Review Essay - "Volenti non fit inuria" - How to make a principle work

By Gregor Bachmann[*]

A. "*Volenti non fit inuria*" as a general principle of law [**]

The ancient Latin saying *volenti non fit iniuria* (loosely translated: if you consent you cannot complain) denotes a legal principle on a par with principles such as *pacta sunt servanda* or *non concedit venire contra factum proprium*. As a defence to tort claims well established in both the civil and the common law tradition,[1] the phrase articulates an universal value that has never been seriously contested. Why, then, does a young German scholar devote a complete *habilitation* (professoral thesis) to the study of such an expression? The answer is clear: as with any general principle of law, the problems start once you try to apply them to a specific case. Unlike rules, principles do not lend themselves to easy execution but require thorough reasoning,[2] taking into account the fact that principles may work *both ways*. For example, if a seller does not deliver the promised good in time, he may invoke the principle of *pacta sunt servanda* in order to convince a judge that despite his breach the contract should be upheld. Likewise, the buyer may claim that, since the seller did not keep his promise (i.e., violated the said principle), she does not have to keep hers either. Similar conflicts may arise in circumstances where the principle of "*vo-*

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[**] Reflections on Ansgar Ohly, *„Volenti non fit iniuria" – Die Einwilligung im Privatrecht*, Mohr Siebeck, ius privatum vol. 73, Tübingen 2002, 503 p., € 99.

[1] Cf. *Prosser and Keaton on Torts*, 5th ed. 1984, p. 112: "It is a fundamental principle of the common law that *volenti non fit iniuria*"; see also C.D. Baker, *Tort*, 5th ed. 1991, pp. 72, 193 seq. (distinguishing between consent and volenti); Zimmerman, *The Law of Obligations - Roman Foundations of the Civilian Tradition* 450, 1013 n. 92, 1990.

[2] The usual reference here is to Dworkin, *Taking Rights seriously*, 1978. The fundamental difference between principles and rules had been highlighted earlier in a comparative methodological analysis by German jurist Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, 1956 (Principle and Rule in Judicial Advancement of Private Law). For a modern account see Robert Alexy, *Theorie der Grundrechte*, 1985 ([Theory of Basic Rights).

lenti non fit iniuria" is at stake. Think of a case where A agrees to his photograph being published for advertisement, unaware of the fact that the advertised product is, say, Viagra.[3] It goes without saying that invoking *volenti non fit iniuria* does not help to decide whether A's rights were infringed or not.

Spurred by the phenomenon of globalization, recent discussions on general principles of law have (once again) focused on the old vision of a "*lex mercatoria*". Regardless of whether "*lex mercatoria*", as its proponents claim, amounts to a "third" legal order, the principle of *volenti non fit inuria* certainly would be a candidate for it.[4] Ohly, who is primarily interested in designing a system of consent in the context of German law avoids this discussion as well as the related question of whether *volenti non fit iniuria* might form a part of a new European *ius commune*. One might criticise this self-imposed restriction, though in the end it deserves applause. If, as an economist has recently noted, "the action is in the details", then the resulting problems must be met "on terms that are responsive to the needs".[5] That also holds true for legal scholarship. Hence, any attempt to make the the *volenti*-defence work must not strife for lofty theories but provide answers to three intertwined questions: (i) What is the rationale behind the principle, i.e. why is it that we consider a person's consent sufficient to deny an infringement of his or her rights?; (ii) how is consent to be distinguished from related legal phenomena?; (iii) what are the pre-conditions that must be met in order to accept "yes" as true consent, or, more simply, what does "*volenti*" mean?

