Legal Methods

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any case, the objective facts of the case are identical, so that aspects of the protection of legitimate expectations and legal certainty do not justify different treatment.[216] These interests would be confirmed by the assessments in the law. The reference to the relevance of the theory of declaration also systematically clarifies the secret reservation of Section 116 of the Civil Code, since what is secretly intended is irrelevant. In addition, contracts according to Section 157 of the Civil Code are to be interpreted with due regard to customary practice (*Verkehrssitte*). The declarant can then only avoid the declaration by making an analogous challenge pursuant to Section 119(1) of the Civil Code.

(3) In accordance with the *subjektive* or *Willenstheorie* (theory of intent), the consciousness of the declarant to trigger legal consequences with their behaviour is one of the prerequisites for the validity of a declaration of intent. Private autonomy requires a self-determining decision. Subjective or intent theory thus denies a systematic comparison with a mistaken declaration of intent within the meaning of Section 119(1) of the Civil Code. The mistaken declaration of intent within the meaning of Section 119(1) of the Civil Code still contains an element of self-determination, while the circumstance of a lack of declaratory awareness does not have any. It makes a decisive difference if someone does not want something at all, or just wants something else. Private autonomy requires that someone only be bound by something that they want. Systematically, these considerations can also be found in the values of the statutes. Section 133 of the Civil Code requires a declaration of intent from the declarant. The theory of intent also finds support in Section 188 of the Civil Code (the provision on lack of seriousness, or *Scherzerklärung*). This legally regulated case of a lack of awareness of the declaration determines nullity as a legal consequence. According to this view, there is therefore generally no valid declaration of intent in the absence of declaratory awareness.[217] However, the confidence of the addressee is protected by analogous application of Section 122 of the Civil Code.[218] **99**

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(4) Since both views have been reflected in the Civil Code, the Federal Court of Justice developed a third mediating view, which is dealt with further below (chapter 5 mn. 30). **100**

b) Systematic interpretation in the hierarchy of law

The hierarchy of the law is decisive and paramount for the importance of systematic interpretation. Not only national law, but also European and international law, needs to be taken into account in order to avoid contradictions. Consequently, some literature describes interpretation that is consistent with the Constitution and European law as part of systematic interpretation.[219] However, because of the overriding importance of interpretation in conformity with the Constitution and European law, it seems more sensible to also separate these legal levels during the interpretation process and to regard the interpretation in conformity with the Constitution and European law as separate types of interpretation.[220] Thus these issues are dealt with separately in chapters 11 and **101**

[216] On the current opinion, see Armbrüster, in: *MünchKomm-BGB*, 8th ed. 2018, § 119 mn. 97 ff.
[217] Canaris, *NJW* 1984, 2281 f.
[218] Singer, *JZ* 1989, 1030 ff., 1034 f.
[219] Säcker, in: *MünchKomm-BGB*, 7th ed. 2015, Intro. mn. 141; Kramer, *Juristische Methodenlehre*, 5th ed. 2016, p. 105 ff.; Grüneberg, in: Palandt, *BGB*, 76th ed. 2017, Intro. mn. 42 ff.; Morlock, in: Gabriel/Gröschner, *Subsumtion*, 2012, p. 179, 187.
[220] Thus, Lutter, *JZ* 1992, 593, 604 ff.; Canaris, in: *FS Bydlinski*, 2002, p. 47, 79 on European Law respectively with further references.

12. If an interpretation in conformity with primary law does not succeed, the higher-ranking norm takes precedence. Such primacy rules are mandatory (chapter 2 mn. 42 ff.).

c) The overall system of the Civil Code – jurisprudence of concepts: Conceptual pyramids – building block techniques – references

102 **aa)** Systematics determines the perspective of the problem, and so is particularly important. Heck,[221] Engisch[222] and Canaris[223] have substantiated these considerations: The **overall system** (*äußeres System*) refers to the formal structure of a statute, its classification and the determination of definitions. The jurisprudence of concepts sees legal science as a logical system: Judicial application of the law is limited to deduction, conclusion, from pre-formulated sentences or sentences that can be determined 'purely on the basis of logic'.[224] Under the natural historical method according to von Jhering's early work, the essence of legal construction was to transform the legal propositions into legal concepts by means of definitions and thus to elevate them to a higher state of aggregation ('spirit'): 'The terms are productive, they mate and procreate anew.'[225] Pandectism[226] systematised Roman law and is thus referred to as the Historical School. Both pandectism and the conceptual jurisprudence of the 19th Century gave their clear structural thinking to the law, along with sharp formation of concepts and conceptual pyramids.[227] With its concise overall system, the Civil Code is a child of pandectism.[228] This strict conclusion of systematic logical propositions is certainly overcome, because in the meantime it is acknowledged that law not only consists of knowledge and gain, but that a certain creative element is inherent in it (chapter 4 mn. 34 f., chapter 14 mn. 39 ff.). It applies in particular to substantiation.

