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Articles

Five political ideas of European contract law*

MARTIJN W. HESSELINK**

Abstract: This paper explores the possible implications of leading contemporary theories of political philosophy for some of the main questions that the political institutions of the European Union will have to decide on concerning the future of European contract law. Thus, it explores what a utilitarian, liberal-egalitarian, libertarian, communitarian, deliberative/citizenship idea of European contract law might look like. The primary aim of the paper is to demonstrate the relevance of social justice theories to some of the main issues concerning the future of European contract and, conversely, to indicate the relevance of (European) contract law to political philosophy. A second, more practical aim is to provide the stakeholders (including legal academics) and politicians that are currently called upon, by the European Commission's Green Paper, to submit their views on 'policy options for progress towards a European Contract Law for consumers and businesses' with an idea of what a position in terms of an articulate and comprehensive political theory might look like. An important question is whether it is possible and desirable to explain and justify one's concept of European contract law and its future exclusively in terms of one single of these five political ideas of European contract law. The tentative answer in this paper is that a pluralist or composite idea of European contract law is more attractive than a monist one.

Résumé: Cet article explore les possibles implications des principales théories contemporaines de philosophie politique pour quelques unes des questions majeures que les institutions politiques de l'Union européenne auront à trancher concernant le futur du droit européen des contrats. Ainsi, il explore à quoi pourrait ressembler un droit européen des contrats utilitarien, libéral-égalitarien, libertarien, communautarien, ou délibératif. Le but premier de cet article est de démontrer la pertinence des théories de la justice sociale pour quelques unes des principales questions relatives au futur du contrat européen et, inversement, d'indiquer la pertinence du droit (européen) des contrats pour la philosophie politique. Un second but, plus pratique, consiste à fournir aux parties prenantes (incluant les universitaires juristes) et aux politiciens qui sont aujourd'hui appelés, par le livre vert de la Commission européenne, à soumettre leurs vues sur les "actions envisageables en vue de la création d'un droit européen des contrats pour les consommateurs et les entreprises" une idée de ce à quoi pourrait ressembler une position en termes de théorie politique articulée et compréhensive. Une question importante consiste à savoir s'il est possible et souhaitable d'expliquer et de justifier sa conception du droit européen des contrats et de son futur exclusivement en termes d'une seule de ces cinq idées politiques d'un droit européen des contrats. La tentative de réponse du présent article est qu'une conception pluraliste ou composite d'un droit européen des contrats est plus attractive qu'une conception moniste.

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Zusammenfassung: Der Beitrag untersucht den Einfluss, den zentrale Gegenwartstheorien zur politischen Philosophie für Hauptfragen haben könnten, die politische Institutionen der EU hinsichtlich eines kommenden Europäischen Vertragsrechts zu entscheiden haben werden. Untersucht wird die Frage für utilitaristische, liberal-egalitäre, libertäre, kommunitaristische und bürgerschaftlich orientierte Ansätze. Hauptziel ist es aufzuzeigen, dass Theorien zur sozialen Gerechtigkeit (Social Justice) durchaus großen Einfluss auf Fragen des Europäischen Vertragsrechts haben und dass umgekehrt dieses für die politische Philosophie von erheblicher Bedeutung ist. Das zweite, pragmatischere Ziel geht dahin, Betroffenen („Stakeholders“), einschließlich Wissenschaftlern sowie Politikern, die die Kommission mit ihrem Grünbuch zu ‘policy options’ von 2010 zur Stellungnahme aufgefordert hat, Hinweise dazu zugeben, wie eine abgewogene, in der politischen Philosophie gegründete Gesamtpositionierung aussehen könnte. Eine wichtige Frage ist hierbei, ob es sinnvoll ist, einen Standpunkt allein aus der Perspektive eines der fünf genannten Ansätze zu erklären und zu rechtfertigen. Es wird vorgeschlagen, hier eher pluralistisch als monistisch anzusetzen.

The political philosophy of European contract law

In this paper I explore the possible implications of leading contemporary theories of political philosophy for some of the main questions that the political institutions of the European Union will have to decide on concerning the future of European contract law. In particular, I will address the questions whether contract law should be European; whether it should be optional; what its content should be (including whether it should contain rules protecting certain weaker parties); and whether it should come about through a democratic process. I submit each of these questions to five leading theories of contemporary political philosophy.¹ Thus, I explore what a utilitarian, liberal-egalitarian, libertarian, communitarian, deliberative/citizenship idea of European contract law might look like. In this way, leading theories of social justice are linked up to the grand questions of European contract law. Ultimately, an analysis of this kind could lead to a rather comprehensive matrix of the main political positions concerning the principal normative questions of European contract law. It is submitted that a political-philosophical analysis of European contract law along these lines could provide a fuller picture than one-dimensional schemes of left-versus-right,² diachronic accounts featuring one leading idea at a time,³ or space-time analyses in terms of national political

1 In the selection of contemporary theories I essentially follow W. Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 2002).

2 See D. Kennedy, ‘The Political Stakes in “Merely Technical” Issues of Contract Law’ 10 *European Review of Private Law* (2002) 7–28. For European contract law see M.W. Hesselink, ‘The Politics of a European Civil Code’ 10 *European Law Journal* (2004) 675–697. For European sales law, see B. van Zelst, *The Politics of European Sales Law* (Alphen a/d Rijn: Kluwer Law International, 2008).

