

# *A Concept of Personal Autonomy Fit for Contract Law*

*DIOGO TAPADA DOS SANTOS\**

## ABSTRACT

The interplays between autonomy and many areas of law are somehow evident but many times redundant and unclear. In this paper, I offer an account of personal autonomy that can be useful in reading private law phenomena, especially focusing on the doctrine of contract as promise. This doctrine, which assimilates contracts and promises, poses two challenges to the ideal of personal autonomy: first, how can autonomy justify or require the ability to be bound by promise or contract; second, how can the possibility to change one's mind, which is a virtue of the autonomous life, be reconciled with the bond created by contracts. By defending that personal autonomy is an ideal of self-authorship, and that the autonomous person authors her own life, being emotionally and intellectually capable of committing to a sufficient variety of long- and short-term choices, which she will consider without uncalled external interferences nor impositions and with respect for a condition of integrity, I will address both concerns, aiming at proving that a thick ideal of autonomy is capable of justifying the practice of contracting and is not in opposition with the strong bond created by contracts. The

\* Diogo Tapada dos Santos, MJur (Oxon). Junior Associate at Linklaters LLP (Lisbon) and Guest Lecturer in Civil Procedure (University of Lisbon School of Law). This paper corresponds to the dissertation presented for the degree of Magister Juris (Oxford, 2015), supervised by Professor Leslie Green. The author is thankful to Clara Martins Pereira for her contribution in discussing and revising the dissertation.

debate will primarily focus on promises, and thereafter its arguments are applied to contracts' analysis.

## I. WHY AUTONOMY IN CONTRACT LAW?

The idea of personal autonomy has long occupied a prominent place in philosophy and is certainly implied in many aspects of legal theory. However, it is many times used in an ambiguous and circular way: people seem satisfied to say that a person is autonomous when a person has autonomy, without elaborating on what that autonomy would mean or imply, and that confers a high degree of elasticity to the concept.<sup>1</sup>

When the debate is moved to the field of law, one soon finds out that autonomy-based accounts of the law tend to be simplistic. Most lawyers are confronted with the very general idea that, because the person is autonomous, the law seeks to create room for the exercise of her personhood. This is a poor account that does not tell us much and does not commit to any vision of autonomy in particular.

An idea of autonomy, even if slim or thin, can be said to exist in all fields of law (again, within the simplistic framework). Public law has rules that limit the state scope of intervention, securing negative liberty. Criminal law works as a coercion mechanism to avoid interferences between persons that diminish the autonomy of ones' life<sup>2</sup>—perhaps the clearest example is the criminalization of kidnapping of persons, a crime that in practice limits someone's practical autonomy.<sup>3</sup> Diversely, private law is not merely a mechanism of negative enforcement of some autonomy, but is more essentially a mechanism of positive enforcement of autonomous actions. This can be seen in aspects such as the acceptance of the trust as a mechanism to transfer wealth, but is more evident in contracts. However, there is not, I believe, a special relationship between autonomy and private law. What is worth pointing out is that, as happens with public law or any kind of law for this effect, there are aspects of the legal regime that both seek justification in and struggle with the ideal of autonomy. Thus, each particular legal institution may have a relevant interplay with the ideal of autonomy.

*Brevitatis causae*, I do not intend to offer a full account of the intersections of autonomy and private law, elaborating on some sort of catalogue of autonomy-

<sup>1</sup> For a summary on the broadness of uses associated with autonomy, see Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 2001) 6.

<sup>2</sup> I am assuming that criminal law works primarily as a mechanism of general prevention by exerting a threat that is sufficient to dissuade criminal activity.

<sup>3</sup> The question of whether or not someone who is physically constrained remains morally autonomous is left open.

driven or autonomy-limited institutions, nor discuss whether autonomy is the driving principle of the institution of contract.

Coming to the delimitation of the scope of this paper, I expect to arrive at an account of personal autonomy, a concept that helps to understand the idea of ‘contract as promise’. This is not new: Kimel undertook a similar exercise<sup>4</sup>. Nevertheless, I hope to bring some elements to the debate, which relevance lays in the challenges that the contractual promissory events pose to the ideal of autonomy. The brevity of this paper requires that only one problem is addressed. Nevertheless, the theory of contract as promise is far from being uncontested and there is more to a contract than its promissory facet, or more to a promise than its contractual potential. Therefore, some assumptions are made for the sake of the argument with a view to enable an elucidating debate on the idea of personal autonomy that is working as a justifying factor of private law institutions.

Likewise, my account of personal autonomy will not certainly be an all-encompassing explanation, considering what has been said before—it is oriented at analysing a specific phenomenon. The value of this exercise relies, in my view, on the fact that contractual obligations are a good illustration of the interplays between a private law institution and autonomy: one has to be able to explain if and why does an autonomous person require the ability to be bound by contract, while solving the paradox that an autonomous person bound by contract will not be able to easily change her mind. By doing so, we are elucidating by example a potentially broader construct about the role of autonomy in private law institutions and we can establish a thick concept of autonomy that sustains the binding force of contracts.

An example may be useful. *A enters into a lease contract with B for the period of three years. After one year, A has a change of mind<sup>5</sup> and B insists A has to keep the lease two more years.* A simple view of autonomy will struggle with such case: A was certainly autonomous when entering into the lease, and as such the law has protected A’s interest in this contract by making it binding to B, who had agreed to lease to A. However, as an autonomous being, A can have a change of mind; why does not the law allow for the unmotivated rescission of the lease, protecting B against A’s change of mind? A thick concept of autonomy should be able to explain this simple case without compromising any relevant moral value of contracting and of living the autonomous life.

<sup>4</sup> Dori Kimel, ‘Promise, Contract, Personal Autonomy, and the Freedom to Change One’s Mind’ (2013) Oxford Legal Studies Research Paper No. 19/2013.

<sup>5</sup> Note that this change of mind has to be legally irrelevant: it cannot be, for instance, a change in circumstances that legally allows for the rescission of the lease.

## II. CONTRACT AS PROMISE: INTRODUCTORY REMARKS

Some notes on why contract as promise is of relevance and asks for an autonomy-based account of law are required. The background conception is that a contract is frequently seen as an interchange of promises<sup>6</sup> (hence the nomenclature of promisor and promisee, which illustrates more than anything this understanding), which is cause for concern because contracts in such sense are an exercise of self-authoring that may be subject to a change of mind. From that, one easily questions how a person can be bound by contract, when a contract is an autonomous promise subject to the possibility of a change of mind.

Let us lay down the problem. The first idea is that a contract is a legally acknowledged promise. The second is that a promise has moral worth by virtue of it being an exercise of autonomy. There is an assumption that self-authorship is an essential manifestation of the idea of autonomy, and that promising is a prominent way of self-authoring one's life. This second idea requires discussion of two aspects I will analyse on Chapters III and V: first, the fact that self-authorship is part of the ideal of autonomy, and second, the statement that promising has anything to do with self-authorship.

