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Self-regulation in Private Law in Japan and Germany

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I. INTRODUCTION

Self-regulation is not a new phenomenon in the "realm" of private law. Rules self-created by private individuals and private communities existed long before there was any state in the modern sense at all.[1] Yet these privately made rules were not understood as self-regu-lation. That changed only when the modern state arose. Since then private norms have been

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1 Cf. N. JANSEN/R. MICHAELS, Private Law and the State: Comparative Perceptions and Historical Observations, The Rabel Journal of Comparative and International Private Law (RabelsZ) 71 (2007) 358–392; F. KIRCHHOF, Private Rechtsetzung (Berlin 1987) 508; K. VIEWEG, Normsetzung und -anwendung deutscher und internationaler Verbände: Eine rechtstatsächliche und rechtliche Untersuchung unter besonderer Berücksichtigung der Sportverbände (Berlin 1990) 144–145.

conceived as a counter-draft to the law of the state; this is because "law" and "state" are in a "traditional" view the same, and, therefore, per this "state-centred" view, rules self-created by private individuals or associations seem to conflict with the state's law-making monopoly.[2]

For this reason, self-regulation is often viewed from a public-law perspective. However, such an attitude does not really fit into private law, which regards itself as the place where citizens "freed" from the state (lat. *privare* = to free) regulate their affairs on their own. And because this article is about the legitimacy and limits of self-regulation in *private law,* the concept of self-regulation encompasses in this context only the rules or norms in which private rule-makers, as individuals or as associations, do not exercise power transferred by the state.

Nevertheless, the following remarks on genuine self-regulation can, in principle, be applied to state-regulated self-regulation, too, provided that the binding nature of this self-created law is based on contract or statute (in the sense of institutional or organizational rules), and thus on the private autonomy of its addressees. If, on the other hand, the binding nature of the privately formulated rules relies on the order of the state, it is the state itself that, as in other cases, must answer the question of legitimacy and not the private rule-makers. Then the question of legitimacy, however, is no longer one of private law but of public law.

The right to regulate one's own affairs in a legally binding way in private law is called "private autonomy". Because contracts and statutes are instruments of this private autono-my, the view here is directed towards them as the two basic forms of genuine self-regulation in private law. But privately made rules are binding not only under contract or statute, but also under the concept of "rough consensus and running code",[3] which works like a kind of customary law.

Because the state intervenes in the life of its citizens without their consent or against their will, the question of legitimacy is, in the first instance, concerned only with legislation. Apparently, this is about state dominion and thus about power. But power and dominion can be exercised not only by the state, but also by private individuals and associations. Therefore, not only state but also private power can threaten the freedom of the citizens,

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2 Cf. G. BACHMANN, Private Ordnung (Tübingen 2006) 21, 51; S. MEDER, Ius non scriptum: Traditionen privater Rechtsetzung (2nd ed., Tübingen 2009) 2–4. According to S. MAGEN, Zur Legitimation privaten Rechts, in: Bumke/Röthel (eds.), Privates Recht (Tübingen 2012) 229, the state has a monopoly not to create but only to confirm rules as law.

3 G.-P CALLIESS/P. ZUMBANSEN, Rough Consensus and Running Code: A Theory of Transnational Private Law (Oxford, Portland 2010).

such that both must be legitimized. The private rules based on this private power must be justified. A private rule is legitimate if there are "good reasons" to demand observance from its addressees.[4] That is why the question of legitimacy always arises where a rule is binding on its addressees.[5] Also, a private rule is binding on its addressees only when the state, to which the monopoly of enforcement is attributed, either implements the private rule actively or chooses not to proceed against a private enforcement of the private rule.[6]

II. The Contract – the Basic Concept of Self-regulation in Private Law

But how can private dominion be legitimized in private law? The basic form by which private parties regulate their own affairs among themselves is the contract.[7] And even the contract establishes dominion.[8] It creates a power in one of the contracting partners over the other. Power is the opportunity to implement one's will, if necessary, also against the reluctance of a counterpart.[9] As soon as the contract is binding, the creditor can demand from the debtor the fulfilment of the obligation, even if the debtor no longer wants it. The creditor may enforce his claim against the will or without the consent of the debtor with the help of the state.[10] The contract becomes a norm, because now it no longer depends on the will of the debtor as the addressee of the contractual rule. This private power is legitimate in the case of a contract since the debtor has also originally agreed to the contract. He has voluntarily submitted to his creditor; he has tied himself to him. In this way, he has made use of his private autonomy, i.e. he has exercised his liberty to regulate his own affairs independently within the legal order.

