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

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3 Rawlsian principles and contract law

In the previous Chapter, I argued that contract law forms a part of the basic structure of society. But that does not yet provide an answer to the question what a Rawlsian contract law would entail. The two principles of justice are quite abstract. Thus it may be hard to picture how they could actually impact policy decisions. Nonetheless, it has been commonplace after the publication of *A Theory of Justice* to attempt to provide such an application to questions of policy. Diverse areas of the law such as international criminal law and environmental law attest to this trend. To make such an application possible, Rawls’ theory needs to be interpreted in light of our specific subject matter: contract law. The main goal of this Chapter is to translate the abstract principles of justice to more concrete (Rawlsian) principles for contract law.

Before attempting to come to such principles for contract law it is important to reemphasize the post-institutional character of justice as fairness and the status of the principles of justice as the definitive standard for justice. In applying Rawls’ theory it is a common mistake to take his contractarian approach and apply the original position directly to the issues at hand. However great the temptation might be to look at certain problems from behind the veil of ignorance, this is not the Rawlsian approach. Instead we must use the principles of justice as our guide and work from there. In this Chapter, I will describe how this path can be taken. I will begin with a description of the four-stage sequence that Rawls envisions for the application of his principles of justice (Chapter 3.1). Then, I will discuss whether contract law is a first, or second principle matter or whether contract law could be construed as both (Chapter 3.2). Finally, I will discuss how Rawlsian principles might have an impact on fundamental rights in contract law (Chapter 3.3) and weaker party protection (Chapter 3.4). Doing so will shine a light on how the principles of justice influence the policy issues that come up in contract law discussions. The contract law system designed to comply with these principles is what I call ‘contract law as fairness’.

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3.1 The four-stage sequence and the role of democracy

As mentioned above, Rawls thinks of the application of the principles of justice to actual society as a four-stage sequence, where the veil of ignorance is lifted a bit higher at each consecutive stage. The first stage pertains to the decision concerning which principles of justice would be chosen in the original position. Here the veil of ignorance is at its most impenetrable and imposes the knowledge restrictions as described in Chapter 2.1.2: no knowledge of one’s position or talent, nor knowledge of one’s conception of the good in actual society. Rawls pictures the second stage as a constitutional convention where the constitutional essentials are decided upon subject to the previously established principles of justice. At this stage, questions concerning institutional governmental design and basic liberties are settled. For this stage, the knowledge restrictions are lifted somewhat and information regarding the general facts about the particular society is available – as opposed to merely general social theory. The legislative stage is the third stage. Here, specific laws and policies are formulated and social and economic benefits and duties are distributed within the constraints laid down by the principles of justice and the constitution. At this stage, the veil of ignorance is thin: all relevant facts about society are available. The historical development and the level of debt of a particular society, for example, will be clear in the legislative stage. Rawls discusses public health as an example of a subject area that will be decided in the third stage at some length. The fourth and final stage of application is that of adjudication, where rules are applied to particular cases. Here, the veil of ignorance is completely lifted and no knowledge restrictions remain.

The second and third stage of application that Rawls discusses correspond to, more or less, the two principles of justice. The first principle, which requires equal basic liberties, plays an important function during the constitutional convention. During the

\[^{192}\text{Rawls 1999, pp. 171-176. For a discussion of the original position and the veil of ignorance, see Chapter 2.1.2.}\]
\[^{193}\text{Rawls 1999, p. 175.}\]
\[^{194}\text{Rawls 2001, pp. 173-174.}\]
\[^{195}\text{Rawls 2001, p. 48.}\]
legislative phase, however, it is the second principle that is responsible for determining social and economic policies within the constraints set by the lexical priority of the first principle. As Rawls noted:

“The second principle comes into play at the stage of the legislature. It dictates that social and economic policies be aimed at maximizing the long-term expectations of the least advantaged under conditions of fair equality of opportunity.”

This four-stage sequence that Rawls describes is intended as a hypothetical model. Its purpose is, in the first place, to help make the principles of justice operational and, in the second place, to help determine what is just and unjust with regard to our constitution and legal policies. The model is not an account of how these practices actually come about. Instead it is meant as a guide as to how the principles of justice can be used to formulate a just constitution and set of laws.

