actual bodily harm and most forms of burglary)[613] if they are satisfied that their sentencing powers are adequate and the defendant does not elect to be committed to the Crown Court. When an offender is charged with a more serious, indictable-only offense, he will still appear before the justices of the peace, but, in this instance, the latter only have the power to commit the case to the Crown Court for trial.[614]

All three justices of the peace have equal decision making powers but only one, the chairman, will speak in court and preside over the proceedings. The two magistrates sitting on either side are referred to as "wingers."[615]

Where a defendant pleads not guilty, a trial will be held where the justices of the peace listen to, and sometimes see, evidence presented by both the prosecution and defense, decide on agreed facts and facts in dispute, decide which evidence they believe is the truth and consider whether the case has been proved beyond reasonable doubt.[616]

Having found someone guilty or when someone has pleaded guilty, the justices of the peace proceed to sentence using a structured decision making process and sentencing guidelines which set out the expected penalty for typical offenses.[617] They will also have regard to case law and to any practice directions from the higher courts and the advice of the legally qualified clerk.

The sentencing powers of justices of the peace extend to shorter periods of custody (maximum of six months, or twelve months for consecutive sentences), fines (maximum £5,000), community orders which can include curfews, electronic tagging, requirements to perform unpaid work up to 300 hours or supervision up to three years and or a miscellany of other options.

A wide range of other legal matters are within the remit of magistrates. They may issue search and arrest warrants, and may issue warrants for further police detention under the Police and Criminal Evidence Act 1984.[618] In addition, they decide whether to remand the offender in custody or on bail.[619] In the past,

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[612] Courts Act 2003 c. 39 p. 44(1).
[613] Courts Act 2003 c. 39 p. 44(3).
[614] Crime and Disorder Act 1998 c 37 p. 51.
[615] http://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/magistrates-court.
[616] Woolmington v DPP, [1935] A.C. 462. (H.L.)(E).
[617] http://sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm.
[618] Police and Criminal Evidence Act, 1984, c. 60 p. 44.
[619] The Criminal Procedure Rules 2010, pt. 19.

magistrates have been responsible for granting licenses to sell alcohol, for instance, but this function is now exercised by local councils, though there is a right of appeal to the magistrates' court.[620]

b. Juries

Around 200,000 people in England and Wales are selected each year for juror service.

A juror is selected at random by a computer from the electoral register.[621] In addition, a person must be aged between 18 and 69 inclusive and meet the residency requirements.[622] There are limited exceptions to eligibility that relate mainly to people currently or formerly subject to criminal proceedings, and to those being treated for mental disorders.[623]

Once a person has been selected by computer, he or she receives a jury summons in the post. This letter will state court, date, and time when the juror service will begin. The selected juror must respond to the summons within seven days. Failure to do so may result in a fine of up to £1,000.

It is possible to defer jury service for up to 12 months and, in very exceptional circumstances, excuse oneself altogether from jury service. A potential juror may only defer once. At any time in the 12 months following the deferral period, the potential juror may ask to be excused from jury service; but such excusals are rare and are only considered in exceptional circumstances.[624] A person may be called once or more than once to jury service. However, a person who is called for a second time within two years of his or her first summons has the right to be excused from the second period of jury service.

When a court is ready to select the 12 members of the jury, a court official will choose a group of people at random from those in the jury assembly area. Normally 15 people will be called at a time. The usher will give the court clerk a set of cards with each juror's name. The clerk will read out names of 12 jurors at random. It is possible for the prosecution or the defense to challenge any member of the jury if they have doubts as to the impartiality of that person. For example, if someone in the courtroom recognizes or knows a juror. However, challenges are exceptional. Preemptory challenges were abolished in England and Wales in

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[620] Licensing Act, 2003, c. 17 p. 181.

[621] To vote in elections a person must be either a British citizen, a citizen of a Member State of the European Union, or a Commonwealth citizen.

[622] These require that the person has lived in the United Kingdom, the Channel Islands, or the Isle of Man for a period of five years or more since turning 13 years of age.

[623] The Criminal Justice Act, 2003, removed ineligibility and the right of excusal from jury service for a number of groups (those aged 65 to 69, MPs, clergy, medical professionals, and those involved in the administration of justice).

[624] Her Majesty's Courts Service, Guidance for Summoning Officers when Considering Referral and Excusal Applications, http://www.official-documents.gov.uk/document/other/9780108508400/9780108508400.pdf.

1988[625]. If the judge allows the challenge, that juror must leave the jury box and is replaced by one of the three jurors who were not selected. Once 12 jurors are seated in the jury box, the court clerk will swear (or affirm) each juror in individually.

There is a fixed subsistence payment for each day the juror attends court. However, while there is legislation to protect jurors from being penalized by employers discriminating against them as a result of their performing jury service, there is no automatic entitlement to recouping loss of earnings. Instead, there is a maximum allowance that the court will pay in compensation for loss of earnings or any additional expenses incurred as a result of jury service, for example child-minding costs.

While jury service normally lasts for a period of two weeks, there is no guaranteed fixed period. While most trials last between three and seven days, some trials are expected to last longer. Some may overrun for a variety of reasons, or the juror may be selected as a juror for a new trial starting later in the second week of his or her service.

3. SWEDEN

Originally, the *nämnd* was reconstituted by the judge for each proceeding.[626] Usually, the judge decided on the constitution of the *nämnd* in agreement with the parties until the right to determine its membership was bestowed exclusively on the parties, who chose an equal number.[627] Since 1863 the members of the *nämnd* have been determined by local councils. At the end of the specified *nämnd* period, the members often stand for re-election.[628]

If the honorary judges are to represent the whole population, then—according to a study carried out in 1992—the *nämnd* fails to do so. The study revealed that almost 60 percent of members were male and 94 percent were over 40 years of age, while 23 percent were not or no longer employed. Although only one percent of the whole population works in the administration, the study also revealed that 27 percent of the *nämnd* members were employed there. Although only 17 percent of the broader population earns more than 160,000 SKR each year, this applied to 65 percent of *nämnd* members.[629] Despite criticism, the situation has not changed significantly over the years: In 2000, there were still 45 percent of honorary judges over 60 years of age and only 8 percent were under 40. In particular, an additional problem lay in the very small number of citizens of non-Swedish origin.[630]

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[625] Criminal Justice Act 1988 p. 118(1).

[626] Harald Hjärne, Om den fornsvenska nämnden enligt landskaps-, stads- och landslagarna 16 (1872).

[627] Almquist, *supra* note 537, at 43.

[628] Olof et al., *supra* note 542, at 133.

[629] Diesen, *supra* note 406, at 140 *et seq.*

[630] Bell, *supra* note 417, at 286 *et seq.*

Even if there is a certain uniformity in the training of lay judges owing to training guidelines issued by an association for judicial training,[631] the training is left by and large to the relevant court which, generally speaking, adopts the principle of learning by doing. The *nämnd*'s role is reduced to consultations with the professional judges. If witnesses are to be heard during the main proceedings, the members listen, and rarely question or participate in the discussions. In one survey, 90 percent of professional judges admitted that the members of the *nämnd* are not allowed to ask questions during proceedings. The reasons given for this policy were for example that the members tended to ask incorrect or irrelevant questions. According to the opinion of the professional judges, *nämnd* members also lacked the training and experience to ask neutral questions, so there was a danger that they would betray their opinion and give the impression of bias. Owing to their lack of training and experience, they also sometimes ended up confusing themselves with their own arguments.[632]

The findings of a questionnaire distributed among professional judges at Swedish appeals courts are therefore hardly surprising. This showed that 60 percent of professional judges do not see any place for members of the *nämnd* at their courts. However, the study does not explain why the remaining 40 percent of those asked believed that honorary judges performed an important contribution within the court system.[633] At the state courts of first instance (*tingsrätt*), however, the matter looks very different: at this level, 94 percent of the judges agreed with the participation of the *nämnd*.[634]

In a comprehensive study of 4,427 judgments of the court of appeals (*Svea hovrätt*) in Stockholm, where cases are decided by three professional judges and two members of the *nämnd*, it was found that two lay judges overruled their one or two professional colleagues in 98 percent of cases—a number which almost corresponded to the divergences among appeals judges. In 18 percent of criminal cases there were disagreements among the three professional judges or *nämnd* members. In other words, 82 percent of decisions were unanimous. In 2.6 percent of the cases, however, the two *nämnd* members voted with one professional judge in order to override the decision of the two other professional judges.[635] Of the 2.6 percent of cases at the court of appeals in Stockholm (*Svea hovrätt*), in which two lay judges passed judgment with only one professional judge (because the two other professional judges were of a different opinion), the question at issue in approximately half the cases was the question of guilt or innocence and the other half concerned the sentencing.[636] In cases in which one or several members of the *nämnd* registered a disagreement, there was a certain tendency toward leniency

[631] *Id.* at 286.
[632] Diesen, *supra* note 406, at 222 *et seq.*
[633] *See* Diesen, *supra* note 406, at 316 *et seq.*
[634] *Id.* at 380 *et seq.*
[635] *Id.* at 315.
[636] *Id.*

(both regarding the finding of guilt as well as the sentencing) in instances of less serious offenses, and toward severity (again, regarding the finding of guilt and sentencing) in instances of serious offenses.[637]

For the three cases out of a total of 97, one has to ask who was right: the two professional judges, or the single professional judge together with his two honorary colleagues without legal education. This is because, although the number of cases may appear small in terms of percentage, if one were to take them as representative of the whole country, the lives of quite a few persons, including the offender, victims, and relatives, would be affected by this constitution of the court. Some believe that the number of cases of disagreement would be even higher if the Criminal Court Code did not require the professional judges to give their opinion first during the consultation stage. In this respect, it must not be forgotten that the court in the study was an appeals court which deals mainly with legal questions and where there is however a higher proportion of difficult cases.[638] This might explain why one finds a lower rate of disagreement (one percent) at the first instance State Court (*tingsrätt*).[639]

Disagreement in judgments is not infrequently attributable to differences in the judges' political outlook, at least as far as the *nämnd* members themselves are concerned. Almost a third of *nämnd* members also regard it as part of their judicial task to voice party politics.[640]

4. THE UNITED STATES OF AMERICA

a. Justices of the Peace[641]

The relatively small number of American states that have justices of the peace (JPs) employ various modes for their selection and training. No state requires that its JPs be formally trained as lawyers. In the State of Arizona, for example, JPs are chosen by the local electorate in partisan elections (that is, where the political parties choose the candidates). While they need not be lawyers, they must all complete a course at the Arizona Judicial College. In addition to limited criminal jurisdiction over traffic infractions and misdemeanors, JPs in Arizona also have limited civil jurisdiction over small claims cases (under $10,000) and landlord-tenant disputes. They also routinely perform marriages. JPs are also elected in partisan elections in Connecticut, Louisiana, Texas, and Vermont.

In the State of New Hampshire, JPs are not elected but are rather appointed by the governor of the state upon the advice of the governor's executive council. In Delaware, the Governor's Magistrate Screening Committee compiles a list

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[637] *Id.* at 315 *et seq.*

[638] *See* Bell, *supra* note 417, at 287 *et seq.*

[639] See Diesen, *supra* note 406, at 206.

[640] *Id.* at 381.

[641] *See generally,* About Justices of the Peace, Justices of the Peace in the U.S., About New Hampshire JPs, http://www.jpus.org/aboutjps.htm#nh.

of candidates from which the governor may appoint. Massachusetts has a similar appointment procedure: there the governor appoints JPs, but their appointment must be confirmed by the governor's council to become effective. In South Carolina, JPs are appointed to lifetime terms by the governor.

b. Juries

Prospective jurors in the United States are chosen at random from official lists of those people with addresses in the judicial district who have registered to vote as well as those who have a driver's license or identity card with an address in the judicial district. These lists do not include every person eligible to serve on a jury, and they also include persons who are ineligible. As to the persons who are not found on these lists, there will be people who have neither registered to vote nor obtained an identification card or driver's license. Further, the lists will not include people who moved recently and who have not changed their addresses with the registrar of voters and with the department of motor vehicles.

The lists will also include many persons not eligible to serve, such as noncitizens. Interestingly, while every American state nowadays requires that jurors be American citizens, this was not always the case. As recently as 1911 a Frenchman charged with murder demanded that he be tried before a jury *de medietate linguae*, as was provided for under a number of state statutes at the time.[642] A jury *de medietate linguae* is one which consists to 50 percent of persons with the same foreign nationality as the criminal accused.

As discussed above, England and Wales recognize a number of professional exemptions from jury service. This is still the case in the federal courts in the United States. A federal statute provides an exemption from jury service for members governmental fire or police departments.[643] However, most American states have few or no exemptions from jury service based on a person's profession. Consequently, it happens that policemen, lawyers, and even judges will sometimes sit on juries, as has been the case for the author.

Despite the general inclusiveness of the requirements for jury service, and the fact that failure to serve is a punishable offense, the jury pools themselves are not particularly representative. One reason for this is that professionals, the self-employed, and those upon whom service would be a hardship are often excused from service. Many people simply disregard the jury summons. Since there is no way to prove that they received the summons, which are sent by mail, no prosecution ensues. However, once the juror reports for duty, he or she can be prosecuted for contempt of court for failure to complete the service. This too, however, is extremely rare. The author successfully prosecuted such a case some years ago in the County of San Diego, California. At the time it was believed to have been only

[642] Wendling v. Commonwealth, 137 S.W. 205 (1911).
[643] The Jury Act, 28 U.S.C. § 1863(b)(5).

the second such prosecution in the history of the County of San Diego, which was founded in the middle of the 19th century.

When they report for jury duty, jurors are generally shown a video on what to expect. Examples of these can be found on the internet by searching for jury orientation videos. The videos show the jurors what is likely to happen when they get into the courtroom. They also advise the jurors about the demeanor expected of them, such as that they must not discuss the case they are sitting on, not even with their fellow jurors, until they retire for deliberations in private. While critics sometimes decry jurors' lack of legal sophistication, defenders of the jury system respond that the purpose of a jury is to judge facts, not law, and having legal qualifications is of no help in this regard. In fact, they argue, it might even be a hindrance. These and other arguments are covered in more depth in the following section.

C. Justifications for Lay Judges and Juries

The following discussion will examine the arguments and studies conducted in the four jurisdictions under study to determine why they believe that lay participation is desirable.

1. GERMANY

One main reason for involving lay judges in proceedings is that they serve as democratic watchdogs within the system of justice.[644] Professional judges can be influenced by the arguments of lay judges, and in certain cases, the professional judges may even be out-voted by lay judges. In panels with multiple professional judges, lay judges might even feel freer than professional judges to speak out or even vote against the judge who is responsible for working up the case and drafting the judgment (*Berichterstatter*) because the professional judges, who play the most important role in other judges' advancement and working conditions, exercise no comparable influence over the future of lay judges. Also, unlike professional judges, the lay judges are never given responsibility for working up a case, so they need not be worried, when disagreeing with another judge, that the judge with whom they disagree might take offense. Whether out-voted or not by the lay judges, the professional judge who is faced with dissent might reconsider his decision.[645] This in turn should reduce the risk that the professional judge will make incorrect decisions and fall into mechanical decision making just to clear his desk of files.[646]

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[644] *See* Liekefett, *supra* note 572, at 117; Hans-Heiner Kühne, *Laienrichter im Strafprozess*, Zeitschrift für Rechtspolitik (ZRP) 237–39 (1985); Rüping, *supra* note 515, at 269–74.

[645] Heike Jung, *Die Beteiligung von Laien an der Strafrechtspflege*, 150 Jahre Landgericht Saarbrücken 317, 330 (1985).

[646] *See* Rennig, *supra* note 592, at 139; Böttges, *supra* note 520, at 129; Hans-Heiner Kühne, *Zusammenarbeit zwischen Berufsrichtern und ehrenamtlichen Richtern*, Deutsche Richterzeitung (DriZ) 390–97 (1975).

The participation of honorary citizens also represents an offshoot of the principle of democracy as enshrined in Article 20 (1) GG.[647] The participation of lay judges serves to realize the constitutional principle that all power emanates from the people within the judicial sphere.

Lay judges draw on their own life experience;[648] in most cases they take an impartial, practical approach that is not influenced by legalistic thinking that can sometimes distort the perception of the professional judge. Lay participation helps make the abstract nature of the main proceedings more understandable to the lay people who are taking part in them.[649] Professional judges must explain the case in question to lay judges in ordinary language. Lay participation therefore performs a bridging function by ensuring that law and its application are understandable to ordinary people.[650] This serves to counteract any suspicion of judicial arbitrariness.[651] Ultimately, lay judges ensure that decisions are only made by those who are present at court proceedings (*Unmittelbarkeitsgrundsatz*) and that proceedings are held orally (*Grundsatz der Mündlichkeit*).[652] Accordingly, a judgment can only be based on the evidence presented during the oral proceedings. Since lay judges only participate in the main proceedings, they ensure that only those facts examined in their presence are taken into account.

At the same time, the participation of lay judges also entails disadvantages. Writing at the beginning of the 19th century, Anselm Feuerbach, who for democratic reasons agreed in principle with the institution of lay judges,[653] doubted, for example, whether lay judges really were in a position to judge guilt and innocence,[654] and he was of the opinion that the professional judges exercised too much influence over their lay colleagues.[655]

The alleged manipulability of lay judges continues to this day to be a topic of discussion. Lay judges are said to be easier to influence and manipulate than professional judges.[656] Arguably, the historical belief that lay judges would guarantee

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[647] *See* Ludwig Gehrmann, *Der demokratische Auftrag des ehrenamtlichen Richters und sein Informationsbedürfnis*, (DriZ) 126, 129 (1988); Kühne, *supra* note 644, at 237–39; Gerfried Schiffmann, Bedeutung der ehrenamtlichen Richter bei Gerichten der allgemeinen Verwaltungsgerichtsbarkeit 93 (1974).

[648] *See* Rennig, *supra* note 592, at 255.

[649] *See* Gero Meinen, Heranziehung zum Schöffenamt: gerichtsverfassungs—und revisionsrechtliche Probleme 2 (1993); Rennig, *supra* note 592, at 286; Fritz Ernst, Berufsrichter und Volksrichter in der Strafrechtspflege 43 (1911); Schmidt, *Der Strafprozess*, Neue Juristische Wochenschrift (NJW) 1137, 1144 (1969).

[650] Ernst, *supra* note 649, at 48.

[651] Böttges, *supra* note 520, at 112.

[652] *See*, *Antwort: der Bundesregierung*, Deutscher Bundestag 4 (May 26, 2004), http://dip21.bundestag.de/dip21/btd/15/031/1503191.pdf.

[653] Paul Johann Feuerbach, Betrachtungen über das Geschworenengericht 47 *et seq.*, 64 *et seq.* (1812).

[654] *Id.* at 178.

[655] *Id.* at 190 *et seq.*

[656] Benz, *supra* note 500, at 113; Susanne Stoffregen, *Der Schöffe als "juristischer Halblaie"?* 18 Zeitschrift für Rechtspolitik (ZRP) 52 (1985).

independence from the governing elite is not borne out by today's system, in which lay judges are far too easily influenced by the arguments of the parties, media reporting, or emotions which impede their ability to draw objective conclusions.[657] Lay judges are said often to have sympathy with the accused when he or she shows remorse or emotion, meaning that defense counsel can sometimes exploit such actions to their advantage.[658]

For many critics, the main disadvantage with lay judges is their lack of expert legal knowledge.[659] An inability to comprehend legal concepts or court proceedings can result in mental overload, manifested by failures in concentration that can have obvious negative consequences.[660]

Furthermore, lay participation can unnecessarily lengthen proceedings,[661] due to the need for the judge to explain the law as well as the need for deliberations between the professional judge and lay judges. This runs the not inconsiderable danger that proceedings may have to be restarted because, for example, lay judges are rejected, objections are made against the constitution of the court, or the lay judges drop out during the course of the trial for some reason.[662] The complaint that lay participation makes justice "a hostage to fortune"[663] because the trial in question depends on the personality and education of the lay judges involved should not be easily dismissed.

A further problem is the lack of a right of lay judges to view the court's file. While lay jurors are expected to reach their decision on the strength of the evidence and arguments presented at the main proceedings, lay judges' lack of access to the file means that they are at a considerable disadvantage compared to the well-prepared professional judge, when trying to understand the relevant legal issues and sort out which evidence is material and persuasive. This is particularly problematical in complex cases. As a result, it seems to some that the role of lay judges in such cases is reduced to mere window dressing, if not to the function of mere supporting actors, so to speak, against the performance of the professional judges.[664] While upholding the general prohibition against lay judges having access to the court file, the German Federal Supreme Court has approved the practice of allowing lay judges to listen to the minutes of court sessions that the professional judge has dictated.[665] The presiding judge is also permitted to reject inappropriate

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[657] *See* Rennig, *supra* note 592, at 238.

[658] Leopold Zimmerl, Sachverständige Laienrichter? 14 (1934).

[659] Rennig, *supra* note 592, at 194; Liekefett, *supra* note 572, at 115.

[660] Benz, *supra* note 500, at 122–23; Gehrmann, *supra* note 648, at 126.

[661] Benz, *supra* note 592, at 110.

[662] Hahn, *Wiederentdeckung der Schöffen*, Deutsche Richterzeitung (DRiZ) 407 (1985); *See*, *Antwort: der Bundesregierung*, Deutscher Bundestag, May 26, 2004, at 1, *available at* http://dip21.bundestag.de/dip21/btd/15/031/1503191.pdf

[663] Ernst, *supra* note 649, at 40 with further references.

[664] Salditt, *Rechtswirklichkeit: Richter zweier Klasse, „Stumme Feierlichkeitszeugen," bloße Statisten*, *in* Der Richter in Strafsachen 67, 68f (G. Bemmann & I. Manoledakis, Eds., 1982).

[665] BGHSt 43, 36 *et seq*.

or irrelevant questions raised by the lay judges; however, he is not allowed to do so with regard to the questions posed by the other professional judges.[666]

Historically, the institution of lay judges was introduced as a democratic control and to counter public suspicions about the impartiality of professional judges. These historical reasons have lost their relevance in modern times, according to some critics, who point out that the independence of judges from political forces and public opinion are now sufficiently protected by the Basic Law.[667] Despite these and other criticisms, including the considerable fiscal cost, there are not many people in Germany who advocate the complete dismantling of the system of lay judges.[668]

A group of researchers in Marburg have asked judicial personnel what they think of lay participation in the criminal justice system.[669] Questionnaires were sent out to 1,629 lay judges, 230 Hessian professional judges, and 307 Hessian state prosecutors. Responses were received from 1,095 of the lay judges, from 136 of the professional judges, and from 206 state prosecutors to whom a questionnaire was sent.[670] The study did not take into account lay and professional judges in proceedings involving juveniles.[671]

Of those who responded to the questionnaire, 98 percent of the lay judges, 74 percent of the professional judges, and 78 percent of the state prosecutors supported the concept of lay participation.[672] The main arguments put forward by the lay judges themselves in support of their role was the opportunity to contribute their life experience and exert popular opinion on the law; they also believed they were protecting professional judges from falling into routine. Professional judges and state prosecutors, on the other hand, regarded lay participation as justified mainly on the grounds that it reflects the principle of democracy and increased public trust in the administration of justice. They also viewed the life experiences of the lay judges in a positive light. On the other hand, lay judges themselves regarded their passivity and possible pangs of conscience as negative points.[673] Professional judges and state prosecutors also regarded the emotionality of lay judges and their inability to comprehend legal concepts as drawbacks.[674]

Ekkehard Klausa carried out a similar survey at local and state courts.[675] Concerning the latter, 40 percent of the criminal judges questioned supported lay participation, 10 percent were neither for nor against, and 50 percent were against.

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[666] *See* §§241 II, 249 II StPO.

[667] Hans-Heinrich Jeschak, in: Festschrift Schultz, 229 & 237 *et seq.* (1951).

[668] *See* Kühne, *supra* note 644, at 237 *et seq.*

[669] See Rennig, *supra* note 592.

[670] *Id.* at 476, tbl. 1.

[671] *Id.* at 457.

[672] *Id.* at 487, tbl. 5.

[673] *Id.* at 491, tbl. 7.

[674] *Id.*

[675] Ekkehard Klausa, Zur Typologie der ehrenamtlichen Richter (1970). The statistics in this paragraph are taken from *id.* at 54.

Five of the juvenile court judges regarded lay participation as wholly advantageous. At the local court, 74 percent of the 19 criminal judges questioned supported lay participation, 10.5 percent were neither for nor against, and 16 percent were against. Ninety percent of juvenile court judges were in favor of lay participation. Ninety-nine point nine percent (99.9 percent) of lay judges at the local court regarded lay participation as advantageous, and this view was also shared by 100 percent of judges at juvenile courts. At the local court, 95 percent of lay judges and 100 percent of lay judges at juvenile courts were supportive of lay participation.

In Klausa's study, the reasons for and against lay participation reflected those ascertained in Renning's study in Marburg. Accordingly, lay participation was viewed positively in terms of sentencing, allowing the public to express their views on the administration of justice, and the prevention of judicial routine. At the same time, the lack of expert knowledge and high degree of emotional involvement were regarded as drawbacks. Criminal judges complained of a possible delay in proceedings while judges at juvenile courts believed that some lay judges lacked proper training.[676]

In conclusion, both studies showed that the concept of lay participation is broadly supported. Professional judges revealed themselves as ready to discuss matters with lay judges and regarded their contribution as helpful.

2. ENGLAND AND WALES

England employs lay judges in two ways: as jurors and as justices of the peace.

The institution of the jury has for centuries been regarded as fundamental to democracy and is traceable back to the Magna Carta in 1215.[677] The central purpose behind the jury system is the notion of a fair and impartial trial.

Juries have historically been seen as an important protection for the individual citizen against the power of the state, and are also seen today as a means of increasing public confidence in the courts by involving citizens directly in the administration of justice. The twelve randomly selected members of the public are required to render an impartial verdict. Although it is preferred that all 12 members of the jury be of the same opinion as to the guilty or not guilty verdict, if after a period of time the jury remains undecided, the judge can call the jury back into court and tell them that he will accept a majority verdict, that is, one on which at least ten jury members can agree.

While the role of the jury is limited to that of a finder of fact, and the sole responsibility of interpreting the appropriate law and instructing the jury is

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[676] *Id.* at 65–70.

[677] Magna Carta, cl. 9 provided that "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."

entrusted to the judge, the power of jury equity ought not be overlooked. This enables a jury to reach a decision in direct contradiction to the law if they feel the law is unjust. Such a decision can create a persuasive precedent for future cases, or even render prosecutors reluctant to bring a charge. A jury can be regarded in this respect as having the power to influence the law and not merely to judge the facts.

Juries are used only in a very small number of cases, accounting for about one percent of all criminal cases. Nevertheless, the institution of the jury is criticized for being time-consuming and costly, and also for being inadequate in the case of particularly complex cases.

Political debate as to the suitability of juries has left many judges sensitive to the issue. This was illustrated from the responses of a survey carried out by the author—"Split Verdicts in Scotland: a Judicial Survey"[678]—in which one of the questions posed in the questionnaire was misinterpreted by several judges as a criticism of the institution of the jury. The controversial question was as follows: "Where you disagreed [with the jury verdict], in how many cases (number or percentage) did the jury vote to convict someone you believed to be innocent?" Several responses conveyed the mistrust of the judiciary to such a potentially politically wired question: "The questionnaire appears to be based on a fundamental misunderstanding of the role of the jury in our criminal procedure." Or, another response: "My belief as to the guilt or innocence would be irrelevant, in my view." And another: "One of the luxuries of being a judge in a criminal trial is that one does not have to worry about whether the verdict should be of guilt or of innocence."[679]

The use of lay people in the judicial system serves much the same functions as the use of lay people in the German judicial system. Democratic legitimation of judicial decisions is perhaps the most often cited reason for the use of juries and lay magistrates. Also often mentioned is the desire to have the judiciary, including the lay judiciary and jurors, reflect the views of the community. This in turns leads to greater acceptance of the decisions, as every citizen is in effect represented in some way.

There is also the argument that jurors and lay magistrates actually improve decision making in that they act in more collegial groups than judges, and without the judicial jaundice that comes from years and years of hearing the same arguments and explanations. Jurors and lay magistrates are, according to this line of thinking, more sensitive and humane. Thus they are seen by many as the conscience of the judicial system. Jurors are said to decide more intuitively and with fewer presuppositions. They are more in touch with the general population from which the parties to the case arise, especially in criminal cases. It is also frequently

[678] Thomas Lundmark, *"Split Verdicts" in Scotland: A Judicial Survey*, 14 Edinburgh L. Rev. 225–35 (2010).

[679] *Id.*

pointed out that lay judges and jurors can and do act as an emergency brake on the apparatus of the state bureaucracy, which might otherwise get out of hand. The institution of jury equity or jury nullification is rooted in this idea. In such cases a jury can find a criminal accused not guilty even in the face of uncontroverted testimony of guilt, and in spite of a confession, if they feel led by their consciences to do so. This right of the jury, according to George Fletcher, does not stand in contravention of justice, but rather serves it. Jury nullification (or equity) does not serve to invalidate the law in question; rather it serves to perfect the law by appealing directly to the sense of justice of the general population.[680] This factual power of the jury is, of course, problematical in terms of legal certainty and equality. Nevertheless, the institution of jury equity or nullification seems to be necessary for a functioning jury system. If this were not the case, then jury verdicts might be reduced to rubber stamps of prosecutorial and judicial decisions.

A few years ago the author sent out questionnaires to all of the judges in Scotland who ordinarily preside over jury trials. While there are a number of distinctive features in Scottish law which prevent the results of this study from being directly applicable to England and Wales, the results might nonetheless shed light on the practice there. The vast majority of those responding to the author's questionnaires—some 85 percent—claimed never to have encountered a verdict of guilty in a case in which they believed the conviction to be unsound. Only 18 judges out of the 120 responding judges reported that they had presided over a trial in which the jury voted to convict on evidence that had not convinced the judge beyond a reasonable doubt of the defendant's guilt. Considering the fact that these 120 judges had presided over some 16,500 jury trials, according to their own estimates, the percentage of convictions that were inconsistent with the opinion of the trial judge is extremely small. On the other hand, the number of acquittals that are inconsistent with the opinion of the trial judge was relatively high. Though only 6 percent of the responding judges reported that they had never disagreed with a jury verdict, 25 percent said that they disagreed in less than 5 percent of the cases, 21 percent reported disagreement in 5 to 10 percent of the cases, 29 percent of the judges reported disagreement at a rate of 10 to 20 percent, and 19 percent reported that they had disagreed with the verdict of the jury in more than 20 percent of the cases over which they had presided.[681]

The functions of justices of the peace, like those of the jury, also serve to legitimate and democratize the law.[682] A survey conducted in 2004 by the Home Office showed that most jurors come away with a positive impression of their experience and role. They considered their participation to be an indispensable component of

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[680] George P. Fletcher, Notwehr als Verbrechen. Der U-Bahn – Fall Goetz 232 (1993).

[681] Lundmark, *supra* note 678, at 115.

[682] Penny Darbyshire and Keith James Eddey, Darbyshire on the English Legal System 491 (8th ed. 2005).

the justice system. The responses also revealed that they had relatively high confidence in their ability to reach just decisions.

English juries, however, are not representative of the general population in that some groups are overrepresented, with the result that others are underrepresented. According to one study, those in administrative and secretarial occupations are considerably overrepresented; women, homeowners, public employees, and those over 30 years of age are somewhat over-represented; those in professional occupations are slightly fewer than would be expected from a comparison with the Labour Force Survey; and economically inactive jurors are greatly underrepresented.[683]

There are also many commentators in England who note the growing complexity of cases, especially those involving business or white-collar crimes, and those commentators doubt whether laymen are able to judge the cases competently. A number of critics also point to the threat of jury tampering. As a consequence of these and other concerns, parliament enacted the Criminal Justice Act 2003. On application of the prosecution in certain complex fraud cases or in cases where jury tampering is feared, that act allows the trial court judge to rule that a case is inappropriate for a trial by jury. If the ruling is approved by the lord chief justice or his designee, then the trial will be before a judge sitting without a jury. Whether this will be a viable alternative to trial by jury remains to be seen. The first and only case prosecuted under this exception was the Heathrow robbery case in 2010, which became the first serious criminal case in England in more than 400 years to be tried without a jury. The trial ended in all four defendants being convicted. The application had been granted after the three previous trials had to be abandoned. In two of those trials, jury tampering had been alleged.

3. SWEDEN

According to a governmental report, the *nämnd* has three functions, of which the second and third may be summarized under the heading of democratic legitimacy:

(1) It ensures that the actions of the judiciary accord with societal values;
(2) it contributes to citizens' trust in the court's activities; and
(3) it responds to citizens' interest in controlling judicial actions.[684]

An additional argument is that the *nämnd* system leads to "more correct" or "more just" judgments. For example, the influence of experienced lay judges or often inexperienced professional judges is often mentioned. It is also argued that a

[683] Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts, Home Office Online Report 05/04, http://library.npia.police.uk/docs/hordsolr/rdsolr0504.pdf.

[684] Framtidens nämndemän, Statens offentliga utredningar (SOU) 51 (2002).

judiciary that reflects the principle of democratic representation will ensure a higher proportion of just decisions.[685]

To the extent that the Swedish court system is not covered by democratic legitimacy, a further reason for lay participation in court proceedings in Sweden is its popularity among Swedish voters. Lindholm states the following:[686] "The extension of the *nämnd* system to the court system some years ago can probably be attributed to political opportunism." Actually, this idea had already been suggested in 1931, and was often discussed until the legislature decided in 1977 that honorary judges could also participate in the courts of appeal (*hovrätt*).[687]

4. THE UNITED STATES OF AMERICA

The following discussion will begin with arguments for and against justices of the peace before turning to juries. After discussing the institution of the jury in general, the discussion will treat juries in civil actions separately from juries in criminal actions.

a. Justices of the Peace

As discussed above, a relatively small number of states in the United States have courts in which the judges need not have any legal training. Contrary to the practice in England and Wales, JPs in the United States hear and decide cases alone and without the assistance of a licensed attorney. Usually called justice of the peace courts, the magistrate or JP who presides over such a court typically hears minor offenses, such as traffic violations and other petty criminal infractions. Sometimes these courts have jurisdiction over the small claims, that is, claims under a certain jurisdictional amount. In other states, these so-called small claims courts are staffed by lawyers who may or may not have been appointed to the position of a judge.

JP courts have a long history in the United States. Today they are found mostly in sparsely settled areas, but at one time these courts, staffed by lay judges, were to be found in practically all major cities. Their number has dwindled in past years, particularly as a result of the efforts of the ABA, which represents the interests of lawyers. California, which formerly had JP courts staffed by lay judges, began phasing them out after a 1974 decision of the California Supreme Court which unanimously held that allowing non-lawyers to preside over criminal trials that could result in incarceration violated the due process clause of the 14th Amendment to the United States Constitution.[688] Two years later, the U.S. Supreme Court ruled that JP courts were constitutional as long as the convicted defendant had a right

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[685] Lindblom, *supra* note 455, at 120 *et seq.*

[686] *Id.* at 119.

[687] Framtidens nämndemän, Statens offentliga utredningar (SOU) 38 (2002).

[688] Gordon v. Justice Court, 525 P.2d 72 (1974).

to a trial de novo before a professional judge.[689] Nevertheless, California and some other states continued to phase out their justice courts. Today, the vast majority of states, including California, have no JP courts.

In 2006 the *New York Times* published the results of a year-long investigation of the 1,250 justice courts in that state and found a long trail of judicial abuses and errors as well as governmental failure to curb them.[690] It remains to be seen whether New York will follow the lead of California and other states in ending the practice of allowing nonlawyers to act as judges on these courts.

b. The institution of the Jury

The justifications for jury trials in the United States parallel those mentioned in England and Sweden to justify juries, and those made in Sweden and Germany to justify lay judges. Basically, these justifications fall into three groups: (1) better decision making, (2) more humanity, and (3) more democratic legitimacy and respect for the separation of powers. These are addressed in order.

While the author knows of no study comparing the quality of the decision making by individual judges to the quality of decision making by panels of judges, various studies have been reported which compare the relative quality of the decision making by judges and other individuals with the decision making of juries or other groups. One of the most provocative is Dean Barnlund's classic study comparing the quality of thinking by individual university students versus thinking by groups of university students.[691] The study is particularly relevant to the law because Barnlund tested the students' performance in syllogistic reasoning, which is an important component of legal reasoning (see the chapter on legal reasoning). Barnlund pre-tested his students on their abilities and then selected out the students that performed extremely well from those that performed the very worst. Wondering whether students in groups would perform better, he placed the poorest performers on the pre-test in groups and tested them and the very best students again. What he found was that, when faced with factual patterns (the major and minor premises) with strong emotional content or value preferences, the groups outperformed the very best individual reasoners.

The second argument for juries—and one that seems at odds with the first argument—is that juries are more compassionate and humane. According to many people, judges, especially those dealing in the criminal law area, have a tendency to become jaundiced and see criminal defendants as people who fit typical molds and get into the same problems over and over again. Juries, on the other hand, bring the community into the court. Juries appreciate, it is said, that all persons

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[689] North v. Russell, 427 U.S. 328 (1976).

[690] William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. Times, Sep. 25–27, 2006, *available at* http://www.nytimes.com/2006/09/25/nyregion/25courts.html

[691] Dean C. Barnlund, *A Comparative Study of Individual, Majority and Group Judgment*, 58 J. Ab. & Soc. Psychol. 55 (1959).

are unique and that the situations they find themselves in are not always of their own making.

The third argument for juries stresses their value to democratic institutions and the doctrine of separation of powers. Participation by members of the public in the judicial system, it is said, cloaks the courts in popular legitimacy and fosters public confidence in the fairness of the judicial system and, in turn, instills respect for democratic government. Supporters of the jury also point out that the legitimizing function of the jury extends to protecting the independence of the judiciary. Judges who believe that they must make a decision that is unpopular with other judges, the public, or the electorate may feel freer in making these decisions if they are backed up by an anonymous jury.[692]

The chief arguments against the institution of the jury basically contradict the three arguments in favor of juries. As to the argument that jurors are somehow better than judges at judging the facts, the critics point out that the evidence is not very convincing. Many of the studies supporting this contention seem designed to prove that jurors are better, a bias that does not give a true picture of the actual role of the jury in practice. Critics point out that juries are extremely hard to convince, at least when their verdict must be unanimous. There are many criminals who are not even brought to trial under these circumstances. Anyway, the critics argue, even if jurors are marginally better than single judges, they might be worse than a panel of judges; yet none of the critics seem to be advocating a change in that direction. Any real or supposed improvement in fact-finding, according to the critics, comes at a very high cost in terms of time taken to process jury trials. And in some jurisdictions, like Los Angeles County, juries fail to reach a unanimous verdict, that is, they are "hung," in 10 percent of cases submitted to them, a circumstance that sometimes results in a costly second trial or worse, that is, the criminal goes free. According to the critics, criminals are being set free merely by the luck of the draw: if someone is lucky enough to have a sympathetic jury, he can even commit murder, as was seen, according to the critics, in the case of O.J. Simpson in Los Angeles.[693] Such a cumbersome, inequitable system has no place in the modern world of justice, according to the critics.

As to the argument that juries are more humane, for example, because they do not get jaundiced by the long parade of criminal defendants telling the same stories, the critics charge that humanity cloaks emotionalism, which is one of the things wrong with juries. Whereas the experienced judge will be able to recognize, for example, real remorse, jurors are easily swayed by the shrewd criminal

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[692] William Burnham, Introduction to the Law and Legal System of the United States 91 (4th ed. 2006) *citing* William W. Schwarzer, Some Observations on the Values of the Jury System, address at the Federal Judicial Center Seminar for Russian Judges and Court Administrators (Jul. 1993).

[693] *See, e.g.,* Kingsley Guy, Trial Demonstrated Perversion of Long-Revered System, Sun-Sentinel (Fort Lauderdale), Oct. 5, 1995, at 27A, and Thomas Sowell, Disgust Is Widespread; Maybe Trial Will Spur Reform of Our Legal System, Atlanta J. & Const., Oct. 5, 1995, at 18A.

who pleads for mercy only to turn around and commit the same crimes upon his release. The seasoned judge knows that remorse alone is not enough; what is necessary is a change in life-style and surroundings.

As to the role of the jury for democracy and the protection of separation of powers, the critics would not deny that these benefits played a role earlier in the nation's history, but here again, there must be other ways of achieving these goals without the inefficiency and inequality of the present system. Are not the courts considered legitimate without juries? If not, how can it be that the vast number of both civil and criminal cases are tried before judges sitting without juries?

c. Civil Juries

Civil jury trials, though rare, account for much of what people know—or think they know—about the jury system. Many Europeans, for example, believe that they will be disadvantaged by American courts because of the prejudice of American juries against foreigners. They point to lawsuits brought in New York, in particular, claiming compensation from German companies for slave labor during the Second World War and from Swiss banks for money held in the names of Jewish depositors who were killed in the Holocaust. The facts do not bear out these claims of bias. One extensive study showed that foreigners win 63 percent of their cases in American courts against American citizens.[694]

Another common perception is that juries award damages far in excess of the amounts that judges award. Studies do, indeed, show that jury awards tend to be higher than judicial awards.

In one of the largest studies conducted to date, a statistician for the federal Bureau of Justice Statistics found that some 16,000 tort cases were disposed of by bench or jury trial in state courts in 2005, 90 percent of which were heard by juries.[695] Almost 9,500 of these cases arose out of traffic accidents. Plaintiffs won about half of their tort trials, regardless of whether their case was heard by a jury (51 percent) or by a judge (56 percent). Half of the plaintiff winners were awarded $24,000 or less. Punitive damages (intended to punish fraudulent, intentional, and other reprehensible conduct, and to serve as an example to others) were awarded in 241 cases.

While the median punitive damage award in all trials was $55,000, judges awarded a median of $54,000 and juries $100,000 in punitive damages. Post trial relief[696] was requested by 18 percent of the defendants who had lost at trial. These defendants succeeded 30 percent of the time by either having the award reduced or being granted a new trial.

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[694] Kevin Clermont and Theodore Eisenberg, *Xenophilia in American Courts*, 109 Harv. L. Rev. 1120, 1120 (1996).

[695] Thomas H. Cohen, Bureau of Justice Statistics, Tort Bench and Jury Trials in States Courts, 2005 (2009).

[696] These include motions for judgment notwithstanding the verdict (JNOV), motions for a new trial, motions to modify the award, and motions for some other form of relief.

The American Bar Foundation conducted a study of federal jury trials as reported in the media and found that the media accounts were far from the truth. While the media reported that plaintiffs won 98 percent of their cases before a jury, the actual statistic was 41 percent. Even more telling, according to media reports, the median jury verdict was $1.1 million while in actuality, it was $150,000.[697]

d. Criminal Juries

Two projects similar to the author's questionnaire to Scottish judges have been conducted in the United States: a study by Kalven and Zeisel published in 1966,[698] and the more recent research project undertaken by the National Center for State Courts (NCSC), in 2000 and 2001.[699] The results are not perfectly parallel to the Scottish survey because of the following differences between the United States and Scotland: jury qualifications; the availability of jury selection and opening statements in the United States; the lack of a corroboration requirement in American criminal law; the right of the defense to speak last in Scotland;[700] the existence of only two verdicts (guilty and not guilty) in the United States, whereas Scotland also has the not proven verdict (which results in acquittal); and the usual requirement of unanimity in most of the United States.[701] Nevertheless, both studies produced data on the propensity of juries to convict an innocent person.

The study undertaken by Kalven and Zeisel gathered data from 3,576 cases, while the NCSC sent out questionnaires to judges, lawyers, and jurors in 401 cases. Although 358 judges responded to the NCSC questionnaire, the total number of cases which were eventually included for a comparison with the Kalven and Zeisel study was 292.[702] How do the results compare with the Scottish survey? The overall rates of judge–jury disagreement recorded by Kalven and Zeisel and the NCSC were 22 percent and 29.7 percent respectively. In comparison, the average rate of disagreement in the Scottish survey fell between 10 percent and 20 percent, with 24 percent of the judges reporting a rate within these parameters and a further 18 percent of judges reporting a rate of disagreement above 20 percent. While the average rate in Scotland is thus lower than in the two American studies, the results are close enough to be roughly comparable.

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[697] American Bar Foundation, 16 Researching Law 3 (2005), as reported in Burnham, *supra* note 692, at 123.

[698] Harry Kalven, Jr. and Hans Zeisel, The American Jury 93 (1966).

[699] P.L. Hannaford-Agor et al., National Institute of Justice, Are Hung Juries a Problem? 1, 2, and 25 (2002), http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf.

[700] On the differences which a corroboration requirement might make, *see* Michael McConville, Corroboration and Confessions: The Impact of a Rule Requiring that no Conviction can be Sustained on the Basis of Confession Evidence Alone (1993).

[701] With the exception of Oregon and Louisiana.

[702] The cases which resulted in hung juries were treated differently by the two studies. While Kalven and Zeisel included such cases and redistributed them evenly among all other possible outcomes, these verdicts were wholly excluded from the results in the NCSC study.

The number of split convictions in the study carried out by Kalven and Zeisel was 77, or 3 percent, while the NCSC study recorded nine (3.1 percent). By contrast, the number of split verdicts identified in the Scottish survey was eighteen, which is a rate barely above 0 percent (0.13 percent). There are, however, four reasons at least why the results are not reliably comparable.

First, the overall rate of disagreement is dependent upon the accuracy of the figures of the total number of cases presided over by all the judges. The figure of 16,500 provided by the Scottish judges can only be viewed as an estimate. On only very few responses did a judge give a precise number of cases.

Second, the results of both American studies were gathered at the time of the actual trial, so that the judge had the benefit of all the evidence in front of him. In the Scottish survey, on the other hand, the judges drew on memories going back many years, even decades, inevitably making their results less reliable.

Third, the percentage of cases going to trial in the American studies might well be lower than in Scotland. If, for example, the availability of plea-bargaining means that the incentives to plead guilty in the United States are greater than in Scotland, then the cases that do go to trial in the United States are likely to be weaker than cases that go to trial in Scotland.

Fourth, the actual questions were different. In the study by Kalven and Zeisel, the judges were asked for a response to the following question: "Before the return of the jury verdict, please indicate how you would have decided the case had you tried it without a jury." The question in the NCSC study read: "If you had decided this case in a bench trial, would you have rendered a verdict for the prosecution or the defense?" The relevant question in the Scottish study was: "Where you disagreed [with the jury verdict], in how many cases (number or percentage) did the jury vote to convict somebody you believed to be innocent?" This question can be read as concerned more with a positive belief in innocence than with mere unease at a conviction. That the Scottish judges displayed sensitivity in answering this potentially politically loaded and controversial question is seen in many of the responses. As mentioned above, seven judges refused even to consider answering the question on the basis that it was "not relevant" or was based upon an "[incorrect] hypothesis that the judge is right or is more likely to be right than the jury." Other judges who did answer believed it was necessary to add a certain conditionality to their responses with comments such as, "When the verdict was for the jury to decide I did not give much thought to whether I agreed or not." Given this sensitivity, the responses of the Scottish judges ought not to be compared directly to those of their American brethren.

Perhaps the final point to be made is that comparative studies must be viewed with extreme caution, as there is a myriad of factors that might affect the rate of split convictions. In addition to those already mentioned, others include the absence of jury vetting, opening speeches, or judicial summing up in Scotland; the attractiveness of pleading guilty in the particular jurisdiction; the size of the jurisdiction; the race and ethnicity of the accused and of the jury; the severity of

the crime; the harshness of the potential penalty; pre-trial publicity; and the jurors' belief in the fairness of the justice system, including the truthfulness of police and other prosecution witnesses.

Summary

The roots of the present day lay judges in Germany and Sweden can be seen in the Germanic *Thing* (Swedish *ting*) in which respected leading citizens and nobles were called upon to decide disputes. The stature and status of the decision makers seem to have been the decisive components of their legitimacy. The Church did not play an active role; rather, dispute resolution was for the most part in the hands of laymen in both a legal and clerical sense.

The long process of the Reception in Germany brought with it a gradual displacement of lay judges by trained lawyers. The establishment of the *Reichskammergericht* in 1495 bureaucratized the judicial apparatus and tended to displace lay people from the administration of justice even further. This development reached its peak under absolutism, during which the model of lay participation in the administration was all but abandoned in favor of professional judges who were dependent on the ruler and consequently administered justice with one eye on the ruler. Beginning with the Enlightenment, people began to question the absolute authority of the ruler, and tried to rein in his power by returning lay people to the judiciary. Yet in the beginning, these lay judges too were in many cases mere puppets in service of the monarch.

In Sweden, on the other hand, lay judges (*nämndemän*) continued to exercise jurisdiction as judges until the end of the 17th century. While Sweden never received substantive Roman law, nevertheless the idea of educated professional judges was appealing to many. Further, the requirement of filing papers in writing in the higher courts necessarily put a premium on educated advocates and judges, which favored the educated professional judges over the less literate, untrained lay judges. Nevertheless, lay judges retained their superiority until the 17th century.

In England and Wales, the tradition of the German *Thing* died with the Norman invasion in 1066. In their stead sheriffs acted as local judges for broad sections of the populace. In the 14th century the sheriffs were renamed justices of the peace, and they continued to serve in a judicial capacity in uninterrupted fashion until 1971. Yet the justices of the peace for the most part only had jurisdiction over minor crimes, although they also handled the preliminary stages of the prosecutions of more serious crimes for the king's judges. At trial before the king's judges, it was the jury that decided the question of guilt or innocence; the judge determined the sentence and passed judgment.

Unlike Germany, Sweden still has the institution of the jury. However, it plays quite a minor role. In England and Wales, on the other hand, a jury is used in practically all major criminal cases. Consequently, it plays a major role in

the administration of criminal justice there. The role is somewhat smaller in the United States, where criminal defendants sometimes elect to waive their right to trial by jury and submit the case directly to the judge.

If the jury in the United States or England and Wales votes to convict the defendant on one or more charges, then the judge will review the evidence to ensure that the jury had before it substantial evidence on all of the elements of each of the crimes; for except in the case of a verdict in which the jury acquits a criminal defendant of the crime or crimes charged, both the trial judge and the appellate courts have the power to set aside the verdict if it is not supported by substantial evidence.

One major difference between the jurisdictions here studied is the extent to which lay judges or juries can substitute their opinion for that of the professional judge or judges. In the model of lay judging employed in Sweden and Germany, in at least some criminal cases, the lay judges are in a position to outvote the professional judge or judges on both the question of guilt and in sentencing. Studies in both countries suggest that this happens in one to 3 percent of cases. Generalizing from a study in Sweden, the lay judges are finding the criminal defendant guilty in about half of these cases. Studies conducted in the United States and Scotland suggest that this number is substantially lower in these jurisdictions when considering the role of the jury. In other words, juries appear far more likely to acquit than judges. Furthermore, in American states where the jury plays a role in setting the judgment, the jury can prevent the judge from imposing the death penalty but cannot require him or her to impose it. This means that there is a significant difference between Germany and Sweden, on the one hand, and England and the United States on the other. Of course, there is no objective way of knowing whether the lay judges and jurors in such cases are right or not.

These four jurisdictions—Germany, England and Wales, Sweden, and the United States—present three different models of lay participation in the judicial system: jury, lay judges serving with professional judges, and justices of the peace. The most well-known model is perhaps that of the jury. Jury members are lay people who make judicial decisions, for example, on guilt or innocence, in a manner that is institutionally and personally independent from the professional judge or judges. This is the rule in trials of major crimes in England and Wales. The situation is somewhat different in the United States. There, the right to a jury trial is understood as being a right of the criminal accused that can be waived, meaning that the trial will be conducted by a judge sitting alone without a jury.

The second model is of *Schöffengerichte,* or lay judge courts. In this model, lay judges sit and decide side-by-side with professional judges. This model is seen in Germany and Sweden; not, however, in the United States or in England and Wales. In Germany and Sweden, lay judges are even found on appellate courts, where they decide questions of law along with professionally trained judges. In criminal *Schöffengerichte*, lay judges and professional judges are charged with both judging the guilt or innocence of the accused and assessing the sentence in the case of a guilty verdict.

Justices of the peace—the third model—are used widely in England, but less so in the United States. Justices of the peace in England appear to be the only lay judges or jurors within the scope of this study who enjoy any substantial training. In Germany and Sweden, by contrast, lay judges are trained on the job, much like jurors in England and the United States.

In all four jurisdictions the same three basic arguments are employed to justify the participation of lay people in the judicial process, particularly in the criminal arena. First, the involvement of lay people is said to strengthen democratic principles by means of transparency and legitimacy. Second, lay involvement is said to add life experience, freshness, justice, and humanity to the decisional process, with the result that the decisions are intrinsically better. Third, lay involvement serves as an emergency brake on the apparatus of the state. This policy is most strongly in evidence in England and Wales and in the United States, where jurors can and do find defendants not guilty despite what seems to be overwhelming evidence of guilt.

Although the English justices of the peace are rarely criticized, the institution of the jury is not so sacrosanct. It is regretted in certain circles that juries in England and Wales find in favor of the criminal accused in as many as two-thirds of cases that come before them. Professional judges would presumably have convicted many of these people if they had been sitting without a jury. Indeed, it is controversial whether lay judges improve or worsen the fact-finding process. Or, even if they do in fact improve the process, perhaps the improvement is so minor that it is not worth the cost. Whether lay judges really do serve as emergency brakes on overly zealous prosecutors and judges is also open to question, particularly in Germany and Sweden when lay people are used in an auxiliary function on panels with professional judges.

It goes without saying that the use of lay people in all four jurisdictions here studied is very costly in both money and time, not to mention adding uncertainty to the law.

Considering the commonalities and differences among the four jurisdictions studied, one might ask what the future is likely to hold. Is it likely that England and Wales and the United States would abandon the jury in favor of the model of the German *Schöffengericht*? If uniformity among the four jurisdictions here studied is sought, this might be the only possible development, since the establishment or reestablish of a criminal jury system in Germany and Sweden seems out of the question. Even though this development in the United States would mean that the United States Constitution would have to be amended, such a develop is possible, although it seems entirely unthinkable at the moment.

Perhaps the whole idea of lay participation in the judiciary is passé. Perhaps judges in the jurisdictions here studied no longer require democratic legitimation. Perhaps lay participation is merely a relic of a past, in which these constitutional democracies were not in a position to guarantee the independence of the judiciary from the arbitrary rule of autocratic and absolutist monarchs. Historically, the

chief arguments for lay participation included suspicion about the independence of the judiciary and a perceived need for direct democratic control of the halls of justice. Perhaps these arguments have lost their persuasive power.

Nevertheless, even if it might appear to many that the original justifications for lay judges and lay jurors are no longer relevant, one should not expect these institutions to be dismantled anytime in the near future. Despite the occasionally brutal criticism of these institutions, one finds very few commentators who favor the total dismantling of the institutions that guarantee citizen participation. Consequently, it should be expected that these institutions might be modified somewhat, for example, by narrowing their ambit to the area of criminal law, but it is not to be expected that they will be totally abandoned in the near future.

PART THREE

Legal Rules

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Legal Reasoning

In the chapter on comparative jurisprudence we explored how jurists in the four jurisdictions under study—Germany, Sweden, England, and the United States—thought about law in a global way, that is, how they defined and understood the law. In that chapter, three general styles of thinking about law that are sometimes seen in these four jurisdictions were described as legal positivism, natural law, and legal realism. Furthermore, we saw that all three of these styles of thinking about the law, at least as they are understood today, make room for the inclusion of case law as a source of law.

This chapter is about the way that jurists think about the law in a narrower sense. By "in a narrower sense" is meant how legislators, lawyers, and judges see their roles in making law and in finding law, and how judges and lawyers see their role in applying law.

A. Law, Rules, Norms, Making Law, and Finding Law

"The law" in this chapter means a legal rule, standard, or "norm." While there are various definitions for "legal norm," we will adopt the definition employed by Hans Kelsen, but without being concerned whether the source of the norm is a statute, judicial decision, custom, or something else. According to Kelsen's definition, which has the dual benefit of being fairly simple as well as generally accepted, a "norm" is a rule which prescribes or permits certain human behavior. Said more specifically, a legal norm expresses a relation of condition and consequence: if a certain act is done, or a certain condition exists, a certain consequence ought to follow.[703]

Before proceeding, perhaps it should be said that the discussion in this chapter assumes that people generally abide by legal rules, or at least by some of them, and that judges' decisions are guided by rules. This might seem obvious to most readers, as it does to the author; but, recalling the discussion of the extreme form

[703] Hans Kelsen, Principles of International Law 6 (1959). Thus, legal definitions are excluded from the term.

of legal realism discussed in the chapter on comparative jurisprudence, there are people who steadfastly contend that judges do not follow rules at all: they merely justify foregone conclusions by bending the rules to fit the facts, or by bending the facts to fit the rules, as the case may be. Nevertheless, as Hart points out, even such extreme rule skeptics seem to accept that judges are the ones who enjoy this privilege in their respective legal systems. In other words, there must be rules (Hart calls them secondary rules) that make judges' pronouncements valid and entitled to respect. In order for this chapter to make sense, the reader must accept at least the theoretical possibility that norms are normative, that is, that people in society tend to conform their conduct to legal rules, and that judges and other officials tend to apply these same rules in judging whether or not people's behavior is in conformance.

Use of the expressions finding law and making law also deserves explanation.

1. FINDING THE LAW: THE NORMSUCHE

Finding law is used here in two senses. First, *finding law* or *finding the law* is used is to describe the process that lawyers and judges employ to select a pre-existing statutory and, occasionally, case law rule or rules that they will use to judge the legal consequences of a factual situation, whether the factual situation is real, such as a case before a court, or imagined, such as judging the legality of proposed action. This usage of the expression finding law is referred to as *Normsuche* (search for the rule) in German. For the sake of clarity, the term *Normsuche* will be used in this chapter for the activity of searching for the applicable rule, and the term *Normsucher* (norm seeker) will be used to describe the person involved in this activity, whether he or she be student, practitioner, scholar, or judge. Second, finding the law is often used in justifying one's choice of the appropriate norm. This sense of the term is discussed below under "Putting a judicial gloss on a statute."

In most real or imagined cases it will be obvious to the *Normsucher* which statutory norm, which judicial extension (or gloss, explained below) of a statute, or which case law or other rule applies. Criminal cases serve as a good example. In criminal prosecutions, it is the charging prosecutor or police officer who is the *Normsucher*, and usually the choice of the crime (that is, the norm) to be charged is clear. Once the accused has been charged with having violated the particular criminal norm, the question becomes whether the prosecutor can prove the charge in court. The *Normsuche* in such cases will in all probability go without mention by the judge who hears the case. If, however, a question about the appropriateness of the choice of the norm should arise, the judge will consult his or her personal experience, and perhaps the experience of other judges, to decide whether the behavior of the accused is properly to be judged by the norm which has been charged.

Notice that the thought processes involved in the *Normsuche* are identical, regardless of the source of the rule and the kind or number of sources of law that

are recognized in the particular jurisdiction: the *Normsucher* has a particular factual situation in mind, and he or she hunts for a rule whose text might conceivably find application to that particular factual situation. The point just made, that is, that the thought processes involved in the *Normsuche* are identical regardless of the source of the rule, is worth emphasizing because some people wrongly contend that searching for a rule among thousands of statutes—the continental *Normsuche*, if you will—constitutes a different mental process than searching for a rule in thousands of case decisions in what might be termed the common-law *Normsuche*.

2. SYSTEMATIZATION AND THE NORMSUCHE

Those who contend that continental jurists use a different mental process to find the appropriate rule sometimes couch their contention as follows: continental lawyers think systematically; common lawyers think casuistically.[704] The choice of the English term casuistic is unfortunate because casuistry, according to English-language dictionaries, means one of two things: (1) "the application of general principles of ethics to specific problems of right or wrong in conduct, in order to solve or clarify them" or (2) "subtle but misleading or false reasoning; sophistry, often about moral issues."[705] That is not what continental observers mean when they dismiss common law thinking as casuistic. Rather, these observers are employing casuistic as they would employ the legal German term *Kasuistik*, the French *casuistique*, and the Swedish *kasuistik*, namely, the consideration of rules articulated in judicial decisions. In stating these rules, the judges, in most cases in these jurisdictions, are concretizing the meanings of the more abstract terms of a statute. Consequently, on account of their origin, these judicial rules tend to be much more narrowly focused, that is, more fact-laden, than the statutory rules from which they are drawn. Thus, when a continental observer describes the common law *Normsuche* as casuistic, he or she means that the common lawyer is searching for rules in a case-by-case manner rather than looking for grand generalities. Hoping not to offend one side or the other, one might picture two animals, a frog and a homing pigeon, trying to cross a lake. The frog jumps laboriously from one lily pad to the next in the general direction of the other shore. The bird, by contrast, sensing its roost on the other shore, merely flaps its wings a few times and glides effortlessly over.

While it is certainly true, as discussed in the chapter on comparative jurisprudence, that German lawyers, but not Swedish or English lawyers, envision themselves as working within a complex structure of laws they call a *System*, when it comes to

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[704] *See* David and Brierley, *supra* note 14, at 94.

[705] Webster's New World Dictionary of American English 219 (3d college ed., 1988). According to The Concise Oxford Dictionary 220 (10th ed. 1999), a casuist is "a person who uses clever but false reasoning."

the *Normsuche*, German lawyers are also frogs, to use the metaphor from the last paragraph. To illustrate this, let us begin by recognizing that both searches, that is, the search in statutes as well as the search in cases, are practically impossible to conduct unless the discrete rules have been organized in a way to make them readily discoverable. In Germany, if one does not already know which rule or statute to apply, one might use the fruits of one's lengthy legal education to identify the most significant factual feature or features of the case at hand, and then search for the applicable rule or rules by looking through the indexes of various loose-leaf collections of statutes.

Before embarking on a hypothetical search for an appropriate rule to apply, the reader should remember that the German *Normsucher*, like any *Normsucher* from any other jurisdiction, must have a specific factual situation in mind before the search can begin. In addition, the *Normsucher* must be able to identify one or more factual features that have potential relevance to the law. In Germany, the *Normsucher* might turn to the books and materials he used while studying law to help refine the search. He or she might also be lucky enough to find the applicable norm by this method.

In most cases, the legally educated German *Normsucher*, armed with printed materials from university and a bar review course (*Repetitor*), will probably know which statutory rule, or at least which statute, to apply to the specific factual situation in mind. If, for example, the specific factual features suggest that criminal liability might attach, the knowledgeable German *Normsucher* will limit his or her search to the Criminal Code (*Strafgesetzbuch*) and the 90 or so other statutes that contain criminal provisions. If the specific factual features point in the direction of labor or employment law, the educated German *Normsucher* would know to look in the second *book* of the German Civil Code, specifically in title 8 of subpart (*Abschnitt*) 8, beginning with section 611. If the *Normsucher* does not find an appropriate rule of decision in the German Civil Code, he or she might consult the 20 or so other statutes that regulate the terms and conditions of employment. To take one last example, if the knowledgeable German *Normsucher* believes that the specific factual features might give rise to an action in tort, he or she would know to consult the second book of the German Civil Code, specifically subpart 8, title 27, beginning with section 823 and a handful of provisions from other statutes, such as the Product Liability Act, which provide for an award of compensation for noncontractual injury.

