

# The Right to Justification of Contract

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*Abstract.* This paper defends a right to the justification of contract, with reciprocal and general reasons, and explores its main implications for the law of contract and its theory. It argues that the leading essentialist and other monist contract theories, offering blueprints for an ideal contract law based on the alleged ultimate value or essential characteristic of contract law, cannot justify the basic structure of contract law. Instead, it argues, a critical discourse theory of contract can contribute to the realisation of the right to justification of contract by exposing patterns of contractual injustice, in particular exploitation and domination by contract, that contract law can and should prevent.

## 1. Contract Law and the Right to Justification

Contracts play important roles in our lives. The omnipresence of contracts often goes unnoticed. However, imagine for a moment what a society devoid of contracts would look like, or how a person's life in our society today would go if she chose henceforward to refrain from concluding any contracts. We depend on contracts for our food, housing, jobs, health care, transport, social media, and being a couple (in some cases), among many other things. These contracts, in turn, depend, at least to a degree, on their legal recognition and enforceability. Therefore, most likely our society would also be an entirely different one—and our lives would be quite different too—if contracts were not legally binding. Similarly, our lives, our society, and our markets might change a great deal if the content of our contract law became a radically different one. This would be the case, for example, if from now on contracts were enforceable only if they contained a fair price, or if the categorical protection of certain types of typically weaker contracting parties (e.g., employees, tenants, consumers, and patients) was abolished.

This raises the fundamental question of why we have contract law: What justifies the legally binding force of contract? Put in more practical terms, why does the law provide remedies for breach of contract, in particular expectation remedies, which force the party in breach to actually perform the contract or to pay damages in lieu of

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performance?<sup>1</sup> That has been the core question of normative contract theory.<sup>2</sup> And different answers to that foundational question may lead to different answers to more specific questions, such as, which contracts the law should recognise and enforce, with what remedies contracts should be enforced, et cetera. These questions are particularly pressing, not only because contracts can bring so many good things to our lives, but also because contractual relationships may bring misery and abuse too, for example in the case of contractual exploitation and domination. Think only of the abuses occurring in certain international supply chains, in which every link is constituted by a contract.

Most leading contemporary contract theories are either (ethically) monist or (metaphysically) essentialist. Ethically monist theories understand contract law as promoting the good of the parties or of society at large, with reference to an ultimate value (e.g., autonomy, solidarity, or efficiency). Metaphysically essentialist theories proclaim contract law's essential nature, with reference to an element or characteristic deemed essential—i.e., without which contract law would no longer be contract law—as opposed to merely accidental, contingent features. Some theories combine ethical and metaphysical claims, arguing that a certain value is the essential value of the law of contract. Others find the essence of contract in morality (i.e., in the right, as opposed to the good).<sup>3</sup> Thus, we find theories claiming that contract is essentially about autonomy—understood variously as promise-keeping (Fried 1981), consent (Barnett 1986), independence (Ripstein 2009, esp. chap. 5), self-authorship (Dagan 2013; Kimel 2003), self-determination (Gutmann 2013b, 3, 12), or choice (Dagan and Heller 2017)—efficiency (see, e.g., Cooter and Ulen 2012, chap. 8; Katz 2014; Shavell 2004, pt. III), solidarity and collaboration (Jamin 2001; Lurger 1998; Markovits 2004, 1421), corrective justice (Gordley 2001; Weinrib 2012), or tradition (Zimmermann 2011).

This state of affairs would not pose any problems if the world was organised as in Lukes's (2009) philosophical satire *The Curious Enlightenment of Professor Caritat*, where all the utilitarians lived in Utilitaria, the communitarians in Communitaria, the libertarians in Libertaria, and—who knows—the liberal perfectionists in Daganistan

<sup>1</sup> In the civil law tradition, the primary obligation is specific performance, with expectation damages constituting only a secondary obligation, while in common law jurisdictions, expectation damages are the ordinary remedy, specific performance being available only as an exceptional remedy.

<sup>2</sup> Cf. the famous challenge by L. L. Fuller and William R. Perdue (1936 and 1937): “why should a promise which has not been relied on ever be enforced at all, whether by a decree of specific performance or by an award of damages?” (Fuller and Perdue 1936, 57). Why indeed is it not enough for the law to compensate the obligee (“promisee”) for any loss she sustains due to the detrimental reliance on the contract (negative interest)? Peter Benson (2019, 8), recently took the Fuller and Perdue challenge explicitly as the starting point of his transfer theory of contract.

<sup>3</sup> I will use the familiar distinction, with regard to practical questions and discourses (i.e., about what to do), into ethical and moral ones. Ethical questions and discourses are concerned with the good (i.e., about how to live a good life) and refer to the values held by the relevant individual or community. Moral questions and discourses are concerned with questions of the right (i.e., about what we owe to each other) and refer to rights and norms (esp. norms of justice and human rights), which are universal. While in practice (for example in a democratic debate) these two different types of questions, discourses, and justificatory contexts may frequently overlap in part, the distinction is nevertheless an important one, because it can contribute to clarity in the debate and it may inform critique (e.g., where a moral claim is denied merely on ethical grounds). See, e.g., Dworkin 2011, 13; Habermas 1996, 4.2.2. Against such “segregation,” see Taylor 1989, 3.2 and 3.3.

(Lukes 2009). For such an imaginary world, a collection of appropriate monist contract law theories would be just the perfect solution. However, in the real world today we live in pluralist societies, where people adhere to quite different values and principles. To be sure, none of these various contract law theories, or the worldviews, values, principles, and metaphysical doctrines they express or rely on, will strike most people as particularly unreasonable. We just disagree fundamentally about which one of these is the right, correct, or best one. What does this fact of reasonable pluralism, as Rawls (2005a, 36) called it, mean for the acceptability of each of these monist theories as the justification for the binding force of contract and of other core features of a contract law system, including contract law's response to claims of contractual injustice?

The right to justification, as proposed by Rainer Forst, provides an intuitive and appealing starting point for addressing these questions (Forst 2013b). This most basic human right, Forst argues (*ibid.*, vii), entitles everyone to demand reasons for the actions and norms (legal or other) affecting her or him, and grants everyone a moral veto right against all those actions and norms that cannot be justified with reasons that are both reciprocal and general. Reciprocity means here that no one claims privileges for themselves (reciprocity of content) or projects their own values or higher truths onto others (reciprocity of reasons). Generality signifies that the reasons must be ones that can be shared by everyone affected; no one's point of view must be excluded. Thus, a Forstian perspective on normative contract theory turns the fundamental normative questions of contract law around by focusing on justifications that no one can reasonably reject.<sup>4</sup> As a result, our attention is directed towards contract's reasons, actual (from lawmakers) and potential (from reform proposals), and towards the injustices following from the recognition (as valid) and enforcement (with remedies) by contract law (or by specific contract law doctrines) of unjustifiable contractual relationships.

The ultimate foundation of the right to justification can be found in practical reason, in particular in the principle of justification with general and reciprocal reasons itself (Forst 2013b, pt. 1).<sup>5</sup> We have a moral right to justification because such a right could not reasonably be rejected in a procedure where only general and reciprocal reasons are admitted.<sup>6</sup> However, as Forst points out, in addition to its moral grounding in practical reason the right to justification also has been a historically operative idea. Arguably, all emancipatory struggles can be understood as demands to fully count as a person, i.e., as someone with a right to veto basic institutional arrangements in society that are not justifiable towards her (Forst 2002, 7). The claim to be recognised as an agent of justification is the most basic claim against (asserted) authorities. Thus, a right to justification can also be reconstructed from the societal practice of contesting existing social institutions and from the demands for more justifiable ones.

<sup>4</sup> The negative formula of nonrejectability of reasons derives from Scanlon 1982; 1998, 4 and *passim*.

<sup>5</sup> On the "reflexive" (i.e., self-critical, self-disciplining) and "recursive" (i.e., nonfoundationalist, circular) character of practical reason, see O'Neill 1989.

<sup>6</sup> The approach is moral-constructivist in that no ground from outside the procedure can trump the procedure. See Forst 2013b, 50. For this reason, it is also autonomous: It requires no other foundation than the right to justification itself (e.g., grounding in some conception of the good life). See *ibid.*, 6. Communitarians argue that practical reason can be shown, as a matter of genealogy, to be deeply rooted in a particular form of life, i.e., that of European modernity. See, e.g., Taylor 1989. However, this does not mean that the justification of autonomous moral principles requires a reference to the good of the modern European form of life. See Forst 2002, 4.4.

