

Law-enforcement in turbulent times – how to work with principles in capital markets law

Thomas M. J. Möllers, Isabella Brosig

Angaben zur Veröffentlichung / Publication details:

Möllers, Thomas M. J., and Isabella Brosig. 2019. "Law-enforcement in turbulent times – how to work with principles in capital markets law." In *Legality and limitation of powers: values, principles and regulations in civil law, criminal law, and public law*, edited by Charl Francois Hugo and Thomas M. J. Möllers, 135–76. Baden-Baden: Nomos.
<https://doi.org/10.5771/9783845291635-135>.

Nutzungsbedingungen / Terms of use:

licgercopyright

Dieses Dokument wird unter folgenden Bedingungen zur Verfügung gestellt: / This document is made available under these conditions:

Deutsches Urheberrecht

Weitere Informationen finden Sie unter: / For more information see:

<https://www.uni-augsburg.de/de/organisation/bibliothek/publizieren-zitieren-archivieren/publiz/>





Charl Hugo/Thomas M.J. Möllers (eds.)

Legality and Limitation of Powers

Values, Principles and Regulations in Civil Law,
Criminal Law, and Public Law



Nomos



Contents

Preface	5
Contents	7
<i>Thomas M.J. Möllers / Charl Hugo</i>	
Introduction	11
<i>Thilo Rensmann</i>	
Normative Values in Modern Constitutionalism Reflections on the Constitution as an "Objective Value System" 60 years after <i>Lüth</i>	19
<i>Roxan Venter</i>	
Comment: Constitutional Values and Transformative Constitutionalism	35
<i>Jennifer Hölzlzimmer</i>	
The Concept of Constitutional Identity in (Quasi-) Federal Systems of Government – From Limitation of Powers to Judicial Policy Making	41
<i>George Barrie</i>	
Comment: "The Concept of Constitutional Identity in (Quasi-) Federal Systems of Government – From Limitation of Powers to Judicial Policy Making"	63
<i>Matthias Rossi</i>	
Democratic Flexibility and Constitutional Stability	69
<i>Mispa Roux</i>	
Comment: "Democratic Flexibility and Constitutional Stability"	85

Martina Benecke

Discrimination in Working Life and Anti-Discrimination Law – Experiments and Experiences in Germany and Europe	99
--	----

Radley Henrico

Beyond Mere Rules and Regulatory Frameworks: A Reply to M. Benecke, “Discrimination in Working Life and Anti-Discrimination Law – Experiments and Experiences in Germany and Europe”	119
--	-----

Thomas M.J. Möllers / Isabella Brosig

Law-Enforcement in Turbulent Times – How to Work with Principles in Capital Markets Law	135
---	-----

Derek van der Merwe

Comment: “Law Enforcement in Turbulent Times – How to Work with Principles in Capital Markets Law”	177
--	-----

Michael Kort

Leniency Programmes under US Antitrust Law and EU Competition Law	185
---	-----

Wim Alberts

Aspects of the Corporate Leniency Program in South African Competition Law	207
--	-----

Michael Biesinger

20 Years after ARAG/Garmenbeck: New Considerations on the Impact of Corporate Reputation on Management Board Liability	213
--	-----

Kathleen van der Linde

The Impact of Corporate Reputation on Board Liability	259
---	-----

Wolfgang Wurmnest / Maximilian Kübler-Wachendorff

The Constitutionalization of Public Policy in Private International Law	267
---	-----

Jan L. Neels / Eesa A. Fredericks

The Various Roles of Public Policy in Private International Law: Exclusion, Inclusion and Reform on the Basis of Constitutional Values	311
--	-----

Stefan Lorenzmeier / Hennie Strydom

External Trade Agreements of the European Union and South Africa – Association Agreements versus Economic Partnership Agreements?	321
---	-----

Law-Enforcement in Turbulent Times – How to Work with Principles in Capital Markets Law

Thomas M.J. Möllers*

Isabella Brosig**

Abstract: *The search for, establishment, and application of new legal principles is among the most challenging of legal methods for academics, lawyers, and judges. One precondition for formulating new principles is a consistent internal and external legal system of terms, conditions and values – a system that was fostered by several Pandectists (German legal scholars) in the early 19th century. Once established, principles may fill gaps in the law, may be used as one argument among many to find a balanced solution, and may even establish the supremacy of one solution over the other. They may thus provide the necessary flexibility to find solutions and enforce rules and regulations – especially in the fast-paced and ever-changing capital markets.*

I.	Introduction and structure of the paper	136
II.	What characterises a legal principle	140
III.	The derivation of legal principles	142
1.	Codified principles	142
2.	The derivation of unwritten legal principles	143
a)	Previous attempts justifying the derivation of general legal principles	144
b)	Induction: a systematic and valuing comparison for the derivation of new general legal principles	146
IV.	Limits to the development of legal principles and the rules and legal doctrines derived hereby	148

* Thomas M.J. Möllers, *Dr. iur.*; Professor, University of Augsburg Faculty of Law. Managing Director of the Center for European Legal Studies. Chair for Civil Law, Economic Law, European Law, Private International Law and Comparative Law.

** Isabella Brosig, Academic Assistant at the Chair of Thomas M.J. Möllers.

1.	Rejecting the arbitrariness of a legal dogmatic justification	148
2.	Rejection of empty phrases (interpretation of contracts, nature of the matter)	148
3.	Justification derived from the valuations and limits of the law	149
V.	Deduction: Specification and scope of principles	149
1.	The specification of a legal principle in general	150
a)	Priority of a legal principle	150
b)	Development of categories, sub-categories and similar factual conditions	150
c)	From legal principle to legal rule	150
d)	Conflicting legal principles	151
2.	Example of capital markets law: the principle of the rational investment decision	152
a)	Extent of damages: rational investment decision and recession	152
b)	Conflicting legal principles	154
VI.	Formation of principles at the European level	157
1.	Extraction of principles through comparative law	157
a)	Reference to the general principles of law or constitutional traditions of the Member States	157
b)	Isolated codification of European legal principles	160
2.	General legal principles of European civil law from the classification of European law	160
a)	Difficulties at the European level	160
b)	Legal principles of European civil law	161
3.	Limits to legal development at the European level	163
a)	Insufficient justification	163
b)	Conflicting legal principles	164
VII.	Outlook	164
	Bibliography	165
	Register of Cases	173

I. Introduction and structure of the paper

In our society, being principled is usually seen as a positive character trait for an individual to have. People who stand by their principles are consid-

ered to be strong-willed, sincere, and straightforward. In this respect, politicians and elected representatives are far too often assumed to put honest convictions aside during elections in order to secure power and influence, or of acting opportunistically in the interests of the strongest lobby, and against the interests of the sovereign people. 'Politics without principles' is one of Gandhi's famous seven deadly sins of modern society.¹ It is therefore hardly a new insight that both Germany's Basic Law (GG) and the ordinary law are permeated with numerous principles which are meant to ensure that the law is as straightforward as possible.

However, it is all the more astonishing that only a few of these legal principles are set out in positive law. So, for example, there is as little explicitly recorded on the principle in the law of obligations of freedom of contract² in the German Civil Code (BGB) as there is on the principle of contractual fidelity (*pacta sunt servanda*).³ However, no one seriously disputes the existence and applicability of these principles. On the contrary, other states have codified numerous principles.⁴ It is generally assumed that the BGB presupposes that these principles are obviously valid.⁵

- 1 Mahatma Gandhi, 'Seven Social Sins', *Young India* No. 43 (October 22, 1925), 361: "politics without principles".
- 2 The term is even referred to in the *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich* (Statements on the Draft of a Civil Code for the German Reich), Volume 2 (1896), p. 2: "By virtue of the principle of freedom of contract, which governs the law of contractual obligations, the parties can determine their legal relationships and associations between themselves at their discretion with binding effect, insofar as there are no conflicting general or specific individual absolute legal provisions."
- 3 In contrast, the principle was even found in the original Article 77 of the *Entwürfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich* (Draft of a Civil Code for the German Reich) (1888): "In order to conclude a contract, it is necessary for the contracting parties to declare their corresponding intentions to each other"; This Article 77 was then deleted by the second commission, see Commission's Report, p. 156, in: Mugdan, *Die gesamten Materialien des Bürgerlichen Gesetzbuchs für das Deutsche Reich*, Volume I (1899), p. 688.
- 4 For *pacta sunt servanda*, see fn. 64, for instance; for the violation of moral principles, see fn. 70.
- 5 Thus Werner Flume, 'Rechtsgeschäft und Privatautonomie', in: Ernst von Caemmerer, Ernst Friesenhahn and Richard Lange (eds), *Festschrift zum hundertjährigen Bestehen des Deutschen Juristentages 1860-1960* (1960), 135 (136 et seq.); Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts, Das Rechtsgeschäft*, Volume 2 (1965), Section 1.1, 1; agreeing Claus-Wilhelm Canaris, 200

However, there are also explicitly stated legal principles. The Basic Law (GG) already contains the best known: fundamental rights are principles *par excellence*. At the European level, it is particularly important to mention the fundamental freedoms set out in the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (CFR). The mere fact that legal principles dominate our highest-ranking codifications shows their enormous importance in reaching legally sound decisions, and forces legal scholars to discuss them.

This paper discusses the issue of whether and how legal principles can be called upon to resolve questions of law in German and European company, capital markets and antitrust law. The purpose of legal methodology is to clarify how legal principles affect the resolution of a case, and how they can be usefully harnessed for this purpose. The main area of application of methodological work with legal principles is to instances where the law does not provide a resolution – or at least does not contain a clear resolution – to a legal problem. If there is a gap in the law, such cases need to be resolved by a court. This is because the judge is obligated to make a decision.⁶ Moreover, the judge cannot simply decide, but rather needs to be able to justify the decision rationally with good arguments.⁷ For this purpose, the judge can make use of the appraisals of existing law as part of an extensive methodological arsenal, and develop a solution from these. In particular, in addition to the option to interpret existing laws, the judge also has

(2000) *Archiv für die civilistische Praxis (AcP)*, 273 (277); Reinhard Bork, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs* (4th Edition, 2016), para. 99.

6 Ludwig Enneccerus and Hans Carl Nipperdey, *Lehrbuch des Bürgerlichen Rechts* (15th Edition, 1957), 336; Arthur Meier-Hayoz, 36 (1981) *JuristenZeitung (JZ)*, 417 (417), Bernd Rüthers, Christian Fischer and Axel Birk, *Rechtstheorie* (8th Edition, 2015), para. 314; see also Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th Edition, 1991), 368 (402); Historically on the so-called prohibition on denying justice see Ekkehard Schumann, 81 (1968) *Zeitschrift für Zivilprozeß (ZZP)*, 79 (83 et seq.); Marie Theres Fögen, 'Schrittmacher des Rechts – Anmerkungen zum Justiz- und Rechtsverweigerungsverbot', in: Heinrich Honsell (ed), *Privatrecht und Methode: Festschrift für Ernst August Kramer* (2004), 3 (3 et seq.).

7 On the obligation to give reasons, German Federal Constitutional Court (BVerfG) 19.05.1992 – 1 BvR 986/91 – BVerfGE 86, 133 (144 et seq.); see from the ordinary law, Sec. 30 (1) German Federal Constitutional Court Act (BVerfGG); Sec. 313 (1) No. 6 (3) Code of Civil Procedure (ZPO); Sec.s 267 (1), 275 Code of Criminal Procedure (StPO) or Sec. 117 (2) No. 5 Rules of the Administrative Courts (VwGO); Sec.s 60 (2), 4, 96 (2) Labour Courts Act (ArbGG).

the power to develop the law.⁸ The judge must therefore inevitably pose the question as to how to resolve a legal problem in the spirit of the existing law when it is not regulated. The judge has to explore existing appraisals of the law, and harness them to solve the specific legal problem.

A line of argument based on principles gains its power of persuasion from this alone. Principles provide for stability in law, legal certainty, and transparency. Principles can also only be rebutted with difficulty; they have a superordinate character compared with individual selective legal provisions. Objections can only be raised against them with difficulty – unless one can claim that the circumstances are sufficient for an exception to the principle. However, for this one then bears the burden of argumentation.

Despite the advantages of reasoning with legal principles, there is also a risk that the mere reference to a principle replaces the deeper analysis of the specific case and its circumstances, and thus the justice of the individual case might get left behind. Decisive aspects of the individual case that could force a departure from the principle are in danger of being overlooked. Furthermore, the fact that legal principles are often uncoded can lead to a temptation to ‘invent’ new legal principles without sufficient connection to the existing law. Moreover, the lack of precise determination of their scope – particularly for unregulated legal problems – opens the floodgates to decisions being made without transparent justification and, ultimately, to arbitrariness.

It is therefore necessary to identify legal principles from a methodological point of view, and clarify the question as to whether and how they can be called upon to resolve the specific case without constitutional objections. For this purpose, the first requirement is a conceptual and characterising delimitation and narrowing down (section B). Following this, the prerequisites for the development and formation of legal principles must be clarified (section C) and the limits in their evolution must be demonstrated (section D). The focus then turns to the application of legal principles as a methodological construction in the specific individual case (section E). Eventually, a methodological consideration of legal principles at the European level is required (section F).

8 Explicitly BVerfG 14.02.1973 – 1 BvR 112/65 – BVerfGE 34, 269, 286 et seq. – Soraya; BVerfG 08.04.1987 – 2 BvR 687/85 – BVerfGE 75, 223, 243 et seq. – Kloppenburg.