Two interesting points can be made with regard to this four-tier structure: one concerning the place of the judge and the other about the place of democracy. First, Rawls is clear about the fact that the difference principle is not part of the constitutional essentials. Thus its implementation does not take place until the legislative stage. Rawls also does not want the judge to examine legislation on social and economic matters with regard to their compliance with the difference principle. This would require too much knowledge from the judge to act and adjudicate adequately and should instead be left to the more capable legislator.

Secondly, an interesting question is to what extent a democratic legislator has any discretion to make policy choices or whether its task should simply be to search for the best interpretation and implementation of the difference principle. Edwin Baker phrases this as the distinction between an epistemic democracy and a choice democracy. In an epistemic democracy it is simply the task of the legislator to

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196 Rawls 1999, p. 175.
determine what is just and to carry that out. In a choice democracy, the legislator has at least some discretion in choosing which public projects are worthy or necessary. Rawls’ theory contains elements of both types of democracy.\textsuperscript{200} As we concluded earlier, most of society’s legal institutions are part of the basic structure. Additionally, the difference principle seems a maximizing principle: it requires social and economic inequalities to be of the greatest benefit to the worst-off. This seems to leave little room for choice democracy, as almost all possible decisions that come before the legislator will have some impact on the worst-off and are hence guided by the requirements of the difference principle.\textsuperscript{201} Accordingly, Rawls states that:

“The legislative discussion must be conceived not as a contest between interests, but as an attempt to find the best policy as defined by the principles of justice. I suppose, then, as part of the theory of justice, that an impartial legislator’s only desire is to make the correct decision in this regard, given the general facts known to him.”\textsuperscript{202}

However, Rawls does acknowledge that there can and will be reasonable disagreement about whether a law or policy is just or unjust.\textsuperscript{203} Even with the additional information that is permissible in the legislative stage (the relevant social and economic facts), it is not always clear which policy the difference principle prefers as such a determination would require more information than is available. But the disagreement runs deeper than a mere lack of information. The burdens of judgment imply that in a democratic

\textsuperscript{201} A more far-reaching argument would be that – if to some extent the task of democratic institutions is merely determining what justice requires – other types of (non-democratic) institutions might be more suitable to accomplish that task. In justice as fairness, however, this can never be the case. The fact that democratic decisions can be unjust does not in itself, provide a reason to adopt other institutions. Instead, the first principle of justice requires \textit{as a matter of justice} the right to democratic participation and hence a democratic system of governance. Because of the lexical priority of the liberty principle over the second principle of justice social and economic interests cannot stand in the way of this right to participation. See Cohen 2003, p. 115 and Baker 2008, pp. 214-215.
\textsuperscript{202} Rawls 1999, p. 314.
\textsuperscript{203} Rawls 1999, p. 174.
society such disagreement is inevitable and not something that has to be cured.\textsuperscript{204} In these situations, justice is indeterminate and allows for a range of options. For Rawls, this indeterminacy is not problematic; justice is not silent in these matters, but allows for multiple options.\textsuperscript{205} Accordingly, this lack of determinacy should not be lamented, as it allows for decision-making to be understood as properly democratic.

However, even though there is room for democratic choice in the legislative stage, the legislator is still presumed to \textit{aim} at satisfying the principles of justice through its laws and policies.\textsuperscript{206} It could still be argued that the fact that the principles of justice are determined in the original position, outside of the actual public discourse, undermines the meaningfulness of democratic participation. This was the subject of a debate between Rawls and Habermas in the \textit{Journal of Philosophy}.\textsuperscript{207} According to Habermas’ critique, Rawls incorporates the idea of political autonomy in the original position through the combination of the rationality of the parties and the reasonableness of the veil of ignorance.\textsuperscript{208} However, as the principles of justice and consequently constitutional requirements are formulated in this original position, the real citizens will find themselves bound by norms that have come into existence without their input. Habermas phrases his observations with great eloquence:

> “They [the citizens] cannot reignite the radical democratic embers of the original position in the civic life of their society, for from their perspective all of the essential discourses of legitimation have already taken place within the theory; and they find the results of the theory already sedimented in the constitution.”\textsuperscript{209}

