Charl Hugo/Thomas M.J. Möllers (eds.)

Legality and Limitation of Powers

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

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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.

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* 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.
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-

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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-
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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. 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 contract in the German Civil Code (BGB) as there is on the principle of contractual fidelity (pacta sunt servanda). However, no one seriously disputes the existence and applicability of these principles. On the contrary, other states have codified numerous principles. It is generally assumed that the BGB presupposes that these principles are obviously valid.

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 Gesetzbuches 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.
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. Moreover, the judge cannot simply decide, but rather needs to be able to justify the decision rationally with good arguments. 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

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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); Secs 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.\textsuperscript{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 uncodified 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).

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, 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. They create meaning by means of their interaction and allow for a certain degree of generalisation. Like the concept of good faith in Section 242 of the Civil Code (BGB), they are only codified by way of exception — which is why they are often obtained from development of the law. Consequently, there are numerous codifications that refer to the general legal principles as part of permissible development of the law. 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. Legal rules are labelled as legal principles although they are often “undeserving of that term”. Before principles can be subsumed, they need to be further substantiated. Working with legal principles methodically requires two steps (see below).


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*, 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.\(^{26}\)
Thus, it is not clear when a norm is a principle or when it is a rule.\textsuperscript{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.\textsuperscript{28} Sieckmann further developed the theory of principles, and more carefully considers principles only as “rudiments of argumentation”.\textsuperscript{29}

\textbf{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.\textsuperscript{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

\textsuperscript{27} Michael Sachs, ‘Die Grundrechte als objektives Recht u. als subjektives Recht’, in: Klaus Stern (ed), \textit{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.


\textsuperscript{29} Jan Sieckmann, \textit{Recht als normatives System} (2009), 41 et seqq.

\textsuperscript{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), \textit{Kölner Kommentar zum WpÜG} (2nd Edition, 2010), § 3 para. 2: Declared aims, use of which is questionable; Ulrich Noack and Timo Holzbom, in: Eberhard Schwark and Daniel Zimmer (eds), \textit{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. 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”. Legal norms are substantively practical if, as principles, they allow for single-case justice because the relevant valuation is clearly discernible – 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). Thus formal and substantive practicability are complementary. 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.
34 Marietta Auer (Fn. 31), 48, 54 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.\(^{41}\)

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36 Ronald Dworkin (Fn. 18), 90.
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.\textsuperscript{42}

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

Legal principles have already been traced back to early legal ideas such as justice, practicality and legal certainty.\textsuperscript{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,\textsuperscript{46} however, are too general for the resolution of a case. They need to be further substantiated.\textsuperscript{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.\textsuperscript{48} According to Canaris, deriving
an idea is based on several legal provisions. Some claim that principles result from an isolated analogy or from a cumulative analogy. 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 fulfills 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. 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. 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. 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.

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.
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 estoppel\textsuperscript{56} or apparent authority,\textsuperscript{57} but also in commercial and corporate law.\textsuperscript{58} It is also possible to derive a principle from a single provision.\textsuperscript{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.\textsuperscript{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,\textsuperscript{61} or the claim for compensation under neighbourhood law in Section 906(2) sentence 2 of the Civil Code\textsuperscript{62} or for the claim for disposal in Section 1004 of the Civil Code.\textsuperscript{63} The principle also applies in public law.\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{57} BGH 20.01.1983 – VII ZR 32/82 – BGHZ 86, 273, 274 et seqq. – Authority by estoppel.

\textsuperscript{58} Claus-Wilhelm Canaris, \textit{Die Vertrauenshaftung im deutschen Privatrecht} (1971), 150 et seqq.

\textsuperscript{59} For example Arthur Meier-Hayoz, in: Arthur Meier-Hayoz (ed), \textit{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.”


\textsuperscript{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."


established by Dernburg and adopted in academic literature and jurisdiction. This must be rejected as well, because 'nature of the matter' does not establish anything in its own right. 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.


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 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 77/101 – GesRZ 2011, 251 No. II.1.1; OGH 15.03/2012 – 6 Ob 28/12d – ÖBA 2012, 548/1828, No. 2.2.et seqq., 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,\textsuperscript{74} the frustration of contract,\textsuperscript{75} and contracts with protective effect for the benefit of third parties.\textsuperscript{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.

\section*{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.\textsuperscript{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


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

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

consequences result from giving the conflicting principle priority? Practicability 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 recission 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. But this would link the market risk to the alleged protective purpose – an unlawful circular argument. 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). 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

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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 prospectus...
tus and the sales prospectus that allows investors to reach a correct conclusion about financial assets and liabilities.\textsuperscript{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 Act\textsuperscript{85} 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,\textsuperscript{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.\textsuperscript{87} Under corporate law, this conflicts \textit{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.\textsuperscript{88} To resolve the conflict, the
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)

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.