II. What characterises a legal principle

A definition of a 'general legal principle' must include various components. In the same way that legal doctrine is more than the law,⁹ so legal principles are more than the legal norms of the laws. Legal principles develop from the totality of the written and unwritten legal norms. Principles build structures that underlie the law.¹⁰ They create meaning by means of their interaction and allow for a certain degree of generalisation.¹¹ Like the concept of good faith in Section 242 of the Civil Code (BGB), they are only codified by way of exception¹² – which is why they are often obtained from development of the law.¹³ Consequently, there are numerous codifications that refer to the general legal principles as part of permissible development of the law.¹⁴ Instead of deriving principles simply from 'justice' or 'legal concord', they must be obtained from the legal system. Many principles claim normative validity and give rise to presumptions.¹⁵ Legal rules are labelled as legal principles although they are often "undeserving of that term".¹⁶ Before principles can be subsumed, they need to be further substantiated. Working with legal principles methodically requires two steps (see below).

9 Here Andreas Voßkuhle, 'Neue Verwaltungswissenschaft', in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, Volume 1 (2nd Edition, 2012), § 1 para. 6; see the various conceptualisations for Christian Waldhoff, in: Gregor Kirchhof, Stefan Magen and Karsten Schneider (eds), *Was weiß Dogmatik?* (2012), 17, 22 et seq.; Christoph Möllers, 'Methoden', in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, Volume 1 (2nd Edition, 2012), § 3 para. 35 et seq.

10 Klaus Friedrich Röhl and Hans Christian Röhl, *Allgemeine Rechtslehre* (3rd Edition, 2008), § 33 I., 283.

11 Jürgen Basedow, 200 (2000) *Archiv für die civilistische Praxis (AcP)*, 445 (453). In detail also Claus Wilhelm Canaris, *Die Feststellung von Lücken im Gesetz* (2nd Edition, 1983), 47 et seqq.

12 Also Ernst August Kramer, 'Funktionen allgemeiner Rechtsgrundsätze – Versuch einer Strukturierung' in: Helmut Koziol, Peter Rummel (eds), *Im Dienste der Gerechtigkeit: Festschrift für Franz Bydliński* (2002), 197 (203).

13 Karl Larenz (Fn. 6), 421 as 'legal discovery'.

14 Thus Sec. 46 Introduction. Preuß. ALR: "If there is no law... the judge must decide based on the general legal principles adopted by the statute;" explicitly also Sec. 7 ABGB: "make a decision according to the natural principles of law".

15 Klaus Friedrich Röhl and Hans Christian Röhl (Fn. 10), § 33 I, 284.

16 Explicitly on the following Klaus Friedrich Röhl and Hans Christian Röhl (Fn. 10), § 33 I, 283.

Building on Dworkin and Esser,¹⁷ Alexy developed a theory of basic rights.¹⁸ According to his strict hypothesis of differentiation, principles are in direct contrast to rules,¹⁹ although distinct limits do not exist. Rules – namely, norms that can be subsumed – are either satisfied or not satisfied. The decision is made on the basis of factual elements or similar factual conditions. But principles do not necessarily lead to a decision, because they need to be balanced with other principles.²⁰ Thus, principles establish requirements for optimisation.²¹ They allow for rational decisions, for instance, by defending a minor violation of a legally protected right with serious reasons for violation.²² Viewing principles as requirements for optimisation is considered commonplace.²³ The hypothesis of differentiation is able to consistently describe the basic rights' mode of action when applying the principle of proportionality.²⁴

A large part of academic literature, however, adopts a critical attitude towards the claim of Alexy's theory to absoluteness.²⁵ The differentiation between principles and rules cannot be derived from the Constitution.²⁶

17 Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (4th Edition, 1990), 39 et seqq., 87 et seqq.

18 Whereas Ronald Dworkin, *Taking Rights Seriously* (1977), 278 et seqq. adopted the 'one right answer'-Theory; Robert Alexy, 25 (1985) *Archiv für Rechts- und Sozialphilosophie – Beihefte (ARSP-B)*, 13 (28) rejects such.

19 Robert Alexy (Fn. 18), 13, 15 et seqq.

20 Ronald Dworkin, *Taking Rights Seriously* (2nd Edition, 1978), 26.

21 Robert Alexy (Fn. 18), 13 (19); *ibid.*, *Theorie der Grundrechte* (1986), 75 et seqq.; *ibid.*, 18 (1987) *Rechtstheorie*, 405 (407); concurring Karl Larenz (Fn. 6), 475; Nils Jansen, *Die Struktur der Gerechtigkeit* (1998), 106 et seqq.; Anne Röthel, *Normkonkretisierung im Privatrecht* (2004), 146 et seqq., 225 et seqq.

22 Robert Alexy, 61 (2002) *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)*, 7, 18 et seqq.; before *ibid.* (Fn. 21), 143 et seqq.

23 Matthias Jestaedt, *Grundrechtsentfaltung im Gesetz* (1999), 213: "widely met with approval."

24 Matthias Jestaedt, 'Die Abwägungslehre – ihre Stärken und ihre Schwächen', in: Otto Depenheuer, Markus Heintzen and Peter Axer (eds), *Staat im Wort: Festschrift Josef Isensee* (2007), 253 (258 et seq.); Jan Henrik Klement, 63 (2008) *JuristenZeitung (JZ)*, 756 (761).

25 Josef Franz Lindner, *Theorie der Grundrechtsdogmatik* (2005), 54; Jan Henrik Klement (Fn. 24), 756 et seqq.; *ibid.*, 64 (2009) *JuristenZeitung (JZ)*, 560 et seqq.

26 Josef Franz Lindner (Fn. 25), 54.

Thus, it is not clear when a norm is a principle or when it is a rule.²⁷ This is also why critics oppose the hypothesis of differentiation, thus giving a clear differentiation between principles and rules. After all, there is a danger that the courts might obtain new competences as a result of the requirements of optimisation that do not arise out of the Constitution.²⁸ Sieckmann further developed the theory of principles, and more carefully considers principles only as “rudiments of argumentation”.²⁹

III. The derivation of legal principles

1. Codified principles

If a principle is codified, the question of its derivation is unnecessary. Here, the only issue is whether a law ‘elevated’ into a legal principle – and thus having a ripple effect on other provisions – can be taken into consideration for their interpretation, or can serve as the basis for further development of the law in the area of law concerned. First, there is the possibility that the law itself ascribes the status of a legal principle to a legal rule. Article 5(1) sentence 1 (3) TEU, for example, explicitly speaks of the principle of conferral and of the principle of subsidiarity. But one rarely finds such clear statements in German law.³⁰

If such a clear legislative emphasis is missing, the distinction between procedural and substantive practicability developed by *Jhering* may help in clarifying whether a codified law is a principle or a rule. According to the

27 Michael Sachs, ‘Die Grundrechte als objektives Recht u. als subjektives Recht’, in: Klaus Stern (ed), *Das Staatsrecht der Bundesrepublik Deutschland*, Volume III/1 (1988), § 65, 502; Matthias Jestaedt (Fn. 23), 214; *ibid.* (Fn. 24), 253 (261); Jan Henrik Klement (Fn. 24), 760.

28 Martin Gellermann, *Grundrechte im einfachgesetzlichen Gewand* (2000), 71; Josef Franz Lindner (Fn. 25), 55; Jan Henrik Klement (Fn. 24), 560 et seq.; warning Bernd Rüthers, Christian Fischer and Axel Birk, *Rechtstheorie* (8th Edition, 2015), para. 757a.

29 Jan Sieckmann, *Recht als normatives System* (2009), 41 et seqq.

30 For example, critical of the “General Principles” set out in Sec. 3 German Securities Acquisition and Takeover Act (WpÜG), Peter Versteegen, in: Heribert Hirte and Christoph von Bülow (eds), *Kölner Kommentar zum WpÜG* (2nd Edition, 2010), § 3 para. 2: Declared aims, use of which is questionable; Ulrich Noack and Timo Holzborn, in: Eberhard Schwark and Daniel Zimmer (eds), *Kapitalmarktrechts-Kommentar* (4th Edition, 2010), § 3 para. 1.

opposing view by *Alexy* discussed above, the distinction between principles and rules has only a gradual nature.³¹ Legal norms are formally practicable depending on the ease and safety with which they can be applied to the specific case. Consequently, a schematical age limit regulating the legal age is significantly more practical than determining the “necessary comprehension and strength of character”³². Legal norms are substantively practical if, as principles, they allow for single-case justice because the relevant valuation is clearly discernible³³ – as, for instance, under the general right to protection of personality or the standard of negligence according to Section 276(2) of the Civil Code (BGB).³⁴ Thus formal and substantive practicability are complementary.³⁵ According to this distinction, rules are formally practicable, but principles are substantively practicable legal provisions.

Based on their breadth and vagueness, the ‘general rules of conduct’ under Section 63(1) (formerly Section 31(1)) of the German Securities Trading Act (WpHG) need to be fleshed out and further specified, and may therefore be considered as substantively practicable principles instead of rules.

2. The derivation of unwritten legal principles

It is more difficult to derive legal principles that are not explicitly stated. In large parts of the ordinary law, this is actually the norm. For this purpose, there are several different approaches.

31 For example Marietta Auer, *Materialisierung, Flexibilisierung, Richterfreiheit* (2005), 48, 135.

32 Rudolf von Jhering, *Geist des römischen Rechts*, Volume 1 (4th Edition, 1878), 51, 53.

33 Duncan Kennedy, 89 (1976) *Harvard Law Review* (*Harv.L.Rev.*), 1685 (1688) mentions “good faith, due care, reasonableness”; Jack M. Balkin, 39 (1986) *Rutgers Law Review* (*Rutgers L. Rev.*), 1 (44).

34 Marietta Auer (Fn. 31), 48, 54 et seqq.

35 Josef Esser, ‘Realität und Ideologie der Rechtssicherheit in positiven Systemen’, in: Siegfried Hohenleitner, Ludwig Linder and Friedrich Nowakowski (eds), *Festschrift für Theodor Rittler* (1957), 13 (14): “Plurality of style and content” („Pluralität von Form und Inhalt“); Jack M. Balkin (Fn. 33), 43 et seqq.

a) Previous attempts justifying the derivation of general legal principles

Dworkin describes principles as standards that, without being rules, may be suitable as arguments for individual rights.³⁶ They need to be specified by balancing, and constitute requirements for optimisation.³⁷ In specifying principles, however, such a formal description is only partially suitable. In particular, in this way legal principles are still not derived on the basis of the law.

Some would like to explain legal principles from a historical perspective.³⁸ It is certainly the case that numerous legal principles come from centuries of tradition – in some cases even millennia.³⁹ Legal constructions such as the prohibition in *laesio enormis* or *clausula rebus sic stantibus* can only provide initial approaches to justifying the current principles of law or legal rules. On closer inspection, however, one will find that many legal principles have developed over the centuries. Because conditions change, the comparison with the historical examples is not always convincing.⁴⁰ Ultimately, the necessary flexibility would not be achieved by forming new principles if these were derived exclusively from the past.⁴¹ Legal doctrine,

36 Ronald Dworkin (Fn. 18), 90.

37 On Civil Law, thus Manfred Wolf and Jörg Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* (10th Edition, 2012.), para. 4 para. 49.

38 See the examples in Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (4th Edition, 1990), 317 et seq.; Joachim Rückert, 'Das BGB und seine Prinzipien', in: Mathias Schmoeckel, Joachim Rückert and Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB* (2003), § 1 para. 80 et seq.; and Reinhard Zimmermann, *Law of Obligations* (1992); *ibid.*, 47 (1992) *Juristenzeitung (JZ)*, 8 et seq.; *ibid.*, 193 (1993) *Archiv für die civilistische Praxis (AcP)*, 121 et seq., who calls for a European *ius commune*.

39 See, for example Aristotle, *Nicomachean Ethics*, 5th Book, 4–9 (Justice and Fairness); Art. 104 et seq. *Constitutio Criminalis Carolina* (CCC) of 27/07/1532 (Principle of Legality); Christian Wolff, *Grundsätze des Natur- und Völkerrechts* (1754), § 438: "When two or more jointly agree on one or more promises, it is a contract (*pactum* or *pactio*).", (*pacta sunt servanda*); Ulp.D. 1.1.10.1. "Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere" (*alterum non laedere*).

40 See only the various groups of cases of frustration of contract which have developed in the course of time in the case law. For example, the overview in Christian Grüneberg, in: Otto Palandt (ed), *BGB* (77th Edition, 2018), § 313 para. 25 et seq.

41 Critical against Reinhard Zimmermann (Fn. 38) for example, Dieter Simon, 11 (1992) *Rechtshistorisches Journal*, 574 (577 et seq.); Wolfgang Wiegand, 12

correctly understood, does not remain in the jurisprudence of concepts, but instead changes with the requirements of the legislature and case law.⁴²

Some describe principles as legal and as having a hybrid status between law and morals because they comprise elements of both.⁴³ Larenz described principles as guiding criteria of legal standardisation that are able to justify decisions on the basis of their own persuasiveness.⁴⁴

Legal principles have already been traced back to early legal ideas such as justice, practicality and legal certainty.⁴⁵ Certain forms of justice by *Aristoteles* have been referred to as natural law. Ultimately, such legal ideas claim higher standards than legal principles. Such values,⁴⁶ however, are too general for the resolution of a case. They need to be further substantiated.⁴⁷

Deriving principles directly from the valuations of legal rules and regulations, therefore, seems more persuasive. Consequently, deriving legal principles legal literature favours induction – which means making an inference from the specific to the general.⁴⁸ According to *Canaris*, deriving

(1993) *Rechtshistorisches Journal*, 277 et seq.; Friedrich Kübler, 12 (1993) *Rechtshistorisches Journal*, 307 (310 et seq).