During their long years of training, German lawyers learn by rote which rules to apply to a great number of factual situations. The way they learn this is by studying not only the text of the statutes, but also by learning to recognize the classic factual patterns to which these statutes are ordinarily applied. German law students write scores of examinations, at university and at the *Repetitor* (see chapter on lawyers), in which they must identify (and apply) the rule or rules that are used to resolve various hypothetical fact patterns. At least by the time of the first state examination, German students will have memorized, and practiced where to find, hundreds of statutory rules. Usually they will highlight them or mark them in some other way in the statutory collections discussed in the next paragraph. These

collections of statutes are of immense importance to the exam takers because they are the only materials that the exam takers are allowed to have with them while sitting for the examinations.

Up to this point in our hypothetical *Normsuche*, the knowledgeable German has made very little use of systematic thinking. As stated at the outset, any *Normsuche* must proceed from a particular factual situation. Having selected the legally relevant features, the *Normsucher* either does know or does not know what rule to apply. If he or she does know what rule applies, maybe by checking highlighted or underlined passages to jog his or her memory, then the thought process that was used in finding the rule was one of accessing one's memory of factual patterns that have previously fallen under that rule, and testing these factual patterns for similarity with the legally significant special features in the hypothetical case. While this search process, if repeated often enough, will at some point become so automatic that lawyers might feel like they are flying to the rule like a homing pigeon to its roost, in fact, they are hopping around in their memories like frogs looking for the lily pad with similar factual contours.

If systematic thinking plays little or no role in the *Normsuche* when the *Normsucher* already knows which rule to apply, or can find it with minimal effort, might systematic thinking nevertheless be important when the *Normsucher* does not know the rule? After all, no person can hope to know where to find all the rules in any particular legal system. The short answer, which will be illustrated below, is: yes, but not very much.

Assuming he or she does not already know which rule or statute is applicable to the factual situation at hand, the hypothetical German *Normsucher* might consult one or more of the four general statutory collections. These are the publications that collect statutes for state law, criminal law, public law, and private law. The state-law volume in Northrhine-Westphalia, the largest state by population in Germany, contains about 1,700 separate statutes. These state statutes can be purchased in bound form from a private publisher. They cover about 900 pages. Although the state statutes do contain many public-law provisions, the most important public-law statutes are found not in the state but in the federal statutes in Germany. Most of these federal statutes can be found in the privately published *Sartorius*, which is published in two loose-leaf volumes plus a supplementary loose-leaf volume. These three volumes, which contain no commentary of any kind, encompass over 8,000 pages of small-print text. Private publishers also offer collections of the federal criminal statutes. In loose-leaf form, the federal criminal statutes comprise nearly 3,000 pages. The federal civil law can be found in the more than 150statutes and regulations reproduced in the two-volume, 7,500-page *Schönfelder*.

Systematic thinking[706] will steer our hypothetical German *Normsucher* to one of these four subject-matter areas: state law (covering public law and civil law),

[706] *Systematizing* is also used in German to refer to all-purpose terms, such as those employed in the German Civil Code; it is, accordingly, sometimes said that the German Civil Code makes use of

federal public law, federal criminal law, or federal civil law. Assume that our hypothetical *Normsucher* is faced with a factual situation which seems to resonate in the civil law area. What he or she might do is to consult *Schönfelder*, where most of the federal civil law is codified. If the *Normsucher* does not know whether to apply the German Civil Code or some other statute to his or her hypothetical case, then he or she might consult the keyword index. As with the other collections of statutes published privately, *Schönfelder* comes with an extensive keyword index to help the reader find the statute or statutes that might apply to the reader's factual situation. In the case of *Schönfelder*, the index to the first volume alone covers over 150 pages. All of the statutes are also available by subscription and at no cost online, where they can be searched for keywords by our *Normsucher* who is trying to find the rule or rules that might apply to the case in mind.

What then of the role of systematic thinking in our hypothetical case? Systematic thinking about an issue of criminal law might prompt the *Normsucher* to consult *Schönfelder*, which contains the most important criminal provisions. Consequently, he or she will not have to look in the consolidated state-law statutes or in *Sartorius*. Systematic thinking might also prompt the *Normsucher* to eschew the keyword index and go straight to a special statute or to one particular subpart or title of a major codification. But is this all that is meant by the continental *Normsuche* being systematic? Before answering that question, we have to address one other aspect of the *Normsuche*.

Despite the tens, if not hundreds of thousands, of statutory provisions in Germany, it happens with some regularity that there is no statutory provision that, by its terms, clearly applies to the specific factual situation that the *Normsucher* has in mind.[707] In such cases, the *Normsucher* who follows the path just described will end up frustrated, for he or she will not find the relevant norm. To do so, he or she must be privy to additional knowledge. Specifically, the *Normsucher* in this situation needs to know about judicial extensions (glosses) of the statutes, about judicial applications of statutes by analogy to fill gaps, about statements of rules in judicial decisions that fill statutory gaps without the use of statutory analogies, and perhaps about rules from other sources of law, such as from custom or from international law. How does the vigilant continental *Normsucher* go about acquiring this additional knowledge?

In most cases, the *Normsucher* will find the additional knowledge necessary to select the relevant rule of decision in practice books and commentaries. Practice books, as their name suggests, tend to present their subject matter from the perspective of a practitioner, from the first conversation with the client through to judgment. This approach is systematic in the sense of being organized and logical,

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systematic thinking. Even if this systematization can be termed a special kind of thinking, it is of little or no use to the *Normsucher*. As such, it does not affect the analysis in the text. For more on systematization in this sense, see the chapter on comparative jurisprudence.

[707] This is discussed in more detail in the chapter on statutes and their interpretation.

but it is not systematic in the sense of following the methodology of the legislature or academic scholarship. Methodological systematization is found in the commentaries. The reader will find more about continental commentaries in the chapter on statutes and their construction. For purposes of the present discussion, it suffices to point out that statutory commentaries follow the structure, sometimes called the internal logic of the codes themselves, and that scholars generally follow this structure in their dogmatic writings and lectures. Traditionally, a commentary begins with a general discussion of the topic, then it moves through the various provisions of the statute and comments upon each one in turn, usually by citing the holdings of the leading cases construing the provisions. Consequently, if one is looking for the proper rule of decision for a factual situation that literally is not covered by the text of any statutes, one is likely to find the answer in a commentary.

To the continental way of thinking, statutory commentaries are per se systematic because they track the structure of statutes. Thus, if our hypothetical *Normsucher* should find the proper rule of decision in a commentary, then the continental observer would likely say that the *Normsucher* has arrived at the norm by a process of systematic thinking, which means in this context that the *Normsucher* found the norm "as reported in a commentary."

If the preceding discussion sounds dismissive of the importance of systematization, it is not meant to be. Systematization does indeed play a much larger role in thinking about law, and in teaching law, in Germany than it does in common law countries. This very significant role of systematization is discussed in more depth in the chapter on comparative jurisprudence and sources of law. However, systematization plays a relatively minor role in the *Normsuche*.

Without wishing to belabor the point, perhaps it would help readers with little or no common-law background if we were to sketch the hypothetical *Normsuche* of a common lawyer so that the reader can see that the approach is practically identical. To begin with, the common law *Normsuche* is identical to the continental *Normsuche* where the *Normsucher* already knows which rule to apply. While it is commonly contended that the typical German law graduate has memorized more of this law than his or her colleagues in the common law world, this fact, if true, has no effect on the process of the *Normsuche* as long as both lawyers are able to spot the legally significant features of the hypothetical factual situation, perhaps with the aid of the books and other materials employed while studying at university and for admission to practice, such as in a legal practice course.

If the common law *Normsucher* is totally ignorant of the rule, it is highly unlikely that he or she will turn first to a statute or codification. This is also true in jurisdictions like California that have a great deal of codified law, including a civil code. Common lawyers' hesitancy to start their *Normsuche* by looking at collections or even codes of statutes makes sense when one considers that law in common-law jurisdictions is neither understood nor taught to consist exclusively (or, as is the case in Germany, almost exclusively) of statutes. Rather than search through

statutes or indexes to statutes, all of which are available for no charge online, the common lawyer is likely to consult a practice book, or perhaps an encyclopedia like *Halsbury's Laws of England* or *Witkin's Summary of California Law*. The material in the practice books is arranged very much like that in the books used by German practitioners. The material in the legal encyclopedias is arranged alphabetically according to subject matter. Headings in *Witkin's*, for example, include agency and employment, constitutional law, contracts, corporations, torts, wills. Consequently, in order to use the encyclopedias, the common-law *Normsucher* will have to know whether the hypothetical factual situation raises issues in one or more of these subject matter areas.

In short, from the point of new of the hypothetical *Normsucher*, English and American law are also systematized in the sense of being arranged in an orderly, logical, and readily accessible fashion. Consequently, it is misleading, at least today, to describe the common law as unsystematic.

3. PUTTING A JUDICIAL GLOSS ON A STATUTE

Before moving on to the next topic, it should first be pointed out that finding the law is often used in a second sense, that is, it is used to describe the justificatory process employed by judges when they feel that the pre-existing statutory rule or rules require concretization. This process, which is sometimes referred to as putting a judicial gloss on a statute, involves judicial rearticulation of the statute in a way that looks like subsidiary legislation. In short, part of the judicial process of finding statute law can involve restating the statute.

The following example is offered to illustrate this second usage of finding the law, that is, of putting a gloss on a statutory provision. Section 30(1)(g) of the Landlord and Tenant Act 1954 in the United Kingdom provides that the landlord may refuse an application for a new lease by the tenant if the landlord "intends to occupy the holding for the purposes of a business carried on by him" upon termination of the current tenancy. Does this provision mean that a mere intention on the part of the landlord to occupy the holding for the purposes of a business is a sufficient ground for refusing to enter into a new lease, or must the landlord possess (1) a bona fide intention to occupy the holding for the purposes of the business (a subjective element) coupled with (2) a real possibility of starting the particular business (an objective element)? The English courts have accepted the second construction of the statute.[708] Accordingly, one could say that section 30(1)(g) of the Landlord and Tenant Act 1954 has been judicially extended or subsidiarily amended to require that the landlord show both (1) a bona fide intention to occupy the holding for purposes of a business plus (2) a real possibility of starting the business.

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[708] Zarvos v. Pradhan, [2003] EWCA (Civ) 208 (Eng.).

One can rightly say, in an objective sense, that the English courts in the preceding example have concretized the statute in the process of interpreting it; but some would say that, in doing so, they have gone too far and have substituted their subjective will for that of parliament's. The question of the extent to which judges should be able to concretize statutes by extending their reach will be dealt with at length in the chapter on statutory construction. For purposes of this chapter, it is sufficient to note that such judicial glosses, concretizations, or amendments look very much like statutory norms, and that they are frequently employed in addition to the bare provisions of the statute.

4. MAKING LAW

Making law is also used here in two senses, one legislative and one judicial. All four of the jurisdictions here studied are democracies which respect the doctrine of separation of powers, albeit by somewhat different means (see the discussion in the conclusion to this chapter and in the chapter on comparative jurisprudence). All four jurisdictions entrust the legislative branch with the primary if not exclusive role of making law. This is the first sense in which making law is used. Nevertheless, as described in more detail below, it sometimes happens that judges are forced to decide cases in which there is no applicable legislative rule to rely on. This process is also described here as making law in the second sense, even though this terminology is not universally adhered to in the jurisdictions studied here.[709]

The two main questions to be addressed under the rubric making law are: How do legislators understand their role in drafting statutes? How do judges understand their role when they decide cases where there is no applicable statute?

The importance of the existence of legislation needs no further elaboration at this juncture, other than to note that jurists in all four jurisdictions will first consider legislative enactments when analyzing the legal consequences of a factual situation that has been presented to them. Nevertheless, cases will sometimes come before a court where there is no obvious statute providing the rule of decision. In Germany, and to some extent in the other jurisdictions studied, the nonexistence of legislation on a particular issue before the court is referred to as a legislative gap or lacuna.

While lacunae can be found in all of the jurisdictions studied, the responses of the courts in their respective jurisdictions vary. (More on this point is presented in the chapter on construction of statutes.) Judges in England and the United States will, if confronted by such a legislative gap, either conclude that the legislation provides no remedy and, therefore, rule against the claimant on this basis, or they will fall back on the common law and rule either for or against the claimant using

[709] For a discussion of the question of whether the judge's statement of reasons is or is not considered to be law, the reader is referred to the chapter on comparative jurisprudence and specifically to the discussion of sources of law.

common-law principles. No matter which approach they use, they are said to be applying the law in the terminology of the common law. German judges must also decide cases for which there is no applicable statute law. However, in contrast to the terminology in common-law jurisdictions, judges in Germany who decide cases in the absence of a legislative enactment are said to be acting beyond the law or *praeter legem*.[710] While Swedish judges, like their German counterparts, commonly speak of legislative gaps, unlike German judges, they will freely employ other sources of Swedish law, including precedents, which suggests that they are following a terminological practice which is closer to that of the common law.[711]

Regardless of how this judicial practice is described, and regardless of which jurisdiction the situation presents itself in, the judge faced with this situation will be forced to reach a decision to deny or to grant relief, that is, to rule for or against the claimant. This is true whether the judge is German, Swedish, English, or American. This is, of course, also true for judges who are legal positivists, legal naturalists, legal realists, or from any other school of jurisprudential thinking. Further, in all of the jurisdictions studied, the judge will be expected to provide reasons for his or her decision. Consequently, at the conclusion of the litigation, one will have a judgment, or *Richterspruch or Urteil* in German, which states reasons for the court's judgment, that is, why the court decided to rule for or against the claimant.

To summarize what has been said to this point: judges in all of the jurisdictions here studied will sometimes find themselves: faced with a case which falls into a lacuna; forced to make decisions on the merits in these cases; justifying their decisions, whether they grant or deny relief; and making statements of the rules underlying their decisions that will be practically indistinguishable in their scope and content from statutes (see the examples of "legislative overruling" below). In short, judges in these cases will be engaging in an activity that is distinctly legislative in content and quality.

In engaging in this activity, judges will, at the most, be making or sub-making law in a piecemeal fashion: no comprehensive codifications will result from their case-by-case, casuistic endeavors. Further, their efforts will result only in rules for resolving concrete disputes: one will not find case decisions, for example, setting up governmental agencies, regulating industries, levying taxes, or establishing navies. Nevertheless, these judicial decisions will be seen as concretizing the reach of the law for so long as the legislature declines to intercede.

The term *making law* is used here to describe this judicial process. Whether the activity of the judges in these cases should properly be described as engaging

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[710] The common lawyer may be familiar with this term from the United Nations Convention on Contracts for the International Sales of Goods (CISG).

[711] *See* Aleksander Peczenik and Gunnar Bergholz, *Statutory Interpretation in Sweden*, *in* Interpreting Statutes 313, 332–34 (Neil MacCormick and Robert S. Summers eds., 1991). *See* Zenon Bankowski et al., *Precedent in the United Kingdom*, *in* Interpreting Precedents: A Comparative Study (Neil MacCormick and Robert S. Summers, eds., 1997).

in legislation or not, which depends upon one's view of the proper role of courts, is irrelevant to the present discussion. What counts is that judges are performing a task that results in statements of rules that are functionally indistinguishable from piecemeal legislation. This process can be illustrated by several examples. These are all examples of rules that regulate behavior, that is, they are legal norms according to the definition found at the beginning of this chapter. Some are drawn from statutes, others from case decisions:

1. No one shall take advantage of his own wrong.
2. One must not injure his neighbor.
3. Damages shall be awarded for injury caused by the invasion of the inner realm of one's personality.
4. A manufacturer is strictly liable in tort when an article he places on the market proves to have a defect that causes injury to a human being.
5. An employer shall compensate his employee for damage to the employee's property at the workplace.
6. If the marriage does not take place, each engaged person may require the other to return what the former gave as a present or as a sign of the engagement.
7. If one sells goods twice, he who paid first shall retain them.
8. A landlord may refuse an order for a new lease if he intends to occupy the holding for the purposes of a business carried on by him.

The first rule is a principle announced by the equity court that has been codified in California.[712] The second is Lord Atkin's neighbour principle from *Donaghue v. Stevenson*.[713] The third rule is the holding of the *Herrenreiter* case of the German Federal Supreme Court.[714] The fourth rule is from *Greenman v. Yuba Power Products*,[715] in which the California Supreme Court judicially adopted strict liability for defective products. Justice Traynor's statement of the law has found its way into numerous statutory provisions, including the European Product Liability Directive. The fifth rule is a holding of the German Federal Labor Court.[716] Of the above rules, only the first rule and the last three rules are taken from statutes. The sixth rule is from the German Civil Code.[717] The seventh is a provision of the Swedish Commercial Code.[718] The last rule is, of course, from the United Kingdom Landlord and Tenant Act 1954, which was used as an example above.[719] As can be

[712] Cal. Civ. Code § 3517.

[713] Donoghue v. Stevenson, [1932] AC 562 (H.L.)

[714] Bundesgerichtshof [BGHZ] Feb. 14, 1958, Neue Juristishe Wochenschrift (NJW) 58, 827 (Ger.).

[715] 377 P.2d 897 (1963).

[716] *See* 93 Bundesarbeitsgericht [BAGE] 295 (2000).

[717] Bürgerliches Gesetzbuch [BGB] § 1301.

[718] Swedish Commercial Code, ch. 5, § 5.

[719] UK Landlord and Tenant Act, 1954, § 30(1) (g).

seen from these examples of rules drawn from various sources, it is impossible to ascertain from the text of the rules alone whether they have a legislative or judicial pedigree.

The rules listed in the foregoing paragraph are relatively simple in form. Judicially created rules can, however, be much more complex. This is shown by the following example in which courts in Germany have recognized a cause of action on behalf of certain strangers to a contract. Such a contract is referred to as a "contract with protective effect for the benefit of third parties" (*Vertrag mit Schutzwirkung zugunsten Dritter*).[720] While this example is from Germany, examples of this more complex type of judicial law making can be found in all of the jurisdictions studied.

A third person not a party to a contract may nevertheless bring a cause of action for damages for breach of an obligation under that contract if all of the following conditions are met:

1. The third person stands in such close proximity to the performance of the contract as to be exposed to the same risk of breach of an obligation as the non-breaching party to the contract;
2. The non-breaching party has a special interest in including the third person within the scope of the protection of the contract;
3. At the time of contracting, the breaching party was in a position to anticipate the risk to the third person; and
4. The third person has a legitimate need for protection under the contract.

The above examples can be employed to illustrate another point, but to do so, the reader must first understand that three of the above rules have no statutory basis whatsoever. These three are the neighbour principle (rule 2) from the United Kingdom, the *Herrenreiter* case (rule 3) from Germany, and the rule on product liability (rule 4) from California. The British and American examples are thought of in England and Wales and the United States as developments in the common law. The German example is described in Germany as being *praeter legem* or even *contra legem*, as the holding seems to contradict the express terms of a statute. The point is that these are merely three examples out of hundreds of potential examples from England and Wales, Germany, Sweden, and the United States of pure judge-made law, or what is called *Richterrecht* in German.

Notice that in all three of the cases, the judges might have decided against the claimants by concluding that they had no legal remedy and that they must, therefore, lose their actions. Indeed, other judges in all three of these cases had reached that conclusion on similar facts. It is after all quite common for claimants not to prevail. Such decisions are usually couched in terms of the law providing no remedy—or in Germany no *Anspruch*—to redress the claimant's perceived loss.

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[720] *E.g.*, 66 BGHZ 57 (1976).

In the case of common law courts, the judicial reference to the law providing no remedy will, either explicitly or impliedly, be understood to mean that neither existing statutory nor case law provide a remedy. In Germany, the word law will be understood to mean statute law; but the reasoning and result are the same as in the common law world.

The point the author wishes to make is this: the judges in these three cases decided that the law was wrong and, more importantly, that they were justified in ignoring the law and correcting this perceived wrong through judicial law making. Hearkening back to the discussion in the chapter on comparative jurisprudence, how did these judges conclude that the law was wrong? What was the source of their conviction? One source of course can be ruled out: existing law.

The reader should not gain the impression from the small number of examples that this occurrence is an uncommon one; hundreds of examples can be found to illustrate this process. In all of the examples, one will see that judges are acting as "undercover politicians." Whether one finds these decisions and this process good or bad, these are all examples of what is submissively called judicial activism.

The most complex example of judicial legislation of this kind known to the author is not from a common law jurisdiction, but rather from Germany. This is the so-called Düsseldorf Table (*Düsseldorfer Tabelle*), published by the courts in Düsseldorf since 1962, which sets guidelines for child and spousal support payments. The document, which today covers five printed pages, classifies children by age into four groups, differentiates between 11 earnings levels, and contains formulas for transition periods, and so on. Even if there were legislative authority for the publication of the table, which there is not, the activity of promulgating guidelines for court-ordered family support is indistinguishable from legislative rule making.

The judicial law making activity described above deserves comparison to, and distinguishing from, traditional parliamentary legislation. As a consequence, the discussion below will return to this topic when discussing the methods of legal thinking that characterize lawmaking.

As will be examined in more detail below, the roles of (1) making law, (2) finding the applicable law, (3) applying the law to the facts, and (4) justifying one's conclusions are conceptually distinct tasks. Even though they are separate in concept, they are often indistinct in practice, as the examples in the following discussion illustrate.

B. Four Steps in Making and Applying the Law

What is presented in the following discussion is an overview of a great number of complicated and subtle processes that are the subject of extensive and sometimes heated debate by legal theorists and philosophers throughout the world. Breaking

the processes down into steps is particularly risky because it disguises their interdependence. Nevertheless, before one can compare, one needs a common frame of reference. Further, as space does not permit a more nuanced, and consequently more accurate, depiction of the processes, we will have to content ourselves with a simplified although nevertheless accurate version.

At this juncture, it is worthwhile to consider one problem that all comparative works face: the terminology is not standardized. This problem is particularly serious in the field of legal theory, to which this chapter belongs. In legal theory, one finds an enormous variety of terms and definitions of terms not only within the English-speaking, but also within the German- and Swedish-speaking communities. At the risk of complicating the field even more, but in the hope of sidestepping one simmering academic debate,[721] the following discussion introduces the neutral term *template* to refer to a statute (or sometimes a case) that provides a rule of decision for a case at hand.

As suggested above, (1) making law, (2) finding the law, (3) applying the law, and (4) justifying the result, while separate and distinct tasks from an analytical standpoint, often influence each other or even overlap to such an extent that they disguise each other. The following discussion includes a number of examples to illustrate some of the overlapping that may result. The examples provided are by no means exhaustive of the kinds of overlapping that occur, but they are common examples that one can find in all four of the jurisdictions studied.

One finds an overlapping of (3) applying the law with (1) making the law when a judicial decision prompts a legislator to propose an amendment to a statute. In the United Kingdom, for example, parliament enacted the Law of Property (Miscellaneous Provisions) Act 1989 (chapter 34) to "overrule" *Bain v. Fothergill*, which had held that the purchaser of land could not recover ordinary contractual damages from the vendor if, through no fault of his own, the only reason for the vendor's breach was that he could not show good title. Section 3 of that act simply reads:

> The rule of law known as the rule in Bain v Fothergill is abolished in relation to contracts made after this section comes into force.

By overruling *Bain v. Fothergill*, parliament decided that purchasers of land should be entitled to recover ordinary contractual damages in all cases, including when the vendor's only reason for breach was his inability, through no fault of his own, to show good title.

The rule in *Bain v. Fothergill* was a product of the English common law: it was judge-made law in the sense of "making law" in the absence of a statute. The following example concerns decisions of the California Supreme Court which had interpreted an existing statute in a way inimical to the legislature. Notice that the judges in California had been interpreting the statute, not creating extrastatutory

[721] Particularly the supposed intrinsic difference between rules and principles.

common law (*Richterrecht*). In response, the California Legislature added subsection (b) to section 1714 of the California Civil Code:

> It is the intent of the Legislature to abrogate the holdings in cases such as Vesely v. Sager (1971) 5 Cal.3d 153, Bernhard v. Harrah's Club (1976) 16 Cal.3d 313, and Coulter v. Superior Court (1978) 21 Cal. 3d 144 and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.

In these two examples from the United Kingdom and California, the result or outcome of the legislative task is indistinguishable from that of the judicial task. To prove this point, one need only imagine that the roles had been reversed: In the first example, it might have been the case that the English courts had awarded the purchaser ordinary contract damages in every case of breach by the vendor, and parliament might have modified the rule for vendors who, through no fault of their own, could not show good title. Similarly, it might have been the case that the California courts had been interpreting California Civil Code section 1714 to disallow recovery for furnishing alcohol to an intoxicated person, which the California Legislature then chose to modify by statutory amendment allowing recovery in such cases.

Making law (1) can also be influenced by an attempt to (2) find the applicable law. One example of this is the German courts' extension of German Civil Code section 823 beyond its text, which requires that one must be proven to have been at least negligent before tort liability can attach:

> (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to compensate the other party for the damage arising therefrom.
> (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

Despite the clear language of section 823, which limits liability to fault, the German courts have held that negligence in some cases is to be presumed, such as when a bottle of sparkling water explodes. For as the manufacturer of the bottle and the bottler itself cannot possibly prove that they acted without negligence in the manufacturing and filling of the particular bottle that exploded, the presumption is irrebuttable, that is, conclusive. In short, the German courts went beyond the language of section 823, and in doing so legislated strict liability into existence, because they were dissatisfied by section 823, which was the only statutory template they found that might apply to the case. Some years later the German legislature enacted the Product Liability Act to cover cases of defective products.

Justifying the result (4) also sometimes influences the selection or (2) finding of the law. Indeed, in cases in which two or more rules might apply, justifying the result necessarily includes justifying the choice of the statutory template. One example is provided by section 11 of the Product Liability Law in Germany, which provides that €500 be deducted from any award for injury to property. The general statute on tort liability (German Civil Code section 823) has no such deduction. If the court chooses to award damages under the general tort statute rather than under the Product Liability Law, it must justify its decision.

These few examples illustrate that the four steps in making and applying the law, while theoretically distinct, are in practice often difficult to separate. This difficulty should not, however, blind the observer to the fact that the roles are indeed distinct.

Before moving on to the next section, there is one aspect of both making and applying the law that may not be obvious but which ought to be observed: namely, both making and applying the law proceed from a given (in the case of judging) or preconceived (in the case of legislating) factual basis. The proposition that judges act on given factual bases is so obvious that it needs no illustration. However, we need to remind ourselves that this is also the case for legislation. A few examples will serve to illustrate this point. Consider German Civil Code section 1301:

> If the marriage does not take place, each engaged person may require the other to return what the former gave as a present or as a sign of the engagement, under the provisions on the return of unjust enrichment. In case of doubt it should be assumed that the claim for return is to be excluded if the engagement ends as a result of the death of one of the engaged persons.

The California Civil Code regulates the same situation somewhat differently in section 1590:

> Where either party to a contemplated marriage in this State makes a gift of money or property to the other on the basis or assumption that the marriage will take place, in the event that the donee refuses to enter into the marriage as contemplated or that it is given up by mutual consent, the donor may recover such gift or such part of its value as may, under all of the circumstances of the case, be found by a court or jury to be just.

The drafters of sections 1301 and 1590 were providing for an eventuality encountered in everyday life. They were in effect writing hypothetical judgments for judges confronted with this particular eventuality.

Even broadly worded statutes with potentially wide application proceed from a preconceived factual basis or bases and consequently also contain hypothetical judgments. Consider section 138 of the German Civil Code:

> (1) A legal transaction which is contrary to public policy is void.
> (2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgment or substantial

> weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.

An example from California's Civil Code section 1708, which is reminiscent of the neighbour principle, also serves to show that even broadly worded statutes are based on preconceived notions about recurring factual situations:

> Every person is bound to abstain from injuring the person or property of another, or infringing upon any of his or her rights.

While on the subject, it should be noted that even—or especially—statutory definitions proceed from factual preconceptions. For example, the UK Civil Partnership Act 2004 defines a civil partnership in section 1 to mean "a relationship between two people of the same sex ('civil partners') . . . which is formed when they register as civil partners of each other." For purposes of the UK Occupiers Liability Act 1984, *injury* is defined in section 1(9) to mean "anything resulting in death or personal injury, including any disease and any impairment of physical or mental condition." The category of public figure is central to defamation law in the United States. According to the United States Supreme Court in *New York Times v. Sullivan* and other cases, a person categorized as a public figure cannot recover for injury caused by incorrect, harmful statements unless he or she proves that the writer or publisher acted with malice, defined as actual knowledge of falsity or reckless disregard for the truth. *Public figure* for this purpose has been judicially defined to mean someone who is either "a public official or any other person pervasively involved in public affairs."

C. The Thinking Processes in Making Law

Above, we saw at least three different groups of legal templates. The first group stated relatively broad principles, that is, their templates could potentially find broad application: one shall not take advantage of one's own wrong; one shall not injure one's neighbor; one shall not invade the inner realm of another's personality; and a legal transaction which is contrary to public policy is void. The second group stated narrower rules, where the templates would likely find less application: a manufacturer is liable for injuries caused by a defect in its products; an employer is liable for damage to an employee's property at work; when an engagement fails, the engagement gifts shall be returned; for goods sold twice, the first buyer who pays shall be entitled to keep the goods; and a landlord may refuse to re-release premises if he plans to run a business there. The third group consists of definitions: *civil partners* are those who register as such; *injury* for purposes of one statute means "anything resulting in death or personal injury, including any disease and any impairment of physical or mental condition"; *public figure* in the

United States means a public official or some other person "pervasively involved in public affairs."

These three groups of legal templates are generally descriptive of the categories of law making available to judges. However, they do not by any means exhaust the possibilities available to legislatures. Others types of legislative action include, for example, statutes that empower private persons to enter into binding legal relationships, like marriage and contracts; statutes that delegate rule-making authority to another entity; taxing statutes; and statutes that appropriate money for specific projects or programs. These and other types of law making in these legislative spheres are generally unavailable to judges.

What kind of legal reasoning or thinking do legislators employ when forging rules in this purely legislative sphere? When they are appropriating money for disaster relief, for example, are they thinking that the victims of the disaster need special treatment, or are they acting out of sympathy and compassion? When they are deciding that same-sex couples should enjoy the benefits previously only enjoyed by heterosexual married couples, are they deducing this from the equal protection clause of a constitution or treaty, or are they reacting to social pressures and political realities? When legislators turn over the day-to-day regulation of the banking industry to a governmental agency with rule-making power, do the legislators reason by analogy to similar regulatory schemes for other sectors of the economy?

It seems to the author that legislating in these instances, while rational, is not deductive in the sense defined below, that is, reasoning from general premises to the particular.[722] However, some German authors describe the process in drafting legislation—both in the exclusively legislative sphere just described, and in the judicial/legislative sphere of rules of behavior—as distinctly deductive, at least when they are describing the drafting of the German Civil Code in the 19th century under the influence of the reigning *Begriffsjurisprudenz* (conceptual jurisprudence). According to these authors, and as described in the summary at the end of Chapter 3, the drafting of the German Civil Code involved a logical process of deducing specific norms from a pyramid of carefully chiseled concepts which the drafters had arranged into a pyramid.[723] In labeling the process of legislative drafting deductive, these and other authors are explicitly or impliedly laying claim to the political philosophy of Plato, who expected the legislator to establish a detailed code that would remain valid for all time with little possibility of change. According to Plato, the thinking process employed in drafting this code would be one of deduction from the principles of natural law. Thus the narrow rule "Do not

[722] *Accord* Luc. J. Wintgens, Legisprudence: A New Theoretical Approach to Legislation 24 (2002).

[723] *E.g.,* 6 Karl Larenz, Methodenlehre der Rechtswissenschaft (6th ed. 1991). Peter Landau, *Die Rechtsquellenlehre in der deutschen Rechtswissenschaft des 19. Jahrhunderts*, *in* Juristische Theoriebildung und Rechtliche Einheit 70–79 (Claes Peterson ed. 1993).

kill" would be deduced from the more general natural law principle, "Do harm to no man."[724]

In the common-law world, it is quite uncommon to describe legislative activity as deductive. Yet one does find references to deduction of rules from concepts in the conceptualist theories of 19th century American legal scholars. These theories held that there were "legal conceptions involved in the very idea of justice and containing potentially an exact rule for every case to be reached by an absolute process of logical deduction."[725] The main proponent of this conceptualism, sometimes referred to as formalism, was Christopher Columbus Langdell, who, as dean of Harvard Law School, introduced the case method of instruction. Langdell and his followers, who drew their inspiration from the axioms of Euclidian geometry, ordered legal norms into a conceptual framework resembling a pyramid, with a few axiomatic principles at the apex, and the more precise and numerous rules at the base.[726] This system was never codified; rather, it was used to train lawyers and to guide them in reaching logical conclusions about the application of legal norms to various factual situations. Judges, particularly those on the U.S. Supreme Court, also took to deducing specific rules from constitutionally protected rights in liberty, private property, and freedom of contract.[727] In short, the Langdellian academic exercise roughly resembled the deductive drafting of the German Civil Code.

As will be discussed in the chapter on precedents, the judiciary as an institution is not very well equipped for building pyramids of norms such as that found in Langdellian conceptual jurisprudence or in the German Civil Code. However, both judges and academics can deduce specific rules or templates from concepts and broad principles, if indeed one wishes to label this process as one of deduction. Consider the judicially forged rules that have been mentioned so far in this chapter:

1. No one can take advantage of his own wrong.
2. You must not injure your neighbor.
3. Damages shall be awarded for injury caused by invasion of the inner realm of one's personality.
4. A manufacturer is strictly liable in tort when an article he places on the market proves to have a defect that causes injury to a human being.
5. An employer shall compensate his employee for damage to the employee's property at the workplace.

Granted, if the legislature were to enact such rules, the legislative staff would open up discussions with broad segments of the population, consult experts, and hear

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[724] R.F. Stalley, An Introduction to Plato's Laws 32–33 (1983).

[725] Pound, *supra* note 224, at 1048.

[726] Feldman, *supra* note 225, at 94.

[727] *See* Joseph William Singer, *Legal Realism Now*, 76 Cal. L. Rev. 465, 491 (1988).

arguments from individuals and from groups with special interests. From a democratic standpoint, this is certainly preferable to the judicial pronouncement of the rules. But do legislators, when enacting identical rules, employ a different kind of legal reasoning or thinking than is available to judges? To take just one example, when the British Parliament enacts strict product liability in the form of the Consumer Protection Act, are the members of parliament thinking more logically, more deductively, or in any way differently than the justices of the California Supreme Court when they judicially recognize the same doctrine? The answer cannot be anything other than, no. Accordingly, if parliament is acting deductively in adopting strict product liability for defective products, then so too is the California Supreme Court. Even though the former avenue is more democratic, it simply cannot be more logical or deductive.

Whether one describes nonsystematic legislative activity in creating regulatory templates as deductive reasoning, as balancing of public interests, or as some other process, need not concern us in our comparative endeavors in this chapter, except to note that the characterization as legislation depends neither on the narrowness or breadth of the enactment, nor on its complexity. Accordingly, both the narrow rules regarding gifts in contemplation of marriage as well as the much broader principle regarding profiting from one's wrongdoing are properly considered to be legislative pronouncements of the law, even if they are announced by courts. Similarly, complex regulatory templates, such as the German "contract with protective effect for the benefit of third parties," are also legislative in this sense. The actions of the legislature and of the judiciary therefore overlap to a considerable extent.

D. Logic and Legal Reasoning

Much of what is written on comparative law and legal reasoning seems very confusing. Examples to illustrate this point will be provided near the end of this chapter. When analyzing these illustrations one is struck by the inexactitude of the language used. Accordingly, it would be advisable first to define a number of terms that are employed in law in general and in comparative law in particular.

The following discussion addresses these terms in order: logical, deductive reasoning, inductive reasoning, reasoning by analogy, the logical syllogism, and the legal syllogism or subsumption (applying the law to the facts).

1. LOGICAL

Lawyers consider themselves to be logical. They boast that they, unlike lay people, know how to think like a lawyer, that is, logically. This is true of lawyers in all four of the jurisdictions studied, but what does this mean? The word is used in at

least six different ways. Sometimes *logical* means obviously, at other times it means mathematical, deductive, or valid. However, when lawyers employ the word they usually mean coherent or convincing or reasonable, in the sense that whatever is being said is not illogical or unreasonable or capricious. In other words, the word is not normally used to refer to classical logical reasoning.

As described in the following sections, classical logical reasoning generally differentiates between three methods: deductive reasoning, inductive reasoning, and analogical reasoning. All three of these methods are therefore logical in the classical sense.

2. REASONING BY DEDUCTION

Deductive reasoning or logic is often described as reasoning from general premises to the particular. It is a process that starts from statements accepted as true and applied to a new situation to reach a conclusion. For example, if all cats have fleas (major premise) and Princess is a cat (minor premise), then Princess has fleas. The conclusion "Princess has fleas," is said to be logically valid. Everything in the conclusion must also be contained in the premises. Therefore, all valid deductive reasoning is by its nature circular reasoning. Further, the conclusion need not be true. The truth or falsity of the conclusion is dependent upon the truth or falsity of the major and minor premises.

3. REASONING BY INDUCTION

Inductive reasoning moves from particular premises to the general. It is always a generalization, but the generalization is not always conclusive. For example, if one examines 1,000 cats and finds that they all have fleas, one might induce that all cats have fleas, which goes beyond what the proof actually warrants. In other words, the validity of the conclusion is probable, not certain or valid. Despite this shortcoming, inductive reasoning is an extremely powerful tool. The empirical sciences, for example, employ this method of reasoning.

4. REASONING BY ANALOGY

Analogical reasoning can be thought of as a kind of inductive reasoning in which the attributes of an observed phenomenon are shared by others. For example, if all people are mortal and people are mammals, then other mammals, such as cows, are also mortal.

Analytically, analogies are persuasive, and therefore jurisprudentially justifiable, if the two subject-matter areas can be connected by a common, overriding rule that is broader than the rule found after an exhaustive *Normsuche*. Three simple examples taken from hypothetical medieval cases will serve to illustrate the concept of connectability via an overriding rule.

Case No. 1: While treating a horse's injured hoof, a farrier injured the soft tissue inside the hoof, which caused the horse to go lame. The owner brought a writ of trespass, which required for its proof that the plaintiff had been injured in his person or property by an act of violence (*vi et armis contra pacem*) of the defendant. The court ruled for the plaintiff.

Case No. 2: Similar case, but the animal is a zebra, not a horse. Both zebra and horse are single-hooved animals. Thus, the overriding rule that connects the cases is that single-hooved animals are to be treated alike when determining whether a farrier who injures the soft tissue inside the hoof is committing an act of violence under a writ of trespass.

Although not strictly relevant to the present discussion, it is worth noting at this juncture that in today's parlance, we would say that the medieval judges in the above examples were construing a statute, not making law beyond statutes, that is, engaging in *Richterrecht*. The writs were orders from the king directed to the specific person or persons named therein to appear in court to explain why they should not be adjudged liable to the plaintiff for injury allegedly caused to him by the act or omission of the person or persons named in the writ. The writ was chosen (and purchased) by the plaintiff in the same way that the prosecutor today would bring a specific charge or that the lawyer for a civil plaintiff would make an allegation of breach of contract, commission of a tort, etc. If the defendant appeared in court, the plaintiff would have to lead evidence to prove his writ, which in the case of the writ of trespass meant that he suffered an injury to his person or property as a result of an act of violence of the defendant.

Today we would refer to such an arrangement (the availability of the writ) as a statute which protects certain rights of the plaintiff. Notice how broadly—or abstractly or open textured, which mean the same thing—the statute of the writ was worded. If one thinks of this writ as a template, it would be a template that could be applied to a very broad class of injuries and actions. Consequently, it required judicial interpretation. What injuries were protected? What is an act of violence? In answering these and other questions, it is quite natural to look at comparable cases, which in effect are restatements or concretizations of the (pseudostatutory) writ with more detail. They are smaller templates, one could say. As shown below, it might also be physically impossible for human beings not to think of similar or analogous cases in this situation. Viewed in this way, medieval judges were not applying the rule of Case No. 1 to Case No. 2; rather, they were considering other cases to help them interpret the concept of violence (*vi et armis contra pacem*) in the writ. It is quite natural to compare the facts of the case to be decided with other cases in this way. Indeed, as will be shown in more detail in the chapter on statutes, German statutory commentaries and English and American legal encyclopedias consist to perhaps 90 percent of reports of case decisions construing statutory and judge-made law.

While the perils of reasoning by analogy are obvious, this does not prevent judges from resorting to this method when they feel it is necessary to reach a

just conclusion. For example, in a case from Germany, a violist broke his bow while practicing for a concert in a practice room at the concert house owned by his employer. There is no applicable statute which makes employers liable for accidents of their employees which injures the employees' property. Rather than deny the violinist compensation, the German Supreme Court employed another statutory provision by analogy. That provision, German Civil Code section 670, does not apply to employees. By its terms it merely allows one who accepts an unpaid mandate to recover for expenses reasonably incurred in performing the mandate:

> If the mandatary, for the purpose of performing the mandate, incurs expenses that he may consider to be necessary in the circumstances, then the mandator is obliged to make reimbursement.

German judges make fairly frequent use of statutory analogies. In applying statutes by analogy, judges are in effect taking a template intended for one factual context and applying it in a completely different factual context for which it was never intended. Swedish courts also sometimes use statutory analogies. For example, most of Swedish law concerning leases of personal property was written by Swedish judges based partly on analogies to statutes concerning sales and concerning leases of dwellings.[728] Common law courts, by contrast, very rarely apply rules from statutes by analogy;[729] they do, however, occasionally apply rules from cases by analogy, such as in the medieval hypothetical cases above, although one should not forget that one could just as accurately describe the mental process as one of defining what the term violence means for purposes of an action in trespass. For purposes of the present discussion it is only necessary to note that, whether the rule is drawn from a statute or a case, the thinking process in applying the rule is identical.

5. THE LOGICAL SYLLOGISM

The syllogism is not a separate logical method. Rather, it is at the heart of traditional deductive reasoning. It can be thought of as a kind of argument containing three categorical propositions: a major premise, a minor premise, and a conclusion. Most readers will recognize the syllogism "All men are mortal (major premise), Socrates is a man (minor premise), therefore Socrates is mortal (conclusion)." The great attraction of the syllogism for someone seeking truth is that, assuming the premises are true, then the conclusion must also be true.

Unfortunately for lawyers, use of the syllogism is subject to dangers that are referred to as fallacies. Modern logicians have identified over one hundred distinct fallacies.[730] Of particular relevance to law are fallacies of ambiguity. These occur when the meaning of a key word or phrase shifts and changes, so that the terms

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[728] Jan Hellner, *The Law of Obligations and the Structure of Swedish Statute Law*, 40 Scandinavian Stud. L. 325, 328 (2000).

[729] See chapter Statutes and Their Construction, *supra*.

[730] Irving M. Copi and Carl Cohen, Introduction to Logic 115 (11th ed. 2001).

do not really match up within the argument. For example, Jonathan Swift quipped, "No man will take counsel, but every man will take money; therefore, money is better than counsel."[731]

The lawyer who wishes to employ the powerful logic of the syllogism has an a priori problem as well: How does he or she find the major premise? Here the syllogism is of no assistance. In other words, the lawyer who wishes to come to the one logical conclusion, assuming there is one, must first possess knowledge of all of the potentially applicable premises. Second, use of the syllogism will be compromised if there is more than one possible major premise. Third, there is no syllogistic process for determining whether the minor premise corresponds in all details with the major premise. These and other problems will be explored in the following section.

6. THE LEGAL SYLLOGISM OR SUBSUMPTION (APPLYING THE LAW TO THE FACTS)

Subsumption in law refers simply to the process of subsuming the facts of the case to be decided under a legal rule as one would subsume the minor premise under the major premise in a syllogism. Indeed, the terms *legal syllogism* or simply *syllogism* are used more widely in English and in Swedish than *subsumption*, which is the preferred term in German.[732] However, even more common in English is the expression "applying the law to the facts," which is the same process.

Perhaps a word should be said about the centrality of subsumption or *Subsumtion* in German, to German legal education. An important component of learning to think like a lawyer in Germany is mastering the task of *Subsumtion*, that is, applying the law to the facts. The word and the activity of subsuming are borrowed from logic, but in the place of a statement of a proposition as the major premise, the lawyer inserts a legal rule. The minor premise consists of the operative facts, which might either be brought into conformity with the rule or not, depending upon how the lawyer decides to interpret the law and the facts.

A simple hypothetical example will illustrate that subsumption is nothing more than applying the law to the facts. The crime of theft is made punishable in Germany by German Penal Code section 242(1):

> Whoever takes personal property not his own from another with the intent of unlawfully appropriating the property for himself or for a third person shall be punished with imprisonment for not more than five years or with a fine.

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[731] *Id.* at 153.

[732] *See* Neil MacCormick, Rhetoric and the Rule of Law: A Theory of Legal Reasoning 32–33, 43–47 (2005) (the legal syllogism is "central to legal reasoning"); Wolfgang Fikentscher, *The Evolutionary and Cultural Origins of Heuristics that Influence Law-making*, *in* Heuristics and the Law 207, 220 (Gerd Gigerenzer and Christoph Engel, eds., 2006).

In order to be found guilty of theft under this statute, the court must be satisfied that (1) personal property which (2) did not belong to the accused was (3) appropriated by the accused for himself or for another person (4) unlawfully. If Anja takes a pair of sunglasses which do not belong to her from a store rack, drops them into her purse, leaves the store, and then puts them on so that she can go to the beach, she will, in all likelihood, be found guilty of theft. In other words, the activity of subsuming for legal purposes means testing in a logical way whether all the elements of the crime have been met.

Of course, the operative facts found in real life, or in law school examinations, are often much more difficult to subsume under the applicable rule than the hypothetical example just given. Consider the application of section 212 of the German Penal Code to the two hypothetical factual situations below.[733] Section 212(1) (manslaughter) provides:

Whoever kills a human being without being guilty of murder [which requires proof of base motives etc.] shall be punished for manslaughter with imprisonment for not less than five years.

The elements of the crime of manslaughter in Germany are consequently (1) killing of a (2) human being without (3) possessing the requisites for the crime of murder.

Hypothetical factual situation 1: Tanja performs an abortion on Anja.

Is an abortion a (1) killing? Does it matter if the fetus is old enough to survive outside the womb? Is the fetus (2) a human being? Does it matter if the abortion is performed after Anja goes into labor at the end of the term of the pregnancy? Do Tanja's motives for the abortion matter? If Tanja is not a physician, can she be said to be acting for (3) base motives?

Hypothetical factual situation 2: Tanja's mother lies in a coma. A brain scan confirms that her mother is brain dead, but her heart is still beating and she is breathing on her own. Tanja removes the feeding tube and the intravenous apparatus for administering liquids. Eventually, her mother stops breathing and her heart stops beating.

Does removal of the tubes constitute (1) killing? Is Tanja's brain dead mother (2) a human being? Does it matter whether Tanja removed the tubes for (3) base motives?

In the legal world, these questions must not only be asked, they must be answered. The question for our purposes therefore becomes: What mental process is used in trying to subsume the operative facts of these two hypothetical cases under (what we assume to be) the relevant statute? Most legal theorists describe the process as one of analogy. In other words, one imagines scenarios that are similar to the one at hand and tries to draw conclusions from them. In the first hypothetical situation, it might make a difference, to some people at least, how the

[733] This hypothetical factual situation is only for purposes of illustration. Abortion is actually covered in German Penal Code § 218.

abortion is performed and, even more importantly, how early it occurred in the pregnancy. In the second hypothetical factual situation, it might make a difference to some people to know whether Tanja's mother had provided for this eventuality in a living will or other instrument.

Notice that the mental process involved in applying section 212 of the German Penal Code to the hypothetical fact situation involves imagining other hypothetical cases, for example: Does it matter if the abortion is performed after Anja goes into labor at the end of the term of her pregnancy? This is exactly the process employed by the hypothetical medieval common law judges in construing the application of the writ of trespass to cases involving various hooved animals. We did not, at least explicitly, employ examples to decide the sunglasses case under section 242(1) of the German Penal Code because the facts, as stated, so clearly fell within the template of the statute. Even the requisite mental state was stated: Anja put on the sunglasses "so that she can go to the beach." But imagine that the facts of the case had been silent on this point. Imagine that Anja had merely left the store with the sunglasses in her purse. In that case, the student, lawyer, or judges would be forced to construct various hypothetical scenarios about Anja's mental state at the time she left the store: Was she distracted by something in the store or elsewhere which prompted her to drop the sunglasses into her purse as a matter of habit? Did she simply forget that she had the sunglasses in her purse? Had she merely gone outside the store to get a better view of an item in the store window?

There are legal scholars, including the author, in all of the jurisdictions here studied who refer to the process just described as one of deduction. These scholars might even constitute a majority. Their main reason for preserving this terminology is apparently because the device of the syllogism is borrowed from classical logic, and there the process is described as one of deduction. Other scholars disagree with this usage of the term deduction. They argue that one should not compare the legal syllogism to the schoolbook syllogism because the crucial activity of the legal syllogism is the process of trying to mold the facts of the case to look like a minor premise that can be fit under the template of the major premise. That process, we can all agree, is not deductive in nature. Rather, it constitutes thinking by analogy, induction, abduction, or something else, maybe even emotional thinking, depending on the rules and the facts under scrutiny. These scholars rightly point out that the selection of the major premise (*Normsuche*) and the application of the norm to the facts are the heavy lifting of legal reasoning and the reason why one cannot merely pick up a code or other law book and call oneself a lawyer. These scholars also argue that the legal syllogism differs in another very important respect from the logical syllogism: In deductive reasoning, if the major and minor premises are both true, then there can be only one conclusion, and it must be true. With subsumption, on the other hand, there can be more than one conclusion, and none of them must necessarily be true.

Unfortunately for comparative legal studies, those scholars who belong to what might be called the contradeduction school of legal analysis, that is, those scholars who describe the application of the law to the facts as inductive, analogical, abductive, or something else, are to be found, with few exceptions, in

common-law jurisdictions. German and other continental scholars, while recognizing the differences from deductive logic, consistently describe the use of the legal syllogism (*Subsumtion*) as deductive. As illustrated in the following section, the topic of comparative legal reasoning has generated many misunderstandings. Many of these are at least in part attributable to different uses and understandings of the terms logic, deduction, and analogy.

E. Mischaracterizations of Common Law Reasoning

As we saw above, legal thinking or reasoning can be analyzed according to four steps:

(1) Making law, which at least sometimes (subsidiarily) falls to judges,
(2) Finding the applicable law,
(3) Applying the law to the facts, and
(4) Justifying one's conclusions.

The fourth of these steps, justifying one's conclusions, might, as seen above, influence the other steps, but it is, theoretically speaking, a separate step in the lawyer's thinking.

How do lawyers, and judges in particular, (4) justify their conclusions? The most common and perhaps best accepted method is by citation of authority. In a simple case, where the judge is not making law, the judge will justify his or her choice of the applicable law by reference to the charges in a criminal case, or the pleadings in a civil case. Thus, if Anja is charged with violation of German Penal Code section 242, the judge will confine his or her attention to that provision. In a civil case, the judge will employ the statute or case law rule that the parties (or the judge independently) have identified as being the right template for resolution of the issues.

How does the prosecuting attorney, or lawyer in a civil case, (2) identify the right template? This is done, of course, by comparing the facts of the case at hand with the operative facts stated in all of the statutes that are available in the particular jurisdiction. In fact, the lawyer does not literally read all of the statutes. Through years of training and experience, the lawyer knows which templates will likely fit, and which will not. Sometimes it is not at all clear from the language of the statute that it will find application. In such cases, one must, to be sure, look for judicial glosses to the statute, which are previous statutory interpretations which restate or even extend the coverage of the statute. The lawyer learns about these glosses in various ways, either through personal experience, learning from another lawyer, or reading about them in a commentary, article, or other source. When the lawyer in the civil case cannot find a statutory template to fit, he or she will resort to pure case law. Such is the case in Germany, for example, for labor negotiations or labor disputes (*Arbeitskampfrecht*).

When (2) finding the applicable law in the common-law world, a template articulated in a single appellate case might be resorted to directly (see the chapter on judicial precedents). In most cases, the civil lawyer need do no more than cite the appellate case the way he or she would cite a statute. It is only when the

application of the appellate case to the lawyer's case is questionable that the lawyer will need to explain why the template should apply. This he or she will do in the same way in which he or she would show that a statutory template fits, that is, by showing that the operative facts in the template of the appellate case correspond to the operative facts in the lawyer's case.

The short explanation in the previous paragraph of how one might go about finding law in an appellate case would find agreement throughout the common-law world. It is most decidedly not controversial. However, observers from outside the common-law world see things differently, as the following quotations illustrate. It will be seen that all of the following characterizations of common-law reasoning are wrong or misleading. All except the quotation from the European Court of Human Rights (ECHR) and one other quotation were originally written in a language other than English. The authors' names have been omitted.

> Quotation 1: (part one) The starting point for the thinking of continental jurists is deductive. They begin with an abstract legal rule and examine whether the facts of the case fulfill the statutory elements.

Author 1 has not identified the starting point of legal thinking: Before one can apply a legal rule, one must first find it. As was illustrated above, this (2) law finding or *Normsuche* is not a deductive process. Neither is (3) applying the law to the facts a deductive process at its crucial core. The same author now describes common law thinking.

> Quotation 1: (part two) The starting point for the thinking of English jurists is induction. They begin with the facts of the case and compare them with the facts of other cases decided in the past.

Unlike in part one, where Author 1 is talking about (3) applying the law, here Author 1 is in fact talking about (2) finding the law (*Normsuche*). When (2) looking for the applicable law, one does in fact compare the facts of the instant case with the (operative) facts of appellate cases; but there is no difference in thinking between that process and the process of comparing the facts in the instant case with the (operative) facts of statutory templates.

> Quotation 2: (European Court of Human Rights) Judicial decisions are rendered through a logical syllogism (or, in the common-law tradition, through *stare decisis* analogy) in which the judge selects a major premise (the norm or the applicable case) depending on how he or she initially perceives the facts.

Author 2, for some reason, thinks that common lawyers do not use the logical syllogism, which is just not true. It is hard to say what Author 2 means by *stare decisis* analogy. Both Authors 1 and 2 might be suggesting that common lawyers only use the facts of an appellate case—not its rule or ratio decidendi—to decide the instant case. If so, this is a common misunderstanding. That this imaginary

style of legal thinking cannot work is elucidated by Professor Melvin Eisenberg in *The Nature of the Common Law:*[734]

> The error of the first conception—that reasoning by analogy in the common law consists simply of comparing similarities and differences between cases—can easily be shown. Assume that (1) on January 1, 1987, (2) a manufacturer (3) of grouting machines (4) in Cleveland (5) sells a grouting machine (6) to a machine-shop operator (7) in Cleveland (8) who on March 1 (9) injures his hand while using the machine (10) as a result of a defect in the machine. The court holds that the manufacturer is liable under the principle of strict product liability. Now a second cases arises, which differs from the first only in that the injury does not result from a defect in the machine. Here there are nine similarities between the cases and only one difference, but obviously the difference is decisive, and it would be decisive if ninety more similarities were added.

Quotation 3: Continental European legal thinking is deductive: it subsumes the case under the general rule. Common law thinking is inductive: it derives the rule by carefully interpreting a case.

Author 3 in the first sentence is talking about (3) applying the law to the facts. In the second sentence, Author 3 is talking about how to (2) find the law in a case decision. In other words, Author 3, like Author 1, is confusing (3) applying law that has already been found on the continent to (2) finding the law (*Normsuche*) in a common-law jurisdiction.

Quotation 4: These statements of operative facts by the deductively thinking continental European judges who are deciding cases beyond the law (*praeter legem*) are expressed in fairly general terms. Their level of generality is consistent with that of the rationes decidendi of the inductive leading cases in England.

Notice that Author 4 is talking about continental European judges deciding cases where there is no statute, in other words, when they are (1) making law. In these cases, European judges are engaging in exactly the same exercise as their English brethren. So how can one be thinking deductively and the other inductively? If they are engaging in exactly the same exercise, must they not therefore be thinking the same?

Quotation 5: Analogy is the traditional kind of thinking in the precedentially determined common law. To say that the common law proceeds analogically is a cliché.

Is Author 5 talking about (1) making law (law making), (2) finding law, (3) applying the law to the facts, or (4) justifying one's conclusions? If Author 5 is

[734] Melvin Aron Eisenberg, The Nature of the Common Law 84 (1991).

suggesting that analogical reasoning is more common in the common law than elsewhere in Europe, then this is probably wrong (see discussion below).

The sixth and last quotation is specifically directed at step (3) application of the law to the facts.

> Quotation 6: The application of a precedent to a case which is on all fours with the precedent involves only a modest version of reasoning by analogy. As both sets of facts clearly fall under the rule thus formulated this decision is usually regarded as the application of a binding precedent, rather than the drawing of an analogy. Technically, however, even this modest version is reasoning by analogy.

This description is correct in saying that it is the rule (ratio) of the precedential case that is to be applied to the later case. In this sense Author 6 has not committed the error of some of the previous authors of confusing (2) finding the applicable law with (3) applying the law—in this case the rule of the case—to the facts. Author 6 is also correct in saying that the process of applying the rule involves reasoning by analogy. This was illustrated in the discussion above: it is only the last step of the legal syllogism that is deductive. The passage implies, however, as is clear from the rest of the article, that applying rules from cases involves a different mental process than applying rules from statutes. This is not accurate. The rational process involved in applying rules to factual situations is necessarily the same regardless of the source of the rule.

In fairness to these and other observers, and in the interest of gaining new insights, we should ask ourselves what these and other foreign observers might be trying to get at when they say that English or common law jurists, in contrast to their continental European counterparts, reason by analogy? In other words, are their observations merely mistaken, or have they hit upon some truth that has been lost in translation? There are at least five things that these observers might be saying. We will look at each of them in order.

First, the observers who contend that common lawyers think by analogy, and not by deduction, might be referring to the articulation of legal rules by judges in a process that is described as (1) law making in this chapter. We saw that the act of drafting the German Civil Code has been described as deductive by many observers. By deductive, in this case, it is meant that the practitioners and academics who drafted the code discovered or deduced the specific rules of the code by studying certain general rules or concepts. As the American experiment with conceptualism has shown, this style of thinking is not particular to the drafting of statutes. Indeed, the judges of the U.S. Supreme Court engaged in exactly this behavior around the turn of the 20th century. Accordingly, if this is the difference that the foreign observers think they see, then they are mistaken.

Second, the observers who contend that common lawyers think by analogy might be saying that common-law jurists use analogical reasoning in choosing

the applicable norm, that is, in the (2) *Normsuche*. If this is what they mean, they are right; but the process of choosing the norm in the common-law world is no different from the standpoint of logic than choosing the norm on the European continent. No matter the legal system, the process of finding the applicable rule proceeds from a set of facts and consists of a process of sifting through the factual templates of statutes, cases, and other sources of law to see if one can find a fit. If the observers mean that finding a norm in a statute is in some way less analogical than finding a norm in a case, then they are mistaken again.

Third, the foreign observers might be suggesting that common lawyers engage in the style of activity described by Professor Eisenberg, that is, of identifying all of the facts of a previous case and comparing them one-by-one with the facts in the case at hand. If this is what the observers mean, then they are suggesting that common lawyers use this type of activity in (3) applying the law to the facts. The process as described by Professor Eisenberg is not remotely logical and, consequently, does not deserve to be called reasoning. In fact, this style of activity cannot yield any results whatsoever, no matter how conscientiously it is applied. Therefore, if this is what the observers mean, they are simply mistaken.

Fourth, the observers who contend that common lawyers think by analogy might be saying that common-law jurists apply the ratios of case decisions in the way that continental jurists sometimes extend the reach of statutes, that is, by applying them by analogy to factual situations that cannot be justified by any stretch of lexical meaning of the statute, or of the ratio of the case (see chapter on statutes). It is true that common lawyers very rarely apply statutes by analogy. German judges do so with some regularity. Swedish judges tend to do so less, in the author's observation. Common-law judges, on the other hand, occasionally apply rules from cases by analogy. This process is less common in Germany, and probably less common in Sweden, than it is in common-law jurisdictions. Does this mean that continental European jurists reason more by analogy than common lawyers?[735] To answer that question, one might be tempted to ascertain the extent to which common lawyers and continental lawyers apply rules from all sources, such as from custom or case decisions, by analogy. The author is not aware of any studies done on this subject and, consequently, cannot say with any degree of certainty which of the jurisdictions here studied uses this style of analogical reasoning most. Regardless of the results of such a study, the reader should recognize that analogy can only come into play in cases where there is no rule from a statute or case that is arguably applicable to the case at hand. Considering the fact that all of the jurisdictions here studied have sophisticated legal systems with a vast body of rules, the number of such lawless cases cannot be large in any of those jurisdictions. Further, no matter which jurisdiction applies more norms (whether statutory of decisional) by analogy, the fact that jurists in that jurisdiction employ

[735] *See* James A. Holland and Julian S. Webb, Learning Legal Rules: A Student's Guide to Legal Method and Reasoning 266–67 (4th ed. 1999).

this style of reasoning marginally more than jurists in the other jurisdictions cannot justify a blanket generalization that juridical reasoning in that jurisdiction is fundamentally different from the reasoning in the others.

Fifth, and finally, the observers who contend that common lawyers think by analogy might be referring to the fourth step in making and applying the law, namely, (4) justifying the result. Perhaps in doing so they are using the word legal reasoning to mean giving reasons in law, which might indicate a further terminological misunderstanding. If the observers mean that common-law judges use more and varied arguments than their continental counterparts in justifying their decisions, this is true. More on this subject will be found in the chapter on the use of precedents.

Summary

After defining various terms, like norm and *Normsuche*, this chapter sought to address the contention that finding the law in the sense of the *Normsuche* involves a different mental process in the jurisdictions here under study depending on whether and to what extent the law of these jurisdictions is systematized. Here, being systematized means that the norms of any particular jurisdiction have been arranged in an orderly, logical, and readily accessible fashion. Tracing the path of the hypothetical *Normsucher* in Germany, England and Wales, and the United States (one who does not know which norm to apply), the author came to three conclusions. First, the mental process of the *Normsuche* is identical in all three jurisdictions: the *Normsucher*, who always has a particular factual pattern in mind, literally embarks on a search for the norm or norms that might apply to that pattern. Second, systematization of the law can assist the *Normsucher*. Third, there is no substantial practical difference between the systematizations of German, English, and American law in this respect.

The author also illustrated that the behavioral rules, that is, the norms, pronounced by judges are indistinguishable from those enacted by the legislature or promulgated by an administrative agency. The discussion also distinguished statutory construction from pure judicial law making (*Richterrecht*). This distinction will be returned to in the chapters on statutes and judicial precedents. For purposes of the present chapter, the point is made that making law, finding the law, applying the law, and justifying one's applications are theoretically distinct tasks, but that they influence one another. The roles of legislating and judging are interdependent and often overlapping.

Thereafter, the chapter's discussion turned to logic and legal reasoning. After sketching the classical methods of reasoning—deduction (including the logical syllogism), induction, and analogy—the author elucidated the use of the legal syllogism (subsumption), which is critical to German legal education and consequently to German legal thinking. It was seen that finding (the *Normsuche*) the

major premise (the template) is not a deductive process. Nor is the process of testing the facts to see whether they fall under the normative template one which can accurately be described as deductive. Only when the lawyer has concluded that the facts do or do not establish all of the elements required in the major premise does the thinking process become deductive.