His self-commitment is a self-renunciation of freedom, e.g. the buyer must pay the agreed purchase price to the seller as his creditor. But, at the same time, his self-commitment is the realization of freedom.[11] For on the

4 G. Bachmann, Legitimation privaten Rechts, in: Bumke/Röthel (eds.), Privates Recht (Tübingen 2012) 223.

5 Magen, *supra* note 2, 232.

6 Bachmann, *supra* note 4, 213.

7 Cf. Bachmann, *supra* note 4, 220.

8 Cf. J.-U. Franck, Machtquellen: Grundlagen privater Machtpositionen, in: Möslein (ed.), Private Macht (Tübingen 2016) 540–542.

9 G. Bachmann, Die Legitimation privater Macht, in: Möslein (ed.), Private Macht (Tübingen 2016) 609.

10 So also Franck, *supra* note 8, 541; Bachmann, *supra* note 9, 620.

11 Cf. I. Kant, Die Metaphysik der Sitten (Königsberg 1797) A 1–14, in: Weischedel (ed.), Immanuel Kant. Die Metaphysik der Sitten, Werkausgabe VIII (Frankfurt/

one hand it is his freedom to commit himself to pay a sum of money to the creditor; on the other hand – in a way as a "return" for his voluntary self-commitment and his self-renunciation of his freedom – he receives the purchase-item promised by the seller. This also applies to the seller, so that there is a proper balance of interests between the contracting parties. Behind this is the idea that someone renounces a part of his freedom solely because he receives in return a portion of – and the control over – the freedom of another. This can be summarized under the concept of self-interest. This expression, too, is abbreviated in this context. The contract mechanism is not aimed solely at the realization of individual freedom, but also at the level of general justice which is to be produced at least in the relationship between the contracting parties. This justice is a formal one in the sense that mutual giving and taking (lat. *do ut des*) as a procedure leads to a proper balance of interests between the contracting parties.[12] In this respect, private law pursues a procedural approach. The acceptance, which is stated in the conclusion of the contract, ensures a justified and therefore legitimate liability.[13]

III. General Terms and Conditions – a Combination of Contract and Norm

1. The Failure of the Contract Mechanism: Justice is no Longer Established by Procedure

This procedural approach presupposes, however, that the potential contracting parties are equally empowered. For only then is the individual agreement voluntary and based on private autonomy. The fact that this condition is often not fulfilled in self-regulation is demonstrated by the appearance of general terms and conditions. General terms and conditions are contractual conditions which are only binding if both the "user", meaning the party to the contract who has pre-formulated the terms and conditions of the contract, and the other party has agreed to the terms and conditions. Since the user has pre-formulated these standard terms, the terms of the contract are no longer negotiated as usual. The other party has only the choice of accepting the standard terms or rejecting the contract *(take it or leave it)*.

The user formulates general terms and conditions only so as to deviate favourably from dispositive legal regulations (cf. § 307 para. 2 no. 1 Ger-

Main 1977) 508–516; G. W. F. Hegel, Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse, in: Moldenhauer (ed.), Georg Wilhelm Friedrich Hegel. Werke, Vol. 7 (Frankfurt/Main 1970) 297–298.

12 P. Buck-Heeb/A. Dieckmann, Selbstregulierung im Privatrecht (Tübingen 2010) 261.

13 Bachmann, *supra* note 9, 607.

man Civil Code, *Bürgerliches Gesetzbuch,* BGB). Thus, a proper balancing of interests can no longer come to be through the contract mechanism. Rather, the user exploits the freedom of contract to his advantage and thereby exercises control over his potential contractual partner. It comes to a kind of heteronomy. A party can theoretically choose his contractual partner through a review of the offered standard terms, but he usually rejects this approach because the effort and costs of such a comparison of the general terms and conditions are disproportionate to the resulting benefits.[14] Through this power imbalance, the standard terms assume a norm character, especially since the user has pre-formulated them for many contracts. Hence, the addressees of the standard terms are accordingly undefined so that the terms of the contract have an abstract-general nature.

