Case note

PEER ZUMBANSEN

PUBLIC VALUES, PRIVATE CONTRACTS AND THE COLLIDING WORLDS OF FAMILY AND MARKET

German Federal Constitutional Court, 'Marital Agreement' Decisions of 6 February 2001 and 29 March 2001⋆

ABSTRACT. In two decisions delivered in February and March 2001, the German Federal Constitutional Court voided the marital agreements struck between a man and a pregnant woman on the grounds that they were the product of an inequality of bargaining power between the parties. These findings, involving an application of the fundamental rights provisions of the German Basic Law to private agreements, demonstrate the creeping competence of the F.C.C. into the sphere of contractual relations and an ongoing questioning of the traditional public/private law divide. Exploring some of the implications of applying public values and constitutional review standards to private agreements, this note contextualises the decisions within the debate upon competing (and ultimately colliding) social systems of the family and the market.

KEY WORDS: constitutional values, family, marital agreement, market, social systems

INTRODUCTION

In 2001, the German Federal Constitutional Court (F.C.C.) handed down two judgements with important implications for gender relations concerning the interpretation of private contracts in the light of constitutional values.[1] In the first decision of 6 February 2001, the Court voided a marital agreement reached between a man and a pregnant woman with a five-year old child from a previous relationship because it was the product of the man's superior bargaining position and severely restrained the woman's personal self-expression. The agreement, it was held, violated provisions of the German Constitution (or Basic Law), namely Article 2.1 (freedom to develop one's personality) in connection with Article 6.4 (every mother's entitlement to the protective care of the community) and

⋆ Decision of the Federal Constitutional Court (F.C.C.) of 6 February 2001, BVerfGE 103, p. 89; Decision of the F.C.C. of 29 March 2001, Neue Juristische Wochenschrift, p. 2248; See commentaries by Zumbansen (2001a, 2001b).

[1] *Ibid.*

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Article 6.2 (guaranteeing the natural right and duty of parents to care for and bring-up their children as well as the community's responsibility to supervise these activities.) The facts giving rise to the second decision of 29 March 2001, bore great resemblance to those of the first with the slight variant that the woman's child from a previous relationship was handicapped.

While feminists have for many years observed that the 'personal is political' and sought to dismantle the public/private divide,[2] in German law there has been a traditional reluctance to countenance the tricky relationship which exists between public and private spaces rooted, as the legal system firmly is, in an established doctrinal division between public and private law. The two recent decisions of the F.C.C. serve, however, as an opportunity to rethink the public/private divide in German law in that they reveal, and require answers to, a number of thorny questions such as the extent to which public law values can and should apply to agreements between private parties, the manner in which the German Basic Law with its protection of fundamental rights can create horizontal effects binding upon individuals, and the role of the Constitutional Court in reviewing the constitutionality of such agreements.

This note examines the two 'marital agreement' decisions of the F.C.C. in the light of the development of its previous case law on the applicability of constitutional norms to private contracts where there exists unequal bargaining power or a structural lack of parity between the parties. In doing so it will highlight some of the difficulties of constitutional intervention in the private sphere while noting also the possibilities it offers for the protection of vulnerable parties (often women) who find themselves in an unequal bargaining position. It will then situate the decisions within the context of the debate on the public/private divide and, using an application of social systems theory, suggest that the cases illustrate a collision between competing worlds of the family and the market which might be resolved by an enhanced respect of the values, notably that of personal autonomy, which are internal to these systems.

UNEQUAL BARGAINING POWER IN MARITAL AGREEMENTS: AN EXTENSION OF F.C.C. CASE LAW

The 'marital agreements' jurisprudence of the German F.C.C. is the latest stage in a developing line of case law which indicates the willingness and legal competence of the F.C.C to check the constitutionality of private

[2] E.g. Boyd (1997); Brown (1995); Pateman (1988); Thornton (1995).

agreements. The specialty of the current development lies in the fact that, while the F.C.C. had intervened previously in a private commercial agreement in its 1990 'commercial agent' decision,[3] and in the triangular relationship between a bank, a debtor (father) and a collateral provider (daughter) in its 1993 'collateral' decision,[4] the present decisions mark a new foray into complex family law agreements. Of importance is the way in which the *principled* approach established in the 1990 and 1993 decisions – notably the general acknowledgment by the F.C.C. of a horizontal effect of constitutional law in private law relationships[5] – has given way to an increasingly specific, *fact* oriented approach which renders the application of constitutional standards very difficult. Bearing these issues in mind, the two agreements and judgements thereon will be considered in turn.