The chapter's discussion concluded with an analysis of six representative quotations characterizing common-law reasoning as being analogical while continental European legal reasoning is supposedly deductive. All of the quotations were seen to be mistaken or at least misleading. Some of the authors of the quotations apparently confused the nondeductive *Normsuche* with the (partially deductive) act of applying the law to the facts (subsumption). Other authors of these quotations seem to think that rules are irrelevant to legal reasoning in the common-law tradition, and that only facts are important. One author apparently fails to realize that all legal reasoning is heavily analogical; logical deduction is in fact very rare in the law, no matter the jurisdiction.

8

Statutes and their Construction

This chapter looks at various aspects regarding statutes and their interpretation in four jurisdictions: Germany, England and Wales, Sweden, and the United States. It begins with a historical part which traces the history of statutory law making in the four jurisdictions, and records when possible the attitudes of courts and academics to certain developments. The history of England and Wales precedes for the most part the history of the United States. Consequently only more recent aspects of the history in the United States will be presented. One major focus of this review will be on the style and content of statutory law.

The second part of this chapter considers the topic of the sources of law. While some commentators have questioned the importance of this topic to comparative legal research, it is a topic that is nevertheless routinely covered; and many comparativists consider this aspect to be one of, if not the, critical difference between the continental European civil law and common-law traditions.

The next discussion will focus on the traditional methods of statutory construction or interpretation. All of the jurisdictions here studied rely essentially on three basic approaches: literal interpretation, historical interpretation, and purposive interpretation. In Germany, a fourth is often mentioned: systematic interpretation. These various approaches will be analyzed and compared with a view toward answering whether the approaches of the judicial interpretation of statutes are basically the same, or whether they reveal fundamental differences.

If there are fundamental differences in the way that judges, administrative agencies, and lawyers interpret the law, then this will have consequences for the process of Europeanization and globalization. These are questions that will be addressed in the summary.

A. Historical development

The following discussion begins with a short history of statutory law making in Germany before turning to England and Wales, Sweden, and the United States. In particular, the discussion will address the separation between statutory and judicial law making in the context of the sharing of political power.

1. GERMANY

The rediscovery in 1070 of the *Corpus iuris civilis* of the Roman Emperor Justinian, which consisted of a collection of Roman law and the systematic arrangement of documents from the classical period of Roman law dating from approximately 100 BC, formed the textual basis for the Reception of Roman Law (Reception) in Germany. In the secular world, these texts in time enjoyed a status comparable to that of the Bible in the religious world. The influence of Roman law on German law and legal practice grew from the 11th century onwards. The influence was very great, far greater than Roman law's influence in England and Sweden.[736]

There are many reasons for the relatively strong influence of Roman law in Germany. On the one hand, the Reception was facilitated by the dissolution of the ruler's central authority and increasing fragmentation of law and jurisdictions between the German states.[737] Historically, the absence of a uniform German law meant that the Reception was akin to the importation of a ready-made, uniform legal system which was lacking among the numerous German principalities.

It was commonly believed that German Emperor Lothar III had issued a decree imposing Roman law in 1135, but this was disproved in the 17th century by Hermann Conring.[738] In fact, the Reception of Roman law was a gradual process. The influence was felt in the practice of German courts[739] and was primarily a result of the education of German lawyers at this point in history.[740] German jurists began traveling to Italy to study law, most popularly at the universities of Bologna and Modena in the 12th century. With the passage of years, this formal Italian education came to be considered an absolute necessity, especially considering the fact that the universities that did exist in Germany were poorly equipped. Students who went to Italy to study returned home to Germany as highly qualified and respected jurists. The German legal system benefitted greatly from its students' training in Italy.[741] One result of such studies was that German lawyers considered their discipline to be academic, even scientific, in nature.[742] Also, the fact that Latin was the language of academia meant that jurists trained in Italy could communicate with each other even though they might not speak Italian or the regional German dialect of other lawyers from Germany. Accordingly, German legal terminology was strongly influenced at the time by Roman law, which

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[736] *See* Hans Hattenhauer, Europäische Rechtsgeschichte mn. 818 (2004).

[737] Wieacker, Privatrechtsgeschichte, *supra* note 237, at 99 *et seq*., with further references.

[738] *Id.* at 140.

[739] Gerhard Wesenberg and Gunter Wesener, Neuere deutsche Privatrechtsgeschichte im Rahmen der europäischen Rechtsentwicklung 83 (3d ed. 1976).

[740] *See* 1 Helmut Coing, Europäisches Privatrecht 9 (1985).

[741] Martinek, *supra* note 238, at 92, 94; Hartstang, *supra* note 238, at 11; Koschaker, *supra* note 238.

[742] Regarding this term, *see* Coing, *infra* note 744, at 38.

provided a universal language. Roman law grew in importance to the legal systems of continental Europe and formed the basis at least for private law.[743]

Admittedly, the systematization of the *Corpus iuris* was relatively weak, especially compared to modern codifications; but Roman law could claim to regulate private law in its entirety (see chapter on comparative jurisprudence). This was also the aim of the later legal codes[744] and so Roman law was influential for the later codification movements. When the European territorial states started to codify their private law, the *Corpus iuris civilis* was used as a model.[745]

Despite the Reception, the fragmentation of law in Germany remained an issue. Judge-made law only had secondary status against the applicable specific law.[746] That said, it had great practical significance because judges were usually only required to have knowledge of judge-made law.[747] Domestic law could only be applied to the extent that the parties relied on it did and could prove it before the court;[748] it was also interpreted in light of Roman law. Therefore, the need for legal unification remained despite the Reception.[749]

Many fundamental terms and ideas of modern German legal thinking originated in the 17th and 18th centuries.[750] It was believed, for example, that law existed in general patterns from which one could, in turn, deduce universal and enduring legal principles. This so-called *Vernunftrecht* (law of reason) or natural law was linked to theological or philosophical concepts and attempted to create the basis for an orderly system of an eternally applicable law.[751] It was during this period that the concept of human rights emerged and was incorporated into the constitutions of the United States (1787) and France (1791). The law of reason existed alongside Roman law and provided basic ethical principles of law as well as technical terms. This formed the framework for modern German legal thinking and theory.

The desire to organize the existing legal material increased and was one of the major motivations in the initial wave of codification.[752] The calls for the codification of law were partially therefore the result of the law of reason (which reflected

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[743] See detailed for history of reception: Wieacker, Privatrechtsgeschichte, *supra* note 237, at 97, § 6; Wolfgang Kunkel and Martin Josef Schermaier, Römische Rechtsgeschichte 235 (13th ed. 2001).

[744] 2 Helmut Coing, Europäisches Privatrecht 7 (1989); Koschaker, *supra* note 238, at 65.

[745] *See* Wieacker, Privatrechtsgeschichte, *supra* note 237, at 101.

[746] *Id.* at 138.

[747] Coing, *supra* note 744, at 132.

[748] Wieacker, Privatrechtsgeschichte, *supra* note 237, at 139; Winfried Trusen, *Römisches und Partikuläres Recht in der Rezeptionszeit: Rechtsbewahrung und Rechtsentwicklung*, *in* FS Heinrich Lange 111. (Kurt Kuchtnke ed., 1970).

[749] Trusen, *supra* note 748, at 107ff.; Wesenberg and Wesener, *supra* note 739, at 91.

[750] Such as the distinction between objective and subjective law.

[751] *See* Klaus Luig, *Vernunftrecht*, *in* 4 Handwörterbuch der deutschen Rechtsgeschichte 781–90 (Adalbert Erler and Ekkehard Kaufmann, Eds., 1993).

[752] For the correlation between reception and codification, *see* Wilhelm Ebel, Geschichte der Gesetzgebung in Deutschland 44–45 (2d ed. 1958); Gerhard Dilcher, *Gesetzgebungswissenschaft und Naturrecht*, *in* 24 JuristenZeitung 1 (1969); Andreas Bertalan Schwarz, Rechtsgeschichte und Gegenwart 191 (1960).

natural law and the Enlightenment) towards the end of the 18th century.[753] The aim was to create, on the basis of rational principles, a new law that took as its starting point the criticism of the *Corpus iuris civilis*. Over the years, law became increasingly systematized. Samuel Pufendorf and Christian Wolff regarded law as a closed system of rules which were based on natural law and interrelated within a logical and mathematical system. (See the chapter on comparative jurisprudence.) The codifications were to represent systematic and uniform legal codes that would regulate certain legal areas exclusively, completely, and enduringly (*ausschließlich, vollständig und dauerhaft*). Ironically perhaps, it was the Englishman Jeremy Bentham who was the first to coin the term *codification* in this sense.[754]

The legal codes provided a simplified and uniform law which limited judges' discretion and thereby the danger of arbitrariness.[755] Codifications were also seen as a solution to the territorial fragmentation of law. The idea of a legislative monopoly on lawmaking was based on the idea of the sovereignty of the people or of the absolutist monarch.[756] The emergence of the modern national or territorial state formed the pre-condition for the codification movement. Such comprehensive codifications were intended to replace the existing common law completely.[757]

The three great codifications of natural law were the General Law of the Prussian State (*Preussisches Allgemeines Landrecht*) of 1794, the French *Code civil* of 1804, and the Austrian General Civil Code (*österreichisches Allgemeines Bürgerliches Gesetzbuch* or ABGB) of 1811. All three were largely based on existing legal traditions[758] and were by no means as radical as some have claimed.[759] Rather, the revolutionary element can be seen mainly in the way the law had been reorganized to ensure that the new source of law followed a systematic structure. In their own way, all three legal codes met the ideals of an enlightened legislation.

The Prussian Code did not just regulate civil law. With 19,000 legal provisions, it was of mammoth size. The perceived need to issue regulations that dealt with the smallest details meant that the ideal of brevity was discarded in favor of creating the most comprehensive codification possible. This proved to be

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[753] Wieacker, Privatrechtsgeschichte, *supra* note 237, at 322.

[754] Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 Yale J. Int'l L. 435, 476 *et seq.* (2000); Wesenberg and Wesener, *supra* note 739, at 156.

[755] Heinz Hübner, Kodifikation und Entscheidungsfreiheit des Richters in der Geschichte des Privatrechts 25 (1980); *see also* Montesquieu, De l´Esprit des Lois, bk. 9, ch. 6, 176.

[756] Wesenberg and Wesener, *supra* note 739, at 157; Hübner, *supra* note 755, at 11.

[757] Wieacker, Privatrechtsgeschichte, *supra* note 237, at 326.

[758] Code civil: "Nous avons fait [. . .] une transaction entre le droit écrit et les coûtumes, toutes les fois qu´il nous a été possible de concilier leurs dispositions, ou de les modifier les unes par les autres, sans rompre l´unité du système, et sans choquer l´esprit général," Portalis et al., *Discours préliminaire du premier projet de code civil*, *in* 1 La Législation civile, commerciale et criminelle de la France, ou Commentaire et complément des codes français 165 (Jean-Guillaume Locré de Roissy, ed., 1827); *see also* 1 Hermann Conrad, Deutsche Rechtsgeschichte: Ein Lehrbuch 162.

[759] Wesenberg and Wesener, *supra* note 739, at 167.

self-defeating.[760] The exquisite detail of the Prussian Code was intended to limit the discretion of judges, and enable the code to take priority over judge-made law. The Prussian Code was the embodiment of the claim of the absolutist ruler to a complete monopoly over law making.[761] This claim also included the right to interpret the law.[762] For interpretation of the law was akin to the making of policy judgments in the same way that law making consisted of codified policy. Because the ruler alone wished to control policy, everyone else was prohibited from interpreting his laws. It was clear to the rulers, at least, that statutory interpretation resembled statutory creation, even if the statute was "merely" a matter of private law.

The drafters of the French *Code civil* chose a different path. They were aware that it was not possible to regulate all situations in advance and that any legal code was prone to age rapidly.[763] For these reasons they emphasized the important role played by legal publications and case decisions to help the law adapt to changing social and political circumstances.[764] The drafters consequently accepted the fact that the terms of the code would be general in nature or open textured. This accounts for its remarkable textual brevity. Judges and legal academics were to be guided "by the general spirit of the law" when applying the law to individual cases.[765] The judges themselves were responsible for interpreting and developing the new code.[766] However, the tension between law making and law interpreting is seen in two somewhat contradictory provisions found in Articles 4 and 5 of the *Code civil*. Article 4 reads: "A judge who refuses to give judgment on the pretext of legislation being silent, obscure, or insufficient may be prosecuted for being guilty of a denial of justice." Article 5, on the other hand, reads: "Judges are forbidden to decide cases submitted to them by way of general and regulatory provisions." In other words, judges were to decide every case on the basis of the code, whether or not the subject matter of the case was directly regulated in the code. This style of thinking, that is, that "the law" is complete, also characterizes German thinking (see the chapter on comparative jurisprudence).

The third great codification of the epoch—the Austrian ABGB—adopted an approach similar to the *Code civil*. Here too the aim was to avoid excessive precision. The result was a short and understandable code.[767] In cases of uncertainty and gaps the judge was to refer to the comparable similar cases and related laws.[768]

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[760] Wieacker, Privatrechtsgeschichte, *supra* note 237, at 332.

[761] Hermann Conrad, Richter und Gesetz im Übergang vom Absolutismus zum Verfassungsstaat 10 (1971).

[762] *Id.* at 11.

[763] Portalis et al., *supra* note 758, at 156.

[764] *Id.*; Coing, *supra* note 744, at 29.

[765] Portalis et al., *supra* note 758, at 156.

[766] Hübner, *supra* note 755, at 42.

[767] Wieacker, Privatrechtsgeschichte, *supra* note 237, at 338; Franz von Zeiller, *Vortrag zur Einführung in das bürgerliche Gesetzbuch*, *in* 2 Der Ur-Entwurf und die Beratungsprotokolle des österreichischen Allgemeinen bürgerlichen Gesetzbuches 473 (Julius Ofner, ed., 1889).

[768] See Allgemeines Bürgerliches Gesetzbuch (ABGB) § 7; Hübner, *supra* note 755, at 33.

Any residual uncertainties were to be eliminated by natural legal principles, by analogy, and by reference to the underlying natural law.

Despite the decision not to regulate specific situations in detail, both the *Code civil* and the ABGB exemplify the exclusive character of a codification but only in the sense that they established a uniform and primary source of law.[769] They both rejected the sovereignty of the absolute monarch (or the public in the case of the French code) over the interpretation of law. Perhaps as a consequence, judges exerted increasing influence over the interpretation and development of the law.[770]

At the end of the 19th century, the codification movement temporarily stalled. Despite codifying the law according to the law of reason, legal fragmentation was still a problem in Germany, especially now that individual states had their own codifications. Accordingly, Prussia had the *Allgemeines Landrecht*, Bavaria the *Codex Maximilianeus Bavaricus civilis*, the southern territories applied the Austrian code, and western territories the French *Code civil*. There was still the need for a uniform code, and this need was accompanied by the growing desire for national unity.[771] At the same time, the territorial states wished to retain the sovereignty of their private law. Indeed, both of these desires—unity, but not at the expense of abandoning existing private law—characterized these times.[772] The revolutions of 1848 included calls for a uniform German codification.[773] However, conservative forces rallied support for the retention of the old individual laws and the *ius commune* amid claims that a uniform codification was necessary in order to protect the emerging national identity.

During this period, the historical school of law became increasingly dominant. During the first half of the 19th century, Friedrich Carl von Savigny (1779–1861) was its most prominent representative. Savigny regarded the law as forming part of national and social culture—the *Volksgeist*—which was characterized by historical continuity. As a result, it was claimed that law could only be understood within the context of a country's historical development. At the same time, however, further development was considered possible and, in this respect, legal academia and the courts were to play a decisive role.

The Napoleonic Wars galvanized the small, German territorial states and inspired the German nationalist movement. Anton Friedrich Justus Thibaut (1772–1840) was influenced by this and convinced by the idea that a common legal code for all German states would facilitate and improve both trade and the predictability of the law. He printed a pamphlet in 1814 which demanded the

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[769] von Zeiller, *supra* note 767, at 469.

[770] For more details see: Hübner, *supra* note 755, at 30.

[771] *See* Michael John, Politics and the Law in Late Nineteenth-Century Germany: The Origins of the Civil Code 15 (1989).

[772] Franz Wieacker, *Aufstieg, Blüte und Krisis der Kodifikationsidee*, *in* Festschrift für 44 (Gustav Boehmer, ed., 1954).

[773] *See* Frankfurt Const. of 1849 [Paulskirchenverfassung], art. 64.

creation of a general Civil Code (*Bürgerliches Gesetzbuch*) for all German states. Until this time, Germany was characterized by a multitude of different customary laws, statutes, and laws which did not display any dominant uniformity.

Savigny rejected codification as an abstraction which bore no relation to reality.[774] His essay *Vom Beruf unserer Zeit für Gesetzgebung und Wissenschaft* of 1814 took issue with Thibaut's view. This dispute about codification is often referred to as the *Kodifikationsstreit*. As far as Savigny was concerned, law was a natural cultural asset which could not be taken out of its authors, namely the people, by means of codification. He opposed the view that general laws of reason could form the basis for creating universally applicable, abstract rules which were isolated from the cultural peculiarities of the people (*Volksgeist*). He believed that an understanding of legal culture was particularly dependent on the historical research of law. He declared his opposition to both the law of reason (*Vernunftrecht*) and positivistic law (*Gesetzespositivismus*) and saw the task of legal academia instead in investigating and applying the legal material which formed part of the people's heritage. Historical development assumed particular importance in this regard.

Savigny and his followers believed that law had an inherent, logical, and reasonable system within which the individual areas of law could be derived logically from others. For Savigny, tradition, organized thought, popularity, and theory converged. Time and again he made reference to the *Corpus iuris civilis* because he believed it to be crucially important to identify the origin of law and, at the same time, to isolate the differences which had resulted from altered living conditions. For Savigny, it was Roman law, ironically, which represented the consciousness of the people whose essence had been distilled by the historical school of thought. His opponents accused him of betraying both the people and reality. This dispute gave rise to the historical school of thought whose aim was to isolate the specifically German roots of law. However, Savigny's theoretical and historical achievements are undisputed, and are still influential today (see the chapter on statutes).[775]

Even though the dispute between Savigny and Thibaut was academic in the sense that it merely postponed the codification movement, it was nevertheless of importance to the direction taken by the codification movement in Germany. The content and style of the first German code were characterized by the Pandectist school of academia, which was based on Savigny's historical school.[776] The defining characteristics of Pandectism were increased formalism and strict attention to terminology (*Begriffsjurisprudenz*). Legal terms were to follow a logical structure and interrelationship. The leading proponent of this school was Bernhard

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[774] Gregor Albers, *Wer war eigentlich . . . Friedrich Carl von Savigny?* Ad Legendum 237 (2010).

[775] For more details on Savigny, *see* 4 Aldabert Erler & Ekkehard Kaufmann, Handwörterbuch zur deutschen Rechtsgeschichte mn. 1313–23 (1990); Rudolf Gmür, Savigny und die Entwicklung der Rechtswissenschaft (1962); Erik Wolf, Grosse Rechtsdenker der deutschen Geistesgeschichte 467–542 (4th ed. 1963).

[776] Konrad Zweigert & Hein Kötz, Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts 143 (3d ed. 1996).

Windscheid, who believed that the intent of the legislator and the terminologically precise application of law were more important than the judge's own sense of justice.[777]

The preparatory work on a German civil code followed directly on from the last legislative work of the Federation. At the time, the Empire's jurisdiction over civil law was not in the hands of the German Federation. This was changed by the Imperial Law (*Reichsgesetz*) of 20 December 1873, which provided the basis for enacting a national legal code. First, a Preliminary Commission consisting of five practitioners was set up in order to plan the work ahead.[778] The proposals of the Preliminary Commission were acted on by the First Commission, which was convened to produce the first draft of the civil code after reviewing the "practicability, inner truth, and consistency" of German private law. Work on the codification was mainly seen as technical rather than political in nature. The legal material was to be unified and organized systematically. The First Commission's chairman was Judge Pape, the president of the Superior Commercial Court of the Empire (*Reichsoberhandelsgericht*), which existed up to 1878. The commission included seven other practitioners and academics, including Bernhard Windscheid, who exercised considerable influence on the spirit and form of the first draft.

In 1887 the first draft consisting of five volumes (*Motiven*) was presented. It provoked a virtual storm of criticism. Over 600 comments were received, criticizing, among other things, the draft's wooden language, its over-frequent reference to other laws, and its lack of "social grace" and any sense of reality. Despite this criticism, the draft proved useful as a basis for further work. 1890 saw the convening of the Second Commission, which consisted of ten permanent and 12 non-permanent members, the latter drawn primarily from business circles. After five years of work, the second draft was published, complete with reports of the meetings, and presented to the Federal Council. Following minor changes it was submitted in 1896 to the Imperial Parliament (*Reichstag*) in the form of a third draft together with a report of the Imperial Ministry of Justice (*Reichsjustizamt*). On 18 August 1896, the code was officially approved. It entered into force on the first day of the new century, 1 January 1900.

When appraising the code, one must admit that the work does indeed display a disciplined structure, but it is also obvious that it is, for better or for worse, largely the product of legal practitioners. This reflects the fact that the members of both commissions were mainly senior judges and ministerial officials who were primarily influenced by historical, Pandectist, formalistic thinking.[779] The few lay people in the Second Commission (including a merchant, a mining advisor,

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[777] Bernhard Windscheid, Die geschichtliche Schule in der Rechtswissenschaft (1878); *see also* Bernhard Windscheid, Gesammelte Reden und Abhandlungen (1904).

[778] Wieacker, Privatrechtsgeschichte, *supra* note 237, at 469.

[779] *See* Wieacker, Privatrechtsgeschichte, *supra* note 237, at 471.

forestry commissioner, and bank director), who were supposed to bring practical experience to bear, ended up bowing to the expertise of the specialists.

The usual characterizations and descriptions of the German Civil Code—the high degree of abstraction and the strict systematic arrangement—are in stark contrast to the legal codes of natural law.[780] The founding fathers of the German Civil Code were obviously influenced by the ideal of a comprehensive codification: the abstract (that is, broad or open textured), systematic organization was intended to rule out the possibility of there being gaps in the law.[781] The high degree of terminological precision that is attempted in the German Civil Code indicates that the codification was aimed at learned and expert jurists rather than at the people. As a result, the code did not achieve the popular success of the French *Code civil*.[782]

When it entered into force, the German Civil Code was immediately put to the test. Within a short time, gaps in the law were discovered. General clauses cried out for judicial definition. As the 20th century wore on, new types of contracts, such as leasing, became popular. Societal mores changed, especially in family law. In confronting these and other issues, the German Civil Code revealed itself for the most part to constitute a mere codification of existing case law that did not fundamentally alter case law post 1900.[783] Judges continued to decide cases as they had done in the past, reinforcing the image of old wine in new bottles.[784]

Even if the German Civil Code succeeded in bringing about legal unity, the question soon arose as to who was best qualified to deal with gaps in the law. In particular, it was unclear to many whether it was even possible to bind judges strictly to the law or whether, on the other hand, emotional, irrational, and intuitive features might not be an unavoidable or even necessary element involved in the application of the law. Because interpretations of the law could not be controlled by the legislator, it was impossible to expect that judges and administrative agencies would adhere strictly to the newly codified law. Further, the law was so broad in so many areas that it literally invited the judiciary to give it substance. The short-lived Free Law School (*Freirechtsschule*) of legal thought, particularly Kantorowicz and Isay, pursued these ideas. They represented a parallel development to the school of legal realism in American legal theory.[785]

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[780] *Id.* at 475.

[781] *Id.*

[782] Rudolf Gmür, Das schweizerische Zivilgesetzbuch verglichen mit dem deutschen Bürgerlichen Gesetzbuch 27 (1965); Rolf Stürner, *Der hundertste Geburtstag des BGB-nationale Kodifikation im Greisenalter*, JuristenZeitung (JZ) 741–42 (1997).

[783] For more details, *see* 1 Mathias Schmoeckl et al., Historisch-kritischer Kommentar zum BGB (2003); 2 Mathias Schmoeckl et al., Historisch-kritischer Kommentar zum BGB 2006.

[784] *See* Reinhard Zimmermann, The New German Law of Obligations: Historical and Comparative perspectives 24 (2005).

[785] James Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 Va. L. Rev. 399, 399 (1987).

Isay was convinced that judges could only make their decisions intuitively at first and then they would refer to the statute as a second step to justify their decisions. However, the great achievement of the Free Law School of thought was to have underlined the importance of the judge's role. Ultimately, the stability and security of the constitutional state and legal system depend on whether the judge affirms the fundamental values of the legal order or pursues differing personal ideologies.[786]

Even today, statutory interpretation is strongly influenced by the school of interest jurisprudence (*Interessenjurisprudenz*), according to which real life interests dictate the interpretation of the statute. Most popular today in Germany is the "teleological" method of statutory interpretation, based on the policies and goals inherent in the statute (*Wertungsjurisprudenz*). Today, it seems that judges have the last word on what the legislation really means.

2. ENGLAND AND WALES

At the time of the Norman Conquest of England, no distinction was made between legislation and case law. All royal proclamations, whether made personally by the king or on his behalf, whether made in a general way or to resolve a dispute, were considered to be the law. Law consisted of taxes, the resolution of disputes, and the punishment of criminals. The law as stated by the judges was, for the most part, customary law that was applied orally to particular circumstances on a case by case basis. Law of general application which had been created by a higher authority was applied by the ecclesiastical courts, but not by the king's courts. While the king's courts were charged to decide disputes "according to law," those courts were forced in most early cases to use custom and reason as their guides.

The importance of what we today refer to as statutory law grew with the English Parliament, whose early members consisted of the nobility and ecclesiastical advisors of the kings. The representatives of the (then still Catholic) church exercised important influence because they were powerful landowners and because the church and ecclesiastical courts had wide-ranging jurisdiction over, for example, matrimonial matters, wills and probate, usury, and contracts supported by oath. The king needed this circle of advisors—which in later centuries (1544) became the House of Lords—in order to govern the country because he had little direct control over his kingdom. There was, for example, no police force or administrative authority. Even in the new feudal system the king had to rely on the council and win the trust of the most influential men in society in order to enforce his authority.

Under the early Norman kings, the Great Councils (1275: *conseil grete*) were only convened when needed, for example, if important matters, primarily taxes,

[786] *See also* Bernd Rüthers, Ideologie und Recht im Systemwechsel: ein Beitrag zur Ideologieanfälligkeit geistiger Berufe (1992).

had to be discussed. It was only after the Magna Carta (1215) that the Councils were regularly convened. In the 13th century, lower ranking knights and representatives of counties and municipalities were invited to attend a parliament (*parlement* derives from the French and Latin terms for "talk" and "discuss"). The precursor to the House of Commons emerged. It met for the first time in 1341 as a body separate from the nobility and clerics.

The parliament did not only regard itself as a consultative organ but increasingly as a means of controlling the king's power. Parliament was convened for the first time without the consent of the king in 1264. The parliamentary agenda at that time included taxes, wars, and sometimes commercial matters. There was no legislation in the modern sense of the word. Rather, individual rulings and statutes were issued which regulated individual aspects of commerce, for example, the Importation of Wine Act 1353, or to correct certain injustices in society. Examples of the latter are the Damages on Writ Dower Act and the Widow's Bequest of Corn on her Land Act, both issued in 1235 to protect the interests of women.

The number of statutes increased continuously and affected almost every aspect of society at the time. There were literally hundreds of such laws concerning weights and measures, rights to forests, trees in church yards, sentences of imprisonment, juries, Jews, the currency, leasehold arrangements, possession of weapons, taxes, military service, the quality of goods, bigamy, children born abroad, customs, birds of prey, travelers, beggars, dogs, fish, wagers, and court procedures—and all of this in the 14th century! These statutes were not usually generally applicable but directed at certain people. Their style and content reflected more court judgments than modern statutes.

This practice was in consonance with the understanding of the legislative function at the time, namely as an extension of the common law by the senior judges who also sat in parliament. People came before parliament with their applications and disputes in order to hear a judgment—just as they did before the king's courts. And, in one respect, the parliament was preferable to the courts: it was also, with the consent (or at least without the objection) of the king, the highest court of the land whose rulings also bound the judges.

Over the centuries, the number of statutes steadily grew. In 1593, Francis Bacon—a lawyer and parliamentarian—advocated in parliament a reduction in the number of statutes "for the people cannot follow them nor the lawyer adequately understand them." Four years later a parliamentary committee began to tackle the issue of legislative reform but without success.[787]

In contrast to the exclusive, complete, and enduring (*ausschließlich, vollständig und dauerhaft*) German codifications, English statutes adopt a very different style. As a rule, they are corrective rather than preventative, problem-oriented, specific in nature, detailed, and reminiscent of German regulations (*Verordnungen*).

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[787] Baker, *supra* note 270, at 218.

In accordance with the acknowledgement of court judgments as a source of law, one also finds statutes which amend or "overrule" case law. One example of such "co-operative" legislation is the United Kingdom Law Reform (Year and a Day Rule) Act 1996, Chapter 19, section 1 which abolishes a long-standing common-law rule:

> The rule known as the year-and-a-day rule (that is, the rule that, for the purposes of offenses involving death and of suicide, an act or omission is conclusively presumed not to have caused a person's death if more than a year and a day elapsed before he died) is abolished for all purposes.

Another example is provided by section 9 of the Law of Property (Miscellaneous Provisions) Act 1989, according to which the rule in *Bain v. Fothergill* was abolished in relation to contracts entered into following the effective date of the statute. In this example, the statute expressly refers to the case law itself. This example, which is unheard of in Germany, is based on an understanding of the law as something that arises from various sources including statutes and case decisions. This is because, in the English tradition, "In the beginning was common law," that is, judge-made law. Although statutes in contravention of the common law are no longer construed narrowly by the courts, it is still necessary for legislation to make clear to the courts that they are not only expanding the reach of law, but that they are also to a certain extent displacing the common law. Accordingly, parliament must tell the judges exactly what is expected of them. Failure to do so means that the courts will likely fall back on their common law.

It is no wonder that common law countries probably have more statute law (measured in wordiness) than those in continental Europe. That is to say, there is a tendency to limit the scope of application of the common law with the result that more legislative activity is required to extend the common law and to fill the gaps. Although subsequent statutes have increasingly suppressed the common law, it has never been abolished, even though parliament possesses the power to do so.

These phenomena can be explained by the historical development of common law. The early common law developed relatively quickly into a detailed, mature system. Until the last century, broad statutes were relatively rare. By and large, statutes exclusively regulated special problem areas on an ad hoc basis. It was the judge's role, not parliament's, to create general principles. Universities had little influence since lawyers and judges did not even have to have a university education. Even when today's statute law and related administrative law (that is, delegated legislation or administrative law) is of overriding importance for citizens and the economy, the tradition of the common law—which reaches back over almost a millennium—accounts for the fact that lawyers are still apt to look for the applicable law in the decisions of courts rather than in statute law.

3. SWEDEN

In the early Middle Ages, Sweden had approximately 500,000 inhabitants who lived predominantly in rural areas. Wealth was measured in terms of the land one owned, and wealthy nobles ruled their estates with little external control. The German Hanseatic League was quite influential in the cities, however. When in 1523 Gustav Eriksson was elected king by the Swedish parliament (which at that time consisted exclusively of nobility), only around five percent of the Swedish population lived in the cities. King Gustav, who is a controversial figure even today, placed the Catholic Church under state control, nationalizing of ecclesiastical properties in the process. As head of the church, the king was also entitled to a large proportion of church revenues. The only university in Sweden at that time was at Uppsala. The university suffered particularly under these reforms because it was (still) under the strong influence of the Church.

To counteract the influences and privileges of the German Hanseatic League, the Swedish king joined with the Danish King Christian III in a military campaign for the complete independence of the Swedish ports from foreign influence. Under King Gustav, the Swedish parliament first included all four estates—nobility, clergy, burghers, and peasants. In contrast to his predecessors, who had all, like himself, been elected, King Gustav (later known as Gustav Vasa) started the Vasa Dynasty.[788]

Under Gustav and his successor dynasties, the state, its administration, and legislative power grew until the constitution entered into force in 1809. The constitution provided for the separation of powers between the king and the parliament (which at the time still consisted of the four estates) and recognized the independence of the judiciary and public administration.[789] Statutes now regulated all societal groups, who enjoyed different rights dependent on their estate or station in society. For example, only the nobility had the right to own certain types of property, and they also enjoyed the privilege of being exempt from many different taxes.[790] Agriculture, industry, and commerce were controlled in order to ensure certain quality standards and to prevent the risk of overproduction. The density of legislation increased with the creation of different authorities and with their related courts, which exercised jurisdiction regionally and at the national level. At least one of the reasons why Roman law was never received in Sweden was this strong tradition of national law.[791]

This diverse, detailed regulation and case law led to a situation where the ordinary courts were eventually overloaded and sometimes decided differently

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[788] Strömholm, *supra* note 279, at 31.

[789] Stig Jägerskiöld, Administrative Law: An Introduction to Swedish Law 79 (1988).

[790] A. F. Upton, *The Riksdag of 1680 and the Establishment of Royal Absolutism in Sweden*, CII Eng. Hist. Rev. 285 (1987).

[791] Åke Malmström, *Sweden*, *in* 1 International Encyclopedia of Comparative Law, 157, 162 (Viktor Knapp, ed., 1975).

from the specialist courts. To rectify this situation, a statute was passed in 1734 providing that regulations, administrative acts, and judgments of the specialist courts, lawfully enacted or passed, were to be considered binding. The creation of the Administrative Court of His Majesty the King (*Kungliga Majestäts regeringsrätt*) in 1909 did not alter this basic principle a great deal since the powers of this court hierarchy were narrowly defined. None of the courts had general jurisdiction; rather, their jurisdiction was defined in detail. The Administrative Court had jurisdiction over tax matters as well as over appeals against decisions of the municipalities. In addition, it had jurisdiction over construction planning and regulation as well as disputes involving social justice. It was only in 1946, as a result of the scandal caused by the Carlsson case, that the court's jurisdiction was expanded.

The facts in Carlsson were as follows: the businessman E.A. Carlsson had to pay a hefty tax levied on sweets manufacturers following a nonreviewable decision of the tax office. The latter had decided that the packaging of sweets in paper bags as decoration for a Christmas tree amounted to a processing of the sweets according to the Act on the Manufacturing of Sweets, and was therefore subject to the tax on sweets.[792] Because the businessman had not submitted any tax declaration in relation to the manufacture of sweets which he had sold, he was accused of tax evasion before the ordinary courts. In the proceedings which went up to the Supreme Court (*Högsta domstolen*), the plaintiff won at every instance because the courts agreed that merely packaging sweets in bags did not constitute manufacturing of the sweets for purposes of the tax law.[793] When the plaintiff demanded the reimbursement of his tax payments, the judges of the Supreme Court nevertheless held that the Act of 1734 prohibited such repayment because it declared administrative acts to be lawful and binding.[794]

Although a royal commission was constituted in 1946 to reform the administrative courts, it was not until 1971 that the Act on Administrative Proceedings was enacted. Although this act did not extend the powers of the administrative courts to all areas, in 1965 regional courts (*länsrätt*, renamed *förvaltningsrätt* in 2010) had been set up, and their jurisdiction included administrative acts and decisions of the government, police, and the municipalities[795] In 1982, the European Court of Human Rights ruled that the lack of a review procedure in relation to a series of administrative acts effectively breached Article 6 of the European Human Rights Convention, which guarantees the right to a fair trial. Owing to this, expanded jurisdiction of the courts was finally introduced in 1998.

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[792] 39 Regeringsrättens Årsbok 109 (1946).

[793] 83 Nytt juridiskt arkiv 384 (1948).

[794] Jägerskiöld, *supra* note 789, at. 86; Rune Lavin, Domstol och administrativ myndighet (1972).

[795] Jägerskiöld, Stig, *supra* note 789, at 90.

4. THE UNITED STATES OF AMERICA

One interesting development in the United States that was not seen in England and Wales was the codification movement of the 19th century. Codification means more than simply passing statutes; there were thousands if not tens of thousands of statutes in effect during the life of the Englishman Jeremy Bentham (1748–1832), who, as mentioned above, is credited with coining the term codification. At a minimum, codification implies a collection of all statutes in a particular subject matter area. At a maximum, it means the total replacement of judge-made law with statute law.

The American reformers of the 19th century wanted to do the latter: to create a system of detailed statutes that would clearly regulate every aspect of legal life. In such a system, the law would be so clear that there would be little need to go to court. The more naïve reformers believed that, if a litigant did choose to go to court, the judge would merely remind him or her of what the code said on the subject of the dispute. If the codification were expertly drafted, there would be little need for statutory interpretation, and no need for judges to "make up law as they went along," which is what people perceived that they were doing with their common law.[796]

David Dudley Field (1805–1894), who was a prominent New York lawyer, spent much of his life advocating the codification of all branches of the law. He drafted a Code of Civil Procedure which was adopted by the New York Legislature in 1848. The Field Code, as it was known, abolished the distinction between law and equity in terms of pleading, as well as the common law forms of action. Field's Code of Civil Procedure, or some form of it, was adopted in 24 states.[797]

Field also drafted four other codes: a criminal procedure code, a penal code, a political code, and a civil code. His penal code was adopted by his home state of New York in 1881 and in 17 other states. However, New York refused to adopt his civil code. According to Rodolfo Batiza, New York critics claimed that the code was unscientific in structure, and inaccurate as a presentation of existing law.[798]

The Field Civil Code is divided into four divisions: persons; property; obligations; and general provisions. The first three divisions are the same as the *Code civil* from France and Louisiana. Batiza contends that, while most provisions of the Field Code stem from the common law, there are substantial civil law influences that most lawyers are not aware of. His research shows that Field often borrowed in particular from the Louisiana Civil Code, which had been enacted in 1808. That Code was drafted basically using French and Spanish models. Of the 2,034 provisions of Field's Civil Code, Batiza found that over 700 were traceable to common law court decisions. The next largest segment was based on common law

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[796] Kermit L. Hall et al., American Legal History: Cases and Materials 316 (2d ed. 1996).

[797] *Id.* at 322.

[798] Rodolfo Batiza, *Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code*, 60 Tul. L. Rev. 799, 799 (1986).

statutes. Thereafter followed well-known commentaries, which themselves often employed continental European sources. Finally, about 150 provisions were borrowed directly from Louisiana and continental sources.

The only states where Field's Civil Code was adopted were in the West, where there was little access to other sources of law. Field's brother Stephen J. Field, who was a judge on the Supreme Court of California at the time (and later was appointed to the U.S. Supreme Court), was instrumental in convincing Californians to adopt all five of his brother's codes. Field's Civil Code was also enacted in Montana, North Dakota, and South Dakota.

Field was apparently worried that his civil code, when enacted, might not be embraced by lawyers and judges, for he added a provision—section 4—near the beginning of the code, reminding them that the courts had abandoned the common law rule of strict construction of statutes in derogation of the common law:

> The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.

Field's concern was warranted; for the Civil Code was never interpreted by its users in California, and in other states which enacted it, in the way that its author had intended. Due in large measure to a series of articles written by a professor of law at the University of California, Berkeley, the judges and lawyers of California adopted the view that the Civil Code constituted a snapshot of the common law in 1872, the year in which the Code was enacted in California. Accordingly, the courts of California have, according to critics, sometimes even ignored express provisions of the Civil Code.

Yet it is not clear from the Civil Code where the Code ends and the common law begins. Recall that section 4 states that the Code (only) establishes the law "respecting the subjects to which it relates," implying that other statutes and the common law establish the law respecting other subjects. This implication is buttressed by section 5 of the California Civil Code:

> The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments.
>
> This provision gives at least some textual support to the "snap shot" argument mentioned above. Further, section 22.2, added later, specifically provides that the common law shall continue to apply:
>
> The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.

On other occasions, the Legislature of the State of California has acted to negate decisions of the California courts which "liberally construed" the provisions of

the California Civil Code "with a view to effect its objects and to promote justice." For example, during the 1970s, the California Supreme Court unanimously held that purveyors of alcoholic beverages who violate section 25602 of the Business and Professions Code by selling alcoholic beverages "to any obviously intoxicated person" can be held liable for injuries that the person subsequently causes to third persons as a proximate result. In doing so, the California Supreme Court was construing section 1714, which reads:

> Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. . . .

In response to pleas from the liquor and insurance industries, the California Legislature amended section 1724 by inserting a new subsection (b):

> It is the intent of the Legislature to abrogate the holdings in cases such as Vesely v. Sager (1971) 5 Cal.3d 153, Bernhard v. Harrah's Club (1976) 16 Cal.3d 313, and Coulter v. Superior Court (1978) 21 Cal. 3d 144 and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.

B. Legal Sources and Hierarchies

Legal rules are understood to spring from various sources of law. For example, they may be enacted by legislatures at different levels, emanate from supranational agreements, arise by custom, or be promulgated by administrative agencies. However, in Germany, unlike in some other jurisdictions, the sources of law are encompassed by a doctrine which aims to give order to these sources and thereby to predetermine which of two conflicting rules should have precedence.[799] In this respect, the doctrine serves to classify legal rules, describe their sources, and create a systematic framework.

In a broad sense, legal sources can include all those factors which influence the articulation, selection, and application of statements which tend to generate order in society. Thus, even the conscience of a single person might be regarded as a source of law. However, the term *legal source* is defined much more narrowly, for example, in Germany. There it refers only to sources which produce binding legal

[799] Bernd Rüthers & Christian Fischer, Rechtstheorie: Begriff, Geltung und Anwendung des Rechts mn. 217 (5th ed. 2010).

norms.[800] Although there are problems with such a narrow definition, it will be adopted here because it is necessary to have a common starting point of comparison of the points of view of the four jurisdictions that are the subject of this study: Germany, England and Wales, Sweden, and the United States.

Before beginning the more detailed comparison, it would be useful to return to the subject of the chapter on comparative jurisprudence and rehearse three of the philosophies of or approaches to law which were examined there—legal positivism, natural law, and legal realism—to ascertain whether one's philosophy of or approach to the law might have an effect on one's understanding of legal sources and in turn on if and how one would go about classifying legal sources into a hierarchy. The discussion will start with positivism before moving on to natural law and legal realism.

If a hypothetical legal positivist were German, she might logically start with the German constitution, the Basic Law. This is so because most legal positivists associate law with the state. The state in Germany is the Federal Republic of Germany. While European and international law are recognized as valid in Germany, it is Germany which does the recognizing; ergo, Germany is the ultimate law giver in the pedigree of any norm which finds application within Germany. Article 20 (3) of the Basic Law states: "The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice (*Gesetz und Recht*)." The legal positivist therefore views the hierarchy of legal sources as follows: at the apex is the constitutional law, and then would follow European law and international law (at least in Germany, as discussed below). Below these are other categories of norms which are created by entities which owe their existence to a compulsory or discretionary norm originating from the apparatus of the state: regulations, ordinances (by-laws), collective bargaining agreements, customary law, and perhaps case law. The discussion below also addresses the question of whether expert opinion or the "majority view" (*herrschende Meinung*) of academics and other experts on any particular legal matter can and should be considered a source of law in Germany.

Unlike legal positivists, natural lawyers attribute greatest significance to overriding principles. Legal positivists omit overriding principles from their hierarchy altogether; which makes it all the more striking that natural lawyers place such principles at the top of their hierarchy. This view is shared by one of the leading natural lawyers, Ronald Dworkin, who opines that law is based on moral principles.[801]

At the second rung of the hierarchy of a typical natural lawyer one might find international law. Only when one reaches constitutional law does the hierarchy begin to correlate with that of the legal positivists. The reason why international law takes second place to overriding principles is found in Article 38 (1) of the Statute of the International Court of Justice (ICJ), which essentially defines what

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[800] *Id.*

[801] Ronald Dworkin, Law's Empire (9th ed. 1986).

international law consists of, at least for purposes of resolving disputes before the ICJ. While Article 38 (1) does recognize "the general principles of law recognized by civilized nations" as a primary source of international law, it also lists two others: international conventions and international custom.[802] These two additional sources might contradict overriding moral principles in any particular case. To the natural lawyer, then, international law with its three primary sources must be inferior in statute to the natural law, which has only one.

The hierarchy of legal sources adopted by a hypothetical legal realist might be described as follows: the legal realist might adopt the hierarchy of the natural lawyers, but place case law at its apex. A hypothetical legal realist might regard case law as even more important than the naturalist's overriding principles of law.

The self-described legal realist Alf Niels Christian Ross (1899–1979) stressed the importance of case law by dividing the sources of law into three categories: sources of legal knowledge; sources of legal values; and sources of legal creation that embrace the ideas and behavior of those affected.[803] Oliver Wendell Holmes (1841–1935) expressed himself even more clearly when he characterized "the predictions about how the court will actually decide" as law. Karl Llewellyn (1893–1962) agreed, stating that law was "what the officials (involved in law) do in disputes."

On several occasions, the German Federal Constitutional Court (FCC) has recognized the Basic Law as being the most important and overriding source of law. According to a hypothetical legal realist, the fact that the German FCC—as a court—has the power to decide this issue proves that case law must have an ever higher status than the Basic Law. In addition, the fact that the FCC has denied the primacy of European Community (EC) law (see below) only serves to confirm the power of case law and its position at the pinnacle of the hierarchy of legal sources. The first part of Article 38 (1) of the Statute of the ICJ also stresses the importance of the judiciary for international law by stipulating that the ICJ, and not the United Nations, has the task of deciding disputes submitted to it under international law.

Numerous examples can be cited to illustrate the contention of legal realists that the judiciary is superior to statutory law in that judges can mould and restrict statutory law to their liking. One example illustrating the sovereignty of the judiciary, at least as perceived by our hypothetical legal realist, is the German criminal prohibition against coercion (*Nötigung*), which according to section 240 of the Criminal Code requires an element of force. For years the Federal Constitutional Court allowed prosecutions under section 240 of people who employed intimidation and other psychological force before the court decided

[802] Article 38(1) also lists "subsidiary means": "subject to the provisions of art. 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

[803] Alf Ross, On Law and Justice (1959).

that "force" in the statute really meant "physical force." Similarly, section 50 (1) of the German Civil Procedure Law (*Zivilprozessordnung*) states explicitly that only those associations having legal capacity to contract also enjoy standing to sue in court, yet the Federal Supreme Court (*Bundesgerichtshof*) construes the statute to permit labor unions, who have no legal capacity to contract, to participate actively in judicial proceedings. Section 253(1) of the German Civil Code stipulates, "Money may be demanded in compensation for any injury that is not pecuniary loss only in the cases stipulated by law." No statute stipulates that one may demand compensation for slander, libel, or other nonpecuniary injury to one's reputation (*Ehrverletzung*), yet the Federal Supreme Court has allowed recovery in such cases since 1958.[804] The law on industrial disputes in Germany can only be found in the decisions of the Federal Labor Court, the Federal Supreme Court, and the FCC. The annual report of the FCC in 1966 states the matter succinctly: "Jurists at least must agree that the applicable law is a mixture of statutory law and case law and the law applied by the court has never correlated with the law issued by the legislator. What is debatable is not the existence but the degree of case law." From these examples, as well as many others, the legal realist would arrive at the conclusion that the modern democratic legal state is, in fact, a "judocracy" (*Richterstaat*).

However, the legal realists' legal hierarchy is not free from criticism. They have to admit that their theory infringes the principle of democracy. In addition, their narrow definition of law completely excludes extra-judicial activities. Legal realists also underestimate the cooperation that exists between the legislator and the judiciary. Ultimately, one must ask whether the view of legal realists, at least as presented here, does indeed reflect reality.

1. GERMANY

In Germany, introductory books on the law as well as academic treatises contain a hierarchical list of sources of law. They vary, if at all, only on the lower rungs of the hierarchy, as noted below.

a. Constitutional Law

Constitutional law is regarded as the supreme source of law and describes the fundamental structure of the state (for example, in Germany, the Basic Law). In this respect, the binding effect of the Basic Law for the legislature, executive, and judiciary emanates from Article 1 (3) and Art 20 (3) of the Basic Law. These two articles are protected under the guarantee against amendment contained in Article 79 (3) of the Basic Law.

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[804] Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] Feb. 14, 1958, Neue Juristische Wochenschrift (NJW) 827, 1958 (Ger.).

b. European Law

As far as sources of European law are concerned, a distinction must be drawn between primary and secondary law. Since the entry into force of the Lisbon Treaty, the former consists of the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The Treaty on the European Atomic Community co-exists as a separate category of law. Primary law mostly contains rules on the organization of the European institutions and such instruments that grant the power to issue secondary law. Primary law sometimes also contains self-executing rules.

The Lisbon Treaty places secondary law on a new legal footing with the result that today it is no longer found in Article 249 TEU but Article 288 TFEU. Secondary law consists of regulations (which are directly applicable and binding on the member states), directives (binding in terms of the aim to be attained but which leave the form and means to the member states themselves), decisions (addressed to a particular entity on whom they are binding), opinions, and recommendations. The latter are not binding.

Initially it was unclear how European law would relate to national German law. In 1964, the European Court of Justice (ECJ), now the Court of Justice of the European Union (CJEU), ruled for the first time in the *Flaminio Costa v. ENEL*[805] that the law of the European Community, now the European Union, took precedence over national law. The German Federal Constitutional Court limited the precedence of European law in terms of the German federal constitution on the basis of Article 23 (1) sentence 3 in connection with Article 79 (3) of the Basic Law.[806] Accordingly, European law is unlawful if it infringes the principles laid down in Articles 1 (human dignity) and 20 (basic institutional principles) of the Basic Law.

c. International Law

The sources of international law for purposes of resolving disputes before the ICJ are, as stated above, laid down in Article 38 (1) of the Statute of the ICJ. These are international conventions, international customary law, generally recognized principles, and, as subsidiary sources, judicial decisions and the teachings of legal scholars.

The general rules of international law are mentioned in Article 25 of the Basic Law, which provides: "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory." According to the text, at least, of Article 25, the general rules of international law take precedence over

[805] (1964) ECR 585 (6/64).

[806] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 22 October 1986, 2 BvR 197/83 (Ger.).

all laws, including federal laws. However, Article 59 (2) of the Basic Law, which applies to international conventions, reads:

> Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis.

Because Germany adopts a dualist approach to international law, international treaty law is not considered to be binding unless it is incorporated into domestic law by implementing legislation. As a result, rules of international treaty law are only valid when implemented; and when they are implemented, they operate at the level of statute law.

d. Statutory Law

The main characteristic of statutes is their general and abstract nature (the opposite would be the classical administrative act, which refers to an individual case and actual circumstances). Accordingly, statutes apply to a whole range of real-life situations and regulate them comprehensively or at least generally. A distinction is made between formal and substantive law. The former represents a legal act which has arisen within the framework of a formal legislative process. Regulations and ordinances (by-laws) are therefore not formal law. By contrast, substantive law need not be the product of a formal process—despite the fact that it too displays a general and abstract character. Statutes, regulations, ordinances (by-laws) as well as customary law also are components of substantive law. However, it is important to note that formal law takes priority over these other substantive laws.

e. Legal Regulations

Below statutory law are the legal regulations which are also of general and abstract character. The difference between these provisions and a formal statute lies in the way the legal regulation is created (as described above). Regulations are issued by the executive on the basis of a delegation in a formal statute. The purpose of such a delegation is to reduce the legislator's workload. Attaining this aim entails an intentional infringement of the separation of powers principle under (Article 20 (2) 2 of the Basic Law), since the executive is permitted to perform tasks that properly belong to the legislature. However, Article 80 (1) of the Basic Law allows delegations as long as the content, purpose, and extent of the delegation are specified in the delegating statute (so-called *Bestimmtheitstrias* or "triad of certainty").

f. Ordinances (by-laws)

Ordinances (by-laws) represent a further source of law. They are issued by bodies, institutions, and foundations of public law in pursuit of their purposes, but they only regulate their internal legal workings. Unlike legal regulations, the adoption

of ordinances does not offend the doctrine of the separation of powers because legal persons of public law are recognized as an informal "fourth power."[807]

g. Collective Bargaining Agreements

An additional source of law is collective bargaining agreements concluded between industry representatives and employee unions. These are considered to be law, and not merely contracts, because they also bind persons who are not party to the agreement. According to section 4(1) of the Act Regarding Collective Bargaining (*Tarifvertragsgesetz*), the standards agreed upon in the collective bargaining agreement which regulate the content and conclusion or termination of employment apply directly to both parties to the agreement. This means that an employer in the same industry is bound by the agreement, even though it might already have concluded an agreement with employee representatives pursuant to section 77 of the Works Council Constitution Act (*Betriebsverfassungsgesetz*). In this case, the tariff agreement takes precedence over both the work agreement and over the provisions of the employment contract, but not over federal or state constitutional law.

h. Administrative Rules

Administrative rules are issued by the authorities to regulate their own affairs. Generally speaking, administrative rules only bind the administration itself. However, they can also affect the rights of the citizens if the latter have a right to participate in the administrative process in conjunction with the principle that the administration has the power to bind itself.

i. Customary Law

Customary law also represents a source of law in Germany. A custom arises by a long period of practice accompanied by the conviction that such practice is lawful. Customary law plays an important role in certain areas, for instance commercial law. Section 364 of the Commercial Code (*Handelsgesetzbuch*) refers, for example, to the applicable customs and practices in commerce which must be observed. Problems are caused by its uncertain definition of how long the practice must continue and how broad the acceptance of the practice as lawful must be.

j. Case Law (*Richterrecht*)

The legislator cannot define and regulate every single legal situation that may arise. In order to solve this problem, the legislator delegates to judges a quasi-legislative function to interpret laws and to fill gaps in the statutory scheme, usually by analogy. Sometimes German judges go beyond interpreting statutes and filling gaps to integrate entire unregulated areas of the law into the legal system by pronouncing *Richterrecht*. The case law regarding industrial disputes mentioned above is one

[807] Rüthers and Fischer, *supra* note 799, at 228.

example of an area that the legislature has not (yet) regulated. Accordingly, the decisions of the appellate courts generate a de facto *binding* effect (see the chapter on judicial precedents).

k. Expert Opinion Law (*Juristenrecht*)?

The question of whether the opinions of legal experts (*Juristenrecht*) can also be considered a source of law, such as it is for international law (see above), cannot easily be answered; however, if there is such a source, then it is at the lowest end of the scale. Bernhard Windscheid (1817–1892) believed that such a source of law must exist because, to his way of thinking, legal principles and their application are to be solely drawn from the system, terminology, and doctrines of legal science. Accordingly, extra-judicial, for example, religious, social, or economic values and purposes were not to be taken into consideration: "Neither ethical nor political considerations nor considerations of international law are the concern of jurists as such." According to Windscheid, the legal system exists independently from social reality and it is possible, in principle, to resolve all legal disputes correctly through logical reasoning alone.

Opposing the recognition of expert opinion as a source of law are those who point out that lawyers, even academic lawyers, do not form part of the legislative, the executive, or the judicature according to Article 20 (3) of the Basic Law. Accordingly, Bernd Rüthers (born 1930) argues that the opinion of legal experts cannot constitute a source of law because legal experts cannot lay down legal rules. One problem with this approach is that it leaves no room for the phenomenon that judges sometimes adopt "prevailing opinion" as "the proper law" to apply in the case, albeit these cases with few exceptions arise in the realm of statutory construction, where "the proper law" can be thought of as statutory construction if one chooses.[808]

2. ENGLAND AND WALES

In his book *Der Geist des englischen Rechts*, Gustav Radbruch stresses the importance of the absence of absolutism and revolution for the development of English law:

> Many characteristics of the English people are based on the fact that in their country, the modern period is not separated from the Middle Ages by a huge gulf such as is observable on the continent. Instead, the effects of the Middle Ages are still felt in the present. Accordingly, the English parliament directly

[808] *See also* Bernadette Tuschak, Die herrschende Meinung als Indikator europäischer Rechtskultur: Eine rechtsvergleichende Untersuchung der Bezugsquellen und Produzenten herrschender Meinung in England und Deutschland am Beispiel des Europarechts (2009).

> developed from the representation of the various estates in the Middle Ages whereas on the continent the corporate state was replaced by absolutism which, in turn, was replaced by the constitutional state.[809]

The fact that parliament was so actively involved in the legislative process is arguably one of the most important reasons why England did not adopt Roman law. In addition, the members of parliament rejected dependency on the Pope and Roman-German empire which Roman law implied. In addition, English law—whether through parliament, the king himself, or the courts—was already generally applicable in all corners of England. The judicial common law, supported by parliament and developed by central courts in London, ensured the corporate order. The non-Reception of Roman law was also due to political reasons insofar as the English kings who attempted to initiate such a reception wanted their own law and not that which was written by parliament or the courts. And who would teach Roman law? Roman law may have been taught at Oxford and Cambridge, but not at the Inns of Court where lawyers were trained (see chapter on lawyers).

In 1529, Henry VIII, one of the most powerful English kings, convened the Reformation Parliament which enacted 137 Acts in seven years and influenced political and ecclesiastical matters. This was unusual for feudal parliaments. With the Act of Supremacy in 1534, which made the king the head of the Church of England, England achieved a new era of the "conformity of the spirit" characterized by a new monarchical supremacy. The King distanced himself from the medieval notion that the monarch was the supreme law giver and guardian of civil conduct. This reflected the modern notion that the ruler was to be seen as the ideological symbol of the state. He was not an absolute ruler in the continental European sense. In fact, all hopes of the English kings to achieve absolutist rule ended in 1649 at the latest with the execution of Charles I, an advocate of the "divine right of kings" (that is, rule by God's will alone).

England never experienced a revolution in the French sense. Even the Glorious or Bloodless Revolution in 1688 did not really earn its name because the change embodied in it was effected legally, within the existing system, and did not amount to a wholesale alteration of existing social relationships. The confrontation in question was triggered by the dissolution of parliament in 1687 by King James. Shortly afterwards, in 1688, he issued the Declaration of Indulgence and ordered the Anglican clerics to proclaim them in their churches. When seven bishops submitted a petition to him, asking that he reconsider his religious policies, they were arrested on the order of the king and prosecuted for sedition. However, the proceedings ended with the bishops being found not guilty.

On the same day, a group of protestant nobles called on the Prince of Orange, who was James's son-in-law, to advance on England from Holland with an army. Once the Prince of Orange landed in England, James was abandoned by all his

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[809] Gustav Radbruch, Der Geist des englischen Rechts 5 (1946).

protestant officers. The Prince of Orange allowed him to escape on 23 December. In France, Ludwig XIV granted James a palace and generous allowance. Back in England, the Prince of Orange was declared King William III by the English parliament, and his wife Queen Mary II, but only after they had accepted the conditions of the Bill of Rights. According to the Bill of Rights, English monarchs must convene parliaments at regular intervals. In addition, they need the consent of parliament to levy taxes and to maintain a standing army in times of peace. The act also reestablished parliamentary sovereignty and guaranteed members of parliament and citizens certain rights.

Case-law in England is a firmly recognized, if only secondary, source of law. For the English, the answer to the question whether a judge can create law is simple, "Of course." To think otherwise would be "silly."[810] For example, although there is a statute providing that any person convicted of murder be sentenced to imprisonment for life,[811] there is no statute defining the crime or expressly making murder illegal. Murder is illegal by virtue of previous decisions of the courts. Common law can be amended or repealed by parliament. Murder, again by way of example, carries a mandatory life sentence today, but had previously carried the death penalty.

Even though judge-made law is universally considered to be law in England and Wales, the doctrine of parliamentary supremacy ensures that parliament, and not the courts, have the last say. Unlike in Germany and the United States, where (at least some) courts are empowered to hold acts of the legislature and the executive to be unconstitutional, in the United Kingdom, parliament is always supreme. The closest counterpart in England and Wales to the American doctrine of the judicial review of constitutionality is found in the United Kingdom Human Rights Act 1998, enacted "to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights." Accordingly, section 3 directs that legislation "be read and given effect in a way which is compatible with the Convention rights" so far as possible. If it is not possible to construe a provision of an act of parliament in a way compatible with the convention rights, then the court may make a declaration of incompatibility pursuant to section 4 of the Human Rights Act. However, such a declaration does not affect the validity, continuing operation, or enforcement of the provision, nor is the declaration binding on the parties to the proceeding. Rather, the declaration must be referred to parliament for further action (section 10).

In their fascinating book *Form and Substance in Anglo-American Law*,[812] Professors Patrick Atiyah of Oxford University and Robert Summers of Cornell University in New York State suggest that the English legal system relies far more

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[810] Penny Darbyshire and Keith James Eddey, Darbyshire on the English Legal System 47 (8th ed. 2005).

[811] Murder (Abolition of Death Penalty) Act 1965, ch. 71, § 1(1).

[812] Atiyah and Summers, *supra* note 355.

heavily on statute law than on case law, and that the dominance of statute law in England and Wales is far greater than in the United States. According to these scholars, England relies more on source-oriented, rather than content-oriented, standards of validity. As a consequence of their more source-oriented approach, English and Welsh lawyers invoke relatively formal rules of hierarchical priority (p. 32). Other insights from Atiyah and Summers are found at the end of the discussion below of the United States of America.

3. SWEDEN

Despite the fact that statute law is regarded as being the primary source of law, Sweden has not undertaken a systematized codification of law such as the German Civil Code or the *Code civil*. Even the codifications of 1734 consist of "beams" or "girders" (*balkar*), which merely provide a statutory framework. While they are described here and elsewhere as codes or codifications, the Swedish codifications of 1734, unlike the German Civil Code and the *Code civil,* were never regarded as being exclusive, complete, and enduring (*ausschließlich, vollständig und dauerhaft*). With the exception of the code on planning law (*byggningabalken*) and part of the code on commercial law (*handelsbalken*), everything has since been revised. The code on planning law still contains provisions on the rural law governing relations with neighbors, which are obsolete and no longer followed. The other seven codes regulated matrimonial law (*giftermålsbalken*, today *äktenskapsbalken*), wills and probate (*ärvdabalken*), real property law (*jordabalken*), criminal law (*missgärningsbalken*), sentencing in criminal matters (*straffbalken*), the enforcement of civil judgments (*utsökningsbalken*), and procedural law (*rättegångsbalken*). The two criminal law codes (*missgärningsbalken* and *straffbalken*) were replaced in 1864 by a criminal statute, which was issued as a new criminal law code in 1962 (*brottsbalken*).

The modern family code (*föräldrabalken*) as well as the environmental code (*miljöbalken*) were also enacted as codes, basically because of their size. The less lengthy statutes covering such areas as administrative, copyright, and social welfare law, for example, do not have their own codes. Many of the newly issued statutes are printed each year by a private publishing house in its 3,000-page volume *Sveriges rikes lag* (Swedish Imperial Law). These new statutes are reproduced there in chronological order, behind the codes and other selected statutes. Almost every law student owns such a book. At the end of each year, the Swedish government publishes an official and complete collection of statutes and also makes these available online under *Svensk författningssamling*. These statutes are not regarded as exclusive sources of law, although they are very comprehensive.[813]

[813] See Malmström, *supra* note 791, at 157 and 161.

