

Introduction
into
employment
law

08



Principle of general civil and contract law

Four elements of freedom of contract

General civil law is based on the assumption that, in principle, the two parties to a contract are on an equal footing and that, as a result, there is a presumption that the outcome reached through negotiation is fair.

Consequently, there is, in principle, freedom of contract (as to **whether** to enter into a contract, **with whom**, in what **form** and with what **content**) as an expression of private autonomy.

However, there are also exceptions in general civil law, for example to protect minors, consumers to businesses, in tenancy law, in the case of contracts contrary to public policy, etc.

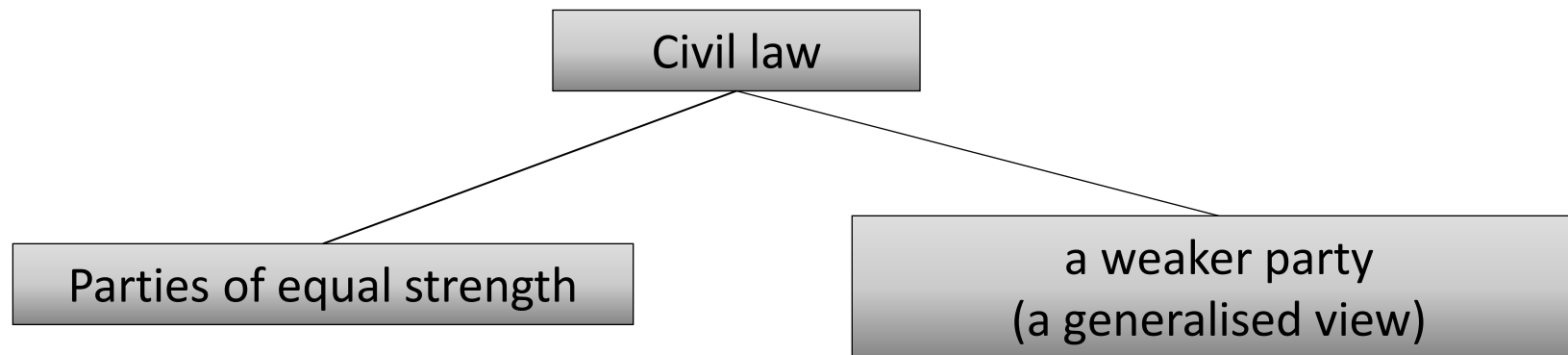


Why employment law?

Structural inequality

What exactly is employment law?

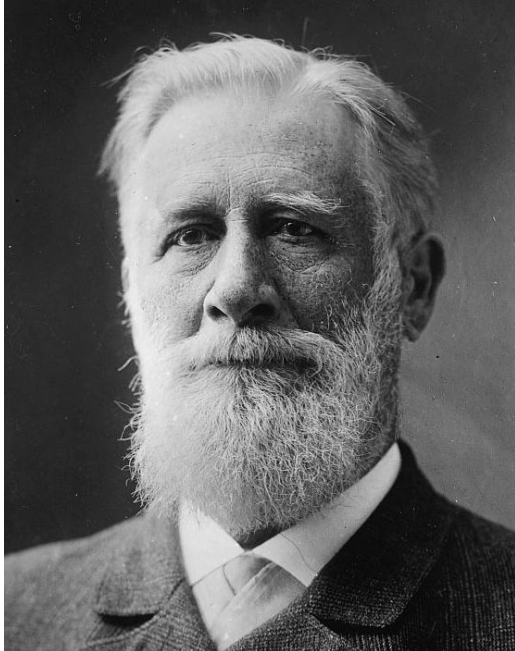
Essentially, it is a branch of civil law, but specific statutory provisions grant employees special protection.



Protection of the weaker party



Otto von Gierke



“Our public law must be imbued with a breath of the freedom inherent in natural law, and our private law must be infused with a drop of socialist spirit!”

→ This is the case in employment law.



Definitions of terms

Characteristics and definition

Employment contract (nature):

- a contract creating mutual obligations (labour – wages)
- Continuing contractual relationship
- a specific area of civil law

Definition of an employment contract:

A contract between an employer and an employee, in which the employee undertakes to perform services for the employer in return for remuneration, subject to the employer's instructions.