3 D. Kennedy, ‘Three Globalizations of Legal Thought: 1850–2000’, in D. Trubek and

traditions.⁴ However, what follows here are not more than a few first impressions.

The primary aim of this paper is to demonstrate the relevance of social justice theories to some of the main issues concerning the future of European contract law and, conversely, to indicate the relevance of (European) contract law to political philosophy. In other words, the aim is to show that whether we live in a just society depends, in part, on the contract law that we have, and, conversely, that contractual justice is, at least in part, a matter of social justice. Thus, it is also meant as a response to those who argue that private law is merely a matter of individual (notably commutative) justice.⁵ A second, more practical aim is to provide the stakeholders (including legal academics) and politicians that are currently called upon, by the European Commission's Green Paper, to submit their views on 'policy options for progress towards a European Contract Law for consumers and businesses' with an idea of what a position in terms of an articulate and comprehensive political theory might look like.

Within the actual debate on European contract law, sometimes theories of contemporary political philosophy (or more classical ones)⁶ are explicitly invoked in order to justify a certain normative position. More often, however, without any explicit claims being made by anyone, there exist in fact structural similarities between discourses. For example, much of the law & economics contribution to the European private law debate is implicitly utilitarian, albeit sometimes combined with some libertarian elements. Some further instances of such congruence will be provided throughout the paper.

An important question, which will be addressed in the concluding section, is whether it is possible and desirable to explain and justify one's concept of European contract law and its future exclusively in terms of one single idea out of these five political ideas of European contract law. The tentative answer will be that a pluralist or composite idea of European contract law is more attractive than a monist one.

A. Santos (eds), *The New Law and Economic Development. A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 19–73.

4 See eg H.-W. Micklitz, 'Failure or Ideological Preconceptions – Thoughts on Two Grand Projects: The European Constitution and the European Civil Code' EUI Working Papers LAW No. 2010/04.

5 See especially J. Gordley, *Foundations of Private Law. Property, Tort, Contract, Unjust Enrichment* (Oxford: Oxford University Press, 2006).

6 Especially Kant is often invoked to explain the nature of contractual obligation, notably by German scholars. See recently eg H. Unberath, *Die Vertragsverletzung* (Tübingen: Mohr Siebeck, 2007) and J. Basedow, 'Freedom of Contract in the European Union' 16 *European Review of Private Law* (2008) 901–923.

Utilitarian

General

For a utilitarian, what matters is the greatest happiness of the greatest number. In other words, the maximisation of social utility or social welfare. A society is a better society when there is more happiness. Indeed, the best society is the society with the highest total amount of happiness.⁷ Thus, utilitarianism is a consequentialist theory: it is forward looking. It justifies policies and laws in terms of their consequences, not their origin. What happened in the past is water under the bridge.

Although, in principle, social welfare is quite a broad and inclusive concept (ie the aggregate of whatever is valued by the individuals concerned), it is often reduced, especially in the welfare economics and law & economics literature, to 'economic efficiency' and economic growth in a much narrower sense (often merely GDP). On this view, the protection of rights, distributive justice and other values are not of direct importance, but only in terms of their welfare consequences; they should count at most indirectly, ie to the extent that individuals value them.⁸

What costs and benefits individuals do derive (in their own estimation) from the presence or absence of certain legal rules (including contract law rules) clearly is an empirical matter. And in recent times the economic analysis of law has taken a distinct empirical turn, with the arrival of 'empirical legal studies', which was reinforced by the realities of the financial crises. However, although the law and economics literature on contract law today is increasingly informed by empirical data from, in particular, behavioural science, nevertheless a solid basis for a normative economic answer to many of the crucial questions relating to European contract law is still lacking. Therefore, normative law and economics often still resorts to generalisations in relation to human choice ('path dependence', 'endowment effect' et cetera) or even to assumptions concerning what would amount to a 'rational choice'. Thus the normative analysis becomes far removed from a utilitarian foundation, which is essentially empirical, and therefore requires a further normative justification, which then is often found, not wholly unproblematically, in libertarianism.

7 Cf J. Bentham, *An Introduction to the Principles of Morals and Legislation* [1789] Ch 1 (in J.S. Mill and J. Bentham, *Utilitarianism and other essays* (London: Penguin, 2004) 97).

8 And maybe as proxies for variables that (so far) escape reliable measurement. For a full statement of this idea see L. Kaplow and S. Shavell, *Fairness versus Welfare* (Cambridge, Massachusetts: Harvard University Press, 2002).

European

For a utilitarian whether contract law should be European or national in principle depends entirely on what would contribute most to the happiness of everyone concerned. The question is essentially empirical and raises difficult (albeit not irresolvable, in the eyes of some) issues of aggregation of happiness and interpersonal comparison. So far, however, this question rarely has been addressed in such very general utilitarian terms. (And the same goes for the other questions of European contract law.) In contrast, the more specific (and more reductive) ‘economic argument’, which focuses on ‘preferences’, is quite prominently present in the European private law debate. In particular, it has been directed against the idea of a European civil code, on account of the claims (borrowed from the economics of federalism) that centralised and uniform law is bad, given (largely assumed) diverse preferences along Member State lines, and that regulatory competition between countries is more efficient.⁹ The problem with such assumptions is that they are derived from empirical data which, however, almost invariably have been collected by national statistical institutes.¹⁰ Indeed, the European Commission, when arguing for full harmonisation in its consumer rights directive proposal produced its own statistics concerning the preferences of European citizens and barriers to cross-border trade.¹¹ In either case, however, the assumption is that if a European contract law will increase economic growth then for that reason alone it is desirable. And whether it would remain a still largely unresolved empirical matter.