According to the current academic discussion in Sweden, legal sources are statutes (including regulations and provisions), the legislative history (*traveaux préparatoires*), contracts, case law, custom, and doctrines. According to this view, Swedish legal science appears to accept the practical definition of a legal source (formulated by Alf Ross) as "a reason for recognizing something as law." Ross distinguished between normative and descriptive legal sources and regarded the search for normative sources of law as meaningless—at least if the search is intended to be scientific in nature and not simply a mere recommendation for legal practice.[814] In agreement with Ross's "realistic" conception of law (see chapter on comparative jurisprudence), the typical judge will undertake a search for legal sources within the context of having to resolve a pending case. Corresponding to Ross's definition, custom, case law, and doctrine also represent legal sources even if they are not normally regarded as binding. This is because there is no distinction between them as far as the judge is concerned: regardless of whether the norm is found in a statute, a court decision, or elsewhere, it can only have "binding force" if the judge is convinced that it should apply to the case at bench.[815] This view of legal sources defies hierarchical treatment because, in many cases, the norm which best fits the case in question might not necessarily be the highest ranking norm.[816] The Swedish legal sources should cooperate and not compete with each other.[817]

According to Bergholtz and Peczenik the statutes, *traveaux préparatoires,* and case decisions (in that order) are the legal sources which are most frequently resorted to. The judicial application of the *traveaux préparatoires* is helped by the statutory drafts and accompanying material which have also been produced with the same aim. However, the authors assume that case law will soon supersede the *traveaux préparatoires* owing to the steady Europeanization of Swedish law.[818]

4. THE UNITED STATES OF AMERICA

Magna Carta established the principle that the English monarch is subject to the law of the land. As far as the English judiciary is concerned, the basic premise of the common-law tradition has always been that the judges reach their decisions according to the law of the land. Until the North American colonies declared their independence, that land was, of course, Britain for U.S. purposes; but the change in loyalty did not require amending the basic premise: one can induce the law out of legal decisions. For example, if a litigant tries to win on a novel theory and the judges grant him a remedy, then, by definition, the remedy is granted not by

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[814] Stig Strömholm, Rätt, Rättskällor och Rättstillämpning-en lärobok i allmän rättslära 290 (1981).

[815] Henrik Lindblom, Inledning till juridiken 7 (2d ed. 1991).

[816] *Id.* at 4.

[817] Sandström, *supra* note 216, at 475–84.

[818] Aleksander Peczenik and Gunnar Bergholz, *Precedent in Sweden*, *in* Interpreting Precedents: A Comparative Study 298 Neil MacCormick & Robert S. Summers, eds., 3d ed. 1997).

the judges, but by the law. By the same token, if the litigant loses, then the law is against him: he has no right of action. According to this conception of the law, the judges are merely the law's intermediaries, not its makers.

This conception of the law prevailed for most of the history of the common law; and it still has considerable currency, a conception not limited to cases in which the judges are applying their common law. When judges construe statutes, they are also by definition deciding according to the law. Thus, their decisions represent windows through which we can view and discern the counters of both the common law and statutory law.

For lawyers immersed in this mode of thinking about the law, how could one contend that the decisions of the courts do not reveal the law, in other words, that they do not constitute a source of law? After all, the judges are among the best trained, most knowledgeable, and fairest lawyers in the land. Are their insights to be degraded to the level of sublaw or, even worse, ignored altogether?

American common lawyers agree with their English colleagues that it would be "silly" to contend that judicial decisions do not contain law. Today every common lawyer would agree that, in finding law, common-law judges are actually (at least sometimes) creating it. But this insight is not to be understood as a criticism of common law judges; rather, it is merely the position in which the judges find themselves: whether they agree or disagree with a litigant, the reason for their decision is law. Consequently, they are "making" or at least revealing the law.

In at least one respect, however, American common lawyers might take this idea of judges "making" law a step further than their English and Welsh colleagues: they extend it to constitutional law. This means that American judges—all of them—can, and sometimes they do, refuse to follow statutory mandates of the congress or the state legislatures if the judges find the mandate incompatible with the U.S. Constitution or the constitution of the state (in the case of state statutory mandates). This doctrine or tradition or convention—for it is not mentioned in the text of the U.S. Constitution—is itself the product of judicial interpretation,[819] although most legal historians agree that this interpretation was historically valid. This doctrine is known in the United States as judicial review of constitutionality. Its underlying thesis is that the opinion of the judiciary can in some circumstances trump the opinion of the legislative and executive.

In their book *Form and Substance in Anglo-American Law*,[820] mentioned above, Atiyah and Summers list a number of observations in support of their generalization that the English legal system relies more on statute law than the American system. The approach they take is not quantitative or statistical. Indeed, they note that there are no settled criteria by which to judge such a generalization in a quantitative manner. However, their observations are shrewd and worth serious consideration.

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[819] Marbury v. Madison, 5 U.S. 137 (1803).

[820] Atiyah & Summers, *supra* note 355.

First, Atiyah and Summers observe that the American system is dominated in many fields by federal and state constitutional law. While these constitutions are written in statutory form, their provisions have been interpreted so often in case decisions that practitioners immerse themselves in the constitutional case law and employ case decisions in much the same way in which they would if they were working in a common-law field. There is nothing quite comparable to this in England and Wales. Second, Atiyah and Summers note that many branches of American public law are only superficially drawn from statute. Atiyah and Summers observe the same phenomenon with non-constitutional public law in the United States that they observed above for constitutional law: case law has overtaken the statutes to the extent that no useful purpose is served by returning to the text of the statute. Here too case law is supreme. By contrast, there is a higher proportion of statutes in the public law area in England, and the statutes tend to be very detailed, which leaves the judges little discretion. Finally, a great many of the reforms of private law in recent times have been carried out by statute in England and by the courts in the United States. Atiyah and Summers mention that England and Wales have statutes importing implied warranties of habitability and fitness in various forms of residential leases; bad faith or malicious discharge of employees is compensated for by industrial tribunals as "unfair dismissal"; the common law contributory negligence rule was replaced by a comparative negligence statute in 1945; governmental immunity in tort was abolished by statute in 1947; spousal immunity to suit was abolished in 1962; and the law relating to the liability of occupiers was reformed by the Occupier's Liability Act 1957. In all of these instances, one can find parallel developments in American law; but the developments in the United States were initially undertaken by courts, not by state legislatures.[821] Atiyah and Summers return again and again to the theme that the courts play a tremendous role in the United States. The federal courts, and especially the United States Supreme Court, do so for federal (including federal constitutional) law, and the state courts, especially the supreme courts of the states, do so for state law, which accounts for the vast majority of the criminal and civil (that is, private) law.

Seen from this perspective, it would be tempting to conclude that American lawyers view the hierarchy of laws in accordance with the (admittedly somewhat simplified) depiction of legal realism found at the beginning of this section, with judges and their judge-made law at the top of the pyramid. This might, however, constitute an unfair and unjustified generalization. Although the author knows of no studies on the subject of how American lawyers think on the subject, American textbooks and casebooks prioritize federal constitutional law above all federal law, including federal case law, and above all state law. Federal statutory law supersedes state law in all those cases in which the federal law expressly or impliedly preempts the field of

[821] *Id.* at 99–100, 140–41.

regulation. In the absence of preemption, if two provisions conflict, then the federal provision takes precedence. State constitutional law is superior to a state legislative law which in turn is superior to all subsidiary law, such as regulations promulgated by administrative agencies and ordinances adopted by cities and counties.

Since the turn of the 20th century, and particularly since the 1930s, there has been considerable growth in statutory law making in the United States. In fact, one prominent scholar referred to the late 20th century as the "age of statutes."[822] William Burnham notes that the average state in the United States probably has as many statutes as the average civil law country in Europe.[823] Nevertheless, as pointed out by Atiyah and Summers, a quantitative analysis only tells part of the story. Another part of the story is how statutes are interpreted. That is the subject of the discussion which follows.

C. Statutory Interpretation

1. GERMANY

The origins of statutory interpretation lie in the interpretative rules of Roman law which continued to apply following the Reception along with the *Corpus Iuris,* although it cannot be claimed that the Romans were ever able to develop a systematic doctrine of legislation in the modern sense.[824] As far as German law was concerned, the quadripartite theory (*Viererkanonlehre*) of the famous German legal theorist Friedrich Carl von Savigny (1779–1861) proved to be of fundamental importance. He defined interpretation using four elements.[825] One category—the grammatical interpretation (also known as the philological or textual interpretation or "interpretation according to the wording")—focuses on the text of the statutory norms and analyzes the linguistic techniques applied by the legislator. An additional category describes the contextual interpretation; this is related to the internal context and views all legal institutes and rules as a whole. In this category, the individual norms of a statute are read within the context of the other rules and are regarded in relation to them. The contextual interpretation is nowadays referred to by the terms "interpretation according to the contextual meaning" or context. Next, von Savigny refers to the historical background as an additional interpretative method. As a basis, he uses the situation which applied at the time the statute relating to the legal relationship was issued. The interpreter refers to, for example, the legislative materials (e.g. the printed materials of the Federal Parliament) to ascertain this situation. Finally, von Savigny describes one category

[822] Guido Calabresi, A Common Law for the Age of Statutes (1985).

[823] Burnham, *supra* note 692, at 49.

[824] 1 Stefan Vogenauer, Die Auslegung von Gesetzen in England und auf dem Kontinent: Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen 43 (2001).

[825] 1 Friedrich Carl von Savigny, System des heutigen Römischen Rechts 213 (1840).

as the logical interpretation because it relates to the organizational aspects of the term in question (that is, to the logical relationship between individual components of the term). This method of interpretation is therefore to be classified as teleological whereas the historical method is known as the subjective method. However, in this respect, one must also recognize the way that the term teleological has changed. According to legal methodology, teleological "focuses on the purpose of the norm." Since the beginning of the 1970s, some have increasingly referred to "the consideration of results" instead of "teleological argumentation" owing to the fact that the result the legislator is actually trying to achieve also reveals the rule's purpose.

Preferably, the systematic or contextual interpretation should be merged with the textual in order to create a common, separate category and thereby reduce the number of interpretative methods from four to three. The reason for this is that it is almost unthinkable today that the statutory interpreter would interpret the text of an individual norm without taking into account the way it relates to other legal rules, institutions, and terms. In so doing, the teleological interpretation acts as a catchall interpretation, covering all arguments which do not fall under the linguistic and historical interpretation. This gives rise to a tripartite canon, which in contrast to von Savigny's quadripartite doctrine is better able to cope with the modern demands of interpretation. This tripartite doctrine is divided into the linguistic, the historical, and the teleological interpretation.

The order of the individual interpretative methods in both von Savigny's four canons as well as the preferable three canons of interpretation can be problematic should they lead to unfavorable results. In this respect, the practical importance of the historical interpretation should not be exaggerated; accordingly, it is improbable in everyday life that every judge can or will look up the legislative materials (in Germany, usually the printed materials of the federal or state parliaments).

a. Linguistic Interpretation

Linguistic interpretation is fundamentally concerned with the wording of the norm in question, and aims to establish the meaning of the individual words or the sentence as a whole. In so doing, it aims to ascertain what the norm is actually stating rather than what the legislator intended to say (which is the subject of the historical interpretation). It should be noted that the linguistic interpretation does not only relate to legal rules; it is frequently used in relation to all subjects in the field of humanities in order to determine the meaning of textual passages.[826] Thereby, the view is often taken that this method of interpretation takes precedence over the others.[827]

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[826] Norbert Horn, Einführung in die Rechtswissenschaft und Rechtsphilosophie mn. 178 (3d ed. 2004).

[827] Rüthers and Fischer, *supra* note 799, at mn. 731.

When interpreting the wording it should also be borne in mind that individual words are not bound by a God-given meaning—rather, their meaning is governed by social conventions. Unless the word has been deliberately invented, its meaning arises through an evolutionary, natural process in which the language gradually and automatically adapts itself to the needs of the people. It is rarely the case that words have stable meanings, such as one finds for example with numerical terms.[828] The determination of linguistic conventions (which is the subject of the empirical science of linguistics), can therefore help find the meaning of a word. While language scholars regard linguistic conventions as equivalent to facts, jurists tend to rely on their intuition (that is, their feeling for language).

A particularly difficult challenge in interpreting the meaning of words is presented by ambiguous and vague terms. Terms are said to be ambiguous if a term is capable of two or more different meanings. Obvious examples here include for example the word *term,* which in English can mean either a contractual condition, a period of time, or a word as well as the law which has several meanings including a statute, court decision, or unwritten custom. In such cases, the meaning can only be determined by reference to context. This proves to be quite simple in the examples just referred to but other terms can cause difficulties. Accordingly, there are also cases where even the context does not help in ascertaining the particular meaning of ambiguous words. If the interpretation does not succeed in producing a clear result from the wording, then the historical and teleological interpretative methods are to be used.

The linguistic interpretation is similarly challenging in the case of vague terms (also referred to as "undefined legal terms"). Such terms include those with "blurred edges," whose defining characteristics are not wholly apparent. Instead, these terms only provide general conditions. In particular, one can often find vague terms in the form of general clauses (for example, the term "unconscionability" in section 138 German Civil Code). According to the doctrine formulated by Philipp Heck (the founder of interest-based jurisprudence), vague terms are divided into a terminological core and terminological outer ring or corona. The core consists of the cases which obviously either fall within the term's meaning (positive application) or not (negative application). The meanings which fall within the core meaning are more often than not unambiguous whereas those caught by the terminological corona are ambiguous. Accordingly, this part of the chapter describes the cases of application where it is not quite clear whether they are capable of falling within this term with the result that a more detailed investigation in to the individual case is necessary. The term *Mensch* (human being) under section 212 of the Penal Code is often cited as an example of this. At first glance, one would imagine that this term is so clear that it does not require any more detailed explanation or even a definition. Of course a living, 30-year old man would fall within the scope of this term's meaning and therefore the terminological core. However,

[828] Rolf Wank, Die Auslegung von Gesetzen 60 (3d ed. 2005).

there are nevertheless ambiguities in this term which point towards a terminological corona. For example it must be enquired as to when the existence of a human being begins (case law points to the beginning of the birth pangs in the case of natural birth and the opening of the womb in the case of Cesarean section) and when it ceases (according to case law with brain death, that is, the point when there is no discernable brain activity).

The linguistic interpretation can conclude in two scenarios, either when a clear result is obtained, or the linguistic interpretation is incapable of obtaining such a result, making it necessary to fall back on other interpretative methods. In this respect, it must be noted that the linguistic interpretation has performed its function if it leads to an unambiguous result. In such a case, the clarity of the term makes the other methods of interpretation redundant. Only in very rare problem cases will a clear term be assigned a different meaning on the basis of the teleological or historical interpretation since the term only admits of a single meaning (which has already been ascertained by the linguistic interpretation).

The linguistic interpretation is also completed even if an interpretation cannot provide assistance with the ambiguity of the term having recourse to context or even if the result of the grammatical interpretation of a vague term remains precisely that: vague. In this case, it must be examined whether the meanings that come within the term are compatible with the possible meaning of the word. The approach to adopt with the linguistic interpretation is strictly according to the credo that any interpretation may not exceed the limits of the wording, that is, the most extreme meaning that the term is capable of supporting. In order to achieve the aim of the interpretation, that is, to find out what the term or legal norm actually stands for, recourse must be had to the other methods of interpretation so that on the basis of the historical or teleological methods one particular meaning can be selected from those available that are compliant with the possible meaning of the term.

b. Historical Interpretation

An additional interpretative method is provided by the historical interpretation (also termed the *subjective interpretation* or "interpretation according to the genesis of the norm"). This method aims to identify what the legislator intended to say with the legal norm (as opposed to the determination of what *was* said—which is the aim of the linguistic interpretation). This method of interpretation interprets the legal norm within the overarching context of its legal genesis.[829] In order to follow the legislator's train of thought, the interpreter has recourse to the legislative materials (nowadays, for example, the printed materials of the federal parliament, ministerial drafts, protocols of debates in the federal parliament and committees). However, in this respect it may prove problematic that, in the period between the creation of the norm and its application, the social and economic structures may

[829] Dieter Schmalz, Methodenlehre für das juristische Studium mn. 247 (3d ed. 1992).

have changed. Therefore, the importance of the historical interpretation is constantly being questioned.

Of course, the historical method of interpretation could only develop in practice once the legislative documents in the first half of the 19th century were made available to the public.[830] That method did not meet with unqualified enthusiasm since many questioned the reliability of referring to legislative materials.[831] Accordingly, in the second half of the 19th century, one distinguished between subjective (that is, historical) and objective "interpretative theory." The beginning of the 20th century saw initial attempts to overcome this distinction by Philipp Heck who augmented the historical interpretation with aspects of objective interpretation and thereby made it socially acceptable again.[832] Nowadays literature and case law are agreed[833] that the historical interpretation represents an important method (in particular, the German Federal Supreme Court often has recourse to legislative materials). However, the degree of importance and its order of priority in relation to the other methods of interpretation are always in dispute. Accordingly, it is sometimes argued that this method of interpretation is only to be used when the others do not lead to any satisfactory result, although others vehemently reject this opinion.[834]

It is possible to divide legal theoreticians into two groups depending on how they view the historical interpretation method, namely the supporters of the objective-teleological theory (also known as objectivists), who oppose the subjective-historical theory as well the members of the opposing camp (also classified as subjectivists). In this respect, it should be noted that both groups recognize the interpretative criterion of the legal norm's genesis. The essential difference lies in the fact that subjectivists deem the intention of the legislator (to be established using the historical method) as binding while the objectivists do not feel themselves bound to it in the slightest.[835]

However, the arguments employed by the two groups are questionable. The main argument of the supporters of the objective theory centers on the intention (so-called intention argument), that is, that in a democracy the legislator is not a separate, individual institution and therefore is incapable of forming an intention. Only natural persons are capable of doing so and thereby of pursuing their own aims. On the other hand, this claim is challenged by the argument that the "intention of the legislator" is admittedly a theoretical construct but there are definite regulatory aims which underlie every piece of legislation. In this respect, the subjective method of interpretation does not determine the aims which the

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[830] Peter Raisch, Juristische Methoden: vom antiken Rom bis zur Gegenwart 145 (1995).

[831] *Id.*

[832] *Id.*

[833] *Id.*

[834] Wank, *supra* note 828, at 91.

[835] *Id.*

individuals involved in the legislation had but rather the underlying historical purpose of enacting the legislation.[836]

In addition, the subjective interpretation is opposed by the so-called form-related argument: Only the wording of the law is decisive in determining the intention of the legislator, and not the actual intention and ideas of the legislator, since these were not included in the act.[837]

However, this argument is not convincing either. Every act, every legal norm is a product of human ideas—whether of those people who have actually worked in drafting the act or the majority of the population who were alive at the time of the enactment. Owing to the fact that the formulation of many concepts is characterized by ambiguity or vagueness (see above, the discussion on linguistic interpretation), the intention of the legislator in a democracy is only capable of being enforced if the interpreter is allowed to have recourse to these ideas (of course, under the condition that it is possible to ascertain them). In addition, there must also be the possibility to correct mistakes made by the legislator regarding the wording of the legal norm.[838]

However, it is also important to decide which statements in the parliament can be attributed to the legislator. Accordingly, it is not permissible to involve persons who participated in the legislative procedure as witnesses or experts in a court case and find out what their motivation was in passing the statute. On the other hand, the recitals in the draft legislation are often used in order to establish the legislator's intention.[839]

It is also unclear what should happen if the legislator was mistaken in her understanding of facts which were crucially important for the intended purpose of legislation. In this case, the historical interpretation is to be attributed less weight.

If it is no longer possible to establish the historical purpose of the norm in a given case, then the historical interpretation will be redundant and passed over in favor of the other interpretative methods. It may also be the case that the historical interpretation is not applied as often in practice as the other methods of interpretation (accordingly, it will only be rarely the case that a judge at the local court will make the effort to seek or request the legislative materials to interpret a definite, unknown term). It must also be noted that the historical interpretations become less important as time goes on.[840] Nevertheless, these facts do not give rise to any general hierarchy which places the historical interpretation at the lowest level.[841] In rare cases, the application of the historical interpretation is ordered by

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[836] Rüthers and Fischer, *supra* note 799, at mn. 790.

[837] Reinhold Zippelius, Juristische Methodenlehre 22 (9th ed. 2005).

[838] *Id.*

[839] Schmalz, *supra* note 829, at mn. 249.

[840] Horn, *supra* note 826, at mn. 179.

[841] Rüthers and Fischer, *supra* note 799, at mn. 791; *see* Peter Schwacke and Rolf Uhlig, Juristische Methodik mit Technik der Fallbearbeitung und Normsetzungslehre 34 (2d edition 1985).

the legislator itself—such as in Article 33 of the Basic Law, which refers to traditional principles of official practice.[842]

c. Teleological Interpretation

The teleological method of interpretation, (derived from the ancient Greek *telos* (aim)) is determined by the meaning and purpose of the norm (*ratio legis*). Even if von Savigny designated this method systematic, he was nevertheless thinking of the teleological method.[843] This method of interpretation summarizes the relevant arguments for the interpretation of statutes and development of law which do not fall within the grammatical or historical interpretation. In this respect, the expression teleological interpretation refers to the distinction between subjective and objective methods of interpretation. While the historical or subjective method of interpretation aims to interpret the norm according to the intention of the legislator (see above) and thereby regards the purpose of the act as embodied in the goal that the legislator wished to achieve, the teleological interpretation adopts a different approach. Here, it is possible to determine the purpose of the norm independently of the legislator's intention.[844]

The norm's regulatory purpose is to be determined in the abstract, that is, in isolation from any actual legal disputes. Nevertheless, the regulatory purpose of an act can be determined better if one also pays regard to the conflicts of interest that underlie the act. As the jurisprudence based on interests and values has established, every norm makes a judgment between opposing interests and weighs them up.[845] Accordingly, it must be asked how the legislator has evaluated this conflict of interest and which interests have been allowed to predominate.[846] Thereby, however, attention must be paid to the fact that legal norms do not only pursue a single aim; rather, the usual purpose of legal norms is to balance different interests.[847] If this is the case, then the result must do justice to all the purposes involved.[848] That said, it will only seldom be the case that the legislator expressly states the purpose of an act, for example, section 1 (1) Federal Emissions Protection Act: "The purpose of this act is to protect people, animals and plants, the earth, water, the atmosphere as well as cultural and material goods from harmful environmental effects and to prevent harmful environmental effects from occurring."

It must also be observed that it is not possible to completely divorce the teleological interpretation from the other interpretative methods; there is therefore no statutory purpose which floats over all the other considerations. In end-effect,

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[842] Schmalz, *supra* note 829, at mn. 247.

[843] Klaus Adomeit and Susanne Hähnchen, Rechtstheorie für Studenten mn. 66 (5th ed. 2008).

[844] Wank, *supra* note 828, at 97.

[845] Schmalz, *supra* note 829, at mn. 251.

[846] Horn, *supra* note 826, at mn. 182.

[847] Schmalz, *supra* note 829, at mn. 252.

[848] Schwacke and Uhlig, *supra* note 841, at 37.

all three methods of interpretation pursue the aim of establishing the meaning and purpose of the statute; it is just that they employ different means of doing so and examine different aspects of the legal norm. As a result, even the teleological method must sometimes seek to establish the statutory purpose by considering the systematic and linguistic aspects as well as the historical circumstances.[849] Accordingly, the objective intention of the legislator (contrary to the historical interpretation which regards its subjective will as decisive—see above) is used as a basis: "one assumes the intention of the legislator to be that which the applier of the law can accept at the moment of application."[850] Accordingly, the teleological interpretation and the concept of reason are closely connected; in particular, the teleological interpretation allows statutory norms to be manipulated to achieve a result which contemporary society regards as just.

The Federal Constitutional Court has often recognized the importance of the teleological interpretation. Of particular interest is the senate's statement in the Soraya decision:[851] "The interpretation of a legal norm cannot always adhere to the meaning attributed it at the time of its creation. Rather, it must be asked what reasonable function the norm performs at the time it is applied. The norm is always to be seen in light of the social conditions and social-political views it affects; under circumstances its contents can and must change along with it."

What is uncertain, however, is the position of the teleological interpretation in the hierarchy of interpretative methods. Of particular interest is the extent to which the teleological interpretation is (a) preferred to the literal meaning of the norm and (b) exceeds the latter's limits. Determining this extent may indeed be possible under exceptional circumstances as the decision of the German Federal Supreme Court[852] shows: "An interpretation according to the meaning and purpose of the statute must take precedence over a linguistically clear wording if the conflict of interest that must be decided could not have been envisaged when the act was passed due to the fact that it only became obvious owing to a change after this point in time." The decisions concerned the then applicable section 15 of the Literary Copyright Act, which held the act of copying without the consent of the party affected as admissible if it was undertaken for personal use and absent any intention to profit therefrom. In its decision from 1955, the Federal Supreme Court explained that the legislator of section 15 Literary Copyright Act could not foresee the rapid developments in technology in 1901.

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[849] Horn, *supra* note 826, at mn. 183.

[850] Schwacke and Uhlig, *supra* note 841.

[851] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 9 June 1971, 2 BvR 544/63 (Ger.).

[852] Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 24 June 1955, 1ZR 88/54.

2. ENGLAND AND WALES

Medieval judges interpreted the results of the parliamentary process (which we today term legislation) as they interpreted their own jurisprudence, that is, freely and reasonably according to their notions of equity.[853] According to the opinion of the age, the (statutory) texts, like the text of judgments, did not have any authority of themselves. Instead, it was the subjective intention of the legislator that was crucial. Judges interpreted a statute, for example, which granted a remedy against the prison director of Fleet Prison also to grant a remedy against the directors of other prisons, which accorded with the implied intention of parliament.[854] This so-called equity approach is today found in the mischief rule of statutory interpretation (see below), according to which an act is to be interpreted in such a way that will best eliminate the mischief that parliament had identified.[855]

For a while, English judges looked down on the legislative attempts of the parliament with disdain and with a great deal of skepticism. In order to protect the integrity of common law, judges followed the maxim that a statute that derogated from the common law had to be interpreted strictly.[856] The English parliament reacted to this approach with ever more precise and comprehensively formulated statutes. Since then it has become obvious that the judges have lost the battle against the expansion of statute law and that the old maxims have been were impliedly abolished by case law. Even if this hostility has long since passed, its influence on the style of legislation is still noticeable. According to Zweigert and Kötz, English legislation aims for precision at all costs.[857]

Nowadays in Great Britain, judges adopt at least three traditional methods of interpretation known normally as rules but sometimes referred to as "canons of construction." These are the literal, mischief and golden rules of interpretation.

As has been explained in the historical overview, the literal or plain meaning rule is not the primary method of interpretation but it is the most modern of these three traditional methods. According to this rule, the meaning of a legal norm is to be determined solely according to its wording (as construed in the ordinary sense). This approach is based on the premise that the legislator uses clear and precise wording. The judge therefore attempts to perceive the intention of parliament using the terms in the statutory text but does not attempt to find out whether the wording of the act corresponds to the actual intention of the legislator. This method of interpretation is only concerned about what was expressly stated in the text and not about any (further reaching) meaning. As a consequence, this

[853] Baker, *supra* note 270, at 209; *see also* Vogenauer, *supra* note 824 at 669.

[854] Plat v. Sheriffs of London, [1550] 75 Eng. Rep. 57; *see* Baker, *supra* note 270, at 209.

[855] Baker, *supra* note 270, at 212.

[856] Zweigert and Kötz, *supra* note 60, at 260; Frederick Pollock, Essays on Jurisprudence and Ethics 85 (1882).

[857] *Id.* at 262.

method sometimes leads to harsh results. One example is the case *R. v. Human Fertilisation and Embryology Authority ex p. Blood,*[858] in which Mrs. Blood lost her case requesting fertility treatment using the sperm of her dead husband owing to the fact that her husband had not provided written consent to such treatment, which in England is a statutory requirement.

One problem with the literal rule is that the words and formulations employed by parliament are not always as clear and understandable when they are applied as intended. If this were actually the case, all judges and lawyers could interpret statutory texts without any problems. Such cases would not even come to court. However, even if judges interpret according to the literal method, the lack of clarity in the provision might lead different judges to arrive at different interpretations.

The mischief rule was articulated for the first time in Heydon's Case (1584). In these proceedings, the court posed four key questions which were developed into a classic test:

1. What was the legal position under common law before the statutory norm was created?
2. What was the weakness or gap in the common law rule?
3. What legal remedy did Parliament intend by passing the statute?
4. What was the real reason for creating this legal remedy?

The judge therefore ascertains what problem the statute was intended to eliminate and then decides whether the statutory norm forms part of this purpose. This mischief rule of interpretation allows the court to consider the historical background to a statute which then allows conclusions to be drawn about the purpose that parliament intended the statute to serve. As a means of facilitating this historical perspective, the House of Lords in 1993 overruled the century-old principle (the so-called exclusionary rule of British law) that parliamentary materials (such as protocols) could not be used to assist in the interpretation of statutes. At present the *traveaux préparatoires* may be used under certain circumstances and only if the statutory act in itself is ambiguous or unclear.[859] However, the application of parliamentary materials in judicial practice is very limited.

As the foregoing discussion suggests, legislation should generally be left to parliament, and judges are merely to interpret the existing law. However, what happens in those cases where the statutory text is simply unclear and ambiguous? Do judges always have to wait for parliament to amend the text? Over time, judges have found a way of circumventing this requirement using the "golden rule." This is always applicable if the statutory formulation is ambiguous and interpreting it normally (that is, according to the literal interpretation) would lead to absurdities or contradictions and thereby be untenable. In this case, the judge is empowered to assume that it was not the will of the legislator to create such absurdities by

[858] [1997] 2 All ER 687.

[859] Pepper v. Hart, [1993] A.C. 593 (H.L.).

statute and can therefore depart from the basic meaning of a word or formulation and imply another possible meaning into the text. This further reaching meaning is then attributed to parliament as being a reflection of its true intention.

From the mid 20th century onwards, English judges interpreted some cases more according to their purpose than their wording.[860] Some commentators believe that such a teleological interpretation is European and not English and should be limited to interpreting European law.[861] When using this purpose-orientated method of interpretation, the courts recognize the potential criticism that they do not respect the constitutional balance between the judicature and legislature. The task of the courts is to realize the intention of the legislator as it is enshrined in the wording of the statute. If the courts ascribe a fictitious legislative intention to parliament, they could be seen to be usurping its legislative function. Others regard this as representing a generally applicable method of interpretation.[862] The fact is that judges apply this method relatively rarely and when they do it is obvious that they are applying it.[863] From a historical perspective, however, the purposive rule is not new. In the case *River Wear Commissioners v Adamson*[864] Lord Blackburn stated the following:

> I believe that it is not disputed that what Lord Wensleydale used to call the Golden rule is right viz. that we are to take the whole statute together and construe it all together, giving the words their ordinary significance unless when so applied they produce an inconsistency or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification and to justify the court in putting on them some other significance which though less proper is one which the court thinks the words will bear.

According to the legal theorists Bankowski and MacCormick, these and other methods of interpretation as well as decision-making practice in British courts embody three different types of interpretative methods or "types of argumentation:" the linguistic, systematic, and teleological/evaluative—also called the functional method.[865] Under the textual argumentation, the authors are referring to, for example, the "plain meaning rule," which rules out interpretation if a statute is clear and unambiguous. This method of interpretation is based on the idea that a text only then requires interpretation if it is dubious or unclear. The method's function is to fix and secure the specific legal program which the legislator has

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[860] Darbyshire and Eddey, Penny, *supra* note 810, at 38.
[861] *Id.* at 39.
[862] *Id.* at 38.
[863] *Id.* at 38 *et seq.*
[864] [1877] 2 App. Cas. 743, 767.
[865] Bankowski et al., *supra* note 711, at 26, 364.

proposed. In addition, it aims to reduce the risk of arbitrary judgments. The judge is not allowed to interpret those norms clearly established by the legislator.[866]

However, this method is subject to an exception: that is, if the text is so contradictory that the literal interpretation leads to absurdity.[867] One example was the interpretation of the Rent Restrictions Acts issued in the First World War, which were intended to protect impoverished tenants from increases in rent. According to these statutes, certain tenants were automatically placed in a tenant—landlord relationship following the expiry of the tenancy provided they satisfied all requirements of the current tenancy contract. However, did it not state in the tenancy agreement that the tenant had to quit the property as soon as the tenancy expired? According to the case law, tenants could ignore this clause in the contract because otherwise the legislation would lose its meaning and effect.[868]

The authors categorize the mischief rule (see above) and other subjective historical methods as well as contextual arguments (such as, for example, the introduction of a definition from a different statute or even the comparison with foreign statutes) under the heading systematic argumentation.[869] The authors also regard the argumentation of statutory aims as basically an example of the systematic method.[870] Arguments based on the objective consequences of different interpretative possibilities fall under the heading teleological argumentation. Both arguments concerning the just or common-sense interpretation as well as legal principles such as the rule of law are to be regarded as teleological.[871]

3. SWEDEN

Even if academics advocate the use of diverse methods of interpretation, Swedish judges (perhaps with the exception of the special courts) employ a uniform methodology.[872] As examined below, these methods of interpretation are the grammatical, systematic, and teleological methods, although the last mentioned has subjective and objective variants.

a. Grammatical Interpretation (logisk-grammatisk tolkning)

In Sweden, it is generally recognized that the applier of a statute must start with its text.[873] The grammatical method flourished during the era of terminology-based jurisprudence, when it was believed that, by carefully defining legal terms,

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[866] Stephan Meder, Missverstehen und Verstehen—Savignys Grundlegung der modernen Hermeneutik 17 (2004).

[867] Bankowski, *supra* note 711, at 365; *see above* "golden rule."

[868] Bankowski, *supra* note 711, at 364.

[869] *Id.* at 367, 371.

[870] *Id.* at 369.

[871] *Id.* at 370.

[872] Peczenik & Bergholz, *supra* note 711, at 356.

[873] Strömholm, *supra* note 814, at 397.

the application of law could be elevated to a mathematical science.[874] However, experience showed that the work of defining terms always depended on the values of the person doing the defining, meaning that the grammatical method is nowadays only considered a starting point in all cases (with the exception of those relating to, for example, tax law).[875]

b. Systematic Interpretation (*systematisk tolkning*)

The systematic method extends the grammatical method to other texts. It primarily aims to interpret individual norms as part of the whole legal system and thereby to guarantee its continuity.[876] Swedish legal science criticizes this method not only for being conservative but also because it serves to equate the legislator of today with, for example, a legislator in 1734.[877] As a result of this criticism, Swedish judges may sometimes use the systematic method in order to put a new gloss on older statutes (for example, if a clause in the old Commercial Code has to be adapted to the modern use of language).[878] Moreover, these methods sometime give rise to terminological hierarchies. For example, the Sale of Goods Act of 1905 uses the expressions "immediately," "as quickly as possible," "without unreasonable delay," and "within a reasonable amount of time." According to the systematic method, the expression "within a reasonable amount of time" arguably refers to a longer period of time than "without unreasonable delay."[879]

c. The Teleological Methods of Interpretation (*subjektiv och objektiv lagtolkning*)

The subjective interpretation (also known as the historical interpretation) refers to the search for the actual meaning and purpose of the statute, taking into consideration the aim of the legislator in passing the act and the circumstances under which the act was drafted.[880] The *traveaux préparatoires* form the basis for determining the real meaning and purpose of the act and the aim pursued by the legislator. If this use of the *traveaux préparatoires* reveals the statute's clear purpose, then the legal norm is to be interpreted in such a way that this previously determined purpose enjoys precedence over the legislative purpose established using the grammatical or systematic method.[881] Swedish judges ultimately intend to enforce the legislator's intention directly rather than its intention as enshrined in the statute itself (at least in the view of Peczenik and Bergholz).[882]

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[874] *Id.* at 400.
[875] *See* Peczenik and Bergholz, *supra* note 711, at 314; Strömholm, *supra* note 817, at 401.
[876] Strömholm, *supra* note 814, at 402.
[877] *See* Strömholm, *supra* note 814, at 402–403.
[878] Peczenik & Bergholz, *supra* note 711, at 315.
[879] *Id.* at 315.
[880] Strömholm, *supra* note 814, at 403.
[881] Peczenik and Bergholz, *supra* note 711, at 332.
[882] *Id.* at 332–33.

Peczenik and Bergholz[883] cite two more important reasons that explain the popularity of the subjective method amongst Swedish judges. First, there is Swedish culture (including its legal culture) to take into account, a culture that reflects a highly organized society in which the applier of law usually seeks assistance on a daily basis. Secondly, Peczenik and Bergholz refer to the criticism of legal realists which exposed the "appliers of law" such as judges, as "creators of law." In order to avoid such criticism, Peczenik and Bergholz claim that judges personally turn to the legislator itself in order to ascertain what the law is rather than trying to find it themselves.

The objective-teleological method or the radical-teleological method of Ekelöf[884] has not found much support among judges. If they are confronted with an act for which the *traveaux préparatoires* are inadequate, they refer to a hypothetical intention of the legislator or simply decide on a solution that appears "sensible." Ultimately, every legislator only intends to enact "reasonable" laws and also intends the statutes in question to be interpreted "reasonably."[885] Due to the fact that it is ultimately the judges who establish what is "reasonable" or "the intention of the hypothetical legislator," one can confidently describe this method of interpretation as the objective-teleological method, despite the objection of the Swedish judiciary.

4. THE UNITED STATES OF AMERICA

American courts and commentators generally recognized three basic methods of statutory interpretation: the plain meaning rule, the argument from legislative history, and the social purpose rule.[886] Sometimes the plain meaning rule is referred to as the literal rule, or as textual construction. The argument from legislative history is also referred to as the historical rule. In the context of constitutional interpretation, particularly interpretation of the U.S. Constitution, the historical method often is discussed under the term "original intent."

Most statutory construction begins, and much of it ends, with the text of the statute. These are cases in which the plain meaning rule is applied. It is often said that, when applying the plain meaning rule, the court does not ask what the legislation might be intended to say, just what it actually says. Often the inquiry is: what is the natural and ordinary meaning of the words used? U.S. Supreme Court Justice Robert Jackson is often quoted in arguments in support of the plain meaning rule: "It is the business of Congress to sum up its debates in its legislation."[887]

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[883] *Id.* at 312–13.

[884] Strömholm, *supra* note 814, at 404, 428–37.

[885] Peczenik and Bergholz, *supra* note 711, at 312.

[886] The discussion which follows is based in large part on Burnham, *supra* note 692, at 53.

[887] Schwegman Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

While practically every case which involves a statutory or constitutional provision begins with the text as a starting point, a great many cases—perhaps the majority—do not end with the text. In the 1981 term, for example, the Supreme Court always checked the text against the legislative history.[888] In the 1989 and 1990 terms, only 19 of 55 cases which involved the construction of statutes were decided without any reference to legislative history.[889] However, it is likely that the experience of the U.S. Supreme Court is not representative of the practice of the state supreme courts. The legislative history is quite easy for judges of the U.S. Supreme Court to find. Not only have the cases which are presented to the court moved up through the court system, but they also were handled, for the most part, by very experienced counsel who are willing to spend the time and money to research legislative history to support their case. The practice before the state supreme courts is not as intensive, and the legislative history is often much harder to find. As one moves down the judicial hierarchy to the state trial courts, one would have to say that it is extremely rare for legislative history to be presented in any case at that level.

In the Supreme Court's use of various items of legislative history, Burnham discerns a hierarchy of probative value.[890] At the top of the hierarchy are committee reports and statements on the bill by individual members of congress. Similarly, if a member of congress introduces an amendment to a bill, his or her statement on the meaning of the amendment is accorded great weight. Statements by sponsors of the bill made during the debates on the floor of congress are considered only somewhat persuasive. Statements by other persons, including those who expressed opposition to the bill, are entitled to little or no weight.

The third basic rule of statutory construction generally followed in the United States is the social purpose rule, also referred to as the functional approach. Following this approach, the U.S. Supreme Court tries to find the purpose or purposes of the legislation as a whole. Very often these purposes are stated in pieces of legislation, particularly legislation aimed at correcting particular problems. Notice that this is basically the mischief rule announced in Heydon's Case,[891] mentioned above in the discussion of England and Wales.

In the United Kingdom, the Human Rights Act directs that legislation "be read and given effect in a way which is compatible with the [European Human Rights] Convention rights" so far as possible. While there is no comparable provision in American statutory law, American courts have a long tradition of avoiding

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[888] Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 195 (1983).

[889] Stephen Breyer, *The Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 845 (1992).

[890] Burnham, *supra* note 692 at 56.

[891] Heydon's Case, [1584] 76 Eng. Rep. 637.

interpretations of a statute that might result in the statute being declared unconstitutional.[892]

Summary

In conclusion it can be said that there are differences in the way that statutes are dealt with in Germany, England and Wales, Sweden, and the United States.

As far as the historical development of statutes is concerned, it is particularly noticeable that Germany is unique in that its jurists regard the codification of the German Civil Code in 1900 as a kind of "break" or "gulf" between the developments that took place before and after. This codification was claimed to be exclusive, complete, and enduring (*ausschließlich, vollständig und dauerhaft*) in nature. These features are also reflected in the form and style of the German Civil Code. Accordingly, this "new era" from 1900 onwards regarded the previous law (which largely consisted of court decisions) as outdated, with the result that it was consigned to the annals of legal history and only used as part of the historical method of interpretation. The concept underlying the codification was that the law prior to 1900 was conservative and did not accord with the new democratic developments and requirements.

In England, where a Reception of Roman law did not take place, the predominant idea was of evolution by small, reasonable steps. As a result, English legal history does not offer anything comparable to the drastic break represented by the codification of the German Civil Code. The view which dominates in England and Wales is that law as such already existed and has only been augmented by statute law. What came before—the common law—is still operating in the background. This philosophy can be best explained by the fact that for centuries, until the autumn of 2009 when the Supreme Court of the United Kingdom commenced its work, judges in the House of Lords (that is, in a legislative institution) interpreted the laws they themselves (with their colleagues) were responsible for creating.

The historical development in Sweden resembles that in England and Wales more than in Germany. Sweden did not receive Roman law either, nor was there the drive for codification found in Germany.

The history of statutory lawmaking in the United States diverged from that in England and Wales in at least three significant ways. First, and most importantly, with the decision in *Marbury v. Madison* in 1803, the American courts began to take an active role in supervising the constitutionality of legislation. This change included not only federal legislation, but also legislation of the states, which accounts for perhaps 90 percent of the law in the United States. In their function

[892] *E.g.,* Crowell v. Benson, 285 U.S. 22, 62 (1932).

as guardians of the U.S. Constitution, judges in the United States have played a much larger rule in influencing the legislative agenda and the extent to which the state and federal legislatures can legislate. A second important reason for divergence between the United States and England and Wales is the large number of jurisdictions in the United States. At present there are 50 states which exercise jurisdiction over their own territories. Because many of the jurisdictions are very small, there has been and continues to be much cross-pollination not only in the drafting of statutes but also in their interpretation. This is seen most graphically in the publication of the *Restatements of the Law*, which are attempts to harmonize the common law of the various states. While there have been numerous attempts to adopt uniform legislation—the most successful being the Uniform Commercial Code—these efforts have been haphazard at best. Nevertheless, these attempts at harmonizing American law constitute a third important divergence from the history of England and Wales, which until recently were represented in all matters by a single parliamentary body.

The codification movement of 19th century America evidences dissatisfaction with the ability of the common law to respond to the needs of a fast-changing society. In Great Britain, parliament often proved responsive. In the United States, the governments of the states found themselves in a "race to the bottom:" each state wanted to be more business friendly than the next, so that it was often left to the courts to make much needed adjustments to, for example, the liability regime or employment law. Thus the codification movement in the United States is less significant for what it accomplished, which was relatively little, than for revealing the inability of the political branches of government to respond to the needs of the electorate.

In summary, as far as historical developments are concerned, England and Sweden are quite similar; the United States is fairly similar, but accords judges a larger role. Germany's history appears to be profoundly different to the histories of the other three jurisdictions here studied, except that it shares in common with the United States the institution of judicial constitutional review of legislation to judge its constitutionality.

The conclusions are similar when comparing sources of law in Germany, England and Wales, Sweden, and the United States. Whereas in Germany the large majority of jurists follow the legal positivist school and its strict hierarchical thinking when it comes to legal sources, this style of thinking is less pronounced in the other jurisdictions studied here. England and Wales perhaps come closest, as might be expected when one considers the popularity of legal positivism there (see the chapter on comparative jurisprudence). On the other hand, England and Wales recognize what is here referred to as "co-operative law making," where parliament works in tandem with the judiciary to supplement and occasionally to overrule the judges' common law. Ironically, perhaps, most academic legal authors in the United States repeat the traditional hierarchy—U.S. Constitution, federal statutes and treaties, federal agency regulations, state constitutions, state

statutes, state agency regulations, local ordinances—without much discussion of the prominent role that the courts play in the interpretation and application of this hierarchy. Of course, a similar criticism might be leveled at Germany considering that the German Federal Constitutional Court has the final word on which source of law will have priority in any particular case which comes before it. When it comes to the sources of law and their hierarchy, Swedish academics seem to have adopted the most realistic view: legal sources should cooperate and not compete with each other.

When analyzing the interpretative methods predominantly applied in the four jurisdictions here studied, it is striking that the three European jurisdictions—Germany, England and Wales, and Sweden—seem to prefer different methods of statutory interpretation. In Germany, the teleological method dominates discussions, and the historical method is hardly ever applied. By contrast, England stresses textual interpretation (with the exception of European law). This is borne out by a review of many case decisions. In Sweden, the historical method of interpretation is most often stressed in the literature since the role of that country's legislator is accorded great importance. It would therefore seem on the surface, at least, that all three jurisdictions follow a different approach when they interpret statutes.

However, this impression might be deceiving. The fact that the teleological method is so often discussed in Germany does not necessarily mean that it is employed substantially more often than any other method. Further, the discussions might be so common because of a perceived necessity of breathing new life into old statutes such as the German Civil Code of 1900. If this is true, it means that judges are employing this interpretational method in order to expand their jurisdiction and influence. Viewed in this way, the use by German judges of the teleological method roughly corresponds to the (perceived) flexible way in which American judges interpret statutes. Whatever its cause, the popularity of the teleological method in Germany is in stark contrast to the virtual rejection of that method (with few exceptions) in England and Wales, where the literal method of statutory interpretation appears to be dominant.

The apparent discrepancies between the methods employed by courts in Germany, England and Wales, and Sweden do raise questions about the future of the process of Europeanization. In order to avoid arriving at different results, many observers have advocated the introduction of a uniform European methodology of statutory construction.

If there is ever to be an approximation of interpretative methods as part of European methodology, it might be advisable to expand the independent European judiciary charged with interpreting European law in each of the member states. While a number of scholars have suggested this solution, it seems extremely unlikely in the present business and political climate of Europe. When one considers that Germany has 10 times more judges per capita than England and Wales, and that Sweden has five times as many judges per capita as England and Wales,

one would not expect the countries of Europe to want to expand the number of judges by the addition of specialized European courts on the model of the federal courts in the United States. Indeed, it might be more likely that the American states would agree to the formation of a common Supreme Court with jurisdiction over uniform legislation. However, even this development is unlikely to happen in the near future.

9

Judicial Precedents

This chapter examines the role and importance of judicial precedents in each of the four jurisdictions which are the subject matter of this book, namely, Germany, England and Wales, Sweden, and the United States. The chapter begins with a historical overview of the use and importance of judicial precedents in each of the four jurisdictions through the centuries and up into the present. As was the case in the chapter on statutes, to the extent that American history is the same as the history of England and Wales, it will not be repeated. Consequently the historical discussion in the United States will be comparatively short. The second section of this chapter will look at statutory provisions which concern the authority of judicial precedents. It will be seen that there are statutes in various jurisdictions which single out certain courts for special treatment: the statutes make the decisions of those courts binding as a matter of law on inferior courts and other institutions. It will also be seen that there are numerous statutory provisions which encourage judges at one level of a judicial hierarchy to conform their judgments to the precedents of other judges in the same courts. The third section of this chapter presents an overview of the modern practice of employing precedents in these four jurisdictions.

The fourth section of this chapter presents a study of the case decisions of the German Federal Constitutional Court. This study attempts to ascertain to what extent its judges feel constrained to follow its previous decisions. It will be argued that one way in which to assess the relative persuasiveness or the binding quality of precedents is to look at how often the particular court, here the German Federal Constitutional Court, overrules previous precedents. It will be seen that that court very seldom overrules previous precedents, at least when compared to the practice of the U.S. Supreme Court. This study will also attempt to answer how political the two courts are by identifying the number of overrulings that are political in nature. The definition of political used for this purpose is the one suggested by Lewis Kornhauser: a political overruling is one in which one would not expect the judges who decided the previous case to agree that the case should be overruled.

A. Historical Development

1. GERMANY

The *Reichskammergericht* (Imperial Chamber Court), founded in 1495, was the first appeals court which had jurisdiction over all decisions of subordinate courts in German territories.[893] In addition, it was the first appellate court in Germany which was independent of the monarchy.[894] As a result, the court and its decisions grew in importance. The decisions of the Imperial Chamber Court were published in unofficial digests.[895] These digests contained important precedents (of both the Imperial Chamber Court and the territorial courts) which were unofficially collected and published by academics.[896] One publication, the *Sentenzsammlungen*, listed the guiding principles of precedents in quasi-statutory form; and the principles were usually understood to apply in the same way as statutes.[897] The idea that an older case continued to have legal effect as a precedent was confirmed in 1581 by a procurator before the Imperial Chamber Court who argued that the case in question was decided *contra praeiudicata* and, therefore, illegally.[898]

The first case collections of case decisions merely reproduced the final judgments, which contained few of the facts and reasoning of the case. This practice changed over the course of time until these publications contained a comprehensive description of the case. This form of reporting considerably simplified the application of precedents.[899] Indeed, the process of applying precedents to the exclusion of statute law became so firmly anchored that a lawyer in 1597 was forced to remind people that precedents could not be regarded as equivalent to statute law; rather, cases should be judged on the basis of statute law alone.[900]

Advocates practicing before the Imperial Chamber Court would support their own arguments with as many precedents as possible while at the same time diminishing the persuasive value of their opponents' arguments by distinguishing their case authorities by claiming, for example, that the facts of the case differed from the case at bench.[901] The superior and subordinate territorial courts followed the

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[893] Peter Oestmann, Rechtsvielfalt vor Gericht: Rechtsanwendung und Partikularrecht im Alten Reich 16 (2002).

[894] Heinz Weller, Die Bedeutung der Präjudizien im Verständnis der deutschen Rechtswissenschaft: ein rechtshistorischer Beitrag zur Entstehung und Funktion der Präjudizientheorie 15 (1979).

[895] Filippo Ranieri, *Entscheidungsfindung und Technik der Urteilsredaktion in der Tradition des deutschen Usus Modernus: das Beispiel der Aktenrelationen am Reichskammergericht*, *in* 1 Case Law in the Making: The Techniques and Methods of Judicial Records and Law Reports 278 (Alain A. Wijffels ed., 1997).

[896] Weller, *supra* note 894, at 24.

[897] Ranieri, *supra* note 895, at 37.

[898] Oestmann, *supra* note 893, at 351.

[899] Ranieri, *supra* note 895, at 281, 283.

[900] Dietrich Kratsch, Justiz, Religion, Politik: Das Reichskammergericht und die Klosterprozesse im ausgehenden sechzehnten Jahrhundert 146 (1990).

[901] Oestmann, *supra* note 893, at 362.

opinions of the Imperial Chamber Court, and the judges of the Imperial Chamber Court sometimes accepted the precedents of lower courts.[902] The extent to which the Imperial Chamber Court felt itself bound by its own decisions is unclear.[903] In later years, however, the Imperial Chamber Court imposed time limits on certain cases; for example, for inheritance cases, it was held that precedents prior to 1586 could no longer be followed.[904]

The high-water mark of the Imperial Chamber Court's influence was 1800. By this time, the court was even publishing its own collection of cases, and its precedents possessed a *de facto* binding effect.[905] In fact, Germany was a leading user of precedents within Europe.[906]

The advance of legal positivism which accompanied the Enlightenment demanded that the legislator should have a monopoly over the creation of law.[907] As a consequence, the prevailing precedent cult was condemned as masking the legislative role of judges, who arbitrarily selected a precedent which they then would use to support decisions borne of conservative loyalty to the *ancien régime*.[908] Democracy demanded that judges be demoted to mere appliers of law.[909] In 1794, the Prussian State General Law went so far as to declare that "Future judgments shall not refer to the opinions of legal scholars or previous rulings of the court."

These developments, which followed an era of more or less blind obedience to authoritarian, absolutist rule, caused a critical reappraisal of the role of precedents in light of democratic principles. It was time to reinterpret the role of the judges, and to demote them from creators of law to appliers of law. Academics argued that the democratic legislative monopoly over the creation of law was incompatible with both *de jure* and *de facto* adherence to precedents.[910]

After the dissolution of the Imperial Chamber Court in 1806, Germany suffered a period of legal uncertainty due to Napoleon's conquests, the March Revolution of 1848, and the failure of the Constitution of St. Paul's (*Paulskirchenverfassung*). In order to counteract this malaise, Prussia, Bavaria, Hessen, and other territorial states laid down rules governing the binding effect of decisions issued by their supreme courts. Bavaria prohibited any disagreement with a precedent. Prussia enacted a statute on the binding effect of precedents but at the same time permitted the supreme appellate courts to amend their case law. Hessen attempted to introduce a ius certum by allowing derogation of precedents only when permitted by the territorial ruler.[911] Precedents served as ersatz statutes. Contrary to the prevailing

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[902] *Id.* at 524 and 678.
[903] *Id.* at 524.
[904] *Id.* at 523.
[905] Ranieri, *supra* note 895, at 277.
[906] Weller, *supra* note 894, at 27.
[907] Martin Kriele, Grundprobleme der Rechtsphilosophie 66 (2d ed. 2003).
[908] Weller, *supra* note 894, at 73.
[909] Kriele, *supra* note 907, at 66.
[910] *Id.* at 66, 70.
[911] Frank Diedrich, Präjudizien im Zivilrecht 96 et seq. (2004).; Weller, *supra* note 894, at 75.

opinion, Maurenbrecher (1840) recognized court decisions as a separate source of law;[912] most other academics lamented the role that precedents had come to play.

In 1871, the German Empire and bicameral parliament were founded under Otto von Bismarck. The *Oberhandelsgericht* (Supreme Commercial Court), established in 1869, was superseded by the *Reichsgericht* (Imperial Court) in 1879.[913] The court was charged with ensuring the uniformity of case law throughout the whole German territory.[914] However, the existence of different senates of the Imperial Court meant that decisions often conflicted with each other in practice. In order to promote legal certainty and predictability, section 136 of the Court Constitutional Act (*Gerichtsverfassungsgesetz*) stipulated that as soon as one senate intended to depart from the decision of another, the legal question concerned had to be submitted to the general senate for civil or criminal matters.[915] In addition, section 137 of that law ensured that important precedents could also play an important role in developing the law.[916]

In the 19th century, society experienced far-reaching change, mainly as a result of the industrial revolution. At universities, legal academics no longer bemoaned the binding effect of precedents[917] but rather the fact that judges followed them blindly. It was claimed that the slavish obedience of the subordinate courts led to a complete fossilization of law and, thereby, to a decline in the practical value of case law. The law—including the decisions of the courts—had to adapt to social change. The willingness to correct and change the law was itself evidence that advances were being made.[918]

The legal scholars of the 19th century used the popular "interest-based jurisprudence" (*Interessenjurisprudenz*) to reinforce their progressive stance against the entrenched position of precedents in legal practice. Starting from the conviction that the judge in a modern state was bound by statute and the legislator's avowed aim, interest-based jurisprudence nevertheless recognized that statutory norms in many cases were inadequate and incomplete.[919] In the absence of adequate statutes, interest-based jurisprudence took the view that it was the judges' task to find similar cases and to refer to them when making their judgments. However, judges should not create new law; rather, they should feel themselves bound to the values of the legislator.[920] Therefore, the judge was (again) degraded to the position of

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[912] Kriele *supra* note 907, at 73; Weller, *supra* note 894, at 98.

[913] Diedrich, *supra* note 911, at 89.

[914] *Id.* at 99; Friedrich Lauterjung, Die Einheit der Rechtsprechung innerhalb der höchsten Gerichte unter besonderer Berücksichtigung des Reichsgerichts 85, 93 (1932).

[915] Diedrich, *supra* note 911, at 99, n. 293.

[916] Josef Esser, Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts: rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre 28, 278 (4th ed. 1990).

[917] Regina Ogorek, Richterkönig oder Subsumtionsautomat?: zur Justiztheorie im 19. Jahrhundert 184, n. 24. (1986).

[918] *Id.* at 188.

[919] Weller, *supra* note 894, at 108.

[920] Kriele, *supra* note 907, at 74.

an applier of law. It was the values of the legislator rather than those of the judge which were decisive. At the time, this was the only viable way of ensuring the (political) neutrality of judges.[921]

Judicial practice bore little resemblance to the wishful thinking of academics. Rather, judges clung stubbornly to their precedents despite a growing need to adapt applicable case law to the circumstances of modern, everyday life, which had been drastically changed by the First World War and inflation.[922] Article 102 of the Weimar Imperial Constitution guaranteed judicial independence and strengthened the power of the judiciary.[923] This, in turn, increased the fear of arbitrary judicial decisions.[924] What looked like judicial progressivism turned out to be just the opposite: Fikentscher[925] describes the role of the judiciary as "a brake applied by conservatives loyal to the authoritarian state" (*obrigkeitsstaatlich-konservativer Bremsklotz*).

When the National Socialists came to power in 1933, they seemingly made only slight amendments to, for example, the German Civil Code, where they inserted a clause that required all provisions of the code to be interpreted "absolutely and unreservedly in a National Socialist sense."[926] The "spirit of National Socialism" was considered to be a supra-legislative source of law.[927] When reforming the criminal procedure law in 1935, the National Socialist government inserted a provision which declared that precedents issued before 1935 were no longer binding. Judges were now solely bound to the will of the legislature "and the healthy disposition of the people."[928] As a result, they were depoliticized more than ever and degraded to the status of an applier of law devoid of independent thought. They became the instruments of the dictatorship rather than the instruments of democracy.

2. ENGLAND AND WALES

During the initial development of the common law, the idea gained currency that earlier decisions could provide assistance in deciding new cases. Indeed, failure to follow precedents was probably seen as proof of unfair judicial practices and arbitrary government. In the mid 13th century, Henry de Bracton (ca. 1210–1268) published *De Legibus et Consuetudinibus Angliae* (The Laws and Customs of England) in which he systematized all of English law into a rational system, largely in terms of the ius commune, a combination of Roman and canon law taught at university. To illustrate his description of the law, Bracton employed the rulings of over 2,000

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[921] Weller, *supra* note 894, at 112.
[922] Lauterjung, *supra* note 914, at 94.
[923] Ulrich Eisenhardt, Deutsche Rechtsgeschichte § 770, ¶ 617 (4th ed. 2004).
[924] Weller, *supra* note 894, at 106.
[925] *Id.* at 708.
[926] Eisenhardt, *supra* note 923, at § 73, ¶¶ 650, 655.
[927] *Id.* at § 73, ¶ 652.
[928] *Id.* at § 74, ¶ 672b.

decisions,[929] praising many of them, but denouncing others.[930] In employing these rulings to describe the law, there was no sense that the case decisions were the law; rather, the case decisions were seen as the attempts of learned men to discern the universal law of nature.

Bracton's work led directly to the creation and publication of the Year Books. The first volume of the Year Books was published in 1268, the year of Bracton's death. It became the practice to record important judicial decisions in the Year Books by reporting the arguments of counsel and the ruling and reasoning of the judge. The judgments themselves were not included. The reports in the Year Books were written first in Latin and later in French, the official language of the courts. Between the years 1268 and 1535, over 20,000 court cases were recorded.

In the 16th century, the Year Books were superseded by the Reports. However, it was not until 1765, with Plowden's Reports, that court decisions were recorded regularly and reliably. Year 1865 saw the publication of the Law Reports by the Incorporated Council of Law Reporting, a commission which had been set up specifically for this purpose.

According to the thinking of the time, the law was not to be found in individual court decisions; rather the case decisions in their totality were a reflection of the law. It was only from the beginning of the 19th century that some appellate courts began to speak about the binding power of single legal decisions, or in other words, of determining the law from individual precedents.[931] This view quickly spread throughout the common law world, with the result that the birth of the modern doctrine of *stare decisis*, that is, that the applicable law is to be found in the rules (ratios or holdings) announced in individual cases, can be dated to the middle of the 19th century.

That this legal development took place in 19th century, and not before, was due to three essential reasons. First, up until the Judicature Acts in 1876,[932] the British courts were not organized according to a clearly structured hierarchy. Second, before the 19th century, court decisions were not reliably reported and published to the general legal public.[933] Yet the third reason is probably the most important: before the 19th century, people understood "law" in the natural law sense as something transcendent; in other words, something that the judge could find but not create himself.[934] It was John Austin (1790–1859), a pioneer of legal positivism in the common law world, who disseminated the notion that law "properly so called" consisted only of the norms that originate from the deliberate pen of the legislator.

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[929] *See* 1 Frederick Pollack and Frederic William Maitland, The History of English Law before the Time of Edward I 183, 209 (1903).

[930] 2 William Holdsworth, A History of English Law, 243, 541 (1938).

[931] Max Radin, Handbook of Anglo-American Legal Theory 356 (1936).

[932] Jim Evans, *Changes in the Doctrine of Precedent During the Nineteenth Century*, *in* Precedent in Law 58 (Laurence Goldstein, ed., 1991).

[933] Carleton Kemp Allen, Law in the Making 221 *et seq.* (7th ed. 1964).

[934] 12 William Holdsworth, A History of English Law 150 (1938).

The logical consequence of this realization was that, to the extent that the legislature was not making law, then the judges must be. Without meaning to minimize the influence of Hobbes and Bentham, after Austin, judicial pronouncements were understood, pretty much for the first time on a wide basis, as intruding improperly upon the legislative prerogative. As a consequence, the judges of the common law courts had an obligation to show respect for separation of powers and for democracy. In summary, it was the legal milieu of legal positivism that prompted the harsher form of the *stare decisis* doctrine as a means to minimize the opportunities for judicial lawmaking.[935]

This thinking can be seen clearly in the approach to precedents in Great Britain at the end of the 19th century. In 1898, the British Law Lords also expressed their support for the strict doctrine of *stare decisis* by declaring that they regarded themselves bound by their own earlier decisions (at least those involving the interpretation of statutes) until parliament acts to change their decision.[936] However, in 1966 the Law Lords departed from this approach and held that there was be no voluntary binding effect if that would lead to cases of injustice or obstructed development of the law. In doing so, the Lords specifically acknowledged the two universally recognized justifications for overruling precedents: mistake and changes in society[937]:

> Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore, to modify their present practice and, while treating formal decisions of this house as normally binding, to depart from a previous decision when it appears to be right to do so.
>
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlement of property, and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House.[938]

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[935] Evans, *supra* note 932, at 76.

[936] Anthony Blackshield, *"Practical Reason" and "Conventional Wisdom": The House of Lords and Precedent*, *in* Precedent in Law 107 (Laurence Goldstein ed., 1991) (discussing London Street Tramways v. London County Council, [1898] A.C. 375).

[937] These are referred to below as corrective and renovative overrulings.

[938] Practice Statement, [1966] 3 All ER 77.

The important thing to realize at this juncture is that neither the 1898 ruling of the House of Lords nor the 1966 clarification or reversal of that ruling was required by statute. The 1966 statement might have been issued at any time between 1898 and 1966, or the House of Lords might have refrained from issuing the 1966 statement altogether.