→ The nature of the parties must be taken as the basis.



Consequences of a continuing obligation

Expiry, termination and recurring obligations to perform

Unlike simple contracts of exchange, the employment contract, as a continuing obligation (in which no specific result is owed), means that, unlike most obligations, it is not terminated by performance (Section 362 of the German Civil Code (BGB)).

Unless there is a valid fixed term under the TzBfG, a separate ground for termination is required to bring the employment relationship to an end.

At the same time, in addition to the recurring obligation to perform (work) and the payment of wages, other recurring obligations to perform are established (e.g. holiday entitlements, etc.).



Social protection and livelihoods

Not just money ...

For the majority of the working population, the remuneration derived from their employment forms the basis of their livelihood.

Furthermore, for many people, their employment relationship is also the centre of their lives, both in terms of time and place. There is an intertwining of personal life and employment, meaning that the employment relationship also affects general personal rights.

Protecting the employment relationship therefore means not only safeguarding one's economic livelihood, but also one's personal rights.

Market economy – political system – conflicts with fundamental rights



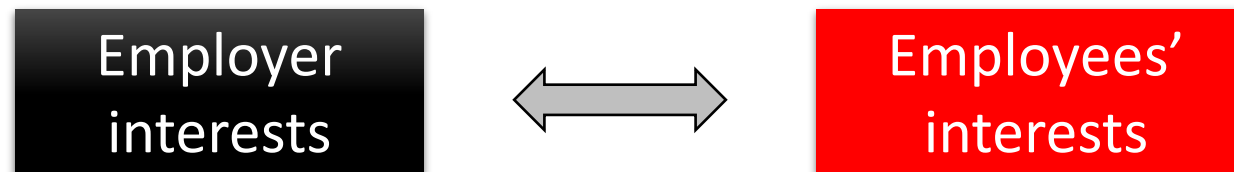
Conflicting fundamental rights

Within the framework of the free market economy, employment relationships are also governed by the laws of the market and are only partially restricted by legislation, insofar as this is permissible within the framework of fundamental rights. The recurring conflict between employers' interests – which are protected by Article 14 of the Basic Law (property), Article 12 of the Basic Law (freedom of occupation) and private autonomy (generally Article 2(1) of the Basic Law; in labour law, more specifically in Article 12 of the Basic Law), and the interests of employees, which are protected by Article 12 of the Basic Law, are generally at odds with one another.

However, the principle of the welfare state (Articles 20(1) and 28(1) of the Basic Law) simultaneously enshrines the State's duty to protect employees.



Balancing of interests and the principle of proportionality



The consequence of the conflict between differing interests is that the legislator seeks solutions that do justice to both sides as far as possible.

For example, there is neither a right to be hired (not even in cases of discrimination) nor absolute protection against dismissal; on the other hand, however, there are, for example, claims for damages in cases of discrimination and relative protection against dismissal.



Freedom of contract v. fairness in contracts

- Employer's perspective: Article 2(1) of the Basic Law (freedom of action in general) and Article 12(1) of the Basic Law (freedom of occupation)
- Employees' side: Article 12(1) of the Basic Law (freedom to choose an occupation)

The principle of social protection (including Article 20(1) of the Basic Law)





Legislative measures

The legislature employs various means to protect employees' interests:

- **The creation of mandatory or, at the very least, unilaterally binding law (in individual employment law)**
- Recognition and regulation of freedom of association and collective bargaining autonomy (collective bargaining law)
- Co-determination rights at works and company level (works constitution law and co-determination acts [Coal and Steel Co-determination Act, Co-determination Act 1976, One-Third Participation Act])