Optional

The idea of an optional code seems to match well, in principle, with giving primordial importance to the preferences of individuals. Moreover, the optional code seems to fit well with the paradigm of competition between legal systems which should, in principle, like all competition, lead to more choice and lower prices, which in turn presumably makes people happier. It is not surprising, therefore, that the optional instrument has been sustained on the

⁹ See eg R. van den Bergh, ‘Forced Harmonization of Contract law in Europe: Not to be continued’, in S. Grundmann and J. Stuyck (eds), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002) 249–268; A. Ogus, ‘Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law’ 48 *International and Comparative Law Quarterly* (1999) 405–418.

¹⁰ This is acknowledged by G. Hofstede, *Cultures and organizations* (London: Harper Collins Business, 1994) 12.

¹¹ See eg *Consumers attitudes towards cross-border sales and consumer protection* (Flash Eurobarometer 282, March 2010); *Business attitudes towards cross-border sales and consumer protection* (Flash Eurobarometer 224, July 2008).

‘economic’ grounds that more choice and competition are good.¹² Nevertheless, others have pointed out that the road followed by the European Commission, by commissioning one single CFR from a ‘network of excellence’ and from an ‘expert group’, is far from optimal. By politically endorsing and financially subsidising one of the models, they argue, the European legislator significantly distorts competition and effectively grants a virtual monopoly.¹³

Content

Clearly, for the content of contract law the single criterion is also the maximisation of social welfare. And again, in the law & economics literature this is usually reduced to economic efficiency. In practice, this has two main implications. First, scholars engage in detailed economic analyses of contract law rules.¹⁴ There is a whole body of literature of standard law and economics, conveniently summed up in handbooks,¹⁵ which has already been applied to the various model rules contained in the Draft Common Frame of Reference

- 12 See W. Kerber and S. Grundmann, ‘An optional European contract code: Advantages and disadvantages’ *European Journal of Law & Economic* (2006) 215–236; J.M. Smits, ‘European Private Law and Democracy: a Misunderstood Relationship’, in M. Faure and F. Stephen (eds), *Essays in the Law and Economics of Regulation in Honour of Anthony Ogus* (Antwerp-Oxford: Intersentia, 2008) 49–59. See also F. Gomez’s contribution to this issue.
- 13 S. Grundmann, ‘The role of competition in the European codification process’, in H.-W. Micklitz and F. Cafaggi (eds), *European private law after the Common Frame of Reference* (Cheltenham, UK: Edward Elgar, 2010) 36–55. See also K. Riesenhuber’s contribution to this issue.
- 14 Other economist have been quite dismissive about this kind of project. See F.A. Hayek, *Law, Legislation and Liberty; A new statement of the liberal principles of justice and political economy* (London and New York: Routledge, 2003) Volume III: *The Political Order of a Free People*, 201–202 (note 35): “The childish attempts to provide a basis for “just” action by measuring the relative utilities or satisfactions of different persons simply cannot be taken seriously. To show that these efforts are just so much nonsense would require entering into somewhat abstruse argument for which this is not the place. But most economists begin to see that the whole of the so-called “welfare economics”, which pretends to base its argument on inter-personal comparisons of ascertainable utilities, lacks all scientific foundation. The fact that most of us believe that they can judge which of the several needs of two or more known persons are more important, does not prove either that there is any objective basis for this, nor that we can form such conceptions about people whom we do not know individually. The idea of basing coercive actions by government on such fantasies is clearly an absurdity.”
- 15 See eg S.M. Shavell, *Foundations of Economic Analysis of Law* (Cambridge, Massachusetts: Belknap Press, 2004). Sceptical about the successes of the economic analysis of contract law is E.A. Posner, ‘Economic analysis of contract law after three decades: success or failure?’ 112 (2003) *Yale Law Journal* 829.

in two collective studies as a way of measuring their economic efficiency.¹⁶ This scrutiny of the DCFR in welfare economic terms has led to severe criticism: many of the rules and doctrines have been rejected as 'inefficient'.¹⁷ The second implication is that exponents of normative law & economics usually reject any protection of consumers and SMEs on account of them being weaker parties.¹⁸ The reason is that re-distribution through contract law would be inefficient.¹⁹ Therefore, it would be better, they argue, first to increase the size of the pie, via an efficient contract law (among other things), and only then to divide it in accordance with some standard of distributive justice, but to do this in the most efficient way, which is, they argue, the tax and transfer system, not contract law.

Democracy

In a utilitarian idea of contract law democracy would not necessarily play a prominent role. Nor has it been prominent in the normative economic account of contract law. As said, the focus has been on the efficiency of individual contract rules rather than on a democratic process which, from a utilitarian perspective, would not per se provide additional legitimacy. However, utilitarians might look upon the current process of expert and stakeholder involvement with some suspicion. They would probably regard it as capture of the decision making process, which would lead to privilege rather than to an increase in social utility. Then, representative democracy might be a more appealing process for organising public choice.²⁰

Liberal-egalitarian

General

What would a liberal-egalitarian make of European contract law? For a Rawlsian the answer would crucially depend on whether contract law should be regarded as part of what John Rawls called the 'basic structure' of society which determines the distribution of the 'primary goods' that every one

¹⁶ See, in particular, G. Wagner (ed), *The Common Frame of Reference: A View from Law & Economics* (Munich: Sellier, 2009); P. Larouche and F. Chirico (eds), *Economic Analysis of the DCFR* (Munich: Sellier, 2010).