103 **bb)** Most laws are structured chronologically (e.g. Code of Civil Procedure, Code of Criminal Procedure), by legal concepts (Civil Code), by legal acts (Criminal Code) or by material or processes of law (Act against Restraints of Competition). The exception proves the rule. There are often transitional provisions on the temporal and spatial scope of application. A statute is normally divided into books (*Buch*), parts (*Abschnitt*), titles (*Titel*), Sections (*Paragraph*) or Articles (*Artikel*). The individual provisions are also divided into subsections (*Absatz* and *Unterabsatz*), sentences (*Satz*) and sometimes numbers (*Nummer*) or letters (*Buchstabe*).[229]

104 **cc)** Statutes often have a **general part** (*Allgemeiner Teil*) (Civil Code, Criminal Code, Social Insurance Code (*Sozialgesetzbuch* – SGB)), and some have several general parts (Civil Code: general part and law of obligations). German law is known for its

[221] Heck, *Begriffsbildung und Interessenjurisprudenz*, 1932, p. 139, 142 ff.

[222] Engisch, *Die Einheit der Rechtsordnung*, 1935, p. 2 f.; idem, *Studium generale*, 1957, p. 173 ff.

[223] Canaris, *Systemdenken und Systembegriff in der Jurisprudenz*, 2nd ed. 1983, p. 19 ff. The prevailing view follow, see p.ex., Karpen, *ZG* 1986, 5, 31; Kramer, *Juristische Methodenlehre*, 4th ed. 2013, p. 97 ff.

[224] Wolff, *Institutiones juris et gentium*, 1750, p. 32, § 62; Puchta, *Cursus der Institutionen*, Vol. 1, 1841, p. 100 ff., who only acknowledges the systematic knowledge of the law as complete knowledge of the law. Also taking this view, Dernburg and Windscheid.

[225] von Jhering, *Geist des römischen Rechts*, Part I, 4th ed. 1878, p. 40 (translated from the original German); idem, Part II, 2nd Abt., p. 384 ff., idem, Part. III, p. 311 ff. Critical von Jhering, *Scherz und Ernst in der Jurisprudenz*, 1884, p. 245 ff.; Brütt, *Die Kunst der Rechtsanwendung*, 1907, p. 88. See Schröder, *Rechts als Wissenschaft*, 2nd ed. 2011, p. 254 f.

[226] Pandects (Greek) or Digests (Latin) of the Codex Iuris Civilis by Emperor Justinian.

[227] See Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd ed. 1969, p. 367 ff.; Schröder, *Recht als Wissenschaft*, 2nd ed. 2012, p. 248.

[228] Thus explicitly, Koschaker, *Europa und das römische Recht*, 1947, p. 258.

[229] On such 'monster articles', see Section 34b WpHG (old version) and particularly in tax law Section 2, Section 2a EStG of 18.10.2009, *BGBl.* I, p. 3366 (Income Tax Law).

numerous **cross-references** and chains of references,[230] including the building blocks technique (*Bausteintechnik*) (chapter 4 mn. 7 f.). The reform of the law of obligations increased these tendencies. The main reason for references is to avoid repetitions, and to demonstrate interconnections.[231] However, this referencing is often at the cost of intelligibility. Precision also suffers, since it has to be determined in each case whether a reference to a legal basis or legal consequences exists. While the basic legal reference is based on the requirements of the cited norm, only the legal consequence of the norm to which reference is made is applicable for the legal consequences reference. References to other statutes are also possible.[232] In criminal law (particularly in commercial and environmental law) there can be problems with the principle of certainty (*Bestimmtheitsgrundsatz*).[233]

