Federal Constitutional Court Affirms Horizontal Effect of Constitutional Rights in Private Law Relations and Voids a Marital Agreement on Constitutional Grounds

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[1] The Federal Constitutional Court (FCC-Bundesverfassungsgericht) recently rendered a judgment that can surely be considered one of the great events both in legal practice and academia. The Court's decision of 6 February 2001, is a clear affirmation of the Court's stand on the issue of horizontal effect of constitutional law in private law relations. It is impossible here to sketch the far reaching radius of arguments and issues connected with the concept, and in particular, the vast body of case law related to the horizontal effect of constitutional law in private law relations. In fact, the debate over whether there is and can be such a thing as horizontal effect has been carrying on for decades and the literature and the jurisprudence in this field are abundant. It must, therefore, suffice to limit our observations to a small number of FCC cases from the past 10 years and a few general remarks.

A. The Public-Private-Dispute

[2] Within both the continental and the American legal system, the issue still provokes a great number of disputes. At first sight, this might come as a surprise, as the number of those that continue to believe in a clear and sharp divide between public law and private law, is getting smaller. The majority of legal academics embraced the teachings of thinkers such as *Roscoe Pound* or *Franz Wieacker* and have, eventually, disavowed all previous confessions to a categorical gap between public and private law. Indeed, it seems, that the belief in a clear-cut public/private divide have severely been under attack ever since the advent of a strong welfare, *interventionist state* at the dawn of WW I. As industrial relations between organized industry and workmen became as much a field of state regulation as the province of the market, especially with regard to monopoly and price-control, the state assumed a role of both active regulator as well as protector of various societal interests. The American Supreme Court's *Lochner* decision with the famous dissent by Justice Holmes is a telling example of this shift in legal perception. In spite of this historical progression towards a unified system of law, the old legal construct (divided between public law and private law) and the attending institutional design still prevails. The doctrinal gap between public and private law remains at the center of legal education and - with regard to German legal academics - it may be noted that the respective expertise in what is referred to as private or public law looks likely to remain decisive with respect to one's eligibility for university positions throughout the career. This, in turn, promises to perpetuate the importance of the division in German legal education.

[3] While there seems to be more common understanding of the intertwined characters of public law and private law, the meaning and importance of the division between the two continuously creeps back onto the agenda. The insistence by feminists in the early eighties that „The Private is Political", aimed at a deconstruction of the dominant views regarding the private sphere, i.e. the household and family relations. To show that the constraints applying to women who stayed „at home" were cemented in the belief that there was a clear division between a „public", political sphere and a „private", a-political sphere eventually opened ways for emancipation and a better informed assessment of the influences that these understandings bore on the individual. In many ways, this feminist critique paved the way for other social emancipation movements and also for a lot of the contemporary discourse on ethnic group identity and pluralism. All of these movements contributed to the heritage (as noted, dating back to the early part of the last Century) of critical thinking from the Continent and America regarding the public/private divide in the law. The earlier critiques focused on arguments offered against and in defense of a state/society or state/market divide. Recent critiques have begun to embrace a more complete spectrum of thinking and disciplines.

B. Constitutional Control of Private Law Relations

[4] In the FCC's new, seminal decision, the Court voided a marital agreement by applying constitutional standards, namely Art. 2.1 (in connection with Art. 6.4) and Art. 6.2 of the German Basic Law. Art. 2.1 protects the „free development of [one's] personality", while Art. 6.4 states that every mother is entitled to the protective care of the [public] community". Finally, Art. 6.2 of the Basic Law guarantees the parents' natural right and duty to care for and bring-up their children as well as the community's responsibility to supervise these activities.

[5] The starting point for the FCC's decision was a marital agreement between a pregnant woman of 26 and her partner, which had been signed in 1976. The woman, who at the time the agreement was formalized, was raising a 5-year old child from her first marriage. The woman had been living with her new partner (the other party to the marital agreement) for 2 years. In the agreement the woman renounced - in the case of a divorce - any alimony for herself. The man who would become the woman's husband pursuant to the marital agreement also renounced any right to alimony – in the case of divorce. The agreement called for the husband to pay - in the case of a divorce - a monthly

sum of DM 150 for child support for the child that was expected to be born in November 1976. The husband alleged that the couple had originally reached an understanding not to have children and that the woman, when finding out she was pregnant, had urged him to enter the disputed agreement and to get married. Subsequent to giving birth to a son, the woman held a position as an office clerk with a remuneration which was substantially inferior to that of her husband.