¹⁷ Ibidem.

¹⁸ Other reasons, such as information asymmetry, may justify intervention to the extent that they represent a market failure.

¹⁹ L. Kaplow and S. Shavell, 'Why the legal system is less efficient than the income tax in redistributing income' 23 *Journal of Legal Studies* 667 (1994).

²⁰ See G. Wagner, 'Die soziale Frage und der Gemeinsame Referenzrahmen' *Zeitschrift für Europäisches Privatrecht* (2007) 180–211.

wishes to have, whatever their particular life plan or conception of the good.²¹ For, only if contract law is part of the basic structure are Rawls' two principles of justice (ie the 'equal basic liberties' and the 'difference' (or maximin) principle) applicable to contract law. Whether contract law is one of these basic institutions that provide the background justice against which individuals are free to make their own choices, is controversial. Rawls himself probably did not regard contract law as part of the basic structure,²² but others have argued that the two principles of justice should apply to contract law because of the important distributive role that contract law plays.²³ Moreover, the idea of the basic structure of society is not universally accepted among liberals. Martha Nussbaum follows Rawls in this respect,²⁴ but Amartya Sen rejects the concept of a basic structure even though he regards his own theory as Rawlsian.²⁵ And other prominent liberals, such as Ronald Dworkin and Isaiah Berlin, have never included such a concept in their theories.²⁶ However, for Rawls the question would have been crucial: if the law of contract is not part of the basic structure different contract laws cannot make our society more or less just.

European

On trans- and post-national justice Rawls' theory is notoriously inadequate.²⁷ Rawls saw transnational justice in terms of a social contract between nations.²⁸ That idea does not fit very well with the reality of our current post-national condition or with the nature of European law. The implication seems to be that Rawls' theory of justice is blank on the question whether contract law should be located on the European or national level of governance. In other words, from a Rawlsian liberal perspective, with or without a specifically European contract law, our society will be equally just.

21 See J. Rawls, *A Theory of Justice*, revised edition (Cambridge, Massachusetts: Belknap Press, 1999 [1971]).

22 See eg J. Rawls, *Political Liberalism*, expanded edition [first edition 1993] (New York: Columbia University Press 2005) 282–283.

23 See A.T. Kronman, 'Contract Law and Distributive Justice' 89 *Yale Law Journal* (1980) 472; K.A. Kordana and D.H. Tabachnick, 'Rawls and Contract Law' 73 *George Washington Law Review* (2005) 598–632.

24 See M.C. Nussbaum, *Frontiers of social justice: disability, nationality, species membership* (Cambridge, Massachusetts: Belknap, 2007).

25 A. Sen, *The idea of justice* (London: Penguin, 2009).

26 R. Dworkin, *Sovereign Virtue; The Theory and Practice of Equality* (Cambridge Massachusetts: Belknap Press, 2000); I. Berlin, *Liberty* (Oxford: Oxford University Press, 2002).

27 See M.C. Nussbaum, *Frontiers of Justice* (Harvard: Belknap, 2006) chapters 4 and 5, in particular 234.

28 J. Rawls, *The law of peoples* (Cambridge, Massachusetts: Harvard University Press, 2002).

Optional

As said, there is a controversy among philosophers as to whether contract law should be regarded as part of the basic structure of society as it was understood by Rawls. In relation to an optional instrument there might be further issues. There is general agreement that even if contract law is part of the basic structure, contracts themselves are not.²⁹ It might be argued, however, that, in this respect, an optional instrument is somewhere between a contract and contract law. That would make an optional instrument less likely to be part of the basic structure, and hence be relevant for social justice, than a non-optional European code of contracts.

Apart from this question of the scope of social justice, in a liberal-egalitarian response to the question whether European contract law could or should be optional the focus probably would be more specifically on the nature of the option. In particular, many liberals would probably emphasise the importance of substantive (as opposed to merely formal) freedom of choice. They would want to know whether the parties opting into the instrument would have a real choice in the sense of having other attractive options. Especially the capabilities approach, as developed by Sen and Nussbaum, has emphasised that freedom of choice should not be merely formal in the sense of absence of force.³⁰ Someone may also be deprived of capabilities, for example, by ignorance or by a lack of resources. Therefore, it would be argued, opting into an optional instrument as a result of ‘adaptive preferences’ should not count an expression of freedom of contract in any real sense.

Content

As said, if contract law is part of the basic structure, the two principles of justice do apply, including notably the difference principle. According to these principles, any distinctions made between groups must be to the advantage of the least privileged.³¹ Thus, for a Rawlsian the difference principle could at first sight provide a justification for the protection of weaker parties such as consumers. However, on closer examination it may also provide an argument against a sharp distinction between B2B and B2C contracts. For to the extent that certain small or otherwise vulnerable businesses are actually less privileged than certain consumers, they should receive at least equal protection. More fundamentally, it is not even certain that the difference principle could actually justify protective rules for consumers, small businesses or indeed any

²⁹ See explicitly Rawls, n 22 above, 282–283.

³⁰ For capabilities approaches to contract law, see the contributions to S. Deakin and A. Supiot (eds), *Capacitas: Contract Law, Capabilities and the Legal Foundations of the Market* (Oxford: Hart Publishing, 2009).