> Reference chains in the Civil Code are references to an infringement of contractual obligations (*Leistungsstörungsrecht*): Sections 326(5), 346 ff.; Sections 323, 346 ff.; Sections 433, 434 (435), 437 no. 2, 323, 346 ff.; Sections 365, 434 (435), 437 ff.; Sections 990(2), 280(1),(2), 286; on the law of unjust enrichment (*ungerechtfertigte Bereicherung*): Sections 951, 812 or the law governing the ownership/possession issue: Sections 292, 987 ff.; Sections 818(4), 819, 292, 987 ff. **105**

A dynamic reference (*dynamische Verweisung*) is when a law refers to a standard of another competent lawmaker in the currently applicable (i. e. modifiable) version. The Federal Constitutional Court has generally recognised such references as constitutional.[234] However, it is contrary to the principles of the rule of law and democracy if the legislature relinquishes its legislative powers to private bodies without further stipulations.[235] If references were unclear, they are declared void for these provisions.[236] **106**

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dd) If there are superordinate terms for concepts, we speak of **conceptual pyramids** (*Begriffspyramiden*): Each derived term contains all the characteristics of the superordinate term and at least one additional term; it can be subsumed under these.[237] A 'contract' is superordinate to the term 'legal transaction' as a more specific term because it is a multilateral legal transaction. Consent (*Einwilligung*) is prior approval (Section 183 of the Civil Code), while authorisation (*Genehmigung*) is a subsequent approval (Section 184 of the Civil Code). Another example of conceptual pyramids is the terminology surrounding the concept of thing (*Sache*) under Section 90 of the Civil Code. The difficulty lies in differentiating between fungible (*vertretbar*) things from non-fungible (*nicht vertretbar)* things. **107**

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[230] Mußung, in: Hill, *Zustand und Perspektiven der Gesetzgebung*, 1989, p. 23 ff., 33 speaks of a 'scavenger hunt'.

[231] On the historical role models, see Mertens, *Gesetzgebungskunst im Zeitalter der Kodifikationen*, 2004, p. 477 f.

[232] Section 2(2) UWG refers to Sections 13 ff. BGB.

[233] Tiedemann, *Wirtschaftsstrafrecht Allgemeiner Teil*, 5th ed. 2017, mn. 240 ff. Exemplary BVerfG, Order of 21.9.2016, 2 BvL 1/15, *NJW* 2016, 3648, 3649 ff.

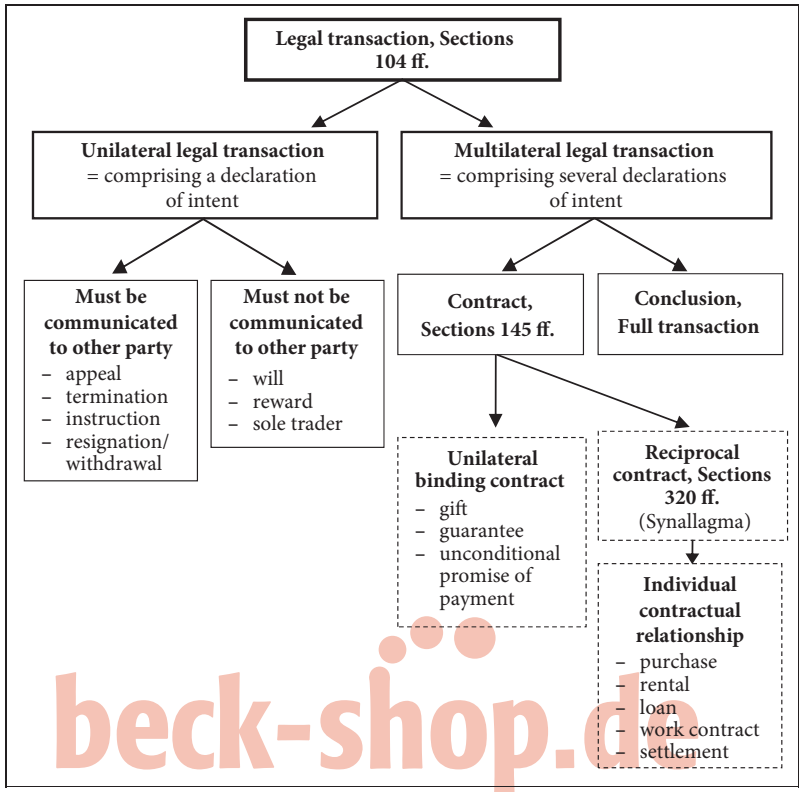
[234] BVerfG, Order of 15.7.1969, 2 BvF 1/64, *BVerfGE* 26, 338, 366 ff.; BVerfG, Order of 25.2.1988, 2 BvL 26/84, *BVerfGE* 78, 32, 35 f.; Differing view Ossenbühl, *DVBl.* 1967, 401, 402 ff.; Wegge, *DVBl.* 1997, 648, 649 f.: violation of the principle of democracy.