[6] After their divorce in 1989, the woman received custody of their son, who, in 1990, sued his father for a declaration of his financial situation and for financial support. The Amtsgericht (Lower District Court) found the agreement to be contrary to public policy (*gute Sitten*, Section 138 para. 1 BGB), whereupon the child's father sued his former wife for violation of the agreement to forego any alimony claims superior to 150 German Marks. The *Amtsgericht* dismissed the husband's suit holding that the agreement constituted an attempt to forego the statutory prohibition on the renunciation of alimony among relatives (§ 1614 BGB). The father was successful before the *Oberlandesgericht* (State Appeals Court). It was against this judgment, in favor of the husband's efforts to enforce the agreement, that the woman brought a constitutional complaint to the Federal Constitutional Court.

[7] The Federal Constitutional Court's ruling must be evaluated against the background described earlier, consisting predominantly of the divide between public law and private law. Indeed, the Court was confronted with the question whether constitutional rights are directly or indirectly applicable within a private law relationship. The Court's decision bears all the marks of the complexity of the debate over that question as it is, at the same time straight forward, concrete and driven by principle. While the Court ultimately affirmed the limitations on private parties' ability to renounce, by contract, the requirement of the payment of alimony, the Court also held that the Appeals Court was not sufficiently aware of and had not adequately mapped-out the boundaries of these limitations (which limit the freedom to form private law relations, spouses contracting to override constitutional law, for example). The issue of marital agreements and the acceptable levels of contractual freedom are deeply embedded in issues of economic freedom, market power, social status and education. It is, therefore, quite obvious that the highly specialized jurisprudence in this field reflects a continuous search for clear and appropriate standards. In other words: in the realm of marital agreements visions of private autonomy clash, head-on, with the pre-eminent necessity of considering the concrete, contextual conditions in which the specific agreements are concluded.

[8] In its lengthy decision the FCC cites its *Lüth*-jurisprudence of 1958 (BVerfGE 7, 198) in which the Court had held that in the sphere of private law, the constitution's *Grundrechte* (fundamental rights) unfold as constitutional value-judgments through the medium of those norms that directly govern the respective field of law, i.e. general clauses such as Section 242 (dealing in good faith) or Section 138 BGB (public policy). The Court's jurisprudence established that, as it is the state's duty to protect the individual's fundamental rights, the courts are charged with the responsibility of guaranteeing such protection through general interpretation and through concrete protection in individual cases. The FCC reserves the right to control and to correct this interpretative discretion, however, only in those cases in which the lower court's holding reflects a radically erroneous misunderstanding of the scope and impact of a fundamental right and if this misunderstanding bears substantial influence on the outcome of the case before. The FCC found these conditions to be fulfilled in the present case and voided the Appeals Court's judgment.

[9] The FCC set off with a straight affirmation of its holding in the famous 1990 case involving a anti-competition agreement between a company and its commercial agent. In BVerfGE 81, 242 *„commercial agent - Handelsvertreter"*, the FCC held - now with regard to contract law, while its *Lüth*-decision was concerned with torts - that the freedom to develop one's personality, as set down in Art. 2.1 of the Basic Law, requires that the conditions are such that this right can actually be realized (exercised). The Court found the instrument of private *contract* to be pre-eminent among the instruments of private relationships for the realization of one's responsibilities to others. „Through a contract", the Court said, „the parties, themselves, determine how to adapt their respective interests in an appropriate manner. Reciprocal ties and their impact on the exercise of freedom can, thereby, be concretely realized." It is the presumption that the parties possess free will that is expressed in the contractual agreement, which obliges the state to respect the presumed fair balancing of the interests at stake.

[10] At this point, the FCC, in its *„marital agreement"* decision (of February 6, 2001), drew on its jurisprudence in the second of its two famous cases in which it addressed the horizontal effect of constitutional law on private contract relations. In the „Guarantee" decision (*„Bürgschaft", BVerfGE 89, 214*) of 1993, the FCC voided a guarantee of collateral contracted between a bank and the debtor's daughter with respect to a loan that the debtor had received from the bank. The „Guarantee" case, even more than the commercial-agent-decision, destabilized the German legal world like a Hurricane. The debate following the „Guarantee"-case can easily be described as quasi-religious. The issues waged in the years since the decision was handed down, included the already mentioned question of the justification of constitutional control of private law relations as such but also an increasingly fierce dispute, among private law and public law academics, about the mostly and heavily critiqued role of the FCC in the field of private law. If it is at all possible at this point to estimate the reactions which are due to surface now that the marital-agreement case is published (NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 957-961), there is reason to expect

a much more lively reaction from within the private law oriented academy, which has been engaging in the horizontal effect-debate with a high level of skepticism, rejection, but also heart-felt appraisal. Meanwhile, members of the public law community might at best take the decision to express another sovereign, maybe hazardous extension of the constitution's radius into the private law field.

