Searching for Contract (Law) in Europe

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Searching for Contract (Law) in Europe*

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1. Introduction

Shortly after joining the University of Amsterdam's Centre for the Study of European Contract Law in 2011, I learned to explain to outsiders that the 'Contract Law' bit in the Centre's name had to be intended expansively – something akin to 'all the law of patrimonial relations'.[1] While some of the non-contract lawyers in the group may have had plausible reasons to cultivate chagrin about this name and approach,[2] many – and certainly the contract lawyers – among us felt quite comfortable with both. In fact, we can now say, the discrepancy between narrow scope and wide definition gave us all wide margins to pursue very different research lines under one reassuring header.

The thought came to my mind when I was trying to bring some unity to various notes and ideas put together while reading Martijn Hesselink's *Justifying Contract in Europe*.[3] What is the contract law the book is talking about? Is it revealing that the title does not mention law, but starts instead with contract as such? What does the book say about contract law itself, beyond the author's wish 'to move the academic and political debates on European Contract Law beyond acquis positivism, market reductionism, normative intuitionism, private law essentialism and methodological nationalism'?[4]

The exercise is not pure speculation: answering the questions – 'finding contract law' in this sense – has normative implications in the debates the book intends to foster. This is in particular true because Hesselink, all nuances and distancing notwithstanding, seems to believe that justice matters at least within the basic

* Even a small piece is a collective effort; thanks to Mirthe Jiwa, Marija Bartl and Niels Graaf for their helpful input and to the Amsterdam Centre for Transformative Private Law for organizing the symposium for which the contribution has been first conceived. Thanks also to Martijn W. Hesselink for his inspiring scholarly commitment and usual equanimity in engaging with questions and criticism. All errors and misconceptions are mine alone.

1 'The general research theme of our program is European contract law. We understand contract law here in a wide and functional sense, i.e., the law of economic transactions' – see CSECL annual report 2012, with thanks to Chantal Mak for sharing her copy. The definition was usually assumed to exclude family law – in hindsight a somewhat pernicious move – but include property, insolvency and company law, next to, it goes without saying, matters of torts and securitization – not to mention private international law.

2 Which may in fact, to connect to one theme in the book and in this issue, have ironically amounted to a form of hermeneutical injustice.

3 Martijn Hesselink has been Academic Director of CSECL almost throughout the Centre's existence (2006-2019).

4 Martijn W. Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford: Oxford University Press, 2021), 1.

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structure of contract law. Contract law, thus, is burdened with a type of justice labor: if it cannot be plausibly expected to bring about justice, contract law must at least, within its boundaries, be designed in such a way that (to the extent possible) it does not produce injustice. Reversing the argument, the book also seems to suggest[5] that the *really* core content of contract law is made of those rules which are inextricably connected with questions of justice. Hence, finding the core means at the same time identifying both where 'justice labor' needs to take place and where, normatively, public rule-production could stop – where contract law can, in other words, give way to contracts. Properly mapping the reach of justice labor, in turn, helps us understand the forms that such labor can take. Some of these forms – or techniques – may be less palatable to the author of *Justifying Contract in Europe* than the more traditional rules that the book seems to consistently go back to when looking for examples. In line with the above, I will first re-articulate Hesselink's non-definition of (European) contract law, to then reverse-engineer a tentative delimitation of the domain(s) of justice labor and finally to speculate what this labor could look like in terms of contract rules and conclude with some questions for the author.

2 No Definition

What is contract law in Europe? The book comes closest to a definition when it describes contract law by what it does: 'It could be said that all the contract law rules together spell out, in great detail, the nature, degree, scope and modalities of the binding force of contract.'[6]

As Hesselink observes, monist (or liberal perfectionist) contract theories are very keen on marking the boundaries between what is and what is not 'proper' contract law: most often, to be slightly curt, rules that clearly establish reciprocal (default) rights and obligations and are justified on grounds of formal corrective justice and legal certainty are within the scope, while everything else is not.[7] Much of traditional European doctrine is well-aligned with this type of theory, to which continental systems add, as a matter of doctrine, 'defects of consent' – situations in which a corrective is exceptionally warranted because something has gone wrong in the process leading to the agreement. Such exceptions are justified in such a way that they in fact reinforce, rather than undermine, the main rules. Broader deviations – for instance by means of categorical protection – are acknowledged but, like in much of the contract theory Hesselink has in mind, they are often dismissed or relativized as interferences with (or even perversions of) actual contract law. If one, however, does not consider themselves to be bound by this sort of essentialism, the question arises: where are the boundaries of contract law?