Notwithstanding the elegance of Habermas’ formulation, it is not clear why this would be the case. First of all, Habermas’ point seems to imply that an already just constitution is in place. Instead, in justice as fairness a just constitution is something

\textsuperscript{204} Rawls 2005, pp. 54-58. See also Chapter 2.1.3.
\textsuperscript{205} Rawls 1999, p. 176.
\textsuperscript{206} Rawls 1999, p. 175.
\textsuperscript{207} See Habermas 1995. Rawls’ \textit{Reply to Habermas} was reprinted in Rawls 2005, pp. 372-434.
\textsuperscript{208} Habermas 1995, p. 128.
\textsuperscript{209} Habermas 1995, p. 128.
that is continually strived for. Furthermore, reasonable disagreement will generally exist regarding whether the constitution is actually just. Both seem to require an ongoing 'essential discourse of legitimation'.

Maybe more important though: even if a just society exists, it must constantly be reproduced. Citizens are not constrained by any pre-fixed notions or principles during this process. On the contrary, they can discuss these principles as the subject of reflexion at the most fundamental level. If, after such reflection, citizens still accept those principles, the fact that they have not 'created' them in the first place cannot be seen as a limitation of their political autonomy. Joshua Cohen is justified in asking:

“How could the possibility of presenting the argument as a matter of what people who are free and equal would choose under hypothetical conditions suggest limits on political autonomy once we see the hypothetical choice argument simply as a way to express conditions on arguments for principles addressed to persons thus understood?”

To summarize, questions of social and economic policy are to be resolved during the legislative stage of the four-stage sequence Rawls outlines. In these matters, there is indeterminacy as to the requirements of the principles of justice. This indeterminacy does not merely result from a lack of knowledge or information, but rather from the fact that multiple options are equally just. This means that there is room for choice and hence actual democratic decision-making on the part of the legislator. Even given this discretion in decision-making, however, the democratic legislator is to aim at satisfying the difference principle and hence to aim at improving the position of the worst-off in society.

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210 Rawls 2005, pp. 400-402.
211 Cohen 2003, p. 126.
212 This will prove important to the application of Rawls’ theory to SMEs in European contract law. See the introduction to Part II.
3.2 The two principles of justice and contract law

I have argued that contract law is subject to the principles of justice but to make this conclusion more operational it is important to obtain a better understanding of whether the first, the second or both the principles of justice should inform contract law. Recall: the first principle of justice requires the most extensive scheme of basic liberties for all, while the second principle demands that social and economic inequalities are to be arranged so that they are both attached to positions and offices open to all and are reasonably expected to be to everyone’s advantage.213

First, it could be argued that the traditional notion of freedom of contract is a liberty that should be protected by the first principle of justice. Given the lexical priority of the two principles this would mean that economic arguments would not be allowed to limit freedom of contract. However, this principle is exclusively concerned with basic liberties, which are presented as an enumerated list in justice as fairness exemplified by the primarily political liberties: freedom of speech and thought. Rawls is explicit that freedom of contract is not such a basic liberty in his theory:

“Of course, liberties not on the list, for example, the right to own certain kinds of property (e.g., means of production) and freedom of contract as understood by the doctrine of laissez-faire are not basic; and so they are not protected by the priority of the first principle.”214

However, this does not mean that the first principle of justice plays no role whatsoever with regard to contract law. To understand why, it is instructive to look at Rawls’ discussion of the right to property. As the last quote clarifies, the right to a specific kind of property is not regarded as a basic liberty in justice as fairness. However, the right to some form of personal property is, as this is a requisite for “a sense of personal

213 Rawls 1999, p. 53.
214 Rawls 1999, p. 54.
independence and self-respect”. The details of that right to property are to be determined by the second principle of justice, as these are social and economic matters:

“The further specification of the rights to property is to be made at the legislative stage, assuming the basic rights and liberties are maintained.”

