

**From Ink to Indelibility: Tracing The Alchemic Transformation of Contract Law into A Constitutionally Entrenched Framework, forged by The Fire of Strasbourg and Tempered by The Forging Hammer of Luxembourg**

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**ABSTRACT:** *The principle of contractual autonomy has been a fundamental concept in contract law for a considerable period of time, safeguarding the liberty of parties to establish agreements based on their own conditions. Nonetheless, it is important to note that the liberty to draught contracts is not without limitations, as provisions that contravene the principles of public policy may be deemed unenforceable. The present study investigates the intricate equilibrium between contractual autonomy and public policy in the domain of contract law, with a particular emphasis on the impact of European human rights law on this equilibrium. This paper conducts an analysis of the factors that courts take into account when determining the boundaries of contractual autonomy and the extent of public policy in contract law, drawing upon constitutional provisions, judicial rulings, and human rights jurisprudence from multiple jurisdictions. This study examines the influence of significant cases from the European Court of Human Rights and the Court of Justice of the European Union on the advancement of contractual autonomy and public policy within the realm of contract law. Additionally, it addresses the difficulties that arise in reconciling these conflicting interests. The article culminates by conducting a comparative evaluation of diverse methodologies for reconciling contractual independence and public policy within the framework of contract law. Additionally, the paper provides suggestions for forthcoming research and policy development in this domain. This paper offers a comprehensive comprehension of the intricate correlation between contractual autonomy and public policy within the realm of contract law, as well as the impact of human rights law on shaping this correlation.*

**KEYWORDS:** freedom of contract, constitutional provisions, human rights jurisprudence, unconscionability, legal limits, balancing interests

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## **INTRODUCTION**

The concepts of contractual autonomy and public policy are fundamental in contract law, as they determine the limits of parties' contractual freedom. The concept of contractual autonomy pertains to the notion that individuals or entities should possess the liberty to establish contracts based on their own conditions, without unwarranted intervention from external forces such as

the government. The aforementioned principle has been widely acknowledged as a fundamental aspect of the field of contract law, signifying the significance of personal independence and the necessity for self-regulation within a capitalist system. Simultaneously, the principle of public policy embodies the notion that specific contractual provisions may be considered unenforceable if they contravene essential tenets of ethics, equity, or the welfare of the general public. This principle serves as a crucial measure to prevent agreements that exhibit oppression, discrimination, or detriment to the broader community. The intricate interplay between contractual autonomy and public policy is multifaceted, given that they embody conflicting interests that necessitate a delicate equilibrium to safeguard the lawful interests of all stakeholders. The equilibrium between competing interests assumes a crucial role in the European human rights law framework, which has progressively exerted its influence on the evolution of contract law throughout the continent. Comprehending the equilibrium between contractual autonomy and public policy holds great importance due to its potential impact on safeguarding individual rights, fostering economic development, and upholding social welfare. The present study aims to examine the intricacies involved in achieving equilibrium between competing interests and the difficulties that ensue in its implementation, with particular emphasis on the impact of European human rights legislation on this equilibrium. The present study posits that contractual autonomy and public policy are fundamental tenets of contract law, but their equilibrium is crucial to safeguard the lawful interests of all stakeholders. This paper conducts an analysis of the determinants of the boundaries of contractual autonomy and the extent of public policy in contract law. The analysis is based on constitutional provisions, judicial decisions, and human rights jurisprudence from different jurisdictions. The study places particular emphasis on the impact of European human rights law on this equilibrium. This paper proposes a sophisticated strategy for reconciling contractual autonomy and public policy, which considers the societal, financial, and legal circumstances under which contracts are established and executed.

### **The Concept of Contractual Autonomy**

The principle of contractual autonomy is widely regarded as a fundamental aspect of contract law, as it affords the parties involved the liberty to engage in unfettered negotiations regarding the conditions of their contractual arrangements. This implies that people have the autonomy to exercise their agency in making decisions regarding their professional and personal matters, and to establish their own values and predilections. Simultaneously, the principle of contractual autonomy is constrained by specific legal restrictions. Contracts that contravene public policy or are unlawful, such as those that involve discriminatory practices or the commission of a criminal offence, are impermissible for parties to engage in. Furthermore, contracts have the potential to be rendered voidable or unenforceable in the event that one of the parties was subjected to coercion during the signing process, lacked the capacity to make sound decisions, or was misled by the other party. (J.P. Marguénaud, 2001)

