

Articles

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Democratic contract law

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Abstract: This article discusses the normative relationship between contract law and democracy. In particular, it argues that in order to be legitimate contract law needs to have a democratic basis. Private law is not different in this respect from public law. Thus, the first claim made in this article will be that also for contract law a democratic basis is a necessary condition for legitimacy. A fully democratic basis may also be a sufficient condition for a legitimate and just contract law. However, my argument in that regard is more conditional. If all relevant reasons and arguments (including moral arguments), made by people from different corners in society, have had a fair and equal chance of influencing the contract law making process, then the outcome may be hard to challenge on the basis of an external standard, such as justice, morality, tradition, efficiency or private law's purported essential nature. These two claims, if successful, have important implications for contract theory. In particular, they lead to a largely procedural theory of contract law, which is pluralist with regard to contract law's content: arguments based on party autonomy, weaker party protection, corrective justice, economic efficiency, or legal traditions, will have to demonstrate their strength within the democratic debate and cannot claim to represent some essential truth with regard to the nature of contractual obligation. The justice and legitimacy of contract law cannot be determined in advance by theoretical analysis but will have to establish itself within the democratic debate. Private law theorists have no privileged access to the truth of contract law and contractual justice.

Résumé: Cet article contribue au débat sur le rapport entre le droit des contrats et la démocratie. En particulier, il fait valoir qu'afin d'être légitime, le droit des contrats doit avoir un fondement démocratique. Le droit privé n'est pas différent à cet égard du droit public. Ainsi, la première proposition formulée ici est que, pour le droit des contrats, un fondement démocratique est une condition nécessaire de légitimité. Il se peut qu'un fondement pleinement démocratique soit également une condition suffisante pour un droit des contrats légitime et juste.

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Cependant, la position tenue ici à cet égard est plus nuancée. Si tous les raisons et arguments (y compris les arguments d'ordre moral) avancés par des personnes venant de l'ensemble de la société ont pu être pris en considération lors du processus législatif, alors le résultat peut être plus difficile à contester à partir de paramètres externes telles la justice, la moralité, la tradition, l'efficacité ou encore la nature supposée essentielle du droit privé. Cette double proposition, si elle est vérifiée, comporte des implications importantes pour la théorie des contrats. En particulier, elle conduit à une théorisation procéduraliste du droit des contrats, qui reste pluraliste quant au contenu de celui-ci. Ainsi, des arguments tirés de l'autonomie des parties, de la protection des faibles, de la justice corrective, de l'efficacité économique ou des traditions juridiques, devront faire leurs preuves dans le cadre du débat démocratique et ne pourront prétendre représenter une vérité intrinsèque relative à la nature des obligations contractuelles. La justice et la légitimité du droit des contrats ne peuvent être mesurées a priori selon des paramètres théoriques mais devront s'établir à travers le débat démocratique. Les théoriciens du droit privé n'ont aucun accès privilégié à la vérité du droit des droits ou de la justice contractuelle.

Zusammenfassung: Dieser Beitrag diskutiert die normativen Fragen im Verhältnis von Vertragsrecht zu Demokratie. Insbesondere argumentiert er, dass ein Vertragsrecht nur dann legitim sein kann, wenn es sich auf eine demokratische Grundlage stützt. Privatrecht differiert insoweit nicht von öffentlichem Recht. Daraus ergibt sich als erste Schlussfolgerung, dass eine demokratische Basis die erste – notwendige – Bedingung für ein legitimes Vertragsrecht bildet. Eine umfassende demokratische Basis mag auch bereits die hinreichende Bedingung für ein legitimes und gerechtes Vertragsrecht bilden. In dieser zweiten Frage ist meine Argumentation jedoch weniger unbedingt. Wenn alle Begründungen und Argumente (einschließlich moralischer Argumente) aus den verschiedenen gesellschaftlichen Gruppen eine faire und gleiche Chance hatten, im Prozess der Vertragsrechtssetzung gehört zu werden und Einfluss zu nehmen, dann wird das Ergebnis kaum mehr auf der Grundlage eines externen Standards anzuzweifeln sein. Zu diesen zählen etwa Gerechtigkeit, Moral, Tradition, Effizienz sowie ein angenommenes „Wesen“ des Privatrechts. Diese beiden Thesen haben, wenn man ihnen folgt, wichtige Rückwirkungen auf die Vertragsrechtstheorie. Insbesondere ist mit ihnen eine vor allem prozedurale Theorie des Vertragsrechts verbunden, die im Hinblick auf den Inhalt des Vertragsrechts pluralistisch ist: Argumente, die sich auf die Privatautonomie, den Schutz der schwächeren Vertragspartei, Überlegungen ausgleichender Gerechtigkeit, ökonomischer Effizienz oder auf die „Tradition“ stützen, müssen sich

alle im demokratischen Diskussionsprozess beweisen und können nicht (statt dessen) für sich in Anspruch nehmen, im Hinblick auf die Natur schuldrechtlicher Pflichten eine unhinterfragbare, „essentielle“ Wahrheit zu verkörpern. Der Gerechtigkeitsgehalt und die Legitimität von Vertragsrecht kann nicht – gleichsam vorab – bestimmt werden durch theoretische Analyse, sondern ergibt sich allein im demokratischen Diskurs. Privatrechtstheoretiker haben keinen privilegierten Zugang zur „Wahrheit“ von Vertragsrecht und Vertragsrechtsgerechtigkeit.

Introduction

This paper discusses the normative relationship between contract law and democracy. In particular, it argues that in order to be legitimate contract law needs to have a democratic basis. Private law is not different in this respect from public law. Thus, the first claim made in this paper will be that for contract law a democratic basis is also a necessary condition for legitimacy. A fully democratic basis may also be a sufficient condition for a legitimate and just contract law. However, my argument in that regard is more conditional. If all relevant reasons and arguments (including moral and ethical arguments), made by people from different corners in society, have had a fair and equal chance of influencing the contract law making process, then the outcome may be hard to challenge on the basis of an external standard, such as justice, morality, tradition, efficiency or private law's purported essential nature. These two claims, if successful, have important implications for contract theory. In particular, they lead to a largely procedural theory of contract law, which is pluralist with regard to contract law's content: arguments based on party autonomy, weaker party protection, corrective justice, economic efficiency, or legal traditions, will have to demonstrate their strength within the democratic debate and cannot claim to represent some essential truth with regard to the nature of contractual obligation. The justice and legitimacy of contract law cannot be determined in advance by theoretical analysis but will have to establish itself within the democratic debate. Private law theorists have no privileged access to the truth of contract law and contractual justice.

From the perspective of democratic theory, the main claims made in this paper (especially the first one, concerning legitimacy) will come as no surprise. Any democrat believes that the law should be enacted democratically and there seems to be no obvious reason why this should be any different for private law. Still, from the perspective of private law theory, the issue looks quite different. There exist in fact many theories holding that private law is indeed different,

even categorically different, from public law. Several articulated private law and contract law theories are based explicitly on the idea – which is also held implicitly by many contract lawyers – that contract law has a core value or foundational normative principle, be it corrective justice, private autonomy, or promise-keeping, that the democratic legislator should not interfere with. I will call these theories essentialist private law theories because they claim that private law, or the core part of it, has a certain essential nature. Essentialist private law and contract law theories tend to be ahistorical and universalistic. They proclaim some objective truth (usually a moral truth) with regard to the nature of contract or private law and/or human nature. From the perspective of these theories, therefore, a democratic process is not essential for contract law's legitimacy; it may even harm: it may lead to a contract law that is illegitimate or unjust.

Essentialist private law theories are the private law equivalents (or variants or branches) of what Rawls called 'comprehensive doctrines', ie general convictions concerning the value and meaning of life. And the question of what role essentialist private law theories have to play in the political debate, and especially in the reasons and grounds provided by public institutions for their decisions, is quite similar to the question of what place there should be in the public square for arguments based on, for example, religious convictions or secular world views. The answer to that latter question given by certain political liberals (Larmore, Rawls and Nussbaum), pragmatists (Rorty), civic republicans (Pettit), and discourse theorists (Habermas, Forst), is quite similar.¹ Public action, and the public discourses offering justification, should be equally respectful of each citizen's point of view and should therefore not depend on controversial ideas about value and the meaning of life. Only if the state is sufficiently neutral in this sense, is a stable and just society of free and equal citizens possible. For private law this means that the private law maker cannot rely on controversial notions concerning private law's essence. For this reason, essentialist private law theories, which are essentially a-democratic, anti-democratic, or post-democratic theories of private law, are the primary targets of the present essay.

This paper is not the first to question the idea of an autonomous, non-political private law. Legal realism and critical legal studies have long pointed out, as one of their core tenets, that there is no categorical difference between private law and public law, that indeed private law is actually public law, and that even the most

1 There are important differences between these different political theories. However, the overlapping consensus among them concerning public discourse and public reasons suffices for present purposes (ie contract law theory). See further below.

seemingly technical issues of contract law are in fact political.² In underlining the political nature of contract law, this paper is squarely within that critical tradition. Critical legal scholars have further argued that with the collapse of the private/public law divide contract law can no longer be coherent, and that disagreement concerning contract law rules cannot be resolved in a rational fashion. However, this radically subversive claim is unwarranted. The fact that contract law is political by no means implies that it is also incoherent. It just means that it should be democratic.

Although this paper is normative in that it concentrates on contract law as it should be, it is not entirely normative. It does not propose an ideal theory of contract law. Rather, it is reconstructive in that it tries to make normative sense of contract law as it exists here and now, ie in Europe today. Therefore, the paper includes a reality check of the feasibility of a democratic contract law and tentatively addresses the question of how citizens' apathy can be overcome with regard to this subject which is perceived by non-specialists as being particularly technical. However, this paper is also not a political pamphlet or manifesto. Its primary aim is not to propose reform, but rather to contribute to a better understanding of the nature of contractual obligation.

The paper is organised as follows. First, I will address the main characteristics of contract law and will argue that these provide strong arguments for a democratic contract law. Then, I will turn to the existing plurality of reasonable contract theories and will maintain that it constitutes a further reason why contract law should come about through a democratic process. Subsequently, I will maintain that most contract law theories (and certainly most comprehensive political theories) strongly underdetermine even the most general contract law questions, and that the complexity of contract law questions together with the indeterminacy of contract law theories call for judgments that are best made through a process of collective deliberation. Then, I will state the main elements of a democratic contract law theory. Finally, I will briefly consider whether the democratic theory of contract law is sufficiently realistic.

Characteristics of contract law

We all conclude contracts. Therefore, contract law applies to us all. And because contract law applies to us all we should all have a say in determining its content.

² D. Kennedy, 'The political stakes in "Merely technical" issues of contract law' (2002) *European Review of Private Law* 10, 7–28.

It will be useful to elaborate briefly the different ways in which contract law may affect our lives, by distinguishing some of its main characteristics, and to indicate how each of these specific characteristics further underscores the need for a democratic basis.

The law of contract has a number of well-known specific characteristics: contract law is coercive, distributive and generally applicable, it ensures entitlements, provides a standard for interpersonal conduct, facilitates transactions and is only partly optional. These are not necessary or inevitable characteristics or essential elements of any contract law system. Nor are they contract law's only characteristics; others may be relevant as well, depending on the context. Rather, these are some of the main general characteristics of contract law as we know it here and now, ie in Europe (or maybe in the Western world) in the 21st Century. They will have to be addressed by any theory that is meant to explain, justify or criticise our current contract law systems.

There exists some overlap among these characteristics. The degree of overlap depends on the way in which each of them is defined. This, in turn, is determined, in part, by the normative perspective from which the matter is addressed. I will come back to the different normative theories of private law in the next section. For now it suffices to note that, despite the overlaps, it still makes sense, from the perspective of at least some contract theories, including a democratic contract theory, to distinguish between these particular characteristics.

I will now introduce each of these characteristic roles of contract and will indicate why it is difficult to imagine that these familiar aspects of contract law could be justified without a proper democratic basis.