42 Thus Rudolf von Jhering, *Geist des römischen Rechts*, Volume 1 (4th Edition, 1878), 14: “Through Roman law, but beyond it”; here Wolfgang Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, Volume II (1976), 165. On the necessary flexibility, see Winfried Brohm, 30 (1972) *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)*, 245 (249); Uwe Volkmann, 60 (2005) *Juristenzeitung (JZ)*, 261 (262 et seq).

43 Franz Bydlinski, *Fundamentale Rechtsgrundsätze* (1988), 128.

44 Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th Edition, 1991), 421.

45 Before Gustav Radbruch, *Grundzüge der Rechtsphilosophie* (8th Edition, 1973), § 9, 164 et seqq.; Karl Larenz, *Richtiges Recht* (1979), 31 et seqq.; Arthur Kaufmann, *Rechtsphilosophie* (2nd Edition, 1997), 191 et seqq.

46 Wolfgang Fikentscher, *Methoden des Rechts*, Volume IV (1977), 394 et seqq.

47 Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (2nd Edition, 1991), 133; Axel Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht* (2009), 22.

48 Explicitly Aristotle, *Aristoteles' Erste Analytiken oder: Lehre vom Schluss* (Issue Kirchmann, 1877), 23. ch., 142; Francis Bacon, *Novum Organum*, Book I (1620, Issue Joseph Devey (ed), 1902), Aphorismus CIV, 82.

an idea is based on several legal provisions.⁴⁹ Some claim that principles result from an isolated analogy⁵⁰ or from a cumulative analogy.⁵¹

This description is too narrow, because legal principles cannot only be derived from several legal provisions. The isolated analogy frequently makes an inference from the specific to the specific; it frequently fulfils a missing factual element by comparing the missing element with the existing element. The general legal principle, however, is derived by making an inference from the specific to the general.⁵² The legal principle is, thus, usually broader than the provision(s) it is derived from. Moreover, *ratio legis* is only a means to an end of the methodical process construing an analogy. But carving out a general legal idea already constitutes the end.⁵³ The comparison to the cumulative analogy must be rejected as well, because the purpose is to close a gap. It requires the underlying case to show a large degree of congruence and comparability. The general legal principle, on the contrary, requires validity also for an indefinite number of cases that cannot yet be identified conclusively.⁵⁴ Eventually, the general legal principles can be based on other criteria of validity as well, whereas the cumulative analogy is derived exclusively from the general principle of legal equality.⁵⁵

- b) Induction: a systematic and valuing comparison for the derivation of new general legal principles

The systematic derivation of a general legal principle can be achieved through positive provisions. For example, the principle of promissory estoppel is based on Sections 171, 172 and 405 of the Civil Code (BGB). This

49 For example, Claus-Wilhelm Canaris (Fn. 11), 97 et seq. "One common legal concept is obtained by several statutory regulations and it is characterized as a general legal principle"; Neil MacCormick, *Legal Reasoning and Legal Theory* (1978), 153 et seq., 232 et seq.

50 For Section 254 BGB Christian Grüneberg, in: Otto Palandt (ed), *BGB* (77th Edition 2018), § 254 para. 3.

51 Ernst August Kramer (Fn. 12), 208; Axel Metzger (Fn. 47), 20, 161 et seqq.

52 Explicitly Claus-Wilhelm Canaris (Fn. 11), 98.

53 Claus-Wilhelm Canaris (Fn. 11), 98.

54 Claus-Wilhelm Canaris (Fn. 11), 98.

55 Claus-Wilhelm Canaris (Fn. 11), 98 et seqq.

principle, consequently, is valid for authority by estoppel⁵⁶ or apparent authority,⁵⁷ but also in commercial and corporate law.⁵⁸ It is also possible to derive a principle from a single provision.⁵⁹ It is generally accepted that the provision in Section 254 of the Civil Code on contributory negligence in the law of damages is considered to be a legal principle, and the concept of contributory negligence is to be understood in non-technical terms. Those who disregard the necessary duty of care when one of their legal interests is harmed breach an obligation, along with the actual injuring party. They are then to be accused of 'culpability to themselves', so that it would be unconscionable to claim full compensation.⁶⁰ The provision also applies outside of the law on damages to provisions that do not require any fault at all, such as strict liability,⁶¹ or the claim for compensation under neighbourhood law in Section 906(2) sentence 2 of the Civil Code⁶² or for the claim for disposal in Section 1004 of the Civil Code.⁶³ The principle also applies in public law.⁶⁴ Thus one can find principles that are only indirectly inferred from the law. This derivation is among the most difficult circumstances in which to determine the legal position. Therefore, principles such as freedom of contract and individual limits are to be substantiated further, which will be an issue further below.

-
- 56 BGH 15.10.1987 – III ZR 235/86 – BGHZ 102, 60, 64; without dogmatic derivation then: BGH 11.05.2011 – VIII ZR 289/09 – BGHZ 189, 346 para. 15 – Usage of another member's eBay account.
 - 57 BGH 20.01.1983 – VII ZR 32/82 – BGHZ 86, 273, 274 et seqq. – Authority by estoppel.
 - 58 Claus-Wilhelm Canaris, *Die Vertrauenshaftung im deutschen Privatrecht* (1971), 150 et seqq.
 - 59 For example Arthur Meier-Hayoz, in: Arthur Meier-Hayoz (ed), *Berner Kommentar on Swiss Private Law, Introduction to Art. 1-10 ZGB* (1962), Art. 1 para. 406: "A legal rule of a broader scope is often designated as a general legal principle."
 - 60 BGH 18.04.1997 – V ZR 28/96 – BGHZ 135, 235, 240 – roots in the tennis court.
 - 61 BGH 23.06.1952 – III 297/51 – BGHZ 6, 319, 320 – Duty to compensate among drivers; BGH 13.04.1956 – VI 347/54 – BGHZ 20, 259, 263 et seqq. – Operational Risk.
 - 62 BGH 18.09.1987 – V ZR 219/85 – NJW-RR 1988, 136, 138.
 - 63 BGH 18.04.1997 – V ZR 28/96 – BGHZ 135, 235, 239 et seq. – roots in the tennis court.
 - 64 BGH 29.03.1971 – III ZR 98/69 – BGHZ 56, 57, 63: "the legal rationale contained in Section 254 BGB."

IV. Limits to the development of legal principles and the rules and legal doctrines derived hereby

1. Rejecting the arbitrariness of a legal dogmatic justification

The obligation to contract and contracts with protective effect for the benefit of third parties are legal doctrines that form part of the basis of legal training and have been recognised for decades. It is therefore surprising that the legal dogmatic justifications underlying them are so disputed and seem to be arbitrary.⁶⁵ As the danger of illegal development of law *contra legem* is thus increased, this seems to be astounding. Neglecting the justification for the development of law means concluding based on previous understanding⁶⁶ and thus violates the obligation to justify the development of law.

2. Rejection of empty phrases (interpretation of contracts, nature of the matter)

Using empty phrases is also not sufficient. Establishing the legal doctrine of contracts with protective effect for the benefit of third parties by the supplementary interpretation of contracts is not enough, because the reference to the intents of a party then becomes a mere fiction as the party ordinarily does not want to be held liable. The contract is interpreted on the basis of objective criteria instead of the parties' contractual intent.⁶⁷ Sometimes legal principles are derived from the "nature of the matter", which was first

65 On contracts with protective effect to the benefit of third parties, see for example BGH 11.01.1977 – VI ZR 261/75 – NJW 1977, 2073, 2074: "indifferent"; Christian Grüneberg, in: Otto Palandt (ed), *BGB* (77th Edition 2018), § 328 para. 14: "As a practical result both views are broadly consistent."

66 Here Hans-Georg Gadamer, *Wahrheit und Methode* (6th Edition, 1990), 281 et seqq., 296 et seqq.; Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (1970), 139 et seqq., 149 et seqq.

67 Wolfgang Fikentscher and Andreas Heinemann, *Schuldrecht* (10th Edition, 2006), para. 305, 158.

established by Dernburg⁶⁸ and adopted in academic literature⁶⁹ and jurisdiction.⁷⁰ This must be rejected as well, because 'nature of the matter' does not establish anything in its own right.⁷¹ Legal ethical principles, such as justice and fairness, must also be further specified to allow for transparent persuasive trains of thought and reasoning.

3. Justification derived from the valuations and limits of the law

Therefore, the derivation and development of a legal principle are among the most difficult parts of working with legal principles. Consequently, it may take decades to establish new legal principles and legal doctrines. It is easier to derive the legal principles from *one or more legal rules*. As shown above, this is rarely the case – which is why the development of new legal principles must be established strictly on the basis of the law and the valuations of the law.

V. Deduction: Specification and scope of principles

Deduction means the inference of the specific from the general. In the underlying context, deduction describes how a general principle works its way into the resolution of a specific legal problem, which is the way from the principle to the rule. Just as the deduction of a general legal principle by inference constitutes judicial development of the law, the legal principles and doctrines derived by means of deduction constitute development of the law. Principles, therefore, serve the development of the law on the basis of pre-existing valuations. Figuratively speaking, legal principles serve as a bridge connecting the existing law and the new law.

68 Heinrich Dernburg, *Pandekten*, Volume 1 (4th Edition 1894), 87; *ibid.*, *System des römischen Rechts*, Volume 1 (8th Edition, 1911), 64; Andreas von Thur, *Allgemeiner Teil des Bürgerlichen Rechts*, Volume 1 (1910), 42.

69 In detail Karl Larenz (Fn. 6), 417 et seqq. with further references; Claus-Wilhelm Canaris (Fn. 11), 100.

70 BVerfG 20.02.1952 – 1 BvF 2/51 – BVerfGE 1, 117, 131.

71 Critical Ralf Dreier, *Zum Begriff der „Natur der Sache“* (1965), 127 et seq.; Klaus Friedrich Röhl and Hans Christian Röhl (Fn. 10), § 7.V., 74: "It appears that the concept of the essence as well as of the nature of the matter do not provide for a new argument anywhere"; Peter Raisch, *Juristische Methoden: vom antiken Rom bis zur Gegenwart* (1995), 178; Bernd Rüthers, Christian Fischer and Axel Birk (Fn. 28), para. 929.

1. The specification of a legal principle in general

a) Priority of a legal principle

The case is relatively easy if different principles conflict with each other, but the conflict can be solved by the priority of one principle with respect to the other. According to the *lex specialis* rule, for instance, one principle is superseded by another principle. While here only the conflict between two legal rules needs to be solved, the conflict of legal principles entails more – because a legal principle can be inherent in several legal rules, or even be valid with no legal justification whatsoever. The German Federal Court of Justice (BGH)⁷² and the Austrian Supreme Court (OGH),⁷³ for example, considered an investor's claim for damages as ranking above to the principle of capital preservation.

b) Development of categories, sub-categories, and similar factual conditions

Further specification is possible by creating categories, subcategories, and similar factual conditions. The same procedure applies to general stipulation. The general stipulation too is specified by means of sub-principles, categories, and similar factual conditions. Case law is primarily subject to specification without such legal justification.

c) From legal principle to legal rule

Eventually, there is one last step to obtain a new legal norm, such as a new basis for a claim, from a legal principle by way of development of law. This

72 BGH 09.05.2005 – II ZR 287/02 – NJW 2005, 2450 – EM.TV; BGH 28.11.2005 – II ZR 80/04 – ZIP 2007, 681 para. 3 – Comroad I.

73 OGH 30.03.2011 – Ob 77/10i – GesRZ 2011, 251 No. II.1.1; OGH 15.03.2012 – 6 Ob 28/12d – ÖBA 2012, 548/1828, No. 2.2.et seq., 9.3.et seq. with comparative references.

is often attached with great uncertainty about the legal dogmatic justification. The classic example is the obligation to contract,⁷⁴ the frustration of contract,⁷⁵ and contracts with protective effect for the benefit of third parties.⁷⁶ The new legal rules were specified by jurisdiction, applying categories and similar factual conditions. As inherent in judicial development, the approaches are made cautiously and the practical application can sometimes only be developed through a *trial-and-error* process.

d) Conflicting legal principles

Conflicting legal principles limit certain specifications of a legal principle. Moreover, one or more legal principles can oppose a legal resolution. This is an issue examining basic rights. Even basic rights granted unconditionally, such as artistic freedom under Article 5(3) sentence 1 of the Basic Law (GG), are limited by the so-called inner-constitutional limitations.⁷⁷ These inner-constitutional limitations are conflicting basic rights of others or other constitutionally protected goods. The same applies to legal principles.

Conflicting principles need to be balanced with each other. They need to be weighed according to the schematic examination of proportionality in the stricter sense. First, the conflicting principles must be examined in relation to each other, according to the abstract value assigned to them by the constitution or the law. Then, the specific case must be examined. How much does one principle have to be restricted for the benefit of the other principle? Are the resulting consequences acceptable? Then again: which

74 Still arguing for Sec. 826 BGB: RG 07.11.1931 – V 106/31 – RGZ 133, 388, 392 – Theater; critic or for example BGH 02.12.1974 – II ZR 78/72 – BGHZ 63, 282, 285 – Compulsory admission of a monopoly organisation; see for the more recent view which derives an obligation to contract from an injunctive relief Karsten Schmidt, *Deutsche Richterzeitung (DRiZ)* 1977, 97 (98); Reinhardt Bork, in: Julius v. Staudinger (ed), *Bürgerliches Gesetzbuch* (edited 2015), Einl §§ 145 et seqq. para. 27; Jan Busche, in: Jürgen Sackner, Roland Rixecker, Hartmut Oetker and Bettina Limberg (eds), *Münchener Kommentar BGB* (6th Edition 2012), Vorbem § 145 para. 21; Christian Armbrüster, in: Erman, *Bürgerliches Gesetzbuch* (14th Edition 2014), Vorbem § 145 para. 29.

