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Articles

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Could a fair price rule (or its absence) be unjust?

On the relationship between contract law, justice and democracy

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Abstract: This paper discusses the relationship between contract law, justice and democracy. In particular, it addresses the question whether the presence or absence of an unfair price rule could make a system of contract law, and thus the society to which it belongs, become unjust. The question is not merely a theoretical one, as recent legislative developments in EU contract law have illustrated. The main argument of the paper is that principles of justice that would be reasonably acceptable to all, as they should be in a society like our own which is characterised by a reasonable pluralism of worldviews, are unlikely either to prohibit or require an unfair-price rule, while the main existing substantive theories of justice that do clearly require such a rule (eg in the name of the virtue of corrective justice) or proscribe it (eg because of the value of liberty), are too partisan ('too thick') to be acceptable to citizens holding different reasonable worldviews. This means that a system of contract law can be just independent of whether or not it contains an unfair price rule. As a result, the question of whether our contract law should contain a fair price doctrine remains a matter for the legitimate democratic lawmaker to decide upon, in a debate where controversial worldviews are also admitted. The more procedural ('thinner') principles of justice will still require that the law can (and will at some point) be justified in non-sectarian terms, but given that such more neutral grounds are readily available on either side of the debate, both the presence and the absence of a fair price rule is compatible with a legitimate and just contract law regime.

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Résumé: Ce texte s'intéresse à la relation entre le droit des contrats, la justice et la démocratie. En particulier, il traite de la question de savoir si la présence ou l'absence d'un principe de prix juste pourrait rendre un système de droit des contrats, ainsi que la société qui le sous-tend, injustes. La question n'est pas seulement théorique, comme l'ont illustré de récents développements en droit des contrats de l'UE. L'argument essentiel du présent texte est que les principes de justice qui seraient raisonnablement acceptables de tous, comme ils devraient l'être au sein d'une société comme la nôtre qui est caractérisée par un pluralisme raisonnable de visions du monde, tandis que les autres théories de la justice qui requièrent clairement un tel principe (par exemple, au nom des vertus de justice corrective) ou qui l'excluent (par exemple, en raison de la valeur de la liberté), sont trop partisans (trop „denses“). Cela veut dire qu'un système de droit des contrats peut être juste indépendamment du point de savoir s'il contient un principe de juste prix. Par conséquent, la question de savoir si notre droit des contrats devrait contenir une doctrine de juste prix demeure un débat qu'il appartient au législateur légitime et démocratique, dans un débat où les visions du monde controversées sont également admises. Des principes processuels de justice (moins „denses“) exigeront encore que le droit peut (et le fera effectivement à un moment ou un autre) justifier en des termes non sectaires, mais étant donné que ces arguments ostensiblement neutres sont disponibles des deux côtés du débat, tant l'absence que la présence d'un principe de prix juste sont compatibles avec un régime légitime et juste du droit des contrats.

Zusammenfassung: Dieser Beitrag diskutiert das Verhältnis zwischen Vertragsrecht, Gerechtigkeit und Demokratie. Dafür ist er fokussiert auf die Frage, ob die Einführung oder Ausklammerung einer Regel über (un)faire Preise das Vertragsrecht – und damit die Gesellschaft, die sich dieses gibt – „ungerecht“ machen kann. Die Frage ist keineswegs allein theoretischer Natur, wie ein Rückgriff auf die jüngsten EU-Initiativen zeigt. Mein Hauptargument geht dahin, dass in einer Gesellschaft wie unserer, die sich durch einen (wenn auch nicht unbegrenzten) Pluralismus an Weltanschauungen auszeichnet, Gerechtigkeitsprinzipien, die für alle akzeptabel sein müssten, wohl weder eine Regel zum „gerechten Preis“ verbieten noch sie gebieten. Demgegenüber sind Theorien, die entweder solch eine Regel vorsehen (etwa im Namen der Tugend der ausgleichenden Gerechtigkeit) oder sie verbieten (etwa aus Freiheitsüberlegungen heraus) zu sehr „voreingenommen“ und sie ergreifen zu sehr Partei, um für alle Bürger akzeptabel zu sein, die solch unterschiedliche Weltanschauungen haben. Folglich kann ein Vertragsrechtssystem „gerecht“ sein unabhängig davon, ob es nun eine Regel zum gerechten Preis enthält oder nicht. In der Konsequenz heißt dies, dass über die Frage nach einem Verbot oder Gebot allein der demokratisch legitimierte Gesetzgeber en-

tscheiden kann und zwar in einem Diskurs, der alle Weltanschauungen zur Debatte zulässt. Die (weniger voraussetzungsintensiven) prozeduralen Prinzipien der Gerechtigkeit verlangen immerhin auch, dass das Recht in weniger parteiischer Form gerechtfertigt werden kann (und wird), aber da solch eine neutralere Art der Rechtfertigung auf beiden Seiten möglich ist, kann ein Vertragssystem im Einklang mit „Gerechtigkeitsprinzipien“ stehen sowohl, wenn es eine Regel über den gerechten Preis vorsieht, als auch, wenn es sie verbietet.

