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Ravenna Capitale

From International Treaties to the Binding Nature of Contract. A Historical and Comparative Study

Collana **Ravenna Capitale**

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Pacta sunt servanda – Basic Principles of a Modern Contract Law

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Sommario: A. The "contract" as a *nucleus* of a modern civil law society – B. *Pacta sunt servanda* – in the past, today and in the future – 1. Overview over the historical roots of the *pacta sunt servanda*-principle – 1.1 Pre-early historical and ancient understanding of contracts – 1.2. Contract law development in the Middle Age – 1.3. Law of Nature and the law of reason as the basis of a secularization and "juridification" of the contract law – 1.4. Influence of *Kant's* ethics of freedom and the theory of *liberalism* on the modern understanding of contract law – 1.5. The German Civil Code as an expression of a liberal-individualistic understanding of Contract and Society – 2. The significance of the *pacta sunt servanda*-principle for a modern understanding of contracts and consequences for today's contract law – C. *Pacta sunt servanda* – conclusion and perspective for future studies.

A. The "contract" as a nucleus of a modern civil law society

Generally, "contract" and "contract law" are among the central core elements of a modern civil law society. The freedom to conclude contracts on one's own responsibility and in a self-determined manner (= freedom of contract), with its different elements "freedom of conclusion" (WHETHER and WHEN the contract is concluded), "freedom of content" (WHAT the content of the contract is), "freedom of form" (HOW the contract is concluded) and "freedom to choose the contractual partner" (WHO concludes the contract) as well as – as an *actus contrarius* to the conclusion of the contract – "freedom of cancellation / amendment" are among the indispensable core elements of private autonomy, which is understood as an essential principle of modern civil law. They guarantee – together with freedom of ownership, freedom of testament and freedom of association – the best possible free and independent development of every individual. Therefore, e.g. in Germany, this freedom of contract enjoys a comprehensive constitutional protection as part of the general freedom of action (Art. 2 I GG; prevailing opinion), whereby not only rights of defence against the state can be derived from this, but also, due to the objective-legal function of the fundamental rights, in particular

an institutional guarantee as well as accompanying duties to protect and further develop this basic freedom.

While the contract seems to be an indispensable instrument for shaping private law relations between legally equal subjects of private law and thus form a central part of the recognized core of every private law system, there is surprisingly no agreement on the details of why and under what conditions contracts are valid. Especially the exact content and the inner justification of the principle of *pacta sunt servanda* – though almost universally recognized – is highly disputed: In Germany, for example, there are two almost diametrically opposed understandings of the origin of contractual obligations: On the one hand, there is a formal, liberal understanding of contracts, which is primarily represented in civil law doctrine. On the other hand, more and more material ("substantive") contract theories evolved, highly promoted by the case law of the German Federal Constitutional Court and heavily supported by the development of the (European) consumer protection law in particular. This dispute of principles is by no means of purely academic significance, but gains direct practical relevance whenever contracts are to be subject to judicial review and the limits of contractual freedom are thus to be clarified.

This contribution will therefore first eluminate – due to the limitations of this publication in a necessarily sketchy and eclectic manner – the historical roots and the subsequent development of the *pacta sunt servanda*-principle (sub B.I.). Based on these findings, the significance of the *pacta sunt servanda*-principle for a modern contract law system will be demonstrated and the resulting consequences for contract practice will be discussed (sub B.II.). The contribution will end with some brief remarks about possible implications of this kind of contract law understanding for the future development of a (European) Contract Law-theory (sub C.).

B. *Pacta sunt servanda* – in the past, today and in the future

1. Overview over the historical roots of the *pacta sunt servanda*-principle

1.1. *Pre-early historical and ancient understanding of contracts*

Even the earliest forms of human social associations were based on task-specific specialization and division of labor ("hunter-gatherers").[1] However, the necessary exchange of goods was usually carried out directly and was based on

[1] See N. LUHMANN, *Die Gesellschaft der Gesellschaft*, Frankfurt/Main, 1997, 634 ff.; U. WESEL, *Geschichte des Rechts*, München, 2006[3], Para. 5 ff.

the idea of "reciprocity" (mutual "barter"), which is why there was no need for further legal regulation.[2]

Only after the recognition of individual legal positions[3], the increasing territorial and personal expansion of community and dominion associations, and the growing specialization and the division of tasks within society[4] strengthened the need for legal organization and safeguarding of exchange relationships, which were no longer merely *ad hoc* and immediate. Particularly important for the development of economic life was, on the one hand, the establishment of "money" as a universal means of exchange[5] and, on the other hand, the discovery of writing[6], which allowed an "embodiment" and thus permanent documentation and proof of legal relationships. Both aspects allowed later compulsory enforcement of exchange transactions that were not immediately executed. Whereas in the beginning, most written contracts concerned important interpersonal (status) contracts, soon also important "credit transactions" and – derived from these – exchange transactions for goods that were not immediately fully executed (special-purpose contracts[7]) emerged.[8] Since mostly only ecclesiastical or secular dignitaries, and later also specially trained state officials, were proficient in writing, certain clauses and formalized business practices soon became established. Only agreements compliant with these practices and rules were regarded as effective and valid.[9]

The preliminary culmination of this development is the Roman (contract) law[10]: While ancient Roman law – as far as known – still seems to follow archaic legal thinking and therefore does not seem to have developed a stand-alone contract law in the modern sense[11], the Republican *Twelve Tables Law of* 449 B.C.

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[2] Wesel, *Geschichte,* Para. 12 f., 25 f., 37. Similarly, for example, M. Bäuerle, *Vertragsfreiheit und Grundgesetz*, Baden-Baden, 2001, 43; H. Kötz, A. Flessner, *Europäisches Vertragsrecht*, Tübingen, 1996, 5 f.

[3] See Wesel, *Geschichte,* para. 47.

[4] Kötz, Flessner, *EuropVertragsrecht*, 6.

[5] On the importance of money as a motor for the development of modern contract law, see Bäuerle, *Vertragsfreiheit,* 43.

[6] For more details, see Wesel, *Geschichte,* 63 ff., 74 ff.

[7] Described by *Maine* as "movement from status to contract"; see Bäuerle, *Vertragsfreiheit,* 42; Kötz, Flessner, *EuropVertragsrecht*, 6; M. Rehbinder, *Status - Kontrakt - Rolle*, Berlin, 1968 141 ff., 143 ff.; Wesel, *Geschichte,* Para. 47 ff. Specifically from a family law perspective, S. Hofer, *Privatautonomie*, 1 ff.

[8] E.g. in Greek or Babylonian law, see Wesel, *Geschichte,* marginal note 117.

[9] See Wesel, *Geschichte,,*74.

[10] See Bäuerle, *Vertragsfreiheit,* 42; M. Weber, J. Winckelmann, *Rechtssoziologie*, Neuwied a. Rh., 1967², 133 ff.

[11] See M. Kaser, *Römisches Privatrecht*, München, 1971², § 39 I 1, 146; M. Kaser, R. Knütel, *Das Römische Privatrecht*, München, 2008¹⁹, § 32 Para. 2 ff.; K.-P. Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert*, München, 1985, 5.

in tab. 6.1 already contains the principle of recognition of freedom of contract.[12] However, the validity of the contract was not linked solely to the will of the parties, but to the existence of a *nexum*[13] or a *mancipatio*,[14] i.e., to the fulfillment of strict formalities.[15]

This shapes the further development of law in two important aspects: On the one hand, the theoretical distinction between contractual (*ex contractu*) and tortious (*ex delicto*) obligations (*obligatio*), which differentiated strictly according to the reason for their origin, for the first time[16] allowed the development of an independent contract law doctrine.[17] On the other hand, the twelve-table legislation already shows the strictly casuistic regulatory technique characteristic of Roman contract law:[18] The validity of the contract was linked to the observance of certain formal acts, the contractual consensus of the parties only played a subordinated role.[19]

Despite the enormous economic and social challenges that accompanied the expansion of the *Imperium Romanum* and the resulting need for flexible and easy

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[12] G. F. HAENEL, *Geschichte des Römischen Rechts*, Stockstadt/Main, 2008, 14 ff.; H. HAUSMANINGER, W. SELB, *RömPrivatrecht*, Wien, 2001[19], 16 ff.; C. HEINRICH, *Formale Freiheit und materiale Gerechtigkeit: Die Grundlagen der Vertragsfreiheit und Vertragskontrolle am Beispiel ausgewählter Probleme des Arbeitsrechts, ius privatum – Beiträge zum Privatrecht, Band 47 (zugl. Hab. Passau 1999)*, Tübingen, 2000, 14 ff.; H. HONSELL, *Römisches Recht*, Berlin, Heidelberg, 2010[7] 4 ff.; W. KUNKEL, M. J. SCHERMAIER, *Römische Rechtsgeschichte*, Köln, 2005[14], 31 ff.; A. SÖLLNER, *Einführung in die römische Rechtsgeschichte*, München 1996[5], 34 ff.; F. WIEACKER, *Römische Rechtsgeschichte*, München, 1988, 287 ff.

[13] T. MOMMSEN, *Rezension zu Beseler, Georg, Volksrecht und Juristenrecht*, Berlin/Dublin/Zürich, 1965[2], 125 ff.