An analogous reasoning applies to contract law. As was discussed in Chapter 2.4 contract law plays an important role in creating and maintaining background justice. Just like some form of property is necessary to meaningfully pursue a conception of the good, some form of exchange is equally necessary. So, just like *some* form of property law, *some* form of contract law will be required. That some form of contract law is required by the first principle, however, stops well short of complete freedom of contract as a baseline right to freedom. The post-institutional character of justice as fairness simply has no place for such a right to laissez faire freedom, as Rawls emphasizes. I will discuss the impact of the first principle of justice on contract law in greater detail in Chapter 3.3. Most specifics of contract law, however, are beyond the reach of the first principle and are instead governed by the second principle. The specification of contract law is, just as specification of the rights of property, left to the legislative stage, the topic of Chapter 3.4.

### 3.3 Justice as fairness and the horizontal effect of fundamental rights

A discussion of the horizontal effect of fundamental rights will help elucidate how the first principle of justice can have a bearing on contract law. But before we look at the relation between justice as fairness and the horizontal effect of fundamental rights in contract law, we must first briefly discuss what this effect entails. Historically, fundamental rights and private law have been considered to be two distinct matters.

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217 See also Chapter 2.4.2.
Fundamental rights were understood as shields to protect the citizen from the power of the state and to create a private sphere outside the scope of state intervention. This is a line of thought that can be traced back to the early contract theories of the 17th century. More recently, however, fundamental rights have started to play a role in private law and hence in private relations. Legislators are bound to take fundamental rights into account when they enact rules of private law and courts have used fundamental rights to expand and limit the scope of private relations. This trend has been called by some the ‘constitutionalization of private law’ and has led to a substantial body of scholarly work.

On the one hand, if fundamental rights protect the citizen from the state, this is called the ‘vertical effect’ of fundamental rights. When they work between citizens, on the other hand, fundamental rights have a ‘horizontal effect’. An example of the horizontal effect of fundamental rights is the invalidity of a surrogacy contract on the grounds of human dignity.

Two approaches to the horizontal effect of fundamental rights can be distinguished: direct and indirect effect. The theory of direct effect (unmittelbare Drittwirkung) implies that fundamental rights should be applied horizontally in just the same way as they are applied vertically. So, fundamental rights do not just impose duties and prohibitions on the state, but also on individuals. The justification of this direct application is that the main principle of fundamental rights is to protect the individual. For the individual it does not matter if a right is infringed upon by the state or by another private party: he or she is entitled to a private sphere. A fortiori, it might even be the case that private parties infringe on these rights more often than the state does, adding importance to direct application in horizontal relations. It is problematic, however, that in private relations the ‘other’ party will nearly always also be able to state a fundamental right. Take for example an extremely unfair surety contract clause. The disadvantaged party might plead that this clause infringes his or her human dignity, but the bank on the other hand can plead that not enforcing this clause would

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218 Hesselink 2003, pp. 120-121. See also Klijnsma 2010, pp. 1870-1876.
219 See e.g. Cherednychenko 2007; Grundmann (ed.) 2008; Mak 2008 and the references there.
220 See on this topic: Klijnsma 2008, pp. 11-19.
221 Enge 2009, p. 165.
infringe its autonomy. Another example can be found in the case of commercial surrogacy. In a dispute, the surrogate mother can appeal to her right to autonomy and physical integrity, while the intended parents can claim a right to family life.\textsuperscript{222} What makes it even more difficult is that the norms in which fundamental rights are articulated are usually directed to the state and are not directly translatable to private parties.\textsuperscript{223}

The other approach is that of indirect effect (\textit{mittelbare Drittwirkung}) of fundamental rights in horizontal relations. Under this approach, it is still the state that is the addressee of the norms that protect fundamental rights, not the citizens themselves. But the state gives effect to them by colouring in the rules of private law in light of fundamental rights.\textsuperscript{224} It is mainly up to the courts to interpret existing rules of private law in such a way as to do justice to these rights. Courts can easily use open norms in private law, such as the norm of good faith to construct private law rules in accordance with fundamental rights.\textsuperscript{225}