Contract law is generally applicable

Contract law is part of private law. Private law addresses us in our civil capacity of persons. The private law rules of a given society are generally applicable, in principle, to all persons in that society: to natural persons and legal persons, to citizens and non-citizens. In other words, private law shares with other parts of the law the ordinary characteristic of general applicability. Of course, many private law rules have a specific scope, either substantive, personal, spatial or temporal, as a result of which they do not have direct consequences for everyone all the time. Indeed, there are many instances of differentiation in private law. In the area of contract law, for example, some rules apply only when parties have concluded a determinate type of contract (eg sales, rent, medical treatment or commercial agency) or only between certain types of contracting parties, eg between a business and a consumer (B2C) or between two businesses (B2B). However, the fact

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remains that, in principle, each of us could be a consumer or start up a business, rent or buy something et cetera. It is not the case that different groups in society are governed, as far as private law matters (such as property, contract and tort) are concerned, by separate comprehensive regimes. Potentially, the rules of private law affect us all. They are not different in this respect from traffic rules, which will only affect those who go out on the public roads, or rules of criminal law, which will not apply to our actions unless we engage in theft, murder or other crimes.

Contract law is coercive

Contract law is coercive. It forces people to do what they do not (or no longer) want to do.³ A party who fails to comply with her contractual obligation can be ordered, by a court, specifically to comply with its obligation, or to pay damages equivalent to the value of the performance to the plaintiff. In case the defendant fails to comply with a court order to perform her primary contractual obligation to perform the contract, or her secondary obligation to pay damages, the plaintiff will be assisted by public officials in seizing the assets of the defendant with a view to satisfying his claim from the proceeds. Thus, the binding force of a contract is warranted by the State who claims the monopoly for the legitimate exercise of force.⁴

There exists, therefore, an important difference, in this regard, between the voluntary performance of a contract, on the one hand, and the exercise of contract remedies, on the other. Voluntary compliance with an agreement, in principle, is something that directly affects the parties alone. In contrast, the legally binding force of contract involves others (third parties) as well.⁵ In particular, it involves the exercise of State power. If the exercise of force by the State is to be legitimate this raises the question of the conditions under which someone can be coerced into contract performance, or its substitute, ie the payment of damages.

The fact that contract enforcement may involve the use of force by the State against its citizens (and against certain non-citizens as well), and the fact that contract law is the law that spells out the conditions under which, the extent to which, and the ways in which agreements between private parties will be publicly

3 R.L. Hale, 'Coercion and distribution in a supposedly non-coercive state' (1923) *Political Science Quarterly* 38 (3), 470–494.

4 M. Weber, *Economy and society* (G. Roth and C. Wittich, eds) (Berkeley: University of California Press, 1921/1978).

5 S.V. Shiffrin, 'Paternalism, unconscionability doctrine, and accommodation' (2000) *Philosophy & Public Affairs* 29, 205–250.

enforced, requires that citizens should have a say in determining the legally binding force of contract. It is for the citizens to decide collectively on the conditions under which State officials are allowed to use force against its citizens and others. Therefore, contract law, no less than eg criminal or administrative law, requires a democratic basis.

Contract law is distributive

Contract law is distributive in that it contributes to determining how much each of us has in terms of wealth, opportunities, and reasons for self-respect. Contract law systems that protect the expectation interest change the pre-existing distribution of resources.⁶ We have no natural right to obtain expectation damages or specific performance when the other party refuses to perform its side of the deal. Therefore, the enforcement of contracts that have not yet been performed ('executory contracts') ensures that parties come to have something that they did not have before.⁷

The idea that with the contract I transfer to you the freedom to choose not to do whatever it is that I am contractually undertaking to do⁸, begs the question. The same goes for the idea that the existence of a moral duty to keep promises also implies (or creates) a legal entitlement.⁹ Also the harm principle cannot explain the protection of contractual expectations, since disappointment in an expectation does not amount to a loss, except if we have already decided that the promisee is entitled to the performance.¹⁰

It is a mistake to think that only a contract law that protects certain groups of weaker parties is distributive. The choice not to protect weaker parties through contract law is equally distributive. Any rule choice concerning contract law is likely to make certain groups in society better off than others.¹¹ There is no default – no distributively neutral baseline.¹²

6 L.L. Fuller and W.R. Perdue Jr, 'The reliance interest in contract damages' (1936–1937) *Yale Law Journal* 46, 52–96, 373–420.

7 P.S. Atiyah, *Essays on contract* (Oxford: Clarendon Press, 1986), 29.

8 I. Kant, *The metaphysics of morals* (M. Gregor [ed], Cambridge: Cambridge University Press, 1797/1996), 6:272.

9 Ch. Fried, *Contract as promise: A theory of contractual obligation* (Cambridge, Massachusetts: Harvard University Press, 1981).

10 L.B. Murphy, 'The Practice of Promise and Contract' in: *Philosophical Foundations of Contract Law* (G. Klass, G. Letsas, & P. Saprai eds) (Oxford: Oxford University Press, 2014). For the harm principles, see J.S. Mill, *On liberty* (London: Penguin Books, 1859/1974).

11 A.T. Kronman, 'Contract law and distributive justice' (1980) 89 *Yale Law Journal*, 472.

12 See Murphy, n 10 above.

This raises the questions of how to determine what amounts to a fair distribution, which contribution contract law should make to reaching such a state of affairs, and who should be involved in answering those questions for a given society.¹³ Decisions about the distribution of a society's (potential) resources are political decisions that should be taken through a robust democratic procedure. Therefore, contract law's distributive nature constitutes a further reason why it should be democratic.

At this point, it might be objected that disputes about a contract should not be treated as windfall opportunities for re-distribution, and that we should respect the property rights and similar entitlements that people have. However, this objection begs the question in the same way as we saw before: how are we to know what our entitlements are? Even if we assume that we are morally entitled to hold individual property to be secured by the State, either as part of our basic liberties¹⁴ or as the historical core of private autonomy¹⁵ then we will still have to determine how much you are entitled to have and how much should (at least) be mine.

Contract law ensures entitlements

Contractual rights and their protection are not just a good idea. A contractual claim is not meant merely to provide a judge in a contract dispute with a good argument that could be defeated by other, better arguments. Contract law – broader: private law – determines what belongs to whom: not merely what should belong to whom, but what actually is mine and what is yours ('mine and thine').¹⁶ This is what Dworkin meant by his famous slogan of 'taking rights seriously'.¹⁷

¹³ There is a further distributive dimension to contract law in that the involvement of judges, bailiffs and other public officials in the enforcement of contracts – the third party's we saw above – also leads to expenses, which will have to be covered from public resources. This adds the distributive question of how to spend tax payer's money (Ch. Fried, 'The Ambitions of Contract as Promise Thirty Years On', in: *Philosophical Foundations of Contract Law* (G. Klass, G. Letsas, & P. Saprai eds) (Oxford: Oxford University Press, 2014)): the carrot of expectation damages may lead to more contract litigation than mere reliance damages.

¹⁴ J. Rawls, *A theory of justice* (revised edition, Cambridge, Massachusetts: Belknap Press, 1971/1999).

¹⁵ J. Habermas, *Between facts and norms: Contributions to a discourse theory of law and democracy* (Trans William Rehg Cambridge: Polity Press, 1992/1996).

¹⁶ Kant, n 8 above, 37 [6:245].

¹⁷ R. Dworkin, *Taking rights seriously* (Cambridge, Massachusetts: Harvard University Press, 1977).

Contract law secures entitlements in that it creates and protects claims and defences in persons vis-à-vis other persons. The absence of secure entitlements (ie the presence of legal uncertainty) may lead to instability and ultimately a 'condition of war of everyone against everyone'.¹⁸

The entitlement-creating aspect of contract law overlaps, in part, with the distributive nature of contract law, while the entitlement-protecting aspect is closely related to the coercive nature of contract law, which were both discussed above. Still, it makes sense to discuss the relationship between contract law and entitlement as a separate characteristic as well, because even the absence of a fair distribution or of enforcement does not preclude the presence of entitlements. The fact that someone is extremely wealthy may justify legitimate claims from the tax authorities against her for a certain sum, but it does not mean per se that she no longer is (or never was) the owner of certain specific things. Nor does it preclude her from having valid and legitimate contractual claims against other persons in society, even if these others are very poor. As to coercion, contractual rights may well (and usually do) exist well before (and even in the total absence of) their enforcement. Thus, they can be placed, as claims, on a business's balance sheet, their value may be subject to taxation, and the spontaneous performance by the promisor does not amount to an undue payment.

Legal entitlements are what distinguishes civil law from natural law. In the civil state, unlike in the 'state of nature', it is the law (in particular 'patrimonial law') that determines what belongs to whom.¹⁹ There exist no pre-institutional entitlements – at least none that under conditions of post-metaphysical thinking we can be confident to have direct knowledge of – and therefore no natural private rights.²⁰

Private entitlements are objective and public in the sense that they exist independently of what the parties believe them to be (although reliance protection may affect entitlement), and that they exist (and would be proclaimed to exist) under the legitimate laws of a given society. In other words, in modern societies subjective rights depend on objective law.

The objective law determining the limits between the subjective rights of individuals, in order to be legitimate, must be acceptable to everyone affected by it, ie all members of society. We can re-formulate this notion by stressing that private autonomy and public autonomy are two sides of the same coin, mutually presupposing each other, and that citizens mutually grant each other equal

18 Th. Hobbes, *Leviathan* (London: Penguin Books, 1651/1985), ch 14.

19 Kant, n 8 above, 44 [6:256].

20 Rawls, n 14 above; Habermas, n 15 above; L. Murphy and Th. Nagel, *The myth of ownership: Taxes and justice* (Oxford: Oxford University Press, 2002).

private rights,²¹ or that the implementation of the principles of justice (which include a right to property) is a matter for the democratic legislator to undertake, and that, as a result of the 'burdens of judgment', different, though equally just, basic structures of society are possible.²² Either way, in order to determine what exactly should be our rights and entitlements, and their limits, we need a democratic procedure.

Contract law provides a standard for interpersonal conduct

Private law provides a public standard for interpersonal conduct. Private law rules tell citizens how they should behave vis-à-vis each other and what kind of conduct they are entitled to expect from each other in their private dealings. These rules, therefore, can be regarded as the parameters of permissible conduct in the market-place,²³ as rules of just conduct²⁴ or even as the civil constitution.²⁵

Thus, for example, the Common European Sales Law (CESL) or a similar text could provide a normative standard for the just conduct of private parties on the European Union's Internal Market.²⁶ As an example, see Article 2 CESL which requires each party to act in accordance with 'good faith and fair dealing', defined in the proposed regulation as 'a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question'.²⁷

Inevitably, the question of what conduct private parties to contracts are entitled to expect from each other depends on the consideration of moral rights and principles, choices affecting individual and common goods, and compro-

21 Habermas, n 15 above, 408.

22 Rawls, n 14 above. For these points of view, see further below.

23 Atiyah, n 7 above, 53.

24 F.A. Hayek, *Law, legislation and liberty; A new statement of the liberal principles of justice and political economy* (London and New York: Routledge, 1973/2003), vol 2 *The mirage of social justice*, 123.

25 J. Carbonnier, 'Le code civil', in P. Nora (ed), *Les lieux de mémoire*, vol II (Paris: Gallimard, 1986) 293–315, 309.

26 Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final. The new Commission announced that the proposal will be modified with a focus on the 'Digital Single Market'. See *Commission Work Programme 2015: A New Start*, Strasbourg, 16 December 2014 COM(2014) 910 final, Annex 2, no 60.

27 In case 489/07, *Pia Messner v Firma Stefan Krüger* [2009] ECR I-07315, the Court of Justice of the European Union referred to the principle of good faith as one of 'the principles of civil law'.

mises with regard to competing private and collective interests. Such choices are best made by the polity collectively.

