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

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5 Introduction to Part II

The aim of this book is to develop a normative framework for contract law based on Rawls’ theory of justice – ‘justice as fairness’ – and to assess the position of SMEs in European contract law against this framework. Part I was devoted to the first part of this aim, while Part II will take up the second.

In Part I, I analysed the implications of Rawls’ theory of justice for contract law in an abstract manner through a discussion of the concept of a basic structure of society. The application of justice as fairness is limited to the basic structure of society, which helps satisfy two liberal ideals: to give effect to an institutional division of labour and to give effect to a division of moral labour. A central question is thus whether contract law as an institution forms part of this basic structure. I argued that in fact it does, as contract law is instrumental in both creating and maintaining background justice against which individual transactions can subsequently be presumed to be fair. Contract law as part of the basic structure is subject to the principles of justice. In other words, the institution of contract law should be designed in such a way that it conforms to the principles of justice. I have argued that contract law is impacted by these principles at (at least) three levels. The first principle of justice requires basic liberties to be given horizontal effect in contract law and the second principle relates to non-discrimination rules and weaker party protection in contract law. Non-discrimination rules can be seen as an attempt to guarantee that offices be open for all, while weaker party protection rules aim at satisfying the difference principle.

In Part II now, we can turn to the manifestation of weaker party protection in the positive law of contract. More specifically, we can turn to the question of whether, from a Rawlsian perspective, SMEs deserve protection as weaker parties in European contract law. To demonstrate that this is the appropriate question to ask, I must first elaborate somewhat further on how the difference principle can be applied to the position of SMEs in contract law. In principle, there are two methods to go about this.

The first method would entail formulating an ideal set of weaker party protection rules based on the direct application of the difference principle. In other words, one
could try to specify exactly what positive rules with regard to SMEs in European contract law would result in the best position for the worst-off in society compared to other comparable schemes. However, this type of approach runs into two problems: the holistic nature of justice as fairness and the burdens of judgment in a democratic society.

First of all, Rawls’ concept of justice is holistic in the sense that at least in ideal theory, it is the justness of the basic structure as a whole that should be assessed. As Rawls asserts:

“There is the possibility not only that single rules and institutions are not by themselves sufficiently important but that within the structure of an institution or social system one apparent injustice compensates for another.”

Accordingly, to zoom in on one particular subset of rules – weaker party protection rules in this case – runs the risk of painting too narrow a picture.

Secondly, applying and specifying the difference principle is subject to the democratic process. To understand the impact this has on the question at hand, we must hearken back to Chapter 3.1 on the connection between democracy and the principles of justice and relate this to weaker party protection. As Rawls argues, even given the principles of justice, there will often still be reasonable disagreement about whether legislation is just. In the first place this is the result of a lack of information. Often it will simply not be clear what the impact of a specific policy will be. The disagreement about the justness of economic policies is more fundamental than mere information deficiency. The burdens of judgment mean that such disagreement is a necessary part of a democratic society and can be perfectly reasonable. In Rawls’ words:

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262 Rawls 1999, p. 50.
263 See also Kordana and Tabachnick 2005.
265 Rawls 2005, pp. 54-58. See also Chapter 2.1.3.
“Sometimes [the principles of justice] are not clear or definite as to what they require. This is not always because the evidence is complicated and ambiguous, or difficult to survey and assess. The nature of the principles themselves may leave open a range of options rather than singling out any particular alternative.”

This indeterminacy is not a flaw; justice simply allows for multiple options. There can be a multitude of basic structures that all satisfy the principles of justice and between which actual choice is possible.

This is especially the case in economic matters like contract law. To quote Aditi Bagchi:

“Whether a distributively-motivated default or mandatory term will actually deliver a benefit to the intended group is a highly contingent question. It will depend on how a variety of market actors value exchange on a variety of terms, and regulators will never know definitely in advance how each market actor will respond.”

Accordingly, it is up to the democratic legislature to determine how to give effect to the demands of the difference principle in the best possible way.

This is not something necessarily lamentable. The fact that the specifics of some economic policies cannot be directly deduced from or read off from the difference principle, however, does tell us something important about justice as fairness. It shows the limits of what a Rawlsian argument can say about such specifics, for example in the case of contract law. It shows that justice as fairness does not offer the normative tools to choose between certain alternatives on some of the questions within contract law doctrine, especially when isolated from the institution of contract law as a whole, as multiple alternatives would be considered equally just. However, it also shows that

266 Rawls 1999, p. 318.
269 Bagchi 2014, p. 17.
there is room for meaningful democratic decision-making in exactly such questions.\textsuperscript{270} Even if legislators should aim at satisfying the difference principle – in our case through weaker party protection – the manner in which this is achieved is subject to their judgment.

