

COMPARATIVE LAW AND LAW TEACHING THROUGH THE CASE METHOD IN THE CIVIL LAW TRADITION – A GERMAN PERSPECTIVE

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SUMMARY: I. *Introduction*. II. *Distinctive features of german legal thinking*. III. *The framework of legal education in Germany*. IV. *Law teaching in Germany*. V. *The case method in the teaching of public law*. VI. *The influence of comparative law and international law*. VII. *Conclusion*.

I. INTRODUCTION

The significance of the case method for law teaching cannot be considered in isolation from a country's legal culture and the basic premises of its system of legal education. As will be shown in the following sections, neither Germany's general legal culture nor its traditional system of educating and training lawyers provides a particularly hospitable environment for the application of the case method in law teaching.

Germany has been firmly moulded in the tradition which is habitually referred to by comparative lawyers as the "civil law" tradition. One of the basic features of the civil law countries is their reliance on codification as the central instrument for the development of the law. The high degree to which laws are contained in codifications and statutory form was previously regarded as the main distinguishing criterion between legal systems belonging to the civil law tradition and those countries which, like the United Kingdom, the United States and the other countries belonging to the common law family, have been shaped by the predominance of judge-made law developed in the decisions and precedents of the courts. This difference, however, is less evident today, with the

huge increase of statutory regulation which has been the consequence from the historical transition of predominantly agrarian societies to industrialized countries in nearly all regions of the world. Statutory legislation is nowadays as frequent and as common for the common law countries as it is for the civil law countries.

Against this background of proliferation of statutory regulation it has to be remembered, however, that codification is not merely a formal, but a substantive concept. It does not primarily refer to the number of statutory laws existing in a legal system at a given time but to their structure and their contents. Codification is more than simple assimilation or compilation or, as in the United Kingdom or the United States, the consolidation of a number of statutes in particular areas of law. It is the presentation of these laws in a complete and systematic form, free from contradiction and complete with general and specific principles. When the legislature undertakes to codify a particular area of law, the statutes and case decisions already existing in that area of law are completely reviewed, and the general principles that exist are filtered out and presented at the beginning of the code with the specific rules assigned to the following books of the code. It is an attempt to present an area of law as a unified whole which does not only comprise the specific rules but also the general and abstract principles which apply to all of the specific circumstances. Codes in the continental style typically contain a number of general legal concepts which at first sight seem to be devoid of any precise meaning but which can be applied to new legal problems to achieve a result.¹

II. DISTINCTIVE FEATURES OF GERMAN LEGAL THINKING

German legal thinking provides perhaps the most sophisticated example of this abstract and systematic approach to legal issues. German jurists tend to view individual codifications as well as the legal system as a whole in terms of conceptual unity. The structure of the legal order is organized on the bases of overarching legal principles. While it may prove unattainable in practice the ideal remains that of law as a rational, complete and logical system of rules. This view is quite peculiar from a comparative perspective. Lawyers raised in a common law tradition would seem

1 Foster, N., *German Legal System & Laws*, Londres 1996, p. 3.

to be much more skeptical of the ideal of law as an internally consistent system of rules. American jurists in particular tend to repudiate the conception of an autonomous system of logically interrelated rules. Indeed, an important current in contemporary American legal thinking holds virtually the opposite view. The Critical Legal Studies movement in the United States is skeptical of the very possibility of any kind of rule-governed regime.²

1. *The origins of modern legal science in Germany*

The preference for an abstract view of the legal order as a logical system of rules in Germany is very much the result of developments in the 19th. century when the foundations for a modern legal science were first established. In Germany, this movement was strongly influenced by the so called *Historical School of Law* which saw in the organically progressive legal science a necessary prerequisite for any successful attempt at codification. In the case of the *Historical School of Law*, this “organic” science took the form of a systematic study of the Roman law of the antiquity which it tried to rid of all the accretions and distortions brought about by some 800 years of scholarship and legal practice. The result of the legal historicism was a new approach to legal science. It used the most important body of Roman legal sources, the Digest, to build an internally consistent and logical system of concepts, rules and principles. The *Historical School of Law* was much admired by lawyers all over Europe and exercised significant influence on legal developments in countries like France, Italy and Austria. Above all, it was the fulcrum for the emergence of a national community of scholars, of German legal unification on a scholarly level.³

When codification finally took place in Germany in the second half of the 19th century, it bore the imprint of the *Historical School of Law* and its offspring, the *Pandectist School* —named after the Greek synonym for the Roman Digest— whose only aim was the dogmatic and systematic study of Roman material. For the *Pandectists* the legal system was a

2 Maxeiner, J. R., “U.S. «Methods Awareness» (Methodenbewußtsein) for German Jurists”, in Großfeld, B. *et al.*, (eds.), Tübingen Festschrift für Wolfgang Fikentscher, 1998, p. 114 (118).

