

Hokkaido University, Sapporo, 5.4.2019

# Freedom of Contract and Fundamental Rights: Recent developments in Germany

Prof. Dr. Alexander Peukert  
Goethe University Frankfurt am Main  
[a.peukert@jur.uni-frankfurt.de](mailto:a.peukert@jur.uni-frankfurt.de)

- Private law and fundamental rights: Basic considerations
  - Savignyan theory of private law:
    - Private law is an autonomous branch of law, immune from fundamental rights and other aspects of public law
    - This is particularly true for the principle of party autonomy
      - private persons are free to define their legal relationships with other persons according to their will (Werner Flume, BGB Allgemeiner Teil II, p. 1)
      - Freedom of contract as an aspect of party autonomy
        - Whether and with whom to enter into a contract ("*Abschlussfreiheit*")
        - Under which conditions ("*Inhaltsfreiheit*")

- Private law and fundamental rights: Basic considerations
  - But: in order to enforce contractual rights and obligations in state courts, contracts have to be recognized and regulated by statutory (contract) law (Flume)
    - § 311(1) [German Civil Code \(BGB\)](#): “In order to create an obligation by legal transaction and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by statute.”
    - § 762(1) s. 1 BGB: “No obligation is established by gaming and betting.”
    - Limits to the freedom of contract, in particular statutory prohibitions (§ 134 BGB), public policy (§ 138)
    - No contract law beyond the state

- Private law and fundamental rights: Basic considerations
  - Art. 1(3) [German Basic Law \(Grundgesetz\)](#): “The following fundamental rights shall bind the legislature, the executive and the judiciary as directly applicable law.”
    - → Statutory contract law and civil court decisions are subject to fundamental rights
    - → But private legal subjects are not directly bound by fundamental rights
    - Generally, contractual obligations limiting the exercise of fundamental rights/freedoms are valid and enforceable

- Private law and fundamental rights: Basic considerations
  - Article 93(1) no. 4a Basic Law (1951/1969): “The Federal Constitutional Court shall rule ... on constitutional complaints, which may be filed by any person alleging that one of his basic rights ... has been infringed by public authority;”
    - → Constitutional complaints against civil court decisions for violation of fundamental rights are admissible

- Solution: Fundamental rights have an “indirect horizontal effect” between private actors
  - Established case law of the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) ever since the [Lüth](#) decision of 15.1.1958 as summarized by BVerfG 11.4.2018 – [Stadionverbot](#):
    - “Fundamental rights do not generally create direct obligations between private actors. They do, however, permeate legal relationships under private law; ...
    - it is thus incumbent upon the regular courts to give effect to fundamental rights in the interpretation of ordinary law, in particular by means of general clauses contained in private law provisions and legal concepts that are not precisely defined in statutory law. These effects are rooted in the decisions on constitutional values (*verfassungsrechtliche Wertentscheidungen*) enshrined in fundamental rights, which permeate private law in terms of “guiding principles” ...; accordingly, the case-law of the Federal Constitutional Court has referred to the fundamental rights as an “objective order of constitutional values” .... ” (para 32)

- Solution: Fundamental rights have an “indirect horizontal effect” between private actors, BVerfG 11.4.2018 – [Stadionverbot](#):
  - “In this context, the fundamental rights do not serve the purpose of consistently keeping freedom-restricting interferences to a minimum; rather, they are to be developed as fundamental values informing the balancing of the freedoms of equally entitled rights holders. The freedom afforded one right holder must be reconciled with the freedom afforded another. For this purpose, it is necessary to assess conflicting fundamental rights positions in terms of how they interact, and to strike a balance in accordance with the principle of practical concordance (praktische Konkordanz), which requires that the fundamental rights of all persons concerned be given effect to the broadest possible extent.” (para 32)
  - “Decisive factors [for the balancing, A.P.] may include the inevitable consequences resulting from certain situations, the disparity between opposing parties, the importance attached to certain services in society, or the social position of power held by one of the parties.” (para 33)

- Solution: Fundamental rights have an “indirect horizontal effect” between private actors, BVerfG 11.4.2018 – [Stadionverbot](#):
  - “[Civil] courts are afforded a wide margin of assessment in this respect. The Federal Constitutional Court intervenes only in the event of manifest errors of interpretation that are based on a fundamentally incorrect understanding of the significance of the relevant fundamental right ... In this respect, it is irrelevant whether the civil courts directly invoke fundamental rights in their decision or, alternatively, give effect to these values by way of considerations rooted in ordinary law in conjunction with the established principles of interpretation under private law, thereby leaving the legal order more open for further development. What matters is that, ultimately, the values enshrined in fundamental rights are sufficiently taken into account.” (para 44)