I will not go any further into the philosophical foundations of the right to justification.<sup>7</sup> Instead, my aim is to discuss specifically the right to justification of contract. In other words, I will explore the implications for contract law and its theory of the general right to justification. Thus, my central question is essentially a question of applied political philosophy. Its answer should be of interest in two different respects. First, as a contribution to contract theory. Most other normative contract law theories, in particular the monistic ones, in fact are also applied political theories. This should not come as a surprise if one realises that through the law of contract a society publicly recognises contracts as valid and publicly supports their enforcement with the help of public institutions and at the public's expense. Given today's widespread privatisation, contractualisation, and commodification, it matters for a society to be clearer on the normative foundations of its contract law. Thus, it is worth exploring what a Forstian theory of contract law might look like. This is especially the case since the core idea in Forst's theory, i.e., the basic human right to justification, is fundamentally a horizontal right, i.e., a right that every person has in the first place towards every other person, and only derivatively, and hence indirectly, towards the state.<sup>8</sup> Secondly, discourses of application, in this case to contract law, feed back into the consideration of the more abstract principles and conceptions of a theory of justice (see Günther 1988), in our case the right to justification and its two demands of reciprocity and generality, and may perhaps provide a reason to reconsider or specify certain elements of the general theory.<sup>9</sup> In particular, a discussion of the right to justification in private-law making, can contribute to clarifying the role of the right to justification within democratic lawmaking more in general.

The paper is organised as follows. First, it briefly addresses, in Sections 2 and 3 respectively, two questions relating, in different ways, to the scope of application of the right to justification of contract, i.e., which parts of contract law are in particular need of justification, and towards whom. Then, Section 4 proceeds by discussing the implications of the demand of reciprocity of reasons for the viability of leading contemporary contract theories, in particular their ambition to provide a single normative foundation for a complete system of contract law. Subsequently, Section

<sup>7</sup> The claim to a moral right to justification and a corresponding moral duty to justify is tied up with positions in a number of debates in moral philosophy, metaphysics, and epistemology that cannot be addressed here. At the same time, contract-law makers and theorists may have other reasons for a commitment to justifiability by reciprocal and general reasons, perhaps not as a fundamental right or a categorical demand, but as a *pro tanto* constraint on political decisions. Readers rejecting deontological morality (or the present version of it) may want to modify and discount my critique and conclusions to the extent necessary for them to match what they consider the right balance with other political values, or the right degree of pragmatism.

<sup>8</sup> In other words, on Forst's view, our most basic human right to justification has direct horizontal effects and only indirect vertical effects. See Forst 2016, 10 (human rights "must be seen as justified *horizontally* between moral and political equals") and Forst 2011, 62 ("Die Menschenrechte [...] haben eine horizontale Struktur"). This is in stark contrast to most contemporary constitutions that understand fundamental rights and freedoms as primarily (or exclusively) vertical rights against the state, whose horizontal effects (if accepted at all) are understood as occurring only indirectly, via open-textured "general clauses" in the civil codes referring to "good morals" and "good faith and fair dealing."

<sup>9</sup> This exercise could also be understood as an attempt at reaching a Rawlsian reflective equilibrium, which results from a back and forth between the principles and our intuitions, in this case our intuitions as informed by contract law questions, doctrines, and theories. This should not, however, undermine the critical nature of the contract theory: It may very well turn out that not the justice principles but some received contract doctrines and theories will have to give.

5 critically discusses the libertarian assumption that the presence of state coercion (binding force, mandatory rules) is generally more in need of justification than its absence (freedom from contract, freedom of contract). Next, Section 6 explores the possibility of toleration through contract. Section 7 discusses the role of the right to justification within the democratic debate on contract law. Finally, Section 8 formulates the kind of contribution a critical and realistic contract theory can make to the realisation of the right to justification of contract.

## 2. The Basic Structure of Contract

According to Forst (2013b, 80), the right to justification and its demands of reciprocity and generality refer to the “basic structure of society.” By focusing—like Rawls—chiefly on the justifiability of the basic structure of society, Forst makes sure that the private and public autonomy of citizens are not unduly restrained by a duty constantly to give reasons. Relatedly, this also leaves space for other than moral reasons to inform (private)-law making. What is at stake here for contract law is whether it is at all subject to principles of justice (Rawls seems to have thought it is not).<sup>10</sup> The “basic structure” refers to a society’s main political, social, and economic institutions responsible for justice (Rawls 1999, 6; 2005a, 11, 258; Forst 2013b, 80). If we understand justice as not being limited to social (esp. distributive) justice, but as also encompassing interpersonal justice, then clearly contract law, and private law more generally, is part of the basic structure of society (at least in part). This resonates with the notion that the civil code is in fact a society’s “civil constitution” (“la vraie,” according to Carbonnier 1986, 309). However, even if the basic structure of society is understood more narrowly (and wrongly in my view) in terms only of the institutions responsible for social justice, in particular distributive justice, then still at least the basic structure of contract law, i.e., its core doctrines and institutions, should be understood as being part of the basic structure of society (in the same sense, Klijnsma 2015; Kordana and Tabachnick 2005; Scheffler 2015; Tjon Soei Len 2017). This is the case for the simple reason that the core choices with regard to contract law have a major distributive impact on society (whether defined in terms of wealth, opportunities, or other) (Kronman 1980). Indeed, there is a considerable risk of the wrong choices in contract law exacerbating already existing distributive injustices (Bagchi 2014, 199; similar, Shiffrin 2005, 235). Therefore, it seems, the core questions of contract law are within the strict scope of application of the right to justification. This means that at least the basic structure of contract law will have to be justifiable with reasons that are both general and reciprocal.<sup>11</sup> What does this entail?

<sup>10</sup> Rawls 2005b, 266–9. Rawls explicitly focused only on social justice (see Rawls 1999, 7), but, as I argue in the main text, even then at least the basic structure of contract law should be subject to the principles of justice.

<sup>11</sup> This is true not only for national contract laws, but also for EU contract law. The objection that a European polity does not exist gets things backward. If the EU’s internal market has a basic structure that exercises an important distributive role, which seems undeniable today, then to that extent a European demos (not an ethnos) by necessity has to exist too. Wherever institutions are exercising a major distributive role, those responsible for it, in this case the EU citizens, will have to justify their actions with general and reciprocal reasons. See Hesselink 2016. In the same sense, Forst 2020, arguing that the requisite institutional form of justification depends on the degree of subjection (“demoi of subjection”).

### 3. Other Countries' Contract Laws

The generality requirement that, Forst argues, follows from the basic right to justification raises difficulties for contemporary contract law because of contract law's extraterritorial effects. In cross-border cases, national systems of contract law apply, via the rules of private international law, also to noncitizens and nonresidents. In those cases, the applicability does not meet the demands of the Habermasian (and ultimately Kantian-Rousseauvian) principle of self-legislation, according to which all addressees of legal rules must be able to also regard themselves as their authors.<sup>12</sup> Similarly, it also does not meet the Forstian demand of generality, in that it is not ensured (via robust institutions) that the reasons of contract are acceptable also to those noncitizens to whom these rules will come to apply. The problem here is that any national contract law system may apply, in principle, to any person in the world, e.g., when a consumer buys online from a seller in a foreign country.<sup>13</sup> The often suggested way out of this legitimization conundrum via private autonomy—i.e., the idea that in cross-border cases the applicability of national contract law to foreigners always depends on the exercise of their own private autonomy, either active (via choice of law) or passive (through conflict rules, which apply in the absence of choice)—is not convincing for two reasons. First, party autonomy (rightly) is not absolute: Choice of law is limited, some conflict rules are mandatory, typically in the interest of weaker party's protection (Arts. 6–8 Rome I Regulation 2008). Secondly, and most importantly, private autonomy cannot replace public autonomy. Or, at least the question of whether and when legal rules can be set aside by private parties should depend, at least in part, on an inclusive democratic deliberation, which brings us back to the requirement of generality. The generality of reasons, required by the right to justification, therefore exposes the questionable legitimacy of the extraterritorial effects, via conflict rules, of national contract law systems. For cross-border contracts within the European Union, this problem was strongly mitigated with the adoption by the European legislator of the Rome I Regulation (2008).<sup>14</sup> However, from the justice point of view the extraterritorial effects of contract law remain particularly problematic in the global economy, where, in the absence of so many of the public institutions familiar from the nation states, economic transactions are largely governed by contract law (mostly national contract laws, applicable via national rules of private international law), which, therefore, carries the full burden of countering exploitation and other injustices. There are no easy solutions to this problem. However, the fact that a United Nations Convention on Contracts for the International Sale of Goods (CISG) was signed in 1980 and has since been ratified by as many as eighty-nine states, suggests that an international

<sup>12</sup> See Habermas 1996, 104, and specifically with regard to private law, 408–9. Habermas speaks of “self-legislation by citizens” (*ibid.*, 120), but that is too narrow.