The third idea is that, for an autonomous person, the ability to commit oneself is as worthy as the ability to change one's mind. It is a legitimate claim that not only committing oneself, on the assumption that promising favours autonomy, is good, but also that the possibility to change one's mind is a requirement for an autonomous life. How can two good things annul each other? For promising supposedly presupposes that a change of mind will not be allowed an impact on a commitment, and this opens up a paradox: the more a person promises, the more a person is autonomous on one side, and the less a person is autonomous on the other; because the more a person promises, the less a person can act on a change of mind.<sup>7</sup> This apparently invalidates future alterations to the contract, starting by preventing the promisor to change a promise and even by trying to avoid a failure to perform.

In what regards the first idea, I do not intend to give a full account of the conception of contract as promise, as that would exceed the scope of this paper. I will say that it is almost factual that a contract is an exchange of promises: a promisee

<sup>6</sup> It is worth pointing out that the statement that a contract is an interchange of promises does not automatically endorse the liberal theory of contract. It happens that case law and many legislative texts address the parties of the contract as promisor and promisee, and label both the contractual obligation and the object of the contractual performance as a promise.

<sup>7</sup> N.B. I say "act on a change of mind" in order to avoid for now the debate on whether a change of mind, at all, is possible. It seems that a promise will not impede a change of mind, unless a person is of such a moral character that a complete adhesion of spirit to a promise crystallises the mind for all effects.

seeks a promisor, who will undertake an obligation that is legally enforceable. The main difference between contract and promise is precisely in the enforcement mechanisms available to the promisee, for to a legally irrelevant promise there are no legal enforcement mechanisms available. Thus, contracts can be seen as a subspecies of promises that the law vests with certain peculiarities in regime. At first it seems that the promises qualified as contracts are not different from promises in general: both are relationships by which one person is obligated to fulfil the undertaken in the benefit of another person. However, contracts are better seen as qualified promises, to which the law and the courts apply specific tests as to give them legal relevance. The availability of mechanisms of legal enforcement is a mere consequence of the legal relevance of a promise, and therefore they are insufficient to argue that contract and promise are two different realities. The legal relevance of a promise, i.e., its qualification as a contract, is established with recourse to tests that normally rely on formalities (as is the case of promises under deed) or on factors that indicate a relationship worthy of legal protection (as the common law doctrine of consideration). Although these may qualify a promise, there is no significant change in the basic nature of the practice. In fact, the mechanisms of legal enforcement of promises (namely, specific performance and damages) work as to coerce the promisor to stick to his promise, either by giving him a direct order to perform or by making it disadvantageous for him not to perform, to the point that performance comes as a lesser evil in his mind. Likewise, promises outside of contract can be enforced by recourse to social pressure or by appealing to the promisor's character or morality. Therefore, one can assume for now that a contract is indeed no more than a species of promise, subject to a particular regime as regards its formation and fulfilment.

### III. A CONCEPT OF AUTONOMY

#### A. THE NEED FOR A CONCEPT

It is important to start by making clear what the use of the word autonomy conveys. Without this clarification, one can easily slip into simplistic stances such as 'a person can enter a contract because it is up to her, by virtue of her autonomy, to stipulate legal relationships'. What is then the idea of personal autonomy that can be relevant to explain the legal phenomenon of 'contract as promise' here at stake? I wish to delimit this incursion on a concept of autonomy by functionalizing the debate, i.e., by accepting that the definition of any concept must take into consideration the prudential uses it is going to serve. Naturally, being teleologically oriented does not imply a deviation from the bigger picture, i.e., the concept of

autonomy in a “pure” form (if such a form is possible, probably it can only be validated in very abstract terms).

As regards the issue of ‘contract as promise’, the autonomistic conception has to be able to explain two distinct aspects, as already noted. Firstly, the concern that an autonomous person may, by binding force of a contract that is no more than a promise comprising certain rules for action or abstention, limit her concrete capacity for autonomy in certain cases. In our case, this first concern is reflected in B committing her property to a three-year lease, excluding all other uses a property owner has available. Secondly, the perplexity that an autonomous agent can be so bound by contract that his contractual promises can be held against him, even against his own will. In our case, this is illustrated by A’s change of mind one year into the contract. The first aspect relates to the omnipresent question of whether the autonomous person can, by her own will, become less autonomous—or, looking at it from an alternative perspective, whether the assumption of compromises (such as promises) is in fact the attitude that best conforms with the autonomous life. The second aspect regards the possibility for a change of mind and its apparent lack of influence to legal life.

#### B. CONCERNS AND CONSTRAINTS WHEN DEFINING A CONCEPT OF AUTONOMY

In order to be able to address these aspects, any conception of autonomy should satisfy some concerns regarding its plausibility and coherence.<sup>8</sup>

One must be aware that the concept sought is going to deal with the legal system (taken as an abstraction here, for I am not considering any particular legal system). There is a certain degree of criticism to the legal rules and their system allowed, especially in the event one finds that the rules under analyses are autonomy-impairing. Notwithstanding, there may be a presumption that the legal rules are a product that reflects the best regulatory solution found to date, and in so far as possible, they should be reconcilable with the concept of autonomy.

Furthermore, Dworkin notes that a concept of autonomy must not be such that it ‘makes it impossible or extremely unlikely that anybody ever has been, or could be, autonomous’.<sup>9</sup> Thus, autonomy—even if an ideal—has to be seen in realistic terms. This is perhaps the most relevant concern, being a deal breaker to the whole question. I wish to extend this concern further: autonomy has to be able to frame the phenomenon of promising, given that promises are part of the everyday life and are in themselves an exercise of the autonomous life. It is impossible to

<sup>8</sup> These are inspired by Dworkin (n 1) 7–9.

<sup>9</sup> *ibid.*

try to explain promising (and contracts as promises) in an autonomy-inspired framework if one is to argue, further on, that the very idea of obliging oneself by a promise harms autonomy. Such an endeavour would lack logical coherence unless one finds a good justification to say that an anti-autonomous practice is widely allowed in societies and jurisdictions that praise the value of autonomy. For instance, everyone will agree that B's right to lease her property exists, and that it is a good thing. Alongside this idea, the concept of autonomy must have 'normative relevance', i.e., it must make clear its usability as a philosophical device.<sup>10</sup>

Besides, any concept of autonomy must be able to explain why people would consider being autonomous good and has to be reconcilable with other goods (competing values). I am here following Dworkin's refusal of the strongest constraint in the value conditions, that if accepted would require prove that autonomy is the supreme good. The reason for this option can be disclosed now, in spite of it being necessarily developed further on: autonomy can hardly be the supreme good, considering that some competing goods may have equal worth, e.g., the reliance of the promisee on a promise can be opposed to a change of mind of the promisor. If we recall the lease, the fact that B has leased her property is good but not the only relevant good for law; in fact, governments sometimes limit or put constraints on the right to lease because there are competing goods (e.g. market stability or house availability) and B's autonomy is sometimes not enough to trump other competing values.

As a weak constraint to the concept, Dworkin proposes that it should respect some ideological neutrality, meaning that the concept must be valuable for various ideological standings. Although I see the necessity for such a constraint, in the sense that a concept entrenched in ideology would not be a satisfying justification for many bystanders, it should be taken carefully. A concept that is too broad and ideologically uncompromised can end up not satisfying anyone's system of beliefs. Dworkin seems to be sensible to these concerns and that is why he opts for a weak constraint, allowing for differences between ideologies regarding particular aspects of autonomy to be relevant, such as its absolute or relative value.<sup>11</sup> For instance, in a country with controlled rent laws, the landlord can still be considered autonomous in leasing his property. Finally, the concept of autonomy has to some extent to respect the set of judgements one has about the idea of autonomy, which in our particular case implies regard to assumptions such as 'contracts without consent

<sup>10</sup> Dworkin (n 1) 8–9.

