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Research Paper

The Presence of Evaluative Components in the Decisions of Judges

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***Abstract**: The aim of this paper is not to address all themethodology of jurisprudence that the most prominent jurists have contributed to legal science over the past two centuries, but to establish a connection between the different methodological schools that have critically considered the tension between the aspirations of judges to reach fair judgements and their link to the law and law imposed by the rule of law. This link does not signify any irrationality in the formal logical dependence of the law, but involves an interpretative activity. However, not all jurists agree on the interpretative scope that judges should be given or on their evaluation capacity when applying the law to a specific case. Accordingly, this paper enquires into the problems that judges face when applying law and the new challenges that they are currently expected to meet in the digital age.*
To talk about assessment in jurisprudence does not mean that legal methodology allows for the least room for personal stance taking. Quite to the contrary, value-focused thinking involves rationally analysing most of the problems arising in human life. Jurisprudence has created value-focused thinking methods that can be equated with the methods of other sciences that, in principle, are free of any kind of value judgements.
***Keywords:** Jurisprudence, legal methodology, value judgement*

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I. Introduction:

Methodological initiatives at the beginning of the twentieth century: neo-Kantianism, neo-Hegelianism and phenomenology

Legal methodology is not concerned with establishing fixed standards for applying legal norms, but rather with the procedure of a scientific-legal investigation, of a judgement or of thegrounds of that judgement. Its role is to clarify the structures of thought and the forms of reasoning that are deployed when elaborating the evaluative yardsticks employed by judges in order to reach the fairest possible judgements in the field of the scope of the law and law.

For StigJørgensen,[1] the uniqueness of legal science and jurisprudence lies in the fact that they have to deal almost exclusively with evaluations. Judges constantly perform mediations that do not have the character of logically binding conclusions, but which are objective and can be demonstrable.

Traditional methodology was based on the doctrine that holds that the application of law is not essentially any different than the subsumption of a fact to the assumption of a legal norm. Thus, the resolution of a case is, in a way, programmed by the law. In this respect, judges are intellectuals who act methodically: their obligation is to apply the law and, as to the rest, they are exonerated from ethical demands as regards fair rulings.[2]

The idea that jurisprudence is not a conceptual work free of value judgements, but a value-focused thinking, opposes to a great extent the recognition that jurisprudence makes a cognitive contribution. Since Max

[1]StigJørgensen, Recht und Gesellschaft (Göttingen: Vandenhoeck& Ruprecht, 1970), p. 8.
[2] One of the main critiques of traditional methodology was performed by Martin Kriele, Theorie der Rechtsgewinnung (Berlin: Duncker &Humblot, 1976).

Weber, a large number of jurists have contended that only a thinking free of value judgements can be scientific. Weber was so firmly convinced that the realm of value judgements did not enter into the equation that he never saw the need to demonstrate this.[3]

But value judgements cannot be compared, in the sense of personal stance taking, with value-focused thinking whose presence precisely reaffirms rationality in the analysis of the majority of problems in human life. Jurisprudence has created methods of value-focused thinking that can be equated with the methods of other sciences that, in principle, are completely free of value judgements.

Since the beginning of thetwentieth century, jurisprudence strives to understand the specific legal ideas and guiding principles that underpin answers to the same problems arising over time or seeks answers to any new problems that may arise.The renovation of German philosophy of law was undertaken by authors who, based on Kant's theory of knowledge, sought to elaborate a methodology of legal science. Neo-Kantianism was very well-received through the works of Stammler, Binder, Lask, Radbruch and Max Ernst Mayer, among others. Together with this movement, also in the 1920s authors like Reinach, Husserl and Welzel developed a new philosophical-legal current which received the name of phenomenology.

The starting point of neo-Kantianism was to combine the alienation of positivism with the affirmation of the historicity of law, with the intention of merging two currents: natural law and historicism.[4]

In his theory of legal science, Stammler conceived jurisprudence as a science and attempted to defend it from those who reproached it for lacking scientific value. To this end, it was necessary to resort to basic concepts of law, for clarifying them was a decisive task for whoever was concerned with law and legal science.[5]

For Stammler, legal science was a science of purposes, to wit, it ordered phenomena according to the form of thinking, for law was a kind of desire (not a kind of perception, as occurs in natural sciences whose way of thinking is of the cause-effect kind). Thus, legal science shaped its concepts in a fully autonomous way, regardless of the rules of scientific-natural knowledge.

The concept of law was that of a particular way of establishing purposes. But Stammler did not understand 'desiring' or 'establishing purposes'as an activity, but as a particular form of thinking, which in law was characterised, more specifically, by including several purposes, in a certain and reciprocal manner, some as the means of others. Stammler was therefore proposing a system of concepts akin to Puchta's pyramid of concepts.[6]But, besides these, heaccepted a praxis of just law, guided by scientific methods, whose creative character could not be denied. This was where another of his doctrines intervened: that of just law.[7]

All thought—even that of law—is subjected to the ultimate demand of fairness. The idea of fairness refers to the perfect consistency of all the imaginable content of consciousness. Thus, a particular legal desire, for example, a certain legal norm, is only fair if it is capable of adapting itself without contradicting all the imaginable legal desires. The idea of just law was proposed as a social ideal. It was not that Stammler believed in the existence of a certain ideal law that was the just one. Rather, he was of the mind that all law needed empirical material and, for this reason, was positive. From this is can be deduced that for him there was no such thing as just law per se, but only just or unjust positive law; but, as a whole, all law attempted to be just.

Having said that, when a judge in a particular case has to choose himself the norm of decision, he needs to be taught how to make that choice in the sense of basic fairness. That instruction offers him what Stammler called principles of just law,[8] which are not legal norms but guidelines to help the judge find the adequate legal norm for the case at hand. These principles are only secondary forms of thoughtfor recognisingthe idea of a conditioned legal desire.

