Preface	VII
Acknowledgements	IX
Translator's note	XI
Illustrations	XXIX
List of Abbreviations	
Databases for German, European and foreign legislative acts	XLI
Principal Works Cited	XLIII
Part 1	
The basics - sources of law	
Chapter 1. Legal methodology as a theory of legitimacy and justification	1
I. The purpose of legal methodology	
1. Determining the meaning of a legal text	
2. Legal methodology as a postmodern methodology – content of this book	
a) Postmodern methodology as criticism of traditional methodology	3
b) A modern legal methodologyb)	
c) Methodology as a theory of legitimacy and argumentation	
d) The necessity of legal interpretation concepts and legal doctrine	
3. The influence of European law on discovering the law	
a) European articles and the multi-level system	
b) The national judge as European judgeb)	7 7
4. The worldwide relevance of figures of argumentation in the justification of legal	,
decisions	8
a) The global claim of legal figures of argumentation	
b) Legal methodology and case law	
II. Legal methodology as a theory of legitimacy	
1. Constitutional requirements for a judicial decision	10
a) Principle of the separation of powers	
b) Legalism	
c) Theory of materiality and the principle of legality (nullum crimen sine lege)	
d) The right to be heard and the constitutional obligation to state reasons	
e) Infringement of the equality of application of Article 3(1) of the Basic Law	14
f) The duty to state reasons at European level	14
2. Methodology as theory of legitimacy to limit the judge's power	
a) Limitation of power vis-à-vis parliament	
b) Limitation of power vis-à-vis citizens	16
c) Right of the judge to develop the law (Article 20(3) of the Basic Law)	
3. The style of reasoning and citation practice of courts in Europe	
a) The judgment and citation style of national courts	19
b) The reasoning style of the ECJ	
III. Legal methodology as a theory of argumentation	
1. The claim to truth and contentious lawyers	
a) The apparently correct decision: One-right-answer thesis	21
b) Decisions based on a fixed preconception	23
c) Rationalising a justifiable decision	25
2. The purpose of the theory of argumentation	26
a) Refutability of incorrect approaches	26
b) Rationalising justifiable results	27
c) Openness, creativity and synthesis as the basis for convincing solutions	27
3. Legal figures of argumentation	29
a) Thesis, premise and argument	29
b) Legal argumentation concepts as a premise for a thesis	29

	4. Weighting of argumentation concepts	30
	a) Binding priority rule	30
	b) Presumption rule	31
	c) Balancing rule	31
	d) Rule about the burden of proof of the argument	31
	e) Concept of legal figures of argumentation	
13.7	The claim to justice of legal methodalogy	32
1ν.	The claim to justice of legal methodology	33
	1. Legal methodology and the claim to justice	33
	a) The supposed injustice in methodology (Rüthers)	33
	b) Theories of discourse	33
	2. Legal methodology as a value-based theory of legitimacy and argumentation	34
	a) Human dignity and natural law as the ultimate validation	34
	b) Legal methodology as a rational theory of justification to prevent unfair outcomes	35
	c) Legal method and the claim that jurisprudence is a science	36
	3. Legal certainty and justice as legal concepts	36
	a) Justice and Aristotle	36
	b) Justice, appropriateness and legal certainty as legal concepts (Radbruch)	37
	c) Human dignity and protection of legal rights	37
	d) Securing freedoms	38
V.	Summary of chapter 1	38
	er 2. Sources of law	40
	Law and sources of law	41
	I. Criteria for describing law	41
	a) Sources of law and sources of legal knowledge	41
	b) Validity and binding effect	42
	c) Legal provisions as norms prescribing conduct	43
	d) Sanctions and enforcing laws	44
	2. Differentiating law from morality, ethics and political correctness	45
	a) Morality, ethics and political correctness	45
	b) Delineation from law	46
	c) The mutual influence of morality and law	47
II	Hierarchy of legal sources in Germany	48
11.	1. Statutes as a source of law in Germany	48
	a) Differences and overlaps between public and private law	48
,	b) Differentiating legal norms: Statutes, statutory instruments and by-laws	49
	2. Higher-ranking law: The hierarchy of the law and the lex superior rule as a conflict-	
	of-law rule	50
	3. The hierarchy of German law	52
	a) Federal law and state law	52
	b) Conflict between federal and state law (Articles 31, 72 of the Basic Law)	52
4	I. Amendments, legal certainty, and protection of legitimate expectation	53
	a) Terminology	53
	b) Genuine retroactive effect/retroactive effect of legal consequences	54
	c) Non-genuine retroactive effect/retroactive effect of constituent facts	54
III. '	The hierarchy of law in Germany today, including European law	55
	. European law as supranational law	55
	a) European law as an autonomous legal system	55
	b) European legal sources – differentiating between primary, secondary and tertiary law	56
	c) Norm hierarchies and interpretation of European law in accordance with primary	50
	law	50
		58
4	2. The autonomous interpretation of European law	60
	a) Autonomous interpretation by the ECJ	60
	b) Exceptions to autonomous interpretation	61
	c) Duty for national judges to apply autonomous interpretation	61
3	The principle of conferral	62
	a) Starting point	62
	b) Types of competence	62
	c) Rules on exercising competence	62