Introduction

This paper discusses the relationship between contract law and justice. In particular, it addresses the question of whether the presence or absence of an unfair price rule could make a system of contract law, and thus the society to which it belongs, become unjust. The question is not merely a theoretical one; it is also practically relevant. In 2014 the European Parliament, in first reading, adopted two amendments to the European Commission’s proposal for a Common European Sales Law (CESL) to the effect that the unfairness control of terms in consumer contracts should be extended both to the adequacy of the price and to individually negotiated terms.¹ The combined effect of these two amendments, if endorsed by the Council, would have been that under the CESL, unfair prices, even if they resulted from individual negotiation, would become non-binding on consumers.² This would have amounted to the introduction of a *iustum pretium* rule for business-to-consumer (B2C) contracts in EU contract law. In December 2014, the new European Commission, in its Work Programme 2015, announced the withdrawal of the entire CESL-proposal and the arrival in 2015 of a ‘modified proposal in order to fully unleash the potential of e-commerce in the Digital Single Market’.³ This Spring, the Juncker Commission confirmed that later this year it will make ‘legislative proposals for simple and effective cross-border contract rules for consumers and businesses’. At present, it is unclear what the substantive scope of these new rules will be, and whether they will include also

1 European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011) 0635 – C7-0329/2011 – 2011/0284(COD)) (P7_TA-PROV(2014)0159).

2 See M.W. Hesselink, ‘Unfair Prices in the Common European Sales Law’, in L. Gullifer and S. Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Oxford: Hart Publishing, 2014) 225-236.

3 See Commission Work Programme 2015 A New Start, Strasbourg, 16 December 2014 COM(2014) 910 final, Annex 2, no. 60.

unfair terms law. However, either way the question of unfair prices and other core terms may well be revisited in the political debate.

The main argument of this paper will be that principles of justice that would be reasonably acceptable to all, as they should be in a society like our own which is characterised by a reasonable pluralism of worldviews, are unlikely either to prohibit or demand an unfair-price rule, while the main existing substantive theories of justice that do clearly require such a rule (eg in the name of the virtue of corrective justice) or proscribe it (eg because of the value of liberty), are too partisan ('too thick') to be acceptable to citizens holding different reasonable worldviews. This means that a system of contract law can be just whether or not it contains an unfair price rule. As a result, the question whether our contract law should contain a fair price doctrine remains a matter for the legitimate democratic lawmaker to decide upon, in a debate where also controversial worldviews are admitted. More procedural ('thinner') principles of justice will still require that the law can (and will at some point) be justified in non-sectarian terms, but given that such more neutral grounds are readily available on either side of the debate, both the presence and the absence of a fair price rule is compatible with a legitimate and sufficiently just contract law regime.

The fact of reasonable pluralism

We live in a pluralistic society in which people hold quite diverse worldviews, which are often mutually incompatible or even incommensurable. Sometimes these views are 'comprehensive doctrines' based on ultimate principles or values,⁴ but more often they are much more incomplete and fragmentary.⁵ They may be secular (eg utilitarian, liberal, libertarian, nationalist or feminist) or religious; they can be paternalistic and moralistic (perfectionist) or not; et cetera. Some people are fanatic about their conception of the common good or the road to salvation (think of certain radical environmentalists or religious fundamentalists) but most people are perfectly reasonable and tolerant of others and their views; they just disagree, albeit sometimes fundamentally and on important issues. This 'fact of reasonable pluralism' (Rawls) or 'reasonable disagreement' (Larmore), is a permanent condition of modern constitutional democracies.⁶ Further debate

⁴ J. Rawls, *Political Liberalism* (expanded edition, New York: Columbia University Press, 2005) 13.

⁵ R. Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (New York: Columbia University Press, 2012) 99.