75 See for example BGH 25.02.1993 – VII 24/92 – BGHZ 121, 378 para. 48.

76 Thus RG 10.02.1930 – VI 270/29 – RGZ 127, 218, 221 – gas meter.

77 Settled case law, cf. BVerfG 26.05.1970 – 1 BvR 83/69, 244/69, 345/69 – BVerfGE 28, 243, 261 – conscientious objection; BVerfG 24.02.1971 – 1 BvR 435/68 – BVerfGE 30, 173, 193 – Mephisto; Udo Di Fabio, in: Theodor Maunz and Günter Dürig (eds), *Grundgesetz-Kommentar* (December 2015), Art. 2 para. 246.

consequences result from giving the conflicting principle priority? Practicality reasons must also be taken into consideration.

2. Example of capital markets law: the principle of the rational investment decision

a) Extent of damages: rational investment decision and recession

In capital markets law, there has been rigorous debate about what the relevant damage would be if a company provides an investor with wrong information – for instance, by way of an ad hoc disclosure – and the stock market price has moved to the investor's detriment. In this case, may a claimant only obtain the difference between the accurate price and the incorrect stock market price? Or may the investor also withdraw from the contract and claim restitution in kind, namely the reimbursement of the purchase price in exchange for the securities?

The starting point of the problem was Section 249(1) of the Civil Code (BGB), which establishes the principle of restitution in kind. Accordingly, the condition existing if the harmful event had not occurred has to be established. There was dispute about whether the principle also allows for complete rescission of the security transaction. The former prevailing opinion only granted the investor the difference in the market price, because otherwise the market risk of the investor would be unlawfully passed on to the issuer and an excess liability would also arise for the listed company.⁷⁸ But this would link the market risk to the alleged protective purpose – an unlawful circular argument.⁷⁹ Instead, according to the general right to withdrawal, the tortfeasor causing the other party to withdraw because of the breach of duty bears the risk of deterioration: see Section 346(3) sentence 1 no. 3 of the Civil Code (BGB).⁸⁰ Sections 281(5), 283 sentence 2 of the Civil Code provide the link to the law of torts. The Federal Court of Justice (BGH) had to consider the problem in the context of Section 826 of the

78 Thus Holger Fleischer, *Betriebs Berater (BB)* 2002, 1869 (1871); Peter O. Mühlert and Steffen Steup, *Zeitschrift für Wirtschafts- und Bankrecht (WM)* 2005, 1633 (1637).

79 Thomas M.J. Möllers and Franz Clemens Leisch, in: Heribert Hirte and Thomas M.J. Möllers (eds), *Kölner Kommentar zum WpHG* (2nd Edition, 2014), §§ 37b, 37c para. 291.

80 BGH 13.12.2011 – XI ZR 51/10 – BGHZ 192, 90 para. 58 – IKB.

Civil Code, and later for the particular claim to damages pursuant to Sections 37b, 37c of the Securities Trading Act (WpHG). In the IKB decision, the Court stated (in translation):

“The issue of the scope of the compensation granted by Sections 37b, 37c WpHG seemingly has been focused on only by the District Court in Hamburg (ruling of 10 June 2009 - 329 O 377/08, juris recital 36) and is disputed in academic literature. One opinion only concedes a claim to compensation of the market price difference – in this case between the actual purchase price and the potential price if the defendant had disclosed the inside information in a timely manner – towards the affected investor, according to Sections 37b, 37c WpHG,– (Sethe, in Assmann/Schneider, WpHG, 5th ed. §§ 37b, 37c recital 70 et seqq. m.w.N.; Fuchs, WpHG, §§ 37b, 37c recital 34 et seq.; [...]). The contrasting opinion assumes that Sections 37b, 37c WpHG also comprise the rescission of the securities business (Möllers/Leisch, in: KK-WpHG, §§ 37b, 37c, recital 240 ff. m.w.N.; [...]). The latter view holds true. The starting point of the examination must be Section 249 as a basic rule of the entire tort law that lays down the principle of total reparation [...].”⁸¹

Aside from the aforementioned rules, this resolution can also be justified with a legal principle: the wrongful information leads to the investor's purchase or sale of the security. A rational investment decision was not possible. The reason to view the conclusion of the contract as the relevant damage is that the error prevented a rational investment decision. This is a general principle in capital markets law:⁸² the principal of rational investment decision aims to allow the investor to make an autonomous investment decision.⁸³ The German legislature requires information in the listing prospec-

81 BGH 13.12.2011 – XI ZR 51/10 – BGHZ 192, 90 para. 48 et seqq. – IKB. Before BGH 19.07.2004. – II ZR 402/02 – BGHZ 160, 149, 153 et seq. – Infomatec II; before Thomas M.J. Möllers and Franz Clemens Leisch, *Zeitschrift für Wirtschafts- und Bankrecht (WM)* 2001, 1648 (1655) et seq. See also EuGH (Fn. 132).

82 In detail Thomas M.J. Möllers, in: Thomas M.J. Möllers and Klaus Rotter (eds), *Ad-hoc-Publizität* (2003), § 3 para. 37 et seqq.

83 Heinz-Dieter Assmann, *Zeitschrift für Bankrecht und Bankwirtschaft (ZBB)* 1989, 49 (57) et seqq.; *ibid.*, ‘Kapitalmarktrecht - Zur Formation eines Rechtsgebiets in der vierzigjährigen Rechtsentwicklung der Bundesrepublik Deutschland’, in: Knut Wolfgang Nörr (ed), *40 Jahre BRD - 40 Jahre Rechtsentwicklung* (1990), 275 (278 et seq.); Thomas M.J. Möllers, 26 (1997) *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)*, 334 (338); similar Holger Fleischer, 64. *Deutscher Juristentag (DJT)* 2002, p. F 27: Principle of the informed transaction decision.

tus and the sales prospectus that allows investors to reach a correct conclusion about financial assets and liabilities.⁸⁴ The right to an autonomous investment decision has also been explicitly included in the Securities Acquisition and Takeover Act (WpÜG). The holders of securities of the target company must be 'provided with sufficient information to be able to make a decision on the offer with full knowledge of the facts', Section 11(1) sentence 2 of the Securities Acquisition and Takeover Act⁸⁵ which has been positioned at the beginning of the rule, Section 3(2) of the Securities Acquisition and Takeover Act. Therefore, this principle also applies to the ad hoc disclosure according to Section 15 of the Securities Trading Act (WpHG). This cannot be based on the wording, but on the historical intent of the legislature,⁸⁶ and is based on the notion that the individual must be able to decide autonomously and that errors caused by a third party must be fully fixed.

b) Conflicting legal principles

Under capital markets law, investors may claim damages if the company disclosed wrongful information and the investor has purchased shares of the company on the basis of this information.⁸⁷ Under corporate law, this conflicts *prima facie* with the principle of capital preservation that prohibits a stock corporation from distributing capital to the shareholders unless outside of the statutory regulations, Sections 57, 71 of the Stock Corporation Act (AktG). Subsequently, there was much dispute about whether the protection of investors under capital markets law or the principle of capital maintenance under corporate law has priority.⁸⁸ To resolve the conflict, the

84 Sec. 5 (1) p. 1 WpPG; Sec. 7 (1) p. 1 VermAnlG; see also Sec. 13 (1) p. 2 WpHG: "consider making his investment decision".

85 WpÜG, Begr. RegE, BT-Drs. 14/7034, p. 29 on General Part and p. 41 on Sec. 11 WpÜG.

86 On ad-hoc publicity, see BT-Drucks. 14/8017, p. 87: "timely possess market sensitive information to be able to make an appropriate investment decision"; Thomas M.J. Möllers (Fn. 82), § 3 para. 49.

87 For example, Sec. 21 et seqq. WpPG, Sec. 12 WpÜG, Sec. 37b, 37c WpHG and Sec. 826 BGB.

88 In detail Thomas M.J. Möllers, *Betriebs Berater (BB)* 2005, 1637 (1639 et seqq.); Eckart Gottschalk, *Das deutsche Steuerrecht (DStR)* 2005, 1648 (1651 et seqq.); Walter Bayer, in: Wulf Goette and Mathias Habersack (eds), *Münchener*

classic argumentation constructions need to be taken into account, and the interests of the issuer need to be weighed against the interests of the affected investor.⁸⁹

The relationship between Sections 37b and 37c and Section 826 of the Civil Code (BGB) to Sections 57, 71 of the Stock Corporation Act (AktG) was not explicitly mentioned in the legislative process. However, it cannot be assumed that the legislature adopts standards that from the outset are of no value because of the priority of the principle of capital maintenance.⁹⁰ This legislative valuation must be respected: Affected investors are insofar equal to third parties – the claim for damages is not based on the membership rights of the shareholders but on the infliction of damage by the board, which means that the claimants must be considered as third-party creditors.⁹¹ This and the question of whether a ‘turnover business’ has occurred are decisive for the priority of investor protection.⁹² Moreover, in the absence of any deviating regulation, Section 249(1) of the Civil Code (BGB)

Kommentar-AktG (3rd Edition, 2008), § 57 para. 15 et seqq.; Michael Kort, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2005, 496 (498); Rolf Sethe, in: Heinz Dieter Assmann and Uwe H. Schneider (eds), *WpHG* (6th Edition, 2012), §§ 37b, 37c para. 6 et seqq.; Daniel Zimmer and Marc Grotheer, in: Eberhard Schwark and Daniel Zimmer (eds), *Kapitalmarktrechts-Kommentar* (4th Edition, 2010), §§ 37b, c para. 11 et seqq.

89 At an early stage already Thomas M.J. Möllers (Fn. 88), 1639 et seqq.; Thomas M.J. Möllers and Franz Clemens Leisch (Fn. 79), §§ 37b, c para. 39 et seqq.

90 Ulf Renzenbrink and Nelson Holzner, *Zeitschrift für Bank- und Kapitalmarktrecht (BKR)* 2002, 434 (438); Thomas M.J. Möllers, in: Thomas M.J. Möllers and Klaus Rotter (eds), *Ad-hoc-Publizität* (2003), § 14 para. 136; Norbert Horn, ‘Zur Haftung der AG und ihrer Organmitglieder für unrichtige oder unterlassene Ad-hoc-Informationen’, in: Mathias Habersack, Peter Hommelhoff, Uwe Hüffer and Karsten Schmidt, *Festschrift für Peter Ulmer zum 70. Geburtstag* (2003), 817 (827); Sven Keusch and Kerstin Wankerl, *Zeitschrift für Bank- und Kapitalmarktrecht (BKR)* 2003, 744 (746); Rüdiger Veil, 167 (2003) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)*, 365 (394); Katja Langenbucher, *Zeitschrift für Wirtschaftsrecht (ZIP)* 2005, 239 (241). On Austrian law OGH 15.03.2012 – 6 Ob 28/12d – ÖBA 2012, 548/1828 No. 3.5; Friedrich Rüffler, ‘Haftung für Kapitalmarktinformationen nach OGH 7 Ob 77/10i’, in: Susanne Kalss and Ulrich Torggler (eds), *Kapitalmarkthaftung und Gesellschaftsrecht* (2013), 1 (7).

91 BGH 09.5.2005 – II ZR 287/02 – NJW 2005, 2450, 2451 – EM.TV; Rolf Sethe (Fn. 88), §§ 37b, 37c para. 6; Holger Fleischer, Stephan Schneider and Marlen Thaten, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2012, 801 (802).

92 For a different view Eberhard Schwark, ‘Prospekthaftung und Kapitalerhaltung in der AG’, in: Karsten Schmidt and Eberhard Schwark (eds), *Unternehmen,*

explicitly allows for compensation for the negative interest also within the framework of Section 21 of the Securities Prospectus Act (WpPG) and Section 826 of the Civil Code (BGB), Section 12 of the Securities Acquisition and Takeover Act (WpÜG)⁹³ and Section 37b, 37c of the Securities Trading Act (WpHG). Thus however, as the Federal Court of Justice emphasised, the damaged party's obligation to return the shares mainly relies on the notion that, due to the damage inflicted, the claimant should not obtain any benefit exceeding the compensation of the damage (*Bereicherungsverbot*).⁹⁴

Balancing the interests of the company or their creditors with those of the affected shareholders, the Higher Regional Court (OLG) in Frankfurt⁹⁵ and the Federal Court of Justice (BGH)⁹⁶ are right to emphasise the serious misconduct in relation to an immoral damage according to Section 826 of the Civil Code (BGB). It is not surprising that the civil liability actions are accompanied by criminal convictions of the acting members of the company's board. The priority of company law fails for the simple reason that the capital of a company stems from the deceived shareholders' assets, and because Section 57 of the Stock Corporation Act (AktG) may not be misused as a *carte blanche* for improper activities under the tort law.⁹⁷ In other words: for the damaged investors it would be incomprehensible if the company distributed dividends to the other shareholders at the expense of the deceived shareholders.⁹⁸ In economic terms, the capital market may not be put at a disadvantage – overemphasising the creditor protection at the expense of the shareholders – because otherwise the willingness to provide

Recht und Wirtschaftsordnung: Festschrift für Peter Raisch zum 70. Geburtstag (1995), 269 (288 et seq.).

