Contract law as fairness: a Rawlsian perspective on the position of SMEs in European contract law
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Citation for published version (APA):
Introduction

Contract law as political morality?

In our daily lives we make countless transactions. We do so both in our private as well as our professional lives. We might purchase tickets for a concert, office supplies for at the office, or a laptop to work on during the day and play on during the evenings. As a costumer, we typically do not read all the conditions that accompany such transactions, nor would we have much hope to negotiate different terms if we did decide to read them. With the development of consumer law over the past 50 years, non-professional contracting parties have been offered protection against businesses trying to take advantage of them. Consumer law provides consumers with a number of rights to compensate for their weakness vis-à-vis sellers. If you purchase a laptop online, for example, you are protected from a range of unfair terms. If, however, you run a small business and buy the same laptop for professional use, you typically cannot count on the same protection.

This raises a number of questions. In what way are the rules for consumers different from rules for small and medium-sized enterprises (SMEs)? Is there a material difference when you contract as a consumer or as someone running an SME? Should consumers and SMEs be treated alike? It also raises more fundamental questions, like what is normatively appealing about protecting weaker parties in contract law? Can helping weaker parties in their contractual relations help socially vulnerable groups? Is contract law a suitable medium to pursue these social justice goals? Contract law as a body of law determines which agreements are enforceable through the state and which ones are not. As such, it concerns and partly determines the relations between citizens while acting on the market.¹ This raises the question: what role can contract law play in making a society just? Thus, issues of contract law are turned into questions of political philosophy. However, understanding contract law as a part of political morality is not necessarily a conventional view.


Introduction

Private law and political philosophy

Traditionally, private law theory and political philosophy have been two separate discourses. On the one hand, contract law was conventionally seen as a mainly non-political area of law. The rules of private law purportedly aim to merely restore the status quo between parties after a wrong has been committed. To achieve this, an almost mathematical compensation should be aimed for. Accordingly, by virtue of their nature or essence, contract law rules are highly technical in character. The leading principle governing private law then is that of corrective justice. This view was already put forward in ancient times by Aristotle, and has been defended more recently by for example Ernest Weinrib. One of the implications was that distributive concerns could have no place in private law nor in horizontal relationships (citizen – citizen).

On the other hand, political philosophy focused on the vertical relationship between citizen and state. The great power of the state versus its citizens demanded justification and invited critical scrutiny. Accordingly, the influential theories that originated in the early modern and modern times (mainly those of Hobbes, Locke and Kant) stressed what negative rights individuals should have vis-à-vis the state. More recent political philosophy has also focused on positive rights (for example a right to education). Clearly, then, political philosophy has been directed primarily at public law – the body of law concerning vertical relations.

A similar observation can be made about one of the most, if not the most, influential contemporary theories of justice: Rawls’ justice as fairness. Over the years, justice as fairness has generated an enormous amount of literature, both criticizing and developing this theory. Already within 10 years of the publication of A Theory of Justice more than 2,500 articles related to Rawls had appeared. Justice as fairness has been applied to fields as diverse as international criminal law and environmental law.

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2 See Weinrib 2012. See also e.g. Benson 1992; Gordley 1991.
4 Wellbank, Snook and Mason (eds.) 1982.
However, an application to private law and more specifically contract law has remained very much underdeveloped. In the first place this might be explained by the fact that Rawls himself paid little attention to contract law. However, interestingly enough, other scholars have not picked up on the link to contract law with some notable exceptions found in the works of Kevin Kordana, David Tabachnick and Arthur Ripstein. It is striking that the arguably most influential contemporary political philosophy, i.e. a philosophy that discusses how society should be organized, gives no account of contract law and its role in organizing society. I believe this in itself makes it worthwhile to look at contract law from a Rawlsian perspective.

This also fits in with the more general recent development to combine political philosophy and contract law theory. In the past few decades, the dichotomy between the two has faded to some extent. It has been argued, I think persuasively, that even seemingly technical rules of contract law are to be seen as a choice in a political continuum. Furthermore, extensive research in the economic analysis of law has made clear that rules of contract law have considerable macro-economic effects. On top of that, an increasing number of services traditionally provided by the state, such as education, health care and military services, now are left to the market and hence fall within the scope of private law. Accordingly, increasing attention has been paid to the distributive effects of contract law and social justice has become a theme in contract law theory. Because of the ever-increasing influence contract law has on the daily lives of people, this shift in focus seems entirely justified.

