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passing a sound judgement.’*

**or Self-Restraint by Methodology as a
Deontological Concept for Judges**

Essay on Magistrate’s Ethics and Deontology

by Team Germany 1
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*'There will never be a law preventing me from passing a sound judgement'*¹

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In 2002, the *Bangalore principles* of the United Nations were published as an international guideline on judicial conduct based on ethical and legal standards. These principles were supposed to be adopted voluntarily by national judiciaries. The first draft was developed on the background of a strong tradition of similar codes in common law countries.² In those legal systems the codes are a basis for disciplinary measures. Yet, the *Bangalore principles* were also supposed to be a guideline for countries with a long-standing tradition of codification - so-called civil law or continental law systems. Therefore, several judges from continental law countries were asked to criticise the *Bangalore principles*, namely the *Consultative Council of European Judges* (CCJE).

In Germany, the *Bangalore principles* caused increasing interest in discussions on judiciary conduct. Similar papers dealing with ethical standards in jurisdiction were phrased by several non-governmental working groups of judges, e. g. by the 'Mainzer Ethikrunde'³ or the 'Schleswiger Ethikrunde'⁴. Yet, the *Bangalore principles* aroused criticism, too. For example the 'Neue Richtervereinigung', a German association of judges and prosecutors, claimed that these principles focused too much on the common law tradition especially by restricting judges' private political commitment; as reasons for disciplinary measures they would restrict judicial independence.⁵ These worries might not be unfounded: In a recommendation of November 2010⁶ the *Committee of Ministers* within the *Council of Europe* demanded similar national codes of judicial ethics which 'not only include duties that may be sanctioned by disciplinary measures, but offer guidance to judges on how to conduct themselves' (Art. 72).

A. From Bangalore to Methodology - A Missing Link?

Looking at these papers, one wonders whether they present a new approach towards judicial conduct and the work of judges and whether the claim for 'ethics based' sanctions is in accordance

¹ Freely adapted from several German judges; e.g. a presiding judge of an Higher Regional Court not mentioned by name in the year 2000, cited in J Weitzel 'Werte und Selbstwertung juristisch-forensischen Begründens heute' in: A Cordes (ed) *Juristische Argumentation - Argumente der Juristen* (Böhlau Köln/Weimar/Wien 2006) 11-28, 18, and Roland Freisler in the year 1943 cited in H Roth (ed) *Widerstand : Jugend gegen Nazis* (Ravensburger Buchverlag Maier Ravensburg 1993), 72.

² Cf. 'The Bangalore Principles of Judicial Conduct 2002' in: United Nations Annual Reports to the Commission on Human Rights (E/CN.4/2003/65), 26 seq <<http://www2.ohchr.org/english/issues/judiciary/annual.htm>>. All homepages cited were accessed on 14 May 2005.

³ Cf. E Faber-Kleinknecht 'Mainzer Ethikrunde' (2009) 87 Deutsche Richterzeitung 349-351.

⁴ Schleswig Ethics Roundtable *Pillars of Judicial Ethics : Reflections on the Ethics of Judicial Conduct* <<http://www.deontologie-judiciaire.umontreal.ca>>.

⁵ Bundesvorstand NRV, Fachgruppe 'Justizstruktur und Gerichtsverfassung' *Stellungnahme der XVII. Mitwirkungskonferenz zum Thema: Richterliche Ethik* (09/27/2003) <<http://www.nrv-net.de>>; cf. Schleswig Ethics Roundtable (cf. n. 4), 2; A Titz 'Über den Umgang mit richterlicher Ethik im Ausland' (2009) 87 Deutsche Richterzeitung 34-36, 34.

⁶ Art. 72, 73 CM/Rec (2010) 12 (Recommendation CM/Rec (2010) 12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities <<https://wcd.coe.int/wcd>>).

with judges' political rights as private citizens. Is it possible to differentiate between the judge as a legal institution and the judge as a person with a private life and opinions? Can a judge himself set his professional life apart from his private life in order to become an impartial authority?

Pertaining to the customary mode of filling the bench of the *Bundesverfassungsgericht* (German Federal Constitutional Court) it is a freely admitted practice that judges are chosen according to their affiliation to the German political parties.⁷ The court itself supports political commitments of its members.⁸ As an apparently paradoxical result this court is highly respected for its political neutrality. Moreover, is it not possible for any judge to be a politically active private person and still an independent judge?

This question did not only lead us to aspects concerning the independence of judges. It also leads to the question: On what do judges actually depend, what are they dutybound to? A first answer is quite simple: On law and justice. This answer can be found in all codes on judicial or ethical conduct. But it is probably an answer too unspecific to help judges in their every day work. Actually, how adjudging only depends on law and justice is a question that has been highly disputed throughout centuries, mainly by the academic branch of legal methodology. This essay does not only focus on the question how the application of certain methods is a way towards law and justice, but to which point it is an ethical question, too.

B. Ethics and Deontology in Methodology and Legal Methods

As a first step, the use of the terms methodology and methods within this essay has to be defined. Methods are considered as the ways according to which judges have to apply the abstract laws on a concrete situation of life. Methodology is the academic discipline that strives to formulate rules of how to conduct this concretisation. In this essay the use of methods is examined only in respect to the adjudging work which has to be distinguished from the jurists' functions as participants in the legislative process in a strict sense.⁹ In contrast, the attempt of the ENCJ working group to define the judicial 'methodical competence' as the ability to solve new and uncommon cases¹⁰ appears as a severe reduction. It seems there is no awareness that the choice and usage of a method reflects on whether this might be considered a more - or less - professional and democratic way to solve a case. Although for example *Kirby*¹¹ almost admires that despite all social changes the basic methodology

⁷ E Steinberger *Umfang und Grenzen der Kritik an Richtern in Deutschland, den Vereinigten Staaten von Amerika und in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte* (Kovač Hamburg 2010), 58; H Frank 'Die „neutralen“ Richter des Bundesverfassungsgerichts' in: W Fürst (ed) *Festschrift für Wolfgang Zeidler : Band 1* (de Gruyter Berlin 1987) 163-173, *passim*.

⁸ BVerfGE 73, 330-339, *passim*.