<sup>13</sup> Mandatory consumer protection ensured by Art. 6(2) Rome I does not preclude the applicability of the national law of the foreign seller or service provider; it merely ensures that any choice of foreign law will not deprive the consumer of the protection provided by mandatory provisions of her or his national law.

<sup>14</sup> The regulation was preceded (for most Member States) by the Rome Convention (1980) on the Law Applicable to Contractual Obligations (Rome). From the perspective of democratic legitimacy, the conversion into a regulation meant progress, given that treaty ratifications in most countries are not highly deliberative inclusive processes. Having said that, EU democracy itself still is far from perfect and, more fundamentally, of course, always remains to come. On “la démocratie à venir,” see Derrida 2006, 110–1.



solution to the problem of transnational contractual injustice is not impossible. Strikingly, the CISG does not address the validity of contracts. This leaves scope for a UN treaty against exploitative cross-border contracts.

#### 4. Contract Theory and the Reciprocity of Reasons

If we leave these two scope-related questions to one side and now further focus on contexts of contract-law making, where (largely counterfactually) (1) the points of view of all those to whom the contract law rules will apply will have a realistic chance of influencing the outcome—e.g., with deliberative democratic lawmaking institutions fed by a healthy public sphere where reasons flow freely from the periphery to the centre—and (less counterfactually) (2) as a result of the economic and social structure of society, contract law plays an increasingly important role in determining distributive outcomes, then, from the point of view of the right to justification of contract, a core question becomes whether the basic structure of the contract law system at hand—and the key political choices the legitimate contract-law maker has made—can be justified with reasons that none of its addressees can reject for lack of reciprocity. If we then further leave aside also the requirement of reciprocity of content—relevant especially when lawmakers seek privileges for themselves, which is certainly not to be excluded, given the usually strong involvement of “stakeholder” representatives (i.e., professional lobbyists) in contract-law making, especially at the European level, with all the familiar risks of rent-seeking—then our full focus comes to fall on the requirement of reciprocity of reasons.

Thus, the question arises: What does it mean that at least the basic structure of contract law must be justified by reciprocal reasons? Or, formulated the other way around, when can we say that a given system of contract law can be reasonably rejected because its basic structure is justified explicitly—or is justifiable only—by irreciprocal reasons? In explaining the criterion of reciprocity of reasons, Forst writes that “no one may simply assume that others have the same values and interests as oneself or make recourse to ‘higher truths’ that are not shared” (Forst 2013b, 6; see also 146). It seems to me that both the monist ethical theories and the essentialist metaphysical theories of contract law, mentioned in the introduction, are caught by the standard or filter thus defined.<sup>15</sup> This means that if a country had a contract law whose basic structure was justified explicitly, or justifiable only, in terms of an ultimate value or of a higher truth concerning contract law’s essential nature, then, from the point of view of the right to justification, it seems, any person who happens to reject the value at hand (either as the supreme value for contracts or even as a value *tout court*), and to whom that contract law nevertheless claims applicability, would have a moral veto right against its application to her.

All essentialist and other monist contract law theories, including all the leading theories, have a similar structure. They formulate one core value or principle as a starting point and then elaborate a full-fledged contract law system on its basis, ready to be offered to lawmakers as a blueprint for an ideal contract law. In other words, they are ideal normative theories. At the same time, they are also systematic analytical theories, elaborating all the implications following from their respective normative starting points for all the main questions to which a system of contract

<sup>15</sup> In Rawlsian terms, these theories are comprehensive doctrines, or specific parts thereof.

law must provide an answer. (Sometimes, theorists address only core issues, leaving the details to doctrinal scholarship.) The result is a proposed normative architecture—often quite impressive—for a complete system of contract law. The debate in normative contract law theory is not usually about the specific contract law rules that should follow from a given core principle or key value, but rather about the question which value or principle should be the ultimate foundation of contract law—its apex principle, as Swaminathan (2019) puts it.

If an actual contract law system based exclusively on one of the familiar metaphysically essentialist or ethically monist theories would in fact violate the right to justification, this means that the first aim of these theories—i.e., to provide a blueprint or starting point for contract law reform—is unacceptable as a matter of justice. Of course, this does not mean that these theories cannot be proposed in the academic and political debates on contract law. The right to justification is not directed against free speech. The point is rather that there is little hope (and rightly so, from the perspective of the right to justification by general and reciprocal reasons) for the theorists proposing monist and essentialist theories that contracts ever will be legally recognised and enforced in the name of their proposed ultimate value or essential characteristic of contract law. Can essentialist and monist contract law theories still play a more modest role? In particular, could they be recycled as ingredients for a pluralist or composite contract theory, based on a number of conflicting (perhaps even incommensurable) contract law values and/or understandings of what contract law is truly about? Perhaps, such a role, either as a matter of realism or because of a commitment to democracy, is what most contract law theories and their proponents would readily settle for.<sup>16</sup> It would also best match, as a descriptive matter, with the contract laws we have today. Therefore, such a compound law of contract, based on a combination of different views of the cathedral (Calabresi and Melamed 1972), may seem an attractive option. However, two questions remain.

First, would such a pluralist theory, combining the best of different contract law worlds, be compatible with the right to justification? Forst (2013b, 4, 19) rightly points out as an important advantage of his theory that justifiability is not a binary matter (unlike, e.g., validity/invalidity) but a matter of degree, of better and worse arguments. So, perhaps a person has more reason to accept a contract law value or an understanding of contract law's true nature that is offensive to her when it is sufficiently diluted with other, more attractive values and palatable understandings. Indeed, arguably that is what democracy is all about: We have reason to accept law as legitimate to the extent that our own point of view, including, in this case, our view on the values and nature of contract law, is assured a fair chance of making an impact on the contract-law-making process. And it seems legitimate for a society faced with persistent disagreement, even after inclusive and extensive societal and parliamentary

<sup>16</sup> Note, however, what Unger (1996, 72) denounces as contemporary jurisprudence's "dirty little secret," i.e., its discomfort with democracy. For political philosophy, see Forst 2014, 4: "All too often political philosophy continues to live in a pre-democratic era. It accords priority to teleological values which are supposed to ground a just or good social order, where those who are subjected to this order do not feature in it as authors." If anywhere, the discomfort with democracy and the tenacity of a predemocratic posture are probably at their strongest in private law theory and doctrine, where theorists keep producing blueprints for complete systems of contract law, and where doctrinal scholars are offering comprehensive drafts for reform, both fearing the worst for the fates of their proposals at the hands of the democratic legislature.



debates on a matter that requires a decision, to decide by majority rule.<sup>17</sup> On a Forstian approach, all this would be discussed under the criterion of generality. However, it is important to note also that Forst's theory (rightly, in my view) does not allow for trade-offs between the two standards that justificatory discourses must meet, i.e., reciprocity and generality. Therefore, it seems, a lack of reciprocity in part of the justification cannot be compensated for by a particularly good score on the generality test, resulting, e.g., from a high level of deliberative inclusiveness.

Secondly, even if Forstian justice did allow for it, what normative work would actually still be done by the ethically monist and metaphysically essentialist theories for a contract law based on many different reasons, i.e., a compromise between divergent theories? At the very least, in such a case any justificatory force in support of the pluralist outcome (i.e., its specific mix of values and principles) coming from the respective monist theories would be subject to the justificatory force derived from the principle or procedure that led to the compound. In this regard, it seems very difficult to come up with a nonproceduralist theory justifying which different values and considerations should provide the normative basis for our contract law, and in what measure.<sup>18</sup> And even if such a theory were found, then still the original monist theo-

<sup>17</sup> According to Habermas (1996, 179), the majority rule is legitimate given that the decision reached by the majority "only represents a caesura in an ongoing discussion" and its content can be viewed as "the rationally motivated yet fallible result of a process of argumentation that has been interrupted in view of institutional pressures to decide, but is in principle resumable." Forst (2013b, 298 n. 66) seems to envisage a more restricted scope for the majority rule when he writes that "on central questions of justice, the criteria of reciprocity and generality must be strictly complied with, while in proceedings and issues of 'normal' politics, adherence to basic principles of majority rule and compromise is legitimate." However, for a society not to have any legal regulation on a certain matter may be much worse from a justice perspective—i.e., more difficult to justify with reciprocal and general reasons—than having a legal rule based on a majority decision, even if the matter raises a central question of justice. See Waldron 1999, 102, and Bellamy 2007, 5, on "the circumstances of politics," i.e., the fact of persisting disagreement among reasonable people not only on conceptions of the good but also on core questions of justice, and the consequent inevitability of majority decisions also on political matters involving such questions. This does not, however, mean that the difference between moral, ethical, and pragmatic questions, and their respective appropriate justificatory discourses, can legitimately be set aside; it only means that in political contexts even disputes about the right answer to moral questions, and, for that matter, even disputes about whether a certain matter involves any moral questions, ultimately (but not definitively) may have to—and legitimately can—be decided by a majority vote.