[14] KASER, *RömPrivatrecht* § 9 II, 43 ff.; U. MANTHE, *Geschichte des römischen Rechts*, München, 2011[4], 19 ff.

[15] Tab. 6. 1. reads „*Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto*". See also KASER, KNÜTEL, *RömPrivatrecht*, § 8 Para. 4 ff.; A. MANIGK, *Privatautonomie*, Weimar, 1939, 266 ff., 269 f.; SÖLLNER, *Einführung,* 47 ff. The importance of the Twelve Tables legislation for the development of an independent contract law is also emphasized by HEINRICH, *Formale Freiheit,* 14 f.; NANZ, *Vertragsbegriff*, 6 f.

[16] This fundamentally distinguishes Roman law from its ancient predecessors, such as *Greek law*, see note 8.

[17] See *Gaius* (120 - 180 AD), Inst. 3.88: "*obligationes, quarum summa divisio in duas species diducitur: omnis enim obligatio vel ex contractu nascitur vel ex delicto*", quoted after WESEL, *Geschichte,* Para. 147.

[18] NANZ, *Vertragsbegriff*, 15 ff., esp. 18 ff. (with focus on the *stipulatio*). KASER, *RömPrivatrecht*, § 128 II, 538 ff.; A. HÄGERSTRÖM, Über *den Grund der bindenden Kraft des Konsensualkontraktes nach römischer Rechtsanschauung*, in *ZSS*, 63, 1943, 268 ff., 283 ff.

[19] See M. SCHMOECKEL, J. RÜCKERT, R. ZIMMERMANN, *Historisch-kritischer Kommentar zum BGB*, Tübingen, 2003[1], before § 145 para. 21; KASER, *RömPrivatrecht*, § 122, 522 ff.; KASER, KNÜTEL, *RömPrivatrecht*, § 7 para. 20 ff.; STATHOPOULOS, *Probleme der Vertragsbindung, AcP*, 194, 1994, 543 ff., 546.

applicable contract law,[20] the *numerus clausus of individual contract types*,[21] which was in principle conclusive and based in each case on different conditions of effectiveness,[22] was only slightly expanded. Therefore, the Roman jurists – in spite of their uncontested merits for the development of the law theory – did not manage to develop an abstract concept of legal transactions or contracts:[23] According to classical understanding, a strict distinction had to be made between the various types of form-bound and thus legally binding *contractus*[24] (or *pacta*[25] *vestia*) and the *pacta nuda*. The latter were based solely on the agreement of the parties´ will[26] – originally not even regarded as a necessary prerequisite for the validity of the contract[27] – and did not give rise to any enforceable[28] obligation.[29]

Only in post-classical times – probably based on the jurisprudence of *praetor peregrinus*[30] as well as on the recognized binding effect of informal side agreements (*pacta adiecta*[31]) and other specific forms of exceptionally enforceable agreements (*pacta praetoria* [= agreements declared enforceable by the praetor] and *pacta legitima* [= binding agreements due to specific imperial orders])[32] of

[20] Kaser, *RömPrivatrecht*, § 112 I, 474 ff.; Kunkel, M. J. Schermaier, *Römische Rechtsgeschichte*, Köln[14.], 2005, 94 ff., 98 ff.

[21] Kaser, Knütel, *RömPrivatrecht*, § 5 Para. 1 ff.; Nanz, *Vertragsbegriff*, 5.

[22] Schmoeckel, Rückert, Zimmermann, *Historisch-kritischer Kommentar zum BGB*, before § 145 Para. 21; Nanz, *Vertragsbegriff*, 11 ff.

[23] Kaser, *RömPrivatrecht*, § 56 I, 227 ff., § 56 II 1, 229. Likewise Honsell, *Römisches Recht,* 25; Nanz, *Vertragsbegriff*, 11 ff., 22 ff.

[24] On the different meanings of the terms *contractus* and *contrahere*, see Nanz, *Vertragsbegriff*, 7 ff.

[25] The concept of *pactum* derived from the "atonement settlement" stipulated in the *Twelfth Table-legislation* (Table VIII, 2: "*si membrum rup(s)it, ni cum eo pacit, talio esto*"). See in detail *Idem,*15 f.

[26] In the sense of an agreement of wills, i.e. an actually concurring will, Schmoeckel, Rückert, Zimmermann, *Historisch-kritischer Kommentar zum BGB*, § 116 - 124 Para. 2; E. A. Kramer, *Grundfragen der vertraglichen Einigung*, München, 1972, 52 ff., 175 ff.

[27] Nanz, *Vertragsbegriff*, 6 f.; Söllner, *Einführung,* 39 ff., 43, 47.

[28] See M. Kaser, K. Hackl, *Das römische Zivilprozeßrecht*, München, 1996[2], § 4, 34 ff., §§ 12 ff., 81 ff.; Kaser, Knütel, *RömPrivatrecht*, § 81 Para. 2 ff.

[29] *Dig*. 2, 14, 7 (Ulipian): «*nuda pacto actio non oritur*». See Schmoeckel, Rückert, Zimmermann, *Historisch-kritischer Kommentar zum BGB*, before § 145 Para. 21; Bäuerle, *Vertragsfreiheit* 44; Heinrich, *Formale Freiheit,* 15; Kaser, *RömPrivatrecht*, § 122 IV, 527; Kaser, Knütel, *RömPrivatrecht*, § 38 Para. 13 ff.; Nanz, *Vertragsbegriff*, 11, 15 ff., 32 ff.

[30] Kunkel, M. J. Schermaier, *Römische Rechtsgeschichte*, 95 f.; Söllner, *Einführung,* 75 ff.; Wesel, *Geschichte,* Para. 146.

[31] Honsell, *Römisches Recht,* 103.

[32] Wesel, *Geschichte,* para. 146. See also Bäuerle, *Vertragsfreiheit* 44 FN 28; Honsell, *Das Gesetzesverständnis in der römischen Antike*, in *Europäisches Rechtsdenken in Geschichte und Gegenwart: Festschrift für Helmut Coing zum 70. Geburtstag* (N. Horn, K. Luig, A. Söllner hrsg), München, 1982, 129 ff., 139 f.; M. Kaser, I. v. Müller, H. Bengtson, H.-J. Gehrke,

the imperial constitutions – did the enforceability of agreements based solely on the "naked" party consensus (*nudo consensu*) become established.[33] At the same time, the *stipulatio*[34], which was originally based on a strict question-and-answer ritual[35], was increasingly transformed into a type of written contract that could be freely formulated in terms of content.[36]

From today's perspective, therefore, it is precisely post-classical Roman law – especially in its *vulgar*[37] form, which is often unjustly criticized as supposed "flattening" and "degeneration" – that forms the actual nucleus for the modern consensual contract.[38] Interestingly, the contractual binding effect was based either *ex fide bona*[39] (thus on considerations of equity[40]), or on the morally binding effect of the given promises.[41] Both aspects formed the theoretical foundation for the doctrine of promises (so called "Versprechenslehre") that characterized the medieval understanding of contract and its moralizing perspective on contract law. The latter seems to have still an effect on the modern understanding of contract law.[42]

RömPrivatrecht, München, 1975², § 261 I 3 b, 363; NANZ, *Vertragsbegriff*, 17 ff.; J. SCHAPP, *Grundfragen der Rechtsgeschäftslehre,* Tübingen 1986, 18.

[33] SÖLLNER, *Einführung,* 77; WESEL, *Geschichte,* Para. 147. See also C. HEINRICH, *Formale Freiheit*, 15; W. SCHERRER, *Die geschichtliche Entwicklung des Prinzips der Vertragsfreiheit*, Basel, 1948, 15.

Focus on *innominate contracts in* HEINRICH, *Formale Freiheit,* 16; KASER, *RömPrivatrecht*, § 135, 580 ff.; KASER, KNÜTEL, *RömPrivatrecht*, § 38 Para. 15 ff.

[34] In detail P. APATHY, G. KLINGENBERG, H. STIEGLER, *Einführung in das römische Recht*, Wien, 2007⁴, 114 f.; KASER, KNÜTEL, *RömPrivatrecht*, § 7 Para. 20 ff., § 40 Para. 1 ff.; MANTHE, *Geschichte,* 26 f.; NANZ, *Vertragsbegriff*, 18 ff.; R. ZIMMERMANN, *The law of obligations*, Cape Town, 1990, 68 ff. On the historical roots of *stipulatio*, for example, L. MITTEIS, Über *die Herkunft der Stipulation - Eine Hypothese*, Weimar, 1907, 107 ff., 114 ff.

[35] For example, HEINRICH, *Formale Freiheit,* 15; NANZ, *Vertragsbegriff*, 20.

[36] H. COING, *Europäisches Privatrecht*, München, 1985, § 79 I, 398; HEINRICH, *Formale Freiheit,* 15; KASER, KNÜTEL, *RömPrivatrecht*, § 7 Para. 23; LEVY, *Weströmisches Vulgarrecht*, 34 ff., esp. 35 ff.; NANZ, *Vertragsbegriff*, 21 f.; SCHERRER, *Die geschichtliche Entwicklung,* 15 f.