The two basic notions put forward by Stammler which have been especially important for methodology were as follows: that of the methodological independence of legal science versus the natural sciences, which was grounded in the fact that dogmatic legal science did not enquire into causes, but into purposes and into the meaning of a legal norm or institution; and the second even more important notionwas that it formed part of the essence of law to orientate and order all the possible purposes of a given situation, according to a higher measure (that of the idea of law). With these two notions, Stammler made a decisive contribution to the jurisprudence of interests, conforming for the first time the teleological method in legal science.[9]

In the neo-Kantian current, it was Heinrich Rickert who introduced the concept of 'value' in the methodology of legal science, conceived as a science of the spirit (which encompassed the so-called 'historical and cultural sciences'), which required methods differing from those applied in the natural sciences. He presented the concept of value as a theoretical-cognitive a priori of the sciences. Historians refer to the values of

[3]Fritz Loos, Zur Wert- Und Rechtslehre Max Webers (Tübingen: Mohr Siebeck, 1970), p.49.
[4]Ibid., p. 104.
[5]Rudolf Stammler, Theorie der Rechtswissenschaft (Halle: Buchhandlung des Waisenhauses, 1911), p. 185.
[6]Ibid., pp. 272ff.
[7]Rudolf Stammler, Die Lehre vom dem richtigen Recht (Halle, Buchhandlung des Waisenhauses, 1926), pp. 52ff.
[8]Stammler, Theorie, p. 679.
[9]Karl Larenz, Metodología,Metodología de la Ciencia del Derecho (Barcelona: Ariel Derecho, 1994).p. 112.

past events. So as to present those events, they should first find a general interest so that the values on which they base their presentations are relevant for the community as a whole; in other words, they should be values factually recognised in a general fashion by at least the cultural community to which those historians are referring.Certainly, the factual recognition of a value does not give it a general normative validity; to that end, it is necessary that all can be called upon to recognise it. All considered, the fact of admitting that values exist before being recognised, even though they are only factually valid, implies accepting that some of them have an absolute validity.[10]

Rickert's oeuvre influenced Gustav Radbruch, an author who made a more significant contribution tothe theory of law. Radbruchwas not only interested in the formal structure of thinking as regards the choice of values, but also especially in the content and connection of meaning of those values relevant for law; hemade the transition from an exclusively formal philosophy of values to another material one. His philosophy of law did not renounce a knowledge of the content of values of supreme validity.[11]

Reality as such was for Radbruch a fact free of meaning and value. Only the evaluative conscience added or subtracted value from things. Additionally, man transformed reality in view of the values to which he aspired. Culture emerged as a fact that had the meaning, the sense of realising values. Radbruch called an ultimate value, which was no longer deductible, an idea. As a cultural phenomenon, law is that fact which has the meaning to realise the idea of law. The idea of law is a central value to which all law ultimately refers as something with meaning. And as the idea of law is that of justice, law has the sense of serving justice. This does not mean that all positive law has necessarily to be just law; but as law, it is subject to the demands of justice and is focused on this idea.[12] Stammler had said much the same, although for him the idea of justice was only a standard of judgement, while for Radbruch it was, in turn, a basic constituent principle, namely, that which gave meaning to positive law.

Radbruch defined dogmatic legal science as 'the science about the objective meaning of positive legal systems',[13] thus showing that he was in favour of the objective theory of interpretation. When in legal dogma there was reference to the will of the legislator, according to Radbruch, it was not a question of the empirical-psychological will of certain people. Dogmatic legal science should determine that meaning of a legal norm pertaining to it within the structure of meaning of a legal system, according to the content of meaning inherent to it. So, interpretation had to develop and highlight the content of meaning implicit in a legal norm or concept, and this could only be understood (in contrast to Kelsen's opinion) by referring to the purpose ultimately underlying the idea of law, while taking into consideration changing legal needs.

So as to understand a certain legal norm, not only in itself but also in connection with the meaning of the legal system as a whole, besides interpretation, legal construction was also required. In this connection, Radbruch understood construction as 'reproducing a whole from the formerly artificially separated parts so as to become aware of the necessary connection of those parts'.[14]True construction was of the teleological kind which aspired to conceive and set out the purposes of particular legal institutions as a means for achieving higher purposes and, ultimately, a supreme purpose of all law. Apart from being an unreachable goal, the teleological system also merged with a system formed according to formal points of view (for instance, the difference between public and private law was not based on the purpose of law, but on the legal form). This begged the question of whether the 'form' of a legal institution had to adjust to its purpose or, if that was impossible, of how both modes of consideration interrelated.[15]

Neo-Kantianism passed its peak, also in philosophy of law, after having been replaced by other approaches, such Edmund Husserl's phenomenology and Max Scheler's and Nicolai Hartmann's material ethics of value and ontology.

In his *Critique of the Neo-Kantian Philosophy of Law*, Erich Kaufmann reproached legal-philosophical neo-Kantianism for having mistakenly chosen the goal of ascertaining the existence of a realm of absolute values over and above reality as its cornerstone and pattern, because it remained entrenched in a formal theoretical-cognitive rationalism and because it did not have the courage to contrast a positive metaphysics with an empirical positivism.[16]This critique was seconded by neo-Hegelian authors who initiated the renaissance of the premises established by the German philosopher.

Julius Binder was the spokesman of neo-Hegelianism in philosophy of law. He drew from neo-Kantian premises to arrive at Hegel. His main aim was to orientate positive law and legal science towards an ethical

[10]Heinrich Rickert,Die Grenzen der Naturwissenschaftlichen Begriffsbildung. Eine Logische Einleitung in Die Historischen Wissenschaften (1896-1902), cited in Larenz, Metodología, pp. 113-117.
[11]GustavRadbruch, Vorschule der Rechtsphilosophie (Göttingen:Vandenhoeck & Ruprecht, 1959), p. 32.
[12]Gustav Radbruch, Rechtsphilosophie(Wiebelsheim: Verlag von Quelle & Meyer, 1932), p. 32.
[13] Radbruch, Vorschule, p. 109.
[14] Gustav Radbruch, Einfuhrung in die Rechtswissenschaft (Tübingen: Mohr Siebeck, 1952), pp. 243-246.
[15] Larenz, Metodología, p. 121.
[16]ErichKaufmann, Kritik der neukantischen Rechtsphilosophie(Tübingen: Mohr Siebeck, 1921), p. 98.

principle: the idea of law. Binder struggled against the instrumental conception of law that did not want to stop enforcing its own value and believed that it could be used as a means for arbitrary purposes and against blind irrationalism.[17]

Its central concept was the 'idea'of law, which Binder understood, on the one hand, in the Kantian sense of an ethical postulate, as a task that had to be constantly undertaken; and, on the other, as the basic constituent principle, that is, as the a priori meaning of positive or historical law. As such, it was not only a formal principle of thinking, but was necessarily replete with content.

