Constitutional Control Of Marital Agreements II: The FCC Affirms Its Path-Breaking Decision

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[1] In a grand decision handed down in February (1), the Bundesverfassungsgericht (Federal Constitutional Court - FCC) held that a marital agreement was unconstitutional, by which a woman resigned, in the event of an eventual divorce, any allocation for her as well as for her son. The Court concluded that the agreement violated both the constitutional provisions pertaining to the protection of the family and to that of the child. The Court upheld the law that prohibits a parent from disavowing claims to the support allocation for a dependent child, but went further in declaring that, by having been led to sign a marital agreement including the surrender of claims to financial support of such drastic degrees, the contracting woman suffered nothing less than a violation of her constitutional rights. According to the Court, this agreement constituted a violation of the rights of the child at the same time, as the bleakness of the mother's financial situation was seen by the FCC to prevent an orderly and safe upbringing of the dependent child.

[2] The case which marks a continuation of precedent set-down in two previous FCC decisions (from 1984 and 1993) in which the FCC also found a constitutional violation in private law relations (2) is likely to further fuel the angry criticism that has already been voiced with regard to the cases just mentioned. At the center of the dispute we find two questions. First, whether it is or should be regarded as a matter of constitutional law and as a violation of constitutional rights if contracting partners, in the sphere of private law known and commonly understood as the realm of self determination and private autonomy, enter into contracts which are severely disadvantageous to one of the parties. Secondly, what role, if any, the Constitutional Court ought to play in this field. While many private lawyers opposed this public law "intervention" into a field which many private lawyers believed to be in the firm hands of private law norms and the ordinary Courts applying them. Public lawyers have had their concerns as well, worrying over the diffusion of constitutional rights provisions if they are to be extended into the jungle of private contracting, with its typical maze of conflicting interests and, most importantly, varying material starting points. While it is too early to paint a complete picture of what might be the contemporary legal history of the FCC's decision of February, one is tempted to expect the worst. For the Court, in its decision concerning the marital contract between a man and a pregnant woman with already one handicapped child, applied an analogy between these facts and those which had existed at the outset of its 1984 and 1993 decisions. While both the case of 1984, the *Handelsvertreter*-case (Commercial Agent-case) and the *Bürgschafts-case* (Collateral-case) clearly reflected commercially implied inequalities reigning between the contracting parties (Agent against Employer; inexperienced apprentice, aged 21, against Bank), a similar situation between future husband and future wife in the most recent decision was much less clear. The main reason that leads to the difficulty in clearly defining the standards are the many fine differences that may occur among somewhat "similar" situations. While no legal norm ever will be able to fully represent or mirror the social situation to which it is eventually applied, (3) we can, however, recognize differences between, say, civil code provisions related in detail to certain "typical" situations as compared to far reaching and, necessarily, more widely formulated constitutional norms. The FCC decided to base its evaluation more on the standards that it found to be flowing from constitutional rights than from the extensive private law as laid down in the German Civil Code in its lengthy section on family and dependents' law. While this is likely to arouse fierce criticism, especially among family lawyers to whom the Court almost seems to suggest itself as a welcome forum for their family law cases, the case is bound to create further insecurity as to which standards apply in cases in which we might detect "inequality" but in which we, so far, have not come to conceive as fields of direct constitutional intervention.

[3] The loss of orientation (4) will not so soon be made up by academic commentary, "the law in the books," but by "law in action." The FCC, shortly after issuing its grand decision in February, handed down another decision in March, (5) in which a three-judge Chamber of the Court granted a rare example of constitutional relief in an altogether drastically short decision. The facts are, to a large degree, comparable to those that controlled the Court's February decision. The Court began the recent decision by recalling that it had already held, in its decision in February, that even in the case of a marital agreement, it was the Court's (*i.e.* every court's) obligation to exercise control of the agreement's content and, where necessary, correct the contractual terms in order to render the agreement compatible with the constitution. This obligation to intervene in a private contract, the Court explained, arises when one party is severely and disproportionately burdened by the duties created by and the effects of the agreement. In the FCC's view, this correction becomes necessary when it is obvious that the contractual terms established by the parties lead to a reversal - for one party - of its self-determination to its opposite, when, in fact, his or her self determination is reversed into his or her instrumentalization. As in the case from February, the Court again pointed to the particular circumstance of the woman's pregnancy at the time of the agreement. The Court found here another indication of the woman's inferior bargaining power in relation to the man who, in the February decision, had been opposed to the marriage. The Court recognized the arbitrariness of choosing pregnancy as a decisive indication of the woman's weaker bargaining position by underlining that pregnancy, along, can merely act as one among other

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indications of inequality and that, surely, other factors need to be considered as well. Among the other circumstances to which the Court pointed (along with the pregnancy) included: the financial situation of the woman, her vocational or professional training, and her prospects for supporting herself and a family. The Court held that it is necessary to closely examine the terms of the marital agreement and ruled that if terms reflect a one-sided burden upon the pregnant woman, as it found to be the case here and in its February decision, her inferior bargaining position was "evident."