[37] HAUSMANINGER, SELB, *RömPrivatrecht*, 47 ff.; KASER, *RömPrivatrecht*, § 1 II, 1 ff.; KASER, MÜLLER, BENGTSON, GEHRKE, *RömPrivatrecht*, § 192, 3 ff., § 193, 17 ff.; KUNKEL, M. J. SCHERMAIER, *Römische Rechtsgeschichte*, 193 ff.; LEVY, *Weströmisches Vulgarrecht*, 1 ff.; H. SCHLOSSER, *Grundzüge der Neueren Privatrechtsgeschichte*, Heidelberg, 2005¹⁰, 7 ff.; WESEL, *Geschichte,* para. 156; WESEL, *Geschichte des Rechts in Europa*, München, 2010, § 43.

[38] In detail WESEL, *Geschichte,* § 146. Similarly BÄUERLE, *Vertragsfreiheit,* 45; KASER, MÜLLER, BENGTSON, GEHRKE, *RömPrivatrecht*, § 261 I, 362 ff.; NANZ, *Vertragsbegriff*, 12.

[39] See LEVY, *Weströmisches Vulgarrecht*, 28 ff.

[40] In detail NANZ, *Vertragsbegriff*, 56; SÖLLNER, *Einführung,* 74 ff.; WESEL, *Geschichte,* Para. 146.

[41] LEVY, *Weströmisches Vulgarrecht*, 46 ff. (Referring on the increasing prevalence of a promissory oath).

[42] Immediately below.

1.2. *Contract law development in the Middle Age*

Even if this dynamic development of contract law came to an abrupt end with the final decline of the (Western) Roman Empire, the turmoil of the migration of peoples and the hereby resulting *fragmentation of personal and territorial law,*[43] as well as the rediscovery of the writings of *Aristotle* (384 - 322 B.C.) and of the *Corpus Iuris Civilis* commissioned as part of a comprehensive program of legal renewal by *Justinian I* (c. 482 - 565 A.D.)[44] had an important impact on the development of contract law. In this context, the fruitful process of mutual influence (*reception*[45]) between (rediscovered) Roman law, Canon Law and the local particular legal systems, becomes very influential: Roman law, taught at the universities as "imperial law" (so called "Kaiserrecht")[46] and condensed into common legal principles (*ius commune*[47]), continued to adhere to a strict *numerus clausus* of contract types[48] and still distinguished between enforceable *pacta vestita* (*pacta induta*[49]) and *pacta nuda,* understood merely as natural obligations (*naturalis obligatio*[50]), the so called *vestiture theory*.[51] Of course, this approach did not fit to

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[43] NANZ, *Vertragsbegriff*, 12 ("dead end" of historical development).

[44] In detail, for example, MANTHE, *Geschichte*, 111 ff.; SCHLOSSER, *Grundzüge,* 28 ff.; WESEL, *Geschichte,* Para. 129, 157.

More critical of the significance of the original *Corpus Iuris Civilis* is SÖLLNER, *Einführung,* 134 ff., 148.

[45] SCHLOSSER, *Grundzüge,* 1 ff., 5 ff., 55 ff., 60 f.; WESEL, *Geschichte,* Para. 237, 239.

[46] J. GAUDEMET, *Réflexions sur l'Empire de Rome,* in *Europäisches Rechtsdenken in Geschichte und Gegenwart*, 63 ff., 65.

[47] In contrast to the *ius proprium* (*ius patrium* or *ius particulare*), which had factually and locally only limited validity, COING, *Europäisches Privatrecht*, § 4 II, 37 ff.; C. MÖLLER, *Das römische Recht in der Rechtsprechung des Reichsgerichts - Geltendes Recht und ratio scripta*, in *125 Jahre Reichsgericht* (B.-R. KERN, A. SCHMIDT-RECLA hrsg.), Berlin, 2006, 109 ff.; SCHLOSSER, *Grundzüge,* 3 ff.; J. SCHRÖDER, *Zur Geschichte und Gegenwart des europäischen Privatrechts*, Mainz, 2003, 35 ff.; W. TRUSEN, *Anfänge des gelehrten Rechts in Deutschland*, Wiesbaden, 1962, 22 ff.; WESEL, *Geschichte,* Para. 217, 239; ID., *Geschichte des Rechts in Europa*, Para. 86 f.; G. WESENBERG, G. WESENER, *Neuere deutsche Privatrechtsgeschichte*, Wien/Köln/Graz. 1985[4], 14.

[48] H. DILCHER, *Der Typenzwang mit mittelalterlichem Vertragsrecht*, in *ZSS,* 77, 1960*,* 270 ff., 271, 273 ff., 277 ff.; NANZ, *Vertragsbegriff*, 34 ff.

[49] NANZ, *Vertragsbegriff*, 32 (citing *Placentinus*, Summa Codicis (1536), C 2, 3: „*quaedam sunt nuda, quaedam induta*").

[50] K. LUIG, *Wissenschaft und Kodifikation des Privatrechts im Zeitalter der Aufklärung in der Sicht von Christian Thomasius*, in *Europäisches Rechtsdenken in Geschichte und Gegenwart*, 177 ff., 185; NANZ, *Vertragsbegriff*, 31 f., 41 f.; DILCHER, *Der Typenzwang,* 270 ff., 273; SCHLOSSER, *Grundzüge,* 65.

[51] Building on the preliminary work of *Placentinus* († c. 1170), *Azo Portius* and *Accursius*, the vestiture theory was shaped in particular by *Bartolus de Sassoferrato* and *Baldus de Ubaldis* and was thus to determine the entire further legal development of the Middle Ages,

the economic necessities. Therefore, the legal practice increasingly sought functionally equivalent instruments to allow flexible contract formations. They found support in the *Canon Law*[52] and its practice of confirming informally concluded party agreements that were not actually actionable under secular law by means of an oath.[53] The ecclesiastical courts, interested to expand their jurisdiction, insisted not only on their jurisdiction to sanction the breach of the oath itself, but also on the enforcement of the contract agreement reinforced by the oath.[54] Hereby, even the simple promise of a contract (*promissio*) was considered binding – at least *pro foro interno*[55] – for the sole reason that the promisor would otherwise make himself sinful of lying.[56] For our purpose, it is important to emphasize that the general binding force of all contractual agreements (principle of *pacta sunt servanda*)[57] is based not on the compliance with certain external formalities, but on the moral obligation effect of the contractual promise.[58] The first such attempts can already be found in the writings of *Clement of Alexandria* (around 150 – 215 AD)[59], but without general acceptance. Still *Thomas Aquinas* (around 1225 – 1274) could therefore postulate the sinfulness of a breach of contract according to the *lex div-*

Dilcher, *Der Typenzwang,* 270 ff., 277 ff.; Nanz, *Vertragsbegriff*, 33 ff.; A. Söllner, *Die causa im Kondiktionen- und Vertragsrecht des Mittelalters bei den Glossatoren, Kommentatoren und Kanonisten*, in ZSS, 77, 1960, 182 ff., 217 ff.

The basis of secular contract law was therefore still until the end of the 16th century the principle *ex nudo pacto actio non oritur*, Nanz, *Vertragsbegriff*, 41 (referring inter alia to *Baldus de Ubaldis*, Comm. in D 2, 14, 7, 5, n. 7 (f. 140): "*nota regulam generalem in ista materia, quod ex pacto nudo non oritur actio*"); Schlosser, *Grundzüge,* 65.

[52] Coing, *Europäisches Privatrecht*, § 79 II, 399 ff.; T. Mayer-Maly, *Der Konsens als Grundlage des Vertrages*, in *Festschrift für Erwin Seidl zum 70. Geburtstag* (H. Hübner, E. Klingmüller, A. Wacke hrsg.), Köln, 1975 118 ff., 123 ff.; Scherrer, *Die geschichtliche Entwicklung,* 21.

[53] J. Kohler, *Das Versprechen*, in *ARSP*, 5, 1911/1912, 307 ff., 308 ff.; G Wesenberg, Wesener, *Privatrechtsgeschichte*, 19 f.

[54] In detail, see Trusen, *Zur Bedeutung des geistlichen Forum internum und externum für die spätmittelalterliche Gesellschaft*, in *ZSS*, 76, 1990, 254 ff., 274 ff.

[55] On the medieval distinction between *forum internum* and *forum externum*, Trusen, *Forum*, 254 ff., 274 ff.; Trusen, *Anfänge,* 135 ff.

[56] M. Bäuerle, *Vertragsfreiheit*, 46; Mayer-Maly, *Der Konsens,* 118 ff., 124; Nanz, *Vertragsbegriff*, 47 f.; Schlosser, *Grundzüge,* 65 f.; M.-P. Weller, *Die Vertragstreue*, Tübingen, 2009, 26 ff., esp. 39 f.; Zimmermann, *The law of obligations,* 576 ff.

[57] Stathopoulos, *Probleme der Vertragsbindung,* 543 et seq., 547; Weller, *Die Vertragstreue,* 26 ff., esp. 39 f.; Zimmermann, *The law of obligations,* 576 ff.

[58] In detail, Nanz, *Vertragsbegriff*, 46 f. (with numerous biblical quotations).