[235] BVerfG, Order of 14.6.1983, 2 BvR 488/80, *BVerfGE* 64, 208, 214 – Contractual tariff agreement.

[236] BVerfG, Judgment of 30.5.1956, 1 BvF 3/53, *BVerfGE* 5, 25, 34 – Establishment of a pharmacy.

[237] Möllers, *Juristische Arbeitstechnik und wissenschaftliches Arbeiten*, 9th ed. 2018, § 1 mn. 73 f.

108 Illustration: The legal transaction



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108a The Historical School was a world leader in the 19th and early 20th centuries and had a great influence in the USA.[238] The pioneer was Christopher Columbus Langdell, who as Dean of Harvard Law School introduced the Socratic method and understood law as a legal science and coherent system of legal principles. This direction, referred to as *classic legal thought*, was based on the assumption that the law would allow solutions to be found for future cases in a deductive manner.[239]

d) The internal system of the law and the values of the Civil Code

109 **aa)** The **internal system** (*innere System*) concerns logical consistency and teleological coherence, and refers to a consistent system of value decisions. In the interpretation of a constituent element in a systematic comparison, the reference to the aforementioned overall system, the systematic interpretation is no more than a first clue which can regularly be 'overridden' by teleological considerations and thus corrected. Thus systematic and teleological considerations flow together.[240] The insight that terms are to be interpreted in the interaction of different interpretation methods also applies in Anglo-American legal systems.[241] Or, as Larenz said: 'The context of meaning of the law and also the conceptual systematics on which it is based can only be understood if the

[238] Riesenfeld, 37 *Am.J.Comp.L.* 1 ff. (1989).
[239] See Kennedy, 36 *Suffolk U.L. Rev.* 631 ff. (2002/03); Singer, 76 *Cal.L. Rev.* 465, 496 f. (1988).
[240] For European Law determined, p.ex., Colneric, *ZEuP* 2005, 225, 227.
[241] Shapo/Walter/Fajans, *Writing and Analysis in the Law*, 6th ed. 2013, p. 99 ff.

regulatory purposes are also taken into consideration'.[242] So the internal system takes precedence over the overall system. This will be explored in chapter 6.

One important thing to note in the Civil Code is the **difference between the law of contracts** (*Vertragsrecht*) **and the law of tort** (*Deliktsrecht*). The law of contracts normally applies only to the two parties, while under the law of torts the potential number of damaged persons may not be straightforward. Consider the situation if a facility contaminates a surrounding town. In order to avoid excessive liability, the requirements in tort law must be higher than in contract law. While the rights and obligations under contract law are agreed between the parties, under tort law the obligations apply by force of law. Under contract law, the obligation is founded in Section 280(1) sentence 2 of the Civil Code. In contrast to the general clause of Section 823(1) of the Civil Code, contract law also includes compensation for damages.[243] We will be returning to these issues later.[244] 110

In greater depth – *Section 253 within the system of the Civil Code:* What effects does it have that the legislature, within the framework of the reform of the law of obligations (*Schuldrechtsreform*) in 2001, repealed the extent of the compensation for damages for pain and suffering in Section 847 of the Civil Code, and instead shifted the extent of the compensation for damages for pain and suffering to the damage provisions of Sections 249 f. of the Civil Code and created the new Section 253 of the Civil Code?[245] 111

bb) Systematic interpretation plays an important role in the elaboration of the values of the law or the legal order – the internal system. It is one of the most difficult tasks faced by lawyers. It must be examined in detail to what extent the (legal) system is open to new evaluations (chapter 13 mn. 34 ff.). Again, teleological considerations must be applied (chapter 6 mn. 2 ff.). In addition, legal doctrine makes use of the external and internal system because it aims at the formation of concepts and develops further deep structures of law (chapter 9 mn. 2 ff.). In German law, Sections 823 ff. of the Civil Code stipulate the **fault principle** (*Verschuldensprinzip*) in general liability law. This means that no-fault or strict liability may only be invoked in cases provided for by law (chapter 13 mn. 30 ff.). 112

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Section 254 of the Civil Code is among other things an expression of the principle of *venire contra factum proprium* (contradictory behaviour), because a party may not make a claim for damages that it has culpably caused (even if another party is also responsible).[246] Section 254 allows for a derivation of the general legal principle that the distribution of the damage contribution is to be carried out according to the degree of fault (*Grad des Verschuldens*) and according to causal contributions. As a general legal principle, Section 254 applies beyond liability based on the fault principle, including also strict liability (*Gefährdungshaftung*) for animals under Section 833 of the Civil Code, injunc- 113

[242] Larenz, *Methodenlehre der Rechtswissenschaft*, 6th ed. 1991, p. 327 (translated from the original German).