Contract law facilitates transactions

Contract law assists people in making credible commitments.²⁸ Thus, contract law facilitates transactions. Even if it is true that in healthy business relationships, business solutions are preferred to legal solutions, and contracts are invoked only when the relationship is already breaking down, as a last resort,²⁹ then still much of the strategic action by business partners takes place in the shadow of the law, ie with an awareness in both parties that the contractual stipulations could be enforced. Moreover, many contracts are not relational at all. It is therefore likely that without the legal binding force of contract there would be fewer transactions. And it seems even plausible that without the legal enforceability of contracts an economy of the kind that we are familiar with could not function properly.³⁰

If contract law facilitates transactions the question arises of what contracts should be facilitated by contract law. Should courts simply enforce any contract presented to them or should there be limits? If so, should the proper limits be assessed exclusively in economic terms – eg by denying enforceability merely to contracts that do not correspond to both parties' actual (ex ante) preferences or have negative externalities –, or should there be additional limits with a view to (other) individual or collective interests and values than economic efficiency and social welfare? This raises the further question of who should decide on these 'limits to freedom of contract'. Facilitating transactions clearly is a social goal. How important this goal is, relative to the other individual and collective aims and aspirations, is something that is best decided by society as a whole, through a democratic procedure.

Contract law is only partly optional

The applicability of contract law rules is partly at the disposal of the contracting parties, on different levels. First, we are not obliged, in principle, to conclude certain types of contracts, or contracts with certain kinds of parties, or indeed any

²⁸ R. Cooter and T. Ulen, *Law & economics*, 6ed (Boston etc: Addison-Wesley, 2012), 286.

²⁹ S. Macaulay, 'Non-contractual relations in business: A preliminary study' (1963) *American Sociological Review* 28, 1–19.

³⁰ A. Smith, *An inquiry into the nature and causes of the wealth of nations* (1776), 910.

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contracts at all: there is 'freedom from contract'. Secondly, if we conclude a contract, many of the rules that otherwise would become applicable could be set aside by the contracting parties, especially in commercial contracts, if other terms than those provided by the law suit the parties better. These are non-mandatory (or 'suppletive' or 'default') rules. Thirdly, in cross-border contracts, between parties from different jurisdictions, the parties may choose to set the applicable law aside, entirely or in part, by making a 'choice of law' for another legal system. Finally, the parties can decide to opt out of the State's judicial system altogether and choose to submit their disputes exclusively to arbitration or other types of alternative dispute resolution.

If certain contract law rules can be set aside by the parties anyway, does it make sense then to count these nevertheless as law for the purposes of democratic theory? Should not at least the non-mandatory or 'default' rules of contract law be exempted from the requirement of a democratic basis? Although this argument may seem plausible at first sight, in fact the answer to the question should be negative. The reason is that the idea that non-mandatory rules are categorically different from mandatory rules – and perhaps should not even count as law – is mistaken. First, because whenever these rules have not been set aside by the parties they are as coercive and distributive for the parties as the rules that the parties could not have set aside in the first place. Secondly, because a democratic deliberation and decision is still required for determining which contract law rules should and which should not be mandatory. Thirdly, because the difference between mandatory and non-mandatory law is not as clear-cut as one might think. In many contexts, default rules are 'de facto mandatory' or 'sticky' in the sense that it is very difficult for the parties to set them aside effectively. For example, in several jurisdictions the unfairness of standard contract terms depends, in part, on how much the terms deviate in substance from the legal rule the term is meant to set aside (*Leitbildfunktion*). In other words, an attempt to opt out of a certain rule through a standardised term may prove to be unsuccessful because the term is caught in the net of an open-ended general unfairness clause. Finally, for a party who had no real choice in any substantive sense with regard to the contract terms – because these were dictated by the other party –, the fact that a contract law provision could have been set aside by the contract, hardly constitutes a good reason for the legitimacy of a rule that was not adopted through a democratic process, but merely was indicated eg by experts as being the one most likely to increase social welfare.

As a matter of fact, the mere fact that the applicability of a provision of contract law could have been avoided by the parties, by setting it aside (eg through a limitation clause) or by making a choice of law, does not remove the

need for democratic legitimacy, even vis-à-vis the party who agreed to the contract with truly substantive freedom (in the sense of having a broad range of valuable alternative options) or who even dictated the terms herself. If this argument was convincing it would defeat the democratic theory of contract law in a much more radical way. For, as said, the parties were free not to conclude a contract in the first place. Given the freedom from contract, the argument would go, contract law is not coercive after all. Indeed, it would defeat democratic theories much more generally. For, if that argument holds true then criminal law is not coercive either, since nobody is obliged to steal or commit other crimes.

Multifaceted contract law

In sum, contract law plays a variety of roles in our society. Each of these typical roles is reflected in specific familiar characteristics of contract law. And for each characteristic it is difficult to imagine that it could be justified without a proper democratic basis.

Moreover, if a law of contract justifiably has these quite diverse characteristics at the same time then a theory explaining and justifying such a contract law (ie our contract law) should do justice to all these characteristic at the same time. However, most existing contract law theories emphasise, explain and justify at best a few (often only one) of these characteristics. In contrast, a theory which properly addresses the different roles that contract law plays and should play in our society, inevitably has to combine a range of quite diverse reasons. It is submitted that such a theory must be a democratic theory of contract law.

The plurality of contract law theories

There exists a broad variety of different theories explaining and justifying the binding force of contract, and contract law more generally. These include libertarian, utilitarian, liberal-egalitarian, communitarian, republican and discourse theories of contract law. While there exists some agreement among several of these theories on various points, there are also major differences which sometimes go to the core of these theories. At the same time, however, none of these understandings of contract law can be said, in a general sense, to be wholly unreasonable or even invalid.

I will briefly discuss each of these theories. It will become apparent from my summary discussion that each of these theories has its strengths and weaknesses. However, exactly what the main strengths and weaknesses are, and what their

relative importance is, remains a matter for debate. Disagreement among reasonable contract law theories is not, at least not entirely, a matter of misunderstanding that could be clarified through proper theoretical analysis. There exists no 'true' nature of contractual obligation or a just contract law that could be determined in the abstract. Rather, the legally binding force of contract (its modalities, its limits) is something that we can determine only together, as free and equal citizens, by actually giving ourselves a law of contract through an inclusive democratic debate.

Libertarian theories

Libertarian (or neoliberal or ordoliberal) theories emphasise the entitlement securing aspect of contract. Indeed, they tend to reduce the nature of contract law to this role by claiming that private law is a matter exclusively of corrective (or rectificatory) justice, formally understood.³¹ This means that distributive and other social justice concerns should be excluded, and that the determination of what belongs to whom should take place without any substantive consideration. In other words, they reject what is called in German the *Materialisierung* of (ie a more substantive approach to) private law.

While the greatest strength of libertarian theories is indeed the fact that they secure entitlement, an important weakness is that they fail to explain how we are to determine entitlements, ie how we are to know who is entitled to what. All libertarian accounts of pre-institutional entitlement (Lockean original occupation, Nozickian self-ownership) have proven to be either explicitly based on natural law or tautological. To this problem of explaining ownership an additional problem is added for contract law, in explaining why the promisee is entitled to the protection of the expectation interest. If we do not have any natural right to expectation damages or specific performance, how is the State to define and effectuate contractual entitlement? How to get from transfer,³² consent,³³ or promise³⁴ to expectation remedies? In sum, libertarian attempts at separating corrective from distributive justice have failed: there are no pre-institutional entitlements.

The main contribution of libertarian accounts of contract law (and of private law more generally) is that they underline that determining how much everyone

³¹ See eg R. Nozick, *Anarchy, state and utopia* (Oxford: Blackwell Publishing, 1974/2006), 152.

³² Ibid.

³³ R.E. Barnett, 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269–321.

³⁴ Fried, n 9 above.

should have is not the only concern of justice, but also the proper determination of what belongs to whom. There is injustice not only if some have too much while others have too little, but also if it is not (or insufficiently) secured that certain specific things belong to a specific person, even though she is too rich, and not to someone else, in spite of her being too poor. If a destitute person buys something (for a normal price, say the market price) from a millionaire, it is not the case that, for that reason, the buyer does not have to pay the price. Contract disputes should indeed not be used as a 'windfall opportunity'³⁵ for re-distribution in this sense.³⁶ On the other hand, however, it is also not true that the promisee should be entitled to the expectation interest, totally independent of whether the other was rich or poor. Social weaknesses may lead to unequal bargaining and to relational weakness. There is no reason why the State should lend its support to the exploitation by one party of its stronger position in a way that it could not do had both parties enjoyed fair equal bargaining power. The State has no task in supporting unfair exploitation. Freedom and equality in contracting should be understood substantively.³⁷ It is unjust for the law to recognise as a contractual entitlement something that was obtained through unfair exploitation. Corrective justice should be understood, not formally, but in a substantive sense.

This means that the libertarian contract law theories of formal corrective justice should be regarded as either wholly inadequate, because they cannot explain contemporary contract law, or as a political programme for a *radical* reform of contract law. (Or indeed as a proposal for a redefinition of 'contract law', labelling all the weaker party protection rules as something different from private law (ie as public law), but frankly that would be a rather silly exercise, since that would change the world of contracting only in a nominal sense).

35 A. Ripstein, 'Private order and public justice: Kant and Rawls' (2006) *Virginia Law Review* 92 (7), 1391–1438, 1398.

36 This is not to deny that contract law has distributive effects and that different contract laws will lead to different distributions, which it clearly does (see above). The point is merely that contract law is not the appropriate place to pursue re-distributive aims (see D. Kennedy, 'Distributive and paternalist motives in contract and tort law, with special reference to compulsory terms and unequal bargaining power' (1982) *Maryland Law Review* 41, 563–658). To put it simply, contract law should not make matters worse, but it is hardly the right instrument to make them significantly better. It should compensate, where possible, for the unjust impact that an unjust distribution might have on a contractual relationship, but it should not overcompensate, ie not go beyond the impact of the unjust distribution on the contractual relationship.

37 See *Bundesverfassungsgericht*, 19 October 1993, BVerfGE 89, 214 (Bürgerschaft case).

Utilitarian theories

Utilitarian contract law theories include most of the economic theories of contract law, based on cost-benefit analysis and other. The strength of the economic analysis of law in general, and of contract law specifically, is that it points our attention to the costs of justice, including the costs of contractual justice. We should not waste resources and, other things equal, we have every reason to opt for the least costly means to achieve our ends, including the end of contractual justice. However, this does not mean that efficiency and cutting costs themselves should become our principal (or even exclusive) individual and collective aims in life. We should not confuse means with ends. Utilitarians will argue that public ends should be determined by aggregating individual subjective preferences, as a way of measuring overall welfare, but that idea, sympathetic as it may seem, leads to several problems, both practical and moral (eg unstable preferences, external preferences, illegitimate preferences, adaptive preferences, interpersonal comparisons).

The main weakness of utilitarian theories of private law, including contract law, relevant here, however, is that they cannot explain, and do not sufficiently support, entitlement. Utilitarian theories are, as all consequentialist theories, intrinsically forward-looking. For utilitarians, claims based on what happened in the past are relevant only to the extent that they can do some good for the future. This means that a claim based on legal entitlement, eg a claim for the specific performance of a contractual obligation, is convincing only to the extent that the net overall balance of its consequences is positive. If the balance is negative the claim may be defeated by the consideration that breach is actually more efficient. There have been various attempts at circumventing or mitigating this result, eg rule-utilitarian or indirect utilitarian approaches, but these all have failed to solve the fundamental problems or actually have made them worse by endorsing the right solutions for the wrong reason.³⁸

Liberal-egalitarian theories

The main strength of liberal-egalitarian theories of contract law is that they offer a convincing account of the relationship between the entitlement and the distributive dimensions of private law: there exist no pre-institutional entitlements.³⁹

38 W. Kymlicka, *Contemporary political philosophy: An introduction* (2ed, Oxford: Oxford University Press, 2002), 32.

39 Rawls, n 14 above; Murphy and Nagel, n 20 above; R. Dworkin, *Sovereign virtue: The theory and practice of equality* (Cambridge, Massachusetts: Harvard University Press, 2000).

