Party autonomy as a fundamental right in the European Union

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I. FREEDOM OF CONTRACT: A SUBSTANTIVE UNDERSTANDING

There is a parallelism between freedom and equality. Today, nobody doubts that attaining equality in the sense of non-discrimination requires more than simple, formal equal treatment. Taking the equality principle seriously means embracing a substantive understanding of equality, which includes the need for positive action to counterbalance existing factual and social imbalances that make people dramatically unequal. Why should this not be true also with regard to freedom of contract? Arguably, taking freedom of contract seriously means embracing a substantive understanding of this freedom, which includes the need for positive action to counterbalance existing factual and social constraints that make one contractual party dramatically less free than the other.

Indeed, some contemporary accounts in literature and case law understand freedom of contract in a substantive sense fond [Canaris, 2000: 200, Grundmann, 2005]. Accordingly, achieving substantive freedom of contract involves preventing and eliminating the harm caused by an unconscionable contract to a party who was only formally, but not substantively free to conclude it. The same applies if one party is only formally, but not substantively free to terminate a contract whose conditions have been unilaterally changed by the other party. Precisely because party autonomy, self-determination, is crucial to private law, private law has to provide remedies for contracts which are the product of a factual subjugation of the weaker party [CfBVerfG, 1990].

Highlighting the substantive dimension of freedom of contract leads to a change in perspective when considering the relationship between freedom of contract and protection of vulnerable parties in contract law. Freedom of contract and weaker party’s protection have traditionally been understood as antagonistic, conflicting principles. Legislative rules or doctrines providing remedies against unconscionable contracts are mostly seen as exceptions to the principle of freedom of contract. Scholars who see freedom of contract and weaker party’s protection as conflicting principles tend to challenge the predominance of freedom of contract, if they share a concern for social justice in contract law [Hesselink, 2001:7, 49, Lurger, 2004, Wilhelmsson, 2004]. For example, the Social Justice Manifesto [Study Group on Social Justice in European Private Law, 2004] criticised the European Commission’s approach according to which in the Common Frame of Reference for a European contract law (CFR) exceptions to

Being written by a co-author of the Social Justice Manifesto, this paper endorses the proposition that fairness and solidarity should be the guiding principles in contract law. However, this paper does not view fairness and solidarity as conflicting with freedom of contract. It starts from the assumption that this antagonism derives from an old, formal understanding of this freedom, which was barely compatible with modern twentieth-century private law as it was, and is certainly no longer fit for purpose in the twenty-first century.

Some scholars conceptualise the difference which this paper expresses in terms of ‘form’ and ‘substance’ in terms of ‘negative’ and ‘positive’ freedom of contract. These scholars consider the freedom from (state) intervention in the contractual relationship as the negative side of freedom of contract, whereas they view the positive side of this freedom in the self-determination and free development of personality of both contracting parties [Mak, 2008].

The substantive understanding of party autonomy is no longer a pure scholarly construct. It has already been acknowledged by the highest courts of some continental legal systems such as Germany and Slovenia, and by lower courts in other legal systems such as Greece. These accounts will be explored in the following subchapter.

II. SUBSTANTIVE FREEDOM OF CONTRACT AS A FUNDAMENTAL RIGHT IN GERMANY, SLOVENIA, GREECE AND THE NETHERLANDS

A common thread which connects the developments concerning the principle of substantive equality and the principle of substantive freedom of contract is their constitutional dimension. All continental European doctrines on substantive freedom of contract known by the author of this paper have so far embedded this principle in national Constitutions or in the European Convention on Human Rights.

