Contract law as fairness: a Rawlsian perspective on the position of SMEs in European contract law
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2 Justice as fairness and the basic structure

2.1 Justice as fairness

2.1.1 The role of justice

I will first discuss the general theory of justice as fairness before discussing the implications of Rawls’ theory for contract law. This will provide insights into the project Rawls was engaged in and will help to interpret specific elements within his theory, like the basic structure. So what did Rawls set out to do? He opens *A Theory of Justice* with the famous sentence: “Justice is the first virtue of social institutions, as truth is of systems of thought”.\(^{47}\) Justice as fairness is an attempt to provide a theory that accounts for this conviction and to offer a benchmark of what this first virtue should look like. The first question is then: what is the role of justice?

Rawls assumes society is a closed association of persons that together create mutual advantages.\(^{48}\) There is a common interest in creating these advantages. However, there is also a conflict of interest, as everybody wants as large a share as possible, while bearing as little of the costs in producing these advantages. Accordingly, the role of justice, and more specifically of principles of social justice, is to offer a system that fairly divides the gains and burdens of social cooperation.\(^{49}\) The aim of such a system is to establish a well-ordered society. For a society to be well-ordered, two criteria have to be met: 1) everyone accepts the same principles of justice and knows others do as well and 2) basic social institutions generally comply with these principles.

This role of justice has a number of implications for the character of justice as fairness. The theory concerns itself with social, procedural and distributive justice.

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\(^{47}\) Rawls 1999, p. 3.


\(^{49}\) Rawls 1999, p. 4.
Rawls explicitly is concerned with social justice.\textsuperscript{50} His theory focuses not on individual actions, but on the basic structure of society. So in justice as fairness “the basic structure of society is the first subject of justice”\textsuperscript{51} This basic structure is comprised of the major social institutions, like the constitution or the way the economy is structured. The principles of social justice apply solely to this basic structure. As the primary subject of justice, and hence subject to the principles of social justice, it is the task of the basic structure to “assign fundamental rights and duties and shape the division of advantages that arises through social cooperation”\textsuperscript{52} These institutions are foundational to Rawls’ theory because of their formative significance for, and pervasive influence on, the life of the individual.\textsuperscript{53} I will elaborate on the basic structure and its role in justice as fairness at some length below, after discussing the rest of the theory.

Justice as fairness is procedural in a number of interrelated ways. Rawls’ theory is procedural in the sense that justice as fairness does not prescribe or presuppose what people ought to do on an individual level or what sort of lives they should live.\textsuperscript{54} It concerns itself with providing fair ‘rules of the game’. What a person does within the boundaries of these rules is then more or less up to that person. In other words, Rawls provides us with a theory of the ‘right’, and remains silent about the ‘good’. However, he stresses that the right always has priority over the good.\textsuperscript{55} As long as a certain conception of the good does not conflict with the right, the state should be neutral towards such a conception as much as possible.\textsuperscript{56}

Justice as fairness is also procedural in the sense that if the procedure through which certain principles are agreed upon is fair, then the principles themselves are considered fair. Justice as fairness does not make an independent evaluative judgment about actual distributions. If the procedure through which a certain distribution is

\begin{itemize}
\item \textsuperscript{50} Rawls 1999, p. 6.
\item \textsuperscript{51} Rawls 2005, p. 257.
\item \textsuperscript{52} Rawls 2005, p. 258.
\item \textsuperscript{53} Murphy 1999, pp. 251-253.
\item \textsuperscript{54} Rawls 1999, pp. 285-292.
\item \textsuperscript{55} Rawls 1999, pp. 26-28.
\item \textsuperscript{56} See De Marneffe 1990 and Kymlicka 1989.
\end{itemize}
reached was fair, the distribution will at least not be unfair. Rawls presents the example of gambling. If the bets are fair, i.e. even odds, voluntarily agreed upon, etc., then the outcome will be fair as well. In other words, justice as fairness is a theory of pure procedural justice, as opposed to a theory of perfect procedural justice.\(^{57}\) Perfect procedural justice includes both an independent criterion as to what a just outcome is and a procedure to achieve that outcome, while pure procedural justice lacks the independent criterion and focuses solely on the procedure. It is important to note that Rawls’ pure procedural justice is dependent on substantive principles, i.e. the principles of justice, thus it is not to be confused with a theory of procedural democracy where any legitimate democratic outcome is seen as right.\(^{58}\) Finally, justice as fairness is procedural in the sense that it offers a procedural model through which principles of justice can be arrived at. In this manner, the procedural and the distributive character of the theory combine: these principles determine the division of advantages arising out of mutual cooperation.

2.1.2 The original position and the principles of justice

Any theory of distributive justice has to answer two questions: what is it that is divided and how should this division take place? To start with the latter, Rawls aims to develop a model through which people can negotiate as free and equal moral persons with regard to the division of the benefits and burdens of society. To do so, Rawls asks us to imagine a hypothetical ‘original position’. This original position is comparable to the state of nature in traditional contract theories articulated by John Locke, among others, albeit with two important differences. First, while older contract theories viewed the state of nature as a historical state, Rawls is explicit about the hypothetical nature of the original position. Secondly, in the original position actors operate behind a ‘veil of ignorance’.\(^{59}\)

\(^{57}\) Rawls 1999, pp. 73-76.

\(^{58}\) See for such an approach Habermas 1996 and more generally Habermas 1997.

One of the basic Rawlsian ideas is that the natural talents with which a person is born, just as much as social positions you are born into, are a matter of luck and hence morally speaking arbitrary. Accordingly, these factors should not play a role in determining the principles of justice that govern society. To achieve this, Rawls introduces the concept of a veil of ignorance. The veil of ignorance imposes restrictions on what knowledge is available to the actors in the original position. Parties in the original position are not informed as to the particularities of their own society, such as the exact economic and political situation. Furthermore, an actor is not aware of his particular conception of a good life, i.e. a life he believes is worth living. Additionally, when choosing principles of justice, the parties are unaware of the talents and positions they have in actual society. So they do not know whether they will be strong or weak, women or men, poorly educated or highly educated, etc.

These talents and social positions are morally irrelevant factors; the result of a natural lottery that one is not entitled to in any meaningful way. The veil of ignorance prevents these morally arbitrary factors to play a role in the determination of the principles of justice. Moreover, it eliminates the differences in bargaining power that exist in actual society because of these factors. In this manner, actors in the original position will deliberate as equals as to what is fair in society. This impartiality leads to a situation in which no one is able to gain an unfair advantage. In Rawls' words: “to each according to his threat advantage is not a principle of justice”. The conditions under which actors in the original position operate are not neutral. They are modelled

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60 See Rawls 2005, p. 29. Rawls defines a conception of the good or a good life as a “conception of what is valuable in human life.”
61 Rawls 1999, pp. 118-123.
62 The exclusion of morally arbitrary factors is not the only argument for the original position and the veil of ignorance. See also Daniels 2003.
63 Libertarians would argue against such an approach. According to them, to eliminate these differences, as long as they were not illegitimately accrued, would violate people’s rights. They would not accept an a-historical argument for principles of justice. See Freeman 2003, p. 11 and Nozick 1974.
64 Rawls 1999, p. 122.
to lead to a certain conception of justice: justice as fairness. Rawls argues that because these conditions are fair, they will lead to fair outcomes.\(^{65}\)

In addition to being behind a veil of ignorance, the actors in the original position are 'mutually disinterested' and 'rational'.\(^{66}\) The former means that in deciding on principles, actors only take their own interests into account and not those of others. The latter means that they will choose the most effective means towards their own ends – a thin notion of rationality. But what are these means? Actors in the original position do not know their own conception of the good and so do not know which particular goods will best promote their idea of a good life. Because Rawls does not prescribe or presuppose any certain way of life, they argue over the distribution of goods that every rational person would want, irrespective of their particular choice of ends. Rawls calls these goods ‘primary goods’ which include not only material wealth, but social rights, liberties, the social bases for self-respect and opportunities.\(^{67}\)

The actors in the hypothetical original position will try to maximize the share of primary goods they will receive in actual society as they are rational and mutually disinterested. However, the knowledge restrictions in the original position make it impossible to create a particular, personally favourable position. Accordingly, actors will choose principles of justice that create the most favourable position possible, regardless of which position is actually occupied. To do so, Rawls argues the actors in the original position will adopt a maximin strategy.\(^{68}\) This means they will maximize the minimum, i.e. make sure that those in the worst situation are as well-off as possible.\(^{69}\) To understand this, the analogy of cutting a cake is instructive. If you do not know which piece you will receive, you will try to divide the cake as evenly as possible. This does not mean, however, that no inequalities will be allowed for at all. In the case

\(^{65}\) Both this and the point that actors are unaware of their conception of the good in the original position correspond with the procedural nature of justice as fairness. Another argument for these conditions can be found in Rawls’ conception of the person, see below.


\(^{67}\) Rawls 1999, pp. 54-55.