General terms and conditions are, therefore, a combination of autonomy and heterono-my, and in this way something between contract and norm.[15] A norm is distinguished by the fact that a rule-maker who is different from the addressee of the rule unilaterally imposes a certain behaviour on the addressee without regard for his will, and in this way he makes him the subject of the created rule.[16] For this reason, the *Bundesgerichtshof* (hereinafter: BGH)[17] designates standard terms as a "ready-made legal system" and classifies them in this way as norms,[18] while at the same time emphasizing the "contractual nature of the conditions".[19]

Even if the other contractual party has agreed to the general terms and conditions so that the standard terms have been formally agreed to as contract terms, this alone is not enough to ensure that they are legally binding as an act of self-commitment for this contractual partner of the user. The presumption that the contract mechanism has led to a proper compensation of interests between the contracting parties is no longer applicable, so that a binding application of the standard terms is not legitimate exclusively on account of the

14 BUCK-HEEB/DIECKMANN, *supra* note 12, 50–51

15 BUCK-HEEB/DIECKMANN, *supra* note 12, 54. J. KÖNDGEN, Privatisierung des Rechts: *Private Governance* zwischen Deregulierung und Rekonstitutionalisierung, Archiv für die civilistische Praxis (AcP) 206 (2006) 480; see also D. V. SNYDER, Private Lawmaking, Ohio State Law Journal 64 (2003) 403–420.

16 MEDER, *supra* note 2, 92.

17 The *Bundesgerichtshof* is the German Federal Court of Justice, the highest German appellate court in civil and criminal cases.

18 BGH, 3 November 1994 – I ZR 100/92, BGHZ (Official collection of decisions of the BGH in civil cases) 127 (1995) 281; BGH, 4 May 1995 – I ZR 90/93, BGHZ 129 (1996) 326; BGH, 4 May 1995 – I ZR 70/93, BGHZ 129 (1996) 349.

19 BGH, 1 March 1982 – VIII ZR 63/81, Neue Juristische Wochenschrift (NJW) 1982, 1389.

real individual consent of the rule addressee. The limit of legitimate self-regulation is reached here because the desired justice is not realized.

2. The Consequence: Material Justice Established by State Control

If justice is nevertheless achieved, it is no longer a result of the contract mechanism as a procedural approach. Instead, state law intervenes by first trying to strengthen the individual agreement as legitimation. The standard terms are pre-formulated and done so unilaterally. Because of this, the user must specifically refer the other contractual party to the standard terms and give him the chance to take note of the contents of the terms and conditions (cf. § 305 para. 2 no. 2 BGB). It is only then, if at all, that the other contractual party's agreement can be the expression of a free and self-determined decision in favour of the general terms and conditions.

The procedural approach, however, does not attain full effectiveness (in achieving justice), and in this respect the other contractual party does not regain its freedom completely. There is still a private domination of the user. The binding nature of the standard terms is, furthermore, an act of heteronomy of the user over the other party to the contract, so that the general terms and conditions retain their norm character. For this reason, the content of standard terms is subject to judicial review. The standard of review is given by legislation and the dispositive legal regulations from which the user deviates with his general terms and conditions. Material fairness between the contractual partners is no longer produced on a purely formal basis; it is instead being achieved primarily on a substantive basis.

3. The Legitimacy of Self-created Law in General and Especially of Standard Terms

The legitimacy of standard terms as privately created law is based on a combination of agreement and common welfare,[20] whereby the concept of common welfare stands firstly only for material justice in the relationship of the contractual partners. However, the general terms and conditions are intended for many contracts and thus for addressees who are still undefined, so that these potential contractual partners are also to be included in the reconciliation of interests and thus into the judicial review of the contents. For this reason, standard terms are not interpreted subjectively, as is otherwise usually done with contractual conditions (§§ 133, 157 BGB), but objectively.[21] This also reveals the norm character of general terms and conditions and thus the heteronomy which they express.

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20 BACHMANN, *supra* note 2, 206–208.

21 BUCK-HEEB/DIECKMANN, *supra* note 12, 53.

The reason why a body of rules must be legitimate is the conviction that a rule addressee should only be subject to a fair set of rules.[22] Both contractual partners must consider their negotiated contract to be fair. What is fair for them is what they determine themselves. To ensure that the state does not have to lay down its own standards and value propositions, the state first draws on a procedural approach to generate fairness between the contracting parties. Anyone who submits to a rule – voluntarily agrees to it – will do so only if it is advantageous for him; that is to say, only if it is a fair rule for him will he accept it. In that case the state no longer has to decide what is good and fair for the two contracting parties. The private rule-makers know best what is good and fair for them. Here self-regulation is autonomous. That is the advantage of a procedural approach in relation to a material one.

