

# § 8 Private autonomy and its limits

## I. The concept of private autonomy [Privatautonomie]

- definition: the right to organise one's own legal relations in free self-determination and self-responsibility in legal transactions
- a concept deeply rooted in the political-philosophical approach of *liberalism* and the idea of *individual self-determination* from the era of Enlightenment, presupposing that human action is based on free will and reason
- most important part: the *freedom of contract* [Vertragsfreiheit]

## II. Private autonomy as the fundamental idea behind the Civil Code

- not explicitly proclaimed but taken for granted in the German Civil Code
  - see, for example, sect. 311(1) BGB
- the basic and dominating idea behind the whole Civil Code, which in most cases links legal consequences to a legal transaction, based on one or more freely made declarations of intent
  - in particular the fundamental idea behind the law of obligations
- a considerable amount of freedom granted by private law, already at a time when no fundamental rights were guaranteed in the constitution

## III. Private autonomy as a fundamental right and a threat to fund. rights

### 1) Private autonomy as a fundamental right under the Basic Law

- private autonomy as part of the general freedom of action (art. 2(1) BL)
  - comprehensive but easily restrictable to protect private rights or public interests
- protection of a core of private autonomy as part of human dignity (art. 1(1) BL)
  - cannot be eliminated, even not by constitutional amendment (→ art. 79(3) BL)
- stronger protection in special contexts by other fundamental rights as *lex specialis*
  - e.g. by freedom of occupation (art. 12(1) BL), for employment contracts and professional contracts
  - e.g. by freedom of science (art. 5(3) BL), for third-party funding contracts in the area of research & teaching
  - e.g. by protection of marriage (art. 6(1) BL), for marrying

### 2) Private autonomy as a fundamental right under European Union law

- private autonomy as part of the freedom to conduct a business (art. 16 ChFR)
  - weak protection: only in accordance with Union law and national laws and practices
- protection of a core of private autonomy as part of human dignity (art. 1 ChFR)
- stronger protection in special contexts by other fundamental rights as *lex specialis*
- protection as a recognised general principle of European Union law (art. 6(3) EU Treaty, ECJ, case C-240/97, Spain vs. Commission, no. 99)

### 3) Private autonomy as a threat to fundamental rights

- although primarily an expression of freedom & self-determination, private autonomy can also endanger them and other fund. rights:
- the power to shape one's own legal relations inevitably involves the *power to influence the legal relations and thus the living conditions of others*
- this impact *cannot always be justified* by referring to the others' "self-responsibility"
  - as the actual circumstances, esp. economic *power imbalances* (between employer & employee, landlord & tenant, provider & consumer etc.) often do not allow to reject a defavourable offer
  - or the other party lacks the necessary insight to actually act as a self-responsible partner

- moreover, selective exercise of private autonomy can lead to *discrimination*
- therefore, legislation and jurisprudence have defined **limits of private autonomy**
  - by introducing special rules for the protection of potentially weaker partners
  - by setting or recognising certain rules in the Civil Code as mandatory (*ius cogens*)
  - by assessing unfair contract clauses imposed by abuse of economic power as invalid
  - by stating an obligation to contract [Kontrahierungszwang] of important providers
  - esp. in the fields of labour law, residential tenancy law, consumer protection law, data protection law and anti-discrimination law

#### IV. The social state principle as a limit to private autonomy (art. 20(1) BL)

- one of the fundamental values and ideas that define the constitutional identity of the state
  - the German implementation of the European value of solidarity/social security, social justice and social cohesion
- includes the constitutional *mandate of the state to actively shape the social conditions*
  - not only but also by the way of limiting or directing private autonomy
  - can justify fundamental rights restrictions in support of weaker or disadvantaged groups of persons in economic life (employees, tenants, consumers, minorities...)

#### V. Fundamental rights as a limit to private autonomy

##### 1) Limitations by the indirect horizontal effect of fundamental rights and the state's duties of protection

- in principle, fundamental rights have only an *indirect horizontal effect* among the citizens: they do not directly bind the citizen but must be taken into account by the legislator when making the law and by the courts when interpreting and applying it
- moreover, where the private autonomy is abused to encroach on the fund. rights of others, e.g. by forcing unfair conditions that hinder their free exercise in the future, the state must intervene actively to protect these rights (*duties of protection*)
- this may cause the legislator to adopt new laws and the courts to reconsider their interpretation of legal norms, esp. indefinite legal terms

##### 2) Direct limitations under fundamental rights

- such fund. rights clauses are rare, since they amount to the opposite of a classic fund. rights norm: not a guarantee of freedom but a *prohibition by fundamental right*
- the Basic Law only includes one such clause (art. 9(3) phrase 2 BL)
- the Charter of Fundamental Rights of the European Union, following a more modern approach, focuses more strongly on the defence against threats emanating from private parties and therefore *expressly prohibits*
  - eugenic practices, in particular those aiming at the selection of persons (art. 3(2) lit. b ChFR)
  - making the human body and its parts as such a source of financial gain (art. 3(2) lit. c ChFR)
  - the reproductive cloning of human beings (art. 3(2) lit. d ChFR)
  - human trafficking (art. 5(3) ChFR)
  - the employment of children (art. 32 sub-sect. 1 phrase 1 ChFR);this includes the prohibition and thus invalidity of respective agreements

## VI. The problem of restricting private autonomy to protect it against itself

### 1) The question

- does private autonomy need protection against itself, i.e. against the conclusion of contracts that bear the risk of practically destroying it?

### 2) The example of personal guarantees (suretyships) by close family members with little income for the high debts of their family

#### a) Facts of the cases

- young adults with small income guarantee under the moral pressure of family relations for their parents' or husband's very high business bank loans, because the bank insists on it
- later the parents/husband go bankrupt, the guarantors will not be able to pay off the debt during their life and consequently they will be insolvent and thus practically unable to make use of their private autonomy again for the rest of their life

#### b) The old practice of the FEDERAL COURT

- the Federal Court had considered the guarantee valid and enforceable
- it argued that private autonomy included the right of the "responsible contract partner" to assume the most severe liability risks regardless of his own economic capacity

#### c) The position of the Federal Constitutional Court (BVerfGE 89, 214)

- the Federal Const. Court required a *content review of the guarantee (suretyship) contract* with regard to the general clauses in private law, such as sect. 138 BGB (invalidity for offending common decency) and sect. 242 BGB (performance in good faith), with the result to free the young adults from their debt
- it argued that the *state must preserve private autonomy* from de facto overriding by dominant contract parties; if one party is structurally inferior, the private law system *must* react in a protective and, if necessary, corrective manner

#### d) Problem: substantive or procedural solution?

- a problem concerning the sensitive relationship between constitutional and civil law jurisdiction
- does the protection of private autonomy against itself require under all circumstances a solution under substantive private law (denying a valid legal obligation of the young adults) or would a procedural solution (e.g. permanent non-enforcement of the civil court judgement) be sufficient?
- what if the guarantor later inherits a large fortune and can easily pay the debt?
- should this question be decided by the constitutional or civil court?