



*Contract Law as Fairness. A Rawlsian Perspective on the Position of SMEs in European Contract Law*

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## Conclusion

This conclusion provides a short summary of the book's central argument and aims to underscore its significance. The book consists of two parts: Part I – Contract law and the basic structure of society and Part II – A Rawlsian perspective on SMEs in European contract law.

Part I develops *in abstracto* what implications a Rawlsian approach has for contract law as an institution. I called this conception of contract law inspired by Rawlsian principles of justice 'contract as fairness'. Rawls' theory, like any liberal theory of justice, has as a basic assumption that people should be able to decide for themselves what they think constitutes a good life, i.e. a life worth living. Hence, it is not the task of a liberal theory of justice to tell people how to live their lives. Instead, justice as fairness focuses on providing principles that can create a fair system in which people can live together on equal footing. Accordingly, justice as fairness is not about individual actions, but rather about what could be considered a just basic structure of society. Society's major social institutions, such as the constitution and the way the economy is regulated are the main components of this basic structure. As Rawls himself is ambiguous about the scope of the basic structure, it has been interpreted both narrowly and broadly. According to a narrow interpretation, the basic structure only includes constitutional essentials and some welfare programs, while according to a broad interpretation the basic structure includes most of society's legal institutions. Through a critical assessment of the concept of a basic structure in justice as fairness, it becomes clear that the broad and narrow interpretations point towards different methods of achieving a central liberal commitment: enabling persons to pursue their conception of the good within certain limits set by the right. This allows for a division of labour between the basic structure and its institutions, which are supposed to create and maintain background justice, and individuals who can freely pursue their ends within the framework, set by this basic structure. Consequently, it can help explain the appeal of the limited scope of justice as fairness and help us understand why the focus on a

basic structure is not merely a seemingly arbitrary distinction between different institutions.

The limited scope of justice as fairness means that the principles of justice in Rawls' theory only apply to the basic structure of society. For justice as fairness to have any implications for contract law, it is necessary to argue that contract law forms part of the basic structure. This is, however, a controversial matter. It paints a picture of contract law as instrumental to the demands of distributive justice and more specifically the version of distributive justice as prescribed by the principles of justice in justice as fairness. This view could be criticized by two sets of opponents: those who hold a deontological or anti-instrumentalist view of contract law and those who agree on the instrumentality of contract law but disagree about its effectiveness as a locus for distributive justice. These two views can roughly be seen as counterarguments from the perspective of an *ex post* and an *ex ante* conception of contract law, where the *ex post* perspective is backward looking, asking questions like who acted wrongly, while the *ex ante* perspective is forward looking, asking questions such as: what kind of effects will this rule have. Briefly, proponents of the deontological view believe that contract law rules should never be the locus of distributive justice for moral reasons, while proponents of the instrumental view believe that it is inefficient to try to achieve distributive aims through contract law.

Part I shows why these possible counterarguments do not provide compelling reasons to exclude contract law from the basic structure. Maybe more importantly, it also provides an argument as to why it is attractive to see the institution of contract law as part of the basic structure. As mentioned above, the task of the basic structure is to create and maintain background justice. I argue that contract law as an institution can play a meaningful role in achieving these two core goals of the basic structure. First, in a society where the basic structure makes production possible, at minimum some form of property and some form of legal exchange are necessary within that basic structure. Without such a structure, people are unable to strive meaningfully for the fulfilment of their own conception of the good, or at least would be improperly dependent on others for such fulfilment. Contract law is one of the primary institutions that makes such exchange possible. Secondly, contract law

ensures that background justice is preserved. It creates a framework within which people can act without having to consider the distributive effects of every individual transaction.