The first 'marital agreement' decision

The object of scrutiny in the F.C.C.'s first 'marital agreement' decision was the accord reached between a pregnant woman aged 26, and her partner, which both had signed in 1976. The woman, who at the time the agreement was formalised was already raising a five year-old child from her first marriage, had been living with her new partner for two years. In the agreement both parties renounced any right to alimony for themselves should they divorce. The agreement provided, however, that the husband would pay a monthly sum of 150 Deutsch Marks in support of 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. The marriage was unsuccessful and led to 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,[6] whereupon the child's father sued his former wife for violation of the agreement to forego any alimony claims superior to 150 Deutsch Marks. The *Amtsgericht* dismissed the husband's claim finding that the agreement constituted an attempt to

[3] Decision of 7 February 1990 BVerfGE 81, p. 242.

[4] Decision of 19 October 1993, BVerfGE 89, p. 214.

[5] On the horizontal or 'radiating' effect of the human rights provisions of the German Basic Law between individuals, see Markesinis (2001, chap. 8).

[6] Section 138, para. 1, *Bürgerliches Gesetzbuch* (BGB), the German Civil Code.

forego the statutory prohibition on the renunciation of alimony between relatives.[7] The father was successful before the *Oberlandesgericht* (State Appeals Court) which upheld the pre-marital agreement.[8] It was against this judgement, in favour of the husband's efforts to enforce the agreement, that the woman brought a constitutional complaint before the F.C.C.

The basis of the F.C.C.'s intervention harks back to its 1958 *Lüth* decision[9] in which the Court had held that in the sphere of private law the Constitution's fundamental rights (*Grundrechte*) provide a set of values which permeate the general clauses of the Civil Code such as Sections 242 (good faith) and 138 (public policy). Furthermore, the Court 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 F.C.C. reserves the right to review and correct the courts' interpretative discretion where this reflects a radically erroneous misunderstanding of the scope and impact of a fundamental right and has a substantial influence on the outcome of the case. The F.C.C. found these conditions to be fulfilled in the present case and hence voided the Appeals Court's judgement.

The F.C.C. began with a straight affirmation of its famous 1990 'commercial agent' decision involving an anti-competition agreement between a company and its commercial agent.[10] In this decision the F.C.C. held (with regard to contract law, while its previous *Lüth* decision had been concerned with torts) that the freedom to develop one's personality guaranteed in Article 2.1 of the Basic Law requires that conditions are such as to allow this right to be realised. The Court found the instrument of private contract to be pre-eminent among the instruments of private relationships for the realisation of one's responsibilities towards others with the effect that "[t]hrough a contract 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 realised" (translation by the author). It is the presumption that the parties possess free will which finds its expression in the contractual agreement that obliges the state to respect the presumed fair balancing of the interests at stake.

The F.C.C. followed its citation of the 'commercial agent' decision with a reference to the second of its famous private agreement decisions, the

[7] Para. 1614, BGB.
[8] See BVerfGE 103, 89, p. 95.
[9] BverfGE 7, 198.
[10] Decision of 7 February 1990, BVerfGE 81, p. 242.

1993 'collateral' case[11] in which it had 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.[12] The 'collateral' case, even more than the 'commercial agent' decision had destabilised the German legal world giving rise to a heated debate on the justification of constitutional control of private law relations and a fierce critique of the role of the F.C.C. in the field of private law.[13] This is because it sought to establish constitutional standards to be applied to private contracts when there is reason to believe that there exists an inequality of bargaining power. Going beyond the need to show *coercion* which was required in the 1990 decision for constitutional intervention, the standard developed in the 'collateral' case was extended to any contractual agreement in which a clear one-sided burden fell upon one of the parties. The F.C.C. held that when, in a contractual relationship, one party had such bargaining power as to be able to dictate unilaterally the terms of the contract it was "the duty of the law to reinforce the fundamental rights of both parties in order to prevent – for one of the parties – the substitution of private autonomy for duress."[14] It is important to note, however, that the F.C.C. did not claim a general authority to intervene in every case of unequal bargaining power nor did it grant such powers to civil courts in general. Its essential finding rather points to the fundamental value of private autonomy and contractual freedom, which the Court understands to be firmly protected by the Constitution. The F.C.C. held instead, that while the legal order cannot preempt all eventual cases of unequal bargaining power, it is the law's duty to strike down *typical* cases of structural imparity. The Court explicitly recognised the existing private law to be sufficiently equipped to guarantee this protection, as civil courts have for many years interpreted private law norms to reflect a less formal and less liberal approach towards private autonomy.[15] Rather, the F.C.C. held it to be the duty of the civil courts to consider constitutional levels of protection of both parties to a contract when interpreting a specific agreement. Thus, in the 'collateral' case the F.C.C. required the civil law judge not to separate the realm of civil, private contractual autonomy from

[11] Decision of 19 October 1993, BVerfGE 89, 214.