3 Zimmermann, R., “An Introduction to German Legal Culture”, in Ebke y Finkin (eds.), *Introduction to German Law*, Boston-Londre, The Hague, 1996, p. 1 (5).

closed order of institutions, ideas and principles developed from Roman law: one only had to apply logical or “scientific” methods in order to reach the solution of any legal problem. In this way the application of law became a merely “technical” process, a sort of mathematics obeying only the logical necessities of abstract concepts and having nothing to do with practical reason, with social value judgements, or with ethical, religious, economic or policy considerations. The *Pandectists* succeeded in creating a set of clear and clearly distinguished legal concepts which contributed much to the technical sophistication of the German Civil Code which came into force in 1900 and had a considerable impact abroad as well, because of the Roman legal materials on which it was founded. On the other hand, the *Pandectists* did not bother to seek out the real forces in legal life, nor did they ask what ethical, practical or social justification for their principles there might be. This method of legal thinking, which put conceptual unity before the careful observation of social reality, was typical for a legal culture which was dominated by remote and theorizing professors and which lacked, in contrast to common law countries like England but also in opposition to other continental systems like France, the moderating influence of a well organized and powerful class of practising lawyers. During much of the 19th century, neither a centralized judiciary nor a class of professional lawyers bound together by professional solidarity existed in Germany, and the integration of legal life was limited to the theoretical sphere, while at the practical and political levels any substantial progress was held up by the unbroken influence of powerful territorial rulers.⁴

The dogmatic approach to the study of law which came to dominate legal science in Germany in the 19th century was not confined to the field of private law. It also exercised a powerful influence on the nascent science of public law which reached its first apogee in the decades following the foundation of the German Empire in 1871. Many of the jurists who played a central role in shaping the new science of constitutional and public law had a distinctive private law background which greatly influenced the methodology and theoretical concepts they used in analysing public law norms. Like their private law counterparts, they stressed the formal qualities of law as a logically coherent system. This approach

4 Zweigert, K. y Kötz, H., *Introduction to Comparative Law*, 3a. ed., Oxford, 1998, pp. 140 f.

received its clearest expression in the work of *Paul Laband*, who set the standards for constitutional law analysis during the time of the Empire.⁵ According to his concept of law, the jurist had at his disposal a series of legal institutes of eternal validity such as dominion, property or contract with which to order the legal universe. Laband compared these legal institutes to logical categories or forces of nature. For him the legal scholar's task was to order existing norms logically under the individual concepts. By contrast, all "nonlegal" aspects of the state, such as historical, political and philosophical observations, had no importance for the exegesis of concrete legal material. By excluding all non-legal aspects from his analysis, the lawyer would be able to find a value-free, logical method of ordering legal norms and explaining their "positive", true content, a method which constituted the indispensable basis for any "true" science of the law.⁶

This method also gained considerable influence in the developing science of administrative law. Whereas legal scholarship in this field previously had integrated the political, economic and social context of administration into its analysis, it now increasingly tended to consider the legal aspects of administrative action in isolation. This attitude favoured an exclusive concern with the legal forms of administrative action which in turn determined the scope of legal remedies available to the citizens in cases of alleged administrative wrongdoing. The most brilliant example of the dogmatic analysis of administrative law was provided by the work of *Otto Mayer*, who established the foundations of modern German administrative law.⁷ His treatise on administrative law⁸ focused on the general principles governing administrative decision-making which he distilled from hundreds of court decisions dealing with the review of administrative decisions. Although inspired by much more practical concerns than either the *Pandectists* or the constitutional lawyers of the German Empire, *Meyer's* work, which was to dominate Ger-

5 See Caldwell, P., *Popular Sovereignty and the Crisis of German Constitutional Law*, Londres, Durham, 1997, pp. 13 ff.

6 Laband, P., *Das Staatsrecht des Deutschen Reiches*, Tübingen, Freiburg, 1876, Vorwort, p. VI.

7 Mayer, O., *Deutsches Verwaltungsrecht*, Leipzig, 1895, vol. 1; Leipzig, 1896, vol. 2.

8 Heyen, E. V. y Mayer, Otto, *Studien zu den geistigen Grundlagen seiner Verwaltungswissenschaft*, Berlin 1981, pp. 194 ff.; Meyer-Hesemann, W., *Methodenwandel in der Verwaltungswissenschaft*, Heidelberg, Karlsruhe 1981, pp. 20 ff.

man academic thinking on administrative law for much of the 20th century, kept very much in line with the basic approach of modern German legal science in seeking to arrange all legal material of a given branch of law in the form of a logically consistent system which is organized around a few key institutes, or general principles of law, from which all concrete legal norms can be logically deduced.

