



Munich University Summer Training in European and German Law

Statutory Interpretation and Civil Law Methodology

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Overview

- **Day 1 (Mo 4/7)**
 - The Legal Syllogism
 - Why Rules on Interpretation? Constitutional Background
- **Day 2 (Tue 5/7)**
 - „Subjective“ *versus* „objective“ Interpretation
 - Canons of Interpretation
- **Day 3 (We 6/7)**
 - Typical Legal Arguments
 - The Structure of Legal Rules in Germany (Civil, Criminal and Public Law)
 - Courts, Practitioners and Academia - the German Legal Culture

The Legal Syllogism

Rule: If A, B and C are given,
the legal consequence shall be X



Assessment: The facts of the case (F) fulfill A, B
and C



Conclusion: X applies to F

Important Provision of the Basic Law I

Article 1 GG

(3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.

Article 2 GG

(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

Article 3 GG

(1) All persons shall be equal before the law.

Important Provision of the Basic Law II

Art. 20 GG

- (1) The Federal Republic of Germany is a democratic and social federal state.
- (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

Art. 38 GG

- (1) Members of the German Bundestag shall be elected in general, direct, free, equal, and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.

Why rules on interpretation?

- **Rule of Law**
 - Need for democratic legitimation
 - Only by law may the state restrict basic rights → the stronger the intervention, the more precise the law has to be
- **Equal Treatment of all Citizens**
- **Legal Certainty**
- **Establishing a Coherent “System of Law”**
 - Clarification of major underlying ideas
 - Avoidance of contradictions within the system
 - Advancing transparency and clarity of the law

Subjective *versus* objective Interpretation

- **Arguments supporting the subjective view**
 - What counts, is the historical will of the legislator
 - Law is made by men for men
 - Only the members of parliament are democratically elected, not the interpreter
 - Law can only be understood with regard to the circumstances of the time of enactment

- **Arguments supporting the objective view**
 - One has to find the ideas embedded in the act itself
 - Once passed, law develops its own momentum over time
 - One can not identify *the* legislator
 - The process of interpretation is *necessarily* influenced by views, experiences etc. of the interpreter

Canons of Interpretation I

- **Literal („semiotic“) Interpretation**
 - Law is deeply connected with language and all its deficits and strengths
 - The wording is starting point as well as the barrier for interpretation
 - Most important indicator also for what the law/legislator intends (*telos*)
- **Systematic Interpretation**
 - Idea: unity of the law
 - Preserving the inner coherence of the law
 - Many rules can only be understood with regard to other provisions

Canons of Interpretation II

- **(Historical) Intention (subjective-teleological interpretation, see also foil no 7)**
 - One can not simply ignore the intentions of the original lawgiver
 - Allows to access concrete and substantive arguments, e.g. from protocols about the legislative process (discussions in parliament etc.)
- **Objective-teleological interpretation**
 - Laws are passed for specific purposes
 - Preserving the inner coherence of the law
 - Many rules can only be understood with regard to other provisions

- **Relevance of constitutional law for the interpretation of statutes**
 - As all “ordinary law” has to be in conformity with the constitution, the same is true for its interpretation and application
 - Even though the basic rights only address the state, also civil law provisions are to be interpreted “in the light” of these rights
 - In exceptional cases constitutional values may even require to ignore the wording of a provision – e.g. to grant compensation also for non-pecuniary damage in severe cases of damage to personal rights
- **Relevance of European law for the interpretation of statutes**
 - Directly applicable? One has to look whether a European provision is sufficiently concrete, non-conditional etc. to be applied
 - Vertical *versus* horizontal effect
 - Some provisions of European law only address the Member States of the EU, others also natural and legal persons
 - However, even if only the Member State is addressed, the European provisions have to be observed also in civil law as long as the wording of the relevant provision allows to do so



Application: Presidential Scrutiny of Legislative Acts

The German parliament (Bundestag) passes - with approval of the federal council (Bundesrat) - a bill of which the president believes that it infringes the constitution. Is he entitled to refuse his signature?

Article 82 [Promulgation, publication, and entry into force]

(1) Laws enacted in accordance with the provisions of this Basic Law shall, after countersignature, be certified by the Federal President and promulgated in the Federal Law Gazette. Statutory instruments shall be certified by the agency that issues them and, unless a law otherwise provides, shall be promulgated in the Federal Law Gazette.



Application: Legal Background

Article 60 [Appointment and dismissal of federal judges, federal civil servants, and military officers; pardon]

(1) The Federal President shall appoint and dismiss federal judges, federal civil servants, and commissioned and noncommissioned officers of the Armed Forces, except as may otherwise be provided by a law.

Article 63 [Election and appointment of the Federal Chancellor]

(1) The Federal Chancellor shall be elected by the Bundestag without debate on the proposal of the Federal President.

(2) The person who receives the votes of a majority of the Members of the Bundestag shall be elected. The person elected shall be appointed by the Federal President.

Article 64 [Appointment and dismissal of Federal Ministers]

(1) Federal Ministers shall be appointed and dismissed by the Federal President upon the proposal of the Federal Chancellor.

Application: Legal Background II

Article 68 [Vote of confidence; dissolution of the Bundestag]

(1) If a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the Bundestag, the Federal President, upon the proposal of the Federal Chancellor, may dissolve the Bundestag within twenty-one days. The right of dissolution shall lapse as soon as the Bundestag elects another Federal Chancellor by the vote of a majority of its Members.

Article 56 [Oath of office]

On assuming his office, the Federal President shall take the following oath before the assembled Members of the Bundestag and the Bundesrat:

“I swear that I will dedicate my efforts to the well-being of the German people, promote their welfare, protect them from harm, uphold and defend the Basic Law and the laws of the Federation, perform my duties conscientiously, and do justice to all. So help me God.” The oath may also be taken without religious affirmation.

Typical Legal Arguments

- **Analogy**
 - § 242 StGB (criminal law code): „things“ may not be stolen
 - A uses the power supply line of his neighbor in order to „save electricity costs“ without the knowledge of his neighbor and the electricity company – is § 242 StGB applicable?
- **Argumentum a maiore ad minus**
 - If the right to act in self-defense entitles to – if necessary – kill the aggressor, one may also injure him or his property
- **Argumentum e contrario**
 - If a provision mentions “natural persons”, it is not applicable to legal persons
- **Argumentum a fortiori**
 - if two persons are prohibited to ride on one bicycle, three may not do so more than ever

- **Civil Law**

- Clear separation of legal entitlement and enforcement
- Starting point: basis for the entitlement (“Anspruch”)
 - Provision claiming that under certain circumstances one can demand an act or omission (e.g. payment of damages)
 - Example: § 985 BGB: The owner of a thing (= physical item) can demand its possessor to hand it out to him
- Defenses
 - Exemptions granted by the law
 - Example: § 986 BGB states that § 985 does not apply if the possessor is *entitled* to exercise that possession with regard to the owner (e.g. as part of a lease contract with the owner)
- Defenses against a defense and so on

- **Criminal Law**

- Starting point: elements of the offense
 - Provision claiming that if a person acted in a certain way with a certain state of mind (intention, negligence etc.) with perhaps a certain outcome shall be punished within a range (e.g. of jail between 5 and 10 years)
 - Example: § 223 StGB: (1) Who by intention physically maltreats another person or damages its health will be punished with imprisonment up to 5 years or a penalty. (2) The effort ... is ...
- Defenses
 - Justifications (e.g. self-defense, § 32 StGB)
 - exculpations (e.g. insanity, § 20 StGB)

- **Public Law**

- In public law it is more difficult to identify one typical structure of legal rules