[12] This decision may be viewed as a parallel example to the U.K. 'sureties' cases decided recently by the House of Lords, concerning the validity of agreements reached between wives and banks to lend money on the security of the matrimonial home. See the commentary by Debra Morris on *Royal Bank of Scotland plc* v. *Etridge (No. 2)* [2001] 4 All E.R. 449, in this volume.

[13] See Diederichsen (1998) and extensive references therein; see also Teubner (2000).

[14] BVerfGE 89, 214, p. 232.

[15] *Ibid*., p. 233.

that of constitutional values but, instead, to assess private law in light of the Constitution.[16]

In its first 'marital agreement' case, the FCC builds on this precedent. The Court explained that the standard elaborated in the 'collateral' decision "holds true also for marital contracts in which spouses stipulate their highly personal relations for the time of their marriage or beyond."[17] While the Court in the earlier two cases directed its constitutional focus towards Article 2 of the Basic Law, i.e. the exercise of the right to freely develop one's personality (in the 'collateral' case) and towards Articles 1, 12 and 14, i.e. human dignity, (professional) competition and property (in the 'commercial agent' case), the Court now applied the Article 6 provisions on marriage and the family. In its decision the F.C.C., while on the one hand underlining the freedom to enter into marriage and contract upon the specific details of that relationship, on the other, stressed the fact that the German Basic Law requires that the institution of marriage display a certain legal design. To this end the F.C.C. cited Article 3.2 of the Basic Law (equality of men and women before the law) and pointed to the constitutional requirement that this equality should not be sacrificed within the marriage. From this the Court drew the conclusion that the state is called upon to set limits on freedom of contract in marriage where marital agreements reflect one spouse's domination over the other. As a result the courts are asked in such cases of "disturbed contractual parity" to review and eventually correct the contract's terms exercising this control via an application of the general clauses of the Civil Code (for example, those requiring good faith and respect for public policy) in order to safeguard the spouses' constitutional rights. Having set up this standard of control, the F.C.C. made light work of 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.

Of key significance here is the F.C.C.'s attempt to trace 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 with regard to how far

[16] From a comparative perspective this approach presents interesting implications for the debate on the applicability of fundamental rights in the private sphere in the U.K. following the introduction of the Human Rights Act 1998 with its potential for the creation of horizontal effects. See Markesinis (2001, chap. 7).

[17] BVerfGE 103, 89, p. 101.

this control should extend. The F.C.C. 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 acquisitions during the time of marriage. In the light of this, the F.C.C. found it to be the duty of the courts to exercise control in order to assess the possible necessity of protecting pregnant women from pressure originating in their social environment or from the father. This, the Court stated, must especially hold true in cases where a woman is pressured into an agreement that is clearly not in her interests. The F.C.C. 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 means 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 within a marital agreement. The Court elaborated upon the circumstances which are likely to influence the woman's discretion and lead her into a "weakened bargaining position". Drawing upon statistics revealing a general loss of financial means of more than 50% for unmarried women who have to guarantee their own existence as well as that of the child, and showing that only 15% of children in a marriage would be raised under similar financial pressures, the Court recognised these findings as generalities which would be considered alongside the actual circumstances of each individual case, making it clear that pregnancy at the time of conclusion of a marital agreement may amount to no more than an *indication* of contractual disparity. Other facts that courts will need to investigate in order to evaluate the woman's concrete situation include her financial situation, her professional qualifications and prospects as well as the proposed distribution of commercial and domestic labour. "Some combinations of these factors", the Court explained, may point towards the "likelihood of adequate compensation for the woman, even if the marital agreement includes renunciations of legally provided guarantees" (translation by the author). Inversely, when the contract's terms reflect a position of inferiority on the part of the unmarried pregnant woman and disproportionately burden her, the need for protection becomes evident.