If the actual consent is no longer voluntary, an illegitimate domination of one party over the other can occur. In place of real approval, or rather flanking its side, we have the idea of common welfare. Even where the weaker rule addressee has not actually and voluntarily agreed to the rules, the body of rules is justified if the addressee could have done so. A rule is fair when it realizes the common welfare. Common welfare is what is beneficial to everyone, so that all individuals would voluntarily agree to the set of rules based on a kind of self-interest. At a minimum, they should do it because it is reasonable for all and in this respect for each of them. In contrast to the view of Gregor Bachmann, here the concept of common welfare is not to be understood in a utilitarian sense.[23] The goal of common welfare is not maximum utility, but justice for all. And therefore, in the words of Stefan Magen, the legitimacy of dominion is assessed not according to its utility but according to its perceived moral quality as a "good" and "fair" dominion.[24]

So that the individual does not seek his own advantage at the expense of others and so that the set of rules is justified for all, one can have recourse to the idea that John Rawls draws up in his theory of justice.[25] The rule-makers, who are at the same time the rule addressees, are under a "veil of igno-

22 MAGEN, *supra* note 2, 232, 244.

23 BACHMANN, *supra* note 2, 16 with note 59, 170, 174–177, 203.

24 MAGEN, *supra* note 2, 232, 244; J. HAIDT/J. GRAHAM, When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals may not Recognize, Social Justice Research 20 (2007) 104–105; see also T. R. TYLER, Psychological Perspectives on Legitimacy and Legitimation, Annual Review of Psychology 57 (2006) 393–394; IDEM, A Psychological Perspective on the Legitimacy of Institutions and Authorities, in: Jost/Major (eds.), The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations (Cambridge 2001) 430.

25 J. RAWLS, A Theory of Justice (Oxford 1972).

rance".[26] Above all, they do not know about their strengths and weaknesses; all are fictitiously powerless.[27] Because an disadvantageous rule can strike anyone, everyone will agree only to the rule which is not "unfair" to anyone, and thus also not to him.[28] Here, too, there is an attempt to produce justice for those affected by the body of rules by means of a procedural approach.[29] Even though people are certainly characterized by a sense of justice and fairness, views differ in the individual case as to what is good and fair.[30] Therefore, Rawls tries to avoid this problem through his theory of justice, and he thus tries to avoid the questions of what is to be understood under the concept of justice and who can – and is – allowed to define it.

4. The Example of Sports Rules as a Kind of Standard Terms

Where sports associations are organizing competitions, they can bind the athletes to sports rules by contract. Because sports associations are monopolists and, in this sense, socially powerful associations, an athlete who wants to participate in a competition must submit to these sports rules, which are for him a kind of general terms and conditions.[31] The actual consent of the individual sportsman is no longer an exclusive expression of his voluntary self-commitment but, at the very least, a form of heteronomy, an exercise of private power which requires justification. Because in this respect sports rules have a norm character, their substantive content is subject to judicial review. But should a state judge really decide on the meaning of the offside rule in a soccer match? The judge often lacks the necessary knowledge. Sports law is also a law requiring expert knowledge.

In addition, it is often not the social welfare that the state should promote and protect, but rather the "group welfare" of those who are involved in sports.[32] Even in the case of heteronomy regarding the sportsmen, the sports association as the rule-maker has a margin of appreciation as to what is an appropriate regulation for the sporting competition. In this sense sports is autonomous. But, as soon as it is no longer a question of sports

26 RAWLS, *supra* note 25, 136–142.

27 RAWLS, *supra* note 25, 137: "The persons in the original position" even "have no information as to which generation they belong", so that "they must choose principles the consequences of which they are prepared to live with whatever generation they turn out to belong to". Therefore, the common welfare is determined not only by the present members, but also by the future members of the community.

28 Cf. BACHMANN, *supra* note 4, 223.

29 RAWLS, *supra* note 25, 136.

30 BACHMANN, *supra* note 4, 219.

31 BUCK-HEEB/DIECKMANN, *supra* note 12, 72–73.

32 See, with the regard to the difference between common and group welfare, BACHMANN, *supra* note 2, 206.

itself, the submission of the athletes to the competition rules imposed on them is no longer justified by the fairness of the athletic competition. The sports rules become illegitimate and judicial review of their contents is reopened.