Neo-Kantianism understood reality as the product of a process of transformation, whose basic conditions were located in the structure of our thought. A legally relevant fact is, indeed, in relation to all events from which it is extracted, merely the result of a mental transformation or, in other words, of its judgement according to legal criteria. But are the different ways in which aspects, for example, belonging to inanimate nature, organic life, moods, spiritual works and the meaningful behaviour of man, present themselves only really based on the different conception of whoever contemplates them and are not themselves prefigured, in the way of being, in the objective structure of these facts? Does a certain event become a human action only because we refer it to a transcendent meaning—for instance, to a legal norm—or does it in itself differ from a mere event of nature? If the second posture is accepted,instead of neo-Kantianism this leads to a radical change in perspective represented, by and large, by Welzel who would declare,

Scientific concepts are not transformations that differ from an identical material free of values, but reproductions of partial bits of a complex ontic being, which implicitly contains the legal structures and the differences in value and does not borrow them from science.[18]

From this follows that the method does not determine the object of knowledge, but should be focused, because of an essential necessity, on the object of study.

Welzel's critique of neo-Kantianism connected fundamentally with Husserl's phenomenology and especially with Hartmann's ontology. For the former, law had the temporary structure of historicity, signifying that it did not only emerge and perish in (historical) time, but also participated in the current of history, which could also change with the historical situation and with those for whom it was valid.[19]

Versus the material ethics of goods or purposes and formal Kantian ethics, Scheler proposed a material ethics of value. By his reckoning there was a certain type of sentiment endowed with an object that allowed people access to a certain type of essences and relationships of essence that, versus the rest, constituted the ontological continent of the realm of values. This realm was not penetrated by means of logical experiences, but through emotional experiences structured with their own order. These values, Scheler would say, were expressed in goods and prior to their eidetic nature. A nature that was not logical and, therefore, was not susceptible to being true or false, but only congenial or not.[20] Although Scheler attempted to shake off subjectivism by drawing a distinction between to be of worth and to be considered as valuable, as Carl Schmitt would say, he did not achieve this since all worth implies will.[21] He also criticised the theory of values of Hartmann who, as with Scheler, held that the act in which a value was directly perceived was not an act of theoretical knowledge, but an emotional act in which a stance was taken in light of a sentiment.[22]

This stance taking on a value led Max Weber to reject the possibility of creating a corpus of common and universal values, as making a judgement on the objectivity of such values was more a question of faith and a task of interpreting the meaning of life and the world than an act of knowledge.[23]

Adolf Reinach was the first to apply the phenomenological method to objects of the legal world,[24] which had the following result for legal interpretation: a legal norm was, first and foremost, created at a specific historical moment from the perspective of a particular legislator. This will (which was not a psychic act of desire) found its expression in legal work and should be taken into account when interpreting a norm; but the will of the legislatordid not have the last word in the interpretation of a law. Instead, it involved interpreting what this norm meant for those who were currently living under that legal system.

The phenomenological movement made a number of contributions to legal methodology. Firstly, it spawned the idea that the positivist concept of science was insufficient for the historical sciences and those of the spirit. The reason behind this (still concealed from neo-Kantianism) was that the positivist concept of reality

[17]Julius Binder, Philosophie des Rechts (Berlin:Verlag von Georg Stilte, 1925), prologue.
[18]Hans Welzel, Naturalismus und Wertphilosophie im Straftrecht (Leipzig: Deutsche Druck- und Verlagsgesellschaft, 1935), p. 49. Reprinted by Keip in 1995.
[19]Gerhart Husserl, Recht und Zeit (Frankfurt am Main: Verlag Vittorio Klosterman, 1955), pp. 21ff.
[20]Max Scheler, Der Formalismus in der Ethik und die materiale Wertethik(Madrid: Caparrós, 2001), p. XII.
[21]Carl Schmitt, Die Tyrannei der Werte (Berlin: Duncker & Humblot, 1979).
[22]Nicolai Hartmann, Ethik (Berlin: Walter de Gruyter, 1926).
[23]Max Weber, Economía y sociedad (Mexico, D.F.: Fondo de Cultura Económica, 1944), p. 9.
[24]Adolf Reinach, Die apriorischen Grundlagen des bürgerlichen Rechts: zur Phänomenologie des Rechts (Munich: Im Kösel, 1953).

was too narrow. Despite the differences in their initial positions, objective idealism and the phenomenological theory of law concurred that the positions of the spirit—including an existing legal system—possessed a real character. A positive law existed in time, if not in space, whereby it was impossible to reduce it to material or physical phenomena, since it had the form of being of 'worth'. In this connection, Hartmannelaborated his notion of strata,[25]according to which the spiritual being, endowed with full meaning, had the structure of a formation with meaning.

Neo-Kantianism considered the shape of reality of these formations with meaning as mere products of ordering scientific reflection referring to value. However, it realised that the intention of fairness in the sense of justice was inherent to law, according to its meaning. In other words, that because of their own meaning all legal norms and institutions referred, at the same time, to a full meaning of law, to the idea of law. Nonetheless, neo-Kantianism only understood this a priori meaning as a formal guideline. With the successive contributions of phenomenology and ontology to law, the difference between the structure of natural and spiritual beings was consolidated, making it necessary to open up new avenues for forming legal concepts from not only a formal but also material perspective. The return to a formal jurisprudence of concepts, to a genetic jurisprudence of interests, to a solely pragmatic legal science or a psychologically, sociologically and normologically focused methodology was now impossible.

The legal method in jurisprudence at the dawn of the twenty-first century: jurisprudence of values and the topical way of thinking

In the post-war period, the greater contact with Anglo-Saxon legal thought led to the renunciation of the logic of subsumption and the propensity of court jurisprudence for the justice of the case. The language of values often appeared in court jurisprudence and in constitutional doctrine under the name of 'principles', a concept that, although it shared the abstract character of that of value, differed from it in the specific reasons behind a legal decision.[26]

The triumphant philosophy of Nietzsche which consolidated the concept of value as the will for power, a subjective point of view that gradually imposed or enforced itself,[27] had a decisive influence in the realm of the legal application of law. As Heidegger would remark, the great achievement of the modern age was revealed in Nietzsche's 'God is dead'.This demise of God implied that the suprasensory world now lacked the strength to operate: 'Thought as the effective reality [*wirksame Wirklichkeit*] of everything real [*Wirklichen*], the supersensory ground of the supersensory world has grownunreal [*unwirklich*].'[28]

According to jurists likeHarry Westermann, Oscar Adolf Germann, Heinrich Kronstein, Joser Esser, Helmut Coing, Reinhold Zippeliusand Theodor Viehweg, court jurisprudence was, in essence, the application of legalassessments whichwere not independent, but involved those that served as a basis for the law and were implicit in it. This resulted in the elaboration of a jurisprudence of values and, when the law was interpreted by judges, the adoption of methodological points of view not based on independent methods or rigid rules, as occurred in the traditional methodology, but on guiding principles, or orientation tools, thus granting them leeway for using their discretion. This did not mean, however, that they could arbitrarily employ systematic principles or omit some or other of them to arrive at the desired conclusion.