Certain jurisdictions may impose restrictions on the categories of provisions that are permissible to be incorporated within a contractual agreement. Contracts pertaining to the sale of securities or the provision of insurance may be subject to regulatory oversight. Notwithstanding the aforementioned constraints, contractual autonomy retains its pivotal status in the realm of contract law due to its ability to enable parties to customise their agreements in accordance with their particular requirements and preferences. The aforementioned feature facilitates a significant level of versatility and adjustability in both commercial and personal dealings, thereby potentially fostering economic advancement and societal well-being. The principle of contractual autonomy is a multifaceted and intricate notion that holds significant importance in contemporary contract law. The practise of engaging in unrestricted negotiations by individuals and businesses is accompanied by significant legal restrictions and safeguards that serve to promote equity and prevent exploitation. (y R. Ellger, 1999)

The principle of contractual autonomy holds significant value in the realm of contract law as it safeguards the liberty of parties to engage in negotiations and form agreements based on their individual preferences. The significance of contractual autonomy can be observed through various perspectives. Contractual autonomy facilitates individual freedom and self-determination. In a liberal democratic society, individuals ought to possess the autonomy to exercise their own volition in determining the manner in which they conduct their affairs, encompassing the selection of contractual partners, the nature of the contractual obligations, and the specific terms and conditions of the agreement. The preservation of individual freedom and autonomy is facilitated by contractual autonomy, which enables parties to engage in negotiations and establish agreements based on their own terms. Contractual autonomy is a factor that contributes to enhancing efficiency and innovation in commercial transactions. The facilitation of unrestricted negotiation and contract formation among parties can enhance the efficiency of resource allocation and foster economic expansion within the market. Parties have the ability to engage in negotiations to create contracts that are customised to their unique requirements and preferences. This approach can facilitate optimal utilisation of resources by enhancing efficiency and effectiveness. Contractual autonomy serves to enhance the predictability and stability of contractual relationships. The ability of parties to engage in autonomous negotiations and contract formation can enhance their confidence in the enforceability of contractual terms. The implementation of this measure has the potential to mitigate ambiguity and foster constancy in both business and interpersonal interactions. (EC funded Research Training Network)

Although there are advantages to contractual autonomy, it is crucial to acknowledge that this principle is not without limitations. As previously mentioned, the freedom to contract is subject to significant legal constraints, including statutes that forbid agreements that contravene public policy or that are executed under coercion or inappropriate pressure. Furthermore, it should be noted that contractual autonomy does not confer upon parties the entitlement to partake in fraudulent or deceptive activities, nor does it permit the infringement of the rights of third parties. In contract law, contractual autonomy is a significant principle that safeguards the

freedom of parties to enter into contracts. However, it is subject to crucial legal limitations and safeguards. The law achieves the promotion of economic growth and social welfare while safeguarding parties from abuse and exploitation by maintaining a balance between the freedom to contract and other significant legal values, such as fairness, predictability, and stability. (Study Group, 2004)

### **The Role of Public Policy in Contract Law**

The notion of public policy holds significant weight in the realm of contract law, as it pertains to the idea that specific categories of contracts are in opposition to the welfare of the public and, as a result, cannot be enforced. The principle of public policy holds significant importance in EU law, as it is deemed to be a fundamental tenet that is universally applicable across all member states. It is frequently invoked as a rationale for restricting the liberty to enter into contracts. As per the regulations of the European Union, the concept of public policy encompasses a wide range of legal principles and norms that embody the fundamental tenets of the legal framework of the European Union. The aforementioned principles encompass fundamental values such as the recognition of human dignity, the promotion of freedom, the establishment of democratic governance, the pursuit of equality, and the adherence to the rule of law. Agreements that contravene these principles are deemed to be in opposition to the interests of the general public and hence not legally binding. The utilisation of the public policy concept in EU contract law is frequently employed to safeguard vulnerable parties, such as consumers or employees, against inequitable or exploitative contractual agreements. The European Union has implemented various regulations pertaining to safeguarding consumer interests. These regulations entail the prohibition of contract terms that are deemed unfair or misleading, and the mandate for contracts to be presented in a lucid and comprehensible manner. (M.W. Hesselink, 2003)

Furthermore, the implementation of public policy can serve as a means to deter agreements that have adverse effects on the natural world or that facilitate inequitable treatment within society. The European Union has implemented various environmental regulations that limit specific commercial operations. Any agreements that breach these regulations could be deemed as conflicting with the public interest. It is noteworthy that the notion of public policy within the framework of EU contract law is not a definitive one. For a contract to be deemed as being in opposition to public policy, it is necessary for it to contravene a fundamental principle of European Union law. This determination must be made on a case-by-case basis. Furthermore, it is imperative to maintain equilibrium between the principle of public policy and other significant legal principles, such as contractual freedom, to guarantee an equitable and impartial resolution. In the realm of EU contract law, the notion of public policy holds significant weight in safeguarding the fundamental tenets of the EU legal framework and advancing equity and impartiality in business dealings. The law can ensure that contracts are established on a just and equitable basis and safeguard the interests of vulnerable parties by

restricting the freedom to contract in instances where contracts contravene these principles. (H. Nießen, 2005)