The greatest impact of fundamental rights has been felt through the application of the doctrine of indirect effect. The German Constitutional Court, the \textit{Bundesverfassungsgericht}, in particular has developed a line of cases in which it chose this approach. The court granted indirect effect to fundamental rights, mainly through the notions of human dignity and freedom of expression. In the \textit{Lüth case} (1958)\textsuperscript{226}, the \textit{Bundesverfassungsgericht} decided for the first time that the right to freedom of speech played a role in the assessment of possible slanderous statements and more generally established that the German Constitution (\textit{Grundgesetz}) applies throughout the legal order, including private law.\textsuperscript{227} In this case, Erich Lüth had called for the boycott of a new, in itself non-offensive film by a former Nazi filmmaker. The filmmaker sought and obtained an injunction against Lüth on the grounds that such a boycott amounted to slander – a tort procedure. Lüth appealed the decision to the

\textsuperscript{222} And this does not even consider yet the rights of the children involved. See also Klijnsma 2010.
\textsuperscript{223} Mak 2008, pp. 47-49.
\textsuperscript{224} Mak 2008, pp. 49-50; Cherednychenko 2007, pp. 58-63.
\textsuperscript{225} Hartkamp 2008, p. 88.
\textsuperscript{226} BVerfG, 15 January 1958, \textit{BVerfGE} 7, 198 (\textit{Lüth}).
\textsuperscript{227} Cherednychenko 2007, p. 5.
constitutional court, prompting the Bundesverfassungsgericht to open its judgment with the following seminal passage:

“The basic rights are primarily rights of the citizen against the State; the basic rights of the Basic Law, however, also embody an objective system of values, to be taken as the basic constitutional determination for all areas of law.”

This line of reasoning was later continued in a number of landmark cases. In the Bürgschaft case for example a 21-year-old daughter provided security for her father’s bank debt. The decision of the Bundesverfassungsgericht resulted in the contract being voided on the ground that this surety-relation in effect infringed, among other things, the human dignity of the daughter. Though Germany has the most sophisticated line of cases endorsing the indirect effect of fundamental rights, a similar, though more fragmented approach can also be identified in e.g. Italy and to a lesser extent in the Netherlands and in the United Kingdom since the adoption of the Human Rights Act.

Why is the horizontal effect of human rights important? It has become clear that legal relations between private parties affect public values and vice-versa. Consider, for example, privacy protection on the internet between users and commercial hosts such as Facebook or Google. Additionally, functions that traditionally belonged to the government have been privatized. Striking examples are found in the arena of war, in which independent contractors are contracted to fight, or the privatization of prisons. If fundamental rights did not have an effect on horizontal relations it would be easy to escape the constraints human rights impose by privatizing such activities.

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228 BVerfG, 15 January 1958, BVerfGE 7, 198 (Lüth).
232 A good example of this can be found in the case C-131/12 Google Spain currently before the CJEU. Here, a person requested Google to prevent links to a newspaper article about him from showing up in the search results when his name was searched for. Advocate General Jääskinen, in his opinion, argues that search engines cannot be considered as ‘controller’ of the personal data on the websites they index and hence that the data subject cannot directly address the search engine.
Instead, fundamental rights work as mediators between policy issues and legal issues in private law.\footnote{This idea is based on Kennedy 1997 and applied to European contract law by Mak 2008, pp. 553-565.} More generally this can be seen as a breakdown of the traditional dichotomy between private (law) and public (law).\footnote{Kennedy 2002, pp. 7-28.}

It is pertinent to ask how this relates to Rawls and the first principle of justice. The liberty principle requires the most extensive scheme of basic liberties for all. Rawls enumerates what he understands by basic liberties: political liberty and freedom of speech and assembly are the most important followed by liberty of conscience and freedom of thought; freedom of the person; the right to some form of property and the freedom from arbitrary arrest.\footnote{Rawls 1999, p. 53.} Creating a scheme of basic liberties means the basic structure of society must function in such a way as to protect these basic liberties. The constitutionalization of private law makes clear that the protection of such rights is also at stake in contract law. Combined with the fact that contract law is required as part of the basic structure, this means that the institution of contract law, to the extent that it exists, should respect the basic liberties of the first principle of justice.

