Contract law as fairness: a Rawlsian perspective on the position of SMEs in European contract law

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1 Introduction to Part I

Many questions are still unanswered and many solutions are still up for debate within the field of European contract law. This strengthens the need for a normative framework from which these questions can be answered. Part I of this book aims to develop an analytical framework that can provide such normative guidance. This framework analyzes a set of key concepts, discusses their interrelation and relates them to a specific topic, in this case European contract law. The framework this Part develops is external to positive law. Conclusions drawn concerning the law on the basis of this framework are normative conclusions, but the framework itself is also normative. Which framework is chosen and how it is formulated determines to a large extent the conclusions for the positive law. Accordingly, it is important to clarify why a certain framework is chosen.

In this book Rawls’ theory of justice, *justice as fairness*,23 will be used as the normative basis for a normative framework for contract law.24 Before discussing how such a framework would take shape, I will explain why this theory and not another theory of justice forms the framework’s foundation.25

A first question that could be posed is: why concern yourself with political philosophy? Political philosophy might provide an appropriate normative basis for public law discussions, but this book focuses on private law. In private law there is no room for such considerations, the argument might go. Why not simply examine the coherence of the system? Or evaluate rules according to a standard of efficiency? However, anything less than a discussion on the level of political philosophy is

23 As formulated in Rawls 1999; Rawls 2005; Rawls 2001.
24 I understand contract law broadly as the body of law that regulates economic transactions and determines which agreements are enforceable through the state. The type of rules that will be most relevant for this thesis are mandatory rules on contract law.
25 I understand political philosophy as the discipline within philosophy that concerns itself with the theory of how to arrange our collective lives in a just manner and theories of justice as specific such theories. Political philosophy in this regard is a branch of moral philosophy, which concerns itself with what we owe each other more generally speaking. As I discuss the body of law that governs which agreements are enforceable through the state, political philosophy is the appropriate level to argue about the issues that arise, at least within contemporary liberal theory. For a wonderful introduction to the main contemporary theories of justice, see Kymlicka 2002.
unsatisfactory for a normative argument concerning the law. The coherence of a system generally only leads to more justice if the system itself is just and efficiency based arguments are typically utilitarian arguments in disguise, which leads the discussion back to political philosophy. Instead, the exercise of state power, even in private relations, must be justified on the level of political philosophy in order to make a persuasive normative argument.\(^2\)

The more pressing question is: why focus on justice as fairness? Why not embrace another theory of justice or multiple theories of justice? There are two possible lines of thought to answer this question: either substantive reasons or pragmatic reasons can be offered to justify the choice for justice as fairness. Substantive reasons for choosing Rawls’ theory entail arguing for justice as fairness as a sound theory of justice or even the best theory of justice. I have chosen not to pursue that approach. Rawls’ theory has invited an incredible amount of criticism, both positive and negative. An attempt to settle the debate as to which theory of justice is most convincing would exceed the scope and aim of this book. More generally, the debate concerning the criteria for a just society has been ongoing for millennia. I do not harbour the illusion to conclusively settle that debate.\(^3\) Accordingly, I will not attempt to defend Rawls’ theory against external criticism. I will of course, where necessary, discuss criticism internal to justice as fairness.

Instead, I believe that the choice for Rawls is justified because of the pervasive influence he has had on political philosophy. To explain this influence let me first briefly sketch the landscape of political philosophy at the time Rawls entered the field. When Rawls completed his PhD thesis at Princeton University in 1951, the discipline of political philosophy was certainly not in the best condition. Isaiah Berlin had written an essay, *Does political theory still exist?* in which he signalled the fact that

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\(^2\) Dworkin 2011, pp. 405-407. Dworkin argues that even the discussion about what law *is*, should not merely be a conceptual one, but a discussion about political philosophy.

\(^3\) Interestingly, Rawls himself suggests that we *can* arrive at an overlapping consensus on matters of basic justice. I will not, however, try to make that positive argument here. See Rawls 2005, pp. 133-172.
political philosophy was dead or dying as “no commanding work of political philosophy had appeared in the twentieth century”.\textsuperscript{28}