⁹ For this distinction cf. LL Fuller 'What the Law Schools Can Contribute to the Making of Lawyers' (1948/49) 1 *Journal of Legal Education* 189-204, 192.

¹⁰ Cf. ENCJ Working Group 'Judicial Ethics Report 2008-2009', 21 <http://www.drb.de/cms/fileadmin/docs/ethik_ag_encj_report.pdf>.

¹¹ M Kirby 'Zeidler and the Future of the Judiciary' in: W Fürst (cf. n. 7) 101-122, 105.

in British or German courts has not changed since the last quarter of the 19th century, one wonders whether judicial methodology should be so indifferent towards constitutional developments.

I. Deontological Relevance of Methods

The application of methods may be considered as a solely formal, technical act, reduced to the judges' inner mechanism. The judge becomes a 'statute automaton' ('Paragraphen-Automat'¹²) as the German sociologist *Max Weber* called it: This kind of judicial machine renders its judgements automatically when the files of the case are inserted. Methodology perceived that way does neither comprise aspects of material justice nor a connection to judicial deontology nor to ethics.¹³ However, the application of law in such a seemingly merely formal process harbours the danger that judges hide behind techniques or methods of interpretation. The pretext of a strictly positivistic approach can cover up or even legitimate the application of unjust law.¹⁴

For instance it has been argued that German judges excused their 'collaboration' with Hitler's Third Reich by claiming to have carried out the law only in a merely formal and non-political way.¹⁵ With this argumentation, the focus of attention is drawn away from judicial appliance of law towards the law that is to be applied. Thus positive law would have to be just to render a merely formally found decision just. Reduced to a 'statute automaton' the judge would not be responsible for his decisions – nor would he take responsibility. He would be an unthinking servant of a system of law and justice – or injustice. But applying law is always a political and moral issue. Therefore the German judges did not collaborate with another person's Third Reich - they were a determinant part of it.

It shall not be denied that ideals of justice are supposed to be of fundamental importance already during the creation of law.¹⁶ Still, the question arises whether methodology and the consciousness of the judge for methods contain themselves ethical assessments and ideals of justice.¹⁷ Are ideals of procedural justice realised by the appliance of methods?¹⁸ Can the appliance of a certain doctrine of methods itself be materially just to a certain degree? Is the adherence to a result found by a just method itself of ethical value thus justifying or even demanding to act against one's own conviction of a just solution?

¹² M Weber *Wirtschaft und Gesellschaft: Grundriß der verstehenden Soziologie* (5th edn Mohr Tübingen 1980), 826.

¹³ B Rüthers and C Fischer *Rechtstheorie: Begriff, Geltung und Anwendung des Rechts* (5th edn Beck München 2010), 607 par. 993.

¹⁴ Cf. B Rüthers and C Fischer (cf. n. 13), 607 par. 994.

¹⁵ Cf. G Radbruch 'Gesetzliches Unrecht und übergesetzliches Recht' (1946) 1 *Süddeutsche Juristen-Zeitung* 105-108, 107. This argumentation corresponds in an abstract way to the approaches by the leading fascist theorist Carl Schmitt to reduce the international law and the legitimating of power to formalistic categories, cf. C Schmitt *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Greven Köln 1950), 128.

¹⁶ B Rüthers and C Fischer (cf. n. 13), 610 par 998.

¹⁷ Answering in the affirmative G Hager *Rechtmethoden in Europa* (Mohr Siebeck Tübingen 2009), 1 seq.

¹⁸ Answering in the affirmative B Rüthers and C Fischer (cf. n. 13), 606 par 991.

In a first approach we will have to differentiate two dimensions of ethical relevance of methods. We would like to call it an external and an internal dimension of methodology corresponding to the ‘external’ and ‘internal independence’ of judges. The external dimension accounts for the judge as being part of a collective system applying and developing a legal order. Within this dimension methods are primarily an element of the reasoning for a single judgement. Yet, the requirement to point out reasons has several functions within a legal system, regarding the sequence of courts as well as the society as a whole. The internal dimension is restricted to one judge as an individual and his way of coming to a decision as well as the result of this process. This result shall be thought of as only existing in the mind of the judge at first, before he is willing to let it enter the objective dimension - maybe censoring it along the way in order to comply with external expectations of his colleagues (especially of the court of appeal or of the court of ultimate resort) or of the public.

II. External Ethical Relevance of Methods and Methodology

As it has already been stated, the appliance of methods is important for the reasons of a decision. Throughout Europe it is expected that “[j]udges should give clear reasons for their judgments in language which is clear and comprehensible”.¹⁹ Yet, the quantity of reasons differs according to legal traditions. In today’s German legal practice it is common to give very elaborate reasons for a judgement. By contrast, notably French courts state comparably few reasons even today. Especially decisions of the *Cour de Cassation* and the *Conseil d’État* usually do not deal with theories and legal opinions; dogmatic reasons may only be found in *conclusions* of the *avocat general* and of the *commissaire du gouvernement*.²⁰

1. History of Reasoning

In legal history it was acknowledged for long time that a judicial decision does not need to give reasons.²¹ Judges were even considered to be lunatics when they did so.²² Later, when reasons were given, the original purpose was only court internal: For the same reason as early Reports of courts of higher authority or last resort were published by individual judges, reasons were used to inform other judges - especially of lower courts - about the underlying legal assessment as directions for their adjudging.²³

By not having to reveal the grounds of a decision judges were only responsible to God. This corresponded with the basic “legal” values founded on Christianity. From a Christian point of view there could only be one true judge: Jesus separating the good from the evil on doomsday. Like him,

¹⁹ Art. 63 CM/Rec (2010) 12.

²⁰ Cf. U Hübner and V Constantinesco *Einführung in das französische Recht* (4th edn Beck München 2001), *passim*.

²¹ I Czeguhn ‘Entscheidungsfindung und Entscheidungsbegründung auf der iberischen Halbinsel und in Deutschland vom 15. bis zum 18. Jahrhundert’ in: A Cordes (cf. n. 1) 219-239, 226.

²² *Ibid.*, 235.