2. The powerful role of the universities

It was inevitable that the way in which the academic study of law developed in Germany in the 19th century would also have a profound impact on the method of law teaching. The universities had played a central role in the education of lawyers since the late Middle Ages. At first, German jurists had obtained their legal education in the famous law faculties of Northern Italy, but later the German universities began to give regular courses in Roman law, at the instance of rulers eager to maintain their cadre of lawyers. Increasingly the territorial rulers in Germany founded universities in their own territories to satisfy the growing need of well-educated personnel for the expanding financial, judicial and economic institutions. In the process, academically educated professors at the faculties began to dominate legal culture in Germany. They adjusted Roman law to the needs of the time, influenced the outcome of concrete cases by drafting legal opinions for the courts and later on played a major role in the codification of the different areas of law. More than in almost any other country, the development of the law in Germany has been shaped by the pervasive influence of the law professors and their focus on the study of the conceptual aspects of law. The discussion of learned opinions of professors which are set out in comprehensive treatises and lengthy commentaries on practically all relevant codes is of huge importance not only for the purposes of scholarly debate, but also for the adjudication of concrete legal issues and the preparation of all major law reform projects.

3. The impact of codification on the academic study of law

With the increasing codification of German law, the focus of the academic study of law has shifted from the analysis of the historical legal

material, in particular the concepts of Roman law, to the interpretation of the major codes enacted by the legislature. In this context it has to be noted, however, that the progress of codification has been much slower in the field of public law than it has been in private law. The great private law codifications in Germany are all products of the 19th century. Civil procedure and criminal procedure are governed by two codifications which both date back to 1879.⁹ The original version of the Criminal Code came into effect in 1871, the Commercial Code, like the Civil Code, on January 1, 1900.¹⁰ Although both the German Empire and the Weimar Republic had written constitutions, it is only with their modern successor, the Basic Law of 1949, that the primacy of constitutional law over all other law has been effectively recognized and thus the normative potential of the constitutional code been fully realized. The rules of administrative law are found in a whole variety of scattered enactments, due to the permanent expansion of administrative activity and the increasing specialisation of administrative agencies which accompanied it. Nevertheless, the general principles of administrative law have also been codified, in the Code of Administrative Court Procedure of 1960 and the Law on Administrative Procedure of 1976.¹¹

Apart from the field of labour law where all attempts at drafting a comprehensive labour code appear to have been abandoned, the German legal order thus is highly codified. This means that the study of law in most areas has to start with the careful interpretation of the relevant codification. Despite the significance of the courts in interpreting and adjusting statutory legislation, the codes remain the principal source of law. In order to understand their meaning, it is not enough merely to read and interpret the text of the norms. It is also necessary to have a firm grasp of the underlying conceptual issues which the code is meant to address. Only if the legal student is familiar, through study of the relevant treatises and commentaries, with the legal concepts used by the draftsmen in order to structure the legal material contained in the code and to give it intellec-

9 The four *Reichsjustizgesetze* which came into force in 1879 established a uniform court system in Germany (*Gerichtsverfassungsgesetz*) and codified the law of bankruptcy (*Konkursordnung*), civil procedure (*Zivilprozeßordnung*) and criminal procedure (*Strafprozeßordnung*), see Zimmermann, R., *op. cit.*, nota 3, p. 6.

10 Zweigert, K. y Kötz, H., *op. cit.*, nota 4, pp. 141 f.

11 On the historical development see Singh, M. P., *German Administrative Law in Common Law Perspective*, 2a. ed., Berlín, Heidelberg, 2001, pp. 20 ff.

tual consistency can he hope to make sense of the often highly abstract language of the code. The structure of German law codes, and the legal culture in which they are embedded, therefore favours a dogmatic approach to legal issues. Although the abstract character of the codes leave much room for interpretation by the courts which plays a vital role in adapting the codified law to the changing needs of the times, courts do not see themselves as law making, and court decisions are not formally considered as sources of law. Even in those cases where they are regarded as persuasive authority in questions of statutory interpretation, the academic analysis of court decisions therefore does not normally include facts, arguments and policy aspects, which form an integral part of case analyses under the case method as taught in US law schools.¹²

The structure of the positive legal order as well as underlying features of the German legal culture thus both favour an approach to legal problems which is more concerned with conceptual issues than with the analysis of individual court decisions. This bias towards an abstract or dogmatic approach to law is further reinforced by the traditional premises of German legal education.

III. THE FRAMEWORK OF LEGAL EDUCATION IN GERMANY

1. *Origins of the current system of legal education*

A legal culture is shaped to a considerable extent by the way in which the education and training of lawyers are organized. This is especially true for Germany where the basic principles of legal education can point to a history of more than 200 years. As in other European countries, German lawyers are mainly educated at universities. As has already been described in the preceding sections, nineteenth century German universities were among the leading exponents of legal learning in the traditional sense, and German pandectism in particular has been enormously influential in moulding the modern legal mind. At the same time, legal education in Germany displays a variety of features which have tended to set it apart not only from countries of the common law tradition, but also from other continental legal systems. They have contributed to the

¹² Ostertag, J., "Legal Education in Germany and the United States – A Structural Comparison", *Vanderbilt Journal of Transnational Law*, 26, 1993, p. 301 (331).

remarkable sophistication of German law but have also favoured a dogmatic approach to legal issues which has given the German tradition of legal thinking its distinctive flavour.¹³