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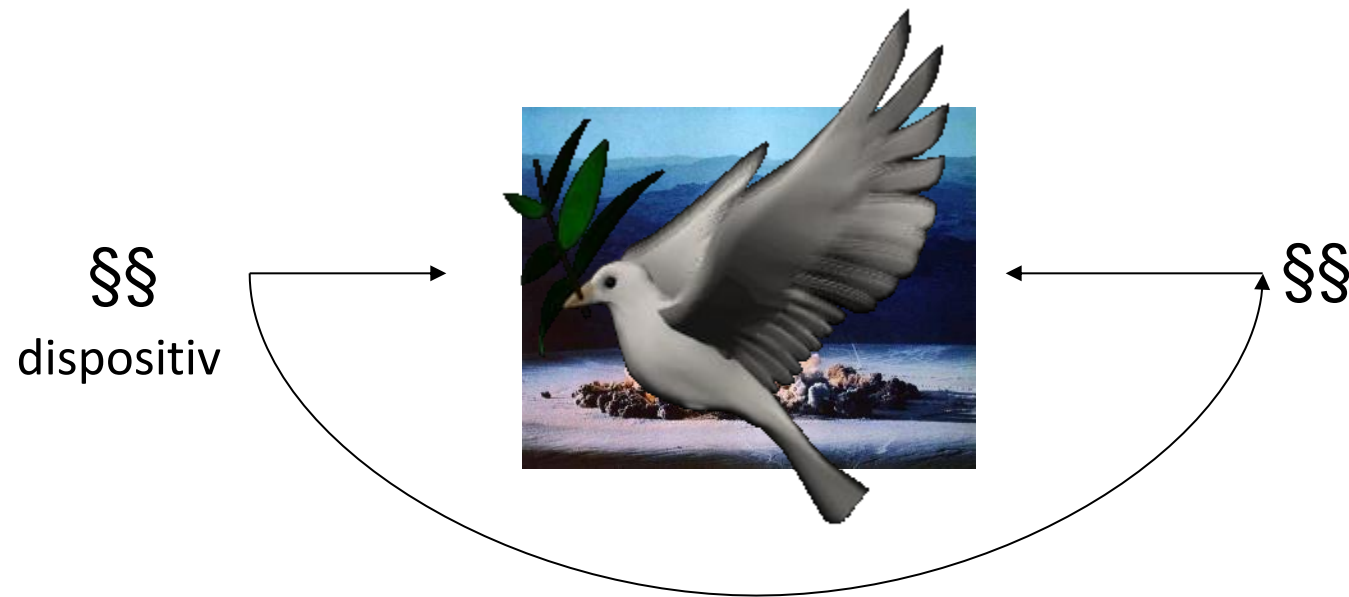
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Conflict of dispositiv laws

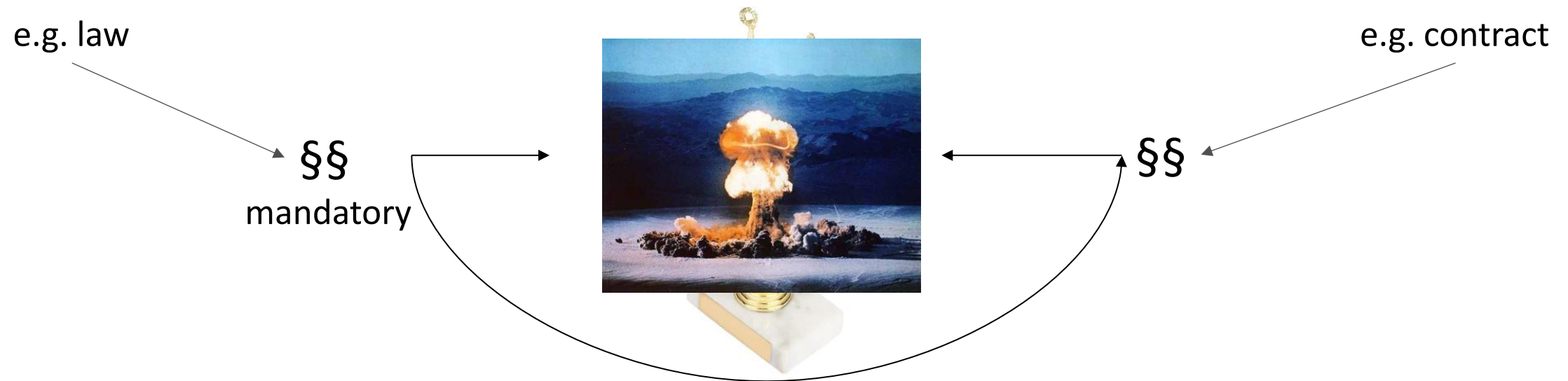
The purpose of statutory law is to prevent a legal vacuum; in other words, it aims to provide a rule in the event that the parties have not agreed on anything.