⁶ Rawls, n 4 above, 36.

among adherents to different worldviews will not make the disagreement about ultimate values and principles go away.⁷ Rather, each new round of discussion is likely to further entrench the positions on each side and exacerbate the disagreement. Under these circumstances (ie our circumstances), the State would not show equal respect and concern for its citizens if it took sides and established one such controversial worldview or set of ultimate values, as the official state doctrine, or, less radically, adopted policies and promulgated laws (including private laws) that could only be justified in terms of such a controversial worldview or in the name of a controversial value. Therefore, the state should try to remain neutral with regard to ultimate values. For, a partisan state would not only lead to instability, because its laws would only last until the other faction comes to power and implements its agenda in the name of its own controversial principles, but it would also be unjust because it would treat all those citizens holding a different worldview than the officially established one as second-rate citizens. Therefore, the state should refrain from acts, such as the promulgation of laws, that can be justified only in terms of such a controversial worldview, and not by reasons that no one could reasonably reject.⁸

The autonomy of morality

The pluralist view does not lead to relativism. The argument that the state should refrain from endorsing a controversial ‘ethical’ doctrine about what makes our lives valuable, leaves open the possibility that state action could and should be guided by ‘moral’ principles with regard to ‘what we owe each other’ (Scanlon), including, in particular, principles of justice. For, it remains possible – and indeed necessary if we want to live together freely as equals – to develop a set of moral principles and a conception of justice, that is independent from controversial ethical principles, and which could and should guide state action in a modern constitutional democracy.

Different versions of such a ‘self-standing’ (Rawls) or ‘autonomous’ (Larmore, Forst) conception of justice have been presented. Rawls proposed his two principles of ‘justice as fairness’ as a candidate for an ‘overlapping consensus’ on ‘political’ principles of justice.⁹ Nussbaum has offered her capabilities approach

⁷ C. Larmore, *The Morals of Modernity* (Cambridge: Cambridge University Press, 1996) 168.

⁸ T.M. Scanlon, ‘Contractualism and utilitarianism’, in A. Sen and B. Williams (eds), *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982) 103–128.

⁹ Rawls, n 4 above. See also J. Rawls, *Justice as Fairness: a Restatement* (E. Kelly [ed], Cambridge, Massachusetts: Belknap Press, 2001).

as a standard for minimal justice as alternative political principles.¹⁰ Larmore proposes a conception of justice based on the norms of rational dialogue and equal respect.¹¹ Habermas advocates the entirely procedural standard of what would be universally acceptable in an ideal speech situation.¹² And according to Forst the foundational principle of justice is that we have a fundamental right to justification with reasons that are both reciprocal and general.¹³ As I will argue below, we do not have to go further into the details of this ‘family quarrel’, as Habermas called it,¹⁴ because for our present purposes they are sufficiently similar.

Private law and justice

Principles of distributive justice apply only to the main social and economic institutions responsible for determining the things and opportunities that each of us will have during our lives, what Rawls calls the ‘basic structure of society’.¹⁵ But obviously this limitation cannot hold for interpersonal justice, ie the principles that determine what is just between you and me, simply because there is no reason to assume that the main distributive institutions (such as the tax and transfer system) are also the ones chiefly responsible for interpersonal justice. Indeed, that latter responsibility falls primarily on private law. There will be an important overlap between the scope of application of the two sets of principles, for the well-known reasons that private law rules (at least private law’s basic structure) have important distributive implications as well – think only of the rules determining property, expectation damages (in contract), strict liability (in tort) and weaker party protection – and therefore belong to the basic structure of society as well.¹⁶ However, the justice of private law is not exhausted by its distributive justice dimension; private law also has to be interpersonally just. Conversely, social justice is not limited to distributive justice; a society may be

10 M.C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, Massachusetts: Belknap Press, 2011) 90.

11 Larmore, n 7 above, 134.

12 J. Habermas, *The Inclusion of the Other; Studies in Political Theory* (C. Cronin and P. De Greiff [eds], Cambridge: Polity Press, 1996) chapters 1–3.

13 Forst, n 5 above.

14 Habermas, n 12 above, 50.

15 J. Rawls, *A Theory of Justice* (revised edition, Cambridge, Massachusetts: Belknap Press, 1999). Similar Larmore, n 7 above, 126; M.C. Nussbaum, *Frontiers of Justice: Disability, Nationality Species Membership* (Cambridge, Massachusetts: Belknap Press, 2006) 311; Forst, n 5 above, 80.

16 See A.T. Kronman, ‘Contract Law and Distributive Justice’ 89 *Yale Law Journal* (1980) 472.

unjust also to the extent that it tolerates interpersonal injustice, eg by failing to enforce private rights.