<sup>18</sup> Lomfeld (2015, 5) offers a "deliberative discourse theory of contractual rights." He understands legal rules, in Alexian fashion, as (logical) priority relationships between different values, and deliberation as the balancing of a plurality of values. He proposes "a logic of reasons" (ibid., 185) for this balancing exercise in the shape of a "general deliberative grammar of the reasons of contract." Within this framework, the entire normative debate on contract law is reduced ultimately to four conflicting core values, i.e., utility, security, justice, and freedom (ibid., 74, 386 and *passim*), where justice is turned into one value to be balanced against the other three. This raises the question of how we can ever know what the reasons of contract might be in advance of any actual deliberation, i.e., before people in the society at hand have themselves thematised problems and solutions, and have proposed relevant ethical, moral, and pragmatic considerations (i.e., values, norms, and means to ends). Although Lomfeld emphasises the political nature of contract law, he does not address the political process of contract-law making or its legitimacy at all. Indeed, he hardly considers the possibility of drafting a contract law reform; the theory is focused almost exclusively on application discourses of the kind judges and doctrinal scholars typically engage in. The result is a rather static picture (a "closed" value system [ibid., 40]). There is no sense of how citizens could modify the grammar of contract law by supplementing its core values or replacing some of them with others. If changing the law starts with changing the discourse, it is not clear that a static, universal grammar will be helpful in making progress.

ries that end up figuring as ingredients in a multivalued contract law will play no role—and have no reasons to offer that might be helpful—in determining which *other* values should contribute to shaping contract law and how much: The compromise is something these monist theories by definition have nothing to say on.<sup>19</sup> In other words, it seems that a pluralist normative theory of contract law (or of any other branch of private law) will have to be a largely procedural theory. A fully procedural theory of contract law could be a democratic one (see Hesselink 2015b). There, the entire burden of justification would fall upon the democratic process. Some contract theorists think that such a (largely) procedural theory would be a metatheory, but that is a mistake: Proceduralist theories of contract law operate on the same plane as all other familiar substantive theories, be they monist or pluralist. It is true that all deontological theories claim the moral high ground by arguing for the priority of the right over the good, but they do this with regard to the *same* questions (in our case, fundamental political questions of contract law, e.g., the question of why, when, and how contracts should be legally binding), not metaquestions concerning the metaphysical, epistemological, or other presuppositions or commitments of contract theory. Therefore, they do operate on the same plane.<sup>20</sup>

A final point on interpretative theories. As said, most essentialist and other monist contract theories are ideal normative theories. They make claims about contract law as it should be under ideal circumstances. They are not meant exclusively or primarily for a specific political community and its legal system.<sup>21</sup> Usually, their proponents regard the implementation of the theory as a separate issue. Frequently, they explicitly present themselves as reform programmes.<sup>22</sup> In order to underscore their relevance and realism, they usually set out to demonstrate also how their normative programme has been realised already, in part, in a given jurisdiction. However, on their own terms there is no reason for these theories to stop short of their full implementation through reforms replacing all the rules and doctrines not matching with the theory with more fitting ones. Meanwhile, these theories offer an external standard by which we can assess the merits of existing contract law systems and compare them: Which is more efficiency-, autonomy-, or solidarity-friendly? However, some theories are different. Adopting an internal perspective, they aim to offer the most

<sup>19</sup> To give an obvious example, the utility principle is a maximising principle. It evaluates any trade-offs with other values exclusively on its own, utilitarian terms (e.g., in indirect utilitarianism). Put differently, from the standpoint of each of the monist theories, allowing for compromises and compounds simply amounts to partial compliance or nonideal theory.

<sup>20</sup> As Forst points out, his critical theory of justice combines justificatory monism with evaluative pluralism (Forst 2013b, 113, 122, 195). As an approach to lawmaking and politics it is perhaps best understood as one of constrained (i.e., nonfoundational) pluralism.

<sup>21</sup> As a prominent example, see Fried 1981, 1: “The promise principle, which in this book I argue is the moral basis of contract law, is that principle by which persons may impose on themselves obligations where none existed before.” Nothing suggests that this principle underlies or should underlie, for example, only American contract law today. See also *ibid.*, 2, where he refers to “this conception of contractual obligation as essentially self-imposed,” quite generally, without reference to any specific place or time. Other prominent examples include most (welfarist) “economic” theories, which outline the main traits of an efficient system of contract law without much reference, other than for reasons of exposition, to a specific existing contract law.

<sup>22</sup> See, e.g., Dagan and Heller 2017, 15 (“choice theory marks a path for reform that brings contract law closer to widely shared liberal ideals”), and Dagan and Heller 2019b, 148 (“choice theory has irreducible normative and reformist value”).

convincing, attractive, or right account of a given system of contract law (see, e.g., Smith 2004, 5 and *passim*; Baird 2013, 1 and *passim*). Such “interpretative” or “reconstructive” theories combine a claim to fit with the main legal materials (“sources”) of the contract law system at hand (its civil code or its leading precedents) with a claim to present these materials in their best light (with reference to certain values or principles) (see Dworkin 1986). Especially in jurisdictions where a contract law reform is not to be expected any time soon (think, in particular, of common law jurisdictions), this latter type of theories would seem to be more relevant. And perhaps a charitable reading of ideal contract theories requires us to understand them also as interpretative or reconstructive ones in this sense. Would this make any difference? Would the essentialist and other monist contract theories fare any better as interpretative or reconstructive theories? No, to the contrary. As interpretative theories, they are bound to do even worse, for reasons relating both to fit and to legitimacy. First, as interpretative theories, which adopt the internal perspective, monist theories, presenting one single value or principle as the ultimate foundation of contract law, will have a hard time (much harder than pluralist theories, which combine various different values) in making sense of all the main legal materials of a given system of contract law. Much of the existing contract law will simply not fit the theory. This would not be a problem for an ideal theory, which aims to provide a standard for critical evaluation and an agenda for reform (which may be radical), but it is for an interpretative theory, where lack of fit constitutes a failure. Secondly, there is the additional hurdle of legitimacy. An attempt to implement a monist contract theory through interpretation rather than via reform would add to the problem we saw of lack of reciprocity of reasons the additional problem that the implementation would have to be undertaken by courts (in some countries, in a steady dialogue with doctrinal scholars) rather than by the democratic lawmaker, which would be hard to match, to say the least, with the requirement of generality of reasons, given that virtually none of those to whom the contract law would apply would have a chance to have a say about its content. In other words, with the judicial implementation of monist contract theory, which is the lawmaking context that interpretative monist theories are meant for, the lack of reciprocity of reasons would not only still exist but would also be exacerbated by a lack of generality of reasons (or, at the very least, a high structural risk thereof).<sup>23</sup>

## 5. No Libertarian Default

Forst’s theory of justice is explicitly Kantian. So, an alternative to a largely proceduralist discourse theory of contract law could be an understanding of contract law entirely in deontological terms, i.e., as a matter exclusively of interpersonal right and wrong (as opposed to also including considerations of individual and societal good

<sup>23</sup> Whatever the merits of judicial contract-law making, its democratic credentials are not usually considered its strongest point. But see Shiffrin (2017), who commends the common law method of lawmaking for its distinctive democratic virtues. However, she seems to confuse the merits of general contract law principles and doctrines with those of the common law method of lawmaking, thus overlooking the fact that in civil law jurisdictions private law codification, usually regarded as the epitome of systematic lawmaking based on general principles, is undertaken by the legislature (which admittedly does not per se ensure robust democratic legitimacy).