In contrast to the House of Lords, the Court of Appeal still considers itself to be bound by its own previous decisions. However, its practice of *stare decisis* is subject to a number of exceptions: the most obvious exception is where the previous decision was per incuriam, which is referred to here as corrective overruling. Another example is where a previous decision has been disapproved by the Judicial Committee of the Privy Council, even though the Privy Council is not part of the judicial hierarchy (although its judgments are widely respected and carry much persuasive force). Finally, the Court of Appeal may refuse to follow a previous decision that was on an interim matter, previously called interrogatory matters, and heard by only two judges rather than the customary three.[939]

3. SWEDEN

The application of previous decisions by future courts presupposed more than mere knowledge that a similar case was once decided. Rather, the later judge must have some way of convincing himself or herself that the legal issue resolved in the previous case really did arise out of a similar set of facts. Accordingly, the earlier decision must state the essential facts with enough particularity so that the previous case can be thought of as a statute containing certain operative facts (process of equivalence) together with a legal consequence. Even if the later judge can establish factual equivalence, then the earlier decision will still be of little use unless it contains a statement of a rule or at least the reasoning of the deciding judges from which a rule might be distilled. In other words, previous decisions are only useful if they articulate (or allow one to generate) a serviceable rule or guiding principle. If they do not do so, they are worthless to later judges unless the later cases display exactly the same facts, which is very seldom the case. In other words, and as is illustrated in the discussion below, the doctrine of *stare decisis* is predicated upon the discernibility of a legal rule and not, as is often contended, by the mere existence of similar facts.

Take the example of the driver of a car who suffers a heart attack, loses control of her car, and thereby causes an accident. If the earlier judgment does not indicate that the car driver had suffered a heart attack or other serious illness (if, for example, the judgment merely states, "B is not liable for the accident"), then the earlier judgment is unusable as a precedent. To be useable, a case decision, like a statute, must contain some minimum modicum of facts.

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[939] Holland and Webb, *supra* note 735, at 125.

What if the judgment does not articulate a broader principle but merely states, "The driver of a car who loses control over his car owing to the fact that he suffered a heart attack is not liable in this case"? In such a case, if one were to apply the principle literally, then it would only apply to cases involving drivers of cars who lose control because of heart attacks, but not because of other maladies. As such, it would not be directly applicable to a case in which the defendant drove a motorbike rather than a car, or to a case in which the driver lost control because he suffered an epileptic attack or was struck by lightning.

Up until the 20th century, the reasoning of the higher courts in Sweden (as was often the case in other countries) was formulated briefly, using keywords in a syllogistic style,[940] as if the decision followed naturally from the wording of the statute. According to Stig Strömholm, this style fit quite well with the reigning ideology of legal positivism and the notion that judges apply the law tersely and in a value-free manner. Because the judges couched their judgments in conclusory form, these judgments were not of much use in resolving later cases.

In the first half of the 20th century, however, the style of judgments started to change. However, although they were no longer syllogistic, they still were laconic and bureaucratic. While they discussed facts, little or no attempt was made to subsume them under the statute.[941] This practice gave way over time to a discursive style which can still be found today in trial court judgments weighing up all the facts but not referring to subsumption or even to the applicable rule or statutory norm.[942] Such judgments, however, are not very helpful in deciding later cases unless the later judge infers his or her own guiding principle from the judgment. For example, from our example of the driver with a heart condition, one could infer the following guiding principles for later use:

- A person who unexpectedly loses consciousness is not negligent (and therefore is not liable for the consequences).
- A person who loses control over an instrument due to a cause beyond his or her control is not negligent (and therefore is not liable for the consequences).

The courts themselves, of course, are not limited in their deliberations to the facts recited in the judgment of the court. They usually have a great deal of additional information at their disposal. In the real world, and regardless of the outcome of the case, judges make their decisions for a reason even if they do not record that reason. The judges involved in any reported case in the past, just like those dealing with a similar case today, would have held discussions before reaching their decision. They would have written notes and formed opinions and discussed difficult, controversial, and important cases with other judges. This is only natural

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[940] Strömholm, *supra* note 814, at 335.

[941] *Id.* at 336f; Peczenik and Bergholz, *supra* note 711, at 295.

[942] Peczenik and Bergholz, *supra* note 711, at 296.

because no judge at first instance wishes to be overruled on appeal. However, if the appellate court should overrule a first instance judge, then internal discussions would be held at the court of first instance to see how a reversal might be avoided in future cases with similar factual patterns. Considering that the training of judges in Sweden begins immediately after university, the judiciary obviously has an enormous institutional memory. By means of discussions with other judges, informal conversations, and tapping their years of experience, including the large number of decisions they have made during their careers, Swedish judges have acquired a great body of knowledge which does not necessarily find its way into the reasoning reported with the judgment. It is this institutional memory which the judge relies on when ascertaining the distinguishing characteristics of a decision. Nowadays, all judgments at court are saved digitally, making it considerably easier to find comparable cases. However, it was not always so easy to find comparable cases.

In order for a previous decision to be applied by another court, the decision must be made known to the other court in some other way, such as by publication. The decisions of the Supreme Court (*Högsta domstolen*) were first published in the journal *Nytt Juridisk Arkiv* in 1874. Before this time, they were not generally available. Accordingly, one could not complain that Swedish judgments were unsuitable as precedents because they were never intended to be used as such. It was only once they were read and (most importantly) quoted at court that they became capable of exerting influence on legal practice.

The modern style of judgments, influenced by the use of typewriters and computers, reminds Strömholm[943] of the common law tradition and German decision-making practice since the end of World War II. The modern style is just as discursive as before but now contains rules, arguments, and, often, value judgments as well as statutory purposes and aims. In many decisions, the judges attempt to articulate guiding principles which can be used to decide subsequent cases.[944]

4. THE UNITED STATES OF AMERICA

The English legal author William Blackstone came to have a strong influence on the American understanding of the doctrine of precedents.[945] As summarized by Mortimer Sellers, Blackstone described judicial decisions as the "principal and most authoritative evidence . . . of the existence of such custom as shall form part of the common law." Even in such cases, however, "the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation." So the attitude that Americans derived from Blackstone was "that precedents and

[943] Strömholm, *supra* note 813, at 339.

[944] Peczenik and Bergholz, *supra* note 711, at 296.

[945] Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 Am. J. Comp. L. 67, 70 (2006).

rules must be followed, unless flatly absurd or unjust." According to Sellers, there was a general presumption in the American common-law tradition that the law was the perfection of reason and experience, so that whatever was not reasonable could not be law (see the chapter on comparative jurisprudence).

The historical development of the understanding and importance of case law in the United States tracked that of England and Wales well into the 19th century. In 1849, Chief Justice Taney of the U.S. Supreme Court[946] wrote:

> I do not, however, object to the revision of [a question decided by earlier cases], and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.

However, in contrast to their British brethren, American judges have always assumed power to disagree with and to overrule earlier cases.[947]

It is not that they were unaware of the London Tramways case of the House of Lords, which announced that the Lords would not overrule previous decisions. Writing in 1932, the U.S. Supreme Court[948] said:

> In cases involving the Federal Constitution the position of this court is unlike that of the highest court of England, where the policy of *stare decisis* was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked.

The difference usually cited by American courts in not following the British lead is the one just given: when construing the U.S. Constitution, the justices of the U.S. Supreme Court must be willing to be flexible lest their mistakes and the policies of the past be forever carved in stone: "This Court, unlike the House of Lords, has from the beginning rejected a doctrine of disability at self-correction."[949]

Sellers suggests that the *Restatements of Law* (*Restatements*) published by the American Law Institute had the effect of immunizing the attitudes of American state court judges against a strict application of the doctrine of *stare decisis*.[950] The American Law Institute was founded in 1923 in part "to promote the clarification and simplification of law and its better application to social needs." According to Sellers, the feeling in the legal profession at the time was that many case decisions were irreconcilable with case decisions in other states. Further, the original authors of the *Restatements* saw themselves to a certain extent as legal reformers

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[946] Passenger Cases, 48 U.S. 283 (1849).
[947] Friedman, *supra* note 411, at 21.
[948] Burnet v. Coronado Oil & Gas, 285 U.S. 393 (1932).
[949] Helvering v. Hallock, 309 U.S. 106, 121 (1940).
[950] Sellers, *supra* note 945, at 76–77.

who sought to renovate case law so as to keep up with the growing complication of modern life. Accordingly, the *Restatements* constituted a bold attempt to encourage common law judges to reform their case law. The attempt was very successful, according to Sellers, who concludes that the *Restatements* have had a tremendous influence on the practices of common law courts. Of course, in order to take part in this movement, the judges had to be willing if necessary to overrule outdated cases, a practice which is referred to as renovative overruling in this book.

B. Statutes Regarding Precedential Effect

1. GERMANY

There are quite a number of statutes in Germany which have a direct or indirect effect on the precedential value of court decisions. A number of these statutes have vertical influence, that is, they have as their purpose that judges on inferior courts should follow the pronouncements of judges sitting on higher, appellate courts. These statutes are discussed below under the heading "The Vertical Effect of Precedents." In addition, there are a number of statutory provisions which encourage a single appellate court to stand by its own previous decisions. These statutes are discussed below under the heading "The Horizontal Effect of Precedents."

a. The Vertical Effect of Precedents

There are numerous statutory provisions regarding the vertical influence of precedents which concern appeals and referrals of cases to higher courts. Statutes concerning appeals are discussed first.

Concerning appeals, there are special rights of appeal in cases where lower courts fail to follow the precedents of the federal courts which constitute the highest courts in each of the five, nonconstitutional German judicial hierarchies: the ordinary courts (civil and criminal), the administrative courts, the social courts, the tax courts, and the labor courts. For example, there is an automatic right of appeal from the state administrative appellate courts (*Oberverwaltungsgerichte*) to the Federal Administrative Court (*Bundesverwaltungsgericht*) in cases which do not adhere to the latter's precedents, to the precedents of the Federal Constitutional Court, or to the precedents of the other federal courts, as long as these other precedents were reached in plenary session.[951] The provisions for the labor courts, social courts, and tax courts are identical.[952] For the ordinary state appellate courts (*Oberlandesgerichte*) in civil cases, the applicable provision grants a right to appeal in all cases when "necessary to ensure uniform case law

[951] Verwaltungsgerichtsordnung (VwGO) § 132 II no. 2.

[952] Arbeitsgerichtsgesetz (ArbGG) § 72 II no. 2; Sozialgerichtsgesetz (SGG) § 160 II no. 2; Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG) § 70 II no. 2.

(*Rechtsprechung*)."[953] There is no comparable provision for appeals from the state appellate courts (*Oberlandesgerichte*) in criminal cases; rather, as described in the next paragraph, the state appellate courts are in effect prohibited from deviating from precedents.

Even more far-reaching than the statute providing for an automatic right of appeal are those statutes requiring the referral (*Vorlage*) of cases to other courts for determination. For example, an ordinary state appellate court (*Oberlandesgericht*) in a criminal case may not by law decide a case which conflicts with a decision of another state appellate court or with a decision of the Federal Supreme Court (*Bundesgerichtshof*); rather, the court in this circumstance is required by law to refer the case to the Federal Supreme Court for final determination.[954] Such referrals are very uncommon, and so, for practical purposes, these appellate courts are choosing to follow the decisions of the other courts. There are similar statutes for other areas of law, such as for competition law.[955]

Article 100 of the German Basic Law divests all German courts of jurisdiction to find statutes unconstitutional, ordering them instead to refer the matter to the constitutional courts. Second, only the Federal Constitutional Court has jurisdiction to rule on whether international law is an integral part of federal law, and whether it directly creates individual rights and duties. Third, the constitutional courts of the states are prohibited from deviating from precedents of the Federal Constitutional Court and from the precedents of the constitutional courts of the other states (but not from their own precedents). Article 100 reads in its entirety as follows:

(1) If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the state (*Land*) court with jurisdiction over constitutional disputes where the constitution of a state (*Land*) is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by state (*Land*) law and where a state (*Land*) law is held to be incompatible with a federal law.
(2) If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.
(3) If the constitutional court of a state (*Land*), in interpreting this Basic Law, proposes to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another state (*Land*), it shall obtain a decision from the Federal Constitutional Court.

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[953] Zivilprozessordnung (ZPO) § 546.
[954] Gerichtsverfassungsgesetz (GVG) § 121 II.
[955] Gesetz gegen Wettbewerbsbeschränkungen (GWB) § 124 II.

There is one final statute with relevance to the vertical effect of precedents which deserves mention: section 31 of the Federal Constitutional Court Act. That statute reads simply as follows: "The decisions of the Federal Constitutional Court are binding upon the constitutional institutions of federal and state government, as well as upon all courts and agencies." This statute has been interpreted to mean that the holdings announced in the judgments of the Federal Constitutional Court are statements of law.

When speaking about the vertical effect of precedents in Germany, one should not forget that the typical German judge works in a collegial hierarchy. Except for those judges at the very highest levels, these hierarchies are autonomous in the sense of being separate and protected from outside influence of a political or other nature. In fact, judicial independence is now protected in Germany by a constitutional provision, namely, Article 97(1) of the Basic Law, which reads: "(1) The judges are independent and subject only to the law."

However, this autonomy from outside pressure should not blind the observer from recognizing the very considerable influence exercised from within the judicial hierarchy by one's colleagues, and particularly by the president of the court. In almost all cases, German judges are drawn from the ranks of young lawyers who have recently passed their second state examination. New judges are initially hired for a probationary period, during which their competence, collegiality, and productivity are assessed. A judge whose opinions are often at odds with those of his or her colleagues, for example, might not pass his or her probationary period. Once hired as a permanent employee, most judges hope for advancement, which means advancement in pay grade, promotion to a higher position within the court (such as attaining the position of presiding judge in a chamber), assignment to a court in a more attractive locale, and perhaps even elevation to one of the many appellate court positions, including those which are appointed politically, that is, from outside the hierarchy (see the chapter on judges). Once again, the sensitivity that judges show toward the decisions of superior courts will play a role. The decisions of a judge who does not follow the decisions of the appellate courts will be reversed much more often than a judge who tries to decide cases in conformance with the decisions of the applicable precedents. More reversals mean more work for judges both on the reviewing courts and on the lower ones. Furthermore, a judge who decides a case in contravention of a precedent will be subjecting the parties to the cost and delay of appeal and reversal. Consequently, there is substantial collegial pressure on judges to conform their decisions to precedents. While this result is not directly mandated by any particular statute or statutes, it is a natural result of the statutes regulating the employment and advancement of judges. This indirect effect might be described as institutional *stare decisis*.

b. The Horizontal Effect of Precedents

The statutes discussed above are intended to induce judges on inferior courts in Germany to follow the precedents of higher courts. In other words, the statutes discussed above are examples of statutes seeking to infuse the decisions of higher

courts with vertical precedential authority. In addition to statutes with a vertical influence, there are also a number of statutes in Germany that have a horizontal influence. These latter statutes seek to prod the judges of the same court to follow the precedents of their own courts and consequently to develop their case law in a consistent manner.

A typical example of a statute which confers such horizontal authority on the decisions of certain courts is section 16 of the German Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetzt*), which stipulates that all 16 federal constitutional judges must be called together in plenary session to hear any case in which one of the two eight-judge senates intends to depart from a case decision of the other senate. The two senates of the Federal Constitutional Court decide between them about 120 cases annually; yet the procedure of section 16 has only been invoked four times since the Federal Constitutional Court began hearing cases in 1951.

Before discussing similar provisions that apply to other courts in Germany, there is another provision applicable to the German Federal Constitutional Court with a far greater precedential influence on the judges of that court, at least in numerical terms. That is Article 93c of the Federal Constitutional Court Act. To understand the influence of Article 93c, one must first know that the two senates are broken down into three chambers of three judges each. (The presiding judge of each senate sits in two chambers.) On average, 2,150 matters are resolved by the chambers annually, constituting almost all the cases that come before the court. According to Article 93c, if the three judges are unanimous in their opinion that the case can be resolved by resort to the precedents of the senates (or to the plenary session precedents), the chamber shall enter final judgment, usually dismissing a constitutional claim.[956] If those three judges cannot agree, or if the case presents an issue which has not been addressed by the senates or by the whole court in plenary session, the matter shall be referred to the full senate for adjudication. When one considers that the senates decide only about 120 cases annually, it is evident that the court's precedents have a very large impact on the work of the three-judge chambers.

Each of the five other federal courts in Germany (the federal courts are the highest in the court hierarchy) has a statute similar to section 16 of the Federal Constitutional Court Act, which forbids the senates of those courts from deciding cases in contravention of the holdings of previous cases of the other senates. Thus, section 132 of the Courts Constitution Act (*Gerichtsverfassungsgesetz*), which applies to the ordinary courts, reads in relevant part:

(1) A Grand Panel for Civil Matters and a Grand Panel for Criminal Matters shall be established at the Federal Court of Justice. The Grand Panels shall form the United Grand Panels.

[956] Art. 93c (1) reads in pertinent part: "If the . . . constitutional issue determining the judgment of the complaint has already been decided upon by the Federal Constitutional Court, the chamber may allow the complaint if it is clearly justified. This decision is equal to a decision by the panel."

(2) In the event that a panel wishes to deviate from the decision of another panel on a legal issue, the Grand Panel for Civil Matters shall decide if a civil panel wishes to deviate from another civil panel or from the Grand Panel for Civil Matters, the Grand Panel for Criminal Matters shall decide if a criminal panel wishes to deviate from another criminal panel or from the Grand Panel for Criminal Matters, and the United Grand Panels shall decide if a civil panel wishes to deviate from a criminal panel or from the Grand Panel for Criminal Matters or if a criminal panel wishes to deviate from a civil panel or from the Grand Panel for Civil Matters or if a panel wishes to deviate from the United Grand Panels.

. . .

(4) The adjudicating panel may submit an issue of fundamental importance to the Grand Panel for a decision if it deems this necessary for the development of the law or in order to ensure uniform application of the law.

(5) The Grand Panel for Civil Matters shall be composed of the president and one member from each of the civil panels; the Grand Panel for Criminal Matters shall be composed of the president and two members from each of the criminal panels. If submission is by another panel, or if there is to be deviation from the decision of another panel, a member of that panel shall also sit on the Grand Panel. The United Grand Panels shall be composed of the president and the members of the Grand Panels.

There are similar provisions which apply to the other four federal appellate courts.[957]

2. ENGLAND AND WALES

In England and Wales, a precedent also produces the two effects discussed above: vertical effect (i.e., the extent to which lower courts are bound by the decisions of superior courts) and horizontal effect (i.e., to what extent a court is bound to its own decisions).

Interestingly, and in contrast to Germany, there is no statutory rule which compels a vertical binding effect for British case decisions. Such a statute would be superfluous because there is a well-established tradition—it might also be called a constitutional convention—that the decisions of the higher appellate courts are normative and binding upon the lower courts. The reasons ordinarily cited for this tradition are threefold: equality, legal predictability, and judicial efficiency or collegiality. There is, however, a statutory rule compelling binding effect for decisions of the Court of Justice of the European Union (CJEU), formerly known as

[957] § 11 II VwGO, § 45 II ArbGG, § 41 II SGG, § 11 II FGO.

the European Court of Justice (ECJ). Section 3(1) of the European Communities Act 1972, Chapter 68, reads as follows:

> For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).

When it comes to the European Court of Human Rights, however, British courts and tribunals are only required to take their judgments "into account."[958]

The horizontal effect of precedents is not anchored in any British statute either, but it too has been accepted for decades. As described above, it reached its high-water mark when the House of Lords stated that it considered itself bound by its own decisions until parliament decided to amend the law. However, in 1966 the Law Lords expressly freed themselves from this stricture,[959] and they now reserve the right to overrule their judgments if the court (today the Supreme Court of the United Kingdom) is of the opinion that, according to the legal principles of the new decision, the previous decision would also have been decided differently.

Other than the one statute quoted above regarding the decisions of the CJEU, the so-called binding quality of judicial decisions in England and Wales is self-imposed. This in itself is interesting because, from a German standpoint at least, it looks as though the judges are legislating rules for themselves; yet judges are not democratically elected. Should this type of legislation not to be left to parliament?

3. SWEDEN

Two formal statutes have had a direct effect on the influence of precedents established by the Supreme Court. They concern the vertical and horizontal influence of precedents respectively.

a. The Vertical Effect of Precedents

According to chapter 54, section 10 of the Procedural Code (*rättegångsbalken*), enacted in 1971, the Supreme Court may only permit appeals under the following circumstances: (1) the legal matter is of fundamental importance (literally: "is important for legal application") or (2) it is supported by special reasons, for example, in order to remedy a gross injustice. Reference to the code's *traveaux préparatoires* confirms the suspicion that the legislator intended to reinforce the power of

[958] UK Human Rights Act, Human Rights Act, 1998 § 2(1)(a) provides: "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any . . . judgment, decision, declaration or advisory opinion of the European Court of Human Rights."

[959] Bankowski et al., *supra* note 711, at 315, 327.

the court to create precedents. This function of court practice is generally recognized despite there being no comparable rule for other courts of last instance. This point was emphasized in a recent report by the government: "The main function of the appellate courts should be to create precedents."[960] Bergholtz and Peczenik report that the chief justices of these courts sometimes ask other judges to identify legal areas where they believe precedents should be created.[961] In the absence of precedents, some legal areas (for example, tort), would be incomprehensible or not even justiciable owing to the lack of statutory rules.[962]

A special division of the court consisting of three judges (*justitieråd*) determines whether to grant a petition for review. A case accepted for review is normally heard by a panel of at least five judges.[963] A plenary session can be convened in the event of derogations from a previous decision. These bodies decide which of their judgments are to be published with a full reasoning of the facts. The other judgments will be published in short per curiam judgments.

Although the decisions of appellate courts are not formally binding, lower courts tend to follow them nonetheless.[964] As early as 1947, the Parliamentary Commissioner for the Judiciary (*justitieombudsman*) criticized a first instance judge in his annual report for failing to follow a decision of the Supreme Court.[965] In the public discussion that followed, Stockholm law professor Folke Schmidt wrote: "The Swedish judge follows precedents precisely because they derive from the Supreme Court. He does this even if he believes that a different decision would per se be more appropriate."[966] Other commentators call for the effect of precedents to be articulated more emphatically: in other words, the subordinate judge will be bound to previous decisions unless the precedent is per incuriam (i.e., erroneous).[967] Even if this view does not find universal support, there is general agreement that precedents exert a very strong vertical effect in Sweden.

b. The Horizontal Effect of Precedents

As mentioned above, the Supreme Court usually decides cases in chambers of five judges. However, it is also possible to convene plenary sessions or a panel of nine judges in accordance with chapter 3, section 5 of the Procedural Code (*rättegångsbalken*):

> If, during their deliberations, a chamber finds that the predominant opinion in the chamber departs from a guiding principle or legal view previously

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[960] Regeringens skrivelse 1999/2000:106, Reformeringen av domstolsväsendet: en handlingsplan 9.

[961] Peczenik and Bergholz, *supra* note 711, at 294.

[962] *Id.* at 301.

[963] Strömholm, *supra* note 279, at 109.

[964] Peczenik and Bergholz, *supra* note 711.

[965] *Id.* at 300.

[966] Folke Schmidt, Domaren som lagtolkare, Festskrift tillägnad Nils Herlitz 272 (1955).

[967] *See* Peczenik and Bergholz, *supra* note 711, at 300, 302.

accepted by the Supreme Court, then the chamber can decide that the case or, if appropriate, a certain question from the case be referred to the Supreme Court sitting in plenary or as a panel of nine judges.

Plenary sessions are, however, a rarity. For example, between 1983 and 1993 there were only three plenary sessions despite the fact that, during this time, the Supreme Court published between 130 to 160 reasoned decisions and 160 to 180 others.[968] This may be due to the fact that one panel of judges cannot correct its own case law because the panels do not sit in regular constellations, but rather are brought together only for the purposes of deciding particular cases. On the other hand, this low number of cases may also be explained by the unpopularity of this procedure (horror pleni).[969] Consequently, Bergholtz and Peczenik have found that there are many cases in which the judges do not formally depart from a previous decision but rather choose to follow another line of reasoning, sometimes by pointing out differences between the facts of this and earlier cases (a process which British and American courts refer to as distinguishing).[970] In other cases, judges simply ignore precedents (referred to as sub silencio overruling in English), with the result that those who need to apply the law in question do not know whether the earlier guiding principle is obsolete or whether the derogation was an exception.[971]

4. THE UNITED STATES OF AMERICA

In 1858 the American State of Georgia enacted a provision intended to make unanimous decisions of the Georgia Supreme Court binding law. That statute provided that such decisions were to have the force of law in the state, and that no court (including the Georgia Supreme Court itself) could disregard or overrule them.[972] While it is not known whether this enactment caused the Georgia Supreme Court to refrain from making unanimous decisions, the statute was repealed a few years later.

In 1990, the Federal Courts Study Committee[973] suggested a mechanism for dealing with conflicts in the case decisions among the various circuits of the federal courts. At present, this problem consumes a good deal of the attention of the U.S. Supreme Court, but there are still many unresolved conflicts. According to the committee's suggestion, congress should empower the U.S. Supreme Court to refer a case presenting a question on which some courts of appeals are split to a court of appeals that has not yet addressed the question. The committee also recommended that this court should decide the case en banc. Once decided, the case

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[968] *Id.* at 311.

[969] *Id.* at 309.

[970] *Id.* at 303.

[971] *Id.* at 303, 309; Aleksander Peczenik, Juridikens teori och metod: en introduction till allmän rättslära 40 (1995).

[972] 1858 Ga. Laws 74, Ga. Code Ann. § 6-1611, discussed in Smith v. State, S.E.2d 369 (1943).

[973] Federal Courts Study Committee, Report of the Federal Courts Study Committee (1990).

would, by federal statute, constitute a binding precedent on all federal courts other than the U.S. Supreme Court. This proposal elicited a number of responses from academics, but it has not been pursued.[974]

C. The Modern Use of Precedents

1. GERMANY

German academics are quick to state that court decisions are not formally binding. Indeed, this is written so often that it needs no citation to authority. How should such a statement be understood? First, by the word *formally,* they mean that there are no statutes making court decisions binding. However, as anyone who has read the discussion above knows, there is one such statute that cannot be overlooked: section 31 of the Federal Constitutional Court Law, which specifically orders judges of other courts (actually, by its terms it would seem also to apply to the judges of the Federal Constitutional Court) to adhere to the legal pronouncements of the federal constitutional judges. But what of the other statutes mentioned above, particularly the referral (*Vorlage*) statutes and the referral provision contained in Article 100(3) of the Basic Law? These are formal laws which have the purpose and effect of making the decisions of certain courts binding on other courts. And what of the phenomenon of "institutional *stare decisis*," which every German judge recognizes? In fact, precedents play an enormous role in German legal practice in concretizing and extending statutory law. Indeed, in the author's opinion, the practical precedential effect of court decisions is so strong in Germany that it would make no appreciable practical difference if a statute mandated that the decisions of all appellate courts were binding.

What then do Germans mean when they say that court decisions are not formally binding? They mean a number of things. First, they mean that only statutes can be binding: the German cognate for binding—*bindend*—is only applied to statutes. Therefore, one would be using the word *bindend* improperly if one were to apply it to court decisions. In short, the word *bindend* could perhaps be better translated into English as "statutorily mandated." Second, court decisions cannot be binding because if they were, it would violate the doctrine of separation of powers, which requires that all legislative power be exercised by the *Bundestag* and *Bundesrat*, not by the courts. This is the reason there is a special word, *bindend*. Third, when stating that court decisions are not binding, Germans are distinguishing their (constitutional) tradition from that of Britain and the common law world, which recognizes case law as an independent, though subordinate, source of law (see the chapter on statutes).

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[974] *E.g.*, Michael Stokes Paulsen, *Abrogating Stare Decisis By Statute: May Congress Remove the Precedential Effects of Roe and Casey?*, 109 Yale L.J. 1535, 1535 (2000); John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 Duke L.J. 503, 503 (2000).

A fourth reason—and one which is strongly connected to the third reason—is that in Germany, there are so many court decisions on most subjects that it would be impossible for all of them to be binding, especially as they are frequently contradictory. In fact, as discussed below, most lawyers need the assistance of a commentary to separate the wheat from the chaff when it comes to case decisions. This is one of the reasons Germans emphasize consistent judicial interpretation or *ständige Rechtsprechung*, which is discussed below. The fact that there are so many inconsistent judicial decisions is interpreted to mean that they cannot be binding. A fifth reason, which is related to the fourth, is that case decisions cannot practically be binding because, as described below, they are so hard to find. Even decisions of the federal courts can often only be found in specialist publications. Another reason, the sixth so far, is that the German authors who voice an opinion on this topic are almost all academics, and German academics for the most part take a condescending attitude toward the judiciary.

The seventh reason, and the final one for our purposes, is this: for all of the reasons mentioned above, and probably others, German lawyers are not in the practice of analyzing and discussing case decisions and citing case decisions to each other and to the courts. Doing so is not part of the legal culture. Rather, the courts are expected to know the law and the judicial construction of the law (see the chapter on lawyers).

To summarize, German academics state that court decisions are not formally binding because German lawyers do not consider them to be binding. This is a statement of their understanding of the (proper) role of precedents in their legal system, and as such it is a valid, observable phenomenon (see the chapter on comparative jurisprudence). This understanding does not, however, in any way negate the fact that judicial decisions are of tremendous practical importance in Germany, as illustrated in the following paragraphs.

One study conducted in 1988 found that 96.7 percent of the decisions of the German Federal Supreme Court (*Bundesgerichtshof*) contained citations to precedents. Books and articles were referenced in 89.1 percent of the cases. In analyzing the cases, the author of the study concluded that judges were influenced more by the decisions of their colleagues than by the opinions of practitioners and academics.[975] This study was done at the highest level of the court hierarchy. If a study were to be conducted at lower levels, the influence of academics would be found to drop dramatically. Further, the decisions of the Federal Constitutional Court have even fewer references to the opinions of practitioners and academics. Almost all of approximately 100 recent decisions of the Federal Constitutional Court contained references to other case decisions, but well under half of them refer to the opinions of practitioners and academics.[976]

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[975] *See* Ellen Schlüchter, Mittlerfunktion der Präjudizien: eine rechtsvergleichende Studie 32 (1986).

[976] This study was conducted quickly for purposes of this chapter. Exact figures will be published separately or in another edition of this book.

The vertical authority of precedents in practice can perhaps best be illustrated by a group of over 160 cases in which an appellate court refused to follow a decision on a point of law which had been reached by a federal court, specifically the German Federal Administrative Court. In the 1980s, many Tamil people from Sri Lanka sought political asylum in Germany. The Federal Administrative Court ruled that the Tamil were not being politically persecuted; rather those seeking asylum were members of a separatist movement who simply refused to recognize the legitimacy of the government of their state. However, the superior administrative court (*Oberverwaltungsgericht*) of the German state (*Land*) of North Rhine-Westphalia disagreed with the Federal Administrative Court and routinely granted members of the Tamil minority group in Sri Lanka asylum in Germany. In every case, there was an appeal to the Federal Administrative Court; and every grant of asylum was reversed. Finally, after over 160 cases of reversal, the superior administrative court reluctantly acquiesced and announced in a published opinion that it would follow the rulings of the federal court in the future even though the judges of the superior administrative court disagreed with that ruling and considered it to be wrong.[977] These cases are interesting because they are unique: the author has never been able to find any other examples of flagrant disobedience by inferior courts to the legal rulings of superior courts.

When one speaks of judicial precedents in Germany, one must pay particular attention to the fact that it is often difficult to obtain copies of the decisions of the appellate courts, even of the federal courts. There is no common practice concerning publication of decisions of the latter, much less of the state appellate courts. While most decisions of senates of the German Federal Constitutional Court are published in the official reports along with the decisions reached by that court in plenary session, this is not the case for the other federal courts. Even though all of them publish official reports, they all reserve the right to select which decisions they believe worthy of publication. Even the Federal Constitutional Court makes generous use of this right. The reader will remember that the Federal Constitutional Court decides over 2,000 matters annually in three-judge chambers, yet only a small number of these decisions are to be found in the official reports, the *Kammerentscheidungen des Bundesverfassungsgerichts (BVerfGK);* and the court only started publishing these decisions in 2003. Many important decisions, particularly of the Federal Supreme Court, are only to be found in nonofficial reports including periodicals.

While one would expect that German judges, who are highly specialized, would learn about the most important decisions from the federal courts in their fields, one would not necessarily expect them to know cases from other German states, because those courts are not superior to them in the judicial hierarchy. This is the main reason why Germans speak of *ständige Rechtsprechung*, which is

[977] Oberverwaltungsgericht Nordrhein-Westfalen (OVG NW), Case No. 19 A 10005/85 at 18.

translated into English as consistent judicial interpretation or into French as *jurisprudence constante*. It not infrequently happens that courts of one state (*Land*) will interpret a federal statute in a way that is contrary to the interpretation in another state. Because the lawyers in the case are not expected to assist the judges on questions of law (see the chapter on lawyers), they do not routinely research the judicial decisions of other states, much less foreign jurisdictions, for what a common lawyer would term persuasive precedents.

Specialized lawyers tend to learn about new judicial developments through specialized journals. These are usually published monthly and are quite up-to-date. There is also a movement to make more judicial decisions available online. The German company Juris,[978] for example, offers such a service; but it does not have access to all relevant case decisions. About 10 years ago LEXIS-NEXIS[979] began a similar project but has been faced with many of the same problems. For one thing, they have had to purchase copies of historically important case decisions from the courts.

The nonspecialist lawyer and student are likely to learn of case developments through commentaries, meaning a one-volume book that usually addresses one code or addresses the statutory law on one subject. The author is expected to find and report on the decisions most important to the interpretation of the statute or statutes under discussion. The commentaries follow the outline of the code or statute being reported on, and the individual reports are arranged according to the sections of the codes and statutes in the same way that the discussions in the American *Restatements* follow individual provisions. As in the *Restatements*, the commentaries quote the provision in bold type at the beginning of the discussion. Then one often finds a short historical note, although the reader might be referred for this purpose to another section where the history is recited. Then the commentary might include a short general discussion of the major books and articles on the subject, although this too is often accomplished by reference to another section, or omitted completely.

Then one arrives at the heart of the commentary, and usually the only part of the commentary that is of interest to practitioners: the discussion of how the particular provision should be applied to different factual situations. This discussion is literally the only reason that the practicing lawyer or judge consults or buys the commentary; for the practitioner seldom has any interest whatsoever in the historical background or in the general discussion or general literature pertinent to the section being discussed. Most interesting for our purposes is this: well over 90 percent of the discussions in commentaries consist of citations to cases. Depending on the subject of the statute and on the particular commentary, the discussion might consist entirely of recitations of headnotes from leading cases. Factual details from the cases are practically never found in the commentaries, so

[978] Juris Das Rechtsportal, www.juris.de.

[979] http://www.lexisnexis.de.

that the user cannot be expected to apply the historical method, discussed below, which is so prevalent in the common law world.

Historically, collecting cases for a commentary has been a very difficult job. The German judiciary, which is not only extremely large but which also is burdened with a very heavy case load, produces thousands of decisions annually (see the chapter on judges). Other things that make this job difficult are, as noted above, the unavailability of many of the case decisions and the contradictory nature of some of them. Due to developments in communications, it has become easier to find current judicial decisions; but the numbers are nevertheless so large that it is difficult for anyone other than a specialist to be able to determine if the decisions are significant in terms of raising or deciding new issues or in terms of agreeing or disagreeing with the literature or with the case decisions of some other state (*Land*). Thus, the commentaries are indispensable to the practitioner in much the same way that legal encyclopedias are indispensable to lawyers in England, Wales, and the United States.

Yet German commentaries are important in one way that common law encyclopedias are not: they are normative in the sense that they serve to standardize the law. This is somewhat like the function served by the American *Restatements* with the important difference that almost all of the American *Restatements* address state, not federal, law. An illustration of the importance of commentaries in Germany can be found below.

As in England, Wales, and the United States, case decisions that are published in the official reports begin with headnotes, parroting language from the case on legal issues. Sometimes the headnotes are mere *obiter dicta*; but at other times they contain the holdings of the decision. In most cases it is these ratios or holdings that are repeated in the commentaries. While this practice of quoting headnotes resembles at first glance the practice employed in England, Wales, and the United States with legal encyclopedias, there are at least two important differences in Germany. First, in Germany one will always refer to the commentary and perhaps add the case citation, whereas in common-law countries, the lawyer will cite the case and may or may not reveal that he or she found the case in an encyclopedia. Second, there is a basic difference in the way in which the ratio or holding is employed. This will be explored in the next paragraphs.

Both the common lawyer and the German lawyer realize that the ratio of a case construing a statute is a refinement of the statute and is in that sense a kind of subsidiary lawmaking. However, in Germany one applies the ratio, or more accurately the statement from the commentary, quite literally as one would apply a statutory norm in a literal fashion. Except for cases from the Federal Constitutional Court and for classic cases, it is almost unheard of for anyone to discuss the particular facts of the case. In the common-law world, on the other hand, it is quite common to do so.

If one applies a rule textually, it means that the person applying the rule is not primarily concerned with the historical source of the rule; nor is he or she

necessarily concerned with the purpose or purposes of the rule. Following the terminology of the chapter on statutes, these two methods of interpretation are referred to as the historical approach (being concerned with the historical source of the rule) and the functional approach (being concerned with the purpose or purposes of the rule). Germans, then, apply rules from cases in a literal, textual manner in the same way that statutes are very often interpreted in the common-law world (see the chapter on statutes). By delving into the facts of the case, common lawyers are applying rules from cases in a historical matter.

Examples from two court decisions concerning National Socialist symbols, one decision from the Federal Constitutional Court and the other from the Federal Supreme Court, can serve to illustrate the observation that German courts often employ a textual approach when applying rules from other cases. Both cases concern alleged violations of section 86a of the Criminal Code (*Strafgesetzbuch*) concerning the use of symbols of unconstitutional (banned) organizations. That provision reads in relevant part as follows:

(1) Whoever:
   1. domestically distributes or publicly uses, in a meeting or in writings disseminated by him, symbols of one of the [banned] parties or organizations; or
   2. produces, stocks, imports or exports objects which depict or contain such symbols for distribution or use domestically or abroad, in the manner indicated in number 1, shall be punished with imprisonment for not more than three years or a fine.

(2) Symbols, within the meaning of subsection (1), shall be, in particular, flags, insignia, uniforms, slogans and forms of greeting. Symbols which are so similar as to be mistaken for those named in sentence 1 shall be deemed to be equivalent thereto.

In 1984, an enterprising Bavarian salesman of T-shirts printed and sold 153 T-shirts with pictures of Adolf Hitler in uniform on the front. Black crosses had been substituted for the swastikas on his uniform and hat. The swastika was the most prominent symbol employed by the National Socialists, whose party has been banned in the Federal Republic of Germany. Hitler's name was printed in Gothic script above his picture. Below his picture were printed the words "European tour," also in Gothic script. Under the words "European tour" appeared the following:

September 1939 Poland
September 1940 England Cancelled
April 1940 Norway
April 1941 Jugoslavia [*sic*]
May 1940 Luxembourg
May 1941 Greece
May 1940 Holland

June 1941 Crete
May 1940 Belgium
August 1942 Russia Cancelled
June 1940 France
July 1945 Berlin Bunker

The T-shirt salesman challenged his conviction for violation of section 86a on constitutional grounds, specifically free speech and artistic freedom, which are protected by Article 5 of the German Basic Law.

In ruling for the T-shirt salesman, the German Federal Constitutional Court[980] stated, "If this were not obvious satire, it would not be constitutionally protected." The headnote of the case states the holding somewhat differently, but with substantially the same meaning: "Satirical representations are not excluded from the protection of Article 5 merely because they have as their subject a former National Socialist organization." In common law parlance, one would say that this is the ratio or holding of the case.

The second case is from 2007. There the defendant was convicted for selling stickers showing crossed-out swastikas in violation of section 86a of the criminal code. The black swastika could be plainly seen in the background behind a red circle with a diagonal red line through it. This defendant appealed his conviction. However, his case did not reach the Federal Constitutional Court because he received a favorable ruling from the German Supreme Court.[981]

If this case had arisen in the United States, and the Hitler T-shirt decision of the Federal Constitutional Court had been a ruling of the U.S. Supreme Court, the appellate court would probably have begun its analysis with the Hitler T-shirt case. The appellate court would probably have reasoned that the holding of that case (satirical representations are protected by Article 5) was too narrow to apply literally to the present case because the crossed out swastika was not satirical. Nevertheless, the appellate court probably would have thought that the judges who drafted the opinion in the Hitler T-shirt case would probably rule that the crossed out swastika was also protected because, while the crossed-out swastika is not satirical, it certainly is critical; and satire is merely a subset of criticism.

If this type of reasoning had been directed at a statute rather than at the holding (or ratio) of a case, one would say that the appellate court was using both the historical and purposive (functional) methods of statutory construction. The historical method involves having the interpreter assume the perspective of the legislators who drafted the rule: here, the judges of the U.S. Supreme Court. The purposive method looks behind the narrow text of the rule to reach the policies or purposes behind it: here, the purpose is to protect not just satirical depictions,

[980] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 3 April 1990, BvR 680 (Ger.).

[981] Bundesgerichtshof [BGH] 15 March 2007, 3 StR 486/06 (Ger.).

but also critical depictions, since satire is a form of criticism. Consequently, an American appellate court would most likely conclude on the basis of the Hitler T-shirt case that the crossed-out swastika was also protected by Article 5.

Interestingly, the Federal Supreme Court followed a different approach. Rather than beginning with the decision of the Federal Constitutional Court, the federal judges who decided the case construed the purpose of the statute to be narrower than its text. Even though the text of the statute would seem to outlaw all depictions of the symbols of banned organizations without exception, that is not, in the court's view, the real purpose of the statute: "Use of a symbol of an unconstitutional organization in a way that obviously and clearly shows one's opposition to that organization, and one's rejection of that organization's ideology, does not contravene the purposes of section 86a and therefore does not come within the ambit of the statute." The court continued by remarking that it was also construing the statute in a way compatible with the protection of constitutional rights, citing another decision of the Federal Constitutional Court. The Hitler T-shirt case is neither discussed nor cited.

Although the author has not communicated with the judges from this case to confirm the following, he submits that it would be naïve to assume that the supreme court judges had never heard of the Hitler T-shirt case, if for no other reason than that it is mentioned in every commentary the author has consulted on section 86a of the Criminal Code. Further, it would be preposterous to assume that these federal judges were unaware of section 31 of the Federal Constitutional Court Act, which makes the decisions of the Federal Constitutional Court binding on all other courts, including the Federal Supreme Court. Thus the only possible conclusions are either that the judges in the swastika case decided that they could and should resolve the case without resort to constitutional law, making the Hitler T-shirt case irrelevant, or that they decided that the Hitler T-shirt case was not dispositive of the swastika case. If the former, then this case illustrates what was stated above: German lawyers are not in the practice of analyzing and discussing case decisions. If the latter, then this case illustrates that German judges apply the holdings or ratios of cases textually: the swastika case fell outside the literal terms of the holding in the Hitler T-shirt case because the anti-swastika symbol was not satirical.

Another important aspect of German legal practice is the interplay between precedents and commentaries mentioned above. This interplay, and the importance and use of commentaries in Germany, can also be illustrated by two cases from the law of product liability. The first is from the Federal Supreme Court, the highest court of appeal for civil cases in Germany, and the second is from the state court of appeal (*Oberlandesgericht*) in Dresden. Both cases concerned the question of whether someone who merely assembles a product from prefabricated parts can be considered a producer for purposes of product liability. The first case, that from the Federal Supreme Court, actually was decided before enactment of the Product Liability Act (*Produkthaftungsgesetz*) . However, it deals with the same legal issue

under German tort law which had been extended by the courts to encompass liability without fault for injuries from defective products. Further, that case is still regularly cited in court decisions and commentaries construing the Product Liability Act.

In the first case, the Federal Supreme Court was faced with a claim involving a large, industrial, movable crane.[982] The defendant had assembled the crane from prefabricated parts. In addition, the defendant had replaced the original petrol engine, which generated electricity to assist in operating the crane, with a German-made diesel engine. The crane collapsed due to a latent defect in part of the superstructure of the crane. The collapse was not caused by anything having to do with the assembly of the crane or with the replacement of the original engine for the generator. The legal issue for decision by the court was: is a defendant who assembles prefabricated parts, including a part with a latent defect, liable as a producer.[983] While noting that an assembler might, in certain circumstances, be considered a producer for purposes of product liability, the German Supreme Court ruled that, in this case, the mere act of assembly does not make the assembler a producer. As its rationale, the court wrote that nothing the defendant did, not even installing a different engine, did anything to cause or even to raise the risk of injury.

The leading German commentary for civil law is *Palandt*, which also covers the Product Liability Directive. In that discussion, the report of the industrial crane case of the Federal Supreme Court discussed in the previous paragraph reads as follows: "Producer of a finished product also includes one who is only concerned with assembly from parts delivered to him by another company with assembly instructions."

In 1996 the state appellate court (*Oberlandesgericht*) in Dresden was faced with another case of someone having merely assembled a product that contained a part with a latent defect. In that case, the product that was a bicycle, and the part that contained a latent defect was the rear axle. When riding the bicycle, the rear axle suddenly failed, letting the pedals spin without friction. The driver lost balance and fell off the bicycle, sustaining injuries. The state appellate court held in favor of the plaintiff. The judges justified their decision by stating that the assembler of a product is liable as a producer, and the only authority they cited was *Palandt*.

Whether one agrees with the decision of the Federal Supreme Court, with the author of *Palandt*, or with the case from Dresden is not the issue here; rather, the example was chosen to show how court decisions are chosen and filtered by commentators in their attempts to make uniform the application of the law.

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[982] Bundesgerichtshof [BGH] 14 June 1977, Betriebsberater [BB] 77, 1117 (Ger.).

[983] European law, with some exceptions, imposes liability only on the producer, not the seller, of defective products.

2. ENGLAND AND WALES

In order to apply a previous decision, the first task is to find a decided case with basically similar facts (a process of equivalence). However, it is unclear what criteria determine how factual similarities are to be examined or similar previous decisions selected. This is a problematic issue and relates to the interrelationship between the rule and the factual situation presented. This interrelationship is in turn influenced by one's understanding law and methodology.[984]

This issue is considered in more detail in the chapter on legal reasoning. However, it should be noted here that the search for relevant precedents is, from an intellectual standpoint, exactly the same process as the search for relevant statutes. A statute, in other words, is a kind of codified court judgment. It also should not be forgotten that in many if not most areas of law, there will be one or more statutes which could find application to the case before the court, and that these statutes have also been the subject of judicial construction, meaning that the problem of finding the most appropriate rule, whether it be statute-based or case-based, does not disappear when one finds a potentially applicable statute.

A further problem concerns how flexible the jurisdiction is in applying its statute-based and case-based rules. For example, statutory rules in Germany are often applied by analogy, meaning that the number of rules which might find application to any particular factual situation is enlarged. Similarly, England and Wales often apply rules by analogy, but, unlike in Germany, the rules so applied are almost exclusively case-based ones, enlarging the reach of such rules.

Moreover, the rule or ratio of any case can be identified and articulated in various ways. Rupert Cross[985] proposes a definition that reflects the judge's train of thought in the original case. He takes the term *ratio* to mean "any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury." Arthur Goodhart, on the other hand, stresses the essential facts[986] and Edward H. Levi essentially adopts the perspective of a judge who looks on the case retrospectively.[987]

Rather than continue to list the great number of further definitions with diverse and sometimes very subtle differences and nuances, the author chooses to adopt the approach of Lewis Kornhauser. According to him, one can expand or restrict the legal principle or ratio of the case depending on whether one chooses to use the result of the case (that is, the fact-based holding), the norm or rule as announced in the decision itself, or some even broader principle, under which the

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[984] *See* Edgar Bodenheimer et al., An Introduction to the Anglo-American Legal System 117 (2d ed. 1988).

[985] Rupert Cross and J. W. Harris, Precedent in English Law 72 (4th ed. 1991).

[986] Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L.J. 1930 161, 182 (1930).

[987] Edward Levi, An Introduction to Legal Reasoning 2 (1949).

previous decision can be subsumed.[988] The result is ordinarily narrower than the rule announced by the judge who wrote the opinion. The other principle may be narrower or broader than that rule.

The processes of finding the appropriate case or cases (the process of equivalence) and of identifying and articulating the binding principles also involves the process of distinguishing, the name given to the decision of the judge not to employ the rule of an arguably binding precedent.[989] Distinguishing sometimes means that the judge in the later case denies the similarities of the previous decision, perhaps because it concerns an analogy with a different field of law which he finds unconvincing. As to another potential precedent, the judge might convince himself that (even if he would have reached the previous decision himself and arrived at the same result), logically, he is not compelled to decide the case in question any differently than he intended to do. Sometimes, judges depart from supposedly binding previous decisions by establishing significant differences in the facts of the case or the previous decision with the result that two superficially similar cases turn out to be not so similar after all. In this way, they restrict the previous decision's scope of application. Using Kornhauser's vocabulary, one would say that the judge is restricting the rule of the previous decision to its fact-based result. No matter what argument is used, the effect of distinguishing is to release the case in question from applying the previous decision's rule.

The intellectual process used in distinguishing cases is exactly the same as used in distinguishing statutes, although the word distinguishing is seldom used in this sense in English; rather, one speaks of statutes being inapplicable to the case at bench. Let us consider the examples in the previous paragraph, but move them into the context of statutory interpretation. An English or Welsh judge who, for example, refused to apply a statute by analogy would most likely hold that the statute by its terms did not extend to the factual situation with which the court was presented. No further justification would be expected or likely given. Employing the second example from the preceding paragraph, if the judge were able to convince himself that the statute did not logically compel him to decide the case in question any differently, then he would be likely to say simply that the statute did not apply or that it did not mandate a different result. As to the third example from the previous paragraph, if the statute on its face seems to apply to the facts before the court, the judge might nevertheless rule that there are significant differences between the facts before the court and the factual situations to which the statute was intended to apply. An observer might say that such a judge is construing the statute narrowly. However, if it were a case-based rule that the judge were choosing

[988] Lewis A. Kornhauser, *Stare Decisis*, *in* 3 New Palgrave Dictionary of Economics and the Law 509 (Peter Newmann, ed., 1998).

[989] Robert Alexy, Theorie der juristischen Argumentation: Die Theorie des Rationalen Diskurses als Theorie der Juristischen Begründung 340 (1978).

not to apply, the observer would more likely say that the judge was distinguishing the previous case.

When can courts depart from their previous decisions, and when should they? To answer these questions, Kornhauser employs the model of an immortal judge.[990] In this imaginary court system, the fundamental personal values of the immortal judge would determine the selection of the applicable statutes, the selection of the applicable case decisions, and the solution to all cases. Provided the immortal judge had perfect recall of all of her previous decisions, similar cases would be decided alike. Such equality in decision-making strengthens legal predictability and trust in the judiciary. Both are crucial in justifying the doctrine of *stare decisis*.

According to Kornhauser, faced with a case with facts similar to one of her precedents, the immortal judge will only depart from a precedent (in other words, she would only overrule one) in three situations: first, if she now realizes that she made a mistake in the previous case; second, if important social, legal, or other features of society have changed since the previous decision was announced; or third, if her fundamental personal values have changed. We know that normal, mortal judges make mistakes now and then, even those sitting in the Court of Appeal and of the Supreme Court of the United Kingdom. They are free to correct their previous per incuriam decisions. If this happens, the judges who decide that the previous case was mistaken can be expected to state this fact, and to explain how the mistake has been rectified. Where the social situation, perceptions of public policy, or developments in the law have changed since the previous ruling, even the Law Lords occasionally change their minds; and, in doing so, we expect them to describe what has changed and to justify the resultant legal consequences.[991] A dynamic understanding of the *stare decisis* doctrine therefore makes exceptions to the horizontal effect of precedents in the interests of correcting errors (corrective overrulings) and of updating case decisions to comport with modern situations (renovative overrulings).

What of the third situation in which the immortal might amend her previous rulings: changes in the judge's personal fundamental values? In reality, neither immortal nor mortal judges are likely to change their personal fundamental values; rather, an overruling which can only be explained by a change in the personal fundamental values of the judges is one due to a change in the constitution of the court. This type of overruling is described here, for the reasons given below, as being legislative or political.

Recalling that the vertical form of *stare decisis* serves three functions—equality, legal predictability, and efficiency—it is submitted that the horizontal form has a forth function: respect for separation of powers. Consider first the situation

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[990] Lewis A. Kornhauser, *Modeling Collegial Courts, II: Legal Doctrine*, 8 J.L. Econ. & Org, 441 (1992).

[991] Holland and Webb, *supra* note 735, at 123.

in which the precedent involves the construction of the statute. When it comes to statutory interpretation, judges are not supposed to impose their own values (according to the doctrine of separation of powers) but rather the codified values of the democratically elected legislature. Consequently, a departure from precedent in this situation merely because different judges have been appointed cannot be justified. If any member of the public, including a judge, feels that a statute should be changed, then he or she should pursue a legislative amendment. Indeed, the British parliament can override any British court decision it wishes to. Indeed, sometimes parliament "overrules" a court decision by name, such as was the case in section 3 of the Law of Property (Miscellaneous Provisions) Act 1989 (c. 34): "The rule of law known as the rule in Bain v. Fothergill is abolished in relation to contracts made after this section comes into force."

As far as case law (*Richterrecht*) is concerned, the same reasoning arguably applies: even though the judges who decided the first case or cases in a new area of law were necessarily acting in a legislative manner, so too were the judges who decided the first case or cases construing any statute. One could say when it comes to case law, therefore, the judges appointed later should also wait for parliament to amend the case law. This, indeed, is the position taken by the House of Lords, now the Supreme Court of the United Kingdom. As described above, that court follows a self-imposed doctrine of *stare decisis* which only allows for corrective and renovative departures from their own previous precedents. Nevertheless, some observers believe that British judges in fact are more willing to adapt the common law to the value judgments of newly appointed judges than they are to adapt decisions construing statutes. While it is beyond the scope of this book to delve into this question in depth, it has already been observed that British judges are more willing to extend case law by analogy than they are to extend statutes by analogy. However, it is not suggested that this small difference is sufficient to prove that adherence to the doctrine of *stare decisis* when applying principles from the common law is any less rigid than the adherence to the doctrine when construing statutes.

3. SWEDEN

The traditional view, anchored in a positivistic, democratic understanding of the separation of powers, namely, that case law does not constitute a source of law in its own right, is no longer taken seriously in Sweden. Rather, academics and practitioners agree that the applicable law is to found both in statutes and court decisions.[992] Peczenik and Lehrberg have found that Swedish legal practice and methodology suggest that the decisions of the superior courts (*Högsta domstolen, Regeringsrätten*, renamed *Högsta domstolen* in 2011, renamed *Högsta domstolen* in

[992] *See* e.g., Bert Lehrberg, Praktisk juridisk metod 94ff (3d ed. 1996); Peczenik, *supra* note 971, at 37.

2011, *Arbetsdomstolen,* and *Marknadsdomstolen*) must be followed in cases that are substantially comparable. As far as the decisions of other courts are concerned, however, the view is that these should be, but need not be, followed.[993]

Even though Swedish judges often use the term *obiter dictum*, they do not often employ the term *ratio decidendi*[994] Instead, they speak of legal rules or legal principles (*rättsregler* or *rättgrundsatser*).[995] Usually, the legal rule being followed is clearly expressed, one example being a decision in 1989 that recognized the principle of strict liability for product defects. Yet there also are cases in which one must induce the rule from the decision.[996]

4. THE UNITED STATES OF AMERICA

In 1997, D. Neil MacCormick and Robert S. Summers published the excellent book *Interpreting Precedents: A Comparative Study.* Professor Summers wrote a chapter in that book on precedent in the United States, focusing on the state of New York. The following description of the modern practice of the use of precedence is mostly drawn from that chapter.

At the top of the New York state judicial system is the New York Court of Appeals. Below that are the supreme courts, divided into an appellate division and a trial term. In order to reach the Court of Appeals, cases originating in the supreme court trial term must usually pass through the appellate division. Virtually all decisions from the trial term of the supreme court and from the other courts of first instance are appealable to the appellate division. The great bulk of appeals go no further than the appellate division. The New York Appellate Division disposed of almost 19,000 appeals in 1995, while the New York Court of Appeals decided only 340 cases.

Precedents from the New York Court of Appeals and, to a lesser extent from the appellate division, form the primary source of law in traditional common law subject matter areas such as contract, tort, and property. In most other areas of law, courts will look first to statute law for the rule applicable to the case. Yet here too the precedents of the appellate courts are very important; for published appellate decisions construing statutes are also considered to be binding on the lower courts. Occasionally a court will be unable to find any close precedent dealing with the issue at hand. In such cases the court is likely simply to declare that the issue is one of first impression. A 1935 report of the New York Law Revision Commission emphasized that a lack of precedent does not mean that judges must wait for the state legislature to act: "The common law does not go on the theory that a case of first impression presents a problem of legislative as opposed to judicial power." In cases of first

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[993] Peczenik, *supra* note 971, at 37; *see* Lehrberg, *supra* note 992, at 105.

[994] Peczenik and Bergholz, *supra* note 711, at 304f.

[995] Lehrberg, *supra* note 992, at 104f.

[996] Peczenik, *supra* note 971, at 39.

impression, New York courts will look at the persuasive pronouncements of courts from other American states and sometimes other common law jurisdictions.

It does also happen that courts will draw what are referred to in English as analogies to their own precedents when faced with a case of first impression, even though, as explained below, this would not be described as an analogy in Germany. In one such case cited by Summers, the question was whether an infant actor, who lacked capacity to contract, could, by disaffirming his contract, avoid payment of commissions to his agent on contracts already procured by the agent. In holding that the commissions on those contracts must be paid, the court relied on an analogy to a case in which a defendant minor had entered into an employment contract to deliver milk, and in which the employment contract included a restrictive covenant prohibiting him from soliciting the plaintiff's customers for a period of three years after leaving the plaintiff's employ. The defendant in that case had disaffirmed the contract on the ground of minority and had started working for a competitor, where he breached the solicitation provision of the contract he had disaffirmed. In deciding to adopt the reasoning of the former case, the court held, "The rationale of the [earlier case is] applicable to this case. In each case, the infant consumed the fruits of the contract and refused to pay for that fruit, to the clear prejudice of the other party."

In both cases, the New York courts were construing section 3-101(1) of the New York General Obligations Law: "A contract made on or after September first, nineteen hundred seventy-four by a person after he has attained the age of eighteen years may not be disaffirmed by him on the ground of infancy." Had this case been decided in Germany, neither the deciding judges nor people commenting upon the case would refer to this is an analogy. If the deciding judges had done more than merely cite the previous case, they would probably have said that the statute was intended to protect minors, not to allow them to avoid responsibility to pay for services already rendered to them.

The precedents of the New York Court of Appeals and of the Appellate Division are generally considered to be binding on all inferior courts. However, as in the other American states, there is no legislation in New York regulating judicial precedent. Lower courts rarely disregard binding precedents. Instead, they usually try to distinguish a case they do not wish to follow.

On the issue of a horizontal effect of precedents, Professor Summers concludes that the New York State Court of Appeals follows its own precedents to a considerable extent, though the court does sometimes overrule or modify them. The four intermediate appellate courts of the Appellate Division generally follow their own precedents as well.

The New York Court of Appeals overrules precedents in three types of cases. The first is where technological improvements have made the precedent obsolete. The second major type of overruling occurs when it is necessary to bring the common law in line with growing social or moral enlightenment. (Both of these types of overruling are referred to in this book as renovative in character.) The third type

of overruling in New York is reserved for cases in which subsequent experience shows that the decision was erroneous or ill-considered when it was made. (Such overrulings are referred to as corrective rulings in this book.) Professor Summers stresses that the New York courts do not overrule very often. Indeed, he suggests that the New York Court of Appeals of today is probably less likely to overrule precedent that it was in 1850.

D. Precedents and Politics in the German Federal Constitutional Court

The study[997] presented in this part elucidates the practice of the German Federal Constitutional Court (FCC) in dealing with its own precedents. It focuses on the FCC's practice of overruling previous decisions, particularly those overrulings traceable to the appointment of new judges to the court.

After sketching the organization and jurisdiction of the FCC, the discussion identifies two provisions of the Federal Constitutional Court Act (FCC Act) that prod the judges of the FCC to develop their case law in a consistent manner. The first of these statutory provisions, section 16 of the FCC Act, stipulates that all 16 federal constitutional judges must be called together in plenary session to hear cases in which one of the eight-judge senates intends to depart from the case law of the other senate. This statutory procedure has been invoked only four times. The second statutory provision, section 31 of the FCC Act, provides that the holdings of FCC judgments shall be binding upon all courts and public institutions in the country.

As to the judgments[998] of the FCC, these almost always contain citations to previous judgments, and they very often quote the holdings from these previous cases. Moreover, the published judgments have headnotes of all the holdings from previous decisions that are quoted approvingly in the judgment, and of all new holdings announced in the judgment. These headnotes (*Leitsätze*) are phrased in the same fashion as the headnotes found in common law jurisdictions.

The FCC sometimes departs from or otherwise disapproves of its previous holdings. In the first 55 years of the FCC's existence (1951–2006), during which it published 2,999 full decisions,[999] the two senates of the FCC departed from only

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[997] The author would like to thank Lewis A. Kornhauser for useful comments on this study.

[998] This discussion uses the terms judgment and decision interchangeably. In German, the word judgment (*Urteil*) is only used in those rare cases in which the FCC has heard oral argument. All other decisions are referred to as a decision (*Beschluss*). Bundesverfassungsgerichtsgesetz (BVerfGG) § 25 II.

[999] This figure was arrived at by adding up all of the judgments in the official reports, the Sammlung der Bundesverfassungsgerichtsentscheidungen (BVerfGE). During the same period, the three-judge chambers, which are discussed below, issued 133,831 decisions and disposed of 1,789 applications for preliminary relief. Bundesverfassungsgericht, Organization, www.bverfg.de/organisation/organisation.html.

15 previous decisions in addition to the four departures under the section 16 procedure already mentioned. In a somewhat comparable period (1946–1992), the U.S. Supreme Court published 6,553 full opinions,[1000] departing from, that is, overruling, previous cases on 115 occasions.[1001] Of these 115 instances of overruling, 41 overruled only cases that were decided before 1946, the first year studied by Brenner and Spaeth.

Although the FCC itself does not distinguish between types of departures, the departures can in fact, as suggested by Lewis A. Kornhauser, be divided into three groups: corrective, renovative, and political.[1002] A corrective departure is one in which the earlier case was decided wrongly or, as is sometimes said, per incuriam. Departures that reflect changes in society are referred to as renovative. Departures that cannot be explained as being corrective or renovative are styled political in this study. Political departures for purposes of this study are those that reflect the adjustments in basic values that are seen when new judges are appointed to a court.[1003] Applying these definitions, the study revealed that over half (58%) of the FCC's departures from precedent appear to be political in nature. The percentage for the U.S. Supreme Court (42%) is somewhat lower.

This study concludes with an examination of seven possible explanations for the relatively small number of departures by the FCC in comparison to the U.S. Supreme Court, and the comparatively large number of political overrulings. Three explanations are found to be persuasive:

(1) While German constitutional judges are homogeneous (e.g., most were chosen while the conservative Christian Democratic Party was in power), the appointment process is political, which in effect gives license to newly appointed judges to overrule previous decisions on the basis of their own political beliefs.
(2) The plenary-hearing process of section 16 of the FCC Act, described below, discourages judges from one senate from trying to overrule a precedent from the other senate unless they can be sure that a sufficient number of judges in the other senate will join them in overruling the precedent.
(3) The collections of cases upon which this comparison was made are not completely comparable: first, the FCC decided very few cases in the first

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[1000] Lee Epstein et al., The Supreme Court Compendium: Data, Decisions, and Developments 212 (2d ed. 1996).