\(^{68}\) Rawls 1999, pp. 130-139.

\(^{69}\) The fact that Rawls argues for a maximin strategy has been criticized by rational choice theorists, most famously Kenneth Arrow who posits that it is not rational to adopt maximin. See Arrow 1973. For a response, see Rawls 2005, pp. 22-28.
that social and economic inequalities can improve the situation of the worst-off, the actors will agree to such inequalities. To extend the metaphor of the cake, imagine the baker would only be prepared to wake up early to bake a larger cake, which would benefit everyone, if he would be rewarded with a piece that was slightly larger than the other pieces. Given these conditions and dispositions, Rawls argues that the following principles of justice will be agreed upon:

1) Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.\(^{70}\)

2) Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged, and (b) attached to positions and offices open to all under conditions of fair equality of opportunity.\(^{71}\)

These principles are lexically ordered, i.e. the first takes priority over the second. Accordingly, social and economic gains can never come at a cost to the basic liberties guaranteed by the first principle. Furthermore, as mentioned above, there are no independent evaluative criteria for justice other than those formulated in the principles of justice: in justice as fairness they are the definitive standard of justice.\(^{72}\)

Whilst this might appear to be abstract and divorced form real world concerns, Rawls, envisages a constant interaction between the principles of justice and concrete judgments. He aims at achieving what he calls a ‘reflective equilibrium’. On the one hand there are principles, on the other hand there are considered judgments about individual cases and “in searching for the most favored description of this situation we work from both ends”.\(^{73}\) The principles should form a systematic and coherent explanation and justification of our considered judgments, while our considered

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\(^{70}\) The formulation of the first principle was revised from the original edition following H.L.A. Hart’s critique. See Hart 1973.

\(^{71}\) Rawls 1999, p. 266. I will use the terms least advantaged and worst-off as interchangeable.

\(^{72}\) See Kordana and Tabachnick 2006, pp. 1283-1284. Definitive here should be distinguished from determinate. The fact that the principles of justice form the only relevant criteria of what counts as just does not mean they give a determinate answer in every situation.

\(^{73}\) Rawls 1999, p. 18.
judgments should support the conclusions derived from the principles.\textsuperscript{74} If there is a discrepancy between judgment and principle, the judgment should be first rethought and possibly revised. If the judgment is too convincing to ignore, the principle will have to be changed. Take for example the considered judgment that slavery is morally wrong. A principled theory should be able to account for this judgment. If it is at odds, it is likely that the theory should be revised because of the strength of this judgment. In this manner, Rawls thinks it is possible to reach a reflective equilibrium. It forms an equilibrium because considered judgments and principles are balanced and it is reflective because this balance is the result of a process of reflection. Rawls believes justice as fairness is the outcome of such a reflective equilibrium.

2.1.3 Political liberalism

In \textit{A Theory of Justice}, Rawls assumes that a society conforming to the principles of justice will naturally be well-ordered and stable. However, communitarian critique mounted by the likes of Michael Sandel\textsuperscript{75} and Alasdair McIntyre\textsuperscript{76} accompanied by the rise of the multicultural society made it all but clear to Rawls that such stability will not be achieved automatically.\textsuperscript{77} \textit{Political Liberalism} is concerned with explaining and justifying the stability of a political constructivist theory like justice as fairness.\textsuperscript{78}

Political liberalism takes for granted the fact of reasonable pluralism, which means that reasonable people can have different but equally reasonable ideas about comprehensive doctrines, i.e. about ‘the good’. The diversity of reasonable comprehensive doctrines is not something that needs to be ‘fixed’, but is a direct result

\textsuperscript{74} Interestingly, this description comes close to Dworkin’s idea of principles in his legal theory of law as integrity. See Dworkin 1986.
\textsuperscript{75} Sandel 1982.
\textsuperscript{76} McIntyre 1981.
\textsuperscript{77} See Scheffler 1994, p. 5.
\textsuperscript{78} Rawls 2005. The theory is political constructivist because the principles that are established are the outcome of a procedure of choice, as opposed to having their foundation in an independent notion of moral truth. This choice is informed by Rawls’ conception of the person as free and equal and deliberating in the original position. See Larmore 1990, pp. 355-356; Klosko 1997, pp. 635-637; McKinnon 2002, p. 27.
of democratic culture that can only be changed by oppression. Rawls calls the cause of such disagreement the ‘burdens of judgment’. Instead, Rawls has in mind an overlapping consensus that can govern public use of power in a way that is acceptable to all reasonable comprehensive doctrines.

To do so, Rawls builds on a specific conception of the person: that of moral persons as free and equal. People are equal in the sense that everyone has an equal right to determine the principles of justice. People are free in the sense that they can choose their own conception of the good. These two characteristics correspond with what Rawls sees as the two moral powers of a person: the capacity to have a sense of justice and the capacity to pursue a conception of the good.

The two moral powers also correspond to two other critical concepts in Rawls’ theory: the reasonable (a sense of justice) and the rational (choosing and pursuing a conception of the good). The concept of the rational applies to a single agent and concerns itself with how this agent should balance his ends and choose effective means to achieve those ends. The concept of the reasonable, on the contrary, is public in a way in which the rational is not. The reasonable specifies terms and reasons that we can put forward in our social relations with others and expect them to accept. In justice as fairness, the reasonable and the rational are represented in the original position. The parties in the original position are rational, so they pursue their interests effectively, i.e. they maximize their share of primary goods. The reasonable is found in the restriction the veil of ignorance imposes on the parties. The veil of ignorance forces parties in the original position to propose principles which all equally situated actors can reasonably accept.

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79 Rawls 2005, pp. 36-38.
80 Rawls 2005, p. 15.
81 Rawls 2005, pp. 18-19, 29-35.
82 Rawls 2005, pp. 48-54. Compare Habermas’ use of the idea of public reasons in e.g. Habermas 2006. See also an interesting discussion between Rawls and Habermas in the Journal of Philosophy, March 1995 (vol 42, 3).
This conception of the person is arrived at through a constructivist method. Rawls stresses that his conception of the person is purely political, not metaphysical.\textsuperscript{83} Rawls argues for a form of liberalism that can be justified without relying on any particular conception of the good. As such, Rawls calls his political account freestanding.\textsuperscript{84} Even though Rawls does not want to impose any specific comprehensive doctrine, this does not mean there are no limits to what comprehensive doctrines can look like. According to Rawls, reasonable persons affirm only reasonable comprehensive doctrines.\textsuperscript{85} A reasonable comprehensive doctrine has three features, 1) it covers the major aspects of human life in a more or less consistent and coherent manner, 2) it helps recognizing which factors are valued strongly and which are not and 3) it draws upon a tradition of thought and doctrine.\textsuperscript{86} These are intentionally very broad conditions, so that many comprehensive doctrines can satisfy them.

2.1.4 Public reason and an overlapping consensus

The fact that comprehensive doctrines are restricted to reasonable ones is an essential step towards the idea of an ‘overlapping consensus’. Rawls believes that, even in light of the fact of reasonable pluralism, there is an overlap between what people with different comprehensive doctrines can reasonably agree to. This overlapping consensus then can form a public conception of justice, shared by all reasonable persons, while remaining impartial between reasonable comprehensive doctrines.\textsuperscript{87}

Under such an overlapping consensus people can decide on fair terms of cooperation. Each participant may reasonably be expected to accept such terms, provided that all other participants likewise accept these terms.\textsuperscript{88} Accordingly, the use

\textsuperscript{83} By this Rawls means that his conception of the person is not dependent on controversial metaphysical or ontological claims about ‘human nature’, but is instead derived from political argument. In justice as fairness this political argument consists mainly in the features of the original position. See Rawls 2005, pp. 29-35.

\textsuperscript{84} Larmore 1999, pp. 599-605.

\textsuperscript{85} Nussbaum 2011, pp. 6-11.

\textsuperscript{86} Rawls 2005, pp. 58-63.

\textsuperscript{87} Rawls 2005, pp. 144-153.

\textsuperscript{88} Waldron 2004, pp. 95-96.
of political power is only proper when we sincerely believe that the reasons we offer to justify our political actions may reasonably be accepted by other citizens as a justification of those actions.\(^8^9\) In justice as fairness, the principles of justice Rawls formulates are seen as fair terms. Thus, an overlapping consensus can create stability by achieving support for the political conception of justice that it arrives at because of two factors: 1) public recognition of the great value of political virtues and 2) the fact that it fits with(in) the reasonable comprehensive views of persons.