[243] Instructive Hager, in: Staudinger, *BGB*, revised ed. 2017, before § 823 mn. 37.

[244] On the unsuccessful construction of Section 831 BGB and the contract with protective effect to the benefit of third parties, see chapter 10 mn. 82 ff. On the potential analogy of Section 844(2) BGB infra chapter 15 mn. 45.

[245] Solution see chapter 15 mn. 9 f.

[246] BGH, Judgment of 14.3.1961, VI ZR 189/59, *BGHZ* 34, 355, 363 f.; BGH, Judgment of 18.4.1997, V ZR 28/96, *BGHZ* 135, 235, 240 – Tennis court.

tive relief (*Unterlassungsanspruch*) pursuant to Section 1004 of the Civil Code, or compensation claims under Section 906(2) sentence 2 of the Civil Code.[247]

2. Individual systematic interpretation concepts

a) Comparison of the constituent elements of a norm

114 **aa)** Neighbouring terms can explain the constituent element (*Tatbestandsmerkmal*) to be clarified. In addition, the systematic position can be used to infer the significance of a constituent element. This argumentation concept is not well recognised in Germany. Anglo-American law recognised the principle of *noscitur a sociis,*[248] according to which the term to be clarified can be specified in the context of its context. Thus headings and the preamble may be used for the purposes of interpretation. In Germany, this applies only when the heading is specified in the law, and not where it was added by the publisher.[249] In addition, the systematic position can be used to infer the significance of a constituent element.

115 The personal legal interests (*Rechtsgüter*) of life, body and health are related in a hierarchy of values. These personal legal interests also enjoy a higher status than the right to property or assets. This is inferred from the sequence of language in Section 823(1) of the Civil Code (which does not mention the protection of property). This leads to the inference that different types of legal rights may enjoy different levels of protection under the law.[250]

116 **bb)** The Anglo-American *sui generis* rule[251] says that a general clause which is substantiated by individual examples may not be interpreted beyond the individual examples mentioned. For example, the ban on copying books, pictures, films, leaflets or the like applies only to optical materials. The ban would also apply to 'similar' non-acoustic media such as CDs. The *sui generis* rule can also be found in Swiss law.[252] Examples of these interpretative concepts can also be found in Germany, even though no name has yet emerged for them. The rule is examined in greater depth in the comparative case method (*Vergleichsfallmethode*) (chapter 7 mn. 44 ff.).

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117 If Section 224(1) no. 2 of the Criminal Code requires the use of a weapon or other dangerous tool (*Waffe oder eines anderen gefährlichen Werkzeuges*) for the purpose of a severe bodily injury, it is necessary to interpret *gefährliches Werkzeug* in relation to the weapon (chapter 4 mn. 60). This does not include a wall, as this is not a moveable object (chapter 4 mn. 74). – Various methods can be used to find the relevant core element. Thus, for example, the murderous element of base motives (*niedrige Beweggründe*) under Section 211 of the Criminal Code can be determined if it is made clear that this can only cover cases that deserve equal treatment with the murderous characteristics of desire

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[247] Grüneberg, in: Palandt, *BGB*, 78th ed. 2019, § 254 mn. 2 f. On contributory negligence, see the case on the FIS rules chapter 15 mn. 6.

[248] Bailey/Norbury, *Bennion on Statutory Interpretation*, 7th ed. 2017, Sec. 23.1.

[249] The legislature gave the articles of the BGB official titles only after the Law for the Modernisation of the Law of Obligations (SchRModG) of 26.11.2001, *BGBl.* I, p. 3138.
An official title can be identified by the fact that it occurs in parenthesis.

[250] In detail Möllers, *Rechtsgüterschutz im Umwelt- und Haftungsrecht*, 1996, § 4.