and bad).<sup>24</sup> However, if we were to go down the formal Kantian route of the innate right to freedom we would end up with a conception of contract law that is hard to distinguish from a libertarian one.<sup>25</sup> Ripstein's sophisticated natural law system of private law entirely disregards (deliberately) the empirical facts of inequality and unfreedom in many contractual relationships that led most legal systems, in the course of the twentieth century, to the "materialisation" of private law, i.e., the transformation from a formal into a more substantive understanding of freedom and equality in private law relationships (sometimes also referred to as a more "social" understanding).<sup>26</sup> Habermas has pointed out that the moral principle, which requires the universality of its norms, and the democratic principle, which provides a standard for legitimate law under time and other factual constraints here and now, do not operate at the same level of abstraction (Habermas 1996, 108–11, 459); that law should not merely implement morality or be subordinated to it (*ibid.*, 84, 120);<sup>27</sup> that for private law, too, it is the case that its addressees must be able to understand themselves as its authors (*ibid.*, 408–9); and that under a discourse-theoretical conception today there is no legitimate going back to a formal private law (*ibid.*, 407). These seem to me to be insights that any discourse theory of contract law (and any contract theory *tout court*) should hold on to.<sup>28</sup> In other—more Forstian—words, not only ethical theories referring to ultimate values, but also a moral theory relying on a controversial metaphysical conception of the moral person as the apex principle for a system of contract law, can be morally vetoed for failing to provide reciprocal reasons, as demanded by the right to justification.<sup>29</sup> Moreover, it is important to note that there is no libertarian default. It is not the case that from the point of view of the right to justification the presence of state coercion is any more in need of justification than its absence.<sup>30</sup> As the historical example of late-nineteenth-century "classical" (i.e., prematerialisation) *laissez-faire* contract law and also today's role of contract law in upholding certain global supply and value chains demonstrate (see Tjon Soei Len 2017), from the point of view of justice, noninterference can be just as problematic as interference—and frequently even more so. Indeed, Forst reads Kant's innate right to liberty, much more convincingly, as the right to be respected as justificatory equals, i.e., essentially

<sup>24</sup> See esp. Gutmann 2013a; Ripstein 2009, chap. 2 and *passim*.

<sup>25</sup> Ripstein's view differs crucially from that of libertarians like Nozick in that it does not claim it to be unjust for the state to redistribute; Ripstein merely argues that horizontal, private relationships should not be the locus for redistribution, and that private law should therefore be formal. It is an argument for a division of moral responsibility, not one against a fair distribution of opportunities along liberal-egalitarian lines. See Ripstein 2006, 1393. The fact remains, however, that the resulting respective accounts of private law are virtually indistinguishable. See Hesselink 2016, 431–6.

<sup>26</sup> On materialisation, see Auer 2014; Canaris 2000; Wieacker 1974, 23–4. On "the social," see Kennedy 2006.

<sup>27</sup> Legal and moral norms are two different and mutually complementary types of action norms.

<sup>28</sup> Not only Habermas's discourse theory of law and democracy, but also Rawls's political liberalism considers empirical factors (esp. the circumstances of justice, the fact of reasonable pluralism, and the idea of an overlapping consensus). Because of this empiricism, O'Neill (2000, 2) and Ripstein (2009, 3) reject Rawls's claim for his theory to be a Kantian one.

<sup>29</sup> Scheffler (2015b, 231), too, understands Ripstein's account as one that relies on "a particular comprehensive doctrine."

<sup>30</sup> Forst (2016, 24) explicitly rejects "a libertarian 'presumption of liberty.'"

the right to justification guided by the criteria of reciprocity and generality (Forst 2016, 12, 16).

Much the same as for Ripstein's theory also applies for the "thin" concept of moral autonomy proposed by Gutmann (2013). He claims that his view is not libertarian because it is compatible with policies of "massive redistribution" (*ibid.*, 51), but at the same time he essentialises contract as exclusively concerned with "protecting" spheres of formal freedom. However, a duly thin notion of moral autonomy will not yield a formal system of contractual rights and obligations. At the very most, it may require a very basic and minimal right to contract, i.e., a right to have at least some contracting options. Arguably, just like a person without any personal property, so too a person who has no chance of alienating any of her property or services lacks agency freedom.<sup>31</sup> However, as Forst (2016, 27) underlines with regard to a basic right to personal property, any concrete form that such a right assumes must be reciprocally and generally justifiable. The same is true for any right to contract. And it is a very long stretch from an abstract (indeed, formal) right to contract to a full-fledged system of contract law rules and doctrines that is entirely formal in the very different sense of disregarding all substantive differences between contracting parties and contractual relationships. As said, it is hard to see how such a system could be justified with reciprocal and general reasons.

## 6. Toleration through Contract

With regard to the right to freedom of religion, Forst argues that people who respect each other as justificatory equals accept that they must not impose their values or beliefs, such as religious beliefs, on others who reasonably disagree with these beliefs. "Imposing religious or antireligious views," he writes, "violates the reciprocity of claims and of reasons, because to do so is to claim a privilege (using the force of law to generalize one's own reasonably rejectable beliefs) and dominate others" (Forst 2016, 26). Arguably, the introduction of a system of contract law that is founded explicitly on—or that can be justified only with reference to—a controversial value or metaphysical doctrine would be similar, albeit on a much smaller scale, to the establishment of a religion.<sup>32</sup> Citizens who are told that the official reason for enforcing a contract against them is that contracts enable self-authored lives or that contract enforcement makes the society as a whole more wealthy (or otherwise better off), or indeed that the law is implementing her (and everyone else's) innate right to freedom, all have reason to feel treated as second-rate citizens if they happen to reject private autonomy, the maximisation of social utility, or Kantian metaphysics as an ultimate value or truth. The direct implication seems to be that essentialist and other monist theories cannot be established as the canonical dogma of our contract law.

Freedom of religion (and of other worldviews) is closely related, both historically and normatively, to the principle of religious toleration. Forst rejects the permission conception of toleration, under which the majority allows the minority to

<sup>31</sup> Rawls and Habermas mainly emphasise the importance for democracy of citizens having at least some private property and private autonomy. However, that seems too instrumental a notion of a basic right to property (and to contract) for a deontological approach.

<sup>32</sup> Cf. the first amendment to the US Constitution: "Congress shall make no law respecting an establishment of religion."

practice their “deviant” faith as long as they do not openly challenge the orthodox view. Instead, he defends the respect conception, according to which tolerance is a mutual attitude of persons who respect one another as equals (Forst 2013b, chap. 6; 2014, chap. 6; 2017, chap. 5). He argues that the normative ground for toleration ultimately lies in the right to justification: If the reasons one has for objecting against the practices of others, however strongly these may be felt, do not meet the standards of reciprocity and generality, then one has to accept that those others engage in those practices. In other words, mutual toleration is “a form of living together where each side accepts that it must not force its own views on the other” (Forst 2013b, 144). Could not a similar toleration-as-respect view be developed for contract? Should not citizens express their tolerance towards each other’s comprehensive doctrines within their contractual relationships as well? And, in line with Rawls’s idea of applying the principle of toleration to philosophy itself (Rawls 2005a, 10), should not the principle of toleration also be applied to the various existing monistic ethical and metaphysical contract theories? As Forst (2013b, 71) explains, “disagreement in conflicts over ethical values by no means indicates that the perspectives involved are immoral or unreasonable, from which arises a justified demand for toleration. This demand arises whenever opposing ethical convictions are equally morally permissible, but not morally binding, that is, where they neither breach the threshold of justification nor can reach it. They are thus in an ethical sense both reasonably acceptable and also rejectable. The insight into this situation—that is, into the limits of practical reason in ethical questions—demands a certain self-relativization, which is to be expected of ‘reasonable’ ethical convictions since it does not imply that they must thereby abdicate their own claim to ethical truth.” For our context, this insight raises the question: What would self-relativization and tolerance towards the contract theories of others that one rejects demand from us? May it perhaps require us sometimes to accommodate people that do adhere to a conception of contract that we regard as misguided albeit not unreasonable? And if so, what would this mean?