93 Thomas M.J. Möllers (Fn. 79), § 12 para. 99.

94 BGH 09.05.2005 – II ZR 287/02 – NJW 2005, 2450 under II.2.b) bb) – EM.TV.

95 OLG Frankfurt 17.03.2005 – I U 149/04 – ZIP 2005, 710, 713 – Comroad.

96 BGH 09.05.2005 – II ZR 287/02 – NJW 2005, 2450 under II.2.b.bb) – EM.TV.

97 Sven Keusch and Kerstin Wankel (Fn. 90), 746.

98 OLG München 20.04.2005 – 7 U 5303/04 – ZIP 2005, 901, 902 – Comroad; before Ossip Flechtheim, *Juristische Wochenschrift (JW)* 1916, 937; James Breit, 76 (1915) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)*, 415 (442); Felix Moos, 70 (1911) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)*, 184; Hartwig Henze, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2005, 115 (120).

venture capital would decrease and this would eventually be to the company's disadvantage.⁹⁹ Therefore, the priority of issuer liability under capital markets law contributes to allocative efficiency and to an increase in competitiveness towards foreign stock exchanges.¹⁰⁰ Numerous other Member States of the European Union and the USA recognise a claim to damages under the tort law directed against the company if a wrongful capital markets information is intentionally provided.¹⁰¹

VI. Formation of principles at the European level

1. Extraction of principles through comparative law

Looking at principles at the European level, one should distinguish between the general principles of primary law, which have priority in cases of doubt, and the principles of European civil law, which have no force of precedence whatsoever, and can (only) be used in the context of teleological considerations.¹⁰²

a) Reference to the general principles of law or constitutional traditions of the Member States

General principles of law also serve to fill in gaps in European law. Reference is thereby often made to the general principles of law that are common to the legal systems. One such provision, for example, is the liability of the Union under Article 340 TFEU. By reference to provisions of the national Member States, the Court of Justice of the European Union (CJEU) can

99 OLG Frankfurt 17.03.2005 – 1 U 149/04 – ZIP 2005, 710, 713 – Comroad; Lutz Krämer and Matthias Baudisch, *Zeitschrift für Wirtschafts- und Bankrecht (WM)* 1998, 1161 (1167); Ulf Renzenbrink and Nelson Holzner (Fn. 90), 437; Sezer Doğan, *Ad-hoc-Publizitätshaftung* (2005), 230.

100 Holger Fleischer (Fn. 83), p. F 73; Eberhard Schwark (Fn. 92), 269, 281 et seqq.; Daniel Zimmer and Grotheer (Fn. 88), §§ 37b, 37c para. 13.

101 Thomas M.J. Möllers and Franz Clemens Leisch (Fn. 79), §§ 37b, c para. 49 et seqq. On the view of the EuGH see below Fn. 126, 132.

102 Bettina Heiderhoff, *Europäisches Privatrecht* (4th Edition, 2016), para. 230.

form a general rule from various provisions by induction.¹⁰³ By reference to the constitutional traditions common to the Member States, the CJEU has developed the fundamental rights at a European level,¹⁰⁴ now standardised in Article 6(3) TEU,¹⁰⁵ and established the claim for State liability against the Member States. It has always emphasised the duty to develop the law that the general principles of law have to fulfil.¹⁰⁶ Meanwhile, at the European level, in addition to recognising fundamental rights the Court has also recognised general principles of law¹⁰⁷ – such as legal certainty,¹⁰⁸ protection of legitimate expectations,¹⁰⁹ effective legal protection,¹¹⁰ *effet utile*, and proportionality.¹¹¹

103 For European law, Axel Metzger (Fn. 47), 2009, 25 et seq.; Jürgen Basedow, 'Mangold, Audiolux und die allgemeinen Grundsätze des europäischen Privatrechts', in: Stefan Grundmann, Brigitte Haar, Hanno Merkt et al. (eds), *Festschrift für Klaus J. Hopt zum 70. Geburtstag* (2010), 27 (35).

104 ECJ 14.05.1974 – 4/73 – ECLI:EU:C:1974:51 – ECR 1974, 491, para. 13 – Nold.

105 Meanwhile, however, the fundamental rights were derived broadly from the Charter of Fundamental Rights of the European Union Art 6 (1) TEU.

106 ECJ 05.03.1996 – Case no. C-46/93 inter alia – ECLI:EU:C:1996:79, para. 27 – Brasserie du Pêcheur: Reference to "the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States."; here Werner Schroeder, *Juristische Schulung (JuS)* 2004, 180 (183 et seq.).

107 Generally on the integration of general legal principles in European case law: Peter Häberle, *Europäische Grundrechte-Zeitschrift (EuGRZ)* 1991, 261 et seq.; Peter Christian Müller-Graff and Eibe Riedel (eds), *Gemeinsames Verfassungsrecht in der Europäischen Union* (1998).

108 ECJ 21.09.1983 – 205/85 inter alia – ECLI:EU:C:1983:233, para. 30 – Milchkontor; ECJ 13.02.1996 – Case no. C-143/93 – ECLI:EU:C:1996:45, para. 27 – Van Es Douane Agenten; ECJ 21.02.2006 – C-255/02 – ECLI:EU:C:2006:121, para. 72 – Halifax.

109 ECJ 05.07.1973 – 1/73 – ECLI:EU:C:1973:78, para. 6 et seq. – Westzucker; ECJ 10.09.2009 – C-201/08 – ECLI:EU:C:2009:539, para. 46 – Plantanol.

110 ECJ 15.05.1986 – 222/84 – ECLI:EU:C:1986:206, para. 18 – Johnston; confirmed as an inherent principle in ECJ 13.03.2007 – C-432/05 – ECLI:EU:C:2007:163, para. 37 et seq. – Unibet.

111 ECJ 16.07.1956 – 8/55 – ECLI:EU:C:1956:11 = ECR 1955/1957, 197, 311 – Fédération Charbonnière; ECJ 13.12.1979 – 44/79 – ECLI:EU:C:1979:290, para. 23 – Hauer; Paul Craig and Gráinne de Búrca, *EU Law* (6th Edition, 2015), 15.4(b), 551 et seq.; Uwe Kischel, *Zeitschrift Europarecht (EuR)* 2000, 380 et seq.; Oliver Koch, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* (2003); Jochen A. Frowein, 'Die Herausbildung europäischer Verfassungsprinzipien', in: Arthur

Interestingly, the CJEU has since developed European fundamental rights and general principles of law. To an extent, they afford citizens stronger legal protection than the fundamental rights of individual Member States. For example, broadly beyond the case law of German courts, the CJEU strengthened equal rights – and particularly the rights of women. This covered not only the level of the wage entitlement, but also access to and securing employment.¹¹² With respect to procedural law, the CJEU has repeatedly stressed that access to the national courts must also be guaranteed,¹¹³ and with this principle of effective legal protection restricted the procedural autonomy of the Member States.¹¹⁴ The European Court of Human Rights has, for example, set higher standards for the requirement for timely legal protection than the national courts, and therefore declared proceedings of lengthy duration to be unlawful.¹¹⁵

Kaufmann, Ernst-Joachim Mestmäcker and Hans F. Zacher (eds), *Rechtsstaat und Menschenwürde: Festschrift für Werner Maihofer* (1988), 149 (151); Manfred Zuleeg and Stefan Kadelbach, 'Individuelle Rechte und Pflichten', in: Reiner Schulze, Manfred Zuleeg and Stefan Kadelbach, *Europarecht* (3rd Edition, 2014), § 8 para. 42 et seq.; The legal competence for the principle of proportionality is found in Art. 5 (4) TEU.

112 ECJ 14.12.1995 – C-317/93 – ECLI:EU:C:1995:438, para. 28– Nolte; ECJ 11.11.1997 – C-409/95 – ECLI:EU:C:1997:533, para. 31 with approving comments, Tobias Lenz, *Neue Juristische Wochenschrift (NJW)* 1998, 1619 – Marschall; Sacha Prechal, 20 (1993) *Legal Issues of European Integration*, 81 et seq. On the influence of the ECJ on the German Federal Labour Court (BAG) concerning impermissible questions regarding a pregnancy by the ECJ 08.11.1990 – C-177/88 – ECLI:EU:C:1990:383 – ECR 1990, I-3941 para. 24 et seq. – Dekker see BAG 15.10.1992 – 2 AZR 227/92 – BAGE 71, 252, para. 13.

113 ECJ 15.10.1987 – 222/86 – ECLI:EU:C:1987:442, para. 14 – Heylens; ECJ 13.12.1991 – C-18/88 – ECLI:EU:C:1991:474, para. 34 – GB-Inno-BM.

114 Rodríguez Iglesias and Gil Carlos, *Europäische Grundrechte-Zeitschrift (EuGRZ)* 1997, 289 (290); Rupert Scholz, *Die öffentliche Verwaltung (DÖV)* 1998, 261 (262 et seq.); Rigide Kakouris, 34 (1997) *Common Markets Law Review*, 1389, 1407 et seq.; Andreas Cahn, *Zeitschrift für europäisches Privatrecht (ZEuP)* 1998, 969 (975).

115 Wolfgang Fröwein and Jochen Peukert, *EMRK-Kommentar* (2009), Art. 6 para. 248 et seq. with further citations. On the requirement for effective legal protection as a common constitutional tradition, see ECJ, 13.03.2007 – C-432/05 – ECLI:EU:C:2007:163, para. 37 et seq. – Unibet; ECJ of 26.11.2013 – C-58/12 P – ECLI:EU:C:2013:770, para. 72 – Groupe Gascogne.

b) Isolated codification of European legal principles

Meanwhile, the European legislature has set out individual fundamental rights in the Amsterdam Treaty, and also included the 1950 European Declaration of Human Rights, Article 6 TEU. Otherwise, general principles of law as found within the German Civil Code (BGB) are only tenuously standardised in the European treaties. This is due to the fact that most principles were first developed by the CJEU before they then found their way into the treaties. In the TEU, for example, one can find the principle of conferral and the principle of subsidiarity (Article 5(1)–(3) TEU) and the principle of proportionality (Article 5(4) TEU). Other principles are also recognised, such as the principle of democracy (Article 2 TEU).

2. General legal principles of European civil law from the classification of European law

a) Difficulties at the European level

If one attempts to extract general legal principles from primary and secondary European law, various disadvantages become evident. Firstly, numerous principles are not standardised at all; secondly, entire areas of law are also only selectively regulated at the European level;¹¹⁶ and thirdly, there is a danger that the European Union is exceeding its competence by extracting a principle and thus violating the principle of conferral, Article 5(2) TFEU.¹¹⁷ Finally, one must avoid the risk of exporting one's own prior understanding. Instead, European law is to be interpreted autonomously. As a consequence, the objectives at the European level are not absolutely identical to the objectives in individual Member States.

116 Fritz Rittner, 50 (1995) *JuristenZeitung* (JZ), 849 (851): "An island in the sea of national law"; before Hein Kötz, 50 (1986) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (RabelsZ), 1 (5) "pointillist character"; Thomas M.J. Möllers, 59 (2004) *Juristen Zeitung* (JZ), 1067 et seq.

117 Critical e.g. Martin Schmidt-Kessel, 'Europäisches Vertragsrecht', in: Karl Riesenhuber, *Europäische Methodenlehre* (3rd Edition, 2015), § 17 para. 43.

It is also interesting to note the attempt to develop a European Civil Code, such as the Draft Common Frame of Reference (DCFR)¹¹⁸ from various research groups or the (withdrawn) proposal from the Commission for a Common European Sales Law (CESL).¹¹⁹ Some principles and rules from German law are already included in these drafts for European law. However, these are all still not legally binding.

b) Legal principles of European civil law

However, it does not seem hopeless to extract general legal principles at a European level from European law itself without having to resort to the law of the Member States. The examples illustrate this.

In academic literature, attempts have been made to develop general legal principles,¹²⁰ such as discerning freedom of contract or contractual fidelity (*pacta sunt servanda*), from European law.¹²¹ This is not straightforward, because neither the treaties nor the Charter of Fundamental Rights directly

118 From Christian Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definition and Model Rule of European Private Law (Draft Common Frame of Reference – DCFR)* 2009, online edition, accessible at http://ec.europa.eu/justice/policies/civil/docs/dcf_r_outline_edition_en.pdf (accessed 12 July 2016); see here, e.g. Martin Schmidt-Kessel (Fn. 117), § 17 para. 47 et seq.; Horst Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner and Reinhard Zimmermann, 63 (2008) *JuristenZeitung (JZ)*, 529 et seq.; Wolfgang Ernst, 208 (2008) *Archiv für die civilistische Praxis (AcP)*, 248 et seq.

119 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law of 11.10.2011, COM (2011) 635 final; here the contributions of the extraordinary meeting of civil law lecturers, published in: 212 (2012) *Archiv für die civilistische Praxis (AcP)*, 467-852.

120 Stefan Grundmann (ed), *Systembildung und Systemlücken in Kerngebieten des europäischen Privatrechts* (2000); Karl Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (2003), § 18; generally: Nils Jansen (2005), *Zeitschrift für europäisches Privatrecht (ZEuP)*, 750 et seq.; Alex Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht* (2009); Norbert Reich, *General Principles of EU Civil Law* (2014).

121 See, e.g. Karl Riesenhuber, 'Die Inhaltskontrolle von Vereinbarungen über Hauptleistung und Preis im Europäischen Vertragsrecht', in: Jens Dammann, Wolfgang Grunsky and Thomas Pfeiffer, *Gedächtnisschrift Wolf* (2011), 123 (130) with further citations; Bettina Heiderhoff (Fn. 102), para. 230 et seq.

standardise freedom of contract.¹²² There are only a few judgements that address freedom of contract.¹²³ However, Article 119 TFEU acknowledges the ‘principle of an open market economy with free competition’; freedom of contract is an essential requirement for this.¹²⁴ Freedom of contract seeks to strengthen the internal market by dismantling different legal rules.

