

Private Autonomy as an Argument in BGH Jurisprudence

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Abstract

Private autonomy is regarded as the guiding principle of German private law. However, there is no consensus among scholars as to what exactly private autonomy means. This vagueness can be a challenge for decision making practice. In law, concepts are not formed for their own sake, but as building blocks of a normative architecture. How does the ambiguity of the principle of private autonomy influence the courts' decisions? Do judges succeed in making the concept of private autonomy operational in practice? Is the argument of private autonomy used consistently? Do judges leave the big conceptual questions to academia, or do they participate in answering them? Is the mode of use reflective or reflexive? The thesis aims to answer these questions by examining the decisions of the German Federal Court of Justice (BGH).

The basis of the study is an evaluation of all decisions published in BGHZ in which the term "Privatautonomie" is explicitly used by the BGH (i.e. "Privatautonomie" as well as the adjective forms "privatautonom/e/er/es"). The use of sub-forms of private autonomy (freedom of contract, testamentary freedom, etc.) was not examined. The BGHZ volumes were reviewed using the search function in the juris database.

The thesis is divided into five chapters: The first chapter presents the quantitative findings of the study. The second chapter examines the use of the private autonomy argument by area of law. The third chapter is devoted to the use of private autonomy as a constitutional argument. Decisions referring to the legal transaction doctrine are examined in the fourth chapter. The fifth chapter considers the limits of private autonomy. The approach taken in the qualitative analysis in chapters 2 to 5 is always the same: the first step is to summarise one or more reference decisions that can be used to illustrate a particular legal issue. The second step is to present the context in which the decision was made. By contextualising the decisions examined, it is possible to place them within the academic discourse on private autonomy. In the third step, each reference decision is analysed, focusing on the private autonomy argument.

As a result, the thesis shows that the BGH has not developed an independent, coherent understanding of private autonomy in the course of its judicial activity. Rather, the use of the private autonomy argument is *context-dependent* and *subject to historical change*. In addition, in many of the decisions examined, the BGH played a *receptive role*, i.e. it adopted solutions from the literature or implemented the requirements of the BVerfG (German Constitutional Court). This may also have led to the fact that the BGH did not develop its own understanding of private autonomy and was therefore particularly open to the ideas and approaches that were being discussed at the time and in the area of law in question. Thus, when one examines the BGH's use of private autonomy as an argument, one learns less about the private autonomy principle itself, but all the more about the development of private law under the BGH's jurisprudence.