An overlapping consensus can be arrived at through the exercise of public reason.\(^9^0\) The idea behind public reason is that it enables the discussion of matters of justice: it embodies principles of reasoning and restrictions to what can count as arguments and what not.\(^9^1\) The most important aspect of public reason is that comprehensive doctrines cannot be relied on in debates concerning the basic elements of justice. The limits public reason imposes do not apply to all political questions, only to those that concern constitutional essentials and questions of basic justice.\(^9^2\) Only in such a way can people with differing comprehensive doctrines reach an overlapping consensus. In a well-ordered society, however, the outcomes of such exercises of public reason can also be endorsed from the perspective of reasonable comprehensive doctrines, precisely because they will fall within the overlap between those doctrines.\(^9^3\)

2.2 The basic structure and its role in justice as fairness

After having discussed Rawls' theory in general, we can now focus on the concept of the basic structure of society. To understand the role the basic structure plays in justice as fairness we have to bear in mind what the core of Rawls’ project is. The role of justice is to provide a fair system for social cooperation.\(^9^4\) It is this social

\(^{8^9}\) Rawls 2005, pp. 49-50.  
\(^{9^0}\) Larmore 2003, pp. 368-393.  
\(^{9^1}\) Nussbaum 2011, pp. 24-26.  
\(^{9^2}\) Constitutional essentials and basic justice can be seen as particularly fundamental aspects of the right.  
\(^{9^3}\) Rawls 2005, pp. 223-227.  
\(^{9^4}\) Scheffler 2006, pp. 102-103.
cooperation that *creates* mutual advantage. The principles of social justice are not merely concerned with the division or redistribution of already existing goods and entitlements, but with the creation of a fair system to divide the advantages gained through that system. Pogge likens it to a game. The question is not whether the gains of the winners should be redistributed to the losers while you are playing poker, but rather whether you should play poker in the first place and not some other game. This is particularly relevant if it turns out that a specific game constantly produces great losers.\(^95\)

Distributive justice in Rawls’ theory is not merely about allocation, it concerns itself with designing a social process that is fair among free and equal moral persons.

This social process is governed by the basic structure and accordingly Rawls starts off *A Theory of Justice* by saying that “the primary subject of justice is the basic structure of society”.\(^96\) The basic structure consists of society’s major social institutions. First, note that Rawls uses the term ‘institutions’ as social practices, i.e. a public system of rules that defines positions with their rights, duties, etc. and ranges from simple games to the system of government.\(^97\) Rawls refers to more specific organizations exemplified by firms or universities as ‘associations’. As the basic structure is the primary subject of justice, “justice is the first virtue of social institutions, as truth is of systems of thought”.\(^98\) In other words, no matter how elegant or efficient an institution is, it must be changed if it is not just. What factors determine whether such change is necessary?

> “Institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life.”\(^99\)

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\(^96\) Rawls 1999, p. 6.
\(^98\) Rawls 1999, p. 3.
\(^99\) Rawls 1999, p. 5. Whether a distinction is arbitrary or not is further determined by the principles of justice.
This illustrates once again the importance of the basic structure for the division of the mutual advantages social cooperation creates. It is up to the institutions of the basic structure, as the primary subject of justice, to “assign fundamental rights and duties and shape the division of advantages that arises through social cooperation”.

This leads to the most abstract definition Rawls gives of the basic structure:

“The basic structure is a public system of rules defining a scheme of activities that leads men to act together so as to produce a greater sum of benefits and assigns to each certain recognized claims to a share in the proceeds.”

This definition reinforces a number of conclusions. First, it emphasizes Rawls concern with social justice. His theory focuses on distributing a share of the mutual advantage society creates and is social in that sense. Second, the function of the basic structure is to assign fundamental rights and claims to the mutual advantage, in other words: primary goods. So the basic structure is not merely distributional, it is distributional for primary goods. Third, the basic structure is a public system of rules. For Rawls, this means that the basic structure is made up of the major institutions of society.

But then, what type of institutions does the basic structure actually include? Rawls names the “political constitution, the legally recognized forms of property, and the structure of the economy, as well as the family in some form” in his list of examples. Pogge concludes:

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100 Rawls 2005, p. 258.
103 Rawls 2005, p. 258.
104 All these conclusions rely on the implicit assumption that in fact, a society exists which can be just or unjust. Cf. Hayek 1944.
“The basic structure consists of a society’s basic mode of economic organization; the procedures for making social choices through the conduct of, or interactions among, individuals and groups, and limitations upon such choices.”106

However, as Rawls himself admits, “our characterization of the basic structure does not provide a sharp definition, or criterion, from which we can tell what social arrangements, or aspects thereof, belong to it.”107

Typically, the debate on the basic structure has focused on whether it should be interpreted narrowly or broadly.108 A narrow interpretation of the basic structure only includes a number of constitutional essentials and some welfare programs via a tax and transfer system. According to the broad interpretation the basic structure includes most of society’s legal institutions and also its way of organizing personal property.109 Hence, the basic structure includes contract law in the broad interpretation but not in the narrow interpretation. This makes examining these two interpretations and the normative driving force behind them essential for our purposes.

Furthermore, assessing these interpretations cannot only help us address questions of contract law, but also inform our understanding of justice as fairness. A narrow interpretation would mean that this theory remains silent on many important discussions generally and in legal theory specifically. I will argue that we need to move beyond these two interpretations and focus instead on the division of labour that a basic structure makes possible. To get a clearer picture of which institutions do belong to the basic structure, we need to look at both the reasons for focusing on the concept of a basic structure in justice as fairness as well as its purposes in society. This will necessarily go beyond an exegesis of Rawls’ texts. Instead, I will argue for the position I believe one should be committed to as a Rawlsian. In other words, I will attempt to interpret and formulate the theory in its strongest form.

106 Pogge 1989, p. 23.
107 Rawls 2001, p. 12. As mentioned above in paragraph 2.1.2, this does not clash with the characterization of the principles of justice as definitive, as that refers to the status of the principles, not the answers they lead to.
2.2.1 Importance of the concept of a basic structure in justice as fairness

There are a number of reasons for the focus on the basic structure of society in justice as fairness. First, there is a practical reason to limit the scope of justice as fairness by focusing on the basic structure. There is intense disagreement on ethical doctrines that cannot be resolved. In light of reasonable pluralism, the best way to establish consensus on how to regulate society is to focus on an abstract conception of political justice with the basic structure as its subject.\footnote{Michelman 1994, p. 814.} Consensus on this particular subject area of justice might prove acceptable for a myriad of differing comprehensive doctrines.\footnote{Rawls is adamant that this does not imply that an overlapping consensus is a mere modus vivendi. See Michelman 1995, pp. 314-315.}

There are also two substantive reasons for focusing on the basic structure of society: its pervasive influence on people’s lives and its institutional character.\footnote{Rawls 2001, pp. 52-57.} The basic structure of a society exerts a great influence on the success of people’s lives in this society in multiple ways.\footnote{Julius 2003.} First of all, it obviously has an effect on the amount of primary goods available to individuals. As primary goods are useful for your life, regardless of any particular conception of the good, this has a profound impact on your life. Second, it determines to a large extent the chances and options that are available. The institutional set-up of society makes certain choices possible, while it makes others impossible. Third, it impacts the way you are able to take advantage of the opportunities that are formally open to you.\footnote{Follesdal 2011, pp. 50-51. Arguably not enough however, as this was subject to famous criticism by e.g. Amartya Sen, arguing that the focus should by on actual capabilities. See e.g. Sen 1990 and more generally Sen 2009.} Finally, it helps form your expectations, aspirations, i.e. life prospects, and possibly your conception of the good.\footnote{An interesting question is how this affects the ‘political’ or freestanding character of justice as fairness, but I will not further pursue that question here.}

The other reason concerns the institutional character of the basic structure. First of all, institutions are particularly suitable in helping to solve coordination problems.
They can provide assurance concerning the actions of others in a situation of mutual cooperation, where otherwise uncertainty would come to the fore. Consequently, this diminishes the risk of free riding and of partial compliance. In Rawls’ ideal theory everyone complies but this compliance is dependent on the realization of general compliance by others. Such a realization can be strengthened effectively by the basic structure.\textsuperscript{116} Secondly, the institutional character of the basic structure makes the creation of social primary goods possible, i.e. the basic structure is constitutive of social primary goods.\textsuperscript{117} To quote Samuel Freeman:

“It is not just fiscal policies, taxation, public goods, and welfare policies that are involved here; more basically it is political decisions about the many property rules and economic institutions that make these policies – and economic and social cooperation as well – possible.”\textsuperscript{118}

Finally, the focus on the basic structure is justified because this basic structure helps to create background justice against which individuals can interact. It helps create the social conditions under which fair agreement and cooperation are possible and it supports the preservation of those conditions:

“Taking the basic structure as the primary subject enables us to regard distributive justice as a case of pure background procedural justice: when everyone follows the publicly recognized rules of cooperation, the particular distribution that results is acceptable as just whatever that distribution turns out to be.”\textsuperscript{119}

This allows for a division of labour, which leads us to the purposes of the basic structure.