4. Higher-ranking law: The supremacy of Union law over national law	
a) The unitary approach of the ECJ: direct applicability of European law	63
b) Primacy of European Union law	
c) The dualist perspective of the Federal Constitutional Court: direct applicability o	n
the basis of national constitutional law	
IV. The hierarchy of law in Germany today, including international law	
1. Sources of law at the international level	
2. The autonomous interpretation of international agreements	
3. The hierarchy of international law	
4. International law and national law	
a) Relationship between international law and the Basic Law	
b) Relationship of the ECHR to the Basic Law	70
V. Natural law	
1. The relevance of natural law	
a) Opponents of natural law	
b) Historical development of natural law	72
c) Mediating perspective: Narrow scope of natural law, and wider scope of supranational legal principles	72
2. Primacy of natural law over the unambiguous law of injustice (Radbruch formula).	
3. Positive forms of natural law	
a) Natural law and anthropology	
b) Legal concepts and no direct subsumption	75
VI. Summary of chapter 2	
, .	
Chapter 3. Secondary sources of law and sources of legal knowledge	
I. Problems: Sources of legal knowledge alongside primary sources of law?	77
1. The previous dualistic approach: restricted definition of sources of law, and sources	of .
legal knowledge	77
2. The broad definition of legal sources - linked legal structures as an alternative to the	ıe
hierarchy of law	
3. Mediating perspective: The theory of secondary sources of law	81
a) Duty of referral, subsidiary duty of compliance and presumption of conformity	81
b) Extent of the presumption of conformity	
4. Beyond legal positivism and natural law	
a) Legal positivism (Kelsen) and dualism of methods	
b) Extending the theory of sources of law to methodological polarity	
II. The importance of case law in the determination of law	
1. The role of customary law	
2. The doctrine of secondary sources of law	
2. The doctrine of secondary sources of law	85
a) Duties of referral and compliance, and rejection of customary law	02
b) Change in precedent: Legal certainty and protection of legitimate expectation	0.4
versus material justice	
c) Changing ECJ case law, legal certainty and protection of legitimate expectation	
3. Strictly binding precedent as an exception in German legal circles	89
a) The stare decisis rule and persuasive authorities in Anglo-American legal circles.	89
b) Binding nature of the rulings of the Federal Constitutional Court	
c) Judgments binding other courts	91
d) Binding nature of decisions of the ECJ	9
III. Administrative regulations, private rule-setting, and European recommendations	92
1. Administrative regulations	92
a) Administrative regulations to interpret and substantiate norms	92
b) Administrative regulations as secondary sources of law	93
c) Protecting the legitimate expectation of citizens	93
2. Private rule-setting and the demarcation to standard terms and conditions, contract	ts
and soft law	
a) Legalisation of private norms	
b) Legal presumption of conformity	
c) Declaration of Conformity (comply-or-explain)	9!
d) Substantiation of general clauses by private rule-setting	9

3. Legal consequences	٠.
a) Presumption of conformity and prerequisites	٠.
b) Legal certainty and protection of legitimate expectation	
4. Recommendations and administrative provisions under EU law	
Presumption of conformity recommendations and administrative provisions under EU law	er
b) Statutory examples of duties of referral and compliance	
7. The importance of foreign judgments in the determination of law	
1. The obligation to take account of comparative law during interpretation under	
European law, uniform international law, and international lawlaw	
a) International private law	
b) Uniform international law (see Article 7 UN Convention on Contracts for the International Sale of Goods)	
c) Fundamental rights under the ECHR	
d) The national legal practitioner as a European legal practitioner	
Case groups using non-binding comparative law	
3. The legal quality of foreign judgments: Between persuasive authority and mere source	
of legal knowledge	
4. The importance of comparative law for the ECJ and the ECtHR	•••
a) Obligation for the ECJ to use comparative law	
b) Non-binding use of comparative law at the ECJ	
c) Comparative law at the ECtHR	
V. Academic legal literature	
I. Summary of chapter 3	•••
Part 2	
Interpretation	
pter 4. Wording, systematics and history as traditional methods of interpretation	
I. Interpretation and subsumption	
1. Deductive syllogism and subsumption	••
a) Subsumption as a logical conclusion	
b) Building-block technique	
c) Interactions of norms and facts - the Hin- und Herwandern des Blickes and case norm theory	
d) Developing definitions to substantiate individual constituent facts	•••
2. The four traditional canons of interpretation	
a) The four canons of interpretation of von Savigny	
b) The current impact of the four canons of interpretation, and their meaning in individual Member States	
c) The importance of the interpretation canons for the ECJ	
3. Criticism of the four interpretation methods and the subsumption model	
4. Interpretation, substantiation and development of the law	
a) Interpretation, substantiation and development of the law as creation of law	
b) The limits of the word as the boundary between interpretation and developing the	ıe
c) The fluid boundary between interpretation and development of the law	
d) Consequences – the increased burden of justification	
Crammatical interpretation	••
I. Grammatical interpretation	
Tools to determine clear or ambiguous wording a) Legal definitions, assumptions and legal fictions as the legal language of the	
legislature	
b) Normative and descriptive terms	•••
c) Narrow (restrictive) and broad (extensive) interpretation of the individual	
constituent facts of the case	
d) General language use	•••
3. The clarity rule of the wording (acte clair doctrine, literal rule, textualism) as an	
interpretation concept	