³¹ Rawls, n 21 above, 65–73.

kind of contracting party. The reason is that what the difference principle aims at is social weakness not contractual or relational weakness. What I am hinting at is that a party may have a very weak contractual position (eg as a consumer or a small business) but may be otherwise more privileged than the other contracting party, eg because she is very wealthy or powerful or otherwise has a much broader range of capabilities. It could be replied that weaker contracting parties (such as consumers or workers or tenants) usually, or on average, are not as well off socially as their counter parties (ie the professional sellers, employers, landlords), but such a justification would violate the Kantian maxim,³² which is dear to most liberals, and certainly to Rawls,³³ and which distinguishes them from utilitarians, that individuals should not be treated as means to the ends of others but as ends in themselves.

Apart from the categorical protection of weaker parties, it seems that a liberal would be neutral, in principle, concerning the content of the contract law rules, except, of course, that contract law should not violate individual rights.

Democracy

Clearly, democracy is a crucial element of political liberalism. And its role is not limited to public law or to mandatory rules. Therefore, it seems that liberal-egalitarians would require a European contract law, including its non-mandatory (or 'default') rules, to have a solid democratic basis.

Libertarian

General

Like liberals, also libertarians come in different varieties. What thinkers like Nozick, Hayek, and Milton Friedman have in common is that they all advocate free markets and reject redistributive policies and, generally, 'socialism'.³⁴ However, on various crucial points, they differ. For Nozick, the key notion is entitlement including what he calls 'self-ownership' ie the liberty to put my physical strength, talents and skills to any profitable use that I deem fit without the State being allowed to interfere. Re-distribution by the State simply

32 Categorical imperative (second formulation). See I. Kant, *Grundlegung zur Metaphysik der Sitten* [1785] (Frankfurt: Suhrkamp, 1974) 61: 'Handle so, daß du die Menschheit, sowohl in deiner Person, als in der Person eines andern, jederzeit zugleich als Zweck, niemals bloß als Mittel brauchest.'

33 Rawls, n 21 above, 221 ff.

34 Hayek, n 14 above; R. Nozick, *Anarchy, State and Utopia* [first edition 1974] (Oxford: Blackwell Publishing, 2006); M. Friedman and R. Friedman, *Free to choose: a personal statement* (New York: Harcourt, 1990 [1980]).

amounts to a form of theft. For Nozick a just distribution simply is whatever results from people's free exchange. Hayek favours free markets for a different reason, ie the incurable ignorance of us all. For him, the market is the only viable discovery device.³⁵ Only the spontaneous order of the market can tell us (through the price mechanism) how much of what is needed where; the State, in contrast, however well-intentioned, can never obtain the information needed to decide what would be a just distribution of resources.³⁶

European

Unlike certain utilitarians (ie welfare economists) a libertarian would probably not per se be sceptical about the European level as the right political level for locating contract law: on this question Nozickian libertarians probably would be neutral whereas a Hayekian libertarian (because of his anti-nationalism) might even be favourable.³⁷ Indeed, Hayek repeatedly warned against nationalism. In his view, nationalism was one of the two greatest threats to our civilization (the other, of course, was socialism).³⁸ He was an advocate of an international legal order,³⁹ although he also was also cautious (and visionary): he warned that any rush would risk a revival of nationalist sentiments.⁴⁰ It seems, therefore, that the European character of an optional instrument or a toolbox would probably not disturb most libertarians. At most, they would warn that if a European contract law is introduced too fast, it might end up being counter-productive.

Optional

A libertarian probably also would prefer an optional to a non-optional instrument. As said, libertarians emphasise free choice and reject State intervention. Unlike liberal-egalitarians, however, they would probably regard formal freedom as sufficient. If a strong business, on the one hand, and a consumer or a small business, on the other, freely opt into the instrument then that legitimises its applicability, even if the consumer or small business had no attractive

35 Invoked by S. Grundmann, 'Consumer Law, Commercial Law, Private Law: How can the Sales Directive and the Sales Convention be so Similar?' *European Business Law Review* (2003) 237–257.

36 Invoked by J.M. Smits, 'European Private Law: a Plea for a Spontaneous Legal Order', in D.M. Curtin, J.M. Smits, A. Klip and J. McCahery, *European Integration and Law* (Antwerp and Oxford: Intersentia, 2006) 85.

37 See M.W. Hesselink, 'A spontaneous order for Europe? Why Hayek's libertarianism is not the right way forward for European private law', in Micklitz and Cafaggi (eds), n 13 above, 123–172.

38 Hayek, n 14 above, volume II: *The Mirage of Social Justice*, 111.

39 Hayek, n 38 above, 144.

40 Hayek, n 38 above, 58.

alternative options. Self-ownership includes the freedom to outwit other parties or to exploit one's superior bargaining power.

Even an opt-out model (such as CISG)⁴¹ might be acceptable to a libertarian, as an instance of what Sunstein and Thaler call 'libertarian paternalism'. To the extent that the optional instrument is in the best interest of parties concluding cross-border contracts making it the default regime would be a form of 'choice architecture' which would 'nudge' them into what is in their best interest, without, however, forcing them – they would still remain free to opt out.⁴²

Content

If the content of an instrument on European contract law is going to be broadly similar to the DCFR, a libertarian probably would not be too pleased with its content. The reason is, of course, that from his perspective the text gives insufficient prominence to formal party autonomy and to freedom of contract. There are just too many mandatory rules. Therefore, the instrument would probably be rejected as being socialist. Indeed, the DCFR has been criticised for paving the way for 'a massive erosion of private autonomy'.⁴³ In particular, libertarians would reject mandatory rules to protect consumers or small businesses. Re-distribution is theft and socialist.