5 In contrast with views focusing, *e.g.*, on contract law as private ordering, various strands in *Lex mercatoria* debates and so on.

6 Hesselink, *Justifying Contract in Europe*, 197.

7 More nuanced in the author's version, see Hesselink, *Justifying Contract in Europe*, 57.

In other words, which rules is the framework in *Justifying Contract in Europe* set out to justify?

In contrast to essentialist doctrines and theory, Hesselink claims to adopt 'a very broad and open notion of contract', which is to be intended 'more as a field'.[8] This should, however, not lead readers to the idea that the book endorses a classical view of general contract law, characterized by presumed equality between the parties; rather, this broad take is instrumental to addressing 'the main political questions explicitly'.[9] In other words, the approach allows each political theory to engage with the chosen questions on its own terms, irrespective of the definition of contract each would endorse. This promise is upheld systematically and even radically. In fact, the book is titled *Justifying* Contract *in Europe* – not Justifying Contract *Law* in Europe.

The first couple of chapters are devoted to questions of more traditionally 'constitutional' nature, but from the book's perspective the most constitutional question concerns the binding force of contract (Chapter 5). If we assume that guaranteeing this binding force is a political choice (and not one of, for instance, natural law or basic human rights), then the definition above – contract law is the set of rules around the binding force of contract – is possibly most consistent with the book's approach. In fact, the book discloses one core allegiance, namely adhesion to the foundational view that *contract law is (always) coercive*.[10]

Two chapters (6 and 7) are devoted to substantive matters: weaker party protection and public policy and immorality. One chapter is devoted then to 'optionality' – which could perhaps hint to the previous chapters being, in fact, about non-optionality, *i.e.*, the mandatory elements of contract law. The scope of Chapters 6 and 7 arguably delimits the scope of the contract law the book is really concerned with. Whereas, by the numbers, most of codified contract law rules are traditionally non-mandatory, *Justifying Contract in Europe* implies that these are indeed optional content – they are dispensable.[11] The area of mandatory contract law, hence, seems to enclose the (likely moving) core without which, even in the book's non-essentialist reading, we would be at pains to identify a meaningful

8 Hesselink, *Justifying Contract in Europe*, 57-58.

9 Hesselink, *Justifying Contract in Europe*, 57-58.

10 Hesselink, *Justifying Contract in Europe*, 60. The author quotes Hale's classic 'Coercion and distribution in a supposedly non-coercive state', but we can assume Hesselink to have here in mind a number or contemporary authors in especially US private law theory – especially Seanna Shiffrin and, albeit in the so-called conventionalist camp, Liam Murphy.

11 While the conclusion of Chapter 8 suggests that none of the political philosophies interrogated in the book strongly rejects the idea of non-mandatory rules, none of those philosophies seems to provide any strong reasons why they should be part of contract law as a matter of justice, efficiency, or liberty. The only possible exception to this conclusion concerns choice-theory liberal egalitarians, who may consider a sufficiently broad set of default options a necessary affordance for substantive autonomy. This does not mean that non-mandatory rules, if put in place, are normatively neutral – neither in theory nor in practice, as the later discussion of the so-called *Leitbildfunktion* also exemplifies, but it is not obvious that their absence would be normatively significant. Thanks are due to Mirthe Jiwa for pushing me to clarify this point.

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image of contract law. This gives us a partial answer to some of the questions above: it is indeed telling that the book does not immediately associate contract and contract law, and it is important to identify 'what contract law' the book is talking about – mainly, such contract law is mandatory contract law which is meant to secure (or at least not undermine) justice. But where does this end and stop and what can distinguish its contents? These questions will be very tentatively investigated in the coming two sections.

3 Weaker Party Protection and Justice

Mandatory contract law is often – albeit not exclusively – associated with weaker party protection, a term in itself closely associated with the European contract law debates that Hesselink sees as the book's main target.[12] Problematizing the social mission of private law – starting with the tension between autonomy and solidarity, as it was also sometimes framed (by Hesselink among others) – has been a recurring theme and characterizing feature of his scholarship. Combining these facts, it should perhaps not come as a surprise that a sizeable chapter in *Justifying Contract in Europe* is entitled 'Weaker Party Protection'.