<sup>11</sup> *ibid* 8.

are invalid because there was no autonomy' or 'all legal restrictions observed, the parties can autonomously establish the contractual provisions they wish'.

### C. AT LAST, A CONCEPT OF AUTONOMY

After the previous remarks, one can adventure into offering a concept of autonomy with which the idea of contract as promise can be explained and justified. There is little room for originality here: many authors have advanced definitions and ideas, and my goal is to have a working concept that serves the main purposes of this paper.

The fundamental idea that seems to permeate all conceptions of autonomy draws from the etymology of the word: autonomy relates to a norm (*nomos*) that is self-imposed (*autos*).<sup>12</sup> In simple terms, the autonomous person is the one who sets her own rules. This is rather vague and leaves unanswered what is the nature of these rules. Besides, it assumes autonomy is an un-empirical deliberation mechanism, which is action-independent. Perhaps this confusion is related with the appropriateness of the concept of autonomy that, one must recall, first started in political philosophy as an attribute of Greek cities, then of collective entities such as the state, and finally of individuals. As in all conceptual extensions, *mutatis mutandis* is key: for instance, comparing an individual to a legislator of his own life is impacting, but still a metaphor. Thus, the concept should grasp something more than an idea of setting rules for oneself, rejecting that the autonomous life is merely an experience of defining a set of rules and living by them.

I believe it is more precise to claim that the autonomous person is one who authors her own life, be it by means of self-created rules, adherence to a life plan, or even a conscientious decision not to follow any rule. Still, the element of self-authoring through auto-normativity is fundamental, especially if one accepts that to set norms to oneself is to "weave the tapestry" of one's own life. There are competing conceptions of autonomy, but their focus is on precisions about the sense of self-authoring one's life more than on denying that autonomy is about self-authoring.

The first aspect in delineating a concept of autonomy is to engage in the debate between procedural and normative accounts of autonomy. A procedural view will argue that a person is autonomous when she acts within a procedure (a set of formal conditions) that has in view an autonomous action, i.e., the emphasis of this account is on the exercise, the way by which the person reaches a decision. On the other hand, a normative perspective will argue that it is not right or enough to focus on the form of an exercise or decision, but it is necessary to observe

<sup>12</sup> Such is the account of Dworkin (n 1) 12.



substantive conditions to the decision so that it can be deemed autonomous; that is to say, autonomy exists when the decision abides to a certain norm that is reflected in substantive conditions. A proceduralist will be satisfied when a person decides following a procedure that assures an autonomous outcome. If we think about contract law, a proceduralist will say A and B entered into their agreement in an autonomous way if they followed the legal formalities. A normativist will further ask the decision to be assessed according to a set of conditions. In our case, besides any formalities, A and B are to be under no duress or mistake. The normativist accounts vary on the conditions that are required. Moreover, it is possible to be a normativist and still to acknowledge the importance of the procedure under which the exercise of autonomy occurs. In my view, to judge a person to be autonomous one has to look at the procedure, and at the content of the decision and its agreement with the substantive conditions for autonomy. One without the other offers an incomplete picture of the idea of self-authorship: to claim that someone is authoring their own life requires the author to be autonomous and his agency to respect autonomy. If the author is not autonomous, then he is not in fact the author. And if his agency does not respect autonomy, then his decisions are not worth of his authorship—rather, they are an emulation of an autonomous life. Later I will try to show how two substantive conditions of the autonomous life—responsibility and integrity—are necessary to identify someone as autonomous.

A second aspect to take into consideration is the debate about the distinction between first-order and second-order desires or preferences. Roughly, the first-order preferences are those that are manifested immediately, ruling concrete exercises of one's autonomy, and second-order preferences belong to the realm of self-reflection, translating a certain sense of identity or of long-term options. Dworkin relies on such a distinction to deny that autonomy only concerns second-order reflection.<sup>13</sup> It is true that an individual builds desire upon desire, that these are interrelated and that, as such, one could devise a "chain of desires". His example is of the man who smokes, desiring so on a first-order basis, but wishing he did not on a second-order reflection. Nevertheless, he recognises the criticism to which the idea of second-order preferences can fall victim, mainly that first-order desires do not need considerations about second-order reflection and that recognising a second level of preferences allows for a never-ending enquiry into the mind of the person, who will always find new levels of reflection.<sup>14</sup> A third obstacle to this distinction seems to be its artificiality. Without entering into the science of cognition and volition, how can we establish with clarity levels of preferences? By questioning the person? Or by adopting an analytical posture and trying to

<sup>13</sup> Dworkin (n 1) 18.

<sup>14</sup> *ibid* 19.

make sense of an individual's actions and motives? It all appears odd and it is. When it comes to preferences or self-reflection, I believe it is impossible to precisely individuate such first- and second-order levels. It is safer to regard an action or omission, in order to assess the autonomy of the agent, in its entirety, considering it to ontologically carry the whole of self-reflection. Autonomy then calls for a holistic reading of the design of the person's life, pondering lingering tendencies, emerging inclinations, long-term reflections, non-negotiable principles of conduct and short-term options. This implies that the judgement of whether a person authors her own life should take into account the whole of the life and the whole of the person, and cannot be centred in a casuistic analysis of actions and omissions.

#### D. CONDITIONS FOR AUTONOMY

So far, we have seen that the autonomous person is one who is capable of authoring her own life, and that both the process and the outcome of every "activity" (for the lack of a better word) of self-authoring is relevant to deem the person autonomous in a holistic account of her life. These reflections presuppose a background state of affairs for autonomy: the capacity for it or the conditions of autonomy, as Raz labelled them.<sup>15</sup> Raz says that the person, to be autonomous, must have appropriate mental abilities, an adequate range of options to choose from and be independent. I accept these conditions, which will be analysed and developed, and will further add integrity as a fourth condition.

The condition of having appropriate mental abilities calls for a judgement on the intellectual and emotional capacities of the person to determine if she has 'the mental abilities to form intentions of a sufficiently complex kind, and plan their execution'.<sup>16</sup> Contract law fully embodies this condition by only enforcing promises of agents that have legal capacity.

As to having an adequate range of options to choose from, it can be translated into the necessity of having a diversity of plans of life at the individual's hand. The autonomous person has to be able to choose what sort of life she will lead and, apart from natural constraints (although even those can be circumvented at times), all possibilities are supposed to be available. A person cannot be said to be the author of her life if there is no room for choice between alternatives, or better, if the whole of the life's plan comes from a source outside the person's volition. However, practicability recalls us that a requirement for all possibilities to be available is too strong: while in theory it is possible to see as desirable a full world of potential for self-authorship, in practice it seems evident that not every possibility can be available. This is due to various reasons: firstly, some possibilities

<sup>15</sup> Joseph Raz, *The Morality of Freedom* (Oxford University Press 2003) 372–373.

