

Party Autonomy, Private Autonomy, and Freedom of Contract

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Abstract

Party Autonomy, Private Autonomy, and Freedom of Contract are misused concepts in the private law area. Indeed, there are a lot of connections among the three concepts; however, it does not mean that they can be used alternatively under any circumstances. After etymology research and semantic analysis, it can be found that the core of the three concepts is autonomy but the application scope and the emphases of the context of each concept are different in certain degree: Party autonomy emphasizes the respect of personal rights, private autonomy is opposed to the constraint and or restriction of public law, and the freedom of contract is an extension of the idea of equality and utility with the situation that commodity economy fully developed. In the applicable area of international private law, the following conclusion can be made: Private autonomy equals to party autonomy, and party autonomy includes freedom of contract.

Key words: Party autonomy, Private autonomy, Freedom of contract

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INTRODUCTION

From the etymological point of view, the word “autonomy” derives from politics. However, with interdisciplinary

development and the appearance of different kinds of derivations, the word “autonomy” has been used in the science of law. As a legal word, autonomy means “eligible civil subject, within the given scope of laws and public order and good morals, follows his or her own will to enact civil juristic act, makes decisions, manages his or her own businesses, and arranges his or her own rights and obligations without being illegally disturbed by others. (Zhao, 2004) “Law of the Twelve Tables stipulates that all property related testaments are laws.” (Liang, 1997, p.151) Taiwan Professor Su (2002) thinks: “The so called autonomy is to let people create mutually restricted relationship of rights and obligations by which people can achieve their goals and even resolve disputes.” It is clear that people do not have the freedom to create rights and obligations, but also have the freedom to settle disputes. Since people have the freedom to settle disputes, then they will have the freedom to choose the applicable rules when settling the disputes. It can thus be seen that autonomy emphasise the people as the subject can subjectively control their own activities. The premise of any kinds of autonomy is the freedom of the subject. Only when the subjects of social activities, no matter natural persons or legal persons, have freedom, they can autonomously manage all of their businesses.

1. THE ORIGIN OF PARTY AUTONOMY

Party autonomy, from the aspect of semantic analysis, can be explained as the expression of the subject’s thought and disposal of personal affairs by oneself. From the most basic meaning, we can get that party autonomy equals to the freedom of people’s behaviors. Such behavioral freedom includes negative and positive freedom (Zhang, 1996). Positive freedom (free to do) is that people can be their owner by following their own will and act freely; negative freedom (free from) is the freedom of not being disturbed by others. Of course, such the disturbance here

mentioned does not mean every kind of disturbance. Legal disturbance exists naturally because since the very first day the freedom appears it has boundaries. Just as Sunstein (2002) said: “the concept of autonomy should be whether the subject can get fully realization of possible opportunities when making decisions, referring to related information, does not have illegal or excessive limitations on the preference forming process.” He was just talking about party autonomy from the point of negative freedom by pointing out that the true essence of freedom is without illegal limitation. About the scope of party autonomy, there are different understandings. Some said:

party autonomy means that the legal relationship between private parties should depend on the free will of individuals. The reflection of such principle in current laws should be the principle of the freedom of legal act and is shown in detail as the freedom of contract and the freedom of testament. (Liang, 1997, p.156)

Some even think that the scope of party autonomy should be broader including: (1) the freedom of association in community laws; (2) the freedom of contract in laws of obligations; (3) the freedom of ownership in property laws; (4) the freedom of marriage and family autonomy in personal status laws; (5) the freedom of testament in inheritance laws; and (6) the freedom of adoption in adoption laws. (Gao, 2007) No matter whether we define the scope of party autonomy in a wide or a narrow way or whether it crosses the boundary of public and private law, freedom of contract is included in the field of party autonomy.

2. THE ORIGIN OF PRIVATE AUTONOMY

The emphasis of the autonomy in private autonomy is opposed to public law. The division of private law and public law is one of the great achievements made by the Roman law. Due to the long time, the source of the division of public and private law is very difficult to verify. Roman scholar Ulpian said: “Public law is about the relationship of the Roman State and private law is about individual’s interest.” The statement was reprinted in Codex Justinianus. Therefore, it is widely believed that Ulpian is the first people raised the concept of dividing private and public law. In the 3rd century, Digest pointed out “the rules of public law should not be changed by individual agreements”, while the principle of private law is “for the parties, the agreement is the law”. (Zhou, 1994) The later scholars also strengthened, “Public law adjusts political relations and the purposes that countries should achieve; private law adjusts the relationship between individual citizens and determines the conditions and limits for the interests of individual and personal benefits.” (Pietro, 1992) Private law is characterized by individual freedom of choice while public law’s main content