IV. Statutes as an Expression of Private Power based on the Example of Sports Associations

1. Statutes – or: the Domination of the Association Over its Members

A sports association that organizes a competition can bind the participants to the sports rules not only by contract but also by its statutes. However, this requires the athletes to be members of the sports association. The statutes become binding as privately created law only if the rule addressee has joined the association and has submitted to the statutes. Because he has voluntarily accepted the statute, its binding nature is legitimate. As in the case of the contract, the binding nature of statutes is based on private autonomy and thus the freedom of the rule addressee. Here as well, the individual member did not negotiate the terms and conditions of the statutes but merely agreed to them. This is like general terms and conditions. The statutes are also a "ready-made legal order"; they have a norm character, and in this respect they are a form of heteronomy. However, this private power is legitimate if the regular addressee has voluntarily consented to them. This changes only when he is dependent on joining the association, for social or professional reasons, especially as a professional sportsman.[33] The statutes of such a socially powerful association are then subject to a judicial review of their contents.

The statutes may be amended, even after the rule addressee has joined the association and thereby submitted to the statutes. In contrast to the general terms and conditions, this does not necessarily require that every member agrees to this because it is not the contract principle that is applied here (cf. § 311 para. 1 BGB) but mostly the principle of majority rule (cf. § 33 para. 1 BGB). Therefore, not all members must agree to the amendment of the statute. This has the consequence that the majority rules over the minority. Hence, at first sight the approval given upon joining the association is no longer sufficient to legitimize the binding nature of the amended statutes. However, the necessary consent can be seen in the fact that the member remains in the association despite the amendment of the statute. However, this presupposes that the member has a right of withdrawal at any

33 Cf. A. Röthel, Lex mercatoria, lex sportiva, lex technica: Private Rechtsetzung jenseits des Nationalstaates?, Juristen Zeitung (JZ) 2007, 757–758.

time (cf. § 39 para. 1 BGB) to avoid the binding nature of the amended statutes and that the member does not depend on his membership in the association. Only then can remaining in the association be regarded as voluntary consent and thus as an act of self-commitment. Otherwise, the binding nature of the amended statute constitutes a dominion of the majority over those members who have not consented to the amendment of the statutes.

2. Autonomy for the Sport?

If joining the association or the fact that the member remains in the association despite the statutes' amendment is no longer an expression of voluntary consent, only the "group welfare" can be considered as a legitimation for the statutes. The association imposes a rule on an individual member without his consent or against his will. But this is legitimate if the member should have agreed anyway, because the norm is well and fair for all members and therefore also for him. For a fair sporting competition to take place, all athletes must be bound by uniform sports rules.[34] The sports association may, therefore, only define "group welfare" for the realm of sport. The sports association is allowed to determine how an appropriate balance of interests between the participating athletes is to be provided. Therefore, the rule formulated by the sports association must be typical for sports and – consistent with the standard for ensuring a fair sporting match – there must be good reasons to demand adherence to this rule from each athlete. The member may be affected by the rule only in his role as a sportsman *(status sportivus)* and not as a private individual, i.e. as a citizen of the state.[35] Otherwise, the sports association exceeds its "self-administration right" and it leaves the "autonomy of sport".

While a sports rule can be sports-typical only to a certain degree, it can still be justified by the association's autonomy.[36] Its legitimacy then depends on the point at which the sports rule leaves the realm of sports. The more a sports rule is typical for sports, the more likely it is legitimized by the autonomy of sport and it is therefore freed of a review by state courts.[37] The fact that a doped sportsman can no longer participate in the competition is cer-

34 Court of Justice of the European Union, 18 June 2006 – C 519/04 P, *Meca-Medina and Majcen/Commission,* Zeitschrift für Sport und Recht (SpuRt) 2006, 197.

35 T. SUMMERER, 2nd Part. Sport, Vereine, Verbände und Kapitalgesellschaften, in: Fritzweiler/Pfister/Summerer (eds.), Praxishandbuch Sportrecht (3rd ed., Munich 2014) 130–131.

36 K. VIEWEG/A. RÖTHEL, Verbandsautonomie und Grundfreiheiten, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 166 (2002) 32–33.

37 B. PFISTER, Sportregeln vor staatlichen Gerichten, Zeitschrift für Sport und Recht (SpuRt) 1998, 226.

tainly necessary to ensure a fair sporting match.[38] Even if a professional athlete is affected not only in his role as a sportsman but also in his role as a private individual, the main emphasis is still in the sphere of sport.