	4. Limits of the wording and the prohibition of analogy	
	a) The four forms of the rule-of-law principle	
	b) The prohibition of analogy (nullum crimen, nulla poena sine lege stricta)	129
	c) The prohibition of non-specific crimes (nullum crimen, nulla poena sine lege certa)	
	d) Prohibition of customary law (nulla poena sine lege scripta)	134
	e) Prohibition of retroactive criminal liability (nulla poena sine lege praevia)	
	5. The importance of the wording for the ECJ	135
	a) The wording in multi-language legal texts	
	b) The difference between legal usage and general use of language at the ECJ	
	c) The ECJ and the limits of wording in criminal and tax law	136
III	Systematic interpretation	137
	1. Meaning	137
	a) The ideal of a consistent legal system	137
	b) Systematic interpretation in the hierarchy of law	139
	c) The overall system of the Civil Code – jurisprudence of concepts: Conceptual	137
	pyramids – building block techniques – references	140
	d) The internal system of the law and the values of the Civil Code	142
	2. In dividual continuation intermediation and continuation and continuati	144
	2. Individual systematic interpretation concepts	144
	a) Comparison of the constituent elements of a norm	
	b) Position of the constituent element within the structure of the law	145
	c) Derogations must not be interpreted as extending the law (singularia non sunt	
	extendenda)	
	d) Uniformity of legal order and the Constitution	146
	3. Conflict-of-law rules	148
	a) A higher-ranking law takes precedence over a lower-ranking law (lex superior	
	derogat legi inferiori)	148
	b) A more recent law takes precedence over an earlier law (lex posterior derogat legi	
	priori)	148
	c) A specific law takes precedence over a more generalised law (lex specialis derogat	
	legi generali)	148
	4. Systematic interpretation by the ECJ	149
	a) The role of systematics	
	b) Conflict-of-law rules	
	c) Derogations interpreted narrowly	
	d) Other argumentation concepts	151
ΙV	Historical interpretation	
	Historical interpretation in the broad and narrow sense	
	a) Relevance and historical interpretation in the broad sense	
	b) Terminology	
	c) Precursor norms as aids for narrow historical interpretation	
	d) Continuity between the precursor norm and the current norm (droit constant)	
	e) Constitutional tradition	
	2. Legislative intent in the materials of the concrete norm	
	a) Genetic interpretation	
	b) Preamble and objectives as legally immanent materials	
	c) Using official materials from the legislative process as an aid	155
	d) Intent of the majority of the legislative body versus individual intent	
	e) Continuity argument: clear intent remains valid	157
	f) Cumulation of genetic sources	
	3. The meaning of the history of the legislation for the ECJ	158
	a) The meaning of broad historical interpretation for the ECJ	
	b) Continuity with the precursor norm as narrow historical interpretation	
	c) Constitutional tradition as narrow historical interpretation	
	d) Genetic interpretation – preamble and recitals as legally immanent sources	
	e) Official materials as aids to genetic interpretation	
v	Summary of chapter 4	

Chapter 5. Telos, logic and impact-oriented interpretation	
I. The purpose of the law as teleological interpretation	163
1. On telos, the ratio legis	163
a) Terminology	163
b) The meaning and purpose of the primary and secondary law of the EU	164
c) The supposed superfluousness of the telos	165
d) The telos as premise	165
2. Determining the purpose of the law	166
a) Internal purpose of the law	166
b) Express or implied purpose of the norm	167
c) Aids to interpretation: In dubio pro libertate, pro consumente, favor laboris	167
3. The jurisprudence of interests and the jurisprudence of values	
a) From jurisprudence of interests to jurisprudence of values	168
b) Difference between interests-based interpretation and teleological interpretation	170
II. Individual logical figures of argumentation	171
1. Contravention of the general rules of logic	
2. Circular argument (petitio principii)	
a) Circular argument (petitio principii)	172
b) The argumentum ex silentio	174
3. Leap in conclusion (saltus in concludendo)	175
4. Avoiding circumvention of the law	175
5. Avoidance of rule contradictions, approximation of norms and maintaining the scope	
of a norm	
6. Individual figures of argumentation of the ECJ	
III. Impact-oriented interpretation	
1. Terminology, and relevance for impact-oriented interpretation	178
2. The limits of impact-oriented interpretation	179
3. Individual figures of argumentation	180
a) Avoiding absurd or impractical results (argumentum ad absurdum)	180
b) Economic consideration: Avoidance of excessive liability or undue hardship	182
c) The law does not concern itself with insignificant matters (de minimis non curat lex)	185
d) Avoiding harmful effects and enabling practicable outcomes	186
e) The sociology of law, general life experience, normative power of the factual	188
f) Normative power of the factual	189
g) Acceptance of the decision and prevailing opinion	190
h) Dynamic interpretation of the Constitution by the Federal Constitutional Court	
i) Attempt at a mediating legal view	191
4. Impact-oriented argumentation at the ECJ	
a) Avoiding absurd or impractical results (argumentum ad absurdum)	192
b) Effet utile	192
c) Dynamic interpretation and the development of new legal remedies	194
d) The law does not concern itself with insignificant matters from the European	
perspective	195
e) Practical results	195
IV. The economic analysis of law	196
I. Aims and methods of the law and economics approach	
a) Homo oeconomicus and allocation efficiency	196
b) Cost-benefit analysis and cheapest cost avoider	197
2. The limits of the economic approach	198
a) Bounded rationality of human beings	198
b) Constitutional aspects and the values of the legislature	199
c) Insufficient empirical data	200
3. The importance for legal methodology	200
a) Importance for legal application	200
b) Cost-benefit analysis, cheapest cost avoider, and liability	201
c) Liability and prevention	203
d) Information gaps and the cheapest cost avoider	204
e) The principal-agent problem	205
f) Game theory	206