The main weakness of some liberal-egalitarian theories, when it comes to contract law, is that they do not specifically address contract law at all. Dworkin, for example, simply takes the existence of the common law for granted and then argues that we should adopt the internal perspective to interpret it in its morally best possible light.⁴⁰

Perfectionist liberal theories,⁴¹ on the other hand, have been applied to contract law and do yield more distinct outcomes. They emphasise the facilitating function of contract law: a law offering a diverse menu of contract types makes it possible for us to shape our lives according to our own conception of the good and thus makes self-authorship possible.⁴² However, they share the problem with communitarian theories, which are also perfectionist, that the State, whose exercise of coercive force should be justifiable in neutral terms,⁴³ without establishing, officially endorsing or privileging one particular conception of the good life, will not treat its citizens with equal concern and respect, if contract law is based on (and can only be justified in terms of) the idea that self-determination is what makes a life worth living.⁴⁴

Rawls proposed 'justice as fairness' as a suitable candidate for being adopted as (part of) the political principles of justice that the 'basic structure of society' (ie the main institutions responsible for the distribution of what we (might) value) should comply with.⁴⁵ However, this seems to leave most contract law questions open, since a wide range of different contract laws may well be compatible with

40 R. Dworkin, *Law's empire* (Cambridge, Massachusetts: Harvard University Press, 1986). Waldron's argument against judicial review and for democracy (J. Waldron, 'The core of the case against judicial review', 114 *Yale Law Journal* (2006), 1346–1406), it seems, could also be directed against the common law, and could, therefore, underscore a democratic theory of contract law. However, Waldron's theory of democracy, as most liberal theories, seems too vote-centred (majoritarian) to provide sufficient legitimacy.

41 I. Berlin, *Liberty* (H. Hardy, ed) (Oxford: Oxford University Press, 2002); J. Raz, *The morality of freedom* (Oxford: Clarendon Press, 1986).

42 H. Dagan, 'Autonomy, pluralism, and contract theory' (2012) *Law and Contemporary Problems* 76 (2), 19–38.

43 Ch. Larmore, *The morals of modernity* (Cambridge: Cambridge University Press, 1996).

44 Dagan's version of perfectionism is explicitly moderate (see eg Dagan, n 37 above). However, it may still be problematic for people who are terrified by menus and wish to avoid them at all costs, live their lives just going with the flow, do their best to abide by God's will, or try to follow some other dogma or guru (without regarding these ways of life as the result of their own choice). To the extent that contract law is enacted in the name of the value of self-authorship or is elaborated in a way that can be justified only in its terms (which should be distinguished from a contract law that is merely more favourable to autonomous than other ways of life) it risks to treat citizens that do not regard their lives as self-authored as second-rate citizens.

45 Rawls, n 14 above, 6.

the two principles of justice. These may include not only most currently existing contract laws but also, for example, a contract law system that would protect only the reliance interest. Given the 'burdens of judgment' and Rawls' emphasis on constitutional democracy, a Rawlsian conception of private law, it seems, would be predominantly a democratic one (Rawls 2005).⁴⁶

Communitarian theories

Neither contract law nor contract theory are something new. On the contrary, articulate and elaborate systems of contract law and learned attempts at systematising it have been around for many centuries. The strength of communitarian theories is that they point our attention to the wealth of experience (and tested reasons) contained in our contract law traditions. It would be insane to try to design a totally new contract law from scratch, on a tabula rasa. Moreover, this would also be impossible since, rather than unencumbered selves we all are already situated,⁴⁷ influenced by our own respective legal traditions,⁴⁸ especially of course those of us with an education in law.

However, theories of contract law formulated in terms of legal culture, legal tradition or *Volksgeist*,⁴⁹ such as neo-pandectist, neo-romantic and other contemporary communitarian theories of private law, cannot tell us *how much* tradition should count, *which* elements of our tradition we should retain and which other aspects we should reject. Clearly, we cannot receive the *ius commune* or follow the precedents of the common law *in toto*. Surely, we need to critically reflect on what to retain and what to let go. Once we start doing that we will realise that opinions will differ on these matters. Moreover, it may also occur – eg with regard to the Europeanisation of contract law – that different persons will refer to different identities (national or European) and traditions (civil law or common law). This raises the further question of whether and how to choose among these different

46 J. Rawls, *Political liberalism* (expanded edition, New York: Columbia University Press, 1993/2005). Indeed, in the four-stage sequence for the application of the principles of justice, Rawls distinguishes quite sharply between legislation and the application of the law, in a way that seems to exclude the common law as a way of law making acceptable for a just society. See further below.

47 M.J. Sandel, *Liberalism and the limits of justice* (2ed, Cambridge: Cambridge University Press, 1982/1998).

48 P. Legrand, 'European legal systems are not converging' (1996) *International and Comparative Law Quarterly* 45, 52–81.

49 F.C. von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg: Mohr & Zimmer, 1814).

identities and traditions adhered to on the same territory. Such disagreements, which by no means have to be inspired by intolerance – they may be entirely reasonable –, cannot be resolved when each side keeps referring to its own identity as a core argument. So, culturists and traditionalists cannot explain and justify the general applicability of the law: why should my contract be governed by a law which expresses your identity or tradition?

Republican theories

Liberals and libertarians distinguish between freedom as non-interference (negative liberty) and freedom as self-determination (positive liberty).⁵⁰ Civic republicans adhere to a concept of freedom that is distinct from both these notions, ie freedom as non-domination. In their view, interference by the state with our affairs, even when coercive, is legitimate as long as it does not amount to domination.⁵¹ Thus, contract enforcement, although coercive, is entirely legitimate, in principle, because it does not amount (at least not normally) to domination. If, on the other hand, the contract came about in a situation of domination, then it would be illegitimate for the State to enforce it. This republican account of contract law, therefore, explains rather well the substantive understanding (*Materialisierung*) of contractual freedom and equality and of corrective justice that characterises contemporary contract law.

The downside of certain republican theories, especially the more neoclassical ones, is that they tend not to be sufficiently neutral, because they require us to display civic virtues, to contribute to the common good of the polity (*res publica*), or they expect from us such an active citizenship as may have been feasible in ancient Rome and Athens, but today would be so engaging and time consuming that it would undermine our private lives. However, other contemporary versions of republicanism are less perfectionist and communitarian, and could support deliberative democratic contract law.⁵²

50 B. Constant, 'De la liberté des anciens comparée à celle des modernes', in *Œuvres politiques*, vol 2 (Paris: Mille et une nuits, 1874/2010); Berlin, n 41 above, 166.

51 P. Pettit, *Republicanism: A theory of freedom and government* (Oxford: Oxford University Press, 1997).

52 Ibid. See further below.

Discourse theory

The strongest point in Habermas' reconstructive theory of law is that it regards private autonomy and public autonomy as co-original, mutually presupposing each other and as mutually limitative of each other.⁵³ As a result, the theory offers a (reconstructive) account of all the main characteristics of contract law and the main requirement for its legitimacy that we saw: the facts that (and the way in which) contract law is coercive, distributive and generally applicable, ensures entitlements, provides standards for interpersonal conduct, facilitates transactions and is partly optional, are all legitimate to the extent that they could be endorsed through an inclusive deliberative process among free and equal citizens.

It is usually regarded as the theory's weakest point that it lacks any concrete substance. This is, of course, a direct consequence of the fact that the theory is both entirely procedural and performative, which means that the validity of substantive claims will always have to establish itself in a debate among all those who could be affected by its outcome. This means that according to the discourse theory a rational debate from which no one was excluded and where all arguments were properly considered is not only a necessary condition, but also a sufficient condition for legitimate contract law; beyond an inclusive democratic debate of such a nature that the addressees of the contract law norms can regard themselves also as their authors, there is no room for a separate standard of distributive or corrective justice, or private autonomy.⁵⁴

Private law autarchy?

It is sometimes argued (and often simply assumed) that private law constitutes (or is based on) a value system of its own. Usually, in such arguments party autonomy or corrective justice are proposed as private law's core values, but more complex value systems have also been suggested as being immanent to private law.

We must distinguish such autarchic theories from the political theories that are their cousins. As we saw, formal corrective justice is defended as a political theory (ie as a theory of a formal understanding of entitlements, of non-distribution through private law and of the illegitimacy of coercive enforcement of claims

⁵³ Habermas, n 15 above.

⁵⁴ I will further elaborate on that idea below.

beyond formal entitlements). We also saw that party autonomy is defended as a perfectionist political principle, according to which self-authorship is the supreme value that should be supported by the State. However, what we are addressing presently are theories according to which private law has nothing to do with political theory and social justice, which is said to relate exclusively to public law.⁵⁵ These, in other words, are theories claiming the existence of a strong (indeed categorical) private/public divide.

Clearly, such autarchic theories of private law are entirely inadequate as an explanation of any of the characteristics of contract law that we saw above. The entitlement ensuring, coercive, distributive, facilitative and partially optional nature of contract law and its role as a public standard for interpersonal conduct cannot be explained by such separatist theories. A theory that justifies action to be undertaken by political institutions necessarily has to be a *political* theory, and a theory that claims the existence of legal entitlements that have to be respected by all, necessarily has to be a theory of *social* justice. The idea of an autonomous, self-sufficient private law is therefore a contradiction in terms.

The notion of a private law freed from social justice and political principles is structurally quite similar to the arguments that were raised against the horizontal effect of fundamental rights. In either case the argument turns out to be definitional: it relies on a definition of private law that is itself in need of a normative argument for its acceptance. Originally, fundamental rights were conceived of as defences (and later also as claims) against the State and its authorities. However, when it became clear, in the course of the 20th Century, that the private interests protected by these rights are as much (or even more) at risk of being undermined by private conduct as by State action, the question arose whether fundamental rights should not also protect individuals against other individuals and businesses. The question arose, in other words, whether fundamental rights should not, in addition to their vertical effects, also have certain horizontal effects. A further question, in case horizontal effect were accepted, was whether this horizontal effect should be direct or indirect. The difference between these two effects is that in the former case a private party can invoke a constitutional provision against another private party, while in the latter case she can only invoke private law provisions, in particular the 'general clauses' in the civil code that refer to 'good morals' and 'good faith and fair dealing', which are relatively open-ended concepts and therefore can easily be interpreted in the light of the values and principles expressed in constitutional

55 E.J. Weinrib, *The idea of private law* (Cambridge, Massachusetts: Harvard University Press, 1995); J. Gordley, *Foundations of private law: Property, tort, contract, unjust enrichment* (Oxford: Oxford University Press, 2006).

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rights. In the second half of the 20th Century, the horizontal effect of fundamental rights gradually became accepted in many European jurisdictions, usually in the form of indirect effect.⁵⁶ Thus, the idea that private law is based on an autonomous value system, which is distinct from constitutional values and principles, was rejected or abandoned in most countries. All the law, including all of private law, is subject to the constitution. Just like the civil code, private law statutes, and their application by the courts, are subject to judicial review for unconstitutionality, including for the violation of constitutionally protected rights, so too are private law theories subject to philosophical review under political theories. And just like private law may be regarded as applied constitutional law,⁵⁷ so too is contract law theory best seen as applied political theory.

Reasonable contract law pluralism

In conclusion, there exists a broad variety of different contract law theories. Each of these offer explanations and justifications for the existing law of contract or provide articulate arguments for reform. As we just saw (albeit in summary form), each theory is stronger at explaining and justifying certain aspects of contract law, but weaker with regard to other characteristics that nevertheless appear to be important to the world of contract law, while none of them can be rejected entirely as being invalid. Moreover, although there are many instances of overlapping consensus among these theories, they also frequently contradict each other, often on important points. Still, each of these theories (and others) seem to be perfectly reasonable (or at least not unreasonable).

Contract law and democracy

If a society wants to adopt a set or system of contract law rules, or evaluate or reform its existing contract law, and wants to do so in a rational way, then how should it determine which 'view of the cathedral' should prevail?⁵⁸ How to make

⁵⁶ The paradigmatic cases are the *Lüth* ruling (BVerfG, 15 January 1956, BVerfGE 7, 198) and especially (for contract law) the *Bürgschaft* ruling (*loc cit* note 7) of the German Bundesverfassungsgericht.