The most direct way in which this can come about is by giving horizontal effect to these (Rawlsian) basic liberties in contract law. A distinction should then be made between mandatory and non-mandatory rules. Only mandatory rules would be able to effectively protect the basic liberties in horizontal relations, as non-mandatory rules might be avoided contractually. Fundamental rights are usually given effect through mandatory rules such as the rules on public morals or good faith. So contract law, as an institution of the basic structure, should be designed in such a way that it prevents the infringement of basic liberties, even if this infringement is initially caused by private parties and not directly by the state. After all, it is the state that has to decide subsequently whether to help or not in the enforcement agreement.\footnote{Shiffrin 2000, p. 235.} Accordingly, contract law should provide for mandatory rules that prohibit the infringement of basic liberties through contracts. Contracts that have such an infringement as an effect

\footnote{Shiffrin 2000, p. 235.}
should be denied enforcement by the state, i.e. the institution of contract law. In this sense we can say that the first principle of justice restricts what can be pursued legitimately through contract law. The German Lüth case provides an excellent example. Here, freedom of speech – one of Rawls’ basic liberties – is used to determine the private relations between the two parties in such a way as to secure a public value. Justice as fairness requires such an approach, but informed by the demands of first principle of justice.

It is interesting to note that on the one hand justice as fairness requires the constitutionalization of private law because contract law is part of the basic structure and thus is governed by the principles of justice. On the other hand, the fact that fundamental rights play a role in contract law strengthens the conclusion that contract law in fact is part of the basic structure. Clearly there is a danger that in private relations basic liberties are infringed upon. For Rawls, what is important is that these basic liberties are protected, no matter the source of a possible infringement. In other words, in justice as fairness there cannot be a principled distinction in this regard between private and public law. Accordingly, the fact that such issues of fundamental rights are at stake in contract law makes it wholly implausible that the entire institution of contract law would be outside the scope of justice as fairness. The idea of fundamental rights in contract law in this respect works both ways: it is both required by justice as fairness as well as the source of a complementary argument that contract law is part of the basic structure.

3.4 Contract law, weaker party protection and the worst-off in society

As discussed in Chapter 3.2, most of the specifics of contract law are governed by the second principle of justice. This principle concerns itself with social and economic factors; the institution of contract law is a part of the basic structure mainly for its social and economic effects. The second principle has two prongs: first, offices should

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237 The fact that this is a tort case does not diminish that, as it concerns a basic liberty being given effect in a dispute between two private parties.
be open to all and second, social and economic inequalities should be to the greatest benefit of the least advantaged (the difference principle). To understand how contract law can function so as to advance these goals, we must first look at how the difference principle can be made more operational.

The difference principle requires social and economic advantages to be of the greatest benefit to the least advantaged. For Rawls, this would be the case if inequalities are allowed only if they benefit the worst-off. Rawls makes clear that the ‘worst-off’ refers to a group of people, i.e. a certain segment of society. The ‘worst-off’ is not a rigid designator of particular people. Instead, it is a fluid group where people can move in and move out of. The simplest way to define this group would be to point to those with the least social and economic means, for example all persons with an income lower than half of the median. However, if the worst-off are defined in this manner, it becomes unclear why particular individuals who are the worst-off are not singled out. It would, then, be more accurate to look at how different institutional schemes affect individuals, rather than how they affect this group.

Rawls, however, offers a better option to define the worst-off: that is to take a certain social position, e.g. the lowest paid unskilled worker, and count everyone in that social position to the group of least advantaged. As Philippe van Parijs points out, this is because: “the difference principle is an opportunity-egalitarian principle, and its being phrased in terms of expectations associated with social positions rather than directly in terms of primary goods is of crucial importance in this respect”. Accordingly, the difference principle only allows for inequalities when they benefit the relevant social position, not simply certain specific individuals. Or as Rawls himself puts it:

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239 Weatherford 1983, pp. 63-64.
240 Freeman 2007, p. 108.
241 An example given by Rawls: Rawls 1999, p. 84.
242 Not to mention that it would to a large extent colaps primary goods into wealth.
243 Van Parijs 2003, p. 213.
244 Van Parijs 2003, p. 214.
“[T]he relevant social positions are so to speak, the starting places properly generalized and aggregated. By choosing these positions to specify the general point of view one follows the idea that the two principles attempt to mitigate the arbitrariness of natural contingency and social fortune.”