4. Economic considerations of the ECJ	206
a) Economic questions under EU antitrust law	
b) The internal market and effective legal protection	
V. Summary of chapter 5	207
Chapter 6. Teleological counter concepts and simple forms of development of the law	208
I. Teleological counter concepts to formal arguments	
1. Wording	
a) Rejection of the clarity rule	209
b) Legal use of language	
c) Impossibility of the literal interpretation of the wording	
d) Development of the law	
2. System	
a) Correction of the systematic definition of the constituent elements	
b) Relativity of legal terms and differentiating interpretation	213
c) Broad interpretation of exceptions	217
d) Conflict-of-law rules: The principle of alternativity suppresses the lex specialis	
principle	
e) Relativisation of the lex posterior principle	
f) Principles in dubio pro libertate, favor laboris, pro consumente etc. do not apply	
3. Historical interpretation	220
a) Discontinuity within the scope of genetic interpretation: subjective intent of the	
previous norm no longer applies	
b) Subjective intent is unclear, ambiguous or contradictory (perplexity)	
c) Decisiveness of normative, subjective intent	
d) Editorial error	
e) Objective theory	223
4. Telos, impact-oriented and economic analysis	
a) Illogical law	
b) The boundaries of impact-oriented interpretation and economic analysis	
II. Subjective versus objective theory	225
2. Subjective theory	223
a) Importance of the intent of the promulgating legislature	
b) Deliberate omission – the eloquent silence of the legislature	227
c) Criticism of subjective theory	227
3. Objective theory	220
a) Interpretation of the law in its temporal context	
b) The law is wiser than the legislature and ageing codification – the original purpose	
of the rule is no longer appropriate	
c) The nature of the matter	
d) Criticism of objective theory	
4. The subjective-objective theory as a unified theory	232
5. Subjective and objective interpretation	
a) From the perspective of the ECJ	
b) The US perspective: textualism, purposivism versus living originalism	233
III. Ordinary forms of development of the law	
1. Teleological reduction	. 234
a) Methodical basis	
b) Four examination steps to justify teleological reduction	235
c) Unfairness and argumentum ad absurdum as figures of argumentation	. 237
2. The dispute about the definition of an omission	. 238
a) The omission as fata morgana?	238
b) The unintentional omission (planwidrige Lücke) as premise	. 238
c) The different forms of omissions	
3. Individual analogy (statutory analogy)	. 24
a) Methodical basis - the similarity argument (argumentum a simile)	. 240
b) Four examination steps to justify individual analogy	
c) A fartiari conclusion and unfairness as figures of argumentation	24

d) Two variants of the similarity comparison	245
e) The unintentional omission and the circumvention argument	
4. General analogy (legal analogy)	
a) Methodological basis	247
b) Four examination steps to justify a general analogy	248
c) Coherence with the internal system of the law as a figure of argumentation for the	
justification of the unintentional omission	250
5. Ordinary forms of development of the law at the European level	252
a) The term interprétation	252
b) Teleological reduction	
c) Individual analogy	
d) General analogy and the development of new legal concepts	254
IV. The difficult search for telos	
1. Missing link to a constituent element	254
2. Multiple regulatory purposes	
V. Summary of chapter 6	257
, 1	
Part 3	
Substantiation	
Chapter 7. Substantiation of law by the legislature, the administration and the courts	259
I. Substantiation of the law	
1. Interpretation versus substantiation	
a) Interpretation as the first step	
b) Substantiation as a necessary second step	
2. General clauses - curse or blessing?	261
b) Delegation, legal development, flexibility and reception functions of general clauses	262
	264
II. Substantiation by the legislature	
1. General clauses and rule examples in German law	264
a) Systematics and teleological interpretation	
b) Legal definitions and rule examples in private law	
2. General clauses and rule examples in criminal law	
a) Indefinite legal concepts in the constituent facts	
b) Rule examples and legal consequences	
3. Substantiation of general clauses by the European legislature	
a) Legal definitions and rule examples	
b) Annexes	
c) Exhaustive or open character of statutory substantiation	
III. Substantiation by the administration or private regulatory systems	
1. German law	
a) Statutes and regulations	
b) Administrative rules	
c) Private regulatory systems	
2. European law	
IV. The comparative case method as substantiation by the courts	
1. The similarity between individual analogy and the comparative case method	
a) The comparative case method in Anglo-American law	
b) Reasoning from case to case (reasoning from the specific to the specific)	
c) Arguments in the context of the comparative case method	274
d) The formation of a generalisable legal sentence by combining induction and	_
deduction	275
2. The binding nature of court decisions	277
a) Anglo-American law: fundamental reasons (ratio decidendi), other considerations	
(obiter dictum), distinguishing and overruling	277
b) German law: fundamental reasons (ratio decidendi), other considerations (obiter	
dictum), distinguishing and overruling	280
3. The comparative case method of the ECJ	282