⁵⁷ M. Kumm, 'Who is afraid of the total constitution? constitutional rights and principles and the constitutionalization of private law' (2006) *German Law Journal* 341–370.

⁵⁸ Cf G. Calabresi and A.D. Melamed, 'Property rules, liability rules, and inalienability: One view of the cathedral' (1972) *Harvard Law Review* 85 (6), 1089–1128.

fundamental choices and determine details? How should a society go about resolving a conflict between divergent reasonable contract law doctrines? Is there a rational way of resolving the dispute among different theories of contract law? Could an inclusive democratic debate concerning the relevant arguments and reasons be an adequate and legitimate way of making progress? Does not the fact of the 'reasonable pluralism'⁵⁹ of contract and private law theories strongly suggest the need for democratic contract law making?

Most of the existing contract law theories do not address democracy at all. Usually, they are ideal theories that regard their implementation as a separate, institutional matter, that does not belong to contract law theory proper. A fully democratic theory of contract law is, in a way, the opposite. It does not offer foundational substantive contract law principles, but only one fundamental principle which is procedural. Any democratic theory of contract law is fundamentally a pluralistic one. It is based on the idea that contract law is a compound – ideally harmonious – of arguments and reasons deriving from different backgrounds, but which could not be reasonably rejected by anyone. It is based on the idea that there exists no *ex ante* true or right answer with regard to the question what our contract law should be; there is no Archimedean point from which we can observe the truth of contract law, no foundational substantive principle from which we can logically derive the rules of contract law and erect the edifice of a comprehensive contract law system. Instead, there is one foundational assumption, which is a procedural one, ie that a rational argument about contract law is possible.

This assumption has two main implications. First, that contract law, at least ideally, can be a rational and harmonious system. Secondly, that the pluralism that we are dealing with is not 'radical' or 'foundational'.⁶⁰ It is based on the idea that different arguments are not incommensurable at least not most of the time.

The former idea refers, of course, to Habermas' theory of communicative action, in particular his discourse principle, according to which just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.⁶¹

As to the latter idea, radical or foundational pluralism holds, not merely that there is uncertainty as to which argument is the better one, but rather that it is certain that neither of them is better than the other and that they also are not of equal strength. However, unlike it is sometimes suggested radical pluralism (and

⁵⁹ Rawls, n 46 above, 441.

⁶⁰ E. Mason, 'Value pluralism', in E.N. Zalta (ed), *The Stanford encyclopedia of philosophy* (2011).

⁶¹ Habermas, n 15 above, 107.

radical moral scepticism in general) cannot claim to be the default position, thus shifting the burden of proof onto those who argue that a rational debate on legal, moral and ethical questions is possible; radical pluralism and comprehensive internal scepticism with regard to questions relating to value are themselves normative positions that require a positive argument.⁶² Given that radical pluralism and global scepticism are neither logically inevitable nor normatively attractive, there seems to be no good reason to adopt them.

However, this does also not mean that with regard to contract law (or in other matters concerning value) there exists a ready-made truth 'out there', waiting to be grasped by someone with full information and unlimited intellectual capacity such as Dworkin's Hercules. Indeed, Dworkin conveniently adopts the internal, interpretative perspective from within an already existing system (of values, of contract law et cetera) which leaves open the question of how to set up a new system or reform the present system (in our case, the system of contract law).

The nature of the truth with regard to the integrity of our law, including contract law (and its relationship to other branches of the law – to the extent that these are indeed different branches –, such as tort, property, restitution, consumer protection, and administrative law) is not only partly political and contingent, depending on the burdens of judgment,⁶³ but the nature of our seeking of good reasons for contract law, and the harmony among them, is also performative.⁶⁴ In other words, the fact of reasonable contract law pluralism also points to democratic contract law.

Indeterminacy, complexity and judgment

Existing normative contract law doctrines tend to underdetermine contract law rule choices, because even the most general contract law questions tend to be far too specific to allow for determinate answers of the basis of most normative principles. At the same time they usually are reductive, failing properly to take into account the various aspects, roles and dimensions of contract law that we saw, and thus failing to do justice to the complexity of normative contract law questions. At the law maker's end, the burdens of individual judgment provide a further cause of indeterminacy, while the epistemic dimension of public delibera-

62 R. Dworkin, *Justice for hedgehogs* (Cambridge Massachusetts: Belknap Press, 2011), 95.

63 Rawls, n 46 above, 54.

64 Habermas, n 15 above, 110.

tion implies that it cannot be substituted, at least not conclusively, by substantive analysis by theorists.

Indeterminacy

Eric Posner has argued that there exists a mismatch between economic theory and contract doctrine: they operate at different levels of generality.⁶⁵ Something quite similar can be argued for most other normative contract theories as well. There is a mismatch between the general political principles that provide the basis for the main contract theories and the level of detail at which most contract law making takes place, either in courts or in legislative contract law reforms. This is true for general contract law, and even more so for the rules relating only to certain specific types of contracts (from financial services through franchising to health-care), contracting parties (consumers, SMEs, large businesses) or contracting situations (online, off premise or commodity market). The familiar contract law theories based on private autonomy, corrective justice, economic efficiency, legal tradition or similar, do not provide us with a normative standard that allows us to distinguish between the merits of eg the contract law in our own country compared to that of our neighbours, or our present contract law and a proposal for its reform. The theories are just too indeterminate. Most contract theories are equally compatible with a broad variety of existing and conceivable contract law systems (and vice versa).

Complexity

If contract law has all the different characteristics that we saw, at the same time, and if it is justifiable for contract to have these characteristics at least to some degree, then the question arises how these different characteristics, and their implications, should be combined. Can this realistically be done in a purely analytical and abstract way? A contract law that properly takes into account its various roles, functions, and aspects, whose relative importance may vary from one contract law question to another, is necessarily quite complex. And a contract law theory that disregards any of these justified characteristics of our contract law, limiting itself eg to 'general contract law', is unduly reductive. Moreover,

65 E. Posner, 'Economic analysis of contract law after three decades: Success or failure?', 112 *Yale Law Journal* (2003), 829-80.

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given the fact of reasonable pluralism of contract law theories the (prima facie) convincing arguments and reasons deriving from different theories will also have to be taken into account. All this together will have to be combined into one complete picture of the cathedral, the contract law theory. Such a substantive ideal theory inevitably would be a highly complex one. Thus, the complexity of contract law questions deriving from the variety of different contract law characteristics combined with the diversity of potentially relevant and convincing normative considerations deriving from the fact of reasonable pluralism, adds a further reason why contract law should come about through a deliberative democratic process. Only through such a procedure can a proper response to contract law questions, with such a broad variety of dimensions, be determined.

Burdens of judgment

As Rawls pointed out, public debate in our modern democratic societies is characterised by the fact of reasonable pluralism. This is the fact of irreconcilable differences between different comprehensive world views, religions etc, which is a permanent condition of modern democracies. Further debate is not likely to make our differences about – what he calls – comprehensive doctrines (ie religious and philosophical doctrines) go away but rather will entrench or exacerbate these differences: with every new round of discussion each doctrine is likely to be strengthened by new arguments.

One cause of the fact of reasonable pluralism, ie one reason why disagreement about comprehensive world views is not likely to go away even among reasonable people (who are neither in bad faith nor biased or opportunistic), is what Rawls calls the 'burdens of judgment'. By this Rawls means that the judgment of each of us inevitably will be determined, in part, by her or his particular vantage point. Each of us has had different experiences in our lives that will inevitably colour our general views on life and the world around us, and will burden our judgments, also on subjects under public deliberation. Each of us will assess the available evidence, balance the interests, evaluate the arguments, and interpret the question differently.⁶⁶

Even if everyone participating in the political debate is perfectly reasonable and guided by the utmost public spirit, then still different persons are likely to disagree, especially on the most foundational questions of life and the world we live in. This fact leads Rawls to the conclusion that reasonable pluralism is a

⁶⁶ Rawls n 46 above, 54.

permanent condition of modern democracies, one that we should not regret, and that the only way to overcome this diversity would be through the oppressive use of state power. The best we can hope for in non-oppressive, pluralist societies is an overlapping consensus among different reasonable comprehensive doctrines.⁶⁷

Now, contract law theories are, of course, not comprehensive doctrines in the sense in which Rawls understands them. However, many of them can be regarded as specific branches of such comprehensive doctrines (eg libertarianism, liberal perfectionism, utilitarianism, or nationalism), and are in any case based on controversial foundational principles and values. And it is clear that even the most reasonable people will never reach consensus on the ultimate foundational principle(s) or the core value(s) enshrined in contract law. Sectarian contract theories could only be imposed by oppressive state power.

The performative nature of deliberation

According to Habermas, the legitimacy and justice of any law, including contract law, cannot be known in advance of actual deliberation among those who will be affected by the law.⁶⁸ An inclusive democratic debate is indispensable for arriving at the truth with regard to the claims based on different normative contract law theories. Hypothetical deliberation by theorists will not do; the proof of the pudding is in the eating. What is needed is a free and open exchange of arguments, not dominated by power, and that actually influences the outcomes. Thus, the democratic process has an epistemic dimension in that we learn something about legitimate contract law and contractual justice that we could never have known through mere theoretical analysis.

⁶⁷ Ibid, 58. Larmore formulates the same point somewhat differently by stating that in case of irreconcilable difference we have to recede to our last point of common ground (Larmore, n 43 above, 135). According to Forst, we are morally entitled to our laws being capable of justification with reasons that no one could reasonably reject R. Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (New York: Columbia University Press, 2012). What Rawls, Larmore and Forst regard as a question of morality is for Pettit a matter of pragmatism: you are simply not going to be very effective if you try to convince someone of your proposal for your reasons and in your own sectarian language. Pettit therefore treats the overlapping consensus as a common (republican) language, in which public arguments will have to be formulated by anyone aspiring to convince the others (Pettit, n 51 above, 136).

⁶⁸ Habermas, n 15 above, 409.

A democratic theory of contract law

Legitimate contract law

It follows from the main characteristics of contract law combined with the reasonable pluralism of contract theories, the indeterminacy and complexity of contract law questions, and the epistemic dimension of public deliberation, that contract law, in order to be legitimate, has to be democratic. The fact that contract law is generally applicable, coercive and distributive, ensures entitlements, facilitates transactions and is only partly optional, the fact that existing contract law theories all have stronger and weaker points, and the fact that the evaluation of these is a matter of judgment which inevitably depends, in part, on each person's point of view, strongly suggest, that contract law should have a proper democratic basis.

The specific choices with regard to questions of contract law, general or specific, cannot be imposed upon the parties to a contract dispute. Rather, in order for contract law to be legitimate the addressees of its norms should also be able to regard themselves also as the co-authors of these norms.⁶⁹ A democratically legitimised contract law then is what free and equal citizens through an inclusive and deliberative process will have determined collectively to be the conditions, limits and modalities for individual self-determination through agreements (of various types) concluded by two or more persons and enforceable with the force of the State.

A robust democratic contract law making process

What should count as a properly democratic contract law making process? Democratic contract law making does not mean the tyranny of the majority,⁷⁰ the bargaining among stakeholders, or the mere polling of voters' preferences at the ballot box. It means arguing and deliberating (offering reasons) among citizens which will ultimately lead to a formal decision in Parliament. We can derive adequate principles of democratic contract law making from democratic theory, in particular from Habermas' theory of law and democracy. How exactly the democratic principle should be implemented in practice, both generally and

⁶⁹ Ibid, 408.

⁷⁰ A. de Tocqueville, 'De la démocratie en Amérique', in *Œuvres, Pléiade*, vol I (Paris: Gallimard, 1835/1992) 287.

specifically for contract law, is, of course, itself a matter to be determined democratically by free and equal citizens, under their legitimate constitution, and cannot therefore be determined in advance and in the abstract, as a matter of ideal theory. The question of whether a robust democratic contract law making process is at all a realistic idea will be addressed in the final section.