In the framework of value-focused thinking, many of the traditional criteria of interpretation (including those that allowed for a development of law inherent to the law) were seen from a new angle. Thus, while the traditional methodology essentially envisaged a process of logical argumentation in the analogy, the new methodology stressed that the alleged similarity was an identical appraisal, for which reason the compared cases should be identical in aspects that were decisive for evaluating already regulated cases.

Value-focused thinking does not reject the inclusion of the ethical dimension in the discovery of law. It contends that, in the case of an unresolvable conflict between the fidelity to the law and the justice of the case, the ultimate decision is down to the conscience of the judge, for which reason ethical-legal principles are of utmost importance in the development of law. In law, as in ethics, it is ultimately always a question of justification, of the justification of its claim to validity as a whole in a specific legal system and of the particular resolution.[29] All considered, jurists do not immediately enforce ultimate ethical principles that justify a resolution, but only when it is impossible to apply the legal order contained in the laws and the legal system, or when it is the only way of avoiding a blatant injustice.

[25]Nicolai Hartmann, Zur Grundlaegung der Ontologie (Berlin-Leipzig: Walter de Gruyter, 1935); Das Problem des geistigen Seins (Berlin: Walter de Gruyter, 1962); Der Aufbau der realem Welt (Berlin: Walter de Gruyter, 1964).
[26]Robert Alexy, Theorie der Grundrechter (Frankfurt am Main:Suhrkamp, 1985), pp. 125ff.
[27]Friedrich Niestzche, Der Wille zur Macht, Versuch einer Unwertung aller Werte (Leipzig: Alfred Kroner, 1930), p. 715.
[28]Martin Heidegger, Off the Beaten Path (Cambridge: Cambridge University Press, 2002), pp. 189-190.
[29] Cfr. Karl Larenz's contribution in Festschrift für Franz Wieacker zum 70. Geburtstag (Göttingen: Vandenhoeck & Ruprecht, 1978), p. 411.

All recent legal methodology concurs that legal resolutions are not completely pre-programmed in laws. However, it is claimed that judges are linked to the rules of law and law. This implies putting into effect the function of legally and constitutionally envisaged law by means of legal substantiation and arguments, with a view to arriving at a fair resolution, thus also respecting the legally and judicially inestimable mission and responsibility of the legislator.[30] It is important not to lose sight of the fact that legal methodology is influenced by the political constitution. In this respect, authors like Friedrich Müller distinguish legal methodology,as the working and argumentation method effectively employed by practical jurists, from that of legal science. For Müller,the acts of judicial decision-making bodies only have legitimate validity if, according to the methodology's rules, they appear as rules of decision that can be accredited by legal norms.[31]

In any case, value judgements should be substantiated. Additionally, it is necessary to find rules with which to develop a rational discourse on the justness of normative statements since the legal discourse is, in the main, a practical discourse, subject to more restrictive conditions like the relationship with the law, the consideration of precedents, the inclusion of dogma elaborated by legal science and the procedural rules of court discourse.

All considered, the importance of these rules should not be overstated. Neither are they capable of answering the question of why jurists resort precisely to these rules and forms of interpretation, nor can they establish the degree to which value judgements intervene.

The decision in which value has priority in the event of conflict is not pre-established. The importance of a value in a particular case depends on the facts. Certain rules of reasoning assist in the appraisal. Additionally, criteria like the value's proximity to the facts, the greater or lesser probability of respecting or encroaching on a value and how pressing the need is are also important. One clear limit to these rules of preference is equality. As Harry Westermann asserted, however,it is necessary to reduce interest to the appetite that the parties in a litigation may have when seeking more favourable legal consequences for themselves, and to define clearly the concept of interest, in this regard, of the legal standards of assessment.[32]These standards of assessment (for example, protecting legal transactions, legal appearance, guaranteed property rights, etc.) are not interests, but ultimately consequences of the legislator's idea of justice. Judges are bound by the standards of assessment established by the legislator. Accordingly, court jurisprudence is tantamount to applying legal assessments, in contrast to their independent counterparts.

In the same vein, Oscar Adolf Germann acknowledged the merits of the jurisprudence of interests and especially the need for an interpretation in accordance with the purpose of the law, but stressed that these methods had their limits. For which reason a broader approach entails using the social values to which the law corresponds as a basis, following a critical-evaluative method, which does not only imply the independent assessment of judges, but also their interpretation in keeping with the assessments forming the basis of the law and which are implicit in it.[33]

Helmut Coing offered a reasoning for a jurisprudence of values that did not derive from a jurisprudence of interests.[34]The link between the factual situation and the legal consequences, as developed in a complete legal rule, was based on an assessment. It was therefore a value judgement made by legislators and judges, which could be determined by the vested interests of the decision-maker or on the grounds of expediency or justice. Lawapplication, according to Coing,was not simply a process of subsumption, but also one of an act of will for achieving purposes, in which the assessments resulting from the law, whether they be of a moral or pragmatic nature, played a decisive role. Thus, for Coing the mission of jurisprudence was to elaborate the rational content of the values forming the basis of the law, because only in this way would judges be in a position to control themselves. Following Germann, Coing called this course of action a critical-evaluative method.

The order of positivised values on which any jurist called upon to make an assessment should focus is envisaged, in all civilised legal systems, in the part pursuant to the fundamental rights established in their respective constitutions. This is where values such as human dignity and constitutional principles, including the principle of equality in its diverse forms, and the principle of free development of personality, are to be found. All of these legal precepts should be interpreted according to the spirit of this order of values.

However, this begs the question of whether or not this order of values is also an evidently hierarchical one. Reinhold Zippelius poses the question in the following way: do evaluative decisions necessarily lead to a subjectivism or are there objective values and an objective order of values which form part of a spiritual world

[30] Cfr.Peter Badura, "Genzen und Möglichkeiten des Rchterrechts", in Schriftenreihe des Deutschen Sozialgerichtsverbandes, Band X (Bonn-Bad Godesberg: Asgard-Verlag - Dr. Werner Hippe, 1973), pp. 40-57.