- A critique of the “indirect horizontal effect” doctrine
  - Unclear, little guidance
  - No difference between direct and indirect effects?
  - Balancing = weighing without a scale
  - Deciding without hierarchies

- Alternative approach:
  - Distinguish between fundamental rights as a **shield** and as a **sword** in private law settings
  - Reintroduction of hierarchies
  - Justification of state interventions instead of balancing equally footed conflicting rights of private parties
    - Cf. Canaris, Grundrechte und Privatrecht - Eine Zwischenbilanz, 1999
    - Regarding IPRs and fundamental rights Alexander Peukert, [The Fundamental Right to \(Intellectual\) Property and the Discretion of the Legislature](#), 2013

- The shield/sword approach
  - Shield: fundamental rights as a defense against state interferences
    - Classical function of fundamental rights
  - Sword: public authorities including courts have a duty to protect and enable the exercise of fundamental rights
    - Interferences by other private parties, foreign states, natural risks
    - Higher threshold because of effects of a protective state intervention on third parties

- The shield/sword approach applied to private law disputes
  - Shield:
    - Aim: Retain the factual status quo ante
    - Strike down a private law obligation because of an unjustified interference with fundamental rights
    - Typically raised by the defendant (alt: plaintiff asking for a declaratory judgment)
  - Sword:
    - Aim: Enforce a change of the factual status quo ante via fundamental rights
    - Acknowledge private law claims/rights beyond statutory private law or contractual obligations on the basis of fundamental rights
    - Typically raised by the plaintiff

- The shield/sword approach
  - Examples from tort law
    - Shield: protection of freedom of expression vis-à-vis economic interests of the plaintiff
      - BVerfG 15.1.1958 – [Lüth](#) (freedom of expression vs. § 826 BGB)
        - Granting private law remedies against expressions requires justification
          - Is intervention appropriate, necessary, and adequate?
          - # Balancing!

- The shield/sword approach
  - Examples from tort law
    - Sword: the recognition of the general right to personality (privacy) as “another right” under § 823(1) BGB
    - Federal Supreme Court (Bundesgerichtshof), 25.5.1954 – [Leserbrief](#)
      - Higher threshold: not every privacy interest is protected because protection requires limitation of freedom of expression etc.
      - In particular: limited protection of legal persons against public critique

- Fundamental rights and freedom of contract
  - Libertarian position:
    - Complete, frictionless symbiosis between freedom of contract and fundamental rights
    - Why: recognition of the right to free development of personality (Art. 2(1) GG) and equality before the law (Art. 3(1) GG)
    - Otherwise, fundamental rights should play no role in contract law

- Fundamental rights and freedom of contract
  - Formal contractual freedom
    - Absence of restraints, negative freedom to conclude contracts (Isaiah Berlin)
    - ... results in formal contractual fairness
    - Contracts are fair and just if they are concluded voluntarily and free from mistake, deceit, and duress ([Canaris, AcP 200 \(2000\), 273](#))



- Fundamental rights and freedom of contract
  - Thus, formal contractual fairness implies voluntary, informed consent and equal bargaining power
  - This is often not the case in reality:
    - Formal (negative) freedom ≠ material (positive) freedom
    - “I am free to enter into this contract, but de facto I was misled or forced to agree.”
  - Statutory contract law restricts negative contractual freedom because of a lack of **material contractual freedom** (Canaris) on the side of one party
    - E.g. protection of minors and voidability of declarations of intent in case of mistake, deceit or duress (§§ 104 et seq. BGB)

- Fundamental rights as a **shield** in contractual relations
  - BVerfG 5.8.1994 – Suretyship  
(„[Bürgschaftsentscheidung](#)“):
    - In applying general contract law provisions, civil courts have to prevent that formal party autonomy is de facto turned into material heteronomy
    - Facts of the case:
      - 22 year old daughter with 1.100 DM monthly income assumes suretyship for a 260.000 DM loan her parents had received to build a new house

- Fundamental rights as a shield in contractual relations
  - BVerfG 5.8.1994 – Suretyship  
(„Bürgschaftsentscheidung“):
    - Contract law must not be the right of the mighty
    - If one party to the contract is so predominant that he or she is able to de facto dictate the terms of the agreement, autonomy turns into heteronomy for the other party.