1. Germany

In 1957, the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) understood the right to free development of personality under Art. 2 (1) of the Federal Constitution (Grundgesetz, GG) as a catch-all fundamental right to general freedom of action, embracing all manifestations of freedom which are not covered by other, more specific fundamental rights. In German case-law and literature, freedom of contract has been generally considered protected by the Constitution in the framework of Article 2 (1) GG. [M. Bäuerle, Vertragsfreiheit und Grundgesetz: Normativität und Faktizität individueller Vertragsfreiheit in verfassungsrechtlicher Perspektive (Baden-Baden: Nomos, 2001) with further references].

which excessively restricted the agent’s professional freedom after termination of the contractual relationship. The BVerfG stated:

‘(P)rivate autonomy is based on the principle of self-determination, and thus requires that the conditions of free self-determination be in fact actually present. If the bargaining power of one of the contracting parties is so heavily disproportionate that the contractual regulation becomes factually one-sided, this makes the contract heteronomous. Where there is an absence of approximate equality of bargaining power between the parties, then a fair balancing of their interests cannot be reached by the means of contract law alone. Even when the legislator refrains from creating mandatory contract law for certain aspects of life, that in no way means abandoning the field of contract practice to the free play of power. Rather, the general clauses of private law, which have the effect of prohibiting excessive power, first and foremost those in §§ 138, 242, 315 BGB [Bürgerliches Gesetzbuch (BGB, German Civil Code)], are to be applied as integrative instruments. It is precisely in the elaboration and application of these general clauses that fundamental rights are to be observed. The corresponding protective mandate of the Constitution is directed here to the judge, who has to enforce the objective basic decisions of fundamental rights in cases of imbalanced contractual parity, using the means of private law.’

In the ‘Commercial Agent’ case, the civil judgment impugned by the agent’s constitutional complaint was declared unconstitutional by the BVerfG on ground of violation of the agent’s fundamental right to professional freedom under Article 12 German Federal Constitution (GG). In this decision, the BVerfG established the doctrine of substantive freedom of contract, but it did not expressly devise this substantive freedom as a constitutional right. A definition of substantive freedom of contract as a constitutional right was provided by the BVerfG only three years later, with the famous ‘Suretyship’ judgment of 1993 [BverfG, 1993]:

“At least for the sake of legal certainty, a contract may not be challenged or adjusted in every instance in which the equality of bargaining power is disturbed. However, if there is a typical case scenario, which reveals a structural inferiority of one contracting party and the consequences of the contract for the inferior party are unusually onerous, then the civil law must react and enable corrective measures. That follows from the fundamental guarantee of private autonomy (Article 2 (1) GG) and the principle of the social state (Arts. 20 (1), 28 (1) GG)... For the civil courts, it follows that they are under a duty to interpret and apply the general clauses so as to ensure that contracts shall not serve as a means to hetero-determination.”

In this decision, the BVerfG treated the substantive dimension of freedom of contract as an integral aspect of the fundamental right to the free development of personality and the general freedom of action under Article 2 (1) GG. Precisely because of the violation of the surety’s fundamental right to private autonomy and freedom of contract under Article 2 (1) GG, the BVerfG allowed the surety’s constitutional complaint and declared the unconstitutionality of the civil judgment which did not challenge the validity of the suretyship [Colombi Ciacchi, 2005].

In 2001, the BVerfG confirmed the principles of the ‘Suretyship’ judgment in a case concerning a prenuptial agreement [BVerfG 6 February 2001, BVerfGE 103, 89, Neue Juristische Wochenschrift 2001, 957]. A pregnant woman wanted to marry the child’s father. The man only agreed to the marriage on condition that the woman contractually renounced to her right of maintenance granted by matrimonial property law in case of divorce. The woman agreed and a prenuptial agreement was concluded. The BVerfG acknowledged that the woman’s self-determination and freedom of contract at the time of the
conclusion of the agreement was so heavily limited that the agreement itself was not an act of autonomy but it was the precise contrary of self-determination, which the Court in both the ‘Suretyship’ judgment and this judgment expressed with the word *Fremdbestimmung* (‘hetero-determination’) the weaker party.