[31]Friedrich Müller, Juristische Methodik und Polisches System, Elemente einer Verfassungstheorie II (Berlin: Duncker & Humblot, 1976), p. 50.

[32]Harry Westermann, Wesen und Grenzen der richterlichen Streitentscheidung im Zivilrecht (Munich: Aschendorff, 1955), pp. 14ff.

[33]Oscar Adolf Germann, Probleme und Methoden der Rechtsfindung (Bern and Zurich: Stämpfli, 1965), pp. 79ff.

[34]Helmut Coing, Grundzüge der Rechtsphilosophie (Berlin: Walter de Gruyter, 1969), pp. 269ff.

that we share? And in what way and to what extent can we recognise such an order of values? For Zippelius, the guidelines for evaluative decision-making are to be found in the dominant legal morality.[35] Ethical-legal conceptions would find their highest expression in law, above all in fundamental rights. Additionally, the dominant evaluative conceptions could be expressed in the customs of a place and in certain institutions of social life, like, for example, the traditional form of marriage. Nonetheless, a custom would only serve as a guideline for an evaluative judicial decision if it were an expression of the dominant evaluative conceptions and precisely for being so.[36]

Zippelius encounters a new indication of the dominant legal morality in the legal principles elaborated by court jurisprudence, but such an indication leaves many doubts unresolved. Many pending value conflicts constantly emerge; moreover, the dominant legal morality is variable. Lastly, there are sometimes areas in which decisions do not encounter reliable or immediate guidelines either in black letter law or in existing ethical-legal conceptions. In such an event, judges would only be able to reach resolutions according to their ultimate idea of justice and, in the last circumstance, according to considerations of opportunity.[37]

In those cases in which established law does not stipulate standards of assessment, from where those standards to which courts give validity by applying them come, is one of the basic questions addressed by the jurisprudence of values. In this regard, Josef Esser believed that a new legal idea made its way into existing law in the following way:

A real and objective problem requires the development of a specific solution, which primarily still takes place casuistically, without looking for or finding any evidence of the principle; afterwards, this is backed by some or other opportune passage, in relation to which it is conceded—when the contradictions of the system cannot be concealed any longer—that such a passage is only employed to underpin systematically a legal principle transcending it.[38]

Esser addressed the question of how such legal principles were formed and how they managed to be recognised. He ruled out the possibility that they might derive inductively from the law or deductively from a system of natural law or a stable hierarchical order of values.

Esser occasionally referred to the nature of things or to a particular institution, as well as to the purposive spheres of ethical-legal principles and general conviction. To his mind, principles were first formed unconsciously until they encountered a convincing formulation differing from the mere interpretation of that which positively already existed. In constant practice, court rulings then became elements that transformed purposive principles into positive legal norms and institutions.[39]

The question concerning the internal connections of the principles and their content still remains open. Legal principles, as Esser understood them, are neither legal (norms) nor logical propositions (axiomatic ones in which specific ought-to-be propositions may be derived from rational conclusions). Legal principles have their roots in specific cases. Subsequently, they become formulas for a series of typically pertinent points of view. This means that, in atypical cases or when there is a change in the guidelines for assessing a principle, the solution can be precisely the opposite. Even after it has been discovered, a principle's subsequent development in case law is a continual process of configuration.[40]

The interpretation and development of law would be unthinkable without a model, without an idea of the principles that assimilate the disparate nature of a system. Additionally, according to Esser, the normative content of a rule was always determined by principles of all fixed orders and the creation of law. Certainly, a principle is positivised by court jurisprudence, always provided that this has not already occurred by law. Esser understood that, insofar as principles were purposive, they already had an intelligible content that could be enunciated, namely, that they were not only shaped and given content by court jurisprudence, but also initially pointed in this direction.

It is important to mention the distinction that Esser drew between norms and principles, plus the idea that the majority of principles were not deductively derived from more general postulates, but were identified in a specific case, based on the examination of a specific problem of groups of cases. So, in a way, they were discovered, to wit, conscious facts that were included in the development of law.[41]

Besides principles (or guiding concepts), Esser made allowances for another class of extrajudicial grounds for assessment: standards, models or ideas of value (for instance, secure legal transactions). Laws per se refer to them as general clauses. Rules, as Esser would say, are not found interpretatively, in these cases based on the principle, but created by means of legal synthesis; only case law tells us what is law.

[35]Reinhold Zippelius, Wertungsprobleme im System der Grundrechte (Munich: Beck, 1962), p. 62.
[36]Ibid., p. 155.
[37]Ibid., p. 196.
[38]Josef Esser, Grundsatz und Norm in der richterlichenFortbildung des Privatrechts (Tübingen: Mohr Siebeck,1990), p. 164.
[39]Ibid., p. 52.
[40]Ibid., p. 219.
[41]Ibid., p. 151.

Esser also demonstrated that when the law did not, or could not, offer them any indication, judges should not make do with their legal sentiment or subjective assessments. There were maxims for decision-making and objectifiable and verifiable principles of assessment when judging a specific case. In light of the foregoing, Esser did not represent a return to free law.

On the basis of Esser's idea, authors like Franz Wieacker[42] have claimed that these extrajudicial grounds for the judicial creation of law, described by Esser, would be found, first and foremost, in the express appraisals of the authors of the constitution; then, in what Esser called 'standards'—the consensus among legal thinkers at a given time; following this, in the established principles of legal equity; and, finally, in the nature of things, in the logical-objective structures of law and in the accredited doctrine and recognised legal practices.

Indeed, it was in the 'nature of things' that Arthur Kaufmann saw the key concept for understanding the process of creating law, in both the legislative dimension and in that of judicial decisions.[43] This process specifically involved bringing 'ought' in line with 'is'. The nature of the matter was a *topos* in which 'is' and 'ought' coalesced, the systematic point of union between reality and value. Thought based on the nature of things was of the typological kind. Kaufmann's theory of law and the creation of law were grounded in a universal ontology in which that which was susceptible to value and reality was pondered on as one from the very beginning.[44]

It is essential to ask whether or not there are rational methods for creating law, regardless of the law, which judges employ, perhaps unconsciously, it then being down to legal methodology to make them aware that they are doing so. Two of these methods include, on the one hand, topical reasoning, contemporarily proposed by Theodor Viehweg,[45] and, on the other, Martin Kriele's so-called 'legal-rational considerations'. In modern legal jargon, both refer to the application of equity as justice in specific cases.[46]

According to Viehweg, in jurisprudence this does not involve the realisation of general legal principles that have been expressed in laws and which should be clarified in their 'rational' sense by means of interpretation and then developed, but only to the fair resolution, always adapted to the issue in question, of a particular case. Jurisprudence—according to the basic summary provided by Viehweg—can only fulfil its particular purpose: to determine what is fair in each case here and now; the procedure is not 'deductive-systematic' but 'topical'.