B. Consent as "*Rechtsgeschäft*"

In trying to answer these questions, the German lawyer faces a challenge unknown to most other legal traditions. German statutory law contains specific rules that govern any form of (explicit or implicit) consent that fits the category of "*Rechtsgeschäft*" (sometimes, though inaccurately translated as "juridical act" or "act of legal significance"). Early on, attempts to conceptualise the legal phenomenon of consent ("*Einwilligung*") thus focused on whether or not *Einwilligung* must be classified as *Rechtsgeschäft*. Whereas German courts sometimes sidestepped the question and, like their British and American counterparts, tend to address the issue

[3] A similar case has formed the factual background for the famous *Herrenreiter*-decision by the German *Bundesgerichtshof* (Federal Court of Justice), see BGHZ 26, 349 (1958) (recognizing monetary damages for unconsented commercial use of a private picture).

[4] See CENTRAL - Center for Transnational Law (ed.), *List of Lex Mercatoria Principles*, chapter I., principle No. 8: "A party suffering damage or another prejudice may not raise claims arising out of this if it has consented to the act leading to the damage or prejudice ('*volenti non fit iniuria*')".

[5] Oliver Williamson, *The Mechanisms of Governance* 6, 1996

from a more or less pragmatic standpoint, German legal scholarship has devoted considerable effort to determining the "legal nature" of consent. In taking up that debate, Ohly's work on "*Die Einwilligung im Privatrecht*" („Consent in Private Law") sheds some light on the peculiar method of legal reasoning that is characteristic of German legal scholarship till this day.

I. The historical debate

Drawing on the insight that contractual promises, wills and other forms of voluntary, self-binding action all rely on the ethical idea of individual autonomy, 19th century German jurisprudence developed the concept of "*Rechtsgeschäft*", an abstract figure that would encompass any of the above mentioned acts. The German legislature adopted the concept, when, in codifying German private law in the *Bürgerliches Gesetzbuch* (BGB), it gave the *Rechtsgeschäft* a prominent part in the newly devised *Allgemeiner Teil* ("General Part"). It contains provisions that are applicable to any branch of private law, be it contract law, tort law, property law, family law, the law of trust and estates, etc.[6] At the core of the General Part lie rules governing the validity of a *Rechtsgeschäft*. They deal with issues otherwise associated with contract law, such as capacity (§§ 104 seq. BGB), mistake (§§ 116 seq. BGB), form (§§ 125 seq. BGB), effectiveness (§§ 130 seq. BGB), interpretation (§§ 133, 156 BGB), nullity (§§ 134 seq. BGB) and representation (§§ 164 seq. BGB).

Following the enactment of the BGB in 1900, the legal discussion soon turned to the question of whether certain private acts, e.g. a request for payment, can or even must be subsumed under the category of *Rechtsgeschäft*, thereby triggering the application of the aforementioned provisions. Ernst Zitelmann (1852-1923), a prominent legal scholar of his time and one of the main representatives of the "*Willenstheorie*"[7] theory, advanced the debate to the problem of consent to (otherwise) tortious acts. Searching for an adequate legal category, he took the position that consent must be considered a *Rechtsgeschäft* and thus measured by the standards of §§ 104 seq. BGB. Otherwise, Zitelmann reasoned, consent would have no legal basis in

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[6] For a critical account of that legislative concept see Zimmermann (note 1), 31; Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd ed. 1967 (History of Private Law in the Modern Age), 486 seq. (pleading for an abolishment of the General Part).

[7] The „*Willenstheorie*" (will-doctrine) claimed that a promisor is bound to his promise solely because he wants to be bound. The concurring "*Erklärungstheorie*" (reliance-doctrine) held that the promisor is bound because the promissee relies on the promise. See Zimmermann (note 1), 584 seq. A thorough account of the disputing positions and their main proponents in the 19th century is given by Sibylle Hofer, *Freiheit ohne Grenzen? Privatrechtstheoretische Diskussionen im 19. Jahrhundert*, 2002 (Freedom without limits? Discussions on Private Law Theory in the 19th century), 157 seq.

positive law. Other authors disagreed, arguing that consent to a tortious act was a mere fact for which the rules of *Rechtsgeschäft*, modelled after the contractual promise, simply did not fit.[8] According to them, the requirements of valid consent had to be developed outside the body of positive law. Modern statements usually follow the second approach, applying §§ 104 seq. BGB only if they seem fit; others use §§ 104 seq. BGB as a starting point and "modify" them according to the peculiarities of the case at hand. The methodological question that everyone addressing the problem faces is: Should the law of consent be developed by reasoning from case-to-case (inductive approach), or must positive law (here: §§ 104 seq. BGB) form the basis from which to conclude (deductive approach)?