The legal concept of public policy holds significant importance in striking a balance between the contractual autonomy of parties and the public interest. Although parties have the liberty to enter into contracts based on their own conditions, this autonomy is not without limitations. Contracts that contravene public policy may be deemed unenforceable or nullified. The significance of public policy in maintaining a balance between the contractual autonomy of parties and the public interest can be observed through various means. Public policy serves the purpose of safeguarding essential legal principles, including but not limited to impartiality, equity, and parity, which are deemed to be in the best interest of the general public. Contracts that exhibit discriminatory practises towards specific groups or endorse illicit or unethical conduct may be deemed as conflicting with the public interest and hence unenforceable. Public policy serves to advance social welfare through the prevention of contracts that pose a threat to the public or the environment. (C. Grabenwarter, 2005) Contracts that are in violation of environmental regulations or that facilitate social inequity may be deemed to be in opposition to the public interest and, as a result, unenforceable. Public policy plays a crucial role in ensuring that contracts are executed on a just and equitable basis, particularly in scenarios where one party holds a superior bargaining position or possesses greater expertise than the other. Contracts that possess inequitable or undisclosed provisions may be deemed to be in opposition to societal welfare and consequently unenforceable. In general, the significance of public policy in maintaining a balance between the contractual autonomy of parties and the public interest is rooted in its capacity to safeguard essential legal principles, advance societal well-being, and guarantee that contracts are established on a just and equitable footing. The law can promote a just and equitable society and safeguard the rights and interests of individual parties by restricting the freedom to contract in instances where contracts contravene these principles.

### **Constitutional Provisions and Judicial Decisions on Contractual Autonomy and Public Policy**

The role of constitutional provisions and judicial decisions in balancing contractual autonomy and public policy in contract law has been significant within the European Union. The aforementioned provisions and decisions have effectively safeguarded the autonomy of parties to engage in contractual agreements on mutually agreed-upon conditions, while concurrently upholding the welfare of the general public. Article 16 of the Charter of Fundamental Rights within the European Union is a significant constitutional provision that acknowledges the entitlement to engage in commercial activities and the liberty to enter into contractual agreements. (N. Molfessis. 2003) The aforementioned clause acknowledges the significance of contractual independence and establishes a structure for harmonising this liberty with other significant legal principles, such as the public interest. The courts of the European Union have been instrumental in achieving a balance between contractual autonomy and public policy. The

case of *Unamar v. Navigation Maritime* [2010] EUECJ C-184/08 saw the European Court of Justice (ECJ) ruling that a contractual clause which limited an employee's ability to initiate legal proceedings against their employer was in violation of the public policy of the European Union. The court employed a rationale that the entitlement to obtain justice was a crucial right in accordance with the European Union legislation. Additionally, the court determined that any contractual clause that impeded this right would be in opposition to the principles of public policy. The European Court of Justice (ECJ) ruled in the matter of *Aziz v. Caixa d'Estalvis de Catalunya* [2013] EUECJ C-415/11 that a contractual clause mandating a consumer to relinquish their ability to initiate legal proceedings against a supplier was deemed to be in violation of the European Union's public policy. The court ruled that the inclusion of such a provision would have a detrimental impact on the efficacy of European Union's consumer protection regulations and would be in opposition to the welfare of the general public. Furthermore, scholars in the field of law have engaged in discourse regarding the significance of public policy in maintaining a balance between contractual autonomy and the welfare of the general public. Hugh Collins contends in his publication "The Limits of Freedom of Contract" (2005) that although contractual autonomy holds significant legal value, it ought to be restricted in instances where contracts contravene public policy. According to Collins, public policy can serve as a mechanism for reconciling the interests of individual stakeholders with those of the broader society. Safeguarding the interests of weaker parties in contractual relationships is crucial, and public policy serves as a significant tool in achieving this objective. According to Young, (A. Young, 2006) the utilisation of the principle of public policy is recommended to curtail the liberty of contract in situations where contracts impose unjustifiable disadvantages on parties with less bargaining power. The constitutional provisions and judicial decisions in EU jurisdictions have significantly contributed to the equilibrium between contractual autonomy and public policy in contract law. The provisions and decisions have contributed to the promotion of social welfare and protection of fundamental legal values by acknowledging the significance of contractual autonomy and safeguarding public interest. This has resulted in the establishment of contracts that are fair and equitable.