- Fundamental rights as a shield in contractual relations
  - BVerfG 5.8.1994 – Suretyship („[Bürgschaftsentscheidung](#)“):
    - On the one hand, not every disequilibrium of negotiating power ought to be rectified.
      - Higher threshold for invoking fundamental rights even as a shield in contractual constellations!
      - Why: Cases concern a triangle of actors: plaintiff, court, defendant
      - And: The parties have implemented their freedom to enter into a contract; courts should in general pay tribute to this exercise of fundamental rights
    - In typical cases of structural inferiority of one party, however, where the terms of a contract are extraordinarily burdensome for one party, civil courts have to step in.
      - This follows from the constitutional guarantee of party autonomy and the constitutional principle of the social state (Art. 2(1), 20(1) GG)
      - Consequence: suretyship null and void
  - Fundamental rights as a shield provide for equal material freedom/autonomy

- Fundamental rights as a **sword** in contractual relations
  - Fundamental rights as a basis for contractual rights not explicitly granted
  - BVerfG 31.3.2013 – [parabolic antenna](#)
    - Do lessees have a right to install a parabolic antenna in order to receive foreign TV programs? Is the lessor obliged to acquiesce in it?
    - In applying the general duty to perform in good faith (§ 242 BGB), the freedom of information of lessees has to be weighed against the property interests of the lessor
    - Critique from a shield/sword perspective

- Fundamental rights as a sword in contractual relations
  - BVerfG 11.4.2018 - [Stadionverbot](#)
  - Facts of the case
    - A sixteen-year-old football fan of Bayern Munich participates in riots. The German Football League imposed a ban on the complainant, prohibiting him from entering any stadium in Germany for two years. In imposing the stadium ban, the League invoked its right to enforce house rules in stadiums and the League's "Guidelines on Stadium Bans" in the version valid at the time. The criminal investigation proceedings were discontinued on the grounds that the charges were classified as misdemeanours involving only minor personal guilt. Nonetheless, the League decided, without having heard the complainant, that the stadium ban be kept in place. FC Bayern Munich subsequently expelled the complainant from the club and cancelled his annual membership pass.

- Fundamental rights as a sword in contractual relations
  - BVerfG 11.4.2018 - [Stadionverbot](#)
    - The complainant brought an – unsuccessful – civil law action requesting that the nationwide stadium ban be lifted.
    - With his constitutional complaint, the complainant contends that he was banned from entering stadiums on the basis of a mere suspicion without viable justification or reasons. The complainant argues that in light of the paramount significance of football for social life and the importance attached to it by the general public and society, the stadium ban was not merely in breach of ordinary law but also violated his fundamental rights.
    - In this respect, the complainant invokes the general right to free development of his personality and his general right of personality deriving from Art. 2(1) in conjunction with Art. 1(1) GG. The court also considers the general requirement of equal treatment under Art. 3(1) GG.

- Fundamental rights as a sword in contractual relations
  - BVerfG 11.4.2018 - [Stadionverbot](#)
    - No immediate balancing between the right to property and the freedom of the complainant to attend football matches
    - Instead: distinction along the lines of the shield/sword distinction



- Fundamental rights as a sword in contractual relations
  - BVerfG 11.4.2018 - [Stadionverbot](#)
  - As regards the freedom to act:
    - “The general freedom of action provides a defensive right vis-à-vis the state that can be invoked against any unjustified prohibitions, especially on the grounds of disproportionality; as such, it is also applicable to bans [imposed by the state] restricting stadium access during football matches. This is a manifestation of the asymmetry of the rule of law, under which citizens are free, in principle, whereas the state is subject to limitations and held accountable when interfering with this freedom.” (para 37)
    - Freedom to act is a shield against the state.

- Fundamental rights as a sword in contractual relations
  - BVerfG 11.4.2018 - [Stadionverbot](#)
  - As regards the freedom to act:
    - “However, the constitutional guarantee of the general freedom of action does not encompass a similarly general constitutionally enshrined value which would ensure that in every private law dispute, the unspecified freedom to engage in any kind of self-determined conduct would guide the interpretation of private law, by way of indirect horizontal effects. To this end, the freedom to engage in any conduct one subjectively pleases – in this case to attend a football match –, based on the general freedom of action, cannot generally be invoked to restrict the ownership rights of private actors organising certain events.” (para 37)
    - In general, freedom to act has no effect on contracts because contract law recognizes and gives effect to the freedom to act