Clearly, the ideal of a perfectly democratic contract law making process will never be totally fulfilled. Democratic contract law is a question of degree, not a categorical matter. Contract laws can be more or less legitimate to the extent that they are more or less fully democratic. This point is important also for its institutional implications. We cannot simply claim that enacted contract law is more legitimate than judge-made contract law, or that contract law drafted by experts is illegitimate, without further considering the nature of the law-making process that actually led to adopting the particular contract law at hand. Challenges with regard to the legitimacy of contract law are not categorically different from those in other areas, especially areas which, as a result of a (per se not illegitimate) divisions of labour, similarly became the object of a high degree of sophistication, and, as a consequence, came to be perceived by non-experts as rather technical fields.

In the context of the democratic debate, the contract law theories proposed by contract law experts that we saw above function as valuable contributions to the debate, ie prima facie good reasons. Here are a few examples of such reasons:

- Utilitarians are right that we should not waste social resources. Therefore, other things equal, the solution that is likely to yield a net social benefit should be adopted. The problem is that often other things are not equal (eg the rule solutions may differ in terms of distribution of welfare or of reasons for self-respect).
- Neo-Romantics and communitarians have a point when they argue that our traditions, including our legal traditions, matter. It would be unwise, and maybe even wrong, to set out drafting a new contract law on a clean slate. On the other hand, however, it seems doubtful that we should stick to past solutions if we have convincing reasons for adopting new ones for the future.⁷¹
- The principles of self-determination and private autonomy, as proposed by comprehensive and perfectionist liberals as a basis for contract law, seem attractive in principle, especially in the absence of unequal bargaining (ie

71 O.W. Holmes Jr, 'The path of the law', in: S.M. Novick (ed.) *The collected works of Justice Holmes; complete writings and selected judicial opinions of Oliver Wendell Holmes*, Vol. III (Chicago and London: University of Chicago Press, 1995), (originally published in (1897) 10 *Harvard Law Review*, 457), 187.

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inequality understood in a broad sense: reasons for self-respect, capabilities etc) or externalities. Still, just like the State should not officially endorse any religion, it should also not establish the notion – through its contract law – that lives are more valuable to the extent that they are self-authored.⁷²

- Relatively stable entitlements (ie certainty as to what is yours and what is mine), as emphasised by libertarians, seem indispensable, also if we accept that contract law should meet requirements of social (including distributive) justice. Therefore, the reason why one party receives damages should indeed be the same as the reason why the other has to pay them (corrective justice).⁷³ However, an aspect of that reason may be relational injustice, especially unequal bargaining (theory of substantive corrective justice).

But none of these arguments can ex ante (ie prior to deliberation) be said to contain the only truth (any more so than its competitors) or the whole truth (ie provide satisfactory/right/optimal answers to all questions of contract law); they will have to be considered, discussed and tested in an inclusive debate. This is not due to our cognitive, intellectual or emotional limits (from which Dworkin's Hercules would not suffer), but to the performative nature of deliberation, which constitutes the exercise of our public autonomy.⁷⁴ Law making, including contract law making, is not a herculean task, nor is it a matter of Athenian virtue, but a process characterised by a free flow of arguments among the free and equal citizens of a given polity.

Judge-made contract law

One implication of the democratic contract law thesis would seem to be that judge-made contract law, especially the common law of contract, is less legitimate than enacted contract law. This would be a puzzling result given that the practice of contract law making by courts is well established and rather uncontroversial, not only in common law jurisdictions but also on the Continent. Therefore, this argument could also turn against the democratic theory of contract law, to the extent that the theory is meant to be a reconstructive theory. Maybe the democratic theory of contract law is out of touch with reality or biased against the common law? However, again the picture seems more nuanced.

⁷² M.C. Nussbaum, 'Perfectionist liberalism and political liberalism' (2011) *Philosophy & Public Affairs* 39 (1), 3–45.

⁷³ E. J. Weinrib, *Corrective justice* (Oxford: Oxford University Press, 2012), 9.

⁷⁴ Habermas, n 15 above, 110.

On the one hand, much of the enacted civil law of contract also does not pass any serious scrutiny under democratic principles. Some civil codes in force today in Europe are pre-democratic, ie they date back to pre-universal suffrage or were enacted under authoritarian regimes, while still others have been reformed by mere governmental decree. And in many cases the drafting was heavily dominated by academic experts, not usually followed by a public or parliamentary debate of any significance.

On the other hand, especially in common law jurisdictions, judges tend to provide elaborate reasons to justify their decisions. And it may well be that these reasons would also be accepted in a truly democratic legislative process. Moreover, divergent points of view, with reasons, become visible through the practice of openly dissenting opinions. (This is in contrast with civil law jurisdictions where judicial deliberation is secret and only reasons in support of the judgement are made public.⁷⁵) The democratic significance of the discursive nature of the common law should not be underestimated, just like the significance of parliamentary fiat, without any societal debate, for a private law reform should not be overestimated.⁷⁶ Similarly, maybe judicial constitutional reasoning has some deliberative potential, especially with regard to rights and principles,⁷⁷ in particular where representative democracy is dominated by political parties in search of power and by stakeholders lobbyists rather than by public deliberation based on reasons.

Moreover, as a practical matter, it is impossible to avoid judicial contract law making. New contract law questions arise every day, but usually not until they come up in a concrete case. Indeed, it is of the nature of abstract rules that these require interpretation and sometimes also supplementation and correction, by sub-rules on a somewhat lower degree of abstraction, one which may not be the degree of generality most adapted for democratic deliberation. Moreover, it is also in the nature of court rulings in concrete cases, that these are much more likely than abstract rules of general contract law, to attract the interest, support or indignation of the general public and thus to ignite a democratic debate.

Still, the fact remains that from a legitimacy point of view contract law rules that come about through a properly democratic process are to be preferred to

⁷⁵ However, in some civil law supreme courts (and also at the CJEU) rulings are preceded by opinions of advocates-general, which are made public and which explicitly address the various arguments that have been expressed in the doctrinal debate.

⁷⁶ As said, much of Waldron's critique of judicial review seems to apply equally to the common law, but his argument for democracy seems to be rather vote-centred. Therefore, from his point of view the discursive nature of the common law probably is of less significance.

⁷⁷ C. Mak, 'Europe-building through private law: Lessons from constitutional theory' (2012) *European Review of Contract Law* 8 (3), 326–341.

judge-made or expert-dominated contract law making. Where moral rights and principles are at stake, values are balanced, and interests are weighed, a process where the voices of all those affected are heard and arguments from different angles, including remote corners of society, are considered and addressed, is to be preferred to an institution that only has to consider the arguments that happen to be brought up, for reasons related exclusively to their own private interests, by the parties litigating the case at hand.⁷⁸

This also casts some doubt upon activist contract law making by the Court of Justice of the European Union. In a number of cases – all in the area of contract law – the Court has started referring to ‘general principles of civil law’.⁷⁹ Of course, the Court cannot be blamed for answering the questions submitted to it for preliminary ruling. Nor is the Court responsible for the European legislator’s hesitation in adopting a set of background rules of general contract law that could bring some coherence into the rather fragmented *acquis communautaire*. However, the manner in which the principles were adopted was entirely apodictic in spite of the fact that at least some of them (eg the principle of good faith) are far from uncontroversial.⁸⁰

There is a more troubling question of institutional comparison: should the democratic legislator be the preferred (contract) law making institution in all circumstances? What if in a given country democratic institutions are functioning very badly, not from the perspective of some form of ‘output legitimacy’, such as efficiency, but in terms of democratic legitimacy (public autonomy), while the courts or academic experts could (or maybe already do) assure rule-making based on a more inclusive deliberation where different voices are heard and taken into account? Is there not a risk in such a context that the democratic theory itself would turn into an abstract ideal theory? For example, if a broad variety of societal opinions, coming not from a mere elite but from much wider circles, actually has had a significant impact on its rule-making, then in such cases should not these institutions be preferred from the perspective of legitimacy, at least for the time being? The answer may well be yes, but the relevant criterion does not change: it should remain the democratic principle.

78 Thus, the nature of the parties litigating the cases that happen to become leading cases, will determine the nature and content of contract law (H. Kötz, ‘How to achieve a common European private law’, in F. Werro (ed), *New perspectives on European private law (Forum Europarecht, nr 4)* (Fribourg: 1998) 9–21, 20.

79 Eg Messner, *loc cit* note 5.

80 M.W. Hesselink, ‘The general principles of civil law: Their nature, roles and legitimacy’, in D. Leczykiewicz and S. Weatherill (eds), *The involvement of EU law in private law relationships* (Oxford: Hart Publishing, 2013) 131–180.

Contract law justice beyond legitimacy?

Consider the following example. Suppose that in a society a contract law code or statute was enacted which contains a provision on 'unfair exploitation' (Europe) or 'unconscionability' (United States). There was an inclusive debate on the subject, triggered by the legislator and informed by expert drafts and opinions. The debate was not dominated by any special interests or economic or bureaucratic power, nor was any group excluded from the debate. Arguments and reasons did flow freely from the most peripheral angles of society to the political centre and had a real impact upon decision making. Following an open exchange of a broad variety of reasonable ideas, where people listened and responded to each other's arguments, including arguments concerning rights and principles, values and traditions, interests and stakes, the deliberation was concluded, after a reasonable time, by a vote in parliament. The outcome was that purely 'substantive unconscionability' (eg an unfair price) cannot be a ground for invalidity of a contract; the presence of some procedural unfairness, an 'unfair exploitation' of some weakness, is required.⁸¹ What would this mean for the question of whether the presence of a 'substantive unconscionability' doctrine would be more just (and the absence of such a doctrine unjust), and our theoretical and moral knowledge about that question? Should the fact of this democratic outcome matter at all or can we simply ignore it, as irrelevant for contract law theory? Can the outcome of an ideally democratic political process still be considered wrong? Of course, one (eg a liberal-egalitarian) may still be convinced of the substantive unconscionability thesis and propose it, or a 'gross disparity' or 'unfair price' rule, with new arguments, trying to reopen the debate.⁸² Or, on the contrary, someone (a libertarian) could argue that the entire provision should be repealed because it should only be possible to set contracts aside for

⁸¹ In most legal systems such a requirement currently exists. Also art 51 CESL on 'unfair exploitation', only accepts *qualified* laesio enormis: the exploitation of the subjective weaknesses of the promisor, on the one hand, and the objective disproportion between the promises, on the other, operate as cumulative requirements; mere gross disparity does not suffice. Indeed, art 51 CESL is located in the chapter on defects of consent, together with mistake, fraud, and threats, suggesting that it deals with procedural unfairness, not substantive unfairness. Contrast the Unidroit principles of international commercial contracts, where, in art 3.10 (Gross disparity) the test is 'excessive advantage' while advantage-taking is not a requirement, merely a circumstance to which 'regard is to be had, among other factors'.

⁸² See, for example, M.A. Eisenberg, *Foundational principles of contract law* (Oxford: Oxford University Press, forthcoming). For a comment, see M.W. Hesselink, 'Unconscionability, unfair exploitation and the nature of contract theory – Comments on Melvin Eisenberg's "Foundational principles of contract law"', *Amsterdam law school research paper no. 2013-07*, available at: <http://ssrn.com/abstract=2209752>, on which this paragraph draws.

threats and frauds, not for 'unfair exploitation' or 'unconscionability'. But that would place one (and one's argument) – even if one happened to be a contract law theorist – squarely *within* the democratic debate, as one (maybe a particularly articulate one) of the many different voices, not outside the debate, in a position to review and evaluate the outcome – that would bring us back to the boot-strapping method characteristic of private law essentialism.

Of course, my example is merely hypothetical. Given the fact that in the real world we live in we have not yet had anything like an inclusive societal debate on the desirability of the invalidity of contracts that are objectively extremely imbalanced, nor on foundational principles of contract law in general, there still remains much democratic space available for contract theories providing good reasons for reform (and in any case, even to an ideally democratic debate there is no natural end). The point here is merely that to the extent that the democratic process approaches the ideal situation where everyone has had a chance to have her say and be heard, where all arguments and claims with regard to interests, rights and justice have been duly considered, then what is the nature of the validity (other than accordance with natural law or some other metaphysical truth) that we can claim for our theory if we maintain that the rejection (or, as the case may be, the acceptance) of the substantive unconscionability was wrong?