\textsuperscript{116} Follesdal 2011, pp. 49-50.
\textsuperscript{117} Follesdal 2011, p. 51.
\textsuperscript{118} Freeman 2006, p. 245.
\textsuperscript{119} Rawls 2001, p. 54.
2.2.2 Purpose of the basic structure: two divisions of labour

One of the core ideas of liberalism is that a certain amount of liberty should be preserved for the individual, e.g. the maximum amount of liberty compatible with a similar amount of liberty for others.\textsuperscript{120} Within this sphere of liberty the individual should then be free to pursue his own ends. To understand the role a basic structure can play in a liberal theory it is interesting to look at how the theories discussed aim to secure this sphere of liberty. We will see that the concept of a basic structure is one way, but not the only way, to achieve this.

A helpful distinction can be made between a dualist and a monist theory.\textsuperscript{121} As Murphy posits:

\begin{quote}
"I am interested in the specific claim that the two practical problems of institutional design and personal conduct require, at the fundamental level, two different kinds of practical principle. I will use the label “dualism” for this claim and “monism” for its denial.”\textsuperscript{122}
\end{quote}

Dualism often goes hand in hand with a division of labour: not only do different principles apply to the state and the individual, a division of responsibilities or labour exists between them.\textsuperscript{123} At the most abstract level within the liberal framework, this division of labour entails that the state is responsible for establishing the ‘right’, while the individual is responsible for his pursuit of the ‘good’. Conversely, conceptions of the good lie within the individual domain, while principles of the right lie within the political domain. The concept of a basic structure is one way to effectuate such a division of labour. A basic structure then is the set of institutions that can bring about what is required by the ‘right’. In this sense, one way of preserving a sphere of liberty is to envision a division of labour between the individual and a basic structure, where

\textsuperscript{120} See Berlin 2002.
\textsuperscript{121} See also Hevia 2012, pp. 14-15.
\textsuperscript{122} Murphy 1999, p. 254.
\textsuperscript{123} Hevia 2012, pp. 14-15.
the basic structure creates a framework within the limits of which the individual is left free.

The concept of a division of labour can be divided into two related but distinct divisions of labour: a division of moral labour and an institutional division of labour. This distinction will prove important in the discussion of Rawls’ basic structure thus it is paramount to elaborate on it. Samuel Scheffler holds:

“‘the division of moral labour’, is between the principles of justice that apply to the basic structure and those values and norms that apply elsewhere […] the ‘institutional division of labour’ between two sets of rules: the rules constituting those social forms which are part of the basic structure and are necessary to ensure background justice, and the rules that directly regulate economic transactions and agreements among individuals.”

In other words, the division of moral labour is concerned with which sort of principles are appropriate to put forward while debating issues of justice, while the institutional division is concerned with which principles are appropriate for institutions and which for individual conduct.

To sum up, a theory can be either monist or dualist and a dualist theory can employ the concept of a basic structure. A basic structure in a liberal theory can function as a way ofdifferentiating between a set of institutions on the one hand and individuals on the other. This in turn can broadly serve two purposes: effectuating to a division of moral labour and to an institutional division of labour.

We can now use these ideas to analyse which purpose(s) the basic structure serves. The purpose of the basic structure in Rawls’ theory is to bring about a division of labour. Rawls describes this division of labour in a now somewhat infamous passage of Political Liberalism:

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124 Scheffler and Munoz-Darde 2005, pp. 239-240.
125 Hevia 2012, p. 15.
“We arrive at the idea of a division of labour between two kinds of social rules, and the different institutional forms in which these rules are realized. The basic structure comprises first the institutions that define the social background and includes as well those operations that continually adjust and compensate for the inevitable tendencies away from background fairness, for example, such operations as income and inheritance taxation designed to even out the ownership of property. This structure also enforces through the legal system another set of rules that govern the transactions and agreements between individuals and associations (the law of contracts, and so on). The rules relating to fraud and duress, and the like, belong to these rules, and satisfy the requirements of simplicity and practicality. They are framed to leave individuals and associations free to act effectively in the pursuit of their ends and without excessive constraints.

To conclude: we start with the basic structure and try to see how this structure itself should make the adjustments necessary to preserve background justice. What we look for, in effect, is an institutional division of labour between the basic structure and the rules applying directly to individuals and associations and to be followed by them in particular transactions. If this division of labour can be established, individuals and associations are then left free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made.”

This passage has to a large extent inspired much of the discussion regarding the scope of the basic structure. In limiting the scope of justice as fairness in Political Liberalism to the political sphere, Rawls also appears to limit the scope of the basic structure. The passage derives its infamy in part because it has led some scholars to

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126 Rawls 2005, pp. 268-269.
conclude that the basic structure should be interpreted narrowly and consequently that contract law falls outside of this basic structure. Others, on the contrary, refute this and claim the basic structure should be interpreted broadly and consequently should include contract law. This makes it crucial for us to further examine how the basic structure of society should be interpreted.

The distinction between an institutional division of labour and a division of moral labour will prove to be instructive in making sense of what Rawls means. It is characteristic of Rawls’ theory to employ the concept of the basic structure to perform both functions. In other words, I argue that the basic structure in justice as fairness effectuates both an institutional division of labour as well as a division of moral labour. This argument can clear up much of the disagreement surrounding the question of whether the basic structure should be interpreted narrowly or broadly. The dual function of the basic structure moves beyond both interpretations. It can explain the normative appeal behind these interpretations while fitting coherently within the general theory of justice as fairness.

As discussed, Rawls’ theory is of limited scope and it is so in two ways. It is limited in that it concerns political principles of social justice as opposed to comprehensive principles of morality understood more broadly and limited in that it is only applied to the basic structure of society. As Rawls argues:

“Taking the political as a distinctive domain, let us say that a political conception formulating its basic characteristic values is a free-standing view. This means two things: first, that it is framed to apply in the first instance to the basic structure of society alone; and second, that it formulates the characteristic political values without drawing on, or mentioning, independent nonpolitical values.”

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128 Most notably Arthur Ripstein and Martin Hevia.
129 Most notably Kevin Kordana and David Tabachnick.
130 Baier 1989, p. 772.
This corresponds to an institutional division of labour and a division of moral labour.\textsuperscript{132} Rawls is a liberal who believes that within certain limits set by the right – the principles of justice – people should then be let free to pursue their goals as they see fit. On the one hand, Rawls sees a special role for institutions in creating and maintaining background justice. This is something individuals are not capable of creating themselves. In this manner the institutions provide a background framework against which individuals can choose their actions. On the other hand, Rawls aims to formulate a theory that is freestanding from comprehensive doctrines. He wants a theory that incorporates a division of moral labour between principles that govern the way in which we socially interact with each other (the ‘right’) while leaving us free to choose and live by more comprehensive beliefs (the ‘good’) within the framework set by those political principles. So, the institutional division of labour and division of moral labour correspond to the two ways in which justice as fairness is political: political as focused on the basic structure, i.e. not addressed directly to individuals, and political as opposed to comprehensive, i.e. no other moral principles than the political principles of justice apply to the basic structure.\textsuperscript{133}

The division of moral labour points to the fact that the political principle of justice as fairness are not appropriate to regulate the private sphere. In the private sphere other, more comprehensive, principles are both allowed for and fundamental in informing peoples’ choices. However, this division of moral labour cannot impact the question which institutions are part of the basic structure.\textsuperscript{134} That question is informed by which institutions are suitable to create a framework of background justice against which individuals can then act: the institutional division of labour. Put shortly, the basic structure should be interpreted broadly with regard to which institutions are part of it, but should be governed by a set of narrow, political principles. Within the framework the basic structure establishes, people are then left free in two regards: free to act on comprehensive principles as opposed to the political

\textsuperscript{132} Scheffler 2006, pp. 106-110.
\textsuperscript{133} Michelman 1994, pp. 1814-1815.
\textsuperscript{134} As we will see in Chapter 2.3, the idea behind a division of moral labour underlies much of the deontological argument against including contract law in the basic structure.
principles that apply to the basic structure and free to act on their own interests as they are secure that background justice is being taken care of by the institutions of the basic structure. This dual freedom is made possible by the basic structure, as it at once the sphere of application for the political principles of justice as well as the set of institutions that implements what these principles require for society. In this way, the institutional division of labour and the division of moral labour come together in the concept of the basic structure; neither would be possible without it.

To conclude, Rawls' goal in *Political Liberalism* led him to talk about the division of labour in a way that makes the basic structure seem narrow. This is informed by the fact that he aims to provide a freestanding ‘political’ liberalism. However, this political character mainly applies to what sort of *principles* — political principles — are appropriate to put forward in a liberal theory, as opposed to more comprehensive principles. With regard to which *institutions* actually form the basic structure, it makes sense to focus more on the institutional division of labour and accordingly interpret the basic structure inclusively. It is the task of the basic structure to ensure background justice and any institution that can play a meaningful role in accomplishing that task should in principle be eligible to be included in the basic structure. This also corresponds with the examples Rawls gives of institutions that form the basic structure, even in *Justice as Fairness: A Restatement*, which postdates *Political Liberalism*. Here he concludes:

“The political constitution with an independent judiciary, the legally recognized forms of property, and the structure of the economy (for example, as a system of competitive markets with private property in the means of production), as well as the family in some form, all belong to the basic structure.”