4. Individual arguments in case law	
a) Fundamental decisions and consolidated jurisprudence as argumentation concepts	282
b) Arguments in the hierarchy of case law	283
5. The legal comparative method: the 'how'	283
a) Compulsory comparative law using the example of uniform law and European law	283
b) Voluntary comparative law	284
c) Comparative law at the ECJ and ECtHR	
	288
•	
Chapter 8. The Bewegliche System, case groups and comparative case group as substantia-	
tion methods	
	290
1. The basics	
a) Discoverer of the Bewegliche System	290
b) Controversy about the relevance of the Bewegliche System	
c) Conclusive evaluation	
2. Application in German law	292
a) Attribution criteria to substantiate obligations within the scope of Section 823(1) of the Civil Code	292
b) Attribution criteria for contravention of public morals pursuant to Sections 138 and 826 of the Civil Code	294
c) Pre-contractual and contractual duties to provide information	
3. Application in European law	
II. Case groups to substantiate general clauses	297
1. Case groups	
a) The objective of a case group	
b) Requirement of similar constituent elements of a case group	
c) Opportunities and risks	
2. Case groups in European law	
III. The structuring of several attribution criteria of different case groups	
1. Attribution criteria of different case groups as a Bewegliche System	300
2. Developing new case groups – a flux	302
3. Establishing a new case group under European law	
IV. Summary of chapter 8	
•	
Chapter 9. Legal doctrine and general legal principles	306
I. General legal principles and legal doctrine	
1. The use of legal doctrine for legal methodology	307
a) Elements, objectives and concepts of legal doctrine	307
b) Risks of a practical form of legal doctrine (Gebrauchsdogmatik)	308
2. Legal doctrine and legal methodology	309
a) The links between legal doctrine and legal methodology	309
b) Substantiation and construction as figures of argumentation to integrate legal doctrine into methodology	
c) The advantages of combining methodology and legal doctrine	311
3. Differentiating legal ideas, legal principles and legal concepts	
a) Legal ideas as values	
b) Legal principles	
c) Legal concepts as legal propositions	
II. Using legal principles in cases: justification and construction of the legal principle	
1. The justification of the legal principle as a first step: recourse to statute or induction	315
a) The historical derivation of legal principles	
b) Individual or general analogy	
c) Different ways of establishing a legal principle	
2. The substantiation of legal principles as a necessary second step	317
a) The substantiation of legal principles to the legal proposition or legal concept	
b) Substantiation by weighing up interests	
III. Legal principles in private law: derivation and substantiation of private autonomy	
I Inductive derivation of bacta cunt corvanda	310

a) Freedom of contract as a result of freedom of intent	319
b) The reason for the binding contract (pacta sunt servanda)	
2. Freedom of contract and apparently contradictory legal principles	321
a) The controversial doctrinal justification of the obligation to contract	321
b) On the controversial price control of contracts - the laesio enormis	322
c) Disruption of the basis of the business and clausula rebus sic stantibus	
IV. The right to self-determination as justification of various legal concepts	324
1. Approaches in the academic literature	
a) Private autonomy and contractual fairness	
b) Private autonomy as optimisation	
c) Further approaches to the establishment of private autonomy	326
2. Private autonomy as self-determination for both parties	
a) Self-determination of the individual and mutual self-determination	
b) The derivation of the principle of self-determination from the Civil Code and the	320
Constitution	327
c) Restriction of freedom and self-determination as a substantiating measure to	
correct the contract	328
3. The legal-doctrinal justification of the various legal concepts with a lack of the right	220
to self-determination	328
a) Obligation to contract and lack of self-determination	328
b) Price controls in accordance with Section 138(1) of the Civil Code for contracts	320
that severely restrict freedom by interfering with the self-determined lifestyle	329
c) Freedom-restricting lack of equivalence as a disruption of the basis of the	347
	220
transaction4. The substantiation and establishment of legal concepts through the principle of self-	330
	221
determination	331
V. Legal principles at the European level	332
1. Challenges in deriving principles at the European level	332
a) Difficulties at the European level	
b) Differences between primary and secondary law	
2. General legal principles in European law	
a) Isolated codification of European legal principles	333
b) Recourse to the general principles of law or constitutional traditions of the	
Member States	
c) Other legal principles of European private law	
d) The influence of European legal principles on national law	335
VI. Summary of chapter 9	336
Chapter 10. Balancing as construction	337
I. Balancing in public law	338
1. Balancing as construction	338
a) Construction of 'open' constitutional norms	
b) Balancing as a process to substantiate conflicting legal principles	
2. The structure of balancing	
a) The balancing mandate and selection of the aspects relevant for balancing	341
b) Abstract weighting of balancing aspects	
c) Specific weighting in individual cases	342
d) Balancing process in individual cases	343
3. Legal doctrinal conclusions from the balancing	344
a) Intermediate layers, steps, guiding principles etc	344
b) Mandatory rules of precedence	
c) Rules of presumption and burden of argumentation	346
d) The balancing rule and the principle of proportionality	346
4. The examination of fundamental rights as a successful construction of law	
II. Balancing of fundamental rights	
1. The objective scope of protection of fundamental rights	
2. Interference and restrictions	
3. Justifying the interference (Schranken or restrictions)	351
4. Limits of restrictability (Schranken-Schranke), in particular proportionality	353