is to emphasize or constraint. The former emphasizes independent decision and the latter shall have legal basis and certain privileges. Any society decides how to form national life by using private and public law shall have clear understanding over such difference and construct the most appropriate optimal rules. In order to protect individual freedom, we should follow the principle of freedom when occurring doubts and to use private law first. The main reason is that the individual is the best judge of their own affairs and caregivers; to allow individuals’ make decisions, be in charge of their own behaviors, is helpful for promoting social progress and economic development. (Wang, 2003) Of course, the so called “private law” and “public law” is divided under certain circumstances. In fact, any law (positive law) is linked with the operation of public power (state power). From such point of view, any law is “public” and individual cannot legislate. The division of public and private law is because the state takes out different legal adjustment methods for different social life areas. Public law emphasizes more on the exercise of state power and private law focuses more on the party autonomy of social life subjects. (Sun & Yang, 2004) The focus of public law is to control and the focus of private law is to authorize within the scope of legal authorization. It can be found that the so-called private autonomy, on the meaning of its autonomy, there is no difference between party autonomy; But on the wording, it emphasizes more on the difference between public law and is a rejection to the longitudinal, superior-subordinate, and restricted rules in the public law area.

3. THE ORIGIN OF FREEDOM OF CONTRACT

Although the concept of freedom of contract sprouted in Roman law in which the ultimate concern is equality and autonomy, it is a Utopian concept written on papers at that time. The philosophical foundation promoted the prosperity of freedom of contract is the Humanistic thought which once swept the whole Europe while the economic foundation is the fully development of commodity economy. The strong characteristics such as equality, freedom and popularity that contract has almost represent every characteristics of commodity economy. The freedom of contract has found itself the best living soil in market economy. (Zhao & Wu, 2003) According to Patrick S. Atiyah, the concept of freedom of contract should include two closely connected aspects which are not totally different from each other. First, contract is the result of the parties’ mutual agreement; second, contract is the result of free choice which is made without external intervention such as government or legislation (Patrick, 1982). As for the contractual relationship, it only requires the parties to negotiate by depending on their own independent will. The agreement negotiated by

the parties refuses any one, especially the state power's intervention and violation. This is because "according to traditional theory, individual is the best protector for his own interests. Since the contract is made by the parties' agreement, then its content's validity shall be protected herein." (Wang, 2001)

4. THE RELATION BETWEEN PARTY AUTONOMY, PRIVATE AUTONOMY, AND FREEDOM OF CONTRACT

4.1 The Application Scope

After the analysis of the sources of the above mentioned three concepts, it can be found that "autonomy" is the focus of the three words. All of the three concepts have emphasized that individuals have the right to handle their own affairs within the scope of legal authorization. But the application methods or fields of the power are different due to each word's particular focus. Autonomy, details the main body is free, the boundaries of private law autonomy emphasizes on its end, freedom of contract to focus on independent private economy trade practices. However, it is easily to be found out that the word "autonomy" is very common in any kind of private law books. "Party autonomy", "private autonomy", and "freedom of contract" always appear at the same time and even in the same chapter. Without giving any instructions, the three words can be replaced freely or exist side by side. Famous Chinese scholar Lü, Yanfeng states, "no doubt that natural law, especially the thoughts of respecting human rights and human freedom of modern rationalism natural law, is the legal philosophical foundation for identifying and spreading "private autonomy" of Roman law and "Napoleonic Code". (Lü, 1999) The freedom strengthened by the private autonomy mentioned here is more likely to explain "party autonomy". Claus-Wilhelm Canaris once said: "the most important aim for protecting private autonomy and freedom of contract is to achieve individual self-determination." (Claus-Wilhelm, 1999). He paralleled the two concepts without hesitation. The parallel of the two concepts, from the aspect of grammar, can be two different concepts and also a tautology for the purpose of strengthening. So, simple parallel cannot reflect the relationship between the two. Werner Flume thinks, private autonomy is "the principle that each subject voluntarily forms according to their own will". (Dieter, 2004) On these scholars' statements, the meanings of these words are clearly the same or similar, and can be replaced or paralleled which is the common usage of these words. But if we want to make party autonomy of the private international law become the principle in the field of private law, we have to clearly understand the boundaries of the three concepts.

4.2 The Demarcation of Semantic Analysis

Party autonomy derives from social life and it is reflected as the complete freedom of the subject in private areas in political science. When the legal area has not noticed its development, it is shown as pure, natural, and the freedom of individual will. When Roman law¹ which cares very much the private law area voluntarily promotes the development and growth of party autonomy but not lifted it to the fundamental principle of private law area. French scholars who inherited Roman law have upgraded the principle of party autonomy. Carbonnier thinks:

party autonomy is a theory of legal philosophy, that is to say, individuals' will can create obligations and rights for their own according to its own rules, the parties' will is not only the source of rights and obligations, but also is the foundation of them

Cournot thinks: "Party autonomy does not mean the parties have the freedom to set up obligations and rights for themselves, but also means that the parties have the freedom to not to create obligations or rights for themselves." (Yin, 1995) Charles Dumoulin, who is recognized as the pioneer of party autonomy in international private law, is also a French scholar. It seems that due to the acceptance of Roman law, French scholars have started the completed acceptance and fierce thinking on party autonomy.