The principles of interpersonal justice, which determine moral rights and obligations in horizontal relationships, will still have to be political.¹⁷ Briefly put, this is because of what Habermas calls the co-originality of private and public autonomy: private rights and collective self-determination mutually presuppose and shape each other.¹⁸ Therefore, when trying to determine principles of interpersonal justice it is not helpful to refer to private law's asserted essential nature, like most corrective justice theories tend to do.¹⁹ Rather, in our post-metaphysical condition the principles of interpersonal (or horizontal) justice will have to be determined through the same procedure as the distributive principles for social justice, ie through universal consensus in an ideal speech situation (Habermas), an overlapping consensus (Rawls), or by offering reciprocal and general reasons that no one can reasonably reject (Forst).

To the extent that people hold articulate views on private law and its foundations these are likely to differ in very much the same way as more general worldviews tend to do. Indeed, there exists a variety of different normative private law theories which explain and justify existing private law rules and doctrines or offer a normative basis for reform. These are sometimes connected, explicitly or implicitly, to more comprehensive political views (such as utilitarianism, libertarianism, and liberal perfectionism), but sometimes they are not. We can refer to this as the fact of reasonable private law pluralism. Under these circumstances, it would amount to an injustice for the state to enact (or reject) private law rules that could only be justified (or rejected) in terms of controversial values (eg economic efficiency) or worldviews (eg the idea that self-authorship is the key to a valuable life).²⁰ What does this mean for the question whether contracts should be legally binding even if they contain an unfair price?

17 Hayek famously argued that enacting 'rules of just conduct' (ie the general rules of private and criminal law) was the *only* legitimate task for the democratic legislator. See F.A. Hayek, *Law, Legislation and Liberty; A new statement of the liberal principles of justice and political economy* [first edition 1982] (London and New York: Routledge 2003).

18 J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1996). Similar, Forst, n 5 above, 100.

19 See eg E.J. Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) ch 1.

20 The equal treatment of both acceptances and rejections based on partisan reasons, is required in order to avoid status quo bias. Cf C.R. Sunstein, *The Partial Constitution* (Cambridge, Massachusetts and London: Harvard University Press, 1993) 4.

Does justice require an unfair-price rule?

Is a system of contract law that does not include an unfair price rule unjust for that reason? Or, to formulate it differently, is a society unjust if (or less just to the extent that) it enforces contracts even when they contain an unfair price? Or, put still differently, would the introduction of a fair price rule in countries where it does not currently exist (ie most European countries) make contract law (or society) become more just for that reason?

There exist a number of theories according to which a fair price rule is indeed required as a matter of justice. These theories differ, both with regard to their foundational principles, and their practical implications (including the criterion for contractual unfairness). However, what Aristotelian, Kantian, and Hegelian theories of corrective justice have in common is that they are grounded in metaphysical notions of justice to the effect that private law essentially is a matter of corrective (as opposed to distributive) justice of some sort.²¹ In other words, they offer as a ground for the introduction of a fair-price rule a theory of justice that is not universally accepted and – more importantly – could not be accepted by everyone. This means that in a pluralist society these theories cannot provide a compelling reason for the introduction of a fair price rule. It also means that if the unfair price rule could be defended only on the basis of one of these theories, it would be *unjust* for the state to introduce it.

Do more neutral, ‘political’ principles of justice also require an unfair price rule? We do not need to go very deeply into the relative merits of Rawls’ justice as fairness,²² Nussbaum’s capabilities approach,²³ Larmore’s norms of rational dialogue and equal respect, Habermas’ discourse principle,²⁴ and Forst’s principle of justification,²⁵ in order to find an answer to our question. For it is immediately obvious that each of these theories strongly underdetermines a positive answer to our question. Rawls’ difference principle, according to which differences between

21 J. Gordley, *Foundations of Private Law: Property, Tort, Contract, and Unjust Enrichment* (Oxford: Oxford University Press, 2006) ch 17; P. Benson, ‘The Unity of Contract’, in *The Theory of Contract Law: New Essays* (Cambridge: Cambridge University Press, 2001) 118–205; F. Rödl, ‘Contractual Freedom, Contractual Justice and Contract Law (Theory)’ 76 *Law and Contemporary Problems* (2013) 57–70.

22 For an application to contract law see, J. Klijsma, *Contract Law as Fairness: A Rawlsian Perspective on the Position of SMEs in European Contract Law* (PhD thesis, Amsterdam 2014).