²³ *Ibid.* 236.

the human judge should act and always be aware of the fact that one day the Last Judgement would assess his decisions. Therefore, he should try to be as just and professional as possible and not allow himself to be corrupted by his own prejudices or by anybody else's influence. In the Early Modern Times these thoughts of professional judging were brought forward as arguments for the employment of judges trained in the "Law Schools" of Northern Italy and other newly founded European universities. Thus a solid foundation in law and methods was already seen as a guarantee for an accurate judicature and to protect legal interests.

Throughout the centuries the Christian foundation of law vanished and during the Age of Enlightenment it was gradually replaced by the idea of a natural law founded on reason. Based on systematic approaches and methods the thought of codification rose especially in continental Europe. The idea of a law system that would bear a solution for every judicial problem led to the three major civil codifications by the end of 18th century: the Prussian *Allgemeine Landrecht* (ALR, 1794), the French *Code civil* (1804) and the Austrian *Allgemeine Bürgerliche Gesetzbuch* (1812).

Material and procedural law was written down in codifications to bind the judge to the word of the lawgiver because of the thought of separation of powers that was respected since *Locke* (and *Montesquieu*. In France already in accordance with the ideas of enlightened absolutism the capacity of the judges was narrowed in favour of the sovereign, barring them from interpreting the law when there was a *sens clair*.²⁴ For similar purposes the *référé* législatif was introduced by the French revolutionaries to assure the power of the lawgiver.²⁵ If no clear solution could be found within laws and provisions the lawgiver should be called for clarification. Similar regulations were laid down in the ALR as well as in the Austrian procedural law.²⁶ Yet, this implement did soon fail as it was too inflexible.²⁷ There was a practical need for the judge to be freer in his adjudging.

In conjunction with the French Revolution the judges' obligation to give reasons for an adjudging was introduced, too. In addition, upon the enactment of the *Code Civil* in 1804 the *école de l'exégèse* became dominant in proclaiming a very strict legalism, i.e. a strict adherence to the wording of statutes.²⁸ Starting at the beginning of the 19th century this obligation was adapted all over Europe.²⁹ It enabled courts of higher instances and the lawgiver to control the decision. Yet, in the monarchist countries of Prussia and Austria it was the monarch who was interested in

²⁴ Cf. A Gouron 'Jurisprudence de la Cour de Cassation et arrêts de règlement' in A Gouron (ed) *Europäische und amerikanische Richterbilder* (Klostermann Frankfurt a. M. 1996) 53-82, 69.

²⁵ Hager (cf. n. 17), 20; C Baldus Gesetzesbindung, Auslegung und Analogie: Römische Grundlagen und Bedeutung des 19. Jahrhunderts in: K Riesenhuber (ed) *Europäische Methodenlehre* : Handbuch für Ausbildung und Praxis (2nd edn De Gruyter Berlin 2010) 28-112, § 3 mn. 1 fn. 1.

²⁶ U Müßig 'Geschichte des Richterrechts und der Präjudizienbindung auf dem Europäischen Kontinent', (2006) 28 *Zeitschrift für Neuere Rechtsgeschichte* 79-106, 89 et seqq.

²⁷ Hager (cf. n. 17), 20; Baldus (cf. n. 25), § 3 par 37.

²⁸ N Guimezanes, Introduction au droit français (2nd edn Nomos Baden-Baden 1995).

²⁹ Czeguhn (cf. n. 21), 234, 239.

controlling instead of the revolutionary lawgiver. Yet, instead of a clear separation between the legislative and judicative the distinction became more problematic again: On the one hand positions as pronounced by the *Historische Rechtschule* or the *Freirechtschule* demanded even more competences for judges regarding them as the most competent instance for developing the law. Strict legalism was criticised in France as being too inflexible in regard to the changes industrialisation caused to society and economy and was finally overcome by the *école de la libre recherche scientifique*³⁰ at the beginning of the 20th century, most famous representative being *Geny*.³¹ On the other hand since the last quarter of the 18th century basic human rights were - at least in the European legal tradition - more and more accepted as inalienable rights binding judges, rulers and office holders. Finally, this was written down in constitutions all across Europe. By the end of the 19th century these constitutional guarantees could be enforced by legal action. Bearing in mind that this only happened quite recently from a historical point of view, there is a long tradition of the legislative and judicial powers trying to define the boundaries of competence towards each other; a tradition still influencing today's methodical discussion as will be shown.

2. Why to Give Reasons in Judicial Decisions Today?

In today's democratic societies giving reasons in a judgement as well as the appliance of methods should have different or additional functions than in the past; at least these functions should be seen under a different perspective. Although, they are going to be analysed separately in this essay, these functions influence each other: Judges are bound to the separation of powers as this is laid down in every modern European constitution. Stating reasons to their decisions gives the opportunity for controlling whether they stick to their prime constitutional role of applying the law. Yet, a mere appliance of statutes is not sufficient: not only, because judges still need to apply norms that were made prior to the formation of democratic states and therefore might be regarded with suspicion, but also because even today's legislator is not immune against the violation of basic human rights. Thus, adjudging comprises elements of legislating. Additionally, jurisdiction contributes to the legal system's development. By giving reasons for a judgement, jurisdiction also legitimises the democratic system by conveying democratic values and by initiating a social discourse. And last but not least it should be an orientation for the people as they have to know how to behave in accordance to law.

Predictability of Adjudications

³⁰ HJ Sonnenberger and C Autexier *Einführung in das französische Recht* (3rd edn Recht und Wirtschaft Heidelberg 2000).

³¹ F Geny *Méthode d'interprétation et sources en droit privé positif: essai critique* (Libr. Générale de Droit et de Jurisprudence Paris 1899).

The last demand is founded on the principle of predictability of adjudications. This principle is part of the constitutional principle of legitimate expectation which itself is derived from the principle of the rule of law and from human rights.³² From a sociological point of view predictability of future actions of other actors is even considered to be the essential aspect of a legal order.³³ A doctrine of methods could serve as means to predict adjudications. Such a function, however, can only be realised by a doctrine of methods if there are standardised requirements or at least if there are sufficient reasons stated in one case that allow predicting the adjudging in a similar case. Although for an ordinary person the intermediation of a lawyer might still be necessary. Hence, taking into consideration the addressees of law judges only fulfil their function as guides for the appliance of law by stating sufficient grounds.