After the prosperity of such theory, the requirement for distinguishing the concept has come out: whether party autonomy and private autonomy are the same concept with two different ways of expression? Or are they different? Different scholars have different understandings upon these questions. Japanese scholar Eiichi Hoshino thinks the freedom of contract, private autonomy, and party autonomy is different and should be clarified clearly. He further pointed out that the freedom of contract is substantive rule in every country's laws while party autonomy is about "whether people are bound by contract and is a theory about the binding force of contract" and it answers the question that "why people hope to be bound". It is not a substantive law principle and should be the concept of natural law, is the natural principle before the existence of laws, and is a summary of individuals seeking for rights and obligations with their own will. Ichiro Kitamura thinks that in contract theory or common theory of legal actions, the similar theory of "party autonomy" should be the "will theory" in the early 19th century rather than private autonomy. This kind of "will theory" is recognized as a choice by the Pandekten

¹Marx commented on the Roman law that "it is impossible for any of the latter laws to make amendments in essence". See *Collections of Karl Marx and Frederick Engels*. Beijing: People's Publishing House. 1975 (21), 154. René David pointed out: "Roman law never gives any examples in the field of public law." "There is no public law or administration law in Rome". See René, D. (1984). *Les Grands Systèmes De Droit Contemporains* (p.45, 74). In Z. S. Qi (Trans.). Shanghai: Shanghai Translation Publishing House.

scholars. (Chen, 2007) For French law scholars, party autonomy is a combination of the tradition of “contractus consensus” and many theories of the Big revolution. It is not only a legal concept, but also an absolute authority in politics. (Hu, 2008) Chinese scholar Wang Limin thinks there is a bit different between party autonomy and private autonomy. Private autonomy means that the parties can change, set up, or eliminate their private life social relations according to their own will and the relationship between private autonomy and party autonomy should be: party autonomy is an important part of private autonomy but they are not the same. Because private autonomy is the most basic principle of private law area which both includes substantive laws and procedure laws while party autonomy is the most basic principle of substantive laws. Therefore, party autonomy should be included in private autonomy (Wang, 2003). Another Chinese scholar Zhao, Wanyi thinks party autonomy is the core and soul of (Zhao, 2003) What is interesting is that some even say: “Prinzip der Privatautonomie (the principle of private autonomy) is a common term in German Law, it is called party autonomy in French law, and in Japanese law it is called as “private autonomy” or “the freedom of legal conduct”. (Li, 2005). If following such point of view, then the existence of such terms is just because of the difference in translation which is only an external difference that cannot influence the core of the word.

In conclusion, different scholars’ different understandings on private autonomy and party autonomy have formed the colorful world of the discussions on the relationship between them. No matter how to define them, private law theory is always a story about the competition between individual autonomy and social value balance (Dagan, 2008). Both private autonomy and party autonomy cannot exist without the word autonomy which is a respect for the individual will and personal interests. From such point of view, private autonomy and party autonomy are basically the same and can be switched. Because the core of private law is the party autonomy of the social subjects (the parties). From the need for discussion, since we are talking about the parties’ autonomy of will in international private law area, it belongs to the private area. But it is only in dispute settlement and defining what the rules shall be used as the rule for judgment.

Then how should we define the freedom of contract? Jean Carbonnier said that in French Civil Law “the freedom of contract is thought as the core of party autonomy and it gives the parties the power to get rid of any fixed modes that the law given to them and set up mutual legal relationship freely.” Flour and Aubert further pointed out that the freedom of contract is “generated party autonomy and is a principle established on the basis of party autonomy.” This is the freedom of contract in substantial law area which emphasize that during the concluding process of any contract, the parties can choose

the contracting object freely, set up obligations and rights freely, and resolve disputes freely.

Therefore, when the three concepts are juxtaposed, we can understand them this way: Private autonomy equals to party autonomy, and party autonomy includes the freedom of contract. In fact, private autonomy has the widest scope of the three because it is a reversed description appeared to against the character of public law. It can be used anywhere except the scope of public law and it covers all legal areas except the ones that explicitly defined as public law. It is an open and prospective; as the basic principle of private law area, party autonomy defines its application scope from the positive aspect and strengthens that private law area is its main active area. In property law, obligation law, and marriage law and other traditional private law areas, its function can be carried out. Compared with private autonomy, it is a conservative and real attitude; but the essence of the two is the same with only the differences in their starting points and aspects. Private autonomy is an inverted expression which aims at strengthening that the autonomy it has to be different from the autonomy in public law area; party autonomy focuses on identifying its own characteristics. It also conforms to our conventional wisdom when defining a new thing: we have to strengthen its own characteristics and differ it from current definitions. As for the freedom of contract, is specific to the debt of private law and only the agreed debt. So it is inferior concept of party autonomy. It is a detailed and practical party autonomy when party autonomy goes into contract field. It is an external reflection of party autonomy in the private law area. Of course, we can say that freedom of contract is the result of party autonomy in the contract area.

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