[251] Or *eiusdem generis* – belonging to the same class, see *Quazi v. Quazi* [1980] A.C. 744 at 808 f. per Lord Diplock (H. L. (E.)); Cross/Bell/Engle, *Statutory Interpretation*, 3rd ed. 1995, p. 135; Bailey/Norbury, *Bennion on Statutory Interpretation*, 7th ed. 2017, Sec. 23.2. Scalia/Garner, Reading, Law, 2012, Nr. 32.

[252] Kramer, *Juristische Methodenlehre*, 4th ed. 2013, p. 108 f.

to murder (*Mordlust*), sexual gratification (*Befriedigung des Geschlechtstriebes*) and greed (*Habgier*). The determinable core element here thus results from a conclusion from equivalence with other elements.[253]

b) Position of the constituent element within the structure of the law

It is often necessary to understand the interplay of norms in order to fully understand the underlying legislative imperative.[254] Systematic interpretation considers the position of the constituent element or legal principle in the structure and system of the law and draws conclusions for interpretation from this.[255] **118**

It is only possible to understand the term possession (*Besitz*) in Section 854 of the Civil Code in conjunction with Sections 855 and 868 of the Civil Code.[256] The systematic separation of obligations (*Schuldverhältnisse*) and property (*Sachenrecht*) in different books means that rules from the general part of the law of obligations cannot easily be transferred to property law. **119**

The idea of a hierarchy of values of legal interests is supported by the fact that in Articles 1 and 2 of the Basic Law the drafters of the constitution placed human dignity, life and freedom of the person in a particularly prominent position – and thus placed them above other, less important, legal interests such as property in Article 14 of the Basic Law.[257] – Section 228 of the Criminal Code says that a consent to bodily harm is void if the act violates public policy. The meaning of this concept only becomes apparent through systematic considerations: From a synopsis with the elements of mercy killing (*Tötung auf Verlangen*) under Section 216 of the Criminal Code, it follows that the affirmation of immorality is only justified in the case of specifically life-threatening bodily injuries and the most serious (usually irreversible) impairments.[258] **120**

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Not only the surrounding provisions of a norm can contribute to its interpretation. The *order within a provision* – in particular its division into paragraphs, sentences, numbers and letters – can also contribute to its understanding. **121**

For example, in Section 244(1) of the Criminal Code, as a result of the express requirement of a subjective intention (*subjektiver Verwendungsabsicht*) in no. 1(b) and the waiver of this in no. 1(a), it results from Section 244(1) no. 1(a) that the concept of a dangerous tool (*gefährliches Werkzeug*) in the context of Section 244(1) no. 1(a) is only to be determined objectively and that no subjective component is required.[259] The situation is reversed under Section 254 of the Civil Code: According to the system, the reference in Section 254(2) sentence 2 of the Civil Code refers only to the second paragraph; if the legislature had also wanted to extend it to the first paragraph, it would have had to regulate the reference in a separate, third paragraph.[260] However, prevailing opinion also applies Section 254(2) sentence 2, to the first paragraph, since damage occur- **122**

[253] Further example: BVerfG, Order of 10.1.1995, 1 BvR 718/89 et al., *BVerfGE* 92, 1, 17 – Sit-in II.
[254] The technique of building blocks has been presented earlier, chapter 4 mn. 7 f.
[255] Honsell, in: Staudinger, *BGB*, revised ed. 2018, Intro. to BGB mn. 145.
[256] Larenz, *Methodenlehre der Rechtswissenschaft*, 6th ed. 1991, p. 325.
[257] Möllers, *Rechtsgüterschutz im Umwelt- und Haftungsrecht*, 1996, p. 144 ff.
[258] Roxin, *Strafrecht Allgemeiner Teil*, Vol. I, 4th ed. 2006, § 5 mn. 77.
[259] BGH, Order of 3.6.2008, 3 StR 246/07, *BGHSt* 52, 257, 267; Fischer, *StGB*, 66th ed. 2019, § 244 mn. 18, 22; Eser/Bosch, in: Schönke/Schröder, *StGB*, 29th ed. 2014, § 244 mn. 5 a.
[260] Grüneberg, in: Palandt, *BGB*, 78th ed. 2019, § 254 mn. 48.

rence and damage mitigation are to be evaluated equally with regard to contributory negligence (*Mitverschulden*).[261]

c) Derogations must not be interpreted as extending the law (*singularia non sunt extendenda*)