Thus, the example raises a fundamental question: is there a remaining sense in which the outcome of a political debate on contract law that meets all the requirements of democratic legitimacy, can still be said to be wrong? Is there a truth (moral or other) with regard to proper contract enforcement that the legislator must just try to implement as faithfully as possible? There exists a great deal of distrust, especially among legal experts (judges, advocates and scholars), with regard to the competence of the legislator in private law matters: can the legislature safely be entrusted with such an important task? If we accept, as a political principle, that the law, including contract law, should not establish a certain conception of the good life but be justifiable with neutral reasons, and should respect fundamental rights, principles of justice and other moral principles, the question still remains whether these are merely aspects and questions that should be properly taken into account in the democratic law-making (including constitution-making) process, or whether the democratic outcome could become the object of separate moral review for violation of certain substantive principles of contract law, going beyond everyone's right to 'veto' reasons that lack generality and reciprocity (eg claims to privileges).⁸³

83 Cf. Forst, n 67 above, 6. A democratic theory of contract law does not object against a legitimate system of judicial review. The legitimacy of such an institutional arrangement seems to depend on the distinction between discourses of law-making and discourses of application (Habermas, n 15 above, 217). The more an existing practice of judicial review can be regarded as a

Can the legitimacy of contract law be contested directly on other grounds than that it did not come about in a context that assured that good reasons (including moral and ethical reasons), ie reasons that no one could reasonably reject, could prevail, eg because it was dominated by special interest groups or a biased elite? In other words, may a truly democratic basis together with a 'veto' right against non-general and non-reciprocal reasons, be not only a necessary condition but also a sufficient condition for a legitimate and just contract law?

This is a difficult question, both for its factual and its moral dimensions. Given that the functioning of our parliamentary democracies and public spheres will always remain imperfect, it is difficult to imagine the counterfactual situation of a truly open, inclusive and democratic debate guided by a spirit of public reasoning. That easily makes judicial law making seem to be an attractive or indeed indispensable means to maintain or achieve justice. On the other hand, absent moments of crisis (and even then) judicial activism generally seems hard to defend on other than opportunistic grounds ('the right side won', 'the end justifies the means', 'output legitimacy'). The same may apply to 'review' of democratic law in the court of justice or morals in terms of substantive contract law principles, ie beyond the right to justification.⁸⁴

The question cannot be fully addressed here and certainly not finally settled. However, there does indeed not seem to be much room for substantive normative evaluation of contract law beyond a robustly democratic law making procedure. In our post-metaphysical age in pluralist societies like ours, any such limitative principles and rights cannot be natural rights or metaphysical principles. They necessarily will have to be political rights and principles. They have to be, that is, acceptable to people adhering to different reasonable comprehensive doctrines and must be capable of becoming the object of an overlapping consensus concerning such principles.⁸⁵ Maybe we should derive such limits from 'justice as fairness' – if this an acceptable theory –, eg the difference principle, which might

discourse of application (of the democratically legitimated constitution) the more the judicial review itself is legitimated. An activist constitutional courts is in principle suspect from a democratic point of view, because judicial law-making is generally problematic and a fortiori where the rights that citizens mutually grant each other, and their limits, are being determined. There is a risk of heteronomous limitation of private autonomy. Still, formalism is not the only possible discourse of application (if it is at all a viable method). Therefore, the *Materialisierung* of private autonomy through the judicial interpretation of constitutional rights is not intrinsically or categorically less legitimate than a formal interpretation. The same is true for judicial interpretation of contract law (especially its more open-textured standards, such as good faith and good morals) with a view to the protection of constitutional rights (indirect horizontal effect – see above).

⁸⁴ Forst, n 67 above.

⁸⁵ Rawls, n 46 above.

have some implications for defining groups eligible for categorical protection in contract law.⁸⁶ It may also be that capabilities, as defined by Nussbaum, provide a standard for minimum contractual justice.⁸⁷ In any case, these political principles of justice will have to be of such a nature that they could be accepted through a political debate guided by public reason. Moreover, as a result of the burdens of judgment reasonable people will inevitably differ on what exactly the political principles of justice and the political rights entail. This means that probably a broad variety of contract laws (maybe even most of the contract laws we know) will be compatible with political principles of justice. This is even more likely to be the case for specific rules and doctrines of contract law, since their prima facie injustice can be offset by other, counterbalancing contract law rules, or by different institutions that are also part of the basic structure of a given society,⁸⁸ in such a way that the overall outcome is that of a just (or not unjust) society.⁸⁹

Therefore, we are not very likely to encounter great clashes between democratic contract law and political principles of justice. This is particularly true if democratic contract law is based on principles of democracy of the kind proposed by Habermas. According to Habermas, as said, private and public autonomy are two sides of the same coin; they are co-original, mutually presupposing each other's existence.⁹⁰ For any limit to private rights it must be the case that each of

86 J.G. Klijnsma, *Contract law as fairness: a Rawlsian perspective on the position of SMEs in European contract law* (doctoral thesis, University of Amsterdam, 2014).

87 L. Tjon Soei Len, *The effects of contracts beyond frontiers: A capabilities perspective on externalities and contract law in Europe* (doctoral thesis, University of Amsterdam, 2013).

88 From a Rawlsian perspective, a precondition for eligibility for review of democratic contract law under the principles of justice is that contract law be part of the basic structure of society, i.e. be one of the main institutions responsible for the distribution of social and economic advantages. From what we saw above concerning the distributive nature of contract law it seems to follow that contract law is indeed part of the basic structure so understood (in the same sense A.T. Kronman, 'Contract law and distributive justice' (1980) 89 *Yale Law Journal*, 472; K.A. Kordana and D.H. Tabachnick, 'Rawls and contract law' (2005) *George Washington Law Review* 73, 598–632; Tjon Soei Len, n 87 above; Klijnsma, note 86 above). As said, even a decision by a contract law maker against expectation remedies (specific performance or expectation damages) would not be neutral since, morally speaking, there is no pre-institutional, default entitlement to legal protection of the expectation interest.

89 It is not certain that the offsetting strategy will work. If the primary goods include the reasons for self-respect then it may not be enough that a prima facie unjust contract law rule which allows for unfair exploitation is counterbalanced by a steeply progressive income tax system. Moreover, if the difference principle is a strongly maximising principle (see S. Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law', *Oxford Journal of Legal Studies* (2015), 1–23, who however convincingly rejects this idea) then there is no place left for offsetting.

90 Habermas, n 15 above.

the addressees of the norm must be able to regard herself also as its author (ie that the boundaries eg of freedom of contract can be regarded as self-imposed). With regard to moral dimensions of legal questions, Habermas requires universal acceptability (and with regard to ethical questions he requires unanimity within the community.) These are very stringent requirements.⁹¹ On the other hand, the procedure for arriving at an overlapping consensus with regard to political principles of justice, characterised by public reasoning, seems itself quite similar to the democratic procedure as understood by Habermas.

The main remaining difference relevant here seems to be an epistemological one. Habermas' approach is reconstructive while Rawls' remains a constructivist ideal theory. Still, the idea of an overlapping consensus, the fact of reasonable pluralism and the burdens of judgment, combined with the limited claim that his theory is meant for our kind of western constitutional democracies, and the fact that the original position (and even justice as fairness itself) have been moved to the background in *Political Liberalism*, together justify the point that the remaining differences between Rawls' political liberalism and Habermas' theory of law and democracy seem rather small.⁹² Perhaps, also these philosophers 'are climbing the same mountain on different sides'.⁹³ And maybe any remaining differences are just too small to be relevant for contract law theory.

What seems very unlikely, however, (indeed virtually impossible) is that a formal principle of corrective justice, or indeed any other principles deriving from essentialist theories of contract law, would become part of the political principles of justice (ie as part of the right with priority over the good) and thus would be able to 'morally set aside', as it were, (ie to delegitimise) democratic contract law for the mere reason of its incompatibility with an essentialist and separatist theory of contract law.

The practice of democratic contract law making

Realistic ideal theory and idealising reconstruction

Is a democratic theory of contract law even realistic? Even if a democratic theory of contract law is, as I have argued, the normatively most convincing theory,

91 They may be too stringent. Perhaps it is sufficient for the law to accommodate moral agency (S.V. Shiffrin, 'The divergence of contract and promise' (2007) *Harvard Law Review* 120, 708–753).

92 K. Baynes, 'Rawls and critical theory', in J. Mandle and D. Reidy (eds), *A companion to Rawls* (Oxford: Blackwell 2013) 487–503.

93 D. Parfit, *On what matters* (S. Scheffler, ed), vol I (Oxford: Oxford University Press, 2011), 421.

maybe a democratic contract law theory remains too much of an ideal theory, of little practical use for a better understanding and critical evaluation of actually existing contract laws. As Sen puts it: if we have to choose between a Picasso and a Dali picture, of what use is it to know that the Mona Lisa is the most perfect painting in the world?⁹⁴

It is not even entirely clear what kind of knowledge we are talking about when it comes to ideal theories. Since Hegel, ideal theories have been confronted with the problem of 'the impotence of the ought' (*Ohnmacht des Sollens*). What exactly is it that an ideal theory applies to? How do we know that it is applicable in the present situation, ie that the present situation is one of those that should correspond to a given ideal? Presumably an ideal contract law theory will have to make certain assumptions (eg that there will be contracts, a market economy, courts et cetera) but exactly what should these assumptions be, and why these, given that each of these will have certain specific normative connotations and implications? Maybe a society can be just, even in the total absence of contract law, or in the absence of general contract law. Indeed, what should count as contract law for the purposes of an ideal theory of contract law? If we are going to evaluate contract law in terms of some ideal standard, what part of our law exactly should correspond to that standard, only general contract or also (or only) consumer protection law? And what about labour contracts, rent (landlord and tenant), medical treatment and the many other different types of contracts that are the object of specific rules?

As we saw, many normative theories of contract or private law are in fact ideal theories. They present contract law as it should be quite apart from the contract law that we have here and now.⁹⁵ These theories present external standards for normative evaluation. However, a reconstructive theory that tries to make sense of the contract law we have here and now will also inevitably contain certain idealising elements. And maybe a reconstructive theory that regards contract law as democratic is already too strongly idealising and too far removed from the actual world of contract law. Therefore, either way, be it as a matter of reconstruction or as a reality check for an ideal theory, the question arises of whether a democratic contract law theory is not out of touch with the reality of contract law making.

94 A. Sen, *The idea of justice* (London: Penguin, 2009), 16.

95 There are exceptions. The theories of S.A. Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) and D.G. Baird, *Reconstructing contracts* (Cambridge, Massachusetts and London, England: Harvard University Press, 2013) explicitly are intended as being, respectively, (Dworkinian) interpretative and reconstructive of the Common Law.

Recodification and contract law reform

As a matter of fact, democratic contract law is not merely a theoretical possibility. On the contrary, a democratic theory of contract law relates directly to the current contract law making practices in many countries. Think only of some of the most recent examples of legislative codification or reform of private law in Europe, such as the new *Burgerlijk Wetboek* (1992) in the Netherlands, the Contracts (Rights of Third Parties) Act (1999) in the United Kingdom, the *Schuldrechtreform* (2002) in Germany, and the new civil codes in several central European countries, eg Estonia (1996), Latvia (1997), Lithuania (2000) and the Czech Republic (2014), maybe to be followed by France (see the preliminary draft, the *Avant-Projet Catala* (2005) and its competitors). Clearly, the mere existence of a practice of democratic contract law making does not constitute conclusive evidence concerning the need for a democratic basis for contract law – that conclusion would amount to mere positivism⁹⁶ –, but it does suggest that undemocratic contract law may be in need of an explanation. Nor does the existence of a legislative practice itself legitimise contract law even in these examples. That conclusion would reduce us to a merely nominal account of democracy, whereas it may well be that the legislative practices in these examples were wholly insufficient to count as properly democratic in any meaningful sense.