[59] *Idem*, 47 f.; F. Spies, *De l´Observation des Simples Conventiones en Droit Canonique*, Paris, 1928, 7.

ina[60], but at the same time underline the lack of enforceability of the *promissio simplex* according to the secular *lex humana*.[61]

The central turning point is therefore the *Corpus Iuris Canonici*, which served as the central codification of Canon Law until 1918.[62] Based on the preliminary work of *Huguccio* († 1210)[63] and *Bernhard of Pavia* († 1213)[64], who already referred to statutory prohibitions (*contra leges*; in Germany now § 134 BGB) or good morals (*contra bonos mores*; in Germany now § 138 BGB) as general limits of the contractual freedom, *Johannes Teutonicus (*1180 - 1252) postulated the general enforceability of all *pacta nuda*.[65] Under Canon Law, therefore, at least since the 14th century the general rule applied: *ex nudo pacto oritur actio et obligatio*.[66]

This moral justification of the binding force of a contract found its secular parallels in the emerging (transnational) commercial law: Before the *mercantile* courts (*curiae mercatoriae*), the trader was prevented from invoking the lack of compliance with the strict formalities of stipulation (*exceptio pacti nudi*).[67] Argument for this was on the one hand the *aequitas mercatoria*[68], the honorableness of the merchant's profession, on the other hand, the lesser need for protection of professional agents. This led to the binding effect of first commercial, later also all "normal" civil party agreements.[69] Increasingly, the remaining formal require-

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[60] Zimmermann, *Vertrag und Versprechen - Deutsches Recht und Principles of European Contract Law im Vergleich*, in *Festschrift für Andreas Heldrich zum 70. Geburtstag* (S. Lorenz Hrsg.), München, 2005, 467 ff., 468.

[61] In detail, Nanz, *Vertragsbegriff*, 49 (referring to *Thomas Aquinas*); Spies, *De l´Observation des Simples Conventiones,* 21; Söllner, *Die causa im Kondiktionen- und Vertragsrecht des Mittelalters*,182 ff.182 ff., 240 ff.

[62] In detail H.-J. Becker, *Das kanonische Recht im vorreformatorischen Zeitalter*, Göttingen, 1998, 9 ff., 11 ff.; Schlosser, *Grundzüge,* 24 ff.; Wesenberg, Wesener, *Privatrechtsgeschichte*, 16.

[63] Nanz, *Vertragsbegriff*, 52 (unter Hinweis auf *Huguccio*).

[64] See C. Schärtl, *Die Guten Sitten als zentrale Schranke privatautonomer Gestaltungsmacht*, (Habil. Regensburg 2013).

[65] Nanz, *Vertragsbegriff*, 53 (citing *Johannes Teutonicus*), See also Spies, *De l´Observation des Simples Conventiones,* 68 ff.; Söllner, *Die causa im Kondiktionen- und Vertragsrecht des Mittelalters*, 182 ff., 243 ff.

[66] In detail Nanz, *Vertragsbegriff*, 54 ff. Likewise Dilcher, *Der Typenzwang,* 270 ff., 284 f.; Söllner, *Die causa im Kondiktionen- und Vertragsrecht des Mittelalters*, 182 ff., 247.

[67] W. Endemann, *Beiträge zur Kenntnis des Handelsrechts im Mittelalter*, in *ZHR*, 5, 1862, 333 ff., 355 ff.; L. Goldschmidt, *Universalgeschichte des Handelsrechts*, Stuttgart, 1891[3], 169 ff.; Nanz, *Vertragsbegriff*, 57; Coing, *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, München, 1973, 810 ff.

[68] Endemann, *Beiträge,* 333 ff., 362 ff.; Goldschmidt, *Universalgeschichte,* 173, 303 f.; Nanz, *Vertragsbegriff*, 57 f.; Coing, *Handbuch,* 813 f.

[69] In detail Nanz, *Vertragsbegriff*, 57 ff. Similarly, Dilcher, *Der Typenzwang,* 270 ff., 297; Goldschmidt, *Universalgeschichte,* 303 ff., esp. 305 f.; Mayer-Maly, *Der Konsens,* 118 ff.,

ments served only to document and preserve evidence, in particular, to prove the seriousness of the intention to conclude the contract, and no longer to establish the binding effect of the contract.[70]

The discovery of interpolations in the *Corpus Iuris Civilis* by the so-called *humanistic jurisprudence*[71], the increasingly critical questioning of the postulated universal validity of Roman law, and the final phase of reception (*usus modernus pandectarum*) thus initiated, led to a fruitful readjustment of the understanding of the contract. *Matthaeus Wesenbeck* (1531 - 1586),[72] who developed a general doctrine of contract by bringing together the various Roman, canonical and particular legal traditions, played a significant role in this. According to *Wesenbeck,* the promise of a contract had *naturaliter et ex bono et aequo* a binding effect,[73] which is why it could also be enforced before the secular courts by means of an action *ex canone*,[74] provided that the content of the contract itself was legally permissible.[75]

According to the view presented here, this is connected with three central decisions that will shape the further development of modern contract law: On the one hand, *Wesenbeck* succeeds in definitively overcoming the mainly purely formal contract legitimation shaped by Roman law. Instead, *Wesenbeck* based the contractual obligation on the contractual promise and its "natural" binding effect. Closely related to this, on the other hand, is the adoption and hereby secularization of the materialization tendencies marked out by Canon Law (= reference to *aequitas* and *bona fide* in order to legitimate the contractual obliga-

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123; L. SEUFFERT, *Zur Geschichte der obligatorischen Verträge*, Nördlingen, 1881, 65; SCHERRER, *Die geschichtliche Entwicklung,* 20.

[70] H. CONRAD, *Deutsche Rechtsgeschichte*, Karlsruhe, 1962[2], 422; NANZ, *Vertragsbegriff*, 26 ff. (citing the *lex Visigothorum*, the *lex Baiwariorum*, and the *statute of the Bremen master shoemakers* of 1300); O. STOBBE, *Reurecht und Vertragsschluss nach* älterem *deutschen Recht*, in *ZRG*, 13, 1878, 209 ff., 215 ff. (there in detail on the dedication of an *Arrha* and on the *Litkauf*); WESEL, *Geschichte,* Para. 227 f.

[71] See e.g. N. HAMMERSTEIN, *Staatslehre der frühen Neuzeit - Kommentar*, Frankfurt / Main, 1995, 1025 ff. Critical of the reception-historical significance of humanism, however, is WIEACKER, *Humanismus und Rezeption. Eine Studie zu Johannes Apels Dialogus oder Isagoge per dialogum in IV libros Institutionum*, Göttingen, 1959, 44 ff., 90 f. For a detailed discussion, see SCHLOSSER, *Grundzüge,* 68 et seq.

[72] On the person and significance of *Matthaeus Wesenbeck* for seventeenth-century jurisprudence, NANZ, *Vertragsbegriff*, 85 ff. Similarly COING, *Handbuch,* 507, 530; W. FLUME, *Allgemeiner Teil des Bürgerlichen Rechts*, Berlin u.a., 1992[4], § 12/II 3, 166; MAYER-MALY, *Der Konsens,* 91 ff., 99.

[73] In detail NANZ, *Vertragsbegriff*, 90 f.

[74] *Idem*, 92.

[75] SCHMOECKEL, RÜCKERT, ZIMMERMANN, *Historisch-kritischer Kommentar zum BGB*, before § 104 Para. 2; NANZ, *Vertragsbegriff*, 92.

tion). Finally, *Wesenbeck's* approach leads to an important shift in the theoretical understanding of the contract mechanism: From now on, it was no longer merely the formally proper execution of the contract conclusion procedure that justifies the validity of the contract, but rather the admissibility of the content of the party agreement that becomes the central prerequisite for the effectiveness of the contract.[76]

Therefore, by the 17th century at the latest, the binding nature of all contractual agreements was generally recognized.[77]

1.3. *Law of Nature and the law of reason as the basis of a secularization and "juridification" of the contract law*

The binding force of contracts was also promoted by the Law of Nature (so-called "Naturrecht") and the Law of Reason (so-called "Vernunftrecht"), which at the end of the 16th / beginning of the 17th century steadily gained influence.[78] Their theoretical roots reached back to the ancient Greeks[79] as well as the early[80] and late (*Secunda Scholastica*[81]) scholasticism of the Middle Ages.[82] For the understanding of modern contract law, these considerations are of central importance, because they developed an understanding of state and law based strictly on human

[76] See e.g. art II, tit. 26 of the *Churpfälzische Land-Ordnung of 1582,* quoted in SEUFFERT, *Zur Geschichte der obligatorischen Verträge*, 154. See also NANZ, *Vertragsbegriff*, 82.

[77] In detail NANZ, *Vertragsbegriff*, 95 ff.

[78] SCHLOSSER, *Grundzüge,* 105 f. Likewise G. BOHNE, *Naturrecht und Gerechtigkeit*, in *Das deutsche Privatrecht in der Mitte des 20. Jahrhunderts: Festschrift für Heinrich Lehmann zum 80. Geburtstag* (H.C. NIPPERDEY Hrsg.), Bd. I, Berlin u. a., 1965², 3 ff., 6; G. ELLSCHEID, *Strukturen naturrechtlichen Denkens*, Heidelberg, 2004⁷, 148 ff., 167 ff.; H. WELZEL, *Naturrecht und materiale Gerechtigkeit*, Göttingen, 1962⁴, 108 ff. ZENTHÖFER, *Was ist Moral, Recht, Gerechtigkeit? - Grundprobleme der Rechtsphilosophie*, in *JURA*, 2004, 822 ff., 823.