III. Balancing European fundamental rights and freedoms	
1. Comparison of the substantiation of fundamental rights and freedoms	357
2. European fundamental rights	358
a) Sources of European fundamental rights	
b) Justifying the restriction (Schranken) and proportionality	359
3. European fundamental freedoms - differences to German law	359
a) The idea of fundamental freedoms	359
b) Limitation of fundamental freedoms and their justification	360
c) Proportionality	
IV. Balancing conflicting legal principles in private law	363
1. Conflicting principles in private law	363
a) Precedence of one principle over another	363
b) Balancing of conflicting legal interests in private law	
2. Balancing legal principles using the example of the contract with protective effect in	
favour of third parties as a legal concept of conflicting legal principles	365
a) Conditions similar to constituent facts in the case law	365
b) Attempts at legal doctrinal reasoning	
c) The balance between the principle of non-disruption and contractual freedom	
3. The principle of proportionality in private law	
a) The affirmative legal view	
b) The fundamentally opposing legal view	
c) Mediating view: limited application of the principle of proportionality in the Civil	370
	271
Code	
v. Summary of chapter 10	3/2
Part 4	
Primacy of constitutional and European law	
Chapter 11. The Constitution as higher-ranking law	373
I. The different functions of the Constitution	
1. Fundamental rights and the Basic Law as an objective set of values	
a) Rights of defence against the state	
b) The Basic Law as an objective set of values	
c) Fundamental rights as the state's duty to protect its citizens	
d) Prohibition against excessive action and prohibition against failing to take action	
2. The effect of fundamental rights on private individuals	
a) Doctrine of direct third-party effect	
b) Doctrine of indirect third-party effect	
c) Fundamental rights as protective duties	
3. The effect of the Constitution on case law	
a) Specialist courts as constitutional courts	381
b) Control by the case law	382
c) Judicial review in accordance with Article 100(1) of the Basic Law	
II. Unconstitutionality and constitutional law arguments	
1. Invalidity of an unconstitutional law	
2. Exceptions from invalidity	384
a) Declaration of incompatibility and order of temporary continuation of the	
unconstitutional regulation	384
b) Duty to interpret in conformity with the Constitution	
3. Disputed arguments in constitutional law	386
a) The imprecise use of interpretation in conformity with the Constitution by the	
Federal Constitutional Court	386
b) The tripartite division of constitutionally-oriented interpretation, interpretation in	
conformity with the Constitution and development of the law in conformity with	
the Constitution	
	386
III. Constitutionally-oriented interpretation	387
	387 387

private law	
2. Constitutionally-oriented interpretation as a simple balancing rule in private law	
a) Freedom of ownership of landlords versus rights of tenants	
b) Interference with companies versus freedom of opinion	
IV. Interpretation in conformity with the Constitution	39(
1. Fundamental issues regarding interpretation in conformity with the Constitution	
a) The concept according to the guidance of the Federal Constitutional Court	390
b) The primacy of the Constitution as an independent interpretation concept	
2. Interpretation in conformity with the Constitution in public law	
3. Interpretation in conformity with the Constitution in private law	393
a) Protecting legal interests	
b) Defence against excessive restrictions on freedom	
V. Development of the law in conformity with the Constitution	395
1. The contradictory case law of the Federal Constitutional Court	
2. Development of the law in conformity with the Constitution as a legal concept	
3. Case groups of permissible development of the law in conformity with the Constitution	397
a) Teleological reduction	397
b) Protection against obvious violations of fundamental rights of the affected party	398
c) Protection of other fundamental rights	
4. Limits to development of the law in conformity with the Constitution in the case of	
infringements of fundamental rights by third parties - the dispute of the constitu-	
tional Senates	400
a) 2 nd Senate: Development of the law independent of fundamental rights of third	
parties	40
b) 1st Senate: high requirements for development of the law in case of impairment of	
fundamental rights positions of third parties	
c) Author's view: inadmissible development of the law contra legem only in case of	-0-
severe impairment of fundamental rights of the third party	403
VI. Summary of chapter 11	
•	
Chapter 12. The primacy of European law and international law	
I. Direct applicability as a prerequisite for primacy of application	407
1. The relationship between direct applicability, primacy of application, and interpreta-	
tion in conformity with European law	
1, 1, 1, 1, 1, 1, 1, 1, 1, 1, 1, 1, 1,	407
2. Direct applicability or direct effect of European law	
Direct applicability or direct effect of European law	408
a) Prerequisites for direct effect	408 408
a) Prerequisites for direct effectb) Primacy as a consequence of direct effect	408 408 409
a) Prerequisites for direct effect b) Primacy as a consequence of direct effect	408 408 409 409
a) Prerequisites for direct effect b) Primacy as a consequence of direct effect 3. Third-party effect of primary law on private individuals	408 408 409 409
a) Prerequisites for direct effect b) Primacy as a consequence of direct effect 3. Third-party effect of primary law on private individuals a) Examples of direct third-party effects on private individuals b) Direct and indirect effect and protection obligations	408 408 409 409 410
a) Prerequisites for direct effect	408 408 409 409 410 411
a) Prerequisites for direct effect	408 408 409 409 410 411 411
a) Prerequisites for direct effect	408 408 409 409 410 411 411 411
a) Prerequisites for direct effect	408 408 409 409 410 411 411 411
a) Prerequisites for direct effect	408 409 409 410 411 411 412 412
a) Prerequisites for direct effect	408 409 409 410 411 411 411 412 413
a) Prerequisites for direct effect	408 409 409 409 410 411 411 412 412 412
a) Prerequisites for direct effect	408 408 409 409 410 411 411 412 412 413 414 414 414 414 414 414 414 414 414
a) Prerequisites for direct effect	408 408 409 409 410 411 411 412 412 413 414 414 414 414 414 414 414 414 414
a) Prerequisites for direct effect	408 409 409 409 410 411 411 412 413 413
a) Prerequisites for direct effect	408 408 409 409 410 411 411 412 413 413 414 413
a) Prerequisites for direct effect	408 408 409 409 410 411 411 412 413 413 414 416
a) Prerequisites for direct effect	408 409 409 409 410 411 411 412 413 414 416 416
a) Prerequisites for direct effect	408 409 409 409 410 411 411 412 413 414 416 416
a) Prerequisites for direct effect	408 409 409 410 411 412 413 414 416 416 416 416 416 416
a) Prerequisites for direct effect	408 409 409 409 410 411 412 413 413 414 416 416 416 416 416 416 416
a) Prerequisites for direct effect	408 409 409 409 410 411 412 413 413 414 416 416 416 416 416 416 416 416 416
a) Prerequisites for direct effect	408 409 409 409 410 411 412 413 413 414 416 416 416 416 416 416 416 416 416