A subsequent doping suspension can also be typical of sports and therefore legitimate if it is necessary to ensure fairness and equal opportunities in sport.[39] However, the longer the period of suspension, the more the emphasis shifts to the fact that the sportsman is now increasingly affected in his role as a private person (*status extra-sportivus* and *status oeconomicus*).[40] At this point, the sports association's "group welfare" is no longer sufficient for justifying the doping suspension. This makes it clear that sport and society cannot always be clearly defined, and thus it is not always easy to determine when sport remains autonomous and when state control is necessary to help the athlete in his role as a private individual, i.e. as a citizen of the state.

3. Legitimacy of Self-created Law Through Democratic Rules?

Although a rule formulated by a sports association is typical of sports, there is still a heteronomy over the sportsman as an addressee of the sports rule because he is dependent on the affiliation to the sports association. Therefore, his joining the association and his remaining there is insufficient to conclude that the binding nature of the sports rules is based on an act of pure self-commitment. Because of that, judicial review of the rules under the standard of "group welfare" is called for. However, because a state judge does not have the necessary expertise and because there is a desire to ensure the freedom of private law-makers to regulate their own affairs independently of the state (to the extent possible), this manner of material approach is less preferable than a procedural approach. Part of such a preferred procedural approach is allowing the rule addressees to participate at the rule-making level; another aspect is adherence to the majority principle discussed above. Then the norm can be democratically legitimized and seen as an act of self-commitment.

It is argued that by joining the association, the rule addressee has not only subjected himself to the statutes but also to the majority principle anchored there, so that a subsequent majority decision contrary to his will is still justified by his original agreement. Here, too, the procedural approach

38 K. VIEWEG/R. SIEKMANN, Legal Comparison and the Harmonization of Doping Rules: Pilot Study for the European Commission (Berlin 2007) 221–224, 227–229; J. ADOLPHSEN, Internationale Dopingstrafen (Tübingen 2003) 26.

39 Court of Justice of the European Union, 18 June 2006 – C 519/04 P, *Meca-Medina and Majcen/Commission, supra* note 34, 197.

40 SUMMERER, *supra* note 35, 130–131.

is based on the consent of the rule addressee. His freedom, however he uses it, is then the standard which the state regards as a space of freedom, and to which it also belongs, to subordinate himself to a majority.[41] Participation in decision-making increases at least the chance that the interests of all members, including those who have been prevailed over by the majority, have been incorporated into the established rule.[42] However, because this is not necessarily the case, a judicial review of the content takes place even in the case of a majority decision where it is alleged that the majority has, with the aim of giving itself an advantage, tried to harm either the association as such or the subordinate members (cf. § 243 para. 2 German Stock Corporation Law, *Aktiengesetz,* AktG).[43]

4. Conclusion

In the case of a socially powerful association, consent to the statutes and to the majority principle established in them is not really voluntary. Therefore, consent must be supplemented by the common welfare, and because of this a judicial review of the contents must always be undertaken. The expressed decision of the majority should, at least more or less, be beneficial for all. This is, at least, true if the legal consequences of the majority decision impact all members equally, that is, if the majority principle is combined with the principle of equal treatment.[44] In this way, the common welfare is realized by the majority principle. For this reason, together with the possibility of participation in the decision-making process, the majority principle is sufficient to legitimize the rule democratically. Thus, the principle of procedural justice legitimates the dominion of the association over its members, this being what is referred to as "association power" *(Vereinsgewalt).*[45] Here, too, the aim of protecting individuals from exploitation serves to limit the association power, with the result that judicial review of the contents takes place as soon as minority rights are violated by a majority decision.[46] This is the case, in particular, when the common welfare can no longer justify demanding the minority's compliance with a rule imposed on it. For no one would voluntarily submit to such a rule out of reason; nor should one do so where the rule violates the ethical legal minimum that is accepted in the legal community (cf. §§ 138, 242, 826 BGB).

41 MAGEN, *supra* note 2, 238.
42 Cf. KÖNDGEN, *supra* note 15, 522.
43 Cf. BACHMANN, *supra* note 2, 207.
44 Cf. BACHMANN, *supra* note 4, 223.
45 MAGEN, *supra* note 2, 232, 244–245.
46 BACHMANN, *supra* note 2, 207.

V. The Concept of "Rough Consensus and Running Code" – a Kind of Customary Law

1. The Recourse of Statutory Law to Rules Formulated by Private Associations

Hence, a privately formulated rule can, through contract or statute, assume a binding nature for the rule addressees in private law. The binding nature of this soft law is based on the individual consent of the rule addressees and is, insofar as it lacks complete voluntariness, supplemented by the common welfare. A private rule that is not binding and therefore based on voluntary compliance does not raise a question of legitimacy since there is always a lack of dominion and thus no private power of one over another. However, even where a rule formulated by a private individual or an association has not become binding for the rule addressee under contract or statute, it may be binding for another reason.