Still, it might appear puzzling that Rawls seems to discuss the basic structure in dissimilar language in different passages of his work. More concretely, in *A Theory of Justice* Rawls talks about the basic structure as a very broad notion, while in *Political

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Chapter 2

**Liberalism** he refers to it as much narrower, leading to the two interpretations of the basic structure discussed above. However, this again can be explained by the distinction between an institutional division of labour and a division of moral labour, in combination with the different aims both books put forth. In *A Theory of Justice*, Rawls formulates a theory that expresses the ideal of a well-ordered society. With that in mind, he describes principles for institutions – the basic structure – that could promote that end. Accordingly, he describes the basic structure broadly and focuses on the institutional division of labour. In *Political Liberalism*, Rawls is concerned with arguing for the stability of a conception of justice such as justice as fairness. A crucial point in his argument for stability is that the conception is political in the sense that, in light of the fact of reasonable pluralism, it is freestanding from and hence acceptable to different comprehensive views. Only by formulating a narrow political conception can it become part of an overlapping consensus. This shows more of a focus on the division of moral labour. What has been framed as two interpretations of the basic structure in fact can be understood as expressions of the two divisions of labour that are at play. This new understanding of Rawls’ theory and the divisions of labour helps clear up much of the debate regarding the scope of the basic structure and makes it possible to interpret the concept of the basic structure coherently throughout Rawls’ work.

Furthermore, it helps us to understand why a focus on a basic structure is not a seemingly arbitrary distinction between different institutions. The two divisions of labour show the attractiveness of the limited scope of justice as fairness for a liberal theory of justice. On the one hand, the attractiveness of a division of moral labour lies in achieving an overlapping consensus on political principles. Here (political) liberal aims are furthered by a narrow construction of such principles. The institutional division of labour on the other hand derives its attractiveness because it allows people to act freely, knowing that background justice is taken care of at the institutional level.136 Here liberal aims are furthered by a broad construction of which institutions

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136 Cf. Cohen 2000, who argues that for a coherent egalitarian theory the distinction between individual conduct and the basic structure collapses.
can do so. Accordingly, to answer the question as to which institutions are part of the basic structure an inclusive perspective offers the best option.

2.3 Contract law as part of the basic structure

Even if we conclude that the basic structure should be interpreted inclusively with regard to which institutions constitute it, this does not automatically mean contract law is such a constituting institution. It is clear that not any and all institutions are part of the basic structure; that would leave individuals with too little freedom to pursue their own conception of the good. Accordingly, institutions such as universities and the church are not part of the basic structure. Whether contract law is a part of the structure, is a controversial issue and to answer it let me briefly elaborate on what I understand contract law to be.

For the purpose of this book I define contract law as the area of law that concerns itself with economic transactions. In other words, contract law is the institution that determines which agreements the state will enforce and how. The situations in which that is the case are not unqualified, but rather determined by the interest of society.\(^\text{137}\) Intentionally this is still a very broad conception of contract law. It still leaves open many questions with regard to the implications of such a conclusion for contract law doctrines. Chapter 3 provides a closer focus on these implications.

To establish contract law as part of the basic structure both a positive argument specific to contract law as well as the refutation of some of the possible counterarguments are necessary. This discussion is presented from within a Rawlsian paradigm. Some of the points that I offer as counterarguments against the position that contract law is part of the basic structure were originally formulated as either criticism against contract law as locus for distributive justice or against justice as fairness in general. However, my intentions are modest in this respect: I do not wish to contest the general validity of these arguments but rather to see whether they, within the

framework of justice as fairness, would seem to provide arguments against including contract law in the basic structure of society.

2.3.1 The argument for contract law as part of the basic structure

As we saw, as far as social justice is concerned, the primary purpose of the basic structure is to create and maintain background justice. Contract law as an institution performs an important function in terms of both of these objectives. The basic structure is to assign rights and duties or, more generally, primary goods. It is to give shape to a social process that is fair among free and equal persons cooperating. As Samuel Freeman observes:

“How property and the economy should be designed is the first subject of distributive justice. Distributive justice is then, in the first instance, a feature of basic social institutions, including the legal system of property, contract, and other legal conditions for economic production, transfers and exchanges, and use and consumption.”

In other words, the basic structure makes production and exchange possible between persons. This is why Rawls, even when he explicitly does not want to endorse one specific concept of property (he does not argue for private property over socialism for example), does include personal property as an institution of the basic structure. Some form of property is essential for the person as free and equal in the Rawlsian sense, as it is an instrumental element for the individual to be able to pursue his view of the good life. This is an important claim with important consequences. To be able to choose and pursue one’s own conception of the good it is necessary to have at least some control over goods. Without such control the realization of many aspects of a conception of the good life becomes impossible or at least becomes unjustifiably dependent on others.

138 Freeman 2006, pp. 245-246.
Justice as fairness and the basic structure

As soon as there is some form of property and the situation is one of mutual cooperation, there is a need for exchange as well. At least in western societies, contract law is the institution that to a large extent (but not exclusively) governs such transactions. To be clear, these notions of property and contract do not refer to a pre-institutional right. On the contrary, they are required as institutions to make it possible for individuals to exercise their moral power to pursue a conception of the good and lead a meaningful life. This can also help explain why Rawls explicitly includes the social convention of promising as part of the basic structure.\footnote{Rawls 1999, p. 97.} This led Freeman to conclude that:

“An economic system that is regulated by the legal norms that are issued by the political constitution is also part of the basic structure. Here of course, the legal norms of property, contract, and exchange are to be included in the basic structure.”\footnote{Freeman 2009, p. 464.}

Accordingly, the system of rules provided by contract law contributes importantly to creating background justice, as it facilitates people to engage in exchange and production and thus pursue their conception of the good as free and equal moral persons.\footnote{See also Shiffrin 2000, p. 221.} This argument gains even greater importance in a society where an increasing number of areas that are traditionally understood to be in the public domain are left to private actors. When the traditional functions of a welfare state, exemplified by education, healthcare, etc. are left to individuals to contract over the rights and duties distributed through contract law become even more crucial and pervasive for the success of the life of an individual.\footnote{See also: Study Group on Social Justice in European Private Law 2004, p. 655; van Zelst 2008, p. 24.}

The case for contract law as part of the basic structure is even stronger when we consider the basic structure’s role in maintaining background justice. Rawls argues that the basic structure should “continually adjust and compensate for the inevitable
tendencies away from background fairness”. The recent financial crisis serves as a good example. The loan agreements between the consumers and the banks and the credit default swaps by the banks among themselves, all individual transactions, clearly had a perverse effect on people’s life chances. Instead, to quote Rawls:

“The basic structure is to secure citizens’ freedom and independence, and continually to moderate tendencies that lead, over time, to greater inequalities in social status and wealth, and in the ability to exert political influence and to take advantage of available opportunities.”

Even when transactions look fair on an individual basis, they will over time inevitably lead to unfair outcomes.

Rawls aims at making the rules of the game become fair. Remember: justice as fairness is a procedural theory of justice. As a liberal, Rawls wants to create a framework that is fair, a framework within which individuals are then free to pursue their ends. This is also the case for exchange and transactions. The basic structure should maintain through its regulation of transactions, a background against which individuals can act without having to worry about the fairness of their transactions. Contract law is exactly one of the institutions that creates such a background against which individuals can transact.

“Agreements in everyday life are made in determinate situations within the background institutions of the basic structure; and the particular features of these situations affect the terms of the agreements reached. Clearly, unless those situations satisfy the conditions for valid and fair agreements, the terms agreed to will not be regarded as fair.”

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143 Rawls 2005, p. 268.
144 Rawls 2001, p. 159.
Accordingly, background conditions are instrumental in making sure individual agreements are fair.\textsuperscript{146} Rawls makes mention of the example of the labour market. The basic structure has to make sure that the conditions of the labour market are fair, i.e. there is no excessive market power, there is fair bargaining power, etc. Furthermore, the basic structure has to maintain these conditions actively. If the basic structure performs these functions, individual transactions within these conditions are presumed to be fair as far as the principles of justice are concerned. So with regard to the example of the labour market, if this market is fair, wage agreements will also be presumed to be fair.\textsuperscript{147} The analogy to contract law is direct. Contract law as an institution, i.e. the set of contract law rules, is there to create the background which then leads to the presumption that the agreements within that structure are fair.\textsuperscript{148}

Conversely, individual transactions themselves are not directly subject to the principles of justice.\textsuperscript{149}

> “It is a mistake to focus attention on the varying relative positions of individuals and to require that every change, considered as a single transaction viewed in isolation, be in itself just. It is the arrangement of the basic structure which is to be judged, and judged from a general point of view.”\textsuperscript{150}

Accordingly, particular contracts should not be tested directly against the principles of justice. This would be contrary to Rawls’ division of labour. To ask people to determine themselves whether every contract they make is in compliance with the principles of justice would create excessive constraints on their ability to pursue their ends.\textsuperscript{151} Instead the institution of contract law, when considered as part of the basic structure, should be designed as serving the principles of justice in such a way that leaves