23 For an application to contract law, see Lyn Tjon Soei Len, *The Effects of Contracts Beyond Frontiers. A Capabilities Perspective on Externalities and Contract law in Europe* (PhD thesis, Amsterdam, 2013).

24 Habermas, n 12 above, 50.

25 Forst, n 5 above.

groups in society are only permitted to the extent that they also work for the benefit of the least advantaged, is probably the most substantive one among the proposed political principles relevant here. However, even if we were to interpret that principle as a maximising principle, ie as requiring society to place all institutions at the service of improving the condition of the least well-off, it would still not follow directly that we necessarily have to introduce a fair-price rule, not even for B2C contracts. That would still remain a matter of judgment on which people could reasonably differ, as a result of what Rawls called the ‘burdens of judgment’. And if we follow the quite broadly accepted view that the difference principle is not in fact a maximising principle,²⁶ then we will also have to consider not only the other parts of the private law system, but also (and especially) any other existing institutions that compensate for what would otherwise be unjust private law outcomes.

In sum, it seems that only metaphysical – or otherwise controversial – principles of justice would require a fair price rule. This leads to the conclusion that the mere absence of an unfair-price rule does not seem to make contract law unjust (not even *pro tanto*).

Does justice prohibit an unfair-price rule?

The main arguments rejecting the fair price rule as unjust are also based on values that are not universally accepted, in particular the values of personal autonomy and individual liberty. These values are at the core of well-known but controversial perfectionist (and otherwise) comprehensive doctrines.

The classical critique of the unfair price doctrine goes back to classical *laissez-faire* liberalism (‘qui dit contractuel dit justice’),²⁷ and comes back in contemporary libertarian, *ordo-liberal* and neoliberal views which have in common that they reject, in the name of liberty, state interference with contract prices. As a first response to that critique it should be pointed out that liberty, understood as freedom from interference, especially by the state (‘negative liberty’, as Berlin put it),²⁸ is not self-evidently at stake here. For, when the state is said to ‘limit

²⁶ See eg S. Scheffler, ‘Distributive Justice, the Basic Structure and the Place of Private Law’ *Oxford Journal of Legal Studies* (2015) 1–23.

²⁷ A. Fouillée, *La science sociale contemporaine* (Paris: Hachette, 1880) 410.

²⁸ I. Berlin, ‘Two concepts of liberty’, in *Liberty* (Oxford: Oxford University Press, 2002) 166–217. Compare Constant’s ‘freedom of de moderns’, in B. Constant, ‘De la liberté des anciens comparée à celle des modernes (in *Œuvres politiques*, vol 2, Paris, éd Charpentier, 1874; reprinted in Paris: Mille et une nuits, 2010).

freedom of contract' it does not at all interfere with parties' liberty: all it does is refuse to enforce their contract; voluntary performance remains fully permitted. As Shiffrin points out, we have no right (natural or other) to the state's support of all our projects.²⁹ And certainly such a right could not be grounded in liberty as it is usually understood by libertarians. (This argument holds even more strongly with regard to the CESL which would have been optional for the parties anyway.³⁰)

Moreover, – and more to the point here – liberty, understood as freedom from interference or negative liberty is not uncontroversially our supreme value. As it has been pointed out, there even is reason to doubt whether liberty per se (ie other than eg for the purpose of human welfare) is a value at all.³¹ But even if it were, most people would be prepared, at least sometimes, to balance it against other important values. Therefore, an interference with individual liberty does not uncontroversially amount to an injustice. As a consequence, even if a fair-price rule did amount to an interference with liberty so understood then still this would not mean that it would also be unjust. Nozick's 'justice in transfer', Fried's 'contract as promise' and transfer theories such as Barnett's 'contract as consent', all are (highly) controversial theories.³² Striking down an existing fair price rule (or a legislative attempt at introducing it, such as the European Parliament's CESL-amendments) in the name of one of these theories would indeed amount to an injustice, because it would establish libertarianism as the official state ideology in a way analogous to the constitutionalisation of the freedom of contract.³³

29 S.V. Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation' 29 *Philosophy & Public Affairs* (2000) 205–250. This is now acknowledged by C. Fried, 'The Ambitions of Contract as Promise Thirty Years On', in G. Klass, G. Letsas and P. Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2014).

30 See Hesselink, n 2 above.

31 See W. Kymlicka, *Contemporary political philosophy: An introduction* (2ed, Oxford: Oxford University Press, 2002), who points out that if liberty were a non-instrumental value we could simply double the population in order to increase liberty in our society.