However, it does leave us in a difficult position. For if the direct application of the difference principle to contract law is unfeasible, what can we say about the position of SMEs in European contract law? Fortunately, there is another approach available, one that works well within Rawlsian theory and European contract law. This approach considers the weaker party protection rules that currently exist in European contract law to be the outcome of such a democratic process as described above. It assumes that these rules, as the outcome of a democratic process, are distributively motivated to help the weaker party and hence at the very minimum, a legitimate implementation of the difference principle.\textsuperscript{271} This assumption can of course be challenged; some parts of weaker party protection may actually turn out not to help weaker parties. But, that debate is not necessary for our present purposes. As outlined above, to determine exactly what rules of weaker party protection are the optimal implementation of the difference principle is subject to the burdens of judgment and hence best left to the democratic legislator. Instead, a more fruitful approach for assessing the position of SMEs shifts the focus slightly from the question of what an ideal set of rules on weaker party protection would be to the question of who should count as a weaker party, given the weaker party protection rules that exist. In other words, taking the current substantive rules of weaker party protection as a benchmark, who should be offered such protection? Accordingly, instead of focusing on the question of whether weaker party protection as it exists is the optimal implementation of the difference principle, my enquiry will focus on whether SMEs should count as weaker parties.

This emphasis on categories of protected parties fits well with the approach the European legislator has taken with regard to weaker party protection. Instead of focusing on individual and situational weakness, at least in EU contract law, the

\textsuperscript{270} For more on the relation between liberalism and democracy in Rawls’ theory, see Gutman 2003.  
\textsuperscript{271} For an account, though decidedly not Rawlsian, of how weaker party protection can be distributively motivated, see Kennedy 1987.
method chosen by the EU legislature has been categorical protection.\textsuperscript{272} Accordingly, it is generally the group of consumers as a whole who have been classified as weaker parties, as opposed to trying to determine whether an individual consumer is weak and deserving of extra protection in the situation at hand.\textsuperscript{273} Accordingly, to pose the question who should be part of the group that is protected is in line with this categorical approach to weaker party protection in EU contract law.

Another question that could be posed is whether the fact that these rules originate at the EU level as opposed to the national level impacts the conclusions one can reach from a Rawlsian perspective. After all, Rawls’ theory is applicable to individual societies.\textsuperscript{274} Some, notably Thomas Pogge, have argued that Rawlsian principles can be globalized, but this is a contested issue.\textsuperscript{275} It is unclear how Rawls would view a supranational organization like the European Union, although it is possible to deduce some scepticism with regard to how the EU is given shape from a published exchange of letters with Philippe van Parijs.\textsuperscript{276} However, a comprehensive discussion of Rawls’ theory in relation to the EU goes beyond the scope of this book.\textsuperscript{277} Rather, I will assume that the principles of justice can be used to assess EU law normatively, already due to the fact that such laws become part of the law of the Member States either directly or through implementation.\textsuperscript{278}

Moreover, and more importantly, phrasing the question in this way also corresponds to a Rawlsian approach to contract law. As we saw in Chapter 3.4, weaker party protection should be approached categorically in contract law as fairness. The difference principle does not focus on the position of individuals but rather presents an opportunity-egalitarian principle with regards to social groups.\textsuperscript{279} It then becomes

\textsuperscript{272} Rösler 2009, p. 743.
\textsuperscript{273} Hesselink 2007b.
\textsuperscript{274} Originally, Rawls 1993.
\textsuperscript{275} Pogge 2000. See also e.g. Follesdal 2011; Follesdal 2012; Nagel 2005.
\textsuperscript{276} Van Parijs and Rawls 2003. Rawls writes e.g. “One question the Europeans should ask themselves, if I may hazard a suggestion, is how far-reaching they want their union to be. It seems to me that much would be lost if the European Union became a federal union like the United States.”
\textsuperscript{277} For an interesting discussion on whether the four freedoms of the EU treaty should be seen as fundamental rights in a Rawlsian sense, see De Boer 2013.
\textsuperscript{278} See also Chapter 6.
\textsuperscript{279} Van Parijs 2003.
natural to focus on who should count as members of such groups. Rawls remarks: "justice requires that [...] institutions should apply equally (that is, in the same way) to those belonging to the classes defined by them." ²⁸⁰ The next question that immediately presents itself is how to determine what counts as the same class or category. Rawls states that "we must suppose that the criteria of similarity are given by the legal rules themselves and the principles used to interpret them." ²⁸¹ And hence, when differentiating between persons, the "precept of treating like cases alike" forces people "to justify the distinctions that they make between persons by reference to the relevant legal rules and principles." ²⁸² Such an approach attempts to arrive at a reflective equilibrium between the benchmark of current weaker party protection rules as a considered judgment and their underlying principles.²⁸³ As the normative appeal of weaker party protection as well as the categorical nature of such protection flow from contract law as fairness, this goes beyond a pure non-discrimination argument and can rather be seen as an external, Rawlsian normative criterion.

Rawls' emphasis on both the rules and the principles underlying those rules provides the roadmap for how to approach the evaluation of the position of SMEs in European contract law. The rules and the underlying principles that deal with weaker party protection in European contract law will be described and assessed in the remainder of Part II. Now we are ready to examine these rules and determine whether or not SMEs should be protected as weaker parties from a Rawlsian perspective on contract law.

²⁸³ See also Chapter 2.1.2.