On the relationship between Law of Nature and ethics, see J. MOKRE, in *Verhältnis von positivem Recht und Naturrecht: Formales Recht, positives Recht, Naturrecht, Ethik - Begriffliche und erkenntnistheoretische Voraussetzungen*, in *Festschrift für Adolf J. Merkl zum 80. Geburtstag* (M. IMBODEN Hrsg.), München, Salzburg, 1970, 277 ff., 280 ff.

[79] R. MARCIC, *Geschichte der Rechtsphilosophie*, Freiburg, 1971, 152, who speaks of a step „from myth to logos"; likewise A. KAUFMANN, *Problemgeschichte der Rechtsphilosophie*, Heidelberg, 2004⁷, 26 ff., 28 ff.; KAUFMANN, *Rechtsphilosophie*, München, 1997², 21; W. KULLMANN, *Antike Vorstufen des modernen Begriffs des Naturgesetzes*, Göttingen, 1993, 36 ff., 38 ff.; W. NESTLE, *Vom Mythos zum Logos*, Stuttgart, 1942, 360 ff.

[80] For further details see KAUFMANN, *Problemgeschichte,* 26 ff., 40 f.; KULLMANN, *Antike Vorstufen,* 36 ff., 102 ff.; SCHLOSSER, *Grundzüge,* 89.

[81] In detail COING, *Handbuch,* 1016 ff.; SCHLOSSER, *Grundzüge,* 92 ff.; H. THIEME, *Natürliches Privatrecht und Spätscholastik*, in ZSS, 70, 1953, 230 ff., 233 ff.

[82] In detail SCHLOSSER, *Grundzüge,* 84 ff.

reason as a substitute for the internally eroded theological worldview.[83] Their merit was not only the "intellectualization and rationalization" of the society – aptly described by *Max Weber* as the "disenchantment of the world"[84] –, but form the perspective of modern systems theory also laid the foundation for the complete autopoietic closure of the legal system.[85]

The nucleus of the modern understanding of contract law is the *theory of promises* (so-called "Versprechenslehre") developed and later refined by *Hugo Grotius* (1583 - 1645), initially in his work *Inleidinge tot de hollandsche rechtsgeleerdheid.*[86] Starting point of *Grotius´* considerations is the natural human sense of community (*appetitus societatis*)[87], which commands not only the respect for other people's property and the liability for the attributable damage, but also the compliance with validly concluded contracts.[88] Similar to *Johannes Althusius* (1557 - 1638)[89], *Grotius* saw the cornerstone of the binding forces of contractual obligations in the willingly made contractual promise, whereby a strict distinction is made between the purely *moral obligation* and the legally binding enforceable *binding promise*.[90] In the case of congruence between the

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[83] L. KREIMENDAHL, *Einleitung - Einige Charakteristika der Philosophie des 17. Jahrhunderts*, Darmstadt, 1999, 1 ff., 11 speaks in this respect of a "natural religion" as a "minimum consensus on which the members of all denominations can agree".

[84] M. WEBER, *Wissenschaft als Beruf*, Berlin, 2011[11], 17, 35.

[85] In Detail SCHÄRTL, *Die Guten Sitten*, 1 ff.

[86] M. DIESSELHORST, *Die Lehre des Hugo Grotius vom Versprechen*, Köln, 1959, 4 ff.; NANZ, *Vertragsbegriff*, 139 ff.; B. VAN SPYK, *Vertragstheorie und Völkerrecht im Werk des Hugo Grotius - Unter besonderer Berücksichtigung von „De iure belli ac pacis" (1625)*, Hamburg, 2005, 61 ff.; SCHLOSSER, *Grundzüge,* 96 f.; N. TOSCH, *Entwicklung und Auflösung der Lehre vom Vertrag*, Marburg, 1980, 15 ff.; WIEACKER, *Die vertragliche Obligation,* 7 ff., 11 ff.; WIEACKER, *Privatrechtsgeschichte der Neuzeit*, Göttingen, 1967[2], 287 ff.; ZIMMERMANN, *Das römisch-holländische Recht und seine Bedeutung für Europa*, in *Juristenzeitung (JZ)*, 1990, 825 ff., 827 ff. On the importance of the contractual promise for the development of the modern consensual contract, KOHLER, *Das Versprechen*, 307 ff., 308 ff.

[87] DIESSELHORST, *Zum Vermögensrechtssystem Samuel Pufendorfs*, Göttingen, 1976, 9 (referring to *Stoic* origins); E. WOLF, *Große Rechtsdenker der deutschen Geistesgeschichte*, Tübingen, 1963[4], 286.

[88] SCHLOSSER, *Grundzüge,* 96.

[89] On the importance of *Althusius*, see C. J. FRIEDRICH, *Johannes Althusius und sein Werk im Rahmen der Entwicklung der Theorie von der Politik*, Berlin, 1975, 7 ff.; O. VON GIERKE, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien*, Aalen, 1981[7], 44 ff., 321 ff.; WOLF, *Große Rechtsdenker,* 207 ff., esp. 210 f; WIEACKER, *Privatrechtsgeschichte,* 286 f. On the influence of the „*School of Salamanca*" on *Althusius'* doctrine SCHMOECKEL, RÜCKERT, ZIMMERMANN, *Historisch-kritischer Kommentar zum BGB*, vor § 104 Para. 2 FN 11; E. REIBSTEIN, *Johannes Althusius als Fortsetzer der Schule von Salamanca - Untersuchungen zur Ideengeschichte des Rechtsstaates und zur altprotestantischen Naturrechtslehre*, 1955, 1 ff., esp. 36 ff., 54 ff.

[90] P. OTTENWÄLDER, *Zur Naturrechtslehre des Hugo Grotius*, Tübingen, 1950, 73.

expressed and actual will of the promisor and a corresponding manifestation of being bound to this will – *Grotius* speaks in this respect of the facts of a *belofte* – initially only a moral obligation to keep the given contractual promise (*promissio)* arises (*trouw-schuld*).[91] A legally enforceable right of claim of the promisee, which *Grotius* regarded as a "splinter of ownership" of the creditor in the debtor[92], presupposes that in addition to the *belofte* (= first stage of the promise doctrine) on the second stage the will of the promisor is added to grant the contracting party a corresponding right of claim (*toezegging*).[93] This justification of validity, initially in the *Inleidinge* purely subjectively constructed, was later transformed into a three-stage model in order to – in modern terms – protect third parties and the legal traffic.[94]

Grotius´ concept plays an important role in the evolution of the modern contract theory because it was the first to postulate a strictly secularized "legal" justification of the contract obligations, based solely on the will of the parties involved, neither on any formal requirements (like the classical *Roman Law*), nor any moral obligation or connotation (like the *Canon Law*). [95] It was *Samuel Pufendorf* (1632 - 1694), who took up *Grotius´* secularized approach and combined it with the social contract considerations of *Hobbes* to form a coherent understanding of state and law.[96] Starting point and intellectual basis of this theory was the nature of man (*natura hominis*).[97] For the sake of self-preservation, people formed a community (*socialitas*) based on the natural equality (*ae-*

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[91] Nanz, *Vertragsbegriff*, 141 f.

[92] F. Hofmann, *Die Entstehungsgründe der Obligationen*, Wien, 1874, 90 f.

[93] Nanz, *Vertragsbegriff*, 142.

[94] Effectively declared intention to perform a future act/omission (*belofte* as first stage) – intention objectively recognizable to third parties by means of a *signum sufficiens* to want to be bound by the contractual promise (= second stage) – granting of a right to claim recognizable to third parties (*toezegging* as third stage).

In detail Coing, *Europäisches Privatrecht*, § 79 VIII, 406; Diesselhorst, *Die Lehre des Hugo Grotius,* 46 ff.; W. Kersting, *Wohlgeordnete Freiheit - Immanuel Kants Rechts- und Staatsphilosophie*, Paderborn, 2007³, 231 f. (there especially also on its influence on *Kant*); Nanz, *Vertragsbegriff*, 142 ff.

[95] Schmoeckel, Rückert, Zimmermann, *Historisch-kritischer Kommentar zum BGB*, before § 145 Para. 25; Diesselhorst, *Die Lehre des Hugo Grotius,* 111 ff.; Nanz, *Vertragsbegriff*, 139 ff.; Schlosser, *Grundzüge,* 96 f; Zimmermann, *The law of obligations*, 567 ff.

[96] Diesselhorst, *Zum Vermögensrechtssystem,* 21 ff.; Hammerstein, *Samuel Pufendorf,* in: Stolleis*, Staatsdenker im 17. und 18. Jahrhundert*, München 1987², 172 ff., 178 ff.; Hammerstein, *Staatslehre,* 1097 ff.; Nanz, *Vertragsbegriff*, 152. Specifically on *Hobbes'* understanding of contract Diesselhorst, *Ursprünge des modernen Systemdenkens bei Hobbes*, Stuttgart, 1968, 28 ff.; Wieacker, *Die vertragliche Obligation,* 7 ff., 13 f.