Eventually, also conflict set out above between the principle of protection of investors under capital markets law and the principle of capital preservation is of European origin, because the relevant national rules implement European directives. The Austrian Supreme Court (OGH) was correct to initiate a preliminary ruling procedure to the ECJ, while the German Federal Court of Justice (BGH) misjudged the obligation.¹²⁵ In the *Hirman* case, the CJEU found that numerous European directives on capital markets law require liability, and that even without a specific regulation the requirement of effective sanctions does not prohibit claims for damages.¹²⁶

The principle of rational investment decision, and therefore the right to make an autonomous investment decision, is incorporated in the European directives.¹²⁷ The prospectus has to contain information “that enables investors and their advisors to form a well-founded opinion on assets and liabilities, financial situation, gains and losses, and future perspectives”.¹²⁸ Similarly, the Transparency Directive on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market requires information that enables

122 Whereas Art. 2 (1) GG standardises freedom of action, and thus also private autonomy, Art. 16 et seq. Charter of Fundamental Rights only contains the protection of freedom to conduct business; critical, therefore Josef Franz Lindner, *Zeitschrift für Rechtspolitik (ZRP)* 2007, 54 (56): incomplete protection of fundamental rights.

123 ECJ 10.07.1980 – 99/79 – ECLI:EU:C:1980:193, para. 16 – *Lancôme* speaks of “legal certainty in contractual matters”.

124 Christian Schmidt-Leithoff, ‘Gedanken über die Privatrechtsordnung als Grundlage zum EWG Vertrag’, in: Manfred Löwisch, Christian Schmidt-Leithoff and Burkhard Schmiedel (eds), *Beiträge zum Handels- und Wirtschaftsrecht: Festschrift für Fritz Rittner*, 597 (604); Peter O. Mülbet, 159 (1995) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)*, 2 (8); see also Art. II.-1:101 – II.1:103 DCFR.

125 Therefore, critical Thomas M.J. Möllers (Fn. 88), 1641.

126 ECJ 19.12.2013 – C-174/12 – ECLI:EU:C:2013:856, para. 39 et seq. – *Alfred Hirman/Immofinanz AG*; before Thomas M.J. Möllers (Fn. 88), 1641.

127 On the following before Thomas M.J. Möllers (Fn. 82), § 3 para. 38.

128 Prospectus Directive 2003/71/EC of 4 November 2003, Art. 5 (1).

investors to buy or sell shares in full knowledge of the changes in the voting structure.¹²⁹ Also, under the Takeover Directive, the owner of securities of the target company “must have sufficient time and information to enable them to reach a properly informed decision on the bid”.¹³⁰ The right to an autonomous investment decision is phrased most clearly in Recital 1 of the former Directive on Securities Sales Prospectus.¹³¹ Therefore, it was only consequent that the CJEU accepted the reversal of the purchase agreement in the *Hirrmann* case, arguing that the damaged party is taken back to the situation they were in before the damaging event happened.¹³²

3. Limits to legal development at the European level

a) Insufficient justification

As in German law, legal principles – when they are newly devised – must be developed from the applicable law. When the CJEU’s decision in the *Mangold* case elevated the prohibition of age discrimination into a legal principle and invoked *inter alia* the common constitutional traditions,¹³³ it attracted complaints because such a common tradition did not exist in the Member States.¹³⁴

129 Transparency Directive 2004/109/EC of 15 December 2004, Recital 18.

130 Directive 2004/25/EC of 21 April 2004 on takeover bids Art. 3 (1) lit. b) and Art. 6 (2).

131 Securities Prospectus Directive 89/298/EEC of 17 April 1989, Recitals 1–3.

132 ECJ 19.12.2013 – C-174/12 – ECLI:EU:C:2013:856, para. 53 – Alfred Hirrmann/Immofinanz AG: “The aim of such legislation is, *inter alia*, to ensure that the injured party is put back in the position he was in before the occurrence of the act which has caused him harm, by requiring, first, repayment to the purchaser of a sum equivalent to the price which he paid for the purchase of the shares, together with interest, and, secondly, the maintenance of those shares in the share capital of the company concerned in the same way as other shares.”

133 ECJ 22.11.2005 – C-144/04 – ECLI:EU:C:2005:709, para. 75 – Mangold/Helm.

134 Critical, *inter alia*, Jan H. Jans, 34 (2007) *Legal Issues of European Integration*, 53 (65); Jürgen Basedow (Fn. 103), 27 (34); Jürgen Basedow, 71 (2016) *Juris-tenZeitung (JZ)*, 269 (275 et seq.).

b) Conflicting legal principles

As in German law, general principles of law can ultimately conflict with a particular outcome. Here, it is again important to bear in mind the protection of legitimate expectations for the benefit of citizens. Such a protection of legitimate expectations conflicts with the development of the law concerning horizontal direct effect of directives,¹³⁵ and also needs to be taken into consideration as part of the development of the law in conformity with the directive.¹³⁶ Conversely, the principle of effective legal protection can restrict the principle of legal certainty and protection of legitimate expectations – for example, when the national authorities do not revoke unlawful state aid within a one-year period, and the beneficiary must nevertheless repay the unlawfully acquired aid after this period.¹³⁷

VII. Outlook

The German Civil Code (BGB), marked by the ideas of 19th Century Pandectists,¹³⁸ trains German lawyers in systematic thinking and the associated legal doctrine and legal principles. In order to further develop the law,¹³⁹ but also to better understand it, a consolidated doctrine of law with legal

135 ECJ 08.10.1987 – 80/86 – ECLI:EU:C:1987:431, para. 10 – Kolpinghuis.

136 ECJ 04.07.2006 – C-212/04 – ECLI:EU:C:2006:443, para. 110 et seq. – Adeneler.

137 ECJ 20.03.1997 – C-24/95 – ECLI:EU:C:1997:163, para. 37 et seq. und 48 et seq. – Alcan, reclaiming state aid.

138 To mention, for example Anton Friedrich Justus Thibaut, *System des Pandektenrechts*, 3 Volumes (5th Edition, 1818); Georg Friedrich Puchta, *Pandekten* (5th Edition, 1850); Bernhard Windscheid, *Lehrbuch des Pandektenrechts*, 3 Volumes (7th Edition, 1891); Heinrich Dernburg, *Pandekten*, 3 Volumes (4th Edition, 1894); Ferdinand Regelsberger, *Pandekten* (1893); Reinhard Zimmermann, 'Das Bürgerliche Gesetzbuch und die Entwicklung des Bürgerlichen Rechts', in: Mathias Schmoekel, Joachim Rückert and Reinhard Zimmermann, *Historisch-kritischer Kommentar zum BGB* (2003), § 1 para. 6 et seq.

139 On the role of general legal principles for the filling of gaps see Fn. 13 et seq.

principles is required.¹⁴⁰ The relatively young capital markets law is still at the beginning of the process of forming principles.¹⁴¹

Consequently, jurisprudence needs to attempt to develop legal principle at the European level. As shown, there are already initial signs that this is occurring. But due to the gaps in the European legal framework, it faces particular challenges. Aside from the problems depicted above, the concurrency of directives (which need to be implemented in national law) and regulations (which are directly applicable) presents a further challenge for developing principles.¹⁴² The challenges for scholars never cease.

Bibliography

Robert Alexy, 'Rechtsregeln und Rechtsprinzipien' 25 (1985) *Archiv für Rechts- und Sozialphilosophie – Beihefte (ARSP-B)*, 13.

Robert Alexy, 'Rechtssystem und praktische Vernunft' 18 (1987) *Rechtstheorie*, 405.

Robert Alexy, *Theorie der Grundrechte*, (Suhrkamp, Frankfurt am Main 1986).

Robert Alexy, 'Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' 61 (2002) *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)*, 7.

Heinz-Dieter Assmann, 'Konzeptionelle Grundlagen des Anlegerschutzes' *Zeitschrift für Bankrecht und Bankwirtschaft (ZBB)* 1989, 49.

Heinz-Dieter Assmann, 'Kapitalmarktrecht – Zur Formation eines Rechtsgebiets in der vierzigjährigen Rechtsentwicklung der Bundesrepublik Deutschland', in: Knut Wolfgang Nörr (ed), *40 Jahre BRD – 40 Jahre Rechtsentwicklung* (Mohr Siebeck, Tübingen 1990), 275.

140 Legal doctrine is vividly compared with grammar, without which language, here the legal norms, cannot be understood, Maximilian Herberger, *Dogmatik* (1981), 37 et seq., 74 et seq., 119, 257 et seq. with extensive references to Roman law; Nils Jansen, *Zeitschrift für das Europäische Privatrecht (ZEuP)* 2005, 750 (754).

141 Further principles in the law on capital markets are, for example, avoidance of asymmetries of information, or avoidance of conflicts of interest, see Thomas M.J. Möllers, 'Anlegerschutz im System des Kapitalmarktrechts', in: Stefan Grundmann, Brigitte Haar, Hanno Merkt et al. (eds), *Festschrift für Klaus J. Hopt zum 70. Geburtstag* (2010), 2247 et seq.

142 In greater depth recently Thomas M.J. Möllers, *Zeitschrift für Europäisches Privatrecht (ZEuP)* 2016, 325 (355 et seq.). The "First Financial Market Amendment Act (1. FiMaNoG)" as of 3.6.2016 is a good example for an inconsistent implementation of the European Market Abuse Directive and Regulation into German law.

- Heinz Dieter Assmann and Uwe H. Schneider (eds), *Wertpapierhandelsgesetz (WpHG) Commentary* (6th Edition, Otto Schmidt, Cologne 2012).
- Marietta Auer, *Materialisierung, Flexibilisierung, Richterfreiheit* (Mohr Siebeck, Tübingen 2005).
- Francis Bacon, *Novum Organum*, Book I (England 1620, Issue Joseph Devey (ed), P.F. Collier, New York 1902).
- Jack M. Balkin, 'The Crystalline Structure of Legal Thought' 39 (1986) *Rutgers Law Review* (*Rutgers L. Rev.*), 1.
- Christian Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definition and Model Rule of European Private Law (Draft Common Frame of Reference - DCFR)* 2009, online edition, accessible at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.
- Jürgen Basedow, 'Das BGB im künftigen europäischen Privatrecht: Der hybride Kodex' 200 (2000) *Archiv für die civilistische Praxis (AcP)*, 445.
- Jürgen Basedow, 'Hundert Jahre Rechtsvergleichung – Von wissenschaftlicher Erkenntnisquelle zur obligatorischen Methode der Rechtsanwendung' 71 (2016) *JuristenZeitung (JZ)*, 269.
- Jürgen Basedow, 'Mangold, Audiolux und die allgemeinen Grundsätze des europäischen Privatrechts', in: Stefan Grundmann, Brigitte Haar, Hanno Merkt et al. (eds), *Festschrift für Klaus J. Hopt zum 70. Geburtstag* (De Gruyter, Berlin/New York 2010), 27.
- Berner Kommentar on Swiss Private Law*, Volume 1, Arthur Meier-Hayoz (ed), (Stämpfli, Bern 1962).
- Reinhard Bork, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs* (4th Edition, Mohr Siebeck, Tübingen 2016).
- James Breit, 'Ansprüche des Aktionärs gegen die Aktiengesellschaft aus dem Erwerb der Aktien' 76 (1915) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)*, 415.
- Winfried Brohm, 'Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung' 30 (1972) *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)*, 245.
- Franz Bydlinski, *Fundamentale Rechtsgrundsätze* (Springer Verlag, Wien/New York 1988).
- Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (2nd Edition, Springer Verlag, Wien 1991).
- Andreas Cahn, 'Gemeinschaftsrecht und nationales Verfahrensrecht' *Zeitschrift für europäisches Privatrecht (ZEuP)* 1998, 969.
- Claus Wilhelm Canaris, *Die Feststellung von Lücken im Gesetz* (2nd Edition, Duncker & Humblot, Berlin 1983).
- Claus-Wilhelm Canaris, *Die Vertrauenshaftung im deutschen Privatrecht* (C.H. Beck, Munich 1971).
- Claus-Wilhelm Canaris, 'Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner „Materialisierung“' 200 (2000) *Archiv für die civilistische Praxis (AcP)*, 273.