Specifically, in many places, the law of the state moves from blanket norms and vague legal concepts to privately created rules. For example, anyone who fails to exercise customary care acts negligently and is liable (§ 276 para. 2 BGB).[47] But, state law does not define what "customary care" means. Instead "customary care" is determined by what is universally accepted in the relevant group as a measure of care, and in this way the private rules of conduct bind state law. These private rules of conduct must be accepted by the group to which they apply. There must be a common consensus on the binding nature of these private rules in the in-group, at least more or less. This broad agreement can be described as a "rough consensus", which is confirmed and updated in practice by its repeated application, and thus it becomes a "running code".[48] The parallel to customary law, or in the same sense to common law, is obvious. The essence of customary law is that the members of a legal community are constantly exercising a specific behaviour and are convinced that they must behave in this way, because it is perceived as a binding, objective law.[49] This, however, is not self-regulation, which is the subject of this article. Self-regulation is defined here as those norms deliberately created by private individuals or association, and that is the difference from the rules which are developed spontaneously "from the bottom up" in society, here in an in-group.

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47 For KÖNDGEN, *supra* note 15, 520, such a legal norm is an "inclusion norm" *(Inklusionsnorm)*.

48 G.-P CALLIESS/P. ZUMBANSEN, *supra* note 3.

49 H. HONSELL, in: Staudinger, BGB (Berlin 2013), Einleitung zum BGB margin-no. 234; K. F. RÖHL/H. C. RÖHL, Allgemeine Rechtslehre (3rd ed., Cologne, Munich 2008) § 70: customary law as "private" law-making.

Private regulators first formulate non-binding norms, for example technical standards or sports rules such as what is known as the FIS-rules, in which the International Ski Federation (in French: the *Fédération Internationale de Ski,* abbreviated FIS) prescribes requirements for all skiers and snowboarders as they exercise their sport, even as a recrea-tional sport. Although these rules are binding neither by contract nor by a statute, the rule addressees voluntarily accept the rules simply by repeatedly applying and reaffirming them.[50] Therefore the legitimacy of these private standards is based on the principle of "rough consensus and running code". They have become, as it were, a sort of common law.

The private rules become binding through the fact that the rule addressees rely on the knowledge of the private rule makers, called formulating agencies, and therefore immedi-ately accept and follow the privately formulated rules. Thus, this soft law is a form of dominion, and because of this the rules have norm character. The private rule-makers exert power over the addressees of the rule. This heteronomy requires legitimation. In contrast to normal customary law, the rules do not arise out of society "from the bottom up". Rule-makers and addressees of the rule are not more or less equal, and the private individuals are not identically empowered and free of control ("bottom-up model"); instead it is a sort of norm setting "from the top down" ("top-down model").[51]

2. Procedural Requirements for "Good" and "Fair" Self-regulation

For the addressees of a rule to be able to rely on (i) the knowledge of the professional private rule-makers and (ii) the fact that the private rules express an appropriate balance of the interests of all those affected by the private rules, also here a procedural approach is preferable to judicial review in order to offset the legitimacy deficit. For this reason, private rule-makers should be independent, the procedure in which the rules are formulated should be transparent and documented, and the rules should be public.[52] In addition, the possibility of participation in this process must be granted to all who are affected by the private rules, so that their interests can be incorporated into the process of rule-making.[53] Therefore, the private committees that formulate the norms

50 Cf. G. WAGNER, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (6th ed., Munich 2013) § 823 para. 572; P. W. HEERMANN/S. GÖTZE, Modifizierte Anwendung der FIS-Regeln infolge technischer und räumlicher Neuerungen im Wintersport, Neue Juristische Wochenschrift (NJW) 2003, 3253.

51 Cf. MEDER, *supra* note 2, 9.

52 Cf. BUCK-HEEB/DIECKMANN, *supra* note 12, 277–289; KÖNDGEN, *supra* note 15, 523.

53 KÖNDGEN, *supra* note 15, 522.

should be filled with representatives of all groups which might be influenced by the self-created law.[54] If public interest is also effected by the private norms, the state, as the guardian of the public welfare of all its citizens, has to ensure that all third-party interests are taken into account in the case of the private rule-making. Here private or genuine self-regulation becomes a kind of regulated self-regulation. Provided these procedural conditions are fulfilled, there is at least the presumption that the private rules represent an appropriate balancing of the interests of all rule addressees, and therefore they are legitimately accepted and obeyed by them.