II. The rationale of "*volenti non fit iniuria*"

Ohly correctly points out that the alternative as outlined above does not really exist.[9] Positive law neither precludes ethical or economical reasoning which is necessary to decide "hard cases";[10] nor can reasoning case-by-case ignore standards set up by statutory law. Therefore it seems recommendable not to start with explorations of black letter law, but with the rationale behind the principle *volenti non fit iniuria*. In this respect, German jurisprudence, heavily relying on Kant and Hegel, turns to the collective concept of *Selbstbestimmung* (self-determination), whereas Anglo-American scholars prefer to invoke the liberal tradition, stressing individual autonomy as a pre-condition for general social welfare. However, both perspectives, which do not exclude but arguably supplement each other,[11] do not suffice to make the principle work. The same holds true if one looks at the reasons that may allow for restrictions of private autonomy, namely third-party-rights, public interests, and – most relevant with regard to consent to tortious acts – paternalism. Thus, it is hardly astonishing to find Ohly concluding that the determination of accurate boundaries of consent amounts to one of the most difficult tasks a legal theorist faces.[12] Again, this holds true regardless of whether one follows the common law or the civil law.[13]

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[8] See Ohly, *Volenti non fit iniuria*, 42 seq.

[9] Id., 5.

[10] Cf. Esser (note 3).

[11] Ohly (note. 8), 70. John Stuart Mill, ancestor of the liberal-utilitarian tradition, explicitly referred to the "excellent work" by German jurist and Prussian reformer Wilhelm von Humboldt.

[12] Ohly (note 8), 77.

[13] Cf. *Prosser and Keaton on Torts*, 112: „...one of the most complex and difficult [subjects] in the entire area of the law".

Those difficulties do not disappear if one turns to constitutional law. In recent years, the German *Bundesverfassungsgericht* (Federal Constitutional Court) has repeatedly held that values embodied in the constitutional catalogue of basic rights demand attention in private law settings, too.[14] This resulted in the controversial finding that a contractual promise, though valid under private law standards, must not be enforced for constitutional (!) reasons if it was received in a situation of unequal bargaining power amounting to duress. Enforcement of such a promise, the Constitutional Court reasoned, would violate the promisors fundamental right of self-determination.[15] Consequently, the validity of any form of consent may now be contested, arguing that the decision to let someone else infringe on one's right was not a "truly" free act. Laying aside the fact that it does not require constitutional wisdom to understand that private law may only sanction promises that are based on a truly free decision,[16] the action, once again, is in the details: *When* must we say that consent was the result of a truly free decision, and when must we deny it? Here, neither the recourse to philosophical values nor the balancing of constitutional rights will suffice to find a convincing and workable answer.

III. The "legal nature" of consent

This brings us back to where we started. Private law must use its own conceptual reservoir to develop standards that allow for a reasoned decision in hard cases. While Zitelmann believed that the uncompromised application of the BGB would solve the problem, modern understanding searches for more flexible answers.[17] For instance, if a minor consents to medical treatment, unmitigated application of § 107 BGB would require parental approval regardless of whether the minor is 7 or 17 years old, and no matter whether the treatment is hand- or heart- surgery. Ohly sees that such a strict either-or-solution would be inappropriate. Nevertheless, he

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[14] Landmark decision: BVerfGE 7, 198 – "Lüth" (1958): Private call for boycott justified by freedom of speech.