The F.C.C. ultimately voided the Appeals Court's decision for denying, outright, the need to evaluate the marital agreement alongside the factual circumstances present at the time it was concluded. Notably, in the F.C.C'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 F.C.C. found inadequate the Appeals Court's

reference to the son's persisting right to child support as that right failed to remedy the fact that the woman was already in a precarious financial situation at the time the contract was concluded. By the terms of the contract, she could expect an even more disadvantageous situation upon divorce because she would have to raise the means to support her son without the help of her (former) husband. Moreover, drawing further inspiration from the constitutional provisions protective of marriage, the family and children, the F.C.C. found the marital agreement to violate the parents' duty to guarantee their child's well-being as set out in Article 6.2 of the Basic Law. Although, from a strict legal perspective, the marital agreement did not lead to a loss of the child's claim for support, the reality of the situation as brought about by the terms of the agreement was severe financial pressure and a *de facto* waiver of the child support claims. The F.C.C. concluded that when the financial circumstances of the woman lead to a highly problematic situation for both mother and child to the extent that 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 constitutional standards.

The second 'marital agreement' decision

Just as the first 'marital agreement' decision marked an incremental development of the precedents set-down in the 1990 'commercial agent' and the 1993 'collateral' cases, the *second* 'marital agreement' decision of March 2001 marked a further inroad by constitutional law into private relations.[18] In this second case a three-judge chamber of the F.C.C. granted a rare example of constitutional relief in a drastically short decision. The facts were, to a large degree, comparable to those of the February decision with the addition that the woman's first child born prior to the marital agreement was handicapped. The Court began its newest decision by recalling that it had already determined that in cases involving marital agreements, it was every court's obligation to supervise the agreement's content and, where necessary, correct the contractual terms in order to render the agreement compatible with the Constitution. This correction becomes necessary when it is obvious that the contractual terms lead to a denial – for one party – of her self-determination. As in the case from February 2001, the Court again pointed to the particular circumstance of the woman's pregnancy at the time of the agreement finding here again an indication of the woman's inferior bargaining power. The Court correctly recognised the arbitrariness of choosing pregnancy as a decisive indication

[18] Decision of 29 March 2001, *supra* n. 1.

of the woman's weaker bargaining position by underlining that pregnancy alone is only one possible indication of bargaining inferiority and that other factors would have to be considered as well. Among these the Court suggested a consideration of the financial situation of the woman, her vocational or professional training, and her prospects for supporting herself and a family. The Court, on closely examining the terms of the marital agreement in this case ruled that if it reflected a one-sided burden upon the pregnant woman and that, as in its February decision, her inferior bargaining position was "evident."

Consequently, the F.C.C. struck down the lower court's decision in which it had exercised judicial review of the agreement and had obliged the former husband to pay – against the agreement's terms – a monthly allowance to his ex-wife. In doing so the F.C.C extended its previous jurisprudence and struck a blow for female autonomy by drawing a novel and clear distinction between the welfare of the woman herself and that of her child, finding that the lower court had wrongly based its assessment of the contract's terms exclusively on the interests of the latter. By focusing only on the child and the eventual hardships it would suffer as a consequence of the marital agreement, the lower court had failed to assess appropriately the woman's personal situation in light of the fact that she already had to take care of her first, handicapped, child.

RETHINKING PUBLIC AND PRIVATE LEGAL SPHERES

It is still early to appreciate fully the effects of the 'marital agreement' decisions and the extension of the F.C.C.'s powers of review over private relations. However, disquiet is evident from all sides of the legal spectrum. For many private lawyers the decisions represent an unwarranted public law intervention in an area which should remain the preserve of the ordinary courts applying the civil law. Public lawyers have, alternatively, expressed concern at the extension of constitutional rights to private contracting arrangements with their typical maze of conflicting interests and, most importantly, varying material starting points. Both sides point to unease at the unsettling of the doctrinally firmly established divide between German public law and private law and the consequent and continued redrawing of the balance between constitutional protection of personal freedom, marriage and the family as against individual private autonomy.

Herein lie a number of problems. The first relates to the F.C.C.'s creeping competence over areas of private law, moving in this latest instance from its previous interventions in commercial relations to familial

ones. So, while both the earlier ‘commercial agent’ and ‘collateral’ decisions predominantly reflected commercial inequalities between the contracting parties (agent and employer in the first case; inexperienced apprentice, aged 21, and the bank in the second), a similar commercial disparity between future husband and future wife in the most recent decisions was much less obvious, albeit that the agreements would result in financial inequities between the parties upon divorce. Nevertheless, the F.C.C.’s decision to privilege, in the area of family law, a review standard based upon an application of constitutional rights above the extensive norms set out in the existing Civil Code provisions on the family and dependents’, the Court seems to suggest itself as a welcome forum for family law cases in the future. Quite where the limits of constitutional review in family law matters will henceforth be drawn remains for the moment unclear but the possibility certainly exists for further incremental constitutional forays into private family agreements beyond the example of marriage contracts.