<sup>16</sup> *ibid* 372.

are mutually excluding, meaning that by choosing a certain norm the person is also choosing not to choose a norm incompatible with the former; secondly, not only nature sets some restraints (v.g., I could choose to run a mile in 5 minutes, but that is not something I am ever able to do), but also there are life contingencies that limit or make less accessible the possibilities of choice (viz. the geographical location of the person or her socio-economic context). That is why Raz asks for availability of options that enable the person to choose in the long- and short-term timespans, and for varied options, in a logic of quality of diversity above quantity.

Regarding independency, this is a requirement that matches to a certain extent Dworkin's idea of procedural independence.<sup>17</sup> Dworkin is a proceduralist, and seems to believe autonomy is satisfied if the person is not significantly influenced in the process of choosing. Raz goes deeper, and distinguishes—in order to assure independence—that the person should be free from coercion and manipulation (an idea to which contract law seems to adhere by the doctrines of mistake and duress). Coercion is the removal of some or all the options from the person's horizon of choice, while manipulation is the perversion of the process of choosing. Independence as a condition for autonomy is justified in the need to ensure the authorship of a life is truthfully self-conducted: the person-author must have all the adequate perspectives to formulate her desires and must do so relying for the most part in her own judgement.

### E. INTEGRITY

It has been claimed so far that the autonomous person authors her own life, being emotionally and intellectually capable of committing to a sufficient variety of long- and short-term choices, which she will consider without uncalled external interferences nor impositions. However, something might be missing, what I will call the condition of integrity.

Integrity is here used in the sense of stability of the person as author of her own life.<sup>18</sup> When one assumes that autonomy has as a major implication and at its essence the ideal of self-authorship, one can claim that a certain degree of planning or stability of principles is required. The person who refuses to give one second of

<sup>17</sup> Dworkin (n 1) 18–19, 21.

<sup>18</sup> This notion is not the same as that of political integrity used by political philosophers who engaged with R Dworkin's *Law's Empire*. See, in particular, G J Postema, 'Integrity: Justice in Work-clothes', (1997) 82 Iowa L. Rev. 821, 825. Integrity is presented there as a feature of systematic coherence of the legal system that can justify the rule of precedent. Contrarily, I align with the account of integrity given by C Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (Oxford University Press 2009). Korsgaard values integrity as an ideal of unity of being, composed by a unity of will and of coordinated agency directed by the unity of will towards a unity of end that drives all the being.

thought before acting is most probably acting on instinct, rather than authoring her life, because there is normally no attitude of finding and refining the self when acting on instinct. The author, it has been pointed out, is generally aware that choices have impacts and knows that by choosing he is adhering to the outcomes of his choice. In sum, the idea of authoring a life implies that the person constantly legitimises her life events as part of the life she accepts and seeks. Thinking of tapestry weaving as a metaphor, the weaver chooses a strand or accepts one that is given to him, consequently weaving it into his unfinished work until the whole of strands makes sense as a tapestry. Such is the work of the autonomous person that, much like the weaver, does not insert a strand by chance—even if the strand was not picked by him, he will make sense of it applying his artisan craft and personal touch to include it in the tapestry.

Some may criticise integrity as too strong a condition. It can be argued that asking for a person to have integrity is to deny the possibility to change one's mind. However, integrity does not mean absolute unity of life and is reconcilable with a change of mind. If integrity were a requirement for unity of life, it would impose a premature and permanent adhesion to a life plan. A person would need to author her life at once and to stick to the original project. Contrarily, what has been defended is that authorship implies a discovery and refinement of the self through renewed choices, under the conditions for autonomy. Indeed, integrity may even require that the person boldly changes her mind, when some choices reveal that the self-author is distancing himself from his previous outlook on life. Again, life is authored autonomously through short- and long-term options, and the autonomous author has to be free to play with his choices as to give significance to his self. This implies that the unity of one's life may never exist, for the person will mature, accepting some new ideas and disregarding old ones, and even at times rehabilitating old options. Integrity respects the flexibility necessary for the autonomous life and simply asks for awareness of the whole. Thus, requiring integrity is no more than making concrete the idea that autonomy is a holistic virtue, to be verified in each specific choice and in the general trend of one's life.

There may be a tendency to consider integrity as a separate value, even though correlated to autonomy.<sup>19</sup> It could as well be a competing value to autonomy, in need of some harmonisation of values and eventually accepted as a higher or lesser value when contrasted with autonomy. I think that is overcomplicating the issue. If integrity is umbilically associated with autonomy as I defended, the conciliation of both ideas is facilitated; if it is an independent value, one will always need to prevail over the other, or both will be equally affected. In the case that autonomy is placed at a higher level, it would follow that an autonomous person could very well be unfaithful to herself (something like an anti-author, an

<sup>19</sup> Dworkin (n 1) 32.

individual set to dismantle any authorship choices), and autonomy would be no more than an ideal of legitimised incoherence. In the reverse case of integrity being placed at a higher level, it could follow that the autonomous person would never be allowed to change her outlook on life or, at least, that short-term options would be discouraged in favour of long-term commitments. Were the two at the same level, yet independent, we would enter into a paradoxical debate between the ability to change one's mind purported by autonomy and the necessity to be faithful to oneself purported by integrity. It seems easier to reconcile both according to the understanding that integrity in a weak sense is a condition to an autonomous life, as proposed above.

#### IV. RESPONSIBILITY AND AUTONOMY

From the concept of autonomy here defined, one can draw a consequence of the autonomous life, that of holding the autonomous person responsible. Quante treats autonomy and responsibility as concepts of reflection, that cannot be explained in an isolated form and demand their interplay to be taken into consideration when explaining either one.<sup>20</sup> My claim is that the autonomous person can be ascribed responsibility for her autonomous life, i.e., can be confronted with the choices she makes and the life she chooses to author. This is arguable on the assumption that a person can only be held responsible for that over which she has power; or, in different terms when applied to choices, a person can only be held responsible for choices she made autonomously. Autonomy emerges then as a power; the individual, when acting with autonomy, has power over his choices. With power comes responsibility, for those who have control will have the consequences of their actions imputed to them. In this sense Quante affirms that 'a subject is the adequate addressee of an ascription of responsibility only if she has command of the properties and capacities to make her a rational decision maker', which for him means acting with autonomy.<sup>21</sup>

Contrarily to integrity, we are not stuck with irreconcilable values, because autonomy and responsibility coexist without being paradoxical. The autonomous person can always be held accountable for her autonomous choices, and the responsible person can certainly be autonomous in her choices. Responsibility should not detract autonomy, out of an idea of 'fear of freedom',<sup>22</sup> because a person cannot be truly autonomous if she is not willing to accept the outcome of her choices. In this sense, someone who avoids choices because choices come

<sup>20</sup> Michael Quante, 'Being Identical by Being (Treated as) Responsible' in Michael Kühler, Nadja Jelinek (eds), *Autonomy and the Self* (Springer 2013), 254.

<sup>21</sup> *ibid* 260–261.

<sup>22</sup> Dworkin (n 1) 67.

with consequences is autonomous in a very poor sense, considering that avoiding choices is part of that person's autonomy. After all, if in being autonomous she is authoring her life, she has to be satisfied with the life she is shaping with all its consequences.

