Contract law as fairness: a Rawlsian perspective on the position of SMEs in European contract law
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4 Part I – Conclusions

The aim of Part I was to study the implications of Rawls' theory of justice for contract law. Conventionally, private law theory and political philosophy have been considered to be two separate fields of study. In recent years, however, the inadequacy of this separation has become quite clear. Important issues of social justice are unmistakably at stake in private law. In this Part, the implications of applying a theory of political philosophy to contract law were explored, i.e. a normative framework for contract law was developed. Rawls’ theory of justice: justice as fairness provides the basis for this normative framework. The choice for this theory over other theories of justice is mainly informed by pragmatic reasons. Rawls’ theory caused a paradigm shift in and had a pervasive influence on political philosophy. Even though the amount of literature on Rawls is astounding, little research has been undertaken to link justice as fairness to issues of contract law. This book attempts to fill this lacuna. To do so, two main questions had to be answered: first, how is Rawls’ theory applicable to contract law and second, what would a framework for contract law based on justice as fairness look like? These two questions were the subject of Chapters 2 and 3, respectively.

The question regarding the applicability of Rawls’ theory to contract law is inextricably linked to the concept of the basic structure. Justice as fairness is a limited theory in the sense that the principles of justice only apply to the basic structure of society: the major social and political institutions. The basic structure has been interpreted both narrowly and broadly. A narrow interpretation of the basic structure would exclude contract law, while a broad interpretation includes it. In this Part I conclude that contract law is an institution that forms a part of this basic structure. To come to this conclusion, first I argue that the distinction between narrow and broad interpretations of the basic structure is confused to some extent. The basic structure in justice as fairness serves to give effect both to an institutional division of labour as well as to a division of moral labour. The institutional division of labour functions to establish a well-ordered society, while a division of moral labour is concerned with the stability of such a society. This in turn corresponds with the two different goals of
Rawls' *A Theory of Justice* and *Political Liberalism*. Regarding the question which actual institutions make up the basic structure, it then makes most sense to focus on the institutional division of labour, which points to an inclusive conception of the basic structure.

This, however, does not provide enough of a foundation to conclude that the institution of contract law forms part of the basic structure; further argument is required for that. I argued that contract law plays an instrumental role both in creating and in maintaining background justice. For people to be able to meaningfully pursue a conception of the good, i.e. exercise one of their moral powers, some form of personal property is required and accordingly some form of exchange. Contract law is an institution that makes such exchange possible. Still more clearly, contract law functions to maintain background justice. Even transactions that seem fair individually, over time, inevitably lead away from background justice. Contract law as part of the basic structure is well suited to correct these tendencies away from justice.

Both deontologists as well as law-and-economics scholars have criticized this position. Deontologists argue that distribution through private law illegitimately infringes people’s property rights and that private transactions are the responsibility of the individual, not the state. However, this argument is not persuasive due to the post-institutional character of justice as fairness. Rights only exist to the extent they are required by the principles of justice. A contract law instituted according to these principles thus cannot illegitimately infringe property rights, as there are no pre-existing or pre-institutional entitlements. Furthermore, in the division of responsibility between the individual and the state, private transactions might be the individual’s responsibility, but rules of private *law* are definitely not. The critique from law and economics is also unpersuasive. It is not welfare that is the distribuendum in justice as fairness, but primary goods. These differ conceptually from welfarist concerns.

This leads to the second question: how would a Rawlsian framework for contract law take shape? The conclusion that contract law forms part of the basic structure means that the two principles of justice apply to it. The application of the principles of justice comes about through a four-stage sequence. The veil of ignorance is lifted to
some extent at every stage, allowing for more information. At the first stage principles of justice are decided upon, the second the constitution, the third legislation and the fourth adjudication. The second stage is guided mainly by the first principle, while the second principle is of paramount importance to the third stage. Contract law as an institution is affected by both principles of justice: the first principle with regard to fundamental rights and the second with regard to the social and economic effects of contract law.

The first principle of justice comes into play with regard to the horizontal effect of fundamental rights in contract law, not merely in the vertical relation between citizen and state, but in the horizontal relation between citizen and citizen basic liberties are at stake. No matter who threatens or interferes with these basic liberties – the state or another citizen – justice as fairness requires their protection. Accordingly, basic liberties should be given horizontal effect in contract law. Concretely this means that the state should deny the enforceability of contracts that infringe basic liberties and thus give indirect effect to those liberties. The second principle of justice plays a role in contract law with regard to non-discrimination rules and weaker party protection. Non-discrimination rules can be interpreted as an attempt to guarantee that offices be open to all, while weaker party protection rules aim at improving the position of the worst-off in society.

To conclude, contract law is part of the basic structure. Contract law is necessary to create background justice since people need a form of legally regulated exchange to lead a meaningful and independent life. Furthermore, it functions to maintain background justice since it works as a correction to tendencies that undermine justice. Contract law, then, is governed by the principles of justice. The first principle requires that citizens are protected from the infringement of their basic liberties, also through contract law. The second principle can be satisfied when contract law is so designed that offices are open to all through non-discrimination rules and the position of the worst-off is improved through categorical weaker party protection. Accordingly, to realize justice as fairness, we need to see contract law as part of what justice requires: as contract law as fairness.