While central to the book's engagement with substantive aspects of contract law, the chapter quite soon reveals a degree of malaise with its own title and terminology: 'how must I understand myself and my interaction with others if the law labels me as weak and presents itself as my protector?'[13] Despite being attributed to one specific line of critique, it is clear that the concern resonates with the author. Indeed, the chapter ends with a call to reframe weaker party protection as 'contractual justice', a move which seems necessary if '[a]t least in cases where the real aim of the rule is – or ought to be – contractual justice, the law may also be doing [protected parties] an epistemic injustice when it fails to call injustices by their name'.[14]

According to Hesselink, actually existing contractual justice includes

> 'not only the contextualized protection of individuals against unfair exploitation, unfair terms and the consequences of a radical change of

12 This is commonly attributed, not only by Hesselink, to the influence exerted by Wieacker, whose *History of Private Law in Europe* was published in English in 1996.

13 Hesselink, *Justifying Contract in Europe*, 281.

14 Hesselink, *Justifying Contract in Europe*, 335. This reframing, we must assume, does not mean that protecting the interests of one of the contracting parties exhausts the problem of justice; in fact, deciding 'what money can buy' on the internal market seems to be a pressing question to Hesselink, who often remarks that an unjust market cannot be a functioning one. In Chapter 7, most attention goes to contractual invalidity, but in contemporary settings we can imagine that concerns of public interest may similarly be addressed by imposing mandatory content upon the parties – think of product design requirements imposed in the context of circular economy plans. While the distinction between immorality and weaker party protection is often not fully clear-cut, adding product requirements to the regulatory techniques further blurs it. Therefore, issues of public morality will not be addressed separately in the rest of the comment.

> circumstances, but also – and especially – the categorical protection of certain groups, such as employees, tenants, consumers and victims of discrimination'.[15]

If taken as a program, implementing justice is a task that would likely unify categorical and individual protection – and bring both, to a large extent, under the umbrella of EU contract law. The book itself can largely be seen as a critique of EU contract law, mainly due to its failure to go beyond a certain version of market-oriented, categorical weaker party protection. In fact, while it is commonplace in the European debate to observe that the EU takes care of categorical protection and Member States remain in charge of individualized protection in general contract law,[16] this clear division of labor is mainly diagnosed with respect to consumer contracts. Harmonization in other social fields is notoriously less far-reaching. *Justifying Contract in Europe* shows little patience with this state of things: 'the consistent limitation in EU law of most of the weaker party protection rules and remedies categorically to consumers seems arbitrary from the perspective of most, if not all, of the political theories we discussed.'[17]

While not unheard of, Hesselink's diagnosis may be slightly unfair to EU law. In fact, several instruments of European law have a direct bearing on contractual relations of the kind that he has in mind. Hesselink acknowledges this to an extent – mentioning anti-discrimination directives – but ignores many interventions, ranging from the Working time directive[18] to the Directive on predictable and transparent working conditions[19] and the much-debated interventions on posting of workers,[20] only to mention some prominent examples in the area of employment law. Of course, there are limits to this – one notable example being tenancy, which, in contrast to mortgage contracts, has remained outside the scope of EU concerns. However, this state of things is not a matter of necessity and may change, with more justice sensitive concerns being taken up by EU rules.

In fact, one alternative way of looking at EU rules is that the Union's role in contractual relations is expanding steadily, if slowly and – in the way one says of certain academic pieces – *organically*. Say that this development would gradually come to achieve very extensive coverage – including *e.g.*, more courageous rules on

15 Hesselink, *Justifying Contract in Europe*, 333.

16 Hannes Rösler, 'Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-Level Private Law', *European Review of Private Law* 18, no. 4 (2010): 729-756.

17 Hesselink, *Justifying Contract in Europe*, 334.

18 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time.

19 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

20 Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, as amended by Directive 2018/957; Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services; Directive (EU) 2020/1057 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012.

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energy contracts, as well as employment, tenancy, vulnerable actors in supply chains or networks[21] and victims of discrimination not currently protected by anti-discrimination law.[22] Would this be in fact enough to address the justice gap in the internal market? What division of labor between EU and national law, and between (general) contract law and other disciplines, would justice then require? Is it, broadly speaking, conceivable to think of a contract law that 'internalizes' all forms of weaker party protection as categorical interventions? Would a 'general part', that is flexible and realistic enough, be always necessary or even possibly sufficient, making special contract laws redundant?

The book seems sceptical about the hypothesis that the desired closure would be achieved without what one could see as 'traditional' rules on, *e.g.*, mistake, change of circumstances or duress. We will see in the next section that this implied image has an impact on the book's engagement with the *operationalization* of justice labor in more specific rules.