Viehweg defines topical (following Aristotle, the rhetoricians and, above all, Cicero) as 'a special procedure for discussing problems', which is characterised by the use of certain points of view, approaches and general arguments, accepted as stable: specifically*topoi*. *Topoi* are multifaceted points of view, acceptable in all parts, which are employed for and against whatever opinion has been expressed and which lead to the truth. They are used to commence the discussion of a problem and, in a way, to address it from different perspectives, as well as to discover the perceptive connection already made in which the problem is to be found. But while systematic deductive reasoning attempts to understand this perceptive connection as a global, logical system, topical reasoning focuses solely on the problem itself. This reasoning does not lead to a global system, but to a plurality of systems, without demonstrating their compatibility with such a global system.

Viehweg distinguishes between two degrees of topicality. With the first, only positive or causal points of view, which become a problem, are registered. This is practically always the case in daily life. The aim of the second degree is to encounter points of view and to classify them in the so-called 'catalogues of topics' that seem to adapt to specific problems; its essential role is to contribute to the discussion of a problem. Legal *topoi* are, according to these 'catalogues', arguments that are deployed to resolve legal problems and which can be generally accepted.

It is impossible to pinpoint exactly what Viehweg means by legal *topoi*. Apparently, for him a *topos* is any idea or point of view that may play a role, whatever this may be, in legal discussions. But he has perhaps disregarded the fact that jurists tread the path of positive law to achieve fair resolutions, except in those borderline cases in which they are encouraged to rely on their own assessments. Here, positive law assumes the function of mediation—between the immediately evident principal demands of justice and the regulation of particular sectors of life or conflictive situations—and makes certain pre-resolutions binding. Thus, except in borderline cases, judges do not have to administer justice immediately, but should find a resolution that, first and foremost, is in accordance with the rules of positive law and the evaluation principles underlying them, as well as with the guidelines recognised by positive law and their expression in comparable court judgements.

Itwarrants stressing that a legal science that seeks to give visibility to the connections of meaning, structural idiosyncrasies and spiritual composition of that system, must proceed systematically. This does not

[42]Franz Wieacker, Gesetz und Richterkunst (Heidelberg: C. F. Müller, 1958).
[43] Kaufmann, Kritik, pp. 272ff.
[44] Larenz, Metodología, p. 151.
[45]Theodor Viehweg, Topik und Jurisprudenz (Munich: Beck, 1965).
[46]Wilhelm Kriele, Theorie der Rechtsgewinnung: entwickelt am Problemder Verfassungsinterpretation (Berlin: Duncker & Humblot,1967).

mean to say that this legal science is logically and separately derived from legal rules or concepts. For 'systematic reasoning' and 'problematic reasoning' should not be excluded.[47]

For Martin Kriele, a legal-rational method of argumentation is that which makes it possible to substantiate judicial decisions in another way when these cannot only be based on the law or legal precedents. He does not understand the expression 'rational law' in the sense of a legal-natural or legal-rational system of timelessly valid legal rules or principles, for this would imply abandoning the historical discussion. Rather, Kriele is of the opinion that all judicial decisions, both those of legislators and judges, need to be (internally) justified on a rational basis.[48]

In relation to the legal-rational considerations, Kriele observes thatit is first necessary to take into account that the structure of legal-rational argumentation is identified with the legal-political kind. In turn, this consists of a discussion for and against, pondering in this regard on the consequences of the rules proposed and their relevance. The solution to a problem can only be fair if specific issues are resolved fairly, namely, in a justified fashion. To this effect, legal-rational considerations are always indispensable. These would involve predicting the foreseeable consequences that the drawing up of a normative proposal may have, plus the discussion on the integrity of the prediction and on the relevance of the interest in question. So, it would seem that legal-rational considerations are an authentic assessment of interests (performed case by case in the topical sense).[49] However, it is not always clear what interest is more essential in each case. Indeed, Kriele does not always manage to avoid judicial subjectivism in his thesis.[50]

To the jurisprudence of values and the topical way of thinkingshould be added other tendencies relating to legal certainty. In this connection, Friedrich Müller[51] cautions that the topical proposal of going beyond the rules and then riding roughshod over them, as they do not seem to offer any other solution to a problem, is not applicable in this respect to constitutional law because of the peculiarity of constitutions as fundamental sets of regulations. The same can be said of the theoretical-constitutional attempt to entrust the normative framework of constitutions to a dynamic of flowing historicity. Consequently, to Müller's mind, the specific norm should always be applied in constitutional law.

It was undoubtedly Ernst Forsthoff,[52] a disciple of Carl Schmitt, who most vehemently called attention to the legal uncertainty to which the jurisprudence of values could give rise, especially as regards the constitution. The legal system could not lead to an order of values with imprecise content. In line with the arguments deployed by his mentor Schmitt as to the tyranny of values, forForsthoff a system of values represented a spiritual dimension that could not provide a specific and conclusive answer in the realm of the interpretation of legal norms.[53]The fundamental rights were not a system, but merely imposed limits on the state for protecting certain individual functions, which under specific and historical assumptions that were still valid were worthy of special protection. If, therefore, recourse to the idea of a system for interpreting the fundamental rights was extrajudicial, even more so recourse to value. In sum, according to Forsthoff, if jurisprudence did not completely uphold that the interpretation of the law was the verification of the correct subsumption in the sense of a logical conclusion, it would annul itself.[54]

Forsthoff warned about the risk of reducing the constitutional fabric to mere casuistry. He proposed recuperating the traditional rules of legal hermeneutics, as they were expressed by Savigny. When taking into consideration the legal interpretation, which classifies meaning, constitutional law loses is rationality. This results in the transformation of the rule of law in a rule of justice, something that occurs in parallel with the reduction of the constitution to mere casuistry. According to the conception of the rule of law, the interpreter is subject to the constitution. If we accept that the judge interpreting the constitution does so in accordance with an order of values that he places below it, he will become the master of the constitution.[55]