Seana Shiffrin argues that in a liberal society the law should accommodate people who understand the legal obligation of a contracting party also as a moral obligation, i.e., the moral duty to keep one’s promise. This approach differs from Fried’s theory of contract as promise in that it makes no claims to the effect that contract law’s rationale is to enforce our moral obligations to keep our promises (Fried 1981). The requirement of reciprocity of reasons would prevent the lawmaker from making such natural-law-like claims. Instead, Shiffrin makes the much more modest claim that the state should accommodate people who hold (and regard as an objective moral truth) a comprehensive doctrine that requires them to keep their promises (Shiffrin 2004 and 2007). In other words, the accommodationist approach calls for contract law to make room for moral agents, not to reflect morality. Shiffrin illustrates her argument with the example of the theory of efficient breach,<sup>33</sup> which, if enshrined in law, would indeed make it difficult for people to think they should keep their promises (and might even make them feel abnormal if they did). As she explains,

<sup>33</sup> According to this theory, contracts should not be specifically enforced whenever the party in breach could fully compensate the other party and still be better off, thus yielding a net social welfare surplus.



the efficient breach justification is not rejected because it is morally wrong but because it cannot be endorsed by a moral agent and is therefore inconsistent with the imperative to accommodate. Arguments for accommodation do not appeal directly to the correctness of the position of moral agents but rather to the essential importance of morality to moral agents and the significance of their character traits for the flourishing of just institutions and cultures. As with religious accommodation, these grounds are compatible with greater neutrality toward the correctness of substantive moral views than is an approach that engages in more direct moral evaluation. (Shiffrin 2007, 733 n. 47)

At first sight, this seems a powerful argument. Just like the establishment of atheism in the guise of *laïcité* is not neutral, so too is the state not neutral if it fails to accommodate people who aim to live up to what they regard as their moral duties to honour their promises and to be faithful to their agreements, wherever this is possible without violating any principles of justice. However, what about people who genuinely believe that it is not decent or even plain wrong to keep someone to their promises, especially if that would risk bringing them into trouble (unfortunate contingency) or making them forego a very attractive new opportunity (fortunate contingency), e.g., because that would be socially wasteful and it is wrong to waste social resources? Does not a law telling them that in cases of breach contracts can be enforced with strong remedies also risk bringing them into a conflict of conscience? Shiffrin's theory of accommodation already seems to assume that promises should be kept, and focuses therefore more on remedies, but what if promise-keeping—or, more to the point: keeping others to their promises—is already a controversial ideal?<sup>34</sup> Then, the state will still have to choose between different groups of moral agents and their moral convictions; it cannot accommodate these radically opposed moralities at the same time. In fact, the “morality” that Shiffrin refers to looks very much like a comprehensive doctrine, or a part thereof, and therefore seems not categorically different from other comprehensive doctrines, such as utilitarianism.<sup>35</sup> In a clash between those who advocate a contract law that gives incentives for efficient breach and those who argue for a law that accommodates those who aim to live up to what they perceive as their moral duty to keep their promises, who may be parties to one and the *same* contract, there is no point of view from which one of these arguments, as a reason for the public justification of contract law, is stronger than the other. Therefore, from the perspective of toleration as respect and the right to justification by general

<sup>34</sup> Shiffrin (2007, 717) assumes that the basic principles of promissory commitment are uncontroversial.

<sup>35</sup> In Shiffrin 2009, 1551 n. 2, she writes: “By morality, I mean those nonlegal, objectively grounded normative principles that regulate our motives, reasons, and conduct (and perhaps our attitudes).” That concept of morality seems to include not only principles of what we owe to each other (which I refer to here as morality) but also principles of how to live a good life (which I am referring to as ethics). Moreover, in Shiffrin 2008, 485, she advances as her main claim that “the power to make binding promises [...] is an integral part of the ability to engage in special relationships in a morally good way, under conditions of equal respect.” This reference to special relationships and to a “moral” good also suggest that the accommodation of “moral” agency as understood by Shiffrin would extend also to ethical agency (and not merely to different conceptions of morality). This should not surprise us (because for many people a good life is unthinkable without special relationships and personal commitment), but ethical norms (and truths), which are specific to ethical communities or individual ethical agents, unlike moral norms (and truths), which are universal (which is not the same as certain and undisputed), are bound to enter into conflict with each other, and it may not be possible to accommodate different ethical agents with the same set of generally applicable contract law rules.

and reciprocal reasons, both efficient breach and strong binding force through enforced performance, as a general rule of contract law, seem permitted, but neither of them required.

There is another possible avenue towards toleration through contract to be considered here. If religious freedom and toleration require that everyone be free to practice their own religion in their own way (as long as they do not violate the rights of others) and together with other members of their faith, could something similar not be argued with regard to contract law? Perhaps this could be a pluralistic system, but one of a different kind than discussed before. It would be a contract law pluralism where different contract law regimes are made available to choose from for people adhering to different worldviews, wanting to express different value conceptions in their contracts, or understanding contractual obligation differently. This idea also differs from the accommodation view. While on Shiffrin's account different contracting parties should be accommodated in their divergent views of the *same* contract law regime, in such a pluralist system the parties to a contract together could choose a contract law regime that is *different* from the one chosen by the parties to another contract type.

Such a free choice among different legal contract types is central to "the choice theory of contracts," presented by Dagan and Heller.<sup>36</sup> Their core idea is that for each different contracting sphere there should be an adequate range of attractive types to choose from. They propose a taxonomy of "the typical contexts" in which people enter contracts, consisting of four contracting spheres, i.e., family, home, employment, and commerce (Dagan and Heller 2017, 96). For each of these spheres, it is the lawmaker's task to offer a sufficiently rich menu of contract types to choose from. Crucially, there must also be meaningful options to reject. Therefore, the lawmaker must also make some contract types available for which there does not yet—and perhaps never will—exist any significant demand, such as minoritarian or even utopian contract types (*ibid.*, 60). Thus, groups of people organising their contracts (and property: see Dagan 2011) according to utilitarian, communitarian, utopian, or other values would live together harmoniously on the same territory. The result might look a bit like the world of Professor Caritat, but with the key difference that different ways of life would be facilitated, for the groups of people adhering to them, on the *same* territory and within one single jurisdiction, somewhat like the Ottoman millet system, where confessional communities were allowed self-rule under their own respective laws (see, critical, Kymlicka 2002, 230). Is this not a superior way for a society to ensure the pluralism, toleration, and indeed accommodation of different worldviews? Individuals and groups can each express their own respective values and metaphysical conceptions in the contract regime of their own joint choosing. No one will be dominated by a contract law regime they find objectionable. Three problems remain, however.

First, just like Shiffrin's accommodation theory, Dagan and Heller's choice theory of contract also does not solve the problem of contracts between individuals belonging to different value communities. Who should accommodate whom, and whose choice should prevail, in cross-cultural contracts? Secondly, on this view, as

<sup>36</sup> Dagan and Heller 2017. See also their follow-up papers Dagan and Heller 2018 and 2019b.

formulated by Dagan and Heller, the plurality of contract options would be instrumental to achieving the intrinsic value of individual autonomy.<sup>37</sup> However, the idea that a person's life goes objectively better when she lives it by her own lights, i.e., when it is "self-authored" (see Raz 1986) is a controversial one. Moreover, on this view the pursuit of other values and truths through contract becomes instrumental (and subject) to the foundational value of leading a self-authored life (Dagan and Heller 2017, 7). Thus, the theory projects its own foundational value onto others.<sup>38</sup> Therefore, it is incompatible with the respect view of toleration among different worldviews. Could perhaps the choice theory be purged of its liberal-perfectionist overtones and be turned into a contract theory of toleration as respect? It is true that respect is a central feature of the theory. Indeed, according to Dagan and Heller (2017, 42), the legal duty to perform one's contractual obligations (i.e., the binding force of contract) follows from the obligation of reciprocal respect for self-determination that underlies private law. However, self-determination is understood by them as self-authorship, that is, the freedom for each of us to write the story of our lives, i.e., ethical autonomy. This self-authorship foundationalism brings us back directly to liberal perfectionism. As we saw earlier, on a deontological understanding of moral autonomy, by contrast, every person should be respected as a reason-giving and reason-receiving being,<sup>39</sup> which, however, seems merely to permit, not require, a choice among attractive contract types that can make people's lives go better.<sup>40</sup>

This brings us to a third difficulty with the choice theory of contracts. A system of contract law that prioritises an emphasis on specific contract types rather than on general contract law and that makes a broad choice of different options available for

<sup>37</sup> Therefore, the theory is best understood as an (ethically) monist one, because its "autonomy-based commitment to pluralism" (Dagan and Heller 2017, 7) means "a commitment to autonomy as the normative foundation of contract" (ibid.). Contrast Markovits and Schwartz (2019), who understand it as a theory that embraces pluralism.

<sup>38</sup> Dagan and Heller (2019a) suggest that "making contract law more autonomy-enhancing does not affect objectors' ability to pursue their conception of the good," since "objectors need not invoke or use these additional contract types" (ibid., 603), and that, therefore, their objection would amount to an attempt to prevent *others* from benefiting from such empowerment (ibid.), which constitutes an external preference that should not count. However, assuming that choice theory would claim responsibility for all the options on the menu, whether or not they already existed before the choice theory inspired reform, and given the fact that, as said, in the kind of society we live in not concluding any contracts is not a realistic option, it remains problematic when the contract law of the land recognises and enforces contracts of various types in the name of the value of self-authorship.

<sup>39</sup> In their follow-up papers, Dagan and Heller at times seem to edge towards a deontological understanding of moral autonomy. See, e.g., Dagan and Heller 2019b, where they emphasise that the right of each individual to reciprocal respect for self-determination is "the ultimate human right." However, at other times (in the same paper) they characterise theirs as "an unashamedly teleological theory of contract based on the value of personal autonomy" where autonomy is understood as self-authorship, i.e., the writing and rewriting the stories of our lives, where "a self-directed life" is understood to be a better life, and where it is contract law's task to "add options for human flourishing."