Acceptance of Democracy

Judges ought to create acceptance for their individual decision as well as for the legal order in general. Grounds serve as justification and way to inform the public about the decision thus complying with the democratic legitimation of the judge. Although a discourse oriented sociology might correctly observe that a court decision can be a result of the discussion between the parties and the judge,³⁴ there still remains the judicial power to make a decision that binds the parties against their will; e.g. in criminal cases. In a democratic state the sphere of power has to be explained in a rational way to find acceptance. In this respect, the judicial decision can be seen a ritualised form of enforcing and legitimising power and the state's monopoly on the use of force ("*Gewaltmonopol*"). Taking into consideration the pacifying function of the state-provided jurisdiction in comparison to unauthorised self-help judges should be highly aware of the public function they fulfil by giving reasons to their judgements.³⁵ Considering that they need to be understood, they should choose language that is easily understandable.³⁶

Ensuring Homogeneous Application of the Law by the Judiciary

Grounds also function as a mean to control the judge by enabling appeal and revision. Additionally, the reasons stated by the higher instances have are a way to ensure the quality of jurisdiction. Although, nowadays private persons appealing to the law courts of lower instance also need grounds as directions with prediction whether the court of appeal or revision will accept their different reasoning; today's Court Reports still have their former function. That way a homogenous

³² R Riggert *Die Selbstbindung der Rechtsprechung durch den allgemeinen Gleichheitssatz* (Duncker und Humblot Berlin 1993), 26.

³³ N Luhmann *Rechtssoziologie* (4th edn vs-Verlag für Sozialwissenschaften Wiesbaden 2008), 38 seq.

³⁴ J Weitzel (cf. n. 1), 22.

³⁵ HJ Faller 'Die richterliche Unabhängigkeit im Spannungsfeld von Politik, Weltanschauung und öffentlicher Meinung' in: W Fürst (cf. n. 7) 81-100, 98.

³⁶ H Hattenhauer 'Stilfehler sind Denkfehler : Eine Stilübung für Juristen und gebildete Laien deutscher Sprache' (12/08/1995) Frankfurter Allgemeine Zeitung; Art. 63 CM/Rec (2010) 12.

jurisdiction is ensured, plain reasoning of higher courts may forestall parties from appealing to court without success and prevent the courts of lower instances to make decisions that will not last and therefore produce unnecessary costs and procedural efforts for the parties and courts. Taking into account the interdependence between the different courts in a hierarchical system a methodology that is not only oriented to law but also towards the precedents of higher courts could be a reasonable effort. In this case, methodical approaches within case law systems might be adopted.³⁷ For the avoidance of doubt: there should not be a blind obedience to the decisions of higher courts but a sensible use of higher decisions that might also result in the denial of such decisions. Yet, the reasons for such an adjudging of the court of lower instance *contra praejudicia* might be as well founded on the same reasons as a decision *contra legem*, since both would be inspired by the same ethical principles that are about to be discussed in the upcoming paragraph.

Constitutional Demands

The last ethical dimension to be mentioned is regularly discussed in papers on judicial conduct: the separation of powers. Comparing these papers we find phrases such as “the judge depends on law and justice”. Regarding the German constitution for instance this is even more than a simple question of ethics, it is a constitutional one; codified in 1949. Art. 2 EU-Treaty as a summary of the fundamental values of the European Union clearly shows the commitment of all European states to democracy, the rule of law and equality. These principles include competences as well as limitations for judges due to the balance of powers. Accordingly, methods, the choice of methods and the appliance of methods need to be consistent with the respective constitution all across Europe.

The separation of powers is an essential mark of a state under the rule of law. Whereas the legislature creates the law and the executive carries it out, it is the responsibility of the judiciary to supervise its appliance. Looking at it in a quite simplified way each branch has its own sphere of responsibility in which it rules by its own powers. While the core responsibility of each branch needs to be respected, in fact those three powers do not exist completely separated but they confine and control each other via a system of checks and balances.³⁸

Whereas frictions between the judiciary and executive branch are rare, indicating that a commonly agreed on line has been found, the boundary between judiciary and legislature remains disputed especially in respect to judge made law. Although creating law is the responsibility of the legislature, in certain situations judges might even be obliged to create new laws and derogate existing ones, e. g. in cases of frictions between constitutional law and other rules or when a rule is

³⁷ Cf. K Engisch *Einführung in das juristische Denken* (11th edn Kohlhammer Stuttgart 2010), 94.

³⁸ C Degenhart *Staatsrecht I Staatsorganisationsrecht* (24th edn C.F.Müller Heidelberg 2008), par. 265.

missing and the interdiction to deny justice demands a decision. Judgements *de lege lata*, *de lege ferrenda* or *contra legem* might be the right solution.

The degree a judge adheres to the principle of separation of powers when applying a certain doctrine of methods can be seen as a measurement of procedural justice. This concept already implies a notion of procedural justice, namely that the legal order that is relied on actually provides a just solution if it was established by lawful, democratic procedure; e.g. several readings in parliament and backed up by a system of constitutional jurisdiction. However, that is a premise of all democratic nations.

de lege lata or de lege ferrenda

Based on an idealistic concept of codification-based legal orders, the legal order provides a solution to any actual case. However, there will always be cases the legal order has no answer prepared for although this answer would be there if the lawgiver would have thought of the problem - a so-called “legal gap”. The questions that arise are by which methods judges are to find the right solution or how to find out that there is no solution but a “legal gap”. By a methodical approach the judge may find the actually existing gap in the legal system and is barred from inventing a gap to fill. Therefore, methodology is a way to assure the sphere of the legislature and thus respecting the balance of powers.³⁹

A more recent concept regards the solution to a particular case as an act of legalism even within systems of codifications. Judges do not only find a solution, they create it within the presetting of the legal system.⁴⁰ That way, the single judge is part of a collective process of legislative enactment and, by way of the hierarchy of courts, judicial law is created that enacts law beyond the particular case. Thus the judge does not only develop the law but, what is more, takes part in a judiciary legislative enactment process. Perceived that way, eventually, judges in a codification-based legal system do not differ from a judge in a Common Law system. Still, the second approach needs to determine, too, how an unlegislated area, one without the legal presetting is recognised.