In fact, responsibility works in favour of autonomy when seen as a deliberation-aid, a factor taken into consideration when a person is about to act as to author her life. On the verge of choosing, the person considers all the adequate alternative options and assesses their implications. Implications are first assessed against the whole of the life, as to assure their conformity with an attitude of authoring: the person questions whether by choosing X over Y on the long-term she will keep in line with previous trends, inaugurate new perspectives on life or even reformulate old tendencies, or whether by choosing W over Z in the short-term she will be coherent with her system of beliefs or her world view that inspire the personality and life she is authoring. This is mainly the concern of integrity. Responsibility, on its turn, adds to these considerations by making the person aware that there are inner and outer implications to her actions, on the way her life is being shaped and on the way others perceive and relate to her life. It makes the autonomous action or decision not only a matter of the inner realm, but relevant in terms of accountability, which implies that there is true autonomy when the person accepts being held responsible.

Notwithstanding, responsibility seems to be opposed to the possibility of changing one's mind. It is easily argued that holding someone accountable will impede the abrogation of a past decision or the adopting of a new attitude towards life issues. In our case, forcing A to keep the lease prevents him from buying a house. This perspective is false. If anything, responsibility is a strong device to enhance the chances to autonomously change one's mind. By holding the person accountable, one is ensuring not only critical self-reflection at the moment the person decides or acts, but also at every subsequent moment. A's liability for breach of contract is what translated this view on responsibility to our case. Thus, responsibility addresses concerns about arbitrary changes of mind, by preventing them: the autonomous person will ponder consequences when considering new perspectives for her life, and by doing so the procedure of autonomy is aggravated. Moreover, responsibility offers mechanisms to change one's mind by identifying the consequences that may oppose or prevent such a change and allowing the autonomous person to deal with them. Let us imagine a child faced with the option between studying and playing. At a first moment, the child opts for study. Later on, the child starts to consider the willingness to play, and ponders whether there would be any consequences to stop studying. We can admit the child has intellectual and emotional maturity to know study and play must be balanced. If the child is aware that playing at that

time will directly impact a grade on the next day's test, and still decides to play, the child is being both responsible and autonomous. There was acceptance of the consequences, which were seriously considered, and an identification of the worth of playing with the life the child is authoring. The example is naïve, naturally.

## V. ABOUT THE PARADOX OF AUTONOMOUSLY PROMISING AND AUTONOMOUSLY CHANGING ONE'S MIND

The need for the thick concept of personal autonomy I propose above, one which may be of use in explaining the phenomenon of contract as promise, is strictly linked with the paradox of promising and changing one's mind for the autonomous person. In this Chapter, I will start by debating the worth of both promising and changing one's mind in face of the ideal of personal autonomy. Analysing the paradox will put to test the thick concept of autonomy explained above, assessing whether it offers a way out of the paradox while remaining consistent with the ideal of personal autonomy.

### A. UNDERSTANDING PROMISES IN GENERAL

Kimel defines promising as 'the practice by which people voluntarily undertake obligations to others'.<sup>23</sup> Along the same lines, Hogg says that 'a promise is a statement by which one person commits to some future beneficial performance, or the beneficial withholding of a performance, in favour of another person'.<sup>24</sup> The necessary elements of a promise, verifiable in any promissory event, are the assumption of an undertaking (commitment and obligation may or may not be interchangeable concepts) by a person to the benefit of another. By promising, the promisor is agreeing to act (or omit an action) to the benefit of the promisee, which can or not be the sole beneficiary of the promise. Regarding the benefice, it is possible to say that the promisee is always a beneficiary, even if the only benefit he acquires is the fulfilment of the promise itself to the immediate benefit of a third person or the promisor himself (v.g., a mother can ask her son to promise her he will quit smoking, and in fulfilling that promise it is clear how both benefit: the son, in his health, the mother, in her motherly concern for the well-being of her son). Recalling our case, A promises to lease from B, undertaking to pay rent for the period of three years, and in this case B is beneficiary of that promise, a benefit that translates into receiving rent. Reversely, B promises to lease to A, undertaking

<sup>23</sup> Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing 2003) 27.

<sup>24</sup> Martin Hogg, *Promises and Contract Law: Comparative Perspectives* (Cambridge University Press 2011) 6.

to allow A to live at the property, and A is beneficiary in that B cannot pursue an unmotivated eviction.

The voluntariness of the promise is, in my view, an incidental element of the promissory events, although a commonly perceived feature. Ideally, the assumption of obligations should be done voluntarily, but life provides us with various situations in which obligations end up being imposed without much questioning as to their validity (v.g., the parental obligations that come from parenthood, to which no one expects the parents to assent). The language of the promise involving an undertaking or obligation is justified on the accountability that normally comes with a promissory event: what distinguishes a promise from a resolution is, indeed, the fact that someone will be able to demand the fulfilment of the promise. The promisor enters a commitment, whilst the person who makes a resolution simply expresses the desire for the adoption of a conduct that, in her failing to do so, will not defraud an expectation. No doubt the promisee can also be coerced to accept the undertaking, or may be surrounded by circumstances that impede his freedom. The fact that the promise is entered into without voluntary assent by the promisor does not, in my view, change much of its character: rather, it only shows that there are voluntary as involuntary promises. However, the value of these is different: it will be readily accepted that justice demands caution when it comes to the enforcement of involuntary promises to the point of accepting that the promisor does not conform to his commitment. This is why I did not include enforcement as an essential element of a promise, because enforcement and accountability are in different levels: the former implies mechanisms that tend to provoke the fulfilment of the promise, whereas the latter merely implies that someone (normally, the beneficiary or promisee) will be expecting fulfilment of the promise and seek to enforce it, even though it may be unfair.

## B. PROMISES AND PERSONAL AUTONOMY

Promising is, foremost, a social practice.<sup>25</sup> There may be various reasons for promising, ranging from external to internal, from egoistic to altruistic. The qualification of a promise as a contract adds, to whatever these reasons are, the wish to enter into a contract, or better, to create a legal relationship that covers the promissory relationship. It is not only that B wants to make some money by leasing the property, B wants to receive the money within a contract that sets the rules in place. Notwithstanding, these are all motives, and personal autonomy is

<sup>25</sup> Many attempts at understanding promising rely on such an assumption. For instance, Fried (according to the account by Kimel (n 21) 10) centres his explanation of the nature of promising in the fact that it is a social practice, and Hogg's definition of promise ((n 22) 4) starts from the idea that an empirical perspective can help best elucidate what is a promise.



both motive and justification. People promise because they can, and their ability to do so is—outside of coercion or external impositions—a virtue of their autonomy as individuals; also, the value of the ability to promise is normally grounded in autonomy.

Autonomy as a motive for promising seems to compete with other motives: one cannot exclude that human beings may be tempted to commit themselves merely on the grounds of their ability or need to do so. This is a line of enquiry of difficult pursuit in a paper like this one, which does not cover behavioural sciences.