123 Derogations are legal principles that break a written or unwritten legal principle for special cases.[262] There is the famous principle of *singularia non sunt extendenda* – derogations shall be interpreted narrowly. This rule is rooted in Roman law[263] and can still be found in many codifications of systems based on Roman law.[264] German courts often also refer to this principle in their judgments.[265] The ECJ applies it regularly (chapter 4 mn. 140 ff.). A similar rule in Anglo-American law is *expressio unius est exclusio alterius* (when one or more things of a class are expressly mentioned, others of the same class are excluded). Where exceptions are listed, it is presumed that the exception does not apply to anything not listed.[266]

124 The formal requirements for debt agreements or strict liability in the provisions of Sections 833 and 836 of the Civil Code in contrast to the general liability for fault of the Civil Code (chapter 6 mn. 146) are described as exceptions.[267] Also, in the case of a normal traffic accident, no compensation for loss of enjoyment of life can be justified by analogy with Section 651f(2) of the Civil Code, since the legislature only allows for immaterial compensation in exceptional cases mentioned in Section 253 of the Civil Code (chapter 11 mn. 72 ff.).[268] Commercial law is regarded as a special right that cannot be extended beyond its circle of addressees.[269]

d) Uniformity of legal order and the Constitution

125 **aa)** The uniformity of legal order (*Einheit der Rechtsordnung*) requires certain terms to be interpreted equally in different statutes in order to preserve the uniformity of the legal order.[270] This rule is supported by the logical theory of identity: 'Each object is

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[261] BGH, Judgment of 8.3.1951, III ZR 65/50, *BGHZ* 1, 248, 249; Oetker, in: *MünchKomm-BGB*, 8th ed. 2019, § 254 mn. 126.

[262] Enneccerus/Nipperdey, *Allgemeiner Teil des Bürgerlichen Rechts*, Vol. I/1, p. 295 f.

[263] Paul. D. 1,3,14: *Quod vero contra rationem iuris receptum est, non est producendum ad consequentias.* – What has been recognised against the principles of the law, may not be extended to other appropriate cases.

[264] See p.ex. Article 14 of the introduction to the Italian Codice Civile, Article 4(2) Spanish Código Civil (chapter 1 fn. 110), Section 11 Portuguese. Código Civil. For France see Bergel, *Méthodologie juridique*, 2nd ed. 2016, No. 156.

[265] RG, Judgment of 4.12.1900, II 238/00, *RGZ* 47, 356, 360 – Overbuilding; BGH, Judgment of 6.11.1953, I ZR 97/52, *BGHZ* 11, 135, 143 – Public vinyl record performance; BGH, Judgment of 22.5.1989, VIII ZR 192/88, *BGHZ* 107, 315, 319 f. – Interim tenant; BGH, Judgment of 17.10.1995, VI ZR 358/94, *NJW* 1996, 53, 54 – Exceptional nature of § 1664 BGB; BVerwG, Judgment of 26.10.1967, II C 62/67, *BVerwGE* 28, 174, 177 – State Aid Law.

[266] Bailey/Norbury, *Bennion on Statutory Interpretation*, 7th ed. 2017, Sec. 23.12; Scalia/Garner, *Reading Law*, 2012, No. 10. However, considering this legal doctrine not very helpful: Posner, 50 *U. Chi. L. Rev.* 800, 813 (1983); Cross/Bell/Engle, *Statutory Interpretation*, 3rd ed. 1995, p. 140 f.; see the example in Shapo/Walter/Fajans, *Writing and Analysis in the Law*, 6th ed. 2013, p. 261.

[267] Enneccerus/Nipperdey, *Allgemeiner Teil des Bürgerlichen Rechts*, Vol. I/1, p. 296; Bork, Allgemeiner *Teil des Bürgerlichen Gesetzbuchs*, 4th ed. 2016, mn. 1044.

[268] On the problems, however, see Wagner, *Gutachten A zum 66. DJT*, 2006, p. 27 f.

[269] See Canaris, *Handelsrecht*, 24th ed. 2006, § 1 mn. 1 f.

[270] Engisch, *Die Einheit der Rechtsordnung*, 1935, p. 13; Otto/Würtenberger, in: Engisch, *Einführung in das juristische Denken*, 12th ed. 2018, p. 223 ff.; see Larenz, *Methodenlehre der Rechtswissenschaft*, 6th ed. 1991, p. 166 f.; Baldus, *Die Einheit der Rechtsordnung*, 1995; Felix, *Einheit der Rechtsordnung*, 1998.