[97] In detail Diesselhorst, *Zum Vermögensrechtssystem,* 5, 6 ff. (especially also in contrast to *Hobbes*); Nanz, *Vertragsbegriff*, 149; W. Schmidt-Biggemann, *Samuel von Pufendorf - Staats- und Rechtsphilosophie zwischen Barock und Aufklärung*, Darmstadt, 1999, 113 ff., 114 ff.

qualitas) and the individuality of all people (*personalitas)* and constituted by a freely and willfully concluded "social contract".[98] This contract must be binding otherwise it couldn´t fulfill its freedom-ensuring function.[99] For *Pufendorf,* the principle of *pacta sunt servanda,* which applies to all sorts of contracts, not only the initial social contract, thus follows directly from the function of the contract itself, without the need for further recourse to any external, especially moral (theological), legitimation.[100] Instead, the nucleus of any contractual obligation is the voluntary mutual contractual promise (*consensus*), the necessity of which is justified by the loss of freedom of the participants resulting from the obligatory obligation.[101] However, in order to guarantee legal security and clarity, the mutual declarations of *consensus* must be demonstrated by the corresponding *signa*, thus objectively perceptible manifestations of will.[102]

Altogether, *Pufendorf* succeeds in creating an astonishingly up-to-date draft of contract law, based on the freedom and equality of all legal subjects, derived solely from "human nature" and thus completely secular. Hereby, the core of the obligation is the contractual *consensus*, a concept quite similar to the declarations of intent in modern legal contract theory.

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[98] PUFENDORF, *De Iure Naturae et Gentium Libri Octo*, Londini Scanorum, 1672, III, II § 1. See also HAMMERSTEIN, *Samuel Pufendorf*,, 172 ff., 178 f.; NANZ, *Vertragsbegriff*, 150; SCHLOSSER, *Grundzüge,* 99; SCHMIDT-BIGGEMANN, *Samuel von Pufendorf,* 113 ff., 122 f.

[99] PUFENDORF, *De Iure Naturae et Gentium Libri Octo*, III, IV § 2.

[100] DIESSELHORST, *Zum Vermögensrechtssystem,* 3 ff., 26, 54; HAMMERSTEIN, *Samuel Pufendorf,* 172 ff., 182 f. (who in this respect speaks of *Pufendorf's* „supreme rule of natural law"); NANZ, *Vertragsbegriff*, 151; SCHLOSSER, *Grundzüge,* 99; TOSCH, *Entwicklung,* 28 ff.

[101] PUFENDORF, *De Iure Naturae et Gentium Libri Octo*, III, IV § 1. On *Pufendorf's* doctrine of promises, see DIESSELHORST, *Zum Vermögensrechtssystem,* 53 f., 58 ff. (esp. also in contrast to *Grotius* and emphasizing the derivation still strongly focused on "freely given" (gift) promises); NANZ, *Vertragsbegriff*, 152; WIEACKER, *Die vertragliche Obligation,* 7 ff., 14 f.

[102] See NANZ, *Vertragsbegriff*, 153 (referring to PUFENDORF, *De Iure Naturae et Gentium Libri Octo*, III, VI § 16: "*actuum voluntatis, quamdiu signis non manifestantur, nullus inter homines invicem effectus esse.*").

1.4. *Influence of Kant's ethics of freedom and the theory of liberalism on the modern understanding of contract law*

In the following period, these considerations were taken up by, among others, *Christian Thomasius* (1655 - 1728)[103] and *Christian Wolff* (1679 - 1754).[104] They formed a fruitful connection not only with the Theory of State (especially *John Locke* [1632 - 1704],[105] *Charles-Louis de Secondat, Baron de La Brède et de Montesquieu* [1689 - 1755][106] and *Voltaire* [born as *François Marie Arouet,* 1694 - 1778][107]), but also the philosophical theories of liberalism[108] and of modern economy (especially *Adam Smith* [1723 - 1790],[109] *David Ricardo* [1772 - 1823][110], *Jean-Baptiste Say* [1767 - 1832][111] and *John Stuart Mill* [1806 - 1873][112]) and became together the foundation of the modern civil society. Nevertheless it´s important to emphasise a fundamental shift in the theoretical understanding of contract mechanism: Whereas the contract was originally understood primarily as a means of freedom, i.e. as an instrument for realizing one's own objectives and thus shaping the environment positively, later on, the negative dimension of the contractual free-

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[103] See M. Albrecht, *Christian Thomasius - Der Begründer der deutschen Aufklärung und seine Philosophie*, Darmstadt, 1999, 238 ff., 257 („founder of the difference between law and morality"); Luig, *Christian Thomasius*, in: Stolleis*, Staatsdenker*, 227 ff.; Luig, *Samuel Stryk (1640 - 1710) und der „usus modernus pandectarum"* (erstmals erschienen in: *Die Bedeutung der Wörter, FS Sten Gagnér,* München, 1991, 219 ff.), Goldbach, 1998, 233 ff.; Wieacker, *Privatrechtsgeschichte,* 315 ff.

[104] See J. Bärmann, *Zur Methode des Vernunftrechts - Zugleich ein Beitrag zur Geschichte der Rezeption des Code Civil in der Pfalz*, in *Festschrift zum 150 jährigen Bestehen des Oberlandesgerichts Zweibrücken* (J. Bärmann Hrsg.), Wiesbaden, 1969, 17 ff.; C. Schwaiger, *Christian Wolff - Die zentrale Gestalt der deutschen Aufklärungsphilosophie*, Darmstadt, 2000, 48 ff.; M. Thomann, *Christian Wolff*, in: Stolleis, *Staatsdenker*, 257 ff.

[105] J. Locke, *Two Treatises of Government*, London, 1689.

[106] Montesquieu, *De l´esprit de lois*, Genf, 1748.

[107] Voltaire, *Du contrat social ou Principes du droit politique,* Amsterdam, 1762.

[108] On the intellectual-historical foundations of *liberalism*, see in detail Kersting, *Verteidigung des Liberalismus*, Hamburg, 2009, 9 ff., 37 ff. On the diversity of the conceptions of liberalism discussed today, Kersting, *Der liberale Liberalismus*, Tübingen, 2006, 8 et seq. (with numerous references, esp. in FN 1).

[109] See A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, London, 1776.

[110] D. Ricardo, *Essay on the Influence of a low Price of Corn on the Profits of Stock*, London, 1815*; idem, On the Principles of Political Economy and Taxation*, London, 1817.

[111] J.-B. Say, *Traité d'économie politique ou simple exposition de la manière dont se forment, se distribuent, et se consomment les richesses*, Paris, 1803.

[112] J.St. Mill, *On libert*y, London, 1859.

dom, i.e. the possibility of opposing an undesirable contract by refusing consent, gained increasing importance as a substantive guarantee of individual freedom.[113]

A major part in this plays the ethics of freedom of *Immanuel Kant* (1724 - 1804), who understood the legal order as an external "order of freedom and coexistence", based on the formal criteria of "generality, equality and reciprocity".[114] *Kant* understood the civil law contract, defined as an

"*Akt der vereinigten Willkür zweier Personen, wodurch überhaupt das Seine des Einen auf den Anderen übergeht*" (= "Act of the united arbitrariness of two persons, by which the very being of one passes to the other").[115]

Kant understood the contract as an instrument to enable a derivative acquisition of rights and a change in the existing allocation of goods. Although constructively following *Hugo Grotius' Versprechenslehre* (= theory of promises)[116] and considering the contract as a combination of two "juridical acts of arbitrariness", namely as a "promise (*promissum*) and (...) acceptance (*acceptatio*)"[117], *Kant* transfers his postulated strict separation of law and morality[118] in his contract theory: The contractual obligation is not derived from a somehow morally-ethically founded binding effect of the promise, but from the "united will of both".[119] Due to the "categorical imperative", which can be logically derived from the human nature and the human self-preservation instinct, the contracting parties must be mutually held to the willful arrangement of their legal relations, otherwise the contract could not provide the intended autonomy-based change of the legal *status quo* and therefore the freedom of each individual to a self-determined arrangement of its environment.[120]

With this purely secular, solely on the autonomy of the participants' based, justification of the contractual obligations *Kant* succeeds to readjust the Law of Contract and to finally overcome the moralization of contract thinking that took place in the medieval (Canon) Law[121]: Despite the formal reference to the medi-

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[113] KÖTZ, FLESSNER, *EuropVertragsrecht*, 6.

[114] Thus aptly KERSTING, *Kant* über *Recht*, Paderborn, 2004, 16, 49. Likewise DIESSELHORST, *Naturzustand und Sozialvertrag bei Hobbes und Kant*, Göttingen, 1988, 60 f.; A. W. WOOD, *Kant's Doctrine of Right: Introduction*, Berlin, 1999, 19 ff., 38.

[115] I. KANT, *Die Metaphysik der Sitten. Erster Theil: Metaphysische Anfangsgründe der Rechtslehre* (1797), Berlin, 1914, 203 ff., 271. For a detailed discussion, see KERSTING, *Wohlgeordnete Freiheit,* 229 ff.; KERSTING, *Kant,* 85.

[116] See above.

[117] KANT, *Die Metaphysik der Sitten*, 203 ff., 272, 284. See also KERSTING, *Wohlgeordnete Freiheit,* 231 f.; KERSTING, *Kant*, 86.

[118] See e.g. R. ALEXY, *Begriff und Geltung des Rechts*, Freiburg/Breisgau, 2002, 39 ff.

[119] KANT, *Die Metaphysik der Sitten,* 203 ff., 272, similar 271, 273. In detail KERSTING, *Kant,* 85 ff.; KERSTING, *Wohlgeordnete Freiheit,* 232 ff.