In theory, it is – from an international perspective – not clear, when positive law exists and when the judge needs to develop the legal system further. This originates from different views regarding the question whether applying a norm analogue is still interpretation (e.g. France) or whether the literal meaning, “*Wortlautgrenze*”, (e.g. German) separates interpretation from judicial creation of law. However, even if the analogous application of a norm is already seen as a form of development of the law by the judiciary, the judge is still restricted to a very high degree by the original norm

³⁹ HJ Faller (cf. n. 35), 97 et seq.

⁴⁰ J Esser *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (4th edn Mohr Tübingen 1990), 20, 156; J Weitzel (cf. n. 1), 21.

when applying it accordingly.⁴¹ However, the analogous use of a norm may still lead to an opposite result of a decision. To determine in which way a norm is binding, different methods are discussed, e.g. the “literal sense” or the “intention of the law maker”.

The Literal Sense

Several concepts deal with “the literal sense” e.g. the *sens clair* doctrine or the grammatical interpretation/*interpretazione letterale*. Both of them presume that a definite sense of a word can be discerned. However, they have to deal with the constant development of a “living” language by its users to suit their purpose: communicating thoughts. Therefore, meanings of words are likely to change over time. When consulting a dictionary only the commonly agreed on meaning of a word may be identified. In the context of the statute, however, something different may be meant. It might even be that a new meaning of that word is being introduced by the very statute that is to be interpreted. Therefore, what a word means is already interpretation. Thus, interpreting a statute by its literal sense is criticised as a circular reasoning because the sense of the statute also influences the meaning of its words.⁴²

Of course there are certain terms that, in the legal context, have a precise meaning, are even defined by judiciary or literary authorities in lengthy sentences.⁴³ However, without a *stare decisis* rule the definitions of other courts are not binding let alone an opinion in literature. Besides that, in the special context of the statute to be interpreted, the definition may not be applicable, it might be an exception. Thus, the “literal sense” can only hint on the sense of the statute. Precision may not be gained from it.⁴⁴

The Intention of the Law Maker

Another popular line of argumentation is “the intention of the law maker”. This concept is derived from interpreting contracts.⁴⁵ Dogmatics on that matter exists since Roman times.⁴⁶ But in times of a parliament as legislative organ the situation when making the law differs too much from the situation of contracting. Whose opinion of the several members of parliament is authoritative? Only those voiced in official protocols or also those given on informal occasions? And what to do with dissenting views? When interpreting contracts the risk of communication among private parties is distributed; the communication of the state with its citizens is of different nature.⁴⁷

⁴¹ Except of course for Criminal Law where since the principle of *nulla poena sine lege* a norm cannot be applied analogue.

⁴² F Schleiermacher *Hermeneutik und Kritik* (Suhrkamp Frankfurt am Main 1977), Einl. §§ 20, 23.

⁴³ N Horn *Einführung in die Rechtswissenschaft und Rechtsphilosophie* (4th edn. C.F. Müller Heidelberg 2007), par. 178.

⁴⁴ Cf. C Seiler *Auslegung als Normkonkretisierung* (Müller Heidelberg 2000), 26.

⁴⁵ Baldus (cf. n. 25), § 3 mn. 188.

⁴⁶ *Ibid.*, § 3 mn. 22.

⁴⁷ Baldus (cf. n. 25), § 3 mn. 188.

Moreover, it is an unsolved problem in legal sciences whether the intention of the law-maker should even be taken into account. Since only the actual statute was enacted as law, and not the opinions the law maker had on it, it is quite possible that the intention of the law maker is not relevant at all.⁴⁸ But a method that tries to explore the history of the creation of the law and the purposes it was supposed to have, at least may lead to the result that by applying the law in a different way now, one is aware that this way of using it was not intended and one may start thinking whether the way of employing the law in this way can be legitimated.⁴⁹ In some cases an analysis of the process of legislating can lead to a clear solution, e.g. when the lawmaker reacts to a certain problem discussed in literature by solving it in one way it is clear that the other solutions are not to be applied anymore. Even the other way around, when legislation is not reacting one can assume that the problem is still open to the different solutions discussed.

Yet, these methods may themselves be criticised from different point of views. Furthermore it is criticised that the frontier between a solution that can be found within the law and a solution that is created contrary to the law is concealed by ways of arguing in a dishonest way.⁵⁰ A recent case bordering on judicial arbitrariness is for example the so-called “Quelle-Fall”, a decision of the BGH in 2008⁵¹, named after a German catalogue company: Actually, according to the clear wording of the relevant German statute the salesman had a right to claim compensation if a used sales good was returned in cases of rectification of defects concerning a sale of consumer goods. Yet, this claim was not in accordance with Art. 3 of directive 1999/44/EG.⁵² If there is a clear result in national law that is in contrary to a directive the national court is nevertheless obliged to apply the national law. But instead of doing so – and tell the inferior party that maybe they have claims in the field of government liability law – the BGH constructs a ludicrous regulatory gap to gain an outcome that does not violate European Union Law. The explaining statement said that the legislative authority had not infringed European Union Law with intent. The lawgivers expressive intent had been to create a regulation consistent with EU-law but just failed by accident since the lawgiver would never willfully violate European Union law. The result is that a German law which violates a directive is void by law. On the one hand, the BGH could avoid claims in the field of government liability law due to missing or incorrect implementation of this directive against Germany. On the

⁴⁸ N Horn (cf. n. 43), par. 179a.

⁴⁹ B Rütters and C Fischer (cf. n. 13), 608 par 996.

⁵⁰ B Rütters and C Fischer (cf. n. 13), 568 par 913; for different examples cf. EE Ott Juristische Dialektik: Dialektische Argumentationsweisen und Kunstgriffe, um bei rechtlichen Auseinandersetzungen in Prozessen und Verhandlungen Recht zu behalten (3^{edn} Dike Zürich/St. Gallen 2008), passim.

⁵¹ BGH NJW 2009, 427, cf. T Pfeiffer ‘Richtlinienkonforme Auslegung gegen den Wortlaut des nationalen Gesetzes – Die Quelle-Folgeentscheidung des BGH’ (2009) 62 Neue Juristische Wochenschrift, 412-413.