[1001] Saul Brenner and Harold D. Spaeth, Stare Indecisis: The Alteration of Precedent on the Supreme Court 1946–1992, 22 (1995).

[1002] Kornhauser actually identifies four reasons for change: Changes in Values, here called political departures; Changes in the World, here called renovative departures; and Improvements in Information and Imperfect Decisionmaking, both referred to here as corrective departures. *See* Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 Chi.-Kent L. Rev. 115, 115 (1989).

[1003] Nothing in this article should be interpreted as a criticism of political overrulings.

years after its creation in 1951, so there are very few cases from these years which might be overruled; second, some of these early cases are seminal cases which are not likely to be disturbed; third, perhaps more importantly, many of the cases overruled by the U.S. Supreme Court during the period studied (1946–1992) had pedigrees that extended back to decisions decided before 1946, the year the study begins.

1. THE FCC AS INSTITUTION

The following four subsections outline the organization of the FCC, the appointment of FCC judges, the FCC's jurisdiction, and the most important statutory provisions bearing on the normative force of decisions of the FCC.

a. Organization of the FCC

Sixteen judges sit on the FCC.[1004] Each is assigned upon appointment to one of two senates, which were a creation of the FCC Act. Both senates have jurisdiction to hear constitutional claims (*Verfassungsbeschwerden*, explained below) and to review the constitutionality of statutes (*Normenkontrollverfahren*, explained below). Except in the rare cases of plenary hearings, the judges of one senate never sit with judges from the other senate. Only the Second Senate has jurisdiction to decide controversies between constitutional institutions (*Verfassungsstreit*, explained below). The roughly 120 annual decisions of the senates are published in the official reports, the *Sammlung der Bundesverfassungsgerichtsentscheidungen* (BVerfGE). The official reports also contain the four judgments of the FCC in plenary session under section 16 of the FCC Act. These four judgments are discussed below.

Each of the senates has since 1956 been broken down into three chambers of three judges each, resulting in the presiding judge of each senate sitting in two chambers. Once the composition of a chamber has been set, no other judge may be assigned to it. Almost all cases that come before the FCC are disposed of by the chambers. If the three judges are unanimous in their opinion, the chamber enters final judgment, usually dismissing a constitutional claim.[1005] If they cannot agree, or if they deem the case to have national importance, the matter is referred to the entire senate for adjudication. On average, 2,150 matters are resolved by the chambers annually. A selection of the cases decided by the chambers since 2003 can be found in the official reports, the *Kammerentscheidungen des Bundesverfassungsgerichts* (BVerfGK).

[1004] Originally each senate had 12 judges. In 1956 the number was reduced to 10, and in 1963 to eight.

[1005] Since 1986 the chambers have also had the power to grant relief, but only in cases for which there is clear precedential authority.

b. Appointment of Judges to the FCC

Appointment of judges to the FCC is regulated in the FCC Act. According to section 7 of that law, half of the federal constitutional judges are to be appointed upon a two-thirds' vote of the 69-member Bundesrat, which represents the 16 German states. The procedure followed in the Bundesrat is to accept without comment the slate of judges proposed by their own judicial selection committee, whose selection process is described below. Article 94 of the Basic Law foresees that the other half of the federal constitutional judges be appointed by the 598-member Bundestag, whose members are elected at large by the general population by proportional representation. However, instead of direct appointment by the Bundestag, section 6(5) of the FCC Act provides that the judges be appointed by a vote of eight members of a judicial selection committee composed of 12 members of the Bundestag.[1006] The deliberations by both judicial selection committees are to be kept secret by law (FCC Act §6(4)).

According to insiders, the appointments process conforms to an extra-legal pact, sometimes referred to as the golden rule, to split the appointments between the two dominant parties, the traditionally conservative Christian Democrats (CDU/CSU) and the more progressive Social Democrats (SPD). Consequently, on the retirement of a judge, the political party which nominated the retiring judge is entitled to nominate the retiring judge's successor.[1007] The pact stipulates that the party in government bestow upon its coalition partner the privilege of selecting one judge. The coalition partner of both the CDU/CSU and SPD for most years has usually been the pro-business Free Democratic Party. Only one party has ever governed the Federal Republic without a coalition partner: the Christian Democrats.

The golden rule is subject to one exception: a party may block the appointment of a nominee who holds extreme opinions that the opposing party finds objectionable.[1008] This has happened at least three times, the last time being the objection by the Christian Democrats to a judicial candidate who held the view that torture could be justified in extraordinary circumstances, such as to rescue innocent lives.[1009] More on the appointments process can be found in part C of this study.

The FCC Act further provides that at least three judges per senate must be chosen from the 450 federal judges serving on the five highest nonconstitutional courts: the Federal Labor Court, the Federal Finance Court, the Federal Supreme

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[1006] This procedure is criticized for running afoul of the wording of Article 94 of the Basic Law, the German constitution. Klaus Schlaich and Stefan Korioth, Das Bundesverfassungsgericht: Stellung, Verfahren, Entscheidungen; ein Studienbuch mn. 45 (7th ed. 2007).

[1007] *Id.*

[1008] Christoph Hönnige, Verfassungsgericht, Regierung und Opposition: Die vergleichende Analyse eines Spannungsdreiecks, (2007); Georg Vanberg, The Politics of Constitutional Review in Germany 83 (2005).

[1009] Reinhard Müller, Die Karte Dreier sticht nicht, Frankfurter Allgemeine Zeitung (FAZ) 2 February 2008, at 2.

Court, the Federal Social Court, and the Federal Administrative Court. FCC judges, who must be at least 40 years of age, are appointed for a single 12-year term, but must retire at the end of the month in which they reach 68 years of age.[1010] As a consequence of this rule, in the pairs of cases examined below, if more than 12 years have transpired since the initial decision, then none of the judges who heard the initial case could have been involved in the resolution of the second.

c. Jurisdiction of the FCC

There are three constitutional heads of FCC jurisdiction. The first and numerically most significant is the constitutional claim (*Verfassungsbeschwerde*), which was added to the Basic Law, the German constitution, in 1969 by Article 93(1)4a:

> The [FCC] shall decide . . . constitutional claims which may be brought by anyone who contends that one of his basic constitutional rights [or certain other constitutional rights] has been violated by action of the state.

The 6,000 constitutional claims that are filed annually with the FCC challenge court judgments, decisions of state agencies, and the constitutionality of legislation as applied to the claimant. These claims make up more than 96 percent of the cases resolved by the FCC.

Of the cases filed with the FCC, 2 percent arise under the second head of jurisdiction, constitutional review of statutes on their face (*abstrakte Normenkontrolle*), or by reference from another court (*konkrete Normenkontrolle*). The reference procedure is anchored in Article 100 of the Basic Law, discussed above:

> Should a court consider a statute that is necessary to a decision to be unconstitutional, it shall stay proceedings and refer the matter to . . . the [FCC] for decision. . . .

The remaining 2 percent of cases resolved by the FCC consist of controversies between constitutional institutions, including political parties (*Verfassungsstreit*). Quite often these cases concern claims by the states that the federal government has infringed upon the states' jurisdiction (*Bund-Länder-Streit*).

d. Normative Force of the FCC's Judgments

Two statutory provisions bear directly on the normativity of decisions of the FCC. These are sections 31 and 16 of the FCC Act, discussed below.

Section 31 of the FCC Act reads as follows:

> The decisions of the [FCC] are binding upon the constitutional institutions of federal and state government, as well as upon all courts and agencies.

[1010] Before 1970 judges were appointed either for life or for a term of four or eight years. Those appointed for a term could be reappointed.

This statute has been interpreted to mean that the holdings of FCC judgments are statements of law. Consequently, this statutory provision cautions federal constitutional judges to exercise care in articulating the principles in their judgments as these principles must be properly understood and applied by "all courts and agencies." Further, the statute imposes an implicit obligation on the FCC to correct previous statements of law that the constitutional judges no longer consider to be accurate.

The normative power of holdings articulated by the individual senates of the FCC is also inherent in section 16 of the FCC Act:

> Should one senate wish to depart from a decision of the other senate on an issue of law, the issue shall be decided by the [FCC] in plenary session.

By indirectly mandating that each senate abide by the precedents of the other senate, section 16 of the FCC Act in effect bestows binding force upon a previous decision of one senate of the FCC unless the FCC in plenary session decides otherwise by overruling this earlier decision. As stated above, the plenary hearing procedure in section 16 has been invoked only four times in the history of the FCC: once each in 1954, 1980, 1997, and 2003. All four cases resulted in departures from a previous ruling. Those four decisions are summarized in the paragraphs that follow.

The first invocation concerned a line of decisions of the First Senate that allowed political parties to seek federal constitutional review of an alleged violation of their constitutional status either via the constitutional claim procedure (*Verfassungsbeschwerde*) or as an institutional controversy (*Verfassungsstreit*). In a desire to limit political parties to the second avenue of review, that of institutional controversies, the Second Senate invoked section 16 and succeeded in 1954 in departing from the previous rule.[1011]

In the second case, decided in 1980, the First Senate sought to overrule various rulings of the Second Senate going back to 1978 upholding the constitutionality of section 554b(1) of the Code of Civil Procedure, which at the time allowed civil appellate courts to deny appeals on financial claims of more than 40,000 German marks, regardless of the merits of the claim, if the judges by two-thirds' vote concluded that the matter lacked fundamental importance (*grundsätzliche Bedeutung*) and that the appeal was unlikely to succeed.[1012]

The Second Senate had decided that section 554b(1) of the Code of Civil Procedure had to be constitutionally construed in such a way that appeals on financial claims of more than 40,000 German marks that lacked fundamental importance could not be denied if the claim displayed merit. The First Senate

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[1011] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 20 July 1954, 1 PBvU 1/54 (Ger.)

[1012] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 11 June 1980, Neue Juristische Wochenschrift (NJW) 39, 1981 (Ger.).

planned on overruling the Second Senate by considering nevertheless constitutional the denial of an appeal on financial claims of more than 40,000 German marks that lacked fundamental importance if the decision did not show serious procedural errors or unjustifiable legal conclusions. The further consideration of the meritoriousness of the appeal ought to be dispensable. In plenary session, the FCC construed the statute so as to require judges to consider the meritoriousness of the appeal before denying the appeal in every case. The statute has since been amended to accord with this ruling.

The third case under section 16 of the FCC Act concerned Article 101(1) of the Basic Law, usually translated: "No one may be deprived of his lawful judge. . . . " If translated closer to its meaning, rather than its text, Article 101(1) would read: "No one may be deprived of the judge to whom his case has been assigned." This article of the constitution has been construed to mean that cases must be assigned according to a pre-set rotational scheme, for example, alphabetically. The assignment of cases to panels of judges must, according to case law, also be made according to a pre-set rotation. But what happens if panels are overstaffed, for example, if there are four judges instead of three? When the Second Senate ruled that the presiding judge of an overstaffed panel was free to choose which judges would hear the case, on a case-by-case basis, the First Senate invoked section 16 and succeeded in overruling the Second Senate.[1013]

The fourth and most recent en banc hearing under section 16 of the FCC Act concerned the proper construction of Article 103(1) of the Basic Law, which reads: "Everyone is entitled to a hearing in court." For years, both senates had tolerated an informal practice of postjudgment review of denials of a judicial hearing in the state courts that had violated the appellant's right to be heard in court. The First Senate sought to depart from this practice by holding that the Basic Law guarantees a right to seek judicial review of substantial violations of Article 103(1). In plenary session, the seven judges from the First Senate apparently sided with three judges from the Second Senate in ruling that Article 103(1) mandates promulgation of court rules that provide for a formalized procedure of postjudgment review.[1014]

The official report of the previous case, the last case to have been decided under section 16, reveals that the plenary ruling was reached by a 10:6 majority vote. The vote-splits are not reported for the other three cases under section 16. Furthermore, as judicial deliberations are secret, there is no way to know for sure how individual judges voted unless they filed a dissenting opinion, an option granted to them by an amendment to the FCC Act in 1970. Since then, a dissenting

[1013] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 8 April 1997, Neue Juristische Wochenschrift (NJW) 1499, 1997 (Ger.).

[1014] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 30 April 2003, Neue Juristische Wochenschrift (NJW) 1934, 2003 (Ger.).

opinion has been filed in only 135 (7%) of the 1940 FCC judgments published in the official reports.

What explains the small number of cases resolved under the procedure of section 16 of the FCC Act? Most commentators attribute the infrequency at least in part to "horror pleni," the fear of wasting time and, ultimately, the prospect of defeat in an 8:8 tie.

One should remember that cases are generally only referred to the eight-member senate for resolution when there is a split in opinion among the three judges in a chamber. Consequently, despite the small percentage of dissenting opinions, one would expect that in most every decision of a senate, either one or two judges would adhere to their previous ruling and vote against the majority. If the judges in the majority in one senate wish to depart from a previous ruling by the other senate, they will, if they invoke the section 16 procedure, run the very real risk that the judge or judges in the minority of their own senate will side with a majority of judges from the other senate to cement a point of constitutional law with which the invoking judges disagree.

Confronted with the dilemma of horror pleni, judges might be tempted to depart sub silencio from contradictory holdings of the other senate. Indeed, judges sitting in a chamber may feel the same temptation regarding the jurisprudence of their own senate. However, there is very little evidence that judges submit to this temptation. A study[1015] in 1976 identified only four cases of contradictory, or at least arguably contradictory, statements of law between the two senates, where the section 16 procedure might usefully have been invoked, at least in an attempt to clarify the rationales; for it is by no means clear that the results of the four cases are incompatible, even if their rationales are different. In none of the cases identified by Sattler did the other senate lodge an objection, perhaps because, in light of the large number of cases decided by the FCC, occasional inconsistencies are inevitable.

Occasionally, one senate will expressly refer to section 16 when distinguishing its case from a case or cases decided by the other senate. One such case is the 1968 decision of the Second Senate which refused to follow a 1966 decision of a three-judge preliminary examination panel (today's three-judge chambers) of the First Senate. Both cases concerned violations of the selective service law for refusing to report for alternative civilian service. In both cases, the young men had already served a prison sentence for failing to serve, only to be summoned to report again, and refusing again, upon their release. Facing the question of whether a second conviction would violate the constitutional prohibition against double-jeopardy,[1016]

[1015] Andreas Sattler, Die rechtliche Bedeutung der Entscheidung für die streitbare Demokratie—unter besonderer Berücksichtigung der Rechtsprechung des Bundesverfassungsgerichts (1982).

[1016] Art. 103(3) Basic Law: "No one may be punished more than once for the same deed under the general criminal statutes."

the three-judge preliminary examination panel of the First Senate decided against the draftee in 1966, ruling that the second refusal constituted a separate crime.

In the 1968 case, another two-time conscientious objector was lucky enough to have his appeal heard by the Second Senate, which ruled that the second refusal to report was part of a "continuous conscientious decision" and therefore one and the same crime for double-jeopardy purposes. It was unnecessary to ask for a plenary hearing under section 16, according to the Second Senate, because the earlier judgment was not a judgment of the entire First Senate, but only of a three-judge preliminary examination panel whose judgments are not considered binding for purposes of section 31 of the FCC Act.[1017] As this study only concerns itself with departures from binding precedents, this refusal is not counted as an overruling here.

The justification for not invoking section 16 in the conscientious-objector case (namely, that it would be unnecessary, given the nonbinding force of three-judge preliminary panels) seems above reproach and did not provoke controversy. Such was not the case in the more recent "wrongful birth" case, in which the First Senate's refusal to invoke section 16 in a case from 1997 has been deservedly criticized. The Second Senate, anticipating the First Senate's departure, felt compelled to publish an official statement demanding that the judges of the First Senate invoke section 16.

The controversy arose out of a ruling of the Second Senate in 1993 concerning the constitutionality of a new regulation of abortion. Although the case did not involve a failed abortion, the Second Senate stated in an obiter dictum that the parents of a handicapped child, born after a failed abortion, could not hold the doctor liable for the costs of raising the child. According to the Second Senate, awarding damages in such a case would be tantamount to a ruling that the birth of a child constitutes legal injury, and such a ruling would itself violate the right to human dignity guaranteed in Article 1(1) of the Basic Law. The Second Senate consequently stated that the jurisprudence of the civil courts, including the Federal Supreme Court, which awarded damages for the costs of raising a child as well as for pain and suffering, must be revised. The 1997 case before the First Senate concerned not a failed abortion but rather a failed sterilization. Dismissing the Second Senate's exhortation to the contrary as mere obiter dicta, the First Senate, without invoking the section 16 procedure, ruled that the surgeon could constitutionally be held liable for the costs of raising the child.[1018]

The statements of law in the two cases might be reconcilable in the following way: a failed sterilization gives rise to liability for the costs of the child's support, but a failed abortion does not. It is not easy to discern a common principle or policy uniting both results, nor is one articulated in the decision of the First Senate. Accordingly, the policies behind section 16 would militate in favor of en

[1017] 23 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 191 (7 March 1968).

[1018] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 12 November 1997, Neue Juristische Wochenschrift (NJW) 519, 1998 (Ger.).

banc review, even recognizing that the Second Senate's statement went beyond the issues of the case. Nonetheless, for purposes of this study, the uproar directed against the First Senate for essentially ignoring the ruling of the Second Senate suggests that violations of the policies behind section 16 are not common.

2. DEPARTURES FROM PRECEDENT BY THE FCC

After describing the style of the FCC's judgments, the discussion below analyzes all of the cases in which one of the senates departed from its own previous decisions. In examining the cases, the author classifies the departures as being corrective, renovative, or political. Finally, initial comparisons are made with the overruling practice of the U.S. Supreme Court.

a. Style of FCC Judgments

Judgments of the FCC begin with the judgment of the court, which in some cases can be stated in one sentence. The judgment is followed by the reasons for the judgment, usually written in a bureaucratic, impersonal style. Facts are usually woven in as they become necessary rather than spelled out in detail at the outset.

There are very few FCC judgments that do not refer to previous cases.[1019] In the vast majority of judgments that do cite previous decisions, the judges very often quote language from their earlier cases, usually the cases' *Leitsätze*, which are referred to here as holdings. The federal constitutional judges even call attention to inconsistent language in previous decisions although the result in the previous case is not necessarily inconsistent with the result in the case at bench. In other words, the new decisions correct obiter dicta.

These references to previous decisions serve two functions. First, they ensure that the case before the court is consistent, both in result and in reasoning, with previous case law. Second, these references signal to the legal community that the previous decisions are still considered valid. The references are thus consistent with the judges' obligation, imposed by Article 31 of the FCC Act, to articulate clear holdings to be followed by "all courts and agencies."

b. Kinds of Departures

Kornhauser conjures up the specter of a single immortal judge to assist in classifying overrulings into these categories.[1020] An immortal judge, according to Kornhauser, would correct mistakes, including mistakes that she committed due to incomplete information, including information on the repercussions of her decisions. In other words, she would correct decisions which she now regrets having made. The single immortal judge would also adjust her rulings to reflect the times. Her views will reflect, for example, the effects upon society of the industrial

[1019] Of the cases in the official reporter (BVerfGE), 97 percent cite previous decisions.

[1020] Actually, Kornhauser identifies four categories; here, they are collapsed to three.

and technological revolutions and the changing role of women. In short, one would expect her to make renovative departures. But the immortal judge would not likely jettison her fundamental philosophical, political, and religious convictions in favor of something radically different. In other words, a departure that cannot be classified as corrective or renovative—that is, where the composition of the court has changed—is personal to the judge and in this sense political.

Theoretically speaking, assuming the model of the immortal judge, there are basically only three reasons why any court would depart from the principle or holding of a previous case. The most obvious reason is to correct what it now considers to have been a wrong decision. Such departures are referred to here as corrective departures. Accordingly, corrective departures are cases in which the judges made a mistake in the earlier case, sometimes because they had incomplete information. The second reason for a departure from a previous decision occurs when the departing judges consider their previous decision to have been correct at the time, but justify the change as necessary to realign their jurisprudence with social and legal developments in the meantime. This study uses the nomenclature renovative departure to refer to such cases. The third category, political departures, consists of those cases that do not fit the other two categories, so that one is left with the conviction that the judges must have altered their fundamental values and beliefs. In practice, what has happened is that the composition of the court has changed.

It is worth noting at this juncture that the cases in which section 16 of the FCC Act is invoked are likely to be typical examples of political overrulings. As hypothetically immortal judges, the judges of the two senates would correct or renovate their own decisions as a matter of course. Thus in the absence of a strikingly incorrect decision, or of a fundamental change in society leading to a renovative overruling, any future overrulings of one senate by the FCC sitting in plenary session is likely to be political in nature. In other words, the composition of one or both of the senates had undoubtedly changed in these four cases, so as to allow the successful invocation of the section 16 procedure.

c. Departures by the First Senates of the FCC

As mentioned above, the two senates of the FCC have a practice of distinguishing previous decisions of their own senate and of the other senate, and of disapproving dicta that they no longer consider valid. They also, as seen above, occasionally invoke the procedure of section 16 of the FCC Act to attempt to overturn the other senate's jurisprudence. The senates also depart from their own previous cases if they think the previous case is incompatible with the newly decided one. In other words, the senates overrule previous case decisions.

To determine how often the two senates departed from their previous decisions, research was conducted in two databases:

- JURIS (www.juris.de)
- Beck-online (beck-online.beck.de)

The headnotes as well as the full texts of the judgments were searched for the words departures (*Abweichungen*), depart (*abweichen*), and other forms of these words employed by the federal constitutional judges to indicate departures from previous decisions. Unfortunately, the German word for departure (*Abweichung*) is broader than the English overrule. However, after examining every case in which departure (*Abweichung*) in all its forms appeared, a total of 15 cases were found in which departure was employed in the sense of overruled.

In the following discussion, the 15 cases in which one of the Senates altered its previous holdings are examined more closely to determine whether the departure from precedent was an overruling, or merely a distinguishing. By overruling, it is meant that, under the holding articulated in the later case, the previous case would have been decided differently. If it appears that the previous case has indeed been overruled, and not merely distinguished, then the overruling case is classified, according to the above criteria, as corrective, renovative, or political.

As will be seen below, the process of classification is sometimes difficult. For example, there was no case in which the composition of the court in the original judgment was exactly the same as the composition of the court which departed from it. Had this composition stayed the same, then the overruling would have been classified as corrective or renovative, not political, on the assumption that the immortal judge would have concurred in the overruling.

The discussion below first chronicles the departures of the First Senate before doubling back to sketch the departures of the Second Senate.

1. The First Senate first departed from a previous decision in 1986.[1021] At issue was the necessity of exhausting judicial remedies, i.e., litigating in the non-constitutional state courts before bringing a constitutional claim (*Verfassungsbeschwerde*). In 1976 the First Senate had ruled that there was no need to litigate in the state courts before filing a constitutional claim where the language of the statute was mandatory, and where the applicant was directly impacted.[1022] In 1986, in an equal-protection case involving the calculation of retirement benefits of mothers born before 1921, the court changed direction, ruling that one must first make application to the public authority, receive an adverse decision, challenge the adverse decision in the administrative courts, and only then seek constitutional review. In so ruling, the court stressed the subsidiary nature of the constitutional claim, and the advisability of having the non-constitutional judges work up the case before it is heard by the FCC.

This is a clear case of overruling in that the previous case of 1976 would have been decided differently by applying the decision in 1986 to the facts of the case.

[1021] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 4 March 1975, 2 BvF 1/72 (Ger.).

[1022] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 23 November 1976, 1 BvR 150/75 (Ger.) and Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 8 June 1977, Neue Juristische Wochenschrift (NJW) 33, 1978 (Ger.).

As to whether the later decision constitutes a corrective, renovative, or political overruling, one classification—renovative—can be ruled out summarily, as nothing suggests that the change in direction was prompted by independent changes in society. As to the remaining possibilities, a good argument could be made that the overruling is corrective, presuming that 10 years of experience under the previous ruling convinced the court that the earlier decision was ill-advised. Interestingly, no such justification was cited by the First Senate in its 1986 judgment.

The classification of the departing case is complicated—or elucidated—by the fact that three of the judges who heard the 1976 case were still on the court when it decided the 1986 case and, further, that one of them, Katzenstein, filed a dissent in 1986, suggesting that he had been with the majority in 1976. While it is impossible to know for sure, for judges who disagree with a judgment do not always file a dissent, one might surmise from the fact that they did not join Katzenstein's dissent that the other two judges, Simon and Hesse, had been in the majority in 1976, meaning that they could have voted with the majority in both cases. This assumption, particularly in light of the experience gained in the interim, operates in favor of classifying this overruling as corrective for purposes of this study.

2. In 1990, the First Senate reconsidered an equal-protection challenge to a federal statute that reduced the child subsidy for parents in higher tax brackets, and lowered the tax deduction across the board for all tax brackets. The First Senate found a violation of equal protection because the law did not provide for a parental tax deduction at least equal to the minimum cost of supporting their children.[1023] In so deciding, the First Senate criticized its own ruling from 1976[1024] for not imposing this requirement. It is difficult to say whether this case constitutes an overruling in the narrow sense, that is, that the former case was incorrectly decided, because the law at issue in the previous case seems to have satisfied the newly imposed requirement. Consequently, on the assumption that the case involves an overruling at least in the broader sense, it seems that, if this decision indeed is a departure from precedent, it is should be classified as corrective.
3. The third departure by the First Senate came in 1991, in a case considering the constitutionality of the Act on Illegitimacy (*Nichtehelichkeitsgesetz*), which granted sole legal custody to the father after a declaration of legitimacy, even when the mother and father were living together, and even if the mother and father wished to share legal custody. The First Senate had upheld the statute in 1981[1025] against a challenge that it violated Article 6(2) of

[1023] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 29 May 1990, Neue Juristische Wochenschrift (NJW) 2869, 1990 (Ger.).

[1024] 43 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 108, 23 November 1977.

[1025] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 24 March 1981, EuGRZ 1981 (Ger.).

the Basic Law, which reads: "The right of parents to care for and raise their children is a natural one, and the duty to do so rests primarily upon them." But in 1991, noting that the number of illegitimate children living with their parents had increased significantly since their last ruling, the judges of the First Senate ruled that this statutory provision was unconstitutional.[1026]

This is a clear case of overruling. While the fact that none of the judges who decided the 1981 case were on the court in 1991 might suggest that this is a political overruling, the reference in the case to the unanticipated effects of the previous ruling militates in favor of classifying this overruling as corrective, or perhaps as renovative, reflecting the changing societal attitudes towards children born out of wedlock.

4. The year 1991 also saw the First Senate revisiting section 34a(3) of the FCC Act, which awards court costs, including attorneys' fees, when constitutional claims (*Verfassungsbeschwerden*) are resolved in the complainant's favor.[1027] In 1984 the First Senate had ruled that complainants were not entitled to court costs even if the case was resolved in their favor due to a favorable ruling in a companion case.[1028] The senate reversed its position in 1991. Considering that the departing case makes reference to the widespread, universal criticism of its previous decision, it would appear that this is a case of corrective overruling.
5. In 1987 the First Senate refused to allow employers of temporary workers to raise constitutional arguments on behalf of their employees, holding that the employers did not have standing to raise the constitutional rights of third persons.[1029] Just five years later, in 1992, the First Senate reversed itself and allowed an employer to challenge a law prohibiting female workers from working at night.[1030] This appears to be a clear case of overruling. For the reasons stated above, it is not a renovative overruling, leaving only corrective and political as possibilities. The opinion itself does not point to any adverse effects of the previous ruling, or anything the court had overlooked in its earlier decision, either of which might have supported the conclusion that the overruling was corrective. Further, when one considers that four new judges had been appointed to the First Senate in the interim, it seems pretty clear that this is an example of a political overruling.

[1026] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 24 May 1981, Neue Juristische Wochenschrift (NJW) 1944, 1991(Ger.).

[1027] 85 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 117, 122 *et seq.* (19 November 1991).

[1028] 66 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 152, 154 (8 February 1984).

[1029] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 6 October 1987, Neue Juristische Wochenschrift (NJW) 1195, 1988 (Ger.).

[1030] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 28 January, Neue Juristische Wochenschrift (NJW) 964, 1992 (Ger.).

6. In a well-known case from 1995 the First Senate by a vote of 5:3 reversed the convictions of participants in a sit-down demonstration under a statute criminalizing the use of force to coerce others into doing or refraining from doing something (*Nötigung*), ruling that the statute was unconstitutionally vague.[1031] In doing so, a number of the six newly appointed judges apparently joined with one or more of the dissenters in the 1986 case that had upheld the convictions with a 4:4 tie,[1032] making this another pretty clear example of a political overruling.
7. The state statute at issue in the First Senate's next departure from precedent required all men, but not women, aged 18 to 50 and living in rural areas to provide volunteer fire-protection services or pay a fire-protection fee in lieu of doing service. The statute also allowed the state to order men to provide fire-protection services, if needed. When the law was challenged in 1961 on equal-protection grounds, the First Senate upheld the law.[1033] In 1995 the First Senate held an identically worded statute from another state to be unconstitutional, citing three reasons.[1034] First, fire-protection services had been largely mechanized since 1961, meaning that physical strength was no longer critical. Second, the role of women had changed considerably in the intervening 34 years. Both of these reasons suggest a renovative overruling. The third reason cited by the court was experience: in all the years since the statute was enacted, no man had ever been ordered to provide fire-protection services, meaning that the statute was in the nature of a tax, and therefore should be collected equally from men and women. This third reason is corrective, suggesting that the judges who heard the case back in 1961 would have come to the same conclusion if they had foreseen the impact of the statute. Consequently, this case will be considered to be a corrective or renovative overruling for purposes of this study.
8. The First Senate's sole overruling in 2003 is more difficult to classify and might be seen as either renovative or political. At issue was a federal law requiring private employers to top-up contributions paid by statutory health insurance carriers during maternity leave. When first confronted with the question in 1974, the First Senate held the law to be constitutional.[1035] The more recent decision in 2003, which found the law unconstitutional, stressed that, because the state contribution had stagnated since 1968, but

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[1031] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 10 January 1995, Neue Juristische Wochenschrift (NJW) 1141, 1995 (Ger.).

[1032] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 11 November 1986, Neue Juristische Wochenschrift (NJW) 43, 1987 (Ger.).

[1033] 13 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 167, 17 October 1961.

[1034] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 24 January 1995, Neue Juristische Wochenschrift (NJW) 1733, 1995 (Ger.).

[1035] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 23 April 1974, Neue Juristische Wochenschrift (NJW) 1461, 1974 (Ger.).

women's wages had significantly increased, the employers' contribution had risen dramatically through the decades to the point that the law was imposing a substantial burden on employers of mothers, in effect discouraging employers from employing women of child-bearing age.[1036] While the judges who decided the 2003 case might consider this to be a corrective or renovative departure, the author suspects that the same judges would have decided the 1974 case differently if they had been on the court at the time. Consequently this case will be considered a political overruling for the purposes of this study.

To recap, the First Senate overruled eight cases between the FCC's establishment in 1951 and the present. Five cases appear to be corrective and/or renovative departures. Three overrulings appear to be political in nature.

d. Departures by the Second Senate of the FCC

1. The first departure of the Second Senate from its own precedents occurred in 1975.[1037] At issue was a social security rule that made the entitlement of a widower to the pension of his deceased wife dependent on establishing that before her death she contributed significantly to the household finances. Where the remaining spouse was a widow, however, the entitlement to the pension of the deceased husband was automatic. This rule had been considered and declared to be constitutional by the First Senate in 1963.[1038] When the rule came to be reconsidered by the Second Senate in 1975, that senate ruled that the legislature had to amend this rule within the next two legislative periods. While the rule was not explicitly declared unconstitutional, the Second Senate did not follow the earlier ruling of the First Senate, and so the effect of the 1975 ruling is a *de facto* overruling. As the Second Senate explicitly referred to changes in society in terms of the changing roles of men and women and the fact that since the previous ruling, there had been a 30 percent increase in the number of employed, married women, this overruling falls into the renovative category.
2. In the second departure of the Second Senate from its own precedents in 1985,[1039] the senate had to consider the constitutional protection of property under Article 14 of the Basic Law, specifically whether the approval of a zoning plan directly impinged upon the petitioner's constitutional property rights, entitling him to file a constitutional challenge. In 1971 the

[1036] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 18 November 2003, Neue Juristische Wochenschrift (NJW) 146, 2004 (Ger.).

[1037] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 12 March 1975, Neue Juristische Wochenschrift (NJW) 919, 1975 (Ger.).

[1038] 17 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 1, 24 July 1963.

[1039] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 14 May 1985, Neue Juristische Wochenschrift (NJW) 2315, 1985 (Ger.).

Second Senate had ruled that the mere approval of a zoning plan did not infringe constitutional rights,[1040] but that senate reversed itself in 1985 in what would appear to be a political overruling. This conclusion is strengthened by the fact that all but one of the judges who had decided the first case had left the court before the second case was decided.

3. The second departure concerned a 1975 equal-protection ruling of the Second Senate that held unconstitutional a state pension scheme that discriminated against members of the state parliament who were not civil servants (*Beamte*) or civil service employees.[1041] Revisiting the topic in 1987, the Second Senate upheld a federal law that accorded more generous benefits to civil servants who served in parliament.[1042] The Second Senate did not expressly overrule the earlier decision, but rather distinguished it. The court reasoned that, unlike the statute in the 1975 case, the statute at bench treated all alike; and other civil servants are not comparable. The factual predicate is indeed not exactly the same, and one could imagine the immortal judge joining the majority in both cases. Thus, the court's characterization that it was merely distinguishing the case appears to be logically valid. Accordingly, this case will not be classified as an overruling for the purposes of this study.
4. In 1992 the Second Senate revisited the issue of the tax deductibility of political contributions by corporations. In 1986, in a 6:2 decision, the senate had approved the tax-deductibility of campaign contributions by businesses.[1043] In 1992 the senate departed from that decision, holding, among other things, that allowing corporations to deduct their contributions to political parties violated equal protection because it effectively doubled the deduction available to corporate shareholders.[1044] In the 1992 case, the five newly appointed judges sided with the two dissenters in the 1986 case to revamp the jurisprudence in what would therefore appear to be a political overruling.
5. The next case concerns a 1981 decision of the Second Senate in which the judges held that the Basic Law contained no subsidiary jurisdiction for German courts to review the legality of sovereign power exercised by an international body.[1045] When the same question was presented for resolution in

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[1040] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 27 July 1971, BauR 240, 1971(Ger.).

[1041] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 5 November 1975, Neue Juristische Wochenschrift (NJW) 2331, 1975 (Ger.).

[1042] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 30 September 1987, Neue Juristische Wochenschrift (NJW) 1015, 1988 (Ger.).

[1043] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 14 July 1986, Neue Juristische Wochenschrift (NJW) 2487, 1986 (Ger.).

[1044] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 9 April 1992, Neue Juristische Wochenschrift (NJW) 2545, 1992 (Ger.).

[1045] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 23 June 1981, Neue Juristische Wochenschrift (NJW) 507, 1982 (Ger.).

1993, the Second Senate held that the FCC has jurisdiction to decide any case in which activity of a supranational organization impinges upon German constitutional rights.[1046] While this later case might be dismissed as merely a correction of obiter dictum, if it is considered to be a genuine overruling, it would probably best be classified as a corrective departure, as the earlier decision was subject to universal criticism.

6. In 1978, in another widely criticized opinion, the Second Senate upheld a decision of the Federal Supreme Court which held that the subject of a search warrant could not challenge the legality of a search which did not result in a seizure of evidence.[1047] The Second Senate reversed itself in 1997, almost 20 years later, in what probably can be called a corrective departure. This conclusion is reinforced by the fact that the departing case makes reference to the widespread, universal criticism of its previous decision.[1048]
7. In 1999 the Second Senate revisited an earlier case construing Article 84(2) of the Basic Law, which reads: "The Federal Government may, with the consent of the Bundesrat, issue general administrative rules." Is it constitutional for the Bundesrat to delegate its rule-making authority to individual federal ministers, rather than to the government as a whole? In 1969 the Second Senate upheld such a delegation.[1049] In 1999, citing the original intent of the Basic Law, that senate reversed itself, ruling that the rule-making authority could only be delegated to the federal government as a whole by the Bundesrat.[1050] This can probably be classified as a political overruling.
8. In 1969 the Second Senate had the opportunity to consider the constitutionality of a statute allowing the police to impose disqualifications to drive and held that the statute must be narrowly construed to apply on a case-by-case basis only to individuals who have repeatedly and pertinaciously violated traffic laws, or to individuals who have committed single violations that are especially irresponsible.[1051] When the statute was later amended to allow the police to define general classes of behavior resulting in disqualification, rather than having to rule on a case-by-case basis, the statute was attacked via constitutional claim, but upheld by the Second Senate in 1996, with the court distancing itself from the "case-by-case" language of

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[1046] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 12 October 1993, Neue Juristische Wochenschrift (NJW) 3047, 1993 (Ger.).

[1047] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 11 October 1978, Neue Juristische Wochenschrift (NJW) 154, 1979 (Ger.).

[1048] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 30 April 1997, Neue Juristische Wochenschrift (NJW) 2163, 1997 (Ger.).

[1049] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 15 July 1969, Neue Juristische Wochenschrift (NJW) 29, 1970 (Ger.).

[1050] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 2 March 1999, Neue Juristische Wochenschrift (NJW) 3621, 1999 (Ger.).

[1051] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 16 July 1969, Neue Juristische Wochenschrift (NJW) 1623, 1969 (Ger.).

the earlier decision.[1052] This overruling appears to be political in nature, as the court in the previous decision specifically held that the Basic Law required a case-by-case decision, although an argument could be made that the huge increase in the number of cars and drivers in the intervening years had rendered the case-by-case method obsolete.

To recap, the Second Senate distinguished one previous case and overruled seven others. Four of the overrulings appear to be political in nature, two corrective, and one renovative. Taking the two senates together, there were 15 cases of overruling.[1053] Of these, seven appear to have been political. This figure does, however, exclude any overrulings of a decision made by a three-judge panel, which for the purposes of this study have not been included on the basis that such decisions are not regarded as binding precedents.

3. Short Comparison with the U.S. Supreme Court

A study by Brenner and Spaeth published under the title *Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946–1992*, identified 115 overruling decisions, whereas the present study of the FCC's jurisprudence for the years 1951 to 2006 found only 19, counting the four cases under section 16 of the FCC Act. Forty-one of Brenner and Spaeth's 115 overruling cases overruled solely cases decided before 1946.[1054] Subtracting these 41 cases from the 115 overruling reduces the number of overruling cases by the U.S. Supreme Court to 74 during the period from 1946 to 1992.

It will be recalled that the numbers of full decisions by the FCC (2,999) and the U.S. Supreme Court (6,553) are far from identical during the periods studied. In fact, disregarding the decisions of the chambers, the two senates of the FCC plus the FCC in plenary session decided a little less than half (46%) as many cases as the U.S. Supreme Court. Further, there was a significant disparity in the number of judges who sat on the two courts during these periods of time: 29 on the U.S. Supreme Court compared with 100 on the FCC. Mindful of these divergences and of the fact that the periods of time studied are not coincidental, it is nonetheless tempting to compare the relative rates of overruling by the two courts. Doing so reveals that the FCC overruled at a rate of .6 percent while the U.S. Supreme Court overruled at a rate of 1.1 percent.

[1052] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 24 March 1996, Neue Juristische Wochenschrift (NJW) 1809, 1996 (Ger.).

[1053] A study in 1998 found only nine cases of overrulings. Part of the reason for the smaller number is that two of the cases identified in this article (the eighth case of the First Senate and the sixth case of the Second Senate) appeared after the publication of his study. *See* Georg Seyfarth, Die Änderung der Rechtsprechung durch das Bundesverfassungsgericht (1998).

[1054] There were five more cases that overruled cases both before and after 1946. All of the remaining 74 overrulings only involve cases decided after 1945. *See* Brenner and Spaeth, *supra* note 1001, at App. I.

4. EXPLAINING THE SMALL NUMBER OF DEPARTURES FROM PRECEDENT BY THE FCC, AND THE LARGE PERCENTAGE OF POLITICAL DEPARTURES

The following discussion examines and evaluates the following seven potential explanations for the relatively small number of departures by the FCC relative to the U.S. Supreme Court and the relatively high percentage of political overrulings: (1) While German constitutional judges are more homogeneous (for example, most were chosen while the Christian Democratic Party was in power), the appointments process is political; (2) The plenary-hearing process of section 16 of the FCC Act discourages judges from departing from precedents (horror pleni); (3) The FCC decided very few cases at first, and many are seminal cases which are not likely to be disturbed; (4) The FCC has a much narrower range of cases, because, unlike the U.S. Supreme Court, it can only hear claims arising under the constitution; (5) The FCC expresses its holdings or ratios (Leitsätze) more broadly or more narrowly than does the U.S. Supreme Court; and (6) German judges have more respect than their American counterparts do for equality, predictability, judicial efficiency, and separation of powers. These propositions are examined in order.

(1) Homogeneity of German judges. The German legal curriculum instills uniformity, and educates students and young lawyers in strict conventions. Values are held commonly throughout a society that places a high value on consensus. Thus, all other things being equal, one would expect more consistency in German constitutional and statutory interpretation than, say, in the more diverse and considerably larger population of the United States.

The selection of FCC judges, however, is no less political than the selection of justices for the U.S. Supreme Court. As mentioned above, it is clear that judgeships are allotted along party sympathies. And all except two of the eight presidents of the FCC have been members of the conservative parties CDU, CSU, or FDP.[1055] Nevertheless, some observers claim that the equal division of seats between the large parties virtually guarantees that the FCC will be balanced (or deadlocked?) between the interests and views of the two major parties.[1056]

A recent analysis of dissenting opinions by federal constitutional judges strongly suggests that the political persuasion of the judge is a powerful predictor of how he or she will vote. To reach this conclusion, one researcher reviewed all of the dissenting opinions filed between 1974 and 2002 in cases of constitutional review of statutes on their face (*abstrakte Normenkontrolle*) and claims by the states that the federal government has infringed upon the states' jurisdiction (*Bund-Länder-Streit*). The researcher found that 77 percent of the dissents were penned exclusively by judges who had been nominated by minority parties, and

[1055] Stefan Marschall, Das politische System Deutschlands tbl. 18 (2007).

[1056] *E.g.*, Vanberg, *supra* note 1008, at 85; Marcel Kau, United States Supreme Court und Bundesverfassungsgericht: die Bedeutung des United States Supreme Court für die Errichtung und Fortentwicklung des Bundesverfassungsgerichts 196 (2007).

that no judge who had been nominated by a minority party had ever dissented without being joined by one of more judges from minority parties.[1057]

Another interesting finding is that the golden rule mentioned above, whereby the two major parties split the nominations, has not always achieved its goal. The two senates today are evenly balanced along political party lines: The Second Senate has four judges associated with the CDU/CSU and four with the SPD, and the First Senate has four associated with the CDU/CSU, three with the SPD, and one with Bündnis 90/Die Grünen, which was in a coalition with the SPD. However, the First Senate has only enjoyed this balance since 1976, and the Second Senate since 1988. Before these dates, conservative judges were in a majority.[1058]

In short, the composition of the FCC was politically stable before 1976 and 1988 because conservatives were in the majority in both senates. The jurisprudence of the FCC has also shown stability since then because judges nominated by the SPD, who have never been in a majority, have consequently seldom had the votes to overrule the cases decided by their conservative predecessors.

(2) Horror pleni. Horror pleni refers to the effect of section 16 of the FCC Act on federal constitutional judges. The argument proceeds as follows: The section 16 procedure is so cumbersome and time-consuming that judges of one senate would rather follow the previous rulings of the other senate than try to change them. This is a curious argument to an outsider, at least at first blush. Can it really be that a statute—the procedure of section 16 is not constitutionally mandated—can prompt judges to reach decisions they think are wrong (corrective), out-dated (renovative), or unwise (political)? As explained in the following two paragraphs, the answer seems to be "yes."

First, although section 16 is a statute, the bicameral nature of the FCC is constitutional. Thus judges of one senate who revisit a decision of the other senate find themselves in the same position as judges of an inferior court faced with a precedent from a superior court. Inferior judges do sometimes express their dissatisfaction with precedents, but they follow them in most every case unless they can convince themselves that the superior court, if presented with the same question again, would come to a different conclusion. The effect of section 16—or rather of the bicameral nature of the FCC—can be better understood in this context.

Nevertheless, if the judges of one senate were convinced that a decision of the other senate was wrong, outdated, or unwise, why would they hesitate to invoke the section 16 procedure? What are the judges afraid of? After all, the worst thing that can happen is that all of the judges of the other senate will stand firm, with

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[1057] Hönnige, *supra* note 1008, at 201.

[1058] *Id.* at 172 and tbl. 25.

a result that the interpretation stands. That probably is what they are afraid of, not that the interpretation will stand, but that they will fail, and their attempt to change the law will be seen as political. So understood, the horror pleni, or at least the respect for a previous decision, might explain some part of the consistency in the jurisprudence of the FCC. If this explanation is accurate, then one would also predict that the section 16 procedure will only be invoked for political reasons, as the judges of the other senate can be counted upon to correct and renovate their own decisions without the assistance of the section 16 procedure. The results of this study, where all four invocations of the section 16 procedure resulted in political overrulings, bear out this prediction.

(3) The FCC decided very few cases at first (and many are seminal cases that are not likely to be disturbed). Yet another important factor to take into consideration when viewing the relatively small number of departures of the FCC in comparison to those of the U.S. Supreme Court is that the FCC, as a new court, made very few rulings in its early years, and that many of those rulings were made in seminal cases that the court will not likely revisit.

As to the paucity of cases to depart from, the FCC decided only 34 cases, and published only 22 decisions, in its first year (1951) and decided only 704 cases, and published only 306,[1059] in its first decade of existence. In its second decade the number of decided cases rose to 1,109. Accordingly, there were relatively few cases to depart from in the first decades of the FCC's existence.

Second, many of the early precedents are seminal cases reminiscent in stature to the U.S. Supreme Court's decisions in *Marbury v. Madison*[1060] and *Martin v. Hunter's Lessee*.[1061] For example, one seminal case in 1957 recognized a general freedom of action which includes a right to travel internationally.[1062] At least two seminal cases followed in 1958: Lüth[1063] and the Pharmacy Case.[1064] In the former, the FCC recognized that basic rights had an impact on the relations between private parties (*Drittwirkung*), and in the latter, the court announced a three-level test for constitutional review that varies according to the severity of the intrusion (*Stufentheorie*). While these and other seminal cases are not large in number, their inclusion in the mix of cases analyzed might skew the results to some small degree.

[1059] Published cases are those published in the official reporter, Entscheidungen des Bundesverfassungsgerichts (BVerfGE).

[1060] 5 U.S. 137 (1803).

[1061] 14 U.S. 304 (1816).

[1062] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 16 January 1957, Neue Juristische Wochenschrift (NJW) 297, 1957 (Ger.).

[1063] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 15 January 1958, Neue Juristische Wochenschrift (NJW) 257, 1958 (Ger.).

[1064] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 11 June 1958, Neue Juristische Wochenschrift (NJW) 1035, 1958 (Ger.).

Third, and perhaps most importantly, many of the cases that the U.S. Supreme Court decided after 1945, and that were subsequently overruled, were based on reasoning from cases decided much earlier. In other words, the court might not have corrected or renovated its decisions at the first opportunity, a fact might account for a higher rate of overruling for the period of this study (1946–1992).

(4) The FCC is only charged with constitutional interpretation. The jurisdiction of the FCC is limited by Article 93 of the Basic Law to cases arising under the Basic Law and, in certain cases, to controversies over preemption and incompatibility of state law with federal law. Non-constitutional questions on the interpretation of federal law, which includes the vast majority of civil and criminal law, are resolved by the other federal courts and by the courts of the states. A decision of one of the federal courts cannot therefore be reviewed by the FCC unless it involves a constitutional issue. This is not the case in the United States, where the U.S. Supreme Court has jurisdiction over all federal questions, including the construction of federal statutes. The court also enjoys diversity jurisdiction, meaning over cases between citizens of different states, that may also be filed in the state courts, although in recent years the court has seldom decided a case under diversity jurisdiction.

None of the 115 overrulings identified by Brenner and Spaeth were of cases decided under the U.S. Supreme Court's diversity jurisdiction, but 25 of them—including 18 of the 74 cases decided after 1945—were cases that were decided exclusively on statutory, and not constitutional, grounds. As the FCC is not the final arbiter on the meaning of federal law in the sense that the U.S. Supreme Court is, it would be tempting to reduce the 74 cases of overruling identified by Brenner and Spaeth since 1945 by 18. Before doing so, however, one would need to know what proportion of the 6,553 cases in the pool of cases decided by the U.S. Supreme Court were decided exclusively on statutory grounds. Unfortunately, Brenner and Spaeth did not extract this information and the author does not consider that the effort of doing so is justifiable for the purposes of the present study.[1065] Without such statistics it would be premature to speculate upon whether the court is, as it claims to be, more willing to disturb precedents which merely construe statutes.[1066] However, a recent, in-depth study of the historical practice of the U.S. Supreme Court comes to the conclusion that the U.S. Supreme Court treats precedents involving constitutional interpretation the same as other types of precedents.[1067]

[1065] Brenner and Spaeth, *supra* note 1001, at 28 (stating that almost two-thirds of the overrulings rest on constitutional grounds).

[1066] Passenger Cases, 48 U.S. 283 at 470 (1849); Brenner and Spaeth, *supra* note 1001, at 28.

[1067] Lee J. Strang and Bryce G. Poole, *The Historical (In)Accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents*, 86 N.C. L. Rev. 969 (2008).

Another complicating factor is that, during the period of time studied by Brenner and Spaeth, the U.S. Supreme Court was engaged in making uniform throughout the territory of the United States the law of criminal procedure, and, to a lesser extent, substantive criminal law, by the only means available to the federal government, namely, the judicial recognition of federal constitutional rights.[1068] To illustrate, of the 74 overruling cases identified by Brenner and Spaeth, 32 involved criminal law and procedure whereas none of the FCC's rulings did so, perhaps because criminal procedural and substantive law in Germany was in no need of being federalized by judicial decree because criminal law is federal, not state, law in Germany, and because application of the criminal law is overseen in Germany by a single Federal Supreme Court (*Bundesgerichtshof*).

In conclusion, the jurisdiction and constitutional role of the FCC and the U.S. Supreme Court are at variance; but it is by no means clear whether these variances might have affected the courts' respect for precedent during the years studied.

(5) The ratios (*Leitsätze*) are stated differently. Assuming all else remains the same, if ratios are stated more abstractly, there might be less reason to overrule them because there would be fewer obvious collisions. Can it be that the FCC's apparent reluctance to overrule precedent in fact disguises merely a lack of necessity to do so?

Giving due consideration to the FCC's obligations under section 31 of the FCC Act, one would not expect the ratios to be stated broadly, since broader ratios, like open-textured statutes, leave much room for discretion and for disagreement in their application. Moreover, the author's comparisons of dozens of ratios from FCC decisions with those of the U.S. Supreme Court reveal that the degree of specificity is the same. The ratios of the two courts are practically indistinguishable. Accordingly, the small number of departures by the FCC compared to the U.S. Supreme Court cannot be explained by how generally or specifically one court or the other articulates its holdings.

(6) Greater respect in Germany for equality, predictability, judicial efficiency, and separation of powers. The primary jurisprudential justifications for the doctrine of *stare decisis* are equality, predictability, efficiency, and respect for separation of powers. The first three are easy to illustrate. As to equality and predictability, German society and German legal culture place a premium on both equality and predictability, that is, legal certainty (*Rechtssicherheit*). Failing to adhere to precedent is an open affront to both values. Efficiency, the third justification, is a very potent policy in a muscle-bound judicial bureaucracy in which senior judges make almost[1069] all hiring and

[1068] *See* Brenner and Spaeth, *supra* note 1001, at App. I.

[1069] In some of the *Länder*, there is some kind of a parliamentary body that needs to be heard or even has a say in some of the decisions on careers of individual judges (*Richterwahlausschuss*), *see* Khorrami, *supra* note 388.

> promotional decisions. Judges who frequently overrule frustrate their colleagues and jeopardize their own careers. The pattern of practice that results is so pervasive and persuasive that it might even be referred to as "institutional *stare decisis*."

The fourth value—respect for separation of powers—may require explanation. Much of the codified law in Germany is very abstract or open-textured. By enacting such legislation, the legislature in effect confers discretion upon the judiciary to flesh out the statutes, to concretize them, and to make them more detailed. In short, the legislature is delegating legislative authority to the courts. This delegation is necessary and desirable since it is impossible for the legislature to anticipate every factual scenario to which every single legislative norm will be applied in future years. Nevertheless, in exercising this quasi-legislative or sub-legislative discretion, courts are expected to abide by the constitutional constraint of legislative supremacy. Their role is to interpret law, not make it.

Leaving aside the problem of determining exactly what is meant by interpreting the law, one can say in a broad sense that legislative supremacy means that legislators, and not judges, should ultimately decide what the law is. A crass contravention of legislative supremacy thus would be presented by a judicial system of single judges in which each judge determines the law for herself, and from which there is no appeal. In such a system it would be impractical if not impossible for the legislature to have the final say. Standing by previous decisions, both vertically and horizontally, therefore promotes more than just equality, efficiency, and legal certainty; it also serves legislative supremacy and, accordingly, separation of powers.

One measure of the loyalty of a judicial institution to the doctrine of separation of powers is its readiness to subordinate its own values to those of the legislature. It is impossible on the basis of this study to judge which of the two courts, the FCC or the U.S. Supreme Court, is more loyal to the constitution. However, it might be possible to calculate which court's judges are more loyal to the precedents of their predecessors. The discussion above revealed that the FCC overruled 19 previous decisions including the four cases under section 16 of the FCC Act, 11 of which (58%) were classified as political overrulings (on the basis that the overrulings under section16 are to be classified as political), that is, rulings where later judges substituted other values for the values underlying the previous decisions.

Adjusting for the longer history of the U.S. Supreme Court, the comparative question becomes: What percentage of the 74 overruling cases by the U.S. Supreme Court were political under the definition here propagated? Rather than discuss each pair of cases in detail, as was done for the decisions of the FCC, Appendix A, contains the author's classification of the overruling cases as corrective, renovative, or political using the same method as employed for the decisions of the FCC. Using this method, 31 (42%) of the 74 cases were determined to be political

in nature, that is, where one would not expect to find the same judge voting with the majority in both cases.

These percentages—58 percent for the FCC and 42 percent for the U.S. Supreme Court—suggest that when the judges of the latter overrule previous cases, they are slightly more loyal to precedents in a political sense, that is, they are slightly more likely to accept the value judgments made by their judicial predecessors, all other things being equal. But all things are not equal. For one thing, the bicameral structure of the FCC probably inhibits some political (as well as corrective and renovative) overrulings. For another, these percentages should be viewed in light of the statistic that the U.S. Supreme Court is twice as likely as the FCC to overrule previous cases (an overruling rate of 1.1% compared to 0.6% respectively). Accordingly, if one disregards the nonpolitical overrulings (i.e., the corrective and renovative ones) and just calculates the rate of political ruling, one finds that the FCC is slightly less likely than the U.S. Supreme Court to engage in political overruling (political overruling rate of 0.37% for the FCC and 0.47% for the U.S. Supreme Court). But then there is the problem, mentioned above, that the U.S. Supreme Court cases decided after 1945 were often based at least in part on decisions reached before that date, so that including them in the study might unfairly raise the overruling percentage rate for the U.S. Supreme Court. And the percentage for the FCC is artificially low by comparison because the FCC decided so few cases in its early years. If one considers these factors, bears in mind that the rates of overruling and the numbers of overruling cases are small, and remembers that the classification between political and nonpolitical overrulings is inexact, it would be misleading to generalize further than to conclude on the basis of this study that the overruling practice of the two courts is markedly similar.

Summary

Because of the extensive amount of material in this chapter, the following conclusion is divided according to the topics above, namely: historical development; statutes regarding judicial precedents; the modern use of precedents; and a comparison between the overruling practice of the German Federal Constitutional Court and the U.S. Supreme Court.

A. HISTORICAL DEVELOPMENT

At the beginning of this chapter, the history of judicial precedents in Germany is traced back to the founding of the *Reichskammergericht* (Imperial Chamber Court) in the year 1495. This was the first appellate court in Germany that could be considered basically independent from the monarch. However, as was seen, this did not mean that monarchs (and later the parliamentarians) were comfortable with the idea of an independent judiciary. The judgments issued by this court were vital

to the exposition and development of the law. Over time, they took on the character of being binding in the same sense that statutes are considered binding in Germany. By the year 1800, the *Reichskammergericht* was even publishing its own official reports of judgments. Lawyers practicing before the *Reichskammergericht* couched their arguments in reliance on precedents. The judicial practice also extended to the distinguishing of precedents. It is still a matter of dispute to what extent the judges of the *Reichskammergericht* adhered to their own precedents.

In Germany, the increasing influence of legal positivism, which considers all pronouncements by people in authority to be law, combined with democratic forces, inspired a movement to remove the lawmaking power from the courts and to place it firmly in the hands of the monarch, and later the legislature, which under the Kaiser was at least nominally democratic. An extreme example of an absolutist monarch trying to control the judiciary is provided by the General Law for the Prussian States (*Allgemeines Landrecht für die Preussischen Staaten*) of 1794, which sought to legislate for every potential eventuality so that judges could not engage in interpreting the law. The Prussian and other monarchs saw themselves at the apex of the legal system and as the only legitimate font of law and justice. Judicial precedents were accordingly perceived as a threat to their lawmaking authority. In this context, one might think in these terms of the General Acts as an extensive catalogue of potential judgments from which the judges were to choose the correct judgment. This grand undertaking failed, as it was impossible to foresee nearly as many potential controversies as the drafters of the General Law for the Prussian States had hoped.

The political upheavals throughout present-day Germany in the early 19th century brought with them considerable legal uncertainty. In order to promote predictability of the law, particularly with regard to commerce, Prussia, Bavaria, and other German states sought to harness the discretion of the courts in another way: by prohibiting them from overruling their own decisions unless they obtained the permission of the territorial ruler. The Imperial Court of the German Empire, which was established after the formation of the German Reich in 1871, was, however, granted the prerogative of departing from its own precedents, but only in plenary session. Even today, statutorily imposed techniques to force courts to follow precedents are common in Germany. Their existence bears witness both to the value seen in having consistent exposition of the law by the courts, and to the concern that judges might otherwise abuse their discretion.

As demands for increased democracy in the German Reich grew more vocal, democratically minded academics and others renewed earlier criticisms of the judiciary. According to the critics, the judges were too strict in their adherence to precedents. They were failing to bring their precedents in line with changes to society brought forth by the industrial revolution and the accompanying evolution of societal values. In short, adhering to precedents was considered by the reformers to be too conservative for the times. The response of the reformers was that the legislature must take the lead. Even though the legislators only had jurisdiction over private law, which was understood as being apolitical, they too saw

themselves in the role of the Kaiser, sitting atop their own pyramid of laws. As described in the chapter on statutes, the legislators at that time thought that the law that they would eventually codify in 1900—the German Civil Code—would be exclusive, complete, and enduring (*ausschließlich, vollständig und dauerhaft*). Inspired by *Begriffsjurisprudenz* described in the chapter on comparative jurisprudence, the drafters of that code believed that they had finally solved the Kaisers' problem with judicial precedents; for the judges would be able to resolve every legal problem by a more or less mechanical application of the rules in the German Civil Code and would therefore have little need for their precedents in the 20th century. The judiciary, however, clung to their precedents through the era of the Weimar Republic.

Under the rule of Adolf Hitler, who considered himself a democratically elected Kaiser, the German government once again turned its attention to the judiciary and judicial precedents. After amending the German Civil Code to require that it be interpreted according to National Socialist principles, a statute was enacted in 1935 to free the judiciary from any binding effect of any precedents decided before that date. In other words, the National Socialist reformers also believed that adherence to precedents was not only widespread, but that the practice of adhering to precedents was also conservative in the sense that it was inhibiting the judges from interpreting the law in conformance with National Socialist principles.

The modern democratic era in Germany was ushered in by the ratification of the German Basic Law in 1949, which grants the judiciary independence from the political branches of government, that is, the executive and the legislative. The selection of young German judges is therefore not a political process. Judges are free to hire the candidates they think are best qualified for the judiciary. However, the career structure of the judiciary, together with its specialization, institutionalizes a strong form of vertical *stare decisis* by creating a climate in which inferior judges are highly motivated to conform their judgments to those of the higher courts. Furthermore, the highest judges in Germany are appointed through a political process.

The historical use of precedents in England as described in this chapter begins in the 13th century with the publication of *De Legibus et Consuetudinibus Angliae* (The Laws and Customs of England) by Henry de Bracton. He and others after him employed the rulings of the king's courts to illustrate the application of English law. Beginning in 1268, the year of Bracton's death, important judicial decisions were recorded in the initial Year Books. The Year Books were eventually superseded in the 16th and 17th centuries by more reliable and complete law reports.

Throughout the centuries, English judges had been reaching decisions based on (what they believed to be) the law of England. Some of this law could be found in what today would be called statutes, but these were ordinarily quite particularized and not generally applicable to other, even similar cases (see the chapter on statutes). This view only started to change after Jeremy Bentham (1748–1832) began to criticize his former teacher, William Blackstone, for defending judicial decisions as

a source of law. Bentham claimed that English judges were not finding law, as they claimed; rather, they were making it. "It is the judges that make the common law, just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way judges make laws for you and me."

Once the positivistic viewpoint of Bentham and later John Austin became generally accepted, judges and lawyers became more self-conscious of their role in making and developing the law. Since judicial statements about the law were, according to this point of view, themselves law, then they should be applied as one would apply statute law. As a consequence, the judicial statements at law acquired more authority. This change in focus ushered in a formalistic approach quite similar to the movement of *Begriffsjurisprudenz* in Germany. It was hoped that, by applying the holdings or ratios of the courts in a more or less mechanical manner, one could increase the predictability of the law as well as decrease the incidents of judicial lawmaking.

B. STATUTES REGARDING PRECEDENTIAL EFFECT

This formalistic approach led to similar, but not identical, developments in England and Wales and in the United States. The legislature of the American State of Georgia enacted a statute in 1858 which sought to decrease the incidents of judicial lawmaking by preventing the Georgia Supreme Court from overruling its own case decisions. The British House of Lords adopted this same view in 1898. However, while the Georgia statute was short-lived, the House of Lords continued to abide by this view as to the proper role of the judiciary until 1966. This statute from the State of Georgia, which mandated horizontal *stare decisis*, is the only American statute of which the author is aware that mandates that courts adhere to precedents.

In the United Kingdom, the author is aware of only one statute. That statute mandates vertical, not horizontal, *stare decisis*. Further, the statute applies only to decisions of European, not British, courts. The reason is obvious: British courts by tradition (or constitutional convention) accept the notion that the rulings of superior courts on points of law are binding on inferior courts. A statute would be superfluous.

By contrast, both Sweden and Germany have considerable legislation on the binding quality of precedents. These statutes fall into two categories: those which operate vertically and those which operate horizontally. In Sweden, the Supreme Court may only hear an appeal on two grounds: first, when the legal matter is of fundamental importance and, second, in order to remedy a gross injustice. The second ground—to remedy a gross injustice—is directed at doing justice in the individual case. The first ground—the legal matter is of fundamental importance—not only allows the judges themselves to decide which matters are important: it also implies that the court's resolution of the matter will be generally accepted beyond the scope of the individual case.