\textsuperscript{146} Kordana and Tabachnick 2005, p. 603.
\textsuperscript{147} Rawls 2005, pp. 265-267.
\textsuperscript{148} Note that contract law is not the \textit{only} institution that creates this background justice with regard to transactions. Just like in labour law example, e.g. competition law and other forms of market regulation can also play its part.
\textsuperscript{149} Kordana and Tabachnick 2005, p. 600.
\textsuperscript{150} Rawls 1999, p. 76.
\textsuperscript{151} Rawls 2005, p. 268.
individuals free to pursue their own ends “secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made.”\textsuperscript{152} This makes contract law a perfect fit for the institutional division of labour Rawls has in mind, as it:

“Allows us to abstract from the enormous complexities of the innumerable transactions of daily life and frees us from having to keep track of the changing relative positions of particular individuals.”\textsuperscript{153}

Accordingly, within the inclusive institutional interpretation of the basic structure, contract law is instrumental both in creating and in maintaining background justice. Kordana and Tabachnick reach a similar conclusion but my argument differs from theirs in several important respects. First of all, they explain Rawls’ apparent shift to a more narrow conception by indicating that he might have opted for this shift to minimize governmental interference with regard to the individual.\textsuperscript{154} However, they admit in further discussion that this would lead to inconsistencies in justice as fairness. Instead, as I have argued, a general distinction between a broad and narrow conception draws the wrong battle lines because it neglects the distinction between an institutional division of labour and a division of moral labour. Instead, the difference between what seemed to be a broad and a narrow conception of the basic structure is an expression of the two conceptions in which justice as fairness is political.

Second, my argument differs with regard to the question whether (some form of) contract law is required. Kordana and Tabachnick argue that in principle contract law is not required by justice as fairness but that the first principle might require some type of contract law options to be open.\textsuperscript{155} I argue, however, that in fact the institution of contract law is necessary to exercise your moral powers, i.e. to lead a purposeful life, and to create and maintain background justice. Here again it is important to note that

\textsuperscript{152} Rawls 2005, p. 269.
\textsuperscript{153} Rawls 2001, p. 54.
\textsuperscript{154} Kordana and Tabachnick 2005, p. 623.
\textsuperscript{155} Kordana and Tabachnick 2005, pp. 609-611.
this does not amount to a pre-institutional right to freedom of contract. The required institution as it exists is subject to the principles of justice. Just like it is necessary to have a legal institution of some form of property to pursue one’s ends, it is also necessary to have some form of legal institution to enable and regulate exchange: contract law. Consequently, the principles of justice then govern how such an institution should be set up. Of course, the fact that contract law as an institution is required still says very little about the content of such an institution, but that is further defined by both principles of justice. As Chapter 3 seeks to clarify, both principles of justice will be required to leave open certain options and close other options, i.e. will require some contracts to be rendered legally enforceable and others not. It is important to note though that I share Kordana and Tabachnick’s view that with regard to which institutions form the basic structure a broad interpretation is called for and hence that contract law is part of the basic structure.

This is, however, a controversial point of view. It paints a picture of contract law as instrumental to the demands of distributive justice and more specifically the version of distributive justice as demanded by the principles of justice set out in justice as fairness. This view can be criticised broadly by two sets of opponents: those who hold a deontological or anti-instrumentalist view and those who agree on the instrumentality of contract law but disagree on its effectiveness as a locus for distributive justice. These two views can roughly be seen as counterarguments from an ex post and an ex ante conception of contract law.\footnote{The ex post perspective looks back, asking questions like, who acted wrongly. The ex ante perspective is forward looking, asking questions like: what kind of effects will this rule have?}
2.3.2 A deontological counterargument

The core of the deontological critique of using contract law for distributive aims is that in doing so people are used as means and not treated as ends in themselves. This is a criticism that is shared by both libertarians and a number of corrective justice proponents.\(^{157}\) In this section, I will first discuss the former before turning to the latter, though some of the answers to the libertarian critique will also apply to the corrective justice critique. The libertarian argument in a nutshell is that to allow for social justice concerns in contract law leads to the illegitimate infringement of entitlements. Furthermore, not only is the group of people that are actually in a contract dispute limited, it is also, to an extent, arbitrary which persons enter into a dispute and which persons do not. By using contract law as a tool for distributive justice, some people will arbitrarily be singled out and their assets will be used for distributive concerns. This infringes their liberty illegitimately as they become instrumental (a means) to the greater good. In other words, contract law redistributes already existing entitlements in a way that is unjust. Instead, libertarians argue that redistribution, in the limited cases where it is permissible, should occur exclusively within the domains of tax and transfer.

A first response to this critique is to point out that any system of contract law has distributive effects thus contract law as such is not used as a tool to create distributive effects but is there to regulate the effects it inevitably has. There is no neutral division in this sense. More fundamentally, however, the deontological argument holds no ground in Rawls’ theory of justice. To start with, the notion that tax and transfer would be less of an infringement on people’s liberty is misguided as Kronman famously shows in his article *Contract Law and Distributive Justice*.\(^{158}\) He discusses two possible arguments in support of the claim that tax and transfer is less infringing. First, an argument could be brought to the fore that tax rules are a more neutral method of distribution. Only certain transactions are affected through the process of regulation.

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\(^{157}\) The libertarian perspective originates from Nozick 1974, the corrective justice perspective from Weinrib 1995 and tailored specifically towards Rawls by Ripstein 2006.

through contract law rules. This could lead to an unfair discrimination between types of transactions and impair the state’s neutrality with respect to the pursuit of its citizens’ ends. This is not a convincing argument, however, as income tax is subject to the same dangers of discrimination. The most obvious example is the sales tax on specific items (e.g. cigarette tax), but selective income tax also has different effects on different ways of life.\footnote{Kronman 1980, pp. 502-503.}

Second, an argument could be made that tax rules are less intrusive than contract law rules in distributing rights and wealth. Contract law applies to all transactions; these rules impact peoples’ lives all the time. Tax rules on the other hand only apply periodically and hence have less impact on the peoples’ lives. This is as unconvincing as the first argument. Even if income tax is only due periodically, it still exerts a constant impact on a person’s life. Someone is always constrained in the choices he or she can make because of the lesser amount he or she can spend after taxes. Additionally, there are some forms of taxes, for example sales taxes, that apply to every transaction in at least the same direct manner as contract law does.\footnote{Kronman 1980, pp. 503-506. A third argument is that tax rules are \emph{always} more efficient. This will be discussed below in Chapter 2.4.3.}

There is, however, a more fundamental reason as to why the libertarian argument is unconvincing within a Rawlsian framework. This has to do with the post-institutional character of both property and liberty in justice as fairness. As we saw above in the discussion of justice as fairness, the principles of justice are definitive for justice in Rawls’ theory. They create, i.e. are constitutive of the legitimate rights and duties that arise from mutual cooperation. So, any rights people in actual society have, are legitimate because and to the extent that they are established by the principles of justice. This is the case for both property and liberty. Recall the two claims the libertarian makes: distribution through contract law is an illegitimate infringement of property rights and an illegitimate infringement of liberty. If we take the definitive character of the principles of justice seriously, we see that these claims have no place in justice as fairness. A legitimate right to property only comes into existence after the principles of justice have been established and only in as much as those principles...
require it. First, the claim that redistribution through contract law infringes a property right presupposes a concept of pre-existing entitlements that simply has no place in justice as fairness. Accordingly, to quote Kordana and Tabachnick: “theories that hold a post-institutional, maximizing conception of property lack the resources to draw a principled distinction between taxation and the private law.”

Second, the claim that liberty is illegitimately infringed upon presupposes a concept of pre-existing liberty that is absent in Rawls’ theory. In justice as fairness, liberties only exist where and when that is instrumental in satisfying the principles of justice. It is not accidental that Rawls talks about liberties and not liberty: the liberties are enumerated through the principles of justice. So if contract law rules can be made in accordance with the principles of justice, this exercise could never form an illegitimate infringement of a liberty, as liberties only exist because of and in as much as they are required by the principles of justice. Accordingly, there can be no argument in justice as fairness to exclude contract law because of an illegitimate infringement of a right, as this infringement does not occur as far as Rawls’ theory is concerned.

Accordingly, the libertarian critique is not a convincing counterargument against seeing contract law as part of the basic structure and as a locus of distributive justice.