<sup>40</sup> Interestingly, they conclude each of their follow-up papers with the sentence: "Together, we continue on a mutual path toward a just and justified law of contract." The question is: justified towards whom? All those to whom it will apply? Also, on a teleological approach like theirs one would expect a reference to evaluation rather than to justification, e.g., to a path towards a better law of contract. Instead, their surprisingly deontological-sounding closing line seems an almost literal endorsement of the right to justification of contract.

the constitution and legal regulation of similar relationships seems entirely compatible, in principle, with moral autonomy. The limits, of course, remain the demands of reciprocity and generality, at least where the basic structure of contract law is concerned. The first practical consequence following from these demands, as we saw, is that contract law must have a firm democratic basis. This means, in particular, that robust democratic lawmaking institutions must be in place to ensure that the choice of the different contract types and their regulation is made in such a way that those to whom they come to apply can regard themselves also as their coauthors. However, Dagan and Heller explicitly reject the notion that the political institution determining the number and content of the contract types should necessarily be the democratic legislature (Dagan and Heller 2017, 90). This is entirely consistent with their liberal perfectionism: If the first aim is for the law to enable each individual to be the author of the story of her or his own respective life, rather than being the coauthors of the laws applying to them together, then whatever institutional arrangement best ensures the accomplishment of that societal objective should be assigned with the task. Here we see how self-authorship and self-determination—two terms that Dagan and Heller use interchangeably—can come apart, and enter into direct conflict, if we prioritise ethical autonomy over the collective self-determination of morally autonomous (i.e., reason-giving and reason-receiving) citizens as the foundation of generally applicable laws (in this case contract law). Similarly, also the taxonomy question of how the world of contracting should be divided up, as a matter of lawmaking, into spheres, is one that Dagan and Heller seem to think does not require any democratic deliberation or decision-making. Although they acknowledge that their taxonomy is contingent and contestable (*ibid.*, 96), they do not seem too concerned that their happy image of contracting as family, home, employment, and commerce may seem strikingly out of touch with reality, for example to all those who experience contracting mostly in terms of dependence, exploitation, and alienation and who lack any meaningful access to some of these happy contracting spheres. To such a person, a different contract law taxonomy, focusing on problems of injustice and inequality, may seem more to the point than the harmonious image of contract law suggested by Dagan and Heller. To be sure, I am not suggesting that Dagan and Heller disregard inequality.<sup>41</sup> The question is rather whether this demand should not be made more central to contract law—so central, in fact, that it is reflected in the taxonomy of its basic structure—and, most crucially, to who should decide on the basic structure and taxonomy of the law of contract as choice. As Forst (2013b, 244) points out, “the first thing is to become an agent of justice, not just a recipient of justice.” This applies just as much in the sphere of contracting as anywhere else. But how and where will those at the periphery of political society, and indeed anyone else who does not engage in contract theory, have a real opportunity to challenge the proposed taxonomy? Most concretely, how can all those to whom contract law inevitably will apply secure a meaningful say in what will be on the menu and what will be kept off? In sum, it seems that the choice theory of contract, in spite of its commitment to pluralism, does not after all meet the demands of toleration as respect, as required by the right to justification.

<sup>41</sup> They do in fact emphasise that their theory requires substantive equality. See Dagan and Heller 2017, 87, 111.

## 7. Democratic Contract Law

From a Forstian perspective, the right to justification provides a powerful reason for a democratic contract law. However, what further role exactly should the right to justification play *within* the democratic debate, in this case on contract law? Suppose we constitutionalised the right to justification, for example by enshrining it as the most basic human right in Article 1, of our respective national constitutions. Or, imagine we added a new first paragraph to Article 10 of the Treaty on European Union, as the first principle of democracy, preceding the current Paragraph 1, pursuant to which the functioning of the Union is founded on representative democracy. Such a new provision could state that only legislation can be adopted that cannot reasonably be rejected with reasons that are both general and reciprocal. What would this entail? What would be the likely impact of such a constitutional requirement of nonrejectability with generality and reciprocity of reasons upon our legislation, in particular, for our purposes, in the area of contract law? How would and should lawmakers (and, as the case may be, constitutional courts when engaging in the judicial review of legislation)<sup>42</sup> go about making such a constitutional right or principle become operational?

The key to an answer to this question is the understanding that the focus of a critical and realist discourse theory of justice should be on instances of *injustice*, i.e., acts and norms that can be rejected generally-reciprocally. On this view, maximal justice does not mean the full implementation of an ideal theory, in our case, of contract law, but (counterfactually) the elimination of all injustices, in our case the total absence of any contract norms and acts (i.e., rules of contract law and contractual relationships) that cannot be justified with reasons no one can reasonably reject. This means, in turn, that the right to justification, as the normative core of a realist and critical theory of contract law, points our attention most urgently to the worst instances of injustice that contract law can and should prevent (or bring to an end, as the case may be). Thus, economic and other types of exploitation and domination through contract become a prime concern. As Forst (2017, 125) points out, exploitation is a moral concept that expresses the violation of personal autonomy and human dignity;<sup>43</sup> the same applies to domination.<sup>44</sup> From the point of view of the right to justification of contract, it is a priority for contract law to prevent (or, as the case may be, put an end to) the injustice of exploitative contractual relationships and of domination through contract, by providing the victims with adequate remedies. Conversely, from the point of view of justice, relationships that are not structurally

<sup>42</sup> In principle, judicial review is incompatible with the right to justification, because it constitutes a form of domination that is unjustifiable, at least under ideal circumstances. Constitutional review should be undertaken by parliament itself; robust institutional arrangements should be made for that purpose. Any democratic legitimacy of judicial review is always second best. I cannot further elaborate on this point here.

<sup>43</sup> For this reason, the adjective *unfair* in the legal concept of “unfair exploitation” in the Draft Common Frame of Reference (II.–7:207 DCFR 2009) and in Art. 51 CESL (2011) is redundant: exploitation is *intrinsically* unfair.

<sup>44</sup> Pettit’s republicanism, as a political theory of freedom, not a theory of justice, answers the question of when we are free, not of what we owe each other. See Forst 2013a. However, the “eyeball test” that Pettit (2012, 84) proposes, according to which social relationships are undominated when people can look one another in the eye, it seems, could be reread in an agency-centred (as opposed to outcome-oriented) fashion.

exploitative give less reason for concern, as long as effective mechanisms are in place to respond to incidental situations of subjection.<sup>45</sup>

Very concretely, this means that at the most general level, the binding force of contract probably will not incur any major difficulties of justifiability, since contractual relationships are not intrinsically (perhaps not even typically) relationships of domination.<sup>46</sup> At the same time, however, adequate doctrines, such as a general doctrine on the voidability of a contract in the case of exploitation or domination, have to be in place in order to ensure that contractual relationships do not turn into situations of subjection.<sup>47</sup> By contrast, it is not clear that the right to justification of contract would lead necessarily to the kind of undifferentiated, categorical consumer protection we are familiar with in Europe today. From the perspective of justice (both social and interpersonal), the EU's consumer law *acquis* is both over- and under-inclusive. Consumer protection rules benefit rich and powerful consumers as much as poor and vulnerable ones, or even more (think of the typical consumers of luxury goods or simply the fact that wealthy persons can afford to consume more), while the sellers against whom they are protected are sometimes comparatively poor and vulnerable (e.g., the owner of a small shop, or of a larger one but on the verge of bankruptcy).<sup>48</sup> Indeed, more likely priority candidates, where the law must prevent contractual injustice, seem to be cases of multiple domination (see Forst 2013b, 246; 2020)—best known in feminist theory as intersectionality (Crenshaw 1989)—where different dimensions of structural domination overlap and mutually reinforce each other, in particular, racial, gender, and other types of discrimination, to which could be added, for

<sup>45</sup> See Forst 2017, 168 (principle of political proportionality).

<sup>46</sup> Bagchi (2018) argues that “the experience of domination is driven in part by the necessity, inequality, and competition enjoined by markets, and partly by the very structure of authority created by legally binding promise” (ibid., 351). However, especially if we understand domination as a normative, agency-oriented concept rather than as a purely empirical one referring to psychological experience, then the suggestion that contracts structurally are relationships of domination seems too strong, since at least in some cases (and perhaps in many) the authority created by legally binding contracts may be legitimate, i.e., justifiable with general and reciprocal reasons.