- Paul Craig and Gráinne de Búrca, *EU Law* (6th Edition, Oxford University Press, Oxford 2015).
- Heinrich Dernburg, *System des römischen Rechts*, Volume 1 (8th Edition, H. W. Müller, Berlin 1911).
- Heinrich Dernburg, *Pandekten*, 3 Volumes (4th Edition, H. W. Müller, Berlin 1894).
- Sezer Doğan, *Ad-hoc-Publizitätshaftung* (Nomos, Baden-Baden 2005).
- Ralf Dreier, *Zum Begriff der „Natur der Sache“* (De Gruyter, Berlin 1965).
- Ronald Dworkin, *Taking Rights Seriously* (1st and 2nd Edition, Harvard University Press, Cambridge/Mass. 1977 and 1978).
- Horst Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner and Reinhard Zimmermann, 'Der Gemeinsame Referenzrahmen für das Europäische Privatrecht: Wertungsfragen und Kodifikationsprobleme' 63 (2008) *Juristen-Zeitung* (JZ), 529.
- Ludwig Enneccerus and Hans Carl Nipperdey, *Lehrbuch des Bürgerlichen Rechts* (15th Edition, Mohr Siebeck, Tübingen 1957).
- Erman *Bürgerliches Gesetzbuch. Handkommentar*, Vol. 2, Harm-Peter Westermann, Barbara Grunewald, Georg Maier-Reimer (eds) (14th Edition, Otto Schmidt, Cologne 2014).
- Wolfgang Ernst, '„Der Common Frame of Reference“ aus juristischer Sicht' 208 (2008) *Archiv für die civilistische Praxis* (AcP), 248.
- Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (4th Edition, Mohr Siebeck, Tübingen 1990).
- Josef Esser, 'Realität und Ideologie der Rechtssicherheit in positiven Systemen', in: Siegfried Hohenleitner, Ludwig Linder and Friedrich Nowakowski (eds), *Festschrift für Theodor Rittler* (Verlag Scientia, Aalen 1957), 13.
- Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (Athenäum-Verlag, Frankfurt am Main 1970).
- Wolfgang Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, Volume II and IV (Mohr Siebeck, Tübingen 1975 and 1977).
- Ossip Flechtheim, 'Eine wichtige kartellrechtliche Entscheidung' *Juristische Wochenschrift* (JW) 1916, 937.
- Holger Fleischer, 'Der Inhalt des Schadensersatzanspruchs wegen unwahrer oder unterlassener unverzüglicher Ad-hoc-Mitteilungen' *Betriebs Berater* (BB) 2002, 1869.
- Holger Fleischer, 'Empfiehlt es sich, im Interesse des Anlegerschutzes und zur Förderung des Finanzplatzes Deutschland das Kapitalmarkt- und Börsenrecht neu zu regeln?' 64. *Deutscher Juristentag* (DJT) 2002, Gutachten F.
- Holger Fleischer, Stephan Schneider and Marlen Thaten, 'Kapitalmarktrechtlicher Anlegerschutz versus aktienrechtliche Kapitalerhaltung – wie entscheidet der EuGH?' *Neue Zeitschrift für Gesellschaftsrecht* (NZG) 2012, 801.
- Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts, Das Rechtsgeschäft*, Volume 2 (Springer Verlag, Berlin and Heidelberg 1965).

- Werner Flume, 'Rechtsgeschäft und Privatautonomie', in: Ernst von Caemmerer, Ernst Friesenhahn and Richard Lange (eds), *Festschrift zum hundertjährigen Bestehen des Deutschen Juristentages 1860-1960* (C.F. Müller, Karlsruhe 1960), 135.
- Marie Theres Fögen, 'Schrittmacher des Rechts – Anmerkungen zum Justiz- und Rechtsverweigerungsverbot', in: Heinrich Honsell (ed), *Privatrecht und Methode: Festschrift für Ernst August Kramer* (Helbing & Lichtenhahn, Basel 2004), 3.
- Jochen A. Frowein, 'Die Herausbildung europäischer Verfassungsprinzipien', in: Arthur Kaufmann, Ernst-Joachim Mestmäcker and Hans F. Zacher (eds), *Rechtsstaat und Menschenwürde: Festschrift für Werner Maihofer* (Klostermann, Frankfurt am Main 1988), 149.
- Wolfgang Frowein and Jochen Peukert, *EMRK-Kommentar* (N.P. Engel Verlag, Berlin 2009).
- Hans-Georg Gadamer, *Wahrheit und Methode* (6th Edition, Mohr Siebeck, Tübingen 1990).
- Mahatma Gandhi, 'Seven Social Sins' *Young India* No. 43 (October 22, 1925).
- Martin Gellermann, *Grundrechte im einfachgesetzlichen Gewand* (Mohr Siebeck, Tübingen 2000).
- Eckart Gottschalk, 'Die deliktische Haftung für fehlerhafte Ad-hoc-Mitteilungen' *Das deutsche Steuerrecht (DStR)* 2005, 1648.
- Stefan Grundmann (ed), *Systembildung und Systemlücken in Kerngebieten des europäischen Privatrechts* (Mohr Siebeck, Tübingen 2000).
- Peter Häberle, 'Gemeineuropäisches Verfassungsrecht' *Europäische Grundrechte-Zeitschrift (EuGRZ)* 1991, 261.
- Bettina Heiderhoff, *Europäisches Privatrecht* (4th Edition, C.F. Müller, Heidelberg 2016).
- Hartwig Henze, 'Vermögensbindungsprinzip und Anlegerschutz' *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2005, 115.
- Maximilian Herberger, *Dogmatik* (Klostermann, Frankfurt am Main 1981).
- Historisch-kritischer Kommentar zum BGB*, Mathias Schmoekel, Joachim Rückert and Reinhard Zimmermann (eds) (Mohr Siebeck, Tübingen 2003).
- Norbert Horn, 'Zur Haftung der AG und ihrer Organmitglieder für unrichtige oder unterlassene Ad-hoc-Informationen', in: Mathias Habersack, Peter Hommelhoff, Uwe Hüffer and Karsten Schmidt (eds), *Festschrift für Peter Ulmer zum 70. Geburtstag* (De Gruyter, Berlin 2003), 817.
- Rodríguez Iglesias and Gil Carlos, 'Zu den Grenzen der verfahrensrechtlichen Autonomie der Mitgliedstaaten bei der Anwendung des Gemeinschaftsrechts' *Europäische Grundrechte-Zeitschrift (EuGRZ)* 1997, 289.
- Jan H. Jans, 'The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law' 34 (2007) *Legal Issues of European Integration*, 53.
- Nils Jansen, *Die Struktur der Gerechtigkeit* (Nomos, Baden-Baden 1998).
- Nils Jansen, 'Dogmatik, Erkenntnis und Theorie im europäischen Privatrecht' *Zeitschrift für das Europäische Privatrecht (ZEuP)* 2005, 750.

- Matthias Jestaedt, 'Die Abwägungslehre – ihre Stärken und ihre Schwächen', in: Otto Depenheuer, Markus Heintzen and Peter Axer (eds), *Staat im Wort: Festschrift Josef Isensee* (C. F. Müller, Heidelberg 2007), 253.
- Matthias Jestaedt, *Grundrechtsentfaltung im Gesetz* (Mohr Siebeck, Tübingen 1999).
- Rudolf von Jhering, *Geist des römischen Rechts*, Volume 1 (4th Edition, Breitkopf und Härtel, Leipzig 1878).
- Rigide Kakouris, 'Do the Member States Possess Judicial Procedural 'autonomy'?' 34 (1997) *Common Markets Law Review*, 1389.
- Kapitalmarktrechts-Kommentar*, Eberhard Schwark and Daniel Zimmer (eds) (4th Edition, C.H. Beck, Munich 2010).
- Arthur Kaufmann, *Rechtsphilosophie* (2nd Edition, C.H. Beck, Munich 1997).
- Duncan Kennedy, 'Form and Substance in Private Law Adjudication' 89 (1976) *Harvard Law Review* (Harv.L.Rev.), 1685.
- Sven Keusch and Kerstin Wankel, 'Die Haftung der Aktiengesellschaft für fehlerhafte Kapitalmarktinformationen im Spannungsfeld zum Gebot der Kapitalerhaltung' *Zeitschrift für Bank- und Kapitalmarktrecht* (BKR) 2003, 744.
- Uwe Kischel, 'Die Kontrolle der Verhältnismäßigkeit durch den Europäischen Gerichtshof' *Zeitschrift Europarecht* (EuR) 2000, 380.
- Jan Henrik Klement, 'Schlusswort zu Jan-R. Sieckmann, Erwiderung auf Jan Henrik Klement' 64 (2009) *JuristenZeitung* (JZ), 560.
- Jan Henrik Klement, 'Vom Nutzen einer Theorie, die alles erklärt. Alexys Prinzipientheorie aus der Sicht der Grundrechtsdogmatik' 63 (2008) *JuristenZeitung* (JZ), 756.
- Oliver Koch, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* (Duncker & Humblot, Berlin 2003).
- Kölner Kommentar zum WpHG*, Heribert Hirte and Thomas M.J. Möllers (eds) (2nd Edition, Carl Heymanns Verlag, Cologne 2014).
- Kölner Kommentar zum WpÜG*, Heribert Hirte and Christoph von Bülow (eds) (2nd Edition, Carl Heymanns Verlag, Cologne 2010).
- Michael Kort, 'Die Haftung der AG nach §§ 826, 31 bei fehlerhaften Ad-hoc-Mitteilungen' *Neue Zeitschrift für Gesellschaftsrecht* (NZG) 2005, 496.
- Hein Kötz, 'Rechtsvereinheitlichung - Nutzen, Kosten, Methoden, Ziele' 50 (1986) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (RabelsZ), 1.
- Ernst August Kramer, 'Funktionen allgemeiner Rechtsgrundsätze – Versuch einer Strukturierung', in: Helmut Koziol, Peter Rummel (eds), *Im Dienste der Gerechtigkeit: Festschrift für Franz Bydlinski* (Springer Verlag, Wien 2002), 197.
- Lutz Krämer and Matthias Baudisch, 'Neues zur Börsenprospekthaftung und zu den Sorgfaltsanforderungen beim Unternehmenskauf' *Zeitschrift für Wirtschafts- und Bankrecht* (WM) 1998, 1161.
- Friedrich Kübler, 'Traumpfade oder Holzwege nach Europa? Oder: Was wir uns von der Rechtsgeschichte wünschen sollten' 12 (1993) *Rechtshistorisches Journal*, 307.
- Katja Langenbucher, 'Kapitalerhaltung und Kapitalmarkthaftung' *Zeitschrift für Wirtschaftsrecht* (ZIP) 2005, 239.

- Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th Edition, Springer Verlag, Berlin/Heidelberg 1991).
- Karl Larenz, *Richtiges Recht* (C.H. Beck, Munich 1979).
- Tobias Lenz, 'Marshall' *Neue Juristische Wochenschrift (NJW)* 1998, 1619.
- Josef Franz Lindner, 'Fortschritte und Defizite im EU-Grundrechtsschutz – Plädoyer für eine Optimierung der Europäischen Grundrechtscharta' *Zeitschrift für Rechtspolitik (ZRP)* 2007, 54.
- Josef Franz Lindner, *Theorie der Grundrechtsdogmatik* (Mohr Siebeck, Tübingen 2005).
- Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press, Oxford/New York 1978).
- Theodor Maunz and Günter Dürig (eds), *Grundgesetz Kommentar, Band I* (loose-leaf, C.H. Beck, Munich December 2015).
- Arthur Meier-Hayoz, 'Strategische und taktische Aspekte der Fortbildung des Rechts' 36 (1981) *JuristenZeitung (JZ)*, 417.
- Axel Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht* (Mohr Siebeck, Tübingen 2009).
- Christoph Möllers, 'Methoden', in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, Volume 1 (2nd Edition, C.H. Beck, Munich 2012), 123.
- Thomas M.J. Möllers, 'Anlegerschutz durch Aktien- und Kapitalmarktrecht' 26 (1997) *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)*, 334.
- Thomas M.J. Möllers, 'Anlegerschutz im System des Kapitalmarktrechts', in: Stefan Grundmann, Brigitte Haar, Hanno Merkt et al. (eds), *Festschrift für Klaus J. Hopt zum 70. Geburtstag* (De Gruyter, Berlin/New York 2010), 2247.
- Thomas M.J. Möllers, 'Das Verhältnis der Haftung wegen sittenwidriger Schädigung zum gesellschaftsrechtlichen Kapitalerhaltungsgrundsatz' *Betriebs Berater (BB)* 2005, 1637.
- Thomas M.J. Möllers, 'Europäische Gesetzgebungslehre 2.0: Die dynamische Rechtsharmonisierung im Kapitalmarktrecht am Beispiel von MiFID II und PRIIP' *Zeitschrift für Europäisches Privatrecht (ZEuP)* 2016, 325.
- Thomas M.J. Möllers, 'Geschichte und Schutzzweck der Ad-hoc-Publizitätspflicht', in: Thomas M.J. Möllers and Klaus Rotter (eds), *Ad-hoc-Publizität* (C.H. Beck, Munich 2003), § 3.
- Thomas M.J. Möllers, 'Rezension zu Karl Riesenhuber: System und Prinzipien des Europäischen Vertragsrechts' 59 (2004) *Juristen Zeitung (JZ)*, 1067.
- Thomas M.J. Möllers and Franz Clemens Leisch, 'Haftung des Unternehmens gem. den §§ 37b, 37c WpHG bei Verletzung der Ad-hoc-Publizitätspflicht', in: Thomas M.J. Möllers and Klaus Rotter (eds), *Ad-hoc-Publizität* (C.H. Beck, Munich 2003), § 14.
- Thomas M.J. Möllers and Franz Clemens Leisch, 'Haftung von Vorständen gegenüber Anlegern wegen fehlerhafter Ad-hoc-Meldungen nach § 826 BGB' *Zeitschrift für Wirtschafts- und Bankrecht (WM)* 2001, 1648.