More relevant to my enquiry is autonomy as an explanation and justification for promising and its worth. I do not intend to explore other justifications of promises and their worth, for there may be many moral aspects that justify it (e.g., the claim that trust is valuable and can be created by a promise). Promising is valuable as an autonomy-maximising device,<sup>26 27</sup> assuming that what maximises a good is in itself good. The ability to commit oneself through a promise is almost an inevitability of authoring one's life autonomously, for without the ability to promise the range of autonomous choices would not be complete. As argued above, personal autonomy is an ideal of self-authoring that requires the possibility of committing to a sufficient variety of long- and short-term choices. Promising, as claimed now, is a mechanism of self-commitment that presents the possibility of making short- and long-term undertakings binding to the promisor. The connection between both in this aspect is almost immediate: promising is one of the modalities of authoring one's life in an autonomous way, broadening the adequate range of options in quality and quantity, naturally only when promising respects the others conditions for autonomy. Moreover, promising gives origin to solid commitments, which is in line with my claim that integrity is a condition for autonomy. Binding oneself through a promise is an exercise of integrity that indicates that the promisor acknowledges the desirability of a reinforced form of commitment, for which he will be accountable. Indeed, the accountability of the promisor shows the soundness of his self-authoring endeavours, because by

<sup>26</sup> Fried (according to Kimel (n 4) 1) does not use the expression and talks in terms of freedom: 'In order that I be as free as possible ... it is necessary that there be a way in which I may commit myself'. On these grounds, Kimel says Fried's idea is that of promising as a freedom-maximised device, from which I borrowed the concept to the expression used. Freedom and autonomy have blurred conceptual borders, which would be hard to trace here; therefore, I have avoided the use of the word freedom.

<sup>27</sup> Accepting promising is an autonomy maximising device does not equate to accepting that indiscriminately promising will ensure or favour autonomy. Quite the contrary, as Kimel notes ((n 4) 3).

accepting a commitment the promisor is authoring his life with some degree of permanence.

### C. AUTONOMY AND THE POSSIBILITY OF A CHANGE OF MIND

A change of mind can take a multitude of forms: it can mean adopting a totally new idea, rejecting an old conception, updating a previous understanding of reality, conforming a taste to novelty *etc.* What seems necessary is that the person transitions from a mental state of affairs to another, rearranging the factors that will be determinant in making self-authoring choices. Thus, a change of mind in this case is not solely concerned with the world of ideas or representations; it looks at the person's mentality shifts that are translatable into new opportunities for self-authorship.

The concept may come up as hermetic, but what concerns us is the autonomous person and the ability she has of readjusting the train of thought that lead her to previous choices or will condition future choices. Truly, any intellectual or emotional phenomenon with the potential of impacting choices can be called a change of mind for this effect. One of the most impressive illustrations of a change of mind is the acquisition or development of maturity while growing up: almost every person, during the transition from childhood to adolescence, and then from adolescence to early adulthood, will contact with new ideas that replace old ideas and with new realities that will require the person to form an original (as regards her mind) opinion.

The change of mind is a virtue of the autonomous person that, by itself, can occur outside the conditions for autonomy. It cannot be required that the transformation of the mental state of affairs of a person occurs only with respect for the conditions for autonomy, for the autonomous person can have no control over many of the life events that imprint new perspectives in her mind. In fact, it could be argued that most intellectual and emotional events that provoke a change of mind are exogenous, attributable to other persons or to general life circumstances rather than to spontaneous and critical self-reflection ordered at a change of perspective about life. Additionally, changing one's mind is not required by autonomy, considering that in theory (and maybe in practice, although examples all seem to be open to exceptions) a person can have a deeply entrenched system of beliefs and a rooted perspective on life that will not be affected by any kind of external event and that, when subject to critical self-reflection, will invariably end up unaltered. It is thus relevant to add the words "possibility to" to the expression

“change one’s mind”, in order to emphasise that this is something that can potentially but does not need to occur.

Within the framework of an autonomous person’s life, assuring the possibility to a change of mind is essential. It is required by the condition that autonomous choices can only arise from an adequate range of options, which will positively be broadened by facilitating changes of mind. The adequate range of choice is primarily verified (as to its fulfilment as a condition for autonomy) according to the state of affairs presented at the moment the person will choose. But the possibility of a change of mind brings to the moment of choice potential future alternatives that would be impossible to consider if it were not for a change of mind being allowed. That is, when confronted with the moment of choice, the person will be able to decide with autonomy not only because there is sufficient quality and quantity of alternatives, but also because the future alternatives that are somehow incompatible with present choices are available through the “scape valve” of a change of mind. Furthermore, accepting changes of mind removes, from the perspective of the author of his own life, an autonomy-impairing fact: the ‘fear of freedom’.<sup>28</sup> This ‘fear of freedom’ is, in fact, fear of the implications of acting with autonomy. It is expected that a conscious person acknowledges the future implications of her choices, and sometimes that can be an obstacle to autonomy, when the person prefers not to choose or decide in order to avoid making the wrong choice. Allowing a change of mind to be in the perspective about the future of the autonomous person reassures her that, in general, a bad decision is potentially revocable or changeable, which prevents the crisis over having to choose in an all-or-nothing attitude.

#### D. UNVEILING THE PARADOX

The relationship between autonomy and promises is apparently paradoxical. On the one side, there is the view that the ability to promise maximises autonomy. On the other, promising appears as a commitment that impairs autonomy by holding the promisor accountable and thus preventing that at a later stage he prefers an alternative choice to the one he made when promising. It seems as if promising has to be amongst the person’s options to enable an autonomous choice and that by fully committing herself she is benefiting from an autonomy-maximising device, while in fact she is forfeiting the possibility to change her mind: the paradox tells us that the autonomous person would be paralysed by the fear of freedom.

There would be no paradox if promises were easy to disregard. That being the case, promises would seem to be fully in accordance with the thin ideal of

<sup>28</sup> Dworkin (n 1) 67.

autonomy and there would be no place for a ‘fear of freedom’. However, we see how promises are backed by enforcement mechanisms that at least highly discourage non-performance of the promissory undertaking. Are these totally unjustifiable in an account of promising relevant for the autonomous person? The answer is to be found in the condition of integrity and in the value of responsibility. Both ideas give good reason to accept promising as an autonomy-maximising device. Integrity, asking that the autonomous person exerts autonomous choices contemplating the whole of her life and the necessity to be truthful to and consonant with the self she is seeking to author, allows us to view promises as one of the preferred ways of shaping one’s life. Autonomy that respects the condition of integrity is present in many modes of choosing, but the choices included in a promise respect it more patently. The accountability that the promisor accepts reveals his level of reflection in the whole of the life he is authoring, by being sufficiently sound in principle that a more permanent level of commitment does not scare him away from living the autonomous life. As regards responsibility, it is worth recalling that it enters with autonomy in a list of relevant values, thus allowing a claim that if, for one side, autonomy may ask for a greater level of flexibility on one’s commitments (especially considering the possibility of a change of mind), for the other it is not an absolute value and needs to be harmonised with other equal worth values. On the harmonisation between these, I concluded that responsibility works as a deliberation-aid to the autonomous person, a moral side-constraint, considering particularly that true autonomy exists when the autonomous person willingly accepts responsibility. Consequently, given that promising is a way of willingly accepting responsibility for an undertaking, it is easily inferred that promising maximises autonomy and the fact that a person cannot get out of a promise without a consequence is actually an encouragement to choices having to be made with a high degree of autonomy. I am led to conclude that the paradox of promising being at the same time in favour of autonomy and a limit to it is apparent, for autonomy itself agrees with the limitations to one’s life imposed by the entering into promises in virtue of the condition of integrity and of its interplay with the value of responsibility.