Secondly, a question may be posed not just concerning the substantive areas of private law which are subjected to constitutional review, but to the review standard itself. In its February 2001 decision, while the Court ultimately affirmed the constitutional limitations which apply to private parties’ attempts to renounce by contract the requirement to pay alimony, the Court also held that the Appeals Court had not adequately established the boundaries of these limitations.[19] Yet, to do so is evidently an extremely hazardous exercise, as the F.C.C. found itself just one month later, pointing to the difficulty of establishing a general constitutional standard to be applied to individual and often very particular concrete cases. Given that the issue of marital agreements and the extent to which they represent a form of contractual liberty is deeply embedded within frameworks of personal economic freedom, market power, social status and education, the F.C.C. was forced in its two decisions to take account of factual details such as the women’s concrete financial circumstances while at the same time giving a rather abstract and general assessment of the constitutional protection available to pregnant, unmarried women in the light of their often disadvantageous economic and social situation.[20] It is, therefore, apparent that the case law in this field – balancing the general against the specific and the abstract against the concrete – reflects a continuous and on-going search for clear and appropriate constitutional standards which may be applied to the contextual conditions in which individual agreements are concluded.

[19] BVerfGE 103, 89, pp. 101 ff.
[20] *Ibid.*, pp. 102–105.

Inevitably, the F.C.C, in its brief decisions, cannot cope with the difficulties of defining the standards it wishes to impose upon the lower courts when they evaluate the (constitutional) legality of private agreements. A close reading of the Court's February 2001 decision might well have guided an astute lawyer to argue for a correction of the agreement with regard to the *child's* welfare given that in the former decision the F.C.C. had decided that the woman's relinquishment of her own support allocation endangered the child's situation to such a degree that the contract constituted a violation of the child's constitutional rights. Against this background, both the woman's lawyer as well as the lower court in the March case do not appear to have misunderstood the Court's message from one month previous. Be that as it may, the F.C.C. in its second decision shifted, or enlarged, the focus, finding that the lower court's concentration upon the child's welfare led to an insufficient assessment of the *woman's* situation. Yet, even this latest missive to the lower courts regarding the standard of constitutional review to be applied remains distinctly imprecise. While the F.C.C. in its second decision again mentioned that the woman's pregnancy could only be but one indication of her inferior bargaining power, it still did not sufficiently decouple women from their role as mothers in that it did not show how to apply the standard in cases where the woman is: a) not pregnant, and b) does not already have a child. Thus, as solutions to concrete cases, the F.C.C.'s recent decisions may be considered a victory for the individual female constitutional complainants, but their potential to apply to women entering into marital agreements who have not already evidenced a maternal inclination, is not evident despite the fact that many such women may find themselves in financially disadvantageous and unequal bargaining situations vis-à-vis their future spouse.

THE COLLIDING WORLDS OF FAMILY AND MARKET

A final, and broader, question remains as to whether the application of constitutional standards was in fact necessary at all in these cases. Was it appropriate to bring the blazing torch of constitutional review to bear upon the twisted paths of marital law where there already exist the many smaller lamps of detailed provisions and principle-based clauses contained in the Civil Code? Despite the misgivings of those who wish to retain distinct roles for German private and public law, it is suggested that the answer to this question is probably yes, for the reason that it exposes and addresses the underlying tensions of private law itself, notably those which exists

between the market and the family, which have already been the subject of an important feminist critique (see, for example, Olsen, 1983).

In a commentary on the ‘collateral’ decision of 1993, Gunther Teubner, developing an application of systems theory, has noted that a constitutional intervention became appropriate in order to address the real rift which lay between, on the one hand, the sphere of family relations in which the obligation to enter the contract with the bank originated and, on the other, the economic sphere of the banks and their loan practice (see Teubner, 2000). The question is, therefore, not so much one of whether constitutional intervention in private law is justified, but whether conflicts between these two spheres – the family and the market – can aptly be legalised by constitutional law. To separate the spheres as such and to draw attention to their prevailing logic or governing values allows us to look more closely at the real difficulties at hand. In this light, the problem appears not to be one of disturbed contractual imparity, but rather one of two incompatible autonomous systems – both regulated by private law – which collide with each other. Teubner reconstructs this conflict as involving a constitutional problem of protecting the integrity of the family sphere of intimacy and trust, instead of focusing, as is usually done, upon the alleged domination of the bank’s representative over the contracting individual which requires a constitutional intervention. For Teubner, it is, in fact, a case of “structural corruption” – not imparity – between these two incompatible spheres which demands constitutional remedy. So, while the family sphere would be characterised by trust, commitment and sacrifice, the market sphere represents 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, the internal correction mechanism has been corrupted via the entry of the economic force of the bank’s representative into the family’s self-regulatory and protective 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 habitual family norms and protection mechanisms and it is at this point that constitutional review becomes appropriate in order to reinforce the self-regulatory procedures within the family sphere.