b) Changing terminology
4. Development of the law in conformity with the directive
a) The requirements of the ECJ for the further development of the law in conformity with the directive
b) The controversy over the further development of the law in conformity with the directive
c) The author's additional perspective - development of the law in conformity with
the directive as part of the national methodology (richtlinienkonforme
Rechtsfortbildung als Teil der nationalen Methodenlehre)
aa) The separation of powers in the European multi-level system
bb) Intent of the national legislature
cc) Impact-oriented considerations
dd) Order of consideration
d) The recognition of development of the law in conformity with the directive through the case law
e) The contra legem boundary as the limit to development of the law in conformity with the directive
5. Further questions on the implementation of directives
a) Prior effect
b) Beyond the scope implementation: directive-oriented interpretation versus split interpretation
6. Duty of referral and subsidiary duty of compliance with recommendations
7. Summary
IV. Further means of enforcing European law
1. The obligation to clearly transpose European law
a) Transparency requirement: The obligation to clearly transpose directives
b) Obligation to adapt national laws that contravene European law
2. Proliminary ruling proceedings and obligation to refer a proliminary ruling according
2. Preliminary ruling procedure and obligation to refer a preliminary ruling according to Article 267 of the TFEU
a) Duty to refer and acte clair doctrine
b) Legal consequences of non-compliance with the obligation to refer a matter
3. The state liability claim under EU law
a) Derivation and applicability
b) Requirements and legal consequences
4. Recovery of subsidy unlawful under EU law
V. International law
1. Principle of interpretation in conformity with international law
2. Similarities and differences
3. Appraisal
VI. Summary of chapter 12
Part 5
Peace under the law and legal certainty as objectives of legal methodology
Chapter 13. Limits to development of the law
I. The uncertain boundaries of permissible development of the law
The boundaries of permissible development of the law as a permanent dispute in legal methodology
2. The consequences of permissible or improper development of the law
3. Methodological blindfold
a) Against the hidden development of the law
b) Unclear individual matters
4. Definitions of the limits of permissible development of the law
a) Previous terms: legally immanent development of the law, development of the law
that goes beyond the statute, and development of the law contra legem
b) Case law that fills a gap, that substantiates the statute, that replaces the statute, and
that corrects the statute

	c) Redefinition of the terms: development of the law and development of the law
	contra legem
11	5. Arguments to avoid improper development of the law
11.	
	Clarity and openness of the wording Working on the system – omissions and the closed system
	a) Closed system and unauthorised modification of the basic concept of the
	legislature
	b) Permissible extensions in an open system
	3. The intent of the legislature and the change in life circumstances reflected in the law
	(objective interpretation)
	a) Relevance of subjective intent
	b) The reaction of the legislature to the case law
	c) Possible interpretations when the legislature remains silent
	4. The purpose as justification for development of the law
	a) The purpose of the norm as justification for development of the law
	b) The relevance of changed life circumstances for the application of the law
III.	Second step: A glimpse of the legal consequences
	1. Impact-oriented considerations in development of the law
	2. Unfair hardship with obvious legal protection gap and inactivity of the legislature
	a) Unfair hardness with obvious legal protection gap
	b) The inactivity of the legislature
	c) No other legal protection possible
	3. Consensus, support from comparative law, and increase in legal certainty
	a) Consensus and general legal conviction
	b) Confirmation by foreign court decisions
	c) Practicability and legal certainty
V.	Third step: The Constitution as higher-ranking law
	1. Protection of fundamental rights of the injured party and impairment of fundamental
	rights of third parties
	2. Impairment of fundamental rights and protection of legitimate expectations
	3. Protection of legitimate expectations where the case law changes
	4. The principle of legality as an expression of the citizen's legitimate expectations
V.	Fourth step: Higher-ranking European law and international law
	1. Development of the law in conformity with primary law and regulations
	2. Development of national law in conformity with the directive and its limits
	3. Individual expectations as a limit to permissible development of the law
ИI.	Fifth step: Limits to competences
	1. Separation of powers and the limits of the courts
	a) Separation of powers, statutory precedence and judicial self-restraint
	b) Exceptions
	c) The judge as a substitute for the legislature
	d) Improper judicial activism against the legislature
	2. Reservation of the power to legislate and the competence of Parliament
	a) General reservation of statutory powers and materiality theory at the expense of
	the legislature
	b) No reservation of powers to the detriment of the courts
	3. Conflict of jurisdiction between the courts
	a) The Federal Constitutional Court as a super-appeal instance from specialised
	courts
	b) The role of the Federal Constitutional Court in the 'dialogue between the courts'
	c) The principle of institutional balance as a competence of the ECJ in development of the law
	4. Substantiation and development of the law
	a) Legal methodology and legal doctrine as a means of substantiating the law
	b) Construction and limits to development of the law
	Balancing and weighting of various arguments in the context of development of the law
	1. Rules of precedence, presumption and burden of argumentation