The system of legal education in Germany owes its existence to the need of training the homogeneous, highly qualified and loyal body of executive and judicial officers required for the administration of the far-flung and fairly heterogeneous territory which was eighteenth century Prussia. As early as 1713, an order required all candidates for judicial office in Prussia to obtain the necessary practical experience for the exercise of their profession by observing the courts at work. This created the preparatory service requirement as part of the legal education in Germany. At the end of the eighteenth century, preparatory service had become mandatory for lawyers. Starting in 1849, Prussia required advocates to possess the same legal education as the judges of the courts where they practised. A further reform in 1869 finally unified legal education for all legal careers. Whether they wanted to work as judicial officers or whether they envisaged a career as a private legal practitioner, all future jurists were required to undertake three years of study at a university, followed by the first state exam, a preparatory service of four years and the Second State Exam¹⁴. After the foundation of the German Empire, the Prussian model became the blueprint for the common framework of legal education for the whole of Germany which was established by the Judiciary Constitutional Act of 1877. The law formally embraced the system of a two-part legal education. At the same time it unified the diverse state regulations regarding lawyers and legal education by establishing capability for judicial office as a requirement for all legal careers.¹⁵

In the system which was enshrined in the Judiciary Constitutional Act, the first state exam reflected the separation between general legal studies of a theoretical character on the one hand and practical training on the other. The exam, taken after the completion of the university studies, tested the knowledge of the different branches of the law, including its historical development, and of those matters which were considered as necessary components of a general legal and political science education. By contrast, the second exam after the preparatory service was

13 Zimmermann, R., *op. cit.*, nota 3, p. 27.

14 Ostertag, J., *op. cit.*, nota 12, p. 307 f.

15 *Ibidem*, p. 309.

practice-oriented and tested the ability to fulfill the duties associated with the work of a judicial officer successfully. The peculiar feature of this system was that the state did not only assume full responsibility for the practical training of the aspiring lawyers but also for their academic education: the academic study of law at the universities was subjected to detailed state regulation, and the State took control not only over the examination at the end of the preparatory service but also of the one concluding the academic legal training. What used to be a genuine university degree was thus, in essence, converted into an entrance exam for the preparatory service which, in turn, became the needle's eye through which candidates for all legal professions would have to pass.¹⁶

Up to the present day German legal education continues to be based on the two-phase model as framed in the Federal Law on the Judiciary and regulated in detail by the states. Legal education consists today of at least three years of tuition-free law studies at the university completed with the first state exam and a two and a half year preparatory service which is followed by the Second State Exam.

2. *The aim and contents of university legal education*

The German system of legal education remains committed to the aim of producing jurists qualified for all legal professions (*Einheitsjuristen*). Everybody who wants to practise law has to earn the qualification for the office of a judge, a status who enables him/her to become judge, district attorney, or lawyers in private practice, business settings or administrative agencies. According to the relevant statutory provision (Sec. 5 Deutsches Richtergesetz) this qualification is earned by those who complete studies of legal sciences with the First State Examination and the subsequent preparatory service with the Second State Exam. As is already evident from this regulation, the qualifications for the legal professions continue to be modeled on those thought appropriate for the judge¹⁷.

German students may begin legal studies immediately upon their entry to the university. While some study law after earning practical experience and qualifications in other areas or as paralegals, most students move from high school directly into university. There are no entry exa-

16 Zimmermann, R., *op. cit.*, nota 3, p. 28.

17 Brunnée, J., "The Reform of Legal Education in Germany: The Never-Ending Story and European Integration", *Journal of Legal Education*, 42, 1992, p. 399 (400).

minations for the law faculties. Students must have successfully completed thirteen years of schooling and then passed the *Abitur*, a uniform graduation examination. The *Abitur* is reserved to those who have attended a *Gymnasium*, the schools of the highest academic ability in the tripartite German system of secondary education (the other two school forms, *Realschule* and *Hauptschule*, being geared towards those professional careers for which no academic training is needed). The passing of the *Abitur* confers the right to attend the course and the university of one's choice. Much of the "liberal arts" education which in other countries like the United States takes part at the universities is in Germany part of the secondary education provided by the *Gymnasium* which has the explicit mission of preparing people for academic study. This means that in Germany the combination of graduate and undergraduate studies at one and the same institution has been abolished and students can take up at once one of the more specialised topics of study¹⁸. Due to the increasing numbers of those leaving *Gymnasium* with an *Abitur*, however, some restrictions had to be placed on the freedom to enter the university and the university course of one's choice in certain subjects, most notably in medicine and business degrees and from time to time in law. Demand for certain subject areas was so high that some universities and faculties restricted entry or required entrants to have reached a prescribed standard in the final exams for their *Abitur*. But the required score for entry into law faculties has remained so modest that it could hardly be considered as a serious obstacle to the enrolment of new law students.¹⁹

The programs of legal studies are much less structured than those at an American law school. Although, for the most part, required subjects are determined by legislation, students can create their own scheme of study and attend any courses of their choice. While each university has a formal curriculum, it is only precatory; much is left to the student's own judgement and self-discipline. Having attained the required entry standard, German students are able to attend any and as many universities as they wish. Historically, they took advantage of this opportunity and moved universities in order to attend the lectures of the most respected pro-

18 See Ostertag, J., *op. cit.*, nota 12, p. 316 f., who rightly points out that the classification of German studies as undergraduate studies completely ignores the peculiar structure of the German system of secondary education and the special role of the *Gymnasium* as preparatory ground for academic study.