[11] In its „Guarantee"-case, the FCC elaborated its holding in the „commercial agent"-decision but went much further in establishing standards that would have to be applied to private contracts when there is reason to believe that there is inequality with respect to bargaining power. Going further than the principle of *coercion*, the standard developed by the FCC in its „Guarantee"-case would have to apply to cases in which there was a clearly one-sided burden on one of the contract's parties with regard to the duties and obligations following from the agreement. The FCC held that when, in a contractual relationship, one party had such (bargaining) weight that he could in fact unilaterally dictate the contract's terms, it is „the duty of the law to reinforce the fundamental right positions of both parties in order to prevent that - for one of the parties – the substitution of private autonomy for duress."

[12] It its new „marital agreement"-case, the FCC builds on this precedent. The Court explained that the standard elaborated in the „Guarantee" case „holds true also for marital contracts in which spouses stipulate their highly personal relations for the time of their marriage or beyond." While the Court in the preceding two cases directed its constitutional focus towards Art. 2 of the Basic Law, i.e. the exercise of the right to the free development of one's personality (in the „Guarantee" case) and towards Art. 1, 12 and 14 of the Basic Law, i.e. human dignity, (professional) competition and property (in the „Commercial agent" case), the Court now applied Art. 6, i.e. marriage and family. While the FCC underlined the freedom to enter into marriage and to „contract" the specifics details of that relationship, it stressed the fact that the Basic law presupposes a legal design of the institution of marriage. The FCC quoted Art. 3.2 of the Basic Law (equality of man and woman before the law) in reaching that conclusion and pointed to the importance under constitutional law that this equality not be sacrificed within the marriage. From this the Court drew the conclusion that the state is called upon to set limits on the freedom of contract in marriage where marital agreements reflect a position of domination of one spouse over the other. The Courts are asked in such cases of „disturbed contractual parity" to control and to eventually correct the contract's terms by exercising this control through the general private law in order to safeguard the spouses' constitutional rights.

[13] Having set up this standard of control, it seems as if the FCC had an easy task in voiding the Appeals Court's decision, which had held that the spouses' freedom of contract with regard to whether or not (and under what terms) to enter into marriage superceded such fundamental rights interests. But, what seems obvious is nothing less than the FCC's balancing the fine line between constitutionally protected private autonomy, on the one hand, and the application of a rather complex control-standard on the other. While many may accept the state's control of marital agreements as laid down not only in the constitution but also within general private (family) law norms, there are strong grounds for skepticism as to how far this control ought to be carried. The FCC rightly points to the legislature's lack of regulation of marital contracts with regard to alimony obligations as opposed to agreements dealing with the spouses' distribution of their financial intakes during the time of marriage. In light of this legal *status quo*, the FCC finds it to be the duty of the courts' to exercise control in order to assess the possible necessity to protect pregnant women against pressure and coercion originating in their social environment or coming from the father. This, the Court stated, must especially hold true in cases where the woman is pressured into an agreement that clearly is in opposition to her interests. The court found that a similar situation exists in cases where a pregnant woman finds herself exposed to the alternatives of either raising the child mainly through her own support or of entering into a marriage with the father, thereby binding him into a set of responsibilities towards the child, but in possible exchange for a massive subjugation under severely disadvantageous terms of a marital agreement. The Court elaborated the conditional circumstances that are likely to influence the woman's discretion and finds her in a „weakened bargaining position". The FCC drew upon statistics revealing a general loss of financial means of more than 50 % for unmarried women that have to guarantee their own existence as well as that of the child. At the same time, only 15 % of children in a marriage face such financial pressures. While the Court recognized these findings as generalities that might be supportive of the actual circumstances that might be at work in a concrete case, it made clear that pregnancy at the time when a marital agreement is concluded can be no more than an *indication* of contractual disparity. Other facts that courts will need to illuminate in order to evaluate the woman's concrete situation include her financial situation, her professional qualifications and prospects as well as the envisioned distribution of „commercial and family labor" (Erwerbs- und Familienarbeit). Some combinations of these factors, the Court explained, can point towards the likelihood of adequate compensation for the woman, even if the marital agreement includes renunciations of legally provided guarantees. It is precisely when the contract's terms reflect a position of inferiority on the part of the unmarried pregnant woman (as in the case at issue) that the need for protection becomes evident. This, the Court found, is the case when the contract disproportionately burdens the pregnant woman and when her interests are not appropriately reflected in the terms of the agreement.

