

Marietta Auer

Materialisierung, Flexibilisierung, Richterfreiheit

Generalklauseln im Spiegel der Antinomien des Privatrechtsdenkens

[Materialization, Flexibilization, Judicial Freedom. General Clauses as Reflected in the Antinomies of Private Law Theory.]

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General clauses such as good faith and good morals play an increasingly important role as a means of regulation in both civil and common law systems. Nevertheless, because of their vagueness, the task of determining their function and legitimate scope of application poses considerable difficulties for both adjudication and jurisprudence. Against this background, Marietta Auer attempts to show that the function of general clauses in the process of adjudication cannot be rationalized on the basis of the usual methods of jurisprudence alone, but requires a model which takes into account the fundamental shifts in the ethics of private law in the course of the twentieth century. The ethical foundations of private law can be described in the form of three basic value conflicts between individualism and collectivism, between legal certainty and equitable flexibility, and between judicial constraint and judicial freedom, respectively. This book aims to show that these basic antinomies and their immanent tensions are not only present in almost every doctrinal problem of private law, but also provide the necessary background for the development of general clauses. In a more general sense, this book therefore also advocates a change of perspective for legal theory as a whole.

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