Conflict with mandatory law

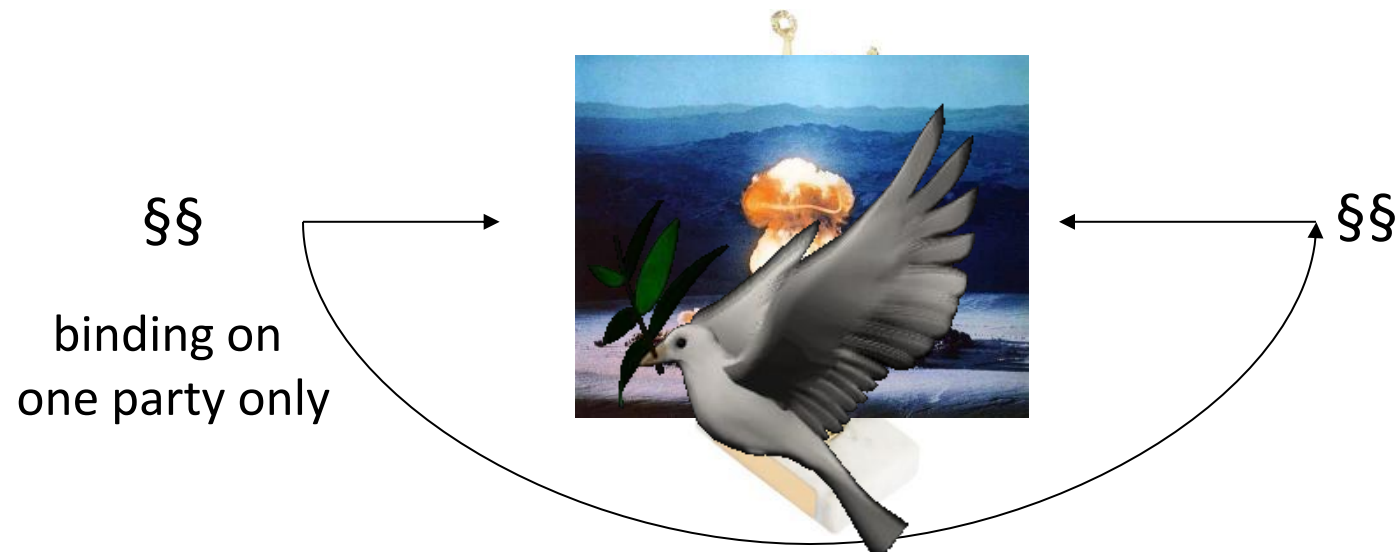
Mandatory law aims to ensure that certain legal consequences are triggered without fail whenever the elements of the provision are satisfied.





Conflict of laws in a unilateral system

Sometimes the legislator considers one party to be more in need of protection or more deserving of it than the other, and therefore lays down minimum standards in law.



2. Deviation complies with the specification

OR

1. Deviation does not comply with the specification



Safeguarding mandatory law

Mandatory legal form pursuant to Section 611a(1), sentence 6 of the German Civil Code (BGB)

If employees are to be, and must be, protected by mandatory law, this means that one may not deviate from the individual provisions of mandatory law.

HOWEVER: It is certainly not possible to alter the employee's status by means of a deviating agreement (stating that the worker is not to be regarded as an employee).

See slide 86 for more on this.

To this end, however, it is necessary to know whether and when the legislator intends a worker to be regarded as an employee.

→ The decisive factor is the worker's status as an employee



Employment relationship

Formation

It is now generally accepted that the employment relationship arises through the conclusion of a 'standard' contract.

The parties are referred to as the employer and the employee.

As with almost all reciprocal contracts, the key factor in characterising the type of contract is the principal obligation, which does not lie in the obligation to pay.

- This consists of the employee's obligation to perform work.
- Problems may arise in distinguishing this from other forms of contract.