[14] The FCC ultimately voided the Appeals Court's decision for denying, outright, the necessity to evaluate the marital agreement with respect to the factual circumstances at the time it was concluded. In the FCC's view, the

Appeals Court failed to assess the consequences of the contract's terms for both the woman and her son. In applying the constitutional standards set out above and drawing on the constitutionally protected sphere of marriage and family, the FCC found that the Appeals Court failed to appropriately consider the impact that the agreement would have on mother and child. The FCC found, as inadequate, the Appeals Court's reference to the son's persisting right to child support as that right fails to account for the fact that the woman found herself already in a precarious financial situation at the time the contract was concluded. By the terms of the contract, she had to expect an even more disadvantageous situation in case of a divorce because she would have to raise the means to support her son without the help of her (former) husband.

[15] Finally, the FCC found the agreement to be violative of the parents' duty to guarantee the child's well-being („Kindeswohl"), as set out in Art. 6.2 of the Basic Law. Although, from a legal perspective, the marital agreement did not lead to the child's loss of his claim for child support, the real situation as brought about by the terms of the agreement in this concrete case were characterized by severe financial pressure resulting in a *de facto* waiver of the child support claims. The FCC concluded that when the financial circumstances of the woman lead to a highly problematic situation for mother and child and the well-being of the child can no longer be regarded as secure, the contract is detrimental to the child's best interest and constitutes a violation of the standards laid down in Art. 6.2 of the Basic Law.

C. Perspectives

[16] It is too early to predict the reception the „marital agreement" case will receive from the interested public, both in legal practice and the academy. It must suffice to say that there will most likely emerge another debate possibly as strong as that which followed the „commercial agent" and the „guarantee"-cases. However, mention must be made to the fact that the Court did not, in any way, follow the direction in which the overwhelming weight of the commentary from within the legal community with regard to its horizontal effect jurisprudence pointed. This might indicate that the Court believes in a division of labor as regards the deciding of the case and its critical academic assessment. Be that as it may, the FCC follows the path it outlined in the „commercial agent" case in 1990, and which it reaffirmed three years later in the „guarantee"-case. The sociological approach which the FCC takes in its constitutional control (and correction) of the Appeals Court's decision, at first sight, seems to satisfy the obvious need to legally assess what was evidently a situation „turned bad". But it must be questioned whether the application of constitutional standards was in fact necessary. The Appeals Court's decision was the end-of-the-line for the woman, but this can hardly be seen as a satisfactory justification to bring the blazing torch of constitutional review into a field in which many smaller lamps of detailed provisions and a number of principle-based clauses (Sections 138 and 242 BGB) already shed a good deal of light on the twisted paths of marital law. But, then again, this seems too much on the line of those that have always condemned the FCC for supposedly *interfering* with private law's „autonomy". The critique here continuously was that the constitutional standards („structural inequality"; „contractual imparity") were finally not adequate to the architecture of private law and that it could not be the role of the FCC to introduce a set of outside standards into a complex system of architecture. How is that? Why should it be possible in the first place to argue that there is incompatibility problem in applying the constitutional standards to private law relations? The problematics underlying the „guarantee"-case consisted in the clashing of two opposed and fundamentally different sets of rationality. Not as you might think between private law's belief in private autonomy and the constitutional law's well-spirited and good-hearted rescue of the poor and needy. No, as *Gunther Teubner*, law professor in Frankfurt, recently pointed out, the real rift ran between the sphere of the family relations in which the obligation to enter the obligation with the bank originated on the one hand and the economic sphere of the banks and their loan practice on the other. The question would then have to be not whether intervention in private law was allowed or justified, but whether conflicts between these two spheres - family and market - could aptly be legalized by constitutional law. To separate the spheres as such and to draw attention to their prevailing logic or, their governing values, would eventually allow us to look much further or, indeed, much closer at the real difficulties at hand. The problem then is not one of disturbed contractual imparity, but rather one of two incompatible autonomous spheres - regulated by private law - colliding with each other. Teubner reconstructs this conflict as involving a constitutional problem instead of recognizing, as is usually done, the alleged domination of the bank's representative over the contracting individual as asking for the constitutional emergency program. It is in fact a case of structural corruption, says Teubner- not imparity! - between these two incompatible spheres that seems to demand constitutional remedy. While the family sphere would mainly be characterized by trust, commitment and sacrifice, the market sphere might be believed to embrace rational exchange, profit and advantage seeking. In the case of the father urgently asking his daughter to back up his loan from the bank by signing a guarantee (as in the 1993 decision), the control and correction could be found *inside* the private law reference system (Family) without it being necessary that constitutional law intervenes. While the traditional „control-and-correct"-approach of constitutional *intervention* of private law would focus on the domination of the bank over the daughter, the focus should rather be on the pressure exercised within the family sphere, but resulting from the corruption by the economic ratio entering in person of the bank's representative. Resulting from this corruption, the self-regulatory and protective system within the family is paralyzed. Looking for help within the private law system then, might allow us to identify the real injustice: the father should abstain from pressing his daughter if this leads to financial down fall. The guarantee demanded from the bank would then still be