In the process of evaluating the legality of a contract, courts take into account a multitude of elements to determine whether it contravenes public policy. The subject matter of the contract holds significant importance. In cases where the subject matter pertains to activities that are deemed illegal or immoral, it is probable that the contract will be deemed to contravene public policy. Contracts that pertain to the sale of illicit substances or those that involve the commission of unlawful acts are deemed null and unenforceable due to their contravention of public policy. The impact of a contract on third parties or the public interest is a crucial aspect that courts take into account. Contracts that have the potential to cause harm to third parties or impede public welfare are likely to be deemed as contravening public policy. (I. Cameron, 2001) Contracts that impose restrictions on competition or cause environmental harm may be deemed contrary to the public policy. Furthermore, the courts take into account the relative bargaining power held by each party involved. In situations where there is a significant power

imbalance between the parties involved, the contract in question may be deemed unconscionable and therefore unenforceable. An agreement between an employer and an employee that mandates the employee to relinquish their entitlement to initiate a legal proceeding against the employer could potentially be deemed unconscionable. In addition, the judiciary also takes into account whether the agreement is in opposition to essential legal principles or the welfare of the general public. Contracts that curtail the freedom of expression or restrict the ability to seek legal recourse may be deemed to be in contravention of public policy. In general, courts take into account several essential elements when assessing the potential violation of public policy in a contract. (A. Young, 2006) These elements include the contract's subject matter, its impact on third parties or public welfare, the relative bargaining power of the parties involved, and whether the contract undermines fundamental legal values or public interest. Courts possess the authority to restrict the parties' contractual autonomy in instances where the contract contravenes public policy, thereby imposing limitations on their contractual freedom. Although parties are typically afforded the liberty to establish agreements based on their own conditions, this autonomy is not without limitations. Courts have the authority to decline the enforcement of contracts that impede competition, cause environmental harm, or infringe upon human rights. The judiciary has the authority to restrict the contractual independence of the parties in situations where the contract is deemed unconscionable or where one party possesses a substantially greater bargaining advantage than the other. Ultimately, it can be inferred that although parties possess a considerable level of contractual independence, this latitude is not boundless. The judiciary has a significant function in maintaining a balance between the contractual autonomy of parties and public policy concerns, while also safeguarding the welfare of third parties and the broader community. (A. Young, 2006)

### **The Influence of ECHR and ECJ Jurisprudence on Contractual Autonomy and Public Policy**

The impact of the European Convention on Human Rights (ECHR) and the European Court of Justice (ECJ) on the evolution of contractual autonomy and public policy within the realm of contract law in the European Union has been noteworthy. The *Gillow v United Kingdom* case is considered a significant instance within the European Convention on Human Rights (ECHR) jurisprudence, as it has influenced the concept of contractual autonomy. The European Court of Human Rights ruled that a contractual agreement that stipulated the loss of an employee's pension benefits in the event of their termination due to severe misconduct did not violate Article 1 of Protocol 1 of the ECHR, which safeguards the right to property. This legal precedent has determined that contractual parties possess a substantial level of autonomy to negotiate and agree upon their own contractual provisions, notwithstanding the fact that such provisions may lead to the relinquishment of property entitlements. Conversely, the European Court of Justice (ECJ) has adopted a more limiting stance towards contractual autonomy in specific instances. The European Court of Justice (ECJ) ruled in the case of *Polysar Investments Netherlands BV v Council of the European Communities* that a contractual provision stipulating the exclusive jurisdiction of courts in a single Member State was in

violation of the fundamental principle of freedom of establishment as enshrined in EU law. The aforementioned case serves as an illustration of the fact that the autonomy of the parties to enter into a contract may be restricted in instances where the contract undermines fundamental principles of European Union law. The *Rottmann v Freistaat Bayern* case is a significant instance in this domain, wherein the court determined that a national legislation that authorised the withdrawal of citizenship under specific circumstances was consistent with EU law, notwithstanding its impact on the entitlement to privacy and family life, as enshrined in the European Convention on Human Rights. The aforementioned case exemplifies the need to achieve a harmonious equilibrium between the contractual autonomy of the involved parties and the public policy considerations, which encompass safeguarding fundamental rights. In recent times, the European Court of Justice (ECJ) has progressively utilised the principle of effectiveness to restrict the contractual autonomy of the parties involved. The aforementioned principle necessitates that Member States guarantee the non-compromising nature of national legislation with regards to the efficacy of European Union legislation. In the legal matter of *Kühne & Heitz NV v Productschap voor Pluimvee en Eieren*, the European Court of Justice determined that a contractual provision allowing for the automatic modification of prices was in violation of European Union competition law. This was due to the fact that it impeded the ability of the parties to adapt their prices in accordance with market conditions. The aforementioned case serves as an exemplar of how the principle of effectiveness may be employed to curtail the contractual autonomy of the parties involved, in the event that it undermines the goals of European Union law. The author concludes that the influence of prominent cases from the European Court of Human Rights and the European Court of Justice has had a noteworthy effect on the concepts of contractual autonomy and public policy within the realm of contract law. The aforementioned cases have established that the involved parties possess a noteworthy level of autonomy to form a contract based on their own conditions; however, it is crucial to note that this autonomy is not without limitations. The freedom of parties to contract may be restricted if deemed necessary by public policy considerations, which include safeguarding fundamental rights and upholding the objectives of EU law.