- Felix Moos, 'Die Schadensersatzansprüche des betrogenen Aktienwerbers gegen die trügerische Aktiengesellschaft' 70 (1911) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)*, 184.
- Peter O. Mühlert, 'Privatrecht, die EG-Grundfreiheiten und der Binnenmarkt' 159 (1995) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)*, 2.
- Peter O. Mühlert and Steffen Steup, 'Emittentenhaftung für fehlerhafte Kapitalmarktinformation am Beispiel der fehlerhaften Regelpublizität' *Zeitschrift für Wirtschafts- und Bankrecht (WM)* 2005, 1633.
- Peter Christian Müller-Graff and Eibe Riedel (eds), *Gemeinsames Verfassungsrecht in der Europäischen Union* (Nomos, Baden-Baden 1998).
- Münchener Kommentar zum Aktiengesetz*, Volume 2, Wulf Goette and Mathias Habersack (eds) (3rd Edition, C.H. Beck, Munich 2008).
- Palandt Bürgerliches Gesetzbuch mit Nebengesetzen*, Gerd Bruder Müller, Jürgen Ellenberger, Isabell Götz, Christian Grüneberg, Sebastian Herrler, Hartwig Sprau, Karsten Thorn, Walter Weidenkaff, Dietmar Weidlich and Hartmut Wicke (eds) (77th Edition, C. H. Beck, Munich 2018).
- Sacha Prechal, 'Combating Indirect Discrimination in Community Law Context' 20 (1993) *Legal Issues of European Integration*, 81.
- Georg Friedrich Puchta, *Pandekten* (5th Edition, Leipzig 1850).
- Gustav Radbruch, *Grundzüge der Rechtsphilosophie* (8th Edition, Koehler Verlag, Hamburg 1973).
- Peter Raisch, *Juristische Methoden: Vom antiken Rom bis zur Gegenwart* (C. F. Müller, Heidelberg 1995).
- Ferdinand Regelsberger, *Pandekten* (Duncker & Humblot, Leipzig 1893).
- Norbert Reich, *General Principles of EU Civil Law* (Intersentia Ltd, Cambridge 2014).
- Ulf Renzenbrink and Nelson Holzner, 'Das Verhältnis von Kapitalerhaltung und Ad-Hoc-Haftung' 10 (2002) *Zeitschrift für Bank- und Kapitalmarktrecht (BKR)*, 434.
- Karl Riesenhuber, 'Die Inhaltskontrolle von Vereinbarungen über Hauptleistung und Preis im Europäischen Vertragsrecht', in: Jens Dammann, Wolfgang Grunsky and Thomas Pfeiffer (eds), *Gedächtnisschrift Wolf* (C.H Beck, Munich 2011), 123.
- Karl Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (De Gruyter Recht, Berlin 2003).
- Fritz Rittner, 'Das Gemeinschaftsprivatrecht und die europäische Integration' 50 (1995) *JuristenZeitung (JZ)*, 849.
- Klaus Friedrich Röhl and Hans Christian Röhl, *Allgemeine Rechtslehre* (3rd Edition, Vahlen, Munich 2008).
- Anne Röthel, *Normkonkretisierung im Privatrecht* (Mohr Siebeck, Tübingen 2004).
- Friedrich Rüffler, 'Haftung für Kapitalmarktinformationen nach OGH 7 Ob 77/10i', in: Susanne Kalss and Ulrich Torggler (eds), *Kapitalmarkthaftung und Gesellschaftsrecht* (Manz, Wien 2013), 1.
- Bernd Rütters, Christian Fischer and Axel Birk, *Rechtstheorie* (8th Edition, C.H Beck, Munich 2015).

- Michael Sachs, 'Die Grundrechte als objektives Recht und als subjektives Recht', in: Klaus Stern (ed), *Das Staatsrecht der Bundesrepublik Deutschland*, Volume III/1 (C.H Beck, Munich 1988), § 65.
- Karsten Schmidt, 'Der Zivilrichter als Schöpfer und Vollstrecker wirtschaftsrechtlicher Normen' 4 (1977) *Deutsche Richterzeitung (DRiZ)*, 97.
- Martin Schmidt-Kessel, 'Europäisches Vertragsrecht', in: Karl Riesenhuber, *Europäische Methodenlehre* (3rd Edition, De Gruyter, Berlin/Munich/Boston 2015), § 17.
- Christian Schmidt-Leithoff, 'Gedanken über die Privatrechtsordnung als Grundlage zum EWG_Vertrag', in: Manfred Löwisch, Christian Schmidt-Leithoff and Burkhard Schmiedel (eds), *Beiträge zum Handels- und Wirtschaftsrecht: Festschrift für Fritz Rittner* (C.H. Beck, Munich 1991) 597.
- Rupert Scholz, 'Zum Verhältnis von europäischem Gemeinschaftsrecht und nationalem Verwaltungsverfahrensrecht' 7 (1998) *Die öffentliche Verwaltung (DÖV)*, 261.
- Werner Schroeder, 'Die Auslegung des EU-Rechts' 3 (2004) *Juristische Schulung (JuS)*, 180.
- Reiner Schulze, Manfred Zuleeg and Stefan Kadelbach (eds), *Europarecht* (3rd Edition, Nomos, Baden-Baden 2014).
- Ekkehard Schumann, 'Das Rechtsverweigerungsverbot. Historische und methodologische Bemerkungen zur richterlichen Pflicht, das Recht auszulegen, zu ergänzen und fortzubilden' 81 (1968) *Zeitschrift für Zivilprozeß (ZZP)*, 79.
- Eberhard Schwark, 'Prospekthaftung und Kapitalerhaltung in der AG', in: Karsten Schmidt and Eberhard Schwark (eds), *Unternehmen, Recht und Wirtschaftsordnung: Festschrift für Peter Raisch zum 70. Geburtstag* (Carl Heymanns Verlag, Cologne/Berlin/Bonn/Munich 1995), 269.
- Jan Sieckmann, *Recht als normatives System* (Nomos, Baden-Baden 2009).
- Dieter Simon, *Rechtshistorisches Journal*, Volume 11 (Löwenklau Gesellschaft, Frankfurt am Main 1992).
- Staudinger Bürgerliches Gesetzbuch* (De Gruyter, Berlin edited 2015).
- Anton Friedrich Justus Thibaut, *System des Pandektenrechts*, 3 Volumes (5th Edition, Friedrich Mauke, Jena 1818).
- Andreas von Thur, *Allgemeiner Teil des Bürgerlichen Rechts*, Volume 1 (Duncker & Humblot, Berlin 1910).
- Rüdiger Veil, 'Die Ad-hoc-Publizitätshaftung im System kapitalmarktrechtlicher Informationshaftung' 167 (2003) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)*, 365.
- Uwe Volkmann, 'Veränderungen der Grundrechtsdogmatik' 60 (2005) *Juristenzeitung (JZ)*, 261.
- Andreas Voßkuhle, 'Neue Verwaltungswissenschaft', in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, Volume 1 (2nd Edition, C.H. Beck, Munich 2012), § 1.

Christian Waldhoff, 'Lob und Kritik der Dogmatik: Rechtsdogmatik im Spannungsfeld von Gesetzesbindung und Funktionenorientierung', in: Gregor Kirchhof, Stefan Magen und Karsten Schneider (eds), *Was weiß Dogmatik?* (Mohr Siebeck, Tübingen 2012), 17.

Wolfgang Wiegand, 'Back to the future?' 12 (1993) *Rechtshistorisches Journal*, 277.

Bernhard Windscheid, *Lehrbuch des Pandektenrechts*, 3 Volumes (7th Edition, Literarische Anstalt Rütten und Loening, Frankfurt am Main 1891).

Manfred Wolf and Jörg Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* (10th Edition, C.H. Beck, Munich 2012).

Christian Wolff, *Grundsätze des Natur- und Völkerrechts* (Regner, Halle 1754).

Reinhard Zimmermann, 'Heard Melodies are Sweet, but those unheard are sweeter...' 193 (1993) *Archiv für die civilistische Praxis (AcP)*, 121.

Reinhard Zimmermann, 'Law of Obligations' 47 (1992) *Juristenzeitung (JZ)*, 8.

Register of Cases

European Court of Justice (ECJ)

ECJ, Case 8/55, 16.07.1956, *Fédération Charbonnière*, ECLI:EU:C:1956:11.

ECJ, Case 1/73, 05.07.1973, *Westzucker*, ECLI:EU:C:1973:78.

ECJ, Case 4/73, 14.05.1974, *Nold*, ECLI:EU:C:1974:51.

ECJ, Case 44/79, 13.12.1979, *Hauer*, ECLI:EU:C:1979:290.

ECJ, Case 205/85, 21.09.1983, *Milchkontor*, ECLI:EU:C:1983:233.

ECJ, Case 222/84, 15.05.1986, *Johnston*, ECLI:EU:C:1986:206.

ECJ, Case 80/86, 08.10.1987, *Kolpinghuis*, ECLI:EU:C:1987:431.

ECJ, Case 222/86, 15.10.1987, *Heylens*, ECLI:EU:C:1987:442.

ECJ, Case 177/88, 08.11.1990, *Dekker*, ECLI:EU:C:1990:383.

ECJ, Case 18/88, 13.12.1991, *GB-Inno-BM*, ECLI:EU:C:1991:474.

ECJ, Case 317/93, 14.12.1995, *Nolte*, ECLI:EU:C:1995:438.

ECJ, Case 143/93, 13.02.1996, *Van Es Douane Agenten*, ECLI:EU:C:1996:45.

ECJ, Case 46/93, 05.03.1996, *Brasserie du Pêcheur*, ECLI:EU:C:1996:79.

ECJ, Case 24/95, 20.03.1997, *Alcan*, ECLI:EU:C:1997:163.

ECJ, Case 409/95, 11.11.1997, *Marschall*, ECLI:EU:C:1997:533.

ECJ, Case 144/04, 22.11.2005, *Mangold/Helm*, ECLI:EU:C:2005:709.

ECJ, Case 255/02, 21.02.2006, *Halifax*, ECLI:EU:C:2006:121.

ECJ, Case 212/04, 04.07.2006, *Adeneler*, ECLI:EU:C:2006:443.

ECJ, Case 432/05, 13.03.2007, *Unibet*, ECLI:EU:C:2007:163.

ECJ, Case 201/08, 10.09.2009, *Plantanol*, ECLI:EU:C:2009:539.

ECJ, Case 58/12 P, 26.11.2013, *Groupe Gascogne*, ECLI:EU:C:2013:770.

ECJ, Case 174/12, 19.12.2013, *Alfred Hirman/Immofinanz AG*, ECLI:EU:C:2013:856.

German Federal Constitutional Court (BVerfG)

BVerfG 20.02.1952 – 1 BvF 2/51 – BVerfGE 1, 117, 131.

BVerfG 26.05.1970 – 1 BvR 83/69, 244/69, 345/69 – BVerfGE 28, 243, 261 – conscientious objection.

BVerfG 24.02.1971 – 1 BvR 435/68 – BVerfGE 30, 173, 193 – Mephisto.

BVerfG 14.02.1973 – 1 BvR 112/65 – BVerfGE 34, 269, 286 et seq. – Soraya.

BVerfG 08.04.1987 – 2 BvR 687/85 – BVerfGE 75, 223, 243 et seq. – Kloppenburg.

BVerfG 19.05.1992 – 1 BvR 986/91 – BVerfGE 86, 133.

German Federal Court of Justice (BGH)

BGH 29.03.1971 – III ZR 98/69 – BGHZ 56, 57.

BGH 23.06.1952 – III 297/51 – BGHZ 6, 319 – Duty to compensate among drivers.

BGH 13.04.1956 – VI 347/54 – BGHZ 20, 259 – Operational Risk.

BGH 02.12.1974 – II ZR 78/72 – BGHZ 63, 282 – Compulsory admission of a monopoly organization.

BGH 11.01.1977 – VI ZR 261/75 – NJW 1977, 2073.

BGH 20.01.1983 – VII ZR 32/82 – BGHZ 86, 273 – Authority by estoppel.

BGH 18.09.1987 – V ZR 219/85 – NJW-RR 1988, 136.

BGH 15.10.1987 – III ZR 235/86 – BGHZ 102, 60.

BGH 25.02.1993 – VII 24/92 – BGHZ 121, 378.

BGH 18.04.1997 – V ZR 28/96 – BGHZ 135, 235 – roots in the tennis court.

BGH 19.07.2004 – II ZR 402/02 – BGHZ 160, 149 – Infomatec II.

BGH 09.05.2005 – II ZR 287/02 – NJW 2005, 2450 – EM.TV.

BGH 28.11.2005 – II ZR 80/04 – ZIP 2007, 681 – Comroad I.

BGH 11.05.2011 – VIII ZR 289/09 – BGHZ 189, 346 – Usage of another member's eBay account.

BGH 13.12.2011 – XI ZR 51/10 – BGHZ 192, 90 – IKB.

Supreme Court of the German Reich (RG)

RG 07.11.1931 – V 106/31 – RGZ 133, 388 – Theater

RG 10.02.1930 – VI 270/29 – RGZ 127, 218 – gas meter.

Federal Labour Court (BAG)

BAG 15.10.1992 – 2 AZR 227/92 – BAGE 71, 252.

German Higher Regional Court (OLG)

OLG Frankfurt 17.03.2005 – 1 U 149/04 – ZIP 2005, 710 – Comroad.

OLG München 20.04.2005 – 7 U 5303/04 – ZIP 2005, 901 – Comroad.

Austrian Supreme Court (OGH)

OGH 30.03.2011 – Ob 77/10i – GesRZ 2011, 251 No. II.1.1.

OGH 15.03.2012 – 6 Ob 28/12d – ÖBA 2012, 548/1828 No. 3.5.

How principles are used to solve difficult questions in law is the stuff of which German jurists call *Methodenlehre* or the science of legal interpretation and is at the heart of this paper.²

² Derek van der Marck, *B.A. (Law), LL.B., LL.M. University of London*, University of Johannesburg.

³ Henry N. Coleridge, *Spectator of the Public Faith of Samuel Taylor Coleridge* (1838), 52 (he made this statement in 1827).

⁴ Much, but certainly not all, of German *Methodenlehre* is captured in contemporary jurisdictions under the title of 'legal interpretation'. The two standard works on judicial *Methodenlehre* that have most often been cited are Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtslehre* (2nd Edition, 1993) and Hans-Martin Pawlowski, *Methodenlehre der Jurisprudenz* (3rd Edition, 1999). On juridical argumentation theory see in particular Robert Alexy, *Theorie der Juristischen Argumentation* (2nd Edition, 1995).