Four years later, in two decisions of 2005 on life insurance contracts [BVerfG 26 July 2005, 1 BvR 782/94 and 1 BvR 957/96, *Neue Juristische Wochenschrift* 2005, 2363; BVerfG 26 July 2005, 1 BvR 80/95, *Neue Juristische Wochenschrift* 2005, 2376.], the BVerfG seems to have broadened even more its understanding of the constitutional principle of private autonomy as substantive freedom of contract. In the first case, an insurer had transferred a contract to another insurance company, without being obliged by law to obtain the insured person’s consent. This change worsened the position of the insured person and left him without a remedy. In the second case, the law of insurance contracts did not guarantee that premium payments of the insured person were adequately taken into account in the calculation of surplus insurance benefits. In both cases, the BVerfG acknowledged a lack of substantive private autonomy of the insured person and found that the legislator was under a duty to modify the law of life insurance contracts so as to provide the insured person with effective remedies. The BVerfG inferred this duty from the constitutional protection of private autonomy (Article 2 (1) GG) and property (Article 14 (1) GG).

In these ‘Life Insurance’ decisions, the insured persons were not vulnerable on grounds of age, education, inexperience or poverty. The contracts were not unusually disadvantageous for them. The lack of substantive freedom of contract consisted in the general inequality of bargaining power between insurance companies and consumers, as well as in the general lack of freedom of choice of every insured person after the conclusion of a life insurance policy. Hence one may argue that the BVerfG in these judgments extended the scope of its substantive understanding of freedom of contract. Accordingly, every situation where one contracting party (before or after the conclusion of the contract) can no longer exercise its substantive self-determination and is therefore dominated by the other party now gives rise to a State’s duty to intervene and provide for a legal remedy.

2. Slovenia

The jurisprudence of the Slovenian Constitutional Court offers another subtle example of substantive understanding of freedom of contract. A milestone in this regard is a judgment of 1994 concerning a credit agreement with an excessive interest rate [U-I-202/93 (6.10.1994), *Official Journal* No. 74/94]. Such cases are normally dealt with under the provision of usurious contract (*oderuška pogodba*), which is now codified in Article 119 of the Slovenian Code of Obligations (CO) [*Obligacijski zakonik, Official Journal* No83/2001]. According to this Article, a contract is usurious if there is a manifest disproportion between the obligation of the two contractual parties, which is a consequence of the exploitation by one party of the other party’s distress, severe financial problems, inexperience, recklessness or dependence on another person. The exploiting party must have acted in order to achieve benefits for him/herself or for another person. If all these requirements are met, the contract is null and void. Alternatively, the injured party can claim for an adjustment of the contract within five years from its conclusion. However, the injured party bears the burden of proof of the requirements of Article 119 being met. Needless to say that it is very difficult for him/her to provide such evidence.

In the case decided by the Slovenian Constitutional Court in 1994, the usury requirements were not met. Theoretically, the contract could have been deemed immoral and thus declared null and void [Article 86 (1) CO reads: ‘A contract that contravenes the Constitution, compulsory regulations or moral
principles shall be null and void if the purpose of the contravened rule does not assign any other sanction or if the law does not prescribe otherwise for the case in question’. Cf. Š. Mežnar

However, Slovenian civil courts were reluctant to avoid a contract solely on the basis of the immorality clause. They required the applicability of other, more specific causes of action, such as impermissible subject matter of the contract, impermissible motive, or, indeed, usury.

This self-restraint of the civil courts was challenged by the Constitutional Court in 1994. The Constitutional Court found that the autonomy of both contractual parties was protected by the Slovenian Constitution of 1991, namely in Article 35 (protection of personality rights) [Article 35 Slovenian Constitution reads: ‘The inviolability of the physical and mental integrity of every person, his privacy and personality rights shall be guaranteed.’] and Article 74 (freedom of business) [Article 35 Slovenian Constitution reads: ‘The inviolability of the physical and mental integrity of every person, his privacy and personality rights shall be guaranteed.’]. On this basis, the Constitutional Court held that the validity of contracts which evidently violated basic principles of contract law such as good faith and fair dealing, equal performance, or prohibition of abuse of rights, had to be be examined by civil courts regardless of whether they could be qualified as usurious [U-I-202/93 (6.10.1994)].