[15] BVerfGE 89, 214 – „Bürgschaft" (1994).

[16] See Manfred Wolf, *Rechtsgeschäftliche Entscheidungsfreiheit und vertraglicher Interessenausgleich*, 1970 (Freedom of choice and contractual balance of interests), drawing on the seminal article by Walter Schmidt-Rimpler, *Grundfragen einer Erneuerung des Vertragsrechts* (Fundamental Questions of a Rebuilding of Contract Law), *Archiv für die civilistische Praxis* (AcP) 147 (1941), 130-197. Although published in 1941 and prompted by the attempt to replace the BGB by a "*Volksgesetzbuch*", Schmidt-Rimplers article does not reflect Nazi-ideology but rather presents an early example of economic analysis of contract law, cf. Schäfer/Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (Economic Analysis of Private Law), 3rd ed. 2000, 391.

[17] See, e.g., Deutsch, Review of Ohly, Volenti non fit iniuria, *Neue Juristische Wochenschrift* (NJW) 2003, 1854.

insists on a systematic approach for which the doctrine of *Rechtsgeschäft* shall serve as guiding pole. This approach leads him to addressthree "dogmatic" questions a Common Law scholar would hardly bother with.

1. Consent as "negative element"

German criminal law scholarship sharply distinguishes between elements of an offence ("*Tatbestand*") and reasons for justification ("*Rechtfertigungsgründe*"). Occasionally the victim's consent is seen as a "negative" element of an offence, thus belonging to the first category (labelled "*Einverständnis*"); sometimes it is viewed a reason for justification (labelled "*Einwilligung*"). Whether this distinction is necessary is a controversial issue, yet most scholars at least accept the general scheme as a helpful systematization. Ohly picks up that debate and asks whether a similar distinction should be made for consent in the private law context. Recognizing that it might be an "irrelevant dogmatic glass bead game",[18] the practical relevance of which "should not be overestimated",[19] he nevertheless embarks on the discussion, reaching the conclusion that private law should consider consent not a justification but a "negative element".[20] From that, however, nothing follows with regard to practical questions such as who has to bear the burden of proof.[21]

2. A "step-ladder" of permissions

More important is the distinction between different forms of private approval. Usually mixed up under the common label "consent", both Civil and Common Law recognize the importance of keeping apart at least two kinds of assent: the voluntary taking of a risk (e.g. riding with a drunk driver) and the consent to infringements of one's rights (e.g. consent to medical surgery).[22] Ohly advances that distinction by refining the second class into a graded scale (which he calls "*Stufenleiter*" - "step-ladder") of permissions, ranking from its strongest form – the complete conveyance of interest – to contractual permissions to use one's rights or property, to the simple and revocable consent to intentional actions by others (consent in its

[18] Ohly (note 8), 132.

[19] Id., 136.

[20] Id., 140.

[21] Id., 134 seq.

[22] Cf. C.D. Baker (note 1) (labeling the first category "volenti non fit iniuria", the second "consent"); Ohly (note 8), 147 (labeling the the second category "volenti non fit iniuria", the first "*Handeln auf eigene Gefahr*" [~ voluntarily assumed risk]).

strict sense).[23] He goes on to exemplify this scale by looking at familiar situations of consent which he classifies according to his scheme.[24] Both the scale and its application are useful as they help to avoid semantic misunderstandings and, more importantly, enable the practitioner to sort out those forms of consent that can easily be dealt with in terms of property law or contract law.