The conclusion that contract law is part of the basic structure means that Rawls' two principles of justice apply to contract law. Contract law as fairness is an attempt to work out what that means for contract law. The first principle of justice – each person is entitled to the most extensive scheme of basic equal liberties compatible with a similar scheme for others – comes into play with regard to the horizontal effect of fundamental rights in contract law. Its presence is felt not only in the vertical relation between citizen and state, but also in the horizontal relation between citizen and citizen basic liberties are at stake. No matter who threatens these basic liberties – the state or another citizen – justice as fairness calls for their protection. Accordingly, basic liberties should be given horizontal effect in contract law. This means concretely that the state should deny the enforceability of contracts that infringe basic liberties. The second principle of justice – social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged, and (b) attached to positions and offices open to all under conditions of fair equality of opportunity – plays a role in contract law with regard to non-discrimination rules and weaker party protection. Non-discrimination rules are normatively appealing because they aim to guarantee that offices be open to all, while weaker party protection rules are normatively appealing because they aim at improving the position of the worst-off in society. A contract law that is formulated according to these principles is what I call 'contract law as fairness'.

Part II, then, turns to the application of this conception of contract law as fairness to European contract law and more specifically the position of SMEs. Where Part I ends with an argument for categorical weaker party protection, Part II marks an attempt to work out what such weaker party protection would entail in European contract law. However, to spell out exactly what the abstract difference principle requires for one aspect – weaker party protection – of one institution – contract law – would not constitute a feasible approach. Judging the precise level of weaker party protection that is optimal for the position of the worst-off in society is

subject to reasonable disagreement and hence open to democratic decision-making. On the one hand this shows the limits of justice as fairness for specific questions of economic policy, but on the other hand it provides room for a meaningful democratic process. As such, discussing justice as fairness in relation to contract law not only helps assess contract law normatively as an institution, but also proves instructive for the understanding of justice as fairness as a (political) liberal theory of justice.

These limits do not mean, though, that there is nothing to be said about weaker party protection from a Rawlsian perspective. Instead, the focus lies on the question *who* should count as a weaker party, given the level of weaker party protection that resulted from such a democratic procedure. A categorical approach fits well with the way in which the difference principle operates generally, and with contract law as fairness, specifically. For assessing the position of SMEs in European contract law from a Rawlsian perspective the crucial question is then: should SMEs be considered as weaker parties? If so, contract law as fairness provides a normative argument for protecting SMEs as well. Such a determination can only be made in light of the actual rules on weaker party protection and their underlying principles. Since consumer law is the prevalent form of weaker party protection in European contract law, it is appropriate to take consumer law as a benchmark and examine whether these rules or their underlying rationales justify making a categorical distinction between consumers and SMEs with regard to weaker party protection.

The core of Part II is concerned with this question, in general and with regard to the main methods of consumer protection. To answer the question, the rules on pre-contractual information duties, rights of withdrawal and unfair terms in both the Directives that deal with these issues – Consumer Rights Directive and the Unfair Terms Directive – and the proposal for a Common European Sales Law are discussed. Furthermore, the way in which these rules affect consumers and SMEs is compared. This comparison shows that SMEs are consistently treated less favourably than consumers.

Both the Directives as well as the CESL contain a very restrictive notion of who can count as a consumer, effectively excluding SMEs from that category. I argue that,

in light of contract law as fairness, the underlying rationales of such a limitation in scope do not merit this categorical distinction. SMEs generally share the salient characteristics that justify the protection consumers be offered and hence SMEs should, in principle, be included in the same category as consumers with regard to weaker party protection in European contract law. Furthermore, the specific underlying rationales of the rules of pre-contractual information duties, rights of withdrawals and unfair terms control also do not provide good reasons for making a distinction between consumers and SMEs with regard to these specific legal mechanisms. The way in which these mechanisms function as weaker party protection applies to SMEs as they do to consumers. Given the normative desirability of categorical weaker party protection in contract law as fairness, to not extend this protection to SMEs without proper justification is unjust from a Rawlsian perspective.

At the same time, I raise the caveat that this argument is stronger when the SMEs under consideration are smaller and their counterparties larger. Accordingly, defining SMEs more narrowly, e.g. by limiting this category to what are now called micro and small enterprises, might be more justified. However, contract law as fairness does not provide the tools to offer an exact definition of e.g. the maximum number of employees a company could employ to still be considered an SME. This caveat notwithstanding, I argue that, from the perspective of contract law as fairness European consumer law should be reconceptualised as weaker party protection law and furthermore I argue that there are no legitimate grounds for distinguishing between consumers and SMEs with regard to who should count as a weaker party. In other words, the implication of applying a Rawlsian framework to European contract law for the position of SMEs is that they deserve the same protection as consumers.