19 Brunnée, J., *op. cit.*, nota 17, p. 401.

fessors. To a growing extent, however, this freedom has been undermined by the increasingly similar organisation for State exams in all federal states and very limited number of students actually makes use of it. More often than not, students take the minimalist approach, stay at the same university and focus on the courses and subjects which are required in the First State Examination.²⁰

Federal law creates only a framework for legal education at the universities and leaves the detailed regulation of the curriculum to the states, the *Länder*. It merely mentions some core subjects like civil law, criminal law, public law, procedural law, and the historical and social foundations of law which have to be included in the faculty curricula. This rather general description is fleshed out by the compulsory subject catalogs of the states. In addition, optional subjects may be studied. Federal legislation provides a model catalog on elective subjects, and the subject groups do not vary much among the *Länder*. They include legal theory, philosophy, sociology of law; history of law; family law and law of successions; company law and foundations of tax law; competition law; labour law; conflicts of laws and comparative law; criminology and juvenile delinquency law; administrative studies; social security law; and international law and European law.²¹

During the course of the study, students must undertake a number of assignments in order to advance to the first state exam which concludes the university part of legal training. This work varies according to the legislation of the respective state, but usually takes the form of lengthy assignments to be completed over a period of several weeks and supervised written tests. In these tests, students are normally asked to render an impartial opinion on the legal controversy or legal situation presented to them. A written assignment will usually involve the setting of a more difficult case for which a full explanation is required, and an extended period of time of four to six weeks is allowed for the preparation and written submission of an answer which must closely follow a distinct style. After completing the assignment and the tests successfully, students receive a certificate which is a prerequisite for admission to the First State Examination. As a minimum, admission to this examination requires beginner and advanced certificates in each of the main subjects

20 Foster, *op. cit.*, nota 1, p. 83; Brunnée, J., *op. cit.*, nota 17, p. 403.

21 Brunnée, J., *op. cit.*, nota 17, p. 402.

of civil, criminal and public law as well as a certificate obtained in a course on legal history, jurisprudence or the economic foundations of law. Apart from that, candidates for the First State Examination must also have successfully completed a seminar or an exercise in their elective subject. Seminars often provide the only opportunity for students in the context of the modern “mass university” to carry out more in-depth research on a particular subject, to participate in academic discussion, and to get to know their professors more closely.²²

In contrast to students of most other subjects, law students conclude their university studies not by obtaining a university degree but by passing the First State Exam. In this requirement the influence of the Prussian tradition, which affirmed the interest of the state in having a class of highly qualified lawyers at its disposal for service in the courts and in public administration, is still clearly visible. The First State Exam (like the Second Exam) is administered by the Court of Appeals of each respective region, which also appoints the examiners. The appointments regularly includes practitioners (i.e. judges and state attorneys) as well as law professors. As a result, each paper is usually graded by one practitioner and by one professor, and each panel for oral exams is equally composed of both practitioners and professors. Students are required to write up to eight supervised five-hour papers covering the main subjects of private law, criminal law, public law and another subject of their choice. In each paper, the student is usually presented with a set of hypothetical facts and has to provide a reasoned legal opinion. He/she is allowed to use the relevant statutory texts but not commentaries or case reports. In some states, students only have to write three five-hours papers but in addition to that are required to write a detailed legal opinion of up to 100 pages and more on a particular tricky set of facts. After all papers have been graded, each student whose aggregate grade reaches a certain minimum level is permitted to go forward to the exam. An oral exam usually takes place with four to five students at one and the same time and lasts about four to five hours. The students are faced by four examiners who, in turn, examine private law, criminal law, public law and the elective subject. Each of those four parts of the oral exam is separately reviewed by the panel of examiners. At the end of the oral examination, each student receives a final aggregate grade, on a scale ranging from 0 to 18,

22 Brunnée, J., *op. cit.*, nota 17, p. 403; Foster, *op. cit.*, nota 1, p. 85.

calculated on the basis of his individual grades for the written tests and his/her showings in the different parts of the oral exam.²³