32 R. Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell Publishing, 2006 [1974]); C. Fried, *Contract as Promise; A Theory of Contractual Obligation* (Cambridge, Massachusetts: Harvard University Press, 1981); R.E. Barnett, 'A Consent Theory of Contract' 86 *Columbia Law Review* (1986) 269–321.

33 For the same reason, the CJEU's recent ruling in *Alemo-Herron* (case 426/11), which seems to constitutionalise the 'freedom of contract' of employers, based on a highly doubtful reading of the CFREU, in a way that reminds of the infamous *Lochner* ruling of the American Supreme Court in 1905 (*Lochner v New York*, 198 US 45 (1905)), should be rejected. See the rightly very critical case note by S. Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of "freedom of contract"' 10 *European Review of Contract Law* (2014) 167–182.

Liberal perfectionist theories, which have personal autonomy (understood as self-authorship) as their core value, differ from libertarian theories in that they do not aim at maximising individual freedom, but rather focus on the availability of a sufficiently wide range of valuable options to choose from, without, however, the need for any specific option to be on the menu.³⁴ It may well be that a contract law doctrine which removes the option of charging unfair prices from the available range of options, is compatible with liberal perfectionism. However, even in the contrary case that a fair-price rule could not be reconciled with personal autonomy, that would still not amount to an injustice. The reason is that liberal perfectionism is also a controversial perfectionist doctrine, rejected eg by many religious people who do not understand themselves as being the authors of their own lives,³⁵ and which therefore has no legitimate claim to be implemented by the state as a matter of justice.

It seems, therefore, that an unfair price rule also cannot be rejected on the basis of neutral, political principles of justice.

A matter of democratic deliberation

If an unfair price rule is neither required nor prohibited by political principles of justice, as arguably is indeed the case, then are the answer to the question whether to introduce (or maintain) an unfair-price rule, and the more detailed questions of its implementation, including eg the question of the standard for unfairness (eg a significant deviation from the going market price?) totally arbitrary, a matter of taste like ice cream (strawberry or vanilla?) or of tossing a coin, incapable of rational argumentation and justification? On the contrary, law-making, including private law making, in order to be legitimate has to be reasoned. This means that all relevant arguments, coming from all points of view in society, not only those close to the lawmaker but also those at the periphery, should be considered in robust democratic institutions and procedures, so that all the addressees of the law are able to regard themselves also as its authors.³⁶

Therefore, the question whether or not contract law should contain an unfair price rule is a matter for the legitimate lawmaker to decide. In principle, this is the

³⁴ See J. Raz, *The morality of freedom* (Oxford: Clarendon Press, 1986). This theory has been applied to contract law by H. Dagan in several publications, eg 'Autonomy, pluralism, and contract theory' 76 *Law and Contemporary Problems* (2012) 19–38.

³⁵ See M.C. Nussbaum, 'Perfectionist liberalism and political liberalism' 39 *Philosophy & Public Affairs* (2011) 3–45.

³⁶ Habermas, n 18 above; Forst, n 5 above, 135.

democratic legislator.³⁷ There are sufficiently neutral arguments with *prima facie* relevance and plausibility available on either side. For example the argument in favour of an unfair-price rule that there is no reason for the law to presume that contracting parties want to make a gift or assume a risk and that therefore a contract price that deviates from the market price requires an explanation.³⁸ The epistemic dimension of public deliberation implies that it cannot be substituted, at least not conclusively, by substantive analysis undertaken by theorists.³⁹ There is no right answer or objective truth that can be known in advance of actual deliberation. More specifically it means that to the extent that a CESL, a new contract law for the Digital Single Market, or similar will have been the result of a legitimate law making process (what exactly this amounts to is itself a controversial question), a fair-price rule contained in it can be entirely legitimate, in the sense of neither unjust nor otherwise illegitimate.

Note: Paper presented at the symposium 'Towards a Role for Price Justice in Contemporary Contract Law', held 5-6 June 2014 at the Università Cattolica del Sacro Cuore in Milan.

37 The question whether contract law could also be legitimately made by judges cannot be fully addressed here. The short answer is that although the standard for evaluating legitimacy should be the same (democratic) standard this does not mean that contract law in civil law countries is necessarily more legitimate than in common law jurisdictions. See further M.W. Hesselink, 'Democratic Contract Law' 11 ERCL (2015), 81–126.

38 See Benson, n 21 above.

39 See further, Hesselink, n 37 above.