Democracy

Libertarians would also not regard a democratic basis for contract law as particularly important. They would probably give priority to liberty. In other words, ample space for freedom of contract is more important for a contracts code than its democratic pedigree. Hayek and other prominent libertarians are known to have admired the economic miracles in Pinochet's Chile and Deng Xiaoping's China without bothering too much about the way in which the freer markets came about.⁴⁴ However, clearly Chicago boys style economic

41 Art. 6, United Nations Convention on contracts for the international sale of goods (1980).

42 R.H. Thaler and C.R. Sunstein, *Nudge; Improving decisions about health, wealth and happiness* (London: Penguin, 2009).

43 H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner and R. Zimmermann, 'The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems' *Oxford Journal of Legal Studies* (2008) 28 (4), 659–708, 706–707. In contrast, T. Wilhelmsson, 'Constitutional values and social justice', presentation at the ERA conference 'The Draft Common Frame of Reference' (Trier, 6–7 March 2008) (available at www.era.int) regards the DCFR as 'a law for big business and competent consumers'.

44 N. Klein, *Shock Therapy; The Rise of Disaster Capitalism* (New York: Metropolitan Books, 2007), reports (on 84) that Hayek travelled to Pinochet's Chile several times to

reform ('shock therapy') is not the only conceivable way of pursuing a libertarian agenda.⁴⁵

Communitarian

General

Also communitarianism is nothing like a single theory or school of thought. However, what such different philosophers as Sandel, MacIntyre and Walzer have in common is an emphasis on community, traditions and the local, as opposed to the individual, rational and universal.⁴⁶ Communitarians would probably reject the idea of an 'instrument' on European contract law to the extent that it is based on a rational design by experts for universal application across Europe which is meant to overcome the variety of legal traditions. At the most they would accept a much more gradual and 'natural' convergence: we should wait until a truly European tradition has developed, bottom up instead of any imposition top-down. Clearly, such ideas match very well with a number of evolutionary and organicist approaches to European private law, such as the neopandectism of Zimmermann (who explicitly invokes Savigny),⁴⁷ the emphasis on the historical development of tradition and authority by Nils Jansen,⁴⁸ the legal culturalism of Legrand⁴⁹ and, although less radical, Sefton-Green,⁵⁰ but also Teubner's theory of law as an autopoietic system.⁵¹

admire the free market laboratory, and (on 131) that he wrote a letter to Margaret Thatcher to urge her to use Pinochet's model for transforming Britain's Keynesian economy, and (on 185) that Milton Friedmann, invited to China by Deng Xiaoping, taught hundreds of officials that Hong Kong, despite having no democracy, was freer than the United States, since its government participated less in the economy.

- 45 Nevertheless, it is the principal claim of Klein's book (op cit), substantiated by many documented examples, that libertarian economic reforms consistently have been introduced, throughout the world, in situations where democracy was off-guard (post-revolution, tsunami etc).
- 46 M.J. Sandel, *Liberalism and the Limits of Justice* (2nd ed, Cambridge: Cambridge University Press, 1998); M. Walzer, *Spheres of Justice; A Defense of Pluralism and Equality* (Basic Books, 1983); A. MacIntyre, *After Virtue* (3rd ed, London: Duckworth, 2007).
- 47 R. Zimmermann, 'Roman Law and the Harmonization of Private Law in Europe', in A.S. Hartkamp et al (eds), *Towards a European Civil Code* (4th ed, Alphen a/d Rijn: Kluwer Law International, 2010) 27–53.
- 48 Most recently, N. Jansen, *The Making of Legal Authority; Non-legislative Codifications in Historical and Comparative Perspective* (Oxford: Oxford University Press, 2010).
- 49 P. Legrand, 'Against a European Civil Code' 60 *Modern Law Review* (1997) 44–62.
- 50 R. Sefton-Green, 'Cultural diversity and the idea of a European civil code', in M.W. Hesselink (ed), *The Politics of A European Civil Code* (The Hague: Kluwer Law International, 2006).
- 51 G. Teubner, *Recht als autopoietisches System* (Frankfurt am Main: Suhrkamp, 1989).

Also, private law nationalists, including ‘closet nationalists’, ie those who will always find a ‘technical’ (eg economic) reason why private law should be located on the political level of the nation state,⁵² may be regarded as a specific type of communitarians whose preferred community is the nation.

European

Most communitarians would probably object to a European contract law. They would point out that private law is a matter of national tradition and would underline that legal diversity is actually an instance of cultural diversity which is good and should be cherished rather than be overcome by an effort to create a new pan-European contract law.