The most obvious statutory provision regarding the vertical influence of precedents in Germany is contained in section 31 of the Federal constitutional court law. That statute declares that that court's decisions are binding (like statutes) on other organs of the state, including the other courts. Yet German statutes also require that lower courts respect the precedents of higher courts in two additional ways. First, concerning appeals, statutes in Germany grant special rights of appeal in cases where the lower courts have failed to follow the precedents of higher courts. Second, and even more far-reaching, are the statutes which mandate that inferior courts refer the entire case to a higher court for final determination. One example is the provision which applies to the state appellate courts in criminal matters, in which the state appellate courts are prohibited by law from deciding a case which conflicts with the decision of another state appellate court or with the decision of the Federal Supreme Court.

The German legislature also makes widespread use of procedural statutes to encourage judges of the same court to follow the precedents of their own court by making it difficult for them to depart from those precedents. One technique employed for that purpose is the same technique used in Sweden: if one chamber or panel of judges on an appellate court wishes to depart from a precedent of another chamber or panel, or from a precedent of the court made in plenary session, then the chamber or panel which wishes to depart must refer the case to the full court in plenary session; it may not decide the case contrary to an existing precedent. There are statutes to this effect in force for all six of the federal court jurisdictions in Germany, including the Federal Constitutional Court.

The vertical effect of precedents is strong in all four of the jurisdictions here studied. Beginning with Germany, we saw that there are various statutory mechanisms in place to encourage, and in some cases to compel, lower courts to abide by the rulings of higher courts on matters of law. In addition to the statutory component, the judicial institutions themselves impose considerable pressure on judges to resolve cases in a manner consistent with the precedents of higher courts. Those institutions apply that pressure because the costs of not doing so are potentially high: in addition to the loss of prestige that comes with frequent reversals, not to mention the extra work, a failure to follow precedents might cause problems in working with other judges, and might even lead to the denial of or delay in obtaining tenure, a pay raise, a promotion within one's court or to another court, or attractive reassignments, perhaps to larger cities. The Swedish judiciaries resemble the German judiciaries in this respect.

In England and Wales and the United States, on the other hand, the institutional pressure is much weaker. The costs to judges of not following the precedents of higher courts is comparatively small: trial court judges work alone in these jurisdictions; compared to Germany, the rate of appeal is extremely low, as are the chances of reversal; and because salaries are set by law, judges do not get individual raises. Judges have more or less reached the top of their profession

upon appointment; promotions to a higher court, while desirable for most, are so uncommon as to be out of reach for most; and, furthermore, reasoned challenges to precedents might even increase one's chance of promotion to a higher court. Indeed, because common law judges have so little to lose by ignoring the precedents of higher courts, lawyers sometimes feel the need to remind judges of their duty to follow precedents, whereas no German judge needs to be reminded of this fact of judicial life.

This is not to suggest that English, Welsh, or American lower court judges are more likely to depart from precedents than their German and Swedish colleagues. From his years of practice, it is the author's impression that American trial court judges adhere religiously to precedents. Although the author is not aware of any comparative studies on this subject, he believes that, were a study of this nature to be conducted, it would show that the rate of departure from precedent is extremely low in all four of the jurisdictions studied; for all of these judges strive to see that like cases are treated alike, all judges see the value of predictability in law, and all want their courts to function more efficiently.

C. THE MODERN USE OF PRECEDENTS

Concerning the practice of applying precedents, both by judges and by others, the discussion above found differences among the jurisdictions studied. One very obvious difference, and one often forgotten, is that the level of specialization among judges is so high in Germany and Sweden that these judges are much more likely than most practitioners to know the relevant case law and to be abreast of the newest precedents. In fact, a number of German lawyers have commented to the author—and the author has himself observed—that German judges are sometimes offended by lawyers who try to tell them what the law is, including case law, on any point. Of course, judges can only be expected to know of recent court developments in their own specialized judicial hierarchy, and also in their own state and region, since these are the courts to which their own judgments might be appealed. As to judgments of appellate courts in other regions and especially other states, judges, like practitioners, rely on periodicals and commentaries. While the periodicals sometimes print the court judgments or at least portions of the judgments, the commentaries essentially extract the holdings or ratios (*Leitsätze*) from the cases that the commentator believes are most important.

It is by no means the case that all reported case decisions can be found in the commentaries, unless it happens that the particular point of law has been dealt with in only a handful of German court decisions, in which case the commentary is likely to report all of the decisions. The author conducted a computer search on a narrow point of law in California and Germany in databanks going back to the year 1850 in California and to 1961 in Germany. There were 74 case decisions in the German databank, which by no means contains every reported appellate decision in Germany on that particular point of law. To highlight the point made by

the author above, only a fraction of these decisions are mentioned in the leading commentary. In California, there were 15 decisions. One could therefore say that, because there are so many case decisions in Germany, the significance of any one decision is diminished unless that decision happens to proceed from one of the federal courts. Conversely, because there are so few decisions in the common-law world, these few take on special significance.

There is a marked difference in the way cases are handled in secondary sources in Germany on the one hand and in England, Wales, and the United States on the other. In Germany, cases are ordinarily reduced to their holdings or ratios; there is very little factual background. More importantly, there is very little that reveals the reasoning of the court: in fact quite often the reasoning consists merely of a conclusory statement that such a thing constitutes some statutory element. By contrast, even legal encyclopedias in England, Wales, and the United States often contain more facts and, more importantly, more substantive reasoning (that is, policy and statutory purposes) to help the reader understand why the judges decided as they did.

The approach in secondary writings in England, Wales, and the United States consequently can be seen as supplying the reader with the information necessary to apply the legal rule in accordance with the thinking of the court that announced the rule. When one compares this style of analysis to statutory construction, one will see that this approach constitutes the historical approach: the user of case law can re-create the circumstances under which the court reached its decision so that he or she can test various hypothetical solutions with this decisional matrix in mind. In Germany, by contrast, the reports of case decisions are textual. As was stated, in most cases the only reasoning that is reported in secondary materials are conclusory statements which do not help the reader understand why the judges reached the decision that they did. Consequently, the reader is not able to form a picture of the circumstances under which the judges decided the case. In other words, readers are left with textual statements of holdings or ratios and little else, leaving them with little alternative other than to apply these in a textual, formalistic manner.

When it comes to the horizontal component of precedential influence, one finds much comparative speculation which is not cited here because it is just that: speculation. The only empirical comparative study the author is aware of is the one summarized below which shows that the overruling practices of the German Federal Constitutional Court and of the U.S. Supreme Court are practically identical.

D. PRECEDENTS AND POLITICS IN THE GERMAN FEDERAL CONSTITUTIONAL COURT

In its judgments, the German Federal Constitutional Court almost always refers to previous decisions, and often quotes from them approvingly. It takes great care in

articulating its holdings or ratios, and does so with a degree of generality consistent with the practice of the U.S. Supreme Court. The FCC reexamines its holdings from time to time, and only very occasionally departs from them, usually when the constellation of the court has changed, but also to correct mistakes and to renovate its case law to conform to changes in society.

In doing so, the FCC acts in a manner practically indistinguishable from the practice of the U.S. Supreme Court. The FCC overrules previous decisions at only roughly half the rate of the American court (0.6% for the FCC and 1.1% for the U.S. Supreme Court), but the percentages are reversed when it comes to political overruling. There, the U.S. Supreme Court resorts to political overrulings at a rate of roughly two-thirds that of the FCC (42% for the U.S. Supreme Court versus 58% for the FCC). Said another way, the FCC is less likely to overrule, but when it does so, it is more likely to overrule politically. However, if one just compares the rate of political ruling, one finds that the FCC (0.37% percent) is slightly less likely than the U.S. Supreme Court (0.4%) to engage in political overruling.

By concentrating on the departures from precedent, that is, the exceptions to the rule, one might be tempted to ignore the rule itself, which is that the FCC respects its own precedents. There are four reasons for this phenomenon: respect for equality, predictability, judicial efficiency, and separation of powers. These interests motivate the judges of the FCC and of the U.S. Supreme Court to stand by previous decisions. In other words, both courts respect *stare decisis*.

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CONCLUSION

In the first chapter, comparative law was defined as the analysis of different laws or legal systems by the use of one or more approaches. Accordingly, the discipline of comparative law includes purposes, methods (referred to here as approaches), and fields of study. *Legal system* is defined to encompass (1) all behavioral legal rules in force in the jurisdiction, (2) all institutional rules that provide for the establishment and administration of legal institutions (including their methodologies), and (3) all of the people involved in making, interpreting, and applying the legal rules, who are sometimes referred to as officials.

Comparative law finds use in five basic fields of legal endeavor: in private international law (that is, conflicts of law); in making law; in the interpretation and application of law; in the confluence of the law and the development of general common principles; and finally in the unification of the law. Comparative law can also be abused, such as when employed for colonial and imperialistic purposes.

There are three general purposes for the study of comparative law: the improvement of one's own law, including international law, and its application; harmonization or uniformity; and the search for universal commonalities and differences.

There are many approaches to conducting comparative legal studies because the discipline of comparative law acts as an interface for communication between people from different legal cultures and with different collective identities. Nevertheless, most comparative legal research falls roughly under one or more of the 13 main approaches which are sketched below.

Functional analysis plays an enormous role in comparative legal research. Zweigert and Kötz call functionality "the basic methodological principle of all comparative law." Although the functional approach has been criticized by many, these criticisms do not undercut the core insight of functionality, that is, that laws and legal systems serve purposes (functions); that these functions very often find expression in differing ways in different legal systems; and, even if they do not do so, then that fact too is of interest.

The approaches to comparative legal study can be roughly divided into two groups: micro-approaches and macro-approaches. Micro-comparisons emphasize rules and practices; macro-comparisons emphasize people, particularly officials (legal actors), in their wider cultural, philosophical, and other contexts. A proper

understanding of foreign and domestic law requires an appreciation for both the rules and practices as well as for the cultural context.

There are six basic micro- or rule-based comparative approaches: comparison of legal terms; comparison of legal concepts; comparison of norms; comparison of sources of norms; comparison of legal institutions; and comparison of bodies of norms. A legal term is the smallest component of any legal norm and consequently of any body of norms. (The terms norm and body of norms are defined below.) The term legal concept means something more than the dictionary denotation of the legal term; a *legal concept* encompasses all usages of the term and similar terms in all conceivable connotations. *Norm* is defined as a legal rule which prescribes or permits certain human behavior, including institutional norms. Consequently, a norm must contain at least two legal terms: one describing a behavior and another one attaching some legal consequence to the behavior. The comparison of sources of norms looks at the notions and mechanisms in any society for determining the validity of norms. By *legal institution* is meant a significant practice, relationship, or organization within legal society, such as the institutions of marriage, of slavery, or of property. The final rule-based comparative approach discussed here is the comparison of bodies of norms. These are collections of norms larger than the collections making up any legal institution. Usually the norms under study are selected from some body of substantive law.

There are also at least seven basic macro-approaches: comparison of legal organizations; comparison of legal systems; comparison of *mentalités*; comparison of juristic styles; comparison of legal philosophies; comparison of legal traditions; and comparison of legal cultures. Legal organizations, also known as legal institutions in English, are made up of people bound by a structure of law. In addition to the organic norms establishing and regulating organizations, organizations have their own unique informal administrative practice, which is often highly dependent on the people who staff the organization. Legal system is defined above.

Lawyers in each culture are said to possess a collective mental program which contains "assumptions, attitudes, aspirations and antipathies" that constitute the "deep structures of legal rationality." This is how the term *mentalité* is employed in this book. The comparison of juristic styles looks at factors which the individual researcher believes to be crucial. Zweigert and Kötz, for example, identify as crucial (1) historical development, (2) distinctive mode legal thinking, (3) certain legal institutions, (4) sources of law, and the (5) ideology, meaning "a religious or political conception of how social or economic life should be organized."

Researchers who compare legal philosophies are attempting to understand how lawyers think about the law, and what this means about their legal system. Lawyers within particular jurisdictions tend to share a common perception of the law; and this perception is sometimes at odds with the perceptions of foreign lawyers. For example, some lawyers consider law to be applied moral philosophy. Others claim that law need not necessarily have anything whatever to do with morality: law has an existence separate and apart from moral philosophy. Some

lawyers view their law as being politically neutral, that is, autonomous, while others think that all law is political. These and other questions are addressed in the chapter on comparative jurisprudence.

The legal traditions approach, according to H. Patrick Glenn, its main proponent, strives to compare "all received normative information" broadly defined. The final approach discussed here, and one that can encompass all the other macro-approaches, is that of comparing legal cultures. Legal culture encompasses everything that influences the making, interpretation, and application of norms, including those things not necessarily thought of as belonging to the realm of law.

There have been many studies over the past 100 years that have attempted to classify jurisdictions into groups. The resulting groups are commonly referred to as legal families. Most of these attempts employ language as one of the criteria by which the classifications are made. In some cases it seems as if language is the sole criterion for classification. All except one of the studies place England and Germany in different families, either primarily because they speak different languages, or because England accepts that judge-made law is a valid source of law.

Legal scholars might want to make use of the two basic models of language transmission when studying the transmission of law and legal culture. The first of these is referred to as the genetic model because the transmission is from parents to their children. The second model is the cultural model by which large populations of people have in effect traded in the language of their parents for a different language. Scholars might also want to turn their attention to other cultural phenomena, such as music and religion, to aid their efforts at understanding how law in all its forms is spread, and in aid of their efforts to understand and classify legal systems.

So much has been and is being published on the topic of law and language in the English language alone that it would be impossible to read much less summarize everything. While the topic of comparative law and language is somewhat narrower, the magnitude of the literature on the topic is nevertheless daunting. Consequently, this chapter could only present a few of the studies and insights which have been published.

Much has been written on the topic of legal translation. While articles and books on this subject are often devoted to translation between specific languages, there are a number of broad-based studies by de Groot and others that could not be presented here for reasons of space. Rather, the coverage in this chapter of language and comparative law had to be limited to the topics of comparative legal linguistics and to language and legal predictability.

This book's discussion of comparative legal linguistics centered on the groundbreaking book by that title by Heikki E.S. Mattila. Tracing the history of legal German and legal English, one should not be surprised to see the influence of Latin on both legal languages. Latin was the language of the Church, of scholars, and of the universities. Latin remained the language of record in the common law courts until the early 18th century. To this day, most procedural terms employed

in the English, Welsh, and American courts are of Latin origin. In Germany, Latin gained prominence in legal circles with the Reception of Roman Law (Reception). However, Latin began losing ground to German in the 16th century. Thereafter, German terms were substituted for Latin ones. Today, Latin words and Latin-based words form only a very small part of German legal vocabulary. Almost all German terms are home grown. The Latin, or rather Roman, influence lives on, however, behind the German terminology and in other ways, such as in the conception of the state, the secularization of law, the exclusivity of the codification of law, and the academic character of the understanding of law.

In England, Wales, and the United States, the most important source for legal terminology is the French language. John Baker estimates that most English legal terms are of French origin. However, this does not mean that French law dominated English life. On the contrary, Law French was used for English legislation, law, and legal institutions. The Norman French influence can still be felt, for example, in the vestiges of feudalism, centralization of power, and in the doctrine of parliamentary supremacy.

German legal practice tends more toward conceptualism than do the legal practices of Sweden, England, Wales, and the United States. This topic will be returned to below in the discussion of comparative jurisprudence. The underlying assumption of conceptualism is that legal terms are labels for distinct, identifiable, reoccurring, and stable elements and structures (for example, relationships) found in (or imposed on) society. The term "concept" is understood by conceptualists therefore not to refer to the bare legal term, but rather to these elements and structures themselves.

Nothing peculiar to the German language, such as its relative preference for nouns over verbs, can account for the popularity of conceptualism (*Begriffsjurisprudenz*). Rather, as will be explored in more depth in the chapter on comparative jurisprudence, conceptualization results from and is reinforced by a view of law as existing independent of other factors, including politics. In a word, conceptualists tend to see law as autonomous. This view is part of a conception of separation of powers that holds that judges and lawyers should refrain from any political activity.

Just as there is nothing peculiar to the German language which can account for conceptualism, there is nothing peculiar to the English language which can account for the length of many English language contracts. By identifying the provisions of certain contracts that account for their length, the author was able to show that their length is due primarily to four factors, none of which is inherent in the English language. These reasons are (1) a cumbersome dispute resolution process; (2) an informal business tradition; (3) jurisdictional diversity; and (4) a preference in England, Wales, and the United States for the private structuring of one's affairs.

In the section on language and legal predictability, the author sought to show that the choice of language alone cannot affect legal predictability. Rather, legal

predictability can only be increased by lowering the density of legal rules or, alternatively, by training the people who write, interpret, and apply the rules to act in concert.

The third chapter sought to rank the four jurisdictions here under study according to how lawyers in those jurisdictions might respond to five questions regarding their perception of their own jurisdiction. Question 1 sought to ascertain whether lawyers see their law as basically autonomous or, on the other hand, whether they consider it to be interdisciplinary. Question 2 asked whether they see their law as complete or, on the other hand, whether they perceive that there are gaps in the law. Question 3 asked about their perception of the probability of identifying the correct rule to apply to any particular set of facts. Question 4 sought to probe how predictable the respondents in the various jurisdictions viewed their courts to be in the application of their law. Question 5 asked if they believe that a law is still law regardless of its content or whether, on the other hand, immoral law cannot be law.

There were only marginal differences between the jurisdictions on the subject matter of the second question, which asked whether respondents see their law as completely covering every area that is regulated or, on the other hand, whether there are gaps in the law. While the respondents in Germany tended to rate their law as fairly complete and all-encompassing, those in Sweden, England, Wales, and the United States rated their law as being perceived to be comparatively incomplete.

The third question asked about the probability of identifying the correct rule to apply to any particular set of facts. Here again, the German respondents were the most confident in their ability to identify the correct rule of law, while the Americans were the most pessimistic.

The fourth question sought to probe how predictable the respondents in the various jurisdictions view the application of their law to be. Once again, Germany is placed at the higher end of the spectrum by claiming to adhere more strictly to rules. The responses in the other jurisdictions surveyed—England and Wales, Sweden, and the United States—give more credence to flexibility and to doing individual justice.

The most striking disagreement was found in the answers to Questions 1 and 5, especially to Question 1, which asked whether lawyers perceive of their country's law as being autonomous or, on the other hand, whether they consider it to be interdisciplinary. All of the Germans who responded to Question 1 of the questionnaire rated their law at levels 1 and 2, meaning that law is understood in Germany as being something separate and distinct from politics. If law is conceived of in this way, one might view the application of the law as a more or less mechanical exercise. Further, viewing the law as autonomous is generally associated with legal positivism, which employs a formal definition of law. At its extreme conception, the complete autonomy of law would mean that law is completely content-neutral and, consequently, that law is law regardless of whether its content is moral.

The perception in Germany of a separation between the quality of law as law and its content is supported by the responses of the author's students to Question 5, which indicate their belief that their law is completely content-neutral. The German legal philosophers who were surveyed rated the thinking of German lawyers at level 4, indicating that law is not content-neutral when it comes to immoral law. As one of these academics wrote in response to the author's questionnaire, most German lawyers probably agree with the safety valve provided by the Radbruch formula:

> Where justice is not even striven for, where equality, which is at the core of justice, is consciously disregarded when drafting positive law, then the law is not merely 'wrong law', rather it completely loses its status as law.

The United States is at the other end of the spectrum from Germany on the questions of the autonomy of law and its content-neutrality. Whereas the German respondents consistently rated their lawyers' view of the legal system as being autonomous, and the student respondents in Germany rated their legal system as being content-neutral, the responses in the United States were reversed: almost all of the respondents answered with a 4 or 5 to both Questions 1 and 5.

It appears that German lawyers today view the autonomy of the law in much the same way that they did at the beginning of the last century, that is, as being necessary to the science of law. To be classified as its own science, law must be understood as a discipline that, at least for most purposes, is separate and distinct from other disciplines, such as theology, philosophy, political science, economics, and even history. If one views law as a science, one is very much attracted to the formal elements of the law, like concepts, for concepts offer the hope of objectification and quantification. This explains much of the historical and present-day attraction of conceptualism (*Begriffsjurisprudenz*), which is one of the approaches associated with legal science. Conceptualism thinks of law as being formulaic in the way that mathematics and chemistry are formulaic: norms are merely equations or chemical formulas. Consequently, if one separates the content of law from its form, the application of the law is (or at least can be) logical and objective in the same way that mathematics and chemistry are logical and objective. The application of the provisions of the *Bürgerliches Gesetzbuch* or German Civil Code is commonly understood to be a politically neutral process, as that code is applied by means of the (neutral) deductive process of the syllogism.

One should not underestimate the political and practical incentives, either in Germany or in the United States, for viewing law in this way. In Germany, Roman law was seen as being politically safe for the monarch during what we now refer to as the Reception. After all, according to Ulpian (c. 170–223), "What is approved by the prince has the force of law" (*Quod principi placuit legis habet vigorem*) and "The sovereign is not bound by the laws" (*Princeps legibus solutus est*). Roman law was also of little threat to the Church because it distinguishes between *fas* (divinely legitimate) and *ius* (secular law). The Reception also benefitted from associations

with the Roman Empire. In their efforts in the 18th and 19th centuries to supplant Roman private law with Germanic law, academics, democrats, judges, and lawyers had to reassure their monarchs and other conservative forces in society that the codifications were politically safe for the monarch, that is, that they were apolitical. The reformers also had to convince the Church that they made no moral claim; for morality was the province of the Church. The incentive to perceive of law in scientific terms was also strong in the United States. The legal trade schools in the 19th century were affiliating themselves with universities and striving to present their programs as scientific in order to profit from an association with the natural sciences, which had made tremendous strides.

The comparable school of jurisprudence in the United States to the German *Begriffsjurisprudenz* is ordinarily referred to as conceptualism, although it is sometimes referred to as formalism. Conceptualism's main promoter was C.C. Langdell, Dean of Harvard Law School. Imitating the German theorists of his age, Langdell sought to construct a system of rules that were neutral in the sense of being devoid of political and other value judgments, such as subjective justice or morality. In fact, he contended that it was irrelevant that application of a rule might lead to injustice. Oliver Wendell Holmes, Jr. dismissed Langdell as a "theologian," implying that he was asking people to accept concepts and rules on faith alone, and perhaps even that he was placing himself above God in judging the justness of law. According to Holmes, the person (usually a judge) who announces and applies a legal rule is actually partaking in value-laden legislative activity. Accordingly, courts must in such circumstances consider business practice and convenience just as one would expect a legislator to do.

Considering the fact that conceptualism was dominant both in Germany and in the United States in the 19th century, why do German and American lawyers today have generally opposing views on the issues of the autonomy and content-neutrality of law? Grechenig and Gelter identify two major historical factors which caused American lawyers to break with the conceptualist tradition. First, utilitarianism—specifically, the idea that judge-made law should be subject to constant utilitarian improvement—gained widespread acceptance in the United States but not in Germany. Second, the legal realist movement in the United States discredited what had become known as classical legal thought. In German-speaking countries, a similar movement, the short-lived Free Law School (*Freirechtsschule*) of legal thought, had a similar agenda, but it failed to displace the formal doctrinal approach to law.[1070] Consequently, German legal reasoning still resembles the conceptualist practice of avoiding all reference to nonlegal sources; for doing so would offend the traditional notion of separation of powers.

In a similar vein, Kirchner opines that German judges restrict their arguments to those within the boundaries of traditional legal reasoning in order to preserve

[1070] Grechenig and Gelter, *supra* note 204, at 302 (2008).

their autonomy *vis-à-vis* the legislature. It is in the self-interest of the courts in Germany, according to Kirchner, to couch their factual lawmaking judgments in the garb of traditional argumentation and in so doing not to allow explicit value judgments and policy arguments to enter into their discourse. Failure to do so would mean a loss of legitimacy, as they would be seen as taking part in the political process.[1071]

Albert A. Ehrenzweig wrote in 1971 that the alleged preference of the civil law for positivism in contrast to the common law's allegiance to natural law was an oversimplification.[1072] That is also the conclusion reached by the author, at least if the defining feature of positivism is its insistence that immoral law can nevertheless be law. Yet the term positivism, like so many others in this book, means different things to different people.

The analysis undertaken in Chapter 3, though rudimentary, disclosed that lawyers in these four jurisdictions perceive certain aspects of their jurisdictions in differing ways. The largest discrepancy found was in how they perceive their legal systems in relation to (political) policy. Whether or not one views the law and legal system as being autonomous affects where one will look for the law, how one will argue about the law, how one will justify conclusions about the law, and many other legal activities. Whether one's view of law's autonomy will actually affect how the law is applied is a fascinating question that deserves, like everything else in this chapter, further study.

As described in Chapter 4, the legal profession developed similarly in Germany and in Sweden up to the time of the 12th century, when the German principalities began receiving Roman law. Through the years, German universities were founded to train lawyers in Roman law for future civil service. Sweden did not receive Roman law. Swedish jurists studied canon law and their own domestic (mostly judge-made) law at university in Sweden. The Swedish universities were the first in Europe to teach domestic law. Norman England had a highly developed legal profession (considering the standards of the time) based in London, which was both the center of commerce and of government. Moreover, the English jurist studied at the Inns of Court, not at university.

These historical influences can still be felt in the modern legal educational systems of the four jurisdictions under study here. In England, Wales, and the United States, the emphasis is on training lawyers, not civil servants. Academic, that is, university legal training is a comparatively recent phenomenon there. Legal education at university level has only existed on a large scale in England and Wales since the middle of the last century. Legal education in Germany remains rule-oriented and regimented as one might expect from institutions engaged in training civil servants. Legal education in England, Wales, and the United States, and probably to a somewhat lesser extent in Sweden, is more practical and sociopolitical in

[1071] Kirchner, *supra* note 204, at 285.

[1072] Ehrenzweig, *supra* note 233, at.133, *criticizing* Lawson, *supra* note 234, at 65.

nature. England and Wales also require that lawyers be trained either as solicitors or as barristers.

Uniformity is also reflected at the practical training stage (*Referendariat*) in Germany, which follows university education. The practical training ends in a single examination geared towards selecting good civil servants and, in particular, judges. Sweden's university education is comparatively long in duration but thereafter does not require graduates to complete practical training before they can practice as lawyers. About 30 percent of recent law graduates are given the opportunity to work at court, and only those who complete this additional stage of training may work as a judge, prosecutor, or elite lawyer called *advokat*. The United States is unique in that almost all law students earn a four-year university degree in a subject other than law before even beginning their law studies.

There are some differences in the activities of the jurists in these four jurisdictions. The most obvious is the prominent role given to the barrister or attorney in English, Welsh, and American court proceedings. Germany also has a profession which is not found in the other jurisdictions here studied: namely that of the civilian notary (*Notar*).

An English or Welsh barrister or solicitor is not automatically qualified to practice in Scotland and Northern Ireland. Neither is an American lawyer admitted in one of the American states automatically qualified to practice in any of the other American states, although he or she will be allowed to practice before the federal courts on matters of federal law. In this regard, the United Kingdom and the United States are a microcosm of Europe, where the bars are controlled locally. There does not seem at present to be a move in the direction of a national bar in either the United Kingdom or the United States.

The future of the legal profession in Sweden, Germany, and England and Wales is heavily influenced by the European Union and the Court of Justice of the European Union (CJEU), owing to their jurisdiction in matters relating to competition and the internal market. The Council of Bars and Law Societies of Europe, which was established to represent the shared interests of European lawyers, reports that there were 146,910 *Rechtsanwälte* practicing law in Germany in 2009, of which 297 were from other European countries. In England and Wales, 139,789 lawyers were admitted, of whom 327 were foreign EU lawyers. In Sweden, of the 4,503 *advokater* who were admitted, only 14 were from other European countries. The relative modesty of these figures points to the fact that a national legal education is practically a mandatory requirement to practice as a lawyer in any of these jurisdictions. It is conceivable that future legal systems and systems of legal education can be structured in such a way that European and American jurists with sufficient linguistic skills could profit from admission and the freedom to practice in greater numbers (as is the case with doctors, for example). However, such a development currently appears a long way off.

Chapter 5 discussed judges and judiciaries. A judiciary as we know it today began to appear in England and Wales towards the end of the 12th century.

Municipal courts were established in Sweden in the 13th century. Prominent citizens together with the mayor served as judges. Around the same time, the sons of wealthy Germans who had studied Roman law in Italy would return to Germany to work for a German prince, oftentimes in a judicial capacity.

Absolutism played a crucial role in the subsequent development of the judiciary in Germany. Indeed, the influence of absolutism is still being felt. Absolutist rulers insisted that judges were only to apply laws, not interpret them. Some judgments only became binding after formal approval of the monarch. German judges were granted a brief period of independence under the Weimar Constitution only to be degraded by the National Socialist government from the 1930s until 1949, and by the Communist government in East Germany until 1990, when the former German Democratic Republic was integrated into the Federal Republic. In England and Wales, by contrast, judges formally achieved their independence with the enactment in 1701 of the Act of Settlement.

Sweden and Germany have comparably large numbers of judges: for every judge there are 4,000 people in Germany and 6,000 in Sweden. By contrast, England and Wales make do with one judge per 44,000 people and the United States with one judge per 35,000 people. In addition, the office of judge in Germany and Sweden represents an independent career path. As a result, politicians in Sweden and Germany do not decide on the appointment of every single judge but only on appointments to the highest courts. Of course, those are the judges with by far the most influence over the interpretation of statutes and the Basic Law, and over the development of case law.

The selection and training of judges also reveals differences. In England, Wales, and the United States there is the belief that the most respected members of the legal profession make the best judges, whereas Sweden and Germany prefer to select the best students for judicial office.

As dealt with more fully in the chapters on legal reasoning, statutes, and judicial precedents, there are ordinarily only three things that courts can do in the exercise of their jurisdiction: (1) reach results in resolving disputes; (2) provide reasons for their results; and (3) announce the rule they are following in resolving the dispute. Resolving disputes is to some extent influenced by the political or other predisposition of the judge. A graphic illustration of this phenomenon is provided by German judges in National Socialist times who construed the German Civil Code to allow divorce from a Jewish spouse even though the ethnic background of one's spouse was not among the enumerated statutory grounds for divorce.

One technique to reduce the discretion of judges is to increase the extent and particularity of statutes. This is indeed the path followed in England, Wales, and the United States, where statutes tend to be very detailed (see chapter on statutes). German statutes, by contrast, tend to be broadly written (often termed open-textured in English or *abstrakt* in German). This means that German judges have more discretion in construing statutory law.

In accord with a conception of separation of powers in which the legislature is superior to the judiciary, the political branches of government in all of the jurisdictions here studied are involved in the judicial appointment process. English, Welsh, and American judges regard themselves as subject to parliament or the legislature, but only in the instances where parliament or the legislature has made its will known in their statutes. German judges regard themselves as civil servants with the task of interpreting and applying the laws. Swedish judges arguably fall between these two positions. Swedish judges also interpret the law like civil servants, but they also develop case law in areas not regulated by statute.

Even if the judicial jurisdiction is allocated differently in England and Wales compared to Germany, the jurisdiction of the courts is basically co-extensive, except for jurisdiction to overturn statutes and executive actions on constitutional grounds. This jurisdiction, which is found in the United States and Germany, is denied to the courts in Sweden, England, and Wales.

The bars of England, Wales, and the United States are very specialized. Judges know the lawyers who appear before them, and know their specialties and reputations. In Germany and Sweden, on the other hand, specialization this intense is for the most part confined to the judiciary itself.

Important decisions on the law are taken in all jurisdictions here studied by multiple judges, at least three in number. Specialized judges in Germany and Sweden are likely to be very well versed in the general area of law in any case that comes before them. One of the three judges assigned to the case will be charged with working up the case and presenting the salient facts and applicable law to the remaining two judges, who will also listen to the witnesses, if any, and to the arguments of counsel.

With this institutional model of a three-judge court in mind, one could say that the common law judge relies on the two advocates to present the opposing positions of the parties. It is the advocates who must familiarize themselves with the court file, select the witness or witnesses who should be heard, conduct any necessary legal research, question the witnesses, and in many cases even draft the judgment once the judge has reached his or her decision. The judge in England or the United States will (ordinarily) adopt the position of one of the two advocates. In short, from a functional standpoint, it could be said that English and Welsh advocates (barristers) and American advocates (attorneys) are acting like German and Swedish judges, and that German and Swedish judges are acting like common law advocates. The roles overlap substantially.

With the increasing diversification of international activities within Europe, member states are cooperating more closely in judicial matters. Judges are coming into contact ever more frequently with foreign legal systems and, when performing their professional activities, they are themselves bound to the common European law and legislation. A speedy and complete harmonization of the judicial profession is nothing more than a utopian vision because, in these times of limited public funds, it is arguably impossible to expect England and Wales to expand their

judiciary by a factor of ten simply to make their judicial system more continental in style. By the same token, one cannot expect Germany to make a similarly drastic reduction in the number of its judges.

Both Germany and Sweden can trace the use of lay judges, who are treated in Chapter 6, back to the tradition of the Germanic *Thing* (Swedish *ting*), in which respected leading citizens and nobles were called upon to decide disputes. Lay judges were gradually replaced by trained lawyers in Germany through the process of the Reception. Lay participation was all but abandoned under absolutism: allowing leading citizens and nobles to resolve disputes only added to their status at the expense of that of the monarch; professional judges who were dependent on the monarch were easier for the monarch to control. The Enlightenment ushered in the belief that one could limit the power of absolutist monarchs by returning lay people to the judiciary. Yet in the beginning, at least, these lay judges too were often mere puppets in service of the German monarchs.

In Sweden, lay judges (*nämndemän*) retained their superiority until the end of the 17th century. While Sweden never received substantive Roman law, the growing formality of the law as practiced before the higher courts favored the educated professional judges over the less literate lay judges.

In England and Wales, the tradition of the German *Thing* died out following the Norman invasion in 1066. In the 14th century the sheriffs were renamed justices of the peace, and they continued to serve in a judicial capacity in uninterrupted fashion until 1971. Yet the justices of the peace for the most part only had jurisdiction over minor crimes. At trial before the king's judges, it was the jury that decided the question of guilt or innocence; the judge determined the sentence and passed judgment.

Germany at present does not employ the institution of the jury. In Sweden, it plays quite a minor role. In England and Wales and the United States, a jury is used in practically all major criminal trials to judge guilt or innocence. However, the vast majority of criminal cases end with a plea of guilty.

If the jury in the United States, England, or Wales votes to convict the defendant on one or more charges, the judge must review the evidence to ensure that there was substantial evidence on all of the elements of each of the crimes to support the conviction; for except in the case of a verdict of acquittal, discussed in the next paragraph, both the trial judge and the appellate courts will set aside a verdict not supported by substantial evidence.

According to studies in the United States and the United Kingdom, juries are far more likely to acquit than professional judges. Further, if a jury in the United Kingdom or in the United States acquits, then judgment will be entered dismissing the criminal action even if the judge is convinced of the defendant's guilt. Studies in Sweden and Germany suggest that the lay judges outvote the professional judge or judges in 1 to 3 percent of cases, and the lay judges in about half of these cases vote to acquit someone whom the professional judge or judges would have convicted. However, in the other half of the cases, the lay judges vote to convict someone

whom the professional judge or judges would have acquitted. Lay judges may also impose a heavier sentence than the professional judge or judges. This difference is significant. However, there is no objective way of knowing whether the lay judges and jurors in such cases are right.

A second significant difference is that in Germany and Sweden, unlike in England, Wales, and the United States, lay judges are employed by courts, including appellate courts, in practically all types of cases, not just criminal cases. By contrast, civil (that is, noncriminal) jury trials in England and Wales are extremely rare, and in the United States they are uncommon. Consequently, lay participation in the noncriminal judiciary is far more widespread in Germany and Sweden than in England, Wales, or the United States.

A few American states still employ lay judges, usually called justices of the peace (JPs), to decide small, mostly criminal and regulatory cases. They decide the cases alone, without legal advice. The organized bar is often quite critical of this institution. However, the JPs in England and Wales are generally appreciated as an efficient and necessary component of the criminal justice system. The model employed there is ordinarily to have cases heard by three JPs, with a trained lawyer present to give legal advice. JPs in England and Wales process the vast majority of criminal and regulatory cases, and even conduct summary proceedings, such as bail petitions, for the Crown Court.

Three basic arguments are ordinarily mounted in support of the participation of lay people in the judicial process, particularly in the criminal arena. First, the involvement of lay people adds transparency and democratic legitimacy to the judicial system. Second, lay people bring life experience, freshness, justice, and humanity to the decisional process, with the result that the decisions are intrinsically better. Third, lay involvement serves as an emergency brake on the apparatus of the state. This last policy is most clearly in evidence in England and Wales and in the United States, where jurors can and do sometimes find defendants not guilty despite what seems to be overwhelming evidence of guilt.

Some criticize juries in England and Wales because they find in favor of the criminal accused in as many as two-thirds of cases that come before them. Professional judges sitting without a jury, it is believed, would have convicted many of these people. Other critics claim that lay judges and juries worsen the fact-finding process. Still others argue that, even if they do improve the process, any improvement is so slight that it is not worth the cost. Whether lay judges really do serve as emergency brakes on overly zealous prosecutors and judges is also open to question. Might not the same purpose be served by having lay judges sit alongside professional judges as is done in Germany and Sweden?

Perhaps the whole idea of lay participation in the judiciary is passé. Perhaps the judiciaries in the jurisdictions here studied no longer require democratic legitimation. Perhaps lay participation is merely a relic of the past.

Nevertheless, even if it might appear that the justifications for lay participation are no longer relevant, one should not expect these institutions to be dismantled

anytime in the near future. Despite the occasionally brutal criticism of these institutions, one finds very few commentators who favor the total dismantling of the institutions that guarantee citizen participation. Consequently, it should be expected that these institutions might be modified somewhat, for example, by narrowing their ambit to the area of criminal law, but it is not to be expected that they will be totally abandoned in the near future.

Chapter 7 concerns legal reasoning. Finding the law, in the sense of the *Normsuche* (the search for the applicable norm) involves the same mental process in all four of the jurisdictions under study here: one begins with a real or hypothetical factual situation presenting one or more legal issues, and literally searches for the norm or norms that might provide a resolution. These norms are referred to as templates here. All other things being equal, if the norms in any particular legal system are systematized in an orderly, logical, and readily accessible fashion, then it should be easier on the whole to find these norms. A review of the systematizations available in Germany, England and Wales, and the United States reveals no substantial practical difference which might enhance or impede the search of the *Normsucher* (the person searching for the applicable norm) in any of the jurisdictions relative to the others.

With a few exceptions not relevant here, behavioral rules pronounced by judges are indistinguishable from those enacted by the legislature or promulgated by an administrative agency. The roles of legislating and judging often overlap. Accordingly, the possible mental processes used to apply judicial and legislative behavioral rules must be identical.

This chapter also distinguished statutory construction from pure judicial law making (*Richterrecht*). The definition of judicial law (*Richterrecht*) employed here, borrowed from German law, is a very narrow one. It encompasses only those judicial ratios or holdings which cannot in good conscience be traced back to a statutory norm, including a statutory norm from another area of the law which was never intended to apply to the case. In other words, this definition of judge-made law excludes those areas of law based on the judicial use of statutory analogies. The narrow definition of *Richterrecht* is employed in this book only because it is the universal usage found in other English-language publications discussing German *Richterrecht*. As was seen in the chapter on statutes and their construction, German courts very often resort to statutory analogies; Swedish courts do so in only a limited number of instances; and English and Welsh and American courts practically never resort to this technique. If one were to employ a definition of judge-made law (*Richterrecht*) which included the analogical extension of statutes, then the reach of German judge-made law would be much more extensive than reported here and in other publications.

Thereafter the discussion turned to logic and legal reasoning. After sketching the classical methods of reasoning—deduction (including the logical syllogism), induction, and analogy—the author elucidated the use of the legal syllogism (subsumption), which is critical to German legal education and consequently

to German legal thinking. It was seen that finding (the *Normsuche*) the major premise (the template) is not a deductive process. Nor is the process of testing the facts to see whether they fall under the normative template a deductive process. Only when the lawyer has concluded that the facts do or do not establish all of the elements required in the major premise does the thinking process become deductive.

The discussion concluded with an analysis of six representative quotations characterizing common law reasoning as being analogical while characterizing continental European legal reasoning as deductive. All of the quotations were seen to be mistaken or at least misleading. Some of the authors apparently confused the nondeductive *Normsuche* with the (partially deductive) act of applying the law to the facts (subsumption). Others seem to hold the inaccurate view that only facts are important in the legal reasoning of the common law; rules are thought to be irrelevant. One author apparently fails to realize that all legal reasoning is heavily analogical. Logical deduction is in fact very rare in the law, no matter the jurisdiction.

As revealed in Chapter 8, Germany is unique among the jurisdictions studied here in that it received Roman law and with it the idea that the state is the source of all law. During the centuries of the Reception, the state was personified by the (often absolutist) monarch. An expression of the monarch's will, whether in the form of an edit, judgment, or statute, was considered to be law; and the judges were sworn to do the will of the monarch. Nowadays the state is, of course, democratic, and the monarch is the legislature. Yet the thinking about law on this point has remained basically the same: all law proceeds from the will of the legislature, and judges are subservient to that will. According to this conception of law, an order of a court in any form cannot or at least should not be viewed as law.

Continuing this line of thought, German jurists to this day regard the codification of the German Civil Code in 1900 (as well as other codifications) as a reassertion of legislative control over the law to the detriment of judge-made law. Codifications are understood to be exclusive, complete, and enduring (*ausschließlich, vollständig und dauerhaft*). Codifications are exclusive in that they are the only proper source of law, they are complete in that they need not be extended by judges, and they are enduring, meaning that they do not need constant judicial reinvention or even legislative amendment. Codifications are understood as displacing and superseding any judge-made law on the subject.

In Sweden and in England and Wales, there was no Reception of Roman law, and the kings never enjoyed the power of absolutist monarchs because the king shared power with a more or less independent parliament and with a judiciary which as often as not sided with parliament in confrontations with the king. For century after century in England and Wales, parliament concerned itself with taxes and security, while the king's judges developed their common law within the confines of the prescribed forms of action. Statutes were never understood to be an exclusive source of law, as neither parliament nor the king ever asserted perfect

control over the judiciary. Statutes were not understood as being complete except in those areas in which parliament, sometimes via subsidiary legislation, had dictated detailed rules for how the judges ought to resolve cases that come before them. To this day, the only legislation considered to be of an enduring nature is that of constitutional stature. As a result, the dominant view in England and Wales holds that the common law has been sometimes displaced and at other times augmented by statute law, yet the common law continues to operate in the background.

The history of statutory lawmaking in the United States began to diverge from that in England and Wales at least as early as 1803, when the U.S. Supreme Court decided in *Marbury v. Madison* that judges had the last word on whether legislation was constitutional. Further, the large number of jurisdictions in the United States has led to a lack of uniformity and to legislative inaction and conservativeness that can only be overcome by judicial action. The growth in judge-made law with little legislative supervision led directly to the codification movement in the United States, which in turn led to the enactment of a civil code in California and a few other American states. However, there is no sense that these codifications are exclusive, complete, and enduring; rather, quite the opposite is true.

In summary, as far as historical developments are concerned, England, Wales, and Sweden are quite similar; the United States is closest to England and Wales, but judges are accorded a larger role in the United States. Germany's history appears to differ profoundly from the histories of the other three jurisdictions here studied. However, it shares in common with the United States the institution of judicial constitutional review of legislation.

The conclusions are similar when comparing sources of law in Germany, England and Wales, Sweden, and the United States. Whereas in Germany the large majority of jurists follow the legal positivist school and its strict hierarchical thinking when it comes to legal sources, this style of thinking is less pronounced in the other jurisdictions studied here. England and Wales perhaps come closest to Germany, as might be expected when one considers the popularity of legal positivism there (see the chapter on comparative jurisprudence). On the other hand, England and Wales recognize what is here referred to as cooperative lawmaking, where parliament works in tandem with the judiciary to supplement and occasionally to "overrule" the judges' common law. Sweden is perhaps the most "realistic" of the four jurisdictions when it comes to the identification of sources of law and their classification into a hierarchy: according to Swedish academics, legal sources cooperate, not compete with each other.

The three European jurisdictions—England and Wales, Germany, and Sweden—seem to prefer different methods of statutory interpretation. In England and Wales, statutory construction is basically textual. In Sweden, the historical method is entitled to great importance. In Germany, the teleological method is employed to extend the application of statutes beyond their texts.

These apparent discrepancies between the methods employed by courts in Germany, England and Wales, and Sweden raise questions about the harmonization

of European law. In order to avoid arriving at different results, some observers advocate the introduction of a uniform European methodology of statutory construction. Others urge that the system of European courts be expanded on the model of the federal courts in the United States. Considering that Germany has 10 times more judges, and Sweden five times more judges, per capita than England and Wales, it should not be expected that the European judiciary will be expanded in the near future.

Judicial precedents are the subject of Chapter 9. The following discussion follows the outline of the chapter, namely: historical development, statutes regarding judicial precedents, the modern use of precedents, and a comparison between the overruling practice of the German Federal Constitutional Court (FCC) and the U.S. Supreme Court.

The *Reichskammergericht* (Imperial Chamber Court), which was established in the year 1495, was the first appellate court in Germany that could be considered independent from the monarch. The judgments issued by this court were vital to the exposition and development of the law. Over time, they took on a binding character in the same sense that statutes are considered binding in Germany.

Legal positivism considers all pronouncements by people in authority to be law. Judicial precedents are accordingly perceived to constitute pronouncing or making law. The increasing influence of positivistic thinking in Germany inspired a movement to remove the lawmaking power from the courts and to place it firmly in the hands of the monarch. The Kaisers tried to bring the judiciary under their control by means of the General Laws for the Prussian States (*Allgemeines Landrecht für die Preussischen Staaten*) of 1794, which sought to legislate for every potential eventuality.

The political upheavals which followed on the heels of the Napoleonic wars in the early 19th century brought with them considerable legal uncertainty. In order to promote predictability in the law, and to solidify their control over the judges, Prussia, Bavaria, and other German states prohibited judges from overruling their own decisions unless they obtained the permission of the territorial ruler. When the Imperial Court of the German Empire was established in 1879, it was only allowed to overrule precedents in plenary session, a restriction still in use in Germany today.

The imperial legislature, the *Reichstag*, appointed a commission to draft a civil code, and then another commission to rework the draft code of the first commission. The Kaiser retained jurisdiction over public (political) law. The legislators saw themselves in the legislative role of the Kaiser when it came to private law. The law that they would eventually codify in 1900—the German Civil Code—would be exclusive, complete, and enduring (*ausschließlich, vollständig und dauerhaft*). It should have, in other words, displaced case law. For their part, the judges went on deciding cases pretty much as they had done before, but took care to cite the code when doing so. The number of precedents construing the code grew.

When the National Socialists came to power, they amended the German Civil Code to require that it be interpreted according to National Socialist principles. In

doing so, they expressly freed the judges from any obligation to respect precedents handed down before 1935, an allowance that suggests that the practice of adhering to precedents was well-established.

The modern democratic era in Germany was ushered in by the ratification of the German Basic Law in 1949. New judges for the lower courts are now selected by judges with whom and for whom they will work; for it is senior judges who decide on promotions and reassignments with the court. This collegial climate provides lower-court judges with strong encouragement to follow the judgments of the higher courts. The highest judges in Germany are appointed through political processes.

Turning to the history of England and Wales, Henry de Bracton (ca. 1210–1268) published *De Legibus et Consuetudinibus Angliae,* which employed many rulings of the king's courts to illustrate the content and the application of English law. Bracton found some of the judicial opinions on the law to be more persuasive than others. In other words, the cases were merely evidence of the law, not statements of the law in and of themselves. Reports of important judicial decisions were recorded in the Year Books, published from 1268 until more reliable and complete reports became available in the 16th and 17th centuries. Because English and Welch judges were, by definition, basing their judgments on law, it was thought that the existing law could therefore be found in case decisions.

The view of judges and practitioners at the time was that judges were "finding" the law, not "making" it. Jeremy Bentham (1748–1832) was the first prominent critic to expose this view as a ruse. As an early positivistic thinker, Bentham contended that all pronouncements by people in authority are law. Once this viewpoint of Bentham and later John Austin became generally accepted, the statements by judges were understood to be statements of the law rather than merely opinions on the law. Seen in this way, it was possible to construe these statements in the same way that statutes can be construed. This, together with reliable reports of case decisions, helped usher in an approach to law that looked primarily at its text.

This positivistic, formalistic approach led to similar, but not identical, developments in England and Wales and in the United States. During the second half of the 19th century, at least one American state prohibited its supreme court by statute from overruling its own (unanimous) decisions; the state legislature would be the only organ for amending well-established law. The British House of Lords adopted this stance in 1898 for the same reasons, but expressly abandoned it in 1966.

In the United Kingdom, British courts by statute must follow the principles handed down by the Court of Justice of the European Union (CJEU). The author is not aware of any current statute in the United States on the issue of the binding quality of precedents. Germany and Sweden, however, have considerable legislation on the topic.

The statutes in those two countries fall into two categories: those which operate vertically and those which operate horizontally. The horizontal component is

returned to below. As to the vertical component, the Supreme Court in Sweden may hear an appeal when the legal matter is of fundamental importance, a rule that implies that the court's resolution of the matter will be generally accepted beyond the scope of the individual case. In Germany, section 31 of the FCC Act declares that the decisions of the FCC are binding (like statutes). In addition, there are statutes in Germany which grant special rights of appeal in cases where the lower courts have failed to follow the precedents of higher courts. Even more far-reaching are the statutes which mandate the inferior courts to refer the entire case to a higher court for final determination rather than decide a case in conflict with appellate precedents. Both Germany and Sweden prohibit chambers of the appellate courts from departing from the precedents of the other chambers; rather, those chambers must refer the case to the entire court in plenary session.

The vertical effect of precedents is strong in all four of the jurisdictions here studied, but institutionally stronger in Sweden and Germany than in England and Wales and the United States. In addition to the statutory requirements mentioned in the preceding paragraph, the German and Swedish judicial institutions themselves strongly encourage inferior court judges to follow the precedents of higher courts. This is so because the cost of not doing so is potentially high: in addition to the loss of prestige that comes with frequent reversals, not to mention the extra work, a failure to follow precedents might cause problems in working with the other judges; and might even lead to denials or delays in obtaining tenure, pay raises, promotions within one's court or to another court, or attractive reassignments, perhaps to larger cities. In England and Wales and the United States, on the other hand, the institutional pressure is much weaker because the costs to judges of not following the precedents of higher courts are comparatively low: trial court judges work alone in these jurisdictions; the rate of appeal is extremely low; salaries are set by law and are practically the same for all judges on the same court; judges do not generally expect to be appointed to a higher court, but even if they are, reasoned challenges to precedents might even increase one's chances of promotion. Yet, by all accounts, lower court judges in England and Wales and in the United States also adhere to precedents. They, like all judges, are very concerned that the law be applied equally, that law be predictable, and that the court system run efficiently. All these reasons militate in favor of the doctrine of precedents.

Although courts in all four of the jurisdictions here studied have a deep respect for judicial precedents, there are differences among the jurisdictions in how precedents are used. Because the level of judicial specialization among German and Swedish judges is so high, the judges themselves can be expected to know the relevant case law and stay abreast of the newest precedents. Judges in Germany rely on periodicals and commentaries. While the periodicals sometimes print the court judgments or at least portions of the judgments, the commentaries essentially extract the holdings or ratios (*Leitsätze*) from the cases that the commentator believes are most significant. Not all cases are reported in law reporters, periodicals, and commentaries. Rather, the editors decide which cases are the most

indicative of the law; said another way, which are most persuasive; for German commentators do not view the statements of judges as statements of law that must be passed on to the users of the commentary: all case decisions other than those of the German FCC, while very important, merely contain statements of what the judges think the law is. They are not the law. Decisions of common law courts take on particular significance because they are seen as containing statements of law and because there are so few decisions on any particular point of law.

The cases that are treated in German commentaries are ordinarily reduced to their holdings or ratios; there is very little factual background. More important, there is very little that reveals the reasoning of the court. Users are accordingly left with little choice but to apply these ratios textually. By contrast, even legal encyclopedias in England and Wales and the United States often contain more facts and, more importantly, more substantive reasoning (that is, policy and statutory purposes) to help the reader understand why the judges decided as they did. Accordingly, the users of these secondary sources can try to imagine how the individual judges in the reported case would think about the legal question before them. If the user then consults the case itself, he or she will sometimes be in a position to personalize an argument by citing the thinking of one or more judges. An argument that is formulated on this basis is essentially the historical approach of construing statutes, but applied to case decisions.

When it comes to the horizontal component of precedential influence, the only empirical comparative study that the author is aware of between the jurisdictions studied here is the one summarized below. This study concludes that the overruling practices of the German FCC and of the U.S. Supreme Court are practically identical.

The FCC takes great care in articulating its holdings or ratios. These are stated with a degree of generality consistent with the practice of the U.S. Supreme Court. The FCC reexamines its holdings from time to time, and only very occasionally departs from them, usually when the constellation of the court has changed, but also to correct mistakes and to renovate its case law to conform to changes in society. Overrulings which cannot be classified as necessary to correct mistakes (corrective overruling) or to modernize the case law (renovative overrulings) are termed political overrulings. These overrulings are solely attributable to changes in the constellation of the court.

The FCC overrules previous decisions at only roughly half the rate of the U.S. Supreme Court (0.6% for the FCC and 1.1% for the U.S. Supreme Court), but the percentages are reversed when it comes to political overruling. There the U.S. Supreme Court resorts to political overrulings at a rate of roughly two-thirds that of the FCC (42% for the U.S. Supreme Court versus 58% for the FCC). Said another way, the FCC is less likely to overrule, but when it does so, it is more likely to overrule politically. However, if one just compares the rate of political overruling, one finds that the FCC (0.37%) is slightly less likely than the U.S. Supreme Court (0.4%) to engage in political overruling.

By concentrating on the departures from precedent, that is, the exceptions to the rule, one might be tempted to ignore the rule itself, which is that the FCC respects its own precedents. There are four reasons for this phenomenon: respect for equality, predictability, judicial efficiency, and separation of powers. These policies motivate the judges of the FCC and of the U.S. Supreme Court to stand by previous decisions. In other words, both courts respect *stare decisis*.

Having arrived at the end of this book, it is time to return to the question posed in the introduction: Are the labels common law tradition and continental European tradition of any use?

Before answering the question, let us recapitulate the findings made in each of the chapters and ask which jurisdictions have the most in common. In Chapter 1, we learned that the approach employed in this book is a macro-approach. The factors considered in this comparison are language, jurisprudence, legal actors (lawyers, judges, and lay judges and juries), and legal methodologies (legal reasoning, statutes and statutory construction, and judicial precedents).

Language was arguably the least revealing factor of comparison. Except for the fact that England and Wales and the United States share a common language (even though the language of public law in the two jurisdictions varies significantly), there seems to be little if anything that necessarily connects two legal systems with the same language other than the obvious, that is, that they likely share a common origin (which we already know) and that communication between them will be the easiest, making cross-pollination much more likely. The English legal language was seen as the most open of the three languages to the importation of foreign terms, but the relative paucity of foreign terms in the German language does not mean that German law has been influenced least by foreign ideas. On the contrary, Germany is the only one of the four jurisdictions that received Roman law. The other three are more insular. However, based alone on the fact that England and Wales and the United States share a common language, one would have to say that these two jurisdictions have the most in common from a linguistic standpoint.

The rudimentary study on comparative jurisprudence presented in Chapter 3 suggests that Germany is the most positivistic of the four jurisdictions when considering the factors of autonomy of the law, formalism, the pedigree thesis, and the separation thesis. The United States appeared to be the least like Germany on the basis of the evidence presented. Sweden seemed to be nearer to the United States in its collective jurisprudential thinking. The attraction of legal positivism seems to be felt more strongly in England and Wales than in either Sweden or the United States. In this regard, England and Wales appear to be closer to Germany. The two jurisdictions which appear to be the most similar in jurisprudential outlook are Sweden and the United States. This coincidence is probably due to the influence of legal realism in those two countries.

Legal education in Germany appears to be the least interdisciplinary, and the American legal education the most. Sweden seems to be more like the United States in this regard than Germany, at least when considering the 70 percent of

Swedish law students who do not complete judicial training. As to the 30 percent who do, their training resembles the German *Referendariat*. Legal education in England and Wales resembles that in Germany, but only in the students' fourth year in England and Wales, when they attend the legal practice course (for solicitors) or the bar vocational course (for barristers). When it comes to the practice of law, England and Wales have a legal profession bifurcated to an extent not seen in the other jurisdictions studied. However, the legal profession in the United States bears at least a strong resemblance to the bifurcated English and Welsh model. In the United States, lawyers are admitted to practice law as "attorneys and counselors at law." American lawyers in larger cities tend to restrict legal practices either to court-related matters (such as trial lawyers and litigators) or to office matters (such as business, probate, property lawyers). A further factor of comparison was the number of judges per capita. England, Wales, and the United States have many fewer judges than either Sweden or especially Germany, which has by far the most. This difference indicates that lawyers in England, Wales, and United States are playing a much greater role in dispute resolution than are their colleagues in Germany and Sweden. All in all, it would appear that England and Wales and the United States are the most similar to each other, and that Sweden shares features with all of the jurisdictions, including Germany.

What was said for lawyers in the United States and in England and Wales is also true for judges: the judicial structure, court procedures, and roles of the judge are similar. What is different in many cases is how judges are selected; many judges in the United States are elected directly by the voters. Yet even here, the difference is not as great as it might appear at first glance. The vast majority of American judges are in fact appointed, not elected; and those who do face reelection or voter approval are almost always confirmed. Consequently, once again, England and Wales and the United States are the most alike. Germany and Sweden, both of which have large judicial bureaucracies, resemble each other more than the two common law jurisdictions.

The only jurisdiction which does not employ the institution of the jury is Germany. Sweden and England and Wales employ juries only rarely in civil cases. However, the similarity ends there. England and Wales make very broad use of juries in serious similar cases, even more so than in the United States. England and Wales also make far more use of justices of the peace. Germany and Sweden, on the other hand, commonly employ lay judges in their judiciaries. Sometimes lay judges even sit on appellate courts which decide only questions of law. On the basis of these criteria, the use of lay judges in Germany and Sweden is quite similar; the use of juries and justices of the peace in England and Wales and the United States is similar.

The chapter on legal reasoning demonstrated that lawyers in all four jurisdictions think the same when it comes to the selection and application of legal rules. However, that chapter revealed that German judges and lawyers justify their decisions differently compared to judges and lawyers in the other jurisdictions.

Specifically, German judges avoid references to policy. They prefer to stick to the functions or purposes (they perceive to be) contained in statute law, and even to apply statutes by analogy to situations which fall outside the ambit of the statutes. Swedish judges rarely apply statutes by analogy; American judges very rarely do so; and English and Welsh judges almost never do so. When viewed from the standpoint of American, English, Welsh, and to a lesser extent Swedish judging, the legal argumentation or reason-giving of German judges seems by comparison to be bureaucratic, formalistic, and sometimes even ingenuous: it seems as if German judges do not want anyone to know that they are undercover politicians engaged in a kind of legislative activity, albeit activity subordinate to that of the legislature. Consequently, for purposes of classification, the argumentation or reason-giving by German judges is quite different from the judicial practices in the other jurisdictions examined here.

The chapter on statutes and statutory construction illustrated that codifications in Germany are understood to be exclusive, complete, and enduring (*ausschließlich, vollständig und dauerhaft*). None of the other jurisdictions understand statute law in this way. Chapter 8 also came to the conclusion that German judges are the most generous in their interpretations of statutes. One example of their generosity in this regard has already been stated: their willingness to apply statutes by analogy. Of even greater practical importance is their readiness to interpret statutes teleologically, that is, to extend their application beyond the text of the statute in order to accomplish what the judges perceive to be the legislative purposes behind the statutes. It has been suggested by some that American judges are similar to German judges in this regard; but any similarity should not be overstated. Statutory construction in the United States is, like statutory construction in England and Wales, basically textual in nature, although American courts appear much more likely to employ the historical approach; in Germany, statutory interpretation is basically teleological or functional. Interestingly, the preferred method of statutory construction in Sweden is the historical method, which is considered the most democratic in the sense that judges are construing statutes as the legislature willed that they be interpreted, and not as the judges themselves choose to interpret them. None of the other three jurisdictions share Germany's understanding of statutes or Germany's preference for the teleological method. Whereas the other three jurisdictions have basically compatible understandings of the role of statutes, there is some variation among them in the preferred method of statutory construction. Here, again, the two common law jurisdictions are fairly closely aligned. With its preference for the historical method of statutory construction, Sweden appears to stand alone among the jurisdictions studied.

Before addressing the last topic—judicial precedents—perhaps it would be advisable to review what has been concluded so far. Concerning language, England, Wales, and the United States are the most closely related. According to the author's rudimentary study of comparative jurisprudence in Chapter 3, Sweden and the United States show the most similarities. The legal professions and judiciaries in

the United States and in England and Wales also displayed the most similarities; but the judiciaries of Sweden and Germany also have a great deal in common. The same is true when it comes to the use of lay judges and juries: England and Wales share many similarities, as do Germany and Sweden. In most of these comparisons, Germany was the least like the others.

That was also the conclusion in Chapter 7 on the question of how courts justify their decisions. When it came to statutes and statutory construction, Germany was unique in its view of the comprehensive nature of codifications and in its insistence that all judicial decisions be at least vaguely based on statute. In summary, to this point in the comparison, England, Wales, and the United States have shown themselves to be the most closely allied, and Germany has been revealed as the most unlike the others. Sweden is somewhere in between, sometimes siding with the common law jurisdictions, sometimes siding with Germany, and sometimes going its own way.

It only remains to be seen what the effect of the last criterion—judicial precedents—might have on this comparative exercise. Before discussing the differences, it should be noted that judicial decisions or case law are of enormous importance for all four of these jurisdictions. The importance of judicial decisions construing statutes is probably greatest in Germany. This should come as no surprise. German legislation on the whole is the most open textured (vague or abstract) of the four jurisdictions studied, meaning that it leaves administrators and judges with the most discretion. Further, the enormous German judicial bureaucracy produces a veritable flood of case decisions. These are so numerous, and sometimes so contradictory, that a commentator is needed to sort through them and to select what he or she believes to be the right constructions for inclusion in the commentary. The commentaries, in other words, are authoritative in part because of the function they serve in filtering case law. In England and Wales, there are so few case decisions on any particular point of law that there is little need for a commentary. The case decisions are entitled to great weight in and of themselves. Legal encyclopedias consequently are not authoritative, but at most persuasive. They sometimes add to their authoritativeness by citing case decisions from other jurisdictions. In the United States, legal encyclopedias very often cite case decisions from various American states. Judicial decisions from other states are entitled to a persuasive effect at most.

Because of the very large number of case decisions in Germany, and because of the geographic parceling of judicial jurisdictions in Germany, only the decisions of the highest courts, that is, the federal courts, can pretend to be authoritative for all of Germany. Yet even the authority of these decisions is weakened by at least two features. First, it sometimes (rarely) happens that two different federal courts announce opposing positions on the same legal question. This is possible because the legal question may arise independently within two or more court hierarchies. Second, and more commonly, the appellate courts of different states (*Länder*) and the judicial districts within the states may issue conflicting pronouncements on the same legal question.