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6 For an application of Rawls’ theory to tort law, see Keating 2004.
7 I will elaborate further on the choice for Rawls’ theory as a normative framework in the introduction to Part I.
8 Kennedy 1982; Kennedy 2002, pp. 7-28. For an application of this continuum to the politics of European sales law, see Van Zelst 2008.
9 See e.g. Posner 2007.
10 Study Group on Social Justice in European Private Law 2004, pp. 653-674. See also e.g. Hesselink 2007b; Lando 2006; Lyn Tjon Soei Len 2013; Micklitz 2011/02; Somma 2006; Wilhelmsson 2004.
11 See also Hesselink 2011a, pp. 296-297.
European contract law

Quite another development, though in a comparable direction, is the Europeanization of private law. Traditionally private law has been mostly a national matter, with the notable exception of private international law. Some countries even see their national private law as an embodiment of a national spirit, something to take great pride in – exemplified by France and its *Code Civil.* However, the European Union (EU) has become more and more involved in national systems of private law. At first mostly through harmonization in specific areas, but increasingly also through more horizontal harmonization, the EU is slowly creating a EU private law.

European private law, mostly focused on rules of contract law, is still very much in development. So far, most harmonization has taken place through the use of directives, which require implementation by the Member States of the European Union into their own systems of private law. Currently, the latest directive, the Consumer Rights Directive (CRD), aims to provide consumers with a number of rights when they shop online or away from business premises. Besides directives, an academic Draft Common Frame of Reference (DCFR) was published at the request of the European Commission, covering (among other things) the whole of contract law. This DCFR is partly based on a comparative study of the contract laws of the Member States and is meant to serve as a guide for future EU legislation. The latest development in the field of European contract law concerns a proposal for the regulation of a Common European Sales Law (CESL). Proposed by the European Commission, the CESL aims

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13 I will take ‘European private law’ or ‘European contract law’ to mean private law or contract law that originated from the EU legislator, as opposed to e.g. private law that originated from specific European countries.
14 Article 288 Treaty for the Functioning of the European Union. See in more detail also Chapter 6.
16 Von Bar, Clive and Schulte-Nölke (eds) 2009.
17 Though there can be doubt so far as to whether the European Commission has actually taken the DCFR into account in drafting e.g. the Consumer Rights Directive, see De Booyts, Mak and Hesselink 2009.
at introducing an optional European sales law, i.e. a sales law that parties can opt into that is the same throughout the European Union. ¹⁹

These developments show that European contract law is in flux. Accordingly, many of the questions concerning what kind of rules would be best are still open for debate. One such debate concerns weaker party protection and more specifically the position of small and medium-sized enterprises. Here, many normative questions are still unresolved, including whether SMEs should count as weaker parties and be protected as such. Or to phrase it differently: should small companies be offered the same or similar protection as consumers under European contract law?

**Structure**

This book marks an attempt to tie these two developments – the application of political philosophy to private law and the Europeanization of private law – together. The aim is to further explore the role of distributive justice in private law and more specifically in relation to the position of small and medium-sized enterprises in European contract law. To do so, I take Rawls’ concept of distributive justice – justice as fairness – as my point of departure. The central question is:

> What are the implications of applying a Rawlsian framework to European Contract Law for the rules concerning the protection of SMEs?

This question focuses on developing a Rawlsian framework for contract law on the one hand and on the other hand on positive European contract law rules concerning SMEs and weaker party protection more generally.

The structure of the book reflects this dual focus. Part I is concerned with formulating a normative framework for contract law based on Rawls’ theory of justice. To develop such a framework, I first discuss whether justice as fairness is applicable to contract law at all. The principles of justice that Rawls formulates are only applicable

¹⁹ See Hesselink 2012; Whittaker 2011.
to what he calls ‘the basic structure of society’. This basic structure consists of the major social institutions of a particular society. For justice as fairness to have a bearing on European contract law, contract law must fall within this basic structure. Accordingly, Chapter 2 analyses the concept of a basic structure, first in other important liberal theories of justice (Chapter 2.2) and then in justice as fairness itself (Chapter 2.3). Critically assessing this concept and its relation to contract law will prove insightful both as an explanation of the appeal of the limited scope of a liberal theory of justice such as justice as fairness, as well as the role of social justice concerns in contract law theory. In this chapter, I discuss different interpretations of the basic structure and eventually argue that contract law does form a part of the basic structure of society (Chapter 2.4). This necessarily goes beyond pure Rawlsian exegesis.