Slovenian scholars welcomed this judgment, which ‘introduced a substantive rather than formal examination of unfair contracts’ [Š. Mežnar (n. above) 256]. In 1998, the Slovenian Constitutional Court confirmed the principles of its 1994 decision. Finally, in 2005 the Slovenian Supreme Court abandoned its restrictive jurisprudence on the immorality clause. By explicitly referring to the Constitutional Court judgment of 1994, the Supreme Court held that Article 86 CO represented a direct legal basis for the nullity of a contract which evidently violated basic moral principles, such as the principle of good faith and the principle that freedom of contract is subject to limitations. It found that civil courts were obliged to declare a contract null and void when it evidently contravened such basic moral principles, regardless of whether the contract met the requirement of other, more specific provisions, such as the prohibition of usury. In particular, the Supreme Court suggested that a gross violation of the principle of equal performance could be sanctioned by Article 86 CO independently of the usury in the contract [Case II Ips 409/2004 (7.4.2005). Cf. S. Mežnar].

The double meaning of freedom of contract (formal and substantive) is well reflected in the difference between the reasoning of the Slovenian Constitutional Court and the Slovenian Supreme Court. Like the German Federal Constitutional Court in the ‘Suretyship’ case the Slovenian Constitutional Court in the credit agreement case of 1994 similarly established a substantive understanding of personal autonomy and freedom of contract. On the contrary, the Slovenian Supreme Court in 2005, by mentioning the ‘principle that freedom of contract is subject to limitations’, revealed a view of the principles of good faith, fairness and equal performance as conflicting with the principle of freedom of contract: this corresponds to the traditional formal understanding of this principle.

3. Greece

In Greece there is no Constitutional Court. Nevertheless, Greek civil courts have begun to view the substantive freedom of contract as a constitutional right, exactly like the German and Slovenian Constitutional Courts. In 1999, the Athens Court of First Instance adjudicated a family suretyship case along the same pattern as the ‘Suretyship’ decision of the BVerfG [Three Member Court of First Instance of Athens 7241/1999, NoV 2000, 1146 et seq. Cf. Y. Erifillidis, ‘Greece’, in A. Colombi Ciacchi and S. Weatherill (eds), Unfair Suretyships in Europe (Oxford University Press, 2010 forthcoming), explicitly
referring to this German judgment. The facts of both cases were very similar: young people with low education and very low incomes had entered into suretyships without being aware of the risk.

The Athens Court of First Instance found that freedom of contract was a fundamental principle that governed both the conclusion and the content of contracts and derived from the principle of self-determination enshrined in Article 5 (1) Greek Constitution [Σύνταγμα (Syntagma)], in force since 1975. Article 5 (1) reads: ‘All persons shall have the right to develop freely their personality and participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages.’ Cf. Y. Erifillidis (above). Since each person that takes part in private law transactions falls within the scope of protection accorded by Article 5 (1) and each person can equally invoke the constitutionally recognized principle of self-determination, the right of the stronger party cannot prevail. The freedom of contract can fulfil its mission only where the contractual parties act on an equal basis and in the context of a balancing of their opposing interests. If one of the contracting parties is in such a superior position and in practice it unilaterally dictates to the other party the contents of the contract, this superiority results in a situation whereby the other party is unable to exercise its private autonomy. Of course the legal order cannot take care of all cases in which the balance in the bargaining power between the two parties is disturbed. However, if there is a typical case scenario, which reveals a structural inferiority of one of the contracting parties, then the legal order has to react and enable the necessary adjustments. If the contractual obligations are manifestly disproportionate and unusually onerous for one party, and the contractual provisions are the result of a structural inequality of bargaining power, the civil courts have the duty to provide remedies by applying the general principles of private law such as good morals (Article 179 of the Greek Civil Code, AK) or good faith (Article 178 and 288 AK). In particular, when young people with low education and no experience in business enter into a suretyship for a business loan, without having been informed by the bank about the suretyship’s risk and without having a personal financial interest in the suretyship, and the guaranteed amount is disproportionate to their financial capacity, the contract contravenes well-established principles of morality.