[4] The FCC struck down the lower court's decision where the court had exercised judicial control of the agreement and obliged the former husband to pay - against the agreement's terms - a monthly allowance to his ex-wife, arguing that the lower court had wrongly based its assessment of the contract's terms exclusively on the interests of the child. But by focusing on the child and the eventual hardships it would suffer as a consequence of the agreement, the lower court's judges, in the FCC's view, failed to appropriately assess the woman's situation as brought about by the agreement and in light of the fact that she already had to take care of her first, handicapped, child.

[5] As much as this FCC decision can and ought to be seen as the right message to the concrete partners of the marital agreement before the Court, its long term merits seem far less laudable. The Court, in its brief decision, cannot cover the difficulties of defining and of handling the standards which it wishes to send out to the lower courts and the lawyers dealing with family cases around the country every day. A close reading of the Court's February decision might well have guided a well versed lawyer to argue before a court for a correction of the agreement with regard to the child's welfare. Indeed, this would have meant nothing else than following the Court's call in its February decision. There the Court had in fact held, with jurisprudential wizardry, that the woman's relinquishment of her own support allocation endangered the child's welfare to such a degree that the contract constituted a violation of the child's constitutional rights. This can described as a form of wizardry because the Court was not at all obliged to go this route. It would have sufficed to highlight the severe and burdensome risk allocations undergone by the woman in the agreement with regard to herself in order to correct the agreement, *i.e.* to void it in those aspects. But the Court had decided to go much further in holding that the bleak financial situation in which the woman would find herself as a consequence of the contract had brought about such pressure and hardship for the child living under the woman's roof that the agreement, while expressly leading only to the woman's resignation of her allocations (the resignation for the child's allocation was already *de jure* void from the beginning and therefore had no effect), violated, at least indirectly, the child's constitutional rights. Against this background, both the woman's lawyer as well as the lower court in the new case do not appear to have misunderstood the Court's message from February. Be this as it may, the Court now recognized the focus laid by the lower court upon the child's welfare to be an insufficient assessment with regard to the woman's situation. This is far from convincing and it does not relate well the Court's own line of reasoning in its February decision. But, and this is more important, the Court's message now seems even less clear as to the standards that have to be applied than in its earlier decision. While the Court, again, makes special mention of its belief that the fact of the woman's pregnancy cannot be but an indication of her inferior bargaining power, it does not show in a sufficiently clear way how to apply the remaining indications or standards in the case that the woman is: a) not pregnant, and b) does not already have a child. As a solution to a concrete case, the FCC's recent decision might be considered a victory for the constitutional complainant and probably future plaintiff's. With regard to the message sent by the Court with the decision, our reaction ought to be patience. This is also what the woman in the case decided in February had to have in abundance - she waited nine years for her judgment from Karlsruhe.

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(1) *See*, Federal Constitutional Court, Decision of 6 February 2001, published in NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 957. *See also*, *Federal Constitutional Court Affirms Horizontal Effect of Constitutional Rights in Private Law Relations and Voids a Marital Agreement on Constitutional Grounds*, 2 GERM. L.J. 6 (April 1, 2001), www.germanlawjournal.com . *See also*, the overview on the jurisprudence related to family allocations by Helmut Büttner and Birgit Niepmann, in: NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 2215-2229.
(2) *See*, the famous *Handelsvertreter*-case, 81 BVerfGE 242; and the *Bürgschafts*-case, 89 BVerfGE 214. Both decisions have brought nothing less than an outrage among numerous private lawyers, acclaim and applause from others, satisfied benevolence by many public lawyers, if any reaction. The literature is too vast to be set into a footnote. For a good overview see the notes in: Gunther Teubner, *Ein Fall Struktureller Korruption. Die Familenbürgschaft in den Fängen unverträglicher Handlungslohgiken (BVerfGE 89, 214 ff.)*, KRITV 2000, p. 388-404; *cf. Federal Constitutional Court Affirms Horizontal Effect of Constitutional Rights in Private Law Relations and Voids a Marital Agreement on Constitutional Grounds*, 2 GERM. L.J. 6 (April 1, 2001), www.germanlawjournal.com
(3) *See, e.g.,* Gunther Teubner & Peer Zumbansen, *Rechtsentfremdungen: Über den gesellschaftlichen Mehrwert des zwölften Kamels* , ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 2000, p. 189-215
(4) Not to mention the interpretion insecurities resulting from such jurisprudence once we transcend the nation state's borders and look at a case's fate in the conflict of laws within international private law: *see* Klaus-Peter Berger, Formalisierte oder "schleichende" Kodifizierung des transnationalen Wirtschaftsrechts (1996), 13, explicitly quoting

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the FCC's Commercial Agent and Collateral Decisions.
(5) Federal Constitutional Court (FCC), Third three-judge Chamber of the First Senate, Decision of 29 March, 2001, published in NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 2248.

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