

# Legal Methods

Möllers

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# Legal Methods

How to work with legal arguments

by

Thomas M.J. Möllers

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Gill Mertens  
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In memoriam  
Wolfgang Fikentscher

  
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## Preface

Anyone who is familiar with Antoine de Saint-Exupéry's *The Little Prince* knows that behind something obvious there can sometimes be something completely different – that behind the drawing of a hat there can also be the drawing of a giant snake that has swallowed an elephant. Like *The Little Prince*, this book seeks to open your eyes to what is hidden – to allow a glimpse 'behind the scenes' of a norm. It gives a new perspective on the previously unknown, and the opportunity to develop something new – thereby strengthening confidence in our legal system.

The law is becoming ever more complex. Finding a legal solution is demanding if a contentious legal question does not arise directly from the statute or previous case law. Therefore it is indispensable to master the basics of legal doctrine and methodology. Those who are driven by the *search for a just decision* want to delve deeper into the law. But how do you develop a good legal solution when the law is not clear or is completely silent? Is it by thinking through the fundamentals of interests and evaluation of the relevant laws, or is it a conflict of legal principles of the legal system? Does the legal solution require rationally convincing arguments, or do judges make creative decisions by virtue of their authority?

In an interview on her work as a judge, Angelika Nußberger, Vice-President of the European Court of Human Rights, said: "Law is essentially a science of argumentation" (chapter 1 mn. 1). Legal decisions are accepted if they are well founded. The work provides the lawyer with more than a hundred legal argumentation figures that are used by lawyers worldwide to justify a legal decision. This book aims not only to present the traditional concepts of interpretation, but also to go beyond them – in an interdisciplinary and legally doctrinal context. The sources of law, the traditional and modern concepts of interpretation and the influence of the Constitution and European law as higher-ranking law are discussed. In addition, there is the demanding substantiation of law – such as how to handle general clauses, trudge-made law and principles of law, determining the boundaries of permissible legal development, an examination sequence of the relevant argumentation figures, and the factual hermeneutics that are so relevant to legal practice. The book describes the most important argumentation figures and develops a modern legal methodology. It brings direct added value to the student, the scholar and the practitioner in their daily work. Its aim is both simple and demanding: to enable lawyers to develop solutions to legal problems that have not yet been clarified – step by step and in such a way that even in the event of a dispute they can *convince the other party of the merits of the legal argument*. The first German edition of this book was sold out after a few months; a reprint sold out after a good year. This English-language work is based on the extended second German edition. It will also be published in Chinese in the near future. I would be delighted to receive any suggestions and criticism from readers.

Augsburg, November 2019

Professor Dr. Thomas M.J. Möllers



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At this point, I would especially like to thank those members of my team at the University who have actively assisted me in recent years with the production of the German and English language versions. First and foremost, I would like to thank my main staff members for their criticism of the content, Isabella Brosig, M.Sc. and Ass. jur. Natalie Höck. My deepest thanks also go to Konstantin Sauer, Ass. jur. Matthias J. Sauer and Julian Glas. Invaluable assistance with the formalities of publication was provided by Pirmin Herz and Dominic Merk.

The second German edition as well as the English edition were supervised by my staff, Ass. jur. Konstantin Sauer and Ass. jur. Sebastian Schwarz. The publication formalities were assisted by cand. iur. Bahar Buldak, Laura Mähle, Lea Wolf, Lisa Wolf and Tobias Manhardt.

My particular thanks go also to Gill Mertens LL.B., LL.M., M.A. for her work in translating the German second edition. The exceptionally prompt and at the same time thorough translation as well as the committed cooperation with her was a pleasure. Dipl.-Jur. Sandra Paulson translated the footnotes and appendices. Lastly, I must acknowledge the commitment of all my student assistants and former colleagues who have been involved with the book in some way.

Above all, I would like to thank my wife and children for the time they have given me while working on this project. Without them, the book would never have been written.

Professor Dr. M.J. Möllers

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## Translator's note

Some readers may comment that this book still contains an awful lot of German words for an English translation. But given that readers are unlikely to be native speakers of German, or even necessarily native speakers of English, the references to German terms and names are essential for a complete and grounded understanding of the concepts and premises discussed here. Since there are no official versions of German laws in other languages, any words chosen to represent a German legal concept in another language are subject to variation and lack of specificity. Often no equivalent term exists in English, and the English term chosen is a mere paraphrase. This is especially so when one considers the radical differences between different legal systems, including the civil law, the common law, international law and EU law. Readers need to know the original German term or concept for their wider academic reading in either German texts or in other languages. Other literature may use slightly different English terms.

Just as the use of German legal language may vary from the understanding of a term in ordinary use of German, a potential misunderstanding of meaning can be greatly magnified if readers unconsciously transpose their own understanding of an English legal term or English word onto the German concept. In order to insert a non-verbal reminder into the text, non-English terms are italicised. British English spelling is used, but the English terms chosen are not to be understood as referring specifically to the United Kingdom (unless specifically stated) as this book is intended for an international readership. The combination of the text descriptions and the meticulous and extensive footnotes and cross references are designed to allow the non-German speaker to identify and access German-language resources with confidence.

Many legislative references have been included. At the first appearance within each chapter, the full reference to the German law is given, including its acronym for easy reference and the most widely accepted translation of the name into English. Thereafter in that chapter, the law is referred to either by the English name (in the text) or by its acronym (in the footnotes). The English translations of German laws referenced can mostly be found on the Gesetze im Internet website.<sup>1</sup> This book contains many references in particular to the translations of the German Civil Code (Bürgerliches Gesetzbuch – BGB)<sup>2</sup> and the Basic Law for the Federal Republic of Germany (Grundgesetz – GG).<sup>3</sup> The translations of German cases are by the translator. Full references allow easy access to the original German source text.<sup>4</sup>

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<sup>1</sup> Made available by the Federal Ministry of Justice and Consumer Protection (Bundesministerium der Justiz und für Verbraucherschutz – BMJV) and the Federal Office of Justice (Bundesamt für Justizamt – BfJ), cf. <https://www.gesetze-im-internet.de>.

<sup>2</sup> Translation by the Langenscheidt Translation Service; [https://www.gesetze-im-internet.de/englisch\\_bgb/index.html](https://www.gesetze-im-internet.de/englisch_bgb/index.html).

<sup>3</sup> Translation by: Professor Christian Tomuschat and Professor David P. Currie. Translation revised by: Professor Christian Tomuschat and Professor Donald P. Kommers in cooperation with the Language Service of the German Bundestag; [https://www.gesetze-im-internet.de/englisch\\_gg/index.html](https://www.gesetze-im-internet.de/englisch_gg/index.html).

<sup>4</sup> Further references to online databases for statutes and cases can be found at the end of the List of Abbreviations and in the Appendix at the end of the Table of Cases.

*Translator's note*

My profuse thanks go to Professor Möllers and the entire team at the University of Augsburg for their magnificent support, cooperation and assistance during this project.

Munich, November 2019

Gill Mertens LLB, LLM, MA

  
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