It is important to note that the difference principle applies to the differences in reasonable expectations with regard to one's share of primary goods. The fact that a group makes up the category of the worst-off also implies that the question of who belongs to this group is not entirely determinate and is subject to fluctuation and change over time. This does not pose a problem for Rawls:

“Any procedure is bound to be somewhat ad hoc. Yet we are entitled at some point to plead practical considerations, for sooner or later the capacity of philosophical or other arguments to make finer discriminations must run out. I assume that the persons in the original position are aware of this, and that they assess the difference principle in comparison with the other alternatives accordingly.”

So, in what way could contract law (broadly understood) contribute in structuring social and economic inequalities to benefit of the worst-off? Firstly, non-discrimination rules can help satisfy the requirement that offices are open to all and secondly, weaker party protection can benefit the position of the worst-off.

When we look at the development of the welfare state in Europe, one of the means through which the socialization of industrialized society was attempted was by injecting social justice into private law. This movement finds it origins in labour, tenancy and consumer law. In these areas of law, protective and non-discrimination rules were created to help the position of the weak-off in society. When Rawls discusses the fairness of labour markets he stresses that first, fair opportunities should

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245 Rawls 1999, p. 82.
247 Rawls 1999, p. 84.
249 Micklitz 2011/02, p. 1. See also Somma 2006.
exist to enter the market and secondly, that fair bargaining power should exist between employers and employees.250 First, the requirement that offices be open to all relates to the non-discrimination rules in labour law and contract law. Non-discrimination rules attempt to provide for the existence of fair opportunities. A good positive law example can be found in the European Directives on equal pay and equal access to work.251 Weaker party protection, in labour law but also in tenancy law and consumer law, attempts to achieve the second requirement. Historically, weaker party protection in these areas has been aimed at helping the weakest members of a society. A good example of this is the development of the habitability requirement in tenancy law for low-cost housing.252 This led Hans Micklitz to conclude that:

“All models use the law by the (social welfare) state as a means to protect the weaker party against the stronger party, the employee against the employer, the tenant against the landlord and the consumer against the supplier. Therefore, social justice is bound to the idea of the redistribution of wealth from the richer to the poorer part of the society, individually and collectively.”253

Besides helping the worst-off through distribution, weaker party protection can help create what Micklitz terms access justice.254 The idea of access justice is that weaker party protection helps those who are excluded from market participation and those for whom market participation is difficult.255 It helps parties take advantage of markets in a way they ordinarily would not be able to. This goes beyond a mere formal access to the market for employees and consumers. Instead, it aims to create a real opportunity to participate and enjoy the benefits offered by access. This idea of access justice and

254 Micklitz seems to think that distributive or social justice and access justice are two distinct notions, where the second can even infringe on the first. I believe, however, that the two are complimentary rather than at odds. Access justice inherently also poses costs – the cost to provide access – and hence will also have distributive concerns. Hence I treat access justice as a specific form of distributive justice.
255 Micklitz 2011/02, pp. 21-29.
the rules on non-discrimination tie in neatly with the idea of the second principle of justice as an opportunity-egalitarian principle. Both sets of rules can be seen as implementations of such a principle in the area of private law and, in the abstract, as satisfying the requirements of justice as fairness.

In contract law as fairness, such weaker party protection should be approached categorically, i.e. the focus should be on the protection of a group of weaker parties rather than on the protection of particular weaker parties. This is suitable for two related reasons. First, as mentioned above, the difference principle does not consider particular individuals, but rather focuses on social groups. Hence, improving the position of such a social group should be approached categorically. Secondly, to grant protection through an open norm to those who are in need of protection in a particular case would jeopardize the division of labour between the basic structure and the rules applying directly to individuals.256 This would require contracting parties at all times to take the distributive position of the other party and the distributive effects of the transaction into account. This is exactly what the institutional division of labour aims to prevent.257 By instituting a system of categorical weaker party protection this can be avoided and the division of labour can be safeguarded. After all, then the contracting parties merely have to establish whether or not their counterparty falls within this category or not and can presume that this takes care of the distributive concerns in contract law.