The other strand of deontological critique comes from the side of corrective justice. It is based on Ernest Weinrib’s view of private law, geared specifically towards Rawls by Arthur Ripstein. Ripstein argues that the division of labour Rawls introduces is based on a division of responsibility between the state on the one hand and the

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161 Kordana and Tabachnick 2006, pp. 144-147 and, more generally, Murphy and Nagel 2002.
162 Kordana and Tabachnick 2006, pp. 146-147. Note that for libertarians, a distinction between tax rules and other legal rules is possible, as they hold a pre-institutional idea of property. However, it is not a viable point of normative criticism internal to justice as fairness.
163 Rawls also elucidates a concept of pre-institutional freedom: his assumption that people are free and equal in the original position. However, this does not in any way change the observation that for Rawls the principles of justice are the only standard for what are just institutions in actual society and that there is no independent claim to the free and equal character of persons after or outside of the original position.
164 Kordana and Tabachnick 2008, pp. 300-305.
165 Ripstein 2006, pp. 1391-1438. Ripstein seemingly combines an idea of private law inspired by Weinrib with an idea of public law inspired by Rawls. A similar argument has been developed more recently by Martin Hevia. See Hevia 2012. The view they subscribe to is heavily indebted to Kant. See e.g. Hevia 2012, pp. 70 ff.
individual on the other. Paraphrasing Rawls, it is up to the state to create background justice. However, Ripstein argues, once the conditions for background justice have been created, it is up to the citizens to take responsibility for (the success of) their own lives. In this situation, distributive principles should no longer play a role. As Ripstein holds: “Having received my fair share it is up to me to make what I will of it, and make what I will of my life, using it as my fair share”.

It is because everyone receives a fair share, according to Ripstein, that people can be held accountable for their own lives. They can pursue their freely chosen conception of the good because everyone has access to a fair share of resources. If a person then fails in achieving his ends, he is solely accountable; the state does not share in that accountability. If people illegitimately infringe on another person’s fair share, for example because they breach a contract, they impose some of the costs of the pursuit of their own ends on others. Accordingly, private law should protect the fair share people have received. As Ripstein argues: “it creates and demarcates a system of equal independence of each person from the choice of others”. Accordingly, Ripstein argues that Rawls refers to private law when talking about ‘rules applying directly to individuals’, i.e. rules that fall outside the scope of the basic structure.

Ripstein provides an interesting and subtle argument against including contract law in the basic structure. However, it misrepresents Rawls’ theory in two important ways: the way in which background justice is created and the manner in which it is maintained. First, he presents an account of justice as fairness that is too static. For Ripstein’s theory to function without perverse repercussions, it is necessary that the

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166 This is not unlike Dworkin’s assumption of ethical individualism and the two principles that flow from it. See Chapter 2.2.1.
169 Hevia 2012, p. 45.
entire distribution as an outcome, not as a process, is fair.\textsuperscript{173} Only then can private law work effectively to protect fair distribution. As soon as (some part of) the distribution is unfair, private law can no longer function in the way Ripstein has envisioned; it might compel someone that already has too small a share to transfer a part of this share to someone who already has too large a share. More importantly, however, it makes justice as fairness resemble a patterned theory of distributive justice, in which one fixed pattern of distribution is more just than all others. This is what Rawls calls an allocative conception of justice and it is not Rawls’ view.\textsuperscript{174} Instead, justice as fairness is a procedural theory of justice that aims at creating a social process that in turn leads to fair outcomes. This process is constitutive of the outcomes. Again, these outcomes – both with regard to property and with regard to liberties – are post-institutional. Accordingly, there is never one point at which someone ‘has’ his fair share. Instead the basic structure creates a framework that is constitutive for the rights and duties that flow from that framework. Contract law as such is an institution that is constitutive in shaping economic relations and possibilities for exchange.\textsuperscript{175}

Secondly, Ripstein’s argument presupposes that the basic structure is only concerned with creating background justice. It is, however, just as important to maintain background justice as it is to create it. This is an element that Ripstein ignores, while contract law is especially suitable to take care of this task. He recognizes that individual transactions can lead to distributively unjust outcomes in the following statement:

“The aggregative effects of contractual transactions may lead to distributive injustice that needs to be addressed through public law. Nonetheless, particular transactions can be judged on their own terms, rather than being subordinated to distributive justice.”\textsuperscript{176}

\textsuperscript{173} A similar problem is shared by libertarian entitlement theories such as the theory developed by Robert Nozick. See: Nozick 1974.
\textsuperscript{174} Rawls 1999, p. 77.
\textsuperscript{175} Kordana and Tabachnick 2005, p. 499.
\textsuperscript{176} Ripstein 2004, p. 1815.
But this is where Ripstein is mistaken. He paints the picture of a dichotomy between contractual transactions on the one hand and public law on the other. However, this sets up a false dichotomy. The real dichotomy that is at stake lies between public law and private law, where private law stands between public law and individual transactions. It is exactly private law as an institution that is suited to tackle the injustice of certain aggregative effects. In Kronman's words:

“Even if one agrees, for the reasons indicated, that in particular cases judges and others charged with responsibility for policing individual transactions should apply established legal rules regardless of their distributional consequences, it does not follow that distributional effects should also be ignored in the initial design of a system of transactional rules or in the choice of new rules to supplement or amend those that already exist. It is one thing to evaluate individual transactions from a distributive perspective; it is another to evaluate the rules governing transactions from the same point of view.”\textsuperscript{177}

Accordingly, while private transactions might fall on the side of individual responsibility, private law falls under the responsibility of the state. When this is properly understood, a great deal of what Ripstein says about the division of responsibility between the individual and the state fits very well with Rawls' theory. Only the conclusion that he draws is flawed with regard to the place private law, and contract law more specifically, take within that division.

2.3.3 An instrumentalist counterargument

Libertarians and corrective justice proponents share a critical view of contract law as a means to distributive aims, i.e. they both hold an \textit{ex post} view of contract law. There is another type of counterargument against using contract law as a means for distributive aims in the Rawlsian sense, but one that does not argue against the

\textsuperscript{177} Kronman 1980, p. 501.
instrumentality of contract law. This type of argument is derived from normative law and economics. Law and economics scholars tend to agree on the instrumentalist nature of contract law, i.e. hold an *ex ante* view of contract law, but disagree as to its goal. Where contract law as part of the basic structure would promote social justice – the principles of justice – normative law and economics argues that contract law should exclusively promote efficiency. This argument is based on welfare economics and has been most strongly advanced by Louis Kaplow and Steven Shavell.

Kaplow and Shavell make two claims: first that distribution through legal rules (like private law) is always more inefficient than a tax and transfer system and second that (social) welfare should set the exclusive standard of evaluation for legal rules.\footnote{Kaplow and Shavell 1994, pp. 667-677 and, more generally, Kaplow and Shavell 2002. For an early statement of the debate between fairness and welfare concerns in tort law, see the seminal article by George Fletcher; Fletcher 1972.} Kaplow and Shavell argue that, instead of using legal rules like contract law to redistribute income, redistribution should be accomplished solely through the tax and transfer system. Even though the tax and transfer system is imperfect and thus intuitively one might think there is room for the legal system to fill in the gaps left by tax and transfer, they show formally that legal rules will still be more inefficient. Why? Because, any time you use the legal system for redistribution, you end up with exactly the same incentive distortions that you would encounter through the tax and transfer system with regard to incentives to work, but, on top of that, you distort the incentives for optimal care that private law is supposed to set. This is the so-called double distortion effect of redistribution through private law.\footnote{See Sanchirico 2000.} Kaplow and Shavell argue that for every inefficient legal rule there is an arrangement of an efficient legal rule in combination with a system of tax and transfer that achieves the same results with less cost to efficiency. Accordingly, they conclude that helping the poor should be effectuated by redistributing income, not by changing contract law in their favour.\footnote{Kaplow and Shavell 2000.} If their conclusions entail that while legal rules might be implemented to help the poor, they actually hurt them, this would create a strong case against contract law as a locus
for distributive justice, even within justice as fairness. However, there are a number of reasons why this is not the case.\textsuperscript{181}

First, Kaplow and Shavell take \textit{income} redistribution as the alternative in their articles on redistribution through the legal system. This could be read as implying that efficiency as a legal standard solely refers to efficiency with regard to wealth. However, for that claim to have any appeal it should be shown that wealth is a worthy social goal in the first place. Ronald Dworkin argued persuasively in ‘Is Wealth a Value’, that it is not.\textsuperscript{182}

It is impossible to show why social wealth is a relevant social value without a link to utilitarian underpinnings. This is enhanced by the fact that how much someone values something is dependent on how much he is willing to pay and this is again dependent on how much he is able to pay. A poor man might be willing to accept a great deal less for something because he desperately needs the money to buy food or gas, while a rich man might be willing to pay the poor man some money for something that will provide him with very little utility. Dworkin gives the example of a poor man willing to sell a book, one of the few things he takes pleasure from, for a small amount of money to buy drugs. A rich man who knows he most likely will not even read the book would be willing to pay this small amount. From a social wealth perspective, the rich man values the book more than the poor man. There would then be an increase in social wealth if a tyrant would relocate the book to the rich man, because transaction costs are avoided. Social wealth would then increase in this situation, but it is wholly unclear why this should be a social goal. As Dworkin claims: “Once social wealth is divorced from utility, at least, it loses all plausibility as a component of value”.\textsuperscript{183} There is no reason why people should choose a wealthy life over a happy life. This line of reasoning is easily transferable to contract law. Income redistribution seems clearly inadequate to compensate for some forms of distribution that can be achieved through a set of

\textsuperscript{181} This is different from the claim that tax should be the only locus of distributive justice as discussed in the previous section. Here, the claim is not that there is a principled difference between legal rules and tax and transfer, but a practical claim as to where tax and transfer turn out to be more efficient.