2. I	Balancing rules	486
	The relationship between the five-step system and the balancing rules	
	mmary of chapter 13	
	,	
	14. A modern legal methodology	
I. Th	e path to a modern methodology	490
1.7	Traditional versus postmodern methodology	490
2. <i>A</i>	A modern methodology	490
II. Ext	tension of legal methodology by case hermeneutics	491
1. 7	The interaction of facts and legal norms	492
8	a) Previous approaches (Engisch, Fikentscher)	492
t	b) The norm range theory (Normbereichtheorie) of F. Müller	492
2. I	Hermeneutics of the facts for determining the case area	493
	a) The need for a separate hermeneutics of the facts (Sachverhaltshermeneutik)	
	o) Raw facts and determined facts: research obligations and interviewing	
	c) The presentation of facts by the courts	
c	d) Case hermeneutics using the example of a potential burqa ban	498
	The norm range	
	a) Establishing norms in the decisions of the Federal Constitutional Court	
	b) Opinion	
	gal creativity and legal thinking	
	Postmodern methodology: identifying the law versus creating the law	
á	a) Innovations and legal discoveries	504
ł	b) The limits of the systematic-deductive justification of decisions and balancing	505
	c) Decisionism and the paradox of decision-making	
	Legal creativity - the process of discovery	
	Topics doctrine and legal creativity	
	a) Topics doctrine as a starting point for finding solutions	507
ì	b) Topoi and legal creativity	508
	c) Topoi, legal doctrine and methodology	509
	d) Type theory	
	Legal thinking as part of modern methodology	
	a) How to deal with unknown problems – the claim of rationality of methodology	
i i	b) Thought structures of a modern methodology	511
	c) Limiting creativity through methodology and legal doctrine	513
,	d) Training legal thought in legal education	512
IV Sou	urces of legal methodology	512
1	The basics as neighbouring disciplines	513
	a) Legal history and the change of legal methods	
	b) Comparative law	
(c) Legal theory	513
	d) Legal sociology	
	State theory, legal doctrine and philosophy of law	
	a) Methodology as argumentation and legitimation theory	
	b) Legal doctrine and the connection to legal methodology	
	c) The philosophy of law: in search of a fair decision	517
	amination sequence and ranking of argumentation concepts as building blocks of a	
me		519
1. 1	Method chaos and pluralism of methods	519
	a) The theory of pragmatic pluralism of methods	519
ŀ	b) Claim to rationality through the specification of a mandatory examination	
	sequence	
	Six examination steps to determine the legal solution	
	a) Step One: hermeneutics of the facts	
	b) Step Two: Savigny's interpretation canon and impact-oriented interpretation	
	c) Step Three: Substantiation of general clauses	
	d) Step Four: Examination of higher-ranking law	
	e) Step Five: Development of the law and its limits	52
	f) Sten Siv. Fairness control and accuracy guarantee	52

3. The fourfold weighting of the figures of argumentation	524
a) Binding priority rules	524
b) Presumption rules	525
c) Rules of burden of argumentation	526
d) Balancing rule of a Bewegliche System	527
4. Conclusions	528
a) European legal methodology as an objective or a diversity of different legal	
methods	528
b) Combination theory and weighting	529
c) Beyond the system and simple deduction	530
VI. Summary of chapter 14	531
VII. The value of judicial methodology - a final word	533
Chapter 15. Cases in greater depth	535
I. Legal methodology as a theory of legitimacy and justification	535
II. Sources of law	535
III. Secondary sources of law and sources of legal knowledge	536
IV. Wording, systematics and history as traditional methods of interpretation	537
V. Telos, logic and impact-oriented interpretation	538
VI. Teleological counter concepts and simple forms of legal development	540
VII. Substantiation of the law by the legislature, the administration and the courts	541
VIII. The Bewegliche System, case groups and case group comparison as substantiation	
methods	542
IX. Legal doctrine and general legal principles	543
X. Balancing as substantiation	544
XI. The Constitution as higher-ranking law	545
XII. The primacy of European law and international law	545
XIII. Limits to development of the law	
XIV. A modern legal methodology	550
Annually Calastal Comments of managements and	EE 1
Appendix. Selected figures of argumentation	551
Table of Cases	
Databases for German, European and foreign cases	
Index	569