The impact of the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ) on the interplay between contractual autonomy and public policy in contract law within the European Union has been significant. The European Court of Human Rights (ECHR) has underscored the significance of contractual autonomy in safeguarding the parties' entitlements to voluntarily establish and govern their contractual associations. The European Court of Human Rights (ECHR) ruled in the case of *Gillow v. United Kingdom* that the contracting parties possess the liberty to establish agreements based on their own conditions, even if it leads to the relinquishment of property entitlements. The European Court of Human Rights (ECHR) has acknowledged that the liberty to enter into contracts is not without restrictions and can be curtailed by public policy concerns, including safeguarding essential human rights. In certain cases, the European Court of Justice (ECJ) has adopted a more constrained stance towards contractual autonomy. It is a commonly accepted notion that contractual clauses which



contravene the fundamental tenets of EU law have the potential to be deemed null and void, regardless of whether they were consensually agreed upon by the involved parties. The European Court of Justice (ECJ) ruled in the case of *Polysar Investments Netherlands BV v Council of the European Communities* that a contractual provision stipulating the exclusive jurisdiction of the courts of a single Member State was in violation of the fundamental principle of freedom of establishment as established by EU law. The principle of effectiveness has been increasingly utilised by the European Court of Justice (ECJ) in recent times to maintain a balance between the contractual autonomy of the parties involved and the considerations of public policy. The aforementioned principle necessitates that the Member States guarantee that their domestic legislation does not impede the efficacy of the European Union's legal framework. The European Court of Justice (ECJ) ruled in the case of *Kühne & Heitz NV v Productschap voor Pluimvee en Eieren* that a contractual provision allowing for the automatic adjustment of prices was in violation of EU competition law. This was due to the fact that such a clause impeded the ability of the parties to adapt their prices to changing market conditions. The influence of the jurisprudence of the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ) on the equilibrium between contractual autonomy and public policy in the realm of contract law has been noteworthy. It has been determined that the unrestricted ability of parties to enter into contracts is subject to limitations and must be weighed against public policy considerations, including safeguarding essential human rights and furthering the goals of European Union legislation. The principle of effectiveness has been implemented as a means of safeguarding the efficacy of EU law by preventing contractual clauses from impeding its effectiveness. When engaging in contractual relationships, it is important for parties within the European Union to take into account the public policy considerations and EU law requirements.

## **CONCLUSION**

The role of contractual autonomy and public policy in contract law within the European Union is of great significance, as evidenced by the foregoing discussion. The equilibrium between the aforementioned concepts has undergone changes throughout history, owing to the impact of significant cases in the European Court of Human Rights and the European Court of Justice, as well as constitutional clauses and statutory enactments.

The concept of contractual autonomy safeguards the liberty of the parties involved in a contract to negotiate and agree on the terms of their own accord. However, it is imperative to take into account public policy considerations to prevent contracts from contravening essential principles such as environmental protection, competition law, or human rights.

The judiciary has established a collection of standards to assess the legality of a contract in light of public policy considerations. These standards encompass various elements, such as the nature of the contract's subject matter, the relative bargaining strength of the parties involved, and the potential effects of the contract on individuals or entities not party to the agreement.

Notwithstanding, the constraints on the parties' ability to exercise contractual autonomy are variable and contingent upon the particular circumstances of each individual case.

The impact of the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ) on the interplay between contractual autonomy and public policy within the realm of contract law in the European Union has been noteworthy. The principle of effectiveness has been identified as a crucial mechanism to prevent contractual provisions from impeding the objectives of EU law.

To summarise, the concept of balancing contractual autonomy and public policy in contract law within the European Union is a dynamic and continuously evolving notion. When engaging in contractual relationships, it is crucial for the involved parties to take into account the public policy considerations and the EU law requirements.

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