In Chapter 3, I discuss what this conclusion implies for contract law. In other words, I attempt to work out how a Rawlsian contract law in abstraco would function. To do so, Chapter 3 translates Rawls’ principles of justice to more concrete principles that can be brought to bear on issues of contract law (Chapter 3.2). More specifically, it discusses what justice as fairness means for the horizontal effect of fundamental rights (Chapter 3.3) and for non-discrimination and weaker party protection in contract law (Chapter 3.4). A contract law system that is organized according to the normative framework developed in this chapter is what I will call ‘contract law as fairness’.

Part II, then, turns to the position of SMEs in European contract law. Based on the normative framework developed in Part I, this part provides an argument as to how weaker party protection should be approached. More specifically, it considers whether a justified distinction can be made between consumers and SMEs with regard to weaker party protection (Chapter 6). To do so, I discuss three prominent areas of weaker party protection in European contract law: pre-contractual information duties (Chapter 8), rights of withdrawal (Chapter 9), and unfair terms control (Chapter 10),

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21 This is meant to indicate both that such a contract law is part of justice as fairness as well as to show it to be an alternative to the many ‘contract as …’ approaches, the most famous of which is arguably Charles Fried’s Contract as Promise. See Fried 1981.
in both the Directives that deal with them – the Consumer Rights Directive and the Unfair Terms Directive\textsuperscript{22} – and the previously mentioned proposal for a Common European Sales Law.

To determine whether a justified distinction can be made between consumers and SMEs, I first discuss the personal scope of these directives and the CESL as well as the underlying rationales for distinguishing between consumers and small businesses in general (Chapter 7). Subsequently, in the chapters on pre-contractual information duties, rights of withdrawal and unfair terms control, I analyze the differences in their application to SMEs compared to consumers and scrutinize whether the specific underlying rationales for these legal mechanisms can provide a justification for the differences in application. Finally, in Chapter 11, I conclude with what follows from the application of a Rawlsian framework to the position of SMEs in European contract law. I argue that contract law as fairness calls for a reconceptualization of European consumer law as weaker party protection law and furthermore that there are no legitimate grounds for distinguishing between consumers and SMEs with regard to inclusion in the category of the weaker party.

\textit{Methods}

The book’s methodology follows from its aim: assessing the position of SMEs from a Rawlsian perspective. First of all, it is an interdisciplinary work, combining political philosophy and more traditional legal analysis. The development of a Rawlsian framework for contract law is applied political philosophy, while the discussion of rules of European contract law pertains to a more conventionally legal analysis. Secondly, the use of a Rawlsian framework also informs the choice of an external or internal perspective. The overarching perspective of this book is an external, namely Rawlsian, view on positive law. However, to describe positive law an internal perspective is appropriate, as this is concerned with setting out the actual rules of

\textsuperscript{22} Directive 2011/83/EC on Consumer Rights and Directive 93/13/EEC on unfair terms in consumer contracts respectively.
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European contract law. Thirdly, the book has a clear normative character, as I will conclude with an argument to support rules regarding the position of SMEs in European contract law that I believe follow from a Rawlsian perspective on contract law. Fourthly, it has a supranational character, as EU rules are under consideration.

Roadmap

This book can be read broadly in two ways. The more philosophically inclined reader can regard the book mainly as applied Rawlsian theory (Part I) and the argument regarding SMEs in European contract law as a case study in such applied theory (Part II). The reader whose primary interest lies within the field of European contract law could view this book mainly as an argument for treating SMEs and consumers alike (Part II), where the Rawlsian framework provides the normative underpinnings for such an argument (Part I). In this manner, the book aims to show how fruitful the interaction between political philosophy and private law theory can be for both discourses.