To help avoid this predicament, the German legislature has enacted statutes to prohibit the judges of one chamber of an appellate court from deciding a legal issue in any way that conflicts with a previous decision of another chamber of the same court, or sometimes with a decision of other courts. Similar statutes are also found in Sweden. In the United States, different federal circuit courts of appeals sometimes deliver conflicting decisions. Unlike in Germany, the other circuits are not bound to follow the decisions of the first court that decided the issue, or to refer the matter to the U.S. Supreme Court for resolution. However, resolving divergence between the circuits is one ground upon which the U.S. Supreme Court will often agree to hear an appeal.

To this point in the discussion of judicial precedents, one would likely conclude that the treatment of judicial precedents in Germany and Sweden is quite similar, and that the common law jurisdictions (England and Wales and the United States) are on a separate path. But what of the statutory provision in the United Kingdom requiring British courts to adhere to the legal principles announced in the case decisions of the CJEU? No comparable statutory provision could be found in the United States or in Sweden. However, there is a statute in Germany which requires all German courts to abide by the decisions of the German FCC. To summarize, Germany and United Kingdom (which of course includes England and Wales) have statutory provisions which impose a vertical form of respect for precedents, and Sweden and Germany have statutes which impose a horizontal form of respect for judicial precedents.

How are precedents employed in practice? Here one finds significant divergence between Germany and the two common law jurisdictions examined here. In Germany, the ratios (*Leitsätze*) of precedential decisions, including those selected by the commentators, are applied in a formalistic textual manner reminiscent of the textual method of construing statutes. In England, Wales, and the United States, on the other hand, the historical method is often used when employing the ratio or holdings of precedential cases. To apply case law in this way, one examines the precedential case decisions to discern how the individual judges viewed the case before them, and then, armed with this information, one attempts to predict how they might respond to the instant case.

As to the vertical binding character of the decisions of the highest courts, the author opined in Chapter 9 that judges in all four jurisdictions probably respect precedents to a similar degree. This is not due to any particular statutory requirement; rather, all judges see the wisdom and justice in the equal application of the law, in legal certainty and predictability, and in judicial collegiality and efficiency. In addition, because judges in Germany and Sweden are on judicial career paths presided over by superior judges in their own hierarchies, there is a strong form of institutional *stare decisis* in these two countries which insures strict vertical compliance with precedential decisions.

When it comes to the horizontal component—the extent to which judges on one appellate court feel bound by the previous decisions of other judges on the

same court—the original research of the author presented in Chapter 9 illustrates that the judges of the German FCC and of the U.S. Supreme Court show great respect for previous decisions in that they overrule them only on rare occasions. The percentage of what the author calls political rulings (those which can only be explained by a change in judicial personnel) was virtually the same for both courts in the years studied.

In conclusion, while judicial precedents play an enormous role in all four of the jurisdictions that are the subject of this book, such decisions are understood and employed somewhat differently in Germany than in Sweden, England, Wales, and the United States. Thus, once again, Sweden, England, Wales, and the United States share fairly similar views, suggesting that Sweden, and probably the other Nordic jurisdictions, should be grouped together. As was seen, Sweden has features in common with both Germany and with the common law world, but which also evidences individual features of its own. Further, while England and Wales and the United States were seen to be quite similar on most of the criteria employed, referring to them as belonging to the same family implies a genetic similarity that cannot account for differences such as the variations in legal philosophies. As a consequence, it is hoped that future scholars will take a more nuanced view of the subject of families and on the supposed divide between the common law and the civil law worlds without forgetting that all legal systems in both of these traditions have far more in common with each other than not.

BIBLIOGRAPHY

Adelaida, Claudette, "Die Unabhängigkeit des Richters in der DDR," *Deutsche Richterzeitung* (DRiZ) 1981, pp. 11 *et seq.*

Adomeit, Klaus, and Susanne Hähnchen, *Rechtstheorie für Studenten*, Heidelberg, 5th ed., 2008.

Albers, Gregor, "Wer war eigentlich . . . Friedrich Carl von Savigny?," *Ad Legendum* 3/2010, p. 237.

Alexy, Robert, *Begriff und Geltung des Rechts*, Freiburg/Munich, 2nd ed., 1994.

Alexy, Robert, *Theorie der juristischen Argumentation*, 1978.

Allen, Carleton Kemp, *Law in the Making*, Oxford, 7th ed., 1964.

Almquist, Jan Eric, *Svensk rättshistoria: efter föreläsningar.* 1, Processrättens historia, 1968.

Alschuler, Albert W., and Andrew G. Deiss, "A Brief History of Criminal Jury in the United States," 61 *University of Chicago Law Review* 867, 1994.

Amede Obiora, Leslye, "Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision," 47 *Case Western Reserve Law Review* 275, 1997.

Asprey, Michèle M., *Plain Language for Lawyers*, Sydney, 3rd ed., 2003.

Atiyah, Patrick S., and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions*, Oxford, 1987.

Atzler, Bernhard, "Das Recht des ehrenamtlichen Richters die Verfahrensakten einzusehen," *Deutsche Richterzeitung* (DRiZ) 1991, p. 207.

Aumann, Francis R, *The Changing American Legal System: Some Selected Phases*, Columbus, 1940.

Babel, Richard Hyland, "A She'ur," 11 *Cardozo Law Review* 1584, 1990.

Bailey, Stephen H., Michael J. Gunn, Nick Taylor, Jane Ching, *Smith, Bailey and Gunn on the Modern English Legal System*, London, 4th ed., 2002.

Baker, John H., *An Introduction to English Legal History*, London, 4th ed., 2002.

Baker, John H., *The Common Law Tradition: Lawyers, Books and the Law*, London, 2000.

Baker, John H., *The Third University of England: the Inns of Court and the Common-Law Tradition,* London, 1990.

Bankowski, Zenon, and D. Neil MacCormick, "Statutory Interpretation in the United Kingdom," in *Interpreting Statutes: A Comparative Study,* pp. 365 *et seq.,* D. Neil MacCormick and Robert S. Summers, eds., Aldershot, 1991.

Bankowski, Zenon, D. Neil MacCormick, and Geoffrey Marshall, "Precedent in the UK", in *Interpreting Precedents: A Comparative Study*, pp. 315 et seq., Neil MacCormick and Robert S. Summers, eds., Aldershot, 1997.

Barnlund, Dean C., "A Comparative Study of Individual, Majority and Group Judgment," 58 *Journal of Abnormal and Social Psychology* 55, 1959.

Batiza, Rodolfo, "Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code," 60 *Tulane Law Review* 799, 1986.

Bell, John, *French Legal Cultures*, London, 2001.

Bell, John, *Judiciaries within Europe—a Comparative Review*, Cambridge, 2006.

Bennett, T.W., "Comparative Law and African Customary Law," in *The Oxford Handbook of Comparative Law* pp. 642–671, 2008.

Benten, "Wa(h)re Beratung," *Die Kanzlei* 2000.

Benz, Ulrike, *Die Rolle der Laienrichter im Strafprozess—eine Untersuchung über das Schöffenamt auf verfahrenspsychologischer und gerichtsorganisatorischer Grundlage mit einem rechtsgeschichtlichen rechtsvergleichenden Überblick*, Lübeck, 1982.

Berg, Christa, ed., *Handbuch der deutschen Bildungsgeschichte*, vol. 1 (Von der Renaissance und der Reformation bis zum Ende der Glaubenskämpfe), Munich, 1996.

Bergholz and Peczenik, "Precedent in Sweden," in *Interpreting Precedents*, pp. 304 *et seq.*, MacCormick, Neal, ed., Aldershot, 1997.

Bergmans, Bernhard, *L'enseignement d'une terminologie juridique étrangère comme mode d'approche du droit comparé: l'exemple de l'allemand, Revue internationale de droit comparé n° 1,* 1987.

Bergström, Sture, and Torbjörn Andersson, Torgny Håstad, and Per Henrik Lindblom, *Juridikens termer,* 9th ed., Stockholm, 2002.

Berman, Harold J., "Comparative Law and Religion," in *The Oxford Handbook of Comparative Law* pp. 739–751, 2008.

Blackshield, Anthony, "Practical Reason and Conventional Wisdom: The House of Lords and Precedent," in *Precedent in Law*, Laurence Goldstein, ed., Tennessee, 1991.

Bodenheimer, Edgar, John B. Oakley, and Jean C. Love, *An Introduction to the Anglo-American Legal System*, 2nd ed., 1988.

Bogdan, Michael, *Comparative Law,* Heidelberg, 1994.

Böttges, Walter, *Die Laienbeteiligung in der Strafrechtspflege—ihre Geschichte und heutige Bedeutung*, 1979.

Brand, Oliver, "Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies," 32 *Brooklyn Journal of International Law* 405, 2007.

Brenner, Saul, and Harold D. Spaeth, *Stare Indecisis: The Alteration of Precedent on the Supreme Court 1946–1992*, Cambridge, 1995.

Breyer, Stephen, "The Uses of Legislative History in Interpreting Statutes," 65 *Southern California Law Review* 845, 1992.

Brunner, Georg, *Einführung in das Recht der DDR,* 1975.

Brust, Dirk, *Die Übernahme ehemaliger DDR-Richter in ein bundesdeutsches Richterverhältnis,* 1994.

Bundesgerichtshof, *Betriebsberater 77,* 1117, 1977.

Bungarten, Theo, and Jan Engberg, *Recht und Sprache: eine internationale Bibliographie in juristischer und linguistischer Fachsystematik,* 2003.

Burnham, William, *Introduction to the Law and Legal System of the United States,* St. Paul, Minn., 1995.

Burnham, William, *Introduction to the Law and Legal System of the United States,* 4th ed., St. Paul, Minn., 2006.

Busse, Felix, "Freie Advokatur—Entwicklung, Bedeutung, Perspektiven für die Rechtspflege", *Anwaltsblatt 2001*, p. 130.

Caesar, Peter, "Wiederaufbau der Gerichtsbarkeit nach 1945," *Neue Juristische Wochenschrift (NJW)* 1995, pp. 1246 *et seq.*

Calebresi, Guido, *A Common Law for the Age of Statutes*, Boston, MA., 1985.

Casper, Gerhard, "Vergleichende Anmerkungen zu der Ausbildung der Juristen in der Bundesrepublik und den Vereinigten Staaten," *Zeitschrift für Rechtspolitik (ZRP)*, 1984, p. 116.

Casper, Gerhard, and Hans Zeisel, *Laienrichter im Strafprozess—Vier empirische Studien zur Rechtsvergleichung,* Heidelberg-Karlsruhe, 1979.

Cavalli-Sforza, Luigi Luca, Paolo Menozzi, and Alberto Piazza, *The History and Geography of Human Genes,* Princeton, NJ, 1994.

Chabris, Christopher, and Daniel Simons, *The Invisible Gorilla: And Other Ways Our Intuitions Deceive Us,* 2010.

Chodosh, Hiram E., "Comparing Comparisons: In Search of Methodology," 84 *Iowa Law Review* 1025, 1999.

Clermont, Kevin, and Theodore Eisenberg, "Xenophilia in American Courts," 109 *Harvard Law Review* 1120, 1996.

Coester-Waltjen, Dagmar, and Gerald Mäsch, *Übungen in Internationalem Privatrecht und Rechtsvergleichung,* 3rd ed., Berlin, 2008.

Cohen, Thomas H., Bureau of Justice Statistics, *Tort Bench and Jury Trials in States Courts*, Washington, D.C., 2009.

Coing, Helmut, *Epochen der Rechtsgeschichte in Deutschland,* Munich, 3rd ed., 1976.

Coing, Helmut, *Europäisches Privatrecht I,* Munich, 1985.

Coing, Helmut, *Europäisches Privatrecht II,* Munich, 1989.

Commichau, Gerhard, "Anwalt kann ich immer noch werden", *Juristische Schulung (JuS),* 1982, p. 858.

Conrad, Hermann, *Deutsche Rechtsgeschichte: Ein Lehrbuch*, Karlsruhe, 1962.

Conrad, Hermann, *Deutsche Rechtsgeschichte*, vol. 1, Frühzeit und Mittelalter, Karlsruhe, 2nd ed., 1966.

Conrad, Hermann, *Deutsche Rechtsgeschichte*, vol. 2, Neuzeit bis 1806, Karlsruhe, 2nd ed., 1966.

Conrad, Herrmann, *Richter und Gesetz im Übergang vom Absolutismus zum Verfassungsstaat, Graz*, 1971.

Constantinesco, Léontin-Jean, "Über den Stil der Stiltheorie der Rechtsvergleichung," 78 *Zeitschrift für Vergleichende Rechtswissenschaft*, 1979.

Copi, Irving M., and Carl Cohen, *Introduction to Logic*, 2001.

Cotterrell, Roger, "Comparative Law and Legal Culture," in *The Oxford Handbook of Comparative Law* pp. 710–733, 2008.

Creifelds, Carl, *Rechtswörterbuch, Juristenausbildung*, Munich, 20th ed. 2010.

Cross, Rupert, and J. W. Harris, *Precedent in English Law*, 4th ed., Oxford, 1991.

Cruz, Peter de, *Comparative Law in a Changing World*, 3rd ed., New York, 2007.

Crystal, David, *The Cambridge Encyclopedia of Language*, 2nd ed., Cambridge, 1997.

Darbyshire, Penny, *Darbyshire on the English Legal System,* 8th ed., London, 2005.

Däubler, Wolfgang, *Verhandeln und Gestalten. Der Kern der neuen Schlüsselqualifikationen,* Juristische Schulung (JuS) Schriftenreihe, Munich 2003.

David, René, *The International Unification of Private Law, International Encyclopaedia of Comparative Law: Legal Systems of the World, Their Comparison and Unification,* Hamburg, 1972.

David, René, and John E. C. Brierley, *Major Legal Systems in the World Today*, 3rd ed., 1985.

Dellapenna, Joseph W., and Joyeeta Gupta, *The Evolution of the Law and Politics of Water*, 2009.

Deutscher, Guy, *Through the Language Glass: Why the World Looks Different in Other Languages,* New York, 2010.

Diedrich, Frank, *Präjudizien im Zivilrecht*, Verlag Dr. Kovac, Hamburg 2004.

Diesen, Christian, *Lekmän som Domare*, Stockholm 1996.

Dießelhorst, Malte, *Die Prozesse des Müllers Arnold und das Eingreifen Friedrich des Großen,* Göttingen, 1984.

Dilcher, Gerhard, "Gesetzgebungswissenschaft und Naturrecht", *JuristenZeitung (JZ),* 1969, p. 1.

Dörig, Harald, "Juristenausbildung in der DDR," *Juristische Ausbildung (JA)* 1990, p. 218.

Döring, Erich, *Geschichte der deutschen Rechtspflege seit 1500,* Berlin, 1953.

Drobnig, Ulrich, and Konrad Zweigert, *International Encyclopedia of Comparative Law,* vol. 12, 1981.

du Plessis, Jacques, "Comparative Law and the Study of Mixed Legal Systems," in *The Oxford Handbook of Comparative Law* pp. 478–510, 2006.

Dworkin, Ronald, *Law's Empire,* 1986.

Ebel, Wilhelm, *Geschichte der Gesetzgebung in Deutschland—eine staatsbürgerliche Einführung,* Hannover, 1956.

Ehrenberg-Sundin, Barbro, *The Swedish government promotes clear drafting,* Clarity No. 47, May 2002.

Ehrenzweig, Albert A., *Psychoanalytic Jurisprudence,* Berlin, 1971.

Ehrmann, Henry Walter, *Comparative Legal Cultures*, London, 1976.

Eisenberg, Melvin Aron, *The Nature of the Common Law*, Cambridge, Mass., 1991.

Eisenhardt, Ulrich, *Deutsche Rechtsgeschichte*, 4th ed., Munich 2004.

Ekelöf, Per Olof, Torleif Bylund, and Henrik Edelstam, *Rättegång, Norstedts juridik,* Stockholm, 7th ed., 2006.

Elanders Gotab, A.B., *Scandinavian Studies in Law*, "Some Salient Features of the Legal Profession in Sweden," in Maritime & Transport Law, vol. 4, Bar Associations, Stockholm 2004.

Elk, Ralf, "Die schwedische Anwaltschaft," *Zeitschrift für Europäisches Privatrecht (ZeuP),* p. 190, 2001.

Epstein, Segal, and Walker Spaeth, *The Supreme Court Compendium: Data, Decisions, and Developments* 212, 2nd ed., 1996.

Erler and Kaufmann-Kieferm, *Handwörterbuch zur deutschen Rechtsgeschichte,* vol. 4, 1990.

Ernst, Fritz, *Berufsrichter und Volksrichter in der Strafrechtspflege*, Berlin 1911.

Eser, Albin, Laienrichter im Strafverfahren, in Kroeschll, *Vom nationalen zum transnationalen Recht*, Symposium der rechtswissenschaftlichen Fakultät der Albert-Ludwigs-Universität Freiburg und der Städtischen Universität Osaka, p. 162.

Esmein, Adhémar, Le droit comparé et enseignement du droit, in Congrès international de droit comparé, in: *Nouvelle revue historique de droit français et étranger,* vol. 24, 1900, pp. 489–98.

Esser, Josef, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts—rechtsvergleichende Beiträge zur Rechtsquellen—und Interpretationslehre,* Tübingen, 4th ed., 1990.

Evans, Jim, "Changes in the Doctrine of Precedent During the Nineteenth Century," in *Precedent in Law*, Laurence Goldstein, ed., Oxford, 1991.

Ewald, William, "Comparative Jurisprudence (I): What Was It like to Try a Rat?," in 143 *Pennsylvania Law Review* 1889, 1995.

Ewald, William, "The Jurisprudential Approach to Comparative Law: A Field Guide to Rats," 46 *American Journal of Comparative Law* 701, 1998.

Federal Courts Study Committee, *Report of the Federal Courts Study*, 1990.

Feldman, Stephen M., *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage,* Oxford University Press, New York, 2000.

Feuerbach, Anselm, *Betrachtungen über das Geschworenengericht*, 1812.

Feuerich, Wilhelm E., and Dag Weyland, *Bundesrechtsanwaltsordnung—Berufsordnung, Fachanwaltsordnung, Partnerschaftsgesellschaftsgesetz, Recht für Anwälte aus dem Gebiet der Europäischen Union, Patentanwaltsordnung; Kommentar,* Munich, 7th ed., 2008.

Fikentscher, Wolfgang, *Modes of Thought*, 2nd ed., Tübingen, 2004.

Fikentscher, Wolfgang, "The Evolutionary and Cultural Origins of Heuristics That Influence Lawmaking," in *Heuristics and the Law*, Ch. Engel and G. Gigerenzer, eds., pp. 207–37, 2006.

Finkenstaedt, Thomas, and Dieter Wolff, *Ordered Profusion: Studies in Dictionaries and the English Lexicon,* 1973.

Fletcher, George P., *Basic Concepts of Legal Thought,* New York, 1996.

Fletcher, George P., *Notwehr als Verbrechen—der U-Bahn-Fall Goetz, Frankfurt on the Main,* 1993.

Fletcher, George, "Comparative Law as a Subversive Discipline," 46 *American Journal of Comparative Law* 683, 1998.

Foschio, Leslie G., "A History of the Development of the Office of the United States Commissioner and Magistrate Judge System," *Federal Courts Law Review* 4, 1999.

Freeman, Michael D. A., and Dennis Lloyd of Hampstead, *Lloyd's Introduction to Jurisprudence,* London, 8th ed., 2008.

Friedman, Lawrence M., *A History of American Law* 21, New York, 3rd edition, 2005.

Galanter, Marc, and Mia Cahill, "Most Cases Settle: Judicial Promotion and Regulation of Settlements," 46 *Stanford Law Review* 1339, 1994.

Gehrmann, Ludwig, "Der demokratische Auftrag des ehrenamtlichen Richters und sein Informationsbedürfnis," *Deutsche Richterzeitung (DRiZ)* 1988, p. 126.

Glaberson, William, "In Tiny Courts of N.Y., Abuses of Law and Power," *New York Times,* pp. 25–27, Sept. 2006.

Glenn, H. Patrick, "Aims of comparative law," in *Elgar Encyclopedia of Comparative Law*, Jan M. Smits, eds, pp. 57–96, 2006.

Glenn, H. Patrick, "Legal Families and Legal Translations," in *The Oxford Handbook of Comparative Law*, pp. 422–439, 2008.

Glenn, H. Patrick, *Legal Traditions of the World: Sustainable Diversity in Law*, Oxford, 4th ed., 2010.

Gmür, Rudolf, *Das schweizerische Zivilgesetzbuch verglichen mit dem deutschen Bürgerlichen Gesetzbuch,* 1965.

Gmür, Rudolf, *Savigny und die Entwicklung der Rechtswissenschaft,* 1962.

Goebel, Julius, Jr., "King's Law and Local Custom in Seventeenth Century New England," 31 *Columbia Law Review* 416, 1931.

Goodhart, Arthur L., "Determining the Ratio Decidendi of a Case," in 40 *Yale Law Journal* 161, 1930

Goodrich, Peter, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* 1, New York, 1987.

Grahl, Christian, *Die Abschaffung der Advokatur unter Friedrich dem Großen—Prozeßbetrieb und Parteibeistand im preußischen Zivilgerichtsverfahren bis zum Ende des 18. Jahrhunderts unter besonderer Berücksichtigung der Materialien zum Corpus Juris Fridericianum von 1781*, Göttingen, 1994.

Gray, John, *Lawyers' Latin: A Vade-mecum*, London, 2002.

Grechenig, Kristoffel, and Martin Gelter, "The Transatlantic Divergence in the Legal Thought: American Law and Economics vs. German Doctrinalism," 31 *Hastings International and Comparative Law Review* 295, 2008.

Groot, Gerard-René de, *Recht en vertalen II*, 1993.

Grossfeld, Bernhard, *The Strength and Weakness of Comparative Law*, Oxford, 1990.

Grube, Friederike Charlotte, *Richter ohne Robe—Laienrichter in Strafsachen im deutschen und anglo-amerikanischen Rechtskreis; eine rechtsgeschichtliche und rechtsvergleichende Untersuchung unter besonderer Berücksichtigung verfassungsrechtlicher Aspekte*, Frankfurt on the Main, 2005.

Grunsky, Wolfgang, "Juristenausbildung in Deutschland," in: *Anwaltsberuf und Richterberuf in der heutigen Gesellschaft*, p. 209, Peter Gilles ed., Baden—Baden, 1991.

Gutteridge, H.C., *Comparative Law: An Introduction to the Comparative Method of Legal Study & Research,* Cambridge, 1946.

Haas, Eberhard, "Anwaltsberuf im Wandel," *Monatsschrift für Deutsches Recht (MDR)* 2721, 1998.

Habermas, Jürgen, *The Theory of Communicative Action*, vol. 1, Boston, 1984.

Hahn, Hugo J., "Wiederentdeckung der Schöffen," *Deutsche Richterzeitung (DRiZ)* 1985, p. 407.

Hall, Jerome, *Comparative Law and Social Theory*, Baton Rouge, LA, 1963.

Hall, Kermit L., William M. Wiecek, and Paul Finkelman, *American Legal History: Cases and Materials,* 2nd ed., 1996.

Hannaford-Agor, Paula L., *et al.,* Are Hung Juries a Problem? (Final Report, National Center for State Court, to National Institute of Justice), 2002.

Harding, Andrew, "Global Doctrine and Local Knowledge: Law in South East Asia," in 51 *International and Comparative Law Quarterly* 35, p. 49, 2002.

Harrison, John, "The Power of Congress over the rules of Precedent," 50 *Duke Law Journal* 503, 2000.

Harrison, Maurice E., "The First Half Century of the California Civil Code," 10 *California Law Review* 185, 1922.

Hart, Herbert Lionel A., *The Concept of Law,* Oxford, 1961.

Hart, James A., and Schultze-Zeu Dieter, *U.S. Business and Today's Germany: A Guide for Corporate Executives and Attorneys,* 1995.

Hartstang, Gerhard, *Der deutsche Rechtsanwalt—Rechtsstellung und Funktion in Vergangenheit und Gegenwart,* Heidelberg, 1986.

Hartung, Wolfgang, "Der Anwaltsberuf im Wandel", *Monatsschrift für Deutsches Recht (MDR)* 1999, p. 1301.

Hattenhauer, Hans, *Europäische Rechtsgeschichte,* Heidelberg, 4th ed., 2004.

Hattenhauer, Hans, "Juristenausbildung—Geschichte und Probleme," *Juristische Schulung (JuS)* 1989, p. 513.

Heidegger, Martin, *Nur noch ein Gott kann uns retten,* DER SPIEGEL, May 31, 1976, pp. 193–219.

Hellner, Jan, "The Law of Obligations and the Structure of Swedish Statute Law," 40 *Scandinavian Studies in Law*, pp. 325–45, 2000.

Henssler, Martin, "Grundlagen des US-amerikanischen Berufsrechts der Rechtsanwälte," *Anwaltsblatt (AnwBl)* 2002, p. 557.

Herget, James E., *Contemporary German Legal Philosophy*, Philadelphia, 1996.

Herget, James, and Stephen Wallace, "The German Free Law Movement as the Source of American Legal Realism," 73 *Virginia Law Review* 399, 1987.

Hinz, Manfred O., "Traditional Governance and African Customary Law: Comparative Observations from a Namibian Perspective," in *Human Rights and the Rule of Law in Namibia*, N. Horn & A. Bösl, Windhoek, pp. 59–88, 2008.

Hjärne, Harald, *Om den fornsvenska nämnden enligt landskaps-, stads- och landslagarna, Uppsala,* 1872.

Högskoleverket, *Rätt juristutbildning? Utvärdering av juristutbildningar*, 2000.

Holdsworth, William, *A History of English Law,* London, 1938, vol. II.

Holdsworth, William, *A History of English Law,* London, 1938, vol. XII.

Holland, James A., and Julian S. Webb, *Learning Legal Rules: A Student's Guide to Legal Method and Reasoning,* London, 4th ed., 1991.

Holmes, Oliver Wendell, "The Path of the Law," 10 *Harvard Law Review* 457, 1897.

Hönnige, Christoph, *Verfassungsgericht, Regierung und Opposition: Die vergleichende Analyse eines Spannungsdreiecks,* 2007.

Horn, Norbert, *Einführung in die Rechtswissenschaft und Rechtsphilosophie,* Heidelberg, 3rd ed., 2004.

Hübner, Heinz, *Kodifikation und Entscheidungsfreiheit des Richters in der Geschichte des Privatrechts,* Königstein, 1980.

Huhn, Diether, and Hans-Joachim von Schuckmann, *Beurkundungsgesetz und Dienstordnung für Notare,* Berlin, 4th ed., 2003.

Husa, Jaakko, "Legal Families," in *Elgar Encyclopedia of Comparative Law*, pp. 382–393, Cheltenham/Northampton, 2006.

Inger, Gören, *Svensk rättshistoria*, Malmö, 3rd ed., 1986.

Isele, Hellmut Georg, "Juristische Filigranarbeit von außerordentlicher Präzision—Ein halbes Jahrhundert deutsches Bürgerliches Gesetzbuch," *Archiv für civilistische Praxis (AcP)* 150, 1949, 1 (6).

Jägerskiöld, Stig, *Administrative Law, An Introduction to Swedish Law* (1988 Stig Strömholm edition).

Jansen, Nils, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective,* Oxford, 2010.

Jarass, Hans D., and Bodo Pieroth, Grundgesetz Kommentar, 10th ed., Munich 2009.

Jescheck, Hans-Heinrich, in *Festschrift Schultz*, pp. 229 *et seq.,* 1951.

John, Michael, *Politics and the Law in the Nineteenth Century Germany—the Origins of the Civil Code,* Oxford, 1989.

Jung, Heike, "Die Beteiligung von Laien an der Strafrechtspflege," in *150 Jahre Landgericht Saarbrücken,* p. 317.

Kahn-Freund, Otto, "On Uses and Misuses of Comparative Law," in 37 *Modern Law Review* 1, 1974.

Kalven, Harry Jr., and Hans Zeisel, with the collaboration of Thomas Callahan and Philip Ennis, *The American Jury*, Boston 1966.

Kau, Marcel, *United States Supreme Court und Bundesverfassungsgericht* 196, 2007.

Kelsen, Hans, *Principles of International Law*, New York, 3rd ed., 1959.

Kelsen, Hans, *Reine Rechtslehre,* Wien, 2nd ed., 1960.

Kennedy, David, "The methods and the politics," in *Comparative Legal Studies: Traditions and Transitions,* Legrand, Pierre & Munday, Roderick, ed., Cambridge, 2003.

Kern, Eduard, *Geschichte des Gerichtsverfassungsrechts*, Munich, 1954.

Khorrami, Saltanat, *Das Einstellungs- und Beförderungsverfahren englischer und deutscher Richter: Auswirkungen auf die richterliche Unabhängigkeit,* Hamburg 2005.

Kirchner, Christian, "The Difficult Reception of Law and Economics in Germany," 11 *International Review of Law and Economics* 277, 1991.

Kissel, Otto Rudolf, *Gerichtsverfassungsgesetz (GVG) Kommentar*, Munich, 6th ed., 2010.

Klami, Hannu Tapani, and Hämäläinen Merva, *Lawyers and Laymen on the Bench, A Study of Comparative Legal Sociology,* Helsinki, 1992.

Klausa, Ekkehard, *Zur Typologie der ehrenamtlichen Richter*, Berlin, 1972.

Knoch, Daria, Alvaro Pascual-Leone, Kaspar Meyer, Valerie Treyer, and Ernst Fehr, "Diminishing Reciprocal Fairness by Disrupting the Right Prefrontal Cortex," 314 *Science* 829, 2006.

Kohler, Marius, *Die Entwicklung des schwedischen Zivilprozessrechts—eine rezeptionshistorische Strukturanalyse der Grundlagen des modernen schwedischen Verfahrensrechts*, Tübingen, 2002.

Kornhauser, Lewis A., "A World Apart? An Essay on the Autonomy of the Law," 78 *Boston University Law Review* 747, 1998.

Kornhauser, Lewis A., "An Economic Perspective on Stare Decisis," 65 *Chicago-Kent Law Review* 115, 1989.

Kornhauser, Lewis A., "Modeling Collegial Courts. II. Legal Doctrine", *Journal of Law, Economics & Organization*, 1992, pp. 441 *et seq.*

Kornhauser, Lewis A., "Stare Decisis," in Peter Newmann, ed., 3 *New Palgrave Dictionary of Economics and the Law*, 1998, pp. 509 *et seq.*

Koschaker, Paul, *Europa und das römische Recht*, Munich, 4th ed., 1966.

Krämer, Achim, "Die verfassungsrechtliche Stellung des Rechtsanwalts," *Neue Juristische Wochenschrift (NJW)* 1995, p. 2313.

Kramer, Adam, *Bewigged and Bewildered: Pupillage and a Career at the Bar—A Guide to Becoming A Barrister in England and Wales,* Oxford, 2007.

Kratsch, Dietrich, *Justiz- Religion- Politik, Das Reichskammergericht und die Klosterprozesse im ausgehenden 16*, Jahrhundert, Tübingen 1990.

Krawietz, Werner, *Recht als Regelsystem*, Wiesbaden, 1984.

Kriele, Martin, *Grundprobleme der Rechtsphilosophie*, Münster, 2nd ed., 2003.

Kühne, Hans-Heiner, "Laienrichter im Strafprozess," *Zeitschrift für Rechtspolitik (ZRP)* 1985.

Kühne, Rudolf, "Zusammenarbeit zwischen Berufsrichtern und ehrenamtlichen Richtern im Kollegialgericht," *Deutsche Richterzeitung (DRiZ),* 1975, pp. 390–97.

Kunkel, Wolfgang, and Martin Josef Schermaier, *Römische Rechtsgeschichte,* Cologne, 14th ed., 2005.

Landau, Peter, "Die Rechtsquellenlehre in der deutschen Rechtswissenschaft des 19. Jahrhunderts," in: *Juristische Theoriebildung und Rechtliche Einheit,* pp. 70–79, Claes Peterson ed., Lund, 1993.

Langbein, John, "The Influence of Comparative Procedure in the United States," 43 *American Journal of Comparative Law* 545, 1995.

Langdell, Christopher Columbus, *Summary of the Law of Contracts*, 2nd ed., Boston, 1880.

Larenz, Karl, *Methodenlehre der Rechtswissenschaft*, Berlin, 6th ed., 1991.

Lauterjung, Friedrich, *Die Einheit der Rechtsprechung innerhalb der hoechsten Gerichte unter besonderer Berücksichtigung des Reichsgerichts,* Breslau,1932.

Lavin, Rune, *Domstol och administrativ myndighet*, Stockholm, 1972.

Legrand, Pierre, "Comparative Legal Studies and Commitment to Theory," 58 *Modern Law Review* 262, 1995.

Legrand, Pierre, "The Impossibility of Legal Transplants," 4 *Maastricht Journal of European and Comparative Law* 111, 1997.

Lehrberg, Bert, *Praktisch juridisk metod,* 3. ed.,1996.

Leiter, Brian, "Legal Realism and Legal Positivism Reconsidered," 111 *Ethics* 278, 2001.

Lempert, Richard O., "The Autonomy of Law: Two Visions compared," in *Autopoietic Law: A New Approach to Law and Society*, pp. 152, Gunther Teubner ed., Berlin, 1988.

Lempert, Richard O., and Joseph Sanders, *An Invitation to Law and Social Science: Deserts, Disputes and Distribution*, 1986.

Levi, Edward H., *An Introduction to Legal Reasoning*, Chicago, 1949.

Levy, Leonard W., "Bill of Rights" in *Essays on the Making of the Constitution*, p. 258, Leonard W. Levy ed., New York, 2. ed. 1987.

Lévy-Bruhl, Lucien, *How Natives Think*, London, 1926.

Liekefett, Karlheinz, *Ehrenamtliche Richter an den deutschen Gerichten,* Munich, 1965.

Lindblom, Per Henrik, *Inledning till juridiken*, 1991.

Lindblom, Per Henrik, "Procedure," in *An Introduction to Swedish Law,* Stig Strömholm , Stockholm, 2nd ed., pp. 120 et seq., 1988.

Lodge, Anthony, "French is a Logical Language," in *Language Myths*, L. Bauer & P. Trudgill, eds., London 1998.

Löhr, Diana, *Mitwirkung der Laienrichter im Strafprozess*, Hamburg, 2008.

Luig, Klaus, "Vernunftrecht," in *Handwörterbuch der deutschen Rechtsgeschichte*, Erler Adalbert and Ekkehard Kaufmann, eds., Berlin, vol. 4, 1993.

Lundmark, Thomas, "Split Verdicts in Scotland: A Judicial Survey," 14 *Edinburgh Law Review* 115, 2010.

Lundmark, Thomas, *Talking Law Dictionary*, Münster, 2005.

Lundmark, Thomas, "Über die grundlegende Unmöglichkeit, ein juristisches Wörterbuch mit der Zielsprache Englisch zu erstellen: Plädoyer für eine Rechtsenzyklopädie," in: *Recht und Übersetzen* at p. 59, de Groot and Schulze, Baden-Baden 1999.

Lundmark, Thomas, "Verbose Contracts," 49 *American Journal of Comparative Law* 121, 2001.

MacCormick, Neil, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford, 2005.

Maitland, F.W., *The Collected Papers of Frederic William Maitland*, vol. I, 1911.

Majer, Diemut, "Die Überprüfung von Richtern und Staatsanwälten in der ehemaligen DDR," *Zeitschrift für Rechtspolitik* 1991, 171

Malmström, Åke, Sweden, *International Encyclopedia of Comparative Law*, vol. 1.
Mann, Bruce H., *Neighbors and Strangers*, Chapel Hill, 1987.
Markesinis, Basil S., *Foreign Law and Comparative Methodology: a Subject and a Thesis,* 1997.
Markesinis, Basil S., "The Destructive and Constructive Role of the Comparative Lawyer," *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ),* 1993.
Markesinis, Basil, "Learning from Europe and Learning in Europe," in *The Gradual Convergence Foreign Ideas, Foreign Influences and European Law on the Eve of the 21st Century* 1, pp. 30, Oxford, 1994.
Marschall, Stefan, *Das politische System Deutschlands*, Konstanz, 2007.
Martinek, Michael, "Der Rechtskulturschock: Anpassungschwierigkeiten deutscher Studenten in amerikanischen Law Schools", *Juristische Schulung (JuS)* 1983, p. 92.
Mattei, Ugo, "Three Patterns of Law: Taxonomy and Change in the World's Legal System," 45 *American Journal of Comparative Law* 5, 1997.
Mattila, Heikki E. S., *Comparative Legal Linguistics*, Aldershot, 2006.
Mattsson, Susanne, *Nämndemän i tingsrätten*, Helsinki, 1992.
McConville, Michael, *Corroboration and Confessions: The Impact of a Rule Requiring that No Conviction Can Be Sustained on the Basis of Confession Evidence Alone*, London, 1993.
Meder, Stephan, *Missverstehen und Verstehen* p. 17, 2004.
Meinen, Gero, *Heranziehung zum Schöffenamt–Gerichtsverfassungs- und revisionsrechtliche Probleme,* Munich, 1993.
Mellinkoff, David, *The Language of the Law*, Boston 1963.
Merryman, John Henry, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America,* Stanford, CA, 2nd ed., 1985.
Messerschmidt, Burkhard, *Anwaltsblatt (AnwBl)* 1989, at p. 124.
Mestres-Missé, Anna, Antoni Rodriguez-Fornells, Thomas F. Münte, *Neural differences in the mapping of verb and noun concepts onto novel words, Neuroimage* 49 (3), 2010.
Michaels, Ralf, "The Functional Method of Comparative Law", in *The Oxford Handbook of Comparative Law,* Mathias Reimann and Reinhard Zimmermann, eds., p. 363, 2008.
Miller, Frederic P., Agnes F. Vandome, and John McBrewster, *Comparative Linguistics,* 2009.
Ministerium für Hoch- und Fachschulwesen, ed., *Studienplan für die Grundstudienrichtung Rechtswissenschaft zur Ausbildung an Universitäten und Hochschulen der DDR,* 3rd ed., Berlin 1982.
Modéer, Kjell Å., *Den Svenska Domarkulturen*, Malmö, 1954.
Modéer, Kjell Å., *Den svenska domarkulturen—europeiska och nationella förebilder*, Lund 1994, also in SOU 1994:99.
Modéer, Kjell Å., *Historiska rättskällor: en introduktion i rättshistoria,* Stockholm, 2nd ed., 1997.
Modéer, Kjell Å., *Juridiska yrkesroller i ett rättshistorisk perspektiv,* 1989.
Moley, Raymond, "The Vanishing Jury," 2 *Southern California Law Review* 97, 1928.
Montesquieu, Charles-Louis de Secondat de, *De l´ Esprit des Lois,* vol. 1, R. Derathé, ed., Paris, 1973.
Montesquieu, Charles-Louis de Secondat de, *De l´ Esprit des Lois*, vol. 11, R. Derathé, ed., Paris, 1973.

Montesquieu, Charles-Louis de Secondat de, *The Spirit of Laws,* 1748.

Moore, Michael S., "The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism," 69 *Cornell Law Review* 988, 1984.

Morse, Bradford, "Indigenous law and state legal systems: conflict and compatibility," in *Indigenous Law and the State* B.W. Morse and G.R. Woodman, eds., Dordrecht: Foris Publications, pp. 101–120, 1987.

Müller, Frohmut, "Ehrenamtliche Richter in der Rechtsordnung der DDR," *Neue Justiz (NJ)* 1989, p. 133.

Müller, Reinhard, "Die Karte Dreier sticht nicht," *Frankfurter Allgemeine Zeitung,* p. 2, 2nd Feb. 2008.

Münch, Ingo von, *Legal Education and the Legal Profession in Germany,* Baden-Baden, 2002.

Myhrberg, Pertti, *Rikos- ja prosessioikeuden kehitys Suomessa,* Helsinki, 1978.

Neufeldt, Victoria and David Bernhard Guralnik, *Webster's New World Dictionary of American English*, 3rd college ed., New York, 1988.

Nieding, Norbert von, *Berufschancen für Juristen,* Munich, 1973.

Nieding, Norbert von, *Berufsmöglichkeiten und Berufsaussichten für Juristen*, Munich, 1986.

Noack, Erwin, *Reichsrechtsanwaltsordnung,* Leipzig, 2nd ed. 1937.

North, Roger, *A Discourse on the Study of the Laws,* London: Charles Baldwyn, 1824.

Nytt juridiskt arkiv Nr. 83, p. 384 *et seq.,* 1948.

Oestmann, Peter, *Rechtsvielfalt vor Gericht. Rechtsanwendung und Partikularrecht im Alten Reich,* Habilitationsschrift, 2002.

Ogorek, Regina, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jh.*, Frankfurt am Main, 1986.

Ortwein, Bernard Michael, II, "The Swedish Legal System: An Introduction," 13 *Indiana International and Comparative Law Review* 405, 2002–2003.

Örücü, Esin, "Law as Transposition," in 51 *British Institute for International and Comparative Law Quarterly (ICLQ)* 205, 2005.

Ostler, Fritz, *Die deutschen Rechtsanwälte,* Essen, 2nd ed., 1982.

Ostler, Nicholas, *Empires of the Word: A Language History of the World*, New York, 2006.

Papier, Jürgen, "Die richterliche Unabhängigkeit und ihre Schranken," *Neue Juristische Wochenschrift (NJW)* 2001, 1089.

Paton, George Whitecross, *A Textbook of Jurisprudence*, Oxford, 4th ed., 1972.

Paulsen, Michael Stokes, "Abrogating Stare Decisis By Statute: May Congress Remove the Precedential Effects of Roe and Casey?," 109 *Yale Law Journal* 1535, 2000.

Peczenik, Aleksander, *Juridikens teori och metod,* 1995.

Peczenik, Aleksander, and Gunnar Bergholtz, "Statutory Interpretation in Sweden," in *Interpreting Statutes—A Comparative Study,* Neil MacCormick and Robert S. Summers, eds., p. 476, Sudbury, 1991.

Peczenik, Aleksander, *Juridikens teori och metod,* 1995.

Pfeiffer, Gerd, and Thomas Fischer, eds., *Karlsruher Kommentar zur StVO und zum GVG,* Munich, 5th ed., 2003.

Pihlajamäki, Heikki, "Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared," 52 *American Journal of Comparative Law* 469, 2004.

Pinker, Steven, *Words and Rules: The Ingredients of Language,* London 1999.

Polenz, Peter von, *Deutsche Sprachwissenschaft vom Spätalter bis zur Gegenwart*, vol. 3, 1999.

Pollack, Frederick, and Frederic William Maitland, *The History of English Law before the Time of Edward I,* vol. 1, 1903.

Pollock, Frederick, *Essays on Jurisprudence and Ethics*, London, 1882.

Portalis, Jeanne Étienne-Marie, and François-Denis Tronchet, Félix-Julien-Jean Bigot-Préameneu, and Jacques Maleville, *Discours préliminaire du premier projet de Code civil*, Bordeaux, 1999.

Pound, Roscoe, "Juristic Science and the Law," 31 *Harvard Law Review* 1047–63, 1918.

Pound, Roscoe, *Organization of Courts*, Westport (Conn.), 1979.

Prest, Wilfrid R., *The Inns of Court under Elizabeth I and the Early Stuarts,* 1590–1640, Harlow, 1972.

Rabel, Ernst, *Das Recht des Warenkaufs: eine rechtsvergleichende Darstellung*, Berlin, 1936.

Radbruch, Gustav, *Der Geist des englischen Rechts,* Heidelberg, 1946.

Radin, Max, *Handbook of Anglo-American Legal History,* St. Paul, 1936.

Raisch, Peter, *Juristische Methoden—Vom antiken Rom bis zur Gegenwart,* Heidelberg, 1995.

Ranieri, Filippo, "Entscheidungsfindung und Technik der Urteilsredaktion in der Tradition des deutschen Usus Modernus: das Beispiel der Aktenrelationen am Reichskammergericht," in *Case Law in the Making: The Techniques and Methods of Judicial Records and Legal Reports,* vol. I, Wijffels and Ibbetson, ed., Berlin, 1997.

Rawls, John, *A Theory of Justice,* Cambridge, Mass., 1971.

Redeker, Konrad, "Bild und Selbstverständnis des Anwalts heute," *Anwaltsblatt (AnwBl)* 1996, p. 503.

Redeker, Konrad, "Freiheit der Advokatur—heute," *Neue Juristische Wochenschrift (NJW)* 1987, p. 2610.

Redeker, Konrad, "Rechtsanwaltschaft zwischen 1945 und 1995—ein Berufsstand im Wandel," *Neue Juristische Wochenschrift (NJW)* 1995, p. 1241.

Reed, Alfred Zantzinger, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States with Some Account of Conditions in England and Canada*, New York City, 1921.

Regeringsrättens Årsbok, *Fall Nr. 39*, pp. 109 *et seq.,* 1946.

Reimann, Mathias, "'Rechtskulturschock' beim Studium in den USA", in *Juristische Schulung (JuS)* 1994, p. 282.

Reimann, Mathias, "Comparative Law and Private International Law," in *The Oxford Handbook of Comparative Law,* pp. 1364–1395, Oxford, 2008.

Reitz, John C., "How to Do Comparative Law," 46 *American Journal of Comparative Law* 617.

Rennig, Christoph, *Entscheidungsfindung durch Schöffen und Berufsrichter in rechtlicher und psychologischer Sicht,* Marburg, 1993.

Rheinstein, Max, *Einführung in die Rechtsvergleichung (von Borries edition),* Munich, 2nd ed., 1987.

Rick, Marcus B., *Die verfassungsrechtliche Stellung des Rechtsanwalts,* Bonn, 1998.

Rinken, Alfred, *Einführung in das juristische Studium,* Munich, 1996.

Roellecke, Gerd, "Erziehung zum Bürokraten?—Zur Tradition der deutschen Juristenausbildung," *Juristische Schulung (JuS)* 1990, p. 337.

Romaine, Suzanne, *Bilingualism (Language in Society),* Oxford, 2nd ed., 1995.
Römermann, Volker, and Wolfgang Hartung, *Anwaltliches Berufsrecht*, Munich, 2002.
Römermann, Volker, and Christoph Paulus, eds., *Schlüsselqualifikationen für Jurastudium, Examen und Beruf,* Munich, 2003.
Rosen, Jerker, *Lunds universitets historia band 1, 1668–1709, utgivet av universitetet till dess 300- års jubileum,* CWK Gleerup, Lund, 1968.
Ross, Alf, *Towards a Realistic Jurisprudence: A Criticism of the Dualism in Law,* Copenhagen, 1946.
Rüegg, Walter, and Olaf Pedersen, eds., "Tradition and Innovation," in *A History of the University in Europe (1500–1800),* vol. II, 1996.
Ruhlen, Merrit, *The Origin of Language: Tracing the Evolution of the Mother Tongue,* New York, 1994.
Rüping, Hinrich, "Funktionen der Laienrichter im Strafverfahren," *Juristische Rundschau (JR)* 1976, pp. 269–74.
Rüschemeyer, Dietrich, *Juristen in Deutschland und in den USA: eine vergleichende Untersuchung von Anwaltschaft und Gesellschaft,* Stuttgart, 1976.
Rüthers, Bernd, *Ideologie und Recht im Systemwechsel: ein Beitrag zur Ideologieanfälligkeit geistiger Berufe,* Munich, 1992.
Rüthers, Bernd, *Rechtstheorie—Begriff, Geltung und Anwendung des Rechts,* Munich, 5th ed., 2010.
Sacco, Rodolfo, "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)," *39 American Journal of Comparative Law 1*, pp. 1–34, 1991.
Sacco, Rodolfo, "One Hundred Years of Comparative Law," in *Tulane Law Review* 1159, 2001.
Salditt, Franz, "Rechtswirklichkeit: Richter zweier Klasse, Stumme Feierlichkeitszeugen bloße Statisten," in: Bemmann and Manoledakis, eds., *Der Richter in Strafsachen*, Baden-Baden, 1982.
Samuel, Geoffrey, "Comparative Law and Jurisprudence," 47 *International & Comparative Law Quarterly* 817, 1998.
Sandström, Marie, "The Swedish Model—Three Aspects of Legal Methodology," in *Liber Amicorum Csaba Varga,* P.Takacs *et al.,* eds., pp. 475–484, Stockholm, 2008.
Sapir, Edward, *The Status of Linguistics as a Science,* in *Language*, vol. 5, no. 4, pp. 207–214, Washington, 1929.
Sattler, Andreas, *Die rechtliche Bedeutung der Entscheidung für die streitbare Demokratie—unter besonderer Berücksichtigung der Rechtsprechung des Bundesverfassungsgerichts,* Baden-Baden, 1982.
Savigny, Friedrich Carl von, *System des heutigen Römischen Rechts*, vol. 1, Berlin 1840.
Schiffmann, Gerfried, *Bedeutung der ehrenamtlichen Richter bei Gerichten der allgemeinen Verwaltungsgerichtsbarkeit,* Berlin, 1974.
Schlaich, Klaus, and Stefan Korioth, *Das Bundesverfassungsgericht—Stellung, Verfahren, Entscheidungen; ein Studienbuch,* Munich, 7th ed., 2007.
Schlesinger, Rudolf B., *Formation of Contracts: A Study of the Common Core of Legal Systems,* Dobbs Ferry, NY, 1968.
Schlesinger, Rudolph B., et al., *Comparative Law: Cases, Texts, Materials*, New York, 5th ed., 1988.
Schlüchter, Ellen, *Mittlerfunktion der Präjudizien—eine rechtsvergleichende Studie,* Berlin 1986.

Schmalz, Dieter, *Methodenlehre für das juristische Studium,* Baden-Baden, 3rd ed., 1992.
Schmidt, Eberhard, "Der Strafprozess," *Neue Juristische Wochenschrift (NJW)* 1969, 1137.
Schmidt, Eberhard, *Einführung in die Geschichte der deutschen Strafrechtspflege,* Göttingen 1995.
Schmidt, Folke, *Domaren som lagtolkare, Festskrift tillägnad Nils Herlitz,* Stockholm, 1955.
Schmidt, Eberhard, "Anmerkung zum BGH-Urteil: 2 StS v. 17.11.1958—2 StR 188/58," *Juristische Rundschau (JR),* 1961, p. 30.
Schmidt-Hieber, Werner, and Rudolf Wassermann, *Justiz und Recht. Festschrift aus Anlaß des 10jährigen Bestehens der Deutschen Richterakademie in Trier,* Heidelberg 1983.
Schmidt-Jortzig, Aufgabe, "Stellung und Funktion des Richters im demokratischen Rechtsstaat," *Neue Juristische Wochenschrift (NJW)* 1991, 2377.
Schmidt-Jortzig, Edzard, *Die Einrichtungsgarantien der Verfassung,* Göttingen, 1979.
Schmidt-Räntsch, Günther, *Kommentar zum deutschen Richtergesetz,* Munich, 6th ed., 2009.
Schmoeckl, Mathias, Joachim Rückert, and Rheinhard Zimmermann, eds., *Historisch-kritischer Kommentar zum BGB*, vol. I, Tübingen, 2006.
Schmoeckl, Mathias, Joachim Rückert, and Rheinhard Zimmermann, eds., *Historisch-kritischer Kommentar zum BGB,* vol. III, Tübingen, 2006.
Schneider, Rolf, *Der Rechtsanwalt ein unabhängiges Organ der Rechtspflege,* Berlin, 1976.
Schwacke, Peter, and Rolf Uhlig, *Juristische Methodik mit Technik der Fallbearbeitung und Normsetzungslehre*, Cologne, 2nd ed., 1985.
Schwarz, Andreas Bertalan, in Rechtsgeschichte und Gegenwart, in Hans Thieme and Franz Wieacker, eds., *Gesammelte Schriften zur Neuen Rechtsvergleichung,* Karlsruhe, 1960.
Schweinitz, Wolf Bernhard von, *Rechtsberatung durch Juristen und Nichtjuristen insbesondere durch Wirtschaftsprüfer,* Berlin, 1975.
Sellers, Mortimer N. S., "The Doctrine of Precedent in the United States of America," 54 *American Journal of Comparative Law* 67, 2006.
Seyfarth, Georg, *Die Änderung der Rechtsprechung durch das Bundesverfassungsgericht*, 1998.
Sheppard, Steve, *The History of Legal Education in the United States: Commentaries and Primary Sources*, Pasadena, CA, 1999.
Singer, Joseph William, "Legal Realism Now," 76 *California Law Review* 467, 1988.
Slapper, Gary, and David Kelly, *The English Legal System*, 8th ed., 2006.
Smits, Jan M., "Comparative Law and its Influence on National Legal Systems," in *The Oxford Handbook of Comparative Law* pp. 514–536, Mathias Reimann and Reinhard Zimmermann, eds., Oxford, 2006.
Sohm, Rudolph, "Die deutsche Rechtsentwicklung und die Codificationsfrage", *Zeitschrift für das Privat- und Öffentliche Recht* Band I, 1874, p. 245.
Solicitors Regulation Authority, *The Legal Practice Course: what you are expected to know before you start* (June 1, 2007), http://www.sra.org.uk/documents/students/student-enrolment/beforeyoustart.pdf.
Solicitors Regulation Authority, *You and your training contract: What you need to know,* SRA 2006, http://www.sra.org.uk/lpc/.
Spaak, Torben, *Naturalism in Scandinavian and American Realism: Similarities and Differences, De Lege—Uppsala-Minnesota Colloquium: Law, Culture and Values,* Mattias Dahlberg, ed, 2009.

Spamann, Holger, "Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law," 2009 *Brigham Young University Law Review* 1813, 2010.

Stalley, Richard F., *An Introduction to Plato's Laws*, Oxford, 1983.

Stein, Eric, "Uses, Misuses and Nonuses of Comparative Law," 72 *Northwestern University Law Review* 198, 1977.

Stephan, Paul B., "The Futility of Unification and Harmonization in International Law," 39 *Virginia Journal of International Law* 743, 1999.

Stevens, Robert Bocking, *Law School: Legal Education in America from the 1850's to the 1980's*, Chapel Hill, 1983.

Stoffregen, Susanne, "Der Schöffe als juristischer Halblaie?," *Zeitschrift für Rechtspolitik (ZRP)* 1985, p. 52.

Stolleis, Michael, *Volksgesetzbuch, Handwörterbuch zur Deutschen Rechtsgeschichte,* vol. 5, 1993.

Strang, Lee J., and Bryce G. Poole, "The Historical (In)Accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents," 86 *North Carolina Law Review* 969, 2008.

Strömholm, Stig, *An Introduction to Swedish Law,* Stockholm, 1988.

Strömholm, Stig, *Rätt, Rättskällor och Rättstillämpning-en lärobok i allmän rättslära,* PA Norstedt och söners förlag Stockholm, 1981.

Stürner, Rolf, "Der hundertste Geburtstag des BGB—nationale Kodifikation im Greisenalter?," *Juristenzeitung (JZ)* 1996, 741.

Surrency, Erwin C., "The Courts in the American Colonies," 11 *American Journal of Legal History* 347, 1967.

Sward, Ellen E., "A History of the Civil Trial in the United States," 51 *The University of Kansas Law Review* 347, 2003.

Sykes, Bryan, *Saxons, Vikings, and Celts,* 2006.

Taylor, Telford, *The Anatomy of the Nuremberg Trials: A Personal Memoir,* 1992.

Tendorf, Thomas, and Lars Sandberg, "Sweden," in *Professional Liability of Lawyers,* Campbell and Campbell, London, 1995.

Terhorst, Bruno, "Information und Akteneinsicht der Schöffen im Strafprozess," *Monatsschrift für Deutsches Recht (MDR)* 1988, p. 809.

Tetley, William, „Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified) (Part I)," 4 *Uniform Law Review* 591, 1999.

Tetley, William, "Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified) (Part II), 2000," in 60 *Los Angeles Law Review* 677.

The Concise Oxford Dictionary, Oxford, 10th ed., 1999.

Thieme, Hans, "Aus der Vorgeschichte des Bürgerlichen Gesetzbuchs: Zur Gesetzgebung des Positivismus", *Deutsche Juristenzeitung (DJZ)* 1934, pp. 968 *et seq.*

Thomas, Jürgen, *Richterrecht,* Köln, 1986.

Tiersma, Peter M., *Legal Language,* Chicago, 2000.

Tönsfeldt, Volker, "Vieles ist unkomplizierter—Im Land des Öffentlichkeitsprinzips," *Anwalt das Magazin* 8–9/2001.

Töwe, Wilhelm, "Die Auslese der Volksrichter," in Roland Freisler, *Der Volksrichter in der neuen deutschen Strafrechtspflege* (Beiträge zur Rechtserneuerung 3), Berlin 1937, pp. 111–15.

Trusen, Winfried, "Römisches und partikuläres Recht in der Rezeptionszeit," in: *Festschrift Lange*, Heinrich, 1970, pp. 97–120.

Tucholsky, Kurt, *Merkblatt für Geschworene, Gesammelte Werke in zehn Bänden,* Reinbek near Hamburg, 1975, vol. 9.

Tuschak, Bernadette, *Die herrschende Meinung als Indikator europäischer Rechtskultur—Eine rechtsvergleichende Untersuchung der Bezugsquellen und Produzenten herrschender Meinung in England und Deutschland am Beispiel des Europarechts*, Hamburg 2009.

Twining, William, *Globalisation and Legal Theory*, London, 2000.

Thibaut, Anton Friedrich Justus, *Über die Notwendigkeit eines allgemeinen bürgerlichen Gesetzbuches für Deutschland*, 1814, in der Ausgabe von Jacques Stern, Thibaut und Savigny, Berlin 1914, Neudruck Darmstadt 1959.

Uppström, Vilhelm, *Öfversigt af den svenska processens historia,* 1884.

Upton, A.F., "The Riksdag of 1680 and the Establishment of Royal Absolutism in Sweden," *English Historical Review*, vol. CII, p. 285, 1987.

Valcke, Catherine, "Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems," 52 *The American Journal of Comparative Law* 713, 2004.

Vallinder, Torbjörn, *Nio edsvurna män, jury och tryckfrihet i Sverige 1815–2000*, Stockholm, 2000.

Vallinder, Torbjörn, "The Swedish Jury System in Press Cases: An Offspring of the English Trial Jury?", 8 *Journal of Legal History* 190, 1987.

van Alstyne, Arvo, *The California Civil Code, California Civil Code Ann,* West Publishing 1954.

van Caenegem, Raoul C., *The Birth of the English Common Law*, Cambridge, 1988.

Vanberg, Georg, *The Politics of Constitutional Review in Germany*, New York, 2005.

Vogenauer, Stefan, *Die Auslegung von Gesetzen in England und auf dem Kontinent: Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen,* 2001.

Volks, Holger, *Anwaltliche Berufsrollen und anwaltliche Berufsarbeit in der Industriegesellschaft,* Cologne, 1974.

Vormbaum, Thomas, Die Lex Emminger January 4, 1924, *Schriften zur Rechtsgeschichte*, magazine no. 43, Berlin, 1988.

Wald, Patricia, "Some Observations on the Use of Legislative History in the 1981 Supreme Court Term," 68 *Iowa Law Review* 195, 1983.

Wallerstein, *Immanuel Maurice, Geopolitics and Geoculture: Essays on the Changing World-System,* 1991.

Walton, F.P., *The Scope and Interpretation of the Civil Code,* Montreal, 1907.

Wank, Rolf, *Die Auslegung von Gesetzen*, Cologne, 3rd ed., 2005.

Warren, Charles, *A History of the American Bar,* Boston, 1911.

Weber, Hermann, "Ehemalige DDR-Richter als Richter im geeinten Deutschland?—Materialien zur Orientierung bei der Beantwortung einer schwierigen Frage," *Neue Juristische Wochenschrift (NJW),* 1991, p. 449.

Weir, Tony, *Wise Men's Counters*, 1998.

Weise, Steven O., *Plain English comes to the Uniform Commercial Code,* Clarity No. 41, September 1998.

Weiss, Gunther A., "The Enchantment of Codification in the Common Law World, " 25 *Yale Journal of International Law* 435, 2000.

Weißler, Adolf, *Geschichte der Rechtsanwaltschaft*, Leipzig, 1905.

Welch, Anthony R., *The Professoriate: Profile of a Profession,* 2005.

Weller, Heinz, *Die Bedeutung der Präjudizien im Verständnis der deutschen Rechtswissenschaft—ein rechtshistorischer Beitrag zur Entstehung und Funktion der Präjudizientheorie,* Berlin, 1979.

Wesenberg, Gerhard, and Gunter Wesener, *Neuere deutsche Privatrechtsgeschichte im Rahmen der europäischen Rechtsentwicklung,* Wien, 4th ed., 1985.

Wieacker, Franz, "Aufstieg, Blüte und Krisis der Kodifikationsidee," in: *Festschrift für G. Boehmer*, Bonn 1954, at p. 44.

Wieacker, Franz, "Foundations of European Legal Culture," 38 *American Journal of Comparative Law* 1, E. Bodenheimer translation, 1990.

Wieacker, Franz, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung,* Göttingen, 2nd ed., 1967.

Wieners-Horst, Barbara, "Germany: Editing in the German Parliament," *Clarity No. 47*, May 2002.

Wiklund, Holger, *Sveriges Advokatsamfund 75år, Tidskrift för Sveriges advokatsamfund*

Windscheid, Bernhard, *Die geschichtliche Schule in der Rechtswissenschaft,* 1878.

Windscheid, Bernhard, *Gesammelte Reden und Abhandlungen*, Paul Oertmann, ed., Leipzig, 1904.

Wintgens, Luc J., *Legisprudence: A New Theoretical Approach to Legislation*, Oxford, 2002.

Wittgenstein, Ludwig, *Tractatus Logico-Philosophicus: Logisch-Philosophische Abhandlung*, London, 1922.

Wolf, Erik, *Große Rechtsdenker der deutschen Geistesgeschichte*, Tübingen, 4th ed., 1963.

Wolf, Manfred, *Gerichtsverfassungsrecht aller Verfahrenszweige,* Munich, 6th ed., 1987.

Zeiller, Franz von, "Vortrag zu Einführung in das bürgerliche Gesetzbuch", in Julius Ofner, ed., *Der Ur-Entwurf und die Beratungsprotokolle des österreichischen Allgemeinen bürgerlichen Gesetzbuches,* vol. II, Wien 1889.

Zekoll, Joachim, "Kant and Comparative Law: Some Reflections on a Reform Effort," 70 *Tulane Law Review* 2719, 1996.

Zimmerl, Leopold, "Sachverständige Laienrichter?," in: *Recht und Staat in Geschichte und Gegenwart, eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaften,* 112, Tübingen, 1934.

Zimmermann, R., and D.P. Visser, *Southern Cross: Civil Law and Common Law in South Africa,* Oxford, 1996.

Zimmermann, Reinhard, "Characteristic Aspects of German Legal Culture," in: *Introduction to German Law*, W.F. Ebke and M. Finkin, eds., pp.1–45, The Hague, 2005.

Zimmermann, Reinhard, "Der europäische Charakter des englischen Rechts," *Zeitschrift für Europäisches Privatrecht,* 4, 1993.

Zimmermann, Reinhard, *The New German Law of Obligations—Historical and Comparative Perspectives,* Oxford, 2005.

Zimmermann, Reinhard, D.P. Visser, and Kenneth Reid, *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*, 2005.

Zippelius, Reinhold, *Juristische Methodenlehre*, Munich, 9th ed., 2005.

Zweigert, Konrad, and Hein Kötz, *An Introduction to Comparative Law*, Oxford, 3rd ed., 1998.

Zweigert, Konrad, and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts,* Tübingen, 3rd ed., 1996.

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