If the private rule-makers have followed these procedural minimum requirements, the formulated rules are presumed to be "fair" and therefore generally accepted and adhered to by the rule addressees, although the private rules are intrinsically non-binding and have merely an advisory character.[55] However, this presumption can be rebutted. An addressee who is burdened by the norm can therefore refute this presumption in court, so that a judicial review of the contents reappears. Because the private rules are already binding if accepted and adhered to by most of the addressees, this legitimate dominion of the majority over the minority finds its limit when an individual addressee is disproportionately affected by the private rule. Here, too, the protection from exploitation applies.

VI. Concluding Remarks

Even if the term "self-regulation" refers to autonomy and thus to self-determination, private power can nevertheless exist and thus there may be a dominion of one over others. Self-regulation, too, can threaten the freedom of the individual and thus threaten social justice in its entirety. As power always needs justification, the question of legitimacy also arises in the case of self-created private rules and not merely in the case of state law. To protect freedom and justice, state law first pursues a procedural approach and abstains from its own material evaluations, recognizing a rule as binding only if the rule addressee voluntarily consented to it as an act of self-commitment.

As an expression of private autonomy, the contract is the model for a principle of material justice generated solely by procedural justice. Behind this is the idea that everyone knows best what is good and fair for him. Because the individual as the norm addressee becomes at the same time the norm creator, he subjects himself only to his own law and not to the dominion of another. This assumes, however, that all parties are equally empowered. Not one of them is master or servant. Because, in the words of Ernst-Joachim Mestmäck-

54 Cf. Buck-Heeb/Dieckmann, *supra* note 12, 278–283.

55 BGH, 14 June 2007 – VII ZR 45/06, BGHZ 172 (2008) 355 (technical norms).

er, it is "the great achievement of private law, that in the play of the forces which arise out of society, no masters and servants are recognized."[56]

If actual and individual consent alone is no longer sufficient to justify a private norm as an expression of dominion, the consent given must be flanked by the aspect of common welfare. Thus, in order for private rules to be legitimate in this case, the real agreement, which must be present always – at least as a "residual" of self-determination – must be supplemented by the common welfare.[57] For what is good and fair for all can and must be agreed to out of reason by everyone. The state is the guardian of the common welfare. It determines what is good and fair for all. This, however, leads to a conflict with the freedom of private law-makers who express their specific valuations in their own realms, especially in sports or technology, and not necessarily those of the public. Accordingly, a procedural approach is again preferable to a judicial review of substantive terms, as this better protects, as far as possible, the autonomy of citizens in private law from well-intentioned interventions by the state.

Here, too, a procedural approach establishes material justice, or at least an opportunity to promote material justice. It legitimates the private norms created in this way as "good" and "fair" and thus ensures that the rule addressees accept them as binding. This procedural approach includes, above all, the majority principle, since the decision of the majority – more or less – ideally expresses what is beneficial and what is therefore more appropriate for all. However, because there is still the risk that the majority rule over the minority will be exploited to the former's advantage and result in an abuse of its private power, even the democratic majority principle finds its limit in protection against exploitation, such that the injury of indispensable minority rights can be asserted at any time before the state courts. Hence, the interventions by the state in the legal relations of its citizens should be restricted in private law to what is necessary to secure and promote the freedom of its citizens as individuals and as communities.[58] Self-regulation as private rule-making is typical in private law, at least it should be, and in this respect self-regulation is just an expression of the principle of subsidiarity in private law.[59]

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56 E.-J. MESTMÄCKER, Private Macht: Grundsatzfragen in Recht, Wirtschaft und Gesellschaft, in: Möslein (ed.), Private Macht (Tübingen 2016) 44, recalling Hegel's depiction of the master and the servant.

57 BUCK-HEEB/DIECKMANN, *supra* note 12, 257; BACHMANN, *supra* note 2, 206.

58 Cf. H. EIDENMÜLLER, Effizienz als Rechtsprinzip: Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts (4th ed., Tübingen 2015) 374–385; W. ENDERLEIN, Rechtspaternalismus und Vertragsrecht (Munich 1996) 52–67.

59 Cf. S. MEDER, Doppelte Körper im Recht: Traditionen des Pluralismus zwischen staatlicher Einheit und transnationaler Vielheit (Tübingen 2015) 293–297, 298–301.