4. The Netherlands

As in Greece, in the Netherlands there is no Constitutional Court. Yet similarly the German ‘Suretyship’ judgment has been a source of inspiration, in particular for scholars. Snijders recently embraced a substantive understanding of freedom of contract which is quite similar to the BVerfG’s one. He demonstrated that Article 8 European Convention of Human Rights (ECHR) not only protects privacy as the right to be left alone, but also the right to personal autonomy and self-determination, which in turn encompasses freedom of contract. Accordingly, a civil court adjudicating a contract entered into under pressure, could consider it to violate Article 8 ECHR. This would apply, for example, to family suretyships where a family member and a bank employee exercised pressure on a private surety [Snijders, 2007].

Already in the late 1960s, Dutch scholars considered freedom of contract as an unwritten fundamental right [Mak: 42]. Snijders’ reliance on the ECHR instead of the Dutch Constitution (Grondwet, Gw) as a source of the fundamental right to substantive freedom of contract is not casual. In the Netherlands, the ECHR may even be said to rank higher than the domestic Constitution. Under Article 120 Gw, Dutch courts are not allowed to test Acts of Parliament against the national Constitution. However, they are not prevented from testing the compliance of domestic statutes with international treaties. In fact, quite often the ECHR is applied in the adjudication of private law cases. Moreover,
certain ECHR provisions can be directly invoked before Dutch courts on the basis of Article 93 and 94.

III. SUBSTANTIVE FREEDOM OF CONTRACT AND THE HORIZONTAL EFFECT OF FUNDAMENTAL RIGHTS

The case-law and scholarly doctrines outlined under the previous section can be explained in terms of either the ‘vertical’ or the ‘horizontal’ constitutionalisation of contract law. The ‘Life Insurance’ cases decided by the BVerfG in 2005 are examples of vertical constitutionalisation. This means that legislative provisions are invalidated on ground of their unconstitutionality and/or the legislator is obliged to reform a certain subject matter. On the contrary, the ‘Commercial Agent’ and ‘Suretyship’ judgments of the BVerfG, as well as the Slovenian and Greek judgments, are examples of horizontal constitutionalisation. This means that no legislative provisions are declared unconstitutional, but the Constitution helps otherwise to determine the rights and duties of the parties of a horizontal, private law relationship.[Colombi Ciacchi, 2006].

The ‘Commercial Agent’ and ‘Suretyship’ judgments of the BVerfG and the Slovenian and Greek judgments on substantive freedom of contract are examples of indirect horizontal effect. Snijders’ construction instead is an example of direct horizontal effect. Snijders’ proposal implies that civil courts take the Human Rights Convention as the direct parameter of validity of contractual claims. Accordingly, an unconscionable contract which disregards the substantive self-determination of one contracting party is considered to violate Article 8 ECHR.

However, from the viewpoint of outcomes, there is no substantial difference between the indirect and direct horizontal effect approach [Colombi Ciacchi, 2007, Mak: 158]. Both approaches lead to the protection of substantive freedom of contract through a declaration of the invalidity of the unconscionable agreement or a judicial adjustment of its content.