A counterargument could be that some of those who are helped by weaker party protection rules turn out in fact to be really well off and hence undeserving of help. First, note that I do not claim identity or strict overlap between the worst-off in society and weaker parties in contract law, though there can be overlap between the two. Rather, my claim is that helping weaker parties in contract law on balance improves the position of the worst-off in society. An example of this is the consumer who is actually extremely wealthy.258 This, however, is not an argument against categorical weaker party protection from the perspective of justice as fairness for a number of

256 Rawls 2005, p. 269.
258 Hesselink 2001, p. 304.
reasons. First of all, as described above, a good number of these rules create equal opportunity. As long as equal opportunities are created, it is hard to see how people who are well-off could ‘take advantage’ of such rules. Secondly, the aim of the second principle of justice is to create a situation that is on the whole, better for the worst-off. The fact that it is possible that people who are well-off will benefit from weaker party protection rules is no argument against these rules as long as the institution on balance helps the worst-off more than if it would not include the rules. Additionally, at some point we are entitled to ‘plead practical considerations’. It is unavoidable that when a group is taken as the unit chosen for beneficial treatment that that group will be at the same time somewhat under-inclusive and somewhat over-inclusive. Yet, for a theory of justice this is not so much of a problem. As Roy Weatherford noted:

“We are free to ignore such cases, or treat them on an ad hoc basis, so long as the overall structure and organization of society is properly constructed, for that, after all, is the basic concern of a theory of justice.”

3.5 Conclusion

The application of the principles of justice in justice as fairness proceeds through a four-stage sequence, where the veil of ignorance is lifted a bit in every consecutive stage. During the first stage the principles of justice are chosen, during the second the constitution is adopted, during the third legislation and policy issues are decided and during the fourth concrete issues are adjudicated. The first principle of justice is the guiding principle in the second stage, while the second principle is paramount in the legislative stage. The main task of the democratic legislator is to adopt policies that further the demands of the principles of justice. Justice, however, is to some extent indeterminate, in which case there is room for choice for the legislator.

259 Rawls 1999, p. 84.
261 Weatherford 1983, p. 66.
The institution of contract law is subject to both principles of justice. The first principle of justice requires that some options for exchange are open, while others are closed so as to assure the most comprehensive scheme of basic liberties compatible with a similar scheme of liberties for others. Most importantly, it requires that fundamental rights be protected horizontally to the extent that contract law exists. The second principle governs the social and economic dimensions of contract law and hence most of the specifics associated with these dimensions. This takes place at the legislative stage in the four-stage sequence; information on all relevant facts on society are available.

The first principle of justice mainly has an impact on the issue of the constitutionalization of contract law, including the horizontal effect of fundamental rights. It has become clear that private relations also have an impact on public matters exemplified by the basic liberties Rawls refers to in his first principle. Justice as fairness requires the protection of these liberties, no matter who infringes them. Accordingly, contract law should give horizontal effect to the basic liberties of the first principle of justice. In other words, contracts that infringe a basic liberty should not be enforceable. Interestingly, the constitutionalization of contract law also strengthens the argument that contract law is part of the basic structure, as Rawls clearly cannot remain silent on fundamental rights issues merely because they occur within the institution of contract law.

The second principle of justice requires offices to be open to all and social and economic inequalities to be arranged so that they are to the greatest benefit of the least advantaged. The difference principle defines the worst-off as a social group and is an opportunity-egalitarian principle aimed at creating the best possible expectations for the group that is characterized as worst-off. In contract law, non-discrimination rules and weaker party protection help achieve the goals of the second principle of justice. Categorical weaker party protection rules can be used to help achieve social justice goals by improving the social and economic position of the worst-off. Additionally, anti-discrimination rules in contract law could guarantee that offices are open to all and that there exists equal opportunity to access and use the market.
To sum up: some legally regulated form of exchange is necessary to lead a meaningful life, i.e. at least some institution of enforcing contracts should exist. The two principles of justice determine the nature of this scheme. The first principle requires that contracts infringing upon basic liberties would be unenforceable. The second principle of justice asks that, within the limits set by the first principle of justice, the scheme of which contracts are enforceable and which ones are not is institutionalised in such a way as to benefit the worst-off. A system of contract law designed according to these principles amounts to a system of contract law as fairness, i.e. the contract law of a just society.