[120] KANT, *Die Metaphysik der Sitten*, 203 ff., 273.

[121] See above.

eval *Versprechenslehre* [= doctrine of promises], *Kant* understood the contractual mechanism and its necessity to reach a common *consensus* as the safeguard of the free will of the contracting parties. Therefore, no further requirements (like the observance of certain forms or the necessity of a *iustum pretium*, a material equivalence or a certain motivation of the parties [„Triebfeder"]) are required. The emergence of the contract is based exclusively on the will of both parties, whereby the contractual binding effect is identified as an *a priori* necessity derived from the function of the contract itself. Like the structurally identical *contractus originarius* (= society-constituting original social contract[122]), the civil law contracts secure the freedom and individuality of all citizens who are formally equal in rights. The contract mechanism enables a flexible organization of all personal legal relations, which can be individually adapted to the respective needs. In particular, private contracts allow a market-like organization of the distribution of goods, as well as a decentralized self-governance of the community, which is largely free of state intervention and therefore an important sphere of liberty.

1.5. *The German Civil Code as an Expression of a Liberal-Individualistic Understanding of Contract and Society*

After the well-known codification dispute between *Justus Thibaut* (1772 - 1840) and *Friedrich Carl von Savigny* (1779 - 1861)[123] had been decided in favor of the proponents of a uniform codification of private law in Germany, there followed a tough struggle – soon described as a fundamental "Principienkampf der Gegenwart" ["struggle of principles of the present"][124] – for the best possible concept of the future private law system. The protagonists of the much

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[122] KANT, *Die Metaphysik der Sitten*, 273 ff., 295, 297 f; KANT, *Zum ewigen Frieden (1795)*, Berlin, 1923, 341 ff., 348 f., 354 ff. See also KERSTING, *Wohlgeordnete Freiheit,* 269 ff.; KERSTING, *Die politische Philosophie des Gesellschaftsvertrags*, Darmstadt, 2005, 180 ff.; KERSTING, *Kant,* 114 ff.

[123] SCHMOECKEL, RÜCKERT, ZIMMERMANN, *Historisch-kritischer Kommentar zum BGB*, vor § 1 Para. 8; H.-P. BENÖHR, *Die Grundlagen des BGB - Das Gutachten der Vorkommission von 1874*, in *JuS,* 1977, 79 ff., 682 ff.; J. BENEDICT, *Savigny ist tot! Zum 150. Todestag von Friedrich Carl von Savigny und zu seiner Bedeutung für die heutige Rechtswissenschaft*, in *JZ*, 2011, 1073 ff., 1082 f.; A. RAHMATIAN, *Friedrich Carl von Savigny's Beruf and Volksgeistlehre*, in *The Journal of Legal History*, 28, 2007, 1 ff., 4 f., 7; SCHLOSSER, *Grundzüge,* 143 ff., 148, 170; WESENBERG, WESENER, *Privatrechtsgeschichte*, 175 ff.; WIEACKER, *Privatrechtsgeschichte,* 390 ff.

[124] Explicitly C. A. SCHMIDT VON ILMENAU, *Der prinzipielle Unterschied zwischen Römischem und Germanischem Recht*, Aalen, 1964, Vorrede, VII f. See also S. HOFER, *Freiheit ohne Grenzen?*, Tübingen, 2001, 56 f.

more multifaceted than sometimes scornfully noted[125] debate were the representatives of the *Historische Rechtsschule* [*historical school of law*][126] founded by *Savigny* and *Karl Friedrich Eichhorn* (1781 - 1854), who understood the law as an "organically grown", "evolved" product of a historical development process and therefore as a core part of the "common consciousness of the people".[127] In this context, *Romanist ideas*, mainly those of *Savigny* himself, *Georg Friedrich Puchta* (1798 - 1846) and *Bernhard Windscheid* (1817 - 1892) and their associated *Pandektenwissenschaft*,[128] collided with *Germanist views* of law.[129] It is very important for the present studies that both currents were based not only on a different understanding of the authoritative order of reference, but also – as *Hofer* has convincingly pointed out – on a fundamentally different understanding of freedom[130]: In principle, the *Germanist concept* of autonomy always had the community-relatedness of the individual in mind[131], which is why private autonomous freedom is regarded from the outset as immanently limited by "higher interests of the totality" and "general welfare"-purposes.[132] In contrast, the *Romanists* underlined the "natural freedom of the individual" (*Puchta*) as the central element of the legal order.[133] The core of their considerations was the "subjective freedom of will of the individual" – to be thought "necessarily unrestricted" – and thus a liberal-individualistic understanding of autonomy emphasizing the right of self-determination of all-natural legal persons.[134] According to the *Romanist* under-

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[125] See *Wieacker's* inaccurate criticism of a supposedly „limitless" pandectist understanding of law, WIEACKER, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft*, Karlsruhe, 1953, 6, 9 f., 18, 24 (et passim); WIEACKER, *Privatrechtsgeschichte,* 375 ff., 397 f., 441 ff.

[126] Instead of many, E.-W. BÖCKENFÖRDE, *Staat, Gesellschaft, Freiheit*, Frankfurt am Main, 1976, 9 ff.; RAHMATIAN, *Friedrich Carl von Savigny's Beruf,* 1 ff., 2; B. WINDSCHEID, *Die geschichtliche Schule in der Rechtswissenschaft*, Leipzig, 1904, 66 ff.

[127] F. C. VON SAVIGNY, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*, Frankfurt/Main, 1814, 11; VON SAVIGNY, *System des heutigen römischen Rechts*, Bd. I, Aalen, 1973, 13 ff., 45 ff. See also SCHLOSSER, *Grundzüge,*145 ff. (on the influence of the philosophy of *Johann Gottfried Herder (1744 – 1803)* on *Savigny*).

[128] SCHLOSSER, *Grundzüge,* 152 f.; WIEACKER, *Privatrechtsgeschichte,* 430 ff.

[129] On the inhomogeneity of the Germanic legal tradition, see B. KANNOWSKI, *Germanisches Recht heute*, in *JZ*, 2012, 321 ff., 327; SCHLOSSER, *Grundzüge,* 159 ("*Wishful thinking of the Germanists who chased after this myth*").

[130] HOFER, *Freiheit,* 15 ff.

[131] In detail *Idem*, 23 ff.

[132] For example, the important German scholar *Georg Beseler* (1809 - 1888), G. BESELER, *Volksrecht und Juristenrecht*, Leipzig, 1843, 177. For a detailed discussion, see HOFER, *Freiheit,* 36 ff.

[133] HOFER, *Freiheit,* 25 (citing *Puchta*, Gewohnheitsrecht, Part I, 156, 158 f.).

[134] SCHMIDT VON ILMENAU, *Der prinzipielle Unterschied,* Vorrede, V (with critical reference to *Jhering*), 29 ff., 47 ff., 82 ff. See in detail HOFER, *Freiheit,* 50 ff.

standing – and in diametric opposition to the supposed "objectivity" and "materiality" of the Germanic concept of law – the fundamental task of the state is the protection of the "legal spheres of the individual citizens", whereas the Germanic law refers to the principle of a „sittlichen Freiheit" ["moral freedom"] of the individual based on a "higher divine will independent of the will of the individual people".[135] Accordingly, *Romanist* contract law was based on the autonomous will of the parties, while *Germanists* focused their attention on the moral obligation of the individual to his contractual promise.[136] This dispute between *Germanists* and *Romance* scholars about the content and the (immanent) limits of individual freedom found its counterpart in the debate about the possible economical outline of the future society: While the so-called *Freihändler* ["*Free-traders*"] supported the individual freedom of the individual market players, the *Kathedersozialisten* ["*Socialists*"] emphasized the commitment and the obligations of the individual vis-à-vis a higher "common good" ["*Gemeinswohl*"].[137]

For this paper, it is decisive to understand that the authors of the German Civil Code [*Bürgerliches Gesetzbuch, BGB*] of January 1st, 1900 – fully aware of this discussions – deliberately voted for the *Romanist* understanding of private autonomy and freedom of contract and thus decidedly for a model of private law committed to *Kant's* ideal of freedom, focusing on the autonomy of the individual and emphasizing the importance of decentralized spontaneous – and as far as possible uninfluenced by state intervention – organization of the private legal relationships.[138] The German private law system is therefore based on a "sophisticated"[139] model of coordination of interpersonal coexistence, which ensures the individual the greatest possible freedom – including internal freedom – vis-à-vis the state, but also vis-à-vis his fellow citizens, without neglecting the indispensable re-

[135] SCHMIDT VON ILMENAU, *Der prinzipielle Unterschied,* 48, 53 ff., 56, 124 ff., 166 f. See in detail HOFER, *Freiheit,* 51 ff.

[136] SCHMIDT VON ILMENAU, *Der prinzipielle Unterschied,* 251 ff., 261 ff. On this point, HOFER, *Freiheit,* 55.

[137] In detail HOFER, *Freiheit,* 77 ff., 98.