The risk of the constitutional fabric being reduced tomere casuistry, noted by Forsthoff, should doubtless be considered. In view of this and analysing the situation of legal science in European continental law, Franz Jerusalem claims that the decomposition of legal thought, consisting in the fact that we no longer think generally but casuistically, is an ongoing process. And casuistry is not now based on tradition (as is the case, for instance, in the English common law system), but law is shaped as something that is in agreement with the specific and objective situation, thus undermining legal certainty.[56]

[47] Larenz,Metodología, p. 156.
[48]Kriele, Theorie, p. 314.
[49]Ibid., pp. 179 and 198.
[50]Larenz, Metodología, p. 159.
[51]Friedrich Müller, Juristische Methodik (Berlin: Duncker & Humblot, 1971).
[52]Cfr. Ernst Forsthoff, Zur Problematik der Verfassungsauslegung (Stuttgart: W. Kohlhammer, 1961).
[53]Ernst Forsthoff, Festschrift für Carl Schmitt zum 70. Geburtstag: dargebracht von Freunden und Schülern (Berlin: Duncker & Humblot, 1959), pp. 35ff.
[54]Ibid.,p.41.
[55]Ibid., pp.51-59.
[56]Franz Jerusalem, Die Zersetzung im Rechtsdenken (Mainz:Kohlhammer Verlag, 1968).

Notwithstanding the foregoing, as Larenz observed, this danger is less threatening due to hermeneutic perspectives and the application of scientific-spiritual methods in legal science, than due to the acceptance of purely casuistic thought in the interpretation of the constitution.[57]The idea that law enforcement does not end in subsumption, but requires the appraisals of whoever applies it, and the need to obtain standards of assessment from the constitution, make it essential to apply 'scientific-spiritual' methods when interpreting the constitution.

Experience has shown that it is impossible to create a code that has an answer to all questions that may arise—that laws not only have inevitable lacunas, but that it is only possible to verify from where they arise pursuant to multiple considerations and by means of very different judgements, which also include the value kind. The basic hermeneutic idea states that understanding texts, namely, the spiritual content that they express, their meaning, is a process in which the subject who understands does not only behave receptively, but nearly always spontaneously. The result thus transcends what was initially being said in the text in an evident manner. For this reason, law enforcement is only possible in an ongoing process of concretion. Consequently, the application of a norm cannot end in a process of subsumption, which the jurisprudence of concepts assumed was evident.[58]

An unquestionable contribution of the jurisprudence of concepts is the elaboration of an abstract-conceptual system, constructed according to the principles of the subordination of always more special concepts under others with a very broad scope (of application), but with always much less content. This system finds its expression in the external regulation of laws and in numerous conceptual divisions (for instance, public/private law, nullity/revocability, etc.). In contrast, this system does not make any contribution to the concept of legal connections or to resolving blatant legal problems.

Engisch was one of the first jurists to take a critical stance on the idea of a system in legal science.[59] Above all, he set out why a strict axiomatic system, according to mathematics, was impossible in jurisprudence. Such a system would first require a fixed number of basic concepts or axioms, logically compatible with each other and always ultimate, to wit, underivable. Secondly, from the most general concept to the most special in jurisprudence so much material has to be mastered that the purely deductive takes second place to the acts of knowledge required by it. Lastly, the legal principles from which they are apparently deduced are intertwined and limited by other legal principles, thus making simple derivation now impossible, for this requires decisions that indicate which principle is ranked above another.

In spite of his clear preference for 'case law' and 'problematic thinking', nor did Esser[60] want to renounce all systematic constructions in jurisprudence. He drew a distinction between the 'closed system', represented by the idea of coding, and the 'open system', as it is ultimately configured also in a casuistic law (because this does not surface 'in the long term without a connection of conceptual and evaluative derivation' that makes particular decisions rationally demonstrable and converts its whole into a system). To Esser's mind, it was here where a historical law emerged: a cycle consisting of the discovery of problems, the formation of principles and the consolidation of the system has been repeatedin all legal cultures.

While the intention of a closed legal system is to provide an answer to all imaginable legal questions, which can be inferred from the system by means of logical mental operations, an open system does not have that intention. This leads to a mutual understanding of already existing solutions to each problem, thus facilitating their recuperation and application to similar problems. But it remains open to new problematic perspectives, for which reason it does not seek more validity than the provisional kind.

Coing,who, as with Esser, also endorsed problematic thinking and, at the same time, was a proponent of the 'jurisprudence of values', stressed the importance of systematic work in legal science.[61]

A science (Coing declared) that only deals with particular problems would not be in a position to make progress in the discovery of greater connections between problems for new principles: such a science would not recognise the affinity between the function of differently established positive legal norms and institutions in a legal comparison. However, the system should remain open, for it is just a provisional synthesis.

Be that as it may, there are different concepts of system. According to Canaris,[62] the axiomatic-deductive system, in a logical sense, is inappropriate for legal science, for such a system requires a lack of contradiction and the completeness of axioms as a basis. Nor is the logical system of the jurisprudence of concepts adequate, owing to the fact that the internal unity of meaning of law, which makes it possible to encompass law in the system, is not of a logical—corresponding to its derivation from the idea of justice—but evaluative nature, that is, axiological. Neither an external system built solely for presentation purposes or for

[57] Larenz, Metodología, pp. 162-163.
[58]Ibid., p. 167.
[59]KarlEngisch, "Sinn und Tragweite juristischer Systematik", Studium Generale 10 (1957), pp. 173ff.
[60] Esser, Grundsatz, p. 7.
[61] Coing, Grundzüge, pp. 347ff.
[62]Claus-Wilhelm Canaris, Systemdenken und Systembegriff in der Jurisprudenz (Berlin: Duncker & Humblot, 1969), pp. 50ff.

facilitating an overview, nor a 'conflict-resolution system', nor a system of purely formal basic concepts (such as that proposed by Stammler), nor a system of connections of problems or life are appropriate for understanding this unity of meaning. This leaves a system as an 'axiological or teleological order' of guiding value criteria. Unlike a system of general legal concepts, this is a system of legal principles, a principle being understood, in contrast to a concept, as an open guideline that needs to be concretised. All in all, the formation of concepts is necessary for preparing subsumption and, therefore, a respective system of legal concepts should be coordinated with that of legal principles.