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 (\textit{Bereicherungsverbots}).\(^94\)

Balancing the interests of the company or their creditors with those of the affected shareholders, the Higher Regional Court (OLG) in Frankfurt\(^95\) 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 \textit{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

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\(^93\) 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 – 1 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 Wankerl (Fn. 90), 746.
venture capital would decrease and this would eventually be to the company’s disadvantage. Therefore, the priority of issuer liability under capital markets law contributes to allocative efficiency and to an increase in competitiveness towards foreign stock exchanges. 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.

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.

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

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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.

form a general rule from various provisions by induction.\textsuperscript{103} By reference to the constitutional traditions common to the Member States, the CJEU has developed the fundamental rights at a European level,\textsuperscript{104} now standardised in Article 6(3) TEU,\textsuperscript{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.\textsuperscript{106} Meanwhile, at the European level, in addition to recognising fundamental rights the Court has also recognised general principles of law\textsuperscript{107}—such as legal certainty,\textsuperscript{108} protection of legitimate expectations,\textsuperscript{109} effective legal protection,\textsuperscript{110} effet utile, and proportionality.\textsuperscript{111}

\textsuperscript{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), Festchrift für Klaus J. Hopt zum 70. Geburtstag (2010), 27 (35).


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

\textsuperscript{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.).


\textsuperscript{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.

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. With respect to procedural law, the CJEU has repeatedly stressed that access to the national courts must also be guaranteed, and with this principle of effective legal protection restricted the procedural autonomy of the Member States. 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.


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.

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It is also interesting to note the attempt to develop a European Civil Code, such as the Draft Common Frame of Reference (DCFR)\textsuperscript{118} from various research groups or the (withdrawn) proposal from the Commission for a Common European Sales Law (CESL).\textsuperscript{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,\textsuperscript{120} such as discerning freedom of contract or contractual fidelity (\textit{pacta sunt servanda}), from European law.\textsuperscript{121} This is not straightforward, because neither the treaties nor the Charter of Fundamental Rights directly

\begin{itemize}
\item \textsuperscript{121} See, e.g. Karl Riesenhuber, ‘Die Inhaltskontrolle von Vereinbarungen über Haupteistung und Preis im Europäischen Vertragsrecht’, in: Jens Dammann, Wolfgang Grunsky and Thomas Pfeiffer, \textit{Gedächtnisschrift Wolf} (2011), 123 (130) with further citations; Bettina Heiderhoff (Fn. 102), para. 230 et seq.
\end{itemize}
standardise freedom of contract. There are only a few judgements that address freedom of contract. However, Article 119 TFEU acknowledges the 'principle of an open market economy with free competition'; freedom of contract is an essential requirement for this. 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. In the Hirmann 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.

The principle of rational investment decision, and therefore the right to make an autonomous investment decision, is incorporated in the European directives. 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”.

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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.


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 Hirmann/Immofinanz AG; before Thomas M.J. Möllers (Fn. 88), 1641.

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

investors to buy or sell shares in full knowledge of the changes in the voting structure.\textsuperscript{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".\textsuperscript{130} The right to an autonomous investment decision is phrased most clearly in Recital 1 of the former Directive on Securities Sales Prospectus.\textsuperscript{131} Therefore, it was only consequent that the CJEU accepted the reversal of the purchase agreement in the \textit{Hirmann} case, arguing that the damaged party is taken back to the situation they were in before the damaging event happened.\textsuperscript{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 \textit{Mangold} case elevated the prohibition of age discrimination into a legal principle and invoked \textit{inter alia} the common constitutional traditions,\textsuperscript{133} it attracted complaints because such a common tradition did not exist in the Member States.\textsuperscript{134}

\begin{footnotesize}

\textsuperscript{130} Directive 2004/25/EC of 21 April 2004 on takeover bids Art. 3 (1) lit. b) and Art. 6 (2).
\textsuperscript{132} ECJ 19.12.2013 – C-174/12 – ECLI:EU:C:2013:856, para. 53 – Alfred Hirmann/Immobinanz AG: “The aim of such legislation is, \textit{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.”
\textsuperscript{133} ECJ 22.11.2005 – C-144/04 – ECLI:EU:C:2005:709, para. 75 – Mangold/Helm.
\textsuperscript{134} Critical, \textit{inter alia}, Jan H. Jans, 34 (2007) \textit{Legal Issues of European Integration}, 53 (65); Jürgen Basedow (Fn. 103), 27 (34); Jürgen Basedow, 71 (2016) \textit{JuristenZzeitung (JZ)}, 269 (275 et seq.).

\end{footnotesize}
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, and also needs to be taken into consideration as part of the development of the law in conformity with the directive. 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.

VII. Outlook

The German Civil Code (BGB), marked by the ideas of 19th Century Pandectists, trains German lawyers in systematic thinking and the associated legal doctrine and legal principles. In order to further develop the law, but also to better understand it, a consolidated doctrine of law with legal
principles is required.\textsuperscript{140} The relatively young capital markets law is still at the beginning of the process of forming principles.\textsuperscript{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.\textsuperscript{142} The challenges for scholars never cease.

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

\textsuperscript{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), \textit{Festschrift für Klaus J. Hopt zum 70. Geburtstag} (2010), 2247 et seq.

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