IV. THE CONSTITUTIONAL DIMENSION OF PARTY AUTONOMY IN ITALY, FRANCE AND POLAND

1. Italy

The Italian Constitution is as old as the German Constitution and the Italian Constitutional Court plays an equally important role in private law as the BVerfG in Germany. Not surprisingly, the acknowledgment of the constitutional dimension of private autonomy is in Italy almost as old as in Germany. As early as the 1960s, the Corte Costituzionale [Corte. 20 February 1962, no. 7; Corte cost. 8 April 1965, no. 30; Corte cost. 13 March 1969, no. 37; available at www.cortecostituzionale.it/giurisprudenza. For more recent confirmations of the same principles see Corte cost. 3-15 May 1990, no. 241; Corte cost. 22-30 June 1994, no. 268; Corte cost. 6-17 March 2000, no. 70] held that freedom of contract, although not a constitutional value itself, was indirectly protected by the Constitution as it was functionally related to the freedom of economic initiative enshrined in Article 41 Cost. The Constitutional Court acknowledged that the freedom of economic initiative and private autonomy were not unlimited and could be counterbalanced by other, higher-ranked socio-economic values which are constitutionally relevant [Corte cost. 13 March 1969, no. 37; Corte cost. 7 May 1976; available at www.cortecostituzionale.it/giurisprudenza.].
In fact, the Italian Constitution does not regulate the freedom of economic initiative in the chapter devoted to the citizens’ rights and duties, but in the chapter regulating economic relationships. Therefore the freedom of economic initiative is less well protected than the personal liberties [Alpa,1995: 49-50]. The wording of Article 41 (2) Cost. mentions the social utility, the liberty, dignity and safety of human beings as limitations of private economic initiative. According to the Constitutional Court, the need to achieve social utility justifies both the setting of restrictive conditions for the operativity of freedom of contract, and the modification or elimination of contract terms which conflict with social utility [Corte cost. 20 February 1962, no. 7 (nabove)].

The prevalent opinion in academic literature follows the Constitutional Court’s approach and considers Article 41 Cost. as an indirect constitutional legal basis of freedom of contract [Rescigno, 1967, Pace, 1993]. Some Italian scholars focus instead, like the German scholars and courts, on the self-determination aspect of private autonomy, as a manifestation of the freedom to decide on one’s own personal and patrimonial legal sphere Guarno, L’organizzazione pubblica, vol. I (Milan: Giuffré, 1977) 134; id., ‘Pubblico e privato nella economia. La sovranità tra Costituzione ed istituzioni comunitarie’, (1992) Quaderni costituzionali 39]. These scholars prefer to rely on the human rights clause in Article 2 (1) Cost. [Article 2 (1) Cost. reads: ‘The Republic recognizes and guarantees the inviolable rights of man, both as an individual and as a member of the social groups in which one’s personality finds expression, and it requires the performance of imperative political, economic, and social duties.’], which has also served as legal basis for the development of personality rights in Italian law. However, this approach to freedom of contract is criticised both by those who deny the open-norm character of Article 2 Cost. [Pace (n. above) 327], and by those who do not view freedom of contract as an individual liberty [G. Alpa (n. above) 45, 48. He seems to limit the contract law relevance of Article 2 Cost. to agreements which create some sort of community]. Moreover, the Constitutional Court explicitly denied the possibility of considering contractual autonomy as a human right protected by Article 2 (1) Cost. [Corte cost. 21 March 1968, no. 16, available at www.cortecostituzionale.it/giurisprudenza].

In Italy, a substantive understanding of freedom of contract has not yet been explicitly acknowledged. However, it is submitted that both this understanding and its constitutional dimension is fully compatible with the Italian legal culture. Two examples will be made here:

First, contractual restrictions of the economic freedom of the weaker party, as in the German Handelsvertreter case, could be dealt with by giving horizontal effect to the freedom of economic initiative under Article 41 Cost. The preparatory works to the Italian Constitution demonstrate that Article 41 was meant to protect this freedom not only vis-à-vis the public power, but also vis-à-vis private economic powers [See Lucifero’s intervention during the meeting of the 1st subcommission on 10 September 1946: cf. A. Pace (n. above) 330]. It follows therefrom that Article 41 Cost. can be given direct horizontal effect in contractual relationships [Cf. A. Pace, ibid.].