- Fundamental rights as a sword in contractual relations
  - BVerfG 11.4.2018 - [Stadionverbot](#)
    - As regards equality before the law:
      - “In principle, all persons have the freedom to choose – according to their own preferences – when, with whom and under what circumstances they want to enter into contracts, and how they want to make use of their property in this context. This freedom is further shaped and variously restricted through statutory law and in particular through private law; in this regard, it can also be subject to specific requirements arising under constitutional law. In contrast, no general principle according to which legal relationships between private actors would generally be subject to equality guarantees follows from Article 3(1) of the Basic Law even when read in conjunction with the doctrine of indirect horizontal effects.” (para 40)
      - In general, equality before the law has no effect on contracts because contract law recognizes and gives effect to equality guarantees

- Fundamental rights as a sword in contractual relations
  - BVerfG 11.4.2018 – [Stadionverbot](#), para 41
    - “However, under **specific circumstances**, equality requirements relating to relationships between private actors may arise from Art. 3(1) GG.
    - The nationwide stadium ban in dispute constitutes such a circumstance ... because the stadium ban imposes ... **a one-sided exclusion from events, which the organisers, of their own volition, had opened up to a large audience without distinguishing between individual persons, and this ban has a considerable impact on the ability of the persons concerned to participate in social life.**
    - In this case, the constitutional recognition of ownership as an absolute right in rem and the resulting one-sided discretionary powers of the owner to enforce house rules must be balanced – in light of the principle that property entails a social responsibility for the public good (Sozialbindung des Eigentums ) (Art. 14(2) GG) – against the principle, which is binding upon the regular courts, that the guarantee of equal treatment permeates private law.”

- Fundamental rights as a sword in contractual relations
  - BVerfG 11.4.2018 - [Stadionverbot](#)
    - “Consequently, the civil courts must ensure, in light of the principle of equal treatment, that stadium bans are not arbitrarily imposed, but are based on factual reasons.” (para 45)
    - Reasonable grounds for suspicion suffice
    - “The requirement that stadium bans be based on factual reasons gives rise to procedural requirements. In particular, stadium operators must make reasonable efforts to investigate the facts of the case. This includes, at least in principle, that the persons concerned be given a hearing prior to the imposition of a stadium ban. Furthermore, reasons for the decision must be provided upon request in order to enable the persons concerned to seek legal recourse.” (para 46)

- Fundamental rights as a sword in contractual relations
  - BVerfG 11.4.2018 - [Stadionverbot](#)
  - Note that finally (para 40): “It is not within the scope of the current proceedings to decide whether stricter standards could be derived from specific equality rights such as:”
    - Art. 3(2) GG (“Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.”)
    - Art. 3(3) (“No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.”)
  - Anti-discrimination law beyond the [General Act on Equal Treatment](#)?

- The Stadion Ban Doctrine has been applied by several courts to the regulation of communication on social media platforms, inter alia by [OLG Munich, 17.9.2018](#)
  - Background: the fight against hate speech in Germany and the EU
  - Terms of services (“Community Standards”) of Facebook, YouTube and other platforms
  - Users complain about deletions of posts and complete accounts for postings they do not consider hate speech
  - Sue Facebook et al., asking for an injunction to delete (= put back)

- The protection of freedom of expression on social media
  - The contract between the social media provider and the user
  - The duty of the provider to “take account of the rights, legal interests and other interests of the other party” (§ 241(2) BGB)
  - ... has to be read in light of the right of freedom of expression and equality before the law
  - Stadion ban doctrine requirements for a “specific circumstance” where fundamental rights come into play are met:
    - Providers open the platform “to a large audience without distinguishing between individual persons”
    - And a “ban has a considerable impact on the ability of the persons concerned to participate in social life”



- The protection of freedom of expression on social media
  - Criminal speech like incitement to hatred may be deleted
  - But what about speech that is protected by the freedom of expression and is not a criminal act?
    - Some lower courts require social media platforms to put back all lawful expression
    - Majority opinion grants platforms more leeway to implement stricter standards
      - Private code of communication

- Summary and evaluation of the Stadion Ban Decision
  - Obligation to enter into a contract via fundamental rights?
  - The purpose of applying fundamental rights in contractual disputes from a shield/sword perspective
    - Fundamental rights as shields:
      - Guarantee a minimum of equal material freedom with a view to formal contractual fairness (surety decision)
      - Fundamental rights as swords:
        - Guarantee of material fairness (equality of outcome)?
        - Guarantee of equal opportunities to participate in important aspects of social life (“specific circumstances”)
          - TV reception, football, social media