Those who have succeeded in the first exam usually start with their preparatory service or practical legal training. The aim of the preparatory service is to introduce them to the various legal professions, but the emphasis here is clearly on public service and, in particular, the judiciary. The preparatory service is entirely run by the state, which places the trainees for periods of three or four months with a civil court, a criminal court or the public prosecutor, an administrative agency, a firm of private practitioners and —toward the end of the preparatory service— with an institution or practitioner of the trainee's choice. During the different stages, the trainees are assigned to supervisors who are to provide individual training and to evaluate their performance at the end of each stage. The individual instruction is supposed to expose the trainees to daily practice in the various branches of the legal profession, but in reality the focus is again on the skills required in the judiciary, the preparation of opinions and judgements, rather than on the skills of negotiating, advocacy and drafting needed in a lawyer's practice. After two and a half years, the trainees take the Second State Exam which follows a pattern similar to the first. This time, however, only judges, senior civil servants and senior practising lawyers serve as examiners. Only a few states admit a small number of law professors to serve as examiners. Those trainees who pass the second exam are fully qualified lawyers and may now try to secure an appointment as a judge, a notary, a public prosecutor or an adviser in the legal department of a firm. Alternatively they may join a law firm or open their own office as a private practitioner. But many lawyers do not even enter one of the specifically legal professions. Law is still regarded as the best general education available in Germany and lawyers are therefore widely taken to be well qualified for senior management positions and for appointments within the civil service.²⁴

IV. LAW TEACHING IN GERMANY

The distinctive features of legal thinking as they have developed in Germany over the last two centuries as well as the basic structure of mo-

23 Zimmermann, R., *op. cit.*, nota 3, p. 28 f.; Foster, *op. cit.*, nota 1, p. 85.

24 Brunnée, J., *op. cit.*, nota 17, p. 405 f., Zimmermann, R., *op. cit.*, nota 3, p. 32 f.

dern legal education which has been preserved with extraordinary tenacity since its beginnings in eighteenth century Prussia provide the framework for the methods of law teaching applied in German universities as well as in private law schools.

1. *Law teaching in the universities*

To a large extent, university education still consists of formal lectures which typically offer an organized, abstract, one-way presentation by the professor. Students are not required to prepare or rework the material covered or even to attend the lectures. While it is not unusual for three hundred students and more to attend a class at the beginning of legal studies, enrolment in lectures tends to decrease, sometimes dramatically, as students advance. In the past little close or small group teaching was given and students were largely left to private study. However, tutorial groups in which a smaller number of students work under the direction of a university assistant have become more common in recent times. The tutorial groups reconsider the material of the main lectures and introduce the student to the technique of preparing legal opinions on individual legal cases. In this regard, they serve as a preparation for the so called practical exercises or *Übungen*, special classes complementing the lectures in the compulsory subjects. Here students are presented with hypothetical fact situations and instructed in methods delivering legal opinions. They have to sit tests and also to write a lengthy paper at home on a particular difficult set of facts. The certificates in the major subjects of law which are needed in order to be granted admission to the First State Examination can only be obtained through successful participation in these practical courses. They are held by professors who apply only the inductive method. Due to the lack of teaching staff, most practical courses enrol more than 100 or 150 students, so that only a small percentage of the more gifted and active students have a chance to contribute to the collective reflection and reasoning on the case.²⁵

Students who are advanced and particularly interested in research work participate in seminars. In the context of the present system of uni-

25 Karpen, U., "Teaching Constitutional Law", en Starck, C. (ed.), *Constitutionalism, Universalism and Democracy-a Comparative Analysis*, Baden-Baden, 1999, p. 327 (338 f.); Brunnée, J., *op. cit.*, nota 17, p. 402 f.

versity education in Germany, seminars offer the only real opportunity for students to enter into a meaningful dialogue with their professor. Seminars are small working groups, usually not exceeding 15 to 20 students, who devote one half year with their professor to the scholarly exploration and discussion of a particular subject. For each seminar session a student prepares a research paper and discusses his or her analysis with the whole group. At most universities, passing two or more seminars with above-average results is the prerequisite for entry into a master's course or for doctoral study.²⁶

Law teaching at German universities has long been subject to debate and criticism. In particular, the usefulness of lectures in the traditional style has been repeatedly questioned. The criticism stems from several factors. As has already been mentioned, students are not required to prepare or rework the material covered by the lecture and therefore often lack the necessary preparation to interact in a meaningful way with the professor during the lecture. Professors, in turn, do not find it congenial to teach huge classes with many ill-equipped and badly motivated students and do not always put in a very inspired performance during their mandatory eight hours of teaching per week. In addition, law professors traditionally tend to regard research rather than teaching as their top priority, since it is mostly their research records that secure them attractive offers from other universities and the prospect of career advancement.²⁷

2. Law teaching outside the universities

As a result of these and other factors, a large number of students is driven, with the First State Examination approaching, to enrol in private cram schools (*Repetitorien*). These cram schools have been for generations a well-established part of legal education. Unlike the universities, they charge substantial fees for their courses and enforce a rigorous work discipline on their students. They are not interested in high-blown academic ideals but teach the nitty-gritty of the working methods required to pass the State Examination successfully: how to tackle hypothetical sets of facts like those presented in the State exam. For a German law student does not only have to have a very broad and detailed knowledge of sub-

²⁶ Karpen, U., *op. cit.*, nota 25, p. 339.