3. The "legal nature" of consent

Still open is the central question of whether private permission not covered by property law or contract law (consent in its strict sense) fits under the category of *Rechtsgeschäft*. At first glance the question seems to be a matter of taste, since it does not affect the outcome of whether one answers it in the affirmative, followed by "teleological modifications" of §§ 104 seq. BGB, or whether one denies it in the first place and then applies §§ 104 seq. BGB where appropriate by way of analogy. Therefore, one is tempted to ask – as is Ohly – whether the German jurists that debated the "legal nature" of consent did not "spill much ink without gaining any material insight".[25] Ohly, however, denies the question, since believes that the concept of *Rechtsgeschäft* would render "some orientation" and would avoid the dangers of case-by-case-reasoning, namely a "seriously restricted foreseeability".[26] Convincing as that may be, the question as to the "legal nature" of consent then needs to be answered. This answer is simple: if we recall that "*Rechtsgeschäft*" is not, as critics in the 20th century have repeatedly claimed, a "bloodless abstraction",[27] but the legal expression for an ideally legitimated order, there can be no doubt that "You may!" is indeed a form of *Rechtsgeschäft*.[28]

C. THE PRINCIPLE APPLIED

Having developed a graded scale of permissions and having determined the "legal nature" of consent, it remains to be seen how those insights help to make the principle "*volenti non fit iniuria*" operative. Ohly does not intend to solve an "ethically

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[23] Ohly (note 8), 141-177.

[24] Id., 237-289.

[25] Id., 206.

[26] Id.

[27] See - from a comparative point of view - Zweigert, *„Rechtsgeschäft" und „Vertrag" heute* („*Rechtsgeschäft*" and „Contract" today), in: Festschrift Rheinstein, 1969, 493, 498.

[28] Ohly (note 8), 214; contra Deutsch (note 17).

and politically difficult problem with the instruments of legal dogmatics";[29] yet still he believes that a modified application of the statutory *Rechtsgeschäfts*-rules (§§ 104 seq. BGB) is the right track to decide on the validity of a given consent. While we cannot follow him through every case where the principle might apply, we shall see how that approach contributes to solving two familiar problems.

I. Capacity

Whether the consent of minors is sufficient to authorise their medical treatment is a question that has repeatedly been brought before the courts.[30] Applying §§ 104 seq. BGB to the problem brings a clear answer: anyone below the age of 18 requires parental approval in order to render his or her consent valid. Yet while this rule may work well with regard to contracts and property rights, it has been deemed inadequate with regard to other rights. Medicine law in Germany has therefore largely left the BGB behind and instead relies on a body of case law. Ohly uses a different approach: since consent is a *Rechtsgeschäft*, §§ 104 seq. BGB are to be applied, however modified by way of "teleological reduction" with regard to personal rights (right of privacy, right of physical integrity).[31] The results reached are not very different from those reached by the direct approach preferred by the courts: Whether a minor's consent alone is sufficient must be determined according to the circumstances of the case. If, for instance, harmless cosmetic surgery is at stake, a 16-year old may validly consent without parental approval. If such treatment may have irreversible adverse effects (such as tatooing or piercing), the minor needs parental permission.[32] Photographs of a minor may be taken without parental approval, since the need for permission would amount to an impractical and unnecessary restriction of the minor's rights, but this does no longer hold true for nude pictures,[33] etc.

II. Revocation

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[29] Id., 248 (concerning the problem of "*Patientenverfügung*" - „living will"). The subject of *Patientenverfügung* will now be tackled by an expert commission headed by former Federal Judge Klaus Kutzer (see *Frankfurter Allgemeine Zeitung*, Tuesday Sept. 9, 2003). Its task will be to develop a legal framework for determining the validity of a "living will". Until now, no special statutory law with regard to that issue exits in Germany.

[30] For a detailed analysis of case-law in Germany, England and the US see Ohly (note 8), 295 seq.

[31] Ohly (note 8), 318.

[32] Id., 323 seq.

[33] Id.