Two factors played a crucial role in leading Berlin to this grim conclusion. On the one hand, from the beginning of the 20th century, ethics had metamorphosed into meta-ethics. Ethical discussions focused on the discipline of ethics, instead of substantive issues. Meta-ethics attempted to understand the status of what people think and say about morality, as for example G.E Moore famously endeavoured in his \textit{Principia Ethica}.\textsuperscript{29} So instead of focusing on first order substantive claims on right and wrong, meta-ethics focused on second order judgments about the status of such claims. Later in the 20th century, this focus on meta-ethics found inspiration in an emerging linguistic turn.\textsuperscript{30} Statements about ethics were reformulated as statements on language and moral judgments restated as speech acts.\textsuperscript{31} This in turn opened the door for subjectivism and emotivism. Stevenson famously argued for emotivism and even held that his theory made no substantive moral claims, nor engendered any practical implication.\textsuperscript{32} In this manner, ethical debates ignored the underlying substantive moral issues that were the reason for ethics to develop as a discipline in the first place. This led Bernard Williams to conclude, “contemporary moral philosophy has found an original way of being boring, which is by not discussing moral issues at all”.\textsuperscript{33}

On the other hand, where substantive issues were discussed, some form of utilitarianism provided the only systematic approach to substantive moral issues. The only real alternative to utilitarianism was intuitionism, a loose set of intuitive moral judgments combined with one another. This situation was also unsatisfactory, as utilitarianism was exposed to severe criticism showing that it had implications radically at odds with moral intuition, its impractibility and a number of internal inconsistencies.

\textsuperscript{29} Moore 1903.
\textsuperscript{30} See Rorty (ed.) 1967.
\textsuperscript{31} See e.g. Hare 1952.
\textsuperscript{32} Stevenson 1944.
\textsuperscript{33} Williams 1972, p. x.
So the focus on meta-ethics and the lack of an alternative to utilitarianism left the discipline of political philosophy in dire straits. Rawls tried to change this situation. Even though, as he put it “there is no assurance we can do better”, he aimed at providing a systematic alternative for utilitarianism, in the tradition of the social contract theories of Locke, Rousseau and Kant. This project led to the publication of A Theory of Justice in 1971, which undoubtedly became the ‘commanding work of political philosophy’ that had been missing. Berlin’s assessment that the sorry state of political philosophy was based on the fact that no such work had been written was vindicated. In one fell swoop, Rawls’ A Theory of Justice revived the discipline declared nigh dead by Berlin just 10 years earlier.

It is hard to overestimate John Rawls’ impact. The publication of A Theory of Justice provided the field of moral philosophy with renewed energy and made substantive issues essential again. To cite Thomas Pogge in his book dedication for Realizing Rawls: “For John Rawls, who made it possible – and necessary”. Rawls’ influence was twofold. Not only did he provide an immensely influential substantive theory with justice as fairness, he also changed the practice of political philosophy. The renowned philosopher Thomas Nagel dedicated his book: “To Rawls, who changed the subject”. The result of the publication of A Theory of Justice was a paradigm shift in political philosophy and Rawls’ theory became the benchmark of this new paradigm. Robert Nozick, one of Rawls’ most famous critics, concluded: “political philosophers now must either work within Rawls’ theory or explain why not”. No work of political philosophy that followed would be complete without a reference to Rawls.

Nozick’s suggestion was followed overwhelmingly. A Theory of Justice was translated into 27 languages. A huge amount of literature was generated, both criticizing and developing Rawls’ theory. However, one area for possible application of justice as fairness has remained very much underdeveloped: private law. In the first

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34 Rawls 1999, p. xviii.
35 Rawls 1971.
37 Nagel 1991. See also e.g. Daniels 1989.
39 Pogge 2007, p. 3.
place this might be because Rawls himself paid little attention to private law. Furthermore, scholars who followed Rawls have not, with a few notable exceptions,\textsuperscript{40} picked up on this. This is striking, as it means that the most influential contemporary political philosophy, i.e. a philosophy concerned with how society should be organized, has no account of private law and its role in organizing society. So even though Rawls has been applied to diverse fields, the creation of a normative framework for contract law, as part of private law, based on his theory is to a large extent groundbreaking. This makes it very interesting to analyse contract law from a Rawlsian perspective. One of the main objectives of this book is to fill the lacuna.

Aside from these pragmatic reasons, there are also a number of more substantive arguments as to why justice as fairness provides an appropriate starting-off point, without having to argue in favour of the merits of the general theory. Firstly, as a political liberal theory of justice it fits well within the tradition of political thought prevalent in contemporary western society. Justice as fairness as an expression of that political tradition can provide a reasonable account of our normative self-understanding. Secondly, the method of reflective equilibrium that Rawls introduces is particularly helpful in translating abstract political philosophy to the more concrete realm of law. This method asks us to weigh our considered judgements against our principles and vice versa until they are in balance with one another.