²⁷ Zimmermann, R., *op. cit.*, nota 3, p. 30.

stantive law and to be able to display that knowledge in one comprehensive exam at the end of his legal training. Equally important is the mastery of a highly formalized method of preparing a legal opinion and “solving the case” that is enforced with unrelenting vigour in the cram schools. This method is designed to ensure that the student considers the case under every possible legal aspect, that he explores every conceivable argument either supporting or barring the plaintiff’s claim and that, in the process, he avoids touching upon any issue that is not strictly relevant. This method of thinking provides the intellectual pattern for any case analysis in German law. It is designed to cure the students of any temptation to approach the case with an unselfconscious sense of what is right and wrong. At the same time, it nurtures a mental discipline that is widely regarded as a specific attribute of lawyers and encourages a style of writing which is precise and detached, but also entirely colourless and devoid of personal flavour.²⁸

While the “case method” is practised in the private cram schools with the greatest rigour, their model has also had a certain impact on the development of university legal education. Most faculties nowadays offer “cram courses”, including tests at an examination level, and professors give trial oral examinations to groups of several students in order to prepare them more effectively for the First State Examination.²⁹

V. THE CASE METHOD IN THE TEACHING OF PUBLIC LAW

While it is true that the case method nowadays forms an integral part of law teaching at German universities, it should have become clear by now that this “case method” is a specifically German one, which is shaped by the requirements of Germany’s system of legal education and by that country’s particular tradition of legal thinking and legal reasoning. As has been shown in the preceding sections, the German legal education system was created by the State to prepare students for judicial office.³⁰ Judges, however, are expected to approach a case in as neutral and

²⁸ *Ibidem*, p. 30 f.

²⁹ Karpen, *op. cit.*, nota 25, p. 339.

³⁰ Maxeiner, J., “American Law Schools as a Model for Japanese Legal Education? A Preliminary Question from a Comparative Perspective”, *Kansai University Review of Law & Policy*, 24, 2003, p. 37 (39).

detached a manner as possible. The German “case method” therefore teaches the student to find the appropriate applicable law, subsume the facts of the legal problem, argue for or against subsumption by using the appropriate interpretation techniques, consider the consequences of each possible decision, consider gaps in the law, and consider whether an analogy is possible. This ideal of neutral application of legal principles is intimately linked to a certain concept of law, i.e. the idea of law as a science, in opposition to the idea of law as a political instrument which can be used for the promotion of specific interests.³¹

It is also closely related to conceptual jurisprudence. The system of sources of law which puts statutory law at the top and does not recognize judicial decisions as an independent source of law favours a deductive approach of legal reasoning. This is equally true in the field of public law, where not only the legal rules for specialized branches of public administration, but also the general principles of administrative law and, above all, constitutional law have been codified to a very large extent. Although the Constitution contains a number of widely framed and indeterminate provisions, particularly in matters of fundamental rights protection, which require a great deal of interpretation, it is still a code, and thus to be interpreted like one. The general criteria which are used in the interpretation and application of ordinary statutes apply, in principle, also in the field of constitutional interpretation. The deductive approach in this context requires that the lawyer envisions law as a self-contained, rational and deductive system of rules and norms. Its object is to keep law, as much as possible, separate from the domain of politics, psychology and sociology. Although political, economic and social considerations have gained increased significance for the reasoning of the courts, and above all for the jurisprudence of the Federal Constitutional Court, their use remains firmly within the boundaries drawn by the traditional methods of interpretation, and notably those by the teleological method.³²

Since the codes contain a considerable number of broad legal concepts and abstract rules, the courts have considerable room for interpreting and adjusting statutory rules. This is particularly important in the field of constitutional law with its broadly framed and indeterminate “open provisions.” In many areas, it is the jurisprudence of the Federal

31 Ostertag, J., *op. cit.*, nota 12, p. 324 f.

32 See Karpen, U., *op. cit.*, nota 25, p. 336.

Constitutional Court which has authoritatively fixed the precise meaning of the Constitution. Law students therefore have to be familiar with the fundamental decisions of the Constitutional Court and, to a lesser degree, of the Federal Administrative Court which complement the written norms of public law in important aspects. University lectures and practical exercises therefore include the discussion of important court decisions. The scope of this discussion, however, is narrower than in most common law systems including the United States. The court rulings are not discussed as sources of law, but as persuasive, and sometimes highly persuasive authorities in questions of interpretation (although in this context again the decisions of Federal Constitutional Court enjoy a special status because the Law on the Federal Constitutional Court explicitly provides that they are binding on the ordinary courts and all Government agencies and even have, in some cases at least, the force of law). Their discussion therefore typically is much more limited than the case method used in United States law schools would suggest; it focuses on the contribution of the individual decision to the further development of the law in the area concerned and the strength of its legal reasoning, but rarely addresses the facts, interests and policy arguments behind the case.³³