However, to the extent that a European instrument (optional instrument or toolbox) can be demonstrated to be, not a rationally designed instrument, but, on the contrary, merely a codification of an existing tradition, this could in fact become appealing in the eyes of a communitarian. That tradition could be either the by now almost a century-old international tradition, ie merely the next step in a historical line running from Rabel, via the Hague conventions (LUF and LUVI), CISG, Unidroit Principles, PECL and the DCFR to the instrument on European contract law, where the same text has gradually developed further, from one version to the next. Or it could be a truly European tradition to the extent that the PECL, DCFR and the instrument can rightfully be claimed to represent the already existing common core of contract law in Europe. Indeed, the instrument could become the pride of Euro-nationalism or Europeanism.⁵³ Having said that, the whole terminology used by the European Commission of tools and problem fixing would probably just sound too pragmatic to anyone holding a more romantic and evolutionary understanding of the law. Indeed, it has been the specific contribution to the European private law debate of scholars such as Zimmermann and Jansen (the new historical school) not that the Europeanisation of private law is bad but that it is just too

52 E. Gellner, *Nations and Nationalism* (2nd ed, Oxford: Blackwell Publishing, 2006) 1, defines nationalism as ‘a political principle, which holds that the political and the national unit should be congruent’. Similar, E.J. Hobsbawm, *Nations and Nationalism; Programme, Myth, Reality* (Cambridge: Cambridge University Press, 1990) 9. In Leerssen’s more elaborate but also very similar definition, nationalism is a political ideology based on the assumptions that ‘the “nation” is the most natural, organic collective aggregate of humans, and the most natural and organic subdivision of humanity ... that the state derives its mandate and sovereignty from its incorporation of a constituent nation ... [and] that territorially and socio-politically, the most natural and organic division of humankind into states runs along “national” (cultural, linguistic, ethnic) lines’ (J. Leerssen, *National Thought in Europe; A Cultural History* (Amsterdam: Amsterdam University Press, 2006) 14).

53 See J. McCormick, *Europeanism* (Oxford: Oxford University Press, 2010).

early for a European instrument: a European tradition of the same level of sophistication as what we have achieved on the national level has to develop first and that takes time, much more time than the current CFR process allows for.⁵⁴

Optional

The idea of an optional code is not likely to be attractive for a communitarian either. As said, communitarians tend to be rather sceptical of individual rational choice. Moreover, they would probably be puzzled by the idea of opting into a legal system. How can one opt into a tradition or a culture?

Content

As to the content, a communitarian would probably object to any rational design of contract law by experts. At the most they would accept mere codification by the legislator of a truly existing tradition or common core. They would probably not have any further substantive agenda. Indeed, choice between rule alternatives based on rational argument is exactly what they would object against.

Democracy

Communitarians would not see much use for democratic decision making on contract law either. Ideally, in their view, the law should grow organically, on a case to case basis and through custom rather than via collective decision making. As said, what a legislator could do at the most is codify the result of evolutionary development. Experts could be called in, not for finding best rules but for figuring out what, if anything, is already there, ie the *acquis communautaire* or *ius commune* in a much deeper sense than of a mere compilation of the EC directives produced in the last three decades.

Deliberative democracy and citizenship

General

As a final prominent group of theories in contemporary political philosophy, we can cite deliberative democracy and citizenship theories. These theories

54 See eg R. Zimmermann, 'Savigny's legacy: legal history, comparative law, and the emergence of a European legal science' (1996) *Law Quarterly Review* 576–605; N. Jansen, *Binnenmarkt, Privatrecht und europäische Identität* (Tübingen: Mohr Siebeck, 2004) 72 ff.

have in common that they are more process than outcome oriented. Unlike utilitarianism communitarianism and liberal-egalitarianism, they focus on civic virtues and deliberation rather than on perfect or minimum outcomes. They are a response to 'passive' or 'private' citizenship. They emphasise that individuals and communities do not merely have rights, but also duties. There are different strands of citizenship theory. Some focus on the civic virtues of individuals. They aim at cultivating seedbeds of civic virtue. This approach is often referred to as 'civic republicanism'. Others focus more on a virtuous collective process. Advocates of deliberative democracy argue in favour of a shift from a vote-centric conception of democracy towards a talk-centric conception of participation. For minorities, it is important that their voice and arguments are heard, even if they will be outvoted. Habermas underlines that there is no reason why there should be any difference, in this respect, between private law and public law: also in relation to private law, citizens should be able to regard themselves not only as the addressees but also as the authors of the law.⁵⁵

European

On the question whether contract law should be European or national the partisans of deliberative democracy and citizenship would probably be indifferent in principle. At most they would prefer the level of governance with the most realistic prospect of citizen participation in the law making process. In most Member States, the record in relation to private law making hardly seems to be much less technocratic (if not more) than the European one has been so far. Indeed, there has been a long standing tradition across different European countries, and not only on the Continent (think of the English Law Commission), of private law drafting by academic experts and subsequent adoption by Parliament without too much deliberation or stakeholder participation. Moreover, deliberative democracy and citizenship theories are not formalistic. On the contrary, what matters for them is actual, substantive participation. This seems to make them more than any other political philosophy well adapted to the multi-level nature of the European legal system.⁵⁶ Thus, participation on the national and the European level could intermingle and cumulate. What matters, ultimately, is the degree of citizens' participation, not so much the level or levels of law-making on which this would take place.

55 J. Habermas, *Faktizität und Geltung; Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (5th ed, Frankfurt: Suhrkamp, 1997) 52.

56 See C. Joerges, 'The challenges of Europeanization in the realm of private law: a plea for a new discipline' *EUI Working papers*, LAW no 2004/12.

Optional

In principle, one would expect advocates of deliberative democracy and citizenship to be neutral on the question whether European contract law should be optional or not. It would only be different if the fact of actively choosing the applicable law could be regarded as an expression of active citizenship. However, on closer examination that idea does not seem very plausible. It is difficult to see how a choice of the law that should govern one's contractual relationship could count as an act of political participation, a contribution to the welfare of the polity.