While this perspective may illuminate the problem underlying the ‘collateral’ case, it is at first sight questionable whether it also holds true for the somewhat different circumstances of the ‘marital agreement’ decisions. Here, the seemingly blunt opposition between family and market is absent. Yet, the F.C.C. did elaborate in detail upon the conflict situation in which a pregnant woman may find herself when contemplating entering into a martial agreement, taking account both of her familial and financial situation and obligations. So, rather than focusing, as the F.C.C.

did, upon the structural imparity of the man over the woman and seeking to create a seemingly set-in-stone system of power and (in)equality, evidenced by the Court's listing of a selected number of "concrete circumstances" which show such (in)equalities, an alternative approach would be to provide a constitutionally approved space in which both sides exercise autonomously their contractual rights. The constitutional nexus would emphasise the 'relational' nature of contractual obligations and involve a new articulation of what autonomy in the contractual sphere might mean.[21] In so doing, rather than seeking to define, and hence reproduce, the competing dualisms of family/market, home/work, public/private, it would be preferable to increase the range of possible opportunities for self-fulfillment by respecting the value which is central to all of these spheres of social activity – that is autonomy. The step towards recognising this autonomy then might be to reinforce, by law, the norm-generating processes that people choose and to aim, by law, at providing the very freedom to choose in a way which makes the whole idea of 'choice' meaningful. This, of course, demands a more fluid version of autonomy. Yet, if constitutionalising these norm-generating processes brings this about then we must surely be on the right road towards an enhanced respect for individual self-determination.

REFERENCES

Biggs, H. and MacKenzie, R., eds., "Feminist Perspectives on Obligations", *Feminist Legal Studies* **8** (2000).

Boyd, S.B., ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: Toronto University Press, 1997).

Brown, W., *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995).

Diederichsen, U., "Das Bundesverfassungsgericht als oberstes Zivilgericht – ein Lehrstück der juristischen Methodenlehre", *Archiv für die civilistische Praxis (AcP)* **198** (1998), 171–260.

Markesinis, B., *Always on the Same Path: Essays on Foreign Law and Comparative Methodology*, Vol. 2 (Oxford: Hart, 2001).

Morris, D., "Surety Wives in the House of Lords: Time for Solicitors to 'Get Real'? *Royal Bank of Scotland plc* v. *Etridge (No. 2)* [2001] 4 All E.R. 449", *Feminist Legal Studies* (this issue, 57–69).

Olsen, F., "The Family and the Market: A Study of Ideology and Legal Reform", *Harvard Law Review* **96** (1983), 1497–1578.

Pateman, C., *The Sexual Contract* (Stanford: Stanford University Press. 1998).

[21] The relational nature of contractual relations has been explored in a special issue of *Feminist Legal Studies*: see Biggs and MacKenzie (2000) and, in particular, Wightman (2000).

Teubner, G., "Ein Fall von struktureller Korruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken (BVerfGE 89, 214 ff.)", *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (KritV)* **83** (2000), 388–404.
Thornton, M., ed., *Public and Private: Feminist Legal Debates* (Oxford: Oxford University Press, 1995).
Wightman, J., "Intimate Relationships, Relational Contract Theory, and the Reach of Contract", *Feminist Legal Studies* **8** (2000), 93–131.
Zumbansen, P., "Commentary on the Decision of the Federal Constitutional Court of 6 February 2001", *German Law Journal* **2**/6 (2001a); available at http://www.germanlaw-journal.com/past_issues.php?id=61.
Zumbansen, P., "Commentary on the Decision of the Federal Constitutional Court of 29 March 2001", *German Law Journal* **2**/15 (2001b); available at: http://www.germanlaw-journal.com/past_issues.php?id=86.

Institute of Economic Law
University of Frankfurt
Senckenberganlage 31
Postfach 11 19 32
D-60054 Frankfurt
Germany
E-mail: zumbansen@jur.uni-frankfurt.de