## VI. AUTONOMY AND CONTRACT LAW

So far, I have explained how I see personal autonomy, its conditions and interplays with responsibility, with hints at contract law. Additionally, I have sought to open the debate about the nature of promises and to give an autonomy-informed account of the act of promising, dealing with the most pertinent problems that promising poses to the autonomous life. These were not “diversion manoeuvres”

to avoid the line of enquiry I chose to follow in this paper: they already addressed many of the concerns about contract as promise in the context of an autonomous life. Simply, the debate required a certain degree of background assumptions that had to be formulated and tested. In this chapter I will finally offer a reading of contracts informed by the ideal of personal autonomy.

#### E. CONTRACTS AND THE MAXIMISATION OF PERSONAL AUTONOMY

If anyone was asked what institution of law conforms the most with the ideal of personal autonomy, advancing contract as an option would be a safe bet. Contracts are, by essence, a legal institution destined to fulfil the individual aspirations of conforming one's life within a legal binding framework.

Within the law of contracts, freedom of contract has a special place as an autonomy-inspired aspect. If the capacity to self-impose an obligation is a 'logically-antecedent freedom',<sup>29</sup> the idea of freedom of contract is a first and most expressive reflexion of that capacity in the legal realm. Freedom of contract is a principle or idea accepted by most jurisdictions that implies the liberty in deciding whether or not to enter a contract, the independence to choose what type of contract to celebrate and the possibility to conform the contract through the inclusion of some provisions and the exclusion of others. Its importance for a legal system is evident in the Draft Common Frame of Reference,<sup>30</sup> which phrased it as a main principle:

II.—1:102(1). "Parties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules."

Along the same lines, the Art. 0:101 of the *Principes directeurs* places freedom of contract as a major governing principle of this prospective European Private Law:

Each party is free to contract and to choose who will be the other party. The parties are free to determine the content of the contract and the rules of form which apply to it. Freedom of contract operates subject to compliance with mandatory rules.

There can be multiple reasons for the relevance of freedom of contract, such as economic and social factors, but its role as an autonomy-maximising mechanism

<sup>29</sup> Kimel (n 4) 1.

<sup>30</sup> Von Bar Commission, 'Draft Common Frame of Reference' <<https://www.law.kuleuven.be/personal/mstorme/DCFR.html>> accessed 03 March 2019.

is what matters for the effect of this paper. By opening up the contractual practice in its formation stages to various alternatives (negotiation and effectively entering into a contract), freedom of contract assures the fulfilment of the conditions of autonomy from the moment the parties are called to make their first contractual decision (that of starting negotiations that may lead to the formation of a contract). Firstly, there is adequacy of options both in quantity and quality: the parties can decide what contract to celebrate, adapt some of the legal terms and reject others, introduce mutually agreed provisions; previous to that, they can decide whether or not to start a negotiation, and in the end—even after the whole of the negotiation had been done—they can withdraw before accepting the final terms (subject to possible consequences, that are of very exceptional nature, such as situations of trust leading to pre-contractual liability). In our case, it is open to A and B to enter into a lease or not, to decide the moment they start negotiating, the type of contract they will celebrate (B could sell instead of lease) and, ultimately, until there is effectively a contract both A and B can say they are no longer interested in entering into a lease. Secondly, the kind of deliberative procedure that freedom of contract causes favours the condition of integrity: by opening up so many potential choices, there is an increase in the parties' awareness that there are many possible solutions to their deliberation, deeming the choice ultimately made as a more matured and well-thought through one. Recalling the lease, A has the time to consider the commitment a three-year lease represents in terms of paying rent and may decide to employ the rent money to obtain a loan and buy some property.

Additionally, even though not immediately related with freedom of contract, contract law includes provisions that assure sufficient maturity (*viz.* minimum age to independently exercise some rights) and the absence of factors vitiating the will of the parties (namely by declaring void contracts entered into without independent deliberation provoke by external interferences), thus ensuring the emotional and intellectual capacity of the parties. In this matter, the doctrines of mistake and duress are of particular importance and evidence how the law is concerned with having an autonomous decision to bestow upon it the binding force of contract.

It may be questionable whether contract law has as its main reason the protection of the parties' autonomy. Some might argue that freedom of contract militates in favour of such conclusion, namely on the grounds that all contract law can be read as either a result or an exception to freedom of contract, which in turn is an autonomy-maximising device. That is, the rules that preside over contracts are seen as forced by the demands of freedom of contract or as legal restrictions to the scope of said freedom, in a way that all contract law revolves around freedom of contract. We may call this perspective the maximalist view of freedom of contract, and immediately point out that it neglects other ends and functions of contract law such as the facilitation of economic transactions and the

prosecution of other types of policy. In my view, these other ends and functions serve to show that freedom of contract is not the main value within contract law, but certainly one of the most relevant amongst others (especially the facilitation of economic transactions between individuals). That being the case, I would argue that personal autonomy is amongst the most valued ends prosecuted by contract law, in equality with some others already mentioned.

Even though personal autonomy is not the main reason for contract law, the fact that it is one of the most relevant ones implies that a reading of contracts within the framework of personal autonomy is reasonable. As I started by delimiting in this paper, autonomy has to be able to justify the ability to be bound by contract, while solving the paradox that an autonomous person bound by contract will not be able to easily change her mind. Again, the other values prosecuted by contract law can have answers to these questions: v.g., the need for protection of economic transactions can justify the ability to be bound by contract and the limitations to the possibilities of leaving a contract. However, in spite of all other alternative values, autonomy must answer the concerns raised by contract law. Otherwise, the value of contract would be undermined, at least to those who most directly benefit from this institution (the parties).

#### F. CHALLENGES THAT CONTRACTS POSE TO THE IDEAL OF AUTONOMY

In Chapter II I explored the assimilation of contract as promise proposed by the doctrine of the same name. The main conclusion was that contracts are qualified promises, i.e., promises to which the law confers relevance by attaching to them legal enforcement mechanisms. Kimel seems to refuse such *tout court* assimilation, at least to a certain extent, when he affirms that seeing contract law as a system of enforcement of promises can lead to a situation in which promises are enforced outside the prevalent ‘nonlegal habitat for promissory activity’.<sup>31</sup> I do not wish to contend the idea that promises are surrounded by a particular environment that offers norms (namely, for enforcement) that can be different than those offered by contract law. Notwithstanding, the problems identifiable in promises are in many ways similar to those posed by contracts when reality is read under the light of personal autonomy.