Canaris explains the distinction between a system of legal principles and a system of concepts in the following terms:

Without exceptions, principles do not have validity and can mutually oppose each other; they are not meant to be exclusive. They develop their peculiar content of meaning only in harmony with their reciprocal supplements and limitations. Moreover, their creation requires that they be concretised by means of sub-principles and assessments and, therefore, areunsuitable for being applied immediately. Rather, it is necessary to connect constantly with new independent assessments.

This leads to the opening of a system formed by legal principles. To these should be added the historical mutability of the legal system, including the assessments that it involves.

Conclusions and new challenges: from evaluative to digital methodology

As noted above, the role of methodology consists in clarifying the structures of thought and forms of reasoning that are deployed when judges follow assessment guidelines in order reach the fairest decisions possible within the scope of the law and law. Jurisprudence can thus be considered as a science, insofar as it applies methods for obtaining a rationally demonstrable knowledge of existing law. And, as such, it is a comprehensive science that interprets the material—viz. the norms and institutions of positive law—with which it is provided in a specific way.

As professionals, judges aspire to arrive at fair decisions and, in that task, there is often tension between their link to the law and to law imposed by the rule of law. Throughout history, this link has been understood in different ways. In current rules of law, and after confirming the dire consequences that an irrationality in the formal logical dependence of the law has had for the effective application of justice, it is understood that the law enforcement of judges has a certain creative character that the law per se considers when requiring interpretation. As a matter of fact, the fidelity to the law and the justice of the case are not in rigid opposition, but there are normally broad areas in which fair solutions can be arrived at within the legal framework.

So, jurisprudence should not only understand linguistic expressions, but also comprehend the normative meaning that they possess. The conclusion arrived at by judges, in their interpretation of a legal norm, is not logically binding, but a choice motivated by sufficient reasons between different possibilities of interpretation.

This process of understanding the meaning of a norm is not linear, like a logical chain of conclusions. Judges, as interpreters, delve into the text with a 'pre-understanding' of its language and the matter at hand and, on that basis, formulate an initial hypothesis of integrity grounded in an assessment.

To talk about assessment in jurisprudence does not mean that legal methodology allows for the least room for personal stance taking. Quite to the contrary, value-focused thinking involves rationally analysing most of the problems arising in human life. Jurisprudence has created value-focused thinking methods that can be equated with the methods of other sciences that, in principle, are free of any kind of value judgements.

In the second decade of the twenty-first century, following the consolidation of the information society and the digital age, the problems arising in the framework of legal methodology have acquired new nuances. As noted above, value-focused thinking has marked a new stage in the legal field which makes it impossible to return to a jurisprudence of concepts or a conception of jurisprudence implying the mere subsumption of facts to legal norms. However, the advent of the Internet and digital technologies has had unforeseen consequences for the field of law and the methodology of legal science, some of which have been put forward by quite a few as arguments against the evaluative activity of judges.

Nowadays, information and communication technologies (hereinafter ICTs) are present in the majority of the fields of law. In the sphere of the administration of justice, they are crucial for safeguarding jurisprudence, the transparency of the judicial body and public institutions in general, legal education and, above all, legal research as regards its two most important methodologies: empirical-qualitative and quantitative.[63]

The changes introduced by ICTs have not only allowed for digitising huge quantities of information, but also nowprovide users immediate access to the legislation that courts and all those who implement the law may require. Thus, it would initially seem that the work of judges and all those intervening in the process has

[63]Ana Luz Ruelas Monjardín, "Metodología jurídica digital: conceptualización y problemática para su construcción", Derecho y Cambio Social (2019), p. 719. Available at: www.derechoycambiosocial.com(last accessed 12 February 2021).

been expedited by the fact that they now have all the legislation available to them on their tablets and even mobile phones. There is now no turning back in the application of digital technologies in both common and continental law systems. Nowadays, courts of justice are equipped with close-circuit television and Internet connections that allow forfilming and broadcastingsessions, accessing online records and notifying and publishing online judicial proceedings, as well as enabling litigants to monitor cases in real time.

The capacity that judges and courts have to access online information on sentences, information contained in past and present records, legal statistics and any other type of legal information relevant to the resolution of specific cases, poses new questions about their interpretative and evaluative work. Artificial intelligence (hereinafter AI), applied to specialised software, makes it possible to review thousands of legal briefs and case records so as to present courts with applicable precedents. There are software packages, like CaseMine, which suggest changes in legal reports in order that they should have a harder tone and propose additional documents for reinforcing a line of reasoning.[64]

In practical terms, however, guaranteeing secure and reliable access to data and reports generated by public institutions, including judicial bodies, is a complex and expensive task: there is still much work to be done beforethe public administrations in general are fully digitised.

Notwithstanding the foregoing, progress is being made in leaps and bounds. In the administration of justice, for instance, access to cloud-based information systems, in which digital security is the main stumbling block, is having a huge impact.[65]The trail left by the use of digital media, the so-called 'digital footprints', provides digital evidence that is currently of vital importance in the outcome of trials. In the field of judiciary, the footprints that have the greatest repercussions are those to found in mobile phones and laptops. Their official recognition is not problem-free, above all as regards the use of recordings, photos and videos, which can be employed for reconstructing events, as evidence. By and large, the validity of digital evidence should meet documentary requirements before it is admissible in court. As before, reliability, veracity and security issues are all major challenges for the interpretative and evaluative work of judges and courts.

In sum, in the framework of legal and administrative processes, the request for digital evidence and its provision and assessment are currently of paramount importance for confirming the existence of offences and the responsibility of the offenders, as well as for the field of specialised legal research. The possibility of including a code in public documents which can be scanned has also been suggested. This would generate the desired certainty and would dispense with the need for requesting witnesses, experts and defendants to scrutinise them in court.[66] Technological possibilities like these, applied in both the pre-trial stage and during the oral hearing, seem to hold the promise of more objective legal decisions. As already observed, some of those who are critical with the jurisprudence of values are, for the sake of legal certainty, calling for a return to the jurisprudence of concepts and to the automatic subsumption of facts to an applicable legal norm. To my mind, however, reality has shown that the administration of justice is an essentially human activity and, therefore, cannot be exclusively performed by a robot or AI. It is true that technology can make, and is making, a valuable contribution to the clarification of facts and precedents and to the arduous task of normative and jurisprudential research, but the application of a legal norm to a specific case will always be a creative task. The professionalism of judges will ultimately be essential so that the legal methodology applied in each specific case should lead to the fairest decision possible.

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