Definition of an employment contract

Normative approach

Section 611a of the German Civil Code (BGB) – Employment Contract

(1)¹ An **employment contract** obliges the employee to **perform work** in **the service** of another person, **subject to instructions and determined by that other person, in a relationship of personal dependence**.² The right to issue instructions may relate to the content, performance, time and place of the work.³ A person is subject to instructions if they are not, in essence, free to organise their work and determine their working hours.⁴ The degree of personal dependence also depends on the nature of the work in question.⁵ In order to determine whether an employment contract exists, an overall assessment of all the circumstances must be carried out.⁶ If the actual performance of the contractual relationship indicates that it constitutes an employment relationship, the designation in the contract is irrelevant. ...

(2) The employer is obliged to pay the **agreed remuneration**.

The most difficult aspect of distinguishing between employment and other arrangements concerns the element of subordination. Whilst the criterion is undisputedly necessary, how it is defined and when it applies is, however, a matter of legal dispute and difficult to ascertain in practice.



Checklist for determining employee status

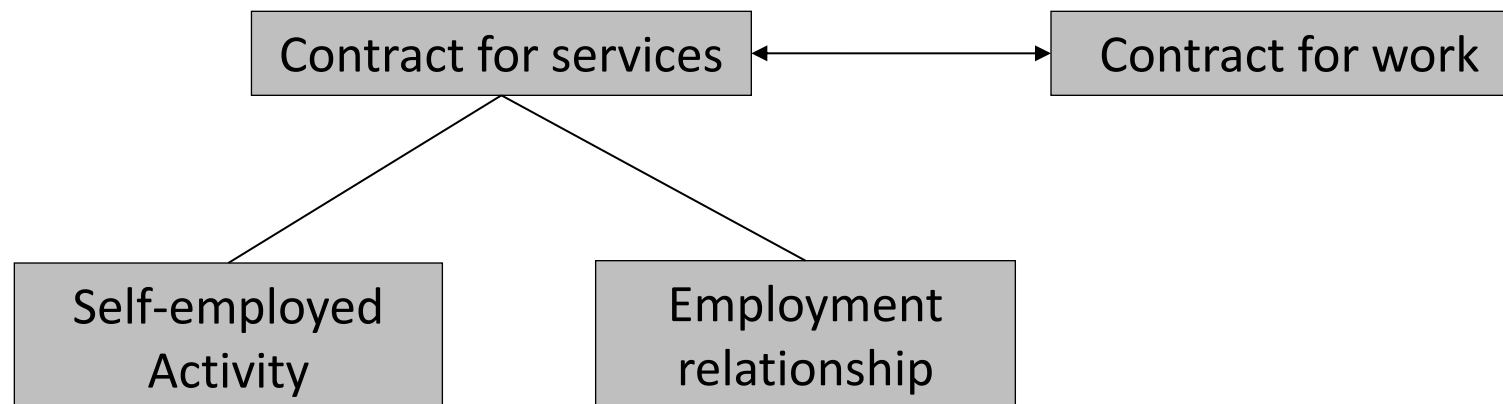
1. Contract under private law
(Distinction from civil servants [judges and soldiers are treated as equivalent to civil servants], statutory obligations to perform work [e.g. prisoners] and family members working in the business [see Sections 1353 and 1619 of the German Civil Code (BGB)])
2. Obligation to provide services
(Distinction from a contract for work and services pursuant to Section 631 of the German Civil Code (BGB))
3. For remuneration
(Distinguished from a contractor within the meaning of Section 662 of the German Civil Code (BGB);
NOTE: Section 612 of the German Civil Code (BGB))
4. Dependency
(Distinction from self-employed persons)



Distinctions according to the prevailing view

The contract must be aimed at the performance of services.

In other words, the obligation is to perform the work, not to achieve a specific result.





Distinction from a contract for work and materials

Case: Patient P visits his GP to be treated for a cold.

→ Contract for services (as no specific result is required) → specifically: Section 630a of the German Civil Code (BGB)

Case: Patient P visits cosmetic surgeon A to undergo breast augmentation or six-pack implantation.

→ Contract for work and services, as a specific result is required → also Section 630a of the German Civil Code (BGB)

Which type of contract applies in each case?