4 Techniques

According to Hesselink, weaker party protection or 'contractual justice' – that is, 'justice labor' as applied to the relative position of the contractual parties – can both limit and enhance the binding force of contract, by, *e.g.*, allowing one party to unilaterally get out of the contract, on the one hand, or by establishing strong claims to specific performance on the other hand.[23] The book does not, however, categorize these interventions, but merely lists examples. A tighter analysis would have been helpful in assessing the claim the book makes at a later stage in the chapter, namely – with Shiffrin – that weaker party protection rules are generally immune from charges of paternalism because 'it is the person who is supposedly interfered with, herself, that invokes the doctrine'.[24] Although based on Shiffrin, the passage is one of those in the book where the reader can perceive how the author's own voice and convictions seem to come through as well. It also somewhat relativizes Hesselink's acknowledgement, at the end of the chapter, that the matter of weaker party protection/contractual justice is necessarily one of open contention in pluralist societies.[25] This requires further consideration, which also makes us interrogate *what* counts as rules of contractual justice.

21 Rules of contract law can be spotted in two recent sectoral instruments, namely Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain and Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

22 A proposal in this sense has been pending since 2008. See Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM/2008/0426 final.

23 Hesselink, *Justifying Contract in Europe*, 273.

24 Hesselink, *Justifying Contract in Europe*, 289.

25 Hesselink, *Justifying Contract in Europe*, 334.

Hesselink makes clear that weaker party protection/contractual justice is not limited to consumer law and the by now classical consumer law 'pillars' that he has foregrounded in previous work.[26] Even starting with these very rules, however, forces us to acknowledge that 'justice work' is hardly ever left entirely within the availability of individuals. To name a few examples: mandatory rights of withdrawal[27] are *paid for* by users even when they do not use them; European consumers cannot choose (unless they go for second hand) to save money by buying products which are not covered by mandatory guarantees. Are these forms of protection uncontroversial because one can choose not to action them, even after they have been required to 'purchase' them? But of course, the question can be posed in more radical terms: what about norms of collective autonomy?[28] This is, evidently, in particular a problem when categorical protection, or protection associated with specific contractual form, comes up; when the use of categories then overlaps with ex ante intervention techniques such as mandatory contract content, the risk of tensions is particularly acute. Without such interventions, in fact, attempts to tackle oppression may be vain – but it is unclear whether *Justifying Contract in Europe* would still consider such interventions to fall within the remit of contract law (let alone its core).

Hesselink writes that it is unlikely that the core of private law for justice purposes – and hence, we can imagine, the core of contract law for such purposes – will go back to what is traditionally considered to be at the core of private/contract law doctrine. Yet, when reading, one gets the feeling that this core is what the book is most interested in – not what the book mainly has in mind when talking about mechanisms of contractual justice. This idea is reinforced by – or perhaps explains – the remark about the availability of weaker party protection recalled above.

If we look at contexts which are likely to touch this 'justice core', then a few variations come to mind which are hardly discussed – or even hardly hinted to – in the book:

– mandatory core terms – minimum salary, maximum tariffs/prices/leases, as opposed or in addition to the mentioned mandatory quality requirements, and in particular guarantees on the other hand;
– protection against termination/disconnection/eviction;

26 Martijn W. Hesselink, 'Private Law, Regulation, and Justice', *European Law Journal* 22, no. 5 (2016): 681-695.

27 As established under EU consumer law by the so-called Consumer Rights Directive, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, at Art. 6 ff.

28 I use the term here with the meaning that is attached to it within a certain (and most mainstream in my home country Italy) strand of labor law, to denote a certain contract-based understanding of collective bargaining which is both similar to and a conceptual mirror image of Kahn-Freund's notion of 'collective laissez-faire'. See also, relatively recently, Andrea Iossa, 'Collective Autonomy in the European Union: Theoretical, Comparative and Cross-Border Perspective on the Legal Regulation of Collective Bargaining' (PhD diss., Lund University Open Access, 2017), 85 ff.

- related: protection against penalties/harsh consequences of non-performance;
- limits to change of terms and unilateral discretion;
- securing access to justice, *e.g.*, by avoiding mandatory arbitration or disallowing choice or law or forum clauses;
- protection against terms that may be at odds with the user's fundamental rights, including, *e.g.*, privacy (including of one's home), religion, self-determination, right to be forgotten, etc.[29]

The forbearance rules in the recently adopted Credit Servicers and Credit Purchasers directive are an interesting example of the forms contractual justice arguably takes.[30] These rules require debt collectors and claim buyers to tolerate non-performance on the side of the debtor, up to a certain point. It is obvious that such requirements have direct influence on the contractual position of the debtor, even though it will be for national legislators to do the necessary translation. The working of such rules seems, in principle, very similar to general rules on obligations – such as the common requirement to put the debtor on notice before turning to termination or seriousness thresholds for termination. They could be, as such, seen as a specification of duties of care not unknown, *e.g.*, at the stage of contract conclusion. Do we need these specific rules or could we do with more fine-tuned general standards?