VI. THE INFLUENCE OF COMPARATIVE LAW AND INTERNATIONAL LAW

This German version of the “case method” does not seem to have been greatly affected by the influence of either comparative or international law. Although more German law students than in previous times go to a foreign university, including US law schools, at one point or another of their legal education, this has left no visible mark on the teaching methods applied at German law faculties. While casebooks on constitutional and administrative law have been included in the legal literature alongside more traditional forms of publications like commentaries, treatises etcetera,³⁴ their scope and contents is very much adapted to the needs of the domestic students and the requirements of the national curricula. On a more general level, comparative public law does not play

³³ Ostertag, J., *op. cit.*, nota 12, p. 331.

³⁴ Richter, I. y Schuppert, G., *Casebook Verfassungsrecht*, 4a. ed., München, 2001; *Casebook Verwaltungsrecht*, 3a. ed., München, 2000.

any mayor role in the typical German university curriculum. Whereas in the field of private law, comparative law figures at least among the elective subjects which students may choose, together with conflict of laws, as complementary subject in the First State Examination, it is not even mentioned in the catalogue of optional public law subjects, which only refers to international law and European law. Still today, comparative research and teaching on public law topics is largely overshadowed by comparative studies in the field of private law which have shaped the theory and methodology of comparative law in Germany. The most successful book on comparative law in German language, the “Introduction to Comparative Law” by Zweigert and Kötz, deals exclusively with matters of private law.

Nor has the growing influence of European law within the domestic legal system changed the picture very much. Although European law as construed by the European Court of Justice enjoys primacy over all conflicting national law, including constitutional law, it has only had a limited impact on the conceptual approach of German lawyers to legal issues. This does not really come as a surprise, since the European legal order displays many of the features which are also to be found in the domestic legal systems of the member states. The legal reasoning of the European Court of Justice in particular is firmly moulded in the continental, and primarily in the French tradition, and therefore does not lend itself easily to an US style case analysis. The decisions of the International Court of Justice, on the other hand, would probably benefit from such a kind of analysis but their scope is much more limited. In addition, international law is still very much a subject for specialists and has not, at least not yet, gained the prominence in national curricula which would allow it to serve as a new model for law teaching in general.

Nevertheless, international law contributes to a change of attitudes in another respect. A number of law faculties follow the example of foreign universities and arrange for “moot courts” in the fields of public international law and international protection of human rights. The “moots courts” introduce an important new element into German legal education because they require the participating law students to learn how to present and argue a case before an appeals court. They provide the most important, if not the only opportunity for law students prior to the First State Examination to train their debating skills, and in this way contribute to

modifying at least marginally the traditional focus of German legal education on the skills required in the judiciary.

VII. CONCLUSION

In conclusion it can be said that while the “case method” is, in a sense, widely used in the German law faculties, it is a case method which reflects the specific aims of the German system of legal education, i.e. the training of supposedly “neutral” and detached judges. At the same time, it is firmly linked to the conceptual premises of German legal thinking with their emphasis on abstract rules and concepts and the need for careful statutory interpretation. The German “case method” is therefore very different from the case method which is applied in US law schools.

This result is not really surprising since methods of law teaching cannot be seen in isolation from the goals of legal education which they serve to promote. These goals, however, vary from one country to another. What is more, they are intimately related to different concepts of law, which makes them hard to change, at least in the short run. The very idea of law as an objective, internally consistent system of rules that is central to German legal thinking is completely alien to most US lawyers. The ideal of a legislator laying down rules based on a single plan is pretty hard to square with the American reality where large areas of the law are left to independent control by fifty different states. To be sure, Germany also is a federal system, but one where large areas of law which in the United States would be governed by a multiplicity of state laws are governed by unitary federal law. Moreover, while the German ideal of legal order is essentially legislative in character, United States lawyers, by contrast, do not possess a developed techniques of legislation and statutory interpretation.³⁵ US legislation is rarely comprehensive or systematic. Nor is the theory of statutory interpretation very refined. As a consequence, American jurists have turned away their attention from formulating general rules. To an extent unparalleled in Germany, American law students are not exposed to systematic treatment of law, with clear-cut concepts, institutions, and rules, but are presented with indivi-

35 Maxeiner, J. R., *op. cit.*, nota 2, p. 119.

dual cases, outside of historical, doctrinal, legal context but against a background of social interests.³⁶

These rudimentary observations suggest that the approach to the case method is deeply rooted within the respective legal culture. As with legal institutions and principles themselves, there is therefore no easy way of transferring methods of law teaching from one legal system to another. This implies that, if a change of teaching methods will take place in the future, it will be evolutionary rather than revolutionary in nature.

³⁶ Watson, A., *Joseph Story and the Comity of errors. A Case Study in Conflict of Laws*, 1992, p. 118 n. 29, quoted by Maxeiner, J. R., *op. cit.*, nota 2, p. 119 f.