\textsuperscript{182} Dworkin 1980, pp. 191-226.

\textsuperscript{183} Dworkin 1980, p. 200.
contract law rules. This is especially clear in the case of the horizontal effect of fundamental rights in contract law. Take for example a contract law rule that prohibits discrimination in labour contracts. It seems clear that to merely reimburse a discriminated minority for the loss of job opportunities through the tax and transfer system is inadequate and socially undesirable.

Instead, Kaplow and Shavell would argue that even though they use the term ‘income’ in these articles, they actually mean utility or welfare.\textsuperscript{184} Accordingly, they can agree on the fact that some aspects of welfare that cannot be distributed through (monetary) income redistribution could best be taken care of through the legal system.\textsuperscript{185} This would complicate their model radically, but in theory they could accommodate for it. A welfarist theory conceptually allows for different schemes of distribution as some schemes might promote wellbeing better than others. According to Kaplow and Shavell, distribution should make sure social welfare is maximized, where the social welfare is the aggregation of the wellbeing of individuals. Different ways in which the wellbeing of individuals is to be aggregated are thinkable and Kaplow and Shavell even mention the Rawlsian maximin strategy as a possible social welfare function.\textsuperscript{186} At first glance, then, this idea looks very similar to Rawls’ theory. Kaplow and Shavell could seek (as they do not endorse any particular mode of distribution) maximization of wellbeing through maximizing the utility of the worst-off, while Rawls seeks to maximize the primary goods of the worst-off. And Rawls referred to primary goods as commodities that are useful to anyone trying to lead a purposeful life.\textsuperscript{187}

However, Rawls’ theory differs meaningfully from Kaplow and Shavell’s welfarist theory in two ways. First, their argument seems to presuppose an already existing structure or baseline from which income can subsequently be redistributed. But as

\textsuperscript{184} This could partly be explained because Kaplow and Shavell are involved in two different debates. On the one hand they take sides in a pure law and economics debate about the efficiency of tax rules, while on the other hand they argue for a comprehensive theory of welfarism in a more philosophically oriented debate.

\textsuperscript{185} See also Coleman 2003, pp. 514-521.

\textsuperscript{186} Kaplow and Shavell 2002, p. 27.

\textsuperscript{187} Rawls 1999, pp. 54-55.
stressed above, the basic structure is actually instrumental to the creation of primary goods as much as it is concerned with allocation. This is also relevant for the distinction between legal rules and tax and transfer. A fine example is provided by the primary good of self-respect and the case of anti-discrimination. In this scenario the legal system is constitutive of self-respect, as opposed to creating a means to redistribute self-respect or damage thereto.

Secondly, Rawls clarifies that primary goods are conceptually different from simply utility. As Van Parijs stated:

“Contrary to what some economists still sometimes call the “Rawlsian” criterion of distributive justice, the distribuendum of the difference principle has never been characterized in terms of utility, or welfare, or degree of preference satisfaction.”

So, even though a social welfare function in theory can aggregate welfare in any manner conceivable, it is not welfare but primary goods that is the distribuendum in justice as fairness.

To understand this difference we must look at the conception of the person that Rawls puts forward. For Rawls, a moral person is characterized by two moral powers: the capacity to have a sense of justice and the capacity to pursue a conception of the good. A person’s two highest-order interests correlate with these powers: they are the interests in being able to exercise these moral powers. Actors in the original position are interested in maximizing their two highest-order interests. This is when primary goods come into the picture. Primary goods are those goods that are necessary and will prove valuable to the exercise of the moral powers of agents. The primary goods include basic liberties to exercise an agent’s sense of justice, freedom of choice to pursue final ends, wealth for achieving ends, etc. It is thus the highest-order interests of moral persons that make the primary goods what they are according to Rawls. These goods are not simply all-purpose goods for achieving any end imaginable.

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188 Van Parijs 2003, p. 211.
189 Rawls 1980, p. 525.
Chapter 2

Their existence and content is dependent on the moral powers of individuals, not the outcome of psychological or historical factors. In this way primary goods are clearly conceptually different from the utility that Kaplow and Shavell seek to maximize. Thus, even though the claims that Kaplow and Shavell make seem to resonate within justice as fairness, after further reflection, these claims cannot hold such power. The difference between subjective welfare and objective primary goods means that the welfarist critique cannot be an argument against including contract law as one of the institutions that is part of the basic structure of society, i.e. in service of the principles of justice.

2.4 Conclusion

First, I described justice as fairness in general to determine whether contract law is part of the basic structure in Rawls’ theory of justice. I then turned specifically to the concept of a basic structure in justice as fairness through a discussion of two divisions of labour: an institutional division of labour and a division of moral labour. This distinction helps clarify the confusion that surrounds the concept of the basic structure. Rawls talks about the basic structure in very different terms: in A Theory of Justice he discusses it as a very broad notion, while in Political Liberalism he describes it as a very narrow notion. This has led to an argument about which interpretation is best: a broad or narrow one. I argue that this discussion is confused to some extent, as Rawls uses the basic structure to give effect to an institutional division of labour as well as to a division of moral labour. These two divisions of labour point to the appealing aspects of both interpretations. Rawls argues for an institutional division of labour with regard to establishing a well-ordered society, while he argues for a division of moral labour with regard to the stability of such a society. This corresponds with the differing goals in A Theory of Justice and Political Liberalism and explains why his terminology differs in these works. By arguing for a freestanding political version of liberalism, Rawls narrows the scope of his theory so as to make it acceptable to

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diverging comprehensive doctrines. However, this is concerned with what type of principles and arguments are acceptable in public discourse. Hence, the division of moral labour cannot impact the question whether an institution, like contract law, should be considered part of the basic structure. So even though this division of moral labour points to the attractiveness of limiting justice as fairness, the limits refer to the appropriate nature and sphere of moral and political principles, not to which institutions are part of the basic structure. Instead, it makes more sense to focus on the institutional division of labour with regard to the question of which institutions actually make up the basic structure. This points to a broad conception of the basic structure and hence is inclusive with regard to which institutions form the basic structure.

This in itself, however, is not enough to draw the conclusion that contract law is an institution within the basic structure: a positive argument is required. I have argued above that contract law performs an important function both in creating and maintaining background justice – two of the core purposes of the basic structure. First, in a society where the basic structure is constitutive of production, it is indispensible to have at least some form of property and some form of legal exchange. Otherwise, people are unable to strive meaningfully for the fulfilment of their conception of the good, i.e. unable to exercise one of their moral powers. Contract law is (one of the) institution(s) that makes such exchanges possible. Second, contract law ensures that background justice is preserved. It creates a framework within which people can act without having to consider the distributive effects of each and every individual transaction. This also means that individual contracts are never directly evaluated from the perspective of the principles of justice; only the institution of contract law is.

This view is criticized from both a deontological and a law and economics perspective. Deontologists argue that using contract law for distributive concerns involves using people as a means to an end instead of treating them as ends in themselves, because it illegitimately infringes on people’s property rights and their liberty to shape their own lives. However, this criticism has no place within justice as fairness because of the post-institutional character of this theory. Both property rights
and liberties only exist in as much as required by the principles of justice. Accordingly, a contract law based on these principles can never illegitimately infringe such rights, as there are no pre-existing entitlements to be infringed. Alternatively, Ripstein argues that contract law should be considered to be outside of the basic structure because private transactions are not the state’s but the individual’s responsibility. In the division of responsibility he, however, creates a false dichotomy between private transactions and public law, while the real discussion is concerned with private law and public law. Within justice as fairness, there is no principled distinction between these two areas of law.

Law and economics scholars, most notably Kaplow and Shavell, argue that, even though contract law is instrumental in achieving public goals, it should not be the locus for distributive justice but solely the locus for efficiency. To the extent that they refer to (monetary) income only, their arguments are unconvincing, as it is unclear why money in itself should be considered a value. They are not bound by this claim, however, and instead can (and do) argue for a welfarist approach, where it is the maximization of individual welfare (not just money) that is the goal of social policies. However, even then, their arguments would not hold in justice as fairness as it is not individual welfare but primary goods that are the distribuendum in Rawls’ theory. Primary goods are conceptually different from welfare because they are linked to the two moral powers that characterize the political person in justice as fairness.

In conclusion, the Chapter argues that Rawls envisions that both an institutional division of labour and a division of moral labour are reflected in the basic structure in justice as fairness and that, with regard to institutions, it makes sense to follow a broad interpretation as to the contents of this basic structure. Furthermore, contract law is an institution in the basic structure because of its role in making exchanges possible and in maintaining background justice.