Second, a substantive understanding of all constitutionally protected freedoms is implicit in Article 3 (2) Cost., according to which ‘(i)t is the duty of the Republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country’. Since the heading of Article 3 Cost. reads ‘Equality’, it has been generally acknowledged that Article 3 (2) enshrines the principle of substantive equality. However, this provision not only mentions the economic and social obstacles that limit the citizens’ equality: it also mentions the economic and social obstacles that limit the citizens’ freedom! In fact, substantive freedom of contract and substantive equality are
closely intertwined. If a contract is concluded between one party which is substantively free to determine its content, and another party which lacks this substantive freedom, there is a substantive inequality between the contracting parties.

2. **France**

In France, the traditional Illuministic conception of freedom of contract as a natural human liberty [Rouhette, 1994: 23] lost its popularity in the twentieth century, as concerns for State interventions and protection of weaker parties grew, which are generally seen as conflicting with (formal) freedom of contract. Unsurprisingly, therefore before 1997 the Constitutional Council (Conseil constitutionnel) denied the constitutional nature of the principle of freedom of contract [Cons. const. 3 August 1994, no. 94-348, *La semaine juridique* (JurisClasseur périodique) 1995.II.22404 with comment Y. Broussolle].

However, as from 1997, the Constitutional Council gradually moved towards an acknowledgment of the constitutional dimension of this principle. In 1997, the Council held that freedom of contract was not a constitutional value, but its infringement could endanger constitutionally guaranteed rights and liberties [Cons. const. 20 March 1997, no. 97-388 DC, (1998) *Revue trimestrielle de droit civil* 99 with comment N. Molfessis, JCP 1997.I.4039 with comment M. Fabre-Magnan]. In 1998 [Cons. const. 10 June 1998, no. 98-401 DC, (1998) *Revue trimestrielle de droit civil* 796 with comment N. Molfessis], it affirmed that severe intrusions into legally concluded contracts, i.e. violations of the principle of economy of contracts (*économie des conventions et contrats*), could be considered as an infringement of the liberty rights enshrined in Article 4 of the 1789 Human Rights Declaration (*Déclaration des Droits de l'homme et du citoyen*) [Article 4 of this Declaration reads: ‘Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law.’]. This finding was then confirmed in two decisions of 1999 and 2000 [Cons. const. 23 July 1999, no. 99-416 DC, (1999) *Actualité juridique, droit administratif* 700 with comment J.-E. Schoettl; Cons. const. 7 December 2000, no. 2000-436 DC, (2001) *Actualité juridique, droit administratif* 18 with comment J.-E. Schoettl].

Finally, in December 2000, the Constitutional Council explicitly acknowledged the constitutional value of freedom of contract [Cons. const. 19 December 2000, no. 2000-437 DC, (2001) *Revue trimestrielle de droit civil* 229 with comment N. Molfessis; (2001) *Revue du droit public et de la science politique* 267 with comment J.-E. Spitz]. In the two years thereafter, the Council seemed to have withdrawn this acknowledgment and resumed its previous, more restrictive jurisprudence [Cons. const. 27 November 2001, no. 2001-451 DC; Cons. const. 12 January 2002, no. 2001-455 DC; Cons. const. 27 December 2002, no. 2002-464 DC. Cf. F. Moderne, ‘La liberté contractuelle est-elle vraiment et pleinement constitutionnelle ?’, (2006) *Revue française de droit administratif* 2, 9.]. In 2003 however, it reaffirmed with a more comprehensive reasoning the constitutional rank of freedom of contract, relying on both Article 4 and Article 16 Human Rights Declaration. This judgment was welcomed by French scholars as a ‘re-evaluation of freedom of contract in the legal order’.

The new approach of the French Constitutional Council seems to converge with the approaches of the German Constitutional Court insofar as freedom of contract is seen as a manifestation of the constitutional principle of general freedom of action. Time will tell whether the Conseil constitutionnel will also develop its jurisprudence towards a substantive understanding of freedom of contract. Arguably, this understanding could be based on Article 4 *Déclaration des Droits de l'homme et du citoyen,*
according to which the exercise of the freedom rights of every person ‘has no bounds other than those that ensure to the other members of society the enjoyment of these same rights.’ In other words: the freedom of one contracting party to determine the content of the contract must be limited if the other contracting party is not in a position to enjoy the same freedom.