⁵² EuGH (1. Kammer), Urt. v. 17.04.2008 - C-404/06 (Quelle AG/Bundesverband der Verbraucherzentralen und Verbraucherverbände) NJW 2008, 1433-1435 - Quelle

other hand the BGH acts up as a backup lawgiver by infringing the principle of separation of powers.⁵³

Multiplied Methodical Diffusion a Supranational Level

Another result was that an open discussion about the hierarchy between European directives and national law was obstructed. Yet, on a supranational level a discussion about methodology would be even more desirable since when interpreting EU law, methodology needs to account for slightly different aspects. The EU is only authorised by the member states to state rules for certain areas of life. For others, it lacks competence. Therefore, on an EU level, the legal “system” is supposed to only regulate single situations of life, not to provide a comprehensive legal order.⁵⁴ Thus there cannot be arguments based on the system of law as a whole the way it is possible within national legal orders.

Secondly, there is no separation of power in the EU to the degree it is expected from a member state.⁵⁵ Although the treaty of Lisbon expanded the power of the European Parliament, it does not have the power any national parliament wields as the legislative organ of that state.⁵⁶ For example the European Parliament does not have the right to initiate the legislative procedure, it may only request the Commission to do so, Art. 225 TFEU⁵⁷. Furthermore, the reasoning by “the intention of the law maker” is even less valuable on supranational level than on national level. The possible sources multiply on European level where there are even more actors e.g. the Commission or the European Council.⁵⁸ Lastly, the problem of the literal sense becomes almost unsolvable on European level.⁵⁹ According to Art. 342 TFEU and the corresponding regulation there are 23 official languages in the EU, all of them are equally binding (Art. 55 EU-Treaty). Therefore, when it comes to the crunch, no certainty may be gained from the criterion of the literal sense.

Ethics as Unethical Argument

There are situation when a gap in the legal order cannot simply be closed by use of legal arguments derived from positive law regulating similar situations.⁶⁰ In these circumstances the judge needs to fall back on general assessments stated by the legislature, on “principles of the legal order” or “the nature of things”.⁶¹ It is self-evident that the subsequent adjudication is arbitrary to a certain degree.⁶² There are other decisions arguing with equity or *bona fide*. Yet, the “Quelle”-

⁵³ Unkritisch diese Methodik begrüßend T Pfeiffer (cf. n. 51), 413.

⁵⁴ Baldus (cf. n. 25), § 3 mn. 190.

⁵⁵ *Ibid.*, § 3 mn. 188.

⁵⁶ BVerfGE 123, 267-437, 372 seq („Lissabon“).

⁵⁷ Treaty on the Functioning of the European Union.

⁵⁸ Baldus (cf. n. 25), § 3 mn. 188.

⁵⁹ *Ibid.* § 3 mn. 188.

⁶⁰ K Larenz *Methodenlehre der Rechtswissenschaft* (6th edn Springer Berlin 1991), 402.

⁶¹ CW Hergenröder *Zivilprozessuale Grundlagen richterlicher Rechtsfortbildung* (Mohr Tübingen 1995), 209.

⁶² *Ibid.*, 209.

decision shows the problem that the judge is putting himself in the place of the lawgiver. A citation of the president of the BGH gives reason to doubt whether there is sufficient respect for the separation of powers: “It is not about what the ‘lawgiver’ - whoever that may be – ‘has thought’ when creating the law, it is about what he reasonably should have thought.”⁶³ In truth, the reasons of the judiciary are likely to replace the reasons of the lawgiver. When general clauses in codification can prevent other assessments because of the “opinion of all people thinking in a just and fair way” these “people” might actually be just the judge himself.⁶⁴ In all these cases it should be an ethical demand to disclose on which reasons or on whose opinions these arguments are founded.

As today we live in societies that for example can not be reduced to one religion or scheme of life the diversion of thoughts even among judges⁶⁵ must be respected. Therefore constitutional freedoms are reliable and fertile ground for ethical reasons.⁶⁶ Arguing for other ethical principles may in general lead to a violation of the principle of separation of powers or basic values. Particularly it is almost unbearable that judges revoke a statute because of values founded in natural law or human rights. It is criticised that the separation between morality and law according to the philosophy of *Kant* is ignored if ethical premises lead to a progress in an illegitimate exploitation of judges for political purposes.⁶⁷ However constitutional values guarantee that not only a short-lived “fashion in thinking” determines the decision.⁶⁸ Even *Radbruch* who is often quoted when arguing against the application of a allegedly inhuman law was only accepting a nullification of positive law in cases when it lead to injustice in a totally unbearable degree.⁶⁹

III. Internal Ethical Relevance of Methods and Methodology

Aside from the outwardly effect justification of the judicial decision takes there is also an internal capacity of methodology, regarding judges’ ‘inner’⁷⁰ or ‘internal independence’⁷¹. *Hager* for example even attributes the interior attitude of a judge an essential contribution to the observance of law and justice: *‘The observing of law finally rests (...) in the person of the judge.’*⁷²

⁶³ Translation of the authors („Es geht also nicht darum, was sich der ‚Gesetzgeber‘ – wer immer das sein mag- beim Erlaß des Gesetzes ‚gedacht hat‘, sondern darum, was er vernünftigerweise gedacht haben sollte.“cited in: Rütters ‘Mehtodenrealismus in Jurisprudenz und Justiz ’(2006) Juristenzeitung 2006, 53-60, 57.

⁶⁴ B Rütters and C Fischer (cf. n. 13), 609 par 996.

⁶⁵ R Wassermann *Die richterliche Gewalt : Macht und Verantwortung des Richters in der modernen Gesellschaft* (v. Decker Heidelberg 1985), 146.

⁶⁶ HJ Faller (cf. n. 35), 97.

⁶⁷ C Wegerich *Die Flucht in die Grenzenlosigkeit: Justus Wilhelm Hedemann (1878-1963)* (Mohr Siebeck Tübingen 2004), 114.

⁶⁸ B Rütters and C Fischer (cf. n. 13), 609 par 996.