A first aspect is that contracts, or rather, the possibility of entering into a contract, are a demand of personal autonomy. The ideal of personal autonomy as the self-authoring of one’s life requires that there is at least one legal institution presenting the individual with a means to self-regulate aspects of his life, especially when rightly understood that self-imposition of obligations can be an autonomy-

<sup>31</sup> Kimel (n 4) 18.

enhancing feature. Contracts, much like promises, create an obligation to an undertaking that is grounded on the agreement of the parties, promisor and promisee. The existence of the possibility to enter into a contract significantly increases the quantity and quality of alternatives of choice, which then reflects as the improvement of one of the conditions for autonomy (much of what I said regarding freedom of contract applies here). Claiming that contracts are a demand of the ideal of personal autonomy may be a stretch, for other alternative commitment methods could exist (e.g., promises in general, without legal framework, could perform the same autonomy-enhancing function as contracts). Nonetheless, the importance of contracting for the autonomous life is less connected with the absence of alternatives than with the necessity that the autonomous person finds a specific alternative in the law, to which she has a legitimate expectation considering that entering into legally relevant relationships is a way to author one's life valuable to many individuals. In our case, A, looking for a house, can either buy one, rent one, or borrow one from a friend. The law of contract offers three contractual devices (in fact, many more) that allow A to achieve his goal. A would not be autonomous, he would not be able to live an autonomous life deciding where to live and how to get a house, if contract law did not offer the contractual types of buying, renting and lending.

A second aspect is the binding force of contracts, which seems in disagreement with the ideal of personal autonomy. Under normal circumstances, a contract is celebrated in view of the fulfilling of the contractual promise, and for that effect it is endowed with legal enforcement mechanisms. On one side, this is a feature that enhances autonomy, because it provides a binding alternative of choice for those who seek it. The autonomous decision of A to rent an apartment is truly autonomous because he can get a lease for three years, allowing A to plan and author his life, which would not be as easy if no guarantee of having a house was in A's horizon. On the other side, entering into a contract poses the same problem as promises: it seems that the promisor (party to the contract) is bound by his promise without an alternative or the possibility to change his mind. In fact, a change of mind concerning the suppositions the person took into consideration to accept the bargain is normally deemed as irrelevant for the effect of contractual validity (which is assessed at the moment of formation of the contract) or getting out of the contract. Most of the legal mechanisms that allow one party to get out of the contract are rooted in the value of autonomy: e.g., the doctrine of frustration opens an exit in the contract on the grounds of a change of events, and not a change of mind. As I defended regarding promising, accepting the condition of integrity helps us realise that the level of compromise which arises from a contract is consonant with the value of personal autonomy. Contracting is, perhaps to a



higher degree than promising, a privileged way of showing soundness of principle when acting autonomously, for by entering into a contract a person is deliberately assuming a legally protected commitment that is thereafter part of her obligations both in a moral and in a legal sense. Moreover, contracting is also a privileged way of assuming responsibility in an aggravated way, because a breach of contract brings about serious consequences for the party in breach.<sup>32</sup> In our case, B decided to rent her house; she could have sold it, but she preferred the commitment to a tenant for three years in exchange of rent, and she was willing for such an engagement. When the lease was entered into, B had the three years in mind and knew for that time the bargain would be mandatory. Her soundness of principle, showed in her willingness to be a landlord, is what allows for a three-year lease.

The fact that entering into a contract apparently creates a situation that does not enhance autonomy can be contested not only on the grounds of the condition of integrity or the value of responsibility for the autonomous life, but also on features of contract law that mitigate the apparent harshness of the binding force of contracts. Having the Common Law in mind, one must be aware that specific performance is not the mainstream remedy for a breach of contract, which serves to show that there is not as much pressure as probably thought in obtaining the fulfilment of the contractual promise. It is possible to see damages (especially clauses foreseeing liquidated damages) as a price to leave the contract, which is understandable as opening up the option to the autonomous person to exit the bargain in a fair manner, respecting at the same time the binding force of the contract and her change of mind regarding her bond. The law offers alternatives to pure specific performance of the contractual promise, and these can be flexible enough to accommodate the promisor's need to exit the contract caused by a change in his mind. If B, in our case, would like to sell the house after one year, she can; it is just that contract law makes it harder, not impossible, to change one's mind. Naturally, these "exits" may have a cost (apart from the money-value of damages, one can envision the loss of the counter-promise or of the promisor's credibility in the market as *inter alia* costs of fully embracing a change of mind), but accepting the costs of one's decisions is a virtue of the autonomous life.

Again, integrity and responsibility explain a lot when talking about contracts and a change of mind. The law is keen in allowing contracts to exist and flourish, and the law has contractual performance in view. This is, I believe, because contract law considers the legal person entering into a contract someone

<sup>32</sup> I hope in these last two paragraphs to have addressed Gutmann's idea that there is some sort of trade-off 'between autonomy, conceived as an individual right, on the one hand, and the ideal of autonomy, as a consequentialist, summable individual value and public good, on the other hand'; cf Thomas Gutmann, 'Theories of contract and the concept of autonomy' (*Preprints and Working Papers of the Centre for Advanced Study in Bioethics*, Münster 2013/55) 21.

gifted with integrity and responsibility. Contract law offers a framework for the person to develop her life plan and to author her life, and this framework includes long- and short-term options that bring unity to the legal person within the legal realm. That is why A, after renting, can contract a housecleaning service: the diversity of his contracts show the flow of autonomous decisions A has made has an author of his life. In addition, responsibility for the autonomous person means legal accountability for the legal person. Entering into a contract always implies (or should, ideally) having in view the consequences of that contract, both while it is performed as after termination. The truly autonomous person is not entering into a contract light-heartedly: she considers the costs of being in a contract and of leaving that contractual relationship. She is responsible and therefore does not fear accountability.

## VII. CONCLUSION

I hope that my reading of contract as promise has served my two purposes: as an illustration of the interplays between the ideal of personal autonomy and private law by reference to one of its most relevant institutions (contracts), and as a useful account of how promising (and therefore contracts) conform to that ideal.

Personal autonomy is an ideal of self-authorship that assures that, by autonomous choices, the person is shaping and refining herself. Autonomy is subject to certain conditions: the intellectual and emotional fitness of the person; the existence of alternatives varied in quantity and quality; the absence of external constraints on the person; and a minimum soundness of principle in the process of choosing. In any case, autonomy is not an absolute value, and it must be balanced with other values of equal worth, like the value of responsibility, which asks for accountability of the autonomous person for her own autonomous choices.

Promising, as an assumption of an undertaking, can enhance autonomy while at the same time jeopardizing it by preventing (in some circumstances) a change of mind. This is not paradoxical, considering that autonomy requires integrity and that responsibility mitigates the power of the possibility of changing one's mind. The same logic applies to contracts, especially because they are considered as qualified promises (i.e., promises to which the law confers legal mechanisms of enforcement). Maybe due to the enforcement of contracts appearing as more grievous, entering into a contract can seem a total forfeit of autonomy. This is not absolutely true, considering that contract law offers ways out of a contract, which have their costs.

The autonomous person has, at last, a way out of the paradox that paralyses her out of fear of freedom: she can conform to a life plan that takes into account

her past and future choices, being as more autonomous as she is more in line with her own aspirations and the life she is authoring; at the same time, the autonomous person knows that with autonomy comes responsibility, meaning that any decision has consequences and choosing something is also choosing its consequences and to be accountable for them. In our case, A and B are truly autonomous when they know a contract will, except for situations of frustration, duress or mistake, bind them for three year, with obligations to each party, and that to get out of the contract before the time the consequences of rescission will apply.