3. Poland

The Polish Constitutional Court, in a decision of 2003 concerning a tenancy agreement [Trybunał konstytucyjny, 29 April 2003, SK 24/02, (2003) 4A OTK ZU [33]], held that freedom of contract, although not explicitly mentioned in the Constitution, had a constitutional dimension since it was connected with the constitutional principle of protection of personal freedom and the obligation to respect the freedoms of others. The Court went on to state that freedom of contract might also be regarded as inherent to the principles of social market economy, protection of ownership, labour law and protection of private and family life, as well as the right to decide about one’s personal life. It considered freedom of contract as a corollary of the protection of the general freedom of the person in Article 31 Polish Constitution [Article 31 Polish Constitution (Konstytucja), in force since 1997, reads: Freedom of the person shall receive legal protection. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.]. It follows from this Article, in the Constitutional Court’s opinion, that nobody can be forced to, nor forbidden from concluding an agreement and that nobody can be forced to choose a particular contracting party or agree on specific contract terms unless the law provides otherwise [Article 31 Polish Constitution (Konstytucja), in force since 1997, reads: Freedom of the person shall receive legal protection. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.].

Unlike the Italian Constitutional Court, the Polish Constitutional Court did not derive freedom of contract from the freedom of economic activity [The Court explicitly denied this derivation and stressed the different scope of application of freedom of contract and freedom of economic activity. See Trybunal konstytucyjny, 29 April 2003 (n. above)]. It relied instead, like the German Constitutional Court and the French Constitutional Council, on the principle of general freedom of the person. It is submitted that from this starting point, the step towards an acknowledgment of the substantive dimension of party autonomy can be easily made.

V. PARTY AUTONOMY: A COMMON EUROPEAN FUNDAMENTAL RIGHT?

It may be argued that the German, Slovenian and Greek case law and Snijders’ opinion witness the beginning of a Europe-wide development of the substantive understanding of freedom of contract as party autonomy. One single step separates the Italian, French and Polish acknowledgments of the constitutional dimension of freedom of contract from the German, Slovenian, Greek and Dutch doctrines on substantive freedom of contract as a constitutional or human right.

Actually, the constitutional dimension of freedom of contract and party autonomy could be acknowledged in all countries where the principles of self-determination, free development of personality and/or general freedom of the person are enshrined in the Constitution. This is for example the case in Ireland [Article 40 (3) no. 1 of the Irish Constitution of 1937 reads: ‘The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen’.] and Spain [Article 10 (1) of the Spanish Constitution of 1978 states: ‘The dignity of the person, the
inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of political order and social peace’.

However, neither a written Constitution nor a legal culture of application of constitutional norms in private law is a necessary prerequisite for the development of the understanding of (substantive) party autonomy as a fundamental right. Snijders demonstrated that this understanding could also be based on Article 8 ECHR. This would provide a potential legal basis for the principle of substantive freedom of contract both in legal systems without a written Constitution like the UK and in legal systems such as the Netherlands and Sweden, where a written Constitution exists but where civil courts when adjudicating cases involving fundamental rights prefer to rely on the ECHR.

At least an indirect horizontal effect of constitutional norms or human rights has been acknowledged by the judiciary in a large number of EU Member States, including the UK. Party autonomy as substantive self-determination can be invoked in contract cases either on the basis of constitutional norms or Article 8 ECHR. The rights enshrined in the Convention and in the common constitutional tradition of the Member States are, according to Article 6 EU Treaty and the established jurisprudence of the ECI, common fundamental rights and principles of the European Union. Therefore, the substantive understanding of freedom of contract as party autonomy has the potential to become a truly common European fundamental principle.

References


BVerfG 19 October 1993, BVerfGE 89, 214 (‘Bürgschaft’).


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