[138] See e.g. WIEACKER, *Das Sozialmodell,* 6; WIEACKER, *Das Bürgerliche Recht im Wandel der Gesellschaftsordnungen*, in *Festschrift zum 100jährigen Bestehen des Deutschen Juristentages 1860-1960* (E. v. CAEMMERER, E. FRIESENHAHN, R. LANGE hrsg.), Bd. II, Karlsruhe, 1960, 1 ff., 2 f.; BÖCKENFÖRDE, *Recht, Staat, Freiheit*, Frankfurt am Main, 1992[2], 42 ff., 92 ff.; E. GRABITZ, *Freiheit und Verfassungsrecht*, Tübingen, 1976, 183 ff., 235 ff.; H. G. ISELE, *Ein halbes Jahrhundert deutsches Bürgerliches Gesetzbuch*, in *AcP*, 150, 1949, 1 ff.; J. RÜCKERT, *Das bürgerliche Gesetzbuch - ein Gesetzbuch ohne Chance*, in *JZ*, 2003, 749 ff., 755 ff.; R. WIETHÖLTER, *Rechtswissenschaft*, Frankfurt a.M., 1968, 68 ff., 175 ff.

[139] KERSTING, *Der liberale Liberalismus*, 8, 54 ff.; KERSTING, *Verteidigung,* 204 (generally on liberalism).

strictions on the individual's natural freedom of action in the interest of well-ordered community life.[140]

Within this understanding of private law, special importance is attached to the contract mechanism: Following *Kant´s* conception, it is understood as a central instrument of self-determined regulation of private law relationships as a guarantee of individual autonomy. The central element within the contracting mechanism is the (negative) contractual freedom contained in the necessity of a contractual *consensus*. The latter leaves the contracting parties the possibility of conserving the legal status quo, including the existing allocation of goods, by simply refraining from concluding a contract. In modern terms, the contract mechanism is therefore a *procedural justice-generating mechanism*[141] and can thus be qualified as a subcategory of *Serving[142] Procedural Justice.*[143] Admittedly, the concretely achieved contract result is not automatically considered "just".[144] However, as a procedure that guarantees the same *legal chances* of self-realization and thus satisfies *fundamental procedural fairness criteria*, the contract mechanism is part of a polycentric, self-networking system of competition ("market"), so due to *invisible hands* of a functioning competition order and despite the absence of *a priori* valid valuation standards[145], contracts lead – at least *idealiter* – to a fair and just allocation of goods and therefore build an important first step to reach *iustitia commutativa*.[146]

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[140] R. OGOREK, *Privatautonomie unter Justizkontrolle - Zur Rechtsprechung des Reichsoberhandelsgerichts (1870 - 1879)*, in *ZHR*, 150, 1986, 87 ff., 93 ff.

[141] In contrast to "procedural theories of justice," in which justice is justified with the help of procedural considerations, procedural justice-generating procedures attempt to realize justice in reality by correctly carrying out a procedure that is understood to be just, while observing the necessary prerequisites for its application. In detail, A. TSCHENTSCHER, *Prozedurale Theorien der Gerechtigkeit*, Baden-Baden, 2009², 88 ff., 123, 133 f.; ZENTHÖFER, *Was ist Moral,* 822 ff., 824.

On the distinction between "procedural theories of justice" and "theories of procedural justice," see in detail TSCHENTSCHER, *Prozedurale Theorien*, 132 Fn. 417.

[142] For details see KERSTING, *Die politische Philosophie,* 259 ff., esp. 264 ff.; TSCHENTSCHER, *Prozedurale Theorien*, 127 ff.

[143] See e.g. TSCHENTSCHER, *Prozedurale Theorien*, 88. In this regard also C.-W. CANARIS, *Wandlungen des Schuldvertragsrechts - Tendenzen zu seiner Materialisierung*, in *AcP*, 200, 2000, 273 ff., 283.

[144] This step – which is actually consistent according to its basic conception – is not even taken by the Objective or Subjective Doctrines of Correctness, since the state would thereby get rid of all possibilities of controlling the content of contracts and would therefore lose its possibilities of social control.

[145] See CANARIS, *Wandlungen*, 273 ff.

[146] The distinction between *iustitia commutativa* (justice of exchange) and *iustitia distributiva* (justice of distribution) goes back to *Aristotle*, Nicomachean Ethics, V 5 1130b ff. See also E. M. BELSER, *Freiheit und Gerechtigkeit im Vertragsrecht*, Freiburg (Schweiz), 2000, 6 ff.; CANARIS, *Wandlungen,* 273 ff., 285; CANARIS, *Die Bedeutung der iustitia distributiva im*

It is therefore crucial for a modern understanding of contracts that the contracting procedure,which appears purely formal at first glance, also finds substantive legitimacy due to its embedding in a market-oriented overall system, provided – and this is decisive for the further considerations – that the functional conditions of both instruments are guaranteed.

2. The significance of the *pacta sunt servanda*-principle for a modern understanding of contracts and consequences for today's contract law

The result of our short historical overview on the *pacta sunt servanda*-principle[147] is that the binding force of contractual obligations is one of the basic constituents of a modern, value-pluralistic private law society: On the one hand, it secures the individual's self-determination and self-development – especially via the *negative freedom of contract* immanent in the contract mechanism (i.e. the ability to maintain the legal status quo by refusing to accept a contract) and since the *consensus* on the contract also implies the subjective approval of the result of the contract. On the other hand, decentrally concluded contracts are at the same time part of a self-coordinating system of goods allocation ("market"), which – at least ideally – leads to the best possible distribution and use of goods and thus makes a valuable contribution to the common good on a supra-individual and macroeconomic level.

However – and this is central for a modern understanding of contract – the contract can only fulfill these two functions if its functional conditions are met. A modern private law system must, therefore, on the one hand, take precautions to correct disruptions in the contract formation process (lack of freedom to refuse to conclude a contract; deception, error, threat, lack of information through no fault of one's own, other defects of will, etc.; dispositions to the detriment of uninvolved third parties [e.g., contract at the expense of third parties] or society [e.g., violations of basic social values standardize in statutory prohibitions (*contra leges*; in Germany now §

deutschen Vertragsrecht, München, 1997, 9 ff.; KAUFMANN, *Rechtsphilosophie*, 157 ff.; K. F. RÖHL, H. C. RÖHL, *Allgemeine Rechtslehre*, Köln, 2008[3], 340 ff.

On the influence of the *Aristotelian* idea of exchange justice on the *Codex Iuris Civilis*, see H. COING, *Zum Einfluss der Philosophie des Aristoteles auf die Entwicklung des römischen Rechts*, in *ZSS*, 69, 1952, 24 ff., 39 ff.

On *Aristotle's* influence on the medieval doctrine of *iustum pretium*, developed in particular by *Thomas Aquinas*, KÖTZ, FLESSNER, *EuropVertragsrecht*, 198 f.

[147] In detail SCHÄRTL, *Die Guten Sitten.*

134 BGB) or good morals (*contra bonos mores*; in Germany now § 138 BGB[148])]. On the other hand, the functional conditions of free, functioning markets must be ensured and, for example, market failures due to the formation of monopolies must be prevented. There, the state and especially the courts must resist the temptation to interfere with the free play of (market) forces through well-intentioned contractual content control and thus provoke misallocations. The present article therefore emphasizes the responsibility of judges to exercise judicial self-restraint not only with regard to possible fundamental political decisions[188], but also with regard to a supposedly just-content control of contracts and the materialization tendencies that can be observed in private law.

C. *Pacta sunt servanda* – conclusion and perspective for future studies

The German Civil Code's understanding of private autonomy, with its link to Roman law as well as to *Kant's* ethics of freedom and its emphasis on the autonomy of the individual and his or her right to self-determination, although dating of January 1st, 1900, is still up-to-date, especially in the modern, value-pluralistic private law society of the 21st century.[149] Cornerstone hereby is the *pacta sunt servanda*-principle, which – provided that the functional conditions of both the contract conclusion procedure and the complementary market order are observed – in principle may not be restricted by judicial content and contract review. Any – even well-meaning – encroachment on the freedom of decentralized self-governance must therefore be subjected to a special duty to justify itself, especially since there is a risk that this will lead to a misallocation of resources. Of course, it must not be misunderstood that this conception of the contract – as well as the entire liberal state model of a social[150] market economy – is based on a thoroughly demanding conception of man and society, which places self-determination and self-responsibility of the individual in the foreground, but at the same time also guarantees the freedom and equality of all those subject to the law and reduces state interference in the private organization of life to the necessary minimum. In this context, the importance of self-responsibility for a liberal social order cannot be overemphasized, which is mirrored

[148] *Ibidem.*

[149] K. Stern, *Rechtliche und* ökonomische *Bedingungen der Freiheit*, in *FamRZ*, 1976, 129 ff. In a decidedly different view, Wieacker, *Das Sozialmodell,* 16 (codification of the „ideals of nineteenth-century bourgeois society").

[150] Kersting, *Der liberale Liberalismus,* 31 f. („basal welfare state," „sock-legalitarianism"). Cf. Kersting, *Kritik der Gleichheit*, Weilerswist, 2002, 37 ff.

in the principle of *pacta sunt servanda,* i.e. the binding of agreements made in accordance with the contractual procedure.

Even if the present studies primarily concern German law and its understanding of private autonomy, the contribution nevertheless hopes to have developed principles for a modern understanding of contracts across legal systems and to have initiated a fruitful comparative law discussion. Special thanks therefore to the initiators of this volume, combined with the hope for numerous further transnational exchanges of ideas in the future!