Public apathy and expert dominance

With regard to the new Dutch civil code, the central part of which was enacted in 1992, Van der Burg MP once remarked that the political return on one public speech in a small provincial town was greater than that of the entire new civil code.⁹⁷ Van der Burg was one of the politicians who were most actively involved, during two decades, in the parliamentary debate on the proposed new code. If elected politicians can hardly be bothered how can we expect there ever to be an inclusive societal debate on contract law? Contract law, especially general contract law (as opposed to eg consumer contract law), seems far too technical a

⁹⁶ It should not be forgotten that political (as opposed to analytical) versions of legal positivism are chiefly based on democratic considerations, also with regard to private law, and aim to preserve the realm of the political. See especially H. Kelsen, *Reine Rechtslehre; Einleitung in die Rechtswissenschaftliche Problematik* (1ed, Aalen: Scientia Verlag, 1934/1994), 110.

⁹⁷ V.A.M. van der Burg MP, cited in E.O.H.P. Florijn, *Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek* (Maastricht, 1995), 46: 'In alle ernst, een spreekbeurt in Vianen levert politiek meer op dan het hele nieuw BW.'

subject to be suitable for a public debate. Or, seen from a different angle, would we not be overburdening the public sphere with a debate on contract law? If we were to expect public debates in the newspapers, on TV, blogs or Twitter, on all subjects on which there exists a degree of sophisticated expert knowledge similar to that in the field of private law, then people would not have any more time left to do anything else than informing themselves with a view to feeding their informed and reasoned opinions into the public deliberations. There is certainly a lot of empirical truth in the idea that general contract law (and indeed private law more generally) is too technical a subject to make any chance of becoming the object of an intense public debate. Still, the case should not be overstated. Here too, there is room for some nuance.

First, as said, public deliberation does not necessarily mean town hall meetings. The republican ideals of citizenship are indeed too demanding. The model for democratic contract law is not the Athenian model of democracy. Advanced societies are characterised by functional differentiation, division of labour, specialisation and expertise. And in principle there is nothing wrong with any of these. So too is it entirely natural that in the area of contract law a sophisticated body of expert knowledge should have developed. This expert knowledge is elaborated, stored and exchanged – with varying roles and hegemonies in different countries – by experts located in universities (academics), courts (judges) and ministries (civil servants). Typical media include commentaries, case notes, opinions by advocates-general, monographs, law journal articles et cetera. Both the existence and the influence on the law-making process of arguments deriving from this body of knowledge and from these experts are, in principle, perfectly legitimate. There is nothing wrong per se with expert involvement in contract law making. However, what is crucial, from a democratic legitimacy point of view, as Habermas in particular has underlined, is that there should be a free and influential flow of public reasons from the periphery to the political centre where the decisions are made. This means, in particular, that reasons that become decisive in shaping (in our case) contract law, should be those which have the force of argument. They should derive from legitimate discursive power, not from illegitimate economic or bureaucratic power. Therefore, the concern should be that experts should not frame the debate in such a way that it effectively excludes participation of non-experts or arguments made in non-technical language, eg by making the debate become unduly abstract, conceptual and doctrinal, or even explicitly push their own personal or collective interests and values (in terms of money, power, ideology or other).

Secondly, the important thing, from a legitimacy point of view, is not that the public be excited and agitated about contract law all the time. There is nothing

against the private law public sphere being at rest even most of the time. However, what is crucial is that it can be mobilised when the need for it is felt at the periphery. With regard to European contract law such mobilisation has not been entirely absent.⁹⁸ Admittedly, however, the debate has still been limited, so far, to an elite and probably much more could have been done, and should be done, to include more peripheral (potential) voices.

Thirdly, there are different ways in which the technicality of the subject can be reduced and, consequentially, the process can be politicised. In the Netherlands, for example, the drafting of the new civil code by an academic expert, was preceded by a questions procedure that highlighted the most politically salient questions relating to general private law, where policy choices had to be made, and explicitly requested political guidance in their regard. Several other suggestions have been made to improve democratic deliberation on contract law. One was the idea of a Wiki-CFR. Another suggestion, with regard to a European civil code, was to set up a convention, after the example of the Constitutional Treaty (which was ultimately transformed into the Lisbon Treaty). The recently founded European Law Institute (ELI) could also play an important deliberative role, although there are risks that its membership will remain limited to the same elite that has shaped the debate so far, or that, following the example of the American Law Institute, stakeholder bargaining will overshadow public reasoning.

General principles and functional differentiation

The public and political interest is stronger (and the legislative activity increases) where private law subjects are functionally differentiated into certain types of contracts (labour, rent, insurance, medical services, transport, bank account etc), certain categories of contracting parties (consumers, SMEs), or certain contracting techniques (boilerplate, off-premise sales). This suggests that further differentiation and specialisation could also contribute to making private law become more legitimate. And, conversely, it also suggests that general private law tends to be more suspect from a legitimacy point of view. However, on the other hand, equal treatment by the law, including private law, is a crucial substantive precondition for the law's legitimacy as well.⁹⁹ Like cases should be treated alike and distinctions should be made on the basis of general principles. This consideration points

⁹⁸ Think of the articles in leading national newspapers such as *NRC Handelsblad* (on the front page) and *Frankfurter Allgemeine Zeitung*, and, more specialised, a polemic involving BEUC in the *European Voice*.

⁹⁹ L.L. Fuller, *The morality of law* (New Haven and London: Yale University Press, 1969).

to the need for general contract law principles and rules. The best result from a democratic point of view, therefore, seems to be a combination of specific and more general rules, as they can be found, for example, in most contemporary civil codes.

The relevant democratic arena

A final question to be addressed by a realistic democratic theory of contract law is the problem of what should count as the relevant democratic arena. Contract law can be made, not only at the national level (civil codes, common law) or the European level (directives, CESL), but also at the regional (Codi Civil de Catalunya) or the global level (CISG, Unidroit Principles). Should a democratic theory of contract law strategically support contract law making wherever the most fertile ground for democratic deliberation is to be expected? Given the contrast between the well-established democratic practices, also with regard to private law, in many countries, and the many democratic deficits in post-national law making this might direct us to the national level.¹⁰⁰ Or should a democratic theory of contract law, on the contrary, be neutral on where contract law is made and simply *require* a robust democratic process wherever contract law making takes place? In the latter case, again the theory could be accused of a lack of realism, for being overly optimistic (in the EU, with regard to the effective powers of the European Parliament, and the vitality of its public sphere) or even utopian (at the global level) when it comes to democratic postnational private law making.

This is not merely an abstract question. When the European Commission proposed a regulation for a Common European Sales Law in the autumn of 2011, a number of national parliaments submitted 'reasoned opinions' under the 'yellow card procedure', claiming that contract law was a matter for the national parliaments, not for the European legislator, to decide. Within the European context, such issues are resolved under the Treaties, by ascertaining, first, whether there is a solid legal basis in one of the specifically attributed competences (the principle of conferral), and, secondly, whether the proposed European measure does not go beyond what is necessary to achieve the aim

¹⁰⁰ However, we should beware of prejudice against the European Union and idealisation of the Member States. There certainly still exists an important democratic deficit in the EU, but this does not mean that democracy in the Member States, with regard to private law or more generally, is necessarily in a better state. For example, it is not self-evident that the public and parliamentary deliberation concerning the Common European Sales Law proposal was any less significant, from a democratic point of view, than in most recent national private law reforms.

(principle of proportionality) and whether the same aim could not be achieved just as well by the Member States themselves (principle of subsidiarity). However, the normative question that concerns us here is what justifies the current distribution of competences between the EU and the Member States and what reasons could justify its modification. At present, there exists no general competence for the EU with regard to private law or contract law. Some have proposed that such a general competence should be introduced rather than basing the CESL on the provision for the completion of the internal market. This certainly would broaden the perspective under which contract law would be considered. Is a rational debate possible on the question whether such a competence should be introduced?

Can the question of whether the democratic debate on contract law should be European or national (or indeed regional or global) be resolved in a rational way and, if so, does this mean that it will have to be discussed and decided in neutral terms, without reference to identity (regional, national, European, cosmopolitan)? This is a very difficult question and a conclusive answer is not readily available. Generally, the borders between different countries, and the distributions of competences among different levels of government within one country and within the EU, are historically determined and seem to elude rational justification.¹⁰¹ Lockean accounts of sovereignty offered by libertarians relying on notions of original occupation¹⁰² are not only historically implausible but also morally weak, because clearly question-begging. Communitarian accounts relating to identity are indeterminate (which is not the same as uncertain): the face of the earth simply is too small to satisfy the irredentist claims of all nations. And liberal-egalitarian theories often tend to avoid the problem.

As a factual matter, the Member States so far have remained the lords of the treaties. However, can this state of affairs also be justified, without bootstrapping, reference to identity or to functionalism, none of which are neutral? Externalities as a moral reason (equal respect) for moving up one level of law-making¹⁰³ may at first sight seem to be a promising neutral criterion. However, given our complex world today almost any policy has potential external effects, certainly contract law. So, ultimately that argument also seems inconclusive or biased in favour of

¹⁰¹ Dworkin, n 62 above, 382.

¹⁰² Nozick, n 26 above, 174.

¹⁰³ M. Kumm, 'Constitutionalism and the moral point of constitutional pluralism: Institutional civil disobedience and conscientious objection', in J. Dickson and P. Eleftheriadis (eds), *Philosophical foundations of EU law* (Oxford: Oxford University Press, 2012).

the version of Europeanism (Europeanism as proto-cosmopolitanism) that has been most popular among the European elite.

The most legitimate way of dealing with this matter therefore seems to be, again, through a democratic debate, on the proper distribution of competences between the Member States and the European Union, in which each of us must be able to partake, in our double capacity as both national and European citizens.¹⁰⁴ Although a civic debate with neutral arguments that do not refer to identity may be very difficult to realise in practice, the alternative will lead to either impasse or oppression.¹⁰⁵ Maybe the notion of shared competence could provide a relatively neutral starting point, at least for contract law.¹⁰⁶

Conclusion

The main characteristics of contract law together with the fact of reasonable pluralism of contract theories and their indeterminacy, the complexity of contract law questions, and the epistemic dimension of deliberation, each provide strong arguments for requiring, in principle, a proper democratic basis for contract law. Moreover, a robust democratic process where all relevant reasons are properly considered, including reasons relating to individual rights (private autonomy), moral principles, legal tradition and culture, and the interests of different groups in society, also seems to provide a sufficient condition for the legitimacy of contract law. This means that the outcome of a properly democratic contract law making process should be immune, in principle, against critique coming from one of the many essentialist and other monist theories of contract law. Although each of these theories, as long as they are reasonable, have equal standing as substantive contributions to the democratic debate, none of these contains an ultimate truth about contract law, moral or other, and therefore none of them can serve as an external ideal standard for evaluating legitimate democratic outcomes. Outcomes may be criticised – contract law may be illegitimate – because certain reasons (including essentialist theories of contract law) were not properly considered, but as substantive arguments they do nothing more (and nothing less) than reopening the democratic debate (to which there is no natural end). Philosophy

104 J. Habermas, *Zur Verfassung Europas: Ein Essay* (Frankfurt am Main: Suhrkamp, 2011).

105 The issues are quite similar to those encountered in the debate concerning the role of religion and whether requiring public reasons from religious citizens is actually neutral.

106 Perhaps the idea of an optional European contract law could be regarded as an intermediate solution, or as a form of accommodation.

has no priority over democracy.¹⁰⁷ So, why do it?¹⁰⁸ Why still engage in contract law theory? Because a vibrant democracy is always in need of good reasons, not least with regard to contract law.

Note: Paper presented at the conference 'Private Law and the Basic Structure of Society' held in Amsterdam on 31 January 2014, and at the Católica Global School of Law in Lisbon, within the series of 'Católica Talks', on 17 March 2014.

107 R. Rorty, 'The priority of democracy to philosophy', in R. Rorty (ed), *Objectivity, relativism and truth: Philosophical papers*, vol I (Cambridge: Cambridge University Press, 1991) 175–196; Rawls, n 54 above, 427.

108 D. Kennedy, *A critique of adjudication [fin de siècle]* (Cambridge, Massachusetts: Harvard University Press, 1997), 339.