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voided, but for a different reason than before. While it may well be in line with market rationality and respective contracting practice, this corruption contradicts norm building/finding procedures such as those unfolding within the family sphere. In so far as the economic pressure leads to a family member trespassing the line of trust and empathy to his kin, it disables these family norms and protection mechanisms and it becomes time that the constitutional control and correction must kick in and stop the deviation, or, in a positive manner, reinforce these self-regulatory procedures within the family sphere. The role of law would have to consist in the protection of the autonomy of the respective spheres, not in an attempt to juridify the norm generating processes, be that within the family or the market sphere.

[17] While this perspective can illuminate the problematics underlying the guarantee-case, it might seem questionable whether this holds true also for the somewhat different circumstances of the marital agreement case. Here, the seemingly blunt opposition - family v. market - is absent. But this does not hinder us to apply the same perspective to the conflicting interests at play on both ends of the marital agreement. The FCC did elaborate in detail the conflict situation in which the pregnant woman finds herself, and it is exactly here that a different reasoning should begin than that which the Court applied. Instead of focusing on the structural imparity of the man over the woman the task would be to prevent that the conflict arises in the first place. Without referring to a seemingly set-in-stone system of power and equality, the evidence of which the Court finds necessary to prove by listing a selected number of "concrete circumstances", the Court should instead try to provide room for both sides for an autonomous exercise of their contractual rights. Finally, the Court would have to strike down the agreement but not by finding one or several proofs of power inequality and disturbed contractual parity but because the „I don't want to have a child" sphere might be incompatible with the „I neither want a child nor do I want to marry" sphere and therefore needs to be shielded from each other. But, here the problem will inevitably arise of how to ultimately define these spheres. Were it that it was up to the Court to identify what is properly "family", "market", "mother-child", "career"..., the same questions will have to be answered that lay at the bottom of our worries about how to define power inequality and structural imparity. Instead of moving then to another level of semantics, the way to choose might be that of respecting the core of what these different spheres are to be made off. If then we find that *autonomy* is what lends its heart noblesse to the autonomous spheres of social activity we might find this very notion to be both eternally aspired and, at the same time, always endangered. Says Rousseau. The step ahead towards this autonomy then might be to reinforce, by law, the norm-generating processes that people choose and to aim, by law, at providing the freedom to choose. To constitutionalize these norm generating processes holds the promise of self-determination. And that is what it has been all about from the beginning.

For more information:
Decision of the Federal Constitutional Court, February 6, 2001, published in: NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 957-961

Decision of the Federal Constitutional Court, January 15, 1958, in: BVerfGE 7, 198.

Decision of the Federal Constitutional Court, February 7, 1990, in: *BVerfGE 81, 242 (commercial agent)*.

Decision of the Federal Constitutional Court, October 19, 1993, in: *BVerfGE 89, 214 (guarantee)*.

Gunther Teubner, Ein Fall von struktureller Corruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken (BVerfGE 89, 214), in: KritV 83 (2000), 388-404.