For most of these terms the specification above applies – parties may choose not to exercise the rights or defences the rules entitle them to, but they cannot renounce their application *ex ante*. Are these rules then acceptable, or are they ultimately unjust when the recipients would want to opt out but are unable to do so? When the book mitigates possible criticisms of weaker party protection because they can be renounced, it seems to have in mind classical norms of individual concern – defects of consent, unfair exploitation, contracts with minors and other vulnerable persons – rather than any of the mechanisms quickly recollected here. Such norms may be relatively ecumenical, but, as Hesselink observes, are unlikely to carry the bulk of the justice labor that is required in our hailing societies.

5 Conclusions

This contribution has concentrated on the scope and techniques of – in essence – mandatory contract law, with an emphasis on the scope and technique characterizing contract law's justice labor as concerns the relationship between contracting parties. This selection is not accidental – while *Justifying Contract in Europe* expressly disavows world creation by experts, including its author, the book ultimately provides a strong suggestion that the 'core' of contract law for its purposes (close to Rawlsian understandings) is delineated by the scope of justice requirements, which are almost necessarily non-optional at least for one of the

29 Something which the book hints at but does not really discuss at large.

30 See Arts. 27 and 28, Directive 2021/2167 of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU.

parties (*e.g.*, the party which exploits their counterparty cannot set aside rules on unfair exploitation where existing). The questions of defining contract law, broadly identifying the scope and shape of 'justice' work in contract *and* questioning how closely actually existing contractual justice techniques resemble the book's background image thereof are crucial to the original enterprise of trying to distil what the book itself says about contract law.

The conclusion in this respect is that the book seems to struggle to detach itself from the idea of a 'general part', while however offering little in the way of an explicit engagement with the question of how and which labor should be done where – more than European or national level – the question is how do we decide what should be done by general contract law and what by specific rules? In other words, what is the specific function and added value of 'general' contract law, once we assume most justice labor will likely be done by more specific rules? The book *longs* for a general part, but the author's denial of this state of things deprives us of an opportunity to think why we would need one.[31]

The preliminary conclusion was confirmed by the following section, discussing techniques: the book seems most comfortable with those mechanisms traditionally associated to individualized protection – think of remedies for defects of consent – even though perhaps in a new jacket, such as possibly remedies for unfair exploitation or third-party rights. We have seen, however, that a close look at weaker party protection rules (qua, per the author's plea 'contractual justice') suggests that these traditional rules – of which, given their relatively residual/exceptional character, it is easy to see that they only matter when they are in fact invoked – are but a portion of the array of techniques that one could use. Hesselink is partially aware of this, as he highlights the role of, *e.g.*, guarantees on sold goods. However, this awareness does not translate into consistent engagement with the justifications that can support the kind of justice labor associated with mandatory terms. The reader, who on so many important issues can happily rely on *Justifying Contract in Europe* to provide them with reasons to consider and deploy, will hardly find much intellectual, political or practical guidance on the 'private law that matters' to justice. Are collective agreements still part of contract law? And what about quality requirements, which are ultimately mandatory core terms not dissimilar to guarantees? What is the appropriate scope of forbearance duties in long-term contracts? Searching for contract law in Europe today requires both abstraction and engagement with the concrete design of contractual relations – on this, *Justifying Contract in Europe* may seem at times somewhat vintage. At the same time, by opening up the field and powerfully making a case that in contract law debates everything is fair game – including ultimately the binding force of contract – the book gives us hope that we *can* in fact take up the work that a

31 We can think of some good reasons in fact: in particular, while Micklitz has prominently argued that a general part is incompatible with the highly specialized niches of contemporary EU private law, the same author often asks its audiences (and we have reasons to think this is not just a provocation): is this even law still? Normativity seems the typical area in which general rules will be able to carry more than highly specific adjustments.

sustainable, just contract law requires. While with its sizable volume *Justifying Contract in Europe* takes a toll in return for its insights, nobody could plausibly claim that hope is not worth five hundred pages.