I believe this provides a sufficient justification for Rawls’ theory as a point of departure and a normative basis for an analytical framework for European contract law. However, there are two more questions that could be posed with regard to this choice. First, why choose Rawls when he himself made so little reference to contract law? And on top of that, Rawls’ theory could be considered as too abstract, i.e. lacking the tools to inform the much more concrete issues central to contract law? A first explanation of the lack of attention to private law in Rawls’ own writing is that the clear-cut distinction between private and public law exists in civil law systems and often is not relevant to Rawls’ US common law system. Generally, however, these objections are not persuasive. Justice as fairness focuses on the just organization of a

\textsuperscript{40} Especially Kevin Kordana, David Tabachnick and Arthur Ripstein.
society and, as I will argue further in Part I, contract law forms an integral part of this organization. It can therefore not be left out of the picture just because it is complicated or difficult to fit within the general theory. Even if Rawls’ theory does not provide immediate answers to contract law issues, this result would provide interesting insights about justice as fairness. In this manner, we cannot only learn something about contract law from Rawls, but also learn about Rawls from contract law.

Second, why focus only on Rawls? Why not include other liberal theories? Or also include alternatives such as utilitarianism and libertarianism? If I would argue that Rawls offers the best theory of justice it would be easy to exclude other theories, as they are normatively excluded once justice as fairness is accepted as the right standard of justice. I have not opted for that argument and instead posit that the lack of inclusion of other theories of justice relates to scope. It would be impossible for this one book to create a comprehensive and in-depth analytical framework for multiple theories. Hopefully other researchers will be inspired to write on the subject of applying political philosophy to private law and create such comprehensive frameworks based on other theories of justice.\footnote{For an interesting recent example of this see Tjon Soei Len 2013. She applies a capabilities approach to externalities and contractual justice in Europe.}

What are the main questions that should be answered in order to formulate a normative framework for contract law based on Rawls’ theory? Firstly, it is paramount to develop a thorough understanding of the general theory of justice as fairness. Accordingly, in Chapter 2, I will discuss this theory in some detail. However, as already mentioned, the theory itself does not provide conclusive answers on the ‘if and how’ of its applicability to contract law. Thus, I will have to go beyond what Rawls has written. In doing so, I will follow Pogge who noted: “The aim is always to treat the theory as Rawls treated it: not as a magnificent machine displayed behind velvet ropes in a museum, but as a work in progress to be used and developed, as well as improved and
adjusted in the light of new arguments and objections, new knowledge and technologies, and new political developments”.

Justice as fairness is a limited theory; it does not even encompass ‘justice’ in the broadest sense. Instead Rawls focuses on the basic structure of society, i.e. its major social institutions: his principles of justice only apply to this basic structure. Whether contract law is part of this basic structure has to be argued for, as Rawls is at best ambiguous concerning this issue. The concept of the basic structure can be interpreted narrowly, in which case contract law is excluded, or broadly, in which case contract law is included. In Chapter 2, I will discuss both interpretations before making the argument that the broad interpretation, with regard to the specific institutions that are part of the basic structure, is more convincing than the narrow interpretation. To support this argument I will examine which interpretation fits best with Rawls’ general theory and where contract law fits into such an interpretation. This will necessarily go beyond a pure Rawlsian exegesis. Instead, I will argue for the position a Rawlsian should be committed to. In other words, I will attempt to interpret and formulate the theory in its strongest form.

After defending the argument that contract law forms part of the basic structure of society, Chapter 3 will focus on how a normative framework for contract law based on justice as fairness could work substantively. Here, I will discuss how the abstract principles of justice can be translated in such a manner as to inform contract law. By discussing these issues I come to formulate the normative framework formed by

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42 Pogge 2007, p. xi.
43 Contrast for example justice as individual virtue or retributive justice. See in this regard the five conceptions of the concept of justice provided by Kurt Baier. Baier 1989, pp. 785-788.
44 This is essentially a Dworkinian method. Originally developed as a theory of interpretation of law, Dworkin more recently also applied this method to political philosophy. See Dworkin 1977 and Dworkin 2011.
45 For those who are interested in pure Rawls exegesis, the Harvard Library has a wealth of unpublished material by Rawls. The collection includes letters, older versions of published papers and lectures and comments on the work of others. These are available in the repository of the Harvard University Archives, Call Number HUM 48. For an overview, see http://oasis.lib.harvard.edu/oasis/deliver/deepLink?_collection=oasis&uniqueId=hua32010.
principles for contract law based on justice as fairness I call ‘contract law as fairness’.\footnote{As I also argue in a forthcoming article in Ratio Iuris titled ‘Contract Law as Fairness’, available on SSRN at http://ssrn.com/abstract=2354376.} This framework will then set a normative standard that serves as a tool to assess the position of SMEs in European contract law.