⁶⁹ G Radbruch (cf. n. 15), 107.

⁷⁰ E Steinberger (cf. n. 7), 53.

⁷¹ Cf. Art. 22 CM/Rec (2010) 12.

⁷² Hager (cf. n. 17), 329.

For a ‘good’ judge ‘realisation of law replaces self-realisation’⁷³. As the Recommendation CM/Rec(2010)12 postulates,⁷⁴ , judicial independence ‘means the independence of each individual judge in the exercise of adjudicating functions’ from external influences - example the public or politics - and independence from the internal influences of their own *weltanschauung* and beliefs. For instance, in all the mentioned papers concerning judicial conduct the judges’ impartiality concerning the parties involved into the proceedings is emphasised: ‘the judge is impartial’, just as the Greek goddess *Themis* or the Latin goddess *Justitia* - who does not care on whom she passes judgement.

Several influences on the judges have been and are being discussed. Judges do not only have to take care that they are not misled by tactical or rhetorical tricks of a party.⁷⁵ While according to sociological analyses the influence by social class might be negligible⁷⁶ some studies have discovered that the judges’ socialisation, their (hierarchical) position and their prospects for personal growth in court influence judges’ attitudes and behaviour.⁷⁷ Especially the customary practice of promotion is seen as a danger for the independence of judges and public prosecutors.⁷⁸ Judges themselves as well as public prosecutors act on the assumption that news coverage o has a considerable influence on criminal proceedings.⁷⁹ The decision will depend on how competent the parties themselves will defend their claims before court.⁸⁰ Another small example for human “sentimental” preconditions any judge will have faced in similar situations in their everyday work: Imagine for instance a dislikeable millionaire filing an action for possessing against his tenant, a nice poor and old widow. A great number of judges will spend considerable thoughts on how to help the widow and are more likely to use rhetorical ruse to substantiate a judgement favouring her.

It cannot be denied that there are occasions when judges succumb consciously or unconsciously to such notions - which is only human. Such an intuitive, emotional way of adjudging cannot objectively be measured but it probably has been felt by any magistrate some day. Some theories in sociology of law postulate that judges always find their decisions in an intuitive way, based on their subjective sense of justice.⁸¹

1. Legal Containment of Judicial Caprice

⁷³ Ibid. 329.

⁷⁴ Art. 22 CM/Rec (2010) 12.

⁷⁵ For these tricks see EE Ott (cf. n. 50), passim.

⁷⁶ Wassermann (cf. n. 65), 86, 145.

⁷⁷ E Steinberger (cf. n. 7), 57; Wassermann (cf. n. 65), 86, 138, 140.

⁷⁸ B Brunn, ‘Richterliche Unabhängigkeit und ihre Gefährdung durch (die Art und Weise von) Beförderungen’ (2005)

81 Betrifft JUSTIZ, 2.

⁷⁹ E Steinberger (cf. n. 7), 64 seq.

⁸⁰ J Weitzel (cf. n. 1), 22.

⁸¹ So auch cf. Wassermann (cf. n. 65), 149. Jsay, Rechtsnormen und Entscheidung (Scientia Aalen 1970), 60 seq; Esser (cf. n. 40), 256.

The question is whether the internal parts of adjudging can be objectively controlled in a legal way. It has been argued that the need to state reasons for a decision is already a mechanism to avoid arbitrary and eccentric decisions.⁸² Yet, a doctrine of methods will only be a truly effective external instrument for controlling the process of decision-reaching if it prescribes binding procedures for the judge. Therefore, an objectively binding canon of methods could be a main instrument against the judge's subjective prepossessions.⁸³ But such a canon does not exist and it is not likely to be developed soon. As already shown, all doctrines of methods are heavily disputed. The Problem remains that different decisions can be justified by choosing and applying the method that supports one's pre-formed opinion.

Even though the irrational process is discovered, e.g. because the judge "spills the beans" or there are objective hints, it is doubtful whether this will entail legal consequences. One might think of penal sanctions as a suitable instrument to prevent a judge from subjective wrong-doing. Penal sanctions are the most severe possible restrictions of judicial independence. Therefore it is a common place that the statutory elements of an offence of judicial arbitrariness have to be applied in a very strict way.⁸⁴ The question is whether there is a need and a legitimacy for criminal liability although the resulted adjudication can be regarded as objectively in accordance with the law. The German Bundesgerichtshof (German High Court), for instance, shows signs of considering penal sanctions for this conduct as it investigates the subjective prospect of the accused for intentional misdemeanour even if the decision can be accepted objectively.⁸⁵ This approach is rightly criticised as penalising the attitude ("Gesinnungsstrafrecht").⁸⁶ Hence it is doubtful whether the process of judicial decision finding can be sanctioned by criminal law at all.

The above mentioned Recommendation CM/Rec(2010)12 postulates disciplinary measures in cases of judicial arbitrariness. Yet, as far as supervision must be limited because of judicial independence, disciplinary measures are not solutions to this problem. The Recommendation states itself that judges' civil or disciplinary liability should only be considered in cases of malice and gross negligence.⁸⁷ Judgements should be reasoned and pronounced publicly but otherwise judges' should not be obliged to justify them.⁸⁸

⁸² Wassermann (cf. n. 65), 141; Engisch (cf. n. 37), 92; H Keuth *Zur Logik der Normen* (Duncker & Humblot Berlin 1972), 39.

⁸³ Wassermann (cf. n. 65), 154; cf. Engisch (cf. n. 37), S. 95.

⁸⁴ Cf. Art. 68 CM/Rec (2010) 12.

⁸⁵ Cf. Art 68 CM/Rec (2010) 12: "The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice."

⁸⁶ J Rath *Gesinnungsstrafrecht – Zur Kritik der Destruktion des Kriminalunrechtsbegriffs in der Rechtsprechung des Bundesgerichtshofs* (Verlag Dr. Kovac Hamburg 2002), 55 et seqq, 60 et seqq.

⁸⁷ Art. 66.

⁸⁸ Art. 15.