<sup>47</sup> See, e.g., Art. II.–7:207 DCFR (Unfair Exploitation), Par. 1: “A party may avoid a contract if, at the time of the conclusion of the contract: (a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill and (b) the other party knew or could reasonably be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or grossly unfair advantage” (DCFR 2009, 212). Art. 51 CESL 2011 (Unfair Exploitation) was almost identical to this provision. The CESL proposal was adopted, in first reading, by the European Parliament in 2014, but was withdrawn in the same year by the incoming Juncker Commission. On European contract law rules and doctrines as moral limits to the internal market, see Hesselink 2016.

<sup>48</sup> Perhaps the objective of “a high level of consumer protection” (Arts. 114(3) and 169(1) of the Treaty on the Functioning of the European Union) could be regarded as a proxy for substantive interpersonal justice. In an ideal world without dispute resolution costs, substantive interpersonal justice probably would be served best exclusively through more contextualised rules rather than via the categorical protection of “consumers,” but in times where governments try to limit the costs of civil justice—a policy that may be based on the distributive objective of increasing access to justice—the operation of such rules would perhaps be too costly. Therefore, we may have to settle for a more standardised and categorical approach, even if this comes at the cost (in terms of justice) of overinclusiveness (also protecting consumers with relevant expertise, experience, or power) and underinclusiveness (failing to provide adequate protection to particularly vulnerable consumers).



contractual relationships, more individual factors such as economic distress, urgent needs, improvidence, ignorance, inexperience, or lack of bargaining skills.<sup>49</sup>

There remains one objection against democratic contract justice to be considered. If a crucial aspect of the right to justification is that it brings the claims of individuals and groups themselves into the centre of attention, starting from their own concrete experiences of injustice,<sup>50</sup> then, one might wonder, is not the courtroom a much more likely forum for exercising that right than the democratic arena? Not necessarily. It may be the case that certain contractual injustices are most likely to come to light first in individual cases. However, especially when the injustice has certain structural features (e.g., structural and intersecting vulnerabilities) there is all the more reason for the legal order to respond with a structural and general solution of the rights scope (which may go well beyond the type of case at hand). Moreover, there is in fact no reason to expect that litigation generally is the most likely place for contractual injustices to surface. On the contrary, it may well be that the worst injustices never come to court at all, because their victims lack the resources for bringing the case or because they fear the consequences of raising the exploitative character of their contractual relationship in individual court proceedings.

## 8. Radical Contract Justice

Where does this leave us? As we saw, essentialist and other monist theories cannot justify contract law because they fail to pass the test of reciprocity of reasons. On the other hand, however, the idea that virtually all leading contract law theories would be discredited may seem counterintuitive and perhaps a little worrying as well.<sup>51</sup> If our most well-known contract law theories cannot justify our existing contract law, or a proposal for its reform, then what remaining reasons do we still have? Is perhaps Forst's theory more liberal-neutralist than it claims, and more than is compatible with the fact of reasonable pluralism, not only, but also with the fact of the practical impossibility of an entirely value-neutral contract law? Contract law is not inevitable; it is a contingent sociolegal institution. Indeed, it has been claimed that we can do without contract law altogether (Gilmore 1974). Therefore, we need a reason for having a law of contract, one that can inform the democratic debate. And if we reject the natural law idea that contract is entirely a matter of morality, then, it seems, we need reasons relating to the individual and collective good to get the democratic contract law debate going. Where can these reasons still legitimately come from if we are

<sup>49</sup> These are the individual factors mentioned in Art. II.–7:207 DCFR (2009) and in Art. 51 of the CESL (2011) proposal. Frequently, such relational “weaknesses” and vulnerabilities are the consequence of belonging to a group—or the intersection of various groups—that are in a socially vulnerable or “weak” position. (The familiar language of “weaker party protection” has unduly stigmatising connotations.)

<sup>50</sup> Forst 2013b, 124. Allen (2016, chap. 4) questions—with reference to Spivak's (1994) famous question: Can the subaltern speak?—whether those caught up in relationships of domination and subordination will always be able to demand justifications in such a way that they will be heard, and if they don't, whether their silence will be noticed.

<sup>51</sup> Having said that, it is a characteristic of (ethically) monist and (metaphysically) essentialist theories, as we saw, that they also mutually exclude and reject one another (cf. Smith 2004, viii: “a variety of mutually exclusive theories”). Therefore, from the perspective of each of these theories, all the others are discredited too, i.e., have no valid reason to offer for the justification of contract.

committed to the right to justification? On the other hand, most contract law codifications and reforms explicitly justify certain contract law choices, but never the general principle of binding force of contract—or the institution of contract law—as such. Nor has it been contested very much.<sup>52</sup> Moreover, as we saw, there is no libertarian default: The justificatory burden of proof is not on those arguing for the legal enforceability of contracts; just like there are no natural contract rights, there is also no natural right against contract. The legal recognition of a principle according to which *pacta non sunt servanda* also would require a positive moral argument.

Arguably, from the point of view of the right to justification by general and reciprocal reasons, then, the binding force of contract is morally neither required nor forbidden as a general principle (and with it, the institution of contract law in general), but merely permitted, while in specific cases, where its presence (or absence) would lead to concrete injustices, it would be forbidden (or, respectively, permitted). Similarly, for example, it can also be argued for the fair price rule that it is neither required nor prohibited as a matter of justice (i.e., in terms of justifiability by general and reciprocal reasons) (Hesslink 2015a). The same may apply to many if not most contract-law-making choices. However, the case of rules and doctrines specifically against exploitation or domination by contract seems different: Their absence would (or, as the case may be, does) constitute an injustice. Ultimately, of course, this will be a matter of democratic deliberation on the implications of the requirements of generality and reciprocity. Contract theorists or political philosophers have no special expertise in this regard. Nevertheless, as critical theorists we can contribute to clarifying relevant distinctions and expose ideological arguments, even if such observations too can always be defeated by better arguments. One important contribution, in this regard, can consist of helping in singling out moral reasons, which refer to what we owe to each other as human beings and which should trump all other reasons brought forward in the democratic debate, notably ethical reasons, concerning the individual and common good, and pragmatic reasons, regarding means to ends.<sup>53</sup>

In conclusion, then, the right to justification provides powerful arguments for a democratic contract law and against the establishment of one of the monist and essentialist theories as the official contract law doctrine, be it as a basis for reform or as a guide to the interpretation of an existing system. However, the right to justification of contract does not yield an alternative blueprint for an ideal system of contract law.<sup>54</sup> On the contrary, blueprint contract theories seem inadequate as a justification for contract. As to the role that the right to justification by general and reciprocal reasons should play within the democratic debate, this is best understood in terms of

<sup>52</sup> Of course, on the classical Marxian view both justice and private law are nothing more than ideology, part of the “superstructure” meant to legitimate—through “false consciousness”—the existing economic structure of society (the “base”). See Marx 2000c, 425. Marx (2000a, 615) famously rejected the notions of rights and distributive justice as “obsolete verbal rubbish.” Moreover, from the Marxian perspective, all contracts are exploitative, simply because they reproduce economically determined power relationships. Specifically with regard to labour contracts, see Marx 1995, 323. See also the young Marx’s poignant characterisation of commercial contracts as “mutual plundering” (Marx 2000b, 130).

<sup>53</sup> On the importance of distinguishing moral, ethical, and pragmatic discourses within the democratic debate, see Habermas 1995, chaps. 1 and 2, and Forst 2013b, chap. 7.

<sup>54</sup> Nor does it, as we also saw, offer an alternative foundational value or principle for normative guidance in the interpretation of an existing system of contract law.

priority. The democratic contract-law-maker must make sure that rules and doctrines are in place to ensure that the binding force of contract does not turn contractual relationships into relationships of domination and that these doctrines are most effective where the risks of domination are greatest.

Remember that a core feature of Forst's critical theory of justice is that it points our attention first and foremost to instances of injustice, in our case contractual injustice. Perhaps the most important lesson from his theory of justice for contract law and its theory, then, is that it shows us where our priorities should lie. Rather than quarrel over the justification for the legally binding force of contract, which no one actually is ever contesting as a general principle, we should focus on the more urgent question of where the binding force leads to injustices. Therefore, a critical contract theory should focus first and foremost on contractual injustices, in particular contractual relationships of domination, which cannot be justified with general and reciprocal reasons towards the persons in those relationships. Contract theorists can help in exposing contract law rules, doctrines, and taxonomies that enable and uphold these relationships of domination and exploitation, and in revealing the insufficiency (and, as the case may be, the ideological nature) of the reasons that are given to justify them. Such a radical understanding of contract theory, which goes to the roots of contractual injustice, seems to be the best contribution contract theory can make to realising the right to justification, in this case everyone's right to the justification of contract.

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