Content

On the content of European contract law the deliberative democracy and citizenship philosophies would definitely be neutral. Of crucial importance for them are participation, process, and deliberation; not the outcome. Indeed, they have often been criticised for their substantive emptiness, which is, of course, only a logical consequence of their procedural nature.

Democracy

Obviously, democracy is of primordial importance in the deliberative idea of European contract law. However, on this view, deliberation, consultation and stakeholder involvement are much more important than the final vote in the European Parliament. And although any instrument on European contract (be it an optional instrument or a legislator's toolbox) will be the outcome of a public consultation, it is doubtful whether the present Green Paper consultation, or the stakeholder involvement during the drafting, will meet the requirements of an inclusive and deliberative process.⁵⁷ In earlier stages the CFR process has already been denounced as lacking legitimacy exactly in these terms,⁵⁸ whereas in the current stage there simply does not seem to be enough time available for a meaningful public debate. Therefore, there is little in terms of citizenship and deliberative democracy that an instrument (toolbox or optional instrument) could derive political legitimacy from. That might be different if, in the longer run, the instrument on European contract law, as a source of inspiration, were to become the object, maybe on a case to case basis, of a much broader and inclusive societal debate.

⁵⁷ On some of the details see above.

⁵⁸ Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto' 16 *European Law Journal* (2004) 653–674.

European contract law for foxes

Utilitarianism, liberal-egalitarianism, libertarianism, communitarianism and citizenship & deliberative democracy are five leading contemporary political philosophies. When interrogated on some of the main political questions concerning the future of European contract law, as we saw, these philosophies all yield some distinct answers. This leads to five different political ideas of European contract law. These five ideas are different, as expected, in that they answer the questions differently. Moreover, they differ also in another important respect, ie they do not regard the same questions as the most important ones. In other words, they differ not only on how the main issues should be resolved, but also on what the main political issues in European contract law are in the first place. However, there are not only differences between these five political conceptions of European contract law, but also important similarities. Indeed, more than one question is answered in a similar way by two or more theories, but on the basis of different, indeed often contradicting, principles. There is a degree of overlapping consensus, as Rawls would say, between these five political ideas of European contract law.⁵⁹

There is a famous line from the Greek poet Archilochus: ‘The fox knows many things, but the hedgehog knows one big thing.’ This line inspired Isaiah Berlin to the hypothesis that in the history of ideas there have been two types of thinkers, hedgehogs and foxes.⁶⁰ He says: ‘[T]aken figuratively, the words can be made to yield a sense in which they mark one of the deepest differences which divide writers and thinkers, and, it may be, human beings in general. For there exists a great chasm between those, on the one side, who relate everything to a single central vision, one system, less or more coherent or articulate, in terms of which they understand, think and feel – a single, universal, organising principle in terms of which alone all that they are and say has significance – and, on the other side, those who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some *de facto* way, for some psychological or physiological cause, related by no moral or aesthetic principle.’ The central question in Berlin’s essay on the philosophy of history was whether Tolstoy was a hedgehog or a fox (the answer was that Tolstoy was by nature a fox but believed in being a hedgehog).⁶¹ Berlin himself identified with the fox. However, Ronald Dworkin recently defended the idea of justice for hedgehogs.⁶² The question that we could ask ourselves here is whether we should look at these five philosophies of European contract law as hedgehogs or as foxes.

59 Rawls, n 22 above.

60 See I. Berlin, *The hedgehog and the fox; An essay on Tolstoy’s view of history* [1953] (London: Phoenix 2009).

61 Op cit, 5.

62 R. Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts: Belknap Press, 2011).

Everyone will easily agree that in trying to achieve our aims we should not waste resources. But why should economic efficiency itself become the single aim of our efforts including attempts to make a better contract law? Similarly, it would be an outrage to design a European contract law on a clean slate completely disregarding the Centuries, indeed Millennia old experiences of the civil law and the common law traditions including all the differences between and among them. However, that should not per se stop us from trying to innovate and to adopt also some entirely new common rules for Europe. And although the two principles of justice seem hard to defeat as minimum standards for the basic structure of a just society, which arguably includes the law of contract, does it follow that the nature and content of contract law is otherwise indifferent from a social justice perspective? Finally, the case for a more open and inclusive process for the elaboration of a European contract law is very strong but deliberation and participation surely cannot be the end of the story as far as social justice in contract law is concerned?

In sum, a European contract law based on one single political idea seems implausible. In a descriptive or positive sense, none of the five political conceptions presented here (nor any other one or indeed a non-political conception, eg in terms of commutative justice) is likely to be capable of explaining today's or tomorrow's European contract law entirely. Indeed, to 'pursue many ends, often unrelated and even contradictory, connected, if at all, only in some de facto way' seems to be a very apt description of the current state, and any likely future condition, of European contract law. And from a normative perspective, each of these political models of European contract law contains valuable elements and arguments, even though they sometimes contradict each other. Or, from the reverse angle, each of us, after having answered the questions in a certain way and having checked the answers against the table of answers yielded by the five theories, may ask ourselves, maybe with some bewilderment: 'Does this mean that I am a communitarian (or libertarian etc, as the case may be)?' Indeed, many of us will at the same time identify with one of these ideas concerning one question while adhering to aspects of another idea on another point, even if these ideas, in the abstract, are difficult to reconcile, eg utilitarianism and libertarianism. The conclusion seems to be that our only realistic prospect is a European contract law for foxes.