In addition, almost the entire process of the judge's search for a solution is at the judge's own subjective discretion since this 'irrational' activity rarely is exposed and remains almost completely in obscurity. It remains a "dominion" of the judge.⁸⁹ Particularly, when there is not only one but a multitude of justifiable solutions, judicial decision-reaching can elude objective control.⁹⁰ If the decision is in any way objectively justifiable, it is possible and even probable that it will become final. Judges' internal independence cannot be enforced by legal action. Only the judges' moral self-restriction can take effect.

Moreover, as a guarantee for the impartiality of judges it is laid down in many papers on judicial conduct that a judge has to be politically neutral, to a certain degree even in his private behaviour. This is quite a controversial debated in Europe. First of all, a judge should actually not be politically neutral but as an organ of a democratic system adhere to democratic values.⁹¹ Furthermore, as a private person he should have political rights, eg. freedom of speech, like anybody else. Additionally, judges - just like any other person - will never be completely neutral regarding politics. They will always have their own political opinions. They will like or dislike the persons they face throughout the proceedings. These opinions, personal impressions and prejudices will – wilfully or not - always influence their adjudging. Therefore, a limitation of the political liberties of judges in their private life can also be labelled an unsuitable and therefore disproportional measure.

Therefore, a limitation of the political liberties of judges in their private life can also be labelled as an unsuitable measure. Already because the effects on the judges' work are doubtful: In fact, judges only are not allowed to seem to have a political opinion. Papers on judiciary conduct can not demand that the judge does not have a political opinion. *Impossibilium nulla obligatio est*. From an enlightened point of view we can only demand judges to be aware that they never will be completely neutral. Hence, to show judges' that they should become aware of their own prepossessions is a central achievement of sociology in law.⁹² As a next step judges should deal with their prejudices in a professional way in order to achieve judgements that are as neutral as possible. In contrary, there is a better chance to control the decisions on unsuitable political influences if judges political preferences are known.⁹³

2. Objective Containment of Judicial Arbitrariness by Methodology

⁸⁹ E Steinberger (cf. n. 7), 61.

⁹⁰ A strict separation between the sociologic preconditions of the reaching of the decision and the reasoning is claimed by Engisch (cf. n. 37), 95.

⁹¹ HJ Faller (cf. n. 35), 89.

⁹² HJ Faller (cf. n. 35), 95; Wassermann (cf. n. 65), 152. B Rütters and C Fischer (cf. n. 13), 609 par 997

⁹³ Cf. Wassermann (cf. n. 65), 188.

Maybe methodology could curtail judicial arbitrariness in an objectively verifiable way. Yet, critical approaches of the sociology of law perceive methodical reasoning only as a way to legitimate a ‘subjective’ decision to the public that was actually found by means of judges’ intuitive sense of justice. Plainly spoken: Methods only disguise the fact that an immethodically and irrationally found conclusion is justified afterwards. An assertion in order to rationalise this decision is supposed to follow in retrospect.⁹⁴

Yet, only by doing it the other way around the judge may rationalise himself and the process of decision reaching. Being aware of one’s own prejudices offers the possibility to reach a decision unbiasedly. The knowledge of one’s own subjectivity is the initial step to enable a more objective process of decision reaching. Only that way, a judge does not replace law with his or her own subjective moral concept. Awareness for methods is a basic condition for that. By employing methods in a conscious way the process of finding a decision and the justification of a decision are not separated anymore.⁹⁵ A rational doctrine of methods that is not chosen to fit the result a judges intuition would like to achieve does not obscure irrational pre-decision but rationalises the process of finding a decision itself.

For this reason, internal self-restriction of judges to one specific doctrine of methods possesses a deontological value of its own. As long as there is no objectively binding doctrine of methods the judge is not forced to apply a certain code of methodology. Therefore, it remains a question of ethics whether judges commit themselves to a personal code of methods. Thus, they would limit themselves to an objective, rational standard that might result in a more impartial decision reaching in their individual jurisdiction. Such a concept should not be understood as an inflexible and never-changing self-commitment. Instead, it can be a concept of self-restriction by the constant use of one methodical approach.

C. Conclusion

Summing it up, we might answer the opening question about the missing link between the Bangalore principles and methodology in two ways: There is no link missing, the opposite is true: Methodological questions in the day-to-day adjudication practice are linked to basic constitutional, democratic and ethical values. Yet, at the same time the link between methodology and ethics is missing in every day life of judges and jurists in general: Starting from an insufficient training during education the negligence of methodology continues in legal practice.⁹⁶ Methodology is applied rather unknowingly in jurisdiction.⁹⁷ An almost embarrassing argumentation can be found

⁹⁴ Jsay (cf. n. 81) 370 et seqq; Engisch (cf. n. 37), Esser (cf. n. 40), 256.

⁹⁵ Cf. Engisch (cf. n. 37), 92.

⁹⁶ B Rütters and C Fischer (cf. n. 13), 610 par 997.

⁹⁷ J Weitzel (cf. n. 1), 18.

in a decision of the BGH in 1983⁹⁸. The author declares that he is not restricted to the literal sense of norms. He is not recognising that his problem does not even depend on this sense because there must be a decision between two opposite principles laid down in civil law. He is arguing for a *beliebige* decision making - by just copying a quote from a former decision⁹⁹ that does not suite his case. One cannot help thinking that methodology does not prevent the legal practice from reaching the decision that is deemed just and best - from the judges' point of view.¹⁰⁰

Many of the most important ethical questions judges ought to ask themselves are too rarely pondered, questions about the judicial sphere within the balance of powers in a democratic constitutional system. Actually, one should not fear too much that judges are not aware enough of their independence, but that they will forget on what they depend, what they are dutybound to. Though there is no solution of striking simplicity regarding the perfect method, how to find and serve law and justice is a question one should at least think and argue about. Maybe awareness of methodology is not the most effective barrier against the abuse of judicial power but it helps to recognise it.¹⁰¹ Therefore methodology is more than just a "complementary subject" for judicial ethics.

⁹⁸ BGHZ 87, 150, 155 f.

⁹⁹ BGHZ 85, 64.

¹⁰⁰ J Weitzel (cf. n. 1), 19. Seiler S. 24; B Rüthers (cf. n. 53), 54.

¹⁰¹ B Rüthers and C Fischer (cf. n. 13), 606 par 992.