Another important issue is the question as to whether a given consent may be revoked. Applying §§ 104 seq. BGB again provides a clear answer: a *Rechtsgeschäft* is only valid if the declaration of will has reached the addressee before a potential revocation (§ 130 BGB); or, more simply: a declaration of consent is revocable unless it has reached its addressee. Again, the clear-cut rule needs modification in order to produce adequate results. Although belonging to the "General Part" of the BGB and thus theoretically applicable to every *Rechtsgeschäft*, it is modelled after the contractual scheme of acceptance of an offer. Outside the setting of commercial contracts, whether or not a *Rechtsgeschäft* is revocable must therefore be determined using different criteria. The crucial questions to be asked here are: what kind of right is at stake?, and: what did the parties intend? [34] Consent to publish private photographs, for instance, may be revoked more easily than the consent to use one's car. Damages that the addresses of a revoked consent may suffer because he relied on it shall be claimed by way of analogy to § 122 BGB.[35]

D. Methodological Conclusion: Is the Common Law superior?

The arguments sketched here make clear that such reasoning will not suffice to determine the "legal nature" of consent. In any case, additional arguments are necessary in order to reach "just" or plausible results. This then begs the question whether it would not be wiser to forgo the question of "legal nature" altogether and to approach the relevant problems directly on its matters. Arguing that the determination of the "legal nature" (*Rechtsgeschäft* or not) of consent will provide better orientation and will make decisions more foreseeable[36] is hardly convincing. More than once Ohly must admit that uncertainties are unavoidable and that normative distinctions follow guidelines different from those presented by the one-size-fits-all model of the BGB's General Part.[37] More than once, then, have German scholars pleaded to abandon the search for the "nature" of legal phenomena in favour of an undisguised analysis of interests that will also take into account the ethical, political or economic implications of a decision ("*Interessenjurisprudenz*").[38] Such an ap-

[34] Id., 349.

[35] Id., 354.

[36] See, *supra*, note 26.

[37] See, e.g., Ohly (note 8), 320 seq.

[38] See especially Philipp Heck, *Grundriss des Schuldrechts* (Compendium on the Law of Obligations), 1929, 471-482; see also Fritz von Hippel, *Zur Gesetzmäßigkeit juristischer Systembildung*, 1930 (On the rules of legal systemizing), reprinted in v. Hippel, *Rechtstheorie und Rechtsdogmatik* (Legal Theory and Legal Dogmatics), 1964, 13-46. For a general account see Wilfried Kallfass, *Die Tübinger Schule der Interessenjurisprudenz*, 1972 (The Tübingen-School of Interest-Jurisprudence).

proach, for instance, could result in the use of more empirical data and of insights from neighbouring disciplines, such as psychology. Here, continental legal scholarship still lacks behinds its (mainly) American counterpart.

On the other hand, the categorical approach that characterises Civil Law jurists also has its advantages. The most important lies in the fact that it makes access to legal problems easier as it helps to avoid misunderstandings and economizes argumentation. The scale of consent, developed by Ohly, is an impressive example of that. The need for a transparent and coherent structure of legal problems is not only felt by continental lawyers, who, if confronted with common law problems, often drown in what appears to them as an ocean of cases, facts and doctrines, but also by common lawyers. An early and famous example of an attempt to describe a logical taxonomy of legal concepts similar to the civilian tradition (and somehow comparable to that presented in Ohly's scale of consent) is that of Wesley Hohfeld's model of "Some fundamental legal conceptions as applied in judicial reasoning".[39] In modern times, the growing number of model laws in the US deserves mention. In the end, neither the Common Law nor the Civil Law can claim to offer a superior method of legal scholarship. As German jurist Josef Esser noted more than 30 years ago, what is needed is a legal science that combines systematic ("dogmatic") *and* substantive concepts.[40] More than 100 years after its enactment, the monumental BGB still makes acceptance of that insight difficult.

[39] Wesley Hohfeld, Some Fundamental Legal Conceptions as Applied in Legal Reasoning, 23 Yale L. J. 28-78 (1913).

[40] See Esser (note 2); see also Josef Esser, *Möglichkeiten und Grenzen des dogmatischen Denkens im Zivilrecht* (The potential